

# Beyond States: A Constitutional History of Territory, Statehood, and Nation-Building

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*The United States has always been more than simply a group of united states. The constitutional history of national union and component states is linked to a third category: federal territory. This Article uses an integrated history of territory, statehood, and union to develop a new framework for analyzing constitutional statehood. Three historical periods are crucial—the Founding Era, the Civil War, and Reconstruction—as times when statehood was especially malleable as a matter of constitutional law. During each of those formative periods, the most important constitutional struggles about statehood and the union involved federal territories.*

*Conflicts about territories reveal an important distinction between theories of states’ constitutional authority to participate in national politics (the “skeleton” of statehood) and their constitutional authority to resist the national government (the “muscle” of statehood). The skeletal authority of states to participate in federal politics has been legally explicit and essential since the Articles of Confederation. By comparison, advocates for muscular states’ rights have relied on dubious inferences and historical distortions.*

*During the Founding Era and the Civil War, pivotal disputes concerning territories were resolved to favor the skeleton of representational statehood instead of the muscular statehood of antifederal resistance. During Reconstruction, however, the Supreme Court created new doctrines of muscular statehood that were based on inaccurate histories of the Founding and the Civil War. Judicial decisions like the Slaughter-House Cases and the Civil Rights Cases applied those doctrinal theories of muscular statehood to limit individual rights and congressional power under the Reconstruction Amendments. In the late twentieth century, such precedents gained force after the confirmation of politically conservative Supreme Court Justices, and similar doctrines might be even more powerful with the modern Court’s conservative supermajority.*

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*This is not how constitutional law should work. Muscular statehood achieved doctrinal success much later than most observers assume, and it has neither the positivist pedigree nor the compelling results to justify antimajoritarian constitutional status. Although the constitutional skeleton for states' participation in the federal government is foundationally important, constitutional doctrines of muscular statehood to resist national democracy should be presumptively disfavored.*

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## INTRODUCTION

The history of constitutional statehood has been told only in fragments, and this Article adds another important piece.<sup>1</sup> The

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<sup>1</sup> See Craig Green, *United/States: A Revolutionary History of American Statehood*, 119 MICH. L. REV. 1, 6 (2020) [hereinafter Green, *United/States*] (“[N]o one has written an adequate history of legal statehood.”); see also GARY GERSTLE, LIBERTY AND COERCION: THE PARADOX OF AMERICAN GOVERNMENT 11 (2015) (“[H]istorians of the ‘American state’ have generally ignored the states.”); ALISON L. LACROIX, THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM 1 (2010) (“Federalism is everywhere and nowhere in American legal and political history. . . . Its parentage [is] unknown and its origins [are] murky.”); Maeve Herbert Glass, *Bringing Back the States: A Congressional Perspective on the Fall of Slavery in America*, 39 LAW & SOC. INQUIRY 1028, 1042 (2014) [hereinafter Glass, *Bringing Back the States*] (“[I]ncorporating the states as a category of analysis . . . [promises] to provide new paths of inquiry for historians and constitutional scholars alike.”).

methodology here is to study states and the United States along with interstate territories that are located outside of any state. The categories of “territory,” “statehood,” and “union” are foundations of the United States’ constitutional geography that emerged from precisely the same historical moments, and their combination has built the United States in its current form.<sup>2</sup> The conventional model of federalism must be expanded beyond dualistic concepts of statehood and union to include territory as a third element.<sup>3</sup> In turn, this Article’s tripartite approach supports a new analytical model of statehood, which implies that states’ substantive power to resist the federal government—often called states’ rights—should almost always be debated and resolved through

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There is ample research about particular states. *See generally* THE UNITING STATES: THE STORY OF STATEHOOD FOR THE FIFTY UNITED STATES 1–3 (Benjamin F. Shearer ed., 2004). For other studies of statehood as a legal category, see GREGORY ABLAVSKY, FEDERAL GROUND: GOVERNING PROPERTY AND VIOLENCE IN THE FIRST U.S. TERRITORIES 235 (2021) (“Statehood became the capstone of a process of transition, signifying the moment when the pluralism of the borderlands—which the territorial system inextricably tied, in Anglo-Americans’ minds, to the temporary period of federal rule—had faded away.”), and Maeve Glass, *Citizens of the State*, 85 U. CHI. L. REV. 865, 934 (2018) [hereinafter Glass, *Citizens of the State*] (“[The forgotten] history of state citizenship [ ] provides us with an additional set of concepts with which to continue ongoing conversations over the role of the states in American constitutional governance.”).

<sup>2</sup> *See* Irus Braverman, Nicholas Blomley, David Delaney & Alexandre Kedar, *Introduction*, in THE EXPANDING SPACES OF LAW 1 (Irus Braverman, Nicholas Blomley, David Delaney & Alexandre Kedar eds., 2014) (“Legal geography . . . takes the interconnections between law and spatiality, and especially their reciprocal construction, as core objects of inquiry.”). The definition of “constitutional” is important for this Article, and it will be used somewhat narrowly to mean: (1) derived from the Constitution, or from the Constitution’s precursors, (2) with purported durability against ordinary political changes. *See* Gerald Stourzh, *Constitution: Changing Meanings of the Term from the Early Seventeenth Century to the Late Eighteenth Century*, in CONCEPTUAL CHANGE AND THE CONSTITUTION 35, 46 (Terence Ball & J.G.A. Pocock eds., 1988) (“[N]ot merely the state constitutions, but the Articles of Confederation as well, were considered to be and were called a Constitution.”). For more expansive interpretations of “constitutional,” see Gregory Ablavsky & Tanner Allread, *We the (Native) People?: How Indigenous Peoples Debated the U.S. Constitution*, 123 COLUM. L. REV. (forthcoming 2023) (describing “diplomatic” constitutionalism based on treaties and intercultural practice); Maeve Glass, *Killing Precedent, The Slaughterhouse Constitution*, 123 COLUM. L. REV. (forthcoming 2023) [hereinafter Glass, *Killing Precedent*] (urging readers to “broaden the archive upon which federal courts construct the history of the Fourteenth Amendment”); Hendrik Hartog, *The Constitution of Aspiration and “The Rights That Belong to Us All”*, 74 J. AM. HIST. 1013, 1033 (1987) (“Supreme Court cases should be only one portion of . . . American constitutional history. As important would be the small, everyday contests, arguments, negotiations, and understandings in which legal rights and constitutional assumptions have been constructed and exercised.”).

<sup>3</sup> *Cf.* DANIEL IMMERWAHR, HOW TO HIDE AN EMPIRE 16 (2019) (“This book aims to show what U.S. history would look like if the “United States” meant the Greater United States, [including territories].”).

ordinary democratic politics, instead of through constitutional lawmaking and adjudication.<sup>4</sup>

Territory and statehood have always been used to organize space in this country, yet a modern legal audience might need re-introduction to both categories.<sup>5</sup> Contemporary discourse has often ignored territories, shifting millions of people to the legal system's bordered margins, but territories have been essential to the constitutional origin stories of statehood and the United States.<sup>6</sup> On one hand, territories are a mechanism for producing

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<sup>4</sup> For constitutional critiques of states' rights that do not focus on history, see John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003, 2068–69 (2009) (“The precise contours of any federal system rest on the allocation of political power . . . . [T]he historical record, as well as the constitutional text, reveals that the founders bargained . . . [about] allocating state and federal power. Treating the Constitution as if it adopts freestanding federalism . . . disregards that reality . . . .”). For unapologetically pragmatic arguments—outside the scope of this Article—that both state and federal powers should be determined through political channels instead of constitutional adjudication, see Herbert Wechsler, *The Political Safeguards of Federalism*, 54 COLUM. L. REV. 543, 558 (1954) (“[T]he national political process . . . is intrinsically well adapted to retarding or restraining new intrusions by the center on the domain of the states.”), and Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 286 (2000) (“The states do not need an untouchable domain of judicially protected jurisdiction; they need only the capacity to compete effectively for political authority, something the structure of American politics guarantees.”).

This Article will not present a detailed normative view of states' importance with respect to politics, policy, culture, or social identification. On the contrary, all of those ideas have changed dramatically with time and context, just like many issues that are governed by American politics. See DANIEL T. RODGERS, *CONTESTED TRUTHS: KEYWORDS IN AMERICAN POLITICS SINCE INDEPENDENCE* 16 (1987) (“Should someone try to sell you . . . an authentic encapsulation of the American political faith, the wise course is to run for cover. . . . The keywords, the metaphors, the self-evident truths of our politics have mattered too deeply for us to use them in any but contested ways.”). This Article is somewhat tightly focused on statehood's contested status as transcontextual, supermajoritarian constitutional law.

<sup>5</sup> See AN ORDINANCE FOR THE GOVERNMENT OF THE TERRITORY OF THE UNITED STATES NORTH WEST OF THE RIVER OHIO, in 32 JOURNALS OF THE CONTINENTAL CONGRESS 342 (1787) (creating the first interstate territory).

<sup>6</sup> See SAM ERMAN, *ALMOST CITIZENS: PUERTO RICO, THE U.S. CONSTITUTION, AND EMPIRE* 161 (2019) (reminding readers “how an imperial power might do justice to the oldest colony in the world”); PAUL FRYMER, *BUILDING AN AMERICAN EMPIRE: THE ERA OF TERRITORIAL AND POLITICAL EXPANSION* 6 (2017) (“The imperial aspirations and geographic expansion of the United States . . . represent one of the nation's earliest and most foundational political projects.”); see also Christina Duffy Burnett, *Preface*, in FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION, at xiv (Christina Duffy Burnett & Burke Marshall eds., 2001) (“The people of the United States, though most are *not* aware of it, . . . continue to be complicitous in a vestigial colonialism.” (emphasis in original)).

new states and changing the country's identity.<sup>7</sup> On the other hand, territories are vulnerable spaces without representation in the Congress that regulates their existence.<sup>8</sup> From every perspective, the history of territories, especially including the development of statehood and the union, is crucial to the U.S. legal system.

By comparison, states are highly familiar but poorly understood constitutional entities.<sup>9</sup> Existing scholarship has not explained how statehood emerged as a legal category, how that category changed over time, and whether those changes should qualify as transhistorical constitutional law.<sup>10</sup> This Article offers a two-part model for analyzing such issues. One defining aspect of states is their unique power to influence the national government through constitutional rules for electoral representation.<sup>11</sup> Because those rules establish unyieldingly foundational

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<sup>7</sup> See *Puerto Rico v. Sanchez Valle*, 579 U.S. 59, 69 n.4 (2016) (“[A] new State, upon entry, necessarily becomes vested with all the legal characteristics and capabilities of the first 13.”).

<sup>8</sup> Empire, dispossession, subordination, and racism have been important parts of the United States' territorial history from the beginning to the present. See *supra* note 6 (collecting sources); see also Christina Duffy Burnett, *Untied States: American Expansion and Territorial Deannexation*, 72 U. CHI. L. REV. 797, 797 (2005) (noting that Supreme Court jurisprudence has created a category of “domestic territory that could be governed temporarily, and then later, if necessary, be relinquished”); Craig Green, *Our Imperial Republic* 58 (2022) (unpublished manuscript) (on file with author) [hereinafter Green, *Our Imperial Republic*] (“Different categories of space represent geographically literal divisions between insiders and outsiders. Inequalities surrounding territories, the District [of Columbia], and Native Land have served various powerful purposes—including capitalism, white supremacy, and dispossession.”); PEKKA HÄMÄLÄINEN, *INDIGENOUS CONTINENT*, at x (2022) (“The history of the overwhelming and persisting Indigenous power . . . is the biggest blind spot in common understandings of the American past.”).

<sup>9</sup> See *supra* note 1 (collecting sources).

<sup>10</sup> Consistent with this Article's approach, some of the best scholarship about statehood has involved territories. See, e.g., ABLAVSKY, *supra* note 1, at 236 (2021) (“By bestowing statehood on the former territories, the system ensured that . . . [former territorial citizens] had become the federal government.”); ERMAN, *supra* note 6, at 144 (“[T]he Reconstruction Constitution had made citizenship, bundled together with rights and statehood, a national imperative. . . . [That was] largely displaced by the territorial non-incorporation doctrine, which deconstitutionalized citizenship, rights, and statehood where empire was concerned.”); BETHEL SALER, *THE SETTLERS' EMPIRE: COLONIALISM AND STATE FORMATION IN AMERICA'S OLD NORTHWEST* 7 (2015) (describing “not just [ ] one but two interdependent constructs of individual and national ‘states’ . . . that together defined U.S. federalism”).

<sup>11</sup> See U.S. CONST. art. I, § 2 (“Representatives . . . shall be apportioned among the several States . . . according to their respective Numbers . . . .”); U.S. CONST. art. I, § 3 (“The Senate . . . shall be composed of two Senators from each State.”); U.S. CONST. art. II, § 1 (“Each State shall appoint . . . a Number of [presidential] Electors.”); see also U.S. CONST. art. V (prescribing states' role in constitutional amendment); U.S. CONST. art. VII (prescribing states' role in constitutional ratification).

characteristics of states, they could be called the constitutional “skeleton” of statehood. That metaphorical word describes aspects of constitutional statehood that are firm, durable, narrow, and architectural.<sup>12</sup> The core example of skeletal statehood concerns the states’ textually explicit and systemically indispensable authority to participate in national politics.<sup>13</sup>

Some scholars have described constitutional rules that govern states’ political representation as “process federalism.”<sup>14</sup> However, unlike this Article’s narrow historical focus on constitutional statehood, existing literature typically offers a functional analysis of federalism across the board.<sup>15</sup> Disputes about process federalism have therefore centered on the institutional availability of judicial review instead of the constitutional history of statehood itself.<sup>16</sup> Process federalism has often described interrelationships among states and the interstate union without fully

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<sup>12</sup> See *Skeleton*, OXFORD ENGLISH DICTIONARY (2d. ed. 1989) (defining “skeleton” as “the bones or bony framework of an animal body considered as a whole; also . . . the harder . . . constituent part of an animal organism” or as “the bare outlines or main features, the most necessary elements, of something” (emphasis added)).

<sup>13</sup> For constitutional text, see *supra* note 11 (collecting sources). See also ALEXANDER KEYSSAR, WHY DO WE STILL HAVE THE ELECTORAL COLLEGE? 8 (2020) (“The one important historical constant has been the difficulty of amending the U.S. Constitution.”). Secondary examples of skeletal statehood appear in other constitutional provisions that are quite clear and explicit, though some readers might debate whether every one of them is truly essential. See, e.g., U.S. CONST. art. I, § 9 (“No Tax or Duty shall be laid on Articles exported from any State.”); U.S. CONST. art. I, § 9 (“No Preference shall be given . . . to the Ports of one State over those of another.”); U.S. CONST. art. IV, § 1 (“Full Faith and Credit shall be given in each State to the public Acts . . . of every other State.”); U.S. CONST. art. IV, § 2 (“A Person charged in any State with . . . [a] Crime, who shall . . . be found in another State, shall on Demand of the executive Authority of the State . . . be delivered up.”); U.S. CONST. art. IV, § 3 (“[N]o new state shall be formed or erected within the Jurisdiction of any other State . . . without the Consent of the Legislatures of the States concerned.”); U.S. CONST. art. IV, § 3 (“[N]othing in this Constitution shall be so construed as to Prejudice any Claims of . . . any particular State.”); U.S. CONST. art. IV, § 4 (“The United States shall guarantee to every State . . . a Republican Form of Government, and shall protect each of them against Invasion; and on Application . . . against domestic Violence.”).

<sup>14</sup> Cf. Wechsler, *supra* note 4, at 543. See generally Ernest A. Young, *Two Cheers for Process Federalism*, 46 VILL. L. REV. 1349 (2001).

<sup>15</sup> See Young, *supra* note 14, at 1351 (“[U]ntil we figure out what we want federalism doctrine to accomplish, it is hard to tell whether the doctrines we have are getting the job done.”); *id.* (applying “a sketch of an ‘ideal’ theory of federalism, derived from some basic structural imperatives in the *Federalist Papers*”); cf. Heather K. Gerken, *Federalism 3.0*, 105 CALIF. L. REV. 1695, 1696 (2017) (“The problem is that our operating system is outdated. It no longer matches on-the-ground realities, which means it can’t help us negotiate the controversies that matter today.”).

<sup>16</sup> See, e.g., John O. McGinnis & Ilya Somin, *Federalism vs. States’ Rights: A Defense of Judicial Review in a Federal System*, 99 NW. U. L. REV. 89 (2004).

interrogating those nouns' constitutional emergence and development over time.<sup>17</sup>

The second aspect of statehood, which could be called “muscle,” concerns substantive powers that are arguably implied from constitutional structure.<sup>18</sup> That metaphor will be used to identify principles of statehood that grow or decay over time, and that are legally secondary to statehood's skeleton.<sup>19</sup> States throughout history have invoked muscular authority—states' rights—to oppose the federal government and support their own particular values and interests.<sup>20</sup> Although any metaphor can be imperfect, just like any nonmetaphorical definition, muscular statehood describes states' authority outside the constitutional text to resist the democratic politics of national government.<sup>21</sup>

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<sup>17</sup> For a partial exception to the foregoing generalizations, see Jeff Powell, *The Compleat Jeffersonian: Justice Rehnquist and Federalism*, 91 YALE L.J. 1317, 1368–70 (1982). For more discussion of Herbert Wechsler's ideas about federalism, see *infra* notes 454–456 and accompanying text.

<sup>18</sup> For a classic discussion of “structural” arguments, see CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 3–7 (1969). See also Craig Green, *Erie and Problems of Constitutional Structure*, 96 CALIF. L. REV. 661, 686 (2008) (“There is something attractive about structural arguments. They raise the line of discussion toward greater abstraction, and this draws attention to basic constitutional values. . . . [T]he generality of structural argument is an invitation to consensus, in the hope that jurists who dispute particular issues might agree on fundamental principles.”).

<sup>19</sup> See *Muscle*, OXFORD ENGLISH DICTIONARY (2d ed. 2011) (defining muscle as “[a]ny of the bundles, bands, or sheets of contractile tissue which act to produce movement in, or maintain the position of, parts of the human or animal body”).

<sup>20</sup> For modern examples in constitutional jurisprudence, see, for example, *Franchise Tax Board v. Hyatt*, 139 S. Ct. 1485, 1493 (“[T]he States' immunity from suits is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today.” (quoting *Alden v. Maine*, 527 U.S. 706, 713 (1999))), and *Murphy v. National Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1475 (2018) (“The anticommandeering doctrine . . . [is] a fundamental structural decision incorporated into the Constitution, *i.e.*, the decision to withhold from Congress the power to issue orders directly to the States.”). Similar issues also arise with respect to statutory interpretation and constitutionally inspired doctrinal defaults. See, *e.g.*, *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2503 (2022) (“States do not need a permission slip from Congress to exercise their sovereign authority. In other words, the default is that States have criminal jurisdiction in Indian country unless that jurisdiction is *preempted*.” (emphasis in original)); *NFIB v. OSHA*, 142 S. Ct. 661, 667 (2022) (Gorsuch, J., concurring) (“There is no question that state and local authorities possess considerable power to regulate public health. They enjoy the ‘general power of governing,’ including all sovereign powers envisioned by the Constitution and not specifically vested in the federal government.” (quoting *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 536 (2012) (opinion of Roberts, C.J.))); *Va. Uranium v. Warren*, 139 S. Ct. 1894, 1904 (2019) (plurality opinion) (“The preemption of state laws represents ‘a serious intrusion into state sovereignty.’” (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 488 (1996) (plurality opinion))).

<sup>21</sup> Historical actors and modern scholars might dispute which specific characteristics of statehood meet those criteria. For example, some nineteenth-century Southerners

This Article develops its theory of skeletal and muscular statehood using a selection of pivotal episodes from the history of statehood and union—the Founding Era, the Civil War, and Reconstruction—which also concerned federal territories.<sup>22</sup> First, during the Founding Era, the Articles of Confederation inaugurated states and the United States as constitutional entities, but the Articles were ratified only after long debates about whether interstate territories could exist outside the boundaries of any state. During that controversy, Virginia advocated muscular theories of sovereign statehood while Maryland relied on skeletal rules for representation, and Maryland prevailed.<sup>23</sup> Second, the Civil War erupted from conflicts over slavery in federal territories because territories embodied the country’s future, and it was unclear how states could legally control that future. Southern myths about independent and autonomous sovereigns were used to support muscular states’ rights arguments against the federal government. By contrast, Lincolnite Republicans insisted that the skeleton of national representation trumped individual states’ claims about their “reserved” or “residual” autonomy. The Unionists’ victory against slavery was another triumph of skeletal statehood over muscular statehood.<sup>24</sup> Finally, during Reconstruction, Congress decided that the rebellious Southern states could retain the constitutional status of statehood, instead of being treated as “conquered territories” that had committed “state suicide.” That legislative choice strengthened racial oppression while weakening the federal government’s policy response. The Supreme Court unexpectedly magnified the impact of Congress’s decision by creating new constitutional doctrines of muscular statehood, based on inaccurate histories of the

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argued that even secession was textually guaranteed. Cf. JEFFERSON DAVIS, *THE RISE AND FALL OF THE CONFEDERATE GOVERNMENT* 130–31 (1881) (“[The Constitution] is full of statehood. Leave out all mention of the states— . . . [I] mean the states in their separate, several, distinct capacity—and what would remain would be of less account than the play of the Prince of Denmark with the part of *Hamlet* omitted.”); *id.* at 2 (“Can any historical fact be more demonstrable than that the States did, both in the Confederation and in the Union, retain their sovereignty and independence as distinct communities . . . ?”). These kinds of historical and modern disputes are a central topic for discussion herein. See *infra* Parts I–IV.

<sup>22</sup> Territorial government represents a useful venue for studying states’ rights in isolation from other doctrines of federalism because the scope of Congress’s enumerated power is relatively clear. See generally DON E. FEHRENBACHER, *THE DRED SCOTT CASE* (1978). But cf. *Dred Scott v. Sandford*, 60 U.S. 393, 403–04 (1857) (limiting Congress’s power over territories).

<sup>23</sup> See *infra* Part I.

<sup>24</sup> See *infra* Part II.



Founding Era and the Civil War, which continue to affect judicial decisions today.<sup>25</sup>

The foregoing events were decisive for America's legal development, yet they are often misread or overlooked by judicial doctrine.<sup>26</sup> Accurate analysis of the past could be important for adjudicative decisions in the future, and it also matters for the continuous production of legal and political culture in law schools and legal scholarship.<sup>27</sup> During modern times, some politicians have revived extraordinarily dangerous examples of muscular statehood, including states' ability to contradict federal policy and even to wage war.<sup>28</sup> Historical perspective offers context to understand why muscular statehood's current expansion is intellectually misguided and also politically destructive.

This Article has four parts. Part I identifies the Founding-Era origins of territory and statehood, including the Declaration of Independence that announced the existence of states, the Articles of Confederation that codified them, and the Constitution that prescribed their enduring form.<sup>29</sup> Conventional analysis has

<sup>25</sup> See *infra* Part III.

<sup>26</sup> See, e.g., *Murphy*, 138 S. Ct. at 1475 (asserting incorrectly that “[w]hen the original States declared their independence, they claimed the powers inherent in sovereignty . . . ‘to do all . . . which Independent States may of right do’” (quoting THE DECLARATION OF INDEPENDENCE ¶ 32 (U.S. 1776))); *Shelby County v. Holder*, 570 U.S. 529, 535–36, 552 (2013) (discussing the “equal sovereignty” of states, with just two references to the Civil War and no analysis of its implications for constitutional statehood).

<sup>27</sup> See PAMELA BRANDWEIN, RECONSTRUCTING RECONSTRUCTION: THE SUPREME COURT AND THE PRODUCTION OF HISTORICAL TRUTH 212 (1999) (“The institutional history of Reconstruction remains a latent source of authority even if originalists do not now tap it. . . . My bet is that this institutional history will be back.”); ROBERT W. GORDON, TAMING THE PAST: ESSAYS ON LAW IN HISTORY AND HISTORY IN LAW 5 (2017) (“[Lawyers are] part of a broader process of development that preserves continuity with the good parts of the past while . . . shedding the bad parts.”); PRIYA SATIA, TIME’S MONSTER: HOW HISTORY MAKES HISTORY 1 (2020) (“Historians are [ ] custodians of the past, repositories of collective memory . . . . Whether explaining our present or understanding the past on its own terms, their work critically shapes how the past infuses our present.”); cf. Maeve Glass, *Theorizing Constitutional History*, 60 HIST. & THEORY 331, 345–46 (2021) (“[A] growing number of legal academics have called for a fundamental reconsideration of how we teach and study constitutional law. . . . [We must] peer beyond the familiar ostensibl[y] neutral landscape of bordered spaces and temporal ruptures.”).

<sup>28</sup> See *infra* Part IV.

<sup>29</sup> This Article’s focus on constitutional history necessarily affects its timeline. For example, to analyze the politics, culture, and social structure surrounding statehood and territory would require extensive discussion of colonial history. See DANIEL J. HULSEBOSCH, CONSTITUTING EMPIRE, NEW YORK AND THE TRANSFORMATION OF CONSTITUTIONALISM IN THE ATLANTIC WORLD, 1664–1830, at 1 (2005); Maeve Glass, *Slavery’s Constitution: Rethinking the Federal Consensus*, 89 FORDHAM L. REV. 1815, 1818 (2021) (describing a prerevolutionary era when “the territorial and institutional boundaries of states and [geographic] sections had yet to take on today’s reified form,” instead

exaggerated states' autonomy and stability during this period.<sup>30</sup> For example, some authors have characterized the Articles of Confederation as an international treaty, comparing states like Massachusetts or South Carolina to foreign nations like France or Spain.<sup>31</sup> Evidence from 1776 to 1786 does not support such extravagant myths of muscular statehood, even though many generations have repeated similar arguments for their own purposes.<sup>32</sup> The declaration of independence from Britain was simultaneously a declaration of interdependence among the states. When revolutionaries fought to separate from Britain, there was not any implicit consensus about how postrevolutionary governments would work. From the beginning, there were clear rules about interstate membership and voting procedures—the skeleton of statehood. But there were not comparably specified constitutional agreements about states' authority to resist the interstate government—the muscle of statehood. The historical distinction between skeletal and muscular statehood provides a baseline for analyzing seemingly endless debates about constitutional statehood over time.

The instability and interdependence of preconstitutional statehood becomes especially clear by examining eighteenth-century disputes about interstate territories. The Articles of Confederation were the very first legal framework to codify statehood and the United States, yet ratifying the Articles required creating interstate territories, and that violated the Articles'

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manifesting “a fluid landscape of property owners engaged in commerce, collectively bound by shared interests in [slavery] and ideologies of a racial caste hierarchy”). Modern issues concerning “unincorporated” territories, unrepresented residents in the District of Columbia, and the violent displacement of Native peoples are even more politically urgent than the historical topics discussed here. See generally Green, *Our Imperial Republic*, *supra* note 8.

<sup>30</sup> See, e.g., *Franchise Tax Board*, 139 S. Ct. at 1493 (stating inaccurately and without support that, “[a]fter independence, the States considered themselves fully sovereign nations”).

<sup>31</sup> See, e.g., Anthony J. Bellia Jr. & Bradford R. Clark, *The International Law Origins of American Federalism*, 120 COLUM. L. REV. 835, 841 (2020) (“[T]he Founders *presumably understood* the term ‘State’ to refer to a separate sovereign possessing *all* of the rights and powers traditionally recognized by the law of nations.” (first emphasis added)).

<sup>32</sup> See Green, *United/States*, *supra* note 1, at 48–57 (explaining how records from the ratification debates, including the Federalist Papers, have fueled misperceptions about muscular statehood); *id.* at 56 (“This is ironic because victorious eighteenth-century Federalists . . . were exaggerating preconstitutional statehood in the hope that Americans would reduce it—and that is what happened.”).

explicit substantive limits on congressional power.<sup>33</sup> Territories and states were historically interconnected from the start, but states' rights arguments have downplayed those links' importance for constitutional law as a field. A large bulk of Founding-Era decisions about territory and statehood were dynamic struggles about governmental power through ordinary politics. They did not produce supermajoritarian or transhistorical certainties that would qualify as constitutional law. The representational skeleton of constitutional statehood was solid from the beginning, but the states' implicit muscular powers to resist were almost exactly the opposite.

Part II analyzes territory, statehood, and union as the approaching Civil War threatened the country's legal existence. During this era, disputes about federal territories generated another fundamental crisis about the skeleton and muscle of statehood.<sup>34</sup> As Americans violently purchased and invaded their way across the continent, the national government's power to regulate territories influenced the country's basic composition.<sup>35</sup> Congressional authority to determine the status of slavery was especially important.<sup>36</sup> An increasing number of antislavery territories were becoming antislavery states with full voting membership, which meant greater political support for national antislavery policies about tariffs, uncensored mail service, and the creation of even

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<sup>33</sup> See ARTICLES OF CONFEDERATION OF 1781, art. XI (“[N]o other colony shall be admitted . . . unless such admission be agreed to by nine states.”); THE FEDERALIST NO. 38, at 186 (James Madison) (Oxford ed. 2008) (“[The Confederation] Congress have assumed the administration of [western territories]. . . . Congress have [proceeded] . . . to erect temporary governments . . . . All this has been done; and done without the least color of constitutional authority. Yet no blame has been whispered; no alarm has been sounded.”).

<sup>34</sup> See JAMES OAKES, FREEDOM NATIONAL: THE DESTRUCTION OF SLAVERY IN THE UNITED STATES, 1861–1865, at 266 (2013) (“[T]he [ ] struggle over slavery in the territories split the Democratic Party in two, leading in 1860 to the stunning electoral victory of a Republican president whose party promised to ban slavery in all the western territories.”).

<sup>35</sup> See U.S. CONST. art. IV, § 3 (“New States may be admitted by the Congress . . . . The Congress shall have Power to . . . make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.”).

<sup>36</sup> See JAMES M. MCPHERSON, BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA 51 (1988) (“[The] triumph of Manifest Destiny may have reminded some Americans of Ralph Waldo Emerson’s prophecy that ‘the United States will conquer Mexico, but it will be as the man swallows the arsenic . . . . Mexico will poison us.’ He was right. The poison was slavery.” (quoting 7 JOURNALS OF RALPH WALDO EMERSON (Edward W. Emerson & Waldo E. Forbes eds., 1909))); *id.* at 116 (“Thus had Thomas Jefferson’s Empire for Liberty become transmuted by 1860 into . . . [a] desire to ‘plant American liberty with southern institutions upon every inch of American soil.’” (quoting CONG. GLOBE, 35th Cong., 1st Sess. 279 (Jan. 13, 1858) (statement of Rep. L.Q.C. Lamar))).

more antislavery territories.<sup>37</sup> The self-affirming cycle of antislavery power, antislavery territories, antislavery states, and more antislavery power was—more than anything else—what made the United States such an intolerable country for Southern secessionists to occupy.<sup>38</sup>

The Civil War was simultaneously a struggle about slavery and also about statehood.<sup>39</sup> The Unionist victors fought to defend skeletal statehood, claiming that states should determine national slavery policies only through ordinary political mechanisms, regardless of muscular assertions of states' rights to resist the national democracy.<sup>40</sup> After the war, constitutional amendments restricted states' individual authority and expanded federal power, without any correspondingly expanded constitutional basis for protecting states' rights against the union.<sup>41</sup> The skeleton of statehood had become clearer and firmer, while theories of muscular statehood were emphatically defeated. Opportunities for misinterpretation arose, however, because the Civil War's implications for constitutional statehood were often written in blood instead of formal law.<sup>42</sup>

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<sup>37</sup> See John L. Brooke, *Cultures of Nationalism, Movements of Reform, and the Composite-Federal Polity: From Revolutionary Settlement to Antebellum Crisis*, 29 *J. EARLY REPUB.* 1, 3 (2009) (“[E]ach section . . . used elements of the [federal government’s] fractured benevolent program . . . gradually to forge the moral centers of the two sectional nationalisms that would feed the fires of the Civil War.”).

<sup>38</sup> See 3 *CONG. GLOBE*, 31st Cong., 1 Sess. 455 (Mar. 4, 1850) (statement of Sen. John Calhoun) (“[Y]ou intend to exclude us from the whole of the acquired territories, with the intention of destroying irretrievably the equilibrium between the two sections. We would be blind not to perceive . . . that your real objects are power and aggrandizement, and infatuated not to act accordingly.”); see also WALTER JOHNSON, *RIVER OF DARK DREAMS: SLAVERY AND EMPIRE IN THE COTTON KINGDOM* 400 (2017) (“Politics . . . was the vehicle by which [the] economy might [ ] constitute space in its own image. . . . [O]ne could control the inflow of pro- or anti-slavery whites. . . . until a territory finally reached a sort of tipping point where its political economy would become forever ‘slave’ or ‘free.’”).

<sup>39</sup> See DAVID WALDSTREICHER, *SLAVERY’S CONSTITUTION* 157 (2009) (“To compromise . . . in 1861, either side would have had to give up not just slavery, or antislavery, but also its constitution . . . . In this sense, slavery did not itself cause the Civil War. Slavery’s Constitution did.”).

<sup>40</sup> See Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), in *THIS FIERY TRIAL: THE SPEECHES AND WRITINGS OF ABRAHAM LINCOLN* 88, 93–95 (William E. Gienapp ed., 2002):

A majority, held in restraint by constitutional checks, and limitations, and always changing easily, with deliberate changes of popular opinions and sentiments, is the only true sovereign of a free people. Whoever rejects it, does, of necessity, fly to anarchy or to despotism.

<sup>41</sup> See U.S. CONST. amends. XIII–XV.

<sup>42</sup> See Cynthia Nicoletti, *The Rise and Fall of Transcendent Constitutionalism in the Civil War Era*, 106 *VA. L. REV.* 1631, 1644 (2020) (“War was a blunt instrument . . . .

Part III describes Congress's postwar decision not to convert formerly rebellious states into territories, which kept Southern statehood intact. Even though the Reconstruction Congress regulated Southern states as military districts, prescribing standards for the restoration of congressional representation, those temporary half measures were not enough to dismantle regional patterns of oppression.<sup>43</sup> Southern states retained their constitutional status as states after the war, and they invoked their statehood to assert ever-increasing power against national authority and federal rights. Congress's choice to preserve Southern statehood shows how conservatism about governmental structure coexisted with otherwise radical substantive changes about individual rights and status. If Congress had been willing to convert Southern states into territories, federal power might have been more effective against Southern examples of destructive violence, even as new constitutional amendments also broadcast individual rights across the country. The unrealized possibility of combining territorial governance with constitutional rights could have transformed the country, but that itself is one reason that national politicians rejected such options at the time.<sup>44</sup>

The Supreme Court turned the preservation of Southern states against Congress itself, creating new constitutional doctrines that weakened the Reconstruction Amendments' transformative potential. Even as such amendments explicitly abolished slavery, reformed citizenship, guaranteed individual rights, and increased congressional power, their highest aspirations were undermined by new constitutional doctrines of muscular statehood. Landmark decisions like the *Slaughter-House Cases*<sup>45</sup> were crucial, but they are often misunderstood. Immediately after the war, the Supreme Court applied new theories of muscular statehood that shamelessly pretended to be old, invoking constitutional "traditions" that did not exist during the Founding Era

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[D]ivining the meaning of a war was particularly problematic. There was no textual summary, no explanatory writing, that came out of the war.").

<sup>43</sup> See ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 603 (1988) ("[W]hether measured by the dreams inspired by emancipation or the more limited goals of securing blacks' rights as citizens and free laborers . . . Reconstruction can only be judged as a failure.").

<sup>44</sup> See BRUCE LEVINE, THADDEUS STEVENS: CIVIL WAR REVOLUTIONARY, FIGHTER FOR RACIAL JUSTICE 218 (2021); see also Glass, *Bringing Back the States*, *supra* note 1, at 1032–42 (describing a long history of political and academic disagreement about whether the Civil War preserved or altered constitutional statehood).

<sup>45</sup> 83 U.S. 36 (1872).

or the Civil War. The first eighty years of disputes about muscular statehood had produced disagreement and war, not supermajoritarian constitutional consensus. *Slaughter-House* and its progeny applied new doctrines of muscular statehood to limit postwar amendments that could have dramatically changed the country. The chronology is important: theories of muscular statehood produced narrow visions of individual rights, not the other way around.<sup>46</sup>

The late nineteenth century was a golden age of constitutional statehood, mixed together with extreme capitalism and racist violence, and similar ideas have become influential again without acknowledging their historical trajectory. The constitutional origins of muscular statehood do not appear in the Founding Era, nor in the Civil War, but in a forgotten sequence of congressional decisions and judicial lawmaking from the Reconstruction Era that diminished individual rights, congressional power, social transformation, and racial justice.<sup>47</sup>

Part IV concludes with a critique of muscular statehood's modern status as constitutional law. The histories of conflict and political bargaining about territories and statehood are completely the opposite of supermajoritarian consensus and timeless constitutionalism. States' rights decisions after the Civil War are also normatively problematic, as doctrines of muscular statehood have facilitated violence and injustice for at least 150 years.<sup>48</sup> A

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<sup>46</sup> For excellent commentary that does not address statehood as such, see Eric Foner, *The Supreme Court and the History of Reconstruction—And Vice-Versa*, 112 COLUM. L. REV. 1585, 1588 (2012) (“The retreat was gradual and never total. And jurists are not solely to blame.”), Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. REV. 1801, 1806 (2010) (“[T]he Reconstruction Power gives Congress all the authority it needs to pass modern civil rights laws, including the Civil Rights Act of 1964.”), and Glass, *Killing Precedent*, *supra* note 2, at 51–65 (noting fiercely contested interpretations of the *Slaughter-House Cases* throughout the nineteenth century).

<sup>47</sup> See, e.g., *Shelby County*, 570 U.S. at 547 (striking down part of the Voting Rights Act because “[i]n the covered jurisdictions, [v]oter turnout and registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels.” (quoting *Nw. Austin Muni. Util. Dist. v. Holder*, 557 U.S. 193, 202 (2009))); see also FONER, *supra* note 43, at 612 (“Nearly a century elapsed before the nation again attempted to come to terms with the implications of emancipation and the political and social agenda of Reconstruction. In many ways, it has yet to do so.”).

<sup>48</sup> See Peggy Cooper Davis, Anderson Francois & Colin Starger, *The Persistence of the Confederate Narrative*, 84 TENN. L. REV. 301, 303 (2017) (“[T]he Confederate narrative [concerning states’ rights] . . . protected slave power, undermined the Civil War Amendments, and justified Jim Crow subordination. . . . [U]nder the banner of state sovereignty state governments were complicit in the surveillance, harassment, and murder of civil rights workers who dared to challenge segregation and white supremacy.”).

modern example of aggressive states' rights arguments reveals that some of muscular statehood's most destructive possibilities are visible even now, including an unspecified potential for military conflict.<sup>49</sup> Those historical and present-day circumstances make any effort to expand doctrines of muscular statehood extremely problematic.<sup>50</sup>

## I. THE FOUNDING ERA: INTERTWINED TERRITORIES AND STATES

Even though countless authors have analyzed how the United States replaced Britain as a central government, most scholarship has overlooked the equally important creation of states to supplant British colonies.<sup>51</sup> Popular myths supporting

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It is also true that states' rights arguments were sometimes used for dramatically different purposes. See Glass, *Killing Precedent*, supra note 2, at 933–34 (“[T]he abolitionist turn to . . . state citizenship . . . [reframed] slavery from the rights of a black person to the sovereignty of a free state. . . . [That history] invites us to broaden . . . state sovereignty from . . . the state’s degree of autonomy from the national government to . . . a state’s duty to protect its citizens.”).

Northerners like Daniel Webster spoke about disunion and “compact” theories of the Constitution as early as 1813. See ROBERT ELDER, *CALHOUN: AMERICAN HERETIC* 106 (2021). And abolitionists like John Quincy Adams considered secession as a potentially worthwhile option long before William Lloyd Garrison advocated it. Compare THE DIARY OF JOHN QUINCY ADAMS, 1794–1845, at 232 (Allan Nevins ed., 1928) (“This would have produced a new Union of thirteen or fourteen States unpolluted with slavery, with a great and glorious object to effect, namely, that of rallying to their standard the other States by the universal emancipation of their slaves.”), with William Lloyd Garrison, *On the Dissolution of the Union*, THE LIBERATOR, June 15, 1855 (“[T]he American Union is the supremacy of the bowie knife, the revolver, the slave-driver’s lash, and lynch law . . . to be resisted, denounced and repudiated . . . until its utter overthrow shall be consummated; . . . there should be one united shout of ‘No Union with Slaveholders, religiously or politically!’” (emphasis in original)).

<sup>49</sup> See Mark Brnovich, *The Federal Government’s Duty To Protect the States and the States’ Sovereign Power of Self Defense When Invaded*, Op. No. I22-001 (R21-015), Feb. 7, 2022, <https://perma.cc/Q3TP-CXPG>.

<sup>50</sup> Voting rights cases have produced especially notable opinions that support muscular statehood. See *Shelby County* at 535 (applying non-textual concepts of “equal sovereignty” to hamstringing the Voting Rights Act); cf. *Petition for a Writ of Certiorari, Moore v. Harper*, Dkt. No. 21-1271 (asking “[w]hether a State’s judicial branch may nullify the regulations governing the ‘Manner of holding Elections for Senators and Representatives . . . prescribed . . . by the Legislature thereof’ . . . based on vague state constitutional provisions.” (quoting U.S. CONST. art. I, § 4, cl. 1)).

<sup>51</sup> See GERSTLE, supra note 1, at 55 (“European theory has driven studies of the state . . . , and that has meant an emphasis on the nature and activities of the central state . . . . [M]ore often than not, the states have fallen out of conversation . . . except among social scientists and legal scholars who study federalism.”). For well-known works that are much more focused on the nation than constitutional statehood, see AKHIL REED AMAR, *THE WORDS THAT MADE US: AMERICA’S CONSTITUTIONAL CONVERSATION, 1760–1840*, at viii–ix (2021) (referencing “colonies-turned-states” briefly on the way toward nationhood); JILL LEPORE, *THESE TRUTHS: A HISTORY OF THE UNITED STATES*, at xviii (2018) (describing

muscular statehood have relied on inaccurate interpretations of eighteenth-century history,<sup>52</sup> and this Part challenges such narratives at their putative source. Part I.A describes statehood's profound ambiguity under the Declaration of Independence. Contra modern assumptions, states were not merely British colonies under new management, nor were they equivalent to independent European countries.<sup>53</sup> On one hand, the Revolution was fought to renounce colonial status, and the war's progress raised questions about what should come next.<sup>54</sup> On the other hand, although the Declaration clearly said that the former colonies were "Free and Independent States"—independent of Britain—it said almost nothing about constitutional relationships among states or between states and the Continental Congress.<sup>55</sup> There had never been a declaration of independence quite like this one, nor had there been legal entities quite like these newly created states.<sup>56</sup>

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the relevant historical trajectory as a movement from "colonies" to "nation" without mentioning "states"); GORDON S. WOOD, *Preface to the 1998 Edition*, in GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787*, at v–xii (1998) (describing ideological republicanism without emphasizing legal statehood).

<sup>52</sup> See, e.g., *Gibbons v. Ogden*, 22 U.S. 1, 187 (1824) ("It has been said, that [the states] were sovereign, were completely independent, and were connected with each other only by a league. This is true."); see also *infra* note 67 (collecting additional sources).

<sup>53</sup> See JACK P. GREENE, *CREATING THE BRITISH ATLANTIC: ESSAYS ON TRANSPLANTATION, ADAPTATION, AND CONTINUITY* 53 (2013) ("The most radical result of the Revolution was the profound reconception of political and social relations that occurred over the following half century and the emergence and endorsement of the idea of popular sovereignty . . .").

<sup>54</sup> See J.G.A. Pocock, *States, Republics, and Empires: The American Founding in Early Modern Perspective*, 68 *SOC. SCI. Q.* 703, 707 (1987):

This is the power which is claimed for the former British colonies . . . [by] the Declaration of Independence . . . There are now thirteen "states" in a "state of nature" with respect to [Great Britain] . . . and the question must necessarily arise whether these thirteen are in a state of nature respecting one another . . . and what it is that keeps them from being so if they are not.

<sup>55</sup> See WILLI PAUL ADAMS, *THE FIRST AMERICAN CONSTITUTIONS* 2 (2001) ("[I]n the Declaration of Independence we find only a pithy statement of beliefs; legally speaking, it was an irrelevant credo."); *id.* at 20 ("The movement for independence and the establishment of the new order occurred simultaneously and interacted constantly with each other."); JACK P. GREENE, *THE CONSTITUTIONAL ORIGINS OF THE AMERICAN REVOLUTION* 190 (2011) ("The Revolution, in short had left the 'organization of power in the United States' in a thoroughly ambiguous state. The effort to . . . solve the ancient problem of how . . . to distribute authority between the center and the peripheries, would be the primary concern of American constitutional thought during the 1780s.")

<sup>56</sup> See DAVID ARMITAGE, *THE DECLARATION OF INDEPENDENCE: A GLOBAL HISTORY* 21–22 (2007) ("The Declaration was innovative in two ways . . . First, it introduced 'the United States of America' to the world; second, it inaugurated the very genre of a declaration of independence.")



Part I.B describes the Articles of Confederation’s initial framework for statehood and union, and the Constitution’s approach to statehood that persists today.<sup>57</sup> A legal history of the Articles shows that states and the United States were established simultaneously, and territories were vital to them both.<sup>58</sup> Historical evidence does not reveal any constitutional consensus about the states’ substantive powers, thereby undermining modern arguments that states somehow “surrendered” their sovereignty by ratifying the Articles and the Constitution.<sup>59</sup> On the contrary, both documents were steps toward *constructing statehood*.<sup>60</sup> There were not any ancient traditions about legal statehood that the Founders could have plausibly smuggled into constitutional law as unspoken conventions.<sup>61</sup> Like the Declaration of Independence and the Articles of Confederation, the Constitution’s skeletal architecture of statehood answered only a few questions about states’ legal authority.<sup>62</sup> Almost all issues concerning muscular powers of states to resist the federal union remained open for dispute and resolution through mechanisms of ordinary politics.<sup>63</sup>

#### A. Declaring Independence and Interdependence

The very first years of territory and statehood have been significantly overlooked as a benchmark to measure what changed

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<sup>57</sup> See Green, *United/States*, *supra* note 1, at 35–41 (describing similar events for different purposes).

<sup>58</sup> See *infra* Section I.B.

<sup>59</sup> See PETER S. ONUF, *THE ORIGINS OF THE FEDERAL REPUBLIC*, at xiv–xv (1983) (“Republican ideology . . . was virtually useless in explaining how sovereign states could be combined in a union with sovereign powers.”). Examples of the dominant modern myth include *Massachusetts v. E.P.A.*, 549 U.S. 497, 519 (2007) (“When a State enters the Union, it surrenders certain sovereign prerogatives.”), and *Rhode Island v. Massachusetts*, 37 U.S. 657, 725 (1838) (incorrectly claiming that “before the adoption of the constitution,” each state had the power “of settling [ ] contested boundaries, as in the plenitude of their sovereignty they might”).

<sup>60</sup> See ADAMS, *supra* note 55, at 20 (“The movement for independence and the establishment of the new order occurred simultaneously and interacted constantly with each other.”); Green, *United/States*, *supra* note 1, at 1 (“[S]tates and the United States were [simultaneously] created . . . and mutually constitutive.”).

<sup>61</sup> Cf. THE FEDERALIST NO. 39, at 192 (James Madison) (Oxford ed. 2008) (describing the “residuary and inviolable sovereignty” of states as necessarily producing ample “*controversies* relating to the boundary between the two jurisdictions” (emphasis added)).

<sup>62</sup> See, e.g., U.S. CONST. art. I, §§ 2–3, art. II, § 1.

<sup>63</sup> See BRIAN BALOGH, *A GOVERNMENT OUT OF SIGHT* 86 (2009) (“Political practices and the very debate over the scope of the General Government helped frame the walls that eventually supported a constitutional ‘roof.’ Day-to-day politics ultimately determined which constitutional powers would be exercised and which would remain dormant.”).

under the Constitution.<sup>64</sup> Scholars and courts traditionally start with the Federalist Papers and ratification debates, which occurred during an era when historical actors systematically exaggerated states' preconstitutional independence for their own political reasons.<sup>65</sup> Likewise, a tremendous number of judges and academics have claimed that the thirteen states were as separate as European countries, and that the Articles of Confederation were an international treaty.<sup>66</sup> That is incorrect, and similar errors have distorted theories of statehood for a very long time.

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<sup>64</sup> See, e.g., *PennEast Pipeline Co., LLC v. New Jersey*, 141 S. Ct. 2244, 2258 (2021) (describing the “plan of the Convention” as “shorthand for ‘the structure of the original Constitution itself’” (quoting *Alden v. Maine*, 527 U.S. 706, 728 (1999))). *But cf.* ADAMS, *supra* note 55, at 2 (“An attempt to reconstruct the political and social thought of the founders during the Revolution can hardly begin [ ] with what we know of the proceedings of the Federal Convention in Philadelphia in 1787, or with the defense of its work in *The Federalist*.”); ARMITAGE, *supra* note 56, at 6 (“Much [scholarship about the Declaration] . . . has debated the various European sources for the Declaration’s statements concerning natural rights or the right of revolution.”).

<sup>65</sup> See, e.g., *Torres v. Texas Dep’t of Pub. Safety*, 142 S. Ct. 2455 (2022) (citing the Federalist Papers eight times and Records of the Convention only once); *West Virginia v. Env’tl. Prot. Agency*, 142 S. Ct. 2587 (2022) (Gorsuch, J., concurring) (citing only the Federalist Papers as evidence of eighteenth-century constitutional meaning). See also MARY SARAH BILDER, MADISON’S HAND: REVISING THE CONSTITUTIONAL CONVENTION 1–2 (2015) (noting that, although “Madison’s Notes are the most complete and detailed description of the Constitutional Convention,” they “are a problem” when it comes to factual reliability); *id.* at 5 (“To what degree did the small states care about state sovereignty? The Notes indicate more concern about large state political dominance than an ideology of state sovereignty.”); Green, *United/States*, *supra* note 1, at 11 (“Federalists and Anti-Federalists disagreed about the Constitution’s substantive merit. Yet both sides circulated broken histories of the Articles of Confederation, characterizing states as primary, essential, and sovereign in contrast to the weak and derivative central government. After ratification, similarly distorted images of preconstitutional state-centrism were even more prominent.”).

<sup>66</sup> This treaty-based misconception about the Articles of Confederation has extremely deep roots. Illustrative judicial opinions abound. See *McDonald v. City of Chicago*, 561 U.S. 742, 819 (2010) (Thomas, J., concurring in part) (describing the Articles as a “‘league’ of separate sovereign States”); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 803 (1995) (“[U]nder the Articles of Confederation . . . ‘the States retained most of their sovereignty, like independent nations bound together only by treaties.’” (quoting *Wesberry v. Sanders*, 376 U.S. 1, 9 (1964))); *Woodruff v. Parham*, 75 U.S. 123, 142 (1868) (“At the time of the Convention . . . the States were independent and foreign to each other, except as bound together by the feeble ‘league of friendship’ in the Articles of Confederation.” (quoting ARTICLES OF CONFEDERATION OF 1781, art. III)); *Dred Scott v. Sandford*, 60 U.S. 393, 434 (1857) (“[W]hat was then called the United States, were thirteen separate, sovereign, independent States, which had entered into a league or confederation.”); *Gibbons*, 22 U.S. at 187 (1824) (“It has been said, that [the states] were sovereign, were completely independent, and were connected with each other only by a league. This is true.”).

For examples from legal scholarship, see Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1448 (1987) (“[T]he ‘United States’ in 1787 was not much more than the ‘United Nations’ is in 1987: a mutual treaty conveniently dishonored on all sides.”), Raoul Berger, *The Founders’ Views—According to Jefferson Powell*, 67 TEX. L.

One corrective starting point is to observe that the prerevolutionary colonies obviously were not sovereign, despite their long traditions of semiautonomous authority and cultural identity.<sup>67</sup> Colonies were subordinate creatures of the British Empire whose borders, economies, governance, and existence were formally subject to central control.<sup>68</sup> Eighteenth-century colonists tried and failed to create an acceptable balance between central leadership and local governance within the framework of British

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REV. 1033, 1038–43 (1989) (“[T]he Declaration of Independence was indeed the work of the thirteen sovereign states.”), Gregory E. Maggs, *A Concise Guide to the Articles of Confederation as a Source for Determining the Original Meaning of the Constitution*, 85 GEO. WASH. L. REV. 397, 402–03 (2017) (“The Articles of Confederation were . . . a mutual defense treaty establishing a ‘firm league of friendship’ among newly-formed, co-equal states.”), and John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167, 236 (1996) (claiming that the Articles were “more of a treaty organization than a national government”).

The foregoing historical characterizations have always coexisted with powerful counterarguments. See THE FEDERALIST NO. 2, at 15 (John Jay) (Oxford ed. 2008) (“[T]he people of America depended on *their continuing firmly united*, and . . . [our] wisest citizens *have been constantly directed* to that object. But politicians now [advocate dividing] . . . States into distinct confederacies or sovereignties. . . . [I]ndependent America was not composed of detached and distant territories, but [instead] one connected, fertile, wide-spreading country.” (emphasis added)); see also 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 144 (1833) (“[A]ntecedent to the Declaration of Independence, none of the colonies were, or pretended to be, sovereign states.”); *id.* at 152 (“The [Continental Congress] . . . exerted powers, which could in no other manner be justified . . . than upon the supposition that a national union for national purposes already existed, and that the Congress was invested with sovereign power over all the colonies for the purpose of preserving the common . . . liberties of all.”); see also *id.* (“From the moment of the declaration of independence, if not for most purposes at an antecedent period, the united colonies must be considered as being a nation *de facto*, having a general government over it, created and acting by the general consent of the people of all the colonies.”); JACK RAKOVE, THE BEGINNINGS OF NATIONAL POLITICS: AN INTERPRETIVE HISTORY OF THE CONTINENTAL CONGRESS 184 (1979) (“[T]he idea that the confederation was essentially only a league of sovereign states was ultimately a fiction.”); Ryan C. Williams, *The “Guarantee” Clause*, 132 HARV. L. REV. 602, 610 (2018) (“[T]he Articles of Confederation . . . bound the states together in a manner that deprived them of many sovereign attributes that independent nations would have enjoyed.”).

<sup>67</sup> See GERSTLE, *supra* note 1, at 59 (“Colonial governing institutions had never been sovereign, of course; this is why the American War of Independence broke out in the first place . . .”).

<sup>68</sup> See Jack Greene, *Law and the Origins of the American Revolution*, in 1 THE CAMBRIDGE HISTORY OF LAW IN AMERICA 447, 449 (Michael Grossberg & Christopher Tomlins eds., 2008) (“Although Crown officials consistently recognized [colonial] assemblies’ authority to pass laws, they always insisted that those bodies were subordinate institutions.”); Alison L. LaCroix, *The Authority for Federalism: Madison’s Negative and the Origins of Federal Ideology*, 28 LAW & HIST. REV. 451, 466 (2010) (“[T]he Privy Council wielded a power over the colonies . . . to evaluate the acts of colonial legislatures, unattached to a specific case or set of parties, and to declare those acts either valid or invalid as applied prospectively to all persons and all scenarios.”).

imperialism.<sup>69</sup> British principles of negotiated colonialism were one influence on the revolutionaries' early governments—along with the Netherlands, Switzerland, ancient Greece, and Iroquoia—but all of those theories were quite different from constitutional statehood.<sup>70</sup> States were a new kind of legal entity, and Delaware was a particularly vivid example.<sup>71</sup>

The state of Delaware could not have been derived from British colonial law because Delaware was never a British colony. This means that widespread references to “thirteen” rebellious colonies are arithmetically incorrect.<sup>72</sup> Lands west of the

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<sup>69</sup> See PAULINE MAIER, *AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE* 8 (1997) (“The outbreak of war . . . [had not] destroyed the colonists’ desire to remain subjects of the British Crown. Reconciliation was still the American dream.”); STEVE PINCUS, *THE HEART OF THE DECLARATION: THE FOUNDERS’ CASE FOR AN ACTIVIST GOVERNMENT* 22 (2016) (“Until the very last moment, North Americans and their British political allies wanted not separation but imperial reform.”).

<sup>70</sup> See LACROIX, *supra* note 1, at 22 n.40 (discussing the influence of the Haudenosaunee (Iroquois) Confederacy); PINCUS, *supra* note 69, at 142–43 (“Over and over again North American Patriots focused their discussions on ancient and modern confederations, ranging from the Greek Achaean League to the Swiss Confederation.”); ARMITAGE, *supra* note 56, at 41–44 (discussing the Scottish Declaration of Arbroath and Dutch Act of Abjuration).

<sup>71</sup> See ONUF, *supra* note 59, at xvii (“[T]o reconceive the American state system, Americans had to articulate and institutionalize new ideas [ ] that had developed over the previous decade but had remained largely implicit and unarticulated.”); Terence Ball & J.G.A. Pocock, *Introduction*, in *CONCEPTUAL CHANGE AND THE CONSTITUTION* 1 (Terence Ball & J.G.A. Pocock eds., 1998) (“[From revolution to ratification, the] concepts of sovereignty, liberty, virtue, republic, democracy—even ‘constitution’ itself—were virtually recoinced. Others, such as ‘federalism’ were scarcely less than novel American additions to the vocabulary of politics. Political innovation and conceptual change went hand in hand.”).

<sup>72</sup> Modern examples of this error are inescapably common. *E.g.*, AMAR, *supra* note 52, at xiii (“In 1776, thirteen British North American colonies renounced their common parent. . . .”); WOODY HOLTON, *LIBERTY IS SWEET: THE HIDDEN HISTORY OF THE AMERICAN REVOLUTION* 4 (2021) (“Thirteen colonies seceded from Britain. . . .”); WILLIAM E. NELSON, *E PLURIBUS UNUM: HOW THE COMMON LAW HELPED UNIFY AND LIBERATE COLONIAL AMERICA, 1607–1776*, at 2 (2019) (describing the “thirteen American colonies that became the United States”); Stephen G. Calabresi, *Originalism and James Bradley Thayer*, 113 *NW. U. L. REV.* 1419, 1434 (2019) (“The King selected . . . the Privy Council, and through them he exercised his prerogative powers over . . . the thirteen [read: twelve] colonies.”); *id.* at 1435 (“[O]n July 4, 1776, the thirteen colonies [read: states] declared their independence.”); Andrew Kent, Ethan J. Leib & Jed Handelsman Shugerman, *Faithful Execution and Article II*, 132 *HARV. L. REV.* 2111, 2176 (2019) (“In October 1776, the Congress ordered that all officers of the Continental Army take an oath pledging allegiance to the thirteen colonies [read: ‘the Thirteen United States’].” (quoting 6 *JOURNALS OF THE CONTINENTAL CONGRESS* at 893–94)); Annette Gordon-Reed, *Writing about the Past That Made Us: Scholars, Civic Culture, and the American Present and Future*, 131 *YALE L.J.* 948, 951 (2022) (describing the United States in 1789 as “a fledgling republic comprising thirteen [read: twelve] separate colonies precariously stitched together”). *But cf.* 2 *JOURNALS OF THE CONTINENTAL CONGRESS* 81 (June 7, 1775) (“Resolved, That Thursday the 20th of July

Delaware Bay were the “Lower Counties” of Pennsylvania, managed by Pennsylvania’s governor under the Penn proprietorship, with a local legislature authorized by Pennsylvania’s colonial law.<sup>73</sup> Delaware claimed independence from Britain and Pennsylvania simultaneously because British law was the only authority that made the “Lower Counties” subordinate to either one.<sup>74</sup> For Delawareans, independence from the King and from the Penn proprietors was identical. The State of Delaware was a new legal entity that did not—and could not—claim any existence, power, or status under British colonial law. The same was true of other revolutionary states, including the twelve that retained British colonial names and two of those that retained colonial charters.<sup>75</sup> Every new state government was tightly linked to the Continental Congress, and all efforts to announce independence from Britain were collective words and deeds.<sup>76</sup>

The most arguably independent actions came from Charlotte County, Virginia—not the state—where residents moved that their *representatives in the Continental Congress* should “cast off the British yoke, and . . . enter into a commercial alliance with any nation or nations friendly to our cause.”<sup>77</sup> Residents of Malden Massachusetts likewise expressed, using exclusively singular nouns, “the ardent wish of our soul that *America* may become a

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next, be observed throughout *the twelve United Colonies*, as a day of humiliation, fasting and prayer.” (emphasis added). After George Washington became Commander in Chief of the Continental Army in June of 1775, the phrase “United Colonies” was “usually found in the title of official pronouncements and publications, sometimes alone, but generally followed by ‘of America’, or ‘of North America’, frequently preceded by ‘Twelve’ or ‘Thirteen’, as the case might be, and sometimes with the word ‘English’ before ‘colonies.’” Edmund C. Burnett, *The Name “United States of America”*, 31 AM. HIST. REV. 79, 80 (1925).

<sup>73</sup> See John A. Munroe, *Revolution and Confederation*, in 1 DELAWARE: A HISTORY OF THE FIRST STATE 48–49, 95, 105 (H. Clay Reed ed., 1947); Green, *United/States*, *supra* note 1, at 31 (“The Lower Counties never had their own colonial charter or governor, and they were not recognized as a separate colony by Britain, Pennsylvania, or any other British entity. The Lower Counties could not be a British colony by accident, and no pre-revolutionary politician claimed that they were.”).

<sup>74</sup> See Munroe, *supra* note 73, at 106.

<sup>75</sup> Connecticut and Rhode Island retained their colonial charters. See 1 THE FEDERAL AND STATE CONSTITUTIONS, at iv, xii (Francis Newton Thorpe ed., 1909).

<sup>76</sup> See MAIER, *supra* note 69, at 9 (“[T]he First Continental Congress had long since resolved that ‘all America’ should support the inhabitants of Massachusetts Bay if Britain attempted to execute recent acts of Parliament by force.”); *id.* at 75 (“Even the most decisive supporters of separation . . . took care to add that they meant not to dictate, but left the final decision . . . ‘to the well-known wisdom, prudence, justice, and integrity of . . . the Continental Congress, under whose direction it more immediately belongs.’”).

<sup>77</sup> Instructions to Delegates for Charlotte County, Virginia, in 5 AMERICAN ARCHIVES 1035 (Apr. 23, 1776) (emphasis removed).

*free and independent state.*<sup>78</sup> Benjamin Franklin reputedly said that revolutionary leaders “must hang together, or most assuredly we shall all hang separately.”<sup>79</sup> Similar principles applied to rebellious states from the beginning.<sup>80</sup>

In 1776, the Continental Congress’s Declaration of Independence announced the existence of states and the United States for the first time, and it did so as a matter of newly interstate constitutional law.<sup>81</sup> The Declaration of Independence from Britain did not specify the legal status of states and the interstate government, nor did it prescribe their interrelationship or mutual balance.<sup>82</sup> On the contrary, examination of the Declaration’s text, context, and governmental practice demonstrates that any constitutional differences between “one United States” and “thirteen states united” were unresolved at the time, thus severely complicating any modern presumption that thirteen new countries became suddenly and completely “sovereign.”<sup>83</sup>

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<sup>78</sup> Meeting of the Inhabitants of the Town of Malden, in 6 AMERICAN ARCHIVES 602–03 (May 27, 1776) (emphasis added).

<sup>79</sup> See JARED SPARKS, THE LIFE OF BENJAMIN FRANKLIN 408 (1845) (reporting Franklin’s apocryphal quotation).

<sup>80</sup> See STORY, *supra* note 66, at 149 (“[T]he declaration of independence . . . was not an act done by the State governments . . . It was emphatically the act of the whole *people* . . . by the instrumentality of their representatives . . . It was not an act competent to the State governments, or any of them, as organized under their charters, to adopt.” (emphasis in original)).

<sup>81</sup> See THE DECLARATION OF INDEPENDENCE ¶ 5 (U.S. 1776); see also ARMITAGE, *supra* note 56, at 22 (“No previous public document had used the name ‘the United States of America’: in the months immediately before . . . and even within the text of the Declaration itself, the political bodies represented at the Continental Congress had been generally called the ‘United Colonies.’”).

<sup>82</sup> See MAIER, *supra* note 69, at 192 (“[T]he document’s original function was to end the previous regime, not to lay down principles to guide and limit its successor.”); 2 JOHN PHILLIP REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION 39 (1987) (describing an eighteenth-century British Empire “in which federalism was only vaguely perceived as a constitutional doctrine”); 3 JOHN PHILLIP REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION 76 (“The rigidity of the logic of supremacy left little opportunity for eighteenth-century imperial constitutional thought to consider the possibilities of federalism.”); *id.* at 228 (“The problem . . . is that we know very little about what English lawyers and British political theorists in the 1760s thought about federalism. . . . [Restraint on power] was not thought of in terms of federal levels of government but of limitations within the sovereign authority itself.”).

<sup>83</sup> See Herbert A. Johnson, *American Constitutionalism and the War for Independence*, 14 EARLY AM. STUD. 140, 142 (2016) (“The very survival of the ‘United States of America,’ as well as the newly independent state governments, compelled immediate, pragmatic, and ad hoc efforts to meet pressing governmental needs, regardless of political theories or popular ideologies. Time, not theoretical meditation, was of the essence.”).

## 1. Text.

The Declaration's explicit term "states" was not necessarily used to reflect international governments—or subnational provincial governments—as would be true today.<sup>84</sup> In 1775, for example, Thomas Jefferson's "Declaration on Taking Arms" used the name "United Colonies of America," while Franklin's draft articles of confederation described the "United Colonies of North America."<sup>85</sup> One year later, the Declaration of Independence almost carelessly switched between references to "Colonies" and "States."<sup>86</sup> Even the Declaration's most emphatic uses of the word "State" emphasized states' collective unity almost as much as their numerical distinction. For example, the document introduced itself as a "*unanimous Declaration* of the thirteen united States of America," thus indicating both singular and collective aspects.<sup>87</sup> And it ended with a similar tone by pronouncing that "*these United Colonies* are, and of Right ought to be Free and Independent States."<sup>88</sup>

Neither the Declaration's beginning nor its conclusion specified whether or how the "united states" could exist *under interstate law* as "Free and Independent [from Britain] States" except through their "unanimous" and "united" expression as a collective

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<sup>84</sup> See ARMITAGE, *supra* note 56, at 19 ("States were not always the primary units of global politics that they had become by the latter half of the twentieth century."); J.G.A. Pocock, *States, Republics, and Empires: The American Founding in Early Modern Perspective*, 68 SOC. SCI. Q. 703, 705 (1987) ("[I]n the last quarter of the eighteenth century, the word 'state' was not yet—though it was on the way to becoming—the normal term for political associations of all kinds, or for political association in the abstract."). By contrast, the word "state" is frequently used in modern contexts to indicate both nations and internal subdivisions. See Kristin M. Bakke & Erik Wibbels, *Diversity, Disparity, and Civil Conflict in Federal States*, 59 WORLD POL. 1, 1 (2006) ("This study is about the diverse capacity of states—federal or decentralized states in particular—to contain [struggles between the central government and subnational groups]."); Nalini Kant Jha, *Foreign Policy Making in Federal States: The Indian and Canadian Experiences*, 55 INDIA Q. 1, 1 (1999) ("The present paper [ ] aims to evaluate the role played by the States and Provinces of India and Canada in managing their foreign policies.").

<sup>85</sup> See Burnett, *supra* note 72, at 81.

<sup>86</sup> The word "states" appears eight times, twice followed by "of America," while "colonies" is used four times. See THE DECLARATION OF INDEPENDENCE (U.S. 1776) ¶¶ 1, 2, 9, 17, 23, 32 (U.S. 1776). John Adams was much more fussy about such terminology than his peers. 3 JOHN ADAMS, THE WORKS OF JOHN ADAMS 21 (2015) ("[By 1775] I mortally hated the Words 'Province' 'Colonies' and Mother Country . . . The last was indeed left out, but the other two were retained even by this Committee who were all [ ] high Americans.").

<sup>87</sup> THE DECLARATION OF INDEPENDENCE ¶ 1 (U.S. 1776) (emphasis added).

<sup>88</sup> THE DECLARATION OF INDEPENDENCE ¶ 32 (U.S. 1776) (emphasis added).

group.<sup>89</sup> The Declaration reflected a similar ambiguity when it described Americans as “one people” (thus indicating national unity) while also referring to Great Britain as a “State” (thus arguably implying the existence of thirteen North American “States”).<sup>90</sup> Adopting one definition of “State” rather than another could have made the difference between recognizing one new country or thirteen of them, but answering that kind of question simply was not a priority for the Declaration as a legal document.

## 2. Context.

Other evidence surrounding the Declaration highlights ambiguities about the intramural legal position of states and the United States. The Declaration targeted an international audience, seeking to announce America’s separation and to attract European allies.<sup>91</sup> When the Continental Congress moved to declare independence, it simultaneously promoted “foreign Alliances” by preparing a model treaty and “a plan of confederation.”<sup>92</sup> Only the plan of confederation—not the treaty or the Declaration—was supposed to describe the United States’ multi-layered framework for government. In 1776, the Articles of Confederation’s effort to prescribe legal relationships between “the United States” and “states” seemed less urgent than the other two documents because various levels of revolutionary government were already working together out of necessity.<sup>93</sup> The

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<sup>89</sup> THE DECLARATION OF INDEPENDENCE ¶¶ 1, 32 (U.S. 1776); see PINCUS, *supra* note 69, at 140 (“The Articles were from the first conceived as part of a ‘revolutionary portfolio’ of state formation . . . with the intention of demonstrating to foreign imperial governments . . . that the new American republic had the strength not only to conduct a war . . . but also to raise money to pay back loans.”).

<sup>90</sup> THE DECLARATION OF INDEPENDENCE ¶¶ 1, 32 (U.S. 1776).

<sup>91</sup> Richard Henry Lee’s original motion included no discussion of individual states’ sovereignty, while repeating twice his intention to separate from Britain. See Richard Henry Lee, Resolution Introduced in the Continental Congress by Richard Henry Lee (Va.) Proposing a Declaration of Independence (June 7, 1776), in DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES 21 (1927) (“That these United Colonies are, and of right ought to be, free and independent States, that they are absolved from all allegiance to the British Crown, and that all political connection between them and the State of Great Britain is, and ought to be, totally dissolved.”).

<sup>92</sup> *Id.*

<sup>93</sup> In 1776, Thomas Jefferson reported that John Adams, Richard Henry Lee, and George Wythe all vehemently asserted that “the question was not whether, by a declaration of independence, we should make ourselves what we are not; but whether we should declare a fact which already exists.” Thomas Jefferson, Notes of Proceedings in the Continental Congress, 7 June–1 August 1776, in 1 THE PAPERS OF THOMAS JEFFERSON 1760–1766, at 311 (Julian P. Boyd, ed., 1950).



Continental Congress was organizing a war, encouraging state constitutions, producing money, and conducting other interstate business.<sup>94</sup> On the other side, state governments were constantly coordinating with Congress and each other to supply troops, political leadership, and resources.<sup>95</sup> For several years, revolutionary practicalities had to be addressed despite the absence of any formal architecture to define constitutional statehood or interstate government.

Richard Henry Lee made the original motion for independence in the Continental Congress, and he repeatedly advocated interstate unity without describing sovereignty for individual states.<sup>96</sup> For example, Lee asked Patrick Henry to support independence as “the most important concern[ ]” at Virginia’s state convention: “Our clearest interest . . . our very existence as freemen requires that we take decisive steps now, whilst we may, *for the security of America*.”<sup>97</sup> Lee urged, “Let us [ ] quitting every

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<sup>94</sup> See ARMITAGE, *supra* note 56, at 33 (“[F]or almost two years before making the Declaration, Congress had been exercising most of the rights claimed for the United States in that document. It had been negotiating with British representatives, appointing agents to pursue its interests in Europe, corresponding with foreign powers, and seeking . . . [revolutionary] aid . . . .”); see also RAKOVE, *supra* note 66, at 89 (“For most intents and purposes, the Americans were already acting as if they were *an independent nation*: waging war, creating new governments, issuing money, and enacting other expedient measures.” (emphasis added)).

<sup>95</sup> The revolutionaries’ reliance on state governments—like many other decisions—was driven by practical necessities more than abstract theories of state sovereignty. See Johnson, *supra* note 83, at 172:

The wartime tension between Congress and the states was resolved by the practical expedient of reliance on the long-established authority and political competence of the colonies and states. This residual authority in state and local governments sustained American access to troops, provisions, and supplies . . . . Congress’s reluctant dependence on its own committees at camp . . . demonstrated the need for central executive leadership, particularly in the conduct of military operations and logistics.

<sup>96</sup> Letter from Richard Henry Lee to Landon Carter (Apr. 24, 1777), in 1 THE LETTERS OF RICHARD HENRY LEE: 1762–1778, at 108–10 (James Curtis Ballagh ed., 1911) (“I am well convinced if the Colonies are all united [the British] will never [venture?] even in any instance to do a material injury to one. Let every American remember the Liberty song. ‘By uniting we stand. By dividing we fall.’” (second alteration in original)); Letter from Richard Henry Lee to Thomas Jefferson (Aug. 25, 1777), in 1 THE LETTERS OF RICHARD HENRY LEE: 1762–1778, at 317–20 (James Curtis Ballagh ed., 1911) (“If our funds fail us not, and our Union continues, no cause was ever safer than ours. . . . [U]pon the success of our funds will probably depend the Unity of our exertions.”).

<sup>97</sup> 1 LETTERS OF RICHARD HENRY LEE, 1762–1778, at 176, 179 (Apr. 20, 1776) (James Curtis Ballagh, ed., 1911) (emphasis added). When Patrick Henry participated in the First Continental Congress, he grandly declared: “Where are your Land Marks? Your Boundaries of Colonies. We are in a State of Nature . . . . The Distinctions between Virginians, Pennsylvanians, New Yorkers and New Englanders, are no more. I am not a Virginian, but

other consideration *heartily (unit[e] in persuading) our countrymen.*<sup>98</sup> Even people who opposed the Declaration believed that colonists' top priority should be interstate unity, not individual state sovereignty. The narrow dispute was whether declaring independence would help or harm political unification. Thus John Dickinson—from the newly minted Delaware—spoke against declaring independence as a collective group: “A Partition of these Colonies will take place if G.B. cant conquer us. . . . [D]eclaring independence would be like Destroying a House before We have got another, In Winter, with a small Family.”<sup>99</sup> When John Hancock circulated final copies of the Declaration to state legislatures, he announced the document as “the Ground and Foundation of a *future Government*,” not as the codification of thirteen existing governments.<sup>100</sup> Another signor said “We are now One people—a new nation.”<sup>101</sup> “The declaration of independence has produced a new era in this part of America,” which would “produce union and new exertions in England *in the same ratio that they have done in this country.*”<sup>102</sup>

In a similar spirit, George Washington read the Declaration to Continental Army soldiers while ordering his officers to obtain physical copies for themselves.<sup>103</sup> Washington hoped that “this important Event will serve as a fresh incentive” for every soldier to know that “now the peace and safety of *his Country*” as a singular entity “depends . . . solely on the success of our arms.”<sup>104</sup> Washington thought that each American fighter was “now in the service of a *State*,” again singular, “possessed of sufficient power

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an American.” 1 LETTERS OF DELEGATES TO CONGRESS 28 (Sept. 6, 1774) (Paul H. Smith et al. eds., 1976–2000).

<sup>98</sup> P. Henry, Jr., *Interesting Correspondence Between Richard Henry Lee and Patrick Henry*, POTTER'S AM. MONTHLY 92–93 (Aug. 1876) (emphasis added).

<sup>99</sup> Speech of John Dickinson of Pennsylvania, Favoring a Condition of Union with England (July 1, 1776), in J.H. Powell, *The Pennsylvania Magazine of History and Biography*, October 1941, at 458–81.

<sup>100</sup> *Letter from John Hancock to the Convention of North Carolina (July 8, 1776)*, N.Y. TIMES, Aug. 13, 1865, at 8 (emphasis added).

<sup>101</sup> Benjamin Rush's Notes for a Speech in Congress, Aug. 1, 1776, in 4 LETTERS OF DELEGATES TO CONGRESS, 1774–1789, at 598–602 (1979) (“Every man in America stands related to two legislative bodies—he deposits his prop[ert]y, liberty & life with his own State, but his trade [and] Arms, the means of enriching & defending himself & his honor, he deposits with the congress.”).

<sup>102</sup> Letter to Charles Lee, in MEMOIRS OF THE LIFE OF CHARLES LEE 172–73 (Edward Langworthy, ed., 1792) (letter from Benjamin Rush) (emphasis added).

<sup>103</sup> See George Washington, General Orders, 9 July 1776, in 5 REVOLUTIONARY WAR SERIES 16 JUNE 1776–12 AUGUST 1776, at 245–47 (Philander D. Chase ed., 1993).

<sup>104</sup> *Id.* (emphasis added).

to reward his merit, and advance him to the highest Honors of a *free Country*.”<sup>105</sup> News reports described another army officer who publicly read the Declaration at Ticonderoga: “[H]aving said, ‘God save the Free Independent States of America!’ . . . the Language of every Man’s Countenance was, now we are a *People!* We have a *Name* among the States of this World.”<sup>106</sup> The new name for that new people was “the United States” as a collective singular, rather than “New York” or “Pennsylvania” as constituent states. Opponents of independence also recognized the Declaration’s contextual tone of unity, rather than division. A former colonial governor thus complained that the Declaration “begin[s] . . . with a false hypothesis, *That the Colonies are one distinct people* and the kingdom another, connected by political bands.”<sup>107</sup> From all perspectives, the Declaration of Independence from Britain was at least equally a declaration of interdependence among the states themselves.<sup>108</sup>

### 3. Government practice.

The Declaration’s description of governmental power is a third category of proof that states were never thirteen sovereign countries. The Declaration listed particular prerogatives of its newly “Free and Independent States,” including “full Power to levy War, conclude Peace, contract Alliances, establish Commerce.”<sup>109</sup> However, that list reflected exactly the kinds of powers that the Continental Congress was continuing to exercise as a collective unit; individual states did not perform the listed tasks any more than the prerevolutionary colonies had done beforehand.<sup>110</sup> The Declaration could not have coherently announced full sovereign powers for thirteen states separate from the group, because individual states did not actually exercise or claim those powers separate from the group.

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<sup>105</sup> *Id.* (emphasis added).

<sup>106</sup> *New York, August 19*, N.Y. GAZETTE & WKLY. MERCURY, Aug. 19, 1776, at 2 (emphasis added).

<sup>107</sup> THOMAS HUTCHINSON, STRICTURES UPON THE DECLARATION OF THE CONGRESS AT PHILADELPHIA 9 (1776) (emphases added and omitted).

<sup>108</sup> See THE DECLARATION OF INDEPENDENCE ¶ 32 (U.S. 1776) (“[F]or the support of this Declaration, with a firm reliance on the protection of divine Providence, *we mutually pledge* to each other our Lives, our Fortunes and our sacred Honor.” (emphasis added)).

<sup>109</sup> *Id.*

<sup>110</sup> See Greene, *supra* note 68, at 447, 449 (describing the relative impotence of the subordinate colonial assemblies).

Congress's decision to declare independence, for example, coincided with the drafting of a model treaty for negotiations with foreign powers.<sup>111</sup> Both the model treaty and a later-ratified French treaty used the ambiguously plural term "United States."<sup>112</sup> But those documents stated that their international agreement would involve "two contracting Parties," counting the United States as only one, and they contemplated the unsavory risk of war between "two Nations," again counting the United States as only one.<sup>113</sup> Both documents repeatedly used the phrase "either Party," still counting the United States as only one.<sup>114</sup> There was no evidence or expectation in either of these documents that individual states would be treated as independent nations, or that international responsibility for a breach could penetrate beyond the United States as the collective signatory. These documents, which were contemporaneous with the Declaration, did not create independent international responsibilities for individual states any more than they did for French provinces and municipalities that were also mentioned in passing.<sup>115</sup>

All of this historical evidence proves what should have been obvious from the start: the Declaration of Independence did not create or contemplate thirteen separately sovereign governments.<sup>116</sup> No one thought that Virginia had an international status comparable to Portugal, or that Georgia was somehow equivalent to Prussia. Throughout U.S. history, too many judges and lawyers have asserted that states "compromised" or "surrendered" elements of their primordial "sovereignty" by ratifying the Articles or the Constitution, but the Declaration does not support

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<sup>111</sup> See 5 JOURNALS OF THE CONTINENTAL CONGRESS 433 (June 12, 1776).

<sup>112</sup> See Treaty of Amity and Commerce Between the United States of America and His Most Christian Majesty, Fr.-U.S., Feb. 6, 1788, 8 Stat. 13 ("said United States have judged"); *Plan of Treaties*, in 5 JOURNALS OF THE CONTINENTAL CONGRESS 774 (Sept. 17, 1776).

<sup>113</sup> See, e.g., Treaty of Amity and Commerce Between the United States of America and His Most Christian Majesty, Fr.-U.S., Feb. 6, 1788, 8 Stat. 20 ("two Nations"); *id.* at 22 ("two contracting Parties"); *Plan of Treaties*, in 5 JOURNALS OF THE CONTINENTAL CONGRESS 774 (Sept. 17, 1776) ("two Nations").

<sup>114</sup> See Treaty of Amity and Commerce Between the United States of America and His Most Christian Majesty, Fr.-U.S., Feb. 6, 1788, 8 Stat. 20, 22, 26, 28; *Plan of Treaties*, in 5 JOURNALS OF THE CONTINENTAL CONGRESS 768, 771, 773, 775, 776-77 (Aug. 17, 1776).

<sup>115</sup> See Treaty of Amity and Commerce Between the United States of America and His Most Christian Majesty, Fr.-U.S., Feb. 6, 1788, 8 Stat. 12 (listing "the Countries, Islands, Cities, and Towns, situate under the Jurisdiction of the most Christian King" and mentioning "the States, Provinces, and Dominions of each Party"); *Plan of Treaties*, in 5 JOURNALS OF THE CONTINENTAL CONGRESS 768, 771 (Sept. 17, 1776) (similar).

<sup>116</sup> *But cf. supra* note 66 (collecting sources that endorse the opposite conclusion).

that premise. On the contrary, the Declaration announced that thirteen states were *essential components* of the United States, without specifying those entities' individual or autonomous powers under a newly created system of interstate law.

#### B. Drafting a “Confederation to Bind the Colonies Together”<sup>117</sup>

The Articles of Confederation—not the Declaration of Independence—provided the first legal framework to describe states, the United States, and their mutually constitutive relationship.<sup>118</sup> Richard Henry Lee proposed a confederation that would “bind the colonies more closely together,” but the Articles accomplished much more than that.<sup>119</sup> The Articles did not merely alter the relative strength or integration of states and the union; they inaugurated new categories of statehood and union in a newly created realm of interstate constitutional law.<sup>120</sup> Before the Articles, there was no way to describe states' legal relationship with the Continental Congress or with one another—nor even to explain what states were—except through idiosyncratically improvised examples.<sup>121</sup> The Articles created a skeleton of statehood that prescribed how states could control the United States, and a vital dispute in this period concerned the United States' authority to manage territories outside of any state.<sup>122</sup>

The states were unable to ratify the Articles of Confederation until they created interstate territory, and that event transformed statehood and the union while violating the Articles themselves. Many states' rights advocates have cited the Articles as ancient support for muscular state sovereignty, but in fact, the

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<sup>117</sup> See Thomas Jefferson, Notes of Proceedings in the Continental Congress, 7 June–1 August 1776, in 1 THE PAPERS OF THOMAS JEFFERSON 1760–1766, at 309 (Julian P. Boyd, ed., 1950) (“Virginia moved . . . that the Congress should declare that these United colonies are & of right ought to be free & independent states . . . that measures should be immediately taken for procuring the assistance of foreign powers, and [that] a Confederation be formed to bind the colonies more closely together.”).

<sup>118</sup> None of those topics was defined by British law, international law, or even state constitutions. See *supra* Part I.A (explaining legal ambiguities that existed prior to the Articles of Confederation). See generally Green, *United/States*, *supra* note 1 (describing in greater detail the mutually constitutive relationships between states and the United States).

<sup>119</sup> Jefferson, *supra* note 117, at 309.

<sup>120</sup> See Stourzh, *supra* note 2, at 35 (“The constitution of a state, Emmerich de Vattel wrote in 1758, is the fundamental settlement that determines the manner in which public authority shall be exercised.” (citing 3 EMMERICH DE VATTEL, LE DROIT DES GENS (M.P. Pradier-Fodéré, ed., 1863))).

<sup>121</sup> See *supra* Part I.A (describing ambiguities surrounding the Declaration).

<sup>122</sup> See ARTICLES OF CONFEDERATION OF 1781, art. V, IX.

main feature of this regime was the states' skeletal power to influence the confederation through national politics.<sup>123</sup> From the beginning, even state and congressional powers to regulate geographical boundaries were more flexible than most observers appreciate.<sup>124</sup>

Creating the Articles required sixteen months of debate on a draft by committee chairman John Dickinson.<sup>125</sup> There were two crucial differences between Dickinson's draft and the final version. First, Dickinson's early draft granted Congress extensive power over state boundaries and interstate territories. The United States would have had "sole and exclusive Power & Right" over "settling all Disputes . . . between two or more Colonies concerning Boundaries, Jurisdictions, or any other Cause whatever," "assigning Territories for new Colonies, either in Lands to be separated from Colonies . . . [or] to be purchased," and "selling all [territorial] Lands for the general Benefit."<sup>126</sup> Congress also could have "fix[ed] and assign[ed] reasonable Limits . . . to those Colonies . . . whose Charters extend[ed] to the South Sea."<sup>127</sup> Under Dickinson's draft, Congress would have had legal authority to write some states off the map, and Congress also could have regulated, assigned, or sold interstate territories that were located outside the states.<sup>128</sup>

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<sup>123</sup> See Henry Paul Monaghan, *We the People(s), Original Understanding, and Constitutional Amendment*, 96 COLUM. L. REV. 121, 144 (1996) (emphasizing deliberately rigid requirements for amending the Articles). For criticism of the Articles, see *Martin v. Hunter's Lessee*, 14 U.S. 304, 345 (1816) (discussing them as "an instrument framed with infinitely more deference to state rights and state jealousies"), and GEORGE WILLIAM VAN CLEVE, *WE HAVE NOT A GOVERNMENT: THE ARTICLES OF CONFEDERATION AND THE ROAD TO THE CONSTITUTION* 3 (2017) ("[R]emarkable stresses transformed the Confederation into a stalemate government, which could not make changes needed to withstand them.").

<sup>124</sup> Controversies surrounding the Bank of North America are another example, quite separate from territorial governments. See James Wilson, *Considerations on the Bank of North America* (1785), in 1 COLLECTED WORKS OF JAMES WILSON 65–68 (Kermit L. Hall & Mark David Hall eds., 2007); John Mikhail, *The Necessary and Proper Clauses*, 102 GEO. L.J. 1045, 1074–78 (2014) (discussing the Bank of North America).

<sup>125</sup> See JEFF BROADWATER, *JEFFERSON, MADISON, AND THE MAKING OF THE CONSTITUTION* 55–58 (2019) (discussing delays in the drafting process).

<sup>126</sup> See John Dickinson, Josiah Bartlett's and John Dickinson's Draft Articles of Confederation, in 4 LETTERS OF DELEGATES TO CONGRESS, 1774–1789, at 233–50 (June 17, 1776) (Paul H. Smith ed., 1979).

<sup>127</sup> *Id.* at 241.

<sup>128</sup> In 1776, almost every state had contested borders, and a majority of states claimed land "to the South Sea" (the Pacific Ocean), which would have triggered the possibility of congressional "limits." See HERBERT B. ADAMS, *MARYLAND'S INFLUENCE UPON LAND CESSIONS TO THE UNITED STATES* 24–28 (1885) (Georgia, South Carolina, North Carolina, Virginia, New York, Connecticut, and Massachusetts). Pennsylvania, New Hampshire, Delaware, Rhode Island, New Jersey, and Maryland had important border controversies

By contrast, the Articles' final draft excised all congressional power over state borders and territories. A complex tribunal was created to resolve boundary disputes, but the Articles insisted that "no State shall be deprived of territory for the benefit of the United States."<sup>129</sup> This was the first time that interstate law used "territory" to describe land that was inside the United States but outside any state, and the Articles denied that the United States could ever control such land or otherwise "benefit." The final draft implied that the United States' western empire would have to be managed by individual states—not the United States—and that all land in the United States would have to be located inside one of the states.

A second change involved states' authority over internal affairs. The Dickinson draft stated: "Each Colony . . . reserves to itself the sole and exclusive regulation and Government of its internal police, in all Matters that shall not interfere with the Articles of this Confederation."<sup>130</sup> Dickinson's draft did not specify what "internal police" would include, and any such specification might have been quite difficult at the time.<sup>131</sup> Much less did the draft grant states any muscular authority to resist interstate power. On the contrary, Dickinson's language was straightforwardly compositional. His draft affirmed states' existence as a matter of interstate law without articulating their legal powers except: (1) a vaguely spatial idea of "internal police," and (2) a requirement that states must not "interfere" with the Articles.<sup>132</sup>

The Articles' final draft used more emphatic language to accomplish similar ends: "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."<sup>133</sup> The new provision was written by Thomas Burke, who bragged that the proposed

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as well. See ONUF, *supra* note 59, at xv ("All states—landed or landless, large or small, old or new—looked to the states collectively in Congress to recognize and uphold their claims.").

<sup>129</sup> ARTICLES OF CONFEDERATION OF 1781, art. IX.

<sup>130</sup> John Dickinson, Josiah Bartlett's and John Dickinson's Draft Articles of Confederation, in 4 LETTERS OF DELEGATES TO CONGRESS, 1774–1789, at 233–34 (June 17, 1776) (Paul H. Smith ed., 1979). Dickinson likewise provided that "all the other Colonies shall Guarantee to Such Colony the full & peaceable possession of, and the free & intire Jurisdiction in & over the territory included within Such Boundaries." *Id.* at 241.

<sup>131</sup> For extensive discussion of "internal police," see MAX EDLING, PERFECTING THE UNION: NATIONAL AND STATE AUTHORITY IN THE U.S. CONSTITUTION 75–104 (2021).

<sup>132</sup> ARTICLES OF CONFEDERATION OF 1781, art. VI.

<sup>133</sup> ARTICLES OF CONFEDERATION OF 1781, art. II.

language “was at first so little understood that it was some time before it was seconded.”<sup>134</sup> In context, however, Burke’s changes were mostly incremental.<sup>135</sup> For example, the reservation of “sovereignty, freedom and independence” was not any clearer than Dickinson’s “internal police.”<sup>136</sup> The revolutionaries’ word “state” was itself only two years old, and wartime British occupation meant that any conception of state “sovereignty, freedom and independence” was almost necessarily aspirational and undefined in this era.<sup>137</sup>

On the other hand, Burke’s requirement that congressional powers must be “expressly delegated” was important because it confirmed that the United States could not possess or regulate any territory of its own. As previously mentioned, the final draft had deliberately annihilated congressional authority to “ascertain” or “limit” state borders, along with interstate power to “assign,” regulate, “dispose” of, or “benefit” from land outside the states.<sup>138</sup> Congress certainly was not “expressly” authorized to govern territories outside the states, thus reinforcing that states were a singular component of the country’s constitutional

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<sup>134</sup> Letter from Thomas Burke to Richard Caswell (April 29, 1777), in 11 COLONIAL AND STATE RECORDS OF NORTH CAROLINA 460, 461 (Walter Clark ed., 1895). Historians have called Burke “outspoken” and “extremely provincial” and have noted that he was “slow in becoming completely reconciled to the idea of any union.” David T. Morgan, *Cornelius Harnett: Revolutionary Leader and Delegate to the Continental Congress*, 49 N.C. HIST. REV. 229, 230 (1972). Burke opposed ratification of the Articles in North Carolina, but he was eventually outvoted with James Wilson and Richard Henry Lee voting against his motion. See also John S. Watterson, *Thomas Burke, Paradoxical Patriot* 41 HISTORIAN 668 (1979). All of this meant that it would be a serious mistake to assume that Burke spoke for any kind of revolutionary majority or consensus.

<sup>135</sup> Further evidence of interstate supremacy includes ARTICLES OF CONFEDERATION OF 1781, art. XIII (“[W]e do . . . [engage] respective constituents, that they shall abide by the determinations of the United States in Congress assembled, on all questions, which by the said confederation are submitted to them. And that the articles thereof shall be inviolably observed by the States we re[s]pectively represent.”); see also ARTICLES OF CONFEDERATION OF 1781, art. XIII (“Every State shall abide by the determinations of the United States in Congress assembled, on all questions which by this confederation are submitted to them. And the articles of this confederation shall be inviolably observed by every State.”).

<sup>136</sup> ARTICLES OF CONFEDERATION OF 1781, at art. II; Dickinson, *supra* note 126, at 234.

<sup>137</sup> See THE DECLARATION OF INDEPENDENCE, ¶ 32 (U.S. 1776) (inaugurating the legal term “state”); DONALD F. JOHNSON, OCCUPIED AMERICA: BRITISH MILITARY RULE AND THE EXPERIENCE OF REVOLUTION 4 (2020) (“Between 1775 and 1783, every large North American city . . . fell under British military rule for some period.”). In September 1777, the Continental Congress itself was compelled to flee occupied Philadelphia while the Articles of Confederation were being drafted. *Id.*

<sup>138</sup> See ARTICLES OF CONFEDERATION OF 1781, art. IX; Dickinson, *supra* note 126, at 240–41, 250.



geography. Only states could govern land in the United States, which meant that all such land would be governed by states.

### C. Ratifying the Articles by Creating Territories

The final draft's decision to narrow congressional power created an existential legal crisis for the United States because conflicts over territory blocked, for three years, ratification of the framework creating statehood and union.<sup>139</sup> Under the old British empire, homeland legal authorities had possessed theoretical authority to resolve border disputes among colonies, but new revolutionary states disputed even the legal source of their boundaries.<sup>140</sup> On one side, Virginia invoked its colonial charter—categorically separate from interstate legal authority—to claim lands stretching north to the Great Lakes and west to the Pacific Ocean.<sup>141</sup> Virginians argued that charter-based historical analysis would grant the new system of statehood unique stability and dignity. At least five states had overlapping land claims north of the Ohio River, and Virginia claimed its share under British colonial law.<sup>142</sup>

Even though the Articles did not explicitly affirm states' colonial boundaries, Virginia claimed that the intrinsic nature of statehood filled the gap. Benjamin Harrison demanded: "How came Maryland by its land, but by its charter? By its charter, Virginia owns to the South Sea. Gentlemen shall not pare away the Colony of Virginia. Rhode Island has more generosity than to wish the Massachusetts pared away. Delaware does not wish to

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<sup>139</sup> The framers of the Articles originally believed that speedy ratification was very important. See Official Letter Accompanying Act of Confederation, in 1 THE DEBATES OF THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, 69–70 (Jonathan Elliot ed., 2d ed. 1836) (noting the "uncommon embarrassment and delay" of the Articles' being drafted and "imminent dangers" that required "the immediate and dispassionate attention of . . . the respective states," hopefully producing ratification "on or before the 10th day of March [1778]"). Ratification did not actually occur until March 1, 1781.

<sup>140</sup> See ONUF, *supra* note 59, at 4 ("Boundary disputes had been adjudicated before Privy Council. . . . Up to the eve of the Revolution, the Crown's right to make new colonies out of old ones had not been challenged. But the independent American states were determined to maintain territorial integrity and control over their own public lands.").

<sup>141</sup> See A THIRD CHARTER OF K. JAMES I. TO THE TREASURER AND COMPANY FOR VIRGINIA (MARCH 12, 1611), in 1 THE STATUTES AT LARGE 99 (William Waller Hening ed., New York, R. & W. & G. Bartow 1823).

<sup>142</sup> See THOMAS PAINE, PUBLIC GOOD 8–11 (1819) (including a drawing of Virginia's territorial claims in the Ohio Valley); see also Marc Harris, *Pennsylvania's Border at Lake Champlain: Borders and Contexts in Colonial North America*, 32 HIST. REFLECTIONS 493, 495 n.3 (2006) (detailing various boundary issues concerning colonial charters).

pare away Pennsylvania.”<sup>143</sup> Samuel Huntington from Connecticut agreed: “A man’s right does not cease to be a right, because it is large; the question of right must be determined by the principles of the common law.”<sup>144</sup> Virginia believed that any state’s right to its physical space was legally unimpeachable, vested as an implicit component of revolutionary sovereignty, regardless of contrary opinions from other states or the interstate government. In practical terms, Virginia’s arguments for muscular statehood would have left nearly all postrevolutionary decisions about western land sales, taxation, slavery, and the creation of new states in the hands of individual state governments.<sup>145</sup>

On the other side, Maryland insisted that Virginia should yield land to the United States for the interstate government to possess and manage.<sup>146</sup> Maryland claimed that British law and intrinsic sovereignty were the wrong baselines for establishing state governments and drawing interstate borders.<sup>147</sup> Instead, the criterion should be creating functional states that could thrive as legal units in the new revolutionary environment.

An oversized Virginia would have had extraordinary quantities of land to tax and sell, thus siphoning away a productive fraction of Maryland’s citizens and economic prospects.<sup>148</sup> Maryland demanded instead that the United States should hold and govern western land for the nation’s collective benefit, just as soldiers from various states continued to fight and die collectively for independence.<sup>149</sup> The geographical dispute between Virginia and Maryland was a struggle over what the country’s new legal category of statehood should mean—pragmatic function versus historical formalism, representational voting versus oppositional

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<sup>143</sup> 2 JOHN ADAMS, *THE WORKS OF JOHN ADAMS* 502 (1850). The reference to Pennsylvania and Delaware was almost ironic, given the latter’s very recent emergence as a political unit. *See supra* notes 72–74 and accompanying text.

<sup>144</sup> *Id.* Connecticut’s colonial charter also extended to the South Sea. *See Harris, supra* note 142, at 496.

<sup>145</sup> Among its other radical consequences, that arrangement would have eliminated federal territory as a major cause of the Civil War because the federal government would not have had control over slavery in such lands. *See infra* Parts II.A–II.B.

<sup>146</sup> *See* 14 *JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789*, at 619–22 (Worthington Chauncey Ford ed., 1909).

<sup>147</sup> *See Green, United/States, supra* note 1, at 39 (detailing Maryland’s constitutional vision).

<sup>148</sup> *See ADAMS, supra* note 128, at 26.

<sup>149</sup> *See* 14 *JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789*, at 619–22 (Worthington Chauncey Ford ed., 1909) (reprinting a letter from the General Assembly of Maryland to the Continental Congress expressing objections to Virginia’s territorial claims, including the harms they felt would befall Maryland).

power—and whether any legal system could produce an acceptable interstate framework for union.

Unlike future generations' arguments about states' rights, at least Virginia's thesis was supported by the Articles' text, because the final draft had removed the interstate government's power to regulate boundaries and territories. By contrast, Maryland pursued its arguments through the Articles' rules for political representation. The Articles required a unanimous vote to ratify, and Maryland simply would not agree.<sup>150</sup> Based exclusively on that principle of interstate law, Maryland's resistance through the skeleton of representational statehood transformed the confederation, produced a dramatic expansion of congressional power, and rebuffed Virginia's muscular view of intrinsic statehood.

The solution was to deliberately violate the Articles' substantive limits on congressional power by creating interstate territories outside of any state.<sup>151</sup> Virginia ceded extensive lands to the United States, abandoning its theory of statehood, colonial boundaries, interstate stability, and "dignity."<sup>152</sup> Maryland then ratified the Articles, and the newly created United States accepted the cession, beginning to plan for territorial government despite the lack of congressional authority to possess such territory in the first place.<sup>153</sup>

This was not a cynical decision to sacrifice legal integrity for political advantage, especially because the ultimate objective was to *create a legal system*. The question instead was what kind of system the Articles would produce. Virginia surrendered land and its muscular approach to statehood, but in return, Virginia was able to join a confederation that could identify and recognize its borders under interstate law. The Articles' interstate authority supported Virginia's legal identity as a state, and that result was possible only because Maryland agreed. The Articles created an

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<sup>150</sup> All sides believed that the Articles required the thirteen states' unanimous consent, even though the Articles' text did not mention that requirement. *See, e.g.*, 11 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 681 (July 10, 1778) (noting in a circular letter to nonconsenting states the need for unanimous agreement "to conclude the glorious compact").

<sup>151</sup> *See supra* notes 125–138 and accompanying text (analyzing the Articles' drafting history).

<sup>152</sup> *See* MERRILL JENSEN, THE ARTICLES OF CONFEDERATION, 1774–1781, at 235 (1940) (describing Virginia's cession).

<sup>153</sup> *Id.* at 238 ("[T]he completion of the first constitution of the United States was at last made possible."); *cf.* THE FEDERALIST NO. 38, at 184 (James Madison) (Oxford ed. 2008) (arguing that the Confederation Congress lacked any "color of constitutional authority" to accept United States territory or authorize local governments).

inflexible skeleton of voting rules for states' political representation, and that is why the other twelve states, including powerful Virginia, had to wait for Maryland's consent.<sup>154</sup> The rule of unanimous approval did not yield, and Maryland's status as a voting member did not bend. By comparison, the Articles' textual limits on the substantive powers of Congress, along with Virginia's theory of muscular state sovereignty, were politically flexible and disposable. The Articles' ratification does not match the hyperformalist, restrictive myths that modern scholars have often taken for granted.

In current discourse, the Articles are overshadowed by the Constitution, but the former document is what created the legal categories of territory, statehood, and union. The Articles laid the foundation for everything that followed, they are a singular benchmark for measuring constitutional change, and they quickly became a touchstone for states' rights arguments to support muscular statehood. The Constitutional Convention, Federalist Papers, and various historical actors overstated the autonomy and sovereignty of preconstitutional statehood in order to highlight the purported urgency of creating a strong federal government.<sup>155</sup> Many generations of states' rights advocates have relied on those distorted histories to argue that muscular statehood was implicitly preserved as an imagined consensus from a bygone era.<sup>156</sup>

To summarize, this Part has described three problems for conventional accounts of preconstitutional statehood that have been repeated for generations. First, there was no broad consensus on questions of muscular statehood under the Articles or the Constitution. On the contrary, wartime leaders including Richard Henry Lee and John Dickinson used interstate law to support states as a unified collective, not as individually separate units. "Confederation" was a complex word during the 1700s, and the United States did not always follow existing patterns.<sup>157</sup> Virginia

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<sup>154</sup> ARTICLES OF CONFEDERATION OF 1781, art. V ("In determining questions in the United States, in Congress assembled, each State shall have one vote.").

<sup>155</sup> See Green, *United/States*, *supra* note 1, at 56–57 (describing such exaggerations).

<sup>156</sup> See *supra* note 66 (collecting sources).

<sup>157</sup> See, e.g., NATHAN BAILEY, AN UNIVERSAL ETYMOLOGICAL ENGLISH DICTIONARY (22d ed. 1770) ("Confederacy/Confederation. An Alliance between Princes and States for their Defense against a common Enemy."); SAMUEL JOHNSON, DICTIONARY OF THE ENGLISH LANGUAGE (1785) ("Confederation. League; alliance."); EMER DE Vattel, THE LAW OF NATIONS 84–85 (Béla Kapossy & Richard Whitmore eds., 2008):

and Maryland agreed that states were essential elements of the union, but they disagreed over what constitutional statehood meant, how it should be preserved, and what it should accomplish. Second, if one were to choose winners and losers in the struggle between Virginia and Maryland, the skeletal vision of political voting mechanisms triumphed, and the muscular vision of resisting national politics failed, thus setting an evaluative standard for other generations' debates about constitutional statehood. Third, the Articles' efforts to protect state "sovereignty" were ratified only because states silently violated those protections. The final draft excised interstate power over territories from the Articles, while ostensibly protecting states' "sovereignty, freedom, and independence," but Founding Era politicians had to eat their words to achieve ratification.<sup>158</sup> That failure to set substantive limits represents a discouraging example for subsequent generations. From the very beginning, it has been hard for Americans to agree about any definite scope for muscular statehood.

The Articles of Confederation failed because the interstate government was too weak and because the rules for constitutional change were too restrictive.<sup>159</sup> Following Maryland's example, various states used the Articles' skeleton requirement of unanimous consent to pursue their own interests over time. Those political disagreements—not a supermajoritarian theory of muscular states' rights—caused governmental paralysis.

Several years later, the Constitution created a very different representational skeleton, with more permissive voting rules,

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[S]overeign and independent states may unite themselves together by a perpetual confederacy . . . . Such were formerly the cities of Greece; such are at present the Seven United Provinces of the Netherlands, and such the members of the Helvetic body. But a people that has passed under the dominion of another is no longer a state . . . . Such were the nations and kingdoms which the Romans rendered subject to their empire . . . . [T]hey dared not of themselves either to make war or contract alliances; and could not treat with nations.

None of these European historical sources considered the possibility of rebellious colonies in British North America—much less did they consider the applicable legal status for colonies after a successful rebellion. In the late nineteenth century, Southern legal theorists used verbal ambiguities about "confederations" and "sovereignty" to support nullification and secession. See ELDER, *supra* note 48, at 283–84 (John Calhoun); *id.* at 313–14 (Langdon Cheves).

<sup>158</sup> *E.g.*, ARTICLES OF CONFEDERATION OF 1781, art. II.

<sup>159</sup> ARTICLES OF CONFEDERATION OF 1781, art. XIII ("[N]or shall any alteration at any time hereafter be made in any of them; unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the Legislatures of every State.").

that allowed nonunanimous groups of states to control the country while also boosting the interstate government's authority.<sup>160</sup> The Tenth Amendment only loosely resembled the Articles, and it was less restrictive than even Dickinson's Draft: "The powers not delegated to the United States . . . are reserved to the States respectively, or to the people."<sup>161</sup> Consistent with a full decade of practice, the Constitution never explained which powers of statehood might be reserved, nor which powers should be allocated to "states" versus "the people." All of those issues would be decided—as they had been from the start—through mechanisms of ordinary politics, rather than binding declarations of constitutional law. The Constitution's Framers simply did not agree about states' substantive authority in the new republic. The Constitution established skeletal structures to govern political disputes, which confirmed states as indispensable components of the whole, yet muscular power to resist federal authority remained vanishingly unclear.<sup>162</sup>

## II. THE CIVIL WAR ERA: TERRITORIES SPLIT THE UNION

The Civil War was a "second founding" for statehood, when constitutional expectations were violently revised and reset.<sup>163</sup>

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<sup>160</sup> See U.S. CONST. art. I, §§ 2–3, art. II, § 1.

<sup>161</sup> U.S. CONST. amend. X; Dickinson, *supra* note 126, at 233–34 ("Each Colony shall retain . . . as much of its present Laws, Rights & Customs, as it may think fit, and reserves to itself the sole and exclusive regulation and Government of its internal Police in all Matters that shall not interfere with the Articles (*agreed upon by*) of this Confederation."); see also *id.* (reserving a state's "present Laws, Rights, and Customs, . . . [and] the sole and exclusive Regulation and Government of its internal police, in all Matters that do not interfere with the Articles . . . of this Confederation"); *supra* notes 125–132 (summarizing the Dickinson Draft).

<sup>162</sup> See, e.g., U.S. CONST. art. V (making states an essential part of the amendment process).

<sup>163</sup> See ERIC FONER, *THE SECOND FOUNDING, HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION*, at xxiv–xxv (2019) ("[S]ignificant obstacles confronted those seeking to implement the idea of equal rights for black americans. Racism . . . was one. Another was the long-standing tradition of local self-government, embodied in the authority of the states within the federal system."); Amar, *supra* note 66, at 1429 (noting that any "full constitutional account of sovereignty and federalism" must "confront the momentous constitutional issues at the heart of the American Revolution and the Civil War").

Scholarship analyzing this era often highlights individual rights more than constitutional statehood. See, e.g., LAURA EDWARDS, *A LEGAL HISTORY OF THE CIVIL WAR AND RECONSTRUCTION: A NATION OF RIGHTS* 4 (2015) ("[T]he Civil War stirred up existing, but previously suppressed conflicts about the legal status of individuals, their relationship to government, and the location of legal authority . . . . How, and by whom, were these matters decided?"); Michael E. Woods, *What Twenty-First-Century Historians Have Said*

This Part analyzes dynamic relationships among territories, states, and the union from 1854 to 1865. The same federal power over territories that delayed creation of the United States with respect to Virginia's borders in the eighteenth century almost destroyed the country in the nineteenth century with respect to slavery.<sup>164</sup> The Civil War concerning vicious racial oppression was also a constitutional conflict about the skeleton of representational statehood versus the asserted muscle of states' power to resist federal governance.<sup>165</sup>

Territorial issues went to the heart of the national union because Congress had explicit constitutional authority to govern territories, including decisions about slavery.<sup>166</sup> The enormous and violent acquisition of territories in the nineteenth century created a feedback loop that the Framers did not foresee, and the addition of new states changed the union forever.<sup>167</sup> Southerners

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*About the Causes of Disunion*, 99 J. AM. HIST. 415, 416 (2012) ("Recent work . . . reveals two widely acknowledged truths: [1] that slavery was at the heart of the sectional conflict and [2] that there is more to learn about precisely what this means.").

<sup>164</sup> See MICHAEL E. WOODS, ARGUING UNTIL DOOMSDAY: STEPHEN DOUGLAS, JEFFERSON DAVIS, AND THE STRUGGLE FOR AMERICAN DEMOCRACY 96 (2020) ("The United States paid for the national sin of slavery in the Civil War, but the conflict's cost might also be added to the bill for westward expansion. Tempted by new territory, Democrats discovered . . . that Manifest Destiny was a 'bomb wrapped up in idealism.'" (quoting FREDERICK MERK, MANIFEST DESTINY AND MISSION IN AMERICAN HISTORY 214 (1963))); MICHAEL F. CONLIN, THE CONSTITUTIONAL ORIGINS OF THE AMERICAN CIVIL WAR, at xxi (2019) ("The most important issue in the sectional battle was not slavery in the South per se, it was the expansion of slavery into the western territories.").

<sup>165</sup> See EDWARDS, *supra* note 163, at 2 ("Critics of slavery feared that federal policies would . . . allow for its extension into free states. Proponents of slavery feared that federal policies would undermine the power of slave states . . . All the arguments came back to the U.S Constitution. Everyone revered it and claimed it as their own.").

<sup>166</sup> See KEVIN WAITE, WEST OF SLAVERY: THE SOUTHERN DREAM OF A TRANSCONTINENTAL EMPIRE 6 (2021) ("Increasingly through the 1850s, the long arm of the South reached west, manipulating federal authority at the edges of the nation to shape the future direction of the United States."); WOODS, *supra* note 164, at 93 ("Congress controlled the financing and planning of internal improvements and could nullify territorial laws; presidents appointed territorial officers; and territorial voters lacked voting representation in Congress and any voice in presidential elections."). This Article's emphasis on territorial governance does not minimize other vital categories of proslavery policy. See MATTHEW KARP, THIS VAST SOUTHERN EMPIRE: SLAVEHOLDERS AT THE HELM OF AMERICAN FOREIGN POLICY 5 (2016) ("[S]laveholders maintained especially firm control over what might be called the 'outward state'—the sector of the federal government responsible for foreign relations, military policy, and the larger role that American power assumed outside American borders.").

<sup>167</sup> See CONG. GLOBE, 31st Cong., 1 Sess. 452 (Mar. 4, 1850) (statement of Sen. John Calhoun) ("[T]he United States, since they declared their independence, have acquired 2,373,046 square miles of territory, from which the North will have excluded the South . . . about three-fourths of the whole . . . Such is the first and great cause that has destroyed the equilibrium between the two sections in the Government.").

first claimed that constitutional principles of muscular statehood protected them from national policies that interfered with enslaved labor.<sup>168</sup> Then proslavery theorists argued that Northern violations of muscular statehood justified Southern secession as a *constitutional performance* of muscular statehood.<sup>169</sup>

This Part explains how struggles emerged over territories, statehood, and union; how those struggles produced secession; and how the Unionist victory affected constitutional statehood. Echoing the Founding Era, nineteenth-century conflicts over territory redefined states and the union as legal categories, and once again, the results favored a narrow skeleton providing electoral representation as opposed to muscular constitutional authority for states to resist the national government.<sup>170</sup> After the war's terrible carnage, many disputes about states' substantive power remained as they had been at the start: occasions for political struggle instead of constitutional law. President Abraham Lincoln's skeletal approach to constitutional statehood prevailed, which further damaged theories of muscular state sovereignty and resistance.<sup>171</sup>

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<sup>168</sup> See *id.* (“[T]he southern section regards the relation [of slavery] as one which cannot be destroyed without subjecting . . . the section to poverty, desolation, and wretchedness; and accordingly they feel bound by every consideration of interest and safety, to defend it.”); CONLIN, *supra* note 164, at 114 (quoting states’ rights advocates who viewed slavery’s protection as an unbending requirement under the “Spirit” of the Constitution, thus satisfying Southern slaveholders’ constitutional right of “self-preservation”).

<sup>169</sup> See Python, *The Secession of the South*, DE BOW’S REV., Apr. 1860, at 2 (“[Because] the predominance of the North in the Union shall ultimately destroy constitutional liberty and social morality . . . arises to the South not only the [states’ rights] principle laid down in the Declaration of Independence, but also the law of self-preservation above which none standeth . . . We need look no further either for the cause, or the right of revolution.”). *But cf. supra* Part I.A (explaining that states’ rights principles are *absent* from the Declaration of Independence).

<sup>170</sup> See *supra* Part I.B (describing a similar victory for skeletal statehood with respect to the Articles of Confederation).

<sup>171</sup> See Abraham Lincoln, Speech from the Balcony of the Bates House, Feb. 11, 1861, in 4 COLLECTED WORKS OF ABRAHAM LINCOLN 195–96 (Roy P. Basler ed., 1953):

What is the particular sacredness of a State? I speak not of that position which is given to a State in and by the Constitution of the United States, for that all of us agree to . . . By what principle of original right is it that one-fiftieth or one-ninetieth of a great nation, by calling themselves a State, have the right to break up and ruin that nation as a matter of original principle? . . . [W]here is the mysterious, original right . . . for a certain district of country with inhabitants, by merely being called a State, to play tyrant . . . and deny the authority of everything greater than itself.

See also John Hay, Diary Entry of May 7, 1861, in INSIDE LINCOLN’S WHITE HOUSE: THE COMPLETE CIVIL WAR DIARY OF JOHN HAY (Michael Burlingame & John R. Turner Ettliger eds., 1997) (quoting President Abraham Lincoln as saying, “the necessity that is



### A. Manufacturing States Before the War

For most of the nineteenth century, federal territories were the engine of America's economy and the soul of its politics.<sup>172</sup> The reason was slavery.<sup>173</sup> Although some eighteenth-century Americans had originally hoped that slavery might vanish from the country, development of the cotton gin, hybrid crop varieties, and British textile factories made short-staple cotton "king" throughout modern Alabama, Mississippi, Louisiana, and Texas.<sup>174</sup> A country that was originally eight hundred thousand square miles soon claimed 2.1 million square miles, and that radically increased demand for enslaved labor.<sup>175</sup>

Because states were effectively insulated from federal control, national politics focused on Congress's indirect authority to affect slavery by regulating traders, escapees, tariffs, mail

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upon us[ ] [is] proving that popular government is not an absurdity. We must settle this question now, whether in a free government the minority have the right to break up the government whenever they choose.”).

<sup>172</sup> See FRYMER, *supra* note 6, at 1 (“Political dynamism, population movement, land acquisition, and racial imperialism dominated the early development of the American nation. In the first half of the nineteenth century, the United States expanded from thirteen states along the Atlantic seaboard west to the Pacific Ocean and south to the Rio Grande.”).

<sup>173</sup> See JOHNSON, *supra* note 38, at 5 (“The flow of capital into the Mississippi Valley transferred title of the ‘empire for liberty’ to the emergent overlords of the ‘Cotton Kingdom,’ and the yeoman’s republic soon came under the dominion of what came to be called the ‘slaveocracy.’”); see also KARP, *supra* note 166, at 256 (“[T]he myth of the lost cause, advanced by the memoirs of men like [Confederate President Jefferson] Davis and [Confederate Vice President Alexander] Stephens, divorced slavery from the causes of disunion, distorting Civil War history for generations.”).

<sup>174</sup> See OAKES, *supra* note 34, at xi (“[E]xplosive growth of the ‘Cotton Kingdom’ after 1790 cemented the political power of the slaveholders and transformed the South into one of the largest slave societies in the history of the world.”); ELDER, *supra* note 48, at 25 (“Cotton imports from British islands . . . quadrupled between 1781 and 1791 . . . . After the Haitian Revolution, English manufacturers began desperately looking for new sources of cotton.”).

<sup>175</sup> See Sven Beckert & Seth Rockman, *Introduction*, in *SLAVERY’S CAPITALISM: A NEW HISTORY OF AMERICAN ECONOMIC DEVELOPMENT* 1–2 (Sven Beckert & Seth Rockman eds., 2016) (explaining “that slave-grown cotton was the most valuable export made in America, that the capital stored in slaves exceeded the combined value of all the nation’s railroads and factories, [and] that foreign investment underwrote the expansion of plantation lands in Louisiana and Mississippi”); *id.* at 27 (“The importance of slavery to the national economy was not only an abolitionist talking point or [ ] a retort offered by aggrieved proto-Confederates; it was also a reflection of the nation’s political economy as it had unfolded in the seven decades before the Civil War.”).

service, and territories.<sup>176</sup> Territories mattered most.<sup>177</sup> For example, although President Thomas Jefferson had witnessed decades of conflict about state slavery laws, he described fights over territorial slavery as “a fire bell in the night [that] awakened and filled me with terror. I considered it at once as the knell of the Union.”<sup>178</sup> Then–Secretary of State John Quincy Adams wrote about that same territorial dispute: “I take it for granted that the present question is a mere preamble; a title page to a great tragic volume.”<sup>179</sup> Senator Henry Clay forecast that, “If the Union is to be dissolved . . . , it will be dissolved because slavery is . . . not allowed to be introduced into the [federal] territories.”<sup>180</sup> And Representative Thomas W. Cobb agreed: “If you persist [in limiting territorial slavery], the Union will be dissolved. You have kindled a fire which all the waters of the ocean cannot put out, which seas of blood can only extinguish.”<sup>181</sup>

Territorial laws governing slavery influenced America’s collective destiny—not just local populations—because new territories gradually altered the ratio of proslavery and antislavery states.<sup>182</sup> For example, congressional decisions about territorial

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<sup>176</sup> See JAMES M. MCPHERSON, *THE MIGHTY SCOURGE: PERSPECTIVES ON THE CIVIL WAR* 7 (2007) (“[E]ven for Calhoun, state sovereignty was a fallback position. A more powerful instrument to protect slavery was control of the national government. Until 1861 Southern politicians did this remarkably well. They used that control to defend slavery from all kinds of threats and perceived threats.”); *id.* at 9 (discussing postal censorship of abolitionist material and so-called Fugitive Slave Laws); see also WAITE, *supra* note 166, at 5–6 (“The federal government . . . was the primary mechanism through which southerners extended their influence over the Far West. . . . [S]laveholding [cabinet] secretaries directed major projects in the West to the benefit of the South. Democrats also used executive authority to fill the Far West with slaveholders and their allies.”).

<sup>177</sup> MCPHERSON, *supra* note 176, at 13 (“It was not the *existence* of slavery that polarized the nation to the breaking point, [] but rather the issue of the *expansion of slave territory*.” (emphasis in original)).

<sup>178</sup> *Letter to John Holmes, April 22, 1820*, LIBRARY OF CONG., <https://perma.cc/8RZ4-GDVK>.

<sup>179</sup> John Quincy Adams, Jan. 10, 1820, in JOHN QUINCY ADAMS AND THE POLITICS OF SLAVERY: SELECTIONS FROM THE DIARY 68–69 (David Walstreicher & Matthew Mason eds., 2017).

<sup>180</sup> CONG. GLOBE, 31st Cong., 1st Sess. 127 (Feb. 6, 1850) (statement of Rep. Henry Clay).

<sup>181</sup> 2 AMERICAN HISTORY THROUGH ITS GREATEST SPEECHES: A DOCUMENTARY HISTORY OF THE UNITED STATES 9–10 (Joylon P. Girard et al. eds., 2016). Representative Tallmadge of New York replied, “If a dissolution of the Union must take place, let it be so! If civil war, which gentlemen so much threaten, must come, I can only say, let it come!” *Id.*

<sup>182</sup> See John R. Van Atta, *Rules of Membership: The Missouri Crisis and the Power to Admit New States*, in CONTESTING THE CONSTITUTION: CONGRESS DEBATES THE MISSOURI CRISIS, 1819–1821, at 83, 85 (William S. Belko ed., 2021) (“[Congressional] leaders rightly assumed that the land and government policies they adopted for the West . . . would determine the social and economic destiny of the nation.”).

slavery would determine basic fundamental patterns of local agriculture and migration.<sup>183</sup> Pro- or antislavery migration would convert territories into pro- or antislavery states with constitutional power to impact national elections and congressional statutes, including the creation of more territories to repeat the cycle.<sup>184</sup> Southern politicians feared that restricting territorial slavery would cause the national government to permanently spiral away from Southern values and economic needs.<sup>185</sup> By comparison, Northerners feared that legalizing slavery in the territories would entrench slaveocracy across the nation.<sup>186</sup> Both sides recognized territories' decisive significance for America's future, and that future was worth a fight.<sup>187</sup>

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<sup>183</sup> See JOHN CRAIG HAMMOND, *SLAVERY, FREEDOM, AND EXPANSION IN THE EARLY AMERICAN WEST* 4 (2007) ("Upper South planters in Congress fought for expansion because it opened up new lands for slaveholders, along with new markets for their regions' 'surplus' slaves."); *cf. id.* at 6 ("Federal policymakers in the East recognized that while they might influence local decisions concerning slavery and freedom in the West, . . . [t]he weaknesses of the federal government in the West meant that [before 1819] the decision to permit or exclude slavery became, by default, a local question.").

<sup>184</sup> See MCPHERSON, *supra* note 176, at 15 ("In 1850 the people living in states that had once been territories . . . accounted for more than half of the nation's increase in population. . . . [N]ew territories would shape the future. To ensure a free-labor destiny, antislavery Northerners wanted to keep slavery out . . . . That was just what Southerners feared.").

<sup>185</sup> See BENJAMIN FRANKLIN STRINGFELLOW, *NEGRO-SLAVERY, NO EVIL* 5–6 (1854) ("[Abolitionists seek] to surround Missouri with non-slaveholding States; force her to abolish slavery; then wheel . . . for an attack upon the States south of her. . . . Let not our friends in the other slaveholding States fold their arms . . . . [Otherwise] they, too, will have a battle to fight . . . at their very doors.").

<sup>186</sup> See *To the People of Ohio*, NAT'L ERA, June 22, 1854 ("[T]he stupendous scheme for the extension of Slavery, and the establishment of the Slave Dominion [in federal territories] . . . call loudly upon all true patriots to . . . unite as a band of brother-freemen in defence of our own rights, and the rights of human nature."); William E. Gienapp, *The Republican Party and the Slave Power*, in *NEW PERSPECTIVES ON RACE AND SLAVERY IN AMERICA* 51, 57 (Robert H. Abzug & Stephen E. Maizlish eds., 2014) ("[B]y stopping the advance of slavery and refusing to admit any new slaves states, the growth of the Slave Power would be halted, thereby enabling the North to take control of the federal government. . . . At stake was nothing less than control of the country's destiny.").

<sup>187</sup> See Abraham Lincoln, *State of the Union* (Dec. 1, 1862) ("A nation may be said to consist of its territory, its people, and its laws. The territory is the only part which is of certain durability. . . . [T]he United States is well adapted to be the home of one national family, and it is not well adapted for two or more."); Kevin Waite, *Jefferson Davis and Proslavery Visions of Empire in the Far West*, 6 *J. CIV. WAR ERA* 536, 536 (2016) ("[Jefferson] Davis . . . articulated a sweeping proslavery vision of empire in the West . . . that would have grave consequences for the deepening political crisis between North and South.").

Of course, this territorial pattern was also the product of international war and Native dispossession. See NED BLACKHAWK, *VIOLENCE OVER THE LAND: INDIANS AND EMPIRES INTENT IN THE EARLY AMERICAN WEST* 1 (2006) ("The narrative of American history . . . has failed to gauge the violence that remade much of the continent before U.S. expansion. Nor

One struggle was called “Bleeding Kansas.”<sup>188</sup> In 1854, Senator Stephen Douglas wished to convert a large mass of “Indian Country” into territories named Nebraska and Kansas.<sup>189</sup> The Kansas-Nebraska Act appeased Southern politicians because it let territorial residents decide for themselves the legal status of slavery.<sup>190</sup> Such “popular sovereignty” wrought havoc in Kansas because territorial elections were poisoned by fraud, violence, and boycotts.<sup>191</sup> Almost immediately, one group of leaders convened a legislature in Lecompton that enacted a rigorous slavery code, while other Kansans ratified an antislavery constitution in Topeka.<sup>192</sup> President Franklin Pierce and the United States Army supported Lecompton, but Topekans had well-armed militias of their own.<sup>193</sup>

Attacks and counterattacks killed dozens of people as anti-slavery Kansans feared that Missouri’s white migrants would spread slaveocracy, while Missouri residents feared that enslaved workers from their state might escape to Kansas.<sup>194</sup> Democrats in Congress refused to accept Kansas as a state unless it promised to protect slavery, and after Republican Senator Charles Sumner made a particularly fierce speech opposing slavery in Kansas, a Southern congressman smashed his head with a cane.<sup>195</sup> National politicians referenced “Bleeding Kansas” and “Bleeding Sumner” so often that one newspaper exclaimed: “Ask what you would and

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have American historians fully assessed the violent effects of such expansion on the many Indian peoples caught within those continental changes.”); MICHAEL JOHN WITGEN, *SEEING RED: INDIGENOUS LAND, AMERICAN EXPANSION, AND THE POLITICAL ECONOMY OF PLUNDER IN NORTH AMERICA* 13–14 (2022) (“The political imaginary of the U.S. Republic called for western expansion at the expense of Native peoples on the ground in the territories being organized into new states.”).

<sup>188</sup> See generally NICOLE ETCHESON, *BLEEDING KANSAS: CONTESTED LIBERTY IN THE CIVIL WAR ERA* (2004); MICHAEL E. WOODS, *BLEEDING KANSAS: SLAVERY, SECTIONALISM, AND CIVIL WAR ON THE MISSOURI-KANSAS BORDER* (2016).

<sup>189</sup> See ELIZABETH R. VARON, *DISUNION!: THE COMING OF THE AMERICAN CIVIL WAR, 1789–1859*, at 252 (2008). The Kansas and Nebraska territories extended west toward modern Utah and Idaho. See *id.*

<sup>190</sup> See MCPHERSON, *supra* note 36, at 121–22.

<sup>191</sup> See *id.* at 146–49; KENNETH M. STAMPP, *AMERICA IN 1857: A NATION ON THE BRINK* 145 (1990).

<sup>192</sup> See MCPHERSON, *supra* note 36, at 146–48 (“By January 1856 Kansas had two territorial governments: the official one at Lecompton and an unofficial one at Topeka representing a majority of actual residents.”); STAMPP, *supra* note 191, at 145–48, 153–55.

<sup>193</sup> See STAMPP, *supra* note 191, at 146; see also WOODS, *supra* note 188, at 41–42.

<sup>194</sup> See WOODS, *supra* note 188, at 30–60; KRISTEN TEGTMEIER OERTEL, *BLEEDING BORDERS: RACE, GENDER AND VIOLENCE IN PRE-CIVIL WAR KANSAS* 46–57 (2009) (discussing flight and resistance by enslaved people themselves).

<sup>195</sup> See ETCHESON, *supra* note 188, at 127–29; MCPHERSON, *supra* note 36, at 149–50.

the same answer—Kansas! Kansas! Was all that was heard.”<sup>196</sup> The Lecompton government held a constitutional convention, even as antislavery groups controlled the territorial legislature.<sup>197</sup> When Lecompton’s proslavery delegates manipulated referendum procedures to approve their constitution, antislavery Kansans boycotted and expressed their dissent in a separate vote.<sup>198</sup>

Despite those layers of chaos, President James Buchanan embraced Lecompton’s proslavery constitution and requested immediate statehood for Kansas.<sup>199</sup> That undemocratic effort to support slavery in Kansas violated principles of popular sovereignty and split President Buchanan’s Democratic Party in half. Northern Democrats like Douglas blocked Kansas statehood in Congress, and Southern Democrats felt betrayed.<sup>200</sup> Slavery was one of the greatest moral and political issues the United States ever faced, but the country’s ultimate struggle was primarily fought over territorial law, not slavery in the states.<sup>201</sup>

A second controversy about territorial slavery was *Dred Scott v. Sandford*.<sup>202</sup> Northern politicians criticized the Kansas-Nebraska Act for violating a provision of the Missouri Compromise’s provision that prohibited slavery in northern territories.<sup>203</sup> *Dred Scott* held that the Missouri Compromise was unconstitutional in the first place because Congress lacked authority to regulate territorial slavery.<sup>204</sup> President Buchanan’s personal involvement raised the stakes. Although he had won the

<sup>196</sup> WILLIAM E. GIENAPP, *THE ORIGINS OF THE REPUBLICAN PARTY, 1852–1856*, at 351–53 (1987) (quoting *Chenango American*, Sept. 11, 1856); see also WOODS, *supra* note 188, at 76; Zachary J. Lechner, “Are We Ready for the Conflict?": *Black Abolitionist Response to the Kansas Crisis, 1854–1856*, 31 KAN. HIST. 14, 16 (2008) (“[B]lack abolitionist responses to the Kansas struggle operated on a continuum, teetering between optimism and pessimism.”).

<sup>197</sup> See ETCHESON, *supra* note 188, at 127–29; MCPHERSON, *supra* note 36, at 164.

<sup>198</sup> See MCPHERSON, *supra* note 36, at 163–67; STAMPP, *supra* note 191, at 270.

<sup>199</sup> See MCPHERSON, *supra* note 36, at 166–67; STAMPP, *supra* note 191, at 324–25.

<sup>200</sup> See ETCHESON, *supra* note 188, at 160–62; STAMPP, *supra* note 191, at 289–93.

<sup>201</sup> See OAKES, *supra* note 34, at 15–24. For a political controversy that involved the status of slavery in states, see Sarah L. H. Gronningsater, “On Behalf of His Race and the Lemmon Slaves”: *Louis Napoleon, Northern Black Legal Culture, and the Politics of Sectional Crisis*, 7 J. CIV. WAR ERA 206, 227 (2017) (explaining that John Tyler Jr. “claimed that the South had lost ‘five hundred thousand dollars worth of slave property annually’ because of Northern states’ aggressive emancipation statutes).

<sup>202</sup> 60 U.S. (18 How.) 393 (1857).

<sup>203</sup> See CONG. GLOBE, 33 Cong., 1st Sess. 281 (Jan. 19, 1854) (statement of Sen. Salmon Chase and others).

<sup>204</sup> *Dred Scott*, 60 U.S. at 452.

presidency in 1856 by espousing popular sovereignty, Buchanan's inaugural address claimed that the Supreme Court's decision would make Kansas voters irrelevant.<sup>205</sup> President Buchanan celebrated judicial authority and said that he would "cheerfully submit" to the Court's ruling.<sup>206</sup> However, this was an especially easy promise to make because President Buchanan already knew *Dred Scott's* result, and he had secretly influenced one member of the Court.<sup>207</sup>

The *Dred Scott* decision appeared just a few weeks after President Buchanan's inauguration.<sup>208</sup> Chief Justice Taney explained that the Fifth Amendment forbade any restriction of territorial slavery—by Congress or by territorial legislatures—because slaveholders who visited a federal territory could not be robbed of their property.<sup>209</sup> The Court's decision alleviated Southern fears about an antislavery spiral, but it correspondingly fueled Northern theories of a "Slave Power" conspiracy.<sup>210</sup>

## B. Electing Lincoln and Causing the War

Territorial slavery reached the apex of its political significance during the presidential election of 1860, "arguably the most important . . . in the history of the United States."<sup>211</sup> The Democratic Party split apart because its nominee, Stephen Douglas, was too ambivalent about territorial slavery.<sup>212</sup> Southern

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<sup>205</sup> See James Buchanan, Inaugural Address (Mar. 4, 1857), in THE MESSAGES OF PRESIDENT BUCHANAN 5, 6–8 (J. Buchanan Henry ed., 1888) (describing territorial slavery as "a judicial question, which legitimately belongs to the Supreme Court of the United States, before whom it is now pending, and will, it is understood, be speedily and finally settled").

<sup>206</sup> *Id.*

<sup>207</sup> See John S. Vishneski, III, *What the Court Decided in Dred Scott v. Sandford*, 32 AM. J. L. HIST. 373, 388 (1988) ("Buchanan wrote to [Justice] Grier, who received the letter on the morning of February 23rd. . . . Grier showed the letter to [Chief Justice] Taney and [Justice] Wayne in confidence. . . . Grier then noted [for the first time] that he planned to concur with Taney on the unconstitutionality of the Missouri Compromise.").

<sup>208</sup> *Dred Scott*, 60 U.S. at 393.

<sup>209</sup> *Id.* at 450.

<sup>210</sup> See Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 428 n.384 (1998) ("[O]nlookers were suspicious of a conversation between President Buchanan and a Supreme Court Justice right before he gave his inauguration speech. . . . 'We say frankly that we do not believe that this *Dred Scott* decision . . . could have been wrenched from magistrates that were not under the undue influence of Slavery.'" (quoting N.Y. DAILY TRIB., Mar. 12, 1857)).

<sup>211</sup> See Don Green, *Constitutional Unionists: The Party That Tried to Stop Lincoln and Save the Union*, 69 HISTORIAN 231, 231 (2007).

<sup>212</sup> See WOODS, *supra* note 188, at 180–81.

Democrats launched a fiercely proslavery ticket, and a third party pursued Southern moderates.<sup>213</sup> Even though the Democratic Party had won six of the last eight presidential elections, conflicts over territorial slavery destroyed their chances in 1860.<sup>214</sup>

Struggles over territories were equally vital for the emergence of Abraham Lincoln and the Republican Party.<sup>215</sup> In 1854, Lincoln was merely a lawyer who had served one term in Congress.<sup>216</sup> His political career was suddenly reborn with three speeches against the Kansas-Nebraska Act.<sup>217</sup> The Republican Party likewise emerged directly out of organizational meetings that opposed the Kansas-Nebraska Act, and the party described territories as a “cordon of freedom” against slavery’s expansion.<sup>218</sup> In 1856, the first words of the first Republican platform summoned all voters “who are opposed to . . . the extension of Slavery into Free Territory; in favor of the admission of Kansas as a Free State.”<sup>219</sup> Territorial slavery was the defining issue, not slavery in existing states.

The 1858 Senate campaign between Lincoln and Douglas followed that same pattern.<sup>220</sup> When Lincoln accepted the nomination, he famously declared that a “house divided against itself cannot stand,” but that phrase *absolutely was not* attacking the existence of states that protected slavery.<sup>221</sup> On the contrary,

<sup>213</sup> See *id.* at 177–211.

<sup>214</sup> See *id.* at 189–90.

<sup>215</sup> See Phillip S. Paludan, *Lincoln’s Firebell: The Kansas-Nebraska Act*, in THE KANSAS-NEBRASKA ACT OF 1854, at 93, 95 (John R. Wunder & Joann M. Ross eds., 2008) (calling the Kansas-Nebraska Act “the ‘perfect’ storm—one strong enough to blow away the established party system and to create, in two years, a political party that dominated the national agenda for decades”).

<sup>216</sup> See DAVID HERBERT DONALD, LINCOLN 142–43 (1996).

<sup>217</sup> See *id.* at 168–69 (“[Douglas’s bill] ‘took us by surprise—astounded us . . . [But] we rose each fighting, grasping whatever he could first reach—a scythe—a pitchfork—a chopping axe, or a butcher’s cleaver.’” (quoting 2 COLLECTED WORKS OF ABRAHAM LINCOLN 282 (Roy P. Basler ed., 1953))).

<sup>218</sup> See WOODS, *supra* note 188, at 25.

<sup>219</sup> See MCPHERSON, *supra* note 36, at 154–57.

<sup>220</sup> See Allen C. Guelzo, *Houses Divided: Lincoln, Douglas, and the Political Landscape of 1858*, 84 J. AM. HIST. 391, 391 (2007) (“Whatever else Illinois and the nation had to think about in 1858, they thought with a peculiar passion about Lincoln and Douglas.”).

<sup>221</sup> Abraham Lincoln, “House Divided” Speech at Springfield, Illinois (June 16, 1858), in ABRAHAM LINCOLN, SPEECHES AND WRITINGS, 1832–1858, at 426–28 (Don E. Fehrenbacher ed., 1989). Frederick Douglass had taken a different approach, and Democrats highlighted Douglass’s interpretation to hurt Lincoln’s political chances. See Frederick Douglass, *The Kansas-Nebraska Bill, Speech at Chicago, October 30, 1854*, UNIV. ROCHESTER FREDERICK DOUGLASS PROJECT, <https://perma.cc/6SGE-GBDD> (“[L]iberty and slavery cannot dwell in the United States in peaceful relations . . . [O]ne or the other of these must go to the wall.”); JAMES OAKES, THE RADICAL AND THE REPUBLICAN: FREDERICK

Lincoln was condemning the Kansas-Nebraska Act, and his claim that “this government cannot endure, permanently half slave and half free” referenced federal policies about territorial slavery, not state laws: “Either the opponents of slavery will arrest the further spread of it . . . or its advocates will push it forward.”<sup>222</sup> The issue of spreading or stopping slavery in federal territories—not slavery’s persistence in states—was crucial for Lincoln and Douglas, Democrats and Republicans, and the North and South as well. Although Lincoln lost the Senate race in 1858, he won the presidency in 1860.<sup>223</sup> Lincoln earned sixty percent of electors with only forty percent of the vote, and he lost every Southern state in addition to Missouri and Kentucky.<sup>224</sup> It is impossible to imagine a Republican victory without the epic struggle over territorial slavery.<sup>225</sup>

Lincoln’s victory caused secession, and the central issue remained territorial slavery, not slavery in existing states.<sup>226</sup> The

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DOUGLASS, ABRAHAM LINCOLN, AND THE TRIUMPH OF ANTISLAVERY POLITICS, at xiii–xv, 4–5 (2008) (“It was not the last time Illinois Democrats would fasten [Frederick Douglass’s] name around Lincoln’s neck.”).

<sup>222</sup> Abraham Lincoln, “House Divided” Speech at Springfield, Illinois (June 16, 1858), in ABRAHAM LINCOLN, SPEECHES AND WRITINGS, 1832–1858, at 426–28 (Don E. Fehrenbacher ed., 1989) (emphasis omitted). Lincoln believed that stopping territorial slavery would eventually eliminate slavery throughout the country, but the mechanism and timing for that transformation were always vague and indefinite. By comparison, Lincoln also cited proslavery laws in territories as a conspiratorial sign that slaveocracy was gaining control over the national government. *See id.* (“Let any one who doubts carefully contemplate that now almost complete legal combination . . . compounded of the Nebraska doctrine, and the Dred Scott decision. . . . [Also] trace the evidence of design and concert of action, among its chief architects, from the beginning.”); *id.* at 432 (“Welcome, or unwelcome, [extending *Dred Scott* to slaveholders in antislavery states] is probably coming, and will soon be upon us, unless the power of the present political dynasty shall be met and overthrown.”).

<sup>223</sup> *See Guelzo, supra* note 220, at 415 (describing Lincoln’s relatively close loss in Illinois); WOODS, *supra* note 164, at 209 (“[I]f every anti-Republican vote [in 1860] had gone to a single competitor, Lincoln still would have prevailed . . . . [H]owever, the breach deprived Democrats of . . . national unity . . . . If 5 percent of Republican voters in [four states] had shifted to Douglas, the House would have chosen a [non-Lincoln] president.”).

<sup>224</sup> *See* 2 WILLIAM W. FREEHLING, THE ROAD TO DISUNION: SECESSIONISTS TRIUMPHANT, 1854–1861, at 338–41 (2007).

<sup>225</sup> Of course, the election involved other issues, including arguments about a federal code protecting slavery. *See* Michael E. Woods, “Tell Us Something About State Rights”: Northern Republicans, States’ Rights, and the Coming of the Civil War, 7 J. CIV. WAR ERA 242, 253–54 (2017). However, the probability of enacting a pro- or antislavery statute on any topic depended on the federal government’s composition: representatives, senators, Electoral College, and president. That is why territorial slavery appeared to be so crucial.

<sup>226</sup> *See* EDWARDS, *supra* note 163, at 3 (“Lincoln’s election was the beginning of the end. It signaled a fundamental shift in the balance of power that would leave slave states



Republican platform expressly allowed—almost endorsed—state control over slavery: “[T]he right of each state to order and control its own domestic institutions according to its own judgment exclusively, is essential to that balance of powers on which the perfection and endurance of our political fabric depends.”<sup>227</sup> Lincoln’s inaugural address confirmed in 1861, “I have no purpose, directly or indirectly, to interfere with the institution of slavery in the States where it exists. . . . I have no lawful right to do so, and I have no inclination to do so.”<sup>228</sup> He promised not to change course over time: “Those who nominated and elected me did so with full knowledge that I had made . . . many similar declarations, and had never recanted them. . . . [T]hey placed in the platform, for my acceptance, . . . the clear and emphatic resolution. That slavery inside the states was a decision for states themselves to make.”<sup>229</sup>

Republicans pledged not to interfere with slavery laws in existing states, but everyone knew that Lincoln’s party would eliminate slavery in Kansas and other territories.<sup>230</sup> Both sides firmly believed that Republican control over territories would wrench the nation’s destiny away from the slaveholding South.<sup>231</sup> Lincoln acknowledged the importance of territorial slavery at his inauguration: “One section of our country believes slavery is *right*, and ought to be extended, while the other believes it is *wrong* and ought not to be extended. This is the only substantial dispute.”<sup>232</sup>

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in the minority and *result in federal policies* that undermined those states’ ability to maintain the institution of slavery.” (emphasis added)).

<sup>227</sup> NATIONAL REPUBLICAN PLATFORM, ADOPTED BY THE CHICAGO CONVENTION (MAY 17, 1860), in 2 THE AMERICAN PARTY BATTLE: ELECTION CAMPAIGN PAMPHLETS, 1828–1876, at 121, 122 (Joel H. Silbey ed., 1999).

<sup>228</sup> Lincoln, *supra* note 40, at 88–89 (“There has never been any reasonable cause for such apprehension. Indeed, the most ample evidence to the contrary has all the while existed, and . . . is found in nearly all [my] published speeches.”).

<sup>229</sup> *Id.*

<sup>230</sup> See CONLIN, *supra* note 164, at 109–10 (describing Southerners’ fears of “utter annihilation” and seven new antislavery states after Lincoln’s election); OAKES, *supra* note 34, at 268 (“[A]bolition in the territories was the one item on their agenda over which the Republicans had always refused to compromise.”); WOODS, *supra* note 164, at 219 (“President-elect Lincoln . . . would yield on fugitive slaves but not slavery expansion, and [he] criticized Crittenden’s guarantee of slavery in future territories as an invitation to tropical imperialism . . .”).

<sup>231</sup> See FREEHLING, *supra* note 224, at 511. For other federal policies that some Republicans wished to change, see OAKES, *supra* note 34, at 32–33 (collecting statements from William Seward and Charles Sumner).

<sup>232</sup> Lincoln, *supra* note 40, at 94 (emphasis in original).

The “substantial dispute” about extending territorial slavery was a dominant factor in causing secession and war.<sup>233</sup>

### C. Skeletal Statehood Versus Muscular Statehood

The Civil War over slavery was also a constitutional conflict about territory, statehood, and union.<sup>234</sup> Many authors have echoed W.E.B. Du Bois in connecting slavery with America’s “dazzling dream of empire,” and those dynamics involved a mixture of territories and states.<sup>235</sup> The decisive military conflict pitted Northern theories of skeletal statehood and political participation against Southern theories of muscular statehood and resistance.<sup>236</sup> The Northern military victory had tremendous significance for constitutional law as a field.

#### 1. Calhoun’s muscle.

One vital component involved the historical mixture of personal property claims with aggregate ideas about constitutional statehood. Collective state sovereignty was the legal justification for secession—not demands to compensate individual slaveholders—and of course secession did not increase Southerners’ practical access to federal territories or enforcement against alleged fugitives.<sup>237</sup> On the contrary, secessionists were fighting about the

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<sup>233</sup> *But cf.* KARP, *supra* note 166, at 7 (“Territorial expansion was only one tactical option on a larger strategic menu—a more comprehensive foreign policy agenda that contemporary opponents of bondage . . . rightly identified as ‘armed propaganda for slavery abroad.’” (quoting Karl Marx, *The North American Civil War*, in 19 KARL MARX & FREDERICK ENGELS COLLECTED WORKS 32 (Eric Hobsbawm et al. eds., 1984))).

<sup>234</sup> *See* EDWARDS, *supra* note 163, at 2 (“References to the Constitution were so ubiquitous on both sides of the debate that a traveler with no knowledge of context might be excused for confusion as to the nature of the sectional crisis.”); *see also* CONLIN, *supra* note 164, at xvi–xvii (collecting evidence that both Southerners and Northerners said they fought for the “cause of the Constitution” and that “many Northerners . . . believed that the Confederates had rebelled not just against the Constitution but also against democracy itself”); Nicoletti, *supra* note 42, at 1635, (“Federal structure necessarily intersected with . . . the war’s impact on race and slavery, and the federal government’s relationship with the citizen . . . . In the eyes of many legal thinkers, the war had altered the nature of sovereignty in the United States.”).

<sup>235</sup> W.E.B. DU BOIS, JOHN BROWN 118 (1909); *see also* FRYMER, *supra* note 6, at 17.

<sup>236</sup> *Cf.* DAVID E. KYVIG, EXPLICIT AND AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION 1776–2015, at 134–35 (2d. ed. 2016) (“[S]lavery’s defenders . . . contributed to an evolving argument that each state retained a right to interpret, reform, or reject individual provisions of the Constitution. Furthermore, some Americans came to believe that it remained a state’s right to withdraw or secede from the Union.”).

<sup>237</sup> *See* DECLARATION OF THE IMMEDIATE CAUSES WHICH INDUCE AND JUSTIFY THE SECESSION OF SOUTH CAROLINA FROM THE FEDERAL UNION (1860) (asserting state

basic structure of government. Their goal was to exchange the Constitution's "union" for a geographically narrow identity based on "section," and the latter was anchored in profound constitutional ideologies about slavery and statehood.<sup>238</sup>

Muscular statehood and anti-national resistance had deep roots in Southern culture, but political leaders John Calhoun and Jefferson Davis were especially important during this period.<sup>239</sup> Calhoun announced resolutions in the Senate that explicitly linked statehood with states' authority to control territorial slavery: "[T]he territories of the United States belong to the several States composing this Union . . . as their joint and common property."<sup>240</sup> Congress could not deprive a state of "its full and equal right in any territory of the United States," and every federal barrier to state citizens who wished to "emigrat[e], with their property, into any of the territories" violated "the constitution and the

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sovereignty—and its various protections for slavery as an institution—as the reason for secession).

<sup>238</sup> See KYVIG, *supra* note 236, at 145 (observing that John C. Calhoun advocated for "individual states' rights in the process of constitutional reform, and [he] pointed to secession as an escape for a state that felt it could no longer accept the terms of the Constitution"); Jonathan B. Crider, *De Bow's Revolution: The Memory of the American Revolution in the Politics of the Sectional Crisis, 1850–1861*, 10 AM. NINETEENTH CENTURY HIST. 317, 321 (2009) ("Even in the use of the term 'the South,' [publisher] De Bow . . . asserted a monolithic identity based more on . . . slavery than on geography. [Repetition of that term] helped to create a regional identity out of a physical and cultural landscape that often had vastly different traditions and interests.").

<sup>239</sup> See 1 MICHAEL O'BRIEN, *CONJECTURES OF ORDER: INTELLECTUAL LIFE AND THE AMERICAN SOUTH, 1810–1860*, at 796–97 (2004) (discussing "the states' right church" during the United States' first four decades); *id.* at 833–36 (discussing Abel Upshur's argument in 1840 that the Constitution was a compact "because it was made by sovereign States, and because that is the only mode in which sovereign States treat with one another"); *id.* at 836–37, 844–45 (discussing Andrew Jackson's uneven commitment to state sovereignty); ELDER, *supra* note 48, at 27 (discussing the Kentucky and Virginia Resolutions drafted by Thomas Jefferson and James Madison, which introduced "compact" theory and "nullification"); *id.* at 221 (quoting an organization of South Carolinian planters that described state sovereignty as "the ark to which we must ultimately look [for] our safety").

<sup>240</sup> CONG. GLOBE, 29th Cong., 2d Sess. 449, 453–55 (Feb. 19, 1847) (statement of Sen. John Calhoun); see also WOODS, *supra* note 164, at 89 ("[Calhoun's] 'common property' doctrine held that since the states jointly owned the territories, Congress, as their agent, must safeguard slavery in each one."); *id.* (noting that Jefferson Davis also defended "the equal right of the south with the north in the territory held as the common property of the United States' and never wavered" (quoting Jefferson Davis to C.J. Searles, September 19, 1847, in 1 JEFFERSON DAVIS, *CONSTITUTIONALIST: HIS LETTERS, PAPERS, AND SPEECHES* 95 (Dunbar Rowland ed., 1923))); *id.* ("Mississippi voters concurred in public meetings, . . . declaring that violation of the common property doctrine would 'subvert the Union itself.'").

rights of the States[,] . . . subvert[ing] the Union itself.”<sup>241</sup> Calhoun proclaimed that he would “rather meet any extremity upon earth than give up one inch of our equality—one inch of what belongs to us as members of this great republic! . . . The surrender of life is nothing to sinking down into acknowledged inferiority!”<sup>242</sup> The connection between territory, statehood, slavery, and violent secession was unmistakably clear.

Davis echoed similar arguments as the signs of war grew stronger.<sup>243</sup> Misstating eighteenth-century history, Davis claimed that states originally ratified the Constitution as “free and independent sovereignties,” so the federal government must not “intermeddle” with a state’s “domestic institutions,” especially the age-old practice of racial slavery.<sup>244</sup> This meant that any antislavery policy from the federal government was a “manifest violation of the mutual and solemn pledges . . . given by the States . . . on entering into the constitutional compact.”<sup>245</sup> To protect territorial slavery, Davis advocated Calhoun’s common-property theory, demanded safe transportation of “slaver property into the common Territories,” and forbade any pressure on territories to ban slavery before receiving statehood.<sup>246</sup>

None of those hardline theories from Calhoun and Davis was supported by constitutional text. For example, the Constitution never said that Congress must govern territories as “common property” of individual states. It did not impose a national obligation to assure sectional “equilibrium.” Nor did the Constitution

<sup>241</sup> CONG. GLOBE, 29th Cong., 2d Sess. 449, 453–55 (Feb. 19, 1847) (statement of Sen. John Calhoun) (“Ours is a Federal Constitution. . . . [I]t was so formed [so] that every State . . . should enjoy all its advantages.”); *id.* (“[The public domain] is the common property of the States of this Union. They are called ‘the territories of the United States.’ And what are the ‘United States’ but the States united?”); *id.* (“Let us be done with compromises [including the Missouri Compromise]. Let us go back and stand upon the constitution!”).

<sup>242</sup> *Id.*

<sup>243</sup> See James H. Read, *From Calhoun to Secession, in* THE POLITICAL THOUGHT OF THE CIVIL WAR 133, 134 (Alan Levin et al. eds., 2018) (“[E]ven though he died a decade before secession, [ ] [Calhoun] set the channels within which nearly every Southern leader argued and acted during the secession crisis.”).

<sup>244</sup> CONG. GLOBE, 36th Cong. 1st Sess. 658, 658–59 (Feb. 2, 1860) (statement of Sen. Jefferson Davis); see Crider, *supra* note 238, at 322 (“Senator Robert Toombs . . . was quoted as saying that ‘African slavery existed . . . at the commencement of the American Revolution’ and ‘was inextricably interwoven with the framework of society, especially in the southern states.’ To challenge the legitimacy of the institution was to challenge the wisdom of the founders themselves . . . .” (quoting Robert Toombs, *Senator Toombs on Slavery*, 20 DE BOW’S REV. 593 (May 1856))).

<sup>245</sup> CONG. GLOBE, 36th Cong. 1st Sess. 658, 658–59 (Feb. 2, 1860) (statement of Sen. Jefferson Davis).

<sup>246</sup> *Id.*

command the federal government to support slavery.<sup>247</sup> Southern theorists cited the Tenth Amendment—a perennial favorite for advocates of muscular statehood—but those cryptic words affirmed the existence of residual state power without specifying anything about its content. To be sure, that implicit recognition of state authority was the Constitution’s most proslavery component, empowering slavery more than any of the document’s explicit provisions.<sup>248</sup> Yet the Tenth Amendment did not—as Davis theorized—license states to *control decisions by Congress* with respect to territories, tariffs, enslaved fugitives, or anything else inside the boundaries of federal authority.<sup>249</sup>

Lacking textual support, Southerners claimed that the constitutional structure of statehood implicitly required the federal government to protect their slavery-based societies against outside influence.<sup>250</sup> States could not only use domestic authority to maintain their own legal, social, and economic systems of slavery. Statehood was also imagined to include a constitutional requirement for the federal government and other states to remain “neutral” and defend slavery against attack.<sup>251</sup> Slaveholding states

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<sup>247</sup> Even the so-called Fugitive Slave Clause was not specific, and it used the passive voice. See U.S. CONST. art. IV, § 2, cl. 3 (“No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall be discharged from such Service or Labour, but shall *be delivered up* on Claim of the Party to whom such Service or Labour may be due.” (emphasis added)).

<sup>248</sup> Most scholars have focused on three explicit clauses. See, e.g., Juan F. Perea, *Race and Constitutional Law Casebooks: Recognizing the Proslavery Constitution*, 110 MICH. L. REV. 1123, 1123–24, 1128 (2012) (reviewing GEORGE WILLIAM VAN CLEVE, A SLAVEHOLDERS’ UNION (2010)). See generally U.S. CONST. art. I, § 2 (Three-Fifths Clause); U.S. CONST. art. I § 9, cl. 1 (Slavery Trade Clause); U.S. CONST. art. IV, § 2, cl. 3 (Fugitive Slave Clause). But cf. WALDSTREICHER, *supra* note 39, at 56 (“[L]ocal autonomy . . . protected slavery on the national level, even as the [civil] war . . . became the largest slave rebellion in American history.”); EDLER, *supra* note 48, at 17 (“Slavery in states where it existed would be recognized, represented, and protected, making the new federal government functionally proslavery, but providing an ambiguity.”).

<sup>249</sup> See U.S. CONST. amend. X.

<sup>250</sup> See, e.g., CONG. GLOBE, 36th Cong. 1st Sess. 658, 658–59 (Feb. 2, 1860) (statement of Sen. Jefferson Davis) (asserting “[t]hat the union of these States rests on the equality of rights and privileges among its members”); DECLARATION OF THE IMMEDIATE CAUSES WHICH INDUCE AND JUSTIFY THE SECESSION OF SOUTH CAROLINA FROM THE FEDERAL UNION (1860) (“The guaranties of the Constitution will then no longer exist; the equal rights of the States will be lost. The slaveholding States will no longer have the power of self-government, or self-protection, and the Federal Government will have become their enemy.”).

<sup>251</sup> See, e.g., CONG. GLOBE, 36th Cong. 1st Sess. 658, 658–59 (Feb. 2, 1860) (statement of Sen. Jefferson Davis) (“[N]either Congress, nor a Territorial Legislature, whether by direct legislation or legislation of an indirect and unfriendly nature, possess the power to annul or impair the constitutional right of any citizen of the United States to take his slaver property into the common Territories.”). For a regrettable defense of similar

claimed that they had originally joined the union to protect their distinctive way of life, but new political opposition to slavery was unconstitutionally jeopardizing Southern societies, economies, and legal systems.<sup>252</sup> Northerners were making unprecedented threats that they would use the federal government's power—especially over territories—to weaken the status and power of slaveholding states, with no limit in sight.<sup>253</sup> For Southern secessionists, this was the connection between individual slaveholders' property interests and muscular statehood's antifederal resistance.

During the 1770s, Maryland had refused to join the United States because Virginia's political power threatened Maryland's economic survival.<sup>254</sup> As the Civil War approached, Southerners made similar self-defense arguments against Northern states and the federal government, but the remedy this time was unauthorized secession instead of an authorized refusal to ratify.<sup>255</sup> For Southern hardliners, statehood was much more than procedural membership in a union with voting rights. It also included the substantive capacity for states to pursue their own visions of political, economic, and social success without friction from other states or the federal government.<sup>256</sup> Secessionist arguments about

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sentiments in modern scholarship, see generally MARK GRABER, *DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL* 239 (2012).

<sup>252</sup> See MCPHERSON, *supra* note 176, at 11 (“The market value of the four million slaves in 1860 was close to \$3 billion—more than the value of land, of cotton, or of anything else in the slave states, and more than the amount of capital invested in manufacturing and railroads combined for the whole United States.”).

<sup>253</sup> See *supra* notes 218–219 and accompanying text (discussing Republicans' view of the territories as a “cordon of freedom”); OAKES, *supra* note 34, at 31 (explaining that “[a] ban on slavery in the western territories was not the goal; it was the first step on the road to [slavery's] ultimate extinction”).

<sup>254</sup> See *supra* notes 142–154 and accompanying text (detailing Maryland's initial refusal to ratify the Articles of Confederation).

<sup>255</sup> See CONG. GLOBE, 36th Cong. 1st Sess. 658, 658–59 (1860) (statement of Sen. Jefferson Davis) (claiming that states joined the Union so that the Federal Government might “[increase the] security of each, against dangers *domestic* as well as foreign,” including “any intermeddling by any one or more States” (emphasis in original)); Crider, *supra* note 238, at 322 (“[Mississippi politician] J. Quitman Moore warned that ‘disunion’ might become ‘the duty’ of Southerners if ‘the oppressive majority’ of the North continued to agitate for the abolition of slavery in the United States.” (quoting J. Quitman Moore, *The South and Her Remedies*, 10 DE BOW'S REV. 267 (May 1851))); SPEECHES OF JOHN C. CALHOUN 209 (1843) (responding to the possibility that Southern states might become permanently subordinate “members of this confederacy” with a declaration that, “[c]ome what will, should it cost every drop of blood and every cent of property, we must defend ourselves; and if compelled, we would stand justified by all laws, human and divine”).

<sup>256</sup> See CONG. GLOBE, 31st Cong., 1 Sess. 455 (Mar. 4, 1850) (statement of Sen. John Calhoun) (“[T]he equilibrium between the two sections . . . when the Constitution was

muscular statehood were not just used to defend slavery at home, but also against the federal government and nationwide. One senator explained: “I will test, for myself and for my children, whether South Carolina is a State or an humbled and degraded province, existing only at the mercy of an unscrupulous and fanatical tyranny.”<sup>257</sup> The Senator’s definitions of “state” versus “province” were crucial, and of course they were also contested.<sup>258</sup>

## 2. Lincoln’s skeleton.

Almost all Northerners opposed Southerners’ muscular theories of oppositional statehood, emphasizing instead the constitutional skeleton of states’ participatory representation.<sup>259</sup> Most Northerners acknowledged that states as states could determine the status of slavery inside their borders, but Lincolnite Republicans denied that any Southern minority of states had the constitutional authority to control federal policies in the territories.<sup>260</sup> The national government’s policies should be simply and exclusively determined by the constitutional skeleton of electoral participation. Northern commenters rejected Southerners’ asserted “right to revolution” as the “right of might,” and they described secession as a “rebellion against American Democracy” that would undermine “the right of the majority to rule.”<sup>261</sup> To accept a constitutional right of state secession—based on sectional power to control the union—would imply as a matter of procedure and substance that “the [federal] government is *no* government.”<sup>262</sup>

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ratified . . . has been destroyed. . . . [A]s it now stands, one section has the exclusive power of controlling the government, which leaves the other without any adequate means of protecting itself against its encroachment and oppression.”)

<sup>257</sup> CONG. GLOBE, 32d Cong., 1st Sess. 655, App., 43–48, 57 (Dec. 15–16, 1851) (statement of Sen. Rhett).

<sup>258</sup> See RODGERS, *supra* note 4, at 16.

<sup>259</sup> For many years, a few Garrisonian abolitionists advocated for Northern secession to escape the sins of slavery. See JAMES BREWER STEWART, ABOLITIONIST POLITICS AND THE COMING OF THE CIVIL WAR 17 (2008) (“[William Lloyd Garrison] argued that the nation’s values had now been revealed to be so utterly corrupted that abolitionists must flee from proslavery churches, spurn the proslavery political process, and oppose the proslavery Federal Union with demands for Northern secession.”).

<sup>260</sup> See *supra* notes 226–230 and accompanying text (discussing Lincoln’s view on the legality of federal intervention related to slavery in the states).

<sup>261</sup> CONLIN, *supra* note 164, at 212 (quoting Letter from Moses G. Atwood to Moody Kent (Feb. 10, 1861)) (emphasis removed).

<sup>262</sup> *Id.* (quoting Letter from William Davidson Harris to J. Morrison Harris (June 4, 1861)) (emphasis in original).

Even as Southern hardliners railed against the “vandal tyranny of the North” and slaveholders’ subjugation to “King Numbers,” Lincoln’s Republicans viewed that same antislavery tilt as moral progress, political persuasion, and representative democracy in action.<sup>263</sup> One newspaper described changes in national politics as entirely normal: “[F]reedom grows faster than slavery.”<sup>264</sup> Southern states might politically oppose federal decisions that threatened their preferred way of life. But the only remedies were debate and voting, not imaginary rights to common property, sectional equilibrium, or sovereign self-defense. Northerners believed that constitutionally prescribed elections were the exclusive mechanism for deciding how federal power and practice should affect the interests and values of individual states.

When Lincoln asserted his obligation as president to “faithfully execute” federal law in secessionist states, constitutional statehood was doubly relevant.<sup>265</sup> The first issue was whether unilateral secession could ever be permissible. Were Southerners correct about the history of states as revolutionary entities and the Tenth Amendment’s reservation of “powers not delegated to the United States”? The second issue—which is much less noticed today—was whether Lincoln’s election and the Republicans’ political agenda were constitutionally appropriate because they followed the ordinary skeleton of electoral participation. Or instead were they a transformative breach of muscular statehood

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<sup>263</sup> See Letter from Thomas Hill Watts to Jefferson Davis (Apr. 25, 1862), in *THE OPINIONS OF THE CONFEDERATE ATTORNEYS-GENERAL, 1861–1865*, at 74, 75 (Rembert W. Patrick ed., 1950); Michael F. Conlin, *The Dangerous Isms and the Fanatical Ists: Antebellum Conservatives in the South and the North Confront the Modernity Conspiracy*, 4 *J. CIV. WAR ERA* 205, 214–15 (2014) (“An aristocratic South Carolinian worried that ‘King Numbers’ ruled the United States and was making inroads even in the Palmetto State.”); see also *PROCEEDINGS AND DEBATES OF THE VIRGINIA STATE CONVENTION OF 1829–30*, at 321 (1830) (“I would not live under King Numbers. I would not be his steward—nor make him my task-master. I would obey the principle of self-preservation—a principle we find even in the brute creation, in flying from this mischief.”) (John Randolph of Roanoke); Daniel E. Sutherland, *Guerrilla Warfare, Democracy, and the Fate of the Confederacy*, 68 *J. S. HIST.* 259, 277 (2002) (“John C. Calhoun’s fears about the tyranny of the majority had long been a cornerstone of southern political thought.”).

<sup>264</sup> CONLIN, *supra* note 164, at 212 (quoting *PROVIDENCE POST*, July 19, 1851).

<sup>265</sup> See U.S. CONST. art. II, § 3 (“[H]e shall take Care that the Laws be faithfully executed.”); Lincoln, *supra* note 40, at 91 (“[I]n view of the Constitution and the laws, the Union is unbroken; and, to the extent of my ability, I shall take care, as the Constitution itself expressly enjoins upon me, that the laws of the Union be faithfully executed in all the States.”).



that unconstitutionally threatened to destroy sovereign states from the outside in?

Both of those issues were resolved by the application of massive violence—in Lincoln’s words, a “fiery trial through which we pass.”<sup>266</sup> Historian Cynthia Nicoletti explained, “Americans who had lived through the horrors of the Civil War . . . considered *the war itself* to have altered the Constitution. For them, the war had been a world-churning, paradigm-shifting event.”<sup>267</sup> A small number of constitutional amendments were ratified to redefine citizenship, liberty, and equality.<sup>268</sup> But a comparable set of changes also transformed the structure of statehood and union. Especially in that structural context, the Civil War’s constitutional transformations were not formally transcribed, and they have not always remained legible to lawyers over time.<sup>269</sup>

For present purposes, it is vital that proponents of skeletal statehood triumphed once again over advocates of muscular states’ rights. In 1861, Lincoln would not have risked one soldier to eliminate slavery from Southern states.<sup>270</sup> Yet the nation suffered losses beyond calculation to defend federal authority to weaken, stigmatize, and smother slavery throughout the country.<sup>271</sup> The constitutional disagreement was not just whether secession was constitutionally legitimate under any conceivable circumstance, but also whether the national government’s policies opposing slavery—especially in federal territories—violated constitutional statehood. Alongside the Reconstruction Amendments, the war decisively resolved questions about territory, statehood, and the union. Unprecedented violence and destruction confirmed that constitutional statehood was about skeletal voting rules, whereas states’ muscular authority to resist

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<sup>266</sup> Abraham Lincoln, Annual Message to Congress (Dec. 1, 1862), in 5 COLLECTED WORKS OF ABRAHAM LINCOLN 537 (Roy P. Basler ed., 1953).

<sup>267</sup> Nicoletti, *supra* note 42, at 1633 (emphasis added).

<sup>268</sup> See U.S. CONST. amends. XIII–XV.

<sup>269</sup> See Nicoletti, *supra* note 42, at 1637 (“Questions about the war’s impact on American federalism [were] partially, but not wholly, expressed in the new constitutional amendments.”).

<sup>270</sup> Cf. Letter from Abraham Lincoln to Horace Greely (Aug. 22, 1862), in 5 COLLECTED WORKS OF ABRAHAM LINCOLN 388 (Roy P. Basler ed., 1953) (“If I could save the union without freeing *any* slave I would do it; and if I could save it by freeing *all* the slaves I would do it; and if I could save it by freeing some and leaving others alone I would also do that.” (emphasis in original)).

<sup>271</sup> See ROGER C. HARTLEY, MONUMENTAL HARM: RECKONING WITH JIM CROW ERA CONFEDERATE MONUMENTS 25 (2021) (“The Civil War created the worst carnage in American history up to that time. . . . In recent years, the death toll has been revised upward and the current estimate of Civil War deaths is 750,000.”).

the federal government was almost always a matter for ordinary political debate.<sup>272</sup>

### III. RECONSTRUCTION: THE UNTIMELY ASCENT OF MUSCULAR STATEHOOD

Myths about muscular statehood during the eighteenth century are historically incorrect, and nineteenth-century claims of muscular statehood were defeated by war.<sup>273</sup> Nevertheless, muscular statehood is alive and well in modern doctrine.<sup>274</sup> This Part describes unrecognized origins of that development, as the Reconstruction Congress made a political choice to preserve Southern statehood, and the Supreme Court applied new constitutional theories of statehood that impeded racial justice.<sup>275</sup> From one perspective—sometimes called “contingency”—missed opportunities in this era represented some mixture of tragedy and irony.<sup>276</sup> Everything seemed possible during the Second Founding, and transformation was urgently necessary, yet constitutional arguments about statehood raised powerful barriers.<sup>277</sup> From another perspective—sometimes called “structure”—the Court’s theories of muscular statehood were part of a much broader betrayal, as the economics of exploitive labor converged with cultural white supremacy and postwar exhaustion to produce national reconciliation.<sup>278</sup> The federal government and national

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<sup>272</sup> Cf. DREW GILPIN FAUST, *THIS REPUBLIC OF SUFFERING: DEATH AND THE AMERICAN CIVIL WAR* 268 (2008) (“The nation was a survivor . . . transformed by its encounter with death . . . . Debates about nationalism had caused the war; national might had won the war; an expanded nation-state . . . emerged . . . from war’s demands. And both the unity and responsibilities of this transformed nation were closely tied to its Civil War Dead.”).

<sup>273</sup> See *supra* Parts I–II.

<sup>274</sup> See *supra* notes 4, 20, 26 (collecting sources).

<sup>275</sup> See *infra* Part III.

<sup>276</sup> See Morton J. Horwitz, *The Historical Contingency of the Role of History*, 90 *YALE L.J.* 1057, 1057 (1981) (“[A]nalytic scholarship . . . regards history as subversive because it exposes the rationalizing enterprise. Nevertheless, it is . . . an historically contingent matter even that history should be subversive. It wasn’t always this way.”).

<sup>277</sup> See FONER, *supra* note 43, at 278 (“Like the Revolution, Reconstruction was an era when the foundations of political life were thrown open for discussion, . . . a stunning and unprecedented experiment in interracial democracy.”); *id.* at 280 (“We have cut loose from the whole dead past and have cast our anchor out a hundred years.” (quoting Timothy O. Howe to Grace Howe (Feb. 26, 1867))).

<sup>278</sup> See Kim Sterelny, *Contingency and History*, 83 *PHIL. SCI.* 521, 537 (2016) (“[I]nstitutional and cultural factors sometimes result in trajectories that depend on the summed decisions of many agents; these population-based causal trajectories tend to be robust.”); see also Erik Mathisen, *The Second Slavery, Capitalism, and Emancipation in Civil War America*, 8 *J. CIV. WAR ERA* 677, 687 (2018) (“Several studies have . . . support[ed] the claim that for all that the Civil War changed, it did not disturb the underlying structures

democracy predictably preferred sectional reunion over racial remediation.<sup>279</sup>

Lawyers and judges were important participants under either vision, as the dominant legal community closed cultural and professional ranks to manufacture new doctrines of muscular statehood.<sup>280</sup> No one could unburn ashes or unbleed blood, yet lawyers adopted constitutional theories that minimized the war's impact and ignored Lincoln's putative victory over muscular statehood.<sup>281</sup> The Supreme Court's deployment of improvised federalism and imaginary line drawing continued from the 1860s until the New Deal, and similar tactics resurfaced during the 1990s.<sup>282</sup> In its original postwar context, the Court's aggressive

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of power and economic inequality that would come to dominate African American life in later decades."); Brooks D. Simpson, *Mission Impossible: Reconstruction Policy Reconsidered*, 6 J. CIV. WAR ERA 85, 99 (2016) ("We might deplore declaring the outcome inevitable, but we have struggled mightily yet fruitlessly to provide a realizable alternative course of events that would have met the twin goals of reunion and justice for the freedpeople. Reminders of just what was accomplished should not overshadow what was not."); see also Sven Beckert, *Emancipation and Empire: Reconstructing the Worldwide Web of Cotton Production in the Age of the American Civil War*, 109 AM. HIST. REV. 1405, 1424 (2014) ("Sharecropping, crop liens, and powerful local merchants . . . characterized the countryside . . . [C]otton farmers, the world over, were deeply enmeshed in debt, vulnerable to world market fluctuations, . . . and politically marginalized. They were often subject to extra-economic coercion."). Professor Sven Beckert's phrase "extra-economic coercion" is a potentially distortive euphemism. See HANNAH ROSEN, TERROR IN THE HEART OF FREEDOM: CITIZENSHIP, SEXUAL VIOLENCE AND THE MEANING OF RACE IN THE POSTEMANCIPATION SOUTH 8 (2009) ("Throughout this book, I investigate not only the climate of terror that emerged from physical violence and racist rhetoric but also African Americans' resistance to it.").

<sup>279</sup> See DAVID W. BLIGHT, RACE AND REUNION: THE CIVIL WAR IN AMERICAN MEMORY 4 (2003) ("In the half century after the war, as the sections reconciled, by and large, the races divided.").

<sup>280</sup> See Nicoletti, *supra* note 42, at 1636 ("The war's energy . . . could forge a nation, . . . but it could also, as many American lawyers feared, destroy federalism in the process, ushering in what contemporaries . . . termed 'consolidation.' The war could provide an impetus for reform. But it could also overcorrect and kill the states entirely."); see also *id.* at 1637–38 ("By [1873], the Court's role in limiting the centripetal energy unleashed by the war generally met with the approval of most American legal commentators, who were anxious to find normalcy and achieve balance."). *But cf.* Glass, *Killing Precedent*, *supra* note 2, at 51–58 (describing the Black lawyer and congressman Robert B. Elliott, who did not accept conventional ideas and interpretations).

<sup>281</sup> See MICHAEL LES BENEDICT, PRESERVING THE CONSTITUTION: ESSAYS ON POLITICS AND THE CONSTITUTION IN THE RECONSTRUCTION ERA 5 (2006) ("Persisting commitment to federalism helps explain why Reconstruction failed to achieve its goals and why so many Republicans appeared so quickly to abandon the struggle after 1869. . . . [M]ost Republicans did not want to displace state and local governments as the primary protectors of the ordinary rights of their citizens.").

<sup>282</sup> See Barry Cushman, *Inside the "Constitutional Revolution" of 1937*, 2016 SUP. CT. REV. 367, 409 ("There can be no doubt that the period between the Wall Street crash of 1929 and the Allied victory in World War II witnessed significant transformations in

constitutional lawmaking significantly weakened the Reconstruction Amendments, using broad theories of state autonomy to undermine congressional power and individual rights.<sup>283</sup> This Part will describe the congressional choice to preserve Southern states as states, before analyzing the Court's constitutional expansion of muscular statehood itself.

#### A. Congress Chose States, Not Territories

Even as decisions to create new territories were essential at the Civil War's beginning, the decision not to create territories was vital at the end. Because the Constitution did not prescribe any particular relationship between the union and disloyal states, at least two options were available to confront postwar Southern resistance: territory or statehood.<sup>284</sup> Representative Thaddeus Stevens and Senator Charles Sumner thought Congress should control rebellious lands as "conquered territories" because Southern governments had committed "state suicide."<sup>285</sup> Southern land and people should be governed like other territories that had been acquired through violence and purchase, including New Mexico, Dakota, and Utah.<sup>286</sup> Under that scenario, the borders, local governance, and even the existence of Southern states as territories would have been determined by national politics without any participation from Southern residents.<sup>287</sup> Such territorial

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American constitutional law."); Heather P. Gerken, *Slipping the Bonds of Federalism*, 128 HARV. L. REV. 85, 86 (2014) (criticizing the Rehnquist Court and Roberts Court for the resurgence of muscular statehood).

<sup>283</sup> See EDWARDS, *supra* note 163, at 161 ("[C]onventional historiographical wisdom has laid much of the blame for Reconstruction's failure at the feet of the U.S. Supreme Court.").

<sup>284</sup> See BENEDICT, *supra* note 281, at 7 ("The whole Rebellion is beyond the Constitution . . . . The Constitution was not made for such a state of things." (quoting Francis Lieber to Martin Russell Thayer (Feb. 3, 1864))).

<sup>285</sup> See CONG. GLOBE, 38th Cong., 1st Sess. 316 (Jan. 22, 1864); BRUCE LEVINE, THADDEUS STEVENS: CIVIL WAR REVOLUTIONARY, FIGHTER FOR RACIAL JUSTICE 157 (2021); CHARLES SUMNER, OUR DOMESTIC RELATIONS: OR, HOW TO TREAT THE REBEL STATES 519–20 (1863); BENEDICT, *supra* note 281, at 8–9. Stevens and Sumner disagreed on a fundamental legal point: whether states had successfully left the union, or whether their failure to leave justified a reduction in constitutional status. However, that difference did not affect the practical scope of their proposed solutions, and Congress rejected both options in any event.

<sup>286</sup> See CONG. GLOBE, 38th Cong., 1st Sess. 316–17 (Jan. 22, 1864); BENEDICT, *supra* note 281, at 8–9.

<sup>287</sup> See Eric Biber, *The Price of Admission: Causes, Effects, and Patterns of Conditions Imposed on States Entering the Union*, 46 AM. J. LEGAL HIST. 119, 120–23 (2004) (describing Congress's broad power to impose conditions on territories as a prerequisite to statehood).

subordination could have lasted for an indefinite period, and admission to statehood could have imposed substantive preconditions to mitigate slavery's profound legacies.<sup>288</sup> The Civil War had violently confirmed the national government's extraordinary power over territories. Stevens and Sumner believed that such authority should be mobilized after the war to help freed people.

Congress unequivocally rejected any territory-based theory of Reconstruction, instead allowing Southern states to retain their constitutional status as states.<sup>289</sup> Congress imposed military governments as a self-consciously temporary measure, and it likewise excluded Southerners from electoral representation.<sup>290</sup> Yet Congress never removed states from the union or took away their constitutional statehood.<sup>291</sup> That decision to protect Southern

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<sup>288</sup> Cf. *id.* at 135–40 (describing conditions for the admission of Louisiana, which was sought to disrupt French influence).

<sup>289</sup> See OAKES, *supra* note 34, at 432 (“Reducing the states to territories put the Republicans in a legally absurd position of simultaneously declaring the secession ordinances null and void, while . . . investing those same ordinances ‘with sufficient validity to destroy the state. As a means of abolishing slavery, territorialization gained few supporters.’” (quoting CONG. GLOBE, 38th Cong., 1st Sess. 1203 (Mar. 19, 1864) (statement from Sen. John Brooks Henderson))); see also Simpson, *supra* note 278, at 87.

<sup>290</sup> The treatment of Southern states for purposes of amending the Constitution was more politically nuanced. See Travis Crum, *The Lawfulness of the Fifteenth Amendment*, 97 NOTRE DAME L. REV. 1543, 1546–50 (2022).

<sup>291</sup> Several Supreme Court opinions and many scholars have incorrectly written about readmission “to statehood” or “to the union” after the war, instead of more precisely describing the much narrower political decision to recognize and “admit” state officials “to Representation in Congress.” See, e.g., *McDonald v. City of Chicago*, 561 U.S. 742, 827 (2010) (Thomas, J., concurring in part) (incorrectly describing the relevant congressional decision as “whether, and on what conditions, [Southern] States should be readmitted to the Union” (emphasis added)); *Richardson v. Ramirez*, 418 U.S. 24, 48–49 (1974) (same); *Oregon v. Mitchell*, 400 U.S. 112, 165 (1970) (Harlan, J., concurring in part) (same); *Reynolds v. Sims*, 377 U.S. 533, 604 (1964) (Harlan, J., dissenting) (same); EDWARDS, *supra* note 163, at 109 (“readmitted to the Union”); Cynthia Nicoletti, *Strategic Litigation and Reconstruction*, in SIGNPOSTS: NEW DIRECTIONS IN SOUTHERN LEGAL HISTORY 280, 283, 285 (Sally E. Hadden & Patricia Hagler Minter eds., 2013) (“readmitted to the Union,” “keep the states out of the Union,” “states out of the union”); Derek W. Black, *Freedom, Democracy, and the Right to Education*, 116 NW. U. L. REV. 1031, 1036 (2022) (“readmission to the union”); Franita Tolson, “*In Whom Is the Right of Suffrage?*”: *The Reconstruction Acts as Sources of Constitutional Meaning*, 169 U. PA. L. REV. 2041, 2043 (2021) (“readmitted . . . into the union”); Crum, *supra* note 290, at 1543 (“After being readmitted to the Union in 1868 . . . [Congress] expelled Georgia and required the ratification of the Fifteenth Amendment as a new fundamental condition for its *second* readmission.” (emphasis in original)). Each of those mistakes embodies, at least rhetorically, the currently prevalent inattention to statehood as a category of constitutional law.

For accurate descriptions of postwar statehood, compare 14 Stat. 153 (Mar. 2, 1867) (legislation that created military districts in “rebel States” because “no legal State governments . . . now exist[.]” and provided further that, after meeting specific conditions, “the people of said rebel States shall be admitted to representation in the Congress,” (emphases

states weakened federal authority to counteract racial oppression, revealing a structural conservatism that undermines heroic images of a supposedly radical Congress in this era.<sup>292</sup> This Section explains Congress's choice between state-based and territory-based Reconstruction, which was the prerequisite for the Court's new constitutional doctrines about muscular statehood.

One of the war's hardest legal puzzles concerned the status of secessionist states.<sup>293</sup> Lincoln refused to accept any possibility that Southerners had left the United States; he forcefully claimed instead that they had failed to leave.<sup>294</sup> Lincoln's first inaugural address said the union was "perpetual," and he cited an obligation to execute federal law "*in all the States*," especially including Southern states, thus implying that secessionist declarations had not changed anything under constitutional law.<sup>295</sup> States were states, now and forever. Lincoln's special message to Congress attacked secessionist theories as a "sophism," and he predicted that suppressing the rebellion probably would not require altering any of "the powers and duties of the Federal Government relatively to the rights of the States and the people."<sup>296</sup> Congress likewise approved the war to "preserve the Union, with all the dignity, equality, and rights of the several States unimpaired," declaring that "as soon as these objects are accomplished the war ought to cease."<sup>297</sup> Early in the war, some Republicans hoped that the

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added)), with 15 Stat. 73 (June 25, 1868) ("An Act To Admit [Formerly Rebellious] States to Representation *in Congress*." (emphasis added)). See *Keith v. Clark*, 97 U.S. 454, 462 (1878) ("At no time were the rebellious States out of the pale of the Union." . . . [T]he several reconstruction acts . . . [meant] that in regard to the States in rebellion there was a simple recognition of their restored right to representation in Congress, and no readmission into the Union." (quoting *White v. Hart*, 80 U.S. 646, 651–52 (1871))).

<sup>292</sup> Cf. EDWARDS, *supra* note 163, at 89 ("[M]any white Americans were reluctant to extend the scope of federal authority, particularly into the area of individual rights. They had gone through the war to preserve, not to change the polity they had known."); Andrew Lang, *Republicanism, Race, and Reconstruction: The Ethos of Military Occupation in Civil War America*, 4 J. CIV. WAR ERA 559, 562 (2014) ("[H]erein lay the central irony of Reconstruction: the very principles for which the United States went to war in 1861—preservation of the Union's republican ideals—were the same values that helped undermine a robust, long-term military occupation in reshaping the postwar nation.").

<sup>293</sup> See Cynthia Nicoletti, *The American Civil War as a Trial by Battle*, 28 LAW & HIST. REV. 71, 80–85 (2010).

<sup>294</sup> Lincoln, *supra* note 40, at 93.

<sup>295</sup> *Id.* (emphasis added).

<sup>296</sup> President Abraham Lincoln, July 4th Message to Congress (July 4, 1861), in 7 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 3221, 3228 (James D. Richardson ed., 1917).

<sup>297</sup> CONG. GLOBE, 36th Cong., 2d Sess. 114 (1860).

nature of statehood and the union would not change very much at all.

Lincoln's Treasury Secretary, Salmon Chase, said exactly the opposite a few months later. Chase's notes are rarely mentioned by historians, but they describe a meeting with chairmen of the Senate and House Territorial Committees:<sup>298</sup>

To both of them I gave my views . . . as to the relations of the insurrectionary States to the Union; that no State . . . could withdraw from the Union . . . ; but that when the attempt was made, . . . the State organization was forfeited and it lapsed in the condition of a Territory, with which we could do what we pleased.<sup>299</sup>

Chase explained that Congress "could form a Provisional Government, as was done in Western Virginia," or "territorial Courts and, as soon as it became necessary, a Territorial Government."<sup>300</sup> For Chase, the key point was that rebellious states "could not properly be considered as States in the Union but must be readmitted from time to time, as Congress should provide."<sup>301</sup> Equally important was a recorded note that the legislative chairmen "expressed their concurrence" after hearing Chase's analysis, seemingly without any level of controversy, discussion, or surprise.<sup>302</sup> Chase and these Republican legislators imagined that perhaps the war could eliminate Southern states altogether. If states were treated as territories, their geographical borders could be redrawn, governments could be reorganized, and even names could be changed if Congress desired that much.

Lincoln's earliest theories about easy reunification became impossible as the war grew to encompass the Emancipation Proclamation, half a million people fleeing slavery, two hundred thousand Black unionist soldiers, and perhaps 750,000 military deaths.<sup>303</sup> It was no longer acceptable for disloyal Southern governments to resume their ordinary powers of statehood simply by declaring peace and surrendering arms; too much had changed. After the Three-Fifths Clause was nullified, for example,

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<sup>298</sup> Journal of Salmon P. Chase (Dec. 11, 1861), in 1 THE SALMON P. CHASE PAPERS: JOURNALS 1829–1872, at 315 (John Niven ed., 1993).

<sup>299</sup> *Id.*

<sup>300</sup> *Id.*

<sup>301</sup> *Id.* at 315–16.

<sup>302</sup> *Id.* at 316.

<sup>303</sup> See ANDREW F. LANG, IN THE WAKE OF WAR: MILITARY OCCUPATION, EMANCIPATION, AND CIVIL WAR AMERICA 1–10, 22–45 (2021).

emancipated African American populations would have dramatically boosted Southern states' power in Congress and the Electoral

College.<sup>304</sup> It seemed ridiculous to think that the North's wartime victory might allow former Confederates to choose the next U.S. president, and it was comparably absurd when Georgia actually did select the Confederacy's former Vice President as one of the state's postwar Senators.<sup>305</sup>

Southern states had to be restricted and subdued—their leaders were still dangerously disloyal—but it was unclear how that would affect their constitutional existence as states.<sup>306</sup> In 1863, Lincoln theorized that rebellious leaders had “subverted” state governments even as they “suspended” national authority.<sup>307</sup> Although various Confederate politicians and governments earnestly claimed to represent their states throughout the war, Lincoln viewed such people and organizations as unlawful imposters—without any true constitutional status—during a period when both statehood and national identity had been operationally displaced throughout the Southern countryside.<sup>308</sup> Lincoln said that any purported government inside a Southern state could only be “reestablished” and “recognized as the true government of the state”—with local officials who could exercise the state's constitutional authorities and privileges—after it satisfied Lincoln's own legal requirements for loyalty, obedience, and emancipation.<sup>309</sup> Andrew Johnson likewise said that Southern statehood

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<sup>304</sup> See EDWARDS, *supra* note 163, at 104 (“When congressional seats were reapportioned . . . , states in the former Confederacy would likely gain representatives, because African Americans would no longer be counted as only three-fifths of a white person for purposes of federal representation. That advantage struck Congressional Republicans as problematic in the extreme.”).

<sup>305</sup> See *id.* (“Why should former Confederates be rewarded after seceding, forcing the nation into war, opposing abolition, and then denying civil and political rights to the African Americans whose presence now enhanced their own political power?”); cf. MARGO J. ANDERSON, *THE AMERICAN CENSUS: A SOCIAL HISTORY* 77 (2d ed. 2015) (“There is abundant evidence to indicate that, were it not for the bonus of representation that the South would receive as a result of emancipation, Northern Republicans would not have spent much time championing the freedmen's right to suffrage.”).

<sup>306</sup> See David E. Pozen & Thomas P. Schmidt, *The Puzzles and Possibilities of Article V*, 121 *COLUM. L. REV.* 2317, 2348–50 (2021).

<sup>307</sup> See Abraham Lincoln, *The Proclamation of Amnesty and Reconstruction*, 13 *Stat.* 737 (1863).

<sup>308</sup> *Id.*

<sup>309</sup> See *id.*



during the war was “impaired, but not extinguished; their functions suspended, but not destroyed.”<sup>310</sup>

Southern states therefore remained states throughout the war, even though their governments were temporarily lost or disabled, and any postwar leadership could exercise powers of statehood only if and when they passed federally prescribed tests. The Executive Branch justified such persistent restrictions on Southern politicians and institutions by reference to war powers and the guarantee of a “Republican” government.<sup>311</sup> Even though Johnson imposed milder substantive requirements than Lincoln, both presidents thought that states were perfectly unbroken as legal entities, and their theories of federal power were deliberately intended to fade away quickly after the war.<sup>312</sup>

Unlike President Lincoln and Johnson, Sumner and Stevens proposed options that echoed earlier comments from Secretary Chase. Sumner argued that secessionist states had forfeited all “functions and powers essential to the continued existence of the State as a body-politic . . . . [T]he territory falls under the exclusive jurisdiction of Congress as other territory, and the State being, according to the language of the law, [killed by itself], ceases to exist.”<sup>313</sup> Stevens said “if a State, as a State, makes war upon the Government and becomes a belligerent power we treat it as a foreign nation, and when we conquer it we treat it just as we do any other foreign nation.”<sup>314</sup> Under either Sumner’s or Stevens’s approach, Congress could have redrawn borders or created new states, similar to Arizona’s territorial separation from New

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<sup>310</sup> President Andrew Johnson, State of the Union Address (Dec. 4, 1865), in ANDREW JOHNSON: COLLECTED STATE OF THE UNION ADDRESSES 1865–1868 (Luca Hickman ed., 2017).

<sup>311</sup> See U.S. CONST. art. IV, § 4; PETER M.R. STIRK, A HISTORY OF MILITARY OCCUPATION FROM 1792 TO 1914, at 173–74 (2016); Abraham Lincoln, The Proclamation of Amnesty and Reconstruction, 13 Stat. 737 (1863); see also FONER, *supra* note 43, at 179; JOHN FABIAN WITT, LINCOLN’S CODE: THE LAWS OF WAR IN AMERICAN HISTORY 305–17 (2013); WILLIAM M. WIECEK, THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION 133–246 (1972).

<sup>312</sup> See Andrew Johnson, Proclamation 157—Declaring that Peace, Order, Tranquility, and Civil Authority Now Exists in Adequate Throughout the Whole of the United States of America (Aug. 20, 1866) (“[T]he Constitution of the United States provides for constituent communities only as States, and not as Territories, dependencies, provinces, or protectorates . . . .”); Simpson, *supra* note 278, at 91; BENEDICT, *supra* note 281, at 7 (“By justifying the massive wartime expansion of the national government’s power in this way, Republicans believed they had preserved the Constitution from contamination. With war’s end, the occasion for using the war powers would cease. The limitations of the peacetime fundamental law would regain their sway.”).

<sup>313</sup> CONG. GLOBE, 37th Cong., 2d Sess. 737 (1862).

<sup>314</sup> CONG. GLOBE, 38th Cong., 1st Sess. 317 (1864).

Mexico, or territorial Dakota's being divided in two.<sup>315</sup> Congress could have extensively delayed admission of Southern states to achieve national policies, as occurred in Utah to eradicate polygamy.<sup>316</sup> Or Congress could have created laws to shape territorial economics and demographics, which happened with nonwhite workers and migrants in New Mexico, Hawaii, and Bleeding Kansas.<sup>317</sup>

Congress's choice to treat Southern lands as surviving states instead of newborn territories was an expression of the political conservatism that crushed reform during this period.<sup>318</sup> Recognition of statehood implied that political labels and boundaries would be drawn with permanent ink: Alabama would be Alabama in the past, present, and future, no matter what.<sup>319</sup>

Prewar arguments about state dignity and unequal treatment quickly resurfaced as Southerners demanded a return to their prior political status, and they also demanded immediate parity between North and South.<sup>320</sup> Whenever the Congress tried to regulate Southern politics and governance, the federal government faced a hailstorm of states' rights objections.<sup>321</sup> As wartime emergencies diminished, constitutional statehood put extraordinary pressure on enforcement clauses in the Reconstruction

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<sup>315</sup> The Enabling Act, 25 Stat. 180 (1889) (admitting North Dakota and South Dakota as states); see HOWARD ROBERTS LAMAR, *DAKOTA TERRITORY, 1861–69: A STUDY OF FRONTIER POLITICS* 1–15 (1966).

<sup>316</sup> See SARAH BARRINGTON GORDON, *THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH-CENTURY AMERICA* 125–40 (2002); Biber, *supra* note 287, at 119–29.

<sup>317</sup> See NOLAN M. MCCARTY, KEITH T. POOLE & HOWARD ROSENTHAL, *CONGRESS AND THE TERRITORIAL EXPANSION OF THE UNITED STATES* 29–30 (1998); see also generally MAURICE CRANDALL, *THESE PEOPLE HAVE ALWAYS BEEN A REPUBLIC: INDIGENOUS ELECTORATES IN THE U.S.-MEXICO BORDERLANDS, 1958–1912* (2019); SALLY ENGLE MERRY, *COLONIZING HAWAII: THE CULTURAL POWERS OF LAW* (2000).

<sup>318</sup> See Brook Thomas, *The Unfinished Task of Grounding Reconstruction's Promise*, 7 J. CIV. WAR ERA 16, 17–18 (2017); BENEDICT, *supra* note 281, at 84.

<sup>319</sup> See U.S. CONST. art. IV, § 3.

<sup>320</sup> See CONG. GLOBE, 41st Cong., 2d Sess. 3607–10 (May 19, 1870).

<sup>321</sup> See NICHOLAS LEMANN, *REDEMPTION: THE LAST BATTLE OF THE CIVIL WAR* 20–45 (2006); Simpson, *supra* note 278, at 93; Magdalene Zier, *Crimes of Omission: State-Action Doctrine and Anti-Lynching Legislation in the Jim Crow Era*, 73 STAN. L. REV. 777, 777–81 (2021). Congress's attempts to regulate Southern politics and governance included the "Klan" Acts of 1870 and 1871, 16 Stat. 140 (May 31, 1870), 16 Stat. 433 (Feb. 28, 1871), the Civil Rights Acts of 1866 and 1875, 14 Stat. 27 (Apr. 9, 1866), 18 Stat. 335 (Mar. 1, 1875), and the Freedmen's Bureau Acts of 1865 and 1866, 13 Stat. 507 (Mar. 3, 1865), 14 Stat. 173 (July 16, 1866).

Amendments because they were the only constitutional authority remaining to support relevant federal statutes.<sup>322</sup>

By rejecting territory-based Reconstruction, national politicians put the “states” back into states’ rights. Unlike state-based Reconstruction, territories would not have faced problems concerning national authority because the Territory Clause would have provided extensive congressional power.<sup>323</sup> Unlike states, it was relatively ordinary for territories to use national military resources for law enforcement and civic peace.<sup>324</sup> Unlike states, territorial residents could have immediately invoked the Bill of Rights instead of waiting for extremely gradual incorporation under the Fourteenth Amendment.<sup>325</sup>

Perhaps most important, federal territories did not require a hasty rush to statehood. Utah waited forty-six years before becoming a state, and territorial New Mexico lasted sixty-two years.<sup>326</sup> Although it seemed oddly unprecedented to disallow Southern states from participating in federal elections and Congress, territories were always and necessarily waiting for national approval.<sup>327</sup> In the meantime, federal politicians could have selected, managed, and structured territorial governments to serve national policies, while a combination of federal law, funding, and military presence could have influenced local governance, electoral suppression, and violence in such areas.<sup>328</sup> As a political matter, federal territories also could have converted Southern issues into national problems that deserved wider attention. All of these intrinsic features of territorial government might have helped—at least incrementally—to address Reconstruction’s legal, social, political, and economic challenges across a longer time horizon, potentially facilitating gradual

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<sup>322</sup> See *infra* Part III.B.

<sup>323</sup> See EDWARDS, *supra* note 163, at 69 (“The federal territories [ ] presented an altogether different situation, because the federal government had jurisdiction there.”).

<sup>324</sup> See William A. Blair, *The Use of Military Force to Protect the Gains of Reconstruction*, 51 CIV. WAR HIST. 388, 389–401 (2005).

<sup>325</sup> See BRANDWEIN, *supra* note 27, at 5 (discussing selective incorporation).

<sup>326</sup> See Biber, *supra* note 287, at 127 n.22 (citing JACK ERICSON EBSSEN, *THE FIRST AND SECOND UNITED STATES EMPIRES: GOVERNORS AND TERRITORIAL GOVERNMENT, 1784-1912*, at 230–31 tbl.2).

<sup>327</sup> Complaints from territorial residents that they suffered “taxation without representation” were routinely ignored. See SALER, *supra* note 10, at 64; PETER S. ONUF, *STATEHOOD AND UNION: A HISTORY OF THE NORTHWEST ORDINANCE 71* (1987).

<sup>328</sup> See FONER, *supra* note 43, at 198–216, 392; Biber, *supra* note 287, at 197.

changes in the character of Southern states and the national union as well.<sup>329</sup>

Regardless of whether one views the reasons for that decision as “contingent” or “structural,” Congress did not take the leap of creating new territories, and state-based Reconstruction quickly restored Southern states to political power, with Georgia as the last in 1870.<sup>330</sup> The result was to strengthen local resistance to federal power while weakening the prospect of a national response.<sup>331</sup> Those political implications of preserving statehood were not so surprising. From the beginning, the Constitution’s most important proslavery feature was not the three-fifths compromise or the so-called Fugitive Slave Clause.<sup>332</sup> It was instead the structural creation and legal autonomy of states that protected slavery in the first place, and across so many decades.<sup>333</sup> During Reconstruction, muscular statehood would only further contribute to its longstanding and well-earned reputation for destructive violence.<sup>334</sup>

Frederick Douglass gave a speech in 1864 that anticipated postwar disputes over statehood and territories, and he also

<sup>329</sup> See Simpson, *supra* note 278, at 90–92.

<sup>330</sup> For systematic exploration of counterfactual history, see QUENTIN DELUERMOZ & PIERRE SINGARAVÉLOU, *A PAST OF POSSIBILITIES: A HISTORY OF WHAT COULD HAVE BEEN*, at vii (2021) (“[C]ounterfactuals are the dark energy of history. . . . As a thought experiment, [counterfactual reasoning] invites us to revisit some of the most important questions of history and social science: causality, historicity, the place of imagination and experimentation, structure and individual agency, as well as civic and political engagement.”).

<sup>331</sup> See William Warren Rogers, Jr., “*Not Reconstructed by a Long Ways Yet*”: *Southwest Georgia’s Disputed Congressional Election of 1870*, 82 GA. HIST. Q. 257, 258 (1998) (“As elsewhere in the South, passionate opposition had sometimes degenerated into violence, and the term ‘ku-kluxed’ entered the American lexicon.”).

<sup>332</sup> *But cf.* SEAN WILENTZ, *NO PROPERTY IN MAN: SLAVERY AND ANTISLAVERY AT THE NATION’S FOUNDING* 1–16 (2018) (criticizing and contextualizing standard arguments that the Constitution included proslavery components).

<sup>333</sup> See Christopher R. Waldrep, *Democracy, and Lynching, in America, in SIGNPOSTS: NEW DIRECTIONS IN SOUTHERN LEGAL HISTORY* 193, 195 (2013) (“Not only did the American constitutional system allow local democracies in the states to tolerate and promote a separate white southern culture . . . but this violence also continued after emancipation. The nation’s commitment to localized democracy was the problem just as much . . . the South’s allegiance to slavery.”).

<sup>334</sup> Frederick Douglass, *Reconstruction, in ATL. MONTHLY* 761 (Dec. 1866) (“While there remains such an idea as the right of each State to control its own local affairs,—an idea . . . more deeply rooted . . . than perhaps any one other political idea,—no general assertion of human rights can be of any practical value.”). None of this ignores antislavery uses of constitutional statehood. Throughout their long historical arc, structures of statehood have obviously served a wide range of political ends apart from slavery and racism.

described what Congress could have accomplished if it had pursued political radicalism:<sup>335</sup>

[W]e should have recognized the war at the outset as . . . the necessity for a new order of social and political relations among the whole people . . . . [W]e have from the first been deluding ourselves with the miserable dream that the old Union can be revived in the states where it has been abolished.<sup>336</sup>

Lincoln, Johnson, and Congress had all accepted some version of that “miserable dream” by choosing to affirm Southern statehood, instead of implementing a “new order” through territorial governance. Douglass condemned “[t]hat old Union, whose canonized bones we saw hearse in death . . . . We are not fighting for the old Union, nor for anything like it, but for that which is ten thousand times more important; and that thing . . . is national unity.”<sup>337</sup> The congressional decision to preserve states dramatically undermined Douglass’s idealistic goals for the war: “[L]iberty for all, chains for none; the black man a soldier in war, a laborer in peace; a voter at the South as well as at the North; America his permanent home, and all Americans his fellow countrymen.”<sup>338</sup> Postwar Southerners used the constitutional power of statehood to delay or prevent most of those results for more than a century.<sup>339</sup>

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<sup>335</sup> Frederick Douglass, *The Mission of War*, N.Y. TRIB., Jan. 14, 1864, at 1.

<sup>336</sup> *Id.* at 2.

<sup>337</sup> *Id.*

<sup>338</sup> *Id.*

<sup>339</sup> See Gregory P. Downs & Kate Masur, *Echoes of War: Rethinking Post-Civil War Governance and Politics*, in *THE WORLD THE CIVIL WAR MADE* 1–21 (Gregory P. Downs & Kate Masur eds., 2015). Even former President Grant eventually criticized state-based Reconstruction as ineffective, but he did so for notably retrograde political reasons. See President Ulysses S. Grant, *Words Regarding Failure of Reconstruction Policy*, in ALLEN C. GUELZO, *RECONSTRUCTION: A CONCISE HISTORY* 130 (2018) (“The trouble about military rule [over states] in the South was that our people did not like it. It was not in accordance with our institutions.”). Grant believed that territorial governance would have given national leaders like himself more power to manage Southern states with less white resistance and less empowerment for free African Americans: “I am clear now that it would have been better for the North to have postponed suffrage, reconstruction, State governments, for ten years, and held the South in a territorial condition.” *Id.*

Given the original proponents of territorial government (political radicals Stevens and Sumner) it is ironic that the only historians to endorse that approach belonged to the notoriously racist Dunning School, especially Columbia’s legal historian John W. Burgess. See John David Smith, *Introduction*, in *THE DUNNING SCHOOL: HISTORIANS, RACE, AND THE MEANING OF RECONSTRUCTION* 19–20 (John David Smith & J. Vincent Lowery eds., 2013). Like President Grant, the Dunning School viewed territorial government as a

In the hands of politicians like Sumner and Stevens, territorial governments in the South could have increased African Americans' freedom, economic status, voting rights, and national integration. Congress's reliance on statehood had the opposite effect, resurrecting "canonized bones"—muscular statehood—that Douglass hoped would stay buried forever.<sup>340</sup> As Douglass prophesied near the end of his life: "Slavery is indeed gone; but its long, black shadow yet falls broad and large over the face of the whole country."<sup>341</sup> The failure of moderate Republicans and their electoral constituents to create federal territories reinforced violent political structures and fueled generations of racial injustice.<sup>342</sup>

### B. Constitutional Statehood with a Vengeance

The congressional decision to preserve Southern states became especially important as the Supreme Court created new constitutional doctrines supporting muscular statehood. The late nineteenth century witnessed a golden age of states' rights that remains doctrinally influential today.<sup>343</sup> Legal elites applied inaccurate versions of eighteenth-century history to normalize aggressive constitutional lawmaking, not for the first or the last time.<sup>344</sup> This Section traces the constitutional origins of muscular statehood, analyzing three relatively unfamiliar cases, before explaining how similar theories were applied to the Fourteenth Amendment in the *Slaughter-House Cases* and the *Civil Rights*

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powerful tool for disfranchising African American voters and disabling African American politicians. See PHILIP DRAY, *CAPITOL MEN: THE EPIC STORY OF RECONSTRUCTION THROUGH THE LIVES OF THE FIRST BLACK CONGRESSMEN*, at ix–xiii (2018); Nicholas W. Sacco, "I Never Was an Abolitionist": *Ulysses S. Grant and Slavery, 1854–1863*, 9 J. CIV. WAR 410, 410–15 (2019). This Article uniquely reconnects territory-based Reconstruction with the original political stance of radicals like Stevens, Sumner, and also Douglass.

<sup>340</sup> Douglass, *supra* note 335, at 2.

<sup>341</sup> FREDERICK DOUGLASS, AN ADDRESS BY FREDERICK DOUGLASS AT THE FOURTEENTH ANNIVERSARY OF STORER COLLEGE 10 (Dover, Morning Star Job Printing House 1881); W.E.B. DU BOIS, *BLACK RECONSTRUCTION IN AMERICA* 30 (1935) ("The slave went free; stood for a brief moment in the sun; then moved back again toward slavery.").

<sup>342</sup> See LEVINE, *supra* note 285, at 118–19.

<sup>343</sup> See PAMELA BRANDWEIN, *RETHINKING THE JUDICIAL SETTLEMENT OF RECONSTRUCTION* 53 (2011) ("Today, the federalism jurisprudence of the Supreme Court has returned the *Civil Rights Cases* to legal prominence.").

<sup>344</sup> Cf. *supra* Part I.B (describing Virginia's muscular theory of statehood and colonial charters); Part II.C (describing secessionists' muscular theories of statehood, control over federal policy, and cession); *supra* note 66 (collecting citations to dominant statehood mythologies).

*Cases*.<sup>345</sup> Despite ample scholarly attention to those Fourteenth Amendment cases, the decisive importance of muscular statehood is often overlooked along with its doctrinal origins in the 1860s.<sup>346</sup>

The Reconstruction Court's decision to embrace muscular statehood was not "constitutional conservatism," in the etymologically literal sense of recapturing prewar jurisprudence like *Dred Scott* and other cases that the war itself had unsettled or rejected.<sup>347</sup> On the contrary, the Court's rulings should be called "imaginary conservatism" because the Justices pretended to apply doctrine from the past while creating precedents that were remarkably new.<sup>348</sup> This Section's recognition of such novelty will be crucial to evaluating muscular statehood's status as constitutional law in Part IV.

### 1. Legal and public perspectives.

Given the war and its devastating consequences, Reconstruction might have seemed like the worst time for advocating muscular statehood to resist the federal government, but

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<sup>345</sup> 109 U.S. 3 (1883). According to Westlaw, only one law review article has even cited *Lane County v. Oregon*, 74 U.S. 71 (1869), *Texas v. White*, 74 U.S. 700 (1868), and *Collector v. Day*, 78 U.S. 113 (1870), and that author addressed a very different set of issues. See generally Kurt T. Lash, *Beyond Incorporation*, 18 J. CONTEMP. LEGAL ISSUES 447 (2009).

<sup>346</sup> See BENEDICT, *supra* note 281, at 4 ("[H]istorians of Reconstruction have tended to slight . . . a persistent concern with federalism—maintaining a proper balance between the responsibilities of the state and federal governments—and a corresponding reluctance to arm the federal government with the powers necessary to protect the rights now guaranteed to all."). For outstanding scholarship that has not centered on statehood, see, for example, Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1279 (1992) ("By the 1860's, libertarianism had displaced federalism and majoritarianism as the dominant, unifying theme of the First Amendment's freedoms."); *id.* at 1257–60 (discussing the *Slaughter-House Cases* without mentioning statehood or federalism); Balkin, *supra* note 46, at 1820 (claiming, accurately but incompletely, that the Supreme Court has "systematically undermined Congress's powers to enforce the Reconstruction Amendments"); Eric Foner, *The Supreme Court and the History of Reconstruction—And Vice Versa*, 112 COLUM. L. REV. 1585, 1587–88 (2012) (claiming that "the Supreme Court played a crucial role" in "abandon[ing] Reconstruction in 1877," while also observing that "jurists are not solely to blame"); Michael A. Ross, *Justice Miller's Reconstruction: The Slaughter-House Cases, Health Codes, and Civil Rights in New Orleans, 1861–1873*, J.S. HIST. 649, 651–52 (1998) (canvassing extant scholarship and also offering an explanation for the Court's decision that does not highlight statehood).

<sup>347</sup> BENEDICT, *supra* note 281 (using the term "constitutional conservatism"). See generally *Dred Scott*, 60 U.S. 393.

<sup>348</sup> Cf. WALTER BENJAMIN, TOWARD THE CRITIQUE OF VIOLENCE: A CRITICAL EDITION 45 (Peter Fenves & Julia Ng eds., 2021) (drawing a distinction between law-positing and law-preserving violence); *id.* at 56 ("Justice is the principle of all divine end-positing, power the principle of all mythic law-positing.").

some legal elites thought it was the best time.<sup>349</sup> Their overriding fear was potential “consolidation” under a federal government that could annihilate states altogether.<sup>350</sup> Military Reconstruction had already blocked states from participating in the federal government, thus jeopardizing even the skeleton of statehood.<sup>351</sup> The Reconstruction Amendments also created new individual rights and congressional powers, prompting ironic fears that the United States might somehow slip into tyranny only after having abolished the systematically violent oppression of slavery.<sup>352</sup> Although the war had eliminated now-obvious evils of slavery and secession, white professionals saw distressing risks that economic, social, and political disruption might be carried too far.<sup>353</sup> Lawyers and judges believed that they might represent the last best chance to protect elite values in government.<sup>354</sup>

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<sup>349</sup> See Nicoletti, *supra* note 291, at 267 (“During the 1860s, many lawyers, both northern and southern, shared basic concerns about what they perceived as the lawless course of the national government during the Civil War and Reconstruction.”). Nicoletti has collected extensive materials that describe legal theories and reactions during Reconstruction. See, e.g., CYNTHIA NICOLETTI, SECESSION BY TRIAL: THE TREASON PROSECUTION OF JEFFERSON DAVIS (2017); Nicoletti, *supra* note 42, at 1631; Nicoletti, *supra* note 291, at 265; Nicoletti, *supra* note 293, at 71. Some of my conclusions from that evidence are different from hers.

<sup>350</sup> See Nicoletti, *supra* note 291, at 271 (“When the South is conquered . . . the lines of States, here and there, for the purpose of convenient government, are to be rubbed out . . . and a vast colonial military tenure will be created to ensure easy subjection.” (quoting from a statement of attorney William Bradford Reed on March 28, 1863)); Frank Towers, *The Threat of Consolidation: States’ Rights and American Discourses of Nation and Empire in the Nineteenth Century*, 9 J. CIV. WAR ERA 612, 626 (2019) (“[Despite] their rhetorical embrace of modern nationalism, Civil War-era Republicans remained committed to federalism’s system of divided powers.”).

<sup>351</sup> See David P. Currie, *The Reconstruction Congress*, 75 U. CHI. L. REV. 383, 385 (2008) (questioning the refusal to seat senators and representatives from Southern states).

<sup>352</sup> Representative George Anderson proposed to eliminate “United States” from the country’s name. See H.R.J. Res. 61, 39th Cong. (1866). Senator Aaron Cragin offered a constitutional amendment “to kill forever the heresy of state sovereignty.” *From Washington: Special Dispatches to the New York Times*, N.Y. TIMES, Dec. 27, 1865, at 4 (“Paramount sovereignty shall reside within the United States; and every citizen . . . shall be bound, and primarily owe faith, loyalty and allegiance to the United States.”); see Nicoletti, *supra* note 42, at 1661. The ironic and tragic reality was that, of course, state-based slavery had meant brutal tyranny and death for millions of people across generations. See JOHNSON, *supra* note 38, at 5 (“The bright-white tide of slavery-as-progress . . . was shadowed by a host of boomtime terrors.”); *id.* at 9 (“The Cotton Kingdom was built out of . . . grain, flesh and cotton; pain, hunger, and fatigue.”).

<sup>353</sup> See FONER, *supra* note 163, at 18.

<sup>354</sup> See Nicoletti, *supra* note 291, at 267–69 (“[A]nti-Reconstruction attorneys . . . viewed . . . litigation as the most effective way to combat . . . a constitutionally suspect social program authorized by the legislative branch. United by a common commitment to restoring the rule of law in the face of [ ] constitutional anomalies . . . , these attorneys . . . attacked Congressional Reconstruction from several different angles.”).



By contrast, radicals like Frederick Douglass were quite eager to alter states' constitutional authority after the war. Douglass wrote that even the Thirteenth and Fourteenth Amendments could not solve the nation's problems "unless the whole structure of the government is changed from a government by States to something like a despotic central government, with power to control even the municipal regulations of States."<sup>355</sup> The nation's ability to manage the peace, while facing extraordinary Southern resistance, would decide whether "the tremendous war . . . shall pass into history a miserable failure, barren of permanent results."<sup>356</sup> Douglass demanded that Reconstruction should "put an end to the present anarchical state of things in the late rebellious States—where frightful murders and wholesale massacres are perpetrated in the very presence of Federal soldiers."<sup>357</sup> Constitutional statehood must not impede America's transformation away from its blood-soaked history as a slaveholders' republic.<sup>358</sup>

The views of Congress and the national electorate were in between legal conservatives and Douglassian activists, which is why conflicting "references to the war's transformative impact . . . fairly litter[ed] the *Congressional Globe*."<sup>359</sup> Some politicians thought that America's nationhood was "written in letters of mingled fire and blood," requiring newly dramatic reductions in state authority.<sup>360</sup> Other leaders instead warned against any "attempted consolidation of . . . States in a centralized Government."<sup>361</sup>

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<sup>355</sup> Frederick Douglass, *Reconstruction*, in *ATL. MONTHLY*, Dec. 1866, at 761 (using the word "despotic" with ironic ambivalence); see *id.* (explaining that, although it was "neither possible nor desirable" to completely eliminate statehood, Douglass would embrace any form of federal power that might "render the rights of the States compatible with the sacred rights of human nature").

<sup>356</sup> *Id.*

<sup>357</sup> *Id.* ("The plain, common-sense way of doing this work . . . is simply to establish in the South one law, one government, one administration of justice, one condition to the exercise of the elective franchise, for men of all races and colors alike."). Douglass understood that the mechanisms for doing so would require massive power—military, legal, political, and financial—that would also have to meet new circumstances as they arose.

<sup>358</sup> See DON E. FEHRENBACHER, *THE SLAVEHOLDING REPUBLIC* 341 (2002) ("The United States did not deserve to be called a nation, charged Douglass, [if] under the state-centered interpretation of the Court the federal government was incapable of protecting 'the rights of its own citizens upon its own soil.'" (quoting a civil rights meeting in Washington, D.C., on October 22, 1883)).

<sup>359</sup> Nicoletti, *supra* note 42, at 1661.

<sup>360</sup> *CONG. GLOBE*, 39th Cong., 1st Sess. 2103 (May 4, 1866) (Rep. Samuel Shellabarger).

<sup>361</sup> *CONG. GLOBE*, 39th Cong., 1st Sess. 292 (Jan. 18, 1866) (Sen. James Nesmith).

One commentator wrote—as a former Calhounite—that the country must find some way to “assert union without consolidation, and State rights without disintegration.”<sup>362</sup> On the other side, a journalist proposed a “careful revision” of state and federal power through political mechanisms: “Our great safeguard against despotism does not lie . . . in [how] we parcel out power between the governing bodies, but in the character of the persons we charge with the management of our affairs.”<sup>363</sup> None of those positions could claim to represent a political consensus, and certainly there was no groundswell “constitutional moment” in support of muscular statehood.<sup>364</sup> On the contrary, specific postwar amendments created new personal rights and congressional powers without any comparable effort to extend or support states’ muscular authority to resist the federal government.<sup>365</sup>

Many lawyers and judges from this era were champions of muscular statehood with George Ticknor Curtis as an excellent example. Before the war, Curtis opposed slavery, and he was an advocate for Dred Scott in the Supreme Court.<sup>366</sup> By 1875, however, Curtis strongly endorsed muscular statehood, asserting that courts must “preserve” a “dividing line between the sovereignty of the United States and the sovereignty of each separate State . . . . It is now of infinite consequence for us to perceive that any effort . . . to break down that line, is revolutionary.”<sup>367</sup> That verb—“preserve”—was misleading because even Curtis could not say exactly where the constitutional “dividing line” should be drawn, thus implying that perhaps it *had not* been satisfactorily drawn

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<sup>362</sup> O.A. BROWNSON, *THE AMERICAN REPUBLIC: ITS CONSTITUTION, TENDENCIES, AND DESTINY* 7–8 (1865).

<sup>363</sup> E. L. Godkin, *The Constitution, and Its Defects*, 99 N. AM. REV. 117, 136–37 (1864) (analogizing “the doctrine of ‘State rights’” to a dangerous “malaria [that] shows itself in some persons in violent fever, and in others only in a lowered vitality”).

<sup>364</sup> See generally BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 6–10 (1991) (offering a theory of “constitutional moments” that alter constitutional law without using Article V’s formal procedure for amendment).

<sup>365</sup> See U.S. CONST. amends. XIII–XV.

<sup>366</sup> George Curtis wrote an antislavery pamphlet about federal territories. See GEORGE TICKNOR CURTIS, *THE JUST SUPREMACY OF CONGRESS OVER THE TERRITORIES* (1859). His brother was Justice Benjamin Curtis, who dissented in *Dred Scott*. See Dean Grodzins, “*Slave Law*” versus “*Lynch Law*” in Boston, *Benjamin Robbins Curtis, Theodore Parker, and the Fugitive Slave Crisis, 1850–1855*, 12 MASS. HIST. REV. 1, 2 (2010) (“[Benjamin] Curtis’s younger brother, George Ticknor Curtis, served as a very active ‘fugitive slave commissioner.’ ([Abolitionist Theodore] Parker called him a ‘kidnapper’s jackal.’)”) (quoting Theodore Parker, “Journal Volume O” 134 (Nov. 1, 1851)).

<sup>367</sup> GEORGE TICKNOR CURTIS, *A DISCOURSE ON THE NATURE OF THE AMERICAN UNION, AS THE PRINCIPAL CONTROVERSY INVOLVED IN THE LATE CIVIL WAR* 29–30 (1875).

beforehand. Curtis feared, in any event, that the postwar consolidation of federal power might somehow risk a “government more despotic than that of Russia.”<sup>368</sup>

Another example is Isaac Redfield, a lifelong Democrat, who wrote that the country’s “*good lawyers* . . . [are] extremely solicitous to maintain the just balance between the powers and functions of the States and those of the nation, and so jealous of encroachments by the latter upon the just prerogatives of the former.”<sup>369</sup> Redfield concluded that “all the functions and powers of the States remain the same as before the rebellion,” but he did not acknowledge that the rebellion stemmed from violent disagreements about what states’ powers actually were.<sup>370</sup> Accurate legal history suggests that there was not any consensus or “balance” that anyone could hope to “maintain.” On the contrary, postwar lawyers who were “extremely solicitous” and “jealous of encroachments” were mobilizing conservative words to achieve something that was remarkably new.

## 2. Statehood that ignored Reconstruction.

The Supreme Court likewise took sides against political radicals, minimized the Civil War, and created newly muscular statehood while insisting that such doctrines were not new. Salmon Chase, who became Chief Justice in 1864, was especially important for three early cases that did not involve the Reconstruction Amendments.<sup>371</sup>

First, Chase wrote a unanimous opinion in *Lane County v. Oregon*<sup>372</sup>—just a few years after the war—holding that Congress’s legislative decision to make greenbacks into legal tender did not require states to accept greenbacks as tax payments.<sup>373</sup> *Lane County* exclusively concerned questions of statutory

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<sup>368</sup> *Id.* at 30.

<sup>369</sup> ISAAC REDFIELD, JUDGE REDFIELD’S LETTER TO SENATOR FOOT UPON THE POINTS SETTLED BY THE WAR 9 (1865) (emphasis added). Redfield was the Chief Justice of Vermont’s Supreme Court. See *Isaac F. Redfield*, 24 AM. L. REG. 257, 257 (May 1876). One of his opinions was quoted in the *Slaughter-House Cases*, 83 U.S. 36, 62 (1873) (referencing “another eminent judge”) (citing *Thorpe v. Rutland & Burlington R.R.*, 27 Vt. 140 (1855)).

<sup>370</sup> REDFIELD, *supra* note 369, at 17.

<sup>371</sup> Chase had a long career discussing states’ rights before the war. See Woods, *supra* note 225, at 244 (“I will show that these aggressions of Slavery encroach upon State Rights; that they have invaded the sovereignty of Ohio.” (quoting a stump speech by then-Governor Salmon Chase in 1857)).

<sup>372</sup> 74 U.S. 71 (1868).

<sup>373</sup> *Id.* at 81.

interpretation, yet the Court's reasoning analyzed the constitutional origins of statehood itself.<sup>374</sup> Chase wrote for the Court that states had a logical existence prior to all interstate government: "The States disunited might continue to exist. Without the States in union there could be no . . . United States."<sup>375</sup> Perhaps Congress was constitutionally unable to regulate state tax payments even if it tried.

The Court's description of states as original and primary echoed states' rights arguments from earlier generations, but that narrative did not match the history of revolutionaries such as Richard Henry Lee and John Dickinson, nor did it cohere with the Federalists' arguments for ratification.<sup>376</sup> States' experience in the Revolutionary War instead mirrored Benjamin Franklin's "Join, or Die" snake cartoon, and that same image was used in the Civil War to illustrate the integration of states as an organic whole.<sup>377</sup> Without the union, there never would have been any states, and vice versa.

*Lane County* not only mischaracterized eighteenth-century history, it also contradicted Lincoln's assertions during the Civil War: "The States have their *status* IN the Union, and they have no other legal *status* . . . . The Union is older than any of the States, and, in fact, it created them as States."<sup>378</sup> Without any explicit constitutional protection for states' preferences about currency, skeletal statehood should have presumptively supported Congress's legislative and democratic choice no matter what an individual state might prefer.

Instead, Chase wrote in blanket terms that "nearly the whole charge of interior regulation is committed" to states because "all powers *not expressly delegated* to the national government are reserved."<sup>379</sup> That was an obvious exaggeration, echoing language from the Articles of Confederation that the Constitution deliberately scaled back.<sup>380</sup> Southern extremists before the Civil War had

<sup>374</sup> *Id.* at 75–78.

<sup>375</sup> *Id.* at 76.

<sup>376</sup> See *supra* Part I.

<sup>377</sup> See Karen Severud Cook, *Benjamin Franklin and the Snake that Would Not Die*, 22 BRIT. LIB. J. 88, 88 (1996) ("The snake cartoon was [] repeatedly . . . adapted to new political circumstances: the Stamp Act crisis in the 1760s, the American Revolution in the 1770s and, finally, the American Civil War in the 1860s.").

<sup>378</sup> Abraham Lincoln, *Message to Congress, July 4, 1861, Second Printed Draft, with Changes in Lincoln's Hand* (July 4, 1861), in ABRAHAM LINCOLN PAPERS: SERIES 1 (1916) (emphasis in original).

<sup>379</sup> *Lane County*, 74 U.S. at 76 (emphasis added).

<sup>380</sup> See *supra* Part I.

used preconstitutional language from the Articles about “express” delegation as support for their allegedly “reserved” “power” to secede, claiming that secession was never “delegated” to the United States.<sup>381</sup> Even though skeletal statehood seemingly triumphed over states’ rights, constitutional theories of muscular statehood were growing stronger in the Supreme Court.

The biggest problem in *Lane County* was not the litigated result, but the Court’s flawed insistence that states came first and were legally independent of the union. Similarly spurious histories were a crucial premise supporting nullification, secession, and theories of “common-property” before the war. Such arguments did not belong in a postwar judicial opinion for a unanimous Court written by longtime abolitionist Salmon Chase.

A second case is *Texas v. White*,<sup>382</sup> which would become the most famous opinion of Chase’s judicial career.<sup>383</sup> The key issue involved federal bond payments, but a preliminary jurisdictional question was whether Texas remained a state during the war.<sup>384</sup> As with *Lane County*, the Court’s reasoning went far beyond any adjudicative necessity, stating that “[t]he Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.”<sup>385</sup>

The first half of that sentence—“indestructible Union”—tracked entirely ordinary Republican critiques of secession.<sup>386</sup> By

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<sup>381</sup> See Roman J. Hoyos, *Peaceful Revolution and Popular Sovereignty: Reassessing the Constitutionality of Southern Secession*, in SIGNPOSTS: NEW DIRECTIONS IN SOUTHERN LEGAL HISTORY 249 (Salley E. Hadden & Patricia Hagler Minter eds., 2013) (“‘It is absurd to talk of this right to secede not being conferred by the Constitution,’ wrote South Carolina’s William Porter. ‘The Constitution can confer no right upon the states.’” (quoting William D. Porter, *State Sovereignty and the Doctrine of Coercion*, 1860 Association, Tract 2, at 32)); *id.* (“William Grayson argued that, ‘to say [that secession] is not in the Constitution, is to say that it has not been granted away; it therefore remains.’” (quoting William J. Grayson, *Reply to Professor Hodge on the “State of the Country”* (Charleston, Evans and Cogswell 1861))); *id.* (“Georgia’s U.S. Senator, Robert Toombs . . . declar[ed] flatly that ‘the Constitution is not the place to look for State rights. If that right belongs to independent States, and they did not cede to it the Federal Government, it is reserved to the States.’” (quoting CONG. GLOBE, 36th Cong., 2d Sess. 269 (1860))).

<sup>382</sup> 74 U.S. 700 (1868).

<sup>383</sup> *Id.*

<sup>384</sup> *Id.* at 724. The case was brought by Texas as a plaintiff, using the Supreme Court’s original jurisdiction. See U.S. CONST., art. III, § 2 (“In all Cases . . . in which a State shall be Party, the supreme Court shall have original Jurisdiction.”).

<sup>385</sup> *White*, 74 U.S. at 725.

<sup>386</sup> Even President Buchanan said that “no State has a right by its own act to secede from the Union or throw off its federal obligations at pleasure.” James Buchanan, *January 8, 1861: Message on Threats to the Peace and Existence of the Union*, UNIV. VA. MILLER CENTER, <https://perma.cc/T33T-7LM6>.

contrast, the second half—“indestructible States”—was exactly the opposite of Chase’s argument as Treasury Secretary, when he said that for Southern rebels, “the State organization was forfeited and it lapsed into the condition of a Territory with which we could do what we pleased.”<sup>387</sup> The *White* Court’s language about “indestructible States” also contradicted “state suicide” and “conquered territory” theories that Sumner and Stevens advocated publicly.<sup>388</sup> The Court implicitly condemned those policies even though they were never enacted, much less were they challenged in litigation.

Exactly what did it mean for the Court to say that *states* were “indestructible,” as compared to the union? The doctrine of indestructible statehood was irrelevant to deciding the case because Congress never tried to destroy any state’s statehood.<sup>389</sup> The only operative question was whether Texas’s *own secession* defeated statehood, and a longstanding consensus among presidents, Congress, and the Court agreed that the rebels’ attempted secession was a spectacular failure. Chase went much farther than the case required, explaining that the union’s survival and victory had not diminished any state’s “distinct and individual existence, or . . . right of self-government.”<sup>390</sup> On the contrary, “the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government.”<sup>391</sup>

The Court’s dictum about states’ rights was especially important because the defendants’ lawyers had designed their strategy to “condemn Reconstruction’s shaky constitutional basis.”<sup>392</sup> The lawyers thought, on one hand, that if the Court ruled that

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<sup>387</sup> Journal of Salmon P. Chase (Dec. 11, 1861), in 1 THE SALMON P. CHASE PAPERS: JOURNALS 1829–1872, at 315 (John Niven ed., 1993). Contrast Chase’s earlier statement as Treasury Secretary with his statement as Chief Justice in *White*: “[T]his conclusion, in our judgment, is not in conflict with any act or declaration of any department of the National government, but entirely in accordance with the whole series of such acts and declarations since the first outbreak of the rebellion.” 74 U.S. at 726.

<sup>388</sup> See *supra* Part III.A.

<sup>389</sup> See *supra* Part III.A (describing state-based Reconstruction).

<sup>390</sup> *White*, 74 U.S. at 725.

<sup>391</sup> *Id.* at 725–26 (“The act which consummated her admission into the Union was something more than a compact; it was the incorporation of a new member into the political body. And it was final. . . . There was no place for reconsideration, or revocation, except through revolution, or through consent of the States.”).

<sup>392</sup> Nicoletti, *supra* note 291, at 282; see *id.* at 267 (“Although legal historians have not focused on the coordinated efforts of these attorneys, cause lawyering played a very important role in hastening the early demise of Radical Reconstruction.”).

Texas *was not a state*, secession itself would be recognized as lawful. On the other hand, if the Court ruled that Texas *was a state*, the federal government might be forced to include unreconstructed Texas as a full participant in Congress, presidential elections, and Article V constitutional amendments.<sup>393</sup>

The immediate result in *White* favored Texas, but the doctrine of indestructible states raised unnecessarily ominous threats for congressional Reconstruction across the board.<sup>394</sup> No one understood these implications better than Chase himself. The Court did not need to endorse dangerous theories of muscular and indestructible statehood; it could have simply held that Texas remained a state because it failed to secede.

A third case, *Collector v. Day*,<sup>395</sup> held that Congress could not tax the salaries of state judges.<sup>396</sup> Justice Samuel Nelson's majority opinion quoted *Lane County* and elaborated the Court's muscular view of statehood as though it were somehow ordinary: "It is a familiar rule . . . that the sovereign powers vested in the State governments by their respective constitutions, remained unaltered and unimpaired, except so far as they were granted to the government of the United States."<sup>397</sup> The Civil War once again was implicitly silenced.

Echoing Southern hardliners, the Court repeated its exaggerations about the Tenth Amendment, declaring that the federal government "can claim no powers which are not granted to it by the Constitution, and the powers actually granted must be such as are *expressly* given, or given by *necessary* implication."<sup>398</sup> The Court also held that states were "as independent of the Federal government, as that government, within its sphere is independent of the States."<sup>399</sup> Similar statements about states'

<sup>393</sup> *Id.*, at 282.

<sup>394</sup> *Id.*, at 283–85.

<sup>395</sup> 78 U.S. 113 (1870).

<sup>396</sup> 78 U.S. 113, 122 (1870).

<sup>397</sup> *Id.* at 124.

<sup>398</sup> *Id.* (emphasis added).

<sup>399</sup> *Id.* The Court's language perhaps deliberately echoed an older tension between opinions from Chief Justice Marshall and Chief Justice Taney. Compare *Ableman v. Booth*, 62 U.S. 506, 516, 523 (1859) (Taney, C.J.) (upholding enforcement of the so-called Fugitive Slave Act while explaining that "the powers of the General Government, and of the State, . . . are yet separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres" and that "the complex character of our Government [ ] [provides for] the existence of two distinct and separate sovereignties within the same territorial space, each of them restricted in its powers, and each within its sphere of action, prescribed by the Constitution of the United States, independent of the other."), with *McCulloch v. Maryland*, 17 U.S. 316, 384 (1819) (Marshall, C.J.)

independence and their insulation from federal policy would have been routine arguments coming from Southerner extremists before the war, but they were more surprising coming from the Supreme Court's Republican-dominated majority in 1870.

Lincoln's own approach to statehood had insisted that federal authority generally was not bound by implicit doctrines of states' rights or sovereignty.<sup>400</sup> Yet the *Day* Court invented a new immunity that excluded state judges from federal tax legislation, holding that "the means and instrumentalities employed for carrying on the operations of [state] governments, for preserving their existence, and fulfilling the high and responsible duties assigned to them in the Constitution, should be left free and unimpaired."<sup>401</sup> The Court further proclaimed that, without "their sovereign and reserved rights . . . no one of the States under the form of government guaranteed by the Constitution could long preserve its existence. A despotic government might."<sup>402</sup> John Calhoun and Jefferson Davis would have applauded the Reconstruction Court's remarkably muscular view of constitutional statehood, including states' allegedly defensive right to resist a "despotic" national government.<sup>403</sup>

Modern readers might not be surprised by the Court's reasoning in *Lane County*, *White*, and *Day* because it echoes so-called "New Federalism" doctrines that have flourished for the past fifty

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(stating inversely and unilaterally that "[u]nless a specific means be *expressly prohibited to the general government*, it has it, within the sphere of its specified powers" (emphasis added)).

<sup>400</sup> See *supra* notes 226–232 and accompanying text.

<sup>401</sup> *Day*, 78 U.S. at 125. The Court cited dictum from yet another Chase opinion as support. See *Veazie Bank v. Fenno*, 75 U.S. 533, 547 (1869) ("It may be admitted [not on these facts] that the reserved rights of the States, such as the right . . . to administer justice through the courts . . . are not proper subjects of the taxing power of Congress.").

<sup>402</sup> *Day*, 78 U.S. at 126.

<sup>403</sup> See 3 CONG. GLOBE, 31st Cong., 1 Sess. 455 (Mar. 4, 1850) (statement of Sen. John Calhoun) ("[Force] may, indeed, keep [the States] connected; but the connection will partake much more of . . . subjugation . . . than the union of free, independent, and sovereign States in one confederation, as they stood in the early stages of the government, and which only is worthy of the sacred name of Union."). Cf. Towers, *supra* note 350, at 617 ("There is no evil more to be deprecated than the consolidation of this government.' 'Those who are in favor of consolidation' . . . would 'sacrifice the equal rights which belong to every member of the confederacy, to combinations of interested majorities for personal or political objects.'" (quoting Speech of Robert Y. Hayne of South Carolina, January 19, 1830 and Speech of Robert Y. Hayne of South Carolina, January 25, 1830, in THE WEBSTER-HAYNE DEBATE ON THE NATURE OF THE UNION: SELECTED DOCUMENTS 10, 73 (Herman Belz ed., 2000))).



years.<sup>404</sup> Nearly every lawyer and law student has been told the same basic myth: (1) states at some point *truly were* independent and sovereign, (2) they sacrificed some fraction of their primordial independence to join the United States, and (3) the Articles and Constitution preserved the implicit remainder as constitutional law that remains insulated from national politics even today.

This Article has challenged that mythology at the source, demonstrating that arguments about surrendered sovereignty and preserved remainders were disputed throughout the Founding Era and the Civil War Era.<sup>405</sup> The Constitution's text never explained which substantive powers were "reserved" to the states, and despite its authoritative rhetoric, the postwar Court could not possibly restore a prewar consensus about statehood because there was no consensus to find.<sup>406</sup> Unionists who won the war were opposed to muscular states' rights, and that should count for something.<sup>407</sup> Instead, the Court's analysis quietly marginalized the Civil War along with arguments from Frederick Douglass, Thaddeus Stevens, Charles Sumner, Salmon Chase when he was Treasury Secretary, and Abraham Lincoln himself, thus confirming a nineteenth-century aphorism that "after the battle of arms comes the battle of history. The cause that triumphs in the field does not always triumph in history."<sup>408</sup>

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<sup>404</sup> The first law review article to identify "New Federalism" in Supreme Court jurisprudence was Laurence H. Tribe, *Unraveling "National League of Cities": The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1065, 1065 (1977). Tribe incorrectly predicted that the Supreme Court's aggressive efforts to impose novel limitations on congressional decision-making would represent only "an unhappy pause in our progress toward a just society." *Id.* *But cf.* *National Fed. Indep. Bus. v. Sebelius*, 567 U.S. 519, 575–85 (2012) (opinion of Roberts, C.J.) (invalidating Medicaid expansion under the Affordable Care Act as unconstitutionally coercive).

<sup>405</sup> See *supra* Part I.A (Declaration of Independence); Part I.B (Articles of Confederation and Constitution); Part II.A–C (Civil War); Part III.A–B (Reconstruction).

<sup>406</sup> See Nicoletti, *supra* note 42, at 1648 ("Politicians, theorists, and constitutional lawyers wrangled endlessly over the precise relationship between the people, the states, and the national government. . . . The arguments were grounded not so much in text but in logical inferences about the history of the creation of the United States as a government. . . .").

<sup>407</sup> See KYVIG, *supra* note 236, at 153:

The force of arms crushed not only slavery but also the argument that individual states possessed the power to alter the Constitution. . . . No longer could a credible claim be made that the Constitution was a compact of the states, severable by any one of them. Indeed, the northern victory was . . . a victory for Article V. When the guns fell silent, it stood as the sole means of formally altering the Constitution.

<sup>408</sup> E.V. SMALLEY, HISTORY, PRINCIPLES, EARLY LEADERS, ACHIEVEMENTS, OF THE REPUBLICAN PARTY 273 (1880) (quoting James Garfield).

### 3. Statehood that undermined Reconstruction.

Even if some readers were inclined—regardless of historical evidence—to believe that *Lane County, White, and Day* were simply applying prewar ideas about statehood to postwar circumstances, the most destructive examples of muscular statehood emerged when the Court used similar doctrines to undermine the Reconstruction Amendments, which had no prewar analogy at all. Many scholars have criticized the Supreme Court’s textual analysis of “privileges or immunities” and “state action” under the Fourteenth Amendment.<sup>409</sup> But the most important doctrinal factor in those decisions was the Court’s commitment to muscular statehood, which had appeared several years earlier.

*Slaughter-House* marked an important crossroads because the Court applied muscular statehood to the Fourteenth Amendment in a case that did not directly involve race.<sup>410</sup> The plaintiffs’ challenge to a municipal monopoly was the Supreme Court’s first occasion to interpret the Fourteenth Amendment, yet the majority opinion did not begin with constitutional text, new individual rights, or any other related topic. On the contrary, the Court’s first five pages and last five pages of analysis were almost entirely focused on muscular statehood and its implications for limiting congressional power.<sup>411</sup> For example, the Court cited numerous authorities about state police power and the Commerce Clause—even though those doctrines were not at all contested in the case—as indirect proof that local slaughterhouse ordinances were “the right and the duty of . . . the supreme power of the

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<sup>409</sup> See BRANDWEIN, *supra* note 343, at 5–6 (describing a “standard view” among academics that “the Court followed and cemented” broader policy shifts, principally after the presidential election of 1876); *id.* at 55 (“The *Slaughter-House Cases* . . . [is] taken to be the Supreme Court’s opening blow against Reconstruction.”); Balkin, *supra* note 46, at 1818 (“The mistake of the *Civil Rights Cases* was construing [Congress’s enforcement] power narrowly.”); Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *Race, Federalism, and Voting Rights*, 2015 U. CHI. LEG. F. 113, 139 (2015) (“In due course, [ ] the Supreme Court, and the nation in general, lost its appetite to take on the racist elements of its society. Scholars disagree whether *Slaughterhouse* signals this shift, or *United States v. Cruikshank*, or the *Civil Rights Cases*, or even *Plessy v. Ferguson*.”); Ross, *supra* note 346, at 649 (“Few decisions by the United States Supreme Court have been more criticized than the *Slaughter-House Cases*.”); *supra* note 346 (collecting additional critiques).

<sup>410</sup> 83 U.S. 36 (1873).

<sup>411</sup> See *id.* at 61–67, 77–82. The majority opinion was roughly twenty-five pages altogether, including an extensive procedural history and other background information. *Id.* at 57–83.

State,” part of “immense mass” of “police regulation” that “belonged to the States, and did not belong to Congress.”<sup>412</sup>

Echoing broader patterns concerning muscular statehood, the Court posited a substantive “line which should separate the powers of the National government from those of the State governments,” and the Court proceeded to describe a nearly infinite range of subjects “within the *constitutional* and legislative power of the States, and without that of the Federal government.”<sup>413</sup> The Court held that the Fourteenth Amendment did not “transfer the security and protection of [such matters] . . . from the States to the Federal government,” flatly refusing to bring “within the power of Congress the entire domain of civil rights . . . belonging exclusively to the States.”<sup>414</sup> Once again, the immediate facts of *Slaughter-House* had no connection at all to federal legislative power.

Modern observers have criticized the Court’s distinction between state and national citizenship, including state and national “privileges” and “immunities.” In context, however, that distinction was merely a vehicle for delivering the Court’s theory of muscular statehood. The most important sentence in the majority opinion was amazingly candid about its results-oriented jurisprudence: “The argument we admit is not always the most conclusive which is drawn from the consequences. . . . But [in this case] . . . the argument has a force that is irresistible.”<sup>415</sup>

The Court’s attention to “irresistible” consequences was explicitly rooted in the constitutional authority of states and corresponding limits upon congressional power.<sup>416</sup> If the Court were to expand individual rights under Section 1 of the Fourteenth Amendment, that would intolerably expand federal enforcement authority under Section 5, thereby “fetter[ing] and degrad[ing] the State governments by subjecting them to the control of Congress, in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character.”<sup>417</sup> The Court used an improvised image of constitutional statehood to

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<sup>412</sup> *Id.* at 61–64.

<sup>413</sup> *Id.* at 77, 81 (emphasis added).

<sup>414</sup> *Id.* at 77.

<sup>415</sup> *Slaughter-House*, 83 U.S. at 78; *see id.* at 72–77 (distinguishing state citizenship from national citizenship).

<sup>416</sup> *Cf. id.* at 78 (noting risks that expanding Fourteenth Amendment rights also might “constitute this court a perpetual censor upon all legislation of the States, on the civil rights of their own citizens, with authority to nullify such as it did not approve”).

<sup>417</sup> *Id.*

derogate the Fourteenth Amendment's powers for Congress, and that result with respect to state autonomy required by inference a narrow view of citizens' constitutional privileges or immunities.

In *Slaughter-House*, even the slightest possibility of infringing muscular statehood appeared "so serious, so far-reaching and pervading, so great a departure from the *structure and spirit* of our institutions" that the majority failed to address the dissenting arguments that some observers celebrate today.<sup>418</sup> Justice Stephen Field complained that the majority was limiting the Fourteenth Amendment "to such privileges and immunities as were before its adoption specially designated in the Constitution or necessarily implied as belonging to citizens of the United States," thereby making Section 1 "a vain and idle enactment, which accomplished nothing."<sup>419</sup> Justice Noah Swayne similarly wrote that the majority's opinion about the Fourteenth Amendment had turned "what was meant for bread into a stone."<sup>420</sup>

Too bad. The majority sacrificed plausible rights claims—including individual protection against potentially destructive monopolies—simply because muscular statehood required that decision.<sup>421</sup> The Court insisted that the Reconstruction Amendments must not "destroy the main features of the general system."<sup>422</sup> Yet given the Court's narrow definition of individual rights and congressional powers, the Reconstruction Amendments were hardly allowed to change anything about statehood, and of course that eviscerated Congress's enforcement powers. The *Slaughter-House* Court cited recently manufactured traditions about the prewar past and applied those "traditions" to unprecedented circumstances, thereby eviscerating the new amendments that were explicitly designed to reduce the constitutional power of states.

Perhaps most shocking was the majority's breathtaking self-confidence: "[W]hatever fluctuations may be seen in the history of public opinion on this subject . . . , we think it will be found that

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<sup>418</sup> *Id.* (emphasis added); see *supra* notes 346, 409 (collecting academic commentary).

<sup>419</sup> *Slaughter-House*, 83 U.S. at 96 (Field, J., dissenting).

<sup>420</sup> *Id.* at 129 (Swayne, J., dissenting).

<sup>421</sup> *Slaughter-House*, 83 U.S. at 78 (describing the practical force of states' rights arguments as "irresistible").

<sup>422</sup> See *id.* at 82:

Under the pressure of all the excited feeling growing out of the war, our statesmen have still believed that the existence of the States with powers for domestic and local government, including . . . the rights of person and of property . . . was essential to the perfect working of our complex form of government.

this court . . . *has always held* with a steady and an even hand the balance between State and Federal power.”<sup>423</sup> Those almost comedically implausible words came from the same tribunal that had endorsed muscular statehood in *Dred Scott* fifteen years earlier, helping to cause a civil war that was only eight years old.<sup>424</sup> Completely untroubled, the *Slaughter-House* Court once again implemented the Justices’ own nontextual vision of muscular statehood to circumvent the ordinary dynamics of national politics and public opinion.<sup>425</sup>

Almost immediately after Congress decided to preserve Southern states as states, new judicial doctrines gave states new constitutional authority to resist the federal government including Congress itself. The majority opinions in *Lane County*, *White*, and *Day* bypassed normal statutory interpretation with respect to greenbacks, state-based Reconstruction, and federal taxation in order to protect the Court’s own ideas of constitutional statehood. Such decisions valued states’ rights above national legislation and democracy, thereby protecting muscular statehood while discounting federal statutes and the rule-based skeleton of representative participation.

In the *Slaughter-House Cases*, the Court used similarly dismissive techniques to distort the interpretation of a constitutional amendment, with vastly more destructive results. The Fourteenth Amendment protects the “privileges or immunities” of federal citizens, and it grants Congress authority to “enforce” those rights. Although some jurists might disagree about such words’ precise meaning, the methodological error in *Slaughter-House* was to undermine the Fourteenth Amendment based on the Court’s improvised ideas about constitutional statehood. Regardless of one’s agreement or disagreement about the term “privileges or immunities,” it is important that any substantive

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<sup>423</sup> *Slaughter-House*, 83 U.S. at 82 (emphasis added).

<sup>424</sup> *Dred Scott*, 60 U.S. 393; *supra* Part II.A–B.

<sup>425</sup> This time, the Court’s results facilitated different forms of violence. See W. Fitzhugh Brundage, *Introduction*, in REMEMBERING RECONSTRUCTION: STRUGGLES OVER THE MEANING OF AMERICA’S MOST TURBULENT ERA 9–10 (Carole Emberton & Bruce E. Baker eds., 2017) (“The violence of the Klan is sprinkled in some textbooks, but far more pervasive and chronic violence, ranging from assassinations, lynchings, riots, and arson, are seldom described.”); ROSEN, *supra* note 278, at 5 (describing “incidents of sexual violence that African American women suffered at the hands of white men during episodes of political violence”).

arguments should involve the right kind of constitutional issue: individual rights not states' rights.<sup>426</sup>

The Court's final step was to apply muscular statehood in a Reconstruction Amendment case that explicitly involved race, but by this point, the doctrinal work was mostly complete. *United States v. Cruikshank*<sup>427</sup> held that the Fourteenth Amendment's "privileges or immunities" did not include the Bill of Rights and did not regulate private parties' conduct.<sup>428</sup> Congress therefore could not punish devastating racially motivated violence in the Colfax Massacre.<sup>429</sup> The *Civil Rights Cases* similarly struck down the Civil Rights Act of 1875 because the Fourteenth Amendment did not reach private action.<sup>430</sup> The Court feared that any other result might somehow allow Congress to completely "take the place of . . . State legislatures and . . . supersede them," thereby violating muscular statehood.<sup>431</sup>

Standard critiques of late-nineteenth-century decisions have highlighted the country's shift away from racial justice and the

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<sup>426</sup> Two recent interpretations of the *Slaughter-House Cases* need brief additional discussion. Michael Ross has emphasized that Justice Miller's majority opinion in the *Slaughter-House Cases* might have tried to "preserve the federal system while providing protection for black civil rights." Ross, *supra* note 346, at 676. Historian Maeve Glass has likewise suggested that the *Slaughter-House* majority should be interpreted alongside the political arguments of a Black lawyer and congressman, Robert B. Elliott, as well as abolitionist research concerning Southern oppression. See Glass, *Killing Precedent*, *supra* note 2, at 51–59. Both of those approaches, however, must be integrated with another Supreme Court case that was pending around the same time as *Slaughter-House*: *Blyew v. United States*, 80 U.S. 581 (1872); see Robert D. Goldstein, "Blyew": *Variations on a Jurisdictional Theme*, 41 STAN. L. REV. 469 (1989). *Blyew* involved brutally racist murders associated with Reconstruction and ongoing efforts to intimidate Black Southerners through warlike violence. The constitutional issue was whether the Thirteenth Amendment required a state court to admit testimony from Black witnesses in the criminal trial. If any member of the *Slaughter-House* majority—including Miller—was especially concerned about mitigating anti-Black violence and oppression during Reconstruction, it is regrettable that not one of them joined the dissenters in *Blyew*. (On the contrary, both of the Justices who dissented in *Blyew* were also dissenters in the *Slaughter-House Cases*). My own tentative perspective is that, in this context, Miller and other Justices showed more favor for state legislative power as such (muscular statehood) than they showed for the particularly important normative combination of legislative power and multiracial government.

<sup>427</sup> 92 U.S. 542 (1875).

<sup>428</sup> *Id.* at 551.

<sup>429</sup> See *id.* at 568–69; LEEANNA KEITH, *THE COLFAX MASSACRE: THE UNTOLD STORY OF BLACK POWER, WHITE TERROR, AND THE DEATH OF RECONSTRUCTION* 154 (2009) (describing *Cruikshank* as "[a] late victory for the cause of white supremacy in Colfax").

<sup>430</sup> *The Civil Rights Cases*, 109 U.S. at 25–26.

<sup>431</sup> *Id.* at 13, 25–26 (1883).

public's exhaustion with white Southern resistance.<sup>432</sup> Muscular statehood, however, was a doctrinal feature that predated those phenomena, and it remained a driving force in restricting federal rights and power. The *Slaughter-House Cases* were mostly celebrated in public discourse at the time, especially in legal circles.<sup>433</sup> Federal courts and the legal profession also used their power and legitimacy to support broader critiques of Reconstruction, including criticism of African American political leadership.<sup>434</sup>

In the end, Congress and the Court must share institutional responsibility for the ironic and tragic rise of muscular statehood during Reconstruction. Congress chose to retain Southern states as legal entities even though everyone knew that territorial governance could provide greater federal power.<sup>435</sup> On the other hand, Congress could not predict that the Court would invent new doctrines of muscular statehood, much less that those so-called "conservative" doctrines would be used to diminish postwar constitutional amendments and congressional powers.<sup>436</sup>

The last word on this remarkable era of muscular statehood comes from a Frederick Douglass speech in Lincoln Hall, delivered one week after the *Civil Rights Cases* were decided.<sup>437</sup>

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<sup>432</sup> See, e.g., Balkin, *supra* note 46, at 1845 ("Cruikshank's crabbed, unsympathetic reading of the Constitution and Congress's 1870 Enforcement Act made it quite difficult for blacks to protect their constitutional rights in the face of a systematic campaign of terror and violence in the South.").

<sup>433</sup> See Nicoletti, *supra* note 42, at 1692–98 ("[M]ainstream contemporary reactions to *Slaughterhouse* were largely favorable.").

<sup>434</sup> See FONER, *supra* note 163, at 142–43.

<sup>435</sup> See *supra* Part III.A. Even the Supreme Court understood that territory-based Reconstruction would have eliminated the need for litigation like *Cruikshank* and the *Civil Rights Cases* because Congress would have had broad regulatory power independent of the Reconstruction Amendment's enforcement clauses. See *The Civil Rights Cases*, 109 U.S. at 19 ("We have [ ] discussed the validity of [the Civil Rights Act] in reference to cases arising in the States only; and not in reference to cases arising in the Territories . . . which are subject to the plenary legislation of Congress in every branch of municipal regulation.").

<sup>436</sup> See DAVID BLIGHT, *FREDERICK DOUGLASS: PROPHET OF FREEDOM* 646–47 (2018) ("Fourteenth Amendment jurisprudence consistently embraced a states' rights interpretation . . . . A [politically] conservative conception of federalism . . . gave racial equality a tenuous and ultimately disastrous trajectory in American courts. . . . The Republicans who wrote the Fourteenth and Fifteenth Amendments tragically retreated from their own creation with a stultified constitutional imagination.").

<sup>437</sup> See Frederick Douglass, *This Decision Has Humbled the Nation*, in *FREDERICK DOUGLASS: SELECTED SPEECHES AND WRITINGS*, at 686–93 (Philip S. Foner, ed., 1999) ("We cannot . . . overlook the fact that . . . this decision has inflicted a heavy calamity upon seven millions of the people of this country, and left them naked and defenseless against the action of malignant, vulgar, and pitiless prejudice.").

[The Court's decision] has swept over the land like a moral cyclone, leaving moral desolation in its track. We feel it, as we felt the furious attempt . . . to force the accursed system of slavery upon the soil of Kansas . . . [or] the Dred Scott decision. I look upon it as one more shocking development of that moral weakness in high places which has attended the conflict between the spirit of liberty and the spirit of slavery from the beginning, and I venture to predict that it will be so regarded by after-coming generations. Far down the ages, when men shall wish to inform themselves as to the real state of liberty, law, [ ] and civilization in the United States, . . . they will . . . read the decision declaring the Civil Rights Bill unconstitutional and void.<sup>438</sup>

Only with the clear eyes of hindsight can modern readers understand how doctrines of muscular statehood emerged many years before the *Civil Rights Cases*, and how similar constitutional doctrines have continued to flourish for a very long time afterward.<sup>439</sup>

#### IV. THE MODERN ERA: BEYOND MUSCULAR STATEHOOD

Interwoven with this Article's historical analysis of territory, statehood, and union is an implicit methodology for evaluating constitutional law and constitutional change.<sup>440</sup> Many other

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<sup>438</sup> *Id.* at 686:

While slavery was the base line of American society, . . . while it was the interpreter of our law and exponent of our religion, it admitted no quibbling . . . Liberty has supplanted slavery, but I fear it has not supplanted the spirit and power of slavery. Where slavery was strong, liberty is now weak. O for a Supreme Court of the United States which shall be as true to the claims of humanity, as the Supreme Court formerly was to the demands of slavery!

<sup>439</sup> *Id.* at 688:

[This decision] presents the United States before the world as a Nation utterly destitute of power to protect the rights of its own citizens upon its own soil. . . . Its National power extends only to the District of Columbia, and the Territories—where the people have no votes—and where the land has no people. All else is subject to the States. In the name of common sense, I ask, what right have we to call ourselves a Nation, in view of this decision, and this utter destitution of power? In humiliating the colored people of this country, this decision has humbled the Nation.

<sup>440</sup> Inspired by Benjamin's critique of violence, this methodology's two elements should be uncontroversial as a matter of abstract theory. Constitutional law should either have a certain kind of relationship to the past—perhaps including a mixture of original framing events, judicial precedents, traditional practices, or persistent social structures—or a certain kind of relationship to normative goodness: including appeals to liberty,



academics have deployed substantive, functional, and normative arguments against muscular states' rights, and this Article can supplement those critiques by identifying such doctrines' historical origins.<sup>441</sup> Any analysis of constitutional beginnings is sometimes casually equated with "originalism." But theories about "gloss," "liquidation," "constitutional moments," and "living constitutionalism" also must wrestle with a Constitution whose interpretive meaning changes sometimes, but not all of the time.<sup>442</sup>

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equality, democracy, stability, security, prosperity, or justice. Cf. BENJAMIN, *supra*, note 348, at 40 ("[T]he thesis of positive law . . . holds that [defensible] violence emerges in history. . . . According to this view . . . violence is a natural product . . . which is entirely unproblematic unless one were to misuse it for unjust ends."). Benjamin explained that "[n]atural law strives, through the justness of ends, to 'justify' the means, and positive law strives to 'guarantee' the justness of the ends through the justification of the means." *Id.* Constitutional law should ideally possess both kinds of relationship—to history and virtue alike—but of course people disagree about the proper balance as well as other details. Cf. *id.* at 54 ("Reason, after all, never decides on the justification of means and the justice of ends; rather, fateful violence decides on the former, while God decides on the latter."). Without at least one of these links—positivist history or normative virtue—constitutional law cannot be distinguished from other kinds of violence, and states' rights doctrines exemplify that condemnable circumstance. Cf. *id.* at 56 (explaining that, when law is based on mythology instead of history or virtue, "[t]he positing of law is the positing of power, and, in this respect, an act [Akt] of an immediate manifestation of violence. Justice is the principle of all divine end-positing, power the principle of all mythic law-positing."); *id.* at 57 ("Mythic violence is blood-violence over mere life for the sake of violence itself . . ."). In this sense, legal history and practice depend significantly on intellectual efforts to identify and analyze constitutional myths like muscular statehood.

<sup>441</sup> There have been other powerful critiques of muscular statehood using various intellectual labels. See, e.g., Gerken, *supra* note 282, at 85 ("[A] story of the failure of craft, of law's best principles bumping up against doctrine's worst frailties, of the conflicting obligations we place on judges. . . . is the real story of 'Our Federalism.'"); Abbe R. Gluck, *Our [National] Federalism*, 123 YALE L.J. 1996, 1999 (2014) ("Wechsler argued that courts need not police federalism doctrine because the states are adequately represented in Congress. National Federalism goes further, embracing Congress as federalism's primary source and viewing Congress as having as much, if not more, of a role to play in shaping federalism as do the courts."); Alison L. LaCroix, *The Shadow Powers of Article I*, 123 YALE L.J. 2044, 2052 (2014) ("The prominent role of the shadow powers in the Court's recent decisions is both a doctrinally unprecedented and an unhelpful development that fails to set meaningful standards for how federalism should work in practice."); Manning, *supra* note 4, at 2008 ("This Article invokes the Court's insights about legislative compromise to call into question the methodological approach . . . that the Court has deployed in its new federalism cases.").

<sup>442</sup> See, e.g., JACK M. BALKIN, *LIVING ORIGINALISM* 3 (2011) ("This book offers a constitutional theory, *framework originalism*, which views the Constitution as an initial framework for governance that sets politics in motion."); Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1763 (2007) ("Higher lawmaking in America is never a matter of a single moment; it is an extended process, lasting a decade or two."); William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 4 (2019) ("Liquidation was a specific way of looking at post-Founding practice to settle constitutional disputes, and it can be used today to make historical practice in constitutional law less slippery, less capacious, and more precise."); Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Constitutional*

This Part will use the historical trajectory of muscular statehood to discuss its contested status as constitutional law today and its possible expansion in the future.

We have seen that doctrines of muscular statehood cannot qualify as valid constitutional law, using any plausible standard of interpretation, during the Founding Era or the Civil War.<sup>443</sup> That is because, although some people fiercely endorsed states' authority to resist the federal government, other people disagreed, and neither side could claim any supermajoritarian mandate sufficient to establish transhistorical constitutional law.<sup>444</sup> That is why fierce conflicts about Virginia's colonial charter, territorial slavery in Kansas, and almost every other issue affecting states' autonomy or interests were necessarily disputed through mechanisms of ordinary politics.<sup>445</sup> The constitutional skeleton of statehood repeatedly prevailed over theories of muscular statehood during America's early history.<sup>446</sup>

Even as antislavery political parties changed the substance of federal policies to imperil Southern societies, the constitutional skeleton promised that states could *always and only* use normal

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*Convention, and the Judicial Separation of Powers*, 105 GEO. L.J. 255, 257 (2017) (“The practices of governmental institutions since the constitutional Founding are a potential source of normative guidance in separation of powers controversies.”).

<sup>443</sup> See *supra* Parts I–II. This Article does not rely on any especially detailed theory to identify the scope of “constitutional law” as a category. See, e.g., Richard Primus, Kevin M. Stack, Christopher Serkin & Nelson Tebbe, *Debate*, 102 CORNELL L. REV. 1649, 1650 (2017) (discussing whether a “distinct interpretive approach to the Constitution [should exist], as opposed to statutory or common law”). On the other hand, the absence of an explicit interpretive theory does not imply “that the constitutional law of the United States is whatever the Justices say that it is,” much less that everything the Justices announce with violent authority qualifies as constitutional law. Richard H. Fallon, Jr., *Constitutional Precedent Viewed Through the Lens of Hartian Positivist Jurisprudence*, 86 N.C. L. REV. 1107, 1137 (2008). For abstract discussion of methodological issues, see *supra* note 440. For potent historical debates about interpretive methodology, see PETER WIRZBICKI, *FIGHTING FOR THE HIGHER LAW: BLACK AND WHITE TRANSCENDENTALISTS AGAINST SLAVERY* 10–16 (2021) (describing the development of a “Higher Law Ethos” during the nineteenth century). For a paradigmatic illustration of modern debates about the label “constitutional law,” compare *Dobbs v. Jackson Women’s Health Organization*, 142 S. Ct. 2228, 2263–64 (2022) (“On many other occasions, this Court has overruled important constitutional decisions. . . . Without these decisions, American constitutional law as we know it would be unrecognizable, and this would be a different country.”), *with id.* at 2335 (Breyer, Sotomayor, Kagan, JJ., dissenting) (“The majority has overruled *Roe* and *Casey* for one and only one reason: because it has always despised them, and now it has the votes to discard them. The majority thereby substitutes a rule by judges for the rule of law.”).

<sup>444</sup> See *supra* Part I.B (Articles of Confederation); Part II (Civil War); see also Green, *United/States*, *supra* note 1, at 48–57 (Constitutional Ratification).

<sup>445</sup> See *supra* Part I.C (Virginia); Part II.A (Kansas)

<sup>446</sup> The Supreme Court’s ruling in *Dred Scott v. Sandford*, 60 U.S. 393 (1856), is not the only exception, but it is an example that helps illustrate the general rule.

electoral rules to control the federal government.<sup>447</sup> That is what it fundamentally meant to be a state—a member of the United States—and the skeletal framework of voting rules overrode arguments that muscular states’ rights authorized constitutional resistance to federal policies.<sup>448</sup> Even legal conflicts that involved explicit constitutional text, such as the so-called Fugitive Slave Clause, were debated through ordinary politics, and the results were codified as statutes or other nonconstitutional authorities.<sup>449</sup>

Measured against those historical benchmarks, the Reconstruction Court’s affirmation of muscular statehood lacked a sufficient positivist pedigree or normative justification to qualify as constitutional law.<sup>450</sup> Muscular statehood was not memorialized in constitutional text, supported by implicit consensus, or fortified by acquiescence and traditional practice. On the contrary, the Court deployed its undecorated judicial power—supported by legal elites and moderate politicians—to invalidate statutes, annul prosecutions, and eviscerate the text of newly ratified amendments.<sup>451</sup> As a normative matter, Reconstruction-era enthusiasm for muscular statehood facilitated racial violence and sociological racism, making the Court’s decisions in this field a plausible candidate for “discriminatory taint” or “anticanon” status instead of constitutional authority or esteem.<sup>452</sup> From any mixture of positivist or normative points of view, the ascent of muscular statehood is not how constitutional law is supposed to work.

The foregoing historical analysis supports a doctrinal and institutional framework for states’ rights that resembles Professor Herbert Wechsler’s “political safeguards of federalism,” which

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<sup>447</sup> See U.S. CONST. art. I, §§ 2–3, art. II, § 1; see also *supra* Part II (discussing theories of secession).

<sup>448</sup> Military Reconstruction suspended states’ participation in Congress and presidential elections, which is why Lincoln’s theory that Southern governments were unlawful imposters was complicated and controversial. See *supra* Part III.A.

<sup>449</sup> See Keith E. Whittington, *The Political Constitution of Federalism in Antebellum America*, 26 PUBLIUS 1, 1 (1996) (“Federalism is best thought of . . . as a continuing tension contained within, and created by, the founding document. . . . [T]he resolution of that tension is a political, and not merely a legal task.”).

<sup>450</sup> For a discussion of “constitutional law” as an analytical category, see notes 443 and 450 above.

<sup>451</sup> See *supra* Part III.B.

<sup>452</sup> See Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 382 (2011) (“[The anticanon] is a distinct phenomenon requiring distinct theoretical treatment.”); Kerrell Murray, *Discriminatory Taint*, 135 HARV. L. REV. 1192, 1194–95 (2022); see also Balkin, *supra* note 46, at 1861 (“Time and again, the Supreme Court hobbled Congress’s enforcement powers through specious technicalities and artificial distinctions.”).

Frederick Douglass presaged seventy years earlier.<sup>453</sup> The burden of persuasion should be firmly against arguments to extend muscular statehood as a matter of constitutional law.<sup>454</sup> Wechsler and other “process federalists” reached similar conclusions (across a wider field of constitutional federalism) by combining their theoretical analysis of democratic function with a practical judgment that constitutional politics operate better without much judicial interference.<sup>455</sup> This Article adds historical perspective to show that skeletal political mechanisms have been the standard tools for debating state power across a large fraction of the United States’ historical experience.<sup>456</sup>

Perhaps this Article’s most surprising result is a critique of muscular statehood based on constitutional statehood itself. Whenever a state asserts muscular rights and sovereignty against the national government, that necessarily threatens other states’ constitutionally grounded skeletal power to influence federal policy through voting procedures. The best example is Lincoln’s belief that Southern states were entitled to any national policy about slavery that they could get through electoral politics, even as the Constitution simultaneously guaranteed the exact same thing to Northern states.<sup>457</sup> The most important defining characteristic of states as states is their unique constitutional authority to participate in federal government and thereby influence federal policies.<sup>458</sup>

Muscular states’ rights undermine national democracy as well as states’ access to the constitutional skeleton. When the Reconstruction Court invalidated federal statutes to promote idiosyncratic substantive visions of state autonomy, such decisions disempowered politicians from various states who helped enact

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<sup>453</sup> See Douglass, *supra* note 437, at 114 (“[W]hen a bill has been discussed for weeks and months . . . when it has taken its place upon the statute book . . . you will agree with me that the reasons for declaring such a law unconstitutional . . . should be strong, irresistible and absolutely conclusive.”); Wechsler, *supra* note 4, at 559 (“[T]he Court is on weakest ground when it opposes its interpretation of the Constitution to that of Congress in the interest of the states, whose representatives control the legislative process.”).

<sup>454</sup> Cf. Wechsler, *supra* note 4, at 560 (“[I]t is Congress rather than the Court that on the whole is vested with the ultimate authority for managing our federalism.”); Kramer, *supra* note 4, at 219 (“[T]he current Supreme Court’s aggressive encroachment on this system is as unnecessary as it is misguided.”).

<sup>455</sup> See Heather Gerken, *Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 14–18 (2010) (discussing “process federalist” scholarship).

<sup>456</sup> *Dred Scott* is the most well-known exception.

<sup>457</sup> See *supra* Part III.B (discussing Lincoln’s theory).

<sup>458</sup> See U.S. CONST. art. I, §§ 2–3; U.S. CONST. art. II, § 1.

those federal statutes in the first place. The Supreme Court not only harmed racial justice and subverted national democracy, but also undermined constitutional principles of skeletal statehood. The conflicts discussed in this Article do not follow ordinary patterns of “states versus nation,” “states versus the people,” or “good states versus bad states.” Disputes about muscular states’ rights frequently implicate constitutional statehood and federalism on both sides.

As a matter of practical results, of course this Article supports authors like Professor John Manning who have criticized doctrines of muscular statehood such as anticommandeering and nontextual state sovereign immunity.<sup>459</sup> Those doctrines have generated constitutional friction by allowing states to resist national policies, and that friction could destructively influence political outcomes in certain circumstances.<sup>460</sup>

A different example, however, illustrates more dramatic consequences that muscular statehood has encouraged over time. On February 7, 2022, Arizona’s Attorney General Mark Brnovich issued a legal opinion to analyze: (1) whether federal policies along the Mexican border have “failed . . . to protect our state from invasion under Article IV, Section 4 of the Constitution” and (2) whether Arizona can “engage in War” because it has been “actually invaded, or in such imminent Danger as will not admit of delay.”<sup>461</sup> In a twenty-five-page memo, Brnovich asserted that Arizona has authority under the federal Constitution to decide whether the state has been “actually invaded” or confronts “such imminent Danger as will not admit of delay.”<sup>462</sup>

Brnovich claimed constitutional power for any state to “control on-the-ground conditions at their borders,” which supported the “sovereign” right of self-defense that was “retained by the States under the U.S. Constitution.”<sup>463</sup> In Brnovich’s judgment, threats from “hostile non-state actors” such as “cartels and gangs” meant that “Arizona retains the independent authority under the

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<sup>459</sup> See Manning, *supra* note 4, at 2006–08.

<sup>460</sup> *But cf.* Gerken, *supra* note 282, at 90–91 (“Despite one threat after another, the Court has made precious little headway in curbing federal power. . . . The nationalists have lost battles, to be sure . . . but they are undoubtedly winning the war.”).

<sup>461</sup> Mark Brnovich, *The Federal Government’s Duty To Protect the States and the State’s Sovereign Power of Self Defense When Invaded*, Op. No. I22-001, at 1–4 (Feb. 7, 2022), <https://perma.cc/EBG8-VZ9D>.

<sup>462</sup> *Id.*

<sup>463</sup> *Id.* at 2 (claiming that “the State does not need the consent of Congress”).

State Self-Defense Clause to defend itself.”<sup>464</sup> The constitutional stakes of this argument implicate the fundamental power to “engage in War” because the Constitution provides as follows: “No State shall, without the Consent of Congress, . . . engage in War, *unless actually invaded*, or in such imminent Danger as will not admit of delay.”<sup>465</sup>

Experts have condemned Brnovich’s memo as indefensible on the merits.<sup>466</sup> Yet the document has provided a blueprint for muscular states’ rights arguments in Arizona as well as other states. When Brnovich was running for Senate, he asked Arizona’s governor to declare that the state was facing an “invasion.”<sup>467</sup> Brnovich admitted that the governor had already “deployed the National Guard and declared a state of emergency.”<sup>468</sup> But he suggested without offering further details that officially recognizing that “invasion” would authorize “more actions that we now have to consider.”<sup>469</sup>

By comparison, a candidate for Arizona governor who was narrowly defeated in 2022 explicitly promised to declare an immigration “invasion,” claiming that “[t]his is the biggest invasion we’ve ever had on our homeland since the founding of this country . . . . So we will issue a declaration of invasion, and we will take on those powers that are granted to us in the U.S. Constitution.”<sup>470</sup>

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<sup>464</sup> *Id.* at 3.

<sup>465</sup> U.S. CONST. art. I, § 10, cl. 3 (emphasis added).

<sup>466</sup> See, e.g., Jim Small, *Brnovich’s Radical and Lawless Border War Opinion Normalizes Extremism and Sets the Stage for Violence*, AZ MIRROR (Feb. 14, 2022), <https://perma.cc/W4VU-PN3M>; Brahm Resnik, “Laughed out of Court”: *Brnovich Opinion Gives Ducey Green Light To “Engage in War” at Border*, 12 NEWS (Feb. 10, 2022), <https://perma.cc/9MKT-HW4X>. But cf. Jeremy Duda, *Arizona GOP Governor Candidates Embrace Brnovich’s Opinion on Using Troops To Repel Border “Invasion,”* TUCSON SENTINEL (Feb. 11, 2022), <https://perma.cc/3ZVP-WPKL>.

<sup>467</sup> See Letter from Mark Brnovich, Att’y Gen. of Az., to Doug Ducey, Gov. of Az. (July 6, 2002) (available at <https://perma.cc/9VH6-JA7L>).

<sup>468</sup> *Id.*

<sup>469</sup> *Id.* (“If there is more that we as a state can and should do, it can be pursued with your declaration of an ‘invasion’ at our southern border.”).

<sup>470</sup> Adam Shaw, *Arizona Gubernatorial Candidate Kari Lake Eyes Invasion Declaration, Sweeping Border Moves If Elected*, FOX NEWS (Aug. 20, 2022), <https://perma.cc/K44N-CCHB> (“The movement for invasion declarations has been brewing since the start of the crisis, initiated by former Office of Management and Budget (OMB) Director Russ Vought and former acting deputy DHS Secretary Ken Cuccinelli, both now at the Center for Renewing America.”); Alexandra Berzon & Charles Homans, *Arizona Judge Rejects Bid By Lake to Overturn Loss*, N.Y. TIMES, Dec. 22, 2022, at 17 (confirming Kari Lake’s defeat by 17,117 votes); STATE OF ARIZONA OFFICIAL CANVASS (2022), <https://perma.cc/C8QK-WC6V> (documenting more than 2.5 million votes cast in Arizona’s 2022 gubernatorial election); see also Michael C. Bender, *Arizona Republican, Still Contesting a Defeat, Eyes*

The candidate called for an “invasion declaration to be accompanied by an interstate compact with ‘like-minded states’ to work together and share resources, including the creation of a dedicated border security force to arrest, detain and return illegal immigrants.”<sup>471</sup> She also would have sought to “invalidate federal regulations on border enforcement” and “expand[ ] the National Guard’s mission to allow it to . . . shoot down drones from Mexico.”<sup>472</sup>

Arizona is not alone. The Governor of Texas has issued an executive declaration that “President Biden’s failure to faithfully execute the immigration laws enacted by Congress confirms that he has abandoned the covenant, in Article IV, § 4 of the U.S. Constitution, that [t]he United States . . . shall protect each [State in this Union] against Invasion.”<sup>473</sup> In this context, efforts to characterize the Constitution as a “covenant” that could be “abandoned” are especially ominous, and the Texas Republican Party as well as several counties have formally declared that Texas is already invaded.<sup>474</sup>

Brnovich’s memo supporting muscular statehood followed a familiar historical pattern, including quotes from Supreme Court opinions that themselves have mischaracterized eighteenth-century history including the Declaration of Independence and Federalist Papers.<sup>475</sup> Echoing various proponents of muscular statehood over time, Brnovich cited the Tenth Amendment as “reserv[ing]” unspecified powers to the states.<sup>476</sup> And Brnovich included a concise version of the states’ rights mythology that this Article has challenged: “The history of the adoption of the Constitution [ ] powerfully shows that the Founders understood the States were giving up certain sovereign powers to the national

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*Another Race*, N.Y. TIMES, Feb. 4, 2023, at 15 (“Ms. Lake . . . declared that her popularity among conservative voters in the state was rivaled only by that of Mr. [Donald] Trump.”).

<sup>471</sup> Shaw, *supra* note 477.

<sup>472</sup> *Id.*

<sup>473</sup> Executive Order GA-41, July 7, 2022 (available at <https://perma.cc/K8JS-EKU5>).

<sup>474</sup> See Adam Shaw, *Texas County Ratifies Invasion Declaration, As Sheriff Warns of Cartel Control of Migrant Flows*, FOX NEWS (July 13, 2022), <https://perma.cc/3DEB-AQ3Y>; Bethany Blankley, *Texas GOP Declares Invasion at Southern Border*, THE CENTER SQUARE (Aug. 14, 2022), <https://perma.cc/3PNK-WY4V>; Bethany Blankley, *Ninth Texas County Declares Invasion at Southern Border*, THE CENTER SQUARE (Aug. 9, 2002), <https://perma.cc/3UFP-3JEV>; Joel Rose, *Talk of ‘Invasion’ Moves from the Fringe to the Mainstream of GOP Immigration Message*, NAT’L PUB. RADIO (Aug. 3, 2022), <https://perma.cc/3DJJ-49FB>.

<sup>475</sup> See Brnovich, *supra* note 461, at 4 (citing some of the same legal authorities that are collected *supra* note 66).

<sup>476</sup> *Id.* at 6.

government, but retaining core self-defense powers against both domestic and foreign threats to their actual security within their territories.”<sup>477</sup> Brnovich’s argument is terribly flawed in its specific details and also in its reliance on patterned tropes of muscular statehood.<sup>478</sup> Arguments for muscular statehood are constitutionally dangerous in their current forms, much as they have been constitutionally dangerous in the past.

A vastly superior model of federalism would focus on statehood’s skeleton, which guarantees national participation, instead of constitutional muscles, for antifederal resistance. With one sole exception, the Constitution has always required that national politics must operate through institutions that are controlled by states.<sup>479</sup> The constitutional skeleton prevents “We the People” from electing the federal government except through mechanisms of statehood. Constitutional ratification and amendment are anchored in separate “peoples” who act through states, and every federal election includes state-based populations instead of a single collective.<sup>480</sup>

As a result, although the United States might be called the land of the free, it has always been the home of the states. There is no reason to think states cannot stand up for themselves in national politics to protect their interests, and the constitutional skeleton implies that indeed they must. When courts derail political voting procedures to favor a particular state’s assertion of muscular statehood, that reinforces some of the worst and least defensible parts of America’s constitutional history. By contrast, if courts instead were to disfavor muscular statehood in support of robust political democracy, it would allow accurate legal history to help chart a better constitutional future.

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<sup>477</sup> *Id.* at 7–8.

<sup>478</sup> See MAX M. EDLING, A REVOLUTION IN FAVOR OF GOVERNMENT 223 (2003) (“The creation of a ‘fiscal-military state’ demanded the centralization of authority. . . . [in] a sphere in which it was generally recognized that the union had to act as one nation: essentially, the areas of defense, commercial regulations, and foreign relations.”).

<sup>479</sup> *But cf.* U.S. CONST. amend. XXIII (granting electoral votes to the District of Columbia).

<sup>480</sup> *E.g.*, U.S. CONST. art. I, §§ 2–3, art. II, § 1, art. V, art. VII.