

ARTICLES

OUR CONSTITUTIONALISM OF FORCE

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The Founders’ constitution—the one they had before the Revolution and the one they fought the Revolution to preserve—was one in which violence played a lawmaking role. An embrace of violence to assert constitutional claims is worked deeply into our intellectual history and culture. It was entailed upon us by the Founding generation, who sincerely believed that people “are only as free as they deserve to be” and that one could tell how much freedom people deserved by how much blood they were willing to shed to obtain it. This constitutionalism of force survived ratification. Its legacy is a constitutional order that legitimizes the violent assertion of rights, especially by groups of armed white men—a legacy that showed itself in the Republican National Committee’s statement that the January 6 Insurrection amounted to “legitimate political discourse.” We must acknowledge this heritage and the pressure it imposes on the rule of law if we are to survive today’s authoritarian challenges to our democracy.

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INTRODUCTION

The insurrectionists who attacked the Capitol on January 6, 2021, went to Washington, D.C. to assert a set of legal claims. Their claims were primarily about who won the election,¹ but they also asserted subsidiary arguments about whose opinion on that question mattered² and how disagreements ought to be settled.³ On each of these points, the rioters were certain they were right. You might think that because the rioters were misinformed⁴ and their message unsophisticated, their constitutional ideas don't matter. But I worry that they matter a great deal. And I do not think we can yet tell how much their beliefs will change our legal order.

In saying that the rioters' beliefs about the constitution matter, I'm not saying anything popular constitutionalism scholars haven't been saying these last twenty years or so. But I am saying it in a less happy, optimistic

1. See Nicholas Fandos & Emily Cochrane, *After Pro-Trump Mob Storms Capitol, Congress Confirms Biden's Win*, N.Y. Times (Jan. 6, 2021), <https://www.nytimes.com/2021/01/06/us/politics/congress-gop-subvert-election.html> (on file with the *Columbia Law Review*).

2. "Nobody voted for Joe Biden . . ." followed by the sneer, directed at a Black police officer defending the Capitol: "You hear that, guys, this nigger voted for Joe Biden." January 6 Committee Meeting With Capitol and D.C. Police, C-SPAN, at 01:23 (July 27, 2021), <https://www.c-span.org/video/?513434-1/capitol-dc-police-testify-january-6-attack> (on file with the *Columbia Law Review*) (internal quotation marks omitted) (providing testimony of Officer Harry Dunn).

3. See Fandos & Cochrane, *supra* note 1.

4. The fact that the January 6 rioters were misinformed puts them in good company with Americans of the Founding Era, as "[n]o one . . . can deny the prevalence of conspiratorial fears among the Revolutionaries." Gordon S. Wood, *Conspiracy and the Paranoid Style: Causality and Deceit in the Eighteenth Century*, 39 *Wm. & Mary Q.* 401, 403 (1982). Indeed, one historian has argued that the American Revolution is rooted in the actions of "highly mobilized" disparate groups, each embracing "violent direct action on the basis of false beliefs." Jordan E. Taylor, *What Pro-Trump Insurrectionists Share—and Don't—With the American Revolution*, Wash. Post (Jan. 7, 2021), <https://www.washingtonpost.com/outlook/2021/01/07/what-pro-trump-insurrectionists-share-dont-with-american-revolution/> (on file with the *Columbia Law Review*); see also Jordan E. Taylor, *Misinformation Nation: Foreign News and the Politics of Truth in Revolutionary America* (2022) (elaborating this thesis).

Instead, what most sets January 6 apart is what we are beginning to learn about the involvement of the President himself, which has no precedent in American history. See Luke Broadwater, *'Trump Was at the Center': Jan. 6 Hearing Lays Out Case in Vivid Detail*, N.Y. Times (June 9, 2022), <https://www.nytimes.com/2022/06/09/us/politics/trump-jan-6-hearings.html> (on file with the *Columbia Law Review*) (last updated June 11, 2022). That, however, is a topic for another article.

tone. And I will add that the many scholars who have elaborated upon Larry Kramer's central idea in *The People Themselves* have gotten popular constitutionalism, as it has actually existed in American life, quite wrong, primarily because they have failed to take violence seriously.⁵ Riot is not only, as Dr. Martin Luther King Jr. famously put it, "the language of the unheard."⁶ It has long been, and continues to be, the language of the heard as well.⁷

The early literature of "popular constitutionalism" aimed to ennoble and validate popular efforts to stir up the stasis and order of the American

5. Larry Kramer ended *The People Themselves* envisioning a Supreme Court that showed the same deference to popular opinion that lower courts accord the Court "with an awareness that there is a higher authority out there with power to overturn their decisions—an actual authority, too, not some abstract 'people' who spoke once, two hundred years ago, and then disappeared." Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* 253 (2004). We've had a chance to see how that would work in practice—not at the Supreme Court but in Congress. In a profile in the *Atlantic*, Congressman Peter Meijer (R-Mich.) recalled:

When the Capitol was finally secured and members returned to the House chamber, [he] expected an outraged, defiant House of Representatives to vote in overwhelming numbers to certify the election results, sending a message to the mob that Congress would not be scared away from fulfilling its constitutional obligations. But as he began talking with his colleagues, he was shocked to realize that more of them—perhaps far more of them—were now preparing to object to the election results than before the riot.

Tim Alberta, *What the GOP Does to Its Own Dissenters*, *Atlantic* (Dec. 7, 2021), <https://www.theatlantic.com/magazine/archive/2022/01/peter-meijer-freshman-republican-impeach/620844/> [<https://perma.cc/LJ8T-3SQ7>]. One member told Congressman Meijer "that no matter his belief in the legitimacy of the election, he could no longer vote to certify the results, because he feared for his family's safety." *Id.*

6. Interview by Mike Wallace with Dr. Martin Luther King Jr. (CBS television broadcast Sept. 27, 1966); see also 60 Minutes Staff, *MLK: A Riot Is the Language of the Unheard*, *CBS News* (Aug. 26, 2013), <https://www.cbsnews.com/news/mlk-a-riot-is-the-language-of-the-unheard/> (on file with the *Columbia Law Review*).

7. Kramer's *The People Themselves* rediscovered the eighteenth-century Whiggish understanding of a constitution defined, in part, by the people out-of-doors and suggested that we use this as a model for modern constitutional regeneration. But the violence somehow disappeared as he translated that tradition from its eighteenth-century origins to modern life. See Kramer, *supra* note 5, at 249 (suggesting impeachment, budgetary maneuvers, and other legislative solutions to judicial overreach—not tarring and featherings, whippings, the stocks, the destruction of the officials' homes, coerced resignations in front of jeering crowds, or other eighteenth-century options). From the beginning, critics needled Kramer for suggesting a theory that, they said, boiled down to mob rule. But even those critics did not seem to take Kramer seriously enough to worry, as I do, that "the people's" methods are bloody, instead arguing primarily that the idea was theoretically unsatisfying. See, e.g., Larry Alexander & Lawrence B. Solum, *Popular? Constitutionalism?*, 118 *Harv. L. Rev.* 1594, 1622 (2005) (book review) (arguing that mobs cannot continually sit, cannot claim to speak for all of the people, cannot make consistent or reviewable decisions, and "cannot exercise authority; they can only exercise power"); L.A. Powe, Jr., *Are "the People" Missing in Action (and Should Anyone Care)?*, 83 *Tex. L. Rev.* 855, 857 (2005) (book review).

constitution—usually in progressive directions.⁸ But in rediscovering that the American constitutional order is not static, this literature has ignored one of the dominant mechanisms of change. The appeal to arms as a way of validating legal arguments is worked deeply into our intellectual history and culture. It was entailed upon us by our Founding generation, who sincerely believed that people “are only as free as they deserve to be” and, relatedly, that one can tell how much freedom people deserve by how much blood they were willing to shed to obtain it.⁹

The optimism of early popular constitutionalism scholarship built on the work of so-called “neo-Whig” historians, the school dominated by Professors Bernard Bailyn, Edmund Morgan, and Gordon S. Wood, among others.¹⁰ This is hardly surprising, as these were still the leading working

8. In a provocative 1988 article introducing a constitutional and historical argument for popular amendment of the Constitution, Professor Akhil Amar argued that “[i]ndividual rights, federalism, separation of powers, and ordinary representation all exist *under* our Constitution, but they all derive from a higher source,” that is, “We the People of the United States.” Akhil Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. Chi. L. Rev. 1043, 1103–04 (1988). A few years later, Professor Bruce Ackerman’s multivolume work developed a theory that throughout American history there have indeed been “constitutional moments,” in which “We the People” have stood up in defense of a new understanding of the Constitution, eventually changing its meaning. See generally Bruce Ackerman, *We the People* (1991–2018) (highlighting moments in American history that widened the franchise and expanded rights beyond the scope of the constitution’s text). But, as Professor Randy Barnett later pointed out, having made the “Second Reconstruction” of the 1960s one such constitutional moment, Ackerman refused to see widespread popular mobilization *against* desegregation in the 1970s as constitutionally significant, describing it instead as the end of popular constitutional activity. Randy E. Barnett, *We the People: Each and Every One*, 123 Yale L.J. 2576, 2585 (2014). Professor Reva Siegel’s work stands as an important exception to this progressive-only view of when the “people’s” ideas should be thought “constitutional,” as she has increasingly focused on the constitutional vitality of social movements on the right. See, e.g., Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 Harv. L. Rev. 191, 192–94 (2008) (exploring the social movement that preceded the decision in *District of Columbia v. Heller*, 555 U.S. 570 (2008), examining how the “boundary between constitutional law and constitutional politics has been negotiated”). But all of these scholars have a blind spot when it comes to how violence has shaped the law.

9. This is Samuel Adams’s axiom from the Revolutionary era that “nations were as free as they deserved to be.” François Furstenberg, *Beyond Freedom and Slavery: Autonomy, Virtue, and Resistance in Early American Political Discourse*, 89 J. Am. Hist. 1295, 1295 (2003) (internal quotation marks omitted) (quoting Letter from Benjamin Rush to John Adams (July 20, 1812), *in* *The Spur of Fame: Dialogues of John Adams and Benjamin Rush, 1805–1813*, at 234, 234 (John A. Schutz & Douglass Adair eds., 1966)).

10. This group of scholars has been given several labels, including “Whig” historians, “consensus” school, and neo-Whig. See, e.g., Thomas P. Slaughter, *Crowds in Eighteenth-Century America: Reflections and New Directions*, 115 Pa. Mag. Hist. & Biography 3, 4–6 (1991) [hereinafter Slaughter, *Crowds in Eighteenth-Century America*] (discussing the “Whig,” “neo-Whig,” or “consensus” interpretative perspective). All agree that “consensus school” fairly points to Professor Richard Hofstadter and scholars grouped around his era

historians when Professors Bruce Ackerman, Akhil Amar, Larry Kramer, and the rest were first developing their theories. And as neo-Whig history, especially Wood's *Creation of the American Republic*, remains the go-to citation for Supreme Court opinions, it is, in a sense, our official state narrative.¹¹ One expects to find it reflected in legal scholarship.¹²

and paradigm of thought, but Bailyn and Wood have also been regularly tarred with the "consensus" epithet over the years. Justin Driver, *The Consensus Constitution*, 89 *Tex. L. Rev.* 755, 757 (2011). See Bernard Bailyn, *Ideological Origins of the American Revolution* (2d ed. 1992) [hereinafter *Bailyn, Ideological Origins*]; Gordon S. Wood, *The Creation of the American Republic 1776–1787* (2d ed. 1998) [hereinafter *Wood, Creation of the American Republic*].

11. Wood has not long been out of the Court's mind over the past three decades. See *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 805 (2021) (Roberts, C.J., dissenting); *Rucho v. Common Cause*, 139 S. Ct. 2484, 2512 n.1 (2019) (Kagan, J., dissenting); *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1878 (2016) (Breyer, J., dissenting); *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1330–31 (2016) (Roberts, C.J., dissenting); *Evenwel v. Abbott*, 136 S. Ct. 1120, 1137, 1138–39 (2016) (Thomas, J., concurring in the judgment); *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2659 n.2 (2015); *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 117 (2015) (Thomas, J., concurring in the judgment); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 353 (2010); *Vieth v. Jubelirer*, 541 U.S. 267, 356 (2004) (Breyer, J., dissenting); *Alden v. Maine*, 527 U.S. 706, 768 (1999) (Souter, J., dissenting); *Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring); *United States v. Winstar Corp.*, 518 U.S. 839, 872 (1996); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 137, 151 & n.45, 155 n.50, 160, 164 n.58 (1996) (Souter, J., dissenting); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 251 (1995) (Stevens, J., dissenting) (citing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 523 (1989) (Scalia, J., concurring in the judgment)); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 826 n.38 (1995); *id.* at 911 (Thomas, J., dissenting); *United States v. Lopez*, 514 U.S. 549, 576 (1995) (Kennedy, J., concurring); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 219 (1995); *Weiss v. United States*, 510 U.S. 163, 184 (1994) (Souter, J., concurring) (quoting *Freytag v. Comm'r*, 501 U.S. 868, 883 (1991)); *Freytag*, 501 U.S. at 883, 885; *id.* at 904 n.4 (Scalia, J., concurring). Bailyn's *Ideological Origins of the American Revolution* was an earlier favorite, only recently giving way to Wood's work in citation count. See *Obergefell v. Hodges*, 13 S. Ct. 2584, 2634 (2015) (Thomas, J., dissenting); *McCullen v. Coakley*, 573 U.S. 464, 489 n.5 (2014); *McDonald v. City of Chicago*, 561 U.S. 742, 815 (2010) (Thomas, J., concurring in part and concurring in the judgment); *Citizens United*, 558 U.S. at 353; *Alden*, 527 U.S. at 768, 799 & n.31 (Souter, J., dissenting); *Seminole Tribe of Fla.*, 517 U.S. at 151 (Souter, J., dissenting); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 360 (1995) (Thomas, J., concurring); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 287, 288 (1990) (Brennan, J., dissenting); *County of Allegheny v. ACLU*, 492 U.S. 573, 612 (1989), abrogated by *Town of Greece v. Galloway*, 572 U.S. 565 (2014); *Lynch v. Donnelly*, 465 U.S. 668, 722 n.28 (1984) (Brennan, J., dissenting); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 127 n.10 (1982); *Larson v. Valente*, 456 U.S. 228, 244 n.18 (1982); *Nevada v. Hall*, 440 U.S. 410, 415 n.8 (1979). Bailyn's work as an editor of primary sources was cited *passim* in *Printz v. United States*, 521 U.S. 898, 910 (1997); *id.* at 946 n.5 (Stevens, J., dissenting); *Thornton*, 514 U.S. at 813 n.23, 814 n.26, 820 & n.30, 821 n.31, 825 n.36, 826 n.40, 833 n.47; *id.* at 880 n.17 (Thomas, J., dissenting).

12. See Driver, *supra* note 10, at 759–67 (describing the rise and fall of the consensus school in history departments and regretting that "the widespread embrace of" the conflict counternarrative "within the history department has yet to migrate across campus to the law

But the view of the neo-Whig school is not neutral.¹³ A theme of neo-Whig history is that the American Revolution unleashed, in Bailyn's words, a "contagion of liberty," subjecting slavery and the other injustices of its day to "severe pressure" and advancing a "spirit of . . . idealism" at a "rapid, irreversible, and irresistible" pace.¹⁴ Morgan taught the "American Revolution" as Americans' "noble," "daring," and "successful" "search" for "nothing more or less than the principle of human equality"—"a discovery that would turn the course of history in a new direction . . . and liberate us from our past as it was soon to liberate them."¹⁵ Wood, Bailyn's student, emphasized the thought of the Federalists because, he explained, "the Federalists' intellectual achievement really transcended their particular political and social intentions" and "embodied what Americans had been groping towards from the beginning of their history."¹⁶ Wood argued that Federalist ideas would endure and underpin a distinctly "American System of Government,"¹⁷ even as those ideas were "adopted and expanded by others."¹⁸ One aspect of the Founders' genius, Wood insisted, was that they "institutionalized and legitimized revolution," such that "new knowledge" could be incorporated into governance "without resorting to violence."¹⁹

This view of history must be understood as an artifact of a particular moment. In the 1950s and 1960s, Americans expressed a higher degree of

school"); Christopher Tomlins, *The Consumption of History in the Legal Academy: Science and Synthesis, Perils and Prospects*, 61 *J. Legal Educ.* 139, 144–45 (2011) (book review) (describing how useful Bailyn's and Wood's histories have been, first to liberal legal academics and then to conservative politicians and lawyers).

13. No works of history are. A journalist once asked Eric Foner, the acclaimed Civil War historian, "[W]hen did historians stop relating facts and start all this revising of interpretations of the past?" He replied, "Around the time of Thucydides." Eric Foner, *Who Owns History? Rethinking the Past in a Changing World*, at xvii (2003). Historians strive to tell a true story about the past, but in choosing some facts to emphasize and build into a coherent narrative, we suppress available alternatives. We do our best to characterize the past truthfully, knowing that other historians with equal integrity will make different choices. We welcome well-constructed and deeply researched alternatives when they come because the competing iterations build together toward something like the true complexity of the past. Of course, I do not mean to "imply that all historical arguments are created equal" or that historians "stand helpless" unable "to distinguish divergent accounts." William J. Novak, *Constitutional Theology: The Revival of Whig History in American Public Law*, 2010 *Mich. St. L. Rev.* 623, 628.

14. Bailyn, *Ideological Origins*, *supra* note 10, at 230–32, 246.

15. Edmund S. Morgan, *The Birth of the Republic, 1763–89*, at 3, 66 (4th ed. 2013). To be sure, the spirit of optimism pervading these works was not naïveté. It was an effort to tell a story about the survival of a republican aspiration to gradualist, nonviolent, pluralistic social change, and these works' relative optimism must be read in light of the recent conclusion of a war against authoritarianism (my thanks to Norm Silber for this insight).

16. Wood, *Creation of the American Republic*, *supra* note 10, at 593–615 (emphasis omitted).

17. *Id.*

18. *Id.*

19. *Id.* at 614.

trust in their government than at any other point since.²⁰ Victory in World War II gave the nation a coherent, if not messianic, idea of American culture and destiny. An all-consuming battle against Soviet ideology then encouraged intellectual efforts to prove the integrity of the American political project.²¹ A muscular administrative state had yet to fall under the relentless attack of the 1980s, and it seemed that the Federalists' vision—Alexander Hamilton's vision—for American empire was ascendant.²² The successes of the Civil Rights movement, first in *Brown v. Board* and then the Civil Rights Act, emboldened historians to downplay the horror of slavery as a doomed theme.²³ It is in that context that the cheerful, triumphant neo-Whig version of American history emerged.²⁴ These historians tried to

20. Pew Rsch. Ctr., *Beyond Distrust: How Americans View Their Government* 18 (2015), <https://www.pewresearch.org/politics/2015/11/23/1-trust-in-government-1958-2015/> [<https://perma.cc/KT6L-8NCV>].

21. See Alfred F. Young & Gregory H. Nobles, *Whose American Revolution Was It? Historians Interpret the Founding* 48–51 (2011) (quoting a 1949 American Historical Association presidential address that “[t]otal war, whether it be hot or cold, enlists everyone and calls upon everyone to assume his part”).

22. See Robert L. Rabin, *Legitimacy, Discretion, and the Concept of Rights*, 92 *Yale L.J.* 1174, 1178–79 (1983) (describing the expansion of the administrative state); see also Jerry L. Mashaw, *Creating the Administrative Constitution: The Lost One Hundred Years of American Administrative Law* 29 (2012) (“The Federalist or Hamiltonian wing of the founding generation was keenly aware of the need to create a government with broad authority that could command the respect and the loyalty of the populace.”).

23. See Young & Nobles, *supra* note 21, at 57–58 (discussing Edmund Morgan’s deficits on this score). Those scholars who discussed race more directly during the 1960s were “like the white mainstream culture from which most of them came and to which most of them spoke, less concerned with blacks themselves than with white attitudes and responses toward blacks.” Peter H. Wood, “I Did the Best I Could for My Day”: The Study of Early Black History During the Second Reconstruction, 1960 to 1976, 35 *Wm. & Mary Q.* 185, 189 (1978). And how could it be otherwise? In historical accounts concerned with the white citizen’s “inevitable” realization of his nation’s majestic core values of liberty and equality, the Black American can only be an inert object—any amelioration of his position is but evidence of others’ moral progress. In 1968, in his Presidential Address, the leader of the Organization of American Historians warned against African Americans’ insistence “on visibility, if not overvisibility, in the textbooks,” a project that could “win little support from true scholarship.” *Id.* at 218–19 (internal quotation marks omitted) (quoting Thomas A. Bailey, *The Mythmakers of American History*, 55 *J. Am. Hist.* 5, 7–8 (1968)). “The luckless African-Americans while in slavery were essentially in jail; and we certainly would not write the story of a nation in terms of its prison population.” *Id.* at 219 (internal quotation marks omitted) (quoting Bailey, *supra*, at 8).

24. Lin-Manuel Miranda’s musical *Hamilton*, which opened during the Obama presidency, is like the neo-Whig history in that it emerged in another moment of optimism. It barely mentions slavery, uses actors of color as the Patriot Founders, and casts white actors for the Loyalists and King George. It thereby associates the “freedom” and “liberty” that the American Patriots fought for with the freedom struggles of Black and brown peoples against white supremacist and colonial regimes. Many of those Patriot Founders, however, owned slaves or otherwise participated in or profited from Black slavery, a vast system of kidnapping

gather a compelling narrative from the mass of information in the past and make it advance sensibly toward their present. This is not a criticism of their work; that is the historian's craft.

We're writing in a different context now. Armed groups have surrounded state legislatures to intimidate them into passing or rescinding legislation.²⁵

and torture and rape. The actual historical figures *Hamilton* depicts knew that slavery was wrong but founded a nation with slavery at its heart anyway. See Paul Finkelman, *Slavery and the Constitutional Convention: Making a Covenant With Death*, in *Beyond Confederation: Origins of the Constitution and American National Identity* 188, 193–97 (Richard Beeman, Stephen Botein & Edward C. Carter II eds., 1987). The musical's innovative casting works an insidious erasure of that history. This was not, of course, the playwright's intention. There was a poignant moment soon after the transition to the Trump presidency that seemed to highlight the optimism or, perhaps, the complacency of the Obama years had always been important context supporting the show's ebullient message. See Christopher Mele & Patrick Healy, '*Hamilton*' Had Some Unscripted Lines for Pence. Trump Wasn't Happy., *N.Y. Times* (Nov. 19, 2016), <https://www.nytimes.com/2016/11/19/us/mike-pence-hamilton.html> (on file with the *Columbia Law Review*). With Vice President Mike Pence in the audience, the cast of *Hamilton* evidently did not feel that the show, by itself, did enough to represent their "American values," including their stance on the "inalienable rights" of "diverse America." Id.

25. See Mike Baker, *Armed Protesters Angry Over Virus Restrictions Try to Force Their Way Into the Oregon Statehouse.*, *N.Y. Times* (June 8, 2021), <https://www.nytimes.com/2020/12/21/world/oregon-coronavirus-protests.html> (on file with the *Columbia Law Review*) (reporting that armed protesters tried to enter the Oregon State Capitol in December 2020 to object to COVID-19 restrictions); Katelyn Burns, *Armed Protesters Entered Michigan's State Capitol During Rally Against Stay-At-Home Order*, *Vox* (Apr. 30, 2020), <https://www.vox.com/policy-and-politics/2020/4/30/21243462/armed-protesters-michigan-capitol-rally-stay-at-home-order> [<https://perma.cc/K3US-A3EH>] (reporting that armed protestors entered the Michigan Capitol to protest Governor Gretchen Whitmer's shelter-at-home order); Bill Chappell, *Richmond Gun Rally: Thousands of Gun Owners Converge on Virginia Capitol on MLK Day*, *NPR* (Jan. 20, 2020), <https://www.npr.org/2020/01/20/797895183/richmond-gun-rally-thousands-of-gun-owners-converge-on-virginia-capitol-on-mlk-d> [<https://perma.cc/G7ZC-MSE8>] (reporting that thousands of gun owners and armed militia members gathered at the Virginia State Capitol to protest new gun restrictions); John D'Anna, *As Nation Braces for Armed Protests, Arizona Showcases How First and Second Amendments Intersect—or Collide*, *azcentral* (Jan. 16, 2021), <https://www.azcentral.com/story/news/politics/arizona/2021/01/16/armed-protests-arizona-first-and-second-amendments-intersect/4183132001/> [<https://perma.cc/DWS4-WWNW>] (reporting that armed protesters gathered outside the Arizona Capitol to protest the results of the 2020 presidential election); Katie Hall, *Armed Gun Rights Activists Gather at Texas Capitol, Say Protest Is 'Not About the Election'*, *Austin American-Statesman* (Jan. 17, 2021), <https://www.statesman.com/story/news/2021/01/17/protests-austin-capitol-texas-live-updates-election-2020/4182139001/> [<https://perma.cc/6VDM-GBQ4>] (last updated Jan. 18, 2021) (reporting that about one hundred protestors, many of them armed, gathered outside the Texas Capitol to support gun rights); Stephanie Lai, Luke Broadwater & Carl Hulse, *Lawmakers Confront a Rise in Threats and Intimidation, and Fear Worse*, *N.Y. Times* (Oct. 1, 2022), <https://www.nytimes.com/2022/10/01/us/politics/violent-threats-lawmakers.html> (on file with the *Columbia Law Review*); Grant Schulte, *Activists With Assault Rifles Stir Fears at Nebraska Capitol*, *AP News* (Feb. 24, 2020), <https://apnews.com/article/88b9dd6f34d930704273bd03fa0835f8> [<https://perma.cc/9ZZ7-66XZ>] (reporting

This behavior has gone unpunished.²⁶ Anti-government extremists laid a months-long plot to kidnap a state governor.²⁷ Elected officials regularly receive death threats, and their homes and the homes of public health officials are picketed by armed men.²⁸ A growing percentage of Americans

that protesters entered the Nebraska Capitol in February 2020 with loaded, semi-automatic rifles to protest proposed restrictions on gun ownership); Shauna Sowersby & David Kroman, *Armed Protesters in Olympia Occupy Capitol Steps, Governor’s Mansion Lawn*, *Crosscut* (Jan. 6, 2021), <https://crosscut.com/politics/2021/01/armed-protesters-olympia-occupy-capitol-steps-governors-mansion-lawn> [https://perma.cc/4Z3Y-9DA5] (reporting that hundreds of armed protesters occupied the steps of the Washington State Capitol demanding the results of the November election be overturned); Ben Tobin, *At Kentucky Capitol, You Can Open Carry a Gun . . . But Don’t Conceal Those Umbrellas*, *Courier J.* (Jan. 8, 2020), <https://www.courier-journal.com/story/news/politics/ky-legislature/2020/01/08/kentucky-state-capitol-photo-circulates-men-guns/2843722001/> [https://perma.cc/RZ96-HGDE] (last updated Jan. 9, 2020) (reporting that gun owners entered the capitol rotunda in Kentucky to protest proposed restrictions on gun restrictions).

26. See, e.g., Jeremy Kohler, “Sense of Entitlement”: Rioters Faced Few Consequences Invading State Capitols. No Wonder They Turned to the U.S. Capitol Next., *ProPublica* (Jan. 19, 2021), <https://www.propublica.org/article/sense-of-entitlement-rioters-faced-no-consequences-invading-state-capitols-no-wonder-they-turned-to-the-u-s-capitol-next> [https://perma.cc/6SZG-ZVXC] (reporting that few, if any, charges were filed in several state capitol invasions).

27. Nicholas Bogel-Burroughs, Shaila Dewan & Kathleen Gray, *F.B.I. Says Michigan Anti-Government Group Plotted to Kidnap Gov. Gretchen Whitmer*, *N.Y. Times* (Oct. 8, 2020), <https://www.nytimes.com/2020/10/08/us/gretchen-whitmer-michigan-militia.html> (on file with the *Columbia Law Review*) (last updated Apr. 13, 2021).

28. See Bill Chappell, *Michigan Secretary of State Says Armed Protesters Descended on Her Home Saturday*, *NPR* (Dec. 7, 2020), <https://www.npr.org/sections/biden-transition-updates/2020/12/07/943820889/michigan-secretary-of-state-says-armed-protesters-descended-on-her-home-saturday> [https://perma.cc/E5KC-MVSP] (showing armed protesters at the home of the Michigan secretary of state in December 2020); Amy Donaldson, *Anti-Mask Protesters Target State Epidemiologist Dr. Angela Dunn*, *Deseret News* (Oct. 29, 2020), <https://www.deseret.com/utah/2020/10/29/21540624/anti-mask-protesters-target-state-epidemiologist-dr-angela-dunn> [https://perma.cc/U8FB-RBRG] (showing protesters targeted the home of Utah’s state epidemiologist); Pete Grieve, *Gunshot Struck Front Door of Ohio Assistant Medical Director’s Residence*, *Spectrum News 1* (Jan. 25, 2021), <https://spectrumnews1.com/oh/columbus/news/2021/01/25/mary-kate-francis-ohio-department-of-health-shots-fired-residence-home> [https://perma.cc/W9RT-T6X3] (reporting that a gunshot struck the front door of an Ohio public health official’s home); Gary Horcher, *Protesters Break Through Gates at Governor’s Mansion in Olympia, Storm to Front Door*, *KIRO 7* (Jan. 7, 2021), <https://www.kiro7.com/news/local/protesters-break-through-gates-governors-mansion-olympia/C5EC7W2MCZBKRA6RFCEJMSRYCE/> [https://perma.cc/Z3D6-67LP] (reporting that armed protesters broke through the gates of Washington’s governor’s mansion and quoting one protestor saying, “We pay for this mansion, so yeah we’re taking it over”); Bob Jacob, *Protesters Gather Outside of Dr. Amy Acton’s Home*, *Clev. Jewish News* (May 3, 2020), https://www.clevelandjewishnews.com/news/local_news/protesters-gather-outside-of-dr-amy-acton-s-home/article_fc0a516c-8d7b-11ea-b3ef-fbbfcd2244ef.html [https://perma.cc/VYP8-54MF] (showing, in May 2020, armed protesters gathered outside of the home of the director of Ohio’s Department of Health); KOIN 6 News Staff, *Photos: Armed Protesters Gather in Front of Gov. Brown’s*

now believe that force is justified to make political change.²⁹ In this context, it no longer makes sense to celebrate America as exceptional because we have discovered how to engage in politics “without resorting to violence.”³⁰ Instead, it makes more sense to ask: What is the path that led us here?

There are more than enough signs, for those looking to find them, that violence has been an integral part of the American system of government from the Founding era. That is because we are the inheritors of not one constitutional tradition from that era but two. One is a constitutionalism of institutions created by text along with a practice of turning to those institutions to resolve political differences.³¹ We have been taught to understand that this is the end-all-be-all. But that’s not right.

We are also the inheritors of the Founders’ unwritten constitutional tradition. And under the unwritten constitution of their upbringing, the

Residence, KOIN 6 (Nov. 22, 2020), <https://www.koin.com/news/oregon/photos-armed-protesters-gather-in-front-of-gov-browns-house/> [<https://perma.cc/22XV-JYJM>] (showing armed protestors in front of the Oregon governor’s home); Siobhan Lopez, Sununu Says Inauguration Ceremony Canceled Because of Concerns Over Armed Protestors, WMUR 9 (Dec. 30, 2020), <https://www.wmur.com/article/chris-sununu-2021-inauguration-canceled/35097969#> [<https://perma.cc/M4HG-KZ9J>] (reporting the New Hampshire governor’s announcement cancelling his outdoor inauguration due to armed protestors gathering outside his home for several weeks, including one individual who was arrested in his backyard with over two dozen rounds of ammunition); Jake Zuckerman, Pandemic Brings Protests, and Guns, to Officials’ Personal Homes, Ohio Cap. J. (Jan. 27, 2021), <https://ohiocapitaljournal.com/2021/01/27/pandemic-brings-protests-and-guns-to-officials-personal-homes/> [<https://perma.cc/EN2A-TUTH>] (reporting that armed protestors gathered at a former Ohio congresswoman’s home); see also Camryn Justice, Protestors Allegedly Supporting Trump Gather Outside State Rep. Weinstein’s Hudson Home, ABC News 5 Clev. (Jan. 24, 2022), <https://www.news5cleveland.com/news/democracy-2020/ohio-politics/protesters-allegedly-supporting-trump-gather-outside-state-rep-weinsteins-hudson-home> [<https://perma.cc/6FGM-YDCZ>] (last updated Jan. 25, 2022) (showing protestors at the home of Ohio Representative Casey Weinstein).

29. See Rachel Kleinfeld, *The Rise of Political Violence in the United States*, 32 *J. Democracy* 160, 167 (2021) (finding that the percentage of Democrats and Republicans who believed that violence was sometimes justified to advance their political goals approximately doubled from 2017 to 2020); Larry Diamond, Lee Drutman, Tod Lindberg, Nathan P. Kalmoe & Lilliana Mason, *Opinion, Americans Increasingly Believe Violence Is Justified if the Other Side Wins*, *Politico* (Oct. 1, 2020), <https://www.politico.com/news/magazine/2020/10/01/political-violence-424157> [<https://perma.cc/8N9X-PGB6>] (last updated Oct. 9, 2020) (finding that “the willingness of Democrats and Republicans alike to justify violence as a way to achieve political goals has essentially been rising in lockstep,” such that 26% of Americans with a strong political affiliation are “quite willing to endorse violence if the other party wins the presidency”); see also Robert Pape, *Why We Cannot Afford to Ignore the American Insurrectionist Movement*, *Chi. Project on Sec. & Threats* (Aug. 6, 2021), https://cpost.uchicago.edu/research/domestic_extremism/why_we_cannot_afford_to_ignore_the_american_insurrectionist_movement/ [<https://perma.cc/42UZ-UBNU>] (concluding from a survey that “the insurrectionist movement is more mainstream, cross-party, and more complex than many people might like to think”).

30. Wood, *Creation of the American Republic*, *supra* note 10, at 613–14.

31. See *supra* notes 16–19 and accompanying text.

Founders made claims through action, won rights through usage, and maintained rights through uninterrupted custom.³² This Article demonstrates that under a constitution thus defined through praxis, violence formed a part of the legal lexicon. It was not just that people at times resorted to violence to get their way; British North Americans belonged to communities that recognized violence as a means of making legal arguments and preserving legal norms.³³

The Federalists tried to replace this constitution of community consensus, of praxis, of action, and of force, with a written constitution. Their accomplishment, the neo-Whig historians taught us (skipping over the Civil War, which was not their period of expertise), was that we would thereafter fight out our controversies at the ballot box or in court.³⁴ A written constitution was supposed to confine constitutional claimsmaking to text and institutions.³⁵ Neo-Whig historians and their students have described the Founding moment as the triumphant establishment by the era's elite of this *ordered* system, one so bloodless and rational that we can still discern its outlines and parse its Framers' intentions by looking at the text they set down.³⁶ But this Article argues that the Federalists were not able to suppress or to fully transform Americans' constitutionalism of force.

The constitutionalism of force endures. Even as our institutional traditions have grown more dominant over the centuries, it is nonetheless impossible to fully account for the ordering of our society or for the interpretation of the textual Constitution without also understanding that

32. As I have previously argued, “[H]aving grown up as Britons, and having lost friends and family in a war to defend their rights as such, they” would continue to think “of themselves as the beneficiaries of a constitution of customary right.” Farah Peterson, *Constitutionalism in Unexpected Places*, 106 Va. L. Rev. 559, 565 (2020) [hereinafter Peterson, *Constitutionalism in Unexpected Places*].

33. These competing traditions are well-represented in the architecture of our Supreme Court building. Text engraved on its architrave proclaims, “Equal Justice Under Law,” while just underneath, the brass doors show King John sealing the Magna Carta following his defeat to the Rebel Barons at Runnymede. Building Features, Sup. Ct. of the U.S., <https://www.supremecourt.gov/about/buildingfeatures.aspx> [https://perma.cc/KL9D-VC4X] (last visited July 26, 2022); Magna Carta, Nat’l Archives, <https://www.archives.gov/exhibits/featured-documents/magna-carta> [https://perma.cc/CC8U-NMGH] (last visited July 26, 2022). Each of these architectural elements, both the textual truism and the pictorial origin story, have become a sort of anodyne pap for the first-year law student. But as constitutional philosophy, these sentiments are in opposition. Equal justice, the system of text- and precedent-based law that gives to each claimant the same principled answer, is not compatible with a system that awards rights to those few who win by force of arms. If these elements both belong on the face of the Supreme Court building, it is because of that tension. Together they help to express a contradiction at the core of our legal culture.

34. See, e.g., Wood, *Creation of the American Republic*, supra note 10, at 614 (“Americans had in fact institutionalized and legitimized revolution . . . [N]ew knowledge about the nature of government could be converted into concrete form without resorting to violence.”).

35. See *id.* at 613–15.

36. See, e.g., *id.*

violence has at times fueled the Constitution's evolution and defined the limits of constitutional amendment by more formal means. The Ku Klux Klan's campaign of terror defined the scope of the Reconstruction Amendments more than its framers' intentions did,³⁷ a scope formalized after the fact in *Plessy v. Ferguson*.³⁸

If America has a constitutional order that has endured since the Founding moment, that order is a blend of text and violence. The Founders' legitimation of violence is not a point of historical interest that has since been "fixed" and safely resolved. Resort to violence to resolve constitutional questions has instead been a recurring theme, one that is not as acute in every era but that resurfaces frequently. When it does, it poses a serious threat to the rule of law system and the institutional traditions we have nurtured and strengthened over the course of our history.

We have inherited the Federalists' failures, and these days we may feel them even more keenly than the Federalists' many successes. Violent movements have power to change our constitutional order. As a result, we are now in a time as precarious and as open to influence as any of the other key moments in our country's formation.

I. ORIGIN STORY

The Founders' constitution—the one they had before the Revolution, the one they fought to preserve in the Revolution, and the one they maintained afterward—was a constitution in which violence played a

37. See John Patrick Daly, *The War After the War: A New History of Reconstruction* 3–4 (2022) (arguing that the "complete triumph of white supremacist military forces in 1877 settled many of the open issues of the legacy of the earlier Civil War," and "ex-Confederate extremists, with their military action," also "crippled" each of the Reconstruction Amendments in the South); Steven Hahn, *A Nation Under Our Feet: Black Political Struggles in the Rural South From Slavery to the Great Migration* 266 (2003) (observing that "[b]etter than anyone," the freed slaves in the South "understood that the rites of democracy had been built on rituals of violence and suppression directed against them," and "[j]ust as "[p]aramilitary organization" had been central to slavery, "it remained fundamental to the social and political order of freedom"); *id.* at 265–313 (discussing the martial efforts Southern Black Americans undertook in order to participate in democracy and the rise of paramilitary organizations like the Klan devoted to suppressing Black participation); see also Eric Foner, *The Supreme Court and the History of Reconstruction— and Vice-Versa*, 112 *Colum. L. Rev.* 1585, 1587–90, 1592–93, 1602–03 (2012) (describing how historical writing of Reconstruction, which valorized the Ku Klux Klan, influenced the Supreme Court to limit the scope of the Reconstruction Amendments). See generally Eric Foner, *The Second Founding: How the Civil War and Reconstruction Remade the Constitution* (2019).

38. In *Plessy v. Ferguson*, 163 U.S. 537, 544 (1896), the Court held that "[t]he object" of the Fourteenth Amendment "was undoubtedly to enforce the absolute equality of the two races before the law, but, in the nature of things, it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality." But critical issues, including what the "nature of things" consisted in and whether "social" equality was a reasonable goal, were decided outside of the courthouse by paramilitary groups.

legitimate role. This is not to say that textual and hermeneutical arguments were unimportant; it is only to recover that violence also made for valid legal argument under the constitution of the Founders' upbringing. They had a "constitutionalism of force," by which I mean a legal culture in which some nongovernmental groups' recourse to violence to make claims could be understood or later ratified as legitimate and lawlike, rather than extralegal or seditious. Those groups' use of force could also establish legal rights and answer unsettled constitutional questions for the community going forward.³⁹

In this Part, as I explain what I mean when I say that the Founders had a constitutionalism of force, I will also address the most obvious counterargument—that I am describing tendencies that the Founders abhorred and tried to guard against, in part by erecting barriers against democracy and what they called a "Spirit of Licentiousness."⁴⁰ One wants to believe that what I am describing is not American culture at all, but American *counterculture*, and that this is not American constitutionalism, but the constitutional phantasms of the dispossessed and the fringe members of society, our rejects. And so, as I describe what I am calling the Founders' constitutionalism of force, I will also attend to what historians have said about class cleavages and the Founders' supposed fastidiousness about violence.

39. I am not using the word "constitution" to describe a system of fundamental law or a restraint on the arbitrary or willful uses of power. I am instead using "constitution" descriptively, to discuss how society is constituted. This Article's use of the word differs, therefore, from the modern law dictionary definition. See Constitution, Black's Law Dictionary (11th ed. 2019) (defining "Constitution," in part, as "the fundamental and organic law of a country or state that establishes the institutions and apparatus of government, defines the scope of government sovereign powers, and guarantees individual rights and civil liberties"). This Article's usage also differs from that of the early twentieth-century British jurist Albert Venn Dicey, who defined "Constitutional law" as "all rules which directly or indirectly affect the distribution or the exercise of the sovereign power of the state," because this Article's use of "constitution" takes into view coercive, custom-enforcing, and norm-setting relationships that are not typically thought of as aspects of sovereign or state power. A.V. Dicey, Introduction to the Study of the Law of the Constitution 22 (8th ed. 1915); see also Stephen Holmes, Foreword to András Sajó, Limiting Government: An Introduction to Constitutionalism, at ix–x (Cent. Eur. Univ. Press trans., 1999) (defining constitutions as restraints on power). On the complicated and multivarious modern definitions of constitution and constitutionalism, see Tom Ginsburg, David Landau & Mila Versteeg, Comparative Constitutional Law: A Global and Interdisciplinary Approach (forthcoming 2022) (manuscript at 2–8) (on file with the *Columbia Law Review*). For important thoughts on the origins of the Founders' other constitutional traditions, including textual constitutionalism and the division of government power among institutions, see generally Alison L. LaCroix, *The Ideological Origins of American Federalism* (2011); Nikolas Bowie, *Why the Constitution Was Written Down*, 71 *Stan. L. Rev.* 1397 (2019).

40. Pauline Maier, *From Resistance to Revolution: Colonial Radicals and the Development of American Opposition to Britain, 1765–1776*, at 22 (1974) [hereinafter Maier, *From Resistance to Revolution*] (citing Letter from John Jay to Thomas Jefferson (Oct. 27, 1786), in 10 *The Papers of Thomas Jefferson*, 22 June to 31 December 1786, at 488, 488 (Julian P. Boyd, Mina R. Bryan & Fredrick Aandahl eds., 1954)).

I am crediting, as part of our constitutional heritage, the ideas of a range of thinkers of America's late eighteenth century, including incipient Federalists, Anti-Federalists, and also a third group of men, often lumped with the Anti-Federalists, who held more egalitarian ideas than the elite representatives of Anti-Federalism we usually study.⁴¹ All of these men thought that violence could create good law. In discussing all of them, I am straying from the fashion for picking out a theme in the intellectual tradition of elite Federalists,⁴² a scholarly trend which makes for far more orderly writing and is also so useful to the history-inclined sensibilities of modern jurisprudence. My history is more unwieldy—and less reassuring. One might hope that a chronology that begins in the mid-eighteenth century and proceeds through the Revolution, Shays' Rebellion, Ratification, the Whiskey Rebellion, and Fries's Rebellion would end on a note of triumph for the Federalists, who would have captured some claim to a monopoly of violence and finally rejected popular insurrections against positive law as transgressive and illegitimate. This, however, is not our story. Including more voices makes more sense of the tradition that emerged, viewed in its totality.

A. *The Urgency of Early American Constitutional Thought*

We now tend to emphasize aspects of eighteenth-century constitutional culture that were inventive, forward looking, and revolutionary. But British North Americans had a self-congratulatory legal culture and, before the war, all but the truly radical seemed to believe that their existing constitution was the “happiest in the World, found on Maxims of consummate Wisdom.”⁴³ They believed, with Voltaire, that it had “not been without some difficulty that liberty ha[d] been established in England, and the idol of arbitrary power ha[d] been drowned in seas of blood.”⁴⁴ All that bloodshed, furthermore, had not been “too high a price.”⁴⁵

British North Americans could not rest on the achievements of prior generations, however, because their “constitution” was not a blueprint for government or a mission statement as ours is. Instead, they used the word descriptively, to compass how their society was constituted, including “that assemblage of laws, institutions and customs . . . according to which the

41. See Saul Cornell, *Aristocracy Assailed: The Ideology of Back-Country Anti-Federalism*, 76 *J. Am. Hist.* 1148, 1149–50 (1990) (describing a “distinctive populist variant of Anti-Federalist ideology” that was shaped by elite antagonism).

42. See Saul Cornell, *Meaning and Understanding in the History of Constitutional Ideas: The Intellectual History Alternative to Originalism*, 82 *Fordham L. Rev.* 721, 725–28 (2013).

43. The Connecticut Resolves, October 25, 1765, reprinted in *Prologue to Revolution: Sources and Documents on the Stamp Act Crisis, 1764–1766*, at 54, 54 (Edmund S. Morgan ed., 1959) [hereinafter *Prologue to Revolution*].

44. Voltaire, *Of the Parliament*, in 13 *The Works of M. de Voltaire* 68, 71 (T. Smollett & T. Francklin eds., 1762).

45. *Id.*

community hath agreed to be governed.”⁴⁶ As such, a government infraction of rights, if unresisted, was nothing less than a redefinition of the constitutional order. During the Stamp Act crisis and the other confrontations with Britain in the 1760s, this understanding of the constitution generated a tremendous sense of urgency.⁴⁷ When other appeals failed, colonists believed that force was necessary to preserve their freedoms.

The constitution was the community’s consensus about its customs, duties, privileges, rules, and procedures, as expressed through ongoing praxis.⁴⁸ The importance of community consensus explains many aspects of eighteenth-century legal thought: the law-finding jury, for instance,⁴⁹ as well as British North Americans’ intense localism.⁵⁰ The explicit legal point most debated in pamphlet literature before the American Revolution was whether adequate representation was possible in a distant legislative body.⁵¹ This makes sense because distance meaningfully limited the range over which it was possible to maintain communities of shared culture. The basis of the constitution in consensus also explains the force behind the frequent argument that a privilege or immunity had persisted from “time immemorial,” which was not just an argument that a practice should be accorded dignity because of its antiquity.⁵² An assertion of continuous

46. From the *Craftsman*, *Boston-Gazette & Country J.*, Oct. 12, 1767, at 3 (discussing the difference between constitution and government); see also Bernard Bailyn, *Power and Liberty: A Theory of Politics*, in 1 *Pamphlets of the American Revolution, 1750–1776*, at 38, 45 (Bernard Bailyn ed., 1965) [hereinafter *Bailyn, Power and Liberty*] (defining British North Americans’ constitution as “the constituted—that is, existing—arrangement of governmental institutions, laws, and customs together with the principles and goals that animated them”).

47. See *infra* notes 63–73 and accompanying text.

48. Jack P. Greene, *Law and the Origins of the American Revolution*, in 1 *The Cambridge History of Law in America* 447, 470 (Michael Grossberg & Christopher Tomlins eds., 2008) (“[I]n the context of British and British-American legal traditions, law in the 1760s and 1770s was still as much thought of as custom and community consensus as sovereign command.”).

49. See John Adams, *Adams’ Diary Notes on the Right of Juries* (Feb. 12, 1771), in 1 *Legal Papers of John Adams* 228, 230 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965) (opining that a juror should use his own judgment even if it goes against the recommendation of the judge, as the “great Principles of the Constitution, are intimately known, they are sensibly felt by every Briton”).

50. See J.R. Pole, *Political Representation in England and the Origins of the American Republic* 339–42 (1971) (discussing localism as a political tradition and strategy for Revolutionary organization).

51. See *Authentic Account of the Proceedings of the Congress Held at New-York in 1765, on the Subject of the American Stamp Act* 6 (n.p. 1767) [hereinafter *Proceedings of the Congress Held at New-York*] (“That the people of these colonies are not, and, from their local circumstances, cannot be, represented in the House of Commons in Great-Britain.”).

52. One sees this argument everywhere, but to pick a relevant series of examples, we find it in every single colony’s official remonstrance to Parliament over the Stamp Act.

practice also represented the acquiescence of many Britons—in essence, the continuing consent of a larger community over time.⁵³ Any change would therefore be met with resistance from those who had come to enjoy privileges that had accrued by prescription, like property rights, under the law as it stood.⁵⁴

Because the word “constitution” described the existing arrangement of society, eighteenth-century thinkers sometimes used the word to describe Britain’s celebrated balance of monarchy, aristocracy, and democracy.⁵⁵ Among groups whose circumstances bred a certain natural antagonism, however, that balance was constantly at risk, and the greatest threat to the constitution was man’s tendency to aggrandize his own power.⁵⁶ “Such is the ‘depravity of mankind,’” warned Samuel Adams, “‘that ambition and lust of power above the law are . . . predominant

Prologue to Revolution, *supra* note 43, at 47–62 (printing the colonies’ remonstrances to Parliament over the Stamp Act); see also Alexander Hamilton, *The Farmer Refuted: Or, a More Impartial and Comprehensive View of the Dispute Between Great-Britain and the Colonies* 10 (New York, 1775).

53. Reflecting on the great difficulty that English legal scholars have had coming up with rational explanations justifying their assertions over the ages that English law is the best law, the historian J.G.A. Pocock once pointed out that “custom is the fruit of experience, operating at the lowest and least articulate level of intelligence, that of trial and error. Only experience can establish it; only experience can know it to be good,” and “it necessarily rests on the experience of countless other men in past generations, of which the custom itself is the expression. Custom therefore is self-validating . . .” J.G.A. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* 17–18 (1975).

54. See Greene, *supra* note 48, at 469–70 (describing the use of “force and intimidation to prevent the enforcement of metropolitan laws contrary to local customs and interests”).

55. Following this pattern of breaking the constitution into taxonomical elements, John Adams compared it to the “Constitution of the human Body,” which included “a certain Contexture of Nerves, fibres, Muscles, or certain Qualities of the Blood and Juices” and whose end was life and health. 1 *Diary and Autobiography of John Adams* 296–97 (L. H. Butterfield ed., 1961). Government was “a Frame, a scheme, a system, a Combination of Powers,” including those of “the King, the Lords, the Commons, and the People.” *Id.* at 297–98. Its purpose was “Liberty.” *Id.* at 298. For a witty and learned essay tracing the rise and fall of the idea of the balanced constitution in British and eighteenth-century American thought, and also arguing that it should be seen as part of a larger intellectual fad for a priori historical reasoning, see generally Stanley Pargellis, *The Theory of Balanced Government*, in *The Constitution Reconsidered* 37 (Conyers Read ed., 1938). For a broader work tying the “balanced constitution” to the development of British institutions in the eighteenth century and showing its overlap and interaction with earlier notions of the mixed constitution, as well as new ideas about separation of powers, see generally M.J.C. Vile, *Constitutionalism and the Separation of Powers* (1967).

56. See *The Nature and Extent of Parliamentary Power Considered*, in *Some Remarks Upon Mr. Pitt’s Speech in the House of Commons, Previous to the Repeal of the Stamp-Act*, *Boston-Gazette & Country J.*, Feb. 15, 1768, at 2 (“In mixt forms of government . . . jealous fears frequently intervene, upon the slightest appearance of irregularity . . . lest a designing minister should extend the prerogative of the crown, or an artful commoner increase the liberty of the subject. A few thousands added to the military list, have alarmed the whole nation . . .”).

passions in the breasts of most men.”⁵⁷ Pastor Zabdiel Adams thought that “the united considerations of reason and religion” had never been enough “to restrain these lusts.”⁵⁸ These temptations “combined the worst passions of the human heart and the worst projects of the human mind in league against the liberties of mankind.”⁵⁹ Institutions of government were prone to overreach as well, as “avarice, pride, malice, envy, and a love of power” always motivate “established bodies in government, so long as men are men.”⁶⁰ Therefore, “the least attempt upon public Liberty” must be opposed immediately because “if it is suffered once, it will be apt to be repeated often; a few repetitions create a habit; habit claims prescription and right.”⁶¹

To say that the constitution is descriptive and made up of rights that accrue through use, like property rights, and to add that men are power hungry and grasping by nature, is to point out a terrible vulnerability. Because men were fallible and because the constitution was whatever the community assented to over time, the constitution was especially

57. Bailyn, *Power and Liberty*, supra note 46, at 41 (alteration in original) (quoting Samuel Adams); see also id. at 38–41, 39 n.3, 40 nn.4–5, 41 n.6 (collecting quotes and sources on the eighteenth-century obsession with the problem of man’s lust for power).

58. Id. at 41 (internal quotation marks omitted) (quoting pastor Zabdiel Adams); see also Daniel Dulany, *Considerations on the Propriety of Imposing Taxes in the British Colonies, for the Purpose of Raising a Revenue, by Act of Parliament 58* (North America, 2d ed. 1765) (“Mankind are generally so fond of Power, that they are oftner tempted to exercise it beyond the Limits of Justice, than induced to set bounds to it . . .”); Letter to the Editor, *Bos. Evening-Post*, Dec. 9, 1765, at 1 [hereinafter Dec. 1765 Letter to the Editor, *Bos. Evening-Post*] (“Power is of a tenacious Nature: What it seizes it will retain.”).

59. Bailyn, *Power and Liberty*, supra note 46, at 41 (internal quotation marks omitted) (quoting pastor Oliver Noble); see also Bailyn, *Ideological Origins*, supra note 10, at 60–61 n.6 (collecting quotes on this theme).

60. Obadiah Hulme, *An Historical Essay on the English Constitution: Or, an Impartial Inquiry Into the Elective Power of the People, From the First Establishment of the Saxons in This Kingdom 140* (London, 1771). While historians have found that lower-class radical political movements in the American colonies seem to have been less interested, overall, in “balance” and more optimistic about man’s basic goodness, popular movements had their own version of these anxious ruminations about the vices of men, focusing on the corruptions of wealth instead of place. See Edward Countryman, “Out of the Bounds of the Law”: Northern Land Rioters in the Eighteenth Century, in *The American Revolution: Explorations in the History of American Radicalism* 37, 49 (Alfred F. Young ed., 1976) [hereinafter *The American Revolution*] (quoting Moss Kent and William Prendergast that “poor men were always oppressed by the rich,” and, as a result, “there is no law for poor men”). As much of the shared rhetoric in the lead up to the Revolution criticized the British Empire as a greedy and unfair trading partner, and as wealth and place usually went hand in hand, in the 1760s and 1770s, this class distinction was not one that mattered. See Peterson, *Constitutionalism in Unexpected Places*, supra note 32, at 573 (explaining the ways economic justice themes contributed to the justification for the Revolution).

61. Thomas Gordon, *Discourse V: Of Governments Free and Arbitrary, More Especially that of the Caesars*, in *4 The Works of Tacitus With Political Discourses Upon that Author 219, 248* (Thomas Gordon ed., Dublin, 5th ed. 1777).

vulnerable to decay. British North Americans believed that “the Fate of Nations” was “precarious” and could tip at any moment toward tyranny.⁶²

During the Stamp Act crisis, Americans sounded the alarm, urging that “such is the delicacy of the *British* constitution, that it instantly dies” when infringed and “every privilege wings” its “flight.”⁶³ They insisted that “the Taxation of the People by themselves, or by Persons chosen by themselves” is “the distinguishing Characteristick of *British* Freedom, without which the ancient Constitution cannot exist.”⁶⁴ This was the language they used—not just that the constitution would be violated but that it “cannot exist”⁶⁵ and “cannot subsist.”⁶⁶

It did not seem hyperbole to them to say that their “rights and liberties” were “in danger of being for ever lost.”⁶⁷ That is because the constitutional rights of the eighteenth century had a “use it or lose it” quality.⁶⁸ A constitution, left unenforced by the people, would be dead and gone, and whatever replaced it as the status quo would be the actual constitution. Because of this, it was not enough during the Stamp Act crisis for British North Americans to say that self-governance had historical precedent—that it was a “Birth-right” that they, “as *Englishmen*,” had “possessed ever since” the colonies were “settled”⁶⁹ and that their rights had been guaranteed by colonial charters.⁷⁰ They also had to insist that their rights to local self-government had not since been “wa[i]v[ed]”⁷¹ and had been enjoyed “without Interruption”⁷² and further, that they “have never been forfeited,

62. The Votes and Proceedings of the Freeholders and Other Inhabitants of the Town of Boston, in Town Meeting Assembled, According to Law 34 (Boston, Edes & Gill, T. & J. Fleet 1772).

63. Letter, Sent by a Plain Yeoman in New-England, to a Certain Great Personage in Old-England, *Providence Gazette & Country J.*, May 11, 1765, at 1 [hereinafter *Plain Yeoman Letter*].

64. Thursday, the 30th of May, 5 Geo. III. 1765, in *Journals of the House of Burgesses of Virginia: 1761–1765*, at 358, 360 (John Pendleton Kennedy ed., 1907).

65. *Id.*

66. The Resolutions as Recalled by Patrick Henry, reprinted in *Prologue to Revolution*, supra note 43, at 48, 48.

67. Proceedings of the Congress Held at New-York, supra note 51, at 13.

68. This is a phrase I’m borrowing from Hendrik Hartog. See, e.g., Hendrik Hartog, *Someday All This Will Be Yours: A History of Inheritance and Old Age 172* (2012).

69. The Pennsylvania Resolves, September 21, 1765, reprinted in *Prologue to Revolution*, supra note 43, at 51, 51–52.

70. Although, they made all these points as well. For additional instances of appeals to “birthrights,” see Petition to the House of Commons, in *Proceedings of the Congress Held at New-York*, supra note 51, at 19, 20–21.

71. Memorial to the Lords of Parliament, in *Proceedings of the Congress Held at New-York*, supra note 51, at 15, 17.

72. Resolves of the House of Burgesses in Virginia, June 1765, *Md. Gazette*, July 4, 1765, at 3.

or any other Way yielded up, but have been constantly recogniz'd by the King and People of Britain.”⁷³

The constitution was nothing more and nothing less than the ongoing, active consent of the governed, and so Americans had to be ever vigilant, to oppose anything they saw as an infringement, and to insist that they were “not in the least desiring any alteration or innovation in the grand bulwark of their liberties and the wisdom of the ages.”⁷⁴ Colonial assemblies explained the need for public resolves against unconstitutional legislation on the same rationale: that “their Posterity may learn and know, that it was not with their Consent and Acquiescence, that any Taxes should be levied on them by any Persons but their own Representatives.”⁷⁵

Because the constitution developed through acquiescence and prescription, eighteenth-century America rang with early warnings about possible insults to constitutional privileges. After all, “SLAVERY IS EVER PRECEDED BY SLEEP.”⁷⁶ “It is well known,” they urged, “by what silent and almost imperceptible degrees the liberties of subjects may be encroached upon.”⁷⁷ And every one of those incursions, “every little infraction of . . . privilege [], whether casual or designed, tends consequentially to the introduction of tyranny.”⁷⁸ While the Stamp Act might seem incremental, a writer in the *Boston Evening-Post* warned that it was actually “an Experiment of your Disposition. If you quietly bend your Necks to that Yoke, you prove yourselves ready to receive any Bondage to which your *Lords* and *Masters* shall please to subject you.”⁷⁹ George Mason agreed, calling the act nothing less than an “endeavor” by “those who have

73. Extract of a Letter From a Gentleman in Philadelphia, to His Friend in This Town, Dated Last Thursday, Newport Mercury, June 24, 1765, at 3 (enclosing the Resolves of the Virginia Assembly on debating the Stamp Act); see also The Maryland Resolves, September 28, 1765, reprinted in Prologue to Revolution, supra note 43, at 52, 53 (noting that Maryland subjects “have always enjoyed the Right of being Governed by Laws to which they themselves have consented” and that this right “hath been Constantly recognized by the King and People of Great Britain”); Proceedings of the General Assembly, Held for the Colony of Rhode Island and Providence Plantations, at East Greenwich, the Second Monday in September, 1765, in 6 Records of the Colony of Rhode Island and Providence Plantations, in New England 447, 452 (John Russell Bartlett ed., Providence, Knowles, Anthony & Co. 1861) (noting that Rhode Island subjects had “enjoyed the right” to self-governance on the subject of “taxes and internal police; and that the same hath never been forfeited, or any other way yielded up; but hath been constantly recognized by the King and people of Britain”).

74. Union in Arms, reprinted in Prologue to Revolution, supra note 43, at 117, 118.

75. The Pennsylvania Resolves, supra note 69, at 52.

76. A Farmer, Letter to the Editor, Dunlap’s Pa. Packet or, Gen. Advertiser, Feb. 27, 1775, at 3 [hereinafter A Farmer Letter].

77. Plain Yeoman Letter, supra note 63, at 1.

78. Id.

79. Dec. 1765 Letter to the Editor, Bos. Evening-Post, supra note 58, at 1.

hitherto acted as our friends . . . insidiously to draw from us concessions destructive to what we hold far dearer than life.”⁸⁰

Symbolic protest was not enough to save a constitution defined by praxis. Patriots had to take concrete measures to preserve their rights against encroachment. Throughout the decade leading up to the Revolution, mobs terrorized officials charged with executing laws they did not like, forcing them to resign their commissions on pain of death, destroying property both public and private, and subjecting suspected collaborators to whippings, tarring and featherings, public humiliations, imprisonments in the stocks, forced marches through jeering crowds, public confessions, hanging in effigy, and other intimidations.⁸¹

Americans justified these measures by appealing to the sacrifices of their forebears. An endlessly repeated theme was that the men of the glorious past had done their bloody duty and British North Americans would not hesitate to do theirs. A New Yorker named himself a “patriot” who, finding his “beloved country” “fainting and . . . hourly expecting to be utterly crush’d by the iron rod of power,” “would joyfully pour out his blood to extricate” her “from destruction.”⁸² A Virginian speaking to his assembly was moved to the “heat of passion” by the “Interest of his Countrys Dying liberty,” to say that “in former times tarquin and Julus had their Brutus, Charles had his Cromwell, and he Did not Doubt but that some good American would stand up in favor of his Country.”⁸³ Gathering in groups calling themselves “Sons of Liberty,” men wrote resolutions, like that of the Virginia Liberty Men, pledging to “cheerfully embark our Lives and fortunes in the Defence of our Liberties and Privileges,” and promising to “resist” the Stamp Act “to the last Extremity.”⁸⁴ North Carolina Liberty Men likewise avowed that they were “truly sensible of the inestimable Blessings of a free Constitution, gloriously handed down to us by our brave Forefathers” and as they preferred “Death to Slavery,” they would prevent the operation of the Stamp Act “at any Risk whatever.”⁸⁵

The obligation to maintain the constitution was not just a debt owed to the honorable dead. It was also a “Duty they owe[d] to . . . their Posterity,” to whom they would either pass the constitution in the state of

80. An American Reaction, reprinted in Prologue to Revolution, *supra* note 43, at 158, 162.

81. See *infra* notes 106–122 and accompanying text.

82. New-York, New-York Mercury, Oct. 21, 1765, at 1.

83. Journal of a French Traveller in the Colonies, 1765, I., 26 *Am. Hist. Rev.* 726, 745–46 (1921).

84. At a Meeting of the Sons of Liberty of the City of New-Brunswick, in the County of Middlesex, and the Province of New-Jersey, the 25th of February, 1766, *Pa. Gazette*, Mar. 6, 1766, at 2; see also New-York, January 13, New-York Mercury, Jan. 13, 1766, at 3 (“[W]e will go to the last Extremity, and venture our Lives and Fortunes, effectually to prevent the said Stamp-Act from ever taking Place in this City and Province.”).

85. North Carolina, *Md. Gazette*, Apr. 10, 1766, at 2.

perfection in which they had found it or gravely diminished if they now failed to defend each inch of ground.⁸⁶ As a Bostonian put it in his town meeting, “Your regard for Yourself and for the rising Generation, cannot suffer you to doze,” or to sit “supinely indifferent,” while “the Iron Hand of Oppression” tore “Fruit” from the “Tree of Liberty, planted by our worthy Predecessors, at the Expence of their Treasure, and abundantly water’d with their Blood.”⁸⁷ The stakes were high. The Virginia Sons of Liberty’s resolves against the Stamp Act asserted that they were willing to “sacrifice” their “lives” because they were “unwilling to rivet the shackles of slavery and oppression on ourselves, and millions yet unborn.”⁸⁸

Eighteenth-century British North Americans also held strong views about how governments should respond to citizen violence. They believed that governments ought to engage in discursive relationships with violent groups of angry men. To “suffer the laws to be trampled upon, by the licence among the rabble” was “far less dangerous, to the Freedom of a State” than “to dispence with their force by an act of power.”⁸⁹ Their view that “[g]overnm’t . . . ought to be weak”⁹⁰ was not, however, a preference for private force over public force. Understanding the constitution as they did—as community consensus—this view was rather a preference for violence to rest in the hands of more of the public, where it could more accurately reflect the will of those who would ultimately decide which measures were lawful.

In what historian John Phillip Reid would call a good summary of Whiggish political theory, the Massachusetts House of Representatives read a lecture to acting Governor Thomas Hutchinson on how responsible executives ought to respond to “complaints” of “riots and tumults.”⁹¹ “[I]t is the wisdom of government,” they said, to “inquire into the real causes of

86. The Pennsylvania Resolves, *supra* note 69, at 51; see also *An American Reaction*, *supra* note 80, at 162 (“[W]e have received [these rights] from our ancestors, and with God’s leave, we will transmit them, unimpaired, to our posterity.”); *Petition to the House of Commons*, reprinted in *Prologue to Revolution*, *supra* note 43, at 66, 67 (“[W]e glory in . . . having been born under the most perfect form of government . . .”).

87. *The Votes and Proceedings of the Freeholders and Other Inhabitants of the Town of Boston*, *supra* note 62, at 34.

88. *At a Meeting of a Considerable Number of Inhabitants of the Town and County of Norfolk, and Others, Sons of Liberty, at the Court House of the Said County, in the Colony of Virginia, on Monday the 31st of March, 1766*, *Pa. J. & Wkly. Advertiser*, Apr. 17, 1766, at 2.

89. *Supplement to New-York J., or Gen. Advertiser*, Jan. 4, 1770, at 1.

90. John Phillip Reid, *In a Defensive Rage: The Uses of the Mob, the Justification in Law, and the Coming of the American Revolution*, 49 *N.Y.U. L. Rev.* 1043, 1051 (1974) (internal quotation marks omitted) (quoting *Letter of July 2, 1770*, in *Letters of Samuel Cooper to Thomas Pownall, 1769–1777*, 8 *Am. Hist. Rev.* 301, 319 (1903)).

91. *Answer of the House of Representatives, to the Foregoing, April 23, 1770, in Speeches of the Governors of Massachusetts From 1765 to 1775; and the Answers of the House of Representatives to the Same*, at 203, 203 (Boston, Russell & Gardner 1818) (writing to Lieutenant Governor Thomas Hutchinson).

them”⁹² and “[i]f they arise from oppression, as is frequently the case, a thorough redress of grievances” puts “an end to the complaint.”⁹³ After all, “[i]t cannot be expected, that a people, accustomed to the freedom of the English constitution, will be patient, while they are under the hand of tyranny and arbitrary power.”⁹⁴

For their part, once alerted to an infringement on their liberties, the people could not back down from their claims. What was at issue in each of these contests was not only whether Americans would remain free but whether, according to the dictates of their own constitutional theory, British North Americans would continue to *deserve* liberty. The English political writers that formed the political education for many American Patriot leaders taught that moral corruption prepared the public for “the Yoke of Servitude.”⁹⁵ These ideas, very much in the air by the 1770s, were well-represented in pamphlet and newspaper propaganda in the lead up to the Revolution: When “states . . . los[e] their liberty . . . [it] is generally owing to the *decay of virtue*,” said “A Farmer” in 1775, clearly a student of this tradition.⁹⁶ Thomas Paine’s pithy warning—“when the republican virtue fails, slavery ensues”—made the same point.⁹⁷ The kind of “Publick Spirit” or “Virtue” called for was the fortitude to “maintain the People in Liberty” by “resist[ing] oppressors.”⁹⁸

92. *Id.*

93. *Id.*

94. *Id.* at 203–04. This argument reflected, John Phillip Reid argues, “respectable political thought not only in the colonies but also in Great Britain.” See Reid, *supra* note 90, at 1051–52. “I love a mob,” said the Duke of Newcastle in the House of Lords, in a boast reported in 1768 in the *Boston Gazette*: “I headed a mob myself. We owe the Hanoverian succession to a mob.” *Id.* at 1068 (internal quotation marks omitted) (quoting Anecdote, *Boston-Gazette & Country J.*, Aug. 22, 1768, at 1). While Whiggish views did not stand unopposed in the metropole, they nevertheless always found an influential mouthpiece. Prime Minister William Pitt told the House of Lords to consider these “tumults” in America merely “the ebullitions of liberty.” *Id.* at 1052 (internal quotation marks omitted) (quoting Paragraph of a Speech of the Right Hon. Earl of Chatham, in the House of Lords, *Boston-Gazette & Country J.*, May 7, 1770, at 2). “[T]hey are only some breakings out in the skin of the body politic, which, if rudely restrained and improperly checked, may strike inwardly, and endanger the vitals of the constitution,” Pitt remarked. *Id.* at 1052 (internal quotation marks omitted) (quoting Paragraph of a Speech of the Right Hon. Earl of Chatham, in the House of Lords, *Boston-Gazette & Country J.*, May 7, 1770, at 2).

95. Maier, *From Resistance to Revolution*, *supra* note 40, at 44 (internal quotation marks omitted) (quoting 1 John Trenchard & Thomas Gordon, *Cato’s Letters* 203 (London, 1723)).

96. A Farmer Letter, *supra* note 76, at 3. John Dickinson wrote a series of letters for colonial newspapers under the pseudonym “A Farmer.” See The English Editor to the Reader [of John Dickinson’s *Letters From a Farmer*], 8 May 1768, Nat’l Archives: Founders Online, <https://founders.archives.gov/documents/Franklin/01-15-02-0066> [<https://perma.cc/QUV8-ZKZW>].

97. Thomas Paine, *Rights of Man, Common Sense, and Other Political Writings* 19 (Mark Philp ed., Oxford Univ. Press 1998) (1776).

98. Letter to the Editor, *Indep. Advertiser* (Boston), Jan. 25, 1748, at 1 [hereinafter Jan. 1748 Letter to the Editor, *Indep. Advertiser*].

Critically, the connection between a failure of vigilance and the loss of rights was not thought simply causal but also moral, and therefore, people always had the constitution they deserved. “[N]ations were as free as they deserved to be,” Benjamin Rush wrote, quoting Samuel Adams in a letter to John Adams.⁹⁹ John Adams replied that he thought this was “true . . . and has a good tendency to excite vigilance and energy in defense of freedom.”¹⁰⁰ That is to say, Americans of the Founding era believed that people had a legitimate legal claim to only as much liberty as they were willing to defend—through violence if necessary.¹⁰¹

As a corollary, Americans believed that those who were *not* willing to defend their rights by force thereby forfeited them. “They, who are willing to be made slaves and to lose their rights . . . without one struggle,” said an author in a Massachusetts paper in 1761, “justly deserve the miseries and insults an imperious despot can put upon them.”¹⁰² Such people “deserve to be trampled on by the whole chain of wretches.”¹⁰³ Or, as a Pennsylvania newspaper trumpeted in 1768, “Those who would give up essential Liberty to purchase a little temporary Safety, DESERVE neither Liberty nor Safety.”¹⁰⁴ “The cause of freedom is a great and good cause,” said the patriot pamphleteer Cato in 1770, “and those only deserve to enjoy it who have the courage to assert it when it is invaded.”¹⁰⁵

And assert it they did. In Elizabeth, New Jersey, townspeople erected “a large Gallows . . . with a rope ready fixed thereon” and declared that “the first person that either distributes or takes out a stamp paper” would “be hung thereon without judge or jury.”¹⁰⁶ In Virginia, gentlemen

99. Furstenberg, *supra* note 9, at 1295 (internal quotation marks omitted) (quoting Letter from Benjamin Rush to John Adams (July 20, 1812), in *The Spur of Fame: Dialogues of John Adams and Benjamin Rush, 1805–1813*, at 234, 234 (John A. Schutz & Douglass Adair eds., 1966)).

100. *Id.* (internal quotation marks omitted) (quoting Letter from John Adams to Benjamin Rush (Aug. 1, 1812), in *The Spur of Fame: Dialogues of John Adams and Benjamin Rush, 1805–1813*, at 234, 235 (John A. Schutz & Douglass Adair eds., 1966)).

101. I should pause to note that Americans were a diverse people and the historical record contains dissenting voices and alternate trends in intellectual culture. There is rarely any one thing that “Americans” “*believed*.” A longer article would have engaged with some of these alternatives. For those who are interested, Reid’s article, cited throughout this section, provides one alternative starting point for analysis. See Reid, *supra* note 90, at 1064. He discusses a contrary “Tory” perspective on the violence of these decades, a perspective which was much more law and order. *Id.*

102. Furstenberg, *supra* note 9, at 1303 (internal quotation marks omitted) (quoting Richard L. Bushman, *King and People in Provincial Massachusetts* 209 (1985)).

103. *Id.* (internal quotation marks omitted) (quoting Richard L. Bushman, *King and People in Provincial Massachusetts* 209 (1985)).

104. Pa. J. & Wkly. Advertiser, July 28, 1768, at 3.

105. Cato, *Libertas et Natale Solum*, N.H. Gazette & Hist. Chron., July 13, 1770, at 1. See generally Furstenberg, *supra* note 9 (proving the thesis that late eighteenth-century Americans believed that liberty must be deserved).

106. New-York, Feb. 20, Bos. Evening-Post, Mar. 3, 1766, at 2.

informed a recently arrived stamp master that “his Baggage was put on board” a “Vessel which was to sail for London the next morning, and advised him to take Passage in her without Delay, as his Life would be in Danger if he staid there another Day.”¹⁰⁷ The newspaper reported that the Stamp Master “complied with” this advice “immediately.”¹⁰⁸

In Newport, Rhode Island, crowds hung effigies of the newly appointed stamp officers from a gallows through the day with contemptuous messages scrawled on them. At nightfall, the effigies were “cut down and burnt under the gallows, amidst the acclamations of the people.”¹⁰⁹ The following night, the “populace” “muster’d and beset the house” of the first stamp master, “enter’d and broke and destroyed the goods, furniture, and every thing therein, leaving only a shell of the house.”¹¹⁰ They did the same to the second stamp master’s house and continued on to the stamp distributor’s lodging.¹¹¹ Finding only this third victim’s landlord at home, they demanded the distributor’s personal effects but were finally convinced to come back for him the following day instead.¹¹² The stamp distributor returned to town the next day and promptly resigned his office “which resolution was immediately published thro’ the town.”¹¹³

On the day the Stamp Act was actually to take effect, a colonial newspaper reported that “the inhabitants of these Colonies, with an unexampled unanimity, compell[ed] the Stamp-Officers throughout the Provinces to resign their employments.”¹¹⁴ These acts of “virtuous indignation,” were “judged the most effectual . . . method of preventing the Execution of a statute, that strikes the Axe into the Root of the Tree, and lays the hitherto flourishing branches of *American* Freedom, with all its precious Fruits, low in the Dust.”¹¹⁵ The colonists could not have achieved this legal point, in effect striking down the statute as unconstitutional, without the help of many scenes of violence and intimidation.¹¹⁶

107. Extract of a Letter From a Gentleman in Newport-Rhode Island, to One in This Town, Aug. 29, 1765, *Boston-Gazette & Country J.*, Sept. 2, 1765, at 4.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. Dec. 1765 Letter to the Editor, *Bos. Evening-Post*, supra note 58, at 1.

115. *Id.*

116. See Frank Moore, 1 *Diary of the American Revolution From Newspapers and Original Documents* 138 (New York, Charles Scribner 1860) (reproducing a later example of a crowd revising a court judgment). A newspaper from 1775 reported that “a judge of the

Retribution against men suspected of reporting information about violations of the hated British revenue laws could be especially harsh.¹¹⁷ In New Haven, Connecticut, in January 1766, a crowd “forcibly took a seafaring man from a tavern who was convicted as a mercenary informer” (the report did not say how he was convicted).¹¹⁸ “A constable soon appeared to suppress the riot, but his endeavours were fruitless.”¹¹⁹ The crowd dragged the man to the edge of town, “where they whipp’d him and obliged him to depart the town immediately with only the clothes he had on,” telling him “never to return . . . lest he should be saluted with a second part of the same tune, with new additions in a higher strain.”¹²⁰ In Cape Ann, New Jersey, a suspected informant was roused from his bed by a mob who “walk’d him barefoot about 4 Miles to the Harbour, then placed him in a Cart they had provided for that Purpose, and putting a Lanthorn with a lighted Candle in his Hand, . . . carted him thro’ all their Streets,” forcing him to denounce himself “at every House” until they finally “bestowed a handsome Coat of Tar upon him,” made him stand up on the town water pump, and “caused him to swear that he would never more inform against any Person.”¹²¹ In another case, “an infamous Informer was laid hold of by a number of people, near the drawbridge, who ducked him” into the water, “afterwards besmeared him all over” with tar and feathers,

Court of Common Pleas” in Dutchess County, New York “was very handsomely tarred and feathered,” and “carted five or six miles into the country . . . for acting in open contempt of the resolves of the county committee” when he “undertook to sue for, and recover the arms taken from the Tories by order of said committee, and actually committed one of the committee, who assisted in disarming the Tories” to jail. *Id.* This “enraged the people so much, that they rose and rescued the prisoner, and poured out their resentment on this villainous retailer of the law.” *Id.*

117. Reid, *supra* note 90, at 1055 (discussing these anecdotes as well but following the neo-Whig convention of framing incidents of crowd violence as examples of restrained crowd behavior).

118. New Haven, January 31, *Bos. Evening-Post*, Mar. 3, 1766, at 2.

119. *Id.*

120. *Id.*; see also Reid, *supra* note 90, at 1074 (discussing this incident).

121. Boston, March 26, 1770, *Bos. Evening-Post*, Mar. 26, 1770, at 3. In a similar incident, men surveilled an informant until he emerged from his home and then he was “immediately seized upon by the Populace, and soon placed in a Cart, his Jacket and Shirt taken off, and his naked Skin well tarr’d and feather’d.” Letter to the Editor, *Bos. Evening-Post*, Oct. 30, 1769, at 2. The men then made the informant “hold a large Glass Lanthorn in his Hand that People might see the doleful Condition he was in, and to deter others from such infamous Practices.” *Id.* The informant was then carted a long way “thro’ the main Street up to Liberty Tree, amidst a vast Concourse of People, where he was made to swear never to be guilty of the like Crime for the future.” *Id.* The crowd then continued “Carting the feather’d Informer thro’ the principal Streets in Town for about three Hours.” *Id.*; see also Reid, *supra* note 90, at 1077, 1079 (discussing these incidents); Boston, May 21, 1770, *Bos. Evening-Post*, May 21, 1770, at 3 [hereinafter Boston, May 1770, *Bos. Evening-Post*] (“[A] Tide-Waiter in the Customs, being suspected of having given Information . . . was taken by a number of Persons, who after Tarring and Feathering him, agreeable to the modern Mode of punishing Informers, carted him thro’ all the principal Streets in Town for about three Hours . . .”).

then locked him in the pillory “for some time[,] after which they took him down, and paraded through the public Streets for near two hours.”¹²²

B. *The Intellectual Origins of America’s Constitutionalism of Force*

In their paradigm-setting works, neo-Whig scholars, including Professors Bernard Bailyn, Pauline Maier, and Gordon S. Wood, urged that the mob actions of the Founding era were models of “restraint.”¹²³ The Founders’ constitutionalism, they argued, was measured even when expressed in riot form. Any bloodletting one finds was simply part of the messy, chaotic transition from one ordered stasis to another. Some tea got wet—but what tea doesn’t? When riots got excessive for their taste, these scholars could quote elite voices repudiating the violence as the lawless behavior of the “rabble,” thus preserving for analysis a category of *lawful* mob actions that seemed more moderate and civilized.¹²⁴

The neo-Whig scholars framed the violence of the Founding era this way because they saw the politics of that period bending inexorably toward the “ordered liberty” of George Washington and Alexander Hamilton. The neo-Whigs recovered the eighteenth-century “Real Whig” tradition, which taught that violent resistance was lawful only when the motivating complaint touched the interests of the entire community, including elites; when it followed attempts at nonviolent resolution; when the use of force was measured; and when the aims of resistance were moderate.¹²⁵ But the

122. Philadelphia, October 12, Bos. Evening-Post, Oct. 23, 1769, at 2. This report assured readers, as many newspaper accounts did, that the crowd ultimately released this victim “without doing any harm to his Person.” *Id.*; see also Boston, May 1770, Bos. Evening-Post, supra note 121, at 3 (noting that after tarring and feathering the suspected informer, the crowd “dismissed him”). While this may tell us something interesting about the rhetorical emphasis on restraint pressed by authors for the newspapers, given the facts related in the article, it cannot tell us that there was no “harm.” See New-Haven, Sept. 15, Essex Gazette (Salem), Oct. 10, 1769, at 42; Philadelphia, October 12, Bos. Evening-Post, supra, at 2. Many of these examples are from Northern or Mid-Atlantic colonies, but the Southern colonies also took part in this custom. In 1775, a South Carolina crowd carted a tarred-and-feathered victim to the homes of every other member of the community who had also refused to join a Patriot military association, forcing the victim to drink a toast: “[T]here is hardly a street through which, he was not paraded; nor a Tory house, where they did not halt . . . I believe there was scarce” one who “did not tremble” as a result. 2 John Drayton, *Memoirs of the American Revolution* 17 (Charleston, A.E. Miller 1821); see also 1 *id.* at 273–74 (noting that the first instance of tarring and feathering in South Carolina was carried out at the direction of the colony’s patriot Committee of Correspondence); Ivor Noel Hume, *1775: Another Part of the Field* 287–88 (1966) (discussing a Tory tarred and feathered in 1775).

123. See Maier, *From Resistance to Revolution*, supra note 40, at 9, 27–50.

124. Josiah Quincy, *Destruction of the House of the Chief Justice*, in *Reports of Cases Argued and Adjudged in the Superior Court of Judicature of the Province of Massachusetts Bay, Between 1761 and 1772*, at 168, 169–70 (Samuel M. Quincy ed., Boston, Little, Brown & Co. 1865) (describing the mob that destroyed Thomas Hutchinson’s house as a “Rage-intoxicated Rabble”).

125. See, e.g., Maier, *From Resistance to Revolution*, supra note 40, at 36–38.

intellectual tradition the neo-Whigs identified was just one of several that taught British North Americans to think of political violence as a legitimate means of making legal claims—and not all were so conservative.¹²⁶

That is not to say the neo-Whig historians were wrong to emphasize the Real Whig tradition. It is not difficult to find examples that prove its salience. During King George's War in the 1740s,¹²⁷ for example, Bostonians chafed at the impressment of American seamen into the British Navy.¹²⁸ When other avenues of legal redress failed, the Boston town meeting and Massachusetts General Court joined with the laboring classes in a communal effort that included mob violence.¹²⁹ These events inspired a young Samuel Adams, together with others, to publish the short-lived but impressive *Boston Independent Advertiser*.¹³⁰ The paper's columnists

126. Bailyn argued that British country opposition writing, which he called "Real Whig" rhetoric, provided the intellectual pattern book for American colonists during the late eighteenth century. See Bailyn, *Ideological Origins*, supra note 10, at 33–54. His student, Wood, built on this aspect of Bailyn's thesis. See Wood, *Creation of the American Republic*, supra note 10, at 3–45 (describing the "Whig science of politics"). Another Bailyn mentee, Maier, took it as her premise for a pivotal book on the ideology of resistance in the lead up to the Revolution. Maier, *From Resistance to Revolution*, supra note 40, at 27–50.

127. See John Lax & William Pencak, *The Knowles Riot and the Crisis of the 1740s*, in William A. Pencak, *Contested Commonwealths: Essays in American History* 3, 7–8 (2011).

128. This anti-impressment activity in Boston was hardly unique. See Jesse Lemisch, *Jack Tar in the Streets: Merchant Seamen in the Politics of Revolutionary America*, 25 *Wm. & Mary Q.* 371, 383–85, 387, 407 (1968) (describing dozens of anti-impressment mobs throughout the colonies that shared many characteristics, including the involvement of the entire community in the protection of the seamen and dramatic antigovernment insurgency). Looking at unrest motivated by a wider range of causes, historian Richard Maxwell Brown has counted eighteen insurgent movements throughout the colonies between 1645 and 1760 "directed by white Americans toward the overthrow of colonial governments." Richard M. Brown, *Violence and the American Revolution*, in *Essays on the American Revolution* 81, 85 (Stephen G. Kurtz & James H. Hutson eds., 1973) [hereinafter Brown, *Violence and the American Revolution*]. By this time, insurrection had a long heritage in the American colonies. During the Glorious Revolution in 1689, for example, four rebellions connected to local grievances—in Maryland, Massachusetts, New York, and North Carolina—strained or unsettled local government. See David S. Lovejoy, *The Glorious Revolution in America* 79–81, 229–31, 233–35, 254–55, 260–61 (1973).

129. See Lax & Pencak, supra note 127, at 3, 26–29 (describing how the Massachusetts legislature covertly cooperated with the Knowles Riot mob to get the people's impressment grievances redressed); William Pencak, *War, Politics, and Revolution in Provincial Massachusetts* 124 (1981).

130. Chris Beneke, *The Critical Turn: Jonathan Mayhew, the British Empire, and the Idea of Resistance in Mid-Eighteenth-Century Boston*, 10 *Mass. Hist. Rev.* 23, 33 (2008) (placing the sermon into the context of these events and describing how the Knowles Riot inspired Samuel Adams to cofound the *Boston Independent Advertiser*). This riot was also the political context for Jonathan Mayhew's sermon, *A Discourse Concerning Unlimited Submission and Nonresistance to the Higher Powers*, arguing that the people were justified in resisting unjust commands. See Jonathan Mayhew, *A Discourse Concerning Unlimited Submission and Nonresistance to the Higher Powers* (Boston, 1750), in 1 *Pamphlets of the American*

cited the impressment riots to argue that violence could be justified when resort to formal legal means had failed: “[W]ill any Man easily trust his Liberty, to the precarious Issue of *Intreaties and Persuasion?*”¹³¹ The people, they urged, have a “natural Right”—even a duty—“to defend themselves,” “as the giving Way to one Invasion is an Encouragement to Another.”¹³² Violence, in this view, was not extralegal but rather law’s own “remedy.”¹³³ As hot-tempered as these justifications of violent resistance to impressment may sound, however, the Real Whig thinkers of British North America were conservative in both the means they urged and the ends they approved.

The seventeenth- and eighteenth-century political writers, whose works informed the Real Whig tradition, taught Britons to be satisfied with the constitutional order they had, along with its hereditary distinctions and inequality.¹³⁴ These authors saw the Glorious Revolution as a founding

Revolution, *supra* note 46, at 203, 237–38. That sermon, Bailyn wrote, would be seen as the “classic formulation of the necessity and virtue of resistance to oppression.” *Id.* at 209. Mayhew’s sermon, said John Adams, “was read by everybody.” Letter from John Adams to H. Niles (Feb. 13, 1818), reprinted in 10 *The Works of John Adams*, at 282, 288 (Charles Francis Adams ed., Boston, Little, Brown & Co. 1856). Adams had read it so well in his own youth that it was “indelibly engraved on [his] Memory.” Letter from John Adams to Thomas Jefferson (July 18, 1818), reprinted in *The Adams-Jefferson Letters: The Complete Correspondence Between Thomas Jefferson and Abigail and John Adams*, at 527, 527 (Lester J. Cappon ed., 1959).

131. Letter to the Editor, *Indep. Advertiser* (Boston), Feb. 15, 1749, at 1.

132. Letter to the Editor, *Indep. Advertiser* (Boston), Feb. 8, 1748, at 1.

133. A 1748 column argued that “in Case of EXTREMITY,” that is, when facing oppression, the law “has resigned the Remedy to those desperate Physicians, the Law of Nature and Self-Preservation.” Letter to the Editor, *Indep. Advertiser* (Boston), Nov. 21, 1748, at 1. In work specifically about the legal mentality of the seaman resisting impressment, Professor Jesse Lemisch has written that “[t]he seaman who defended himself against impressment felt that he was fighting to defend his ‘liberty,’ and he justified his resistance on grounds of ‘right.’” Lemisch, *supra* note 128, at 407. For a more recent study on impressment, see generally Christopher Magra, *Poseidon’s Curse* (2016).

134. Writers in this tradition included seventeenth-century revolutionaries like John Milton, Algernon Sidney, and John Locke, as well as those who later elaborated upon their political ideas in the early eighteenth century, including Robert Molesworth, Bishop Benjamin Hoadly, John Trenchard, Thomas Gordon, the Scottish writer Francis Hutcheson, and historian Catherine Macaulay. Maier, *From Resistance to Revolution*, *supra* note 40, at 27. To be sure, many of these writings were bombastic in tone but those who employed this rhetoric in Britain shared an understanding that the violence of the civil wars had gone beyond the boundaries of normal politics. See John M. Murrin, *The Great Inversion, or Court Versus Country: A Comparison of the Revolution Settlements in England (1688–1721) and America (1776–1816)*, in *Three British Revolutions: 1641, 1688, 1776*, at 368, 411 (J.G.A. Pocock ed., 1980) (“Whigs and Tories agreed after 1689 that violent protest was no longer acceptable politics . . .”); see also J.H. Plumb, *The Growth of Political Stability in England, 1675–1725*, at 188–89 (1967) (attributing the achievement of this stability to the power of patronage). In their proper context in eighteenth-century British politics, Real Whig authors fit into an emerging tradition of a loyal opposition. Their rhetorical themes on the risks of tyranny and corruption, drawing on the previous hundred years of

moment and the English constitution that emerged from it as an ideal of balanced government.¹³⁵ As “the Nobility, Clergy, Gentry, rich Merchants, and the Body of the People” all had some measure of happiness already, it was the duty of each part of the community to “preserve our present Establishment, and support the just Rights of the Crown and the Liberties of the People.”¹³⁶ Englishmen should, in other words, “oppose all Usurpations on either Side” that might “spoil the Harmony which alone can make them both happy.”¹³⁷ Real Whig authors thus rejected the use of violence in service of utopian projects. “No Man of Sense and Fortune,” they argued, “will venture the Happiness he is in full Possession of for imaginary Visions.”¹³⁸ Subjects should not “rise up in Arms against their Governours” merely “to make Alterations in what is good and tolerable already.”¹³⁹ While the people had a “right” to “[e]xtrajudicial proceedings, by sedition” or “tumult” when an oppressor was not susceptible to judicial process,¹⁴⁰ violence was legitimate only as a means to restore the social order—not remake it.

This framework certainly fit the thinking of colonial *elites*. But what the Founding elite had to contend with (and what some historians have struggled to appreciate since) is that elites could not dictate the limits of lawful or legitimate resistance. Other historians have found that poorer Americans had very different intellectual traditions. We know less about

experience, had developed into an opposition set piece. See Quentin Skinner, *The Principles and Practice of Opposition: The Case of Bolingbroke Versus Walpole*, in *Historical Perspectives: Studies in English Thought and Society in Honour of J.H. Plumb* 93, 101–02 (Neil McKendrick ed., 1974) (arguing that Real Whig style rhetoric became a tried-and-true vehicle for attacking the government, taken up in turn by whichever group was out of power, and did not necessarily indicate commitment to the underlying principles). In the colonies, it seems that men took the violent themes in the British rhetoric of opposition even more seriously than those who wrote them. See Bailyn, *Ideological Origins*, supra note 10, at 44–46. Maier noted how bewildered Josiah Quincy Jr. and John Adams were, coming across provisos in Blackstone and elsewhere backing down from essential statements of political philosophy that, in the British context, tended toward the utopian. Maier, *From Resistance to Revolution*, supra note 40, at 47. In hedging, these British authors were suggesting, Quincy Jr. noted in frustration, that “a conclusion can be just in theory, that will not bear adoption in practice.” Id. Adams wrote, “How [principles] can be in general true, and not applicable in particular cases, I cannot comprehend.” Id. But see Pauline Maier, *The Charleston Mob and the Evolution of Popular Politics in Revolutionary South Carolina, 1765–1784*, 4 *Persps. Am. Hist.* 173, 173–98 (1970) (connecting the role of the mob in American colonial politics to a heritage of similar mob actions in British politics).

135. Maier, *From Resistance to Revolution*, supra note 40, at 29; see also Bailyn, *Ideological Origins*, supra note 10, at 33–54.

136. 3 John Trenchard & Thomas Gordon, *Cato’s Letters* 87 (London, 1724).

137. Id.

138. Id.

139. 2 Benjamin Hoadly, *A Defense of the Foregoing Sermon*, in *The Works of Benjamin Hoadly*, D.D. 26, 37 (London, John Hoadly 1773) (emphasis omitted).

140. 2 Algernon Sidley, *Discourses on Government* 245 (New York, Richard Lee 1805).

these traditions, as these groups left fewer records of their thoughts.¹⁴¹ But what we can discern suggests that ordinary Patriots embraced a right to rebel in service of much more radical ends.

Historian Gary Nash, for instance, has shown that times of hardship provoked open discussions about “the proper distribution of wealth and power in the social system.”¹⁴² He found a link that “historians who concentrate on Whig ideology, which had its strongest appeal among the educated and well-to-do” “overlooked” between increasing wealth inequality in eighteenth-century Philadelphia, New York, and Boston and the rise of a new “political radicalism” in those cities.¹⁴³ Lower-class protests in those cities urged that economic redistribution was a moral imperative.¹⁴⁴ And this “resentment of wealth” was increasingly tied to “the rejection of an elitist conception of politics” as well.¹⁴⁵ A Philadelphia committee representing poor workers urged Pennsylvanians in 1776 to vote against wealthy delegates to the state’s constitutional convention, explaining that wealthy men “will be too apt to be framing distinctions in society, because they will reap the benefits of all such distinctions.”¹⁴⁶

Both Gary Nash and Eric Foner—who found this style of radicalism in Thomas Paine’s milieu in Philadelphia in the early 1770s—saw its origins in the Great Awakening, an evangelical religious movement that swept the colonies in the late 1730s. The movement’s fiery preachers spread a radical message that common men should interpret the message of God for themselves and should be “skeptical toward dogma” rather than “bow passively to established hierarchy.”¹⁴⁷ It was a fervor that “overflowed into civil affairs,” teaching laboring people, Foner argued, to look forward to “the establishment of governments that derived their power from the people, and which were free from” the old world’s “great disparities of wealth.”¹⁴⁸ Because British North Americans’ unwritten constitutionalism was rooted in community consensus, a movement that ennobled the thoughts and

141. Gary B. Nash, *Social Change and the Growth of Prerevolutionary Urban Radicalism*, in *The American Revolution*, supra note 60, at 3, 6 (noting that this “popular ideology about which we know very little, also had deep roots in English culture” and involved “a discussion of the proper distribution of wealth and power in the social system”).

142. *Id.*

143. *Id.* at 19; see also *id.* at 12 (quoting a letter to a clergyman from 1721 expressing resentment toward “the Rich, Great, and Potent,” who “with rapacious violence bear down all before them, who have not wealth, or strength to encounter or avoid their fury”).

144. A view elites deplored as a “doctrine of reducing all to a level.” *Id.* at 13 (internal quotation marks omitted) (quoting a letter from David Barclay to Thomas Penn).

145. *Id.* at 30.

146. *Id.* at 31 (internal quotation marks omitted) (quoting *To the Several Battalions of Military Associators in the Province of Pennsylvania* (1776), reprinted in *1 Early American Imprints, 1639–1800* (Clifford K. Shipton ed., 1955) (Evans no. 15115) (misquotation)).

147. *Id.* at 17–18.

148. *Id.*; see also Eric Foner, *Tom Paine’s Republic: Radical Ideology and Social Change*, in *The American Revolution*, supra note 60, at 187, 203.

opinions of more members of the community had revolutionary implications.¹⁴⁹

In rural popular insurrections, hostility toward the British Constitution's class-based hierarchies of power and deference came through even more clearly. Historian Edward Countryman studied long-running episodes of rural unrest, in which smallholders tracing their title to Native conveyors fought with great landowners claiming ownership to the same plots based on royal or colony grants.¹⁵⁰ When large landowners cherishing old-world aristocratic pretensions tried to extract feudal obeisance and tribute from their tenants, they provoked explicit and heated rejections of the traditional basis of those claims.¹⁵¹ Land rioters

149. See Winthrop D. Jordan, *White Over Black: American Attitudes Toward the Negro, 1550–1812*, at 181–220 (1968) (noting that the Great Awakening coincided with slave revolts of the 1740s and that slave owners blamed the religious fervor for subsequent slave rebelliousness).

150. Countryman distinguishes these from urban riots because they were about “how and under what conditions and by whom a limited amount of land would be owned and occupied”; because they were “cases that involved not sporadic rioting but rather movements that lasted for years”; and because “the enemies of the rioters were willing to use nearly any tactic to quell them, for real issues of property and power were at stake.” Countryman, *supra* note 60, at 41, 42, 49. Countryman also references this helpful insight by Huntington: “In agrarian society, a more equitable distribution of ownership is the prerequisite to economic growth.” *Id.* at 56 (citing Samuel Huntington, *Political Order in Changing Societies* 298–99 (1968)). While achieving more equitable ownership of the means of production may be out of reach for the urban industrial worker, for the “peasant” for whom “the basic factor of production is land,” “this is precisely the goal.” Samuel Huntington, *Political Order in Changing Societies* 298–99 (1968). Huntington observes that this is “precisely” why “the tensions of the countryside are potentially so much more revolutionary than those of the city”: “[T]he supply of land is limited if not fixed; the landlord loses what the peasant acquires.” *Id.* “Thus, the peasant . . . has no alternative but to attack the existing system of ownership and control.” *Id.*

151. Countryman, *supra* note 60, at 42 (“[B]y mid-century . . . great owners were revivifying the medieval technicalities of their tenure and bringing about a ‘feudal revival’ in America.” (quoting Rowland Berthoff & John M. Murrin, *Feudalism, Communalism, and the Yeoman Freeholder: The American Revolution Considered as a Social Accident*, *in* *Essays on the American Revolution*, *supra* note 128, at 256, 272)); see also Rowland Berthoff & John M. Murrin, *Feudalism, Communalism, and the Yeoman Freeholder: The American Revolution Considered as a Social Accident*, *in* *Essays on the American Revolution*, *supra* note 128, at 256, 264–69 (exploring these feudal tenancies and their consequences). Whereas in cities, a medieval spirit of carnival might disguise popular revolt as something like pageantry right up to the minute it turned violent, in the land riots Countryman studied, there was never any pretense of play. See William Pencak, *Play as Prelude to Revolution: Boston, 1765–1777*, *in* *Riot and Revelry in Early America* 125, 127–48 (William Pencak, Matthew Dennis & Simon P. Newman eds., 2002) (discussing ways in which popular protest in Boston utilized various forms of “play” and playfulness). Protest in the city contained within it what the Russian theorist Mikhail Bakhtin has described as the carnivalesque tradition, a boisterous throwing-off of social hierarchy and mores, an “upside-down world.” Mikhail Mikhailovich Bakhtin, *Rabelais and His World* 426 (Hélène Iswolsky trans., 1968).

showed, said one of their fervent opponents in New Jersey, a “Natural ill will to superior Power” and “inbred Malice to Authority.”¹⁵² One finds this attitude in Thomas Paine’s most memorable lines urging Americans to liberate themselves from the mentality of monarchical subjects. “Of more worth is one honest man to society,” Paine said in *Common Sense*, “than all the crowned ruffians that ever lived.”¹⁵³ Or, as Vermont’s Ethan Allen put it to a colony-grant settler as his men burned the settler’s house to the ground, “God Damn your Governour, Laws, King, Council & Assembly.”¹⁵⁴

Unlike the “Real Whig” framework, the lower-class constitutional philosophy that historians like Nash and Countryman uncovered does not readily fit the neo-Whig historians’ narrative arc toward Federalist constitutionalism. There is little precursor here to their “ordered liberty,”

It is fitting that Ebenezer Mackintosh, the tradesman who led the mob in Boston protesting the Stamp Act, had gotten his training, as it were, organizing Boston’s annual Pope’s Day celebration, with its ritual costuming, effigies, crownings, and debasements. See Brendan McConville, *The King’s Three Faces: The Rise and Fall of Royal America, 1688–1776*, at 56–63, 69 (2006); Benjamin L. Carp, *Fire of Liberty: Firefighters, Urban Voluntary Culture, and the Revolutionary Movement*, 58 *Wm. & Mary Q.* 781, 806–08 (2001) (explaining Mackintosh’s training at Pope’s Day and involvement in Stamp Act protesting). By contrast, in the land riots in New Jersey and Vermont, dissidents set up alternative governments, with proper militias, courts, and jails. Countryman, *supra* note 60, at 43 (noting that “[t]hese movements . . . created counter-governments that exercised . . . almost all of the functions that government was expected to carry out in the eighteenth century”). In seriousness of purpose and permanency of structure, the jurisdictions they created better resemble the “campyng tyme” settlements erected for years during English commoner rebellions of the 1540s, which also had enough permanency and stability to need their own courts. Diarmaid MacCulloch, *Kett’s Rebellion in Context*, 84 *Past & Present* 36, 44–46 (1979). After those rebellions were forcibly put down, the judgments of the “campyng tyme” courts were sometimes upheld in courts of regular jurisdiction! *Id.*

152. Countryman, *supra* note 60, at 47 (internal quotation marks omitted) (quoting Judge Samuel Nevill’s charge to a Middlesex County grand jury).

153. Paine, *supra* note 97, at 19. Pennsylvania’s first constitution reflected this radical optimism in its unicameral government structure and broad franchise, as did Vermont’s. Pa. Const. of 1776, ch. I, §§ 1–2, ch. II, § 7, *in* *The Proceedings Relative to the Calling of the Conventions of 1776 and 1790*, at 54, 55–57 (Harrisburg, John S. Wiestling 1825); Vt. Const. of 1777, ch. I, § 8, ch. II, § 2, *in* *Vermont State Papers* 241, 245–46 (Middlebury, J.W. Copeland 1823). The democratic simplicity of the resulting plans of government concerned the future Federalists. John Adams, who criticized Paine’s ideas as too “democratical,” thought Paine had “a better hand in pulling down than building.” John Adams, *Autobiography*, *in* 2 *The Works of John Adams* 503, 508 (Charles Francis Adams ed., Boston, Little, Brown & Co. 1850); Letter from John Adams to Abigail Adams (Mar. 19, 1776), *in* *Familiar Letters of John Adams and His Wife Abigail Adams, During the Revolution* 145, 146 (Charles Francis Adams ed., New York, Hurd & Houghton 1876). Adams flattered himself that he “should have made a more respectable figure as an architect.” Letter from John Adams to Abigail Adams (Mar. 19, 1776), *in* *Familiar Letters of John Adams and His Wife Abigail Adams During the Revolution*, *supra*, at 145, 146. He believed Paine “seem[ed] to have very inadequate ideas of what is proper and necessary to be done in order to form constitutions for single colonies, as well as a great model of union for the whole.” *Id.*

154. Countryman, *supra* note 60, at 47 (internal quotation marks omitted) (quoting Warrant to Arrest Certain Rioters in Rupert, *in* 4 E.B. O’Callaghan, *The Documentary History of State of New-York* 745, 746 (Albany, Charles van Benthuysen 1851)).

less foreshadowing of a system that champions virtues like the protection of property, deference to hierarchy, institution-building, and regard for the past. But not all British North Americans identified with Real Whig philosophy.¹⁵⁵ And, as this Article will discuss, the more radical strains of Patriot thinking only became *more* entrenched during the Revolutionary War and its aftermath.¹⁵⁶ It is only by seeing the wider scope of eighteenth-

155. There are necessarily other examples we do not have the space to explore. The constitutionalism of this era was vigorously local and defined by active enforcement of rights by local communities. I have relied here on the studies of urban and rural radicalism by Nash and Countryman to show a distinction between the Real Whig view and alternatives that embraced theories of economic redistribution because they provide vivid and well-researched examples. See *supra* notes 141–154 and accompanying text. But what the localism of constitutionalism of this era means is that what Nash and Countryman offer are by no means a complete or exhaustive picture. When we look elsewhere in the colonies, at other instances of riot and insurrection, we will find other styles of constitutional thought and other justifications of violence that deserve inclusion in our catalog. And there were many other examples of insurrection. See Brown, *Violence and the American Revolution*, *supra* note 128, at 97 (finding that between 1760 to 1775, there were “at least forty-four riots in the colonies”). The earlier four slave insurrections inspired by the Great Awakening likely expressed their own constitutional visions. See Jordan, *supra* note 149, at 118–20. We will also find a constitutional order articulated in the justifications offered by the white populaces that so brutally suppressed those insurrections, including a counterargument going to those white communities’ understanding of the proper causes and justifications for rebellion. Looking to the West, where colonists became increasingly resentful, after 1763, of the British solicitude toward Native allies’ land rights, see *infra* Part II, and where, after 1774, the Quebec Act added anti-Papism to frontiersmen’s concerns, we will find another fully formed set of justifications for just rebellion. And in the dozens of riots in defense of impressed sailors, we find a straightforward claim of constitutional right to rebel in the name of “liberty,” legal and literal. See The Declaration of Independence para. 29 (U.S. 1776) (“He has constrained our fellow Citizens taken Captive on the high Seas to bear Arms against their Country, to become the executioners of their friends and Brethren, or to fall themselves by their Hands.”); Lemisch, *supra* note 128, at 390 (discussing ways sailors justified their resistance to impressment in terms of constitutional liberty).

156. Previously distinct intellectual traditions also mingled in interesting ways. While many historians now think that Bailyn overemphasized Real Whig ideology prior to the Revolution, some scholars believe that “it had achieved a hugely disproportionate impact by 1775” as “[i]n times of crisis men turn to the most compelling explanation for their predicament that they can find.” Murrin, *supra* note 134, at 397–98. But the valence of “Real Whig” rhetoric of the Revolutionary moment may not have been quite the same as the elite version that preceded it. Nash points out that radical and Real Whig traditions “dynamically interacted,” borrowing language and argument from each other in the lead up to war. Nash, *supra* note 141, at 6. The lower-class radicals that Nash and Countryman described could have easily adopted Real Whig concepts and terms, because what made that Real Whig staple—Cato’s Letters—a success was its recourse to common cultural markers of moral good and evil conveyed in a folksy tone. See Bailyn, *Ideological Origins*, *supra* note 10, at 35–36 (attributing the wide circulation of Cato’s Letters in colonial newspapers to their “colorful, slashing, superbly readable pages”). These writings also contained some messages that suited the antinomian themes of radical movements: Although “[m]ost of those who manage” the science of government try to “make the lower World believe that there is . . . Difficulty and Mystery in it, far above vulgar Understandings,” this was all a lie because

century constitutional culture that we can hope to make sense of the world that came next.

Because they saw an origin story in Real Whig notions of moderate resistance, neo-Whig historians characterized eighteenth-century crowds as biddable, respectful of class-based hierarchies, and relatively peaceable.¹⁵⁷ Maier focused her attention on those mobs that were “extra-institutional in character more often than they were anti-institutional.”¹⁵⁸ Wood argued that Revolutionary mobs “were not only excused but often directed and abetted by respectable members of the community.”¹⁵⁹ And, the neo-Whig historians stressed, these crowds showed “discrimination in the choice of victims and force,” often limiting their destruction to property.¹⁶⁰

But this gloss, downplaying violence, is hardly convincing. A crowd that picks its victims with care is, if anything, even more menacing than a crowd that doesn't. Destroying a person's property to coerce him into abandoning his government office is an act of violent intimidation. And when a crowd forces an official to resign under threat of physical humiliation, torture, or murder, as crowds in every colony did in the 1760s, that is the epitome of political terror, not “nonviolence,” even if the crowd spares the official's life when he complies.¹⁶¹

“[e]very Ploughman knows a good Government from a bad, from the Effects of it.” 1 John Trenchard & Thomas Gordon, *Cato's Letters* 303 (London, 1723). There were also economic justice themes, especially as Real Whig thought had been translated in American newspapers. See, e.g., Jan. 1748 Letter to the Editor, *Indep. Advertiser*, supra note 98, at 1 (“In Popish Countries it is publick Spirit, to build . . . Churches at the Expence of the poor People . . . [and] for a Man to starve his Family . . . to endow a Monastery, [whereas] . . . in Protestant Free Countries, Publick Spirit is . . . to maintain the People in Liberty, Plenty, Ease, and Security.”). It is this phenomenon—the different reception of the same philosophy by different audiences—that would cause elites to later reflect, with some dismay, that “[o]pinions which perhaps were excessively dissimulated previous to and during the late revolution seem to produce effects materially different from which were intended.” Letter from Henry Knox to the Marquis de Lafayette (Feb. 13, 1787) (on file with the *Columbia Law Review*). “[F]or instance, the maxim that all power is derived from the people . . .” *Id.*

157. See Thomas P. Slaughter, *Crowds in Eighteenth-Century America*, supra note 10, at 3, 4–6 & n.7 (canvassing scholars writing about crowds from the “consensus” or neo-Whig perspective). Bailyn's 1974 work, *The Ordeal of Thomas Hutchinson*, is the exception, but this revision of his earlier perspective did not change the direction of the school of thought he inaugurated. See Bernard Bailyn, *The Ordeal of Thomas Hutchinson*, at vii (1974) [hereinafter *Bailyn, Ordeal of Thomas Hutchinson*].

158. See Maier, *From Resistance to Revolution*, supra note 40, at 7–8.

159. Wood, *Creation of the American Republic*, supra note 10, at 321.

160. *Id.*; see also Supplement to *Boston-Gazette & Country J.*, Aug. 19, 1765, at 1 (describing how a mob destroyed Andrew Oliver's furniture and valuables to send a message).

161. There was a brisk discussion among historians from the 1960s to the 1990s about just *how* violent mobs were in the eighteenth century, under what circumstances, and how

The “restrained” mobs of the Stamp Act crisis intended to and did strike terror into the hearts of the officials and accused collaborators they targeted. When a Bostonian crowd leveled a brick building intended for use as a stamp office on August 14, 1765, John Adams observed approvingly that “[n]one were indicted” because “this was thought an honorable and glorious action, not a riot.”¹⁶² Neo-Whig scholars pointed to the incident as a model of restrained or “lawful” revolutionary rioting.¹⁶³ But the mob did not stop there. After pulling down the customs house, it went on to ransack the stamp master’s *home* as well, destroying one of the largest mirrors in the colony, breaking the trees in his garden, drinking his wine, and setting fire to his carriage.¹⁶⁴ The stamp master himself, who had “scarcely” managed to escape the destruction, gave word the following day of his intention to resign.¹⁶⁵ But the crowd returned in

elites felt about it. See Slaughter, *Crowds in Eighteenth-Century America*, supra note 10, at 3–4 (summarizing this discussion). Bailyn may have provoked the controversy when he claimed, in 1965, that Revolutionary era rioters were so committed to Real Whig order that they committed “[n]ot a single murder.” Bernard Bailyn, *Liberty and Property Vindicated, in 1 Pamphlets of the American Revolution*, supra note 46, at 580, 581. Lemisch plainly proved that this simply “does not hold up if extended to cover resistance to impressment” as “there were murders on both sides.” Lemisch, supra note 128, at 389–90. Other scholarship added to his findings. See Slaughter, *Crowds in Eighteenth-Century America*, supra note 10, at 10 n.14 (collecting “conflict” scholarship). Writing after Lemisch, scholars hewing to the neo-Whig view of the crowd as nonviolent had to ignore quite a bit of contrary evidence. For Maier to maintain that eighteenth-century crowds showed a “striking” “tendency” “to avoid bloodshed,” she had to decide that the framework fit even though a mob’s victims were “almost strangled,” or “nearly drowned,” or suffered “an hours-long ritual of tarring and feathering” while crowds were “threatening” the victim’s “life.” See Maier, *From Resistance to Revolution*, supra note 40, at 8–9, 13. She had to pass over the Paxton Boys (twice) without mentioning that they slaughtered fourteen Native men, women, and children and to dismiss the summary execution of Black people during riots as exceptions to the rule. See *id.* at 5, 25, 283–84. In later scholarship, Bailyn would come back to the theme of violence with quite a different perspective in *The Ordeal of Thomas Hutchinson*, a book that reads as something like an internal critique of his earlier bald pronouncements. See Bailyn, *Ordeal of Thomas Hutchinson*, supra note 157, at vii. But his students, Wood and Maier, remained neo-Whiggish to the end. Some of *their* students went further still, magnifying the impact of what I describe as an erroneous emphasis on the elite perspective. Professor Paul A. Gilje’s characterization of the eighteenth-century mob, in *The Road to Mobocracy*, typifies this problem. Paul Gilje, *The Road to Mobocracy: Popular Disorder in New York City, 1763–1834*, at vii (1987) (“[T]he eighteenth-century mob respected both persons and property; seldom did it lash out in murderous assault” but instead “minimized conflict by focusing their ire upon an object—like an effigy—which symbolized their grievances.”).

162. For Adams’s reflections on the event, see John Adams, *Novanglus*, No. 5, in 4 *The Works of John Adams* 57, 74 (Charles Francis Adams ed., Boston, Little, Brown & Co. 1851) [hereinafter *Adams*, *Novanglus*, No. 5].

163. See, e.g., Reid, supra note 90, at 1065.

164. Supplement to *Boston-Gazette & Country J.*, supra note 160, at 1; see also Reid, supra note 90, at 1045 (quoting the poem attached to Andrew Oliver’s effigy hanging on the liberty tree, just before the mob forced his resignation, which read: “How Glorious is it to see / a Stamp officer hang on a Tree”).

165. Supplement to *Boston-Gazette & Country J.*, supra note 160, at 1.

force and, having “erected a Number of Stages with Tar Barrels & c.,” surrounded his house.¹⁶⁶ The people were not satisfied until they learned that the stamp master Andrew Oliver had sent a letter declining the office of stamp master and avowing that the position would “endanger the Life of any that did, it being contrary to the Rights and Privileges of Englishmen.”¹⁶⁷ Only this “seem’d to appease the Multitude, so that none offer’d any Violence whatever their intentions may have been.”¹⁶⁸

While some believed the attack on the stamp master’s home had gone too far, others apparently thought it “a necessary declaration” of the people’s “resolution not to submit to the Stamp Act.”¹⁶⁹ The “cruel treatment” of the stamp master “and his family,” Governor Francis Bernard reported, was “justified” in the eyes of Bostonians “by the consequences [of] frightening him into a resignation.”¹⁷⁰

Just two weeks after the “honorable” Stamp Act riot, however, came a riot inspired by “very different Motives” that elites could not countenance.¹⁷¹ On August 26, 1765, a crowd ransacked Thomas Hutchinson’s house, destroying his furniture, his dishware, his papers, taking down the cupola, flattening the trees in his garden, ruining one of the “best finished houses in the Province,” and staying until dawn to try to take down “the slate and boards from the roof.”¹⁷² The Boston town meeting repudiated the violence and instituted nightly patrols to prevent its recurrence.¹⁷³ Historians in the neo-Whig school pointed to this very different reaction as evidence that colonists embraced Real Whig distinctions between lawful and unlawful violence.¹⁷⁴

For neo-Whig scholars, the fact that the elite had these Real Whig standards to distinguish lawful from lawless rioting only made the extraordinary discipline of the people out-of-doors, when accomplished to

166. *Id.*

167. *Id.*

168. *Id.*

169. Letter from Governor Francis Bernard to the Earl of Halifax (Aug. 31, 1765), *in* 9 *English Historical Documents: American Colonial Documents to 1776*, at 675, 678 (Merrill Jensen ed., 1955).

170. *Id.* But see Maier, *From Resistance to Revolution*, *supra* note 40, at 63 (suggesting some elites may have disapproved of the house breaking).

171. Boston, September 2, *Boston-Gazette & Country J.*, Sept. 2, 1765, at 2 (*italics omitted*).

172. Reid, *supra* note 90, at 1046 (*internal quotation marks omitted*) (quoting Letter from Thomas Hutchinson to Richard Jackson (Aug. 30, 1765), reprinted in James K. Hosmer, *The Life of Thomas Hutchinson: Royal Governor of the Province of Massachusetts Bay* 91 (Boston, Houghton, Mifflin & Co. 1896)).

173. *Id.* at 1048.

174. See Maier, *From Resistance to Revolution*, *supra* note 40, at 62 (“There were, it was understood, just and unjust uprisings; and from the start Boston’s upheavals of August 14 and 26 were seen as the prototypes of acceptable and unacceptable uses of mass force.”); see also Reid, *supra* note 90, at 1043–47 (pointing to August 26 as an example and arguing that colonial subjects of the 1760s recognized lawful and lawless riots).

everyone's satisfaction, all the more striking and marvelous. These historians highlighted the fact that elites were often glad to ratify the violence of the people when appeals and petitions through traditional legal channels had been ineffective. Wood explained that "Good Whigs . . . were even willing to grant a measure of legitimacy to" mob actions because they "recognized and appreciated the political existence of the people 'out-of-doors,' that is, outside of the legal representative institutions."¹⁷⁵ Maier quoted members of the House of Lords arguing that "rioting is an essential part of our constitution," and Hutchinson admitting that "[m]obs, a sort of them at least, are constitutional."¹⁷⁶

But of course, mobs would have been constitutional even without the explicit approval of the ruling class. What the neo-Whigs identified as a colonial *American* tradition distinguishing between lawful and lawless political violence was instead consistently the *elite* perspective on what constituted lawful resistance. And the elites who deplored the destruction of Hutchinson's house did not speak for everyone.¹⁷⁷ In his research on lower-class crowds, Nash studied the August 26 riot quite closely. This was an example, he explained, of the fact that while mobs composed of "several socioeconomic groups" sometimes "found it profitable to coordinate their actions," they had differing "interests"—interests that "often coincided" but "sometimes diverged."¹⁷⁸ Time and again, crowds showed that they had their own "moral economy" and "political consciousness" and that in pursuing their own ends, they might go well beyond what elites "wished to countenance."¹⁷⁹ Nash explained that the crowd that attacked

175. Wood, *Creation of the American Republic*, supra note 10, at 320–21; see also Gordon S. Wood, *A Note on Mobs in the American Revolution*, 23 *Wm. & Mary Q.* 635, 639 (1966) ("What particularly seems to set mob violence in the colonies apart from the popular disturbances in England and France is . . . the almost total absence of resistance by the constituted authorities . . .").

176. See Maier, *From Resistance to Revolution*, supra note 40, at 24.

177. Complicating matters, some historians have suggested that the elites we meet in our primary sources can be unreliable narrators. Lax and Pencak found that during the Knowles Riot, the Boston elite abetted or even directed the violence of the crowd and then, in a joint effort with the newspapers, repudiated that violence as "a tumultuous riotous assembling of armed seamen, servants, negroes, and others," to allow the "town" to avoid Commodore "Knowles's guns." Lax & Pencak, supra note 127, at 3, 4, 29 (quoting *Resolves on the Riotous Proceedings* (Nov. 19, 1747), reprinted in *24 Journals of the House of Representatives of Massachusetts, 1715–1779*, at 212–13 (1949)). This is an instance in which the Boston town meeting was only "appearing to suppress a crowd it had in fact supported." *Id.* at 4; see also *At a Meeting of the Freeholders and Other Inhabitants of the Town of Boston*, *Bos. Wkly. Post-Boy*, Dec. 21, 1747, at 1 (voicing the town's ostentatious repudiation of the riot and adding that as "[u]rther proof that the Tumult and Disorders were against the Mind of the Inhabitants of the Town, there was the most numerous and best Appearance of the Militia under Arms, that has been known for divers Years past").

178. Nash, supra note 141, at 27.

179. See *id.* "Moral economy" is E.P. Thompson's concept. See E.P. Thompson, *The Moral Economy of the English Crowd in the Eighteenth Century*, 50 *Past & Present* 76, 79 (1971).

Hutchinson's home was pursuing its own radical populist theory of justified rebellion and was especially vicious and thorough in its destruction of Hutchinson's possessions to send a message of disapproval about his long-running disdain for the poor during his tenure in office.¹⁸⁰

Lower-class rioters sent a similar message in a November 1765 Stamp Act riot in New York City. What began as an orderly procession led by ships' officers turned destructive when the officers ended their participation and the regular sailors continued on to "demolish the elegantly furnished home" of a wealthy English major "with a thoroughness unparalleled even in Boston."¹⁸¹ Maier credited elites' description of that incident as a "threat of anarchy," using it as evidence that things could get out of hand unless elites exercised firm control over the course of events.¹⁸² But Jesse Lemisch pointed out that if the lower-class sailors were interested in looting, it is hard to explain why they passed through the wealthy center of town leaving so many tempting targets unmolested.¹⁸³ Instead, they marched in an orderly fashion "clear across town to do violence to the home and possessions of an English major whose provocative conduct had made him [their] obvious political enemy."¹⁸⁴

180. See Nash, *supra* note 141, at 29.

181. Maier, *From Resistance to Revolution*, *supra* note 40, at 68; see also Lemisch, *supra* note 128, at 396.

182. See Maier, *From Resistance to Revolution*, *supra* note 40, at 67.

183. Lemisch, *supra* note 128, at 396.

184. *Id.* Another example of dueling perspectives: John Adams famously won acquittal for Captain John Preston and his men, the British soldiers responsible for the Boston Massacre. Adams believed it was "as important a cause as was ever tried in any court or country" because of what the case suggested about colonial constitutionalism. Farah Peterson, *Black Lives and the Boston Massacre*, 88 *Am. Scholar* 34, 38, 42 (2019) [hereinafter Peterson, *Black Lives and the Boston Massacre*]. By suggesting to the watching world that Bostonians were capable of setting aside their immediate resentments toward the soldiers for the massacre, an acquittal served the broader argument "that Bostonians were principled in a classic legal sense" and that "Boston's position in its quarrel with Britain was based on a constitutional argument, not provincial egoism." *Id.* at 41. As part of his trial strategy, Adams demeaned the crowd the officers had fired upon as "a motley rabble of saucy boys, negroes and molattoes, Irish teagues and outlandish jack tars" unrepresentative of the "good people of this town." *Id.* at 38, 40. Adams has been celebrated for his principled lawyering ever since.

In 1774, another crowd of Bostonian sailors seized John Malcolm, a customs official with a long history of abusive behavior in office. From the *Massachusetts-Spy* of Thursday Last, *Boston-Gazette & Country J.*, Jan. 31, 1774, at 2. When several gentlemen tried to divert the crowd, reassuring them that "the law would have its course with him," the sailors "asked what course had the law with Preston or his soldiers." *Id.* They said they had seen "so much partiality to the soldiers and custom-house officers by the present Judges, that while things remained as they were, they would, on all such occasions, take satisfaction their own way." *Id.* They proceeded to strip Malcolm, tar and feather him, and cart him through the streets. *Boston, January 31, 1774, Boston-Gazette & Country J.*, Jan. 31, 1774, at 2. They threatened

What the record reveals, then, is not so much a distinction between lawful and lawless rioting but rather a persistent disagreement between men of different social classes over which constitutional settlement the people ought to be striving toward. While these groups concurred on the legitimacy of violent resistance, they diverged on the appropriate scope, aims, and character of that resistance. John Adams thought that the Boston Tea Party was “absolutely and indispensably . . . necessary” because allowing the tea to come ashore “would be giving up the principle of taxation by parliamentary authority” and would consign colonial subjects “and our posterity forever to Egyptian task-masters; to burthens, indignities . . . to desolation and oppression; to poverty and servitude.”¹⁸⁵ It was in part the “Real Whig” *method* the Tea Partiers used, harming no person, destroying tea and tea alone, and accomplishing their work almost in total silence, that made him exclaim that “the [s]ublimity of it, charms me!”¹⁸⁶ But the crowd attacking Hutchinson’s house was not meaningfully different. The main difference was the “principle” they were asserting. There’s no reason we, as historians, should privilege what Adams—a member of the elite threatened personally by demands for a redistribution of wealth—found “charming” and what he found distasteful.¹⁸⁷ After all,

to hang him, beat him with a rope, and threatened to cut off his ears, until he finally promised “to renounce his present commission, and swear that he would never hold another inconsistent with the liberties of his country.” *Id.* In the newspaper report memorializing these events, the author finishes: “See reader, the effects of a government in which the people have no confidence!” *Id.*

John Adams thought he was following a course consistent with the constitution and the jury agreed. Peterson, *Black Lives and the Boston Massacre*, *supra*, at 41. But the sense of the crowd in the following years was that the Boston Massacre trial had been a miscarriage of justice. That trial had taught them not to look to the courts for the defense of constitutional liberty.

185. John Adams, Diary Entry (Dec. 17, 1773), *in* 2 *The Works of John Adams*, *supra* note 153, at 323, 324.

186. Letter from John Adams to James Warren (Dec. 17, 1773), *in* 2 *Papers of John Adams* 1, 2 (Robert J. Taylor ed., 1977).

187. Governor Francis Bernard warned that the crowd would embark upon “a War of Plunder, of general levelling & taking away the distinction of rich & poor.” Letter from Francis Bernard to the Earl of Halifax (Aug. 31, 1765), *in* 2 *The Papers of Francis Bernard: Governor of Colonial Massachusetts, 1760–69*, at 337, 339 (Colin Nicolson ed., 2015). Fearing this, wealthy Bostonians took the precaution of “moveing their cash & valuable furniture” to the homes of poorer friends. Nash, *supra* note 141, at 29 (internal quotation marks omitted) (quoting Letter from James Gordon to William Martin (Sept. 10, 1765), reprinted in 13 *Massachusetts Historical Society, Proceedings* 392, 393 (1900)). This is not to suggest that John Adams had amassed great wealth at this point in his career, because of course his means did not then compare to Hutchinson’s. John Ferling, *John Adams: A Life* 10 (1992) (noting that none “of the Adamses had ever been part of the truly elite”). But he was comfortable during a time of wealth inequality and a member of the elite in terms of his connections, his marriage, his social milieu, and his aspirations. See *id.* at 12, 17, 316 (noting that Adams “feared the wealthy few as much as he was disturbed by the humble”); see also Woody Holton, *Abigail Adams: A Life* 2 (2009) (describing Abigail Adams’s family as “among the Massachusetts Bay Colony’s most prominent families”).

one man's anarchy might be another man's justice. And in an era when the constitution was a matter of praxis, the constitutional ideas of the poor no less than the rich must be attended to, especially as they acted out their views so obviously, consistently, and repeatedly.

The production of the shared constitution of eighteenth-century communities was not a top-down operation but one that, to elites' enduring frustration, remained a collaboration with the middling and laboring classes.¹⁸⁸ Because the constitution of British North America was community consensus acted out over time, we cannot use the voices of the elite as a guide to what was within the law the community defined together. We cannot listen to John Adams alone and rest satisfied that we have the entire picture.

While we are now used to thinking of law as something imposed from above by a government with its own independent and salaried agents sworn to implement rules as written, things were then very different.¹⁸⁹ It was then impossible for a person at the top of the social or political hierarchy to issue a controversial rule or a command in the expectation that his word would govern simply because of his status.¹⁹⁰ In eighteenth-century colonies, law and policing were managed by communities through posse comitatus, the militia, and eventually, the summoning of the local grand jury to indict offenders.¹⁹¹ That meant that when a local community agreed with the moral sentiment expressed by a mob, there was no way to overcome the community's judgement without outside military intervention.¹⁹² As historian Jack P. Greene has explained, "Even the sheriffs

188. As Governor William Shirley complained in 1747:

[W]hat I think may be esteem'd the principal cause of the Mobbish turn in this Town, is it's Constitution; by which the Management of it is devolv'd upon the populace assembled in their Town Meetings . . . [where] the meanest Inhabitants . . . by their Constant attendance there generally are the majority and outvote the Gentlemen, Merchants, Substantial Traders and all the better part of the Inhabitants; to whom it is Irksome to attend . . .

Letter from William Shirley to the Lords of Trade (Dec. 1, 1747), in 1 Correspondence of William Shirley: Governor of Massachusetts and Military Commander in America 1731–1760, at 412, 418 (Charles Henry Lincoln ed., 1912). Before the struggle with Britain, there was a long-running contest in Boston over who should rule at home, an electoral struggle for control of government between the wealthier and lower classes of the community. See Nash, *supra* note 141, at 22–23.

189. See Greene, *supra* note 48, at 471.

190. *Id.*

191. See Maier, *From Resistance to Revolution*, *supra* note 40, at 17–18 (describing the use of "peacetime garrisons" and militias).

192. See Carl Bridenbaugh, *Cities in Revolt: Urban Life in America, 1743–1776*, at 297 (1967) ("Apart from the distasteful use of the military for constabulary duty, no colonial official broached a feasible plan for keeping the peace, nor, it may be noted, did anyone in

and constables responsible for enforcing court judgments could only do so when local communities were willing to allow the judgments to be carried out,” and “officials charged with” law enforcement “were helpless without the support of the local community.”¹⁹³ It does not make sense, therefore, for a historian to look to the top of the era’s hierarchy for an articulation of legal rules, and trust that those voices provide definitive answers to questions that were obviously the subject of sustained community contention.

The historical record shows substantial agreement on the view that violence was an appropriate tool of constitutional argument. Everyone seems to have embraced the use of violence in their own causes.¹⁹⁴ But the record shows sustained conflict over which constitutional settlement the people should be striving toward.¹⁹⁵ And the record also suggests that elites saw the lead-up to war as a moment of great precarity—not only because of the looming conflict with London but because of the risk to order at home.¹⁹⁶ Gentlemen of the eighteenth century looked at the violence of the crowd and the urgency of its claims and felt afraid.¹⁹⁷ Gouverneur Morris, observing a crowd in the streets in 1774 New York, wrote that the “mob begin[s] to think and to reason.”¹⁹⁸ Unless gentlemen found a method to keep the people uninformed: “[F]arewell aristocracy.”¹⁹⁹

Elites’ worry that they could not control lower-class protest made them recoil from the excesses of early Stamp Act incidents and gather into associations intended to provide a moderating effect on popular engagement.²⁰⁰ But as protest evolved toward active Revolution, this became harder.²⁰¹ After all, Patriot leaders needed the violence of common people to win a long and difficult war. And they were right to be afraid. The violence of the Revolution, by itself, would have a leveling effect. The sheer brutality of war would play a role in “the rapid erosion of

London, Paris, or Rome, either.”); *id.* at 18; Greene, *supra* note 48, at 471 (noting that because officials relied upon the community for the implementation or enforcement of any legal rule or judgment, “[c]olonial Massachusetts was thus a standing example of one of early modern British political theorists’ favorite maxims: all government depends on opinion”).

193. Greene, *supra* note 48, at 471.

194. See *supra* notes 101, 177–180 and accompanying text.

195. See *supra* notes 101, 177–180 and accompanying text.

196. See *supra* notes 170–171 and accompanying text.

197. Letter from Gouverneur Morris to Thomas Penn (May 20, 1774), in 1 Jared Sparks, *The Life of Gouverneur Morris, With Selections From His Correspondence and Miscellaneous Papers*, at 23, 25 (Boston, Gray & Bowen 1832) (“The gentry begin to fear this . . . We shall be under the dominion of a riotous mob.”).

198. *Id.*

199. *Id.*

200. See Maier, *From Resistance to Revolution*, *supra* note 40, at 76, 86, 96–100.

201. *Id.* at 100.

deferential political behavior.”²⁰² After common men had “taken part in hounding, humiliating, perhaps killing men known to them as social superiors, they could not easily reacquire the unthinking respect for wealth and status that underpinned the old order.”²⁰³

II. THE CONSTITUTIONALISM OF FORCE AT WAR

The Revolution changed everything it touched, including the former colonists’ understanding of when and for what causes violence was legally legitimate. It changed Americans’ understanding of the legality of violence in two ways. First, trends hardening America’s racial categories would become an enduring legacy, associating the liberty Americans fought for with white racial identity.²⁰⁴ Second, the economic and political egalitarianism of prewar radical movements became much more mainstream.²⁰⁵ Men who had been drawn to Real Whig ideas looked for a return to deferential, elite-driven, post-war governance.²⁰⁶ But those who had joined the Revolution because of their hopes for a more economically and politically just society had very different goals indeed.²⁰⁷ These differences were temporarily disguised by common grievances and challenges while the war was ongoing. Disagreements over which part of society should bear the burden of the economic recovery after the war would reveal the depth of this schism.

A. *Race*

Racial justifications for the Revolution added a new dimension to Americans’ theory of constitutional violence. For white settlers in the West, primarily concerned about Native Nations, and whites in the South, who wanted to be left alone to brutalize their slaves, Real Whig rhetoric suggested more than the libertarian message that it conveyed to the tax-obsessed Bostonians. In addition to a right to fight for freedom from oppressive rule, these Americans heard an imperative to earn through violence what they viewed as their proper place on top of a racial hierarchy threatened by the British. That is what defense of *their* status quo and community consensus, *their* local constitutional order, necessarily entailed. Making these causes national and legitimizing the Revolution this way would leave a powerful legacy.

The Declaration of Independence blamed King George III for “excit[ing] domestic insurrections amongst us, and . . . endeavour[ing] to

202. John Shy, *The Military Conflict Considered as a Revolutionary War*, in John Shy, *A People Numerous and Armed* 213, 242–43 (1990).

203. *Id.*

204. See *infra* section II.A.

205. See *infra* section II.B.

206. See *infra* notes 295–298 and accompanying text.

207. See *infra* notes 299–304 and accompanying text.

bring on the inhabitants of our frontiers, the merciless Indian Savages.”²⁰⁸ Thomas Paine’s *Common Sense* likewise accused the king of having “stirred up the Indians and Negroes to destroy us.”²⁰⁹ Had not the British, a Philadelphia columnist writing in 1776 urged, “attempted to spirit up the Indian savages to ravage our frontiers, and murder, after their inhuman manner, our defenceless wives and children?”²¹⁰ “Have not our Negro slaves been inticed to rebel against their masters, and arms put into their hands to murder them?”²¹¹ To compromise, the author urged without irony, was “SLAVERY.”²¹²

Few Southern Patriots were troubled by the fact that they fought for their own liberty while holding others in bondage. The bondage of others gave their fight content and form. As historian Alan Taylor has argued, “Freedom seemed all the more precious because colonists daily saw the humiliation and exploitation of the enslaved.”²¹³ “Slavery” had long been a fixation for British political theorists,²¹⁴ but for North American slave owners, it was hardly an abstraction. The oppression white Patriots feared was the condition they imposed on Black people.²¹⁵ Indeed, American revolutionaries frequently compared their own situation to that of their African captives.²¹⁶ Left unchallenged, George Washington warned in 1774, the “Imposition[s] . . . heap’d upon us” by the British Crown would “make us as tame, & abject Slaves, as the Blacks we Rule over with such arbitrary Sway.”²¹⁷

The experience of fighting a war for “liberty” in which their slaves took up arms against them only confirmed the connection white Southerners had long drawn between constitutional liberty and slave ownership. White Southerners had long been locked in what they saw as a

208. The Declaration of Independence para. 29 (U.S. 1776).

209. Paine, *supra* note 97, at 35.

210. Honest Farmer, Pa. J., Feb. 28, 1776, at 1.

211. *Id.*

212. *Id.*; see also Robert G. Parkinson, *The Common Cause: Creating Race and Nation in the American Revolution 193–94*, 194 n.12 (2016) (contextualizing the prior citation and collecting other examples of similar rhetoric).

213. Alan Taylor, *American Revolutions* 22 (2016) [hereinafter Taylor, *American Revolutions*].

214. See, e.g., F. Nwabueze Okoye, *Chattel Slavery as the Nightmare of the American Revolutionaries*, 37 *Wm. & Mary Q.* 3, 10–11 (1980).

215. See *id.* at 12–14 (showing how the colonial pamphleteers envisioned and feared chattel slavery).

216. See, e.g., *id.* at 4, 12–14 (“You will become slaves indeed, in no respect different from the sooty *Africans*, whose persons and properties are subject to the disposal of their tyrannical masters.” (quoting Joseph Galloway, *A Letter to the People of Pennsylvania* 38–39 (Philadelphia, 1760))).

217. Furstenberg, *supra* note 9, at 1301 (internal quotation marks omitted) (quoting Letter from George Washington to Bryan Fairfax (Aug. 24, 1774)).

state of suppressed war with their slaves.²¹⁸ Both before and during the Revolution, slave overseers in Virginia and South Carolina were exempt from militia musters: They already served a critical role on that other front line.²¹⁹ White Southerners experienced British overtures to these “internal enemies,” including Lord Dunmore’s 1775 offer of freedom to slaves willing to abandon patriot masters, as an acute betrayal.²²⁰ Indeed, the prospect of slave rebellion was so terrifying that for a moment during the war, in 1779, white Patriots and Loyalists in Wilmington, North Carolina put their differences aside and united against the common threat of Black self-determination.²²¹

Fears that slaves would free themselves, as historians estimate that more than 20,000 did,²²² and fear of former slaves’ vengeance, left a lasting impression on Southern Patriots.²²³ Because of that trauma and the South’s postwar economic crisis, “the majority of [white] Southerners came out of the war convinced that the promises of the Declaration of Independence could only be secured to them by the continuation of slavery.”²²⁴

218. They were of course familiar with Locke’s analysis of the relationship between master and slave. See John Locke, *Two Treatises of Government* 110 (Peter Laslett ed., Hackett 2003) (1689) (“This is the perfect condition of slavery, which is nothing else, but the state of war continued, between a lawful conqueror and a captive . . .”); Okoye, *supra* note 214, at 10 (noting early Americans’ familiarity with John Locke).

219. See Laura Sandy, *Divided Loyalties in a “Predatory War”: Plantation Overseers and Slavery During the American Revolution*, 48 *J. Am. Stud.* 357, 374 (2014) (“From the seventeenth century onwards, statute books in both Virginia and South Carolina show that plantation overseers were exempt from military muster, in order that they might remain on the plantation, keeping watch over their slaves.”).

220. See Douglas R. Egerton, *Death or Liberty: African Americans and Revolutionary America* 72 (2009) [hereinafter Egerton, *Death or Liberty*] (“The fact that British soldiers were increasingly willing to encourage slaves ‘to leave their masters [and] to take up arms against them’ only convinced irresolute masters to endorse calls for independence.” (alteration in original)); Alan Taylor, *The Internal Enemy: Slavery and War in Virginia, 1772–1832*, at 23–27 (2013) [hereinafter Taylor, *The Internal Enemy*].

221. Jeffrey J. Crow, *Slave Rebelliousness and Social Conflict in North Carolina, 1775 to 1802*, 37 *Wm. & Mary Q.* 79, 84, 101 (1980).

222. Maya Jasanoff, *Liberty’s Exiles: American Loyalists in the Revolutionary World* app. at 352 (2011).

223. A Scottish gentlewoman traveling in North Carolina in 1775 wrote that patriot officers were telling soldiers they enlisted that a proclamation issued by the royal governor “was ordering the tories to murder the whigs, and promising every Negro that would murder his Master and family that he should have his Master’s plantation.” Janet Schaw, *Journal of a Lady of Quality* 199 (Evangeline Walker Andrews & Charles McLean Andrews eds., 1921). The Scotswoman thought these were all lies but believed “[t]his last Artifice they may pay for, as the Negroes have got it amongst them and believe it to be true. Tis ten to one they may try the experiment, and in that case friends and foes will be all one.” *Id.*; see also Crow, *supra* note 221, at 84 (situating this quote in its context in revolutionary North Carolina).

224. Sylvia Frey, *Liberty, Equality, and Slavery*, in *The American Revolution: Its Character and Limits* 230, 238–39 (Jack P. Greene ed., 1989).

When, buoyed by Revolutionary idealism, two Methodists submitted a petition to Virginia's legislature in 1785 advocating for general emancipation, the reaction was swift.²²⁵ Proslavery petitions from Virginia's highest tobacco-producing counties drew hundreds of signatures.²²⁶ Patriots, the petitions urged, had "waded thro' Deluges of civil Blood to that unequivocal Liberty, which alone characterises the free independent Citizen, and distinguishes him from the subjugated Vassal of despotic Rule."²²⁷ That liberty was, unequivocally, the freedom to own others. The proslavery petitions asserted that white Virginians had "seald with our Blood, a Title to the full, free, and absolute Enjoyment of every species of our Property,"²²⁸ and they rejected the call for general emancipation as "a daring attack on that sacred Constitution thereby establishd."²²⁹

All of the themes of the constitutionalism of force are here—a claim to legal rights asserted in battle and paid for in blood—but with a new justification this time: the right to a privileged place in a racial hierarchy. That is not to say the Founders' constitutionalism required a racially oppressive outcome. It was in part these same justifications that motivated the emancipation of slaves who joined in the Patriot cause in the North. Rhode Island, New York, and Connecticut allowed masters to free enslaved men to serve in their place in the militia.²³⁰ The states were short on troops and the war was punishing, but we need not probe the rationale too hard.²³¹ Whatever their mix of motivations, these states applied the idea that liberty could be earned through battle-proven virtue for men with black skin. And in some Northern states, the participation of Black troops in the Revolution helped inspire gradual emancipation laws.²³²

225. Fredrika Teute Schmidt & Barbara Ripel Wilhelm, *Early Proslavery Petitions in Virginia*, 30 *Wm. & Mary Q.* 133, 134–35 (1973).

226. *Id.* at 137.

227. *Id.* at 140 (internal quotation marks omitted) (quoting the Remonstrance and Petition of the Free Inhabitants of the County of Lunenburg (Nov. 29, 1785)).

228. *Id.* at 141.

229. *Id.*

230. Egerton, *Death or Liberty*, *supra* note 220, at 74–77; Manisha Sinha, *The Slave's Cause: A History of Abolition* 49 (2016) ("All the Northern States followed Rhode Island in allowing slaves to enlist and granting them freedom for their military service."). It would become a tradition for "slave regimes at war and chronically short of men," to be "forced into negotiations with their own slaves, usually to recruit them as soldiers, often on condition of emancipation." Stephanie McCurry, *Confederate Reckoning: Power and Politics in the Civil War South* 4 (2010). Even Virginia enacted legislation after the Revolution, freeing the much smaller number of slaves who had fought against the British. *Of Dealing With Slaves and Suffering Them to Go at Large*, Code of Va. tit. 30, ch. 104, at 512 (2d ed., Richmond, Ritchie, Dunnivant & Co. 1860) (noting that in 1782, "an act passed to authorize the manumission of slaves," and "[i]t was followed by that of 1783, emancipating those slaves who had served as soldiers in the war," and that these laws had not since been repealed). But Virginia "also sold state-owned slaves who had served in the navy." Sinha, *supra*, at 49.

231. Egerton, *Death or Liberty*, *supra* note 220, at 74 ("Within just a few months of declaring independence, the American government faced a severe crisis in military manpower.").

232. *Id.* at 95–96.

In part for this reason, notwithstanding the hardening of racial hierarchies in the South, Black Americans would continue to see belligerent constitutional themes—“live free or die”—as part of their own heritage as Americans.²³³ At the same time, however, François Furstenberg has argued that the Revolution’s “live free or die” rhetoric “linked freedom to resistance,” grounding “slavery in an act of individual choice” or even consent, and in doing so legitimated “slavery on principles consistent with the American Revolution.”²³⁴ Looking at this rhetoric, Historian David Brion Davis has wondered whether the American Revolution may have made some whites *less* open to emancipation. “Since the Revolution tended to define liberty as the reward for righteous struggle,” he explained, it may have become more “difficult to think of freedom as something that could be granted to supposedly passive slaves.”²³⁵

In western colonies, British sympathy for Native Nations helped make a national issue of the longstanding racial grievances of frontiersmen. A major part of the Patriot cause in that region was that the British “car[ed] too much for Indians” and that they were “indifferent to or even complicit in ordinary country people’s sufferings at Indian hands.”²³⁶ Violence between colonists and Native peoples never truly ended after the Seven Years War. Instead, the 1760s saw a cycle of attacks and retaliation—including episodes in which colonist mobs slaughtered entire Native communities in the Pennsylvania hinterlands.²³⁷ Anger over the British Proclamation Line of 1763, which had forbidden colonists from dispossessing Native peoples, and a “horror and fear” of “Indian” “attacks”

233. It was not only because white Americans moved toward emancipation in the North that Black Americans saw this intellectual heritage as their own, of course. Black North Americans should not be seen as a population of objects, acted upon but not changed by historical moments. Indeed, Black Americans in the North and South were also radicalized by the age of Revolution. For an account of Black Americans who saw these “live free or die” themes as their own, see Furstenberg, *supra* note 9, at 1324–26 (noting this theme in Frederick Douglass’s autobiography). See generally Kellie Carter Jackson, *Force and Freedom: Black Abolitionists and the Politics of Violence* (2019) (exploring the use and justifications of violence by antebellum Black abolitionists); Shaun Ossei-Owusu, *The People’s Champ: Legal Aid From Slavery to Mass Incarceration* (forthcoming) (on file with the *Columbia Law Review*) (discussing the violent defense of refugees from slavery by Black abolitionist organizations and those abolitionists’ reliance on some of these themes). But see Farah Peterson, *The Patriot Slave: The Dangerous Myth that Blacks in Bondage Chose Not to Be Free in Revolutionary America*, 89 *Am. Scholar* 32, 32 (2020) (discussing the cultural theme of the grateful, happy, and loyal slave that developed to “suppress and obscure” memories of “black self-determination during the Revolution”).

234. Furstenberg, *supra* note 9, at 1296–97.

235. David Brion Davis, *The Problem of Slavery in the Age of Revolution, 1770–1823*, at 257 (1975).

236. Peter Silver, *Our Savage Neighbors: How Indian War Transformed Early America*, at xviii, xxiii (2008).

237. See Rob Harper, *Looking the Other Way: The Gnadenhütten Massacre and the Contextual Interpretation of Violence*, 64 *Wm. & Mary Q.* 621, 621 (2007).

became “a vital means of forming public coalitions.”²³⁸ One of the freedoms Patriots from the western frontier fought for was, in short, the freedom to kill more Indians and to take their lands without hindrance.

The Revolution made this brutality respectable. Previously intolerable figures like Michael Cresap, a frontiersman Thomas Jefferson called “infamous” for his role in a massacre of Native women and children, became celebrated for their military prowess during the war years.²³⁹ The Paxton Boys, a posse denounced as “barbarous Men” by Benjamin Franklin for their 1764 massacre of fourteen unarmed Native men, women, and children, would go from being outlaws under British rule to folk heroes.²⁴⁰ The royal government of Pennsylvania had shared both Franklin’s disapproval of the Paxton Boys and a long-range interest in reducing the defense costs of interethnic violence. But after Independence, Franklin’s government would no longer share his views.

Where the British had feared western expansion as the prelude to a loss of imperial control, the new nation was committed to expansion and the violence expansion entailed.²⁴¹ The Revolution’s “closing years” included “extraordinary anti-Indian violence.”²⁴² Officers under General John Sullivan, pausing on their march into Iroquois Territory, raised a toast on July 4, 1779, to “Civilization or death to all American Savages,” a phrase that historian James Merrell argues would soon “become common among those interested in Indian affairs.”²⁴³ Franklin and Jefferson had secured a place in the new nation’s cultural firmament, but so had the formerly liminal frontiersman.²⁴⁴

238. Silver, *supra* note 236, at xviii, xix.

239. Robert G. Parkinson, *From Indian Killer to Worthy Citizen: The Revolutionary Transformation of Michael Cresap*, 63 *Wm. & Mary Q.* 97, 97–99 (2006) [hereinafter Parkinson, *The Revolutionary Transformation of Michael Cresap*]; see also Extract of a Letter from Frederick-Town, August 1, *N.Y. Gazette & Wkly. Mercury*, Aug. 21, 1775, at 3 (publishing an article written in fawning tones, marking Cresap’s progress through Pennsylvania and New York on his way to the front lines).

240. Benjamin Franklin, *A Narrative of the Late Massacres* 9 (Philadelphia, Franklin & Hall 1764); see also Slaughter, *Crowds in Eighteenth-Century America*, *supra* note 9, at 21 n.23.

241. See Andrew Shankman, *Toward a Social History of Federalism: The State and Capitalism to and From the American Revolution*, 37 *J. Early Republic* 615, 616–28 (2017) (explaining that British authority was strongest at the coasts and dwindled further into the interior of the continent).

242. Silver, *supra* note 236, at xxiii.

243. James H. Merrell, *Declarations of Independence: Indian–White Relations in the New Nation*, in *The American Revolution: Its Character and Limits*, *supra* note 224, at 197, 198.

244. See Gautham Rao, *The New Historiography of the Early Federal Government: Institutions, Contexts, and the Imperial State*, 77 *Wm. & Mary Q.* 97, 117 (2020) (explaining that the new federal government “helped channel settler colonist circulation, provided military and commercial support, and ultimately actualized the ideology of Indian removal” and that “white settler colonists” would become “at times the state itself”).

The war thus “generated racial distinctions that associated freedom with whiteness.”²⁴⁵ Southern colonists’ protests against British efforts to end slavery in the decades before Independence had focused on the contention, said historian Alan Taylor, that “white men became fully free by owning blacks.”²⁴⁶ Likewise, argues historian Peter Silver, the persistent conflict with Native Nations in the western colonies helped disparate European groups forge a new identity as “the white people.”²⁴⁷ The Revolution only entrenched these racial categories in the Founding generation’s constitution.

Over the long run, the emphasis on white racial identity inaugurated during the Revolution would become an even more important element of American constitutional culture. The jingoistic rhetoric of the War of 1812 would strengthen a national politics of racial exclusion.²⁴⁸ It would rise ascendant with Jacksonian Democracy, a party orientation that easily combined populism for white men with anti-Indian and pro-slavery politics.²⁴⁹ These shifts would eventually limit the gains that some non-whites had made in the fight for Independence in the North. New York’s 1821 constitutional convention voted to strip Black men of the vote in that state.²⁵⁰ In Pennsylvania, white men of the same social milieu that had gathered to pass the gradual emancipation statute in 1801 would make up the mobs that torched an abolitionist meeting house in 1838 and then burned a Black orphanage in Philadelphia to the ground, standing “guard around the burning building so that fire companies could not reach the flames.”²⁵¹ That year, Pennsylvania state leaders also amended the constitution to restrict the franchise to whites and purged Black voters from the rolls.²⁵²

The constitution that emerged from the Revolution made it a virtue to turn a cannibalistic hunger on the rights of others. Future generations of white Americans would continue to see violence as a legitimate tool of constitutional engagement but only when employed by other whites—and

245. This pithy phrase is from Alan Taylor, *Expand or Die: The Revolution’s New Empire*, 37 *J. Early Republic* 599, 614 (2017) [hereinafter Taylor, *Expand or Die*], but he relies upon Parkinson, *The Revolutionary Transformation of Michael Cresap*, supra note 239, whose book is devoted to proving this thesis. See Robert G. Parkinson, *Thirteen Clocks: How Race United the Colonies and Made the Declaration of Independence*, at ix (2021).

246. Taylor, *American Revolutions*, supra note 213, at 21.

247. Silver, supra note 236, at xxi.

248. For the origin, rise, and progress of these themes, see Taylor, *The Internal Enemy*, supra note 220, at 137–38.

249. *Id.* at 137–38, 347.

250. See Reports of the Proceedings and Debates of the Convention of 1821: Assembled for the Purpose of Amending the Constitution of the State of New York 376–77 (Albany, E. & E. Hosford 1821).

251. Terry Bouton, *Taming Democracy: “The People,” the Founders, and the Troubled Ending of the American Revolution* 265 (2007).

252. *Id.*

often in the cause of white racial domination.²⁵³ This style of American constitutional thought has persisted ever since,²⁵⁴ in part because elites have ever needed the men of the periphery, the liminal types, to serve as overseers on their plantations and as the foot soldiers of western expansion and so could not repudiate the violence those roles require. And in part they have not rejected this strain of constitutional thought because generations of American elite have, of course, believed that the strong should dominate the weak—or, at least, have not been very interested in asking difficult questions about a moral worldview that supports and furthers their own power.

B. *Democracy and Schism*

The war also moved egalitarian ideas to the fore. The experience of war and the way Patriots justified its hardships made the American people who emerged from the Revolution quite different from the colonists who had started it. The pamphlet litany of British wrongs emphasized the tyranny of British taxation and credit collection and the cycle of “slavish” dependence they created.²⁵⁵ Elites justified the extraordinary taxation and service demands of wartime in increasingly inclusive ways, using a

253. Although we don't have the space to discuss it, the persistence of this style of constitutional thought in the late nineteenth-century South is well documented. Subsequent generations would be able to look back on the Revolution as having confirmed the legitimacy of violence in the cause of white supremacy. See, e.g., Andrew Slap, *The Spirit of '76: The Reconstruction of History in the Redemption of South Carolina*, 63 *Historian* 769 (2001); see also Daly, *supra* note 37, at 2–3, 19; Hahn, *supra* note 37, at 266; George C. Rable, *But There Was No Peace: The Role of Violence in the Politics of Reconstruction I* (1984) (“By the time the federal government retreated from its reconstruction of the South, former confederates had achieved through political terrorism . . . the freedom to order their own society and particularly race relations as they saw fit.”).

254. This style of constitutionalism also persisted in the American Southwest. See, e.g., Monica Muñoz Martinez, *The Injustice Never Leaves You: Anti-Mexican Violence in Texas* 11 (2018) (discussing the nineteenth-century “Texas Rangers,” an organization that “blurred the lines between enforcing state laws, practicing vigilantism, and inciting racial terror”). White settlers—“inheritors of a tradition of vigilantism and popular justice from the eastern states”—believed that victory in the Mexican-American War “meant the fulfillment of the nation’s manifest destiny and the acquisition of California and the Southwest for the use by white men” and turned to “mob violence” to drive out Mexican competitors for land or gold, out of frustration with local courts too ready to deal on fairer terms with Mexicans. William D. Carrigan & Clive Webb, *Forgotten Dead: Mob Violence Against Mexicans in the United States, 1848–1928*, at 21, 23–28 (2013) (“[Lynchings consistently defended their actions as rational responses to the ineffectual state of the frontier courts.”). Indeed, looking at the legislative and legal compromises over civil rights that have followed in the wake of white racial vigilantism—and in the wake of the forced dispossession of Native Nations—one could argue that important aspects of our constitutional order have evolved through concessions to violent movements.

255. See Peterson, *Constitutionalism in Unexpected Places*, *supra* note 32, at 575 (describing how tax increases to repay war debt and tightening of British credit in the 1760s created resentment among American colonists).

language of popular sovereignty and touting the possibilities of self-rule.²⁵⁶ Newly independent state legislatures, eager to gather support for the revolutionary cause, also fostered popular participation.²⁵⁷ As the fighting drew to a close, men with egalitarian beliefs “saw themselves as upholding the mainstream understanding of the Revolution” and no longer as “radicals or outsiders.”²⁵⁸ They believed that “their notions of democracy were rights they had secured through the struggle with Britain.”²⁵⁹

The American population had put eighteenth-century theories of just rebellion into practice. They were to find out, however, that they were sharply divided about what came next: whether it should be a Real Whig denouement, in which “the people” subsided into their deferential role as a balance to the ruling aristocracy, or instead, “the people” themselves enthroned as sovereign, as the rhetoric of Revolution had seemed to guarantee.

The new state legislatures, led generally by the same men in leadership positions before Independence, alienated this newly awakened electorate even before the war was over.²⁶⁰ At the close of a war that had been sold to common men with what sounded like appeals to redistributive justice, including a great deal of discussion of the unfair “servitude” imposed by American debtors’ obligations to British creditors,²⁶¹ courts reopened for business and started confiscating property for unpaid debts.²⁶² Although patriotic rhetoric had explained the war as a reaction to ruinous taxation, state legislatures imposed tax

256. See *id.* at 586 (explaining how populist, pro-debtor rhetoric by American elites engendered an expectation of economic fairness after the revolution); Taylor, *Expand or Die*, *supra* note 245, at 607 (“The demands of war rendered the revolution more transformative as patriot leaders had to make concessions to common people.”).

257. Pole, *supra* note 50, at 340–41; see also Farah Peterson, *Statutory Interpretation and Judicial Authority, 1776–1860*, at 40–41 (Sept. 2015) (Ph.D. dissertation, Princeton University) (on file with the *Columbia Law Review*) [hereinafter Peterson, *Statutory Interpretation and Judicial Authority*] (“In Massachusetts, the assembly erected a public gallery in its chamber; Pennsylvania increased representation for more populous counties; and in Virginia, a new interest in politics in 1776 produced the first hotly contested elections.”).

258. Bouton, *supra* note 251, at 258.

259. *Id.*

260. See Peterson, *Constitutionalism in Unexpected Places*, *supra* note 32, at 585–91 (describing legislative economic policies that exacerbated inflation and increased wealth inequalities coupled with harsh judicial enforcement of debtor obligations); see also Gary J. Kornblith & John M. Murrin, *The Making and Unmaking of an American Ruling Class, in Beyond the American Revolution: Explorations in the History of American Radicalism* 27, 28–79 (Alfred F. Young ed., 1993) [hereinafter *Beyond the American Revolution*] (tracing the class politics and sharp political reversals that followed the Revolution, largely in reaction to these unpopular early legislative choices).

261. Peterson, *Statutory Interpretation and Judicial Authority*, *supra* note 257, at 41.

262. Peterson, *Constitutionalism in Unexpected Places*, *supra* note 32, at 573, 586.

rates in the 1780s averaging three or four times those of the colonial era.²⁶³ Some of these choices were driven by necessity, as governments turned to tax revenues to settle foreign war debts and preserve state credit.²⁶⁴ But the values of the governing class, and not just the post-war difficulties themselves, better explain many of these fiscal measures.²⁶⁵ In effect, state leaders decided to place the burden of a severe post-war economic slump on the poorer, agrarian populations. This was a part of the citizenry that was, in many cases, not as well represented in state assemblies because of legislative apportionments that favored eastern areas.²⁶⁶

It was these legislatures' decisions about the debt states owed to Revolutionary War veterans that finally triggered a major political crisis.²⁶⁷ Continental soldiers had accepted pay in the form of government bonds—essentially, promissory notes. When they returned home, soldiers who needed cash immediately “to prevent their families from actually starving” began selling their bonds for whatever coin they could get at prices far below their face value.²⁶⁸ Wealthier Americans bought up the bonds at these discounted prices and then used their influence in legislatures to levy taxes sufficient to redeem them at their full printed value with an added annual interest fee for bondholders.²⁶⁹ Not without justice, the soldiers “complain[ed] that shadows have been offered to us while the substance has been gleaned by others.”²⁷⁰ Farmers, many of them veterans, saw their last cow confiscated because they could not afford to pay these taxes²⁷¹—taxes that were high in order to pay the interest to “opulent gentlemen” now holding the “publick securities” that the veterans had been forced to sell for pennies.²⁷²

Conservative legislators argued that this massive redistribution of wealth served to “put . . . property into the hands of those who would

263. Woody Holton, *Did Democracy Cause the Recession that Led to the Constitution?*, 91 *J. Am. Hist.* 442, 445 (2005) [hereinafter Holton, *Did Democracy Cause the Recession that Led to the Constitution?*].

264. Allen Nevins, *The American States During and After the Revolution, 1775–1789*, at 479 (1924) (demonstrating the difficulty of paying war costs and states' obligations as creditors).

265. See Sean Condon, *Shays's Rebellion: Authority and Distress in Post-Revolutionary America* 40 (2015) (describing the fiscal issues, policy proposals, and government choices that prompted the political crisis in Massachusetts).

266. See Holton, *Did Democracy Cause the Recession that Led to the Constitution?*, *supra* note 263, at 442.

267. See Peterson, *Constitutionalism in Unexpected Places*, *supra* note 32, at 586–87.

268. *The Address and Petition of the Officers of the Army of the United States*, in 24 *Journals of the Continental Congress: 1774–1789*, at 291, 291 (Gaillard Hunt ed., 1922).

269. Peterson, *Constitutionalism in Unexpected Places*, *supra* note 32, at 586.

270. *The Address and Petition of the Officers of the Army of the United States*, *supra* note 268, at 291.

271. Condon, *supra* note 265, at 18–20.

272. *Objections Against Reducing the Publick Debt Examined*, *Mass. Centinel*, Mar. 1, 1786, at 1 [hereinafter *Objections*].

manage it better.”²⁷³ To poorer citizens, however, it was obvious that “every tax laid on the community [was] virtually a tax to [the wealthy]; the greater the debt, the greater is their gain; they are accumulating fortunes by the general distress.”²⁷⁴ Many were forced to give up their land, the most effective guarantee of independence, to satisfy their pettiest debts. The same leaders who had promoted the Revolution as a moral imperative now sat in the assemblies. Some of their constituents now began to feel that they had been “horribly deceived and deluded” by the very men who had urged them to fight against British taxation.²⁷⁵ These same men were now imposing the “burdens” that veterans had been “told they should have been forever free from.”²⁷⁶ But the Revolution itself had taught the citizenry how to respond to such provocations.

The Revolution, fought in defense of fundamental rights, had heightened the antinomian impulse in civic life that had originated in the Great Awakening. It had encouraged the idea that common men were qualified to identify constitutional rights and determine for themselves when they had been violated. As a Massachusetts man argued, “By the Constitution, our General Court [that is, the legislature] are empowered to make laws, levy taxes, &c. that are founded in equity and justice, and they have no power by [that], to make any other.”²⁷⁷ Common men would be at their most confident asserting claims against government actions that had been directly at issue during the struggle with Britain: as here, an attempt to impose ruinous taxes or give unfair advantages to the creditor class; or, as during the Whiskey Rebellion and Fries’s Rebellion, an attempt to impose internal taxes and stamp taxes on a population that felt inadequately represented; or, as would come later, attempts to extend government protection to Black people or Native peoples. In such cases, Revolutionary War veterans and their descendants asserted that they did

273. Holton, *Did Democracy Cause the Recession that Led to the Constitution?*, supra note 263, at 455 & n.23 (internal quotation marks omitted) (quoting *Amicus*, *Va. Indep. Chron.*, July 4, 1787).

274. *Objections*, supra note 272, at 4.

275. Robert E. Moody, *Samuel Ely: Forerunner of Shays*, 5 *New Eng. Q.* 105, 113 (1932).

276. *Id.*

277. Letter to the Editor, *Falmouth Gazette & Wkly. Advertiser*, June 11, 1785, at 3. In 1786, for example, a community of squatters moved from the Connecticut River Valley to occupy land in Pennsylvania. Alan Taylor, *Agrarian Independence: Northern Land Rioters After the Revolution*, in *Beyond the American Revolution*, supra note 260, at 221, 233. When the proprietors of those lands asked them to move, they refused, calling for an “[e]qual distribution of property” and arguing that “the labours bestowed in subduing a rugged wilderness were our own, and can never be wrested from us without infringing the eternal rules of right.” *Id.* (internal quotation marks omitted) (quoting Baptist preacher James Finn). A preacher ministering to these squatters informed Pennsylvania’s agent in the county that these “lands belonged to the Con[necticu]t people, by the laws of God & nature; but that the laws of Penn[sylvani]a would take them from them: that laws contrary to the laws of God & Nature were not to be obeyed.” *Id.* (internal quotation marks omitted) (quoting Reverend Jacob Johnson).

not “contend against the Powers of Great-Britain, in order to displace one Set of Villains to make Room for another; but . . . to contend for permanent Freedom.”²⁷⁸

Common folk started gathering in country conventions to voice their dissatisfaction with state governance in Massachusetts even before the end of the Revolutionary War. In January 1782, an itinerant preacher named Samuel Ely stood up at one of those conventions to urge men to overthrow the Massachusetts constitution.²⁷⁹ In April, Ely led a body of men to prevent the courts from sitting by force.²⁸⁰ Arming himself with a club, he told the “riotous mob,” “Come on, my brave boys, we’ll go to the woodpile and get clubs enough and knock their Grey Wiggs off and send them out of the World in an Instant.”²⁸¹ Ely was arrested, but Massachusetts could not hold him. In mid-June, a group of about 130 armed men marched to the jail to rescue Ely.²⁸² Massachusetts could muster only about fifty men to respond.²⁸³

The encounter between Ely’s rescuers and the officers of the state would reveal what would become an enduring dynamic. Despite all the efforts Massachusetts citizens had taken to craft a written constitution and to form a government under its aegis, the people still understood their fundamental law as community consensus. When the outgunned government forces finally caught up and engaged with Ely’s rescue party, Ely himself escaped during the scuffle.²⁸⁴ The outcome was a parlay: The two sides agreed to sit down together, and after a discussion that lasted several hours, the sheriff and other government officials agreed to join with the insurgents in a cosponsored petition asking the legislature to consider the Hampshire County Convention’s grievances.²⁸⁵

278. Herman Husband, *Proposals to Amend and Perfect the Policy of the Government of the United States of America* 32 (1782).

279. Moody, *supra* note 275, at 108 (citing Ely’s argument that the “Governor had too much salary” and neither “the Supreme Court nor the General Court should be allowed to sit” as reasons for rejecting the Massachusetts constitution). He further argued that “the Attornies [sic], Sheriffs, & all Officers should be sacrificed,” especially the Justice of the Peace, whose “Body should be given to the Fowls of the Air and to the Beasts of the Field.” John L. Brooke, *To the Quiet of the People: Revolutionary Settlements and Civil Unrest in Western Massachusetts, 1774–1789*, 46 *Wm. & Mary Q.* 425, 425 (1989) (internal quotation marks omitted) (quoting Massachusetts Supreme Judicial Court Docket Book, 1781–1782, at 179–80 (1782)).

280. Moody, *supra* note 275, at 109.

281. *Id.*

282. *Id.*

283. *Id.*; see also Condon, *supra* note 265, at 24.

284. Moody, *supra* note 275, at 110.

285. See Condon, *supra* note 265, at 25. When the violence resumed, government officials again relied on parlay and diplomacy. In the days that followed the insurgents took

When, in 1786, the yeomanry of Massachusetts began gathering in conventions again, they felt confident that their efforts were consistent with “the principles of [the] constitution, which was instituted for the common good” and for the “happiness of the people; and not for the honour or interest of any man, family, or class of men.”²⁸⁶ The 1786 convention in Worcester County drew up a petition carefully enumerating popular grievances, including the scarcity of specie and other conditions that gave “the creditor” “too great advantage” over “the debtor.”²⁸⁷ The convention also expressed a “general disgust” with the courts, the high salaries of government officials, the inconvenience of the probate courts, and the unfairness of various parts of the tax scheme.²⁸⁸ It was time, the convention argued, to gather public sentiments on “revising the constitution.”²⁸⁹

To critics, a convention amounted to “a government erected within a government; a body assembling to consult and debate upon the degree of submission due to the constitutional government.”²⁹⁰ This was, they urged, “an idea directly subversive of all order.”²⁹¹ Although many of the conventions urged peaceful measures, Massachusetts Governor James Bowdoin classed the violent mobs and county conventions together. Now

government supporters as hostages and the sheriff learned that a crowd was “on the March with Fire Arms & swear that if opposition is made to them they will lay the town in Ashes.” *Id.* (internal quotation marks omitted) (quoting Letter from Sheriff Porter to Governor John Hancock (June 14, 1782)). The unrest swelled until, estimated a sheriff, about “five or six hundred” were “engaged in the riots.” *Moody, supra note 275, at 111.* A witness wrote to warn a legislator that the rioters were threatening “houseburnings” and other violent acts. *Id.* at 112. He urged that “an attempt to Subdue these People by force will at least be very expensive, if not a very dangerous Course” as their “number . . . increase daily,” and he advised that “a Comitee” of sensible and even-keeled politicians “come without loss of time to endeavour to assuage the Storms and to Explore the Causes.” *Id.* at 113 (emphasis omitted) (quoting Letter from Joseph Hawley to Caleb Strong (June 24, 1782)). This was the course the state government eventually followed. A local officer had also reduced tensions with his own diplomatic gestures. *Condon, supra note 265, at 26.* The sheriff explained he had complied with the insurgents’ demands to release some of their number from jail in part because of the danger of bloodshed but also because the insurgency included “a number of (otherwise) truly respectable People.” *Id.* Diplomacy was essential because the confrontation between officers of the state and the insurgents was not just a question of manpower. The insurgents asserted legal claims that could not be dismissed without a hearing.

286. The Address of Worcester Convention to the People: An Address to the Inhabitants of the County of Worcester, *Worcester Mag., Second Week in October, 1786*, at 327, 335, reprinted in 2 *Worcester Magazine* (Isaiah Thomas ed., 1786).

287. Petition of the Worcester County Convention to the General Court, *Worcester Mag., Second Week in October, 1786*, at 327, 334–35, reprinted in 2 *Worcester Magazine*, *supra note 286*.

288. *Id.* at 334.

289. *Id.* at 335.

290. Another Citizen, Opinion, From the Massachusetts Gazette, to the Free and Independent Citizens of Massachusetts, *Indep. Chron. & Universal Advertiser* (Boston), Aug. 31, 1786, at 1.

291. *Id.*

that the form of government was republican, he said, “every complaint, or grievance” could be redressed by annually elected legislature, which was “the only body within whose department it is, to redress publick grievances.”²⁹² Appeals to “all other bodies, and all other modes of redress, are anti-constitutional, and of a very dangerous tendency, even when attempted in a peaceable manner”—although, he admitted these appeals were “more” dangerous “when attempted by acts of violence.”²⁹³

This became a recurring plea of anxious leadership: Now that Massachusetts was a republic, the constitution had a fixed method and calendar for channeling popular policy concerns. The people could end the constant vigilance of 1760s constitutionalism. To the citizens meeting in conventions, this sounded like rank hypocrisy. As one of them reflected, “When we had other *Rulers*, Committees and Conventions of the people were lawful—they were then necessary; but since I have *myself* become a ruler, they cease to be lawful—the people have no right to examine into my conduct.”²⁹⁴

Men preaching order were asking for a return to old patterns. They wanted yeomen to go back to the social deference and political apathy that characterized that class during the prewar decades.²⁹⁵ In answer to the robust policy proposals that emerged from the conventions, gentlemen insisted that government was hard work and that “the people” were unqualified to do it. “What a growth of politicians in this country!” one writer said, sneering at a convention’s argument that taxation unfairly favored mercantile over landed estates.²⁹⁶ They “can confidently decide upon a question in fifteen minutes, which the General Assembly thought it hard to decide in twelve months.”²⁹⁷ In these elite critiques, one hears gentlemen urging the people to let them rule and to go back to their former status of being quietly ruled. “My dear sir,” said an author, who didn’t quite believe the conventions’ complaints about the scarcity of currency, “I will tell you what will make money plenty”—“Let the people choose good rulers: let the rulers take care of the government,” “[t]ake away the rod of violence,” and “let conventions return home to their

292. Governour Bowdoin’s Speech, Worcester Mag., Second Week in October, 1786, at 327, 330, reprinted in 2 Worcester Magazine, supra note 286.

293. Id.

294. Letter to the Editor, Worcester Mag., Second Week in October, 1786, at 327, 337, reprinted in 2 Worcester Magazine, supra note 286.

295. On political apathy, see Pole, supra note 50, at 45–46. On deference, see Gordon S. Wood, *The Radicalism of the American Revolution* 145–68 (1991) [hereinafter Wood, *The Radicalism of the American Revolution*]. See generally Richard Beeman, *Deference, Republicanism and the Emergence of Popular Politics in Eighteenth Century America*, 49 *Wm. & Mary Q.* 401 (1992).

296. An Old Republican, Opinion, Strictures Upon County Conventions in General, and Upon the Late Meeting Holden at Hatfield in Particular; Addressed to the Freeholders of the County of Hampshire, Number III, Hampshire Gazette, Oct. 4, 1786, at 2.

297. Id.

proper callings; meddle with government when they are called to it.”²⁹⁸ These men made little distinction between the conventions and more violent methods of constitutional engagement because what most bothered them was the challenge both posed to hierarchy, not the particular form those challenges took.

But regular people had experienced the Revolutionary War as a radical political education.²⁹⁹ And so the common folk of western Massachusetts did not let down their guard but instead began to urge one another that this was “the important period” to either “uphold that liberty you have purchased with your blood” or lose the freeman’s constitution to the efforts of the power hungry.³⁰⁰ “[A]fter expelling foreign domination,” warned an anonymous author from Attleborough, Massachusetts, there might be even “more dangerous enemies” at home “among the wealthy men in this State.”³⁰¹ The wealthy assumed common men were “so tired with the late war” that they had relaxed their vigilance.³⁰² He believed the purpose in “continuing the heavy and insupportable taxes” was so that “in a few, very few years” elites might extirpate the “independent spirit from among us, and forge the chains for our liberties so strong that the greatest exertions and convulsions will not break them.”³⁰³ This, the yeomanry could not permit. When upstart legislators “play with laws, and laugh at the calamities of the people with impunity, society must unhinge government.”³⁰⁴

By the end of 1786, as it became clear that peaceful measures had failed, the discontent became an uprising that would become known, in Massachusetts, as Shays’ Rebellion.³⁰⁵ The broader unrest eventually swelled to “almost 9,000 militants or about a quarter of the ‘fighting men’ in rural areas” in almost every part of New England.³⁰⁶ In an echo of the

298. *Id.* He added the condescending advice: “Earn money, and you shall have money enough.” *Id.*

299. See Wood, *The Radicalism of the American Revolution*, supra note 295, at 229–38. See generally John Shy, *A People Numerous and Armed: Reflections on the Military Struggle of American Independence* (1976) (discussing war as political education).

300. Attleborough, *Opinion, To the Yeomanry of Massachusetts*, *Indep. Chron. & Universal Advertiser* (Boston), Aug. 31, 1786, at 3.

301. *Id.*

302. *Id.*

303. *Id.*

304. Rusticus, *Opinion, To the Freemen of New-Hampshire*, *N.H. Gazette & Gen. Advertiser*, Aug. 10, 1786, at 1.

305. David P. Szatmary, *Shays’ Rebellion: The Making of an Agrarian Insurrection* 91 (1980).

306. *Id.* at 59 (quoting Jedidiah Morse, *The American Geography* 172 (Elizabethtown, N.J., Shepard Kollack 1789)). The exception was Rhode Island, where the agrarian interest took a majority in the legislature and passed debt-relief legislation. See *id.*; Woody Holton, “Divide et Impera”: *Federalist 10* in a Wider Sphere, 62 *Wm. & Mary Q.* 175, 184 (2005) (detailing how Rhode Island farmers organized to elect council candidates who would go on to pass paper money emission legislation).

tactics of the early Revolutionary War years, in Hampshire, Bristol, and Worcester County, Massachusetts, crowds calling themselves “Regulators” gathered to intimidate and threaten officials.³⁰⁷ They shut down courts and ordered the judges “to forbear doing any business” until the conventions could obtain “the minds of the people” and have “an opportunity of having their grievances redressed.”³⁰⁸ In September 1786, Regulators in New Hampshire surrounded the legislature as it sat in session, explaining that they had come “to do ourselves that justice which the laws of God and man dictate to us” and demanded a favorable response to their petitions.³⁰⁹ They posted sentinels “at the doors and windows, with bayonets fixed to their muskets, and forb[ade] any person from going in or coming out.”³¹⁰ One Massachusetts man admitted he “wished the insurgents had not taken up arms so soon,” but said he “did not know whether any other method than by arms would do.”³¹¹

When state leaders first attempted to suppress the mobs, they found themselves in the same difficult position that had mired the British, trying to manage from above a constitution which was *constituted*, at least in part, from below. Militiamen, called up to suppress a mob gathering to assault a courthouse in Worcester County, refused—some giving their commander an evasive answer, others a “flat denial,” just as the colonial militias had refused to suppress unrest in the 1760s.³¹² If the militia refused to come when called, Governor Bowdoin of Massachusetts complained, even the “best remedial laws” were “as baseless as the fabrick of a vision.”³¹³

307. Condon, *supra* note 265, at 57 (“[T]he regulators . . . organized as crowds to intimidate and put pressure on courts . . .”); Ray Raphael, *The First American Revolution: Before Lexington and Concord* 130–38 (2002) (discussing court closings as a prerevolutionary tactic).

308. Szatmary, *supra* note 305, at 68 (internal quotation marks omitted) (quoting Address by John Thompson, Asa Miller, Thomas Ansolon, Luke Day, Simeon Vaughan & Joel Billings to the Justices of the Northampton Court (Aug. 29, 1786), 189 *Mass. Archives: Shays’ Rebellion, 1786–1787*, at 111–13).

309. Letter from William Plumer to John Hale (Sept. 20, 1786), *in* 11 *Publications of The Colonial Society of Massachusetts: Transactions 1906–1907*, at 390, 390–91 (Albert Matthews ed., 1910) (recounting the Regulators’ demands).

310. *Id.* at 391.

311. Szatmary, *supra* note 305, at 67 (quoting Michael Hatch Testimony, Shays’ Rebellion Box, Robert Treat Paine Papers, *Mass. Hist. Soc’y*).

312. For the Worcester incident, see *id.* at 80 (internal quotation marks omitted) (quoting Letter from Jonathan Warner to Governor James Bowdoin, 190 *Mass. Archives: Shays’ Rebellion, 1787*, at 230). For colonial-era militias refusing to comply with British orders to suppress the mob, see Maier, *From Resistance to Revolution*, *supra* note 40, at 92 (“Militias had either refused to answer royal governors’ calls for support or were so clearly behind the mobs that it seemed foolhardy to muster them . . .”). A major general found his country militia units equally reluctant to come to his call. Stephen T. Riley, Dr. William Whiting and Shays’ Rebellion, 66 *Proc. Am. Antiquarian Soc’y* 119, 125 (1956).

313. Governour Bowdoin’s Speech, *supra* note 292, at 330–31. He also suggested that any “evils that have arisen, or may arise” from such lawlessness would be “chargeable” to “the good people” “themselves.” *Id.*

The problem, a Massachusetts historian writing in 1788 explained, was that “[t]he stopping of the Judicial Courts had been blended, in the minds of some people” with the legitimate “redress of grievances.”³¹⁴ To many militiamen, mobbing seemed a reasonable “mode of awakening the attention of the legislature” to the people’s unaddressed concerns.³¹⁵ On another occasion, when a contingent of about a thousand militiamen was called to protect the opening session of the court at Great Barrington, Massachusetts, they found the Regulators already there in force.³¹⁶ Instead of protecting the court’s opening day from the mob, some seven to eight hundred of the militia decided to join the Regulators.³¹⁷

Militiamen frequently “excused themselves from military duty.”³¹⁸ They may have taken the classic Whig position that government suppression was an inappropriate response to citizen unrest.³¹⁹ Or they may have felt sympathetic to the mobs’ grievances.³²⁰ Whatever the reason, this was still a people governed by a constitution of community consensus, and the community was clearly open to the insurgents’ way of thinking.

For their part, the Regulators saw taking up arms as a tool of legal reform. They said they “did not intend to destroy law, but only to reform all those laws which were oppressive.”³²¹ Or, as a veteran explained after joining the mob at the Worcester courthouse, he had “no intention to destroy the publick government” but had “stepped forth in the defence of this country” to fight for liberty.³²² By turning to force, the Regulators followed established precedent for making these kinds of claims. Daniel Shays was confident that after marching on Boston “to destroy the nest of devils, who by their influence, make the [legislature] enact what laws they please, [and] burn it,” it would be “in his power to overthrow the present

314. George Richards Minot, *The History of the Insurrections in Massachusetts* 40 (Worcester, Isaiah Thomas 1788).

315. *Id.*

316. Condon, *supra* note 265, at 56 (describing the encounter with the Regulators).

317. *Id.* at 56–57. The court was unable to sit in session, and when the judges left the courthouse, the insurgents followed to extract signatures from three out of the four on a pledge not to hold court “until the Constitution of the Government shall be revised or a new one made.” *Id.* at 57 (internal quotation marks omitted) (quoting Letter from Sheriff Caleb Hyde to Governor James Bowdoin (Sept. 13, 1786), 190 *Mass. Archives: Shays’ Rebellion, 1787*, at 263–64).

318. Minot, *supra* note 314, at 40.

319. See *supra* Part I (discussing eighteenth-century British North Americans’ theory about how governments should respond to citizen violence).

320. See Szatmary, *supra* note 305, at 80 (quoting Artemus Ward’s explanation that the militia in Worcester “were too generally in favor of the people’s measures” to suppress the mobs (citing Letter from Ward to Governor James Bowdoin (Sept. 5, 1786), 190 *Mass. Archives: Shays’ Rebellion, 1787*, at 233)).

321. *Id.* at 69 (internal quotation marks omitted) (quoting Daniel Mathews, *To the Inhabitants of New-Braintree*, 2 *Worcester Mag.* 303, 311 (1786)).

322. Condon, *supra* note 265, at 2 (internal quotation marks omitted) (quoting Adam Wheeler).

Constitution, and that he would do it.”³²³ Their critics may have sneered at the yeomanry for “seem[ing] to think it as easy and safe to change the government as the representatives,” but the fact was, both sides believed the insurrections might succeed.³²⁴

Governor Bowdoin’s best hope was to portray the Shaysites’ possible “success” as something distinct from the righteous riots of the 1760s or the justified rebellion of the Revolution: “the result of force, undirected by any moral principle.”³²⁵ He took his case directly to the people with a newspaper address, calling on “men of principle” to “take their stations, and unite under the government, in every effort for suppressing the present commotions” or else stand “accessory to their own and their country’s ruin.”³²⁶ After first attempting to quiet the unrest with concessions, the government turned to a more forceful response. If the violence of the Regulators was at once political speech and a bid to alter the constitution, then violence of the government was, in part, the government’s counter speech. Bowdoin eventually recruited an army of volunteers drawn mostly from coastal mercantile communities, a contingent that he hoped would be sufficiently impressive as it “march[ed] . . . through the western counties” to convince “the misguided of the abilities of government.”³²⁷ These recruits took up arms, said the Massachusetts State Secretary, in the hopes of “totally defeat[ing]” the Shaysites by creating “a different way of thinking among them.”³²⁸

At the same time, Bowdoin continued to urge the legislature to pass measures “to vindicate the insulted dignity of government.”³²⁹ The legislature complied with a draconian Riot Act drawn up by Samuel Adams—formerly a firebrand, in causes of his own.³³⁰ The legislature also passed acts suspending habeas corpus, permitting the arrest and indefinite detention of any person suspected of being “unfriendly to government” and punishing seditious speech.³³¹ After government troops routed the

323. A., Letter to the Editor, *Mass. Centinel*, Jan. 17, 1787, at 138.

324. Fisher Ames, *Works of Fisher Ames* 102 (1809).

325. Gov. James Bowdoin, *An Address to the Good People of the Commonwealth*, *Mass. Centinel*, Jan. 17, 1787, at 137.

326. *Id.*

327. Letter from James Bowdoin, Governor, to Benjamin Lincoln (Jan. 19, 1787), in George Richards Minot, *The History of the Insurrections in Massachusetts, in the Year 1768, and the Rebellion Consequent Thereon* 99, 99–100 (1788).

328. Szatmary, *supra* note 305, at 90. While “some” disliked the prospect of arming against citizens, Fisher Ames called this “absurd[.]” arguing that in the “zeal of their philanthropy against shedding blood,” those who objected “seemed wholly to forget, that the right of self defence belongs to rulers as plainly as to private men.” Ames, *supra* note 324, at 105; see also John W. Malsberger, *The Political Thought of Fisher Ames*, 2 *J. Early Republic* 1, 2 (1982) (contextualizing Ames).

329. *Governour Bowdoin’s Speech*, *supra* note 292, at 331.

330. Szatmary, *supra* note 305, at 83.

331. *Id.* at 83–84.

Regulators in a major confrontation in February 1787, the legislature tried to reduce the threat the Shaysites posed to the constitutional order by passing a Disqualification Act. The Act made insurrectionists ineligible for juries or public office and stripped them of their vote.³³² The Act also barred them from serving as “school-masters, innkeepers, or retailers of spiritous liquors,” in a nod to the importance of these professions as community thought leaders.³³³ When Shaysite candidates were elected to office in the next election in defiance of the law, the legislature refused to seat them.³³⁴

But not everyone agreed with the government response, not even those of the governing class. Judge William Whiting would endure having his court shut down by one of the riots. But after seeing the plight of the agrarian citizenry, he wrote under a pseudonym expressing sympathy with the rioters. He argued that the fundamental purposes of government were “the equal Protection, Prosperity, and Happiness of all its Subjects,” and when one part of the citizenry was able to enrich themselves at the expense of all the others, “that Government is either defective in its original Constitution, or else the Laws are unjustly and unequally administered.”³³⁵ Further, when the people’s liberties or property were encroached upon without any other avenue of redress, it was a “Virtue in them to disturb the government.”³³⁶

Addressing the Regulators directly, Whiting wrote that while “those that Now Stile themselves the Government” have asserted that “you have done Extremely Wrong in adopting those Violent measures,” they had no authority in the matter.³³⁷ “[A]s you Consist of a Major part of the Inhabitants . . . None but God Almighty has a Right to Call you to an account for That Wrong.”³³⁸ Giving voice to a theme that had matured during the American Revolution, Judge Whiting pointed to the “maxim in Monarchial Governments that the King Can Do no Wrong” and argued

332. *Id.* at 106.

333. *Id.* This measure reflected the worry, as Ames put it, that “almost every tavern and conversation circle were infested with the harangues of the emissaries of treason, who without fear or measure reviled the government, and without shame perverted the truth, the opinions of the people at large were inevitably tainted.” Ames, *supra* note 324, at 105.

334. Szatmary, *supra* note 305, at 114.

335. Gracchus, Some Brief Remarks on the Present State of Publick Affairs, *in* Riley, *supra* note 312, at 131, 131.

336. Riley, *supra* note 312, at 124.

337. William Whiting, Some Remarks on the Conduct of the Inhabitants of the Commonwealth of Massachusetts in Interrupting the Siting of the Judicial Courts in Several Counties in that State: To Which Is Added an Appendix Extracted From the Antient Roman History, *in* Riley, *supra* note 312, at 140, 152.

338. *Id.* at 152–53.

that “[w]ith much greater propriety, may it be Said, that the people of a free Republikin Government Can Do no Wrong.”³³⁹

The Governor of Vermont also refused, at first, to help neighboring states capture fugitive Shaysites, arguing that “whenever people were oppressed[,] they will mob,” and as such, it was not “the duty of this state to be aiding in hauling them away to the halter.”³⁴⁰ And Thomas Jefferson, writing from France, deplored the overheated reaction to the Shaysites, asking whether “history [can] produce an instance of a rebellion so honourably conducted?”³⁴¹ For Jefferson, the violence of the insurrection was part of what made it honorable. Was it possible for a country to remain free, he asked, if “rulers are not warned from time to time that their people preserve the spirit of resistance? Let them take arms. . . . The tree of liberty must be refreshed from time to time with the blood of patriots and tyrants.”³⁴² He granted that the people might be mistaken in their anger, but he said that in those cases, “the remedy is to set them right as to facts, pardon and pacify them.”³⁴³ After all, “the people” cannot always be “well informed,” and “if they remain quiet under such misconceptions[,] it is a lethargy, the forerunner of death to the public liberty.”³⁴⁴

In conventional narratives of the Founding era, this is where our story changes from a boisterous experiment to the sober commitment to “ordered liberty,” establishing the great nation that endures to this day.³⁴⁵ Similar violent protests occurred in the same span of time in Maryland, New Jersey, Pennsylvania, South Carolina, and Virginia, where, in 1787, James Madison reported that prisons, courthouses, and clerk’s offices were being “willfully burnt.”³⁴⁶ And it was these popular insurrections—

339. *Id.* at 153. When Judge Whiting was prosecuted for sedition for making these remarks, he protested that these were ideas that he had learned from Trenchard and Gordon, “Writings which I have always been taught to consider as authodox political sentiments.” *Id.* at 128. He was amazed that it could now be considered “criminal to avow such sentiments,” when “it would have been almost [a capital offense] Ten years ago to have contradicted or denied them.” *Id.* Whiting was not the only person to notice an inconsistency in patriot leaders, so lately traitors against the British monarch, who now gave no sympathetic ear to their own domestic insurgency. Time and again, elites had cause to reflect that “[t]he people have turned against their teachers the doctrines, which were inculcated in order to effect the late revolution.” See Ames, *supra* note 324, at 101.

340. Szatmary, *supra* note 305, at 117–18.

341. Letter from Thomas Jefferson to William Stephens Smith (Nov. 13, 1787), *in* 12 *The Papers of Thomas Jefferson* 355, 355–57 (Julian P. Boyd ed., 1955).

342. *Id.*

343. *Id.*

344. *Id.*

345. See, e.g., Wood, *Creation of the American Republic*, *supra* note 10, at 606–15 (arguing that the “revolution marked an end of the classical conception of politics and the beginning of what might be called a romantic view of politics”).

346. Szatmary, *supra* note 305, at 124–26; Letter from James Madison to Thomas Jefferson (Sept. 6, 1787), *in* 10 *The Papers of James Madison* 163, 163–65 (Robert A. Rudland, Charles F. Hobson, William M.E. Rachal & Frederika J. Teute eds., 1977).

demanding debt relief, ignoring their betters, imagining an economically equitable society (and, while they were at it, despising lawyers)—that helped nationalists finally convince enough leading statesmen to gather in convention in Philadelphia in the summer of 1787.³⁴⁷

Once those men were gathered on the false pretext of considering amendments to the Articles of Confederation, the recent unrest made them more willing to hear the suggestion that they instead replace the Articles wholesale so as to disempower the people in multiple ways. Indeed, Jefferson worried that the “[Constitutional] Convention ha[d] been too much impressed by the insurrection of Massachusetts” and would do too much in the new constitution to prevent similar unrest like it under the new government.³⁴⁸ This was an instinct he compared to “setting up a kite to keep the hen yard in order.”³⁴⁹

But the result of the constitutional convention’s efforts did not justify Jefferson’s fears. Nor did the habits, attitudes, or constitutional thinking of the Founding era justify the historians’ narrative shift away from “licentiousness” and toward a staid and safe republicanism. For one thing, ratification almost failed in Massachusetts.³⁵⁰ Importantly, it almost failed there because Massachusettsians were so angry about the draconian measures that the state government had taken to suppress Shays’ Rebellion that they elected a wave of Anti-Federalist types into state office the following year—in spite of the fact that hundreds of men in western counties had been stripped of their vote under the Disqualification Act.³⁵¹ At the Ratification Convention itself, a Federalist noted that “[m]any of the insurgents” had been elected, “even some of Shays’s officers.”³⁵² The final vote for ratification was 187 to 168—an unimpressive victory, especially given the traditional electoral heft of the mercantile eastern portions of the state.³⁵³ If Massachusetts had not ratified the federal Constitution, New York and Virginia may not have followed.³⁵⁴ And

347. Michael J. Klarman, *The Framers’ Coup: The Making of the United States Constitution* 74 (2016) (“Shay’s Rebellion, together with the tax and debt relief measures enacted in most states during the mid 1780s, played a critical role in . . . the calling of the Constitutional Convention.”).

348. Letter from Thomas Jefferson to William Stephens Smith, *supra* note 341, at 356–57.

349. *Id.* at 357.

350. Richard D. Brown, *Shays’s Rebellion and the Ratification of the Federal Constitution*, in *Beyond Confederation*, *supra* note 24, at 113, 122–23 [hereinafter Brown, *Shays’s Rebellion*] (“This mobilization of country representatives threatened to swamp the Constitution in a wave of antigovernment, antilawyer, antiestablishment reaction . . .”).

351. *Id.* at 115–16, 127 (“[I]n Massachusetts the heavy-handed repression of the rebellion created a nearly disastrous backlash against the Constitution.”).

352. Letter from Benjamin Lincoln to George Washington (Feb. 3, 1788), in *Debates and Proceedings in the Convention of the Commonwealth of Massachusetts, Held in the Year 1788, and Which Finally Ratified the Constitution of the United States* 404, 405 (1856).

353. Brown, *Shays’s Rebellion*, *supra* note 350, at 122, 125.

354. *Id.* at 127.

without the four states in which the new nation's legal, commercial, intellectual, and reputational powers were concentrated (New York, Pennsylvania, Massachusetts, and Virginia), it is unlikely that the United States could have been a going concern.

III. ORDERED LIBERTY?

When the federal Constitution was finally ratified in 1788, it took effect alongside Americans' unwritten constitutions and the constitutionalism of force that had propelled the confrontation with British rule. The Founders understood this. They drafted the Constitution and Bill of Rights to complement, rather than replace, the customary rights they fought to vindicate against the British—they said so explicitly.³⁵⁵ But Americans' enduring belief that only constant vigilance and active, forceful opposition to any encroachment could protect their freedoms put federal power on a collision course with popular legitimacy from the start.³⁵⁶

During the Revolution, common men had come to believe that a "Constitution, framed by the People" should work "for the advantage of the *governed*" to secure their "liberty."³⁵⁷ That was its only "fixed principle"—everything else could "be changed or modified when and as often as a majority of that People think fit."³⁵⁸ Having attained Independence, the Federalists and their supporters saw this kind of thinking, with all of its creative—and destructive—potential as a direct threat to their national project. "The die long spun doubtful," said one, "whether anarchy and disgrace; or government and honor were to crown our labors: Having secured the latter, the idea, that we have agreed on no fixed principles, must make us pause in anguish."³⁵⁹

"Liberty," leading Federalists urged, "is order."³⁶⁰ They denounced "innovation" and "change" in government as "anarchy."³⁶¹ And they warned against "factious men" who "seem to think the business of government consists in perpetual change" and that "to *undo* and to *do well*, are things of synonymous import."³⁶² A "government of the people, and its most necessary institutions," they argued, cannot be "adapted to the

355. See, e.g., U.S. Const. amend. X.

356. See Bouton, *supra* note 251, at 261 (arguing that after the Revolution, common folk in Pennsylvania believed that "politics was not . . . primarily about voting," but instead a year-round effort to "regulat[e] the government to act on behalf of the governed").

357. Philadelphia, May 21, *Gazette U.S.*, May 21, 1791, at 27.

358. Bouton, *supra* note 251, at 258; Philadelphia, May 21, *Gazette U.S.*, *supra* note 357, at 27.

359. Philadelphia, May 21, *Gazette U.S.*, *supra* note 357, at 27.

360. Communication, *Gazette U.S.*, Jan. 23, 1793, at 271.

361. *Id.*

362. Cato, Opinion, From the American Daily Advertiser, *Gazette U.S.*, Oct. 3, 1792, at 141 [hereinafter Cato, From the American Daily Advertiser].

passions of the day.”³⁶³ Instead, “A wise nation will prefer such regulations as secure permanency.”³⁶⁴ This vision of “ordered liberty” turned Real Whig rhetoric on its head, insisting that the vigilance and suspicion long regarded as a public virtue was now vice and that it was government, not the governed, that deserved solicitude and protection.³⁶⁵

It is unclear how many converts these efforts won. The administration’s opponents, including elites who would later align with the Jeffersonian Republicans, worried that Federalists advocated stasis out of a wrong-headed ambition, as Madison put it, that government “may by degrees be narrowed into fewer hands, and approximated to an hereditary form.”³⁶⁶ And these ideas about order appear to have had very little impact on people they most needed to reach: those folk who continued to violently resist government programs. Americans on the frontier may not even have noticed these efforts in the press and congressional debates to redefine the terms of the constitutional order they continued to embrace.

Alexander Hamilton’s hated excise on distilled alcohol was the first attempt at a new top-down style of constitutional governance in the new Republic. To Federalists, the excise soon became a test of whether “the laws of the United States” could be “set aside and repealed in the corner of one State”—the Pennsylvania hinterlands where popular resistance to the excise would ignite the Whisky Rebellion.³⁶⁷ To its opponents, “[t]he fate of this excise law” would “determine whether the powers of the government” were “held by an aristocratic junto or by the *people*.”³⁶⁸ Its ultimate failure in an outburst of violent resistance offered a vivid demonstration that Americans would remain vigilant and suspicious of their government even with the beloved General Washington at its helm.

363. Communication, *Gazette U.S.*, supra note 360, at 271.

364. *Id.*

365. See, e.g., Cato, *From the American Daily Advertiser*, supra note 362, at 142 (“Are there not men among us, who . . . seem to think . . . that the people can never be happy or safe, but when they are uneasy and alarmed? . . . [L]et us be upon our guard against their machinations . . .”); Communications, *Gazette U.S.*, June 5, 1793, at 423 (stating that some “comfort themselves” that distrust of government will “keep the government right,” but “it would be hard to see how a free government can be made honest and fair in its administration, by the basest suspicions, and the most unmeasured abuse”). Another writer explained:

Without this support of the lovers of order, the government of this country would not have so much as the shadow of force. Its life is in every man’s hand, and every good man will consider this trust as a sacred one. It is such a man’s duty, as well as his interest, to watch for the government which he has assisted to establish.

Original Communications, *Gazette U.S.*, Feb. 8, 1792, at 327.

366. James Madison, Letter to the Editor, *Nat’l Gazette*, Sept. 22, 1792, at 378.

367. *From the Connecticut Courant*, *Gazette U.S.*, Nov. 10, 1792, at 185.

368. *Centinel*, *Excise Law*, *Nat’l Gazette*, May 7, 1792, at 218.

Hamilton himself anticipated the crisis he would provoke. During the ratification debates, Hamilton had argued that “[t]he genius of the people will ill brook the inquisitive and peremptory spirit of excise laws.”³⁶⁹ Yet, just three years later, as Secretary of the Treasury, he made an excise on distilled spirits a keystone of his federal budget strategy.³⁷⁰ This turnaround struck some as a stunning disregard for the popular will. The “table of Congress was covered with petitions from the people complaining of the excise law as a grievance,” opponents of the measure argued.³⁷¹ And yet, all of “[t]hese petitions were neglected.”³⁷² To others, it seemed deliberately provocative.³⁷³

The excise faced the united opposition of virtually every representative from frontier districts in Congress.³⁷⁴ These representatives knew that Hamilton’s proposal would face determined resistance. Because of poor road infrastructure leading east to state market centers, and because international politics complicated access to other markets via the Mississippi River, distilling grain into alcohol might be the only way a frontier farmer could make a profit on his crop.³⁷⁵ A tax on distilled liquor thus imposed its greatest burdens on those who had least to give and who believed they benefitted the least from federal services and protection.³⁷⁶ Further, westerners retained all the localist antipathy toward internal taxation that had motivated Patriots in the 1760s, as well as old frontier resentments about the burdens of serving on the front lines of an ongoing war for territory with Native Nations.³⁷⁷ The American people had ever been governed un-

369. The Federalist No. 12, at 93 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

370. See Murrin, *supra* note 134, at 410 (“Through the whiskey excise Hamilton hoped to establish beyond question the government’s power to tax internally.”); see also William Maclay, *The Journal of William Maclay* 387 (1890) (assigning credit to Hamilton bitterly for the excise—“Congress may go home[;] Mr. Hamilton is all-powerful and fails at nothing he attempts”); Freeman W. Mayer, *A Note on the Origins of the “Hamiltonian System”*, 21 *Wm. & Mary Q.* 579, 581 (1964) (assigning the credit to Hamilton for the excise and the funding program it fit into).

371. *Centinel*, *Excise Law*, *Nat’l Gazette*, *supra* note 368, at 218.

372. *Id.*

373. Indeed, some have wondered whether Hamilton wanted to provoke a crisis. See Richard H. Kohn, *The Washington Administration’s Decision to Crush the Whiskey Rebellion*, 59 *J. Am. Hist.* 567, 567 (1972) (describing the question about whether “Hamilton provoked the rebellion in order to enhance the government’s stature with a show of military power” as a “major historiographic controversy”). Historian Thomas P. Slaughter cautions that “no one man, not even the forceful and brilliant Alexander Hamilton, could create a ‘rebellion’ alone,” and to attribute the entire thing to him would be “foolish.” Thomas P. Slaughter, *The Whiskey Rebellion: Frontier Epilogue to the American Revolution* 123 (1988) [hereinafter Slaughter, *The Whiskey Rebellion*].

374. Slaughter, *The Whiskey Rebellion*, *supra* note 373, at 105.

375. *Id.* (explaining adverse effects on frontier populations).

376. *Id.* at 108–10.

377. See *id.* at 93–94.

der fulsome *unwritten* constitutions, and only very recently written ones.³⁷⁸ A very clear-cut precept of the frontiersman's constitutionalism was that excise taxes were unconstitutional.³⁷⁹

Perhaps Hamilton believed that westerners would pay his tax, but no one who knew them seemed to think so. A Pennsylvania senator noted that his home state had to "wink" at the loss of its own tax revenue in its western counties.³⁸⁰ As for Hamilton's excise, he said, "nothing short of a permanent military force could effect it."³⁸¹ He wondered, darkly, whether an excuse for a standing army was what Hamilton actually wanted. He believed that "war and bloodshed" would be its "most likely consequence."³⁸² An article written under the pseudonym "Centinel" noted the same inevitable problems with enforcement or, as the author put it, the fact that "the free citizens of America will not quietly suffer the *well born few* to trample them under foot."³⁸³ The author said that to "support their weak, wicked and unjust laws" friends of the excise had promoted a companion law that would allow the president "to make use of the militia of one state to put the excise law and other laws in force in another."³⁸⁴ The use of "foreign" armies to subdue locals raised some of the same concerns as a standing army.³⁸⁵

The questions savvy men were asking, therefore, even before the tax became law, were what measures the federal government was prepared to take against inevitable popular resistance and whether those measures threatened tyranny. A year later, as active rebellion against the excise made these questions concrete, Madison published anonymous articles warning of a growing "division" of men who seemed to believe that "mankind are incapable of governing themselves" and "that government can be carried

378. Thomas C. Grey, *Origins of the Unwritten Fundamental Constitution*, 30 *Stan. L. Rev.* 843, 874–75 (1978) (explaining ubiquity of unwritten constitutions in pre-Revolutionary United States). See generally Suzanna Sherry, *The Founder's Unwritten Constitution*, 54 *U Chi. L. Rev.* 1127 (1987) (exploring the "multiple sources of fundamental law," beyond the Constitution that "the founding generation . . . envisioned").

379. Slaughter, *The Whiskey Rebellion*, *supra* note 373, at 112.

380. *Id.* at 98.

381. Maclay, *supra* note 370, at 388.

382. *Id.*

383. Centinel, *Excise Law*, *Nat'l Gazette*, *supra* note 368, at 218.

384. *Id.*

385. *Id.*; see also E. Wayne Carp, *The Problem of National Defense in the Early American Republic*, in *The American Revolution: Its Character and Limits*, *supra* note 224, at 14, 19–22 (tracing the source, in Real Whig ideology and seventeenth-century British history, of colonists' distrust of professional standing armies and their preference for local militia). This article possibly referred to the Militia Act, which became law in 1792. See Act of Dec. 12, 1812, ch. 3, 2 Stat. 787, 787 ("An Act for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions . . .").

on only by the pageantry of rank, the influence of money and emoluments,” and also “the terror of military force.”³⁸⁶

It is tempting to see the Federalists and the other politicians of this era who landed on the court side of a court–country divide as heralds of the system we enjoy today because so many of their actions and arguments seem familiar to us. But the similarities are misleading. Hamilton’s apparent belief that getting his excise through Congress gave the government the right to enforce it—a notion that might be taken as a given now—was far from settled in his day. It was a “slavish doctrine,” said a group of Germantown, Pennsylvania manufacturers, railing against another of Hamilton’s proposed statutes, “that every law enacted by the legislature ought to be obeyed.”³⁸⁷ Statutes, like other government actions, might impair constitutional liberty, and “every attempt made by the legislature to destroy” the “rights of man” “ought to be opposed by a free people.”³⁸⁸ Hamilton *knew* that the excise was against “[t]he genius of” this “people.”³⁸⁹ Their community consensus continued to define their rights. Seen from the perspective of its time, Congress’s decision to impose the excise on western regions was at least heedless, if not actually aggressive.

The excise immediately confronted resistance. One set of efforts was limited to a series of conventions culminating in petitions, led by men like future Treasury Secretary Albert Gallatin.³⁹⁰ Others took up arms. In Pennsylvania, an army officer who dared to rent space to an excise officer was forced to rescind his hospitality after a mob in Indian dress threatened to burn his home to the ground.³⁹¹ Distillers in Augusta, Virginia resolved to oppose the tax until they could “petition for redress or repeal [it] by force.”³⁹² The excise inspector in the western region of North Carolina resigned because of violent threats.³⁹³ In western South Carolina, excise agents likewise faced “obstructions” and “menaces so violent and serious

386. James Madison, For the National Gazette, A Candid State of Parties, Nat’l Gazette, Sept. 26, 1792, at 378; see also Madison’s *National Gazette* Essays, 19 November 1791–20 December 1792 (Editorial Note), Nat’l Archives: Founders Online, <https://founders.archives.gov/documents/Madison/01-14-02-0103> [https://perma.cc/4GW8-UE7U] (“JM wrote eighteen unsigned essays that Philip Freneau published in the *National Gazette* between 21 November 1791 and 22 December 1792.”).

387. Madison, For the National Gazette, A Candid State of Parties, Nat’l Gazette, *supra* note 386, at 378.

388. *Id.*

389. Hamilton, *supra* note 369, at 93.

390. See Declaration of the Committee of Fayette County, September, 1794, in 1 *The Writings of Albert Gallatin* 4, 4–9 (Henry Adams ed., J.B. Lippincott & Co. 1879).

391. Slaughter, *The Whiskey Rebellion*, *supra* note 373, at 109, 114–15 (recounting these incidents of violence); see also Peterson, *Constitutionalism in Unexpected Places*, *supra* note 32, at 571–72 (providing context for the Indian dress of the rioters). For a description of a similar incident, see Slaughter, *The Whiskey Rebellion*, *supra* note 373, at 113.

392. See Slaughter, *The Whiskey Rebellion*, *supra* note 373, at 118.

393. *Id.* (“The excise inspector of the western region resigned because of harassment.”).

as to occasion the collector to refrain from the execution of his duty.”³⁹⁴ The same was true in Georgia, and the U.S. Treasury received not a penny of excise tax income from the entire state of Kentucky.³⁹⁵

In the face of this violent resistance, the federal government dithered. Members of the administration were afraid to incur the political costs of raising what looked like a “standing army” without a clear and effective plan for its use.³⁹⁶ And they had real doubts that they could field a force at all. Pennsylvania’s governor, Thomas Mifflin, warned George Washington that the willingness of the militia to take part in an operation to put down the insurrection “would essentially depend on their opinion of its justice and necessity.”³⁹⁷ There was also the possibility that federal forces might suffer a humiliating defeat in the field. As the conflict escalated in western Pennsylvania in 1792, Alexander Hamilton fretted over whether

394. *Id.* (internal quotation marks omitted) (quoting Letter from Tench Coxe to Alexander Hamilton (Oct. 19, 1792), *in* 7 *The Papers of Alexander Hamilton* 599, 600–01 (Harold C. Syrett & Jacob E. Cooke eds., 1967)).

395. *Id.* at 117. A poet calling himself a “North-Carolina Planter” summarized some old Revolutionary themes, renewed for this cause:

The countrys’ a’ in a greetin mood
An some are like to rin red-wud blud;
Some chaps whom freedom’s spirit warms
Are threatning hard to take up arms,
And headstrong in rebellion rise
‘Fore they’ll submit to that excise: Their liberty they will maintain,
They fought for’t, and they’ll fight again

A Member of the Pennsylvania Assembly, and a Delegate From the Counties that Oppose the Excise-Law, *South-Carolina State Gazette*, Oct. 9, 1794, at 2. The entire poem is well worth a read.

396. Letter from George Washington to Alexander Hamilton (Sept. 17, 1792), *in* 11 *The Papers of George Washington*, Presidential Series 126, 126 (Christine Sternberg Patrick ed., 2002) (stating that “the employing of the regular Troops” should be “avoided, if it be possible to effect order without their aid; otherwise, there would be a cry at once ‘The cat is let out; We now see for what purpose an Army was raised’”).

397. See Letter from Thomas Mifflin to George Washington (Aug. 5, 1794), *in* 16 *The Papers of George Washington*, Presidential Series, *supra* note 396, at 514, 517 (“I [do] not think it [will] be an easy task to embody the Militia, on the present occasion.”). Mifflin further wrote:

The Citizens of Pennsylvania (however a part of them may, for a while, be deluded) are the friends of law and order: but when the inhabitants of one district shall be required to take arms against the inhabitants of another, their general character does not authorise me to promise a passive obedience to the mandates of Government.

Id. “As freemen,” Mifflin argued, “they would enquire into the cause and nature of the service proposed to them; and, I believe, that their alacrity in performing, as well as in accepting it, would essentially depend on their opinion of its justice and necessity.” *Id.*; see also Letter from Alexander Hamilton to Edward Carrington (July 25, 1792), *in* 12 *The Papers of Alexander Hamilton*, *supra* note 394, at 83, 84 (asking whether the Virginia militia was reliable—“If process should be violently resisted in the parts of N Carolina bordering on your state, how much could be hoped from the aid of the Militia of your State”).

Washington himself should command the troops in the event that “application of force” became “unavoidable.”³⁹⁸ If “such outrages [should] be committed as to force the attention of Govt. to its Dignity,” John Jay advised him, it was essential that the government leave “nothing to Hazard.”³⁹⁹

By the summer of 1794, the resistance had become intolerable. After an angry crowd of men descended on his lodging, a tax collector named John Neville opened fire, killing a man.⁴⁰⁰ In the exchange of gunfire that ensued, several more were injured.⁴⁰¹ A few weeks later, a group of between five and seven hundred men led by a major in the Pennsylvania militia marched to Neville’s home.⁴⁰² After exchanging gunfire for an hour with federal soldiers guarding the residence, the mob’s leader was killed.⁴⁰³ The men then torched Neville’s home and forced the soldiers’ surrender.⁴⁰⁴ About a week later, agitators heard that moderates in Pittsburgh had written letters criticizing the insurrectionists.⁴⁰⁵ This was excuse enough to rally about seven thousand men, who threatened to reduce the town to ashes.⁴⁰⁶ It was in part a well-timed delegation of emissaries from Pittsburgh, promising that its offending citizens had been expelled—and offering the men a gift of several barrels of whiskey—that saved the town from destruction.⁴⁰⁷

These outrages drove Washington to agree at last to the military response for which Hamilton had been advocating for two years.⁴⁰⁸ The conflict over the excise had become a test not only of the national government’s capacity to enforce its laws as a practical matter but of its authority to do so. It was, in Hamilton’s words, no less than a “crisis” over “whether Government can maintain itself.”⁴⁰⁹ The excise was a national tax meant to support shared expenses. It made no sense to collect it only from the willing—to do so would make the “[b]urdens” of the law “unequal.”⁴¹⁰ But if Pennsylvanian frontiersmen could render the law a dead letter in

398. Letter from Alexander Hamilton to John Jay (Sept. 3, 1792), *in* 12 *The Papers of Alexander Hamilton*, *supra* note 394, at 316, 317.

399. Letter from John Jay to Alexander Hamilton (Sept. 8, 1792), *in* 12 *The Papers of Alexander Hamilton*, *supra* note 394, at 334, 335.

400. Slaughter, *The Whiskey Rebellion*, *supra* note 373, at 179.

401. *Id.*

402. *Id.*; Letter from Alexander Hamilton to George Washington (Aug. 5, 1794), *in* 17 *The Papers of Alexander Hamilton*, *supra* note 394, at 24, 54–57.

403. Slaughter, *The Whiskey Rebellion*, *supra* note 373, at 180.

404. *Id.*

405. See *id.* at 185.

406. See *id.* at 186–87.

407. *Id.* at 187–88.

408. *Id.* at 192–93, 196.

409. Kohn, *supra* note 373, at 573 (internal quotation marks omitted) (quoting Alexander Hamilton).

410. From the Connecticut Courant, *Gazette U.S.*, *supra* note 367, at 185.

their region, then government would be confined to legislation by consensus—an impossible task on a national scale.⁴¹¹ The question was therefore whether the frontiersmen’s “resistance” would “controul the government.”⁴¹² “If such proceedings were tolerated,” Washington argued, “there was an end to our Constitution & laws.”⁴¹³

But committing troops to the insurgency posed its own, potentially catastrophic risks to the national government. Secretary of State Edmund Randolph warned that the four Pennsylvania counties where a “radical and universal dissatisfaction with the excise” was “perva[sive]” were home to “more than fifteen thousand white males” of fighting age.⁴¹⁴ This number would be augmented, Randolph thought, by friends and kindred who might come to their aid: “If the militia of other states are to be called forth, it is not a decided thing, that many of them may not refuse.”⁴¹⁵ And even if other states’ militia did come, the presence of foreign troops “introduced into the bosom of their country” might forge a “strong cement” between otherwise loyal Pennsylvanian militia and those sympathetic to the insurgency.⁴¹⁶ A conflict among white citizens, moreover, would draw manpower away from another battlefield. “[I]s it possible to foresee,” Randolph asked, “what may be the effect of ten, twenty or thirty thousand of our citizens being drawn into the field against as many more[?]”⁴¹⁷ He urged Washington to consider that “[t]here is another enemy in the heart of the Southern States, which would not sleep, with such an opportunity of advantage.”⁴¹⁸ He spoke, of course, of the slaves.

Even if the government could muster enough troops to put down the insurgents, the legitimacy of popular violence meant that victory in battle carried its own risks.⁴¹⁹ “[N]otwithstanding the indignation, which may be raised against the insurgents,” Randolph warned, “if measures, unnecessarily harsh, disproportionately harsh, and without a previous trial of every thing, which law and the spirit of conciliation can do, be executed, that indignation will give way, and the people will be estranged from the

411. *Id.*; see also Letter from Alexander Hamilton to George Washington, *supra* note 402, at 58 n.88 (expressing the same sentiment as this Article in crossed-out paragraphs at the end of the letter).

412. From the Connecticut Courant, *Gazette U.S.*, *supra* note 367, at 185.

413. Kohn, *supra* note 373, at 573 (internal quotation marks omitted) (quoting George Washington).

414. Letter from Edmund Randolph to George Washington (Aug. 5, 1794), *in* 16 *The Papers of George Washington*, *supra* note 397, at 523, 525.

415. *Id.*

416. *Id.*

417. *Id.* at 526.

418. *Id.*

419. See Kohn, *supra* note 373, at 568 (“The most vexing problems for George Washington and his advisers were . . . whether a military expedition would restore order and respect for the law [or would instead] provoke . . . deeper disrespect for the whiskey excise and the federal government’s authority generally.”).

administration.”⁴²⁰ What Randolph here described was the very dynamic that almost defeated ratification in Massachusetts in the wake of Shays’ Rebellion.⁴²¹ Americans felt this way, Randolph explained, because “they are confident, that they know the ultimate sense of the people” and that in the end, “the will of the people must force its way in the government.”⁴²²

Heeding this advice, Washington first dispatched a peace commission authorized to “grant blanket amnesty for all unlawful acts as well as absolution from previously uncollected excise taxes.”⁴²³ At the same time, the administration carefully embarked on a strategy to test public sentiment and to bring, if it could, “the weight of the public opinion” behind the use of military force.⁴²⁴ This public relations campaign included the wide publication of a letter Washington commissioned from Hamilton explaining in Real Whig terms that what was happening in western Pennsylvania was nothing like the wholesome riots in the lead-up to the Revolution.⁴²⁵

420. Letter from Edmund Randolph to George Washington, *supra* note 414, at 527.

421. See *supra* notes 305–313 and accompanying text.

422. Letter from Edmund Randolph to George Washington, *supra* note 414, at 527.

423. Kohn, *supra* note 373, at 575–78. These efforts at conciliation would fail. When the commission arrived, they were soon convinced that the rebels would never submit to the law and were only stalling “until cold weather made military operations impossible.” *Id.* at 577–78; see also Slaughter, *The Whiskey Rebellion*, *supra* note 373, at 192–94 (articulating other reasons, including worries about international affairs, that made a confrontation in Pennsylvania seem necessary).

424. Letter from William Bradford to Elias Boudinot, *in* 2 *The Life, Public Services, Addresses and Letters of Elias Boudinot*, LL. D., President of the Continental Congress 86, 87 (J.J. Boudinot ed., 1896).

425. See Kohn, *supra* note 373, at 575–76 n.38 (noting that “Washington asked Hamilton to prepare” the document at a cabinet meeting on August 6 but that “it was not published until two weeks later”). This letter was reprinted around the country. See *A Statement From the Secretary of the Treasury of the Rise and Progress of the Malcontents in the Inland Counties of Pennsylvania and the Southern States, With Regard to the Excise*, *Norwich Packet*, Sept. 4, 1794, at 1; *A Statement From the Secretary of the Treasury of the Rise and Progress of the Malcontents in the Inland Counties of Pennsylvania and the Southern States, With Regard to the Excise*, *Wkly. Reg. (Norwich, Conn.)*, Sept. 9, 1794, at 1; *A Statement From the Secretary of the Treasury of the Rise and Progress of the Malcontents in the Inland Counties of Pennsylvania and the Southern States, With Regard to the Excise*, *Rhode-Island Museum*, Sept. 22, 1794, at 1; *A Statement From the Secretary of the Treasury on the Rise and Progress of the Malcontents of the Inland Counties of Pennsylvania, and the Southern States, With Regard to the Excise*, *Spooner’s Vt. J.*, Sept. 29, 1794, at 1; *From the American (Phil.) Daily Advertiser*, *Treasury Department*, August 16, 1794, *Greenfield Gazette*, Sept. 18, 1794, at 2; *Treasury Department*, August 5th, 1794, *Dunlap & Claypoole’s Am. Daily Advertiser (Philadelphia)*, Aug. 21, 1794, at 1; *Treasury Department*, August 5th, 1794, *Gazette U.S. & Daily Evening Advertiser*, Aug. 21, 1794, at 1; *Treasury Department*, August 16, 1794, *Am. Minerva & New-York (Evening) Advertiser*, Aug. 23, 1794 at 2; *Treasury Department*, August 5th, 1794, *Conn. Courant*, Sept. 1, 1794, at 2; *Treasury Department*, *Report on the Disturbances in the Western Part of Pennsylvania*,

Without questioning the legitimacy of popular resistance to unjust laws, Hamilton tried to paint the protest as something very different. The rebels, he contended, were “actuated not merely by the dislike of a particular law, but by a disposition to render the Government itself unpopular and odious.”⁴²⁶ This was not, in other words, a salutary example of the people out-of-doors assembling to enforce the constitution. It was instead, in Hamilton’s telling, a lawless, brutal rabble whose many outrages included the senseless maiming of a deluded young man and the beating of a citizen who had merely expressed an unpopular opinion.⁴²⁷ A man sent to serve process on a group that had attacked a tax collector frankly refused, for fear that “he should not have returned alive.”⁴²⁸ Another man sent to serve writs in the rebellious counties was seized, whipped, tarred, and feathered, and “after having his money and horse taken from him, was blindfolded and tied in the woods, in which condition he remained for five hours.”⁴²⁹ Mobs punished those who complied with the excise by burning their homes and businesses, and officers of the law were threatened with death unless they resigned their stations.⁴³⁰ In short, “the ordinary course of civil process” had been found “ineffectual for enforcing the execution of the law.”⁴³¹

At the same time, Hamilton’s letter highlighted Washington’s efforts, in keeping with Real Whig sensibilities, to humbly engage with insurrectionists’ concerns. He catalogued the administration’s efforts to revise the law, to parlay with the rebels, and to take other actions short of confrontation, “evincing, unequivocally, the sincere disposition to avoid this painful resort” to a military response, “and the steady moderation, which have characterised the measures of the Government.”⁴³²

This groundwork freed George Washington, in the proclamation he issued on the eve of his eventual military campaign, to make a strong closing argument for the justice of government suppression. Washington there characterized the Whiskey Rebels as a “treasonable opposition,”

Aug. 5th, 1794, Salem Gazette, Sept. 2, 1794, at 2; Treasury Department, August 16, 1794, Guardian; or, New-Brunswick Advertiser, Sept. 2, 1794, at 1; Treasury Department, August 16, 1794, Potowmac Guardian & Berkeley Advertiser (Martinsburg, W. Va.), Sept. 8, 1794, at 2; Treasury Department, August 16th, 1794, Hampshire Gazette, Sept. 10, 1794, at 2; Treasury Department, August 16, 1794, Newhampshire & Vt. J.: or, Farmer’s Wkly. Museum, Sept. 12, 1794, at 1; Treasury Department, August 16, 1794, S.C. State-Gazette & Timothy & Mason’s Daily Advertiser, Sept. 17, 1794, at 1.

426. Letter from Alexander Hamilton to George Washington, *supra* note 402, at 30.

427. *Id.* at 34.

428. *Id.*

429. *Id.*

430. *Id.* at 49.

431. *Id.* at 34.

432. *Id.* at 44–45.

“propagating principles of anarchy” and “acts of insurrection.”⁴³³ The time for popular resistance to duly enacted laws, Washington explained, had passed. Now that Americans had the right to elect their representatives, there could be no justification for armed opposition.⁴³⁴

It would have been ironic indeed if Washington had won this point on a battlefield. But he did not. The conflict over the excise and its aftermath instead attests to the endurance, after ratification, of a constitutionalism of force. Washington handily defeated the rebels, many of whom fled before his more organized forces.⁴³⁵ It was such a rout that, after issuing a general amnesty to everyone in the area except a few ringleaders, Washington felt compelled the following year to issue a full pardon to the only two men unsympathetic enough to have been adjudged guilty by Pennsylvania juries. But this military victory did not win the legal argument Washington advanced in his proclamation.

Washington had been determined “to reduce the refractory to a due subordination to the law.”⁴³⁶ “The misled,” he proclaimed triumphantly in pardoning the defeated leaders of the resistance, had “abandoned their errors, and pay the respect to our Constitution and laws which is due from good citizens.”⁴³⁷ Yet the excise tax remained dead letter in the places where it had faced resistance. Even after the defeat of the rebellion, historian Thomas Slaughter explains that the government “still could not collect internal taxes on the frontier.”⁴³⁸ Indeed, it became “a folk belief that any attempt to enforce a national excise on liquor, except during time

433. George Washington, Proclamation of Sept. 25, 1794, *in* 3 *Annals of Cong.* app. at 1413, 1414 (1849).

434. *Id.* at 1415. This was not quite the unanswerable argument it seems as, rightly or wrongly, westerners did not believe that their balance of representation in state and national councils had ever been fairly apportioned or adequate to protect their unique interests. See Bouton, *supra* note 251, at 261 (noting that after the Revolution, common folk in Pennsylvania believed that “politics was not . . . primarily about voting,” but instead about “regulating the government to act on behalf of the governed happened mostly outside the polling place” and year-round, rather than “just on Election Day”). They would retain “a political culture that valorized petitions and crowd protests over electoral politics.” *Id.* at 258. In the 1790s, “[t]he founding elite attempted to obliterate that idea of politics . . . and to confine political self-expression within an electoral system replete with barriers against democracy.” *Id.* at 261; see also Robert L. Brunhouse, *The Counter-Revolution in Pennsylvania, 1776–1790*, at 221–27 (1942).

435. Slaughter, *The Whiskey Rebellion*, *supra* note 373, at 218, 220.

436. Washington, *supra* note 433, at 1414.

437. President George Washington, Seventh Annual Address to Congress (Dec. 8, 1795), *in* 4 *Annals of Cong.* 10, 12 (1855). “[T]he part of our country which was lately the scene of disorder and insurrection, now enjoys the blessings of quiet and order.” *Id.*

438. Slaughter, *The Whiskey Rebellion*, *supra* note 373, at 226. In marching on the Pennsylvanians, Slaughter observed, the Washington administration “helped to create” the Jeffersonian-Republican “constituency.” *Id.* After that constituency elected Jefferson President in 1800, the excise and all other internal taxes were repealed, and “[t]he dominant ideological faith from 1800 through 1860 interpreted constitutional authority to levy [internal] taxes . . . as reserved only for grave national emergencies.” *Id.*

of war, would be met with another insurrection by liberty-loving Americans.”⁴³⁹ This belief, “established by the Whiskey Rebellion,” was one the “federal government never challenged” until “the Civil War.”⁴⁴⁰ The rebellion ended, in other words, in a constitutional stalemate.

That has not stopped some from pointing to this episode as a turning point. As recently as 2021, Akhil Amar—in a book that heavily glosses neo-Whig scholarship—insisted that the military victory succeeded in making Washington’s point that Americans could no longer “beat, maim, torture, or kill” as a mode of protest.⁴⁴¹ Setting aside Amar’s failure to engage with the rebels’ constitutional claims, the story of the Whiskey Rebellion is hardly a triumph for the forces of ordered liberty, much less a proud assertion of a new method of interpreting the constitution and engaging in disagreement over its meaning.⁴⁴²

In eighteenth-century America, a constitutional change of that magnitude would have required a massive shift in the way people related to one another and understood themselves as members of political communities. Amar paints the defeat of the rebels as an example of Washington harnessing “Hamilton’s greatness” to execute a “grand strategy,” the “subtleties” of which the Pennsylvanian “backcountry folk might not have grasped.”⁴⁴³ But the burden on anyone suggesting that events in the 1780s and 1790s convinced the people that political disagreements would be resolved by the terms of the written constitution and paced by the calendar of elections is to show a meaningful and widespread cultural change. Looking past the battlefield to what came next, what Amar calls Washington’s “grand strategy” appears to have been far too subtle for many Americans to grasp.⁴⁴⁴ Indeed, the Federalists would soon find themselves back in the same predicament.

Within five years, Pennsylvanians once again took up arms against a federal tax, throwing the Adams Administration into a new test of federal authority. Faced with the threat of war with France, Alexander Hamilton decided on yet another internal tax regime to raise funds for the national defense. In contrast to the highly regressive whiskey tax, Hamilton carefully designed his 1799 “house tax” to estimate wealth and to tax

439. *Id.*

440. *Id.*

441. Akhil Reed Amar, *The Words that Made Us: American’s Constitutional Conversation, 1760–1840*, at 383–87 (2021) [hereinafter *Amar, The Words that Made Us*] (arguing that Washington’s militaristic suppression of the Whiskey Rebellion established that, in a self-governing republic, critics of the government should “vote, serve on juries, speak up, sue, and petition,” rather than engage in violent rebellion).

442. *Cf.* Stanley Elkins & Eric McKittrick, *The Age of Federalism* 482 (1993) (opining that the Whiskey Rebellion collapsed because the rebels’ “popular protest” was “stifled by the popular will and the force of republican principles,” personified by Washington riding at the head of an army of militia).

443. *Amar, The Words that Made Us*, *supra* note 441, at 383, 387.

444. *Id.* at 383.

people progressively based on the size and opulence of their homes.⁴⁴⁵ But his proposals also included incendiary measures, including a Stamp Tax similar to Britain's hated tax of 1765, and a tax that assessed the vacant lands of large speculators at a lower rate than the cultivated land of smallholders.⁴⁴⁶

This time the resistance to the tax was concentrated in Bucks, Montgomery, and Northampton—all Pennsylvania counties with high German-speaking populations⁴⁴⁷—where citizens worried that the taxes were part of a plot to recreate the feudal tenancies of Europe.⁴⁴⁸ In terms that echoed pre-Revolutionary rhetoric, they charged that the new measures would leave the people “Slaves.”⁴⁴⁹ More than a hundred men in Northampton County signed a petition warning their local federal tax assessor not to perform his duties, as the law was “unconstitutional.”⁴⁵⁰ A preacher there encouraged a crowd that the people should “oppose the law” or “otherwise” become “slaves.”⁴⁵¹ Brandishing a book that “he pretended contained the Constitution and laws of the country,” he told the gathering that the Federalists’ laws contravened it.⁴⁵² One of the county militias erected a liberty pole and swore together that “they would rather die than submit to the Stamp Act and the House Tax Law which was Slavery and Taking the Liberty Away.”⁴⁵³ Men joined in associations of mutual support, pledging not to submit to the tax law and “that in case any one of them was put into confinement upon account of the opposition that they would rescue them.”⁴⁵⁴ Tax “assessors were taken and imprisoned

445. Act of July 9, 1798, ch. 70, 1 Stat. 580 (providing for the valuation of lands and dwelling houses and the enumeration of slaves within the United States).

446. *Id.*; Act of July 6, 1797, ch. 11, 1 Stat. 527 (laying duties on stamped vellum, parchment, and paper); see also Paul Douglas Newman, *Fries’s Rebellion: The Enduring Struggle for the American Revolution 76–77* (2012) [hereinafter Newman, *Fries’s Rebellion: The Enduring Struggle for the American Revolution*] (noting that Hamilton knew that the house tax “would behave regressively when applied to improved small farms of modest taxable men as compared to the unimproved lands of wealthy speculators”).

447. Newman, *Fries’s Rebellion: The Enduring Struggle for the American Revolution*, *supra* note 446, at 7–8.

448. Paul Douglas Newman, *Fries’s Rebellion and American Political Culture*, 119 *Pa. Mag. Hist. & Biography* 37, 48 (1995) [hereinafter Newman, *Fries’s Rebellion and American Political Culture*] (quoting the deposition of Henry Ohl, given before Judge William Henry, on April 27, 1799).

449. *Id.*

450. *Id.* at 54–55 (internal quotation marks omitted) (quoting the deposition of James Williamson, given before Judge Richard Peters, on April 15, 1799).

451. *Id.* at 55 (internal quotation marks omitted) (quoting the deposition of John Lehrfoss, given before Judge William Henry, on February 1, 1799).

452. *Id.* (internal quotation marks omitted) (quoting the deposition of John Lehrfoss, given before Judge William Henry, on February 1, 1799).

453. *Id.* at 54 (internal quotation marks omitted) (quoting the deposition of Philip Wescoe).

454. *Id.* at 55 (internal quotation marks omitted) (quoting the deposition of Michael Bobst, given before Judge William Henry, on January 28, 1799).

by armed parties” and “mobs assembled to compel them, either to deliver up their papers, or to resign their commissions.”⁴⁵⁵

A federal district court judge issued warrants for the arrest of the agitators, sending a marshal to detain them since the local justice of the peace and magistrate had joined the resisters.⁴⁵⁶ As the marshal retrieved and confined the arrestees in an inn in Bethlehem, Pennsylvania, men were already gathering in taverns in Bucks and Montgomery Counties to discuss plans for a rescue.⁴⁵⁷ Some thought the tax laws were unconstitutional.⁴⁵⁸ Others were of the opinion that the government’s main wrong was in removing the arrestees from German-speaking counties to Philadelphia, where they would have to face English-speaking juries.⁴⁵⁹

The rescue effort would eventually coalesce behind John Fries, a captain of the Bucks County militia. Fries would later testify that he didn’t know “who originally” thought of “rescu[ing] . . . the prisoners” or who “assembled the people for the purpose—[t]he township seemed to be all of one mind.”⁴⁶⁰ When Fries’s unit set out to march to Bethlehem, they encountered another militia contingent from Northampton County that had also mustered to the rescue.⁴⁶¹ Arriving at the inn leading a combined company of some hundred and fifty men, Fries went in to parlay with the marshal and soon secured the prisoners’ release.⁴⁶²

455. Francis Wharton, *State Trials of the United States During the Administrations of Washington and Adams* 493 (1849) (quoting the opening statement of prosecutor Samuel Sitgreaves); see also *id.* at 512 (quoting testimony of Jacob Eyerly, tax assessor, noting that he had difficulty finding deputies because locals “thought it was dangerous for them to accept” the positions); *id.* at 513 (noting, in the same testimony, that “the assessor from Hamilton township . . . told me that he had been obliged to fly from his house in the night to save his life, and begged of me to accept of his resignation”). A local judge testified that it was difficult to take witness depositions about tax resistance, because members of the militia paraded in uniform outside the building, peering and making faces at witnesses through the windows. *Id.* at 536. One witness was “in [such] great terror . . . when he was called up to give his testimony, he cried like a child, and begged, for God’s sake, that we would not ask him, for that the people would ruin him when he returned home. Indeed, all the witnesses were much agitated.” *Id.* at 536 (quoting testimony of Judge Henry). One tax assessor was forced to swear allegiance to a mob as it beat him and threatened his life. *Id.* at 529–30. The poor young man told his abusers that because of these hardships, he was leaving “the township with a view of not returning to it, unless compelled by authority, and from their present treatment, if they ever caught me going back without that authority, I would give them leave to shoot me.” *Id.* at 532 (quoting testimony of Jacob Eyerly).

456. *Id.* at 532–33.

457. *Id.* at 503 (testimony of William Nichols); *id.* at 517–22 (testimony of William Thomas and George Mitchel).

458. *Id.* at 503.

459. *Id.* at 505–06; see also Newman, *Fries’s Rebellion and American Political Culture*, *supra* note 448, at 56.

460. Wharton, *supra* note 455, at 534 (quoting the examination of John Fries).

461. *Id.* at 494–95, 498.

462. *Id.* at 500–01.

The marshal would later testify at Fries's trial for treason and sedition that he had asked Fries to consider that he "and those about him would be severely punished for this conduct, that he would surely be hanged."⁴⁶³ Fries was unconcerned, the marshal recalled, explaining that "the stamp act" and the "house-tax law" were "unconstitutional."⁴⁶⁴ He "could not be punished" in any event because "the government [was] not strong enough to hang him, for . . . if the troops were brought out, they would join him."⁴⁶⁵ Fries's testimony to the judge who took his deposition before trial was similarly self-assured. Advised that he need not incriminate himself, Fries had been not "at all disinclined" to discuss his actions and indeed had the manner of "a man not having done anything wrong."⁴⁶⁶ After all, Fries had acted with the consensus of his community.

Echoing Washington's proclamation, the prosecution urged that "it is not necessary to say whether the complaints urged [against the tax laws] were well or ill founded, because it is a settled point that any insurrection for removing public grievances" was "treason," as insurrection "is not the mode pointed out by law for obtaining redress."⁴⁶⁷ But the *unwritten* law that validated Fries's Rebellion could not so easily be brushed aside.

Although Fries was convicted and sentenced to death, the question of what to do with him vexed the Adams Administration.⁴⁶⁸ The Federalists had come to "suspect[]" that it was the lack of capital punishment" after the Whiskey Rebellion "that precipitated the second" spate of unrest,⁴⁶⁹ and so members of Adams's cabinet were dismayed when they learned that the President meant to pardon Fries and his associates.⁴⁷⁰ Adams heard them out.⁴⁷¹ But he expressed skepticism that what Fries had done really amounted to treason, or even insurrection.⁴⁷² Was Fries's Rebellion "any thing more than a riot," asked the aging Patriot—even if it had been "high-

463. Id. at 505 (quoting testimony of William Nichols).

464. Id. (quoting testimony of William Nichols).

465. Id. (quoting testimony of William Nichols). This was Fries's settled view. A tax collector earlier testified that Fries had warned him to stop all the assessments or else "there would be five or seven hundred men under arms here to-morrow by sunrise." Id. at 524 (quoting testimony of James Chapman). When the assessor told him that the federal government would respond militarily, Fries replied "if they do, we will soon try who is strongest." Id. (quoting testimony of James Chapman).

466. Id. at 535.

467. This was the opening statement of the prosecution in the first of two trials. Id. at 492 (quoting Samuel Sitgreaves).

468. Id. at 636, 641.

469. Newman, *Fries's Rebellion and American Political Culture*, supra note 448, at 38.

470. Id. at 39 n.6 ("All the secretaries agreed that at least Fries ought to hang.").

471. Letter from John Adams to Heads of Department (May 20, 1800), in 9 *The Works of John Adams* 57, 57–59 (Charles Francis Adams ed., Boston, Little, Brown & Co. 1854) (probing whether a capital sentence for treason was warranted in Fries's case).

472. Id.

handed, aggravated, daring, and dangerous”?⁴⁷³ Would not the national Constitution “acquire more confidence in the minds of the American people by the execution than by the pardon of one or more of the offenders”?⁴⁷⁴

“It is in vain to expect or hope to carry on government against the universal bent and genius of the people,” John Adams wrote in 1775. “[W]e may whimper and whine as much as we will, but nature made it impossible when she made men.”⁴⁷⁵ A quarter-century after Independence, Adams knew the nation was still governed by constitutions of consensus. Adams understood, perhaps better than Hamilton, the danger of ignoring the “genius of the people” and the risk that an overreaction posed to the federal Constitution and the government it had created.⁴⁷⁶ Adams followed through on his intentions and issued a pardon to Fries and those awaiting execution alongside him.

* * *

The Whiskey Rebellion and Fries’s Rebellion put the newly constituted government in a bind. The administration could not be seen backing down in the face of violent intimidation. To do so, Washington understood, would be the “end to our Constitution & laws.”⁴⁷⁷ But neither could it deny the continued legitimacy of violent resistance to laws deemed unjust by the body of the people.⁴⁷⁸ The federal government’s authority, Edmund Randolph explained, still had to contend with “the ultimate sense of the people.”⁴⁷⁹ That included the unlettered views of men like Fries and his compatriots as to what was constitutional. What made it difficult to convince militiamen to muster to confront the rebels, and what made it ultimately impossible to execute their ringleaders, was that the unwritten constitution they invoked had not been superseded.

Over time, Americans would become more committed to text and institutions. The legal role of community consensus in the form of the law-finding jury would be displaced by the embrace of the law-finding judge, and over the course of the nineteenth century, there would be a turn to

473. *Id.* at 58.

474. *Id.*

475. Adams, *Novanglus*, No. 5, *supra* note 162, at 74–75.

476. *Id.*; *The Federalist* No. 22, at 145 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

477. Kohn, *supra* note 373, at 573 (internal quotation marks omitted) (quoting George Washington, Conference at the President’s (Aug. 2, 1794), 4 *Pa. Archives* 122–24).

478. See Gregory Ablavsky, *Two Federalist Constitutions of Empire*, 89 *Fordham L. Rev.* 1677, 1680 (2021) (noting that “Federalists failed to anticipate how poorly their antidemocratic efforts would fare in a political system in which opportunities for popular control and dissent remained rife” and turned to currying “popular favor” by “deploying federal power to placate” the “demands” of frontier whites).

479. Letter from Edmund Randolph to George Washington, *supra* note 414, at 527.

formalism and institutionalization in law.⁴⁸⁰ But our nation's evolution toward institutionalization and text-based legalism has not meant that we ever wholly gave up our constitutionalism of force.⁴⁸¹ Americans have instead made recourse to both tools of constitutional change.

Amid a robust culture of textual interpretation and hermeneutical debate in the early nineteenth century, the Constitution continued to evolve through the use and threat of force.⁴⁸² One need only recall the violent reactions of state governments to the rulings of the early Supreme Court to find that elites were ready to pick up arms when their legal arguments failed and that sometimes a Supreme Court opinion amounted to no more, as Ohio State Representatives put it, than “make-weight in effecting a compromise.”⁴⁸³

Even the Founders' debate over which style of interpretation should be given to the written Constitution during the first few decades of the Republic at times gave way to the threat of violence.⁴⁸⁴ By the late 1820s, John C. Calhoun had come to the conclusion that “a proper system of construction” alone would not be able to resolve the debates over the constitution's meaning and that instead “power can only be met with power.”⁴⁸⁵ Throughout the nineteenth century, Americans picked up hermeneutics, institutionalism, and texts—and then put them down again when those tools stopped working to achieve the ends they preferred.

Our constitutional order would continue to evolve through force, most obviously during the Civil War and its aftermath. To be sure, not every act of violent opposition to authority is an example of our

480. See generally Peterson, *Statutory Interpretation and Judicial Authority*, *supra* note 257, at 177–282.

481. Whether any development in legal culture can totally protect a society from constitutional change by force is a question for political scientists. What may be different about our society is that, after the first break from England, we have never accounted any of our violent constitutional change “revolutionary.” Instead, we continue to insist that we have lived under the same Constitution and in the same nation since a single Founding moment, defined as 1788, and not the more plausible 1870 (when the final Reconstruction Amendment was ratified).

482. See generally Farah Peterson, *Expounding the Constitution*, 130 *Yale L.J.* 2 (2020) [hereinafter Peterson, *Expounding the Constitution*] (discussing debates about interpretation of the constitution at the Founding).

483. See *Right of a State to Tax a Branch of the United States Bank*, 37 *Annals of Cong.* 1684, 1697 (1821) (asserting that “in great questions of political rights and political powers, a decision of the Supreme Court of the United States is not conclusive of the rights decided by it”); Richard Ellis, *Aggressive Nationalism* 151–53 (2007) (discussing the Ohio legislature's reaction to *McCulloch v. Maryland* and the violent confrontation between U.S. Bank officials and state agents that followed); R. Kent Newmyer, *The Supreme Court Under Marshall and Taney* 36 (2006) (discussing how Pennsylvania's Governor reacted to *United States v. Peters*).

484. See Peterson, *Expounding the Constitution*, *supra* note 482, at 6–10 (discussing debates about interpretation of the constitution at the Founding); *id.* at 36 (describing a Southern congressman musing that a judge's life would be in danger were he to follow the mode of interpretation suggested by a Northern colleague).

485. *Id.* at 72 (internal quotation marks omitted).

constitutionalism of force.⁴⁸⁶ But when armed Americans have invoked the constitution and customary rights in support of their claims, men like Washington, Adams, and Randolph have understood that those claims might have transformative potential.

And it adds little to ask whether an act of resistance is “illegal.” The examples of Fries and the leaders of Shays’ Rebellion illustrate vividly that punishing an act of violence as a crime cannot resolve the question of whether the act amounts to a constitutional argument or whether the argument will gain adherents. As he pondered whether executing Fries would undermine his government’s efforts to establish its legitimacy, John Adams knew better than to rely on Fries’s conviction for treason.⁴⁸⁷

When seeking out our constitutionalism of force in the historical record, nor is it useful to attempt to distinguish private and “official” conduct. Were the members of the Pennsylvania militia who marched to liberate federal prisoners by threat of force in Fries’s Rebellion private vigilantes? During another “constitutional moment”—the Red Summer of 1919 and the riots that followed—were the police officers who joined with the mobs to burn Blacks’ homes and businesses to the ground “state actors”?⁴⁸⁸ These categories are not easily separable. And more importantly, what makes a claim pursued in violence ultimately part of our constitutional order is its post-hoc ratification through the consensus of the community. The presence or absence of state officers in the initial violence is therefore entirely beside the point.⁴⁸⁹

486. Note that partial victories, pyrrhic victories, and dominance within a locality or within a dominant discursive community but not in others may be enough to “count.” Total dominance of a constitutional argument pressed through violence is not necessary for us to see a claim as part of our constitutional order, any more than total dominance of a formal legal idea is necessary for us to see it as a governing paradigm. Because constitutionalism by praxis is necessarily local and often contested, it makes even more sense to speak of *constitutionalisms* that one expects to find in tension, overlapping, and at odds.

487. Newman, *Fries’s Rebellion: The Enduring Struggle for the American Revolution*, *supra* note 446, at 69–70.

488. During the span of years starting in the summer of 1919 and stretching into the early 1920s, after Black veterans returned from World War I newly confident in their claims to American rights and respect, white mobs engaged in brutal riots across the country intended to beat Black communities back into a place of penury and oppression. See James S. Hirsch, *Riot and Remembrance: The Tulsa Race War and Its Legacy* 58–59 (2002). Those riots included the 1921 destruction of Black Wall Street in Tulsa, Oklahoma. Randall Kennedy, *Preface to Alfred L. Brophy, Reconstructing the Dreamland: The Tulsa Riot of 1921*, at ix (2002). The perpetrators, including police officers, acted openly and with impunity. *Id.* at 57–59. Was this private vigilantism or was it state action? Either way, the riots certainly achieved their ends: the violent reordering of those communities and reassertion of white political and economic dominance by force. See Hirsch, *supra*, at 58–59, 101–02, 127; see also Scott Ellsworth, *Death in a Promised Land* 54 (1982).

489. Defining a constitution as *how society is constituted*, sweeping in all of a society’s

In general, the way we think about and teach law as textual and institutional breeds a strange naiveté on this issue, an expectation that there will be clear lines between constitutional violence and private crime. This is a naiveté that has never really been available to the Black citizen, for whom, in many places and across generations, the police force has blended imperceptibly into the vigilante posse comitatus.⁴⁹⁰ White citizens may not notice this as much because the blurring redounds to their benefit. The Second Amendment, for instance, affords a white person the ability to clothe himself with constitutional authority even as he poses a direct threat to those around him.⁴⁹¹ His actual violence is also more likely to be found lawful.⁴⁹² A white man's home is his castle, and his home is the State; he is at home in our shared nation and so he can "stand his ground." The Black citizen cannot.⁴⁹³ In the end, where rights reside in our society

nonvoluntary relationships and associations and including relationships among groups, continues to be useful to us, in spite of the fact that it downplays the boundaries between state and private action. In some contexts, it may be more useful than a definition of our constitutional order that consists merely of the organization of the government and those points of connection between the institutions of the state and individual private citizens. This latter version is easier to describe and easier to teach, but it does not capture the instrumentalities of power and sources of coercion by which our society is actually governed.

490. See, e.g., Ellsworth, *supra* note 488, at 100 (explaining the blending of police and "vigilante" violence against Black citizens in Tulsa, Oklahoma).

491. See John R. Lott, Jr. & Rujun Wang, *Concealed Carry Permit Holders Across the United States: 2021*, at 31 (2021), <https://ssrn.com/abstract=3937627> [<https://perma.cc/LS9A-U9QP>] (finding that "whites still hold the vast majority of [concealed firearm] permits").

492. See U.S. Comm'n on Civil Rights, *Examining the Race Effects of Stand Your Ground Laws and Related Issues 16* (2020), <https://www.usccr.gov/files/pubs/2020/04-06-Stand-Your-Ground.pdf> [<https://perma.cc/4WN6-97AB>] (citing empirical research showing that in states with Stand Your Ground laws, it is "ten times more likely" for a homicide to be deemed justified "when the shooter is white and the victim is black, than if the shooter is black and the victim is white").

493. *Id.* Nor is the state as likely to step in to protect the Black citizen from the power the armed white civilian has arrogated to himself, or punish his killer, even when the state might impose consequences if the victim were white. See American Bar Association, *National Task Force on Stand Your Ground Laws: Report and Recommendations 13* (2015), https://www.americanbar.org/content/dam/aba/administrative/diversity/SYG_Report_Book.pdf [<https://perma.cc/XP25-KAMB>] ("[A] white shooter who kills a black victim is 350 percent more likely to be found to be justified than if the same shooter killed a white victim."). We must see such arenas of conflict, suppression, and violence in which the state regularly withholds its power, surveillance, and protection for what they are: not the absence of law, but rather, consigned to governance by means other than institutions and text. See Michele Goodwin, *Pregnancy and the New Jane Crow*, 53 *Conn. L. Rev.* 543, 562 (2021) (connecting the law's failure to protect Black citizens from mob violence during Jim Crow to the many ways law now persecutes and fails to protect women of color of childbearing age); Aziz Z. Huq, *The Private Suppression of Constitutional Rights*, *Tex. L. Rev.* (forthcoming 2023) (manuscript at 6), <https://ssrn.com/abstract=4072800%20> [<https://perma.cc/8JRP-VKQP>] (discussing that while laws like Texas's S.B. 8 seem a "loss

is not really a formal question that can be answered by reading and interpreting a text or understanding a text's institutional context, although of course it is the duty of courts to strive to make it so. As a practical matter, we can only understand our rights by understanding how our society is constituted, and this is essentially a question about power.

Ours is a victor's constitution. It includes violent claims that have been ratified by elites or through community consensus and have become part of the fabric of our formal law. In the decades following the Revolution, successive American governments would continue to indulge violent movements in which men willing to "live free or die" asserted their claims to a vision of constitutional rights distinct from those envisioned by those in formal positions of power.⁴⁹⁴ Some of those visions would thrive and

of control on the part of the state," in practice they work "as a way for the state" to empower private citizens to weaken constitutional constraints, magnifying its reach and achieving policy changes otherwise difficult to effect). The blind zone perpetuated by qualified immunity doctrine, for instance, and the perpetual refusal to create "clearly established" rules governing conflict with police and carceral officials, is an active decision to reserve those arenas to governance by violence. See William Baude, *Is Qualified Immunity Unlawful?*, 106 *Calif. L. Rev.* 45, 46–47 (2018) (arguing that the "technical legal justification[s]" of qualified immunity do not hold up). One cannot help but think qualified immunity endures because of the lingering view that, just as before the Civil War, the police state helps protect the "real" citizenry from an "internal enemy" and needs as much leeway to do so as possible. See Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 *Geo. L.J.* 1479, 1484 (2016) (arguing that the qualified immunity doctrine helps to explain police use of excessive force against Black Americans). When the cannons fire, the law falls silent.

494. Not all "constitutionalism of force" is populist. Throughout our history elites have also had recourse to force change to the Constitution, and they enjoy distinct advantages when they choose to use force to pursue their aims. Some of the armed groups in Southern States after Reconstruction pursuing vicious campaigns of rape, murder, and torture were nothing less than the Confederacy out of power, fighting until they finally resumed control of Southern state governance. See Carole Emberton, *Beyond Redemption: Race, Violence, and the American South After the Civil War* 5, 8 (2013). When they retook power, they did so with an internal hierarchy entirely intact. See *id.* at 182–92 (describing the "armed assaults on local governments" that "white leagues and rifle clubs" executed as a spectacle of Southern white unity and a demonstration of their military strength); Hahn, *supra* note 37, at 270 (noting that Klan "leaders generally had held rank in the [Confederate] army . . . and were connected to families of local prominence"); see also Michele Goodwin, *The Thirteenth Amendment: Modern Slavery, Capitalism, and Mass Incarceration*, 104 *Cornell L. Rev.* 899, 990 (2019) (discussing the horrors Black men, women, and children suffered in the post-war South and their helplessness in the face of the "collusion and complicity" of local officials). But it is worth pausing a moment to ask what makes some violent populist efforts more likely to succeed in becoming incorporated into our constitutional order. The answer seems to be that violent populist movements have succeeded when elites could more readily coopt them than suppress them. When the constitutional values a movement expresses support the rule of a governing elite, or some portion of an elite, or its colonial projects, the movement tends to be indulged. Consider, for instance, the anti-rent uprising of 1840s New York. During these deadly land riots, angry tenants urged that New York's

would be incorporated into governance: when adopted as the constitutional positions of major parties, or as formalized in legislation, or in court judgments that either hewed to the constitutional positions of violent groups or disclaimed judges' power to correct them.⁴⁹⁵

But not all movements were indulged, of course, and not all men. In 1800, the same year Adams pardoned John Fries, a group of enslaved Virginians plotted a bold armed rebellion. Gabriel Prosser intended to lead an armed uprising to bring an end to his bondage and to all bondage in Virginia while marching under a banner stitched with the words "death or liberty."⁴⁹⁶ The plot failed. The conspirators were betrayed, captured, tortured, and taken to "trial." Asked what he had to say for himself, one of the insurrectionists responded:

I have nothing more to offer than what General Washington would have had to offer, had he been taken by the British and put to trial by them. I have adventured my life in endeavouring to obtain the liberty of my countrymen, and I am a willing sacrifice in their cause.⁴⁹⁷

Virginia did not hesitate to put this Black Nathan Hale figure to death, along with more than two dozen of his associates.

CONCLUSION

The men and women who defended the Capitol on January 6, 2021, experienced our violent constitutional heritage first hand. Capitol Police Officer Harry Dunn described "a sea of people," with officers "engaged in

manorial tenancies were incompatible with republicanism. See Charles W. McCurdy, *The Anti-Rent Era in New York Law and Politics, 1839–1865*, at 252, 270–71 (2001). Some of them were arrested and sentenced to death for the murder of an undersheriff, but the Governor of New York commuted the sentences of some and pardoned the rest of those facing the most severe sentences. *Id.* And though the anti-renter rioters never achieved their specific aims, the rioters' cause remained on New York's policy agenda for two decades. *Id.* This is because during the 1840s, the economic radicalism of the American Revolution still formed part of the value system defining Jacksonian Democracy. See Michael Feldberg, *The Turbulent Era: Riot and Disorder in Jacksonian America* 4–7, 127–28 (1980) (arguing that Americans saw rioting as a regular part of the political process during the Jacksonian period). By contrast, in the late nineteenth- and early twentieth-century, labor movements were often crushed with government force, private force, or some combination. See Scott Martelle, *Blood Passion: The Ludlow Massacre and Class War in the American West* 123–76 (2007) (describing how the Colorado National Guard and private militia violently suppressed a coal miner strike in Ludlow, Colorado in 1914). Because economic radicalism was no longer central to the identity of a major political party, elites could crush movements based on constitutional claims to economic redistribution without sparking broader accusations of hypocrisy or otherwise undermining the majoritarian basis of their power.

495. On the theme of judicial powerlessness, see Robert Cover, *Justice Accused: Antislavery and the Judicial Process* 210 (1975).

496. Douglas R. Egerton, *Gabriel's Rebellion: The Virginia Slave Conspiracies of 1800 and 1802*, at 51–52 (1993).

497. *Id.* at 102.

desperate, hand-to-hand fighting with rioters across the West Lawn.”⁴⁹⁸ He saw “rioters using all kinds of weapons against officers, including flag poles, metal bike racks they had torn apart, and various kinds of projectiles.”⁴⁹⁹ Officers were “bloodied,” “many were screaming, and many were blinded and coughing from chemical irritants being sprayed in their faces.”⁵⁰⁰

Metropolitan Police Officer Daniel Hodges almost died when the mob crushed him in a door, and he suffered injuries to his ribs, his skull, and his eye socket. But his testimony before the House Select Committee investigating the events of January 6 emphasized the destabilizing psychological experiences of that day. He described how the rioters justified and explained themselves even as they fought their way into the Capitol. “Men alleging to be veterans told us how they had fought for this country and were fighting for it again.”⁵⁰¹ Members of the crowd accused him and the other officers of betraying the country they served, calling out to him to “remember” his “oath.”⁵⁰² Hodges recalled with indignation that “[a]nother woman, who was part of the mob of terrorists laying siege to the Capitol of the United States, shouted ‘Traitors!’”⁵⁰³ The crowd then made this their chant.

Above all, throughout that brutal day, Officer Hodges remembered the “terrorists alternated between attempting to break our defenses” and “attempting to convert us.”⁵⁰⁴ He remembered one man who told him to

498. The Law Enforcement Experience on January 6th: Hearing Before the House Select Comm. to Investigate the Jan. 6th Attack on the United States Capitol, at 01:19 (July 27, 2021), <https://january6th.house.gov/legislation/hearings/law-enforcement-experience-january-6th> (on file with the *Columbia Law Review*) [hereinafter Law Enforcement Experience on January 6th]; see also Harry A. Dunn, Capitol Police Officer, Written Statement to the Select Committee to Investigate the January 6th Attack on the U.S. Capitol 2 (Jan. 27, 2021), <https://docs.house.gov/meetings/IJ/IJ00/20210727/113969/HHRG-117-IJ00-Wstate-DunnO-20210727.pdf> [<https://perma.cc/T6Q5-HX3U>] [hereinafter Statement of Officer Harry Dunn].

499. Statement of Officer Harry Dunn, *supra* note 498, at 2.

500. *Id.*

501. Law Enforcement Experience on January 6th, *supra* note 498, at 01:06; see also Daniel Hodges, Metropolitan Police Officer, Written Statement to the Select Committee to Investigate the January 6th Attack on the U.S. Capitol 3 (n.d.), <https://docs.house.gov/meetings/IJ/IJ00/20210727/113969/HHRG-117-IJ00-Wstate-HodgesO-20210727.pdf> [<https://perma.cc/FH8U-UMJ8>] [hereinafter Statement of Officer Daniel Hodges].

502. Statement of Officer Daniel Hodges, *supra* note 501, at 2.

503. *Id.*

504. *Id.* at 3. Officer Harry Dunn, who is Black, and Sergeant Aquilino Gonell, who is Dominican American, had a different experience that day from Officer Daniel Hodges. See Ari Shapiro, Ashley Brown & Anna Sirianni, ‘This Is How I’m Going to Die’: Capitol Police Sergeant Recalls Jan. 6 Attack, NPR (July 30, 2021), <https://www.npr.org/2021/07/30/1022909553/this-is-how-im-going-to-die-capitol-police-sergeant-recalls-jan-6>

“show solidarity with ‘we the people’ or we’re going to run over you!”⁵⁰⁵ Even during the most intense fighting, when Hodges and his fellow officers were desperately engaged in a “battle of inches” fought in a “hallway filled with smoke and screams” that they believed was the “last line of defense before the terrorists had true access to the building, and potentially our elected representatives,” the insurrectionists continued to try “to convert us.”⁵⁰⁶ He remembered a man shouting, “We just want to make our voices heard! And I think you feel the same! I really think you feel the same!” while at the same time another man tried “to batter us with a stolen shield.”⁵⁰⁷

The officers were in an untenable position. They were the foot soldiers of the constitutional order of today and yesterday, facing a mob that represents what some Americans, including powerful officials, hope will be the constitutional order of tomorrow.⁵⁰⁸ The disorientation they

attackblack [<https://perma.cc/DJ7N-9T58>] (describing how the “undercurrent of racism” was present in the mob’s treatment of Officer Dunn and Sergeant Gonell). Members of the mob also screamed that they were traitors, but no one was trying to convert them to the cause the mob represented, as an overt aspect of that cause was white supremacy. Statement of Officer Harry Dunn, *supra* note 498, at 3. Remembering a moment when about twenty members of the mob started screaming “nigger” at him, Officer Dunn said that in the days that followed, other Black officers shared that they had had similar experiences. *Id.* One said the insurrectionists had “told him to ‘Put your gun down and we’ll show you what kind of nigger you really are!’” *Id.* One of the white officers testifying before the committee said that members of the mob had told him, “Do not attack us! We are not Black Lives Matter!” Statement of Officer Daniel Hodges, *supra* note 501, at 3.

505. Statement of Officer Daniel Hodges, *supra* note 501, at 3.

506. *Id.* at 4.

507. *Id.*

508. Former President Trump has promised that if he wins reelection, he will “treat those people from January 6 fairly . . . [a]nd if it requires pardons, we will give them pardons.” WION, Former US President Donald Trump Vow to Pardon January 6 Rioters, Teases 3rd Run for the White House, YouTube, at 00:17 (Jan. 30, 2022), <https://www.youtube.com/watch?v=7X1JcqFludE> (on file with the *Columbia Law Review*). Senator Ron Johnson (R–Wis.) has said of the January 6 insurrectionists, “[T]hose were people that loved this country, that truly respect law enforcement, would never do anything to break a law.” Dartunorro Clark, GOP Sen. Ron Johnson Says He Never Felt Threatened During Jan. 6 Capitol Attack, NBC News (Mar. 12, 2021), <https://www.nbcnews.com/politics/congress/gop-sen-ron-johnson-says-he-never-felt-threatened-during-n1261024> [<https://perma.cc/6ADP-E8S8>]. Congresswoman Marjorie Taylor Greene (R–Ga.) justified January 6 with the reflection: “[I]f you think about what our Declaration of Independence says, it says to overthrow tyrants.” Aaron Blake, Marjorie Taylor Greene Says Jan. 6 Riot Was in Line With the Declaration of Independence, Wash. Post (Oct. 26, 2021), <https://www.washingtonpost.com/politics/2021/10/26/marjorie-taylor-greene-says-jan-6-riot-was-line-with-declaration-independence/> (on file with the *Columbia Law Review*). Former Speaker of the House Newt Gingrich called the January 6 House Committee a “lynch mob” and warned that its members “face a real risk of jail” should power change hands. Rick Rouan, Newt Gingrich Says January 6 Investigators ‘Face Real Risk of Jail’ if GOP Wins Congress, USA Today (Jan. 24, 2022),

experienced during the insurrection persisted long after the riot was over and the presidency had changed hands.⁵⁰⁹ Officer Michael Fanone testified to the House committee that “nothing—truly nothing—has prepared me to address those elected members of our government who continue to deny the events of that day,” including the “very same members whose lives, offices, staff members I was fighting so desperately to defend.”⁵¹⁰ After a year in which various members of the party

<https://www.usatoday.com/story/news/politics/2022/01/24/newt-gingrich-january-6-committee-investigators-may-face-jail/9200720002/> [https://perma.cc/8E27-N62B]. An Ohio candidate for Senate called those arrested and in jail awaiting trial for their involvement in the January 6 insurrection “political prisoners” and said that “their captivity is an assault on democracy.” J.D. Vance (@JDVance1), Twitter (Jan. 6, 2022, 1:50 PM), <https://twitter.com/JDVance1/status/1479163416363384834?cxt=HHwWhIC-0cnShYcpAAAA> (on file with the *Columbia Law Review*).

509. This reflected a deepening schism of perspectives on our constitutional order. In an interview months later, Officer Michael Fanone said he had rewatched the bodycam footage from the insurrection and reflected on the many police officers that seemed friendly with the rioters and on the fact that out of more than 3,000 on duty, only about 850 had responded to the Capitol. Molly Ball, What Mike Fanone Can’t Forget, *Time* (Aug. 5, 2021), <https://time.com/6087577/michael-fanone-january-6-interview/> [https://perma.cc/JA4G-PVUS]. During the attack, he suffered “a heart attack and a traumatic brain injury after being tased numerous times at the base of [his] skull.” *Id.* He survived only by pleading for his life. *Id.* But he wondered: “The vast majority of police officers—would they have been on the other side of those battle lines?” *Id.*; see also Martha Bellisle & Jake Bleiberg, US Police Weigh Officer Discipline After Rally, Capitol Riot, *AP News* (Jan. 24, 2021), <https://apnews.com/article/us-police-capitol-riot-980545361a10fff982676d42b79b84ab> [https://perma.cc/UG4E-ZL2P] (citing a survey finding at least thirty-one police officers in twelve states are suspected or face criminal charges for participating in the riot). In a 2021 op-ed, three retired generals, noting the outsized involvement of veterans and active-duty servicemen in the January 6 insurrection, warned that the “potential for a total breakdown of the chain of command along partisan lines . . . is significant should another insurrection occur.” Paul D. Eaton, Antonio M. Taguba & Steven M. Anderson, Opinion, 3 Retired Generals: The Military Must Prepare Now for a 2024 Insurrection, *Wash. Post.* (Dec. 17, 2021), <https://www.washingtonpost.com/opinions/2021/12/17/eaton-taguba-anderson-generals-military/> (on file with the *Columbia Law Review*). They explained that while servicemembers swear “to protect the U.S. Constitution,” “in a contested election, with loyalties split, some might follow orders from the rightful commander in chief, while others might follow the Trumpian loser,” and “[u]nder such a scenario, it is not outlandish to say a military breakdown could lead to civil war.” *Id.*

510. Law Enforcement Experience on January 6th, *supra* note 498, at 54:42; Michael Fanone, Metropolitan Police Officer, Written Statement to the Select Committee to Investigate the January 6th Attack on the U.S. Capitol 5–6 (July 27, 2021), <https://docs.house.gov/meetings/IJ/IJ00/20210727/113969/HHRG-117-IJ00-Wstate-FanoneO-20210727.pdf> [https://perma.cc/462V-B7GR]; see also Pew Rsch. Ctr., Declining Share of Republicans Say It Is Important to Prosecute Jan. 6 Rioters 4–5 (2021), <https://www.pewresearch.org/politics/2021/09/28/declining-share-of-republicans-say-it-is-important-to-prosecute-jan-6-rioters/> [https://perma.cc/Q9CC-LW5T] (showing a significant decline in the percentage of Republicans who believed that it was important to prosecute rioters from January 6 between March and September 2021); Tim Malloy & Doug Schwartz, 78% of Republicans Want to See Trump Run for President in 2024, *Quinnipiac*

downplayed the events of January 6, in early 2022, the Republican National Committee committed to the position that the deadly insurrection amounted to “legitimate political discourse.”⁵¹¹

We cannot be sanguine. The danger of violent movements like the one the rioters brought to the Capitol on January 6 is not simply that they threaten to destabilize our treasured institutions; it is that they have the potential to remake them, to create a new order that conforms to their demands. This is the heritage of our constitutionalism of force. Despite the efforts of the Founding elite, ours has remained a government of the people and by the people, as contingent on community consensus as the unwritten constitution it replaced. The question confronting the men and women guarding the Capitol on January 6—and so many of us watching at home—was whether that consensus had shifted beneath their feet.

University National Poll Finds; Americans Now Split on Border Wall as Opposition Softens, Quinnipiac Univ. Nat'l Poll (Oct. 19, 2021), https://poll.qu.edu/images/polling/us/us10192021_uplv52.pdf [<https://perma.cc/N5NU-RJXW>] (finding that by October 2021, 66% of Republicans did not consider the January 6 insurrection “an attack on the government”).

511. Republican Nat'l Comm., Resolution to Formally Censure Liz Cheney and Adam Kinzinger and to No Longer Support Them as Members of the Republican Party (Feb. 4, 2022), <https://int.nyt.com/data/documenttools/rnc-censure-resolution/58226d40412e4f18/full.pdf> [<https://perma.cc/FP9Y-MQ2Q>]; see also Jonathan Weisman & Reid J. Epstein, G.O.P. Declares Jan. 6 Attack ‘Legitimate Political Discourse’, N.Y. Times (Feb. 4, 2022), <https://www.nytimes.com/2022/02/04/us/politics/republicans-jan-6-cheney-censure.html> (on file with the *Columbia Law Review*) (capturing the vacillation and attempts to walk back the dramatic implications of the censure in some Republicans’ public statements after the initial official statement).

