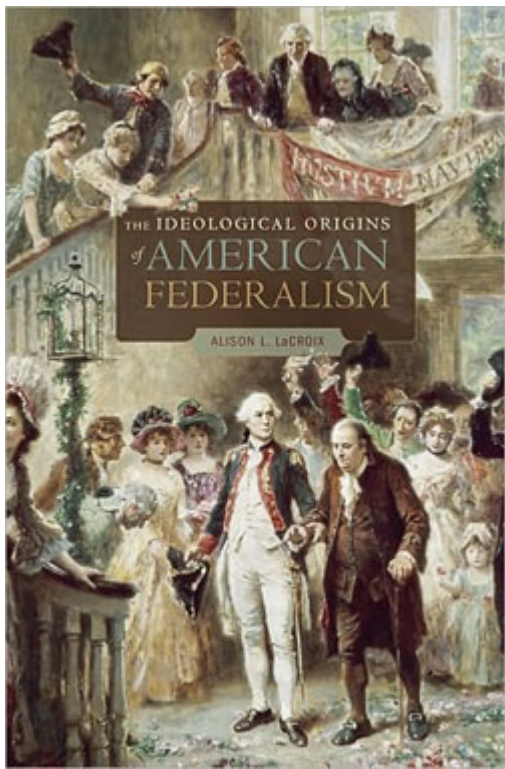
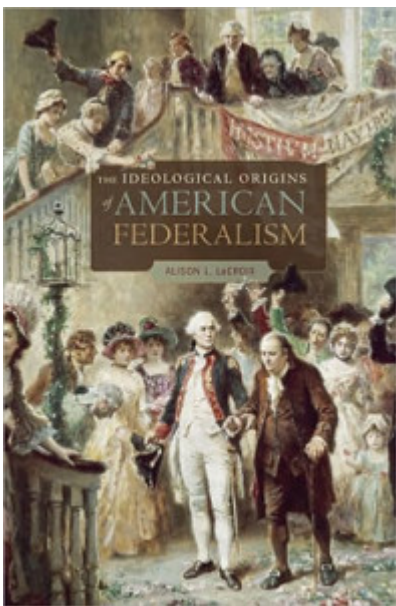


Dividing Sovereignty, Inventing American Federalism



Alison LaCroix has written a well crafted, deeply textured work that argues for the necessity of placing the idea of federalism in a larger historical context. Rather than treat federalism as a transcendent ideal made manifest in Constitutional Convention debates, LaCroix illustrates the evolution of the idea from colonial dissent over British tax policy to the repeal of the Judiciary Act of 1801 when a messy, multi-layered British imperial structure evolved into a unique constitutional and political institution. *Ideological Origins* identifies three critical transformative moments that explain how American federalism emerged and how it came to shape the courts and judicial review: the legitimation of divided sovereignty, the Convention's rejection of a provision allowing Congress to veto state legislation, and the drafting of Article III and the assignment of courts the power to decide the allocation of jurisdiction between state and central governments. Until the end of the Seven Years War, the colonial legislatures and Parliament had an ambiguous understanding of their lines of authority. As a practical matter, the regulation of local affairs was left to colonial assemblies while Parliament presumed to govern the empire. Not addressed explicitly in the day-to-day operations of North America was the locus of sovereignty, of where dominion ultimately lay. Parliament never questioned its own ultimate supremacy, and in the course of its policies of benign neglect, the assemblies had been largely left to their own devices. However, as the colonists faced the burden of new taxation, they found in the work of continental legal theorists like Puffendorf

and Scottish and Irish writers the basis for legitimating their dissent in their descriptions of confederations, unions of political equals charged with the pursuit of more general interests. Providing a new reading of the distinction between internal and external taxes, LaCroix points out how critical this concept was to the resistance to Parliamentary taxation because it sanctioned colonists' view that authority over certain subjects could be divided among different layers of legislative bodies. When Franklin and Dickinson questioned internal taxes for revenue, they challenged Parliament's view of a unitary sovereign imperial structure. Arguing in 1773 to the Massachusetts General Court that sovereignty was indivisible and that Parliament, as the supreme legislative body for the Empire, had plenary powers, Thomas Hutchinson impelled the resistance to expand its arguments to encompass the more abstract idea that the assemblies retained substantive powers outside of its reach.



Alison L. LaCroix, *The Ideological Origins of American Federalism*. Cambridge, Massachusetts: Harvard University Press. 312 pp., \$35.

While the subsequent adoption of the Articles of Confederation affirmed the principle that sovereignty could be divided, the specific allocation of powers between the layered legislative structures of states and Congress remained ambiguous. The Constitutional Convention, LaCroix says, is the moment when ideas born in dissent became the basis of a new structure for deciding the division and allocation of sovereignty. The Convention's debates were a second order of decision-making that determined where and how the processes for resolving ambiguities and conflicts would take place. Madison's recommendation that Congress have the power to veto state legislation smelled too much of the restoration of a unitary sovereignty like the Privy Council's ability to invalidate colonial legislation repugnant to English law and prompted immediate opposition. Although not at the Convention, Thomas Jefferson had written to Madison to consider instead the use of judicial review in matters "where the act of Confederation controlled the question" (to Madison, June 20, 1787 q.v.

159). Jefferson's idea had widespread currency among the delegates and, in particular, among the supporters of the New Jersey Plan. With the inclusion of the Supremacy Clause, Article III furnished the constitutional justification for an explicit division of sovereign powers and entrusted judges and courts to mediate among the different authorities. Article III and the Supremacy Clause also provided a significant intellectual transformation in the idea of federalism from issues of sovereignty to matters of process and jurisdiction, and two key pieces of legislation, the Judiciary Acts of 1789 and 1801 helped define the scope of judicial power. While most scholars dismiss the significance of the Act of 1801, which created federal court districts irrespective of state boundaries, LaCroix establishes it as part of the evolution of ideas that came to affirm the courts' significant role in defining the relationship of state and federal jurisdictions. In the necessity to expand the national judiciary, constitutional discourse shifted from legislative sovereignty to judicial process. After the Judiciary Act of 1789, courts came to wrestle with the need to mediate between state and federal judiciaries as they operated within a single overarching polity. In LaCroix's reading, 1801 marked a terminus, a repudiation of Federalist attempts to impose a broader, more aggressive, potentially expansive intrusion of national authority through a realignment of the federal judiciary. Following Jefferson's election, he and the Republicans dismantled the 1801 courts, essentially repealing the Act, pulled Americans back from intimations of the restoration of the imperial paradigm and located subsequent discourse in the "Supreme Court where claims for federal jurisdiction accompanied the expansion of federal judicial power" (212).

The Ideological Origins of American Federalism is an important work that points out the necessity of seeing Revolutionary developments in a larger context. In so doing it also makes three important specific contributions. It demonstrates how the arguments supporting opposition to British tax policies evolved into ideological and constitutional innovation. Second, in assessing the ideological legacies of the American Revolution, it compels us to reconsider Federalist history—our tendency to assume that the Constitution was simply the repudiation of a set of failed structures and intellectual paradigms and was the starting point for subsequent constitutional analysis. And third, like Jack Rakove's *Original Meanings*, it should give most serious pause to those who assume that the original intentions of the founders are easily discerned.

Jonathan M. Chu is associate professor of history at the University of Massachusetts Boston. He is completing a book-length manuscript *Stumbling towards the Constitution: The Economic Consequences of Independence and the Articles of Confederation*

