

ORIGINAL ARTICLE

Legislation, Regulation, and Administration in the American Revolution

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Abstract

This article continues a long-term investigation into the nature of legislation, regulation, and administration across United States history. In contrast to persistent myths about an original American legal and political inheritance dedicated primarily to private rights, limited government, and laissez-faire economics, this article explores the earliest roots of American public rights, popular lawmaking, and regulatory policymaking. In the very first activities of revolutionary Provincial Congresses and Committees of Safety, this article locates a surprisingly robust template for the future development of American state police power, public provisioning, general-welfare legislation, and socio-economic regulation.

“Historical myths have perhaps played nearly as great a role in shaping opinion as historical facts.”

Friedrich Hayek

Introduction

England’s finest legal historian Frederic William Maitland once said of the past, “Such is the unity of all history that anyone who endeavors to tell a piece of it must feel that his first sentence tears a seamless web.”¹ I never quite reckoned with the depths of that sentiment until I stumbled down the crooked path that led to this article. You see, I never intended to write about the 18th century,

¹ Frederick Pollock and Frederic William Maitland, *The History of English Law before the Time of Edward I*, 2d ed., 2 vols. (Cambridge: Cambridge University Press, 1898), vol. 1, 1.

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let alone the American Revolution or the Founding. I've always been a more modern historian, concerned with investigating the historical origins and legal technologies of contemporary American statecraft: legislation, regulation, and administration. I long assumed those things to be chiefly products of more recent historical developments. In contrast to pervasive myths about an American legal-political inheritance built primarily around private individual rights, a weak state, formalist constitutional limitations, and laissez-faire political economy, I have tried to exhume the 19th and early 20th century historical roots of powerful American traditions of public rights, public law, and popular lawmaking as well as surprisingly energetic state regulatory and administrative techniques.² Going forward, I fully intended to take such research questions and emphases into subsequent analyses of New Deal and postwar American policy initiatives. But, alas, the sources intervened. Let me explain.

Midway through the research for my most recent book, *New Democracy* on progressive-era social democracy and statecraft, I came across a surprising and unusual source.³ I was in the Michigan law library investigating the extraordinary aggrandizement of public power during the Woodrow Wilson administration. Without question, one of the most important episodes in the growth of the modern American state took place on Woodrow Wilson's watch. During World War I, Wilson infamously launched an audacious program of legislative, executive, administrative, and central state action that included such expansive initiatives as conscription, espionage and sedition acts, immigration restriction, a deportation "mania," national prohibition, the nationalization of the railroads, and the radical experiment in national domestic price control known as the Food and Fuel Control Act of 1917. By December 1917, Wilson's war and emergency mobilization included over 22 major acts of Congress (from the National Defense Act to the Trading with the Enemy Act), 20 Presidential Proclamations (from Unlawful Exports to the licensing of the Fuel Oil Industry), and 22 Executive Orders (from German Boats to the organization of the Food Administration Grain Corporation).⁴ As Senator James Reed complained at the time, "The power demanded is greater than has ever been exercised by any king or potentate of earth; it is broader than that which is exercised by the Kaiser of the Germans. It is a power such as no Caesar ever employed over a conquered province in the bloodiest days of Rome's bloody despotism."⁵

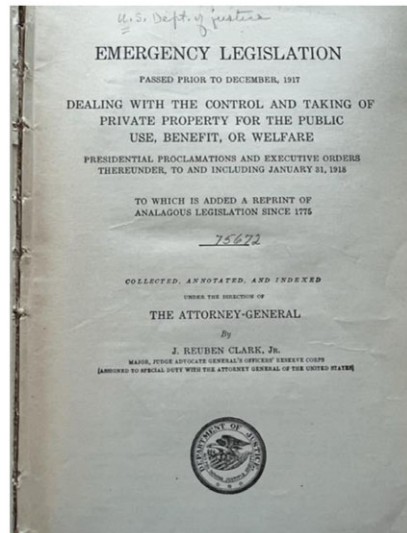
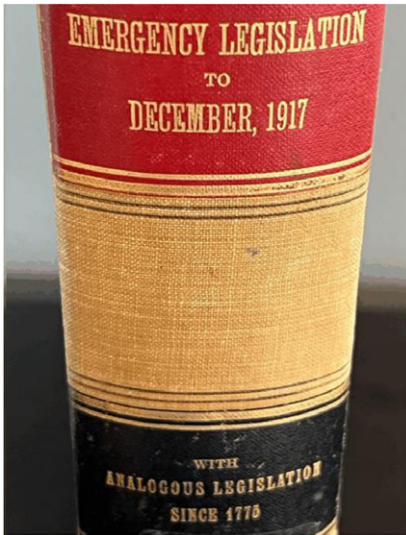
² William J. Novak, *The People's Welfare: Law and Regulation in Nineteenth-Century America* (Chapel Hill, NC: University of North Carolina Press, 1996); Novak, *New Democracy: The Creation of the Modern American State* (Cambridge, MA: Harvard University Press, 2022). Such concerns are also central to two recent collaborative projects, Naomi Lamoreaux and William J. Novak, eds., *Corporations and American Democracy* (Cambridge, MA: Harvard University Press, 2017), and Dan Crane and William J. Novak, eds., *Antimonopoly and American Democracy* (New York: Oxford University Press, 2023).

³ Novak, *New Democracy*.

⁴ J. Reuben Clark, Jr., *Emergency Legislation Passed Prior to December, 1917 Dealing with the Control and Taking of Private Property for the Public Use, Benefit, or Welfare* (Washington: Government Printing Office, 1918), iii-vi.

⁵ Senator James A. Reed, *Congressional Record*, 55 (1917), 3597.

In coming to terms with this unprecedented wave of modern state-building, I was especially interested in the question of where the Wilson administration turned for precedents for this ramping up of a wartime state. And that's when I stumbled upon a 1918 U.S. Department of Justice commissioned study entitled *Emergency Legislation Passed Prior to December, 1917 Dealing with the Control and Taking of Private Property for the Public Use, Benefit, or Welfare*.⁶



The volume was compiled by one J. Reuben Clark, Jr., at the direction of the Attorney General of the United States. The intent of the study was to collect, annotate, and index historical precedents for the most recent spate of World War I governmental expansionism. This bulky volume ultimately weighed in at over 1100 pages of historical precedents. When I first pulled it down from the library shelf, I thought I knew exactly what I would find within. I fully expected to encounter a compilation filled with Civil War era precedents from the years of Abraham Lincoln's wartime Presidency. And, in fact, the volume does contain 50 pages of statutes from the Civil War period—from both the Confederate and Union sides. There are also 30 pages of federal statutes from the War of 1812. But what I fully didn't expect to find in an 1100-page tome on historic American emergency legislation was a total and complete preoccupation with the actions of American state legislatures during the American Revolution. Nearly 800 pages of this volume were taken up with a detailed catalog of the extraordinary activities of the Continental Congress, but even more significantly, the laws of the individual states from Connecticut to Virginia.

As early as 1857, Griffith McRee drew some attention to some of the engaged, proactive, and inventive tasks undertaken by the revolutionary American state legislatures. McRee described a harried North Carolina assembly working under the most extreme and adverse conditions—working during a difficult time in

⁶ Clark, *Emergency Legislation*.

the war, with a governor in whom they lost faith, and in severe economic crisis and social turmoil. Yet, according to McRee, the legislature levied a public tax, emitted bills of credit, established a Board of Commission to attempt to redress the difficulties of obtaining salt and other foreign commodities, authorized the governor to send up to 8,000 men to the relief of South Carolina and to fill the ranks of the Continental battalions, and passed acts to limit counterfeiting and “to protect Quakers, Moravians, Menonists, and Dunkards against persons who had taken possession of their lands.”⁷

The 800 pages of statutes compiled by the Wilson administration further bear out that early historical assessment of ambitious legislative activity under extremely dire and difficult conditions. In almost all the states, legislatures began by taking control of state trade and political economy and aggressively policing fraud and wartime opportunism. Connecticut early passed an “Act to Encourage Fair Dealing, and to Restrain and Punish Sharpers and Oppressors” that required a license to purchase any of the following products (except in small quantities for domestic consumption and use): “Rum, Sugar, Molasses, Tea, Wine, Coffee, Salt, Tow-Cloth or any kind of linen or woolen Cloths, Stockings, Shoes, raw Hides, Leather, Wool, Flax, Cotton, Cotton and Wool Cards, Butter, Cheese, Wheat, Rye, Indian Corn, Beans, Peas, Meal or Flour of any Kind, Beef, Pork, Cyder, Tobacco, Neat-Cattle, Sheep, or other live Stock.” Licenses were to be controlled by town officials and only granted to individuals “of good Character for Probity, public Spirit, and Friends of the Freedom and Independence of the American States.”⁸ In 1778, at the urging of an actively engaged Continental Congress, Commissioners from seven states met at New Haven and agreed to more aggressively regulate the price of labor, manufactures, internal produce, and imported commodities. The Connecticut legislature ordered prices returned to 1774 levels across an encyclopedic list of commodities from “Good merchantable Wheat, Peas, and white Beans” at “Nine shillings and nine pence per bushel” to “common Steel made in America” at “One shilling and four pence per Pound.”⁹

Beyond such basic economic and price controls (which further extended common law prohibitions against monopoly, forestalling, engrossing, and regrating), all of the revolutionary states aggressively legislated to provide adequately for the militia and the armed services. Maryland, for example, passed ample and detailed statutes for “The Quartering of Soldiers” (which notably included the power to “enter, quarter, and billet, such Officers, Soldiers, and Troopers, in the Houses of the Other Inhabitants ... in Proportion to their Number, Ability, and Convenience); “To Procure Cloathing for ... the American Army,” “To Secure (or Impress) Vessels and Carriages,” “To Procure a Supply of Salt Meat for the Use of the Army,” and to provide “For the Service of the United

⁷ Griffith J. McRee, *The Life and Correspondence of James Iredell* (New York: Appleton & Company, 1857), 443-44.

⁸ “An Act to Encourage Fair Dealing, and to Restrain and Punish Sharpers and Oppressors” *Acts and Laws of Connecticut* (1777), 476.

⁹ “An Act for the Regulation of the Prices of Labour, Produce, Manufactures, and Commodities within this State,” *Acts and Laws of Connecticut* (1778), 485.

States.”¹⁰ The Maryland legislature also frequently and extensively expanded the powers of the governor and council, prohibited the distillation of grain into spirits, and regulated auctions. Other states followed suit with equally aggressive legislative measures distinguished primarily by exclusionary and racially-discriminatory customs and habits. Georgia, for example, passed a law requiring “Negro Slaves to work on the several Forts, Batteries, or other public Works” within the state.¹¹

The catalog of early legislation continued ad nauseam. The detail and elaboration of such statutes went on for hundreds of pages. The early American state legislative record was replete with powerful statutes regulating almost every aspect of state economic and social life in time of war and transition. The public powers exercised in the name of wartime necessity, public safety, and public welfare were as extensive as imaginable—from fixed prices to forced labor to the expropriation of needed resources (shelter, food, clothing, and transportation). In a period when historians have tended to emphasize primarily private rights and liberties, the state legislatures passed laws requiring the taking and confiscation of private property, the quartering of soldiers, the disarming of loyalists, and new definitions of treason for the punishment of traitors.¹² The empirical record is one of emergency, necessity, strength, and power—a force ultimately capable of defeating British imperial authority at one of the heights of its influence. The socio-economic policing of the early American state legislatures involved a revolutionary reorganization of society and economy that not only met the short-run exigency of war, but established a new baseline for internal police and domestic policymaking with long-term implications for the future of the United States.

A “seamless web.” Regulation in America was not invented by New Dealers, nor birthed in the Progressive era, nor constituted when John Marshall wrote the magic doctrinal words “police power” into the *US Supreme Court Reports* in the early 19th century.¹³ There never was an age (golden or otherwise) of laissez-faire or a weak state or unadulterated individualism or pure social contract and natural law in American history.¹⁴ Those things are fictions and fabrications—“stork fibs” legal realist Jerome Frank used to call them—symbolic products of

¹⁰ “An Act for Quartering Soldiers,” *Laws of Maryland* (1777); “An Act to Procure Cloathing for the Quota of this State of the American Army,” *Laws of Maryland* (1777); “A Supplementary Act to the Act, Entitled, An Act to Regulate the Militia,” *Laws of Maryland* (1777); “An Act to Procure a Supply of Salt Meat for the Use of the Army,” *Laws of Maryland* (1780); “An Act for the Service of the United States,” *Laws of Maryland* (1778).

¹¹ “An Act for the Better Security of this State by Obliging and Making Liable Negro Slaves to Work on the Several Forts, Batteries, or other Public Works Within the Same,” *Laws of Georgia* (1777).

¹² “An Ordinance Respecting the Arms of Non-Associators,” *The Statutes at Large of Pennsylvania* (1776), ch. 729; “An Ordinance of the State of Pennsylvania Declaring What Shall be Treason and for Punishing the Same and Other Crimes and Practices Against the State,” *The Statutes at Large of Pennsylvania* (1776), ch. 732; “An Ordinance for Punishing Persons Guilty of Certain Offenses Therein Mentioned Against the United States of America,” *Statutes at Large of Pennsylvania* (1776), ch. 733.

¹³ *Brown v. Maryland*, 25 U.S. 419 (1827), 443.

¹⁴ William J. Novak, “The Myth of the ‘Weak’ American State,” *American Historical Review*, 113 (2008): 752–772.

interpretation, myth-making, and national origins stories generated for reasons far removed from the cold, hard historical facts on the ground.¹⁵ The Wilson administration's compendium of revolutionary emergency legislation for public use, benefit, and welfare thus opens a window onto a potential alternative historical reality with some intriguing possibilities for rethinking the Founding and indeed the rest of American history.

First, and most obviously, the history of American state police regulation simply cannot be confined to its 19th and 20th century dimensions. To the contrary, regulatory statecraft was there from the beginning, wholly coincident with the first acts of independent American governments. These materials illuminate the central roles of legislation and administration in the very earliest moments of American state formation. Of course, the "rise of the assemblies" is an age-old theme in American and European history. Indeed, Charles Andrews placed the "colonial background of the American Revolution" directly in the prominence of self-governing representative colonial assemblies: "These representative assemblies increased the number and scope of their powers ... and began to claim for themselves all the privileges and functions of the House of Commons in England."¹⁶ Bernard Bailyn similarly traced the "origins of American politics" to the wide-ranging quasi-administrative tasks of the first colonial legislatures in distributing land, building wharfs and roads, and establishing towns, schools, and societal institutions.¹⁷ On the road to Revolution itself, Barbara Black and Alison LaCroix have centered the defense of provincial legislative power against Parliament's asserted supreme sovereignty to regulate internal colonial affairs.¹⁸ As Max Edling, Jerry Mashaw, Nick Parrillo, and Gautham Rao, among others, have argued, the long founding period was home to robust traditions of active governance, energetic administration, and surprisingly interventionist legislation and regulation.¹⁹

¹⁵ Jerome Frank, *Law and the Modern Mind* (London: Stevens and Sons, 1949), 244. Frank's full diatribe against unrealistic thinking about the law is legendary and has obvious analogs in thinking about the state: "Myth-making and fatherly lies must be abandoned—the Santa Claus story of complete legal certainty; the fairy tale of a pot of golden law which is already in existence and which the good lawyer can find, if only he is sufficiently diligent; the phantasy of an aesthetically satisfactory system and harmony, consistent and uniform, which will spring up when we find the magic wand of a rationalizing principle. We must stop telling stork-fibs about how law is born and cease even hinting that perhaps there is still some truth in Peter Pan legends of a juristic happy hunting ground in a land of legal absolutes."

¹⁶ Charles M. Andrews, *The Colonial Background of the American Revolution* (New Haven: Yale University Press, 1924), 35. See also Jack P. Greene, *The Quest for Power: The Lower Houses of Assembly in the Southern Royal Colonies, 1689-1776* (Chapel Hill: North Carolina University Press, 1963).

¹⁷ Bernard Bailyn, *The Origins of American Politics* (New York: Vintage Books, 1967), 102-104.

¹⁸ Barbara A. Black, "The Constitution of Empire: The Case for the Colonists," *University of Pennsylvania Law Review*, 124 (1976): 1157-1211; Alison LaCroix, *The Ideological Origins of American Federalism* (Cambridge, MA: Harvard University Press, 2011), chs. 3-4. See especially LaCroix's discussion of Jefferson's effort to "extract greater legislative autonomy for the colonies" in his "Summary View of the Rights of British America" (1774). LaCroix, *American Federalism*, 113-120, 116.

¹⁹ Max M. Edling, *A Revolution in Favor of Government: Origins of the U.S. Constitution and the Making of the American State* (New York: Oxford University Press, 2003); Jerry L. Mashaw, *Creating the Administrative Constitution: The Lost One Hundred Years of American Administrative Law* (New Haven: Yale

Second, revolutionary legislation and administration provides an especially good place to explore the interrelationship of ordinary regulatory state police powers and larger concepts of necessity and emergency and the ways in which regulatory practices developed under exceptional wartime circumstances could underwrite and influence ordinary peacetime governance.²⁰ The slogan “war makes states” is a historical-sociological commonplace.²¹ More interesting is the way in which the necessity, force, and even violence so visible in the wartime exception also continued to shape every day, ongoing efforts to secure public safety, police disorder, and keep the peace.²² Indeed, one of the classic treatises on the law of state police power was built around exactly such themes—W.P. Prentice’s *Police Powers Arising under the Law of Overruling Necessity*.²³

Third, the inherently divisive revolutionary legislative and administrative record (along so many lines beyond the transparent Patriot/Loyalist divide) invites further exploration of the distinct limits and exclusions of historic American regulatory practices, especially as they pertained to the enactment and enforcement of unequal, punitive, and discriminatory laws.²⁴ A burgeoning critical historiography of the American Revolution has now only underscored the original pervasiveness of social contest and social policing across an ever-increasing number of diverse sub-groups, populations, and ever-expanding locales.²⁵ But understanding the particular legal and regulatory techniques that

University Press, 2012); Nicholas R. Parrillo, *Against the Profit Motive: The Salary Revolution in American Government, 1780–1940* (New Haven: Yale University Press, 2013); Gautham Rao, *National Duties: Custom Houses and the Making of the American State* (Chicago: University of Chicago Press, 2016).

²⁰ I explore this theme in more detail in William J. Novak, “The American Law of Overruling Necessity,” in Gary Gerstle and Joel Isaac, eds., *States of Exception in American History* (New York: Cambridge University Press, 2020): 95–122. For an additional historical exploration of this phenomenon in the more recent past, see James T. Sparrow, *Warfare State: World War II Americans and the Age of Big Government* (New York: Oxford University Press, 2011).

²¹ Charles Tilly, “Reflections on the History of European State Making,” in Charles Tilly, ed., *The Formation of National States in Western Europe* (Princeton: Princeton University Press, 1975), p. 42.

²² This theme is unpacked with special urgency in reinterpreting the founding period (and with special attention to mob violence and brute force) in Farah Peterson, “Our Constitutionalism of Force,” *Columbia Law Review*, 122 (2022): 1539–1625, 1620–1621. See also Pauline Maier, *From Resistance to Revolution: Colonial Radicals and the Development of American Opposition to Britain, 1765–1776* (New York: W.W. Norton, 1972); and Robert M. Cover, “Violence and the Word,” *Yale Law Journal*, 95 (1986): 1601–1629.

²³ W. P. Prentice, *Police Powers Arising under the Law of Overruling Necessity* (New York: Banks & Bros., 1894).

²⁴ On the limits of (and struggle for) citizenship in the face of racial and gendered discriminating laws, see Kate Masur, *Until Justice Be Done: America’s First Civil Rights Movement: From the Revolution to Reconstruction* (New York: W.W. Norton & Co., 2021) and Nancy F. Cott, “Marriage and Women’s Citizenship in the United States,” *American Historical Review*, 103 (1998): 1440–1474. For a generous reading of some of my previous work on themes of policing, discrimination, and social exclusion, see Jamelia N. Morgan, “Rethinking Disorderly Conduct,” *California Law Review*, 109 (2021): 1637–1702.

²⁵ It is impossible to capture the sprawl of recent developments here in a short footnote. But see, for example, Alan Taylor, *American Revolutions: A Continental History, 1750–1804* (New York: W.W. Norton & Co., 2016); Edward Countryman, “Indians, the Colonial Order, and the Social Significance of the American Revolution,” *William and Mary Quarterly*, 53 (1996): 342–62; Sara T. Damiano, “Writing

leveraged social control, exclusion, discrimination, and domination remains a priority.

Finally, the legislative, regulatory, and administrative record of the Revolution is fundamentally about action as well as words, deeds as well as interpretive justifications and legitimations. Legal texts are distinctively performative ones, producing effects and making things actually happen by saying so.²⁶ The urgency of the revolutionary moment thus holds in stark relief the particular public problems to be solved, the concrete socio-economic needs to be met, and the obsessive public provisioning that grounded the struggle for independence from start to finish. It is thus a good place to deploy a more pragmatic history of law and politics.²⁷ Still too many of our most canonical constitutional histories of the Revolution and Founding start where Carl Becker did in the first sentence of *The Eve of the Revolution* (1918): “I have chiefly endeavored to convey to the reader, not a record of what men did, but a sense of how they thought and felt about what they did.”²⁸ From *The Eve of the Revolution* to Akhil Amar’s *The Words that Made Us* to the even more formalistic interpretations of founding “thoughts and feelings” in the latest version of constitutional originalism, we get interpretation on top of interpretation, glosses on glosses on glosses ... all the way down.²⁹ And words, texts, forms, and meanings rather than actions, deeds, facts, and consequences take center stage in our constitutional origins stories. The paucity of modern historicism, pragmatism, and critical realism in contemporary constitutional and popular renderings of the Founding makes it only that more difficult to see things like the Revolution’s vast *Emergency Legislation*.³⁰

Cold War Liberalism and the Case of the Missing Regulation

That was not always the case. For the first half of the 20th century, the dominant vision of early American history, authored by the so-called “progressive historians,” did not include an especially favorable, text-based, or formalist

Women’s History Through the Revolution: Family Finances, Letter Writing, and Conceptions of Marriage,” *William and Mary Quarterly*, 74 (2017): 697-728; David Waldstreicher, “Ancients, Moderns, and Africans: Phillis Wheatley and the Politics of Empire and Slavery in the American Revolution,” *Journal of the Early Republic*, 37, (2017): 701-733.

²⁶ Pierre Bourdieu, “The Force of Law: Toward a Sociology of the Juridical Field,” *Hastings Law Journal*, 38 (1987): 814-853.

²⁷ Stephen Sawyer and I begin to outline some of the components of such an approach in William J. Novak and Stephen W. Sawyer, “Possibilities of a Pragmatic History of the Political,” *Revista da Faculdade de Direito da UERJ*, no. 41 (2022).

²⁸ Carl L. Becker, *The Eve of the Revolution: A Chronicle of the Breach with England* (New Haven: Yale University Press, 1918), vii.

²⁹ Becker, *Eve of Revolution*; Akhil Reed Amar, *The Words That Made Us: America’s Constitutional Conversation, 1760-1840* (New York: Basic Books, 2021); William E. Baude and Stephen Sachs, “Yes, the Founders Were Originalists,” *Yale Journal of Law and the Humanities*, 36 (2025): forthcoming.

³⁰ I make the case for progressive historicism, pragmatism, and realism against the reactionary formalism of originalism in Novak, “Some Realism About Originalism,” *Michigan Law Review*, 123 (2025): 1185-1207.

rendering of the Founding.³¹ Part of the more critical realist “revolt against formalism” that anchored professional social science at the turn of the century, progressive history featured a much more skeptical, empirical, and materialist methodology emphasizing conflict, consequences, and the actual winners and losers of the public policy battles that determined so much of American history.³² Charles Beard’s progressive classic *The Economic Interpretation of the Constitution* (1913) skewered the secular constitutional theology of earlier interpretations of the Founding as something approaching divinely-inspired benevolence:

By calm mediation and friendly councils, says [George] Bancroft, the people had prepared a Constitution which in the union of freedom with strength and order, excelled every one known before ... In the happy morning of their existence as one of the powers of the world, they had chosen justice for their guide; and while they proceeded on their way with a well-founded confidence and joy, all the friends of mankind invoked success on their endeavor as the hope for renovating the life of the civilized world.³³

Beard’s perspective was decidedly less sanguine. Written in a period when many viewed judges, courts, and constitutionalism as undemocratic obstacles to progressive popular will, Beard more critically investigated the long road to Philadelphia as yet another opportunistic moment for dominant economic interests to secure privileges by writing them into laws. Beard was not alone, rather he was joined by two generations of critical realists who produced some of the most thoroughgoing critiques of law and constitutionalism in American history: *The Growth and Decadence of Constitutional Government*, *Court over Constitution*, and *Government by Judiciary*.³⁴ With respect to the Founding, Merrill Jensen was perhaps the last progressive historian especially focused on the

³¹ The best treatments of progressive historiography generally are Richard Hofstadter, *The Progressive Historians: Turner, Beard, Parrington* (Chicago: University of Chicago Press, 1968); Lee Benson, *Turner and Beard: American Historical Writing Reconsidered* (Glencoe, IL: The Free Press, 1960); and Morton J. Horwitz, “Progressive Legal Historiography,” *Oregon Law Review*, 63 (1984): 679–687.

³² Morton G. White, *Social Thought in America: The Revolt Against Formalism* (New York: Viking Press, 1949). On antiformalism also see, Morton J. Horwitz, *The Transformation of American Law: The Crisis of Legal Orthodoxy, 1870–1960* (New York: Oxford University Press, 1992); and Novak, *New Democracy*, 83–89. The roots of the American antiformalist tradition ran deep. Both Perry Miller and David Brion Davis drew connections back to an original revolutionary and radical strain in American religious and political traditions. Perry Miller, *The Life of the Mind in America: From the Revolution to the Civil War* (New York: Harcourt, Brace & World, 1965); David Brion Davis, *Challenging the Boundaries of Slavery* (Cambridge: Harvard University Press, 2003), 51–53.

³³ Charles A. Beard, *An Economic Interpretation of the Constitution of the United States* (New York: Macmillan Co., 1913), 10.

³⁴ J. Allen Smith, *The Growth and Decadence of Constitutional Government* (New York: Henry Holt and Co., 1930); Edward S. Corwin, *Court over Constitution: A Study of Judicial Review as an Instrument of Popular Government* (Princeton: Princeton University Press, 1938); Louis B. Boudin, *Government by Judiciary*, 2 vols. (New York: William Godwin, Inc., 1932).

concrete and conflicted policy output of early American legislation and regulation.³⁵

By the middle of the 20th century, however, American founding constitutional narratives began an ineluctable turn away from such critical realism. For Daniel Boorstin, writing in 1953, the constitutional institutions bequeathed to us by the founders sprang once again from original “genius,” and the fierce conflicts of the Revolution dissolved beneath a more soothing balm of anti-ideological consensus. “The major issue of the American Revolution,” Boorstin argued, was simply a non-revolutionary disagreement about the nature of “the true constitution.”³⁶ The theme of “liberty” also began a new ascendancy in mid-century interpretations of the founding period. Clinton Rossiter’s *Seedtime of the Republic: The Origin of the American Tradition of Political Liberty* (1953) was a *locus classicus*, emphasizing “the broad agreement among Revolutionary thinkers over constitutional fundamentals.” At the core of those fundamentals stood liberty—“natural law” and the “rights of man”—the original constitutional baseline for the “ethical, ordered liberty that the American people still cherish as their most precious intellectual possession.”³⁷ Edmund Morgan’s 1956 portrayal of *The Birth of the Republic* similarly featured a more abstracted “search for principles”—shared principles continuous with “a golden age of Anglo-Saxon purity and freedom.” And property joined liberty as fundamentals. For the Americans (as for the English), Morgan harmoniously asserted, “Property was not merely a possession to be hoarded and admired; it was the *source of life and liberty*.... Liberty rested on property and whatever threatened the security of property threatened liberty.”³⁸

The reasons for this mid-century about-face on the general orientation of the American founding are not complicated, and they are now themselves the subject of growing literatures on consensus history as well as Cold War liberalism. In law and constitutionalism, Edward Purcell and Richard Primus have argued that America’s confrontations with totalitarianism (from right-wing Fascism through to left-wing Communism) gave rise to a still-lasting vision of American exceptionalism at the start of Henry Luce’s “American Century.”³⁹ Indeed, by mid-century, deeply-rooted American traditions of antiformalism, pragmatism,

³⁵ Merrill Jensen, *The Founding of a Nation: A History of the American Revolution, 1763-1776* (New York: Oxford University Press, 1968); Jensen, *The Articles of Confederation: An Interpretation of the Social-Constitutional History of the American Revolution, 1774-1791* (Madison: University of Wisconsin Press, 1940); Jensen, *The New Nation: A History of the United States During the Confederation, 1781-1789* (New York: Alfred Knopf, 1950).

³⁶ Daniel J. Boorstin, *The Genius of American Politics* (Chicago: University of Chicago Press, 1953), 76.

³⁷ Clinton Rossiter, *Seedtime of the Republic: The Origin of the American Tradition of Political Liberty* (New York: Harcourt, Brace and Company, 1953), 1, 415-416.

³⁸ Edmund S. Morgan, *The Birth of the Republic, 1763-89* (Chicago: University of Chicago Press, 1956), 3, 6, 17.

³⁹ Edward A. Purcell, Jr., *The Crisis of Democratic Theory: Scientific Naturalism and the Problem of Value* (Lexington, KY: University Press of Kentucky, 1973); Richard Primus, “A Brooding Omnipresence: Totalitarianism in Postwar Constitutional Thought,” *Yale Law Journal*, 106 (1996): 423-457; John Higham, “The Cult of the ‘American Consensus’: Homogenizing Our History,” *Commentary*, 28 (1959): 93- 100; Henry R. Luce, *The American Century* (New York: Farrar and Rinehart, 1941).

and critical realism came under blistering attack as not foundational or formal or normatively absolute enough to take on totalitarian fighting faiths. In their place, a growing cult of “American studies” downplayed historical connections with continental European states and policies and meticulously catalogued instead America’s distinctiveness, especially its supposed lack of divisive political ideologies and the “givenness” and “naturalness” of its exceptional constitutional liberty and property traditions.⁴⁰

Sam Moyn dubbed it a liberalism turned “against itself” as the new Cold War dispensation repudiated the previous generation’s priorities and commitments. As Moyn put it, “The most important fact about Cold War liberal political theory is how profoundly it broke with the liberalism it inherited.”⁴¹ The progressivism, perfectionism, and materialism that fueled earlier social democratic reform was rendered increasingly suspect and even potentially dangerous amid a rising tide of anti-communism. In particular, the idea of an “Emancipatory State”—with expansive democratic and social-welfare aspirations—became anathema.⁴² After two generations of arduous work by progressive reformers building a new democratic state upon new public law traditions of citizenship, police power, public utility, social legislation, antimonopoly, and public administration, Cold War liberalism turned back to celebrations of American individualism, voluntarism, anti-statism, and constitutional limitations.⁴³ The road from these anti-totalitarian priorities to the revival of various forms of contemporary constitutional formalism was straighter and narrower than most first think.⁴⁴

An especially good place to see the powerful beginnings of this broader revision in thinking about American liberalism and constitutionalism is the history of the Founding. In place of a conflicted people deploying robust technologies of self-government to their newly preferred ends, the American founding at mid-century was reinterpreted so as to emphasize underlying agreement about timeless constitutional fundamentals, particularly the centrality of individual liberties and limited government. Consequently, today, orthodox renderings of the tale of the road to the Articles of Confederation, the Constitutional Convention, and the First American Congress still hew closely to an interpretive template emphasizing private rights as well as a congenital weakness or vulnerability in the nascent American state.⁴⁵

“Since 1750,” Oscar Handlin noted, “From the pulpit, through the press, and in a flood of pamphlets, the colonists pointed their discussions by way of the

⁴⁰ Louis Hartz, *The Liberal Tradition in America* (New York: Harcourt, Brace, and World, 1955).

⁴¹ Samuel Moyn, *Liberalism Against Itself: Cold War Intellectuals and the Making of Our Times* (New Haven: Yale University Press, 2023), 2.

⁴² Moyn, *Liberalism Against Itself*, 3–4.

⁴³ For an elaboration of this earlier progressive reform regime, see Novak, *New Democracy*.

⁴⁴ As Primus put it, “Constitutional thought still operates within the framework defined by opposition’ to totalitarianism.” Primus, “A Brooding Omnipresence,” 423.

⁴⁵ For further discussion of this point, see William J. Novak and Steve Pincus, “Revolutionary State Formation: The Origins of the Strong American State,” in John L. Brooke, Julia C. Strauss, and Greg Anderson, eds., *State Formations: Global Histories and Cultures of Statehood* (Cambridge University Press, 2018), 138–155.

immediate issues ... at the ultimate issue of rights.”⁴⁶ Handlin’s student Bernard Bailyn, who originally charted the extraordinary powers of colonial legislatures in the seventeenth and early eighteenth centuries, highlighted the important shift circa 1760 toward what he dubbed the “Alienation of the State.”⁴⁷ In excavating the deep intellectual roots of American revolutionary pamphlets, Bailyn fixated on the overriding influence of “eighteenth-century radical libertarianism.” Thus a “central theme” of the American Revolution was the idea “that power is evil, a necessity perhaps but an evil necessity; that it is infinitely corrupting; and that it must be controlled, limited, restricted in every way compatible with a minimum of civil order.” The road from this understanding of the original revolutionary moment to the constitutional limitations imposed at Philadelphia was short and direct: “Written constitutions; the separation of powers; bill of rights; limitations on executives, on legislatures, and courts; restrictions on the right to coerce and wage war—all express the profound distrust of power that lies at the ideological heart of the American Revolution and that has remained with us as a permanent legacy ever after.”⁴⁸ These were the seeds as well of a radical Jeffersonian conception of “minimal government.” As Gordon Wood put it, “The most liberal-minded of the eighteenth century—those in the Revolution who had used terms from English politics and called themselves Whigs in opposition to the conservative and royalist Tories—tended to see society as beneficent and government as malevolent.”⁴⁹ Jack Rakove similarly emphasized the “weak” nature of established authority as “the great issue” in this entire interpretive tradition: “This sapping of the status and power of elites finds a parallel in the weakening of the authority of the state itself, in its inability to define and advance transcendent notions of the public good.”⁵⁰ Indeed, this overriding myth of an essentially weak 18th century state prevailed through Bernard Bailyn’s last words on the Revolution and so much more: “The essential spirit of eighteenth-century reform – its idealism, its determination to *protect the individual from the power of the state* – lived on, and lives on still.”⁵¹

In contrast to this long and distinguished tradition emphasizing an original revolutionary rights orientation and hostility to positive governance (perhaps

⁴⁶ Oscar Handlin, *The Americans: A New History of the People of the United States* (Boston: Little, Brown and Company, 1963), 139.

⁴⁷ Bernard Bailyn, “The Alienation of the State,” in Bailyn, et. al., *The Great Republic: A History of the American People* (Lexington: DC Heath and Co., 1992), I: 193–198. Richard R. John, “Governmental Institutions as Agents of Change: American Political Development in the Early Republic, 1787–1835,” *Studies in American Political Development*, 11 (1997), 347–380.

⁴⁸ Bernard Bailyn, “The Central Themes of the American Revolution: An Interpretation,” in Kurtz and Hutson, eds., *Essays on the American Revolution* (1960), pp. 26–27.

⁴⁹ Gordon S. Wood, *Empire of Liberty: A History of the Early Republic, 1789–1815* (New York: Oxford University Press, 2011), 10.

⁵⁰ Jack Rakove, “‘How Else Could It End?’: Bernard Bailyn and the Problem of Authority in Early America,” in James A. Henretta, Michael Kammen, and Stanley Katz, eds. *The Transformation of Early American History* (New York: Alfred A. Knopf, 1991): 51–69, 54–55; Gordon S. Wood, *The Radicalism of the American Revolution* (New York: Vintage Books, 1993), 81, 85.

⁵¹ Bernard Bailyn, *Faces of Revolution: Personalities and Themes in the Struggle for American Independence* (New York: Vintage Books, 1992), xiii (emphasis added).

even anti-statism), this article entertains the alternate possibility that American independence was worked out against background assumptions of forceful statecraft and surprisingly interventionist efforts in social and economic policymaking. It thus joins an ongoing revisionist project approaching the Founding as a revolution very much “In Favor of Government.”⁵² To date, this revision has mainly followed Max Weber and John Brewer in highlighting central administration and the fiscal-military imperatives of emerging nation-states.⁵³ But, as Woodrow Wilson’s Attorney General perhaps anticipated, the other place to look for the earliest lineaments of robust American state power is in the record of the revolutionary legislatures.

Now, the revolutionary state legislatures might strike many as an unusual choice for a preliminary investigation into early American statecraft. After all, unlike the original colonial legislatures that have been extolled for their controlled political economy and assertive public governance in times of necessity,⁵⁴ the general verdict on America’s founding-era legislatures has not been nearly as flattering. On the contrary, rather than a solution, the early state legislatures are typically seen as key parts of the problem—one of the central reasons for the “weakness” of the Confederation and a faltering early American state.

“Drifting toward Anarchy” was John Fiske’s original appraisal of the “Critical Period” in American history, featuring a veritable chaos of state reprisals, quarrels, retaliatory measures, failures, financial distress, rag-money, insurrection, and Barbary pirates.⁵⁵ Gordon Wood maintained Fiske’s general portrait of the “Critical Period,” emphasizing the “vices of the system” and the “abuses of legislative power.” Here, James Madison rose to special prominence in what Jack Rakove ultimately dubbed a “Madisonian [rather than Machiavellian] Moment.”⁵⁶ Indeed, something of the climax of the entire era was reached in Madison’s “remarkable” memorandum on “The Vices of the Political System of the United States”—prelude to Catherine Drinker Bowen’s “Miracle at Philadelphia.”⁵⁷ The core of Madison’s memo on the eve of that

⁵² Edling, *A Revolution in Favor of Government*.

⁵³ Max Weber, *The Theory of Social and Economic Organization*, tr. A.M. Henderson and Talcott Parsons, ed. Talcott Parsons (New York: Oxford University Press, 1947), 154-156; Max Weber, *Economy and Society: An Outline of Interpretive Sociology*, ed. Guenther Roth and Claus Wittich, 2 vols. (Berkeley: University of California Press, 1978), I: 217-220; John Brewer, *Sinews of Power: War, Money, and the English State, 1688-1783* (Cambridge: Harvard University Press, 1990).

⁵⁴ Bailyn, *Origins of American Politics*, 102.

⁵⁵ John Fiske, *The Critical Period of American History, 1783-1789* (Boston: Houghton, Mifflin and Company, 1888), 134-186.

⁵⁶ Gordon S. Wood, *The Creation of the American Republic, 1776-1787* (Chapel Hill: University of North Carolina Press, 1969), Part IV: The Critical Period, Chapter X: Vices of the System; Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (New York: Alfred A. Knopf, 1996), Chapter III: The Madisonian Moment. Rakove refers to the “Vices” of the previous regime more than 20 times.

⁵⁷ James Madison, “The Vices of the Political System of the United States,” in *The Papers of James Madison* (Chicago: University of Chicago Press, 1975), IX, 345-357. Catherine Drinker Bowen, *Miracle at Philadelphia: The Story of the Constitutional Convention May to September 1787* (Boston: Little, Brown & Co., 1966).

famous gathering was essentially a screed aimed directly at the state legislatures and the “multiplicity and mutability” of state laws. Without presenting much in terms of empirical evidence or investigation, Madison excoriated the state legislatures and their collective output in the most extreme terms imaginable: “evils,” “malady,” “a nuisance,” “pestilent,” “vicious,” “a snare,” “injustice,” “defect,” “alarming,”—the list of strained adjectives goes on. Madison’s thoroughgoing critique of the founding-era state legislatures condemned them to a status of censure, neglect, and political vilification from which they have never fully recovered.

In conventional accounts of the founding, Madison’s “Vices” memo is sometimes paired with a quotation from another favored source—James Iredell, North Carolina Attorney General and later Associate Justice of the United States Supreme Court. In 1780, Iredell called the output of the North Carolina state legislature “the vilest collection of trash ever formed by a legislative body.” That single quote has played an outsized evidentiary role in accounts of the defects of the “critical period” of confederation—defects that ultimately paved the way for constitutional reform at Philadelphia. Gordon Wood utilized it to such effect in his epic *Creation of the American Republic*.⁵⁸ But the actual provenance of the quote might provide reason for caution if not doubt. Indeed, Iredell’s extreme conclusion about the legislature was not the product of a close study of state statutes at all, rather, it was dicta from a May travel letter home to his wife, Hannah Iredell, during an arduous sojourn away. Iredell’s opinion about the legislature was harsh—exactly like everything else in a letter surely meant to convey to a loved one just how miserable everything was in their absence. Iredell’s letter was a litany of complaints detailing his arrival in Newbern “after an infinite deal of difficulty and trouble.” Iredell complained about the weather, the roads (“almost impassable”), the distance (long), the rivers (“unfordable”), the bridges (“torn up”), the milldams (“broke”), the Circuit (“disagreeable”), expenses (“monstrous”), the circumstances of Continental troops around Charleston (a “melancholy” account), his companion Mr. Williams (“severe inflammation in his eyes, and pain in his head”), and the Doctor’s wife (“one of the fattest women I ever saw”). His previous letter was even more “disagreeable,” noting “that spunging creature Lathberry is shut up in the house with us, and so insolent with his Tory conversation and sly slanders, that we have been obliged to handle him a little roughly, and should have done it much more.” The letter is self-consciously exaggerated in tone and entertaining in content—it should not be mistaken for a judicious assessment of state legislative activity. Indeed, Iredell explicitly wrote that his assessment was a product of “skimming over the laws, so far as a very few minutes would permit me.”⁵⁹

⁵⁸ Wood, *The Creation of the American Republic*, 406. Wood seems to get this quote from a secondary source noted earlier in this article, Griffith J. McRee, *Life and Correspondence of James Iredell*, 446. See also, Barry Friedman, *The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution* (New York: Farrar, Straus, and Giroux, 2009), 24.

⁵⁹ McCree, *Life and Correspondence of Iredell*, 444–446, 442.

Despite the fact that most histories of the founding since Madison's memo and Iredell's letter have disparaged the policymaking output of the early American states, there is thus perhaps reason to challenge the empirical bases of (as well as ideological and interpretive reasons for) that common historical judgment. Merrill Jensen was one of the most diligent students of the entire period, and he took direct aim at Fiske's portrait of "chaos and patriots to the rescue," wherein "political leaders, full of wisdom learned during the Revolution, sought to save the nation from the results of ignorance and inexperience." Jensen alternatively endorsed a more realistic, fact-based, and grounded approach to the history of the period, rooted in the primary sources:

The story told by Fiske and repeated by publicists and scholars who have not worked in the field – and some who have for that matter – is based on the assumption that this was *the* 'critical period' of American history during which unselfish patriots rescued the new nation from impending anarchy, if not from chaos itself. The picture is one of stagnation, ineptitude, bankruptcy, corruption, and disintegration. Such a picture is at worst false and at best grossly distorted. It is therefore important to attempt a history which makes an effort to examine the sources, which is concerned with the nature of political and economic problems.⁶⁰

And indeed, historians who have stayed closer to the sources when assessing the actual output of early American state legislatures have delivered more nuanced accounts.⁶¹ So, it might perhaps be time again to pay more attention to what the very first American legislatures and committees (committees of safety, observation, and inspection, no less) were actually *doing* as opposed to what the "Big Six" Founders—as Akhil Amar refers to them—were *saying*.⁶² Such a shift in perspective foregrounds a different set of public problems facing the birth of new modern states in an "Age of Democratic Revolution."⁶³ An emphasis on the actual practices of our first independent bodies politic

⁶⁰ Merrill Jensen, *The Articles of Confederation: An Interpretation of the Social-Constitutional History of the American Revolution, 1774-1781* (Madison: University of Wisconsin Press, 1940), 7; Jensen, *The New Nation: A History of the United States During the Confederation, 1781-1789* (New York: Alfred A. Knopf, 1950), xii-xiii. Jensen was also critical of the way in which Andrew C. McLaughlin's characterized "The Tribulations of the Confederate Period: The Chief Problem of the Time," but he concurred with McLaughlin's critique of Fiske's method as "altogether without scientific standing, because it is little more than a remarkably skillful adaptation of a very few secondary authorities showing almost no evidence of first hand acquaintance with the sources." McLaughlin, *A Constitutional History of the United States* (New York: Appleton-Century, 1935).

⁶¹ The two great exceptions to the conventional view of late colonial and revolutionary-era states as weak and enervated are Allan Nevins, *The American States During and After the Revolution, 1775-1789* (New York: The Macmillan Company, 1924), viii; and Henry W. Farnham, *Chapters in the History of Social Legislation in the United States to 1860* (Washington: Carnegie Institution, 1938).

⁶² The "Big Six" are allegedly Washington, Adams, Jefferson, Madison, Franklin, and Hamilton. Akhil Reed Amar, *The Words That Made Us: America's Constitutional Conversation, 1760-1840* (New York: Basic Books, 2021), 304; Gregory Ablavsky, "Akhil Amar's Unusable Past," *Michigan Law Review*, 121 (2023): 1119-1145.

⁶³ R.R. Palmer, *The Age of Democratic Revolution* (Princeton: Princeton University Press, 1959).

highlights the unprecedented popular demand for public provisioning and governmental administration in a society and economy at war and in constant crisis. New modes of revolutionary and self-governance were pioneered in vital efforts to meet the needs and solve the problems of new and intensely conflicted democratic publics.⁶⁴

Some of those substantive priorities were already apparent in the scale and scope of revolutionary state emergency legislation. New Jersey alone, for example, enacted emergency acts to:

1. Prohibit the Exportation of Provisions
2. Prevent the Distilling of Wheat, Rye, and other Grains
3. Restrain the Exportation of Pitch, Tar, and Turpentine
4. Encourage the Making of Salt
5. Erect Salt Works
6. Procure Clothing for Regiments
7. Regulate and Limit the Prices of Sundry Articles of Produce, Manufacture, and Trade
8. Prevent Forestalling, Regrating, and Engrossing
9. Regulate the Quartering of Soldiers
10. Grant a Bounty upon Wood, Flax, and Hemp
11. Empower a Commission to take Possession of the Andover Iron-Works
12. Encourage the Manufacture of Paper
13. Regulate and Limit the Price of Labor
14. Prevent the Withholding from Sale the Necessaries of Life
15. Settle Public Accounts
16. Procure Supplies
17. Prevent Trading with the Enemy⁶⁵

On December 11, 1777, the New Jersey legislature went so far as to set specific maximum rates and prices for the following articles of produce, manufacture, and trade: Salt, Bloomy Bar-Iron, Pig Metal, rolling Iron, Open Castings, Raw Hides, Soal Leather, Upper Leather, Men's Neat-Leather Shoes, Women's Shoes, Wheat, Rye, Indian Corn, Oats, Buck-Wheat, Wheat-Flour, Hay of first Crop, Best Hay of second Crop, Pork, Beef, Potatoes, Wool, Flax, Cyder-Spirits, Grain Spirits, Butter, and Cheese. It also set a maximum wage level for Farming-Labor, Mechanics, Tradesmen, and Handicraftsmen as not more than double their level in 1775.⁶⁶

But while such statutory overviews are suggestive in providing introductory insight into the range of legislative, regulatory, and administrative activities of the first formally constituted state legislatures, even greater light is shed on the original moment of revolutionary legislation and administration by examining the very earliest governmental bodies to emerge out of revolutionary

⁶⁴ On this more pragmatic configuration of the problems of the political, see John Dewey, *The Public and Its Problems* (Chicago: Gateway Books, 1946).

⁶⁵ J. Reuben Clark, *Emergency Legislation*, 496-581.

⁶⁶ *Ibid.*, 513-514.

conditions—the Provincial Congresses and the Committees of Safety. Jared Sparks nicely set the stage for the emergence of these first institutions of independent self-governance in his *Life of Gouverneur Morris* (1831):

The American colonies, during the three first years of the revolution, presented a phenomenon in the political world, of which there is no example in the history of nations. Twelve governments, which had hitherto existed independent of each other, and alike subordinate to a superior power, all at once and as if by common consent, threw off their allegiance to that power, and assumed to themselves the perilous task of self government, at the fearful hazard of distraction and anarchy among themselves, and of receiving on their heads the weight of vengeance prepared by their former masters, as a punishment of their disobedience and revolt. No condition of human affairs could be more critical or alarming. The social and political compact was absolutely resolved into its first elements, and it remained with each individual in these wide spread communities to determine in what manner, and on what terms, he would consent to renew this compact, and what sacrifices he would make of his private interests and personal independence for the general good.⁶⁷

With the revolutionary unraveling of the social and political fabric and amid “common suffering and danger,” Gouverneur Morris joined the First Provincial Congress of New York and the Committee of Safety. In Massachusetts, Sparks noted, towns had already commonly formed three different kinds of revolutionary committees—of Correspondence, of Inspection, and of Safety. The first forwarded intelligence, warned of danger, and undertook other measures “of public good,” while the second policed the British non-importation agreement under the Continental Congress’s “Association.” The third—the committee of safety—was even more ambitious. As Sparks described it, it “was a kind of executive body, whose duty it was to watch over the *safety of the community*, the *internal police*, and the *welfare of society*, at a time when law was prostrate, and there was no remedy against disorder and confusion.”⁶⁸ America’s earliest governing bodies seem much worth a closer look.

Provincial Congresses

Provincial Congresses (occasionally called “conventions”) were the 1st independent legislative bodies established in 10 of the 13 colonies after the collapse of British rule, the formal dissolution of colonial assemblies, and/or the flight of royal governors between 1774 and 1776.⁶⁹ The immediate catalyst for this extraordinary auto-creation of legislative self-governance was, of course,

⁶⁷ Jared Sparks, *Life of Gouverneur Morris*, Vol. 1 (Boston: Gray & Bowen, 1832), 28.

⁶⁸ *Ibid.*, 29–31 (emphasis added).

⁶⁹ Hermann Wellenreuther lists the flights of royal governors in Wellenreuther, ed., *The Revolution of the People Thoughts and Documents on the Revolutionary Process in North America, 1774–1776*

British Parliamentary reaction to the Boston Tea Party in the form of the so-called Coercive or Intolerable Acts of 1774. Aiming once-and-for-all to assert Parliamentary prerogative over Massachusetts's internal governance and to forever punish Boston radicals, the Boston Port Act, the Massachusetts Government Act, the Administration of Justice Act, the Quartering Act, and the Quebec Act launched a cascade of legal-political as well as rebellious-violent events that ultimately culminated in war and independence. As the "white tents" of the British military rose on Boston Common and military governor General Thomas Gage replaced Thomas Hutchinson, animosities and tensions that had simmered since before the Stamp Act crisis boiled over into a steady current of coordinated and organized revolutionary action.⁷⁰ Most significantly, committees of correspondence renewed their calls for intercolonial resistance and cooperation as well as plans for a more general and "Grand Congress." Royal governors tried to frustrate such ambitions by proroguing or dissolving many existing legislative assemblies, which only further fueled the development of quasi-legal committees, associations, and, ultimately, nominating conventions. The latter, of course, culminated in the fateful meeting of delegates at the First Continental Congress on September 5, 1774. On October 20, Congress issued its Articles of Association calling for local enforcement of a sweeping boycott of British goods. The new organizational and governmental requirements of non-importation (and ultimately non-consumption and non-exportation), in turn, launched a new round of grassroots institutional innovation in the form of Provincial Congresses as well as Committees of Safety, Inspection, and Observation—the latter on both state and local levels.⁷¹

Now, of course, the major legal actions and political events surrounding the American Revolution like the Stamp Act, the Sons of Liberty, the Committees of Correspondence, and the Continental Congress are some of the most written about and well-traversed topics in all of American history.⁷² But, somewhat strangely (with some important and more recent exceptions⁷³), the actual

(Universitätsverlag Göttingen, 2006), 16. Connecticut, Rhode Island, and Delaware had no need for provisional legislatures as their assemblies evaded formal dissolution early in the revolution.

⁷⁰ Agnes Hunt, *The Provincial Committees of Safety of the American Revolution* (Cleveland: Winn and Judson, 1904), 10.

⁷¹ Section 11 of the Articles of Association declared that "a committee be chosen in every county, city, and town, by those who are qualified to vote for representatives in the legislature, whose business it shall be attentively to observe the conduct of all persons touching this association." First Continental Congress, *Journals of the American Congress: 1774-1788*, 4 vols. (Washington, DC: Way and Gideon, 1823), I: 25.

⁷² See, for example, Edmund S. Morgan and Helen M. Morgan, *The Stamp Act Crisis: Prologue to Revolution* (Chapel Hill: University of North Carolina Press, 1953); Richard D. Brown, *Revolutionary Politics in Massachusetts: The Boston Committee of Correspondence and the Towns, 1772-1774* (Cambridge, MA: Harvard University Press, 1970); Jack N. Rakove, *The Beginnings of National Politics: An Interpretive History of the Continental Congress* (New York: Alfred A. Knopf, 1979).

⁷³ See, for example, Edward Countryman, *A People in Revolution: The American Revolution and Political Society in New York, 1760-1790* (Baltimore: The Johns Hopkins University Press, 1981), chs. 2 & 5; T.H. Breen, *American Insurgents American Patriots: The Revolution of the People* (New York: Hill and Wang, 2020), chs. 6-8; David Ammerman, *In the Common Cause: American Response to the Coercive Acts of 1774* (Charlottesville: University of Virginia Press, 1974); and Howard Pashman, *Building a*

output of the Provincial Congresses and especially the revolutionary Committees of Safety has been comparatively neglected. Indeed, the most recent historian of some of the “unrestrained powers of force and coercion” unleashed by revolutionary provisional legislatures and committees has hypothesized a somewhat purposeful omission from “the traditional narrative about rights and liberties.”⁷⁴ While reserving judgment about the exact reasons for neglect, it is worth taking a closer look at some of the main legislative and regulatory preoccupations of America’s very first revolutionary governments.

In Massachusetts, the first Provincial Congress was formed at Salem on October 7, 1774—driven from its “ancient seat” in Boston after Governor Gage dissolved the General Court.⁷⁵ The Congress built upon several spontaneous “conventions of the people” in the counties of Suffolk, Middlesex, Essex, Hampshire, Plymouth, Bristol, Worcester, Berkshire, and Cumberland where delegates of towns and districts met in private homes, courthouses, and as committees of correspondence in building support for a more general Provincial Assembly.⁷⁶ After appointing a committee to encourage “arts and manufactures,” the Suffolk convention, for example, paid “due respect” to the Continental Congress while calling for a more general Massachusetts legislative body: “That the exigencies of our public affairs demand that a provincial congress be called, to concert such measures as may be adopted and vigorously executed by the whole people.”⁷⁷ The Middlesex Convention alone consisted of 150 delegates drafted from more local town and district committees—testament to the extraordinary wave of self-governing committee and resistance organization and participation that launched an American revolution.⁷⁸ Indeed, the Provincial Congresses themselves were typically much more representative than the colonial assemblies they replaced. South Carolina’s Provincial Congress consisted of 180 representatives—triple the size of its previous legislative incarnation.⁷⁹

The Provincial Congresses met irregularly owing to the crisis and eventual wartime conditions. The First Provincial Congress of Massachusetts, for example, convened at Salem only on October 7, at Concord from October 11 to October 14, and at Cambridge from October 17 to October 29 and again on November 23, before dissolving on Saturday, December 10, 1774. With representatives from 12 counties and over 200 towns, the Congress elected

Revolutionary State: The Legal Transformation of New York, 1776-1783 (Chicago: University of Chicago Press, 2018).

⁷⁴ Joshua Canale, “American Dictators: Committees for Public Safety during the American Revolution, 1775-1784,” Ph.D. Dissertation, SUNY-Binghamton, 2014, 21.

⁷⁵ William Lincoln, *The Journals of Each Provincial Congress of Massachusetts in 1774 and 1775 and of the Committee of Safety* (Boston: Dunton and Wentworth, 1838), i-ii.

⁷⁶ Lincoln, *Journals of Each Provincial Congress*, 601-660.

⁷⁷ *Ibid.*, 604.

⁷⁸ *Ibid.*, 609-610.

⁷⁹ New Jersey and Maryland had provincial assemblies twice the size of their colonial representative bodies. David W. Conroy, “Development of a Revolutionary Organization, 1765-1775,” in Jack P. Greene and J.R. Pole, eds., *The Blackwell Encyclopedia of the American Revolution* (Cambridge, MA: Blackwell, 1991): 223-230, 229.

John Hancock as President and Benjamin Lincoln as Secretary and immediately began to establish committees to begin the actual work of day-to-day provisional governance. An original “committee on the state of the province” made clear the necessities of the situation, reporting on “the distressed and miserable state of the province” and noting a determination to “concert some adequate remedy for preventing impending ruin, and providing for the public safety.”⁸⁰ The range of actions taken by the Congress attested to the broad swath of legislation, regulation, and administration required by the crisis, wartime, and emergency conditions.

In but its first days in session, the First Provincial Congress quickly resolved that constables, sheriffs, and tax collectors should not turn over any provincial moneys in their possession to crown officers and devised measures for the identification and punishment of “rebels against the state”—especially those who took up royal commissions under the Coercive and Intolerable Acts.⁸¹ Committees were appointed to investigate the state of the army and to report on what was “necessary to be done for the defence and safety” of the province. And the Congress met with selectmen, overseers of the poor, the committee of correspondence, and the committee of donations from Boston to discuss “means for preserving the town” in the “alarming crisis.” The Congress organized a boycott of East India teas and recommended that every town establish a committee to publicize the names of any locals “who shall sell or consume so extravagant and unnecessary an article of luxury.”⁸² And even before it received explicit instructions from the Continental Congress, it approved and ratified non-importation and non-consumption agreements concerning British goods in general and further recommended that inhabitants of this province also boycott importers “who have sordidly preferred their private interests to the salvation of their suffering country.”⁸³ On the military front, the Provincial Congress began making arrangements for military exercises and the organization of local militias as well as the provision, preservation, and storage of some £20,837 worth of gunpowder and ordinance (field pieces, pounders, carriages, irons, cannons, mortars, shot, bomb-shells, lead balls, arms, bayonets, and barrels of powder).⁸⁴

Beyond military production and preparation, the First Massachusetts Provincial Congress also endorsed the priority of both county conventions and the Continental Congress to improve and encourage so-called “domestic manufactures” through internal policymaking. Drawing on the rich legal traditions and vocabularies that would ultimately underwrite 19th century American state police powers, the Provincial Congress argued that “every state ought to regulate their internal policy in such a manner as to furnish themselves, within their own body, with every necessary article for subsistence and defence ... to encourage agriculture, manufactures, and economy, so as to

⁸⁰ Lincoln, *Journals of Each Provincial Congress*, 17.

⁸¹ *Ibid.*, 19, 24.

⁸² *Ibid.*, 22, 26.

⁸³ *Ibid.*, 41.

⁸⁴ *Ibid.*, 41, 46–48.

render this state as independent of every state as the nature of our country will admit.”⁸⁵ In consequence, the Congress passed resolutions “productive of the greatest good” that recommended improvement in the breeding of sheep and the raising of hemp and flax, preferable use of domestic wools, reasonable prices for such goods, and increases in the making of nails, steel, tin-plate, saltpetre, salt, and glass. Likewise, the Congress endorsed the “public utility” of encouraging horn smiths, wool-combers, textile manufactures, and the raising and curing of madder, and they recommended the establishment of societies for “introducing and establishing”⁸⁶ such arts and manufactures as may be useful to this people.”⁸⁷ Before dissolving and recommending the election of delegates for a Second Provincial Congress in Cambridge in February 1775, the First Congress also entertained a brief discussion of slavery, noting the propriety while attempting to “preserve ourselves from slavery” to also “take into consideration the state and circumstances of the negro slaves in this province.”⁸⁸

While the output of the very 1st Provincial Congress of Massachusetts is emblematic of some of the first priorities of revolutionary legislative statecraft, the tasks of government only increased after 1775. South Carolina’s First Provincial Congress provides another alternative window into the growing demand for mutual protection and public provision amid heightened conflict with Great Britain. South Carolina’s Provincial Congress came into being on January 11, 1775, as the work product of a predecessor “General Meeting” and “General Committee”—themselves created as shadow governments after the Coercive and Intolerable Acts, heeding the Continental Congress’s October 1774 call for further Intercontinental Association in enforcing the anti-British boycott. In South Carolina, the incipient worry about loyalty and scofflaws and opposing commissioners detectable in Massachusetts’s first provincial session became a preeminent concern, especially after the “shots heard round the world” on April 19, 1775, in Lexington and Concord resounded in Charleston. On June 1, 1775, South Carolina convened 172 members in the Statehouse Assembly Room, who immediately began working on strengthening the bonds of consociation and policing dissent.

The South Carolina’s Provincial Congress unanimously resolved to form a “General Association” of subscribers committed to the following engrossed, printed, and circulated terms:⁸⁹

⁸⁵ *Ibid.*, 63. This language channels late 18th-century discussions of “internal police” or what Blackstone discussed as “public police and oeconomy” and “the due regulation and domestic order of the kingdom.” William Blackstone, *Commentaries on the Laws of England: A Facsimile of the Edition of 1765-1769*, 4 vols. (Chicago: University of Chicago Press, 1979), IV: 161. I discuss this police power and public economy tradition in more detail in Novak, *People’s Welfare*, ch. 3.

⁸⁶ William Edwin Hemphill and Wylma Anne Wates, eds., *Extracts from the Journals of the Provincial Congresses of South Carolina, 1775-1776* (Columbia, SC: South Carolina Archives Department, 1960).

⁸⁷ *Ibid.*, 64-65.

⁸⁸ *Ibid.*, 29.

⁸⁹ *Ibid.*, 34.

“The actual commencement of hostilities against this continent, by the British troops, in the bloody scene on the 19th of April last, near Boston—the increase of arbitrary impositions from a wicked and despotic ministry—and the dread of instigated insurrections in the colonies—are causes sufficient to drive an oppressed people to the use of arms: We therefore, the subscribers, inhabitants of *South-Carolina*, holding ourselves bound, by that most sacred of all obligations, the duty of good citizens towards an injured country, and thoroughly convinced, that, under our present distressed circumstances, we shall be justified before God and man, in resisting force by force; DO UNITE ourselves, under every tie of religion and of honour, and associate, as a band in her defence, against every foe: Hereby solemnly engaging that, whenever our Continental or Provincial Councils shall decree it necessary, we will go forth, and be ready to sacrifice our lives and fortunes to secure her freedom and safety. This obligation to continue in full force until a reconciliation shall take place between Great-Britain and America, upon constitutional principles—an Event which we most ardently desire. And we will hold all those persons inimical to the liberty of the colonies, who shall refuse to subscribe this association.”⁹⁰

It is worth highlighting a couple of central elements in this revolutionary associative decree. First, it flags the overarching concern with resisting heteronomous and alien governing impositions that violated traditional expectations of local self-rule—i.e., the “arbitrary impositions from a wicked and despotic ministry.”⁹¹ Second, South Carolina emphasized the actual, physical deprivation and socio-economic precarity on the ground—“an injured country” and “present distressed circumstances” that drove an “oppressed people” to arms. In contrast to Whig-intellectual interpretations emphasizing what Gordon Wood dubbed “conspiracy and the paranoid style,” South Carolina underscored the social fact of a necessitous people.⁹² Finally, the Association reflected the overarching need for the policing of loyalty in the securing of “freedom and safety.” Subscription to the Association was mandatory, and anyone who refused to sign or adhere to these principles was branded an enemy of the people—“inimical to the liberty of the colonies.” As the members of the Provincial Congress themselves signed the Association, they simultaneously

⁹⁰ *Ibid.*, 36.

⁹¹ Nicholas Parrillo has usefully highlighted the categories of familiar vs. alien imposition in chronicling major changes in early American governmental regimes, wherein “familiar” imposition referred to more traditional and local style of self-rule (autonomy), featuring norms imposed by “reference to a single face-to-face community.” Alien imposition (heteronomy), in contrast, featured a mode of rule imposed from beyond and on-high by an outside, external force commanding a society of strangers. Parrillo, *Against the Profit Motive*, 92.

⁹² Gordon S. Wood, “Conspiracy and the Paranoid Style: Causality and Deceit in the Eighteenth Century,” *William and Mary Quarterly*, 39 (1982): 401–441. In later explanation of its motives, the Provincial Congress continued to emphasize issues of need in the “midst of our complicated distresses,” wherein “our present proceedings are the result of dire necessity, not of choice.” Hemphill and Wates, *Journals of the Provincial Congresses of South Carolina*, 52–53.

endorsed “the most effectual methods” for procuring subscription and signing more generally by the other inhabitants of represented districts and parishes. By June 7, a committee was formed “to receive the signatures of all the inhabitants of Charles-town” into the Association and further committees of “Intelligence and Observation” were established to be “watchful and diligent.”⁹³ Anyone who refused to sign the Association was subject to an appearance before the “General Committee” empowered to “make such order as they shall think consistent with sound policy.” Any person violating or refusing “obedience to the authority of the Provincial Congress” was declared and advertised as an “enemy to the Liberties of America, and an object for the resentment of the public.”⁹⁴ In the context of this overarching concern with loyalty and internal enemies, South Carolina’s Provisional Congress mustered two regiments of foot (750 men each) and one regiment of rangers (450 privates)—“officered, raised, paid, and disciplined, and put under the direction of the Congress.”⁹⁵

While military organization and the policing of internal dissent remained high priorities of South Carolina’s First Provincial Congress, domestic necessities and socio-economic provisioning also remained important concerns. Indeed, the day after mustering regiments, South Carolina also established nine members as official Commissioners of Rice, responsible for receiving and purchasing “good and merchantable rice” with certificates at the rate of fifty-five shillings per 100 pounds. Such rice (2700 barrels) was then to be placed in public granaries at Charleston (200 barrels), Jacksonburg (1000 barrels), Pocotaligo (200 barrels), Beaufort (100 barrels), Dorchester (500 barrels), Watboo (500 barrels), and Georgetown (200 barrels). The Rice Commissioners were then charged with disposing of such rice “in such way or manner as to them shall seem most conducive to the public good.” The Congress made similar arrangements for the purchase and provision of flour, while also instituting a ban on the export of corn.⁹⁶ In addition to commissioners of rice and flour, the Provincial Congress also ordered the appointment of another group of persons to purchase wool, cotton, and utensils so as to set up a “complete manufactory of cloth”—a manufactory that would especially employ “the poor.”⁹⁷ Such regulations of internal policy and economic police also revived old common law concerns with forestalling, engrossing, and regrating. Indeed, when the Congress was informed of the “buying up” of “Indian corn, with a view of taking advantage of the times,” they declared “that such engrossing is intolerable, and ought not to be suffered in

⁹³ *Ibid.*, 37, 39.

⁹⁴ *Ibid.*, 59, 66.

⁹⁵ *Ibid.*, 39–40. The Congress provided a detailed schedule for pay in pounds per day: To the Colonel 6; To the Lieutenant Colonel 5; To the Major 4.10; To ten Captains, each 3; To twenty Lieutenants (1st & 2d) each 1.15; To the Adjutant 2.05; To the Quarter-Master 1.05; To a Serjeant-Major 00:15; To thirty Serjeants, each 00:10; To thirty Corporals, each 00:08:9; To a Drum-Major 00:15; To twenty drums, each 00:08:9; To an Armourer 1; To an Assistant-Armourer 00:10; To a Surgeon 2; To two Surgeon’s mates, each 1:10; To seven hundred and fifty privates 00:07:6.

⁹⁶ *Ibid.*, 41–42.

⁹⁷ *Ibid.*, 56–57.

this time of scarcity.” With the subsequent sale of such corn “at an advanced price,” the Congress held that “proper information of engrossers ought to be immediately laid before the Congress, or the General Committee.”⁹⁸ Of course, South Carolina’s concerns about internal police and economy also reached its enslaved population (as the Congress voiced concerns about potential slave insurrection) as well as native Americans (in attempts to press the Catawba tribe into military service).⁹⁹

As should be clear, given their irregular sessions, Provincial Congresses spent most of their time setting up a plethora of substantive committees and a wide variety of commissioners, both internal and external to the legislative body, to further carry on the conduct of governance. South Carolina’s establishment of a select committee to “direct the printing of money” followed by the appointment of three “proper persons” as “Commissioners of the Treasury” for “answering the demands of the public service” was typical.¹⁰⁰ Indeed, before adjourning South Carolina’s First Congress authorized the continuation of “the General Committee, the Secret Committee, the Committee of Observation in Charles-Town, and Committee of Intelligence” notwithstanding “the expiration of the present Congress.”¹⁰¹ The record of executive action by these committees is astonishing in both variety and extent, frequently dwarfing the work of the more famous revolutionary committees of correspondence. Indeed, amid this whole universe of revolutionary committee action, the practices of the various states as well as local “Committees of Safety” are especially instructive about the actual practice of early American revolutionary governance.

Committees of Safety

When discussing the role of committees in American revolutionary governance, conventional histories have long focused attention on “Committees of Correspondence”—a commonplace in grammar school accounts of the coming of Independence. In consequence, many Americans grow up thinking about the Revolution as something akin to a literary event, wherein luminaries of American letters debated finer points of ancient political philosophy and English constitutional history. The dangers of such a blinkered perspective were captured long ago by Evangeline Walker Andrews who cautioned that the founders “were engaged in real rebellion and revolution, characterized by extremes of thought and action that always accompany such movements, and not in the kind of parlour warfare, described in many of our text books, in which

⁹⁸ *Ibid.*, 47.

⁹⁹ The First Congress expressed concern about slave insurrection and also received a report on the topic. *Ibid.*, 37 & 51. On native Americans, it resolved that “It is the opinion of this Congress, that the Council of Safety should invite fifty men of the Catawba Indians, or so many more, as upon any emergency may appear needful, to enter into the service of this colony, under the command of one or more proper white men.” *Ibid.*, 56.

¹⁰⁰ *Ibid.*, 51–52.

¹⁰¹ *Ibid.*, 56.

highly cultivated and periwigged American gentlemen of unquestioned taste and morality” debated abstract “principles of democratic government.”¹⁰² Without taking anything away from the crucial role of correspondence committees (yet alone political and constitutional ideas) in the American Revolution, another set of revolutionary committees shines a different light on the “real rebellion” and practical “extremes of thought and action.”

Those committees were the Committees of Safety, sometimes also known as Committees of Inspection, Committees of Observation, and Commissions for Detecting and Defeating Conspiracies. “American dictators,” Joshua Canale provocatively dubbed such committees at the state level in New York, Virginia, and New Jersey as they “assisted the war effort, regulated the economy, and policed internal dissent.” Policing dissent included “monitoring inhabitants’ movement, confiscating mail, stifling free speech, extending oaths, interrogating the accused, summoning the suspicious, apprehending potential subversives, deporting residents, paroling neighbors, and even jailing those deemed enemies.”¹⁰³ In New York, Howard Pashman has delved further into the committees that emerged at town and county levels, known alternatively as “committees of observation,” “committees of safety,” or just “Committee of Albany” (or some other such locality). Such committees “gathered war materiel, regulated local economies, [and] kept the roads clear.” But more significantly, they also confiscated, expropriated, and redistributed private property. As Pashman put it, “‘Commissioners of Sequestration’ provided material relief to a society suffering shortages and inflation ... by seizing the personal property of British sympathizers, auctioning it off, leasing the vacant farms, and paying anyone who helped to redistribute goods.” Pashman’s work on the committees supplements Daniel Hulsebosch’s observations about anti-loyalist statutes in New York that were “so numerous, so encompassing, and so detailed that they reveal a systematic attempt to stigmatize the loyalists, to take their property, to tax what remained, and to force them to settle their debts cheaply.”¹⁰⁴

Scholars have traced historical precedents for such committees back to the English Civil War as well as to even earlier incarnations in local colonial self-defense and self-protection.¹⁰⁵ But Committees of Safety surged in importance

¹⁰² Evangeline Walker Andrews with Charles McClean Andrews, eds., *Journal of a Lady of Quality: Being the Narrative of a Journey from Scotland to the West Indies, North Carolina, and Portugal in the Years 1774-1776* (New Haven: Yale University Press, 1921), 9. See also T.H. Breen, *American Insurgents*, 314.

¹⁰³ Joshua Canale, “American Dictators: Committees for Public Safety,” iv-v.

¹⁰⁴ Howard Pashman, “The People’s Property Law: A Step Toward Building a New Legal Order in Revolutionary New York,” *Law and History Review*, 31 (2013): 587-626, 593-594; See also Pashman, *Building a Revolutionary State*; Daniel J. Hulsebosch, “A Discrete and Cosmopolitan Minority: The Loyalists, The Atlantic World, and the Origins of Judicial Review,” *Chicago-Kent Law Review*, 81 (2006): 825-866, 835.

¹⁰⁵ See, for example, Agnes Hunt, *Committees of Safety of the American Revolution*, 158-171; Edward Countryman, *A People in Revolution and Political Society in New York, 1760-1790* (Baltimore: Johns Hopkins University Press, 1981), 136-137. One local historian has asserted that “Albany had one version or another of the Committee of Safety since the 1600s,” providing for “police functions” and “militia-type organization.” Peter Hess, “Revolutionary Albany: Organizing the Committee of Safety, Protection, and Correspondence,” *New York Almanack*, February 14, 2022.

during the American Revolution (as they would again take center stage in the French Revolution)—quickly filling the governmental power vacuum left by closed courts, dissolved legislatures, and fleeing governors. Local committees of safety were frequently spontaneously organized out of local town meetings or various committees of correspondence. But state Committees of Safety were often formally constituted by Provincial Congresses. One of the first things the Massachusetts Provincial Congress did was constitute a committee to consider what was “necessary to be done for the defence and safety of the province.” On October 26, 1774, taking note of the war-like preparations of British troops endangering “the lives, liberties and properties of its oppressed citizens,” that committee in turn recommended the establishment of a nine-member Committee of Safety with extraordinarily broad powers for the “safety and defence” of the province and for the protection of its lives, liberties, and properties.¹⁰⁶ That Committee would continue in office until further order of the Provincial Congress, with the following powers and obligations:

1. To “most carefully and diligently inspect and observe” all persons aiming at “the destruction, invasion, detriment or annoyance” of the province.
2. To “alarm, muster, and cause to be assembled” the militia of the province as necessary for the “safety and defence” of the inhabitants of the province.
3. To “call or order” all officers and soldiers of the militia who were under “the strictest obedience thereto.
4. To “provision” the militia with “cannon and carriages” and “small arms,” “ammunition and ordinance stores as they shall judge necessary.”
5. To provide “an allowance from this province” for mustered officers and soldiers, “adequate to their services.”¹⁰⁷

On June 14, 1775, South Carolina’s Provincial Congress followed suit, establishing a thirteen-member state Council of Safety with similar powers and discretion: to appoint and suspend officers in the army, to order a general court-martial, and to direct, regulate, and maintain the army and all military establishments, notably, “subject always to the control of the Congress.”¹⁰⁸

And without question, the first task of state Committees of Safety was preparation for war—the mustering of the men, militia, and materiel necessary to confront the British army. The Massachusetts Committee of Safety at first coordinated with a separate Committee of Supplies to provision the army. And early meetings at various private houses were preoccupied with food supplies (355 barrels of pork, 700 barrels of flour, 20 tierces of rice, and 300 bushels of peas) and tools (spades, iron shovels, pick-axes, wheelbarrows, iron pots, mess bowls, sieves, tin cases, drawing knives, fuses, etc). Such provisioning required further inspections and observations of stores, commissaries, and medicine chests—as a veritable public economy was mobilized under the Committee’s

¹⁰⁶ Lincoln, *Journals of Each Provincial Congress*, 31.

¹⁰⁷ *Ibid.*, 32–35.

¹⁰⁸ Hemphill and Wates, *Journals of the Provincial Congresses of South Carolina*, 50.

direction for conflict.¹⁰⁹ The procurement of arms and ammunition came immediately thereafter, as meetings meticulously noted the gathering of cannon, mortars, cannon balls and shells, howitzers, pounders, brimstone, powder, grape shot, and province arms. The Committee also took note of the procurement of 1500 yards of Russia linen, 2 barrels of Lisbon oil, 6 casks of Malaga wine, and 9 casks of Lisbon wine.¹¹⁰ To pay for such supplies, the Committee made drafts on the receiver general and also enforced the Provincial Congress's order that constables and local officers turn over tax receipts to the province. The Committee also ordered and oversaw the necessary watches in towns and at arsenals and magazines.¹¹¹ Finally, on April 20, 1775—one day after Lexington and Concord—the Committee decried “the barbarous murders committed on our innocent brethren” by the “butchering hand of an inhuman soldiery” and turned constant and close attention to actually raising an army of officers and soldiers. The Committee urgently drafted forms of enlistment for fielding some “eight thousand effective men.”¹¹²

Lexington and Concord were also the spark for South Carolina's “General Committee” to reconvene the Provincial Congress, which, in turn, created the Council of Safety. Like their Massachusetts counterpart, the South Carolina Council immediately turned attention to provisioning and mustering. Indeed, their earliest papers and reports are consumed with similar listings of the procurement of beef, pork, wheat flour, rice, and salt; the securing of artillery, ammunition, and arms (cannon, pounders, muskets, powder, etc.), and the detailed raising of regiments of provincial troops.¹¹³ But early on, South Carolina's Council also showed keen interest in the more general policing of loyalty and opinion. On July 18, 1775, the Council of Safety received a report from the Committee for St. Paul's Parish of a “proceeding and sentence” against one Charles Webb for “Malicious Expressions” against the Lieutenant Governor and the Committees of the Province. According to affidavits, Webb declared in “public company” in a public tavern on the very day of British hostilities against Boston that “He would go to England take a Commission & come Against the Americans.” Later that same day, he was accused of calling the Lieutenant Governor “A Damd Fool for not Hoisting the King's Standard.” In the context of a further dispute over a past due account where a Committee summons was invoked to assist in collection, Webb attacked “The Committee” directly as a “Sett of Mechanical, Ignorant Rascals ... Butchers, Taylers & Cobblers.” He further hoped that “the men of War” would take the delegates “Prisoners & carry them to England, There to be Treated as Rebels,” noting “How Pretty the Foolish Rascals of Property would Look when their Lands & Negroes comes to be forfeited to the King.” In a final attack, Webb suggested that “It was a Pity there was not a Gallows in charlestown to hang all the Americans in a String, & as for

¹⁰⁹ “Journal of the Committee of Safety,” in Lincoln, *Journals of Each Provincial Congress*, 505–506.

¹¹⁰ *Ibid.*, 505–511.

¹¹¹ *Ibid.*, 513.

¹¹² *Ibid.*, 518–520.

¹¹³ “Papers of the First Council of Safety of the Revolutionary Party in South Carolina, June–November, 1775,” *The South Carolina Historical and Genealogical Magazine*, 1 (1900): 41–75, 42–43, 49–51, 52–61.

the Committee They were a Lousey Sett. Blackgards, such as Butchers, & Taylers.” In consequence, Melcher Garner, Chairman of the St. Paul’s Parish Committee, ordered Webb “Guilty of the Accusation,” whereby “Wee Therefore Look on him as an Enemy to This Province & America in General And an Object of the Resentment of the Public.”¹¹⁴

While detailed descriptions of the actual enforcement of loyalty oaths and the policing of dissent by Committees of Safety are more rare in the extant primary sources, the account of one Janet Schaw in her *Journal of a Lady of Quality* has been seized upon by historians for its more granular detail.¹¹⁵ Like so many of its counterparts, the Wilmington, North Carolina, Committee of Safety in March 1775 produced an oath of allegiance in accord with the Continental Association (akin to the South Carolina oath quoted earlier). They also voted that its members move quickly and en masse to canvass householder signatures so that “enemies of their country may be set forth to public view and treated with the contempt they merit.”¹¹⁶ The eleven merchants and planters who refused to sign were swiftly boycotted, and things escalated from there. In her journal, Janet Schaw described walking to Wilmington in the midst of the chaos that ensued. Entry to town was “closed up by a detachment of soldiers,” but she was allowed to pass. Once in town, she noticed several acquaintances—no doubt “of quality” as well—but whom she now recognized “were prisoners.” “Every avenue of the town was shut up,” she recalled, and “in all human probability some scene would be acted very unfit for me to witness ... I became unable to move and absolutely petrified with horror.”¹¹⁷ According to the royal governor, a large band of local soldiers and militia had actually threatened resisters with “military execution.” But Schaw recounted that “the prisoners stood firm to their resolution of not signing the Test, till past two in the morning, tho’ every threatening was used to make them comply.” At last, “They were suffered to retire on their parole to appear next morning.” By August 1775, the royal governor reported the endgame, wherein “the Scotch merchants at Wilmington who so long maintained their loyalty have lately ... been compelled ostensibly to join in sedition by appearing under arms at the musters appointed by the committees.”¹¹⁸

From socio-economic provisioning and domestic necessities to military mustering, property confiscation, and the policing of dissent, the record of America’s first independent governing bodies—Provincial Congresses and Committees of Safety—is one of surprising power and force.

Conclusion: Salus Populi

This article posits but a single test case—the record of the earliest revolutionary state legislatures and executive committees—as a new starting point for reassessing

¹¹⁴ *Ibid.*, 62–65.

¹¹⁵ Evangeline Walker Andrews, *Journal of a Lady of Quality*, 189–193; Breen, *American Insurgents*, 186–197.

¹¹⁶ Andrews, *Journal of a Lady*, 192.

¹¹⁷ *Ibid.*

¹¹⁸ *Ibid.*, 193–194.

conventional wisdom about the historical meaning of the founding period and the power and nature of the earliest American state. Here, conventional wisdom is found wanting. In place of conventional portraits of a simple rights orientation, negative liberty, and limitations on state power, the earliest reports of legislative and executive action reveal the tip of a fairly large but submerged empirical record dedicated to the extensive use of state regulatory power, interventionist socioeconomic policymaking, and broad-scale policing of public safety. But, of course, there are so many other places to look in due time. This article, for example, has said little about the extraordinary record of the Continental Congress itself. So, let me conclude with a final example from the Congress at the end of this crucial period of American history that reinforces this key theme.

One of the more significant constitutional moments in the history of the American republic occurred in the Continental Congress on September 26 and 27, 1787. On those dates, the handiwork of the Constitutional Convention in Philadelphia was “laid before the United States in Congress assembled”—i.e., the Continental Congress. And the question for the only official body of U.S. governance at that time was what to do with what could only be officially thought of as something like an all-important committee report. Under Article 13 of the Articles of Confederation, any alteration of the Articles had to be agreed to by Congress and confirmed by the legislatures of every state. Notably, the Philadelphia Convention had already decided upon a different mode of ratification via conventions in only nine of the original states (contravening the very Article upon which Congress officially recommended a Philadelphia convention in the first place). So, what should Congress do with this document so “laid before” it? Could it amend the document? Should it vote to approve or disapprove the document? So precarious was this moment and so vulnerable was the nascent Constitution at this time that the Journals of the Continental Congress contain very little record of the secret debates that ensued. Consequently, scholars have substantively relied upon the more detailed notes of Melancton Smith.¹¹⁹

Though there is much worth discussing in this short but momentous constitutional debate at the end of this historical period, one important aspect has been overlooked by scholars. For at the very center of the crucial debate that Smith noted, there was an almost constant reference by the founders to “*salus populi*” as the primary substantive rationale through which the U.S. Constitution would pass through Congress to the state ratification conventions. *Salus populi*—the safety of the people, the welfare of the people—came from the common law maxim “*salus populi suprema lex est*” (“the welfare of the people is the highest law”). *Salus populi* was mentioned four times in Smith’s notes, including a last mention that “the *salus populi* much talked of.”¹²⁰ *Salus populi*

¹¹⁹ The best discussions of this pivotal moment are Pauline Maier, *Ratification: The People Debate the Constitution, 1787-1788* (New York: Simon and Schuster, 2020), 52-59; Julius Goebel, Jr., “Melancton Smith’s Minutes of Debates on the New Constitution,” *Columbia Law Review*, 64 (1964), 26-43; and Bruce Ackerman and Neal Katyal, “Our Unconventional Founding,” *University of Chicago Law Review*, 62 (1995), 475-573.

¹²⁰ Melancton Smith, “Notes of Debates,” *Letters of Delegates to Congress*, 24 (September 27, 1787), 439-444.

and its grounds of necessity, public welfare, public spirit, and the health and safety of the populace would go on to become a major principle of American common law and one of the key bases of U.S. state police power—a foundation for modern American legislative power in general.¹²¹ One of its key legal-constitutional consequences was the idea that public right was always supreme to private right. In an early American historiography centered on notions of private rights and limited governance, it is perhaps not surprising that historians have missed the central place of *salus populi* in the creation of the new republic. It is my hope that a fresh investigation into the actual output of the earliest American governing institutions might shed new light on the roles of public welfare, socio-economic provision, and social policing—the public and its problems—in the original American founding vision.

Acknowledgments. Special thanks to Jack Balkin, Joshua Canale, John Cisternino, Greg Downs, Laura Edwards, Heather Foster, Jonathan Gienapp, Sally Gordon, Amy Kapczynski, Alison LaCroix, Naomi Lamoreaux, Kate Masur, Kieran O’Keefe, Farah Peterson, Richard Primus, Gautham Rao, Stephen Sawyer, and Jim Sparrow.

¹²¹ For a fuller elaboration of the role of *salus populi* and police power in 19th-century statecraft, see Novak, *People’s Welfare*.

Cite this article: William J. Novak, “Legislation, Regulation, and Administration in the American Revolution,” *Law and History Review* (2025): 1–30. <https://doi.org/10.1017/S0738248025101235>