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ADMINISTRATIVE CONSTITUTIONALISM AND THE  
NORTHWEST ORDINANCE

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“[A]re not the people in this territory in a much worse situation, than the United States were, before the late revolution?”<sup>1</sup>

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INTRODUCTION

Since 1934, four “organic laws” of the United States have prefaced the volumes of the U.S. Code: the Declaration of Independence, the Articles of

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<sup>1</sup> Vitruvius, *Cincinnati, October 4*, CENTINEL NORTH WESTERN TERRITORY, Oct. 4, 1794, <https://news.google.com/newspapers?id=VshFAAAAIBA&sjid=oeMMAAAAIBA&pg=3988%2C1018866> [https://perma.cc/p6QZ-CLET].

Confederation, the U.S. Constitution, and the Northwest Ordinance.<sup>2</sup> Formally an ordinary statute that established the first federal territory, the Ordinance's exalted company suggests its exceptional status within the nation's constitutional history.<sup>3</sup> The Ordinance's protections of freedom of worship, private property, and jury trials, and its ban on "cruel or unusual punishments," all prefigured, sometimes verbatim, the provisions of the Bill of Rights.<sup>4</sup> Its prohibition on slavery rendered the Ohio River the ostensible divide between "free" and "slave" territory,<sup>5</sup> while the document's promise to admit the territories as future states "on an equal footing" with other states became a foundational principle of federalism.<sup>6</sup> And the law's requirement that the "utmost good faith shall always be observed towards the Indians," even as it anticipated that "[I]ndian titles shall have been extinguished," epitomized the contradictory and often hypocritical nature of U.S. settler colonialism.<sup>7</sup>

But, while historians and legal scholars have thoroughly explored the Ordinance's quasi-constitutional aspects, they have largely ignored most of

<sup>2</sup> 1 U.S.C., at XLV–LXXV (2012).

<sup>3</sup> For the original text of the Ordinance, see 32 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 334–43 (Roscoe R. Hill ed., 1936) [hereinafter NORTHWEST ORDINANCE]. The Ordinance was reenacted after the adoption of the Constitution with minor alterations to conform to the new constitutional system. See Act of Aug. 7, 1789, ch. 8, 1 Stat. 50, 51–53.

<sup>4</sup> NORTHWEST ORDINANCE, *supra* note 3, at 340. For examples of recent works that read the Ordinance in light of the Constitution, see generally AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY 258–62 (2012); PETER S. ONUF, STATEHOOD AND UNION: A HISTORY OF THE NORTHWEST ORDINANCE (1987); Matthew J. Festa, *Property and Republicanism in the Northwest Ordinance*, 45 ARIZ. ST. L.J. 409 (2013); Denis P. Duffey, Note, *The Northwest Ordinance as a Constitutional Document*, 95 COLUM. L. REV. 929 (1995); Matthew J. Hegreness, Note, *An Organic Law Theory of the Fourteenth Amendment: The Northwest Ordinance as the Source of Rights, Privileges, and Immunities*, 120 YALE L.J. 1820 (2011).

<sup>5</sup> NORTHWEST ORDINANCE, *supra* note 3, at 343. Multiple scholars have traced how this provision nonetheless failed to eliminate slavery in the Northwest Territory and the states carved from it. See generally M. SCOTT HEERMAN, THE ALCHEMY OF SLAVERY: HUMAN BONDAGE AND EMANCIPATION IN THE ILLINOIS COUNTRY, 1730–1865 (2018); MATTHEW SALAFIA, SLAVERY'S BORDERLAND: FREEDOM AND BONDAGE ALONG THE OHIO RIVER (2013); Paul Finkelman, *Slavery and the Northwest Ordinance: A Study in Ambiguity*, 6 J. EARLY REPUBLIC 343 (1986).

<sup>6</sup> NORTHWEST ORDINANCE, *supra* note 3, at 342; accord *Coyle v. Smith*, 221 U.S. 559, 579–80 (1911) (ruling that Congress cannot require conditions for admission to the Union that would impair a new state's equal standing). On this aspect of the Ordinance, see Robert S. Hill, *Federalism, Republicanism, and the Northwest Ordinance*, 18 PUBLIUS 41, 49 (1988) ("The commitment to equal statehood has the character of a sacred pledge."); Peter S. Onuf, *New State Equality: The Ambiguous History of a Constitutional Principle*, 18 PUBLIUS 53, 54–57 (1988) (explaining how the Court constitutionalized the "equal footing" principle by prohibiting restrictive state admission conditions).

<sup>7</sup> NORTHWEST ORDINANCE, *supra* note 3, at 337, 340. For discussion of the Ordinance's implications for Native peoples, see Robert F. Berkhofer, *Americans Versus Indians: The Northwest Ordinance, Territory Making, and Native Americans*, 84 IND. MAG. HIST. 90, 92–95 (1988); Jack N. Rakove, *Ambiguous Achievement: The Northwest Ordinance*, in THE NORTHWEST ORDINANCE: ESSAYS ON ITS FORMULATION, PROVISIONS, AND LEGACY 1, 2 (Frederick D. Williams ed., 1989).

what the Ordinance actually did: create a structure of governance.<sup>8</sup> In the Ordinance, Congress delegated executive, legislative, and judicial power over the Northwest Territory, subject to limits imposed by Congress, to five presidentially selected and congressionally confirmed federal officials: a governor serving a three-year term; a secretary (effectively lieutenant governor) serving a four-year term; and three judges who served during good behavior.<sup>9</sup> The governor and judges collectively served as the territorial legislature, at least until there were “five thousand free male inhabitants,” when the Ordinance authorized an elected “general assembly.”<sup>10</sup> Until that point, too, the territorial governor appointed all local “magistrates and other civil officers.”<sup>11</sup>

Viewed anachronistically, territorial government under the Ordinance strongly resembled the modern administrative state: it explicitly empowered federal officials within the executive branch<sup>12</sup> to exercise “binding legislative and judicial power” over U.S. citizens.<sup>13</sup> Yet surprisingly, the early history of the territories has played almost no role in the intensifying scholarly debates over administrative law’s constitutional legitimacy.<sup>14</sup> Even scholars who

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<sup>8</sup> See generally R. Douglas Hurt, *Historians and the Northwest Ordinance*, 20 W. HIST. Q. 261 (1989) (providing an overview of the Ordinance’s historiography). As Hurt notes, an older strand of scholarship *did* focus on the imposed and arguably undemocratic nature of the Ordinance. See *id.* at 267-69.

<sup>9</sup> NORTHWEST ORDINANCE, *supra* note 3, at 335-36. The reenactment of the Ordinance after the Constitution’s ratification substituted presidential for congressional appointment of territorial officials. Act of Aug. 7, 1789, ch. 8, § 1, 1 Stat. 50, 52-53.

<sup>10</sup> NORTHWEST ORDINANCE, *supra* note 3, at 336-37.

<sup>11</sup> *Id.*

<sup>12</sup> The territorial governor and secretary were officers of the United States who reported to the Secretary of State. The status of territorial courts and judges was unstated, but the evidence strongly suggests that they were not considered part of the Article III judiciary, as the Court would later rule. See *Am. Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511, 546 (1828) (describing territorial courts as “legislative Courts” as opposed to “constitutional Courts, in which the judicial power [is] conferred by the Constitution”). As Jerry Mashaw points out, the Salary Act of 1789 listed the “three judges of the ‘western territory’” as “Executive Officers.” Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787-1801*, 115 YALE L.J. 1256, 1288 (2006). Moreover, although those three congressionally appointed territorial judges served during good behavior, NORTHWEST ORDINANCE, *supra* note 3, at 336—a provision abandoned in later federal territories—lower court territorial judges were unambiguously not Article III judges: they were appointed by the governor and served during his pleasure, ANDREW R. L. CAYTON, *THE FRONTIER REPUBLIC: IDEOLOGY AND POLITICS IN THE OHIO COUNTRY, 1780-1825* 65-66 (1986). The Judiciary Act of 1789, which established the lower federal courts, contained no mention of the territorial courts, see Act of Sept. 24, 1789, ch. 20, 1 Stat. 73; and, until 1805, there was no provision for appeal from the territorial courts to the U.S. Supreme Court, see Act of March 3, 1805, ch. 38, 2 Stat. 338, 338-39.

<sup>13</sup> PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* 4 (2014).

<sup>14</sup> This absence is particularly surprising given that Gary Lawson, one of the strongest critics of the constitutionality of administrative law, has also written extensively on the constitutional law of American empire. See, e.g., GARY LAWSON & GUY SEIDMAN, *THE CONSTITUTION OF EMPIRE: TERRITORIAL EXPANSION AND AMERICAN LEGAL HISTORY* (2004); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1231 (1994) (opining that “[t]he post-New

recognize the broad scope of early federal administrative practice posit the existence of a constitutional “hole where administration might have been,”<sup>15</sup> notwithstanding the Constitution’s grant of power to Congress to craft “all needful Rules and Regulations” for federal territories<sup>16</sup>—a provision adopted, James Madison suggested, specifically to validate the Northwest Ordinance.<sup>17</sup>

This omission of the territories from discussions of administrative law’s history reflects two related assumptions. The first is that early federal territorial governance, although authorized by Congress, actually rested on “local legislative power that comes from below.”<sup>18</sup> Superficially, the Ordinance’s language supports this claim: it closely resembled state constitutions grounded in popular sovereignty and even purported to be an “unalterable” “compact” between existing and future states.<sup>19</sup> Yet in reality, the Ordinance imposed and staffed a government almost entirely from above. The people governed by the Ordinance had no say in its creation or adoption: Congress enacted it without any process for ratification or assent, and territorial citizens lacked voting representation in Congress. Governance *within* the Territory was also arguably undemocratic. Until the territory’s population reached 5,000 white men, at which point the Ordinance authorized an elected legislature (its sole concession to self-governance), there were no territorial officials selected by, or representing, the governed.<sup>20</sup> As the U.S. Attorney General wrote in 1799, “[t]he governor and all persons in authority [in the Northwest Territory] derive their authority from the present constitution of the United States or from Congress . . . .”<sup>21</sup>

The second and related assumption is that the territories were exceptional, “anomalous zones” whose governance through federal fiat

Deal administrative state is unconstitutional, and its validation by the legal system amounts to nothing less than a bloodless constitutional revolution”).

15 JERRY L. MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW* 29-33 (2012); *but see* Maggie McKinley, *Petitioning and the Making of the Administrative State*, 127 *YALE L. J.* 1538, 1600-11 (2018) (rooting the subsequent administrative state—which she dubs the “participatory state”—in the Petitions Clause).

16 U.S. CONST. art. IV, § 3.

17 *See* THE FEDERALIST NO. 38, at 191-92 (James Madison) (Ian Shapiro ed., 2009).

18 HAMBURGER, *supra* note 13, at 389-90; *see also* William Baude, *Adjudication Outside Article III*, 133 *HARV. L. REV.* (forthcoming 2020) (manuscript at 12-20), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3194945](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3194945) [<https://perma.cc/P4WS-7QCH>] (arguing that territorial courts exercise the judicial power of their territory rather than of the United States). The Supreme Court recently rejected the argument that the territories derive their authority from popular sovereignty as a matter of doctrine. *See* *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1874 (2016).

19 NORTHWEST ORDINANCE, *supra* note 3, at 339-40.

20 *Id.* at 337.

21 Letter from Attorney General to Secretary of State (Aug. 22, 1799), in 3 THE TERRITORIAL PAPERS OF THE UNITED STATES 66, 66-67 (Clarence Edward Carter ed., 1934).

reflected expediency rather than constitutional principle.<sup>22</sup> Some commentators have even suggested that large swaths of the Northwest Ordinance are unconstitutional, an odd claim for a text long thought to be foundational to U.S. constitutional thought.<sup>23</sup> Not only does such an approach improbably disregard what the drafters of the Constitution repeatedly said the text meant, it also ignores over two centuries of governmental practice, which even those who emphasize textualism concede has an important role in constructing constitutional meaning.<sup>24</sup> As for the suggestion that the territories were a minor exception to “normal” structures of constitutional governance, this assertion, dubiously descriptive of the present, is particularly inapposite for the eighteenth and nineteenth centuries. As a number of commentators have emphasized, the territories represented one of the most significant sites of federal governance in the early United States;<sup>25</sup> they also empowered Congress, through its control over admission to statehood, to dictate the nation’s political future.<sup>26</sup> Consequently, as even a casual glance at U.S. constitutional history reveals, the territories were fundamental to nearly every major constitutional controversy of the long nineteenth century: most notably slavery,<sup>27</sup> but also

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<sup>22</sup> See, e.g., KAL RAUSTIALA, *DOES THE CONSTITUTION FOLLOW THE FLAG?: THE EVOLUTION OF TERRITORIALITY IN AMERICAN LAW* 31-58 (2009) (describing how early American’ ambitions for geographic expansion “raised quandaries about the relationship between territoriality and sovereignty”); Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 *TEX. L. REV.* 1, 250 (2002) (arguing that the Court’s jurisprudence on the territories “reflected an approach to national sovereignty radically different from the concepts of enumerated powers and limited government, with powers reserved to the states and the people, that inspired the Constitution”); Gerald L. Neuman, *Anomalous Zones*, 48 *STAN. L. REV.* 1197, 1200-01 (1996) (defining an “anomalous zone” as “a geographical area in which certain legal rules, otherwise regarded as embodying fundamental policies of the larger legal system, are locally suspended”).

<sup>23</sup> See, e.g., Gary Lawson, *Territorial Governments and the Limits of Formalism*, 78 *CALIF. L. REV.* 853, 907-08, 910 (1990) (explaining that “[a] strict reading of the text and structure of the Constitution—my formalist approach—leads to conclusions almost certainly at odds with the intentions of most of the relevant participants in the Constitution’s framing and adoption,” including an elected territorial legislature and a non-Article III judiciary).

<sup>24</sup> See, e.g., *NLRB v. Noel Canning*, 573 U.S. 513, 525 (2014) (“[T]he longstanding ‘practice of the government’ can inform our determination of ‘what the law is.’”) (citations omitted); William Baude, *Constitutional Liquidation*, 71 *STAN. L. REV.* 1 (2019) (tracing how long-established and settled practice can “liquidate” the meaning of ambiguous constitutional provisions).

<sup>25</sup> See generally BRIAN BALOGH, *A GOVERNMENT OUT OF SIGHT: THE MYSTERY OF NATIONAL AUTHORITY IN NINETEENTH-CENTURY AMERICA* 185-97 (2009); WILLIAM H. BERGMANN, *THE AMERICAN NATIONAL STATE AND THE EARLY WEST* (2012).

<sup>26</sup> See U.S. CONST. art. IV, § 3, cl. 1 (granting Congress the power to admit new states into the union and requiring its consent for territorial changes to existing states).

<sup>27</sup> See, e.g., *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 431-32 (1856) (resolving the interconnected questions of federal authority over the territories and the congressional power to bar the importation of slaves).

religious freedom,<sup>28</sup> property ownership,<sup>29</sup> racial discrimination,<sup>30</sup> citizenship,<sup>31</sup> and the scope and nature of constitutional rights.<sup>32</sup>

The language of exception does important work in the present, however, because it preserves a particular vision of the “Founding.” Administrative law, we are told, was a relic of British legal thought consciously repudiated in the American Revolution, which insisted that law be rooted in popular sovereignty.<sup>33</sup> This forward-looking perspective of a world made anew echoes revolutionary-era rhetoric, yet it ignores a more complicated relationship between federal governance and its imperial antecedents. As recent legal histories have demonstrated, British precedents and thought remained deeply entangled within the new nation’s constitutional project.<sup>34</sup>

This backward-looking view was particularly significant for territorial governance. Often discussed as the “colonies” of the new nation,<sup>35</sup> the territories directly raised the question of how the center could legitimately govern the periphery—the questions of imperial constitutional structure that had prompted the Revolution. Early Americans, who routinely spoke of the United States as an empire,<sup>36</sup> recognized this parallel. As James Monroe stated of an early version of what became the Northwest Ordinance, “It is in

<sup>28</sup> See, e.g., SARAH BARRINGER GORDON, *THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH-CENTURY AMERICA* 49, 65 (2002) (describing Congress’s attempts to intervene in marriage practices in the Territory of Utah).

<sup>29</sup> See, e.g., Gregory Ablavsky, *The Rise of Federal Title*, 106 CALIF. L. REV. 631, 658-59 (2018) (highlighting how the federal government used its authority in the territories to rework the meaning of property).

<sup>30</sup> See, e.g., KATE MASUR, *AN EXAMPLE FOR ALL THE LAND: EMANCIPATION AND THE STRUGGLE OVER EQUALITY IN WASHINGTON, D.C.* 223-25, 232 (2010) (describing the complicated relationship between African Americans and the territorial government and ways in which African Americans strove to obtain racial equality).

<sup>31</sup> See, e.g., SAM ERMAN, *ALMOST CITIZENS: PUERTO RICO, THE U.S. CONSTITUTION, AND EMPIRE* (2018) (recounting litigation over the citizenship status of residents in the U.S. territories).

<sup>32</sup> See *infra* Part II.

<sup>33</sup> See generally HAMBURGER, *supra* note 13.

<sup>34</sup> For works exploring the interrelationship between pre-revolutionary precedents and subsequent constitutional practice in the early United States, see generally MARY SARAH BILDER, *THE TRANSATLANTIC CONSTITUTION: COLONIAL LEGAL CULTURE AND THE EMPIRE* (2004); DANIEL J. HULSEBOSCH, *CONSTITUTING EMPIRE: NEW YORK AND THE TRANSFORMATION OF CONSTITUTIONALISM IN THE ATLANTIC WORLD, 1664-1830* (2005); and ALISON L. LACROIX, *THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM* 44-59, 79-80 (2010).

<sup>35</sup> See *infra* Part II.A.

<sup>36</sup> For the uses of the term “empire” and its meanings in the early United States, see PETER S. ONUF, *JEFFERSON’S EMPIRE: THE LANGUAGE OF AMERICAN NATIONHOOD* 53-61 (2000); JAMES G. WILSON, *THE IMPERIAL REPUBLIC: A STRUCTURAL HISTORY OF AMERICAN CONSTITUTIONALISM FROM THE COLONIAL ERA TO THE BEGINNING OF THE TWENTIETH CENTURY* 11 (2002).

effect to be a colonial govt similar to that w[hic]h prevail'd in these States previous to the revolution . . . ."<sup>37</sup>

The early territories reveal, then, the limits of popular sovereignty in the United States—not only because, as present-day scholars have stressed, the nation explicitly excluded women, African-Americans, and Native peoples from governance, but also because territorial governance failed to include the people, however narrowly defined, in making the laws that governed them. Unlike most present-day commentators, territorial citizens readily grasped this imperial aspect of the Northwest Ordinance, which proved controversial. Territorial politics, wracked by intense constitutional debates, sometimes made it seem as though the American Revolution had never really ended, as territorial citizens litigated issues that the war had supposedly settled. Here, I focus on two particularly contentious questions of the 1790s with close parallels in the imperial crisis: the relationship between military and civil authority, and the uncertain jurisdictional and constitutional status of the territories within the United States.

Yet, for all that territorial constitutional debates closely resembled revolutionary controversies, they unfolded quite differently. The key difference was not the existence of a written U.S. constitution: although the Northwest Territory actually had *two* authoritative constitutional documents, given the Ordinance's claim to fundamental law, constitutional argument there maintained the eclecticism of sources that had long characterized early American constitutionalism.<sup>38</sup> What marked the Northwest Territory, rather, was the limited institutional scope for these constitutional arguments. Until 1805, for instance, there was no appeal from territorial courts to the U.S. Supreme Court.<sup>39</sup> Congress and the executive both enjoyed considerable power over the territories, but both, preoccupied by geopolitics, showed little interest in intervening in quotidian local disputes. The outcome was a sort of administrative constitutionalism by default, as the governor, secretary, and judges/legislators often had to hash out these questions themselves. Their arguments produced much disagreement but little resolution: Secretary of State Edmund Randolph dismissively referred to the territory's records as "little more, than a history of bickerings and discontents."<sup>40</sup>

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<sup>37</sup> Letter from James Monroe to Thomas Jefferson (May 11, 1786), in 2 THE PAPERS OF JAMES MONROE 298, 298-99 (Daniel Preston & Marlana C. DeLong eds., 2006).

<sup>38</sup> See generally JONATHAN GIENAPP, THE SECOND CREATION: FIXING THE AMERICAN CONSTITUTION IN THE FOUNDING ERA (2018).

<sup>39</sup> See *Clarke v. Bazadone*, 5 U.S. (1 Cranch) 212, 214 (1803) (ruling that the Supreme Court could not take a case from the Northwest Territory because an "act of congress had not authorized an appeal or writ of error"), *superseded by statute*, Act of March 3, 1805, *supra* note 11 (authorizing the Supreme Court to review appeals from territorial courts).

<sup>40</sup> Letter from Secretary of State to President (Jan. 4, 1794), in 2 THE TERRITORIAL PAPERS OF THE UNITED STATES 472, 472-73 (Clarence Edwin Carter ed., 1934).

Ironically, these bickerings were among the earliest discussions of some of the most fundamental constitutional questions in U.S. history, issues that endure into the present. But this history of early debate in the territories was lost. One consequence of ignoring this early administrative constitutionalism is the assumption, beginning with the Louisiana Purchase and going forward, that questions about, for instance, the Constitution's geographic scope, were new, the result of changed circumstances. In fact, as the history presented here suggests, the uncertainties and contradictions raised by territorial governance existed from the beginning.

## I. CIVIL AND MILITARY AUTHORITY IN THE NORTHWEST TERRITORY

The early U.S. Army was small. Even at the height of the war against the Northwest Indian Confederacy in the early 1790s, the army only amounted to a few thousand soldiers.<sup>41</sup> Yet the army loomed large in the Northwest Territory, where nearly the entire federal military was stationed. Part of what made the Northwest Territory an imperial space was the presence of federal military power, with the attendant threat of raw force and violence.

The existence of the military in the midst of civilians made for an uneasy division of authority. In particular, two interrelated constitutional issues arose. The first was the exercise of military jurisdiction over civilians; the second was the extent to which civil authority extended over internal military matters. Both raised uncomfortable memories of the imperial crisis in a nation that had decried British tyranny for "render[ing] the Military independent of and superior to the Civil power."<sup>42</sup> Drawing the boundaries between military and civil authority plagued the Territory with "jostleings of the executive, judicial, and military powers"—a contest "always pregnant with evils," in the words of one territorial judge.<sup>43</sup>

### A. *Military Jurisdiction over Civilians*

Anglo-American law, especially as interpreted by the citizens of the new nation, was hostile to military rule, with its connotations of despotism. Anxieties over a standing army figured prominently in Anti-Federalist critiques of the Constitution, and suspicion of military authority remained

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<sup>41</sup> On the history of the early federal military, see generally RICHARD H. KOHN, *EAGLE AND SWORD: THE FEDERALISTS AND THE CREATION OF THE MILITARY ESTABLISHMENT IN AMERICA, 1783–1802* (1975).

<sup>42</sup> THE DECLARATION OF INDEPENDENCE para. 14 (U.S. 1776).

<sup>43</sup> Letter from John Cleves Symmes to Winthrop Sargent (June 30, 1792), in Winthrop Sargent Papers (on file with the Massachusetts Historical Society, Reel 3).

widespread.<sup>44</sup> But, while some in the Washington Administration shared this skepticism, others, particularly Secretary of the Treasury Alexander Hamilton and Secretary of War Henry Knox, regarded the creation of a functional national army as one of the core purposes of the new Constitution. To them, the military's hierarchical, top-down structure promised the "energy" for enforcing federal law lacking under the Articles of Confederation.<sup>45</sup>

The use of the army for law enforcement was particularly prominent in the Northwest Territory prior to the adoption of the Northwest Ordinance, when no formal civil authority existed. To fill this jurisdictional void, Congress granted the military exceptional authority, charging it with expelling illegal settlers from lands north of the Ohio River.<sup>46</sup> One army commander, relishing the opportunity to "give them [the settlers] *federal Law*," ordered his soldiers to evict settlers, destroy their crops, and burn their homes.<sup>47</sup> This pattern persisted throughout the existence of the Northwest Territory: in 1799, Joshua Fleeheart had his salt works on Indian land completely destroyed by the army, allegedly resulting in over \$2000 in damages.<sup>48</sup>

The army's status as the only Anglo-American institution with jurisdiction over much of the Northwest Territory also led the military to act as a quasi-judicial institution. In one case, there being "no tribunal" under civil law, the commander at a local fort, Captain Asheton, made himself judge in a local debt dispute.<sup>49</sup> Finding for the debtor, this ad hoc proceeding ordered that the creditor receive forty lashes for taking the debtor's axe as partial repayment of the debt.<sup>50</sup>

Even after the enactment of the Northwest Ordinance, army officers were loath to concede the authority they had amassed. Some officials asserted that the long-settled French *habitants* of the region favored military rule: "the

<sup>44</sup> See SAUL CORNELL, *THE OTHER FOUNDERS: ANTI-FEDERALISM AND THE DISSENTING TRADITION IN AMERICA, 1788–1828* 28 (1999) (identifying "[f]ears about the creation of a standing army" as one of Anti-Federalists' five main critiques of the Constitution); KOHN, *supra* note 41, at 73–88 (stressing "public apprehension about standing armies" in constitutional debates).

<sup>45</sup> See KOHN, *supra* note 41, at 54–72 (describing the weaknesses of the Confederation-era military); see also MAX M. EDLING, *A REVOLUTION IN FAVOR OF GOVERNMENT: ORIGINS OF THE U.S. CONSTITUTION AND THE MAKING OF THE AMERICAN STATE* 47–58 (2003) (arguing that the creation of a "fiscal-military state" was one of the purposes of the Constitution).

<sup>46</sup> Congress later codified this authority in the Trade and Intercourse Acts. See Act of May 19, 1796, ch. 30, § 5, 1 Stat. 469, 470; Act of Mar. 1, 1793, ch. 19, § 5, 1 Stat. 329, 330.

<sup>47</sup> Letter from Josiah Harmar to Henry Knox (Aug. 4, 1786), in Josiah Harmar Papers, (on file with the Clements Library, University of Michigan, Vol. 28, Letterbook A).

<sup>48</sup> See Affidavit, *Flaherty v. Chribbs* (May 1, 1801), (on file with Knox County Public Library, Vincennes, Ind., Knox County Court File Box 7, File 562), <http://visions.indstate.edu:8888/cdm/ref/collection/ving/id/11900> [<https://perma.cc/H4N2-GLC3>].

<sup>49</sup> Letter from Michael Lacassagne to George Washington (Oct. 26, 1789), in 4 PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES 229, 229–32 (Dorothy Twohig ed., 1993), available at <https://founders.archives.gov/documents/Washington/05-04-02-0162> [<https://perma.cc/XC75-72HY>].

<sup>50</sup> See *id.*

command or order of the Military commandant is better law and speedier [sic] justice for them & what they prefer," one territorial judge reported, "to all the legal systems found in Littleton and Blackstone."<sup>51</sup> Officers were also dubious about the efficacy of civil institutions in the Territory. In the raucous Anglo-American settlements newly made along the Ohio River, the inhabitants' "uncontroled-Licentiousness [sic]" supposedly made it impossible to govern them through juries, constables, and justices of the peace.<sup>52</sup> "[W]e Shall never have good government in this County," one local magistrate grumbled, "till we have a Military Establishment to enforce the laws and Create Respect for the Government."<sup>53</sup>

Yet the principal argument advanced in favor of military jurisdiction was necessity. Exercising military authority over civilians under a "free Government," was, territorial secretary Winthrop Sargent acknowledged, "very delicate," yet the military was the only institution capable of exercising authority in a place "totally destitute of the Benefits of civil Law & Magistrates."<sup>54</sup> A military officer similarly argued that the Territory's "present situation" made military authority "necessary."<sup>55</sup> "Civil Law is an admirable institution any where," the officer wrote, "except on a frontier situated in the center of an Indian Country and in a time of War."<sup>56</sup>

Territorial citizens sharply disagreed. Steeped in the imperial crisis, they insisted that military authority over civilians was "subversive of those principles established by the American revolution."<sup>57</sup> At every turn, military and federal officials confronted citizens wielding legal arguments against their jurisdiction. The "intruders" living north of the Ohio, for instance, bitterly protested that the military lacked the authority to remove them.<sup>58</sup> One of the most heated responses came from Michael Lacassange, a Kentucky merchant who wrote directly to President Washington to protest Captain Asheton's intervention in the debt dispute (which involved two of Lacassagne's tenants).<sup>59</sup> Surely the President would not permit an American citizen to be

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<sup>51</sup> Letter from John Cleves Symmes to Robert Morris (June 22, 1790), in *THE CORRESPONDENCE OF JOHN CLEVES SYMMES* 290, 290 (Beverly Bond, Jr. ed., 1926)

<sup>52</sup> Letter from Acting Governor Sargent to Governor St. Clair (Feb. 12, 1793), in 2 *TERRITORIAL PAPERS*, *supra* note 40, at 433.

<sup>53</sup> Letter from William St. Clair to Arthur St. Clair (Oct. 25, 1794), in Arthur St. Clair Papers (on file with the Ohio Historical Society, Roll 4).

<sup>54</sup> Letter from Winthrop Sargent to John Francis Hamtramck (July 16, 1790), in 3 *TERRITORIAL PAPERS*, *supra* note 21, at 321.

<sup>55</sup> Letter from John Francis Hamtramck to Secretary of War (Mar. 31, 1792), in 2 *TERRITORIAL PAPERS*, *supra* note 40, at 381.

<sup>56</sup> *Id.* at 381.

<sup>57</sup> Lacassange to Washington, *supra* note 49.

<sup>58</sup> ONUF, *supra* note 4, at 28-33.

<sup>59</sup> See Lacassange to Washington, *supra* note 49.

deprived of rights purchased through “so much blood and treasure” in the Revolution.<sup>60</sup> To such a citizen, Lacassange asserted, being subjected to the arbitrary punishment of a military officer like Asheton “must be worse than death itself.”<sup>61</sup>

As these instances demonstrate, civilians constantly challenged military efforts to claim jurisdiction over them. In these contests, complaints to superiors sometimes proved an effective check against perceived military overreach. Lacassange’s complaint, for instance, produced an investigation and a court of inquiry (which apparently ultimately vindicated Asheton),<sup>62</sup> while allegations that Northwest Territorial Governor Arthur St. Clair had overstepped his authority prompted a cautionary letter from President Washington warning him to exercise “the utmost circumspection.”<sup>63</sup> Even on a distant frontier, federal officials were well aware of scrutiny of their actions from Philadelphia, which often served as the most effective limit on their behavior.

Yet appeals to the administration took months, even years, to resolve, if they were ever addressed at all. Many inhabitants of the territory turned to what seemed a speedier source of justice: local magistrates and courts. As a result, the question of military jurisdiction over civilians quickly transformed into a fight over the scope of civilian jurisdiction over the military; it also became a bitter struggle *among* territorial officials.

### B. *Civil Jurisdiction over the Military*

Federal officials in the Northwest Territory had sharply differing views on the proper relationship between military and civil authority. The Territory’s executives, Governor Arthur St. Clair and Secretary Winthrop Sargent, had both served in the Continental Army and now held military as well as civil positions in the new federal government.<sup>64</sup> Both were deeply committed to establishing national authority over a region that the federal government only tenuously controlled and believed the military was central to that project. Creating a robust military presence, St. Clair argued, would ensure that “[t]he People . . . saw and felt that the Government of the Union was not a mere shadow: their progeny . . . would learn to reverence the Government.”<sup>65</sup>

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<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *See id.* at n.3.

<sup>63</sup> Letter from President Washington to Gov. Arthur St. Clair (Jan. 2, 1791), in 2 TERRITORIAL PAPERS, *supra* note 40, at 321.

<sup>64</sup> *See* CAYTON, *supra* note 12, at 14-17, 25-26 (providing brief biographies of St. Clair and Sargent).

<sup>65</sup> Letter from Arthur St. Clair to the President (Aug. 1789), in 2 TERRITORIAL PAPERS, *supra* note 40, at 212.

They did not advocate for military rule—St. Clair refused calls to use the army to enforce civil law because it was “not the business of [the] military”—but rather embraced a conception of separate spheres in which military and civilian authority were kept “perfectly distinct.”<sup>66</sup>

This vision of non-interference put St. Clair and Sargent at odds with two of the territorial judges, John Cleves Symmes and George Turner. Military and civil authority were not coequal, the judges insisted: rather, as Symmes stated, “The military force of the nation is always considered as subordinate to . . . the civil arm.”<sup>67</sup> Symmes went so far as to insist that, rather than enjoying any special jurisdictional status, “soldiers are merely members of the community,” likening them to “students in a college.”<sup>68</sup>

These differing views primed these officials for the confrontations that followed. The growth of the Northwest Territory in the early 1790s, as land sales lured many Anglo-American settlers down to Ohio, made collisions between military and civil jurisdiction even more likely. These tensions peaked in Cincinnati, the Territory’s administrative hub and most important town.<sup>69</sup> As one visitor passing through during this period summarized the conflict, “The military want to run things, but the town insists upon its rights under the constitution, & in consequence there are frequent quarrels.”<sup>70</sup>

The center of these quarrels, and of Cincinnati, was Fort Washington. In summer 1791, the fort was a hub of activity, as St. Clair, who was also serving as the commander of the First American Legion, prepared to lead an expedition into Indian country.<sup>71</sup> Living cheek to jowl, soldiers and civilians engaged in licit and illicit commerce and altercations, which army commanders constantly bemoaned subverted military discipline, particularly when alcohol was involved.

Consistent with his emphasis on noninterference, St. Clair attempted to forestall conflicts by establishing sharp jurisdictional boundaries. In August 1791, he drew a line around Fort Washington.<sup>72</sup> Any civilians who elected to remain within this district, St. Clair announced, would be considered as

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<sup>66</sup> Letter from Arthur St. Clair to Judge Turner (June 19, 1791), in 2 THE ST. CLAIR PAPERS 218, 219-20 (William Henry Smith ed., 1882).

<sup>67</sup> Letter from John Cleves Symmes to Arthur St. Clair (July 22, 1791), in Arthur St. Clair Papers (on file with the Ohio Historical Society, Roll 3).

<sup>68</sup> *Id.*

<sup>69</sup> See CAYTON, *supra* note 12, at 63-67 (recounting the early history of Cincinnati).

<sup>70</sup> JOHN GOTTLIEB ERNESTUS HECKEWELDER, THIRTY THOUSAND MILES WITH JOHN HECKEWELDER 269 (Paul A. W. Wallace ed., 1958).

<sup>71</sup> See COLIN G. CALLOWAY, THE VICTORY WITH NO NAME: THE NATIVE AMERICAN DEFEAT OF THE FIRST AMERICAN ARMY 61-92 (2014).

<sup>72</sup> See Proclamation by His Excellency, Arthur St. Clair (Aug. 23, 1791), in 2 THE ST. CLAIR PAPERS, *supra* note 66, at 211-12.

“voluntarily submit[ting] themselves to the military law.”<sup>73</sup> Yet St. Clair’s effort to separate soldiers from civilians angered Judge Symmes, who informed St. Clair that this effort to “subject the Citizens of the territory to Military government” exceeded his authority under the Northwest Ordinance.<sup>74</sup>

St. Clair and Symmes’s disagreements escalated later that month when a deserting soldier accused a civilian named Shaw with encouraging him to desert and even supplying him clothes to do so.<sup>75</sup> St. Clair clapped Shaw in irons; a subsequent search of Shaw’s home unearthed a regimental uniform.<sup>76</sup> Asserting authority under the Secretary of War’s orders to expel intruders from the public lands, St. Clair ordered Shaw’s house burnt and Shaw banished from the territory.<sup>77</sup>

Shaw’s detention quickly surfaced broader jurisdictional tensions. Symmes read Shaw’s detention as part of a pattern of “acts of despotic complexion”<sup>78</sup> that reflected the “superiority which the Governor affected to give the military over citizens.”<sup>79</sup> It would, Symmes feared, only embolden the army’s officers, who already acted as so many petty tyrants, “beating and imprisoning citizens at their pleasure.”<sup>80</sup> Symmes reported of one officer with an “imperious disposition,” Captain John Armstrong, who had often feuded with the local sheriff over the “superiority of the civil or military authority.”<sup>81</sup> Now, in the wake of Shaw’s detention, Armstrong reportedly “deridingly t[ook] the sheriff by the sleeve, saying: ‘what think you of the civil authority now?’”<sup>82</sup>

For his part, Judge Turner intervened in the controversy by issuing a writ of habeas corpus for Shaw, even though no complaint had actually been filed in his court.<sup>83</sup> For early Americans, the writ, which required a judicial hearing to determine the legality of a detention, had acquired almost talismanic

<sup>73</sup> *Id.* at 212.

<sup>74</sup> Letter from John Cleves Symmes to Arthur St. Clair (July 12, 1791), in Arthur St. Clair Papers (on file with the Ohio Historical Society, Roll 3).

<sup>75</sup> Letter from John Cleves Symmes to Jonathan Dayton (Aug. 15, 1791), in CORRESPONDENCE OF JOHN CLEVES SYMMES, *supra* note 51, at 148; Letter from Arthur St. Clair to Henry Knox (Aug. 17, 1791), in Arthur St. Clair Papers (on file with the Burton Historical Collection, Detroit Public Library).

<sup>76</sup> Letter from Arthur St. Clair to Henry Knox, *supra* note 75.

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

<sup>78</sup> Letter from John Cleves Symmes to Jonathan Dayton, *supra* note 75, at 149.

<sup>79</sup> Letter from John Cleves Symmes to Elias Boudinot & Jonathan Dayton (Jan. 25, 1792), in CORRESPONDENCE OF JOHN CLEVES SYMMES, *supra* note 51, at 161.

<sup>80</sup> Letter from John Cleves Symmes to Jonathan Dayton, *supra* note 75, at 149.

<sup>81</sup> Letter from John Cleves Symmes to Elias Boudinot & Jonathan Dayton, *supra* note 79, at 161.

<sup>82</sup> *Id.*

<sup>83</sup> Letter from Judge Turner to Arthur St. Clair (Aug. 12, 1791), in Arthur St. Clair Papers (on file with the Ohio Historical Society, Roll 3).

significance as a check against arbitrary authority,<sup>84</sup> and was protected in both the U.S. Constitution<sup>85</sup> and the Northwest Ordinance.<sup>86</sup> But, to Turner's shock, St. Clair refused to honor the writ, claiming that Shaw, as an intruder, was "not entitled to the benefit of the Laws of the Land."<sup>87</sup> An outraged Turner insisted that the authority of civil law was not geographically limited by quasi-military spaces. "I know of no corner or garrison in any county of this Territory into which civil process may not run," he wrote.<sup>88</sup>

Because neither St. Clair nor Turner acknowledged the legitimacy of the other's claim to authority, what might have been a judicial dispute became a brittle contest of wills that played out in correspondence rather than a courtroom. The only option was appeal to some higher authority that both might concede enjoyed the power to decide. With no higher court holding jurisdiction, territorial officials looked up the administrative chain, to the Washington Administration, for vindication. Both St. Clair and Judge Symmes voiced their grievances to their higher-ups, while Symmes's formal complaint against Captain Armstrong was dispatched to the President.<sup>89</sup> Yet the Administration remained silent on these issues, at least publicly. Privately, the Secretary of State recommended to the President that these issues be left to the local courts to resolve.<sup>90</sup>

In the absence of any official resolution, the unsettled question of civil jurisdiction over the military resurfaced during the following summer of 1792. The army, having suffered a crushing defeat at the hands of the Northwest Indian Confederacy in November, retreated to Cincinnati demoralized and fractious.<sup>91</sup> General James Wilkinson, who replaced St. Clair as military commander (St. Clair remained the governor of the Northwest Territory), sought to restore order through vigorous enforcement of military discipline. On Wilkinson's orders, an ensign named Harrison harshly punished an

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<sup>84</sup> See, e.g., AMANDA L. TYLER, *HABEAS CORPUS IN WARTIME: FROM THE TOWER OF LONDON TO GUANTANAMO BAY* 123-40 (2017) (quoting contemporaneous statements that habeas corpus was "essential to freedom").

<sup>85</sup> See U.S. CONST. art. 1, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.").

<sup>86</sup> See NORTHWEST ORDINANCE, *supra* note 3, at 340 ("The Inhabitants of the said territory shall always be entitled to the benefits of the writ of habeas corpus, and of the trial by Jury.").

<sup>87</sup> Letter from Arthur St. Clair to Judge Turner (Aug. 12, 1791), *in* Arthur St. Clair Papers (on file with the Ohio Historical Society, Roll 3).

<sup>88</sup> Letter from Judge Turner to Arthur St. Clair, *supra* note 83.

<sup>89</sup> Letter from Arthur St. Clair to Henry Knox, *supra* note 75; Letter from Secretary of State to President (Mar. 28, 1792), *in* 2 TERRITORIAL PAPERS, *supra* note 40, at 379.

<sup>90</sup> Letter from Secretary of State to President, *supra* note 89, at 379.

<sup>91</sup> See CALLOWAY, *supra* note 71, at 116 (describing how St. Clair's troops were "[p]oorly trained, badly provisioned and equipped, dispirited by a month of frustrating delays, tedious marches, cold wet weather, desertions, and dissension").

“artificier,” the term for a craftsman who assisted the military.<sup>92</sup> The artificier then hired two local attorneys, Blanchard and Smith, who filed suit for assault against Ensign Harrison in the territorial courts.<sup>93</sup>

Angered by this “interference of the civil authority” in internal military discipline, General Wilkinson forbade the service of process within Fort Washington.<sup>94</sup> Claiming a “sacred regard” for “civil rights,” Wilkinson nonetheless feared the consequences if his authority over military personnel could be second-guessed by magistrates.<sup>95</sup> Already, he lamented, “[t]he Precedent has infected the Corps of Artificiers & the Soldiers with the Idea of licentious Freedom,” threatening “Anarchy & disorder.”<sup>96</sup>

Wilkinson appealed to Secretary Sargent, who was acting as governor during one of St. Clair’s many absences from the Territory. Sargent disagreed with Wilkinson’s implicit assumption that he had the authority to reject civil jurisdiction—“[T]here is no Sanctuary from the sovereign Authority of Civil Law,” Sargent lectured the General—but he was also hostile to the attorneys’ efforts to intervene in military matters.<sup>97</sup> Informed of the controversy, Secretary of War Knox wrote to Sargent in support, stating his belief that “the civil power has nothing to do with military discipline.”<sup>98</sup> Sargent then wrote Judge Symmes, urging him to “avoid all Infringement of military Police so essential to the Existence of an Army” by dismissing the suit.<sup>99</sup>

Symmes was an unsympathetic audience for Sargent’s pleas. The judge conceded that the civil courts might be barred from interference with military justice.<sup>100</sup> But whether Harrison fell under military jurisdiction in the first place “is most surely the province of a court of justice to determine.”<sup>101</sup> In other words, civil, not military, authorities held the power to decide the scope of their respective jurisdictions.

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<sup>92</sup> Letter from James Wilkinson to Winthrop Sargent (June 2, 1792), in Winthrop Sargent Papers (on file with the Massachusetts Historical Society, Reel 3). For a biography aimed at a popular audience recounting Wilkinson’s checkered career, see generally ANDRO LINKLATER, *AN ARTIST IN TREASON: THE EXTRAORDINARY DOUBLE LIFE OF GENERAL JAMES WILKINSON* (2009).

<sup>93</sup> Letter from James Wilkinson to Winthrop Sargent, *supra* note 92.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> Letter from Winthrop Sargent to General Wilkinson (June 4, 1792), in 3 TERRITORIAL PAPERS, *supra* note 21, at 376-77.

<sup>98</sup> Letter from Henry Knox to Winthrop Sargent (July 23, 1792), in Winthrop Sargent Papers (on file with the Massachusetts Historical Society, Reel 3 [second letter]).

<sup>99</sup> Letter from Winthrop Sargent to Judge Symmes (June 4, 1792), in 3 TERRITORIAL PAPERS, *supra* note 21, at 377-78.

<sup>100</sup> Letter from John Cleves Symmes to Winthrop Sargent (June 30, 1792), in Winthrop Sargent Papers (on file with the Massachusetts Historical Society, Reel 3).

<sup>101</sup> *Id.*

Symmes hoped “the matter [would] die away altogether.”<sup>102</sup> In one sense, he got his wish. The Harrison matter, like the Shaw controversy, seemingly faded; if there was a court decision, it does not survive. Yet it set the stage for another, even more heated confrontation between Symmes and Sargent that happened on Christmas that same year.

This time, the precipitating event was one of surprising legal import in the Northwest Territory: the frivolous firing of guns in violation of territorial statute. Symmes and Sargent unsurprisingly viewed this action very differently. While Symmes saw musket firing as an “immemorial” custom that should be indulged,<sup>103</sup> Sargent read it as a dangerous practice that led territorial citizens to ignore Indian attacks on the mistaken belief they were harmless “common Sport.”<sup>104</sup> From his first arrival in the Territory, Sargent had repeatedly sought, often fruitlessly, to suppress what he believed to be riotous behavior.<sup>105</sup>

On Christmas 1792, Sargent sought to avoid “disagreement amongst the Citizens and military” by relying on the local militia, not the army, to police Cincinnati and prevent gunfire.<sup>106</sup> Yet the situation, if anything, grew worse, producing riots that lasted over two weeks.<sup>107</sup> The militia were mocked when they tried to make arrests; the only two men apprehended were released without bond; and soon, the rioters began shooting into houses.<sup>108</sup> Sargent knew who the ringleaders were—the lawyer Smith among them—and appealed to Judge Symmes for assistance.<sup>109</sup> Yet all Sargent got from Symmes was a lengthy disquisition on allowing the people their whims. How could such behavior be stopped, Symmes lectured, if the people condoned it?<sup>110</sup> “Jurors will not indite—militia guards will not apprehend . . . and I shudder

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<sup>102</sup> *Id.*

<sup>103</sup> Letter from John Cleves Symmes to Winthrop Sargent (Jan. 7, 1793), in Winthrop Sargent Papers (on file with the Massachusetts Historical Society, Reel 3).

<sup>104</sup> Orders to the Militia of Hamilton County (March 26, 1792), in 3 TERRITORIAL PAPERS, *supra* note 21, at 370-71.

<sup>105</sup> See, e.g., “A Biographical Sketch of the Origen & Descent of Gen’l Benjamin Tupper Connected with his Military Life” (on file with the Marietta, Ohio Collection, Folder 2). Firing off guns, especially at Christmastime, was a traditional custom, particularly in the South. See STEPHEN NISSENBAUM, *THE BATTLE FOR CHRISTMAS* 262 (1996).

<sup>106</sup> Letter from Winthrop Sargent to Arthur St. Clair (Jan. 19, 1793), in Winthrop Sargent Papers (on file with the Massachusetts Historical Society, Reel 3).

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> Letter from Winthrop Sargent to John Cleves Symmes (Jan. 6, 1793), in Winthrop Sargent Papers (on file with the Massachusetts Historical Society, Reel 3).

<sup>110</sup> See Letter from John Cleves Symmes to Winthrop Sargent (Jan. 7, 1793), in Winthrop Sargent Papers (on file with the Massachusetts Historical Society, Reel 3 [second letter]).

at the Idea of calling in the aid of the regular military; nor am I sure of success if we did.”<sup>111</sup>

Finally, one night, Thomas McCulloch, himself a militiaman, was discovered firing illegally.<sup>112</sup> Because McCulloch was subject to military justice, Sargent determined to try him before a court martial, imprisoning McCulloch in Fort Washington in the interim.<sup>113</sup> The example, Sargent believed, at last caused peace and quiet to prevail.<sup>114</sup> But Smith—the same lawyer who filed on behalf of the artificier—quickly became McCulloch’s counsel, obtaining a writ of habeas corpus from Judge Symmes.<sup>115</sup> Rumor had it, though, that Fort Washington’s commandant would refuse to honor the writ—in which case, Smith threatened Sargent, he would show that the service “cannot be refused.”<sup>116</sup>

Word of the habeas writ reached Sargent, along with reports that Smith was boasting that he had gathered eighty men ready to free McCulloch.<sup>117</sup> Sargent once again found himself in a difficult situation. If he honored the writ, it would have “destroyed even the *Shadow* of Subordination with the militia.”<sup>118</sup> Yet if he refused to acknowledge it, the commandant might be liable to a suit, and Sargent’s action might be deemed a “most arbitrary measure.”<sup>119</sup> Sargent decided to preempt the writ by quickly trying McCulloch.<sup>120</sup> He took the militiaman to his own house for court martial, where a panel found McCulloch guilty of disobedience and sentenced him to two weeks’ imprisonment.<sup>121</sup>

But McCulloch’s conviction did not settle the matter, as Sargent and Symmes continued to battle. Sargent angrily complained to Symmes about his interference, which he argued merely served to “encrease [sic] the Turbulence of the licentious.”<sup>122</sup> As it was, Sargent threatened that if

<sup>111</sup> *Id.*

<sup>112</sup> See Letter from Winthrop Sargent to Arthur St. Clair, *supra* note 106.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> Letter from Jonathan Smith to [Thomas] Cushing (Jan. 13, 1793), in Winthrop Sargent Papers (on file with the Massachusetts Historical Society, Reel 3).

<sup>116</sup> Letter from Jonathan Smith to Winthrop Sargent (Jan. 24, 1793), in Winthrop Sargent Papers (on file with the Massachusetts Historical Society, Reel 3).

<sup>117</sup> See Letter from Winthrop Sargent to Arthur St. Clair, *supra* note 106.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> Sargent did not make clear why he believed this action would allow him to avoid the writ. Most likely, Sargent believed the proceeding would firmly settle that McCulloch was subject to military discipline and therefore outside civil process, perhaps relying on Knox’s earlier endorsement of that position. See *supra* notes 97–99 and accompanying text.

<sup>121</sup> Letter from Winthrop Sargent to Arthur St. Clair, *supra* note 104; Militia Orders (January 14, 1793), in 3 TERRITORIAL PAPERS, *supra* note 21, at 396–97.

<sup>122</sup> Letter from Winthrop Sargent to John Cleves Symmes (Jan. 13, 1793), in 3 TERRITORIAL PAPERS, *supra* note 21, at 393–96.

necessary, he would suspend the writ of habeas altogether: if he erred, “the Sovereign Authority will correct me.”<sup>123</sup> Symmes’s response was sparse but clear. If Sargent attempted to suspend the writ, the question would come before the court.<sup>124</sup> Symmes noted only that even the British king could not suspend habeas without the legislature’s concurrence.<sup>125</sup> Although both Symmes and Sargent indicated that they would submit to a decision by the Washington Administration, once again the Administration was silent, and so the matter went unresolved.

These recurrent conflicts between the territorial judges and executives are susceptible of multiple interpretations. One view—that of the participants in the territories—was that they were engaged in a contest over weighty principles that followed a well-worn, Revolutionary-era script. The territorial judges, especially Symmes, cast themselves as part of a heroic judicial resistance against an overreaching and self-aggrandizing executive. For their part, St. Clair and Sargent regarded themselves as upholding their duty to safeguard the fragile and tentative authority of the new United States as the only bulwark against licentiousness and disorder. Another view—widespread among those outside the territories, as Edmund Randolph’s dismissive remarks suggested<sup>126</sup>—regarded these conflicts as the petty clash of overweening egos. In their correspondence, territorial officials on both sides come off as peevish and arrogant, and both judges and territorial executives all ultimately suffered ignominious fates, as their hubris undermined their subsequent careers.<sup>127</sup>

Yet all these readings arguably distort. Although there was little love lost between Symmes and Sargent, their fractious conflicts over jurisdiction were, at root, structural. Contests between civil and military authority quickly recurred, for instance, when the army moved its headquarters from Cincinnati to Detroit: at one point, an army officer wielding an axe even invaded the home of the county court clerk to recover a runaway sailor, which

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<sup>123</sup> *Id.* at 393.

<sup>124</sup> Letter from John Cleves Symmes to Winthrop Sargent (Jan. 18, 1793), in Winthrop Sargent Papers (on file with the Massachusetts Historical Society, Reel 3).

<sup>125</sup> *Id.*

<sup>126</sup> See *supra* note 40 and accompanying text.

<sup>127</sup> Congress ultimately recommended that Turner be investigated and removed from office, 1 AMERICAN STATE PAPERS 151-52, 157 (Walter Lowrie & Walter S. Franklin eds., 1834); Sargent, who became governor of the Mississippi Territory, similarly faced congressional investigation for alleged misdeeds, *id.* at 233-41; Symmes, accused of abusing his office, watched his land speculation empire collapse around him and died penniless, CORRESPONDENCE OF JOHN CLEVES SYMMES, *supra* note 51, at 21; and St. Clair was attacked by territorial citizens as a tyrant and was ignominiously unseated by the Jefferson Administration weeks before his term was set to expire anyway, CAYTON, *supra* note 12, at 70-72, 80.

led to legal maneuverings predictably involving habeas writs.<sup>128</sup> General Wilkinson responded to these confrontations by declaring martial law over the entire town, a move so bold it finally elicited a response from the (now) Adams Administration. Warning that “[c]ollison” with “the Civil authority” would “produce no good and must be attended with much evil,” Alexander Hamilton urged Detroit’s commander to negotiate a resolution.<sup>129</sup>

Moreover, even though these struggles pitted judges against executives and came clothed in legal garb, they were not, at core, judicial struggles. St. Clair, Sargent, and military officials refused to accept the judgments of civil courts in part because judicial supremacy was not well established in the Early Republic,<sup>130</sup> but their skepticism was arguably even more attributable to the oddity of territorial government, which made territorial judges into legislators and administrators.<sup>131</sup> The result was that, in disputes over constitutional authority, the judges acted less like impartial mediators than combatants, slugging it out with executives not in courtrooms (almost none of the disputes resulted in an actual civil proceeding) but in constant correspondence. In this litigation by letter, both judges and executives claimed to have the law on their side, and yet neither acknowledged the other as arbiter of these claims. The only authority they both recognized was not a court, but their higher-ups in the Washington Administration.

In short, although their disagreements resembled judicial politics, territorial officials were actually locked in an administrative struggle over their respective authority and the meaning of the Northwest Ordinance. The continued refusal of their higher-ups to intervene meant that their testy debates over constitutional interpretation persisted right up until the Territory became a state.

### C. *The Military, Jurisdiction, and Administrative Constitutionalism*

In 1802, representatives gathered to draft a constitution for the new state of Ohio, to be carved from the Northwest Territory’s eastern portion. The

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<sup>128</sup> For the saga of the runaway sailor as it played out through correspondence, see Letter from Peter Audrain to Winthrop Sargent (Jan. 20, 1798); Letter from David Strong to Winthrop Sargent (Mar. 4, 1798); Letter from James Wilkinson to Winthrop Sargent (Mar. 6, 1798), all in Winthrop Sargent Papers (on file with the Massachusetts Historical Society, Reel 4).

<sup>129</sup> Letter from Alexander Hamilton to David Strong (May 22, 1799), in 23 PAPERS OF ALEXANDER HAMILTON 127, 128 (Harold C. Syrett, ed., 1976); see also Letter from James McHenry to Alexander Hamilton (Apr. 11, 1799), in 23 PAPERS OF ALEXANDER HAMILTON, *supra*, at 32 (summarizing the correspondence of Brigadier General Wilkinson showing concern over the state of martial law).

<sup>130</sup> See generally LARRY KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM & JUDICIAL REVIEW 94-140 (2004).

<sup>131</sup> See *supra* note 10 and accompanying text.

new constitution's bill of rights contained a provision, copied from other states, mandating that "the military shall be kept under strict subordination to the civil power."<sup>132</sup> But it also included a further, unprecedented stipulation that "no person in this State, except such as are employed in the army or navy of the United States or militia in actual service, shall be subject to corporal punishment, under the military law."<sup>133</sup> This language suggests the legacy of the Cincinnati fights over Shaw and Harrison: in the end, the bickerings of the Territory's administrative constitutionalism seemingly shaped the explicit text written into state constitutions.

Yet Ohio's constitutional provision was seemingly never tested, and was stripped from the state's Bill of Rights when it was rewritten in 1851.<sup>134</sup> The provision proved vestigial because, while controversies over military jurisdiction had not ended, they had shifted westward, following the bulk of the U.S. Army into new federal territories. There, disputes over military authority recurred, as did the ambiguity that had marked these controversies in the Northwest Territory.<sup>135</sup>

This durable uncertainty over the boundaries between civil and military authority reflects, in one sense, the failure of administrative constitutionalism in the Northwest Territory, at least from the perspective of many of the disputes' participants. Craving finality from some authoritative source that they never got, these officials seemed trapped in perpetual argument. This lack of conclusiveness was a particular problem for the kind of constitutional controversy that plagued the Northwest Territory—the second-order question over the authority to adjudicate itself. Territorial officials largely agreed that there had to be some military sphere freed from civil control, but sharply disagreed over who would determine that space. Military men like Wilkinson believed merely acknowledging civil authority subordinated the military, while Symmes and his allies insisted that the military had to submit to civilian supremacy as a necessary precondition to the protection of its autonomy. The insistence on both sides of their sole right to decide made compromise impossible.

Yet the only institution that the participants acknowledged had the jurisdiction, legitimacy, and authority to resolve these disputes—the "Sovereign Authority of America," as embodied in Congress and the national executive<sup>136</sup>—remained silent even in the face of constant appeals and

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<sup>132</sup> OHIO. CONST. of 1802, art. VIII, § 20.

<sup>133</sup> *Id.* § 21.

<sup>134</sup> See OHIO. CONST. of 1851.

<sup>135</sup> See, e.g., BETHEL SALER, *THE SETTLERS' EMPIRE: COLONIALISM AND STATE FORMATION IN AMERICA'S OLD NORTHWEST* 97–98 (2014).

<sup>136</sup> Letter from Winthrop Sargent to John Cleves Symmes (May 10, 1792), in 3 *TERRITORIAL PAPERS*, *supra* note 21, at 375–76.

complaints. This silence mostly went unexplained, yet there were a handful of indirect, yet suggestive, statements. Edmund Randolph's dismissive remarks about territorial "bickerings" indicate that at least some in the Administration thought the underlying controversies too transient and local to warrant intervention from Philadelphia. Even more telling was Secretary of State Jefferson's response to Judge Symmes's complaint against Captain John Armstrong: a "civil prosecution in the courts of the Territory," Jefferson told the President, was the "most proper" remedy.<sup>137</sup>

What these remarks suggest is a fundamental misunderstanding of the nature of governance in the Northwest Territory—one based on the appealing, yet flawed, analogy between territorial and state governments. Implicitly relying on a sharp divide between local and national, Randolph and Jefferson sought to keep the federal government free from messy disputes they thought best resolved locally. But that was not how authority worked in the Northwest Territory, where, as a matter of formal law, legitimate power flowed from the center outward. Territorial officials like Symmes intuitively understood that when they appealed up the hierarchy for vindication; as Symmes knew all too well from experience, civil proceedings against officers in territorial courts offered no resolution.

The problem for all involved was that they seemed to lack the theory or language to articulate what they were doing. Just as the Northwest Ordinance created a form of administrative law, territorial officials found themselves engaged in administrative constitutionalism by default as they sought to fill the gaps created by Congress's broad delegation of authority. None of the officials had any doubts about the *legitimacy* of this endeavor: on the contrary, their letters brim with confidence and pious expressions of duty to the font of their authority, the sovereign power of the United States. But this responsibility, based partly on older imperial models of colonial governance, bore an uneasy relationship to newer conceptions of popular sovereignty.

This tension between territorial governance and early American republicanism may seem to echo present-day critiques of the administrative state, but that perspective anachronistically ignores post-revolutionary contexts. Federal administrators were not alone in seeking new vocabularies to justify their actions; their uncertainties reflected the broader struggle in the postwar United States to explain how any exercise of state power outside popularly elected legislatures was legitimate. Territorial officials' efforts to articulate administrative constitutionalism most closely resembled the better-documented attempts by judges to explain how judicial review—a process

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<sup>137</sup> Letter from Secretary of State to President, *supra* note 89.

similarly rooted in prior precedents that smacked to many of imperial rule—was compatible with the rule of the people.<sup>138</sup>

The current jurisprudential landscape demonstrates how successful judges were in this effort. Over the past several decades, the questions swirling around habeas and military authority, particularly in territories controlled by the federal government, that arose in *Cincinnati* have not vanished; if anything, they have grown more pressing. Moreover, these matters still involve deep tensions between administrative and judicial claims to adjudicative authority; the executive and the military still assert immunity from civil jurisdiction. But officials no longer feel quite so free to disregard judicial determinations. Instead, as these questions have become the subject of high-stakes constitutional litigation, the jurisdictional question has been heard and answered by the Supreme Court, which has declared itself to have the final word. This legal landscape differs sharply from the world of the Northwest Territory. There, a handful of contentious and bickering territorial officials, neglected by their superiors, struggled to fill the interstices of the new constitutional order as best they understood.<sup>139</sup>

## II. “GONE TO THE UNITED STATES”: FEDERAL JURISDICTION, IMPERIAL LAW, AND THE NORTHWEST TERRITORY

In 1795, a local magistrate wrote to territorial secretary Winthrop Sargent, who was acting as governor while Arthur St. Clair was away on one of his frequent visits to Philadelphia. The magistrate would have written to St. Clair directly in *Cincinnati*, but “I hear he is gone to the U[nited] States.”<sup>140</sup>

This odd usage, at least to present-day readers, underscores the multiple meanings of “United States” in the late eighteenth century. Sometimes, the term referred specifically and only to the thirteen states collectively; in other instances, it described the entire territory of the nation of the United States. The result was that, depending on the definition used, the territories could

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<sup>138</sup> For works examining the early and contested history of judicial review, see generally SCOTT DOUGLAS GERBER, *A DISTINCT JUDICIAL POWER: THE ORIGINS OF AN INDEPENDENT JUDICIARY, 1606–1787* (2011); KRAMER, *supra* note 130; Mary Sarah Bilder, *The Corporate Origins of Judicial Review*, 116 *YALE L.J.* 502 (2006); Theodore W. Ruger, *“A Question Which Convulses a Nation”*: *The Early Republic’s Greatest Debate about the Judicial Review Power*, 117 *HARV. L. REV.* 826 (2004); William Michael Treanor, *Judicial Review Before Marbury*, 58 *STAN. L. REV.* 455 (2005).

<sup>139</sup> In *Hamdi*, the Supreme Court rejected the claim that the separation of powers limited its authority to hear the case, concluding, “unless Congress acts to suspend it, the Great Writ of habeas corpus allows the Judicial Branch to play a necessary role in maintaining this delicate balance of governance . . . .” *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004). For a discussion of the Court’s recent habeas cases in the context of the legal status of the territories, see Amy Kaplan, *Where Is Guantánamo?*, 57 *AM. Q.* 831 (2005).

<sup>140</sup> Letter from Henry Vanderburgh to Winthrop Sargent (April 30, 1795), in Winthrop Sargent Papers (on file with the Massachusetts Historical Society, Reel 4).

be either within or without the United States. This was not an idle semantic debate: it had important legal implications hotly argued among federal officials, particularly on whether ordinary congressional legislation encompassed the territories. Even more significantly, this debate raised the fundamental question of how much the new American empire would resemble the old British empire, as proponents of earlier imperial practice clashed with advocates who embraced newer conceptions of uniform territorial sovereignty.

#### A. *Unequal Footing*

The British model was clear, at least in principle. All of Britain's overseas territories were colonies rather than part of Britain proper, and so excluded from the scope of ordinary parliamentary legislation.<sup>141</sup> But Britain's colonies *were* subject to Parliament's legislative jurisdiction, which Parliament could exercise by specifically naming the colonies within the statutory text.<sup>142</sup> These principles, established over long usage, became contested during the imperial crisis. Anglo-Americans increasingly denied Parliamentary legislative authority, first by distinguishing power over internal and external legislation, and subsequently by arguing that their allegiance lay with the British king alone.<sup>143</sup>

After their separation from Britain, citizens of the newly-created United States spoke of creating their own American empire.<sup>144</sup> Yet they used the term "empire" differently from its British antecedents. Usually "empire" described the extensive territory Anglo-Americans envisioned enfolding within the United States; rarely did it imply a system in which an imperial center would indefinitely govern the colonial periphery.<sup>145</sup> Rather, from the end of the Revolution onward, most Anglo-Americans assumed that the western

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<sup>141</sup> See, e.g., WILLIAM BLACKSTONE, COMMENTARIES \*108-09 (concluding that the British colonies were "subject however to the control of the parliament, though . . . not bound by any acts of parliament, unless particularly named.")

<sup>142</sup> *Id.*

<sup>143</sup> For examinations of the constitutional arguments leading to the Revolution, see generally JACK P. GREENE, THE CONSTITUTIONAL ORIGINS OF THE AMERICAN REVOLUTION (2011); JOHN PHILLIP REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION (1995); Barbara A. Black, *The Constitution of Empire: The Case for the Colonists*, 124 U. PA. L. REV. 1157 (1976).

<sup>144</sup> See *supra*, note 36 and accompanying text.

<sup>145</sup> Later in his life, Gouverneur Morris, one of the delegates to the constitutional convention, recalled drafting the Admission and Property Clauses of the U.S. Constitution to permit the exclusion of future states; he stated that he had envisioned subsequent acquisitions of Louisiana and Canada as having "no voice in our councils." But he also stated that had he made his views known, "a strong opposition would have been made." Letter from Gouverneur Morris to Henry W. Livingston (Dec. 4, 1803), in 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 404, 404 (Max Farrand ed., 1911).

territories would eventually become new states within the union.<sup>146</sup> Both the Constitution and the Northwest Ordinance codified this view: the Constitution granted Congress the power to admit new states,<sup>147</sup> while the Ordinance promised that the territories would become states on “equal footing” with the original thirteen once they reached sixty thousand white male inhabitants.<sup>148</sup> A sharp break from British law—James Monroe described the promise of future statehood as the “remarkable & important difference” between the Ordinance and British imperial precedent<sup>149</sup>—this innovation occasioned little debate, perhaps reflecting Anglo-Americans’ long-standing experience with the creation of new and co-equal jurisdictions such as towns and counties as a consequence of expansion.

This promise of ultimate statehood on equal terms has long served as the principal evidence of the Ordinance’s anti-colonial and democratic commitments. But the fact that the territories would eventually become states did not resolve the territories’ status within the United States *prior* to admission, a question on which the Constitution and the Ordinance were largely silent. In this respect, the system of governance adopted for the territorial period broke far less with earlier practice. With an appointed governor and judiciary serving on good behavior, a two-house legislature with appointed legislative council, and the right of disapproving laws vested in Congress, territorial government strongly resembled British imperial structures.<sup>150</sup> One territorial citizen later described “ordinance Government” as a “true transcript of our old English Colonial Governments;” “our Governor,” he complained, “is cloathed [sic] with all the power of a British Nabob.”<sup>151</sup>

As the Ordinance began to operate, territorial officials puzzled over this mélange of old and new in thinking through the Northwest Territory’s constitutional status. The question of the Territory’s position with respect to the United States first emerged as territorial officials struggled to decide

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<sup>146</sup> For an example of an early assumption that the territories would be readily admitted as states, see Draft Petition of Continental Army Officers to President and Delegates of Congress (May 7, 1783), in Manuscripts and Documents of the Ohio Company of Associates, Special Collections (on file with the Marietta College Library, Marietta, Ohio, Box 4, Folder 2), <http://cdm16824.contentdm.oclc.org/cdm/ref/collection/p16824coll6/id/2924> [<https://perma.cc/294F-PGTH>] (stating that the territory is “of such a quality” that it might “in time to be admitted *one* of the confedinated [sic] States of America”). For a thoughtful discussion of the development of territorial governance, see ONUF, *supra* note 4, at 44-66.

<sup>147</sup> U.S. CONST. art. IV, § 3, cl. 1 (“New States may be admitted by the Congress into this Union”).

<sup>148</sup> NORTHWEST ORDINANCE, *supra* note 3, at 342.

<sup>149</sup> Letter from James Monroe to Thomas Jefferson, *supra* note 37, at 298.

<sup>150</sup> NORTHWEST ORDINANCE, *supra* note 3, at 335-39.

<sup>151</sup> Letter from William Goforth to President (January 5, 1802), in 3 TERRITORIAL PAPERS, *supra* note 21, at 198.

whether the Territory's similarity to British colonies encompassed the rules about parliamentary legislation. When Governor St. Clair and the judges for the Northwest Territory (who, recall, also initially served as legislators) gathered to enact laws for the territory, the judges expressed their "doubts . . . whether the Laws of the united States can have course in the Territory unless it be especially named in them."<sup>152</sup> The judges suggested formally readopting federal statutes to ensure they had force within the Territory.<sup>153</sup>

There the matter lay, unresolved, until 1795. The previous year, Congress enacted a tax on whiskey and other distilled spirits that had convulsed the frontier.<sup>154</sup> In passing, Governor St. Clair had earlier written to Secretary of the Treasury Alexander Hamilton, suggesting that the revenue law did not encompass the Territory, which was not named in the law.<sup>155</sup> When St. Clair repeated this view to Hamilton's successor Oliver Wolcott, Wolcott could not let the claim pass unnoticed.<sup>156</sup> He found St. Clair's suggestion that "*the Laws of the United States are not deemed to extend to either of the territorial districts unless they are specially named*" to be "an inadmissable pretension."<sup>157</sup> Wolcott forwarded St. Clair's letter to Attorney General William Bradford, who confirmed Wolcott's view. "There can be no doubt," Bradford wrote to Wolcott, "that all the laws of Congress, unless local in their nature or limited in their terms, are, in their operation coextensive with the Territory of the United States, and obligatory upon every person therein."<sup>158</sup> Bradford reasoned that the Constitution compelled this result, as it required uniform duties and imposts throughout the United States.<sup>159</sup> He also pointed to Article Four of the Northwest Ordinance, which stated that the territory and the states formed from it "shall forever remain a part of this Confederacy of the United States of America."<sup>160</sup> Wolcott forwarded Bradford's letter to St. Clair by way of rebuttal.

This legal dispute reflected a generational divide. Born in Scotland in 1737, St. Clair had first come to Pennsylvania as a British officer during the

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<sup>152</sup> Letter from Arthur St. Clair to Attorney General (Dec. 1790), in 2 TERRITORIAL PAPERS, *supra* note 40, at 319.

<sup>153</sup> *Id.* at 320.

<sup>154</sup> THOMAS P. SLAUGHTER, *THE WHISKEY REBELLION: FRONTIER EPILOGUE TO THE AMERICAN REVOLUTION* 160-61 (1986).

<sup>155</sup> See Letter from Arthur St. Clair to Alexander Hamilton (Aug. 9, 1793), in 2 THE ST. CLAIR PAPERS, *supra* note 66, at 317-18.

<sup>156</sup> See Letter from Oliver Wolcott to Arthur St. Clair (June 20, 1795), in *id.* at 385.

<sup>157</sup> *Id.* (emphasis in original).

<sup>158</sup> Letter from Attorney General to Secretary of the Treasury (June 19, 1795), in 2 TERRITORIAL PAPERS, *supra* note 40, at 520.

<sup>159</sup> *Id.* at 520-21.

<sup>160</sup> NORTHWEST ORDINANCE, *supra* note 3, at 341.

Seven Years' War.<sup>161</sup> Strongly rooted in earlier imperial law, St. Clair responded to Wolcott's dismissal of his argument by observing that, whatever its merits, his claim was "no new pretension—and is a Doctrine which has long been held with respect to colonies—and those Districts [the territories] . . . have ever been considered in congress as colonies."<sup>162</sup> Wolcott and Bradford, by contrast, were a good deal younger—Wolcott was 35 in 1795; Bradford was 40—and had come of age during the American Revolution.<sup>163</sup> Despite formal legal training at the Litchfield Law School, Wolcott claimed to have never encountered the principle that St. Clair advanced. "[T]he Doctrine is novel to me," Wolcott told St. Clair, "and as I verily believe erroneous."<sup>164</sup> Wolcott promised to "press for a judicial decision as soon as possible" to resolve the question.<sup>165</sup>

Yet no judicial decision happened, and so, notwithstanding Wolcott's objections, St. Clair's "pretension" about federal jurisdiction persisted. The claim that territories had to be specifically named in federal legislation proved particularly appealing whenever federal statutes veered toward echoes of the imperial crisis because it allowed officials to avoid enforcing unpopular laws. So, when Congress passed a stamp tax in 1797, a territorial magistrate wrote to Secretary Sargent of his "Doubts" as to whether the Act encompassed "this Territory . . . not being particularly named."<sup>166</sup> And when Congress prompted a constitutional crisis with the enactment of the Sedition Act in 1798, Arthur St. Clair clung to his old views in a letter to the Secretary of the State on the law. "It has been assumed as a principle," St. Clair wrote, "and it is, perhaps, not an ill founded one, t[hat] the general Laws of the Union do not extend to the territorial dependents except in cases where they are expressly named."<sup>167</sup> Displacing responsibility for this seemingly repudiated doctrine, St. Clair noted that it was "most probable" that territorial judges would "apply th[is] principle" in any prosecutions under the Sedition Act.<sup>168</sup> The Secretary of

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<sup>161</sup> See Gregory Evans Dowd, *Arthur St. Clair*, AMERICAN NATIONAL BIOGRAPHY ONLINE (2000), <http://www.anb.org/view/10.1093/anb/9780198606697.001.0001/anb-9780198606697-e-0100850?rskey=vpDpuy&result=3> [https://perma.cc/CPT4-899T].

<sup>162</sup> Letter from Gov. Arthur St. Clair to Secretary of the Treasury (July 24, 1795), in 2 TERRITORIAL PAPERS, *supra* note 40, at 523.

<sup>163</sup> See Ethan S. Rafuse, *Oliver Wolcott*, AMERICAN NATIONAL BIOGRAPHY ONLINE (2000), <http://www.anb.org/articles/02/02-00344.html?a=1&n=wolcott%2C%20Oliver&ia=-at&ib=-bib&cd=10&ss=1&q=2> [https://perma.cc/S33L-4LUE].

<sup>164</sup> Letter from Oliver Wolcott to Arthur St. Clair (Aug. 29, 1795), in *Oliver Wolcott Papers* (on file with the Connecticut Historical Society, Box 16, Folder 13).

<sup>165</sup> *Id.*

<sup>166</sup> Letter from John Rice Jones to Winthrop Sargent (Oct. 17, 1797), in *Winthrop Sargent Papers* (on file with the Massachusetts Historical Society, Reel 4).

<sup>167</sup> Letter from Gov. St. Clair to Secretary of State (July 15, 1799), in 3 TERRITORIAL PAPERS, *supra* note 21, at 58 (alteration in original).

<sup>168</sup> *Id.*

State forwarded St. Clair's letter along to the new Attorney General, Charles Lee, who (likely unwittingly) reiterated Bradford's earlier position. "[S]urprised" by St. Clair's claim, Lee stated his view that the "true rule" was "that the General laws of the Union reach every part of the United States, unless a particular and express exception be made."<sup>169</sup>

For all the echoes of the imperial crisis in this debate, however, there was an important difference. Unlike the revolutionaries who had denied parliamentary authority, neither St. Clair nor the attorneys general sought to cabin congressional power over the territories. St. Clair did not even disagree with the conclusion that federal law applied uniformly throughout the United States. For St. Clair, the relevant question was more fundamental: "whether the Territory be a part of the United States" at all.<sup>170</sup> In a lengthy letter to Wolcott, St. Clair argued that it was "easy to prove" that it was not, and "that the legislature have never considered them as such, but, on the contrary, as a dependent colony."<sup>171</sup>

St. Clair adduced substantial evidence. He noted that the territory had had its government "imposed upon it by . . . [the] States, and if any thing can be a proof of inferiority and dependence, it is this very thing."<sup>172</sup> He observed that the territory was excluded from the jurisdiction of the U.S. Supreme Court and the lower federal courts.<sup>173</sup> And he pointed out that the territory's inhabitants were denied a vote for representative in Congress or any officer, which, if they were subject to federal law, seemed to run afoul of the revolutionary principle that the "consent of the people" was "essential to give laws a binding force."<sup>174</sup> St. Clair even turned on its head Bradford's argument about the pledge, in Article Four of Northwest Ordinance, that the territories would forever remain part of the United States.<sup>175</sup> This provision, St. Clair insisted, was properly read as the "terms on which the colonies shall be settled," and became binding only once the territories sought to become states.<sup>176</sup> The alternate would suggest that "the United States made a compact

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<sup>169</sup> Letter from Attorney General to Secretary of State, in 3 TERRITORIAL PAPERS, *supra* note 21, at 66. Much later, there would be a controversy over whether the federal government could require documents to be stamped in *state* courts, *Latham v. Smith*, 45 Ill. 29 (1867), but this concern did not extend to the territories, where the federal government enjoyed plenary power, *Patterson v. Gile*, 1 Colo. 200 (1870).

<sup>170</sup> Letter from Arthur St. Clair to Oliver Wolcott (December 5, 1795), in 2 THE ST. CLAIR PAPERS, *supra* note 66, at 378. The printed version of the letter is undated; however, the manuscript letter in the Arthur St. Clair Papers puts the date as Dec. 5. See Arthur St. Clair Papers (on file with the Ohio Historical Society, Roll 4).

<sup>171</sup> *Id.* at 379.

<sup>172</sup> *Id.* at 379.

<sup>173</sup> *Id.* at 381-82.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* at 382.

<sup>176</sup> *Id.*

with themselves,” which St. Clair thought “too great an absurdity” to be conceded.<sup>177</sup> For all these reasons, “[t]he truth is, the Territory is a dependency of the United States, not as yet an integral part of them, but capable of becoming so at a future day.”<sup>178</sup>

St. Clair’s conclusion that the territories were colonies of the United States, subject to its authority and yet not integrated into the nation, laid bare a deep and uncomfortable tension between republican principles and territorial governance. For all the language in the Northwest Ordinance about “fundamental principles of civil and religious libert[ies],” the Ordinance also made the United States imperial in the older, British sense, since territorial inhabitants remained subject to a distant government not of their choosing.<sup>179</sup> “[I]f the [territory’s] inhabitants are a part of the people of the United States,” St. Clair pointed out, “they are, at least, upon a very unequal footing with their brethren.”<sup>180</sup> St. Clair’s rhetorical inversion of the Ordinance’s famous language about “equal footing” pointed out the large gap between the Ordinance’s abstract promises and the realities apparent from a close reading of its text. St. Clair’s proposed solution to this problem of inconsistency—excising the territories from the United States altogether by labeling them colonies—had the advantage of resolving the contradictions by creating explicit boundaries of belonging that would serve to explain why so many fundamental rights of self-governance seemed to be denied territorial citizens. But St. Clair’s logical conclusion that U.S. inhabitants who moved to territories “ceased to be the citizens of the United States and became their subjects” was deeply unsettling in a nation created in an anti-imperial revolt.<sup>181</sup>

Many inhabitants of the Northwest Territory came to agree with St. Clair about their status, although they put a different valence on it. By 1800, the personal and local disputes within the Territory had been enveloped within a thick blanket of partisanship, as local factions aligned with the political parties that had arisen in Philadelphia.<sup>182</sup> A vocal movement of Jeffersonians, weary of St. Clair and his chokehold on patronage, sought to replace the governor.<sup>183</sup> Yet they began to fear that replacing St. Clair might only “be exchanging an old and feeble tyrant for one more active and wicked.”<sup>184</sup> So their critique

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<sup>177</sup> *Id.*

<sup>178</sup> *Id.* at 380-81.

<sup>179</sup> NORTHWEST ORDINANCE, *supra* note 3, at 339.

<sup>180</sup> Letter from Arthur St. Clair to Oliver Wolcott, *supra* note 170, at 379.

<sup>181</sup> *Id.* at 383.

<sup>182</sup> See CAYTON, *supra* note 12, at 68-80.

<sup>183</sup> *Id.*

<sup>184</sup> Letter from Stevens Thomson Mason to Thomas Worthington (Feb. 5, 1801), in 2 THE ST. CLAIR PAPERS, *supra* note 66, at 531.

broadened to encompass territorial government more generally. “They were tired of the Colonial Yoke,” one wrote to President Jefferson;<sup>185</sup> another stated that he “reckon[ed] territorial government” as “a despotism.”<sup>186</sup>

In response to the clamor, in 1802 Congress enacted a law authorizing the Territory to hold a constitutional convention in preparation for statehood.<sup>187</sup> As St. Clair fought for his political life, he abandoned his earlier acceptance of congressional authority. Instead, he adopted the prerevolutionary logic denying parliamentary jurisdiction into his doctrine of territorial jurisdiction. Congress, St. Clair argued, had legislative jurisdiction over the Territory in its “corporative capacity,” but it lacked authority over the Territory’s “internal affairs,” in which the Territory’s own legislature was competent.<sup>188</sup> Congress’s act requiring a convention, then, was a “nullity,” and the Territory’s inhabitants were no more obligated by it “than we would be bound by an edict of the first consul of France.”<sup>189</sup> St. Clair’s airing of these platitudes of the American Revolution led the Jefferson Administration to rapidly remove the Federalist from office, even though he had mere weeks still to serve, for his challenge to congressional authority.<sup>190</sup> As for St. Clair’s critique, Ohio gained statehood months later, making his analysis of territorial status moot for the residents of the new state.

The debate over the constitutional status of the Northwest Territory thus raged fiercest just as the territorial period was coming to an end. Many offered sharply-worded critiques of territorial rule: St. Clair described it as a form of government “which has been loaded with every epithet of opprobrium which the English language affords.”<sup>191</sup> Yet, for territorial inhabitants discontented by the lack of self-government, the possibility of following codified procedures to gain admission to the union made statehood, rather than reform, seem the easier solution. The promise of statehood did not solve the contradictions of republican imperialism; it obviated them. Admission to the Union clarified Ohio’s status, yet, as with the issue of

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<sup>185</sup> Letter from John Smith to Thomas Jefferson (Nov. 9, 1802), *in* 3 TERRITORIAL PAPERS, *supra* note 21, at 255.

<sup>186</sup> Letter from Nathaniel Macon to Thomas Worthington (Sept. 1, 1802), *in* 2 THE ST. CLAIR PAPERS, *supra* note 66, at 590.

<sup>187</sup> Act of April 30, 1802, ch. 40, 2 Stat. 173.

<sup>188</sup> Governor Arthur St. Clair, Remarks Before the Constitutional Convention (Nov. 3, 1802), *in* 2 THE ST. CLAIR PAPERS, *supra* note 66, at 594.

<sup>189</sup> *Id.*

<sup>190</sup> Letter from Secretary of State to Arthur St. Clair (Nov. 22, 1802), *in* 3 TERRITORIAL PAPERS, *supra* note 21, at 260.

<sup>191</sup> Governor Arthur St. Clair, Remarks Before the Constitutional Convention, *supra* note 188 at 594-595. For a fuller consideration of the debate over territorial status in the leadup to statehood, see ONUF, *supra* note 4, at 66-87.

military jurisdiction, the question of the relationship between the territories and the United States persisted—somewhere else.

### B. *Constitutionalism and the American Empire*

Ohio became a state in February 1803.<sup>192</sup> Two months later, the United States signed a treaty with France to purchase Louisiana, which encompassed much of western North America.<sup>193</sup> The governance of the new territory quickly proved controversial in Congress, where representatives reprised the disagreement between St. Clair and Wolcott over the status of newly acquired territory and its residents. Both positions had advocates.<sup>194</sup> Many embraced Wolcott's position and insisted that the new territory was fully part of the United States, with all the constitutional rights and limitations this concession implied. "We must . . . apply the Constitution to that people in all cases or in none," opined one representative.<sup>195</sup> "We must consider that country as being within the Union or without it—there is no alternative."<sup>196</sup> But others disagreed, arguing, following St. Clair, that the United States could hold Louisiana as a colonial appendage without extending constitutional rights or citizenship to its residents. The Constitution, they argued, was a compact only among the states and did not encompass the territories. "Congress . . . have a power in the Territories which they cannot exercise in States," one representative reasoned, "and the limitations of power, found in the Constitution, are applicable to States and not to Territories."<sup>197</sup>

The law that Congress ultimately passed created a government for Louisiana similar to that for the Northwest Territory.<sup>198</sup> It established several presidentially appointed offices—a governor with a three-year term, a secretary with a four-year term, and three judges with four-year terms rather than life tenure—as well as a separate federally-appointed legislature of "thirteen of the most fit and discreet persons of the territory."<sup>199</sup> But, although the law's imposition of a government without consent was not especially novel, many thought it was. "This . . . is a Colonial system of government. It is the first the United States have established," John Quincy Adams complained in opposing the Louisiana government bill.<sup>200</sup> "It is a bad

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<sup>192</sup> Act of Feb. 19, 1803, ch. 7, 2 Stat. 201.

<sup>193</sup> Treaty of Cession, U.S.–France, Apr. 30, 1803, 8 Stat. 200.

<sup>194</sup> See generally EVERETT SOMERVILLE BROWN, *THE CONSTITUTIONAL HISTORY OF THE LOUISIANA PURCHASE: 1803–1812* (2000).

<sup>195</sup> *Id.* at 110 (quotations omitted).

<sup>196</sup> *Id.* (quotations omitted).

<sup>197</sup> *Id.* at 88 (quotations omitted).

<sup>198</sup> Act of Mar. 26, 1804, ch. 38, 2 Stat. 283 (1804).

<sup>199</sup> *Id.*

<sup>200</sup> BROWN, *supra* note 194, at 131 (quotations omitted).

precedent.”<sup>201</sup> Present-day commentators have echoed Adams, stressing that the Purchase “led to the creation of an ‘American Empire’” and “revealed . . . the problematic constitutional status of the territories in a United States to be governed of, by, and for the people.”<sup>202</sup>

Such comments, which casually excised over a decade of prior debate over territorial governance, found their parallel in the U.S. Supreme Court. As it happened, February 1803 was also when Court decided what was arguably its first case on the constitutional status of the U.S. territories. In *Clarke v. Bazadone*, the Court considered whether it had the power to hear an appeal from the General Court of the Northwest Territory, even though that court was on the verge of extinction.<sup>203</sup> The plaintiff’s counsel forcefully argued that, even though Congress had not specifically authorized the Supreme Court to hear such appeals, the Court inherently enjoyed that power as the nation’s “one Supreme court.”<sup>204</sup> “The very existence of the courts whose judgment is complained of, is derived from the United States,” the attorney argued.<sup>205</sup> “All power and authority exercised in [the Northwest] territory have emanated from the United States.”<sup>206</sup> Yet, in a sentence-long opinion, the Court rejected this position. Even though there were “manifest errors” in the record, they concluded that they could not issue a writ of error without congressional authorization.<sup>207</sup>

The Court’s sparse decision in *Clarke* implicitly vindicated St. Clair’s position: the Court would not second-guess Congress’s power to treat the territories differently from states, even if Congress excluded them from fundamental constitutional structures.<sup>208</sup> Yet *Clarke* seemed to vanish from the Court’s subsequent decisions on territorial status.<sup>209</sup> Two decades later, in *Loughborough v. Blake*, Chief Justice John Marshall took the opposite tack.

<sup>201</sup> *Id.* (quotations omitted).

<sup>202</sup> Sanford Levinson & Bartholomew Sparrow, *Introduction*, in *THE LOUISIANA PURCHASE AND AMERICAN EXPANSION, 1803–1898* 1, 13 (Sanford Levinson & Bartholomew Sparrow eds., 2005).

<sup>203</sup> *Clarke v. Bazadone*, 5 U.S. (1 Cranch) 212, 214 (1803).

<sup>204</sup> *Id.* at 213.

<sup>205</sup> *Id.* at 214.

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

<sup>207</sup> *Id.*

<sup>208</sup> Jim Pfander has convincingly suggested that *Clarke* reflected the view, emphasized by St. Clair, that territorial citizens lacked federal rights to enforce before Article III courts. James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643, 706–14 (2004).

<sup>209</sup> The Court heard a similar case arising from the District of Columbia two years later, which raised a similar question of whether the Constitution constrained Congress in legislating for the territories. *United States v. More*, 7 U.S. (3 Cranch) 159 (1805). The court below had split, with a majority embracing Wolcott’s position in favor of territorial uniformity, while one dissenting judge echoed St. Clair in excluding the territories from many constitutional restraints. *Id.* at 160 n.2. As in *Clarke*, however, the Court declined to decide the case on the grounds that Congress had not authorized jurisdiction. *Id.* at 172–74.

Interpreting the application of a revenue statute to the District of Columbia, Marshall reasoned that the term “United States” designated the “whole . . . of the American empire,” so that territories were “not less within the United States, than Maryland or Pennsylvania.”<sup>210</sup> Marshall waved away the complaint that the territories were taxed without representation—“that great principle which was asserted in our revolution”—by pointing to the promise that the territories “look[ed] forward to complete equality” upon admission.<sup>211</sup> Yet eight years later, in *American Insurance Company v. Canter*, Marshall seemingly changed course.<sup>212</sup> Echoing but not citing *Clarke*, he upheld the exercise of admiralty jurisdiction by Florida’s territorial courts, stating that Article III’s limitation on federal judicial power within the states “does not extend to the territories,” where “Congress exercises the combined powers of the general, and of a state government.”<sup>213</sup>

The disappearance of *Clarke* mattered because the Northwest Territory increasingly became the normative yardstick against which subsequent territories were measured and, often, found lacking. In *Dred Scott*, for instance, Chief Justice Roger Taney sought to resolve the tension between *Loughborough* and *Canter* by distinguishing two kinds of federal territories.<sup>214</sup> In a challenge to the congressional power to bar slavery in the territories—a provision that first appeared in the Northwest Ordinance—Taney argued that federal power under the Territories Clause was limited solely to territories held at the time of the Constitution’s adoption; it did not encompass the subsequently acquired territory at issue in the case.<sup>215</sup> In other words, Taney carved out an exception for the Northwest Ordinance that at once explained and rendered irrelevant what one dissent called a “settled construction of the Constitution for sixty years.”<sup>216</sup>

Nearly a century after Ohio’s statehood, the Court issued arguably its most influential decision on territorial status, *Downes v. Bidwell*, the most significant of the early twentieth-century Insular Cases that sought to clarify the position of newly-acquired U.S. territories overseas.<sup>217</sup> Although the case’s multiple opinions rested heavily on historical practice and precedent,

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<sup>210</sup> *Loughborough v. Blake*, 18 U.S. (5 Wheat.) 317, 319 (1820).

<sup>211</sup> *Id.* at 324.

<sup>212</sup> 26 U.S. (1 Pet.) 511, 546 (1828).

<sup>213</sup> *Id.*

<sup>214</sup> *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856).

<sup>215</sup> *Id.* at 432-42.

<sup>216</sup> *Id.* at 546 (McLean, J., dissenting). For fuller consideration of this line of cases, see Cleveland, *supra* note 22, at 181.

<sup>217</sup> *Downes v. Bidwell*, 182 U.S. 244 (1901). For additional background on the Insular Cases, see generally RECONSIDERING THE INSULAR CASES: THE PAST AND FUTURE OF THE AMERICAN EMPIRE (Gerald L. Neuman & Tomiko Brown-Nagin eds., 2015); and BARTHOLOMEW H. SPARROW, THE INSULAR CASES AND THE EMERGENCE OF AMERICAN EMPIRE (2006).

the Northwest Ordinance played a surprisingly minor role: writing for the majority, Justice Brown offered a flat declaration that, reading the Northwest Ordinance and the Constitution, “it can nowhere be inferred that the territories were considered a part of the United States.”<sup>218</sup> Brown’s ultimate conclusion that the territory of Puerto Rico was, at least for the purposes before the Court, “not a part of the United States” vindicated St. Clair nearly a century after his death.<sup>219</sup> Yet it was Justice White’s concurring opinion that proved the most durable and influential. Like Taney, White drew a sharp dichotomy between different territories, in his case distinguishing “incorporated” territories—those placed on the path toward statehood—and the “unincorporated” territories, where Congress had a freer hand.<sup>220</sup> For White, the hallmarks of incorporation were the features of the Northwest Ordinance: the extension of constitutional rights and the promise of statehood.<sup>221</sup>

Viewed in light of the early debates in the territories, *Downes* is a deeply ironic decision. The Justices’ disagreements over the territories’ constitutional status echoed, almost uncannily, the arguments between St. Clair and the Attorneys General over a century earlier. But, even though the reasoning in *Downes* relied extensively on prior practice, particularly administrative practice, the Justices fixated on the history of Louisiana, not the Northwest Territory.<sup>222</sup> This omission likely reflected the unavailability of those prior administrative debates: unlike federal officials’ extensively cited views on the constitutionality of the Louisiana Purchase, the Attorneys’ General opinions on the status of the Northwest Territory were unpublished.<sup>223</sup> Yet the absence of those debates allowed the Justices to offer a very different account of the history of territorial governance than that suggested by St. Clair and territorial citizens. Both the governor and his political opponents had viewed the Northwest Ordinance as a colonial document that controversially denied powers of self-government. A century later, however, Justice White spun a story of incorporation by ignoring the Ordinance’s imposition of federal rule and focusing exclusively on its promise of fundamental rights and eventual statehood: “at the adoption of the Constitution,” White lyricized, “all the native white inhabitants” of both states *and* territories were “endowed with citizenship” and “enjoy[ed] equal

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<sup>218</sup> *Downes*, 182 U.S. at 250-51.

<sup>219</sup> *Id.* at 287.

<sup>220</sup> *Id.* at 287-88 (White, J., concurring).

<sup>221</sup> *Id.* at 319-20.

<sup>222</sup> See, e.g., *id.* at 251-56, 268, 324-33.

<sup>223</sup> The correspondence between the Secretary of State, Attorneys General, and St. Clair did not appear in either the *American State Papers* or in the *Official Opinions of the Attorney General*, both of which were relied on extensively by the Court in the nineteenth and twentieth centuries. See generally *Gregg v. Forsyth*, 65 U.S. (24 How.) 179 (1860); *Bryan v. Forsyth*, 60 U.S. (19 How.) 334 (1856); *Watkins v. Holman’s Lessee*, 41 U.S. (16 Pet.) 25 (1842).

rights and freedoms.”<sup>224</sup> This change in perspective made early territorial governance seem the antithesis of the colonial order that the United States sought to establish in Puerto Rico and elsewhere.

The Insular Cases thus reflected a bifurcation that began in the nineteenth century and still persists: Americans came to celebrate the Northwest Ordinance as embodying a new system of democratic expansion even as they feared subsequent territorial extensions as a betrayal of self-governance and an embrace of colonialism. Yet this dichotomy is only tenable by reading the Ordinance very partially, and by ignoring what people in the territories actually said and thought about it. Early Americans recognized that the Northwest Ordinance was not an unambiguous charter of liberty and democracy, and that the new American empire had buried within it many of the contradictions of the old. They struggled to reconcile this colonial legacy with the nation’s newly pronounced constitutional principles; some, like Arthur St. Clair, thought territorial governance so inconsistent with republican constitutionalism that the Northwest Territory could not really be part of the nation at all.

Recovering the history of administrative constitutionalism in the Northwest Territory does little to solve the fundamental question of territorial status, on which the Insular Cases, for now, remain the final word. Like the better-known debates over Louisiana that ensued a decade later, the arguments among territorial officials in the Northwest Territory show mostly how contested and uncertain territorial status remained even after the adoption of the Constitution and the Northwest Ordinance.

What these debates do demonstrate, however, is the mistaken assumption, embraced by many scholars, that the United States’ creation in an anti-colonial revolt entrenched principles of uniformity, self-governance, and limited federal power at odds with imperialism.<sup>225</sup> In fact, from the beginning, the United States, like its British predecessor, was an empire that excluded its subjects—even those white male property owners normally deemed citizens—from self-governance. One way to interpret this contradiction was as territorial citizens did, as the nation hypocritically failing to follow its own constitutional ideals. Yet a more accurate reading is to acknowledge the existence of another, countervailing set of constitutional norms, ones grounded in power and territorial sovereignty. The Northwest

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<sup>224</sup> *Downes*, 182 U.S. at 320 (White, J., concurring).

<sup>225</sup> For examples of works that see a substantial break between the Insular Cases and earlier constitutional practice, see LAWSON & SEIDMAN, *supra* note 14; Cleveland, *supra* note 22, at 209-14. But as Christina Ponsa-Kraus has astutely pointed out, the divide between the position of “incorporated” and “unincorporated” territories has been overdrawn. Although Ponsa does not discuss this early history traced here, it reinforces her claims. Christina Duffy Burnett, *Untied States: American Expansion and Territorial Deannexation*, 72 U. CHI. L. REV. 797, 800 (2005).

Territory's embrace of federal authority and deprivation of self-governance arguably embodied these imperial principles. In this sense, then, as well as in its much-heralded protection of individual rights, the Ordinance was a constitutional document.

#### CONCLUSION

In 1935, Congress created a commission to celebrate the one hundred-fiftieth anniversary of the Northwest Ordinance, a law that, Congress proclaimed, had made "such a complete change in the method of governing new communities formed by colonization, that it will always rank as one of the greatest civil documents of all time."<sup>226</sup> A sweeping commemoration followed: over two million people came out to watch a reenacted westward procession to Ohio.<sup>227</sup> At the procession's final destination, after a pageant featuring a cast of over one thousand, the chairman of the local organizing committee gave a speech.<sup>228</sup> He invoked the Ordinance as embodying "our cherished democratic forms of government" before offering a warning: that legacy, he urged, was now under threat from the expansion of the federal state under the New Deal.<sup>229</sup>

It was chance that the Ordinance's sesquicentennial coincided with the era that scholars identify as the rise of the modern administrative state in the United States, yet it was also fitting. As the chairman's speech exemplified, the memory of the Ordinance had sharply diverged from the bitter complaints of territorial citizens: the document that they had decried as undemocratic had now become one of the founding texts of American democracy. A more accurate history might have suggested continuity between the Ordinance and the New Deal state rather than rupture, given the deep interconnections between the history of administration and the territories.

In particular, administration and territorial governance posed similar conceptual challenges within early American constitutionalism. As Dan Hulsebosch has written, supporters of the Constitution believed they could solve the "long quest . . . for a binding imperial law" by transforming the United States from a system in which the "metropolis . . . imposed law on the periphery" into one founded on "a new kind of legality based on transcendent rules."<sup>230</sup> As many have traced, such transcendence could only be achieved by

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<sup>226</sup> H.R.J. Res. 208, 74th Cong., ch. 249, 49 Stat. 511 (1935).

<sup>227</sup> JOHN BODNAR, *REMAKING AMERICA: PUBLIC MEMORY, COMMEMORATION, AND PATRIOTISM IN THE TWENTIETH CENTURY* 126–34 (1992).

<sup>228</sup> *Id.*

<sup>229</sup> *Id.* at 130–31 (quotations omitted).

<sup>230</sup> HULSEBOSCH, *supra* note 34, at 258.

shunting aside the exceptions—enslaved Africans,<sup>231</sup> Native peoples,<sup>232</sup> women,<sup>233</sup> children<sup>234</sup>—that troubled this project. The territories and administration presented a different sort of challenge. Both were constitutionalized holdovers from the earlier imperial regime that fit uneasily within a system in which governance purported to rest on consent and what would later be deemed “the rule of law” for legitimacy. Both seemed to cling to an older logic in which authority radiated hierarchically, outward and downward from the imperial center, rather than arising from popular sovereignty. Celebration of the Northwest Ordinance notwithstanding, then, the early United States failed to solve the legal problem of empire presented in the American Revolution—that is, how to ground legitimate authority and sovereignty within colonial dependencies. Or, rather, the United States “solved” the problem by sidelining it.

The implications of this history for the ongoing fights over the constitutionality of the administrative state are twofold. As a descriptive matter, it demonstrates that a category of positive law akin to modern administrative law not only existed during the creation of the United States, but was explicitly sanctioned by its foundational documents. The denial of this history rests on a tendentious, results-oriented narrative that is constrained to ignore or distinguish away substantial contradictory evidence. This effort—to cast as “exceptional” instances that might otherwise trouble an unquestioning faith in the nation’s fundamental republicanism—echoes the broader history of the territories’ place within the U.S. constitutional imagination. From the Northwest Territory onward, many Americans similarly found it simpler to write the territories out of the United States altogether rather than to attempt to reconcile undemocratic territorial governance with the new nation’s ostensible commitments.

But, while analogs of present-day administrative law have existed since the nation’s creation, they also at times proved a particularly congenial tool for serving normatively undesirable ends. Early on, territorial governance established the long-standing pattern—obvious in the current War on Terror or fights over immigration—in which federal administrators’ authority was at its height in places imagined as outside the constraints of “ordinary”

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<sup>231</sup> See, e.g., GEORGE WILLIAM VAN CLEVE, *A SLAVEHOLDERS’ UNION: SLAVERY, POLITICS, AND THE CONSTITUTION IN THE EARLY AMERICAN REPUBLIC* (2010); DAVID WALDSTREICHER, *SLAVERY’S CONSTITUTION: FROM REVOLUTION TO RATIFICATION* (2009).

<sup>232</sup> See, e.g., AZIZ RANA, *THE TWO FACES OF AMERICAN FREEDOM* (2010); Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1787 (2019).

<sup>233</sup> See, e.g., ROSEMARIE ZAGARRI, *REVOLUTIONARY BACKLASH: WOMEN AND POLITICS IN THE EARLY AMERICAN REPUBLIC* (2007).

<sup>234</sup> See, e.g., HOLLY BREWER, *BY BIRTH OR CONSENT: CHILDREN, LAW, AND THE ANGLO-AMERICAN REVOLUTION IN AUTHORITY* (2005).

constitutional jurisdiction. There, beyond the limitations of federalism or democratic accountability, federal officials and military officers enjoyed seemingly unfettered authority, at least as depicted by territorial residents.

I have argued elsewhere that the Constitution served as much to facilitate as to restrain imperialism.<sup>235</sup> The supposed exceptions of administration and the territories suggest that this was true for what the document did not say as well as for what it did. The “holes” that others have identified in the Constitution concerning both administration and territorial governance—more accurately broad grants of indefinite authority—facilitated the repurposing of older imperial law and created spaces where constitutional silence aggrandized federal power. These omissions helped construct an imperial power grounded on inequalities even as the new nation celebrated the comforting myth that it was a new kind of empire founded on equality and liberty.

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<sup>235</sup> See Gregory Ablavsky, *The Savage Constitution*, 63 DUKE L.J. 999 (2014).

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