

TOWNS OR COUNTIES

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The United States is a nation of counties with a latent romance for towns. The development of American local government law from the arrival of the first Europeans was defined by two opposing visions of settlement and local governance. On the one hand was the county, with its roots in the dispersed settlements and plantations of the South. On the other hand, was the town, with its roots in the communitarian congregational theocracies of New England. These models contrasted and competed in the on-the-ground progress of settler colonialism, and they contrasted and competed in the theoretical debates over how Americans should define themselves and the project of a growing continental nation/empire. On the ground, it was the dispersed settlement, protection of property rights, and minimal government of counties that spread and shaped most local government development from first arrival to 1800. But in the eyes of elites, political theorists, and the founders of the 1780s, the orderly and collective idea of the town remained a figure of political imagination and aspiration. This idealism was written into the Land Ordinance of 1785 and the Northwest Ordinance of 1787. This Article tells the history of these competing modes of settlement and imagination and how they have shaped local government law in the United States from the colonial project and into the imperial project of westward expansion. In so doing, it describes and unsettles the shape of our present local government law. Everyone who lives in the United States lives within the boundaries of at least one local government. Almost all of us live within a county boundary, and many of us live within a separate municipal boundary—in a town or a city. The structure of these governments and the differences between them not only shape the legal landscape of the most sprawling and diverse area of American public law (local government law); they also shape residents' lived experiences and civic imaginations. It matters where people live and how they are governed there. Because it matters, the formation and adjustment of local government systems and their boundaries have been subjects of contestation, theorizing, and political imagination from the beginning of the colonization of North America. Not only has that contestation shaped the world we live in today, but it shapes the ongoing process of local government change, development, and administration.

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PROLOGUE—KEYSTONE

In the spring of 2023, the newest town in Colorado was born when the resort area of Keystone voted to incorporate.¹ Municipal incorporation can mean many things in many contexts, but in general, “incorporation” refers to the birth of a general purpose local government, such as a city or a town.² By incorporating, Keystone emerged from its status as unincorporated land within Summit County and became an independent municipality with its own borders, powers, and responsibilities.³ In choosing to incorporate, Keystone voters claimed to choose

1. See Robert Tann, *Keystone will become Colorado’s newest town following incorporation approval*, SUMMITDAILY (Mar. 29, 2023), <https://www.summitdaily.com/news/keystone-will-become-colorados-newest-town-following-incorporation-approval-tuesday/> [https://perma.cc/77M7-Y9ZD].

2. See Municipal, BLACK’S LAW DICTIONARY (12th ed. 2024).

3. See Memorandum from Jennifer Madsen, Town Att’y, Town of Keystone, Colo., to Mayor & Town Councilmembers, Town of Keystone, Colo., exhibit A (Feb. 13, 2024) (on file with the Town of Keystone, Colo.), <https://keystone.colorado.gov/sites/keystone/files/documents/24-02-13%20Regular%20Meeting%20Packet.pdf> [https://perma.cc/X6FP-AHAE].

local “self-governance” over the status quo of county governance.⁴ In the face of what residents complained was “literally no voice or power,” incorporation was sold as a means for local control over the tax base, which was “[t]he only way that [they were] going to get [their] needs met”⁵

In Colorado, as in many states, the barrier to incorporation for Keystone residents was relatively low. All that was required was that residents of an unincorporated area gather at least 150 signatures from landowners and residents of the proposed incorporated place.⁶ The petition needed only to describe and map the proposed town, offer a name, and prove that there were enough residents in the proposed new town to make it financially solvent.⁷ Once this petition was submitted to the district court for approval, the court set up the mechanism for holding an election of the residents within the boundaries of the proposed new town.⁸ If a majority of those residents voted in favor of incorporation, the new town would be incorporated and a new town government formed.⁹

This process was followed in Keystone, and under it, the pathway to incorporation ran entirely through the internal politics of the proposed new town. Some residents were in favor of the new town, arguing that it gave them the tools to protect public safety (controlling street traffic) and to control local tax revenue (Keystone has a lot of high value vacation properties within its putative new borders).¹⁰ A minority of dissenting voices argued that creating a new municipality was unnecessary and would only raise taxes without providing any new benefits or local control.¹¹ In the end, by a two-to-one majority, the residents of the proposed town of Keystone voted to incorporate, and on March 28, 2023, Keystone emerged as a new town with a new town government and the coveted capacity for “local control.”¹²

All throughout this process, as it was designed under Colorado law and as it was pursued through local politics, the Keystone incorporation project was animated by an unspoken pair of core political principles. First, it was assumed

4. See Robert Tann, *Keystone residents pitch their vision for a new town with weeks to go before incorporation vote*, SUMMITDAILY (Mar. 6, 2023), <https://www.summitdaily.com/news/keystone-residents-pitch-their-vision-for-a-new-town-with-weeks-to-go-before-incorporation-vote/> [https://perma.cc/H69R-L8FW].

5. *Id.*

6. See COLO. REV. STAT. § 31-2-101(1) (2025). In counties where there are fewer than 25,000 residents, the petition requirement is even lower—only forty signatures are required. *See id.*

7. *See id.*

8. *See id.* § 31-2-102.

9. *See id.* § 31-2-103.

10. See Tim Huiting, Opinion, *Keystone Incorporation Committee: Becoming a town brings benefits*, SUMMITDAILY (Mar. 25, 2023), <https://www.summitdaily.com/opinion/opinion-keystone-incorporation-committee-becoming-a-town-brings-benefits/> [https://perma.cc/R48U-BV3K].

11. See Roman Kowalewicz, Opinion, *Letter to the Editor: There are too many negatives to making Keystone its own town; vote no*, SUMMITDAILY (Mar. 23, 2023), <https://www.summitdaily.com/opinion/letter-to-the-editor-there-are-too-many-negatives-to-making-keystone-its-own-town-vote-no/> [https://perma.cc/L4JU-YZ2Z].

12. Tann, *supra* note 1.

that the status quo of Summit County government was somehow vestigial, minimal, or basic. County government was *less* government—taxes were lower, services were fewer, and government was simply less robust. Against this backdrop, creating a town government was an act of choosing a more active form of local democratic control in opposition to a minimal and less participatory county government. Second, and related, Colorado law incentivized this choice of local self-government over county government by making it very easy to form a new town.¹³ Unlike in some other states, the county and the existing county government had no say at all in whether Keystone would incorporate.¹⁴ Nor were the residents of the county who would be drawn outside of the new boundaries of Keystone given a say in whether those new boundaries would be drawn.¹⁵ Under Colorado law, Keystone was not seceding from its existing local government formation (Summit County); it was emerging into self-governance from the primordial soup of under-governed, “unincorporated” status.¹⁶ By distinguishing virtuous incorporation from secession, Colorado establishes a clear preference for “incorporated” towns and cities over the base-level governance of counties.¹⁷

In making this distinction and preference in its law, Colorado (like many other states) draws a clear, if implicit, distinction between the two archetypal, base-level forms of local government in the United States. On the one hand, there is the county—a backstop of basic and sometimes minimal services. In most of the country, counties are large and cartographically inclusive. Where one county ends, another begins. On the other hand, there is the town or the city. If counties represent the minimal amount of democratic governance required to maintain a society, towns and cities represent an aspiration towards something more. They represent local control, self-determination, or even participatory democracy. Many states, like Colorado, explicitly prefer towns to counties and make it easy for residents to incorporate new towns out of the base material of the county. In drawing this distinction—and in preferring towns to counties—state laws replicate an underlying tension in political theory that has animated local formation in the United States since the first Europeans began the colonial project of imposing their political imagination on the continent.

13. See COLO. REV. STAT. §§ 31-2-101, -103 (2025).

14. In California, for example, counties are given at least some say in whether new towns and cities can be incorporated through the Local Agency Formation Commission (“LAFCO”) process. See Bob Brownne, *Mountain House CSD approves application for incorporation*, TRACY PRESS (Jan. 14, 2021), https://www.townmedia.com/tracy_press/news/mountain-house-csd-approves-application-for-incorporation/article_40e7e042-56c6-11eb-a8f3-3f3ebebeaf9.html [https://perma.cc/D2S7-T22B]. For example, when the recently-formed city of Mountain House was incorporated in San Joaquin County, residents had to submit a petition to the “San Joaquin Local Agency Formation Commission,” which could review the new boundaries and evaluate the costs and benefits to the county of incorporation. *Id.* Although the county LAFCO ultimately approved the application, the process included much more county voice and was much less deferential to the voters of the new town. *Id.*

15. § 31-2-101(2.5) (describing to whom notice of the petition to incorporate must be sent).

16. §§ 31-2-101, -103.

17. *Id.*

From nearly the first moment that European colonizers set foot in North America, there have been two primary models for local government in the colonized lands that they controlled. In Massachusetts and across New England, the land was settled collectively, and the dominant form of social, religious, and political organization was the town (or, when a town grew sufficiently large, the city).¹⁸ In Virginia, and across the South, land was settled in a far more individualized and dispersed way.¹⁹ The plantation was the center of daily life and the county emerged as a form of local government designed to protect the power of planters and landowners.²⁰

This Article is about the origins of these two ways of imagining local government and about the underlying ideals of government and political imagination that they represent. For as long as towns and counties have been counterposed as alternatives, American “founders” and political imaginers have been using them to litigate their aspirations and preferences for local government. From the earliest moments of American political imagination, a consistent dynamic has emerged: statesmen and idealists have preferred the political order and participatory structure of the town, while the organic structure of chaotic frontier settlement and underlying property-based libertarianism has led to the proliferation of counties.

In other words, for the last four centuries, local government in North America has been characterized in much the same way that the incorporation movement in Keystone described itself. Planners and framers have sought to build a nation of towns where self-determination and self-government would be the bedrock of civic participation. Meanwhile, settlers and citizens pursuing their own interests and protecting their property have largely built a nation of counties.

As a result, the towns, cities, and counties that make up the foundation of modern American local government law are the complex product of this contestation. While there are some (even many) towns that are obstacles to participatory civic life,²¹ and while there are some counties where a more robust form of participatory civic life seems possible,²² in most of the country, the underlying dynamic remains familiar. Towns and cities represent (or at least represent the aspiration towards) “more” government—more participation, more regulation, more local voice, and a thicker civic life. And counties represent “less” government—fewer services, less regulation, less democratic

18. Carl Bridenbaugh, *The New England Town: A Way of Life*, AM. ANTIQUARIAN SOC’Y, Apr. 1946, at 19.

19. *See id.* at 47.

20. *See* Daniel Farbman, *Plantation Localism*, 50 FORDHAM URB. L.J. 771, 774 (2023).

21. An example of this is the town of St. James in North Carolina, which was formed to protect the planned development of St. James Plantation. *See id.* at 788–95.

22. A number of urban counties have created consolidated city/county governments, where the county represents the promise of a thick regional government where suburban and urban resources and political problems are dealt with across parochial boundaries. Unigov in Indianapolis and Miami-Dade are classic examples. *See* IND. CODE § 36-3 (2025); FLA. CONST. art. VIII, § 6 (1968).

participation, and a thinner civic life.

Laws like Colorado's incorporation statute are built on this framework. And this framework itself is built on a long history of imagining and settling, projection, and pragmatism. Because this history has shaped the present of American local government law, understanding it is vital to understanding how we can (or should) navigate the ongoing tensions between a desire for civic participation and a deep-rooted desire to be left alone as we continue to shape and reshape, imagine and re-imagine our local political geography.

The contrast between the town and county shaped the project of colonial settlement and the imagination of localism in the newly formed independent republic. This Article tells the story of planners in New England, Pennsylvania, Georgia, and beyond, who looked to the town as a vector for political order, civic virtue, and collective prosperity. It also tells the story of settlers and colonists in Virginia (and Pennsylvania, Georgia, and beyond), who rejected collective civic projects in favor of individual property claims. Again and again, it is a story of political theory foundering on the shoals of political and economic reality. Again and again, it is a reminder that local government is the place in our public law where political theory and the reality of our lived politics and culture collide.

I. INTRODUCTION—1783 AND THE NORTHWEST

In 1783, the United States was faced with new questions of westward imperial imagination. The Colonies that had been part of the British Empire were now, according to the terms of the Treaty of Paris, an independent nation.²³ This transformation was tricky enough,²⁴ but along with independence came the problem of “new” land.²⁵ Before independence, the colonies were largely bound between the Atlantic coast and the Appalachian Mountains, but the land claimed by the British Empire stretched west to the Mississippi River.²⁶ In an act of optimistic cartographic speculation, the colonies projected their borders westward.²⁷ A map of the colonial land claims looks like a child drew westward lines extending colonial borders to the Mississippi River.²⁸ Virginia claimed most of the land north of its southern border while Massachusetts, Connecticut, and New York disputed the land stretching west from their borders.²⁹ North Carolina, South Carolina, and Georgia each claimed a slice of westward land (though South Carolina's claim was little more than a miniscule strip).³⁰

23. See GEORGE WILLIAM VAN CLEVE, *WE HAVE NOT A GOVERNMENT: THE ARTICLES OF CONFEDERATION AND THE ROAD TO THE CONSTITUTION* 33–36 (2017).

24. The new states' unsteady settlement of their relationships to each other in the Articles of Confederation was never stable and would lead, through a series of crises, to the drafting and ratification of the new Constitution in 1787. See generally *id.*

25. See *infra* Figure 1.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

Figure 1³¹

These land claims were contested and complex. For the most part, the land west of the mountains had not been seized and colonized by Europeans, which meant that it was the home of hundreds of thousands of Indigenous People³² who had either been living there for generations or who had been pushed westward by earlier European colonization. In the eyes of the colonists and the newly minted states, this land was “unoccupied” but under the jurisdiction of

31. Richard J. Werther, *The Articles of Confederation and Western Expansion*, J. OF THE AM. REVOLUTION, fig. 1 (June 14, 2022), <https://allthingsliberty.com/2022/06/the-articles-of-confederation-and-western-expansion/> [<https://perma.cc/2EE2-UDBF>].

32. The question of terminology, in referring to the people living in North America before the arrival of Europeans, is complex—and there is no single settled scholarly or political convention. See generally Brooke Bauer & Elizabeth Ellis, *Indigenous, Native American, or American Indian? The Limitations of Broad Terms*, 43 J. EARLY REPUBLIC 61 (2023). Indigenous People in the United States represent a huge diversity of language, culture, and experience. See generally *id.* Some people prefer the use of “Native” or “Native American,” others prefer “Indigenous,” and still others prefer “American Indian.” *Id.* at 62. I am conscious that I am writing about this topic and these people as an outsider (and as a descendent myself of European settlers). With that said, I am persuaded by scholars wiser than myself that all of “these labels foreground peoples’ relationships to the settler governments, and so they are primarily useful for talking about colonization and settler political and legal ideologies.” *Id.* at 74. For this reason, where talking about individual tribal nations, I will use names or the term “tribal nation.” And where talking about the broader group of Indigenous People generally, I will use that term. Words matter, and terminology matters. This is not a perfect solution, but it is a considered one. That is, in the end, the best that those of us writing about the past can do.

the newly formed nation.³³ Decisions had to be made: would the land be part of existing states or ceded to the national government? Who would sell the land? On what terms? Who would settle the land? Under whose authority? How would government function amongst the settlers?

These were questions of foundational political theory, but they were also essentially pragmatic questions. The words of an anonymous editorialist summed up the underlying contingency of the situation in the eyes of many of the newly minted Americans: “We live at the origin of things.”³⁴ The same people who were fighting over the terms of the new national order projected their imaginations westward over the “unsettled” land. They imagined the westward expansion of the best parts of the new nation and sought to use what they saw as the blank slate of the West as a buffer against what they saw as the worst predilections of their neighbors.³⁵

In all of this imagining, their pictures of settlement were specific and local. The blank slate would be filled with order, virtue, and self-government. To make that happen, there would have to be not only territorial government, but local government.

Since the first years of the European settler colonialist project, the questions of how land was owned, sold, and held were entwined with the problem of how the owners and inhabitants of the land would be governed. Across the colonies, starkly different ideas about land distribution were both the cause and product of starkly different ideas of local government.³⁶ In New England (and in other parts of the North influenced by Yankee migration), land was generally sold in large grants to be resold and developed according to a centralized plan.³⁷ In other words, settlement was largely collective and towns were generally imagined and formed before the land was sold and divided up.³⁸ By contrast, in

33. See Michael Witgen, *A Nation of Settlers: The Early American Republic and the Colonization of the Northwest Territory*, 76 WM. & MARY Q. 391, 392 (2019).

34. See PETER S. ONUF, *STATEHOOD AND UNION: A HISTORY OF THE NORTHWEST ORDINANCE* 38 (Univ. of Notre Dame Press 2019) (1987).

35. See GREGORY ABLAVSKY, *FEDERAL GROUND: GOVERNING PROPERTY AND VIOLENCE IN THE FIRST U.S. TERRITORIES* 4 (2021). Ablavsky emphasizes orderly treaty relations with Native nations and clear property rules. See *id.* His masterful book dives deep into the weeds (and failures) of these aspirations. See generally *id.* This Article adds a missing layer to that story—the layer of the local government emerging from and then governing the distributed property.

36. Here, and throughout the Article, I will refer to a somewhat simplistic binary opposition between the New England vision of local government and the Virginian vision. As I will discuss below, it is of course true that there were many variations of these systems within states and regionally across New England and the South. It is also true that the story of the Mid-Atlantic states is muddled and complex with states like Pennsylvania, New York, and New Jersey adopting elements of both systems and perhaps creating altogether separate models. With that said, the binary between New England and Virginia was largely understood as an operative binary by the framers of the new nation in the 1780s. Moreover, this binary reflects a still-existing rough binary in operation today between town-like places (incorporated, more government) and county-like places (unincorporated, less government). Like everything in Local Government Law, things are much messier and more nuanced below the surface—but there is value in resisting the gravity of chaos and contingency in order to see the patterns that emerge at higher levels of generality.

37. Bridenbaugh, *supra* note 18, at 19–20.

38. See *infra* Part II.A.

Virginia and most of the rest of the South, land was sold to individuals and settlement was haphazard and guided by individual choice.³⁹ Dispersed population was the rule, and towns and cities were rare.⁴⁰ The center of political, economic, and private life was the plantation.⁴¹ County government was largely formed as an *ex poste* solution to collective problems faced by these individual owners.⁴² Local government at the county level was intended not to serve the goals of communitarian self-government, but rather to protect the interests of property owners.⁴³

All of this was relatively well understood in 1783, when the leaders of the newly-independent United States were faced with the question of what to do at “the origin of things.” They understood the costs and benefits of communitarian, pre-planned, town-based settlement versus individualized, free-range, plantation and county organization. Understanding these differences, led by both Virginians (including Thomas Jefferson) and Yankees, they chose to endorse the township model when they laid out the framework for the distribution and settlement of the “new” land in the Land Ordinance of 1785 and the subsequent Northwest Ordinance in 1787.⁴⁴

But this township plan went off-track almost immediately—in fact, initially, the Northwest was settled in a haphazard, individualized way. Instead of a system of well-ordered towns, what emerged was a quilt of dispersed settlements organized into counties loosely governing (and protecting the property holdings) of individual owners and speculators.⁴⁵ The Founders had tried to choose towns, but they got counties instead. It was not until after 1830, when the volume of settlement increased and more Yankees found their way west, that something like the aspiration of a town-based system of local government would gain a foothold in the Northwest.

This was not the first time that this dance had happened in the story of local formation in the North American colonies. The original proprietors of Georgia initially imagined that their new colony would be settled as towns rather than counties (and without slavery), only to be overrun by dispersed plantations exploiting enslaved labor and governed by county courts.⁴⁶ Likewise, William Penn first imagined that Pennsylvania would be divided into orderly towns, only to find that settlement was haphazard and dispersed into a Mid-Atlantic patchwork of towns, counties, and variations in between.⁴⁷

This misalignment between the elites’ political imaginings of the town and the reality of chaotic, dispersed settlement underlies the theoretical contribution of this Article. The relationship between political imagination and the formation

39. See *infra* Part II.B.

40. See *infra* Part II.B.2.

41. See Farbman, *supra* note 20, at 775–76.

42. See *id.* at 778.

43. See *id.* at 778–79.

44. See *infra* Part III.B.

45. See *infra* Part III.C.

46. See *infra* Part II.B.3–4.

47. See *infra* Part II.C.2

of local government in the United States is older than 1776; it is a foundation to the project of settler colonialism in North America. It is also not merely historical; local governments remain vibrant (and sometimes stubborn) sites of contestation about the most basic questions of pragmatic political theory.

This history of the development of local government in the United States, this story, has not been told before in this way. Pieces of it have been hiding in plain sight, but nobody has fully explained the fundamental political and economic differences between towns and counties and the stakes of those differences in the shaping of our political geography. This Article thus fills a gap in the legal historiography of local government in the United States—and as any gap filler is, it is both necessary and perhaps, upon reflection, obvious.

But, as always, behind the history lies a normative goal as well. Every year when I teach Local Government Law, I observe the extent to which most residents of local places do not fully grapple with or understand the differences between how those places are governed. A resident of Bethesda, Maryland (an unincorporated place in Montgomery County, Maryland—governed entirely by county government) is unlikely to see how different the structure of their local government is from that of a resident of Brookline, Massachusetts (an incorporated and wealthy inner-ring suburb of Boston which still preserves vestiges of town-meeting government).

On the one hand, the fact that “normal folks” do not immediately see a difference in how these places are governed suggests that perhaps those differences do not really matter. Maybe there really is no difference (apart from scale) between town and county government. But the history in this Article, and in my other prior work,⁴⁸ suggests that we should take a deeper look. From the very beginning of local government in the United States, towns and counties have represented deeply divergent ways of understanding how land should be owned and how we should govern ourselves. The ramifications of these divergent conceptions of political economy still haunt our politics (the urban/rural political divide, the dynamics of state preemption of municipal laws) and our civic imaginations (the contrast between social democratic redistribution and libertarian small-government individualism).

Let me be clear that, in describing the history this way, I do not mean to lionize towns or denigrate counties. I freely admit that, as a matter of intellectual history, *the idea of the town* represents an aspiration towards a collective civic project, which seems to me normatively preferable to the individualist libertarian civic project that dominates the idea of the county. But one of the central themes here, and in the rest of my work, is that the idea of the town has always existed as more of an aspiration than a practice. In colonial New England, towns were theocratic collectives which were also engines of war,

48. See generally Farbman, *supra* note 20; see also Daniel Farbman, *Reconstructing Local Government*, 70 VAND. L. REV. 413 (2017).

inequality, and genocide.⁴⁹ In modern suburban America, towns are often enclaves of preserved wealth that exclude outsiders and protect the status quo.⁵⁰ To the extent that there is a normative argument latent in the story I am telling here, it is not that towns or cities are inherently good or politically virtuous. Rather, it is that the idea of the town has been and can be a vector for civic aspiration in ways that the idea of the county has not been and cannot be.

One further disclaimer is necessary before I proceed further. In establishing the binary between towns and counties, I am intentionally leaving cities out of the narrative. There are three reasons for this—two substantive and one pragmatic. The first substantive reason is that cities simply did not play a large role in the story of land distribution and local government formation in the colonial era and the antebellum era.⁵¹ The fact is that there were very few cities in the United States before 1780. When the colonies were founded, of course, there were no European cities at all. After nearly a century of settlement, in 1700 the largest cities in the United States were tiny. Boston and Charleston each had around 7,000 inhabitants,⁵² New York had less than 5,000 inhabitants,⁵³ and Philadelphia around 2,000.⁵⁴ All in all, fewer than five percent of all the colonial population lived in cities in 1700.⁵⁵ While the overall population grew, cities remained a tiny portion of the American population—less than four percent of the total population of the colonies lived in cities in 1776.⁵⁶ Today, of course, cities are the center of our political, social, and economic lives—the most recent estimates indicate that eighty-three percent of Americans live in urban areas.⁵⁷

49. See 10 STEVEN C. EAMES, *RUSTIC WARRIORS: WARFARE AND THE PROVINCIAL SOLDIER ON THE NEW ENGLAND FRONTIER, 1689–1748*, at 25–29 (2011). Town militias were the core of New England military strength as the colonists pushed westward in their series of brutal wars against the indigenous population. *Id.*

50. See Brian Highsmith, *The Structural Violence of Municipal Hoarding*, THE AM. PROSPECT (July 6, 2020), <https://prospect.org/civil-rights/the-structural-violence-of-municipal-hoarding/> [<https://perma.cc/45MH-KUFV>].

51. See generally *infra* Part II.

52. See *Population Trends in Boston 1640–1990*, BOS. HIST. & ARCHITECTURE, <https://www.iboston.org/mcp.php?pid=popFig> [<https://perma.cc/TET4-WHPF>] (last visited Jan. 24, 2026); Charles F. Kovacik, *Population*, S.C. ENCYC. (Aug. 22, 2022), <https://www.scencyclopedia.org/sce/entries/population/> [<https://perma.cc/APU3-J4QE>].

53. *Exhibition Text—New York at Its Core: Port City*, MUSEUM OF THE CITY OF N.Y., <https://www.mcny.org/nyaic-portcity-online> [<https://perma.cc/JFF2-2US3>] (last visited Feb. 14, 2026).

54. See Marie Basile McDaniel, *Immigration and Migration (Colonial Era)*, THE ENCYC. OF GREATER PHILA. (2014), <https://philadelphiaencyclopedia.org/essays/immigration-and-migration-colonial-era/> [<https://perma.cc/4Y45-4TJ2>].

55. See *Cities and Towns*, NAT'L HUMAN. CTR. TOOLBOX LIBR. (Sep. 2009), https://nationalhumanitiescenter.org/pds/becomingamer/growth/text2/text2read.htm#_ednref1 [<https://perma.cc/R7VQ-T55S>].

56. See *Reading List: The Role of Cities in the American Revolution*, MUSEUM OF THE AM. REVOLUTION (June 17, 2020), <https://www.amrevmuseum.org/read-the-revolution/reading-list-the-role-of-cities-in-the-american-revolution> [<https://perma.cc/SL45-Y5XH>].

57. See *U.S. Cities Factsheet*, UNIV. OF MICH. CTR. FOR SUSTAINABLE SYS. (Sep. 2025), <https://css.umich.edu/publications/factsheets/built-environment/us-cities-factsheet> [<https://perma.cc/D9AU-QA52>].

While it is nearly impossible to think about American local government *without* cities today, cities were simply not the center of land distribution or government during the colonial period.

This leads me to the second substantive point: because cities were small, they were not readily distinguishable from towns as forms of government. Boston may have been the largest town in Massachusetts, but it was run in much the same way as any other town in the state—it had a town meeting and understood itself to be a part of a coalition of Massachusetts “towns” rather than a city in contrast to towns.⁵⁸ New York and Philadelphia were slightly different cases, less because they were bigger or more urban, and more because they were cities in states where towns were not so established as the locus of political power. Charleston was yet another case as it was one of very few large settlements in the entire American South. All in all, however, for these reasons it makes more sense to think of what cities did exist in North America as large towns rather than as a separate category of local government.

This leads me finally to my third pragmatic point. Cities were not central to the local government imagination of the founders in the 1780s and so they are not central to the story that I am telling here. At its origins, the story of American local government development is *not* an urban story. Rather, it is a story of competing ideas of communal settlement (towns) and dispersed settlement (counties). In many ways, the ideology that animated the preference for communal settlement is now lodged in thinking about cities and urban life. But since this was not how the characters in this history saw it, it would be anachronistic and unnecessarily messy to muddle the binary between towns and counties with cities.

I will proceed in three further parts. Part II offers a description of the modes of local government that had developed in the colonies by 1776. The most simplistic description is that in New England, the town or township system dominated.⁵⁹ Colonists settled in groups (usually congregations) and conceived of settlement as a collective activity. Land was bought and developed under the expectation that a new town was being created. And the classic trappings of town government followed—town hall meetings, town militias, town schools, and town churches. In contrast to the New England system, the Southern system was rooted in the county and governed by the county court. This system existed

58. See Nikolas Bowie, *The Constitutional Right of Self-Government*, 130 YALE L.J. 1652, 1660 (2021).

59. A note on terminology. At first glance, it may seem as though the terms “town” and “township” are distinct and carry different meanings. This matters because the term used in both the Land Ordinance of 1785 and the Northwest Ordinance of 1787 is “township,” not town. That said, in my research I have found no evidence that these two terms were used differently during the colonial era or in the first years of the independent United States. When William Penn’s advisor and friend William Petty advised Penn to adopt the New England system at the founding of Pennsylvania, he called it the “township system.” See *infra* notes 186–89 and accompanying text. This terminological muddle persisted into the nineteenth century. Perhaps the most famous champion of the New England town, Alexis de Tocqueville, in the original English translation of *Democracy in America*, referred to “New England Township System.” ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 68 (Henry Reeve trans., Lawbook Exch. Ltd. 2019) (1847).

in some form from Virginia to Georgia, and it was characterized by scattered individual settlements orbiting around a more distant center of gravity defined by the county court. Individual landowners were linked through churches and some common enterprises, but collective settlements like towns were far rarer. The most common form of dense settlement was the plantation, where owners of land and human beings ruled largely unfettered by the relatively weak constraints of the county court. Between these two models there existed a complex myriad of variations in the Mid-Atlantic region, where the trappings of large feudal holdings were seasoned by reforms instituting more town-like forms of local government.

In Part III, this Article develops this backstory in the founding moment of the 1780s. Faced with a vast expanse of unsettled land west of the Appalachian Mountains, the chief imaginers of the new government drew on the existing forms of local organization to structure their imaginations about what the West could and should look like. Specifically, in a series of negotiations leading to and through the Northwest Ordinance, a tacit national policy developed: the new government imagined the land northwest of the Ohio River as divided into “townships” with a clear, though abstract, desire that settlement resemble the New England plan. At the same time, the land southwest of the Ohio River was left to the South and the southern pattern of settlement.

Following this, I briefly describe the ways in which these clear imaginations began to break down as people started moving west in large numbers. Except for limited exceptions (most famously in the northeastern corner of Ohio), settlers did not arrive in the west in orderly, pre-organized towns. Rather, the pattern of settlement was more haphazard, more individualized, and less orderly. As a consequence, in the first decades of territorial government and statehood, nearly all of the newly settled land was governed by some form of county system, with more formalized and structured towns being much rarer. I close Part III with a gesture toward future work, teeing up the story of an influx of New Englanders who came to the Northwest in the 1830s and brought with them a revitalized ideology about town-based local government.

Finally, in Part IV, I pivot to suggest ways in which this history might change the way we think about the present. The gap between aspirations toward civic participation and the on-the-ground reality of minimal local government remains a central fact of our localism today. We continue to invest local politics with aspiration, and local government remains a place where pragmatic political theory is practiced in law and policy. Design matters, and I argue that we should take the question of local government design as seriously as the drafters of the 1780s ordinances did. Northerners who grew up in towns with town meetings had a fundamentally different relationship to the state and the apparatus of government than Southerners who grew up amid plantations and counties. The same is true today—we are formed by our political geography—and that political geography is determined (if not caused) by its history.

If this is true, then we have more choices in the present about how we design and experience local government than we might think. Towns and counties often

feel like natural phenomena, unchanging and unchangeable. But they were contingent creations and the products of ideological, economic, and political contestation. Even if the solution to our political malaise(s) are not as simple as “towns not counties,”⁶⁰ the very fact that there was and remains a real and substantive difference between towns and counties is a reminder that we can and must choose how we govern ourselves in the present. And when we do, we should be thinking not only about local questions, but about the big questions that have haunted local government law forever: what kind of a political project are we engaged in, and how should we relate to each other where we live?

II. TOWNS OR COUNTIES IN THE COLONIES

From the very beginning of the English colonial project in North America, different patterns of settlement dictated different modes of self-government which, in turn, matured into profound differences in politics, culture, and national identity. The story of the way that patterns of settlement shaped the development of local government is at once a story of a slow evolutionary process over time and a story of how lasting political differences were born and nourished. People were and are shaped by their local political environment, and so observing the way that local political environments evolved to be different is a way of understanding how political division is born and grows. Throughout this story in both New England and Virginia, it is striking how local formation is at once haphazard and determinative—how ideas of self-government are both actively constructed and passively retained. The parallel developments of the town and county shaped colonial politics in profound, but subtle ways.

The political geography of the first European settlements in North America reflected both precarity and dependence. In Massachusetts and Virginia, Europeans clustered along the Atlantic Coast with an eye toward home.⁶¹ When they moved inland, it was along navigable waterways that linked the colonists with the coast and with the ships that might bring them back to Europe.⁶² When you look at maps of Massachusetts and Virginia drawn in the seventeenth century, this orientation is very clear. In a 1677 map of New England,⁶³ the towns are clustered along the coast and along the navigable portions of the major rivers, while the named settlements become sparser and sparser the further inland you look. In the spaces on the map between towns are the names of the nations who had been living on the land before the New Englanders arrived: Narragansett, Pequod, and Nipmuc. In the ocean, lying at the bottom of the map, are depicted the ships that connected the colonists with home.

60. This was the simplistic goal of the carpetbaggers who sought to transform the post-Civil War South by replacing counties with towns. See generally Farbman, *Reconstructing Local Government*, *supra* note 48.

61. See *infra* Figure 2.

62. See *id.*

63. See *id.*

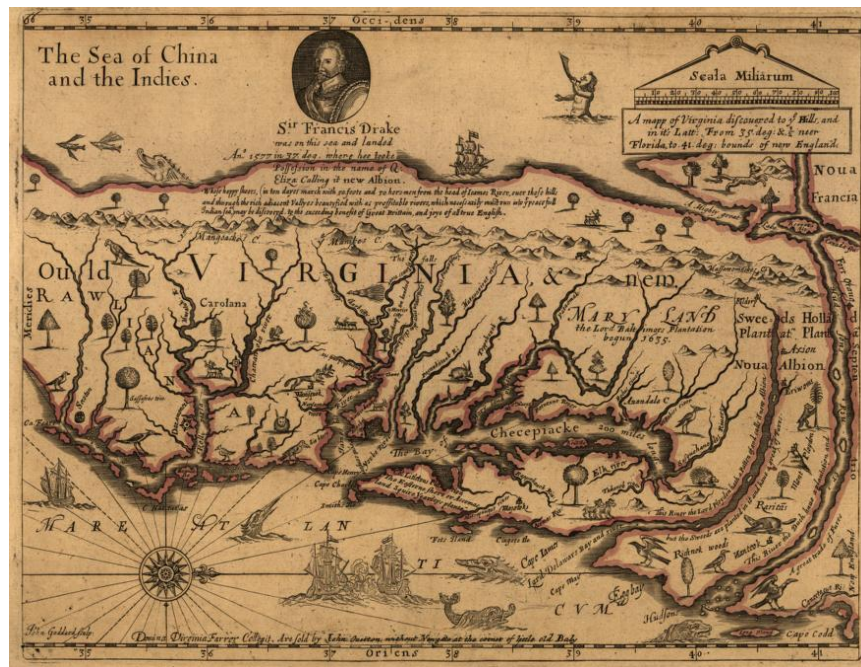
Figure 2⁶⁴

In Virginia, another map from 1677 shows much the same thing.⁶⁵ The ocean is depicted at the bottom of the map while the settlement that existed is depicted snaking up and along the tendrils of the Chesapeake Bay and James River. As in Massachusetts, large swaths of the map are attributed to the nations of people who had been living there before the Europeans arrived. And, as in Massachusetts, ships stand off the coast ready to take colonists home. (Though unlike the Massachusetts map, those ships are joined by a vivid variety of sea monsters.)⁶⁶

64. Michael Buehler, *Mapping Massachusetts, Part I (1600–1720)*, BOS. RARE MAPS, fig. 4 (Feb. 8, 2019), <https://bostonraremaps.com/mapping-massachusetts-part-i-1600-1720/> [<https://perma.cc/VHK3-ABAV>].

65. See *infra* Figure 3.

66. While the Massachusetts map makes no predictions or assumptions about what lies beyond the westward border (the top of the map), the Virginia map confidently predicts that the “Sea of China and the Indies” lies just across the spine of the Appalachian Mountains. See *id.*

Figure 3⁶⁷

While these two seventeenth century maps reflect a similar sense that the new colonists were perched on the edge of an uncharted, uncertain, and dangerous world, there is one striking difference. In New England, the path of settlement and colonization was clearly marked by little icons that showed concentrated and clear towns—each with a name that is still familiar to us: Cambridge, Watertown, Concord, Hartford, and New London.⁶⁸ But in Virginia, a close look at the map reveals only two formal “towns” (Jamestown and Henrico City), while other markers of European occupation are labeled as “plantations.”⁶⁹ In other words, in the earliest depictions of the political geography of these two colonies, a pattern was evident that would grow over time. In New England, settlement was accomplished in the shape of the collective, congregational (and theocratic) project of towns. In Virginia, by contrast, settlement happened by way of individual acquisition of land and the establishment of largely independent plantations.

If the seventeenth century maps were suggestive, maps from the mid-eighteenth century make this pattern all the more clear. A map of Massachusetts

67. *A Mapp of Virginia Discovered to Ye Hills, and in Its Latt. from 35 Deg. & 1/2 Neer Florida to 41 Deg. Bounds of New England*, LIBR. OF CONG. (1667), <https://www.loc.gov/resource/g3880.ct000903/?r=0.466,0.085,0.64,0.34,0> [https://perma.cc/B5PT-Y855].

68. See *supra* Figure 2.

69. See *supra* Figure 3. Maryland is noted as “The Lord Baltimore’s Plantation” and Accomack, or the eastern shore of Virginia and Maryland, is noted as “Col. Littleton’s Plantation” and “Squire Yearly’s Plantation.” See *id.*

from 1780 shows a proliferation of towns radiating out from Boston.⁷⁰ While rivers and roads are marked, the entire logic of the map depends upon the relationship between the towns. Towns are the inflection points and focal points that mark the colonists' understanding of political space.

Figure 4⁷¹



Compare this map with a roughly contemporaneous map of Virginia.⁷² Unlike the earlier Virginia map, the eighteenth century map is thick with notations indicating settlement.⁷³ All along the rivers and inlets are the detailed markings of names and places.⁷⁴ But almost all of the marked place names are not towns, but rather the names of plantations.⁷⁵ This map prominently notes the different counties in the colony and occasionally delineates the location of a courthouse among the plantation names.⁷⁶ But the thickest and most detailed notations are not local governments at all, but private place names, either noting owners (Eppes, Powels, Kennon), or the estate names of the plantation (Bullhill, The Row, Mount Pleasant).⁷⁷

70. See *infra* Figure 4.

71. *A New and Accurate Map of the Colony of Massachusetts [i.e. Massachusetts] Bay, in North America, from a Late Survey*, LIBR. OF CONG. (1780), <https://www.loc.gov/resource/g3760.ar088100/?r=0.272,0.229,0.431,0.229,0> [https://perma.cc/4NSL-MED8].

72. See *infra* Figure 5.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. See *id.*

Figure 5⁷⁸

Altogether, and across time, these maps trace the outline of a simple but important story at the root of the history of American local government. From the very beginnings of the colonial project, Europeans arranged themselves in different ways on the North American landscape. In New England, they congregated around churches, town greens, and schools. In Virginia, they spread out on pieces of property over which they claimed dominion. In New England, the governments that emerged were town governments, which over time became empowered sites of self-government (even if they began as locations of theocratic control). In Virginia, no such town governments emerged, which meant that local government was organized in a looser and more diffuse way in the form of the county (and in the accompanying church designation of the parish).

As the rest of this Part discusses, these differences were the product of a complex system of cultural, religious, and economic differences. Rarely was local government the central organizing idea of settlement. Still, the local government institutions that emerged were concrete manifestations of real differences that would only become more entrenched and salient over time. The differences between town and county were not superficial—they were fundamental and would determine the shape of other, deeper differences at independence and into the first century of the new nation.

A. New England: Congregations and Towns

The men and women who came from England to New England arrived from different places, with different backgrounds and different ideas of how to

78. *A Map of the Most Inhabited Part of Virginia Containing the Whole Province of Maryland with Part of Pensilvania, New Jersey and North Carolina*, LIBR. OF CONG. (1755), <https://www.loc.gov/resource/g3880.ct000370/?r=0.57,0.362,0.164,0.087,0> [https://perma.cc/E3JP-E43U].

organize themselves. Although the colonizers knew that the land they were travelling to was occupied by indigenous nations, they also saw it as “open” in the sense that it represented opportunity for a fresh start, both socially and economically. But, although both New England colonists and Southern colonists were committed to the acquisition of land,⁷⁹ what distinguished the New Englanders was “a concern for community integrity.”⁸⁰ In broad strokes, New Englanders were more interested in finding and forming communities than Virginians were. Having landed on the other side of the Atlantic Ocean, they found themselves organized into congregations and towns which, in turn, formed the foundation of both religious and political life.

In a thin sense, it is sufficient for the purposes of this Article to observe and affirm that, in New England, from the 1630s onwards, towns stood at the center of the life of the colony. They structured the way that Europeans experienced the economy, politics, culture, and religion. They also formed the center of the military apparatus—a fact that was brutally salient during the nearly constant bloody skirmishes of conquest and expropriation with the Indian nations who were being displaced.⁸¹ But if this thin observation lays a foundation, it does not do enough to explain how and why New England became a land of towns. To do that, one must look at culture in both its secular economic and religious aspects.

1. *Congregationalism and Community.*—Most tend to look back on the settlers of New England as a unitary group of “Puritans” who shared a common zeal for religious independence and freedom from the feudal and ecclesiastical hierarchies of England. In fact, it was by no means true that every emigrant was a Puritan or that their reasons for coming to North America were religious.⁸² Even so, anyone looking at New England from across the Atlantic could hardly have been blind to the Puritan identity of the new colony. Those who described New England to old England argued that unlike Virginia colonists, who sought only profit, New England colonists “went upon two other designs . . . to satisfy their own curiosity in point of conscience [or] to transport the Gospel to the heathen that never heard thereof.”⁸³ Whether or not all those who came to New England were Puritans, they came understanding that they were coming to a place where Puritanism dictated the shape of colonial life.⁸⁴ At the same time, it

79. And, horribly, to the expropriation of land and violent expulsion of the Indigenous People who had been living there for centuries.

80. VIRGINIA DEJOHN ANDERSON, *NEW ENGLAND’S GENERATION: THE GREAT MIGRATION AND THE FORMATION OF SOCIETY AND CULTURE IN THE SEVENTEENTH CENTURY* 90 (1991).

81. The New Englanders fought their wars through the mechanisms of town militias. Despite a veneer of control at the colony level, it was the town militia that structured and prosecuted military action from King Phillip’s War in the 1670s to the Seven Years War in the 1750s and 60s. See KYLE F. ZELNER, *A RABBLE IN ARMS: MASSACHUSETTS TOWNS AND MILITIAMEN DURING KING PHILIP’S WAR* 8–11 (2009).

82. See ANDERSON, *supra* note 80, at 89–90.

83. *Id.* at 38. In Anderson’s words, “New England, then, promised its settlers *spiritual* advantages; men merely seeking wealth would be better advised to seek their fortunes elsewhere . . .” *Id.* at 37–38.

84. See *id.* at 39.

would be wise to be somewhat skeptical of the Yankee claims of piety over profit—while some colonists were drawn by spiritual betterment, others were drawn by the prospect of getting rich.⁸⁵

Puritanism, or nonconformism, or congregationalism, are broad terms for a set of religious attitudes.⁸⁶ In its simplest terms, the Puritans' attitude toward worship centered the congregation and the "community" of the godly.⁸⁷ Perhaps the most famous iteration of this was the Mayflower Compact, in which the congregation of Puritans who took ship on the Mayflower from their exile in Leiden agreed to "covenant and combine our selves together into a civill body politick, for our better ordering and preservation and furtherance of the ends aforesaid"⁸⁸

While the Mayflower Compact has been vigorously overused as a rhetorical precursor for American democracy, what it does indicate is the broad inclination toward collective self-government as consistent with and necessary to the religious identity of the new settlements.⁸⁹ For the first seventeenth century colonists, the distinction between congregation and town was not clearly delineated. But both sides of the community coin indicated a draw towards collective settlement and ordered government.⁹⁰ What this meant was that the medium of settlement was not the scattered farm or manorial estate. Rather, it was the town.

It would be a mistake to overromanticize the self-government and democracy that English settlers exercised within their towns. In the colonial center of Boston, the hierarchy of church and magistrates still exercised strong central control over both religious and civil life.⁹¹ But despite the ecclesiastical and economic micromanagement from Boston, the fact was that towns (and their attendant congregations) were established as the center of public life.⁹² When towns grew too big, or when congregations splintered, new towns (and new

85. Virginia DeJohn Anderson, reviewing both the historiography and contemporary tracts and advertisements seeking migration, concludes that profit was not the primary motive for most migration. See Virginia DeJohn Anderson, *Migrants and Motives: Religion and the Settlement of New England, 1630-1640*, 58 *NEW ENG. Q.* 339, 370-83 (1985). But other scholars have noted that dreams of wealth and colonial expansion found their way quickly into the New England consciousness. See STEPHEN INNES, *CREATING THE COMMONWEALTH: THE ECONOMIC CULTURE OF PURITAN NEW ENGLAND* 39-45 (1995). Max Weber and Perry Miller are the most famous of these voices, but there is a deep scholarly tradition linking puritanism with capitalism and the accumulation of wealth. See *id.*

86. See generally PERRY MILLER, *ERRAND INTO THE WILDERNESS* (1956); DAVID D. HALL, *THE PURITANS: A TRANSATLANTIC HISTORY* (2019).

87. See DAVID D. HALL, *A REFORMING PEOPLE: PURITANISM & THE TRANSFORMATION OF PUBLIC LIFE IN NEW ENGLAND* 163 (2011).

88. 1 WILLIAM BRADFORD, *HISTORY OF PLYMOUTH PLANTATION 1620-1647*, at 191 (1912).

89. See 10 JEREMY DUPERTUIS BANGS, *A NEW LIGHT ON THE OLD COLONY: PLYMOUTH, THE DUTCH CONTEXT OF TOLERATION, AND PATTERNS OF PILGRIM COMMEMORATION* 11 (2020).

90. See ANDERSON, *supra* note 80, at 89. "Settlement would be a corporate enterprise as groups of colonists voluntarily gathered together to establish towns, each with its church, where the spiritual and secular communities would be coterminous." *Id.*

91. See MICHAEL ZUCKERMAN, *PEACEABLE KINGDOMS: NEW ENGLAND TOWNS IN THE EIGHTEENTH CENTURY* 11-12 (1970).

92. See *id.*

churches) were born.⁹³ When exiles (Roger Williams) or dissenters (Thomas Hooker) left the Massachusetts Bay Colony, they did not abandon the town as a form of settlement. They brought the Puritan idea of congregation, town, and community with them and established towns—in Hooker’s case, the towns that hugged the Connecticut River Valley from Northampton and Hadley south to New London.⁹⁴

Even as the first generation of religious purity and colonial exigency wore off, the town and town government had become central to the public cultural identity of New England. Across the region, this cultural underpinning became more politically exigent at the end of the Glorious Revolution in England when William and Mary moved to assert royal control over the heretofore self-determining New England colonies.⁹⁵ As Michael Zuckerman so persuasively argues, once the central authority of the Boston clerics and magistrates was supplanted by the Crown, the heart of New England puritan self-determination was forced into retreat at the level of the town.⁹⁶ Where congregations had been willing to be subordinate institutions in a centralized system with a centralized base of power, they became independent bases of religious identity and cultural identity when the centralized system was displaced. In Zuckerman’s terms, in the eighteenth century in New England, “the public peace could not be entrusted to Boston, but would have to be separately secured in each town in the province . . . From that time forward to the era of the American Revolution, the locus of power and influence over the lives of the people lay primarily in the towns”⁹⁷

In this way, the Puritan impulse towards communal and congregational settlement established an infrastructure of town government which, over time and under pressure from oppositional royal rule, became increasingly invested with civic and political meaning.

2. *Buying and Owning Land.*—If religion and culture were part of why New Englanders organized themselves into congregations and towns, it was the raw economic reality of buying and selling land that guided those forces into practice. Having laid claim to the “unoccupied” land in Massachusetts, the colonizing authorities had to determine how that land would be distributed to the colonists who were coming. The various colonial projects in Massachusetts initially offered different answers to this question. In Plymouth, the land was held collectively by a joint stock corporation which meant, in effect, that the

93. See BANGS, *supra* note 89, at 31–32. Among the most famous splinterings occurred within the first decades of the Europeans’ arrival, when Thomas Hooker broke with the Boston hierarchy (John Winthrop and John Cotton) over who should be allowed to participate in government. See HALL, *supra* note 87, at 41. Winthrop believed in limiting participation to the few and godly, while Hooker wanted to distribute participation and the franchise more broadly. See *id.*

94. See Clarence Deming, *Town Rule in Connecticut*, 4 POL. SCI. Q. 408, 408–09 (1889).

95. See ZUCKERMAN, *supra* note 91, at 17.

96. See *id.* at 17–18.

97. *Id.* at 18.

property of the colony was held in common with no individual land owners.⁹⁸ By contrast, in the Massachusetts Bay colony based out of Boston, land was initially granted through the same kind of individualized, head right system that was used in Virginia.⁹⁹ These initial experiments were short-lived, and by the end of the 1630s, as more colonists began to flow into Massachusetts, both Plymouth and Massachusetts Bay had transitioned to a “town grant” system of land distribution.¹⁰⁰ This meant that land was granted and sold not to individuals, but rather to towns as corporations.¹⁰¹

The town grant system did not mean that individuals were not profiting from land sales or purchasing property. Rather, it meant that if and when an individual wanted to buy or occupy land outside of an established town, that land would be sold or granted as a large collective with the understanding that it would, itself, be established as a new town.¹⁰² Once granted by the colony, the land was transferred to “proprietors” who, in turn, managed the sale and distribution of land to individual inhabitants.¹⁰³ The town grant system of land distribution meant that as the colonists moved inland and westward, the spread of settlement would retain the fundamental communal form that the first coastal settlements had adopted.

In practice, this system balanced an underlying commitment to communal settlement (and the order and implication of self-government that it entailed) with the project of distributing the colonized land to individual landowners. The colonial leaders sought to constrain settlement and population growth through the vehicle of towns, while the property created in the ever-growing roster of New England towns represented the opportunity for colonists to buy an individual stake in the colonial project.

The specific terms of this system of land distribution were not a direct import from “the old country;” rather, they developed under the pressures and

98. See BANGS, *supra* note 89, at 25. Some historians have suggested that the land in Plymouth was held in true communal ownership. See, e.g., Tom Bethell, *How Private Property Saved the Pilgrims*, HOOVER DIG. (Jan. 30, 1999), <https://www.hoover.org/research/how-private-property-saved-pilgrims> [<https://perma.cc/5NJU-JJS6>]. This has been an especially popular claim for conservative and anti-communist commentators, who are eager to point to the fact that Plymouth abandoned the communal project for individual land ownership as proof that communism is bad, unworkable, or unamerican. *Id.* More recent and nuanced accounts suggest that Plymouth was never a true commune, but rather a relatively common (and capitalist) joint stock company, which held the land for the common benefit of all the stockholders (including the colonists). See BANGS, *supra* note 89, at 25–26.

99. See ANDERSON, *supra* note 80, at 90–91.

100. See *id.* at 91.

101. See *id.*

102. In practice, the entrepreneurial colonists who set out to occupy land that was vacant (in their eyes) after expropriation, acted much like modern day developers. See ROY H. AKAGI, *THE TOWN PROPRIETORS OF THE NEW ENGLAND COLONIES* 3–5 (1924). These town “proprietors” secured the permission to establish a town and then managed the sale and distribution of the property within that town grant. See *id.* For a rich and deep investigation of the town proprietors of a single town—the town of Sudbury, Massachusetts—see generally SUMNER CHILTON POWELL, *PURITAN VILLAGE: THE FORMATION OF A NEW ENGLAND TOWN* (1963).

103. See EDWARD T. PRICE, *DIVIDING THE LAND: EARLY AMERICAN BEGINNINGS OF OUR PRIVATE PROPERTY MOSAIC* 29 (1995).

contingencies of the colonial project. The land-ownership systems that the settlers brought with them from England were not all the same. As Sumner Chilton Powell's rich account of the formation of Sudbury, Massachusetts demonstrates, English colonists drew on at least three distinct ways of thinking about land ownership from their homes: "[T]he open-field manorial village, the incorporated borough; and the enclosed-farm East Anglian village."¹⁰⁴ Open-field villagers operated in the remnants of a feudal regime where the "Lord of the Manor" owned the land and administered the farming and grazing on common fields.¹⁰⁵ In caricature, this was a system of feudal aristocratic rule, where the lord owned land and the peasants worked that land. In practice, it was a thick and complex web of informal but deeply-held relationships, whereby the residents of the village understood themselves to have quasi-ownership rights to the land they worked.¹⁰⁶ That said, open-field villagers were not accustomed to the absolute rights of individual property ownership and instead understood their uses of property to be more collective and collaborative.¹⁰⁷

In contrast to the open-field emigrants, those who came from incorporated boroughs in England had the experience of living outside of a feudal system and within something more familiar to town government. Like New England towns, English boroughs were composed of individual property owners who were governed (and taxed) by a complex interweaving of civil and church authorities.¹⁰⁸ Burgesses (the residents of boroughs) were accustomed to the more overt project of governing a complex community with concerns that went beyond the common agricultural enterprise of the open-field manor.¹⁰⁹

Third, last, and perhaps most familiar, were the East Anglian villagers. These emigrants came from communities in East Anglia (an area to the northeast of London) where the land had been "enclosed," meaning that each farmer claimed ownership of his land to the exclusion of his neighbors on the other side of the fence.¹¹⁰ Enclosed villages had much less common land and farmers owned and worked their land themselves, seeking both to increase their holdings and to compete with their neighbors.¹¹¹

The form of land distribution in New England towns was a refraction of the various systems that the emigrants brought with them, but a copy of none. Towns were formed and laid out as communal projects, but there was no lordly manorial ownership, nor was there widespread commonly held land. Instead, the town committed some common land for school, church, and town green while translating the need for collective organization through mechanisms of self-government that drew on borough government.

104. POWELL, *supra* note 102, at xvii.

105. *Id.* at 3.

106. *See id.* at 8.

107. *See* WILLIAM SEARLE HOLDSWORTH, AN HISTORICAL INTRODUCTION TO THE LAND LAW 39 (1927).

108. *See* POWELL, *supra* note 102, at 28–31.

109. *See id.* at 26.

110. *See id.* at 60.

111. *See id.* at 61.

In this sense, the town was a vehicle for land distribution and for civil and spiritual self-government. As such, the town was also a vehicle for colonialism and empire. As the leaders of the New England colonies managed the expansion of European conquest and settlement westward, they proliferated towns as outposts of godliness and government. Not only did each new town help to organize the expansion of population and the economic exploitation of the land, each town also operated its own militia.¹¹² These militias became a central element of town identity and governance—and they were the roots of the military power of the colonizers when war broke out (as it frequently did) with the indigenous nations, the French, and ultimately the Crown.¹¹³

And so, between religion, economy, culture, conquest, and self-preservation, the town emerged in New England as the focal point of the public sphere. Towns were local governments and they were influential voices in colonial government as well.¹¹⁴ But they were, more fundamentally, the base unit of political imagination and the building block of political geography. Towns and town governments were coextensive with the religious and political cultural identity of New England.

B. The South: Parishes and Counties

The men and women that came from England to Virginia in the seventeenth century were not so very different from the colonists who arrived in Massachusetts. As was true in New England, the people who came to Virginia came from all corners of English life: the country, towns, and the city. But, where emigrants to New England were sold the ideology of a godly settlement, the emigrants to Virginia were largely unencumbered by anything more than the dream of profit. The cliché version of the story goes: those in power in New England acted explicitly to maintain and protect the congregations that were coextensive with towns, while those in Virginia acted to protect property rights and profit.

As with most clichés, this distinction between the individual profit motive and the communal Puritans obscures as much as it reveals. Still, it is useful to rehearse for at least two reasons. First, this sense of the difference between the origins of Virginia and the origins of New England was salient the first decade after the Declaration of Independence when the “founders” set about the project of framing the outlines of the new republic. It mattered that influential voices, from John Adams to Thomas Jefferson, thought about the history of settlement in these terms. Second, while the cliché overstates the case, it does point in the direction of some real and meaningful differences that help to explain how the local institutions of Virginia developed so differently from those of New

112. See EAMES, *supra* note 49, at 26.

113. See ZELNER, *supra* note 81, at 8.

114. See Bowie, *supra* note 58, at 1663. Bowie tells the story of how New England towns came to dominate the politics of New England and how the towns’ resistance to the Crown was fundamental to the public imagination of what government was and should be during the writing of the new constitution. See generally *id.*

England.

1. *Gentry and Class*.—By one measure, more than thirty percent of the “free” (i.e., non-indentured) immigrants to Virginia in the seventeenth century identified as “gentry.”¹¹⁵ Despite the fact that they were coming across the ocean to cultivate the North American land and produce cash crops, only three percent of free immigrants identified as farmers or agricultural workers.¹¹⁶ Behind the “gentry,” the next most prominent identified occupation was “merchant.”¹¹⁷ The gentry and the merchants had come to grow and sell tobacco—they had not come as farmers to work the land, but rather as planters to manage workers on their farms.

In the years before the widespread adoption of the system of plantation slavery,¹¹⁸ the entrepreneurial project of cultivating cash crops in Virginia required that the new colonists find people to work the land for them. This explains why so many indentured servants came to Virginia during the 1600s—and why so many of them were agricultural or unskilled laborers.¹¹⁹ This is not to say that there were no gentry who immigrated to New England, nor (by any means) that there was no indentured labor in New England.¹²⁰ But the raw numbers suggest not only that the system of indentured servitude was more predominant in Virginia, but also match with the economic reality that, in Virginia, there were fortunes to be made on tobacco plantations, while the same was simply not true in New England.¹²¹

This dynamic matters because it helps explain why, even before the advent of the horrific and brutally profitable system of plantation slavery, the initial settlement patterns of Virginia were sparser. The people who were migrating were not coming to live in congregations or communities. They were coming to make money from the land and to build a ruling social and economic elite.

Where the elite of New England had sought to establish congregational freedom distinct from the Episcopalian oppression at home, the Virginian project was to establish an aristocracy of land, power, and wealth that was

115. JAMES HORN, *ADAPTING TO A NEW WORLD: ENGLISH SOCIETY IN THE SEVENTEENTH CENTURY CHESAPEAKE* 26–27 (1994).

116. *See id.* at 27.

117. *See id.*

118. It is important to distinguish between a period where Africans (and Indigenous People) were enslaved and forced into labor on small farms (and the economic, political, and cultural reality of plantation slavery, where enslavement was a tool of mass agriculture and a foundational social structure). Ira Berlin distinguishes between “societies with slaves” and “slave societies.” *See* IRA BERLIN, *MANY THOUSANDS GONE: THE FIRST TWO CENTURIES OF SLAVERY IN NORTH AMERICA* 8–12 (1998). The rise of the mass plantation did not happen until the end of the seventeenth century, and it was not until the rise of the plantation that the oppressive foundation of mass enslavement and exploitation developed. *See id.*

119. *See* HORN, *supra* note 115, at 34. Nearly half of all the indentured servants who traveled from England to the Chesapeake region in the seventeenth century identified as “agricultural” laborers while roughly another quarter identified as “semiskilled or unskilled labor.” *Id.*

120. Indentured servitude, like slavery, was a practice that spanned all of the North American English colonies. *See* JOHN WAREING, *INDENTURED MIGRATION AND THE SERVANT TRADE FROM LONDON TO AMERICA, 1618–1718*, at 78–79 (2017).

121. *See id.*

unavailable at home.¹²² This fantasy of lordship (which quickly transformed into reality for many) meant that in the absence of any cultural, religious, or coercive directive to establish communal settlements, many new Virginians actively sought to establish independent plantations at a distance from each other to maintain independence on their private property.¹²³ That meant that settlement was dispersed with many independent plantations and very few towns.¹²⁴

Just as the towns had emerged as the base-unit of Puritan life in New England, the Cavaliers in Virginia had imposed the self-sufficient and dispersed plantation as the base unit of life on the Chesapeake.¹²⁵ Would-be (and actual) lords ruled over the unfree labor of other humans to cultivate cash crops and make their fortunes.

It was against this cultural backdrop that local government in Virginia emerged as an exigent response to two intertwined problems. First, as was true everywhere for the colonial project in North America, settler colonialism was an act of violence that provoked violent response from the people who had been living in Virginia before the English arrived.¹²⁶ Under threat from attack from the people whose land they sought to take, dispersed settlement presented problems both of self-defense and coordination.¹²⁷ Second, the dispersal of settlement and commitment to property autonomy meant that, on the occasions where collective action was required (roads, taxation, etc.), it was difficult to coordinate.¹²⁸ This led to economic chaos and political unrest and incentivized the new gentry of Virginia to organize themselves to rule.¹²⁹ They did so not by condensing their settlement into towns or adopting collective ideas of self-government. Rather, they did so by establishing a county court system that empowered the emergent economic and cultural elite to exercise control over a limited public sphere in order to preserve public peace and maintain the economic and cultural status quo.¹³⁰

2. *Buying Land and Population Dispersal.*—Alongside the cultural strands that pushed Virginians into dispersed settlement ran a system of land ownership and distribution that facilitated that dispersal. In its simplest form, land was

122. See generally DAVID HACKETT FISCHER, *ALBION'S SEED: FOUR BRITISH FOLKWAYS IN AMERICA* (1989). David Hackett Fischer observes that "[n]early all of Virginia's ruling families were founded by younger sons of eminent English families . . . with no hope of inheriting an estate in England." *Id.* at 162. By emigrating to Virginia, these younger sons hoped to establish themselves as lords in their own right in the new world. See *id.* It is worth saying that these colonists were very much sons and not daughters. See *id.* Unlike New England, only one in four immigrants to Virginia were women. See *id.* at 229.

123. See Kevin P. Kelly, "In dispers'd Country Plantations": *Settlement Patterns in Seventeenth-Century Surry County, Virginia*, in *THE CHESAPEAKE IN THE SEVENTEENTH CENTURY: ESSAYS ON ANGLO-AMERICAN SOCIETY* 183 (Thad W. Tate & David L. Ammerman eds., 1979).

124. See *id.*

125. *Id.* at 183.

126. See Warren M. Billings, *The Growth of Political Institutions in Virginia, 1634 to 1676*, 31 WM. & MARY Q. 225, 225–26 (1974).

127. See *id.* at 226.

128. *Id.* at 225–26.

129. See *id.*

130. See *id.*

distributed to Virginian colonists through direct grants to individuals from the Virginia Company.¹³¹ Under Virginia's original "headright" system, each colonist was granted a large tract of land whose size corresponded to the number of people he was bringing over to work that land.¹³² In practice, this meant that a rich and ambitious prospective planter who brought over his family and a number of indentured servants could claim thousands of acres.¹³³ These grants created huge tracts of land controlled by relatively few individuals, and those grants were not required to be concentrated.¹³⁴ Rather, colonists were free to spread out in search of the land that suited them best. Not only did this dispersal serve the desires of colonists who wanted the best land (and to live out their manorial imaginings), but it also served the imperial needs of the new colony by spreading the English population more broadly to claim dominion in the face of tribal nations and other European political powers.¹³⁵

To put the situation differently, in Virginia land was distributed to colonists with no requirement of prior planning and without regard to a broader regional plan for distributing and organizing the population. In the absence of religious or cultural pressures that would press colonists into condensed settlements, and with the latent fantasy of lordship and individual domain in the new world, land was settled in a dispersed way, with large parcels of land being held by individual proprietors to control as they saw fit.

3. *Slavery and Plantations*.—African slavery came to Virginia at nearly the same time as the English colonists. Enslaved people lived and worked in North America across the length of the seventeenth century. That said, for most of the 1600s, Virginia planters relied on the indentured labor of their fellow Englishmen to a much greater extent than on enslaved Africans.¹³⁶

The combination of chivalric aspiration, large-scale individual landownership, and dispersed population rendered the individual plantation the center of colonial power and public life. Landowning elite owned land and controlled a subjugated workforce to produce large scale cash crops for export. That meant that in Virginia, as in most of the Southern colonies, a plantation system had developed as part of a pattern of settlement before the racialized system of chattel slavery became embedded in the political, economic, and cultural fabric of Southern life.

To put it another way, just as towns developed as the base unit of cultural, political, and economic organization in New England in the first decades of the colonial project, plantations emerged as the base unit of local life in the South during that time.¹³⁷ But the plantation as a form of social organization was not initially constituted by its relationship to slavery (a relationship that would

131. PRICE, *supra* note 103, at 35.

132. *See id.* at 14.

133. *See id.*

134. *Id.*; *See also* WARREN R. HOFSTRA, THE PLANTING OF NEW VIRGINIA: SETTLEMENT AND LANDSCAPE IN THE SHENANDOAH VALLEY 176 (2004).

135. *See* HOFSTRA, *supra* note 134, at 176.

136. *See* EDMUND S. MORGAN, AMERICAN SLAVERY, AMERICAN FREEDOM 306–09 (2003).

137. *See* Farbman, *supra* note 20, at 775.

deepen into the horrific system of plantation slavery that has hung like a pall over American life for three centuries); rather, the plantation emerged as a system of settlement and social organization in the South as a product of how land was distributed and local identity was organized.¹³⁸ Plantations were the heart of Southern local government, and their constitutive local character was as essential to Southern life and culture as the town was to New England.¹³⁹

As slavery quickly metastasized and came to dominate the cultural, economic, and political culture of much of the South, the centrality of the plantation as the focal point of local life deepened.¹⁴⁰ Where planters had previously acted as small-scale proprietors on the edge of subsistence and profit, by the beginning of the eighteenth century, large plantations began to emerge where the planter elite ruled as local despots over sometimes hundreds of enslaved people.¹⁴¹ As slavery and the economic power of the plantation economy grew together, the logic of local plantation power within a weak county system was reinforced. With slavery at the center of life, most of the people living within the system orbited around the power of the plantation. Enslaved humans were subject to direct despotic oppression by the planter elite who claimed ownership over their bodies. Poor whites worked on the periphery of the plantation system, sometimes as direct employees, other times as freelancers and intermediaries.¹⁴²

Where the plantations had begun as dispersed in a kind of neo-feudal dream of would-be gentry, they became a neo-feudal reality as slavery spread. As a result, this reinforced the dispersed settlement patterns in Virginia and southward, and it also made it unlikely that anything like township settlement would take hold. When counties emerged, they promised a tool to allow the planter elite to solve collective action problems at a regional level, but they were never imagined to structure the daily lives of the people living there—that was the role of the plantation.¹⁴³

4. *The County Court*.—Having founded plantations and settled sparsely across the tidewater of Virginia, a problem emerged: collective governance of this dispersed population of small-scale lords was hard to manage. The classic picture of seventeenth century Virginia is one of social unrest and political disorder—in opposition to the comparatively orderly and stable Northern

138. *Id.* at 775–76.

139. *See id.*

140. *See id.* at 781–84.

141. It was not until after 1700 that Virginia's tobacco plantations transitioned en-masse to the use of enslaved labor. *See* TREVOR BURNARD, *PLANTERS, MERCHANTS, AND SLAVES: PLANTATION SOCIETIES IN BRITISH AMERICA, 1650–1820*, at 9 (2015). As Trevor Burnard notes, “As late as 1700, blacks were only a sixth of the population of the Chesapeake, and just 10 percent of slaves lived in units of twenty-one or more individuals.” *Id.* at 9. But by 1774, enslaved people made up more than one-third of the “Tobacco Coast,” and their labor and value was the dominant source of wealth in the area. *Id.* at 9–10.

142. *See* JEFF FORRET, *RACE RELATIONS AT THE MARGINS: SLAVES AND POOR WHITES IN THE ANTEBELLUM SOUTHERN COUNTRYSIDE* 14 (2006).

143. *See* Farbman, *supra* note 20, at 775.

colonies.¹⁴⁴ However nuanced this story is in real life, it points to a deeper reality. Between the fiefdoms of the plantations and the distant colonial government, there was a vacuum of government power.

Virginians filled that vacuum with the innovation of the county and the county court. In broad strokes, the county court emerged as a mechanism of local government that spread across the Southern states that were dominated by the plantation system of settlement.¹⁴⁵ The judges, justices of the peace, and magistrates (all terms that were used in some contexts—and sometimes interchangeably) who ran the county court were not chosen democratically, nor were they imagined to be representatives of the whole population living within a given county.¹⁴⁶ Rather, they were chosen from among the richest and most powerful landholding elite in a given county.¹⁴⁷ Their purpose was to maintain the peace and preserve order and the social and economic status quo by providing a forum for airing disagreement and structuring decision-making about whether and how the elite of a county should collaborate on collective goods (roads) or collective needs (public safety).¹⁴⁸

The boundaries and institutions of counties in Virginia emerged as an adaptation to the dispersed, plantation-based settlement in the tidewater region. Counties emerged first as eight “shires” whose boundaries were drawn around somewhat amorphous centers of population.¹⁴⁹ These boundaries were necessary both to preserve order within the colonists and to protect the colonists from external threats.¹⁵⁰ Within the boundaries, the planter elite established a government centering around a “county court” where a group of magistrates, led usually by a singular judge, heard and resolved disputes among planters while also exercising the role of executive.¹⁵¹

The county courts were composed of the landed elite who were chosen by the colonial authorities and reappointed year to year by the central government.¹⁵² These “justices” convened periodically to hear complaints and cases.¹⁵³ These meetings often took place at the property of an individual plantation owner, at least before the construction of official county

144. HORN, *supra* note 115, at 334.

145. See Farbman, *Reconstructing Local Government*, *supra* note 48, at 419.

146. Farbman, *supra* note 20, at 786 (“The county court system of government was weak and largely delegated power to wealthy landowners.”).

147. *Id.*

148. See *id.* at 777–80.

149. See Edward Ingle, *Local Institutions of Virginia*, in 2–3 *JOHNS HOPKINS UNIV. STUD. IN HIST. & POL. SCI.* 109, 183 (Herbert B. Adams ed., 1885). A few of the first counties were named after “cities” that represented the original first settlement. See *id.* James City, Charles City, and Elizabeth City all made reference to a former town-like center of population that had been the beachhead of English settlement. See *id.* But by the time the first counties were established in 1634, these “towns” had largely ceased to exist amid the dispersed plantation pattern of settlement. See *id.*

150. See *id.* at 185.

151. See HORN, *supra* note 115, at 338–39.

152. See *id.* at 339.

153. *Id.*

courthouses.¹⁵⁴ Justices were not elected, nor were they chosen in consideration of the extent to which they were representative of the county populous.¹⁵⁵ Rather, they were “recruited from among the gentry, prominent mercantile families, and large landowners.”¹⁵⁶ While being chosen as a justice was a sign of distinction, the duties were light (and not remunerated). Court days were infrequent, and often only a small proportion of the justices showed up to participate.¹⁵⁷ The purpose of the county court was not to act as an active and continuously engaged local government, but rather to provide a backstop of dispute resolution, criminal law enforcement, and community welfare sufficient to allow the otherwise individualist plantation system to thrive.¹⁵⁸

The court was most familiarly court-like when it heard private disputes and was empowered to enforce criminal laws.¹⁵⁹ But, as the only government at the county level, the court’s duties covered more than just resolving disputes and enforcing the law. The courts were involved in regulating the economy by supervising markets, granting licenses, and establishing local taxation systems.¹⁶⁰ The courts appointed highway surveyors and raised (through taxes) and spent money to build and maintain roads and bridges.¹⁶¹ The courts were where the poor were cared for (to the extent they were), where inheritance disputes were resolved, and more broadly, where the business of local government took place.¹⁶²

County courts emerged to fill the gap between the proprietary fiefdoms of plantation governance and the need for some measure of collective local authority. Unlike towns, counties were not imagined as thick forms of communal organization. In fact, the first counties in Virginia were not formed until 1636, decades after the first English colonists arrived.¹⁶³ When counties and county governments did emerge, they reflected their origins in sparse settlement and the maintenance of the plantation system. County governments were comparatively thin, prioritizing the exigency of protecting private property

154. *See id.*

155. *Id.* at 340.

156. *See id.*

157. CARL R. LOUNSBURY, *THE COURTHOUSES OF EARLY VIRGINIA: AN ARCHITECTURAL HISTORY* 19 (2005).

158. *Id.* at 22.

159. *See id.* at 22–25.

160. *See id.* at 25–26.

161. *See id.*

162. *See id.* at 26–28.

163. *See* Emily Jones Salmon, *Early Years and Progress toward County Courts*, ENCYC. VA. (Dec. 7, 2020), <https://encyclopediavirginia.org/entries/county-formation-during-the-colonial-period/> [https://perma.cc/C8A2-DFVG]. In South Carolina, counties were not established until well after independence. *See* B. James Ramage, *Local Government and Free Schools in South Carolina*, in 12 *JOHNS HOPKINS UNIV. STUD. IN HIST. & POL. SCI.* 5, 24–28 (Herbert B. Adams ed., 1883). Instead, during the colonial period, what local government there was conducted itself through the Episcopal boundaries of the parish. *Id.* at 5–17. When this was transmuted to lay control, the boundaries of local government were denominated as “districts” rather than counties. *Id.* at 17–24.

and protecting the autonomy of the plantation elite who ran the counties.¹⁶⁴

C. Feudalism, Freeholders, and Other Middle Ways

In the preceding two sections, I have presented a caricature of two regimes of settlement and land distribution: New England and Virginia. Like any binary, this caricature leaves out much and elides a good deal of nuance. As is true with all corners of local government law—historical and present—the closer you look at the details of local governance, the more it becomes clear how different those details are from place to place.¹⁶⁵ In this vein, in telling the story of the development of the New England town, there are real differences between the first coastal towns, the early inland towns, the towns in the Connecticut River Valley, the towns in New Hampshire, etc. Likewise, the way in which the plantation system established itself in the tidewater of Virginia was different in subtle but important ways from how it became established in the Carolinas and Georgia.¹⁶⁶ These differences matter! But a full accounting of them would occupy more room than I have in this Article.¹⁶⁷ Moreover, too close a focus on these differences threatens to obscure the most important fundamental point for my purposes: that at the moment of independence, New England and Virginia represented the two competing visions of local government in the eyes of the newly empowered Americans looking west.

With this broad apologia, I will very briefly canvas the puzzling middle way of land distribution and government represented by the Mid-Atlantic colonies, from New York to Delaware.

The most honest way of summarizing the way that land was distributed in the Mid-Atlantic is that it was a hodgepodge that ranged from sporadic pockets of New England towns, to large feudal estates (both Dutch and English), to aspirationally planned but chaotically and sparsely settled vastness. Neither the New England model of township settlement nor the Virginia model of scattered plantations were dominant, but both stood in the background. Most importantly for this Article, because land distribution and local government was such a hodgepodge, there was no “Mid-Atlantic” model to compete with New England

164. This does not mean that county government was “weak.” As I have previously argued, counties frequently operated as a kind of pass-through shell of local government, where planters protected the space of the plantation as their realm of local domination through the means of a thin local sphere. See Farbman, *supra* note 20, at 780.

165. For just one salient example, the neighboring inner ring Boston suburbs of Cambridge and Somerville appear quite similar in many ways, and yet a close look at their local governments reveals that Cambridge is governed by a strong city manager, backed by a city council elected in at-large elections through ranked choice voting. Somerville, by contrast, has a strong mayor and a city council that is partially elected through a geographical ward system. These differences have salient local consequences! But they are not evident until you begin to look closely.

166. For example, in both the Carolinas and in Georgia, the original planners hoped that settlement would proceed under the township model, rather than the dispersed model of Virginia. See PRICE, *supra* note 103, at 336. These aspirations towards organized settlement quickly succumbed to the reality of the more chaotic and organic dispersed plantation model.

167. I hope to expand on these details in future work.

and Virginia in the 1780s. That said, in Pennsylvania in particular, the New England model represented an aspirational standard that would founder on the realities of dispersed settlement. This would turn out to be a consistent pattern in the first half-century of the new republic.

1. *New York—Patroons, Manors, and Yankees.*—New York was, of course, at first New Amsterdam,¹⁶⁸ and the settlement and local government patterns of the state have their roots partially in the Dutch West India Company.¹⁶⁹ The most salient form of land distribution and local control (beyond the city of New Amsterdam itself) was the quasi-feudal “patroon” system, whereby the company would grant a large tract of land to anyone willing to start a colony of fifty or more people.¹⁷⁰ Patroons operated as feudal lords, having first claim to the ownership of the land in the colony and being empowered to set up a governance system (setting up courts, etc.).¹⁷¹ The settlements that developed under the patroonship system were compact on the model of European feudal villages, with tenants working the land and doing the commerce of the colony.¹⁷²

While the manorial system of patroonships was a prominent mechanism for governing the colony outside of the cities, the Dutch West India Company also provided for independent farmers to purchase individual plots of land and for towns to incorporate when enough settlers gathered in one place.¹⁷³

While the Dutch were still in control of the colony, New Englanders began to encroach westward, bringing their ideas of town planning and settlement with them. The beachhead of the New England model of settlement was Long Island, where emigrants from New Haven founded Southold and emigrants from Lynn founded Southampton in 1640.¹⁷⁴ Some of these towns represented colonial claims from the English colonies (especially New Haven), but other towns were formed within Dutch governance.¹⁷⁵ Gravesend (what is now Coney Island) was formed in 1643 by Deborah Moody, who had been driven out of Massachusetts for her “heretical” opposition to infant baptism.¹⁷⁶ The town was planned and laid out in the New England style, with land reserved for school and church and with the explicit intention of communal settlement.¹⁷⁷ The Dutch government welcomed Moody and her settlers and folded the New England town into their

168. THEY MIGHT BE GIANTS, *Istanbul (Not Constantinople)*, on FLOOD, at 00:48-00:53 (CD, Elektra Records, Jan. 15, 1990); see also RHINO, *They Might Be Giants - Istanbul (Not Constantinople) (Official Music Video)*, at 00:51-00:56 (YouTube, Nov. 19, 2021), <https://www.youtube.com/watch?v=0XIO39kCQ-8> [<https://perma.cc/64JV-4EEZ>].

169. PRICE, *supra* note 103, at 213.

170. *See id.*

171. *See id.*

172. *See* JANNY VENEMA, BEVERWIJCK: A DUTCH VILLAGE ON THE AMERICAN FRONTIER, 1652–1664, at 23 (2003).

173. *See* PRICE, *supra* note 103, at 214.

174. *See id.* at 218.

175. *See id.* at 217–20.

176. *See* Anna Minster, *Gravesend*, ATLAS OBSCURA (July 1, 2020), <https://www.atlasobscura.com/places/gravesend> [<https://perma.cc/2YFL-4SFV>].

177. *See id.*

colony.¹⁷⁸

As a result, when Dutch rule ended in 1644 and the colony became New York, the hodgepodge of settlement and local government was already there in a mix of quasi-feudal villages, independent towns, and individual scattered farms.¹⁷⁹ Under English rule, that hodgepodge continued.¹⁸⁰ Large portions of the colony were granted as aristocratic estates by the early governors of the state, which led to huge, consolidated land-holdings under the control of wealthy speculators.¹⁸¹ These large estates could be run as feudal manors or could be further subdivided by the owners for subsequent sale and settlement.¹⁸² This mechanism of land sale and settlement persisted through and after independence in 1776.¹⁸³ New York's colonial (and later state) claims were so vast, the indigenous population so widespread, and European settlement so sparse that ownership and colonization were speculative projects.¹⁸⁴

Thus, although New York was one of the original thirteen colonies, much of its western lands were in largely the same position as the other land west of the Appalachian Mountains that would be the subject of the Northwest Ordinance. In short, what local government and settlement patterns in New York that existed were a combination of feudal manors, scattered farms, New England towns, and the city of New York.

2. *Pennsylvania—Quakers, Speculators, and Dispersion.*—The story of Pennsylvania is similar in many ways to that of New York. By 1776, much of Pennsylvania's land had not yet been colonized by Europeans and what land had been distributed and settled was also a mixture of dispersed settlement, towns on the New England model, and the city of Philadelphia.¹⁸⁵ What distinguished Pennsylvania from New York, however, was that where New York was a hodgepodge by (the absence of) design, Pennsylvania's hodgepodge was the result of a design that never came to be.

When William Penn was granted the land that would become Pennsylvania, he set out to survey and map the territory in advance of sale and settlement.¹⁸⁶ Penn's colonization project began more than a half century after the first English people had landed in Massachusetts and Virginia. As such, he had the benefit of comparison and past experience. His friend William Petty explicitly advised him against adopting the Virginia model. Petty urged him to "Avoyd Stragling plantations" and the indiscriminate location that led to dispersed and inefficient

178. *See id.*

179. PRICE, *supra* note 103, at 220–22.

180. *Id.* at 222–26.

181. *See id.*

182. *Id.*

183. *See id.*

184. *Id.* at 232.

185. *See* COMMONW. OF PA., THE PENNSYLVANIA MANUAL 1-12 (2009), <https://www.lincolninst.edu/app/uploads/legacy-files/gwipp/upload/sources/Pennsylvania/2010/PAMannual2009.pdf> [<https://perma.cc/TS5C-Y9SL>].

186. *See* PRICE, *supra* note 103, at 258.

settlement.¹⁸⁷ Instead, Petty urged Penn to adopt a township system that would lend itself to urban centers and prevent the chaos and inefficiency of scattered pockets of settlers all across the vast expanse of the colony.¹⁸⁸

Penn largely took this advice, directing that the colony be mapped and surveyed and that the land be broken up into townships in anticipation that the whole township would be sold and then settled communally on the model of New England.¹⁸⁹ The map that emerged of the pre-surveyed colony in 1687 showed the extent to which Penn imagined that settlement would be ordered, rational, and rooted in the township.

Figure 6¹⁹⁰



For all this planning, only a few portions of Pennsylvania were actually settled according to the township plan. Penn's careful surveying met up against a few realities. First, in addition to the surveyed townships, Penn had also granted large swathes of land (most of his own ten percent of the land) as estates to be held by speculators and sold in individual lots.¹⁹¹ Second, the nature of

187. Marcus Gallo, *William Penn, William Petty, and Surveying: The Irish Connection*, in *THE WORLDS OF WILLIAM PENN* 111 (Andrew R. Murphy & John Smolenski eds., 2019).

188. *See id.*

189. *See id.* at 114. In fact, Penn imagined two different models of town settlement. *See* PRICE, *supra* note 103, at 262. The first imagined a town center with a crossroads in the middle and houses radiating outwards. *See id.* The second imagined a central village with houses and farms radiating outwards from a central square. *See id.*

190. *A mapp of ye improved part of Pensilvania in America, divided into countyes, townships, and lotts*, LIBR. OF CONG. (1687), <https://www.loc.gov/item/81692881/> [<https://perma.cc/R4NP-HFQ5>].

191. *See* PRICE, *supra* note 103, at 266.

immigration to the new colony militated against the tight-knit township culture of New England.¹⁹² Quakers, who made up many of the colony's settlers and elites, were not nearly so bound to their congregations as the Puritans were, and the many immigrants from other parts of Europe and around the colonies were heterogenous in ways that did not lead to deep community ties.¹⁹³ More than that, the forces pushing people west and north into the "unsettled" lands were individualized and haphazard in ways that pushed dispersed and individualized farmsteading such that squatters and frontier people made up a large portion of the actual settlers—making the actual settlement of Pennsylvania look much more like Virginia's indiscriminate location than New England.

One of the few exceptions to this rule was not a product of Penn's planning, but rather a result of direct New England cultural and political transference. Remember that prior to independence, some of the original colonies claimed to possess vast tracts of land extending westward from their borders. In the case of Connecticut, that meant that while the colony had ceded their claim to the Hudson Valley in New York, the colony leaders claimed portions of what would become Pennsylvania and westward into Ohio.¹⁹⁴ So in the 1750s, a group of Connecticut speculators sought and were granted claims of land in the Wyoming Valley along the Susquehanna River.¹⁹⁵ Pennsylvania (predictably) resisted Connecticut's claims and a complex land dispute blossomed—the result of which was that in 1762, a group of New Englanders arrived in northeastern Pennsylvania and began the process of establishing a new outpost of Connecticut there.¹⁹⁶ After a series of disputes (sometimes violent), in 1774 five towns had been settled and the Connecticut General Assembly had recognized them collectively as "the Town of Westmoreland" and incorporated them into Litchfield County.¹⁹⁷ In short, Connecticut was claiming power to govern the outpost.

Connecticut's westward claim did not survive the chaos of the war, independence, and the forming of the new union.¹⁹⁸ Over and above the drama of the competing claims, however, were the clear ways in which the Connecticut settlers' political and cultural ideology shaped the local government in this corner of the colony. Unlike Penn's planned townships, and very much unlike the hodgepodge that had developed over time, the settlers in the Wyoming Valley brought a clearly articulated New England plan of land distribution and local government. They formed towns on the New England model with town

192. *Id.* at 268.

193. *See id.*

194. *See* Donna Bingham Munger, *America's First Great Land Controversy: A Precedent for MABO? Connecticut Settlers vs Pennsylvania*, 4.2 *TASMANIAN HIST. STUD.* 42, 42–43 (1994).

195. *See id.* at 43. The Wyoming Valley is the region where Wilkes-Barre and Scranton are located.

196. *Id.* at 44.

197. *See id.* at 45.

198. *See id.* at 49–50. There were really violent skirmishes over the competing claims to the land, but in the end, even though the Yankees were no longer part of Connecticut, they were allowed to stay and own the land that they had laid claim to. *See id.*

centers, allowances for church and school, and compact communal settlement patterns.¹⁹⁹ The echoes of this mode of planning and settlement are still visible in Wilkes-Barre and surrounding towns.²⁰⁰

D. The Ideology of Local Government

The story of Pennsylvania is an encapsulation of the way that patterns of settlement and the resulting patterns of local government developed from the accidental contingency of importation (culture, politics, environment, religion, necessity) into concrete expressions of ideology, economics, and democratic theory. In conquering and colonizing the eastern seaboard of North America in the seventeenth and eighteenth centuries, colonial leaders had to figure out how to distribute land to new colonizers and how those new colonizers would be governed (or would govern themselves). The political, economic, and cultural realities that developed from these experiments manifested in the form of a widely divergent set of local government systems across the colonies.

As these divergent systems crystallized, they also became visible to the people who were puzzling over the ongoing question of westward migration and colonization. So, when later colonizers sought to plan how land would be distributed and government would be established, they could look to Virginia and Massachusetts as competing models. Notably, faced with this choice, most of the planners chose the New England model in some way, shape, or form. Not only did William Penn seek to emulate New England in the 1680s, but the proprietors of the Carolinas and Georgia also began by imagining that settlement would proceed in collective, orderly ways.²⁰¹

But, if Pennsylvania shows the growing sense that settlement *should* be structured by a township system, it also shows the ways in which this kind of orderly planning was easily subverted by the chaos of settlement in real life. Without the cultural and religious imperatives of New England, and in the face of vast expanses of apparently available land, it was far too easy for even the best planning to transmute into indiscriminate settlement and dispersal. In the South, this meant that any planned townships quickly dissolved into a version of Virginia's county system where plantations and planter elites dominated a weak local sphere in service of their own despotisms of private property. In the Mid-Atlantic, the story was more complex—with some town governments developing communal coherence, while other forms of dispersed settlement reverted to something more like county government.²⁰²

199. See PRICE, *supra* note 103, at 274.

200. See *id.* The city of Wilkes-Barre has sprung up from an archetypal New England downtown. See *Downtown's History*, DOWNTOWN WILKES-BARRE, <https://downtownwilkesbarre.org/post/history> [<https://perma.cc/3ULY-VGRE>] (last visited Dec. 18, 2024).

201. See *supra* note 166.

202. What is complex about this is that, even today, in New York, New Jersey, and Pennsylvania, "town" government is the form of weak, background local government that governs dispersed settlements and unincorporated land. Thus, it would be too simple to distinguish

In places like Pennsylvania and New York, it was not until actual New Englanders migrated outwards and formed towns that town government really proliferated. In this, we see the history of what would follow in microcosm. In 1780, looking at the land between the Appalachians and the Mississippi River, the leaders of the newly independent nation set themselves to the task of planning how that land would be conquered, distributed, settled, and governed. They drew on the models they had to project an image of government emerging from ordered land distribution. Despite their aspirations, those plans would not materially shape the actual course of migration and local government formation. It would not be until the New Englanders themselves moved west that the idea of the town would become a part of the actual firmament of local government.

III. TOWNS OR COUNTIES IN THE NEW REPUBLIC

A. Land and Imagination

From the beginnings of the American colonial project, the distribution and government of people across the “unoccupied” (conquered and depopulated) land of North America has been at the heart of public imagination. As a matter of aspiration, the elite actors who sought to plan the colonization of North America saw the distribution of land as a project of creating and ordering a society that would yield profits and be susceptible to government. These aspirational imaginations cut against the more chaotic reality of settlement by individual Europeans who came to the colonies for divergent reasons: community, profit, and escape.

The dissonance between aspiration and actuality is the most consistent story underlying both land distribution and local government formation in the colonial and antebellum eras. To put it too bluntly: the elite planners imagined a nation of orderly settlements (much like towns) and the settlers themselves dispersed themselves into a nation of counties. To put it more precisely: settlement and local formation were in a feedback loop where settlement drove local government formation and then, where ongoing elite aspiration looked at the settlement patterns and local governments that had been established, built their subsequent imagination on that foundation.

This is how, in 1780, the leaders of the newly independent United States came to frame the choice of how the western lands would be organized and sold as a choice between New England and Virginia—between communal, compact, and pre-planned towns and scattered, indiscriminately-located plantations and counties. Faced with this choice, like most other elites before them, they chose towns.²⁰³

between towns and counties—rather, there, the distinction is between incorporated places and unincorporated “town” land.

203. I should emphasize here, again, that the picture that I am drawing is necessarily simplified. The story of how land was disposed of, and how that process was imagined is

1. *Colonial Township Aspirations.*—The idea that the town was the ideal form of land distribution and local government was a part of the colonial imagination beyond the boundaries of New England. As mentioned above, in 1680, as he imagined the settlement of Pennsylvania, William Penn pictured his new colony to be organized as agrarian townships, both to maximize his profits from land sale and to best organize the growing population.²⁰⁴ Penn’s advisor, William Petty, explicitly advised in favor of towns and *against* the Southern plantation model of more haphazard and dispersed settlement.²⁰⁵ Even though Penn and Petty’s aspirations were frustrated by the eventual haphazard settlement of many parts of Pennsylvania, their imagination of settlement was clearly ordered around towns—not counties.

If the story of Pennsylvania is instructive, it is not singular. Some of the other later-formed Southern colonies were also imagined as towns rather than scattered plantations. In 1730, the first governor of South Carolina, Robert Johnson, offered a plan to settle the western portions of the new colony *not* as a land of scattered plantations, but rather as “towns . . . to be settled by poorer whites instead of planters and slaves; with diversified farm-and-market economies”²⁰⁶ The Carolina townships were designed in explicit contradistinction to scattered plantations and the county system of Virginia. The hope was that “townships would resist the advance of plantation agriculture” and act as “[e]conomically diversified settlements free of slavery”²⁰⁷

The story of the South Carolina frontier echoed even more loudly a few years later, when the colony of Georgia was born in 1732.²⁰⁸ The crown-appointed Trustees imagined a new colony on the southern frontier of Spanish-held Florida that would be militarily useful and morally upright.²⁰⁹ They rejected the plantation monocultures of the West Indies (sugar), South Carolina (rice), and Virginia (tobacco) as both economically and morally harmful.²¹⁰ In place of the plantation, they imagined “a town-oriented society of tradesmen

immensely complex. *See generally*, ABLAVSKY, *supra* note 35. Greg Ablavsky’s *Federal Ground* explores the nuances of this process in great detail, brilliantly showing how elites on the Eastern Seaboard and in Washington, D.C. aspired to an orderly (and federally controlled) process of settlement—and how in practice that settlement became entangled with the localized complexities of encounters with native nations, financial precarity, and the question of self-government. *See generally id.* Others like K-Sue Park have traced the way in which land claims (and expropriation) took place through localized title registries—showing the violence and contingency running underneath the process of buying and claiming land. *See generally* K-Sue Park, *Property and Sovereignty in America: A History of Title Registries and Jurisdictional Power*, 133 YALE L.J. 1487 (2024). My purpose in this Article is to build on the excellent work done by other historians by layering a focus on local government on top of the story of land distribution.

204. *See* Gallo, *supra* note 187, at 111–12.

205. *See id.* at 111.

206. *See* JOYCE E. CHAPLIN, AN ANXIOUS PURSUIT: AGRICULTURAL INNOVATION & MODERNITY IN THE LOWER SOUTH, 1730–1815, at 38 (1993).

207. *See id.*

208. NUMAN V. BARTLEY, THE CREATION OF MODERN GEORGIA 1 (2d ed. 1990).

209. *Id.* at 2.

210. *Id.*

and small farmers.”²¹¹ Slavery would be banned (as would free blacks, Roman Catholics, and lawyers!) and the land would be divided into towns to promote public equality, public order, and to attract the “right sort” of British immigrants.²¹² The trustees of Georgia shared similar agrarian utopian ideals to William Penn. As they laid out their ideal towns of Savannah and Augusta, they sought to escape the taint of slavery and materialism and to create an “‘American Zion’ where the sins of materialism and the dissipation of alcoholism would be purged” from the middle-class emigrants who came from across the ocean.²¹³ In this, the town and town design were crucial, with individual lots arranged around a public square to promote community, air circulation, and exercise.²¹⁴

In the end, neither the townships of South Carolina nor Georgia survived the increasing pressure of the growing economy of plantation slavery. Almost immediately settlers sought the expansion of slavery—and with it the expansion of the plantation system of settlement and government. For the elites who imagined these places, town settlement was a means to stop the spread of slavery and the inefficient and hard to govern indiscriminate location of settlement.²¹⁵ But their best intentions were swamped by the economic imperatives of the booming slave economy. By 1750, Georgia had lifted its ban on slavery and soon after most of the initial township settlements were swamped by scattered plantations, where growing numbers of enslaved people labored and lived.²¹⁶ By 1780, Virginia’s plantation system and its companion county court system had spread across the Carolinas and Georgia.²¹⁷ But that reality should not obscure the fact that, even if the county had become dominant, it had done so against the will and imagination of those who had initially imagined and directed the colonization project. The county followed plantations and plantation slavery and the town receded under that pressure.

This dynamic, cyclically repeated from Pennsylvania, to South Carolina, to Georgia, would be destined to continue to loop over the course of the nineteenth century. Towns and the promise of orderly, compact, and efficient town government would continue to enchant the people who were imagining the project of building a government and a legal system.²¹⁸ Those who imagined the new map of the Northwest committed themselves to the idea of the town. So too would reformers who sought to renovate Southern political culture after the Civil War,²¹⁹ and so too would utopians who sought to structure the cataclysmic

211. *Id.*

212. *See id.* at 2–3.

213. ROBERT PAULETT, *AN EMPIRE OF SMALL PLACES: MAPPING THE SOUTHEASTERN ANGLO-INDIAN TRADE, 1732–1795*, at 80 (2012).

214. *See id.*

215. *See Gallo, supra* note 187, at 111.

216. *See BARTLEY, supra* note 208, at 4–5.

217. *See id.* at 3–4; *see also Ramage, supra* note 163, at 7.

218. *See Gallo, supra* note 187, at 111.

219. *See generally Farbman, Reconstructing Local Government, supra* note 48.

forces of the Industrial Revolution.²²⁰ But these aspirations would be consistently met by the more chaotic reality of individualism and dispersion. On the planners' page, towns and order marched westward. In practice, people dispersed themselves and resisted communal governance. In many ways, the story of American local government is an aspiration of towns fading into a chaos of counties.

B. Land Ordinances

1. *Land Cession and the "Blank Slate."*—The colonial history of Pennsylvania, Georgia, and South Carolina would repeat itself in 1783, after the end of the war and with the ratification of the Treaty of Paris. The leaders of the new republic found themselves facing a new colonial project and its associated questions: how should the land between the Appalachian Mountains and the Mississippi River be distributed, settled, and governed? The shape of these questions was parallel to the original colonial question that the first European colonizers faced in the seventeenth century. The land west of the mountains was vast and populated by many Indigenous People who had either been living there for generations or who had been pushed west by the first wave of colonization.²²¹ To the eyes of Europeans, the land was "unclaimed" and ungoverned.²²² Westward expansion represented a huge economic opportunity to resolve war debts as well as an imperial necessity.²²³ If the United States was to maintain its territorial gains, it had to find a way to settle and govern its western territories.

The first problem in 1783 was that there was no agreement amongst the new states as to who owned the land west of the mountains. At the time of the Revolutionary War, some of the new states claimed wide swaths of land stretching westward from their borders—Connecticut (as mentioned above), Massachusetts, New York, Virginia, North and South Carolina, and Georgia all claimed lands roughly stretching westward from their boundaries.²²⁴ There were at least three problems with these westward claims. First, many of them overlapped with each other and with lands claimed by other states. Virginia, for example, claimed ownership of *all* the land north of the Ohio River—a claim directly in conflict with the claims of New York, Connecticut, and Massachusetts.²²⁵ Connecticut's claim, as we've seen, conflicted with the claims of Pennsylvania and New York (and later the new state of Ohio).²²⁶ In addition

220. See generally MARGARET CRAWFORD, BUILDING THE WORKINGMAN'S PARADISE: THE DESIGN OF AMERICAN COMPANY TOWNS (1995).

221. See ELLIOTT WEST, THE WAY TO THE WEST: ESSAYS ON THE CENTRAL PLAINS 9 (1995).

222. KRISTOPHER MAULDEN, THE FEDERALIST FRONTIER: SETTLER POLITICS IN THE OLD NORTHWEST, 1783–1840, at 17–18 (2019).

223. See JOHN R. VAN ATTA, SECURING THE WEST: POLITICS, PUBLIC LANDS, AND THE FATE OF THE OLD REPUBLIC, 1785–1850, at 17–18 (2014).

224. See *id.* at 29.

225. *Id.* at 32.

226. See *id.* at 24, 32.

to these competing claims, others of the original thirteen states argued that it was unfair for some states to have westward claims while others did not. States like Maryland argued that the western lands should belong to everyone in the new nation, not to only a select few of the former colonies.²²⁷ Finally, and related to the second problem, was the raw reality that after the war, the new nation was impoverished and everyone understood that its path to solvency ran through selling its newly acquired western lands.²²⁸

In addition to nationalist reasoning pushing states towards ceding land, there was the reality that there was no effective way for the new states to manage and govern these vast tracts of land. Much of the land was occupied by Indigenous People who were not uniformly eager to sell their land.²²⁹ Moreover, frontier settlement was often haphazard, chaotic, and violent—leading both to internal unrest and sometimes risking war with tribal nations or even with the other imperial powers still active in North America.

For these reasons, the land north of the Ohio River was all-but entirely ceded to the federal government to be governed as a federal territory by 1786.²³⁰ By contrast, the land south of the Ohio River was not ceded so easily.²³¹ Although Virginia ceded its claims north of the Ohio River, it never ceded its claims to what would become Kentucky—Kentucky was never federal territory, it moved directly from being a part of Virginia to statehood.²³² North Carolina did not cede its western claims until 1790 when, in doing so, it created the short-lived “Southwest Territory” that would become Tennessee six years later, in 1796.²³³ In Georgia, cession took even longer—it was not until 1802 that Georgia ceded the territory that would quickly become Alabama and Mississippi.²³⁴

All of this meant that, in 1785, the new nation’s westward gaze was divided. To the north of the Ohio River, there was a swath of land to be sold, settled, and governed according to centralized national policy. To the south, there was a morass of more complex and still-contested land claims. This dichotomy would matter for the future of slavery in the new nation, but it also mattered for the future of local government and the westward dispersal of towns and counties.

2. *The Land Ordinance of 1785*.—One of the first problems facing the new

227. See Merrill Jensen, *The Cession of the Old Northwest*, 23 MISS. VALLEY HIST. REV. 27, 34 (1936).

228. See VAN ATTA, *supra* note 223, at 30.

229. See *id.* at 32.

230. See *id.* The exceptions to this were the “Western Reserve” of Connecticut, in the northeast corner of what would become Ohio, and, slightly more complicatedly, the military land grant of Virginia, in what would become south-central Ohio. See *id.* at 57. In the first instance, Connecticut refused to cede the land to the federal government, only finally relinquishing its claim after Ohio became a state. In the second instance, Virginia conditioned its cession of land in part on holding a swath of land in reserve that the colony had promised as compensation to soldiers for their service in the recent war. See *id.* at 56.

231. See Peter Onuf, *Toward Federalism: Virginia, Congress, and the Western Lands*, 34 WM. & MARY Q. 353, 370–73 (1977).

232. See *id.* at 373.

233. See JOHN R. FINGER, TENNESSEE FRONTIERS: THREE REGIONS IN TRANSITION 127 (2001).

234. See BARTLEY, *supra* note 208, at 13.

national leaders as they looked west in 1783 was the fact that although the land was “unsettled” and thus ripe for imposing imperial imagination, it was also affirmatively populated. It was populated, of course, by Indigenous Peoples, whose land claims had not been purchased or expropriated (and who were not inclined to allow westward settlement to progress unhindered). It was also increasingly being populated by opportunistic pioneers who were finding and occupying land on the frontier on their own terms.

The first order of business, before even dealing with the problem of securing title to lands from the Indigenous People who claimed ownership, was to clear the land of the squatters who were settling on the western lands. State governments individually, and the new national government collectively, made edicts and sent forces westward to clear away people occupying “vacant and unappropriated lands.”²³⁵ Squatters were a problem not only because they occupied land that was supposed to be vacant and ready for sale, but also because they were disorderly and difficult to govern.²³⁶ They settled where they pleased and felt entitled to their land, either by right of violence or improvement.²³⁷ In some cases, they settled on lands that were disputed with Indigenous Peoples, causing their frontier neighbors with more legitimate land claims to argue that they posed “great imminent & manifest danger of involving the Country in a Bloody, ruinous, and destructive War with the Indians.”²³⁸ In the eyes of the new national government, they were not the sort of settlers that were wanted or needed for the imperial project. They were an “infestation,” not settlers and citizens, and if action were not taken, the whole West would “soon be inhabited by a banditti whose actions are a disgrace to human nature.”²³⁹ As Secretary of War Henry Knox worried, if they were not cleared away, “a precedent will be established, to wrest all the immense property of the western territory out of the hands of the public.”²⁴⁰

Anxiety about squatters and their unruly and violent relationship to the state and public order cast a shadow over how the new national government set about imagining what was to be done with the land in the northwest. To many elites in the new government, the squatters represented chaos, ungovernable dispersed settlement, and the possibility that profiting off of the vast new lands for sale would be squandered. The answer to this chaos was order—both in the distribution of land and in the imagined local government on that land. As

235. VAN ATTA, *supra* note 223, at 39. Pennsylvania and Connecticut each ordered crackdowns on squatters in 1783, while the Continental Congress sent a small military force, into what would become Ohio in 1785, to clear away people occupying the land that would soon be surveyed for legitimate settlement. *See id.* at 39, 41.

236. *See id.* at 41.

237. *See id.* In the words of Lieutenant Colonel Josiah Harmer, the officer who led the troops that the Congress had sent to clear Ohio: “These men upon the frontiers . . . have hitherto been accustomed to seat themselves on the best of lands, making a tomahawk right or Improvement, as they term it, supposing that to be sufficient Title.” *Id.*

238. *See* R. DOUGLAS HURT, *THE OHIO FRONTIER: CRUCIBLE OF THE OLD NORTHWEST, 1729–1830*, at 145 (1998).

239. *See* MAULDEN, *supra* note 222, at 32–33 (quoting John Armstrong).

240. *Id.* at 33.

Congress turned its attention to the question, two models for ordering settlement emerged as possibilities. On the one hand, some Southern and Mid-Atlantic representatives favored settlement on the Virginia model—warrants would be granted by a central land office and settlers could go and find a parcel of land wherever they wanted to be surveyed after it was settled.²⁴¹ This plan would mirror the indiscriminate location of Virginia and likely replicate scattered settlement.²⁴² Still, it would be more rationalized than the chaos of squatting because, according to its original proponents, settler's choice of land would be subject to a pre-mapped grid of land claims.²⁴³

On the other hand, New Englanders in Congress pushed back against replicating the Virginia model in the Northwest. Worried about dispersed settlements being inefficient and hard to govern, they argued for settlement on the New England township model.²⁴⁴ Massachusetts brahmin Timothy Pickering wrote that dispersed settlement would be “impossible to govern.”²⁴⁵ Instead, New Englanders argued that carefully planned, coordinated, and compact settlement would ensure not only that the empire expanded, but that it expanded in an orderly, law-abiding, and economically efficient way.²⁴⁶ In Pelatiah Webster's words, “we can *extend our laws, customs, and civil police as fast and as far as we extend our settlements.*”²⁴⁷

These were the ideas on the table as Congress set to work drafting a land ordinance to govern the distribution of land in the Northwest. On the one hand was the model of Virginia: dispersed, individualized settlement. On the other was New England: compact, pre-planned, collective settlement. Behind these models were the already well-established systems of local government associated with them. Where the Virginia pattern of settlement had spread, the county court had spread with it.²⁴⁸ With the county court came weak local government, the empowerment of propertied elites, and a strong thumb on the scale toward individual property-owners' control over their land. This system flourished in the South where the plantation was the predominant location of power, wealth, and local control in many places.²⁴⁹ In contrast to this model was the totem of New England settlement: the town. The town stood for a more communal and civic-minded model of local government. In the eyes of many of the nation's new leaders, the ideal of the town represented order, virtue, and the

241. See ONUF, *supra* note 34, at 25.

242. See *id.*

243. See *id.*

244. See *id.*

245. See *id.* at 39.

246. See *id.* at 38.

247. See *id.*

248. See ROBERT M. IRELAND, *THE COUNTY COURTS IN ANTEBELLUM KENTUCKY* 10 (1972).

249. See Farbman, *supra* note 20, at 774–75. Even in places in the South where plantation slavery was not as dominant, the image of the plantation remained a powerful model for how power and property should be organized. See EDWARD E. BAPTIST, *THE HALF HAS NEVER BEEN TOLD: SLAVERY AND THE MAKING OF AMERICAN CAPITALISM* xxvi (2014).

possibility of control.²⁵⁰

Given these choices, it turned out that it was not just Yankees who preferred the model of the town. Beginning with Thomas Jefferson, a series of influential Virginians came to agree that compact and deliberate town-based settlement was the best way forward for the northwest.²⁵¹ Jefferson was one of the first men tasked with imagining distributing the newly federal lands.²⁵² Briefly in Congress, between 1783–1784, Jefferson chaired the committee tasked with organizing the impending Virginia land cession for division and sale.²⁵³ Working with Hugh Williamson, Jefferson proposed a system where the entirety of the Northwest would be divided into ten-mile units, which would, in turn, each be divided into a hundred mile-square lots.²⁵⁴ While Jefferson’s original plan said nothing about townships, its commitment to systematic pre-settlement surveying was clearly drawn from the model of New England, rather than the Virginia model of settlement first, surveying later. That said, Jefferson’s plan did not require that each ten-mile square “hundred” be settled collectively as a township, nor did it reserve land (and money) for schools and churches, as was customary with township settlement.²⁵⁵ Though Jefferson never went so far as to advocate explicitly for the New England plan, he did argue that a virtue of his plan was that it would promote a more egalitarian distribution of property—which would militate against the entrenched power of planter elites.²⁵⁶ In this, his plan was consistent with Jefferson’s long-standing critique of planter aristocracy in the South—a critique that he would later develop into an explicit argument against the county court system and for a “ward republic” system modeled on the New England town.²⁵⁷

The draft that Jefferson and Williamson’s committee generated never came before Congress.²⁵⁸ Instead, when Jefferson left Congress to serve as minister to France, he passed the draft along to another Virginian, William Grayson.²⁵⁹ Grayson was no Yankee, but he was also inclined toward the New England plan. Grayson had been an aide to George Washington during the war, and he wrote to him after submitting the draft ordinance to Congress, arguing for “the idea of a township with the temptation of a support for religion & education holds forth an inducement for neighbourhoods of the same religious sentiments to

250. While I’ll admit that my own biases run against counties and toward the aspiration that towns represent, for normative reasons that I will return to in Part IV, I don’t intend to defend that normative claim here. Rather, I’m describing what the governing elites came to see in the 1780s, as they considered these questions.

251. See VAN ATTA, *supra* note 223, at 34.

252. *Id.*

253. *Id.*

254. See BENJAMIN HORACE HIBBARD, A HISTORY OF THE PUBLIC LAND POLICIES 35 (Richard T. Ely ed. 1924); VAN ATTA, *supra* note 223, at 34.

255. See *id.* at 37–38.

256. See VAN ATTA, *supra* note 223, at 34.

257. See Farbman, *Reconstructing Local Government*, *supra* note 48, at 430–33.

258. HIBBARD, *supra* note 254, at 38.

259. See *id.*; see also VAN ATTA, *supra* note 223, at 35.

confederate for the purpose of purchasing and settling together.”²⁶⁰ This was in contrast to the “Southern mode” of “indiscriminate locations & settlements, which would have a tendency to destroy all those inducements [sic] to emigration which are derived from friendships religion and relative connections.”²⁶¹

Washington, it turned out, agreed. Of course, Washington was no Yankee himself, but he also supported compact settlement. “Compact and progressive Seating . . . will give strength to the Union; admit law & good government” and prevent the evils of “land jobbers and speculators.”²⁶² With New Englanders in support and enough Virginians on board, Grayson and his committee presented a draft ordinance for the distribution of the northwestern lands that drew heavily on the New England model.²⁶³ The land would be surveyed in advance and divided into rectilinear “townships” that would be divided again into square “lots.”²⁶⁴ Grayson’s proposal explicitly adapted the New England model where one township lot was reserved to support building public schools and another was preserved to support religious institutions.²⁶⁵ Grayson’s idea was that every township would be sold whole and then be subdivided by the owner—much like the old idea of the town proprietor in Massachusetts.²⁶⁶

When Congress received Grayson’s proposal, it provoked a drawn-out debate.²⁶⁷ Southerners objected to the idea that townships would be sold whole and not by individual lots. They objected to the size of the townships. They objected to reserving lots for schools and religion. Tellingly, however, they did not object to the rectangular surveys or advocate strongly for indiscriminate location.²⁶⁸ In other words, although Southern critics attacked features of the New England plan, they did not propose to supplant it with the full-fledged Virginia plan. They agreed, at least in principle, that some form of condensed and planned settlement was preferable to indiscriminate location and dispersed settlement.

What emerged in the spring of 1785 was a compromise that mediated Grayson’s whole-hearted embrace of the New England model, but which kept the model largely intact. The townships were made smaller than Grayson had

260. VAN ATTA, *supra* note 223, at 35; Letter from William Grayson to George Washington (Apr. 15, 1785), available at <https://founders.archives.gov/documents/Washington/04-02-02-0359> [<https://perma.cc/RJ77-LEWK>].

261. Letter from William Grayson to George Washington, *supra* note 260.

262. TOM CUTTERHAM, *GENTLEMEN REVOLUTIONARIES: POWER AND JUSTICE IN THE NEW AMERICAN REPUBLIC* 102 (2017).

263. HIBBARD, *supra* note 254, at 38.

264. *Id.*

265. *See id.*

266. *See* PAYSON JACKSON TREAT, *THE NATIONAL LAND SYSTEM, 1785–1820*, at 37–38 (1910). New Englanders agreed that the Grayson proposal largely adopted the New England plan. *See id.* at 38. Timothy Pickering had earlier written to Eldridge Gerry and Rufus King recommending that the western lands be settled explicitly on the New England model. *Id.* at 38–39. When Grayson’s report was brought to Congress, King wrote to Pickering noting that his ideas had been influential on the proposed plan. *Id.* at 39.

267. *See The Creation of the National Land Policy*, 3 BULL. OF THE CHI. HIST. SOC’Y 72, 73–74 (1926).

268. *Id.* at 74.

proposed, and alternating townships were to be sold by individual lot, rather than sold whole as townships.²⁶⁹ This meant that the barrier to sale was lower both for potential communal settlers (with fewer lots to buy as a whole) and that there would be room for individual settlers to buy in without going through the mediating mechanism of a township. But if the compromise was not a full embrace of the New England town, it still preserved the scaffolding of the system. It also preserved Grayson's proposal that one lot of each township be reserved to provide for public schools (although the final compromise removed the reservation for the support of religious institutions).²⁷⁰ Rufus King, the Massachusetts delegate to the drafting committee, confirmed what he saw as the victory of the New England plan when he wrote to Eldridge Gerry that "[Y]ou will find it bears strong features of an eastern System."²⁷¹

When Congress passed the ordinance, it set in motion the first division for sale of the northwestern lands. And it did so with the explicit imagination that these lands would be settled as townships on the model of the New England town. In this, Congress chose towns over counties as it first imagined the settlement of the northwest. And it did so with intention, arguing that counties and dispersed population were less conducive to good government and more conducive to speculation while towns were engines of civic virtue and republican government.

But Congress could not project townships westward by sheer force of imagination. If the idea of compact New England towns spreading across the northwest was behind the Land Ordinance of 1785, the reality was far more chaotic. In the end, at least for the first half century of settlement, it would be the Virginia plan and the county that shaped the political landscape.

C. The Northwest Ordinance

After the land ordinance was settled, Congress had a further task in projecting its imagination westward. Although the land ordinance imagined the microstructure of land sales, local settlement, and local government, Congress still had to devise a mechanism for bringing these settlers under a rationalized system of national control. With the states having ceded their land claims, some mechanism had to be devised whereby newly settled territories could be organized, governed, and eventually admitted to the Union as states.

269. See VAN ATTA, *supra* note 223, at 35–36.

270. See *id.*

271. *Id.* at 36 (alteration in original). One might argue that a victory for the “eastern system” refers only to the system of land distribution and not any kind of statement about the form of local government. There is some truth in this—the land ordinance was explicitly about how land would be subdivided and distributed and it said nothing about local government. And yet, the central premise of this Article is that local government and land distribution are interconnected. Condensed settlement was part and parcel with a township system of government while dispersed settlement was part and parcel with counties. It was the orderly governance and communal spirit of the towns (orbiting around schools and churches) that was the key attraction of the township system in the ordinance. In short, political geography is entwined with and inseparable from forms of public law.

In order for orderly township settlement to occur, there had to be a matching commitment to territorial government and to a prospective process for political self-determination. The virtuous citizens that men like Grayson and King were imagining would settle the northwest would need a foundational legal framework to articulate their relationship to the nation.²⁷⁸

The ordinance did a number of things in service of this larger purpose. As a matter of structure, the Northwest Ordinance created a single district out of territorial lands and provided that each territory should be governed by Congress through the intermediary of a governor, a secretary, and three judges, all of whom would be appointed by Congress.²⁷⁹ These officers would rule with the power to make laws and appoint local officials (including “civil officers in each county or township”) until there were “five thousand free male inhabitants of full age” living in the district, at which point the territory would form a general assembly made up of representatives from the territory.²⁸⁰ Once the assembly formed, it would supplant the congressionally appointed territorial government for all local purposes and it would send a non-voting delegate to Congress.²⁸¹ The idea behind all this was to create an orderly path from unsettled western frontier toward becoming a state on equal footing in the union.²⁸²

In addition to this structural background, the Ordinance famously laid out a background compact of guaranteed rights: freedom of worship, the right to habeas corpus, trial by jury, and other forms of judicial due process, and an endorsement of public education.²⁸³ In addition to these guarantees to potential settlers, the Ordinance laid out markedly egalitarian ground rules for social order: native nations should be treated with “good faith” and land should only be taken with “consent.”²⁸⁴ More famously, slavery would be banned in the territory (apart from the punishment of crimes)—but the claims of people claiming to own slaves in other parts of the nation would be honored by the mechanism of a fugitive slave clause.²⁸⁵

These provisions of the Northwest Ordinance are familiar in large part because they have been rightly understood to be precursors to (and a bedrock for) the Constitution that would emerge from Philadelphia in 1787. But in the context of the Land Ordinance of 1785 and in the analytical frame of this Article, the provisions of the ordinance lay out a framework for orderly settlement.

278. Manasseh Cutler, the impresario of the fledgling Ohio Company that had been founded to speculate on western lands, was one of the primary lobbyists for the Northwest Ordinance. *See id.* at 58. He thought that it was necessary to attract “‘robust and industrious’ settlers from New England.” *See id.*

279. *See id.* at 60–61.

280. *See id.*

281. *See id.* at 61–62.

282. *See id.* at 62. The ordinance seeks to lay the foundations of republican government “to provide also for the establishment of States and permanent government therein, and for their admission to share in the federal Councils on equal footing with the original States, at as early periods as may be consistent with the general interest.” *Id.* at 62.

283. *See id.* at 63.

284. *See id.*

285. *See id.* at 64.

Specifically, the explicit preference for settlement on the New England and northeastern model shows that the Ordinance was a founding structural vision not only for federal law, but for local government law. The Ordinance explicitly imagines that “townships” will exist—and that they will exist as more than administrative surveying abstractions.²⁸⁶ The Ordinance imagines that at some townships will be independent governments in that the governor is empowered to appoint township officials.²⁸⁷ Perhaps more telling, the Ordinance imagines that once territorial assemblies are formed, the representatives to those assemblies will be elected “from their counties or townships.”²⁸⁸ This seems to harken back to the Massachusetts system where the state legislature was made up of representatives from the various towns in the state.²⁸⁹

It would be easy to overstate this point. The Ordinance clearly contemplates *both* county and town governments. Moreover, in the same passage that it suggests that representatives might be chosen from their local governments, it also mandates that there should be one representative for every five hundred voting residents.²⁹⁰ My argument is not that the Northwest Ordinance effectively chooses towns over counties in its text. Rather, the Ordinance was consistent with the ideas running behind the Land Ordinance of 1785 which *did* explicitly prefer condensed settlement and towns over dispersed settlement and counties. The settlers that the framers of both ordinances were imagining were those that would seek ordered settlement, the rule of law, and stability. When people from Jefferson to Grayson to Washington imagined these people, they looked like town residents much more than plantation owners or frontier subsistence farmers.

These substantive points fold into an important semantic observation. People discussing the Northwest Ordinance and the land system of the northwest often take the term “township” for granted. Because of the way that settlement ultimately transpired in the Midwest, townships were generally understood as administrative surveying units. As I discuss below, it was quite rare for any of the square townships surveyed under the model laid out by the Land Ordinance of 1785 to be settled as “towns” on the New England model. As a result, the word “township” has drifted away from its association with the idealized New England town. But a close look at the Northwest Ordinance in the context of the 1785 Ordinance reveals that the framers of both ordinances clearly held a thicker understanding of what township meant. Where the Northwest Ordinance refers explicitly to “townships” it refers to them as units of government, not units of land measure. Townships would be political communities with civil governments and have interests to be protected in the representative elected assemblies. Refracted back through the Land Ordinance—and indeed even further back through the history of Pennsylvania and Georgia—it becomes clear

286. *See id.* at 61.

287. *See id.*

288. *See id.*

289. *See* ZUCKERMAN, *supra* note 91, at 23.

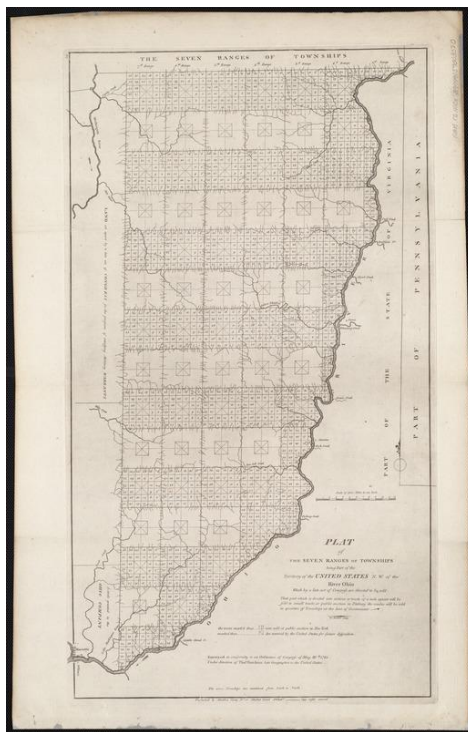
290. ONUF, *supra* note 34, at 61.

that the term “township” was *meant* to carry with it a normative commitment to a form of settlement and government that was distinct from dispersal, plantation, and the county.

D. The Settlement of Ohio and the Failure of the Township

In the immediate aftermath of the Land Ordinance of 1785, surveyors were dispatched to the eastern portion of what would become Ohio to begin the process of dividing the land up into townships.²⁹¹ The ordinance had provided that seven “ranges” of townships would be surveyed and broken into townships as a dry run for the surveying and then distribution of the rest of the townships across the northwest.²⁹² The idea was that once the ranges were surveyed, land sales would begin in the checkerboard pattern of township/individual lots that the 1785 Ordinance envisioned.²⁹³

Figure 8²⁹⁴



291. See VAN ATTA, *supra* note 223, at 35. It is worth restating here that the full story of the migration of Europeans westward in the first decades of the republic is far too rich and nuanced to tell in full here. Part I of Greg Ablavsky’s *Federal Ground* tells the story that I canvas briefly here in much more detail than I have space for. See ABLAVSKY, *supra* note 35, at 19–106.

292. See VAN ATTA, *supra* note 223, at 37.

293. See *id.*

294. Thomas Hutchins, William Barker & Matthew Carey, *Plat of the seven ranges of townships being part of the territory of the United States, N.W. of the River Ohio*, LIBR. OF CONG. (1796), <https://www.loc.gov/item/99441743/> [<https://perma.cc/Q766-JBGZ>].

The process of surveying the land was slow going, and only the eastern four ranges were surveyed by early 1787.²⁹⁵ A complete survey of all seven ranges was not completed until 1801.²⁹⁶ While Congress did try to open up the ranges for sale as soon as possible, it quickly became clear that the 1785 Ordinance was not matched to the actual pattern of settlement that was playing out on the ground. When the first townships came up for sale in 1787, only a tiny portion of the land was purchased—and all of it was purchased by individual settlers, not as whole townships.²⁹⁷ One major problem was that although the land was being surveyed, it was not unoccupied or unclaimed. The Indigenous People living in the northwest fought back against colonization and dispossession, and they made it feel unsafe for many would-be settlers.²⁹⁸ Compounding this problem was that, while there were some people who sought out the freedom of frontier life, the massive westward push that people had imagined would flow from the eastern seaboard was slow to materialize.

Congress had been counting on the windfall of the land sales to help stabilize the young nation's financial situation, and as the years passed without the robust, hoped-for sales, there was increasing pressure to change the terms of the 1785 Ordinance. In 1786 and 1787, Southern representatives twice tried to undo the township system and implement Virginia's system of indiscriminate location.²⁹⁹ While these efforts failed, by 1787, it had become clear that the imagined townships would not fill in the idealized, orderly way that Grayson and his colleagues had hoped for. In frustration, Congress increasingly turned to the prospect of selling large swathes of the northwest not to individuals or townships—but rather to land speculators.³⁰⁰ In a series of deals, Ohio was divided up between companies who agreed to take on the work of surveying and distributing the land.³⁰¹ The Ohio Company was organized by a group of Massachusetts-based speculators in 1786, and in 1787 it purchased a large swath of land to the west of the original seven ranges.³⁰² As part of the purchase agreement, the company agreed to survey the land according to the rules of the 1785 Ordinance.³⁰³ In fact, reflecting the New England origins of the founders of the Ohio Company, the township system that the company developed was closer to Grayson's original plan with one lot reserved for schools and another reserved for religion.³⁰⁴

Around the same time, a New Jersey land speculator purchased one million acres along the Ohio River, surrounding what would become Cincinnati.³⁰⁵ Just

295. See HIBBARD, *supra* note 254, at 41.

296. See TREAT, *supra* note 266, at 43.

297. See *id.* at 45.

298. See VAN ATTA, *supra* note 223, at 49.

299. See TREAT, *supra* note 266, at 43–44.

300. See HIBBARD, *supra* note 254, at 43–44.

301. See *id.*

302. See *id.* at 46, 49.

303. See *id.* at 47.

304. See *id.* at 49. Two townships were also reserved to establish a university. *Id.*

305. See *id.* at 50–51.

a few years later, a group of Connecticut speculators would purchase the Western Reserve land still claimed by Connecticut.³⁰⁶ While none of these large purchases explicitly rejected the township system, collectively they created a patchwork of surveying systems and settlement strategies that militated against the ideas that had been laid out in 1785.³⁰⁷ Adding in the swath of land north of the Ohio River that Virginia had held in reserve to be distributed to its war veterans,³⁰⁸ and then the land that the federal government had additionally held in reserve for war veterans in the center of the territory, by 1800 what was emerging looked like a chaotic patchwork rather than the orderly system of towns marching westward.

Figure 9³⁰⁹



306. See VAN ATTA, *supra* note 223, at 50.

307. *Id.*

308. See ABLAVSKY, *supra* note 35, at 31–32. This land had always been exempted from the surveying plan of the 1785 Ordinance and would instead be distributed in the Virginia style, according to indiscriminate location. See *id.*

309. Jerome S. Higgins, *The Seven Ranges Survey*, in SUBDIVISIONS OF THE PUBLIC LANDS, ILLUSTRATED 93 (1887).

This patchwork would match and help define the haphazard pattern of settlement of Ohio over the next two decades. While the territory that would become the state was slowly surveyed into townships (as the whole northwest would eventually be), the townships did not provide the outlines for the towns that did emerge. Where New Englanders came to settle, as in the Western Reserve and within parts of the Ohio Company's grant and Symme's Purchase, some collective settlement did take place and some towns did emerge.³¹⁰ But in much of the rest of the territory, the population was dispersed and relatively few towns were established.³¹¹ A map of the state from 1814 illustrates the story well. It reads like a mashup between the maps of Virginia and Massachusetts from the eighteenth century.

Figure 10³¹²



310. *See infra* Figure 10

311. *See id.*

312. Matthew Carey, *The State of Ohio, with part of Upper Canada, &c.*, LIBR. OF CONG. (1814), <https://www.loc.gov/resource/g4080.ct011775/> [<https://perma.cc/JUN3-RYL3>].

The new state is already divided into counties, which are the baseline level of local government, and there are some places where town dots are thick (frequently with New England names: Litchfield, Salem, and Deerfield in the Western Reserve and Roxbury, Wooster, Adams, and Salem (again!) in the Ohio Company grant near Marietta).³¹³ The history of the township in Ohio is not so much a narrative of the town being *rejected* despite the 1785 Ordinance. Rather, it is a story of settlement driving local government formation. It demonstrates the recurring pattern of aspirational plans and civic imagination of collective local settlement and the way that those plans were supplanted and disregarded by the preferences and actions of colonizers and settlers on the ground.

E. The Antebellum Period

The purpose of this Article is to set up the dichotomy between towns and counties and to show how these competing ideas of settlement and local government shaped the imagination of the United States in its imperial westward meditations. The story goes: two distinct systems of local government developed during the colonial period, and the first designers of the nation (for the most part) chose the town over the county when projecting their imagination westward. They did so because they thought towns were a better way of fostering civic identity, law and order, and economic efficiency. But despite their best laid plans, towns did not emerge where they were imagined. As had happened in Pennsylvania, South Carolina, and Georgia, the aspiration of condensed town settlement yielded to the entropic pressures of frontier migration. The people who came to settle in the west brought very different ideas of community and local government with them. Where those people were New Englanders or northeasterners, they brought towns. Where they were Southerners, they brought dispersed settlement, the fantasy of the plantation, and counties.

It is beyond the scope of this Article to fully catalog the shape of this over years between 1800 and 1860. There are too many moving pieces to tell the story cleanly. From the brutal genocide of Indian Removal which opened swathes of land up to mass migration in the 1830s to infrastructure improvements like early railroads, steamboats, and the Erie Canal, there are simply too many factors to describe within the boundaries of a (somewhat!) constrained law review article.

With that said, it may help to offer a precis of this history to contextualize the founding narrative and to offer a glimpse of what I plan to develop in future work. For the first decades of the nineteenth century, most settlement in the northwest came from the south and southwest.³¹⁴ As this map of the population density in 1810 shows, the bulk of settlement in Ohio, Indiana, and Illinois was concentrated along the southern-facing Ohio and Mississippi Rivers.

313. *See supra* Figure 10.

314. *See infra* Figure 11.

Figure 11³¹⁵

Most of the Northwest Territory remained dominated by the populous native nations living there, and most of the migration was from the Virginia and Carolina diasporas travelling along the rivers.³¹⁶ This means that for all the surveyed townships in the Northwest, what European settlement there was largely dispersed and organized against the backdrop of weak county government. Thus, the original constitutions of Ohio, Indiana, and Illinois provided for county government and largely ignored town government.³¹⁷

Starting in the 1830s, however, this would change. Between 1830 and 1860, a combination of factors including economic shock, infrastructure improvement, and Indian Removal paved the way for a flood of Yankees to move west.³¹⁸ These Yankees came not as individual pioneers, but frequently in large groups—congregations, families, and whole towns.³¹⁹ They poured in through the Great Lakes, populating northern Indiana and Illinois, southern

315. Francis Amasa Walker, *Statistical atlas of the United States based on the results on the ninth census 1870 with contributions from many eminent men of science and several departments of the government*, LIBR. OF CONG. (1874) (depicting 1810 data), <https://www.loc.gov/resource/g3701gm.gct00008/?sp=65&r=0.05,0.817,0.418,0.236,0> [https://perma.cc/NQ2D-MK7J].

316. John D. Barnhart, *Sources of Southern Migration into the Old Northwest*, MISS. VALLEY HIST. REV. 49, 49–53 (1935).

317. See generally OHIO CONST. (1802); IND. CONST. (1816); ILL. CONST. (1818).

318. See THE AMERICAN YAWP, 200–05 (Joseph L. Locke & Ben Wright eds., Stan. Univ. Press 2019).

319. Albert J. Larson, *Northern Illinois as New England Extended: A Preliminary Report*, 7 PIONEER AM. 45, 45 (1975); SUSAN E. GRAY, COMMUNITY LIFE ON THE MICHIGAN FRONTIER 9–11 (1996).

Michigan, and Wisconsin.³²⁰ By 1840, population across the northwest was dispersed much more evenly, and a huge proportion of those new residents were from the New England diaspora.

Figure 12³²¹



These New Englanders brought their local government ideology with them. The original constitutions of Michigan and Wisconsin made explicit provisions for town government and imagined that local government would be conducted in town halls using the old town meeting format.³²² In Illinois, the New Englanders advocated for a constitutional change in 1848 that gave counties the choice to break apart and adopt town government or to remain governed on the Southern model.³²³ Only a handful of southern Illinois counties chose not to adopt the town model.³²⁴ Similar stories could be told about the neighboring states of Indiana and Iowa.³²⁵

So, even though the northwestern township never took hold in the way that the framers of the ordinance of 1785 imagined, by 1860 a large portion of what had been the Northwest Territory was dominated by town government rather

320. Larson, *supra* note 319, at 45; GRAY, *supra* note 319, at 9–11; *The Yankee Empire, 1820-1890*, LIBR. OF CONG., <https://www.loc.gov/collections/pioneering-the-upper-midwest/articles-and-essays/history-of-the-upper-midwest-overview/yankee-empire/> (last visited Mar. 17, 2026).

321. Francis Amasa Walker, *Statistical atlas of the United States based on the results on the ninth census 1870 with contributions from many eminent men of science and several departments of the government*, LIBR. OF CONG. (1874) (depicting 1840 data), <https://www.loc.gov/resource/g3701gm.gct00008/?sp=66&r=0.526,0.16,0.307,0.174,0> [<https://perma.cc/W3P8-U37S>].

322. See MICH. CONST. (1850); WIS. CONST. (1848).

323. See MICHAEL D. SUBLETT, *TOWNSHIP: DIFFUSION AND PERSISTENCE OF GRASSROOTS GOVERNMENT IN ILLINOIS, 1850–2000*, at 24–29 (2004).

324. *Id.*

325. Clyde F. Snider, *Indiana Counties and Townships*, 33 IND. MAG. HIST. 119, 134 (1937); CLARENCE RAY AURNER, *HISTORY OF TOWNSHIP GOVERNMENT IN IOWA* 25–32 (1914).

than county government. As my future work will argue, the sectional differences between forms of local government contributed to and echoed widening sectional differences between North and South in ways that would contribute to the coming Civil War.

IV. TOWNS OR COUNTIES NOW

Local government structure has shaped the political geography of the United States, and it continues to matter. For those of us who live in Massachusetts, our daily lives are circumscribed, shaped, and governed by boundaries that were drawn centuries ago. Towns not only provide government and services, but they also shape cultural identity and community. By contrast, for people who live in the South (and much of the west), counties remain the dominant form of government. In many states, the most important local executive officer is still the County Judge.³²⁶ By-and-large, in these places, counties are the base-layer of local government. They tax, police, and provide schools and other services.

It is still broadly true that places with more compact communal settlement are organized as cities and towns while places where population is more dispersed are more likely to be governed as counties. While there are urban county governments³²⁷ and rural town governments,³²⁸ it remains broadly true that towns represent compact communal settlement while counties represent dispersed, individualized settlement. There are some counties that are muscular local governments that provide robust services³²⁹ and there are some towns that are minimalist and do little more than protect property rights.³³⁰ Even so, as a rule, county governments are weak and tax and govern less while town governments are stronger, taxing and governing more. Within these caricatures

326. See, e.g., KY. REV. STAT. ANN § 67.710 (West 2025); ARK. CODE ANN. § 14-14-1101 (West 2025). And in other states, the county governance system still bears plenty of resemblance to the old Virginia model.

327. For example, Montgomery County in Maryland is home to quasi-urban but unincorporated places like Bethesda and Silver Spring. See *Community Links*, MONTGOMERY CNTY., MD., <https://www.montgomerycountymd.gov/resident/community.html> [<https://perma.cc/R7TB-H26X>] (last visited Feb. 17, 2026). Moreover, a handful of county governments have merged with big city government to create unified urban county governance. This is the case with Unigov in Indianapolis and Miami-Dade County in Florida. See *supra* note 22.

328. There are many of these in New England, of course, but my favorite example is Neponset, Illinois. Neponset is a tiny town in central Illinois that was named after the Neponset River, which runs through Dorchester in Boston, Massachusetts. See Opinion, *Early pioneer struggles include building their own place to live*, STAR COURIER (Jan. 8, 2021, at 14:07 CST), <https://www.starcourier.com/story/opinion/2021/01/08/early-pioneer-struggles-include-building-their-own-place-live/6600048002/> [<https://perma.cc/5766-FQ4V>].

329. Los Angeles County, for example, has a budget of over forty-five billion dollars and provides services ranging from schools to fire protection to water to electrical power to millions of people. See Makenna Sievertson, *LA County's New Budget*, LAIST (Oct. 4, 2023), <https://laist.com/brief/news/politics/la-countys-new-budget-adds-billions-in-spending> [<https://perma.cc/EY6B-BKJU>].

330. For example, in my prior work I tell the story of St. James, North Carolina, which exists for the sole purpose of sheltering a housing development (St. James *Plantation*) from being annexed by other nearby incorporated places. See Farbman, *supra* note 20, at 788–96.

there are a million variations—and the nature of local government law makes it easy to get entangled in them. Still, when you zoom out far enough, I think it's fair to say that we *still* live in a nation of towns and counties and that there are real and salient differences between the two.³³¹

If this is true in the present—and if it is a banality to say so—then one obvious takeaway from this Article is simply that the difference between towns and counties has a history that runs through ideology, colonial imagination, economy, and plantation slavery. In the colonial and antebellum South, the county evolved into a form of local government that protected the power of elite property owners, many of whom claimed significant property ownership in human beings.³³² Counties were not designed to provide robust services or to offer thick democratic self-government. In the heart of slavery, they were tools of a planter elite to protect their own individual freedom. And elsewhere, they remained a tool for relatively scattered residents to govern themselves as much as necessary—which is often to say, not very much.

In this, most counties are different from what we would call “towns.”³³³ Towns developed around congregations and the idea of communal settlement. The town itself was imagined as an interlocking network of residents whose interests converged in the town identity. This meant that towns were collective ideas. They were filled in points on a map while counties were empty squares ready to be filled in. Although counties represented individualism and limited government intrusion, the idea of the town suggested a more robust and participatory model of civic life.

These past differences help to explain present differences. One concrete way of seeing this is by returning to Keystone and the structure of local government incorporation laws. In many parts of the country (including much of the South) where county government dominates, large swaths of county land is “unincorporated.”³³⁴ This means that people living on this land are governed “only” by the county government. This is in contrast to “incorporated” land which is governed by town or city government.³³⁵ There is no land in any state

331. In this dichotomy, I lump cities in with towns. If towns are characterized by thicker settlement and a thicker civic sphere, cities go further down this spectrum.

332. See Farbman, *supra* note 20, at 774–75.

333. What we mean by a “town” is a relatively simple question in the context of the history in this Article, but a substantially more complex question in the present. One definition of a town would simply be any place that is “incorporated” such that it is no longer “just” part of a county, but rather is an independent, self-governing municipal government. There is something to this, but perhaps not enough. For my purposes, when I think of a “town,” I think of a place with a relatively compact settlement pattern and a cohesive sense of community identity. That is to say, to this New Englander, a “town” means, functionally, a New England Town.

334. See Amel Toukabri & Lauren Medina, *America: A Nation of Small Towns*, U.S. CENSUS BUREAU (May 21, 2020), <https://www.census.gov/library/stories/2020/05/america-a-nation-of-small-towns.html> [<https://perma.cc/X8JZ-DDPJ>].

335. The precise balance between the powers of incorporated places and the latent county governance is very different from place to place. As a general rule, people living in incorporated towns and cities have their own police and fire departments and a whole suite of other locally provided municipal services. This often, but not always, includes schools. That said, the county will generally still tax incorporated places and provide some subset of services.

that is *not* part of a county—it is the minimal backstop for local government. But when a group of people living on unincorporated land in a county want to form themselves into a community to be recognized under state law, they vote to incorporate. In doing so, they emerge out of the base-level of county governance and level up to the status of town or city. In practice, of course, this means that they are seceding from the county and establishing themselves as a new and distinct form of government. Usually, they are removing some portion of their taxes from the county coffers and restructuring the ways in which the county polices, educates, and provides services. In other words, incorporation has a significant effect on the political and fiscal reality of county government.

And yet, nearly every state makes it easy for places to incorporate like this.³³⁶ As a matter of structural local government law, states understand counties to be weak and basic and they imagine incorporated towns and cities to be more robust.³³⁷ As between the two, in making it easy to incorporate, states explicitly prefer town government to county government. The residents who choose to incorporate are understood as exercising civic virtue and committing to communal self-government. The counties that they leave behind have little say in the matter because they are *not* such a cohesive political entity. They are “unincorporated” and inert—doing the bare minimum of governance, but not in any kind of thick, participatory-democratic sense self-governing.

We tend to take this dynamic for granted. When I teach these issues in Local Government Law, my students almost uniformly share the intuition that it *should* be easy for communities to form in unincorporated counties and to incorporate themselves into a more robust and intentional political community. But why should we prefer towns to counties in this way? Why do we see incorporation as emerging into a “higher” plane of government rather than a secession from the existing county order? Through the lens of this history, the preference for towns baked into most state legal regimes emerges as a reflection of the preference for compact settlement, social cohesion, and self-government that drove the framers of the 1785 Ordinance to prefer townships to dispersed settlement. At least for the first two centuries of American local government, the elite planners who wrote the laws aspired towards towns and the collective governance they represented.

One way of understanding this is that counties have *always* suggested a form of local governance that was skeptical of governance itself. Planters sought to retreat from the state and protect their own despotic power, and the county served as both vessel for government and shield from further intervention. From the beginning, this was a threat to social cohesion, public safety, and democracy; it was also a threat to political and social equality because planters sought to use

336. The canonical authority for this proposition is Richard Briffault, who outlined in detail how relatively easy it is in most states for a community to vote to incorporate. See Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 73–77 (1990).

337. In Briffault’s words, state laws and courts “often treat the formation of a local government as a healthy development, reflecting the area’s growth and the democratic desires of its residents.” *Id.* at 77.

counties to protect the existing distributions of power, wealth, and privilege. It is not surprising for state constitutions—themselves aspirational charters of fundamental law—to prefer more government to less and to prefer a more robust structure of self-government to individual and dispersed power.

Even if the deep structures of structural local government law echo the old planners' preference for towns over counties, it would be a mistake to hear the echo without engaging with its complexity. In many instances, by making it easy for communities to incorporate, state law has made it possible for groups of privileged property owners to wall themselves off from their neighbors, hoard their resources, and perpetuate exclusionary structures. Incorporation laws have allowed gated communities to incorporate to remain exclusive,³³⁸ white suburbs to incorporate to preserve school segregation,³³⁹ and rich enclaves to incorporate to keep taxes low.³⁴⁰ In many of these contexts, it had been county governments that were providing services and redistributing resources—and it was town government that created exclusion and inequality. Indeed, I'm on record as arguing that many incorporated "towns" today actually replicate "plantation localism" by protecting individual property owners' power to do what they like against the threat of regulation and redistribution.³⁴¹

The point, then, is not that towns are (or ever were) actually "better" local government than counties either as a matter of democracy, good government, or redistribution. Rather, the point is that the old *idea* that towns were more virtuous and more democratic remains alive and well in the underlying structures of American local government law—and this idea is a mirror of many people's persistent intuitions. We live in a nation of counties, but we subscribe to a national ideology of towns. Even if the towns that we have do not meet our aspirations, we can see the shadows of that aspiration lurking in the background.

This leads me to the other, more concrete presentist takeaway from this

338. In addition to St. James, which I already mentioned, the most famous example of this is Rolling Hills, on the Palos Verdes Peninsula, south of Los Angeles. Rolling Hills is an incorporated, gated community with no public land—outsiders are not allowed to enter the city without an invitation from a resident. See GARY J. MILLER, *CITIES BY CONTRACT: THE POLITICS OF MUNICIPAL INCORPORATION* 90–91 (1981).

339. Perhaps the most striking example of this can be found in Shelby County, Tennessee, where, after the Memphis City school district dissolved into the county school district, in an attempt to desegregate the city's predominantly black schools, Tennessee subsequently allowed suburban areas of Shelby County to incorporate into new cities and new school districts to "protect" those richer and whiter places from the force of county-wide desegregation. See generally Genevieve Siegel-Hawley, Sarah Diem & Erica Frankenberg, *The Disintegration of Memphis-Shelby County, Tennessee: School District Secession and Local Control in the 21st Century*, 55 AM. EDUC. RSCH. J. 651 (2018).

340. One of the focal points for this movement is suburban Atlanta, where a number of rich, suburban enclaves are seeking either to secede from Atlanta or to incorporate from unincorporated county land to keep taxes low and protect against redistribution to poorer areas. See Brentin Mock, *The Future of Cityhood*, BLOOMBERG (Feb. 11, 2022, at 22:35 EDT), <https://www.bloomberg.com/news/features/2022-02-11/atlanta-s-wealthy-white-suburbs-want-their-own-cities> [https://perma.cc/48DW-7FCP].

341. See Farberman, *supra* note 20, at 795.

history.³⁴² If I am right that the choice between towns and counties remains latent and weighted in our ideology, it runs up against a countervailing baseline reality, namely that we usually understand the structure of our local government to be static rather than dynamic. We think of towns and counties and cities more as fixtures of our political landscape than products of negotiation. This may be because here in the twenty-first century, the frontier appears to have closed. Unlike William Grayson looking west in 1785, there are no “open” questions of local government formation for us to answer in the present. Everywhere in the United States seems to be *already somewhere*. In this stasis, it can become hard to imagine how things might be different.

In a static world where local government is, but is not being designed, the historical struggle between the ideology of the town and the creeping reality of the county seems like old news. Whatever large-scale ideas of political theory that might have been motivating local government formation are now baked into the ossified structure. In a world of stasis, we are no longer authorized to try to choose how to organize ourselves; we are simply subject to the fossils of choices made long ago.

But this stasis is a misdirection in two directions. First, it is simply not true that the frontier of local government formation has closed. According to the Census Bureau, more than 700 new local government units were registered between 2017 and 2022—that’s more than 100 new local government entities being born every year.³⁴³ The borders of existing local governments are constantly expanding through annexation, new school districts are emerging through secession,³⁴⁴ and new municipalities are incorporated. In fact, in most parts of the country, apart from New England (where local boundaries have been settled for centuries), the location of local boundaries and how they should be drawn remains an active and open conversation.

Because the local design frontier is not truly closed, the big theoretical and imaginative questions that animate whether and how local boundaries should be drawn are not dead either. Every time a subdivision is annexed or a school district is split in two, echoes of the biggest and most basic questions become live again: how should we organize and govern ourselves? Who should be within and without the jurisdictional boundaries that we draw? What should those boundaries mean? These are the questions that have animated questions about local formation from the seventeenth century onwards, and they are the

342. I make no apologies for turning my historical work toward the present and engaging with the consequences that it may have for present political or theoretical debates. I remain aligned with my former self when I wrote that I was “sympathetic with the cadre of new critical legal historians who argue that legal history is an essential tool for interrogating the present.” See Farbman, *Reconstructing Local Government*, *supra* note 48, at 482.

343. See Table 1, *2022 Census of Governments—Organization Tables*, U.S. CENSUS BUREAU (Sep. 23, 2025), <https://www.census.gov/data/tables/2022/econ/gus/2022-governments.html> [<https://perma.cc/8E56-R74Q>].

344. See P.R. Lockhart, *Smaller communities are “seceding” from larger school districts. It’s accelerating school segregation*, VOX (Sep. 6, 2019, at 17:30 EDT), <https://www.vox.com/2019/9/6/20853091/school-secession-racial-segregation-louisiana-alabama> [<https://perma.cc/GJ3V-NV4B>].

questions that have animated the stakes of the choice between town and county for that long as well.

The conclusion to this Article is hardly the place to resolve these questions, but if the big questions of how we should organize ourselves are more alive than we think—and if the history here suggests that these are old and constitutive questions—then it seems worth closing by saying briefly what *I* think the stakes are. I am convinced that our experience of local government shapes our relationship to each other and to the state.³⁴⁵ Towns and counties are different, and the experience of daily life is different in ways that structure civic identity and imagination. I grew up in a Connecticut town that leveraged local power in ways that seemed natural to me but were comparatively robust and invasive in the broader national context. The town bussed students from across town to maintain socioeconomic diversity in its elementary schools. The town collected trash, mandated recycling, and plowed the roads. The town provided (limited) public housing, paid its firefighters, and maintained its roads well. When you got to the border of the more-rural neighboring town, the roads got worse and the fire department became volunteer. Growing up in this town context inculcated in me a relationship to government and the state that shapes my civic imagination. It is hard to imagine living in a place where I would have to plow my own street or where I would have to drive my children to school. When I have lived in places without robust downtowns or where the urban geography is sprawl, I have felt alienated and disoriented—not so much because I “don’t like it,” but because I experience a dissonance between my understanding of local political geography and what I’m experiencing.

Extrapolating outward from my own experience is, of course, speculative and anecdotal. Yet, it seems unavoidably true to me that our local political structures matter to how our relationship to the world is shaped. Whether that shaping is sympathetic (i.e., I grew up in a city and I liked it) or oppositional (i.e., I grew up in a city and I hated it), the structural baseline matters. If there are differences between towns and counties (and cities and villages and hamlets and census-designated places), then those differences matter not only as a matter of description, but as a matter of politics and political formation. If this is true—and I think it is—and if it is true that the boundaries of local government are constantly changing and are *always* subject to change even where they feel permanent, then the subsequent normative question is unavoidable. We have no choice but to ask: what kind of local government will shape a good society?

This is the colonists’ question that has been asked, answered, and asked again since the beginning of the colonial project. In both the past and the present, framers have preferred the order, structure, and coherence of the town to the spread and abstraction of the county. But in practice, the county has tended to spread where the commitment to the town was not explicit, intentional, and ideological. For my part, I am a communitarian. I am drawn to the promise of

345. In Richard Thompson Ford’s words, “[t]erritorial jurisdiction produces political and social identities. Jurisdictions define the identity of the people that occupy them.” See Richard T. Ford, *Law’s Territory (A History of Jurisdiction)*, 97 MICH. L. REV. 843, 844 (1999).

participatory democracy, community identity, collective endeavor, and possible redistribution that the town and city represent. But this is not the place to advance an argument for my own view. Rather, I want to close with the admonition that this fundamental normative question has always been and remains at the center of how we think about local government. We get the local government we design—and we are always designing it. Just as the colonists in Virginia and Massachusetts built competing systems of local governance and then promulgated the ideology of those systems across time and space, we are still empowered to make big theoretical choices about who we are together and why.

This power seems obvious to me, but if it is obvious, it is also destabilizing. And if it is destabilizing, it is also optimistic. If we are living within a local government system heavily in debt to plantation ideology that allows for the hoarding of wealth and racial segregation, then it matters whether these are structures that we chose or that we are stuck with. If we chose them, then we deserve blame, but we also have the power to choose again, and to choose differently.