ARTICLES

Alternative Visions of American Constitutionalism: Popular Sovereignty and the Early American Constitutional Debate

By CHRISTIAN G. FRITZ*

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Overview

American constitutional interpretation and theory remain prisoners of an excessively narrow perspective of the Constitution. Such perspective is limited by entrenched assumptions about constitutional history and a blinding fixation on the federal document. These

* Henry Weihofen Professor of Law, University of New Mexico, and visiting Professor of Law, University of California, Hastings College of the Law. The author gratefully acknowledges the critical readings of earlier versions of this Article by James W. Ellis, Joseph Franaszek, Marlene Keller, James H. Kettner, and Robert F. Williams.

preconceptions suggest the inevitability of the received wisdom about American constitutionalism, constraining the debate and delimiting the range of constitutional ideas. Expanding the arena in which the contemporary play of ideas occurs is conceptually difficult and has met with considerable resistance. A more complete account of the American experience with written constitutions reveals much complexity and forces us to re-evaluate many of our most cherished constitutional beliefs.

This Article explores the revolutionary period and the early national period of American constitutionalism, examining popular sovereignty as the foundation of American governance and political power. It intends to challenge standard perspectives on American constitutionalism, in particular the notion that the United States Constitution was the model constitution and reflected the mature, complete understanding of how to translate revolutionary theory into republican practice. The Federal Constitution was not the culmination of the "correct" understanding of popular sovereignty, but merely one version that ultimately produced a distinct constitutional tradition. An alternative vision, however, existed, survived, and gave coherence to a rather different tradition of constitution-making and revision. The validity and vitality of that tradition has largely been muted by two hundred years of Federal Constitution worship.[1]

This Article discusses the tensions between broader and narrower visions of constitutional possibilities and how those two visions formed and re-formed in the early constitutional experience of the states. This early, developmental period of constitutional formation is viewed through the lens of a series of questions that Americans continued to struggle with in constitutional conventions and as they thought about constitutional revision. These questions sprang from popular sovereignty and concerned the role of legislatures in framing constitutions, the necessity of popular ratification, the people who could create constitutions, and the limits, if any, to constitutional change.

Popular sovereignty was the dynamic concept that underlay the American Revolution. By examining rarely utilized sources, one can

1. Joyce Appleby has made a similar point about the Anti-Federalists and the constitutional possibilities they anticipated. *See* Joyce Appleby, *The American Heritage: The Heirs and the Disinherited*, 74 J. AM. HIST. 806 (1987); *see also* Richard E. Ellis, *The Persistence of Anti-Federalism After 1789*, *in* BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY 295, 297 (Richard Beeman et al. eds., 1987); Pauline Maier, *The Road Not Taken: Nullification, John C. Calhoun, and the Revolutionary Tradition in South Carolina*, 82 S.C. HIST. MAG. 1 (1981).

see that the development of American constitutionalism was intertwined with deliberations and perceptions about popular sovereignty.[2] Indeed, popular sovereignty became the central challenge to Americans in establishing republican governments. Americans were both united in accepting popular sovereignty as the foundational principle of their governments and divided over how to implement the principle. As Americans framed and reframed answers to popular sovereignty, a complex and conflicted American constitutional tradition emerged that departed in many important respects from the conception of constitutionalism embodied in the Federal Constitution.

Moreover, that divergent tradition continued to enjoy a vibrant life long after 1787. State constitutions and state constitution-makers embraced a far more expansive view of popular sovereignty, while the Federal Constitution and its Framers reflected a constrained view of the people's right to alter or abolish their government. The coexistence of these competing perceptions of popular sovereignty hinged

2. This Article emerges from a broader study of the American debate over the implications of popular sovereignty from the Revolution until the end of the nineteenth century. That study analyzes all the extant debates of state constitutional conventions of that period as well as contemporary and scholarly accounts of such conventions. Well over 200 state constitutional conventions have been held since the eighteenth century. *See* Albert L. Sturm, *The Development of American State Constitutions*, 12 PUBLIUS 57, 57-84 (1982).

Because the first published debates appeared only in the 1820s, the work and understandings of prior state constitution-makers must largely be gleaned from sources other than published debates, such as newspaper accounts, private papers, and the often cryptic proceedings and minutes of those conventions. Ironically, state constitution-making during the 1820s and 1830s has received disproportionate attention, given the fact that the best evidence of the thought of delegates—the published debates of the conventions—proliferated at that time. *See, e.g.*, DEMOCRACY, LIBERTY, AND PROPERTY: THE STATE CONSTITUTIONAL CONVENTIONS OF THE 1820S (Merrill D. Peterson ed., 1966) [hereinafter DEMOCRACY, LIBERTY, AND PROPERTY]. In fact, only 7 of 59 published debates of nineteenth century constitutional conventions were for conventions that took place in the 1820s and 1830s, including Massachusetts (1820), New York (1821), Virginia (1829-1830), Delaware (1831), Michigan (1835), North Carolina (1835), and Pennsylvania (1837).

From the 1840s through the 1860s the debates for 35 conventions were published, usually increasing in sophistication of stenographic accuracy. Seventeen debates were published for conventions that met during the 1870s until the end of the nineteenth century, but what they lacked in numbers they gained in length, as, for example the 12 volumes of Missouri's 1875 convention and the 5 volumes of Delaware's 1896-1897 convention.

The focus on state constitution-makers offers a unique means of tracing not only the results of American constitution-making, but attitudes towards the process of constitutional revision. In most conventions, delegates engaged in a wide range of substantive debates that reflected political partisanship. Nonetheless, the process of drafting or revising constitutions inevitably raised questions about the philosophical dimensions and meaning of American constitutionalism. Although not entirely free from various political agendas, delegates frequently discussed how and why constitutions should be framed and revised in terms that reflected divergent constitutional persuasions shaped by differing perceptions and understandings of popular sovereignty.

on differences over how the people could create and change their written constitutions. The groundwork for distinctive, competing traditions of constitutionalism was well established by the early national period. Branded as revolutionists after the Dorr Rebellion and as secessionists after the Civil War, a significant number of delegates kept alive a constitutional tradition that had emerged with the American Revolution. They maintained the inherent right of the people to revise, insisted on the existence of a constitutional middle ground between revolution and procedurally driven constitutional revision, and persisted in trying to enshrine such guarantees in the constitutions they drafted or revised.

I. Popular Sovereignty as the Basis of Constitutional Law

With the Declaration of Independence, Americans took an irrevocable step in embracing popular sovereignty. The principle that all political power derived from the people became indispensable to the creation of republican governments through written constitutions.[3] The centrality of popular sovereignty was the acknowledgement that the people provided the source of authority that made constitutions fundamental. Constitutions could limit and control government because they expressed the will of the people in their sovereign, primary capacity. As such, constitutional law took clear precedence over statutes passed by legislatures functioning in their ordinary capacity as representatives of the people. This distinction between constitutional and ordinary law formed the basis of American constitutionalism. The hallmarks of that constitutionalism were identifying the people as the only legitimate basis of government and translating that theory into a practice of constitution-making.

The procedures and mechanisms used to create and revise constitutions, however, are often confused with popular sovereignty as the basis of constitutional law. The source of constitutions—the will of the sovereign people—and not the manner in which they were created endowed them with their fundamental authority. Eventually, specially elected conventions were routinely used to frame constitutions, accompanied by an increased reliance on popular ratification. A mod-

3. The creation of American "states" implicated the notion of sovereignty in two different senses. The process entailed both a territorial dimension, that is, the state's jurisdiction over a particular region, and a political dimension, that is, the creation of a legitimate government. However, "[t]he revolutionary right to create new governments was a political right. It could not, without totally upsetting property relations, bring with it a right to land or territory. Territorial jurisdiction, like property itself, rested on a title." PETER S. ONUF, THE ORIGINS OF THE FEDERAL REPUBLIC 40 (1983).

ern assumption that orthodox constitution-making exclusively entails constitutional conventions followed by ratification has led to a mischaracterization of early American constitutions. Moreover, it has overlooked the vitality of the principle of popular sovereignty in constitutional discourse.

In the midst of struggling to define their republican government and societies, Americans easily agreed on the underlying premise of popular sovereignty. Accepting popular sovereignty, however, did not insure agreement on a series of questions having profound consequences for constitution-making and revision. Indeed, the American Revolution initiated a debate over the implications of popular sovereignty that continued throughout the nineteenth century. That debate proved persistent because popular sovereignty easily lent itself to a variety of interpretations. It could be seen as a principle inviting practical invocation and expansively giving the people an active and direct role in their governments. On the other hand, it could be regarded as merely the theory underlying American governments that envisioned a more constrained and passive role for the people. These conflicting views reflected a struggle over what claims the people had on their constitutions and what power they had to shape a constitutional tradition that ultimately rested on their authority. Beneath these differences lay the relative faith one placed in the capacity of the people to pursue their best interests. The tensions between these opposing views were not resolved when the Federal Constitution incorporated a more passive understanding of popular sovereignty. Beyond the role of popular sovereignty in constitutional theory, various approaches to popular sovereignty proved useful in the political debates over substantive issues in state constitutional conventions. Thus, both theoretical malleability and practical politics helped keep the debate over the implications of popular sovereignty alive throughout the nineteenth century.

The Federal Constitution did not epitomize the natural evolution and mature understanding of American constitution-making since the Revolution. Rather, it only represented an important eighteenth century victory for those who adhered to a narrower view of popular sovereignty that sought to minimize the people's role by channeling their impact through procedures and the legislative process. Likewise, judicial review was not inevitable, but consistent with an effort to narrow the implications of popular sovereignty. The context and process of constitution-making both before and after 1787 reveals the continuing development of more expansive views of the principle of popular sov-

ereignty, including the rejection of a judicial monopoly on constitutional interpretation. The ongoing debate over popular sovereignty compels us to reconsider the inevitability and orthodoxy of what the Federal Framers produced.

An alternative constitutional view of popular sovereignty has also been obscured by the tendency to consider the principle primarily as it relates to the Federal Constitution. The great struggle over the shape of the national government and its relationship to the states was but one important battle over the meaning of popular sovereignty. In successfully asserting that the theoretical basis of the Federal Constitution rested on an "unmediated relationship" between the national government and all American citizens, the authors of *The Federalist* advanced an understanding of popular sovereignty that held enormous consequences.[4] Not only did their version of popular sovereignty render the sovereign people an arguably impotent "ghostly body politic,"[5] it also justified the suppression of secession.[6]

The predominant focus on popular sovereignty as it has shaped the federal government has largely overlooked the principle as it has been regarded within the context of state constitution-making. Irrespective of the arguments of Federalists and Anti-Federalists, and the outcome of their struggle, popular sovereignty had a related, but ultimately independent meaning at the state level. Both the outcomes and arguments over what role the people played in constitution-making and revision varied from the better known debates captured at the national level. In the end, both the federal and state constitutions realized the necessity of implementing popular sovereignty.

What revolutionaries said and did reflected their widespread belief that a sovereign people formed the only legitimate basis for governments. Subsequent generations of Americans, not to mention constitutional theorists, have continued to endorse this belief almost without exception.[7] This consensus, however, naturally raised such

4. *See* Joshua Miller, *The Ghostly Body Politic:* The Federalist Papers *and Popular Sovereignty*, 16 POL. THEORY 99, 113 (1988).

5. *Id.*

6. *See* Kenneth M. Stampp, *The Concept of a Perpetual Union*, 65 J. AM. HIST. 5 (1978). Alternative views of popular sovereignty as the basis of the Federal Constitution suffered by their connection with states' rights arguments in defense of slavery.

7. Despite the debate over the origins and nature of the American Revolution and the Federal Constitution, revisionism has "not undermined in any important way the orthodox view that the United States government derives its legitimacy, in the Lockean sense, from the consent of the governed." James A. Gardner, *Consent, Legitimacy and Elections: Implementing Popular Sovereignty Under the Lockean Constitution*, 52 U. PITT. L. REV. 189, 193 (1990); *see also* MARSHALL L. DEROSA, THE CONFEDERATE CONSTITU-

questions as: How do we make a constitution based on popular sovereignty? Who were *the people*? How could constitutional change occur? And, are there limits to constitutional revision? The implications of popular sovereignty in terms of how constitutions should be created and the people's role in that process were initially addressed by the revolutionary generation. The issues of future revision and constitutional change began to receive attention soon thereafter, when the first constitutions were created in 1776 and 1777.

In basing their governments on the people, the American revolutionaries embraced ideas which necessarily rejected the authority of the King and the British Parliament. Invoking these ideas to effect revolution proved easier than restraining them after revolutionary success. Popular sovereignty, according to the Declaration of Independence, entitled the people to make their own governments and "to alter or to abolish" them whenever governments become destructive of their rightful ends.[8] This right would endanger the stability of new governments established under the authority of popular sovereignty if

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TION OF 1861: AN INQUIRY INTO AMERICAN CONSTITUTIONALISM 7 (1991); DON E. FEHRENBACHER, CONSTITUTIONS AND CONSTITUTIONALISM IN THE SLAVEHOLDING SOUTH 1 (1989); DONALD S. LUTZ, POPULAR CONSENT AND POPULAR CONTROL: WHIG POLITICAL THEORY IN THE EARLY STATE CONSTITUTIONS 38 (1980); Akhil Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043, 1054-55 (1988); Sanford Levinson, *"Veneration" and Constitutional Change: James Madison Confronts the Possibility of Constitutional Amendment*, 21 TEX. TECH. L. REV. 2443, 2444 (1990). Even a critic who repudiates Amar's theory and calls popular sovereignty an "esoteric notion that is irrelevant to constitutional interpretation" ultimately concedes it to be "a premise of our beliefs" and "an idea that underlies the constitution." David R. Dow, *When Words Mean What We Believe They Say: The Case of Article V*, 76 IOWA L. REV. 1, 26, 35 (1990).

The exception to this consensus occurred late in the nineteenth century and accompanied the Progressive era. One of the few repudiations of popular sovereignty and the necessity of the people's consent comes from the late nineteenth century commentator Christopher Tiedeman at a time when opponents of an expansive view of popular sovereignty were fixated on the dangers of anarchy and socialism. *See* CHRISTOPHER G. TIEDEMAN, THE UNWRITTEN CONSTITUTION OF THE UNITED STATES: A PHILOSOPHICAL INQUIRY INTO THE FUNDAMENTALS OF AMERICAN CONSTITUTIONAL LAW 115-24 (New York, G.P. Putnam's Sons 1890). Bruce N. Ong argues that while popular sovereignty clearly formed the basis of American constitutions framed in the eighteenth century, in the late nineteenth century and early twentieth century it came under attack by Progressives as the true theory of government. Woodrow Wilson, one of the leading Progressives, "attacked the idea of popular sovereignty as it applied to the constituent act of establishing a fundamental law" and "sought to replace that notion of sovereignty with one which emphasized the sovereignty of those who led the state, not those who ratified its charter of power and limitations." Bruce N. Ong, Constitutionalism and Political Change: James Madison, Thomas Jefferson, and Progressive Reinterpretations 333, 339 (1985) (unpublished Ph.D. dissertation, University of Virginia).

8. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

the people were frequently to resort to their power to make constitutional change. How this underlying power might be exercised long remained an open question.

Jefferson's Declaration of Independence asserted the American people's *right* of revolution in rejecting their political allegiance to Britain. When Jefferson described the people's right "to alter or to abolish" governments, observers from his day to our own have linked his words to natural law. After all, Jefferson had spoken of "inalienable" rights before identifying the source of government's power as "the consent of the governed," which allowed the people to overthrow oppressive regimes.[9] Moreover, Jefferson's formulation of the right of revolution embraced the Lockean justifications for England's Glorious Revolution of 1688.[10] Central to John Locke's theory of such a right was a distinction between "constituent" and "ordinary" sovereignty, with the right of the people to act on their supreme, constituent power limited to the situation of government's dissolution.[11] Even the most conservative eighteenth century thinkers agreed that the people had a natural right to revolution in the face of "oppressions" that "threaten desolation to a state."[12] As political scientist Julie Mostov has observed, if such a theory "provided a way of limiting the arbi-

9. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

10. *See infra* note 192.

11. *See* JULIE MOSTOV, POWER, PROCESS, AND POPULAR SOVEREIGNTY 55-60 (1992). Mostov describes Locke's position as follows: "When the King puts himself in a state of war with the community, acting 'beyond right,' he loses the immunity and authority given to him by law. The government dissolves, authority reverts back to the people, and they then are free to establish a new government." *Id.* at 59; *see also* PAUL K. CONKIN, SELF-EVIDENT TRUTHS: BEING A DISCOURSE ON THE ORIGINS AND DEVELOPMENT OF THE FIRST PRINCIPLES OF AMERICAN GOVERNMENT—POPULAR SOVEREIGNTY, NATURAL RIGHTS, AND BALANCE AND SEPARATION OF POWERS 22-23 (1974); Richard Buel, Jr., *Democracy and the American Revolution: A Frame of Reference*, 21 WM. & MARY Q. 165, 168-176 (1964).

12. GERALD STOURZH, ALEXANDER HAMILTON AND THE IDEA OF REPUBLICAN GOVERNMENT 12-13 (1970) [hereinafter STOURZH, ALEXANDER HAMILTON] (quoting William Blackstone); *see also generally* Gerald Stourzh, *William Blackstone: Teacher of Revolution*, 15 JAHRBUCH FUR AMERIKASTUDIEN 184 (1979).

In 1775, Alexander Hamilton explicitly embraced the people's natural law-based right of revolution:

> When the first principles of civil society are violated, and the rights of a whole people are invaded, the common forms of municipal law are not to be regarded. Men may then betake themselves to the law of nature; and, if they but conform their actions, to that standard, all cavils against them, betray either ignorance or dishonesty. There are some events in society, to which human laws cannot extend; but when applied to them lose all their force and efficacy. In short, when human laws contradict or discountenance the means, which are necessary to preserve the essential rights of any society, they defeat the proper end of all laws, and so become null and void.

trary power of the government, it also offered a way of preventing popular consent from becoming too direct or overt."[13] Such an understanding came to characterize the basis of the Federal Constitution. Equating the people's inherent right to alter or abolish government with a right of revolution, however, has obscured the development of American attitudes towards popular sovereignty for constitutional change.

Although the Declaration of Independence provided the most important initial formulation of popular sovereignty and the inherent right of the people to revise government, it did not become the inevitable model for state bills of rights of the eighteenth and nineteenth centuries. In fact, the language describing the people's inherent right under popular sovereignty underwent subtle, but significant changes. From the Declaration's description of that right as the last-ditch effort of an oppressed people, state variations increasingly implied that popular sovereignty gave the people a right of constitutional revision available long before the development of circumstances justifying revolution.[14] Even though Jefferson alluded to altering government, the fact remained that revolution followed the Declaration.

In state constitution-making, and particularly as the first state constitutions were replaced and revised, the focus shifted to the people's right to make constitutional modifications. As it became increasingly clear that the practice of constitutional change did not precipitate revolution, the scope of legitimate revision widened. Although virtually no one denied the ultimate right of revolution, some efforts were made to describe popular sovereignty in terms that implied dire circumstances as a pre-condition to revising the fundamental law of a state.[15] Despite such attempts, by the 1820s the trend in state constitutions was to include statements of popular sovereignty that implied a constitutional right to revise governments in lieu of a natural law right of revolution.

In implementing popular sovereignty, Americans had departed in revolutionary ways from traditional understandings of government. Conceding that sovereignty rested with the people forced a novel view of constitutions. Popular sovereignty meant that a constitution could "no longer be regarded as it still was in England, as a contract or

1 THE PAPERS OF ALEXANDER HAMILTON 136 (Harold C. Syrett, & Jacob E. Cooke eds., 1961-1987).

13. MOSTOV, *supra* note 11, at 59; *see also*, EDMUND S. MORGAN, INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA 49-50 (1988).

14. *See infra* Part IV.D.

15. *See infra* note 205 and accompanying text.

agreement between two hostile parties, between rulers and people."[16] Rather, in America "the people created constitutions and governments."[17] James Wilson would later describe constitution-making as an act of the people themselves and constitutions "as clay in the hands of a potter," giving the people "the right to mould, to preserve, to improve, to refine, and to finish it as they please."[18] Thus, determining the people's role became crucial.[19] Popular sovereignty implied that the people might "dissolve political society into its individual, constituent atoms, if they chose, and make their governments anew."[20] These possibilities gave the debate a "radical edge."[21] They contributed to an expansionist vision of popular sovereignty that justified the people as a continuous, direct force for change.

At the same time, other views of popular sovereignty emphasized its theoretical aspects. The passive view of popular sovereignty simply justified government as such and regarded popular sovereignty as the underlying principle that gave American governments their distinctive republican character. The theory behind republican governments distinguished non-republican forms, such as monarchies or aristocracies. While identifying the people as the theoretical basis of republican government, this approach concentrated on the institutional arrangements and limited the people to indirect participation.

The struggle over characterizing popular sovereignty proved confusing and long-lasting because both sides could and did lay claim to a legitimate understanding of the principle. While disagreeing over its

16. Gordon S. Wood, *The Political Ideology of the Founders*, *in* TOWARD A MORE PERFECT UNION: SIX ESSAYS ON THE CONSTITUTION 7, 23 (Neil L. York ed., 1988). For the novelty of the idea of "enacted" constitutions, see Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843, 864 (1978).

17. Wood, *supra* note 16, at 23.

18. 1 THE WORKS OF JAMES WILSON 304 (Robert G. McCloskey ed., 1967), *quoted in* Gordon S. Wood, *Forward: State Constitution-Making in the American Revolution*, 24 RUTGERS L.J. 911, 918 (1993).

19. The profound consequences of defining the reach of popular sovereignty were quickly evident to some revolutionaries. John Adams, for example, worried in 1776 about constitution-making in the wake of rejecting the British monarchy: American agreement that "'the consent of the people'" provided "'the only moral foundation'" for government still left untouched the issue of "'to what extent'" the principle would be activated. WILLI PAUL ADAMS, THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA 26 (Rita Kimber & Robert Kimber trans., 1980) (quoting John Adams).

20. DANIEL T. RODGERS, CONTESTED TRUTHS: KEYWORDS IN AMERICAN POLITICS SINCE INDEPENDENCE 112 (1987).

21. *Id.*; *see also* ONUF, *supra* note 3, at 175; GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 319-28 (1969).

meaning, their shared commitment to popular sovereignty trapped them on common ground. Sharing this basic assumption about the basis of American republics guaranteed that the debate would remain vital, even if inconclusive.

The process of defining the extent of popular sovereignty has been described as a "struggle with words" known "to be treacherously unstable and yet too vitally needed simply to abandon."[22] Ultimately, the tensions between these competing visions of popular sovereignty extended beyond the revolutionary period. They surfaced in the wide range of contexts in which state constitution-making and revision occurred during the nineteenth century. An exploration of these arenas permits an analysis of important differences in understanding constitutions and the implications of popular sovereignty. Indeed, defining the slippery term "popular sovereignty" proved central to the contest over the meaning of American constitutionalism and the development of a tradition of constitution-making during the nineteenth century.

The early experience with constitution-making and its products suggests the persistence of an expansive view of popular sovereignty. Evidence of an active view of popular sovereignty is found in the text of the early bills of rights and constitutions.[23] The language used to describe the principle of popular sovereignty, the inherent right of the people to effect constitutional revision, and the articulated necessity of a "frequent recurrence to fundamental principles" illustrated the activist view. Additionally, the early constitution-makers distinguished between ordinary and constitutional law even as they created constitutions through means other than conventions.[24] Finally, the very absence of procedures for future revision or amendment in many of the earliest constitutions implied, for many, an assumption that the people retained an inherent right of revision.[25]

The first documents produced by constitution-makers and their experience with those constitutions also reveal the initial, formal expressions of a constitutional middle ground—a central tenet of what became an expansive understanding of popular sovereignty. This middle ground posited that the people possessed an inherent, legitimate right to change their governments and constitutions without relying on either the natural law-based right of revolution or the specified procedures for constitutional revision. Opponents of a middle ground in-

22. RODGERS, *supra* note 20, at 109.
23. *See infra* notes 198-201 and accompanying text.
24. *See infra* notes 125-29 and accompanying text.
25. *See infra* notes 130-34 and accompanying text.

sisted that such action could only be justified by the raw power any people had to act in defiance of established rules. Defenders of a middle ground claimed it as a right uniquely available to Americans.[26] Having governments grounded on popular sovereignty distinguished them from all other "peoples" in the world who could only fall back on the right of revolution. The absence of such a tradition of a constitutional middle ground in terms of the Federal Constitution has made it difficult to see its existence at all.[27]

II. The Challenge of Republicanism

Even with a consensus on popular sovereignty as the foundation of future American governments after the Revolution, Americans disputed the meaning of republicanism. Forty years after independence, Thomas Jefferson aptly captured the controversy by recalling, "we imagined every thing republican which was not monarchy."[28] Such a definition accommodated a wide spectrum of conflicting views. Reaching agreement on republicanism became nearly impossible in view of the assumption that a single legacy of the Revolution and authentic expression of republicanism existed.[29] Jefferson, no less than his political rivals and others who joined in the debate, repeatedly claimed a monopoly on views that were faithful to the spirit of the revolution.

In some respects, the Revolution was a culmination of popular sovereignty. It marked the transformation of ideas that replaced kingship with government based on the people. Mainly, however, the

26. *See infra* notes 193-95 and accompanying text.

27. *See* PETER SUBER, THE PARADOX OF SELF-AMENDMENT: A STUDY OF LOGIC, LAW, OMNIPOTENCE, AND CHANGE 225-32 (1990); Michael G. Colantuono, *The Revision of American State Constitutions: Legislative Power, Popular Sovereignty, and Constitutional Change*, 75 CAL. L. REV. 1473, 1477, 1496 (1987); Dow, *supra* note 7; Miller, *supra* note 4, at 99, 107; James W. Torke, *Assessing The Ackerman and Amar Theses: Notes on Extratextual Constitutional Change*, 4 WIDENER J. PUB. L. 229 (1994); Thomas R. White, *Amendment and Revision of State Constitutions*, 100 U. PA. L. REV. 1132, 1139 (1952); Note, *State Constitutional Change: The Constitutional Convention*, 54 VA. L. REV. 995, 1005 (1968).

28. Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), *in* 10 THE WORKS OF THOMAS JEFFERSON 37 (Paul L. Ford, ed., G.P. Putnam's Sons, 1892-1899).

29. *See* STOURZH, ALEXANDER HAMILTON, *supra* note 12, at 38-75; Robert E. Shalhope, *Toward a Republican Synthesis: The Emergence of an Understanding of Republicanism in American Historiography*, 29 WM. & MARY Q. 49, 72 (1972) (stating that republicanism produced "a consensus that promoted discord rather than harmony"). For an example of how revolutionaries were able to monopolize an understanding of what the Revolution and republicanism required in Pennsylvania, see Richard Alan Ryerson, *Republican Theory and Partisan Reality in Revolutionary Pennsylvania: Toward a New View of the Constitutionalist Party*, *in* SOVEREIGN STATES IN AN AGE OF UNCERTAINTY 114-16 (Ronald Hoffman & Peter J. Albert eds., 1981).

Revolution posed the challenge of republicanism, namely, the need to examine and reform institutions and behavior and measure them against a republican yardstick. This stemmed in part from a religious and moral dimension of the Revolution that entailed more than a change in forms of government.[30] But it also drew strength from the widespread belief that republican governments precariously rested on preserving the public and private virtue of the people and their leaders. As John Adams explained several months before the Declaration of Independence, "'[p]ublic virtue cannot exist in a Nation without Private, and public Virtue is the only Foundation of Republics.'"[31] Thus, almost from the start of the Revolution, self-scrutiny focused on how a republican people waged war and then on how they were to organize their governments and societies.[32]

The process of forming republican governments and defining republicanism was complicated by the liberating effects of the Revolution itself. In the course of their struggle for independence, Americans had employed a wide range of ad hoc committees, extralegal conventions, and even mobs to advance their constitutional position.[33] The effect of politics "out-of-doors," the active political partici-

30. *See, e.g.*, RUTH H. BLOCH, VISIONARY REPUBLIC: MILLENNIAL THEMES IN AMERICAN THOUGHT, 1756-1800 (1985); James T. Kloppenberg, *The Virtues of Liberalism: Christianity, Republicanism, and Ethics in Early American Political Discourse*, 74 J. AM. HIST. 9 (1987). As Gordon Wood has put it, republicanism for Americans "added a moral dimension, a utopian depth, to the political separation from England—a depth that involved the very character of their society." WOOD, *supra* note 21, at 47.

31. DREW R. MCCOY, THE ELUSIVE REPUBLIC: POLITICAL ECONOMY IN JEFFERSONIAN AMERICA 69 (1980) (quoting John Adams); *see also* WOOD, *supra* note 21, at 65-70.

32. *See* HENDRIK HARTOG, PUBLIC PROPERTY AND PRIVATE POWER: THE CORPORATION OF THE CITY OF NEW YORK IN AMERICAN LAW, 1730-1870, at 85 (1983); JAMES H. KETTNER, THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608-1870, at 173-247 (1978); CHARLES ROYSTER, A REVOLUTIONARY PEOPLE AT WAR: THE CONTINENTAL ARMY AND AMERICAN CHARACTER, 1775-1783, at 3-53 (1979); Stanley N. Katz, *Republicanism and the Law of Inheritance in the American Revolutionary Era*, 76 MICH. L. REV. 1 (1977).

Nonetheless, Americans tended to avoid controversial issues, such as the nature of American federalism, during the war years. *See* JACK N. RAKOVE, THE BEGINNINGS OF NATIONAL POLITICS: AN INTERPRETATIVE HISTORY OF THE CONTINENTAL CONGRESS 158-76 (1979).

33. *See* DAVID AMMERMAN, IN THE COMMON CAUSE: AMERICAN RESPONSE TO THE COERCIVE ACTS OF 1774 (1974); LUTZ, *supra* note 7, at 78; John Phillip Reid, *In a Defensive Rage: The Uses of the Mob, The Justification in Law, and the Coming of the American Revolution*, 49 N.Y.U. L. REV. 1043 (1974). For contemporary appreciation of the revolutionary potential of popular sovereignty, see ADAMS, *supra* note 19, at 129, 147-49; JACKSON T. MAIN, THE UPPER HOUSE IN REVOLUTIONARY AMERICA, 1763-1788, at 99-243 (1967); J. KIRBY MARTIN, MEN IN REBELLION: HIGHER GOVERNMENT LEADERS AND THE COMING OF THE AMERICAN REVOLUTION (1973); Matthew J. Herrington, *Popular Sovereignty in Pennsylvania, 1776-1791*, 67 TEMP. L. REV. 575, 576 (1994); Edmund S. Morgan, *The Problem of Popular Sovereignty*, *in* ASPECTS OF AMERICAN LIBERTY 107, 111 (1977).

pation by many who in ordinary times might be expected to defer to their "betters," and the repeated declaration that all power stemmed from the people produced a heady atmosphere.[34] The populist aspects of the revolutionary struggle were undeniable. They excited some and worried others.[35] Most American revolutionaries drew a distinction between popularly based yet stable republican governments and dangerously unstable democracies.[36] Still, the challenge remained to enable both political participation by the people and representation consistent with republicanism.

That challenge surfaced immediately once the people started to participate in government through elected representatives. Even before the Revolution, colonial Americans had wondered how to discover the people's will, express that will, render government responsive to it, and balance popular opinion against the public interest.[37] The Revolution, however, intensified interest in these questions by fully embracing the principle of popular sovereignty. After 1776, a key question became how to manifest the premise of governments founded on the will of the people. Inherent in the question of representation were tensions between a tradition that stressed deference to

34. *See* ELISHA P. DOUGLASS, REBELS AND DEMOCRATS: THE STRUGGLE FOR EQUAL POLITICAL RIGHTS AND MAJORITY RULE DURING THE AMERICAN REVOLUTION (1955); GARY B. NASH, THE URBAN CRUCIBLE: SOCIAL CHANGE, POLITICAL CONSCIOUSNESS, AND THE ORIGINS OF THE AMERICAN REVOLUTION 34 (1979); GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION (1992); Joyce Appleby, *The Radical Recreation of the American Republic*, 51 WM. & MARY Q. 679 (1994); Merrill Jensen, *The American People and the American Revolution*, 57 J. AM. HIST. 5 (1970); Jackson T. Main, *Government by the People: The American Revolution and the Democratization of the Legislatures*, 23 WM. & MARY Q. 391 (1966).

35. For the dismay that some colonial elites felt about sharing power with humbler sorts after the Revolution, see Robert F. Williams, *Evolving State Legislative and Executive Power in the Founding Decade*, 496 ANNALS AM. ACAD. POL. & SOC. SCI. 43, 49 (1988). *See also* PAULINE MAIER, FROM RESISTANCE TO REVOLUTION: COLONIAL RADICALS AND THE DEVELOPMENT OF AMERICAN OPPOSITION TO BRITAIN, 1765-1776, at 3-26 (1972); MORGAN, *supra* note 13, at 257-58; Pauline Maier, *Popular Uprising and Civil Authority in Eighteenth Century America*, 27 WM. & MARY Q. 3 (1970). As early as 1776, George Washington worried about the prospects of popular government given the fact that, "'[t]he few . . . who act upon Principles of disinterestedness, are, comparatively speaking, no more than a drop in the Ocean.'" Martin S. Flaherty, *History 'Lite' in Modern American Constitutionalism*, 95 COLUM. L. REV. 523, 578 (1995) (quoting Letter from George Washington to John Hancock (Sept. 24, 1776)).

36. *See* WILLIAM M. WIECEK, THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION 65 (1972); WOOD, *supra* note 21, at 222-23.

37. In historian Carl Becker's classic phrase, the American Revolution produced a political struggle over "home rule" as well as "who should rule at home." CARL L. BECKER, THE HISTORY OF POLITICAL PARTIES IN THE PROVINCE OF NEW YORK, 1760-1776, at 22 (1909).

political leadership composed of natural elites and emerging notions of egalitarianism.

The issue of leadership became especially important given the lurking question of majoritarianism and the potential tyranny of the many over the few. Constitutions and their bills of rights partly reflected an attempt to address some of the concerns for safeguarding vested property rights and social stability. However, just who "the people" were, who could elect leaders, and what limits might be imposed on the people remained unsettled. Over time, some argued that the people constituted the majority of the voters and that their will deserved predominant expression.[38] Others strongly opposed majoritarianism and sought governmental stability "by balancing the superior talents of the few against the numerical strength of the many."[39] Discussing the proper means and basis of representation, of course, drew upon English and colonial antecedents, but the Revolution forced Americans to revisit these issues through the lens of republicanism.

Exploration of the people's political participation in republics emerged as the colonies established their first state constitutions. Historian Edmund Morgan has observed the growing recognition that popular sovereignty had a volatile potential in terms of the people's political participation.[40] Some sought to tame popular sovereignty by establishing its practice and meaning so "as not to threaten the government of the few on the one hand or the rights of the many on the other."[41] The challenge consisted of giving popular sovereignty "a close enough resemblance to fact to permit the willing suspension of disbelief," but not interpreting it "so literally as to invite subversion either of the social order or the accompanying political authority it was designed to support."[42]

Similarly, historian Willi Paul Adams has identified the existence of a "minority" after the Revolution that was unsatisfied with "the mere recognition of popular sovereignty as a principle" and who "demanded that the principle be put into practice more and more extensively by increasing the number of those who would control

38. *See infra* note 191 and accompanying text.

39. Appleby, *supra* note 1, at 801; *see also* DAVID H. FISCHER, THE REVOLUTION OF AMERICAN CONSERVATISM: THE FEDERALIST PARTY IN THE ERA OF JEFFERSONIAN DEMOCRACY (1965); David H. Fischer, *The Myth of the Essex Junto*, 21 WM. & MARY Q. 191, 199-213 (1964).

40. MORGAN, *supra* note 13, at 136.

41. *Id.* at 151.

42. *Id.*

government power."[43] Such "willingness to realize popular sovereignty fully, or at least to a greater degree than it had been realized in the past, became the criterion for political radicalism."[44] Pennsylvania's "radical" 1776 Constitution arguably marked the "outer limits of the Revolution" by its thoroughgoing incorporation of democracy.[45] Most Americans, however, favored a representative government that would control numerical majorities of the people. Thus, Adams identifies a split between those who differentiated between "the *source* of legitimate power . . . rightly in the people, and the actual *seat* of that power . . . held by those who govern" and those seeking representative equality to prevent "interest groups" from undermining "the exercise of government for the good of the majority."[46] Both positions were compatible with "republicanism." A decision remained as to which understanding of popular sovereignty ought to shape government.[47]

The urgency of this initial dispute remained an underlying dynamic in the debates over popular sovereignty, namely, that the source that legitimized governments—the people—constantly remained as a potential power superior to the existence and operation of government itself. How the people could exercise that power—strictly in accordance with existing procedures, only through their elective representatives, or in some more direct, primary invocation of their sovereignty without such constraints or authorization—became one of the great issues that constitution-makers wrestled with in the nineteenth century. Indeed, historian Joyce Appleby has observed that the radicalism generated by the American Revolution "was more liberating than the simple democratization of elite social relations, more intellectual than the benign affirmation of civic virtue by classi-

43. ADAMS, *supra* note 19, at 147.

44. *Id.* at 148.

45. Ryerson, *supra* note 29, at 96, 132-33; *see also* Robert F. Williams, *The State Constitutions of the Founding Decade: Pennsylvania's Radical 1776 Constitution and Its Influences on American Constitutionalism*, 62 TEMP. L. REV. 541, 554-58 (1989).

46. ADAMS, *supra* note 19, at 148.

47. Willi Paul Adams suggests that the "minority" wanting a fuller recognition of popular sovereignty was not committed to democratic government. Rather, their statements could simply have reflected a belief that popular sovereignty had practical consequences and was not merely the theoretical principle underlying American governments. Such a radical or minority view of popular sovereignty was consistent with the notion of delegated power under republican (as opposed to democratic) governments, but it insisted on recognition of the inherent right of the people to alter their governments as constitutionally legitimate. *See id.* at 147-49.

cal republicans, and more revolutionary than a war for independence."[48]

If the war raised questions about the nature of representation, political activity from 1776 to 1787 affected many Americans' perceptions of representative government. Well known are the excesses and "vices" James Madison saw in American government, largely shaped by his personal observations as a member of the Virginia Legislature.[49] Even more attention, both within and without Pennsylvania, was paid to that state's experience under its first constitution, which by 1789 Benjamin Rush characterized as a "'mobocracy.'"[50] However, many others besides Madison and Rush were distressed by popular government in the state assemblies after the war. They intended to "subdue the unthinking many to the thoughtful few, to curb the local prejudice of representatives and give a more cosmopolitan composition to their assemblies."[51] Their concerns promoted the conviction that while the people formed the source of political legitimacy, their involvement should be less direct, freeing representation from popular pressure, and hopefully resulting in leadership by a virtuous elite.[52] Such attitudes clearly favored a narrower formulation of popular sovereignty and found expression in the Federal Constitution.

48. Appleby, *supra* note 34, at 683 (criticizing Gordon S. Wood's *The Radicalism of the American Revolution* for discounting the theoretical and philosophical dimensions of the nascent democracy in the Revolution that would ultimately overthrow republicanism).

49. *See* JAMES MADISON, *Vices of the Political System of the United States*, *in* 9 THE PAPERS OF JAMES MADISON 348 (William T. Hutchinson & William M.E. Rachal eds., 1962-1991); *see also* Charles F. Hobson, *The Negative on State Laws: James Madison, the Constitution, and the Crisis of Republican Government*, 36 WM. & MARY Q. 215, 215-35 (1979). With a new Federal Constitution, Madison hoped to "redeem the honor of the Republican name." Letter from James Madison to Edmund Pendleton (Feb. 24, 1787), *in* 9 THE PAPERS OF JAMES MADISON, *supra*, at 294, 295.

For the way in which many contemporaries perceived the post-revolutionary years as a "critical period," see ONUF, *supra* note 3, at 149-85.

50. David F. Hawke, In the Midst of a Revolution 178 (1961) (quoting Letter from Benjamin Rush to John Adams (Jan. 22, 1789)).

For the galvanizing effect of Pennsylvania's 1776 Constitution on early state constitution-makers and the Federal Framers, see Williams, *supra* note 45, at 561-78.

51. MORGAN, *supra* note 13, at 255; *see also* STOURZH, ALEXANDER HAMILTON, *supra* note 12, at 51; ROBERT H. WIEBE, THE OPENING OF AMERICAN SOCIETY: FROM THE ADOPTION OF THE CONSTITUTION TO THE EVE OF DISUNION 21-23 (1984); Appleby, *supra* note 1, at 801.

52. *See* DANIEL J. ELAZAR, THE AMERICAN CONSTITUTIONAL TRADITION 108-09 (1988); PAUL W. KAHN, LEGITIMACY AND HISTORY: SELF-GOVERNMENT IN AMERICAN CONSTITUTIONAL THEORY 16 (1992); MICHAEL G. KAMMEN, SOVEREIGNTY AND LIBERTY: CONSTITUTIONAL DISCOURSE IN AMERICAN CULTURE 24-25 (1988); LUTZ, *supra* note 7, at 22; MORGAN, *supra* note 13, at 255; J.R. POLE, POLITICAL REPRESENTATION IN ENGLAND AND THE ORIGINS OF THE AMERICAN REPUBLIC 169-382 (1966); WIEBE, *supra* note 69, at 38-39; Joyce Appleby, *Capitalism, Liberalism, and the United States Constitution*, *in* THE

Even if the Federal Constitution represented a "presumption that the people should be seen and not heard," democratic-republican societies continued to stress "the need for extensive popular participation in the governmental process."[53]

III. Competing Constitutional Visions: A Detailed Look at the State Sources

The period between 1776 and 1787 is commonly considered to be a crucial time in American history, in which changing conceptions of popular sovereignty, government, and constitutions were largely incorporated into the Federal Constitution. This focus on the revolutionary era has distorted our understanding of American constitution-making. Much of the scholarly work on the period 1776-1787 has examined the ideology behind the American Revolution and the philosophical basis of the Federal Constitution.[54] As important as these questions are, they have led to erroneous assumptions and have overlooked the significance of the debate over the implications of popular sovereignty in American history.

The principal erroneous assumption represents this time as the critical occasion for the development of attitudes towards American

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UNITED STATES CONSTITUTION: ROOTS, RIGHTS, AND RESPONSIBILITIES 61, 64-66 (A.E. Dick Howard ed., 1992); Buel, *supra* note 11, at 177-90; Wood, *supra* note 16, at 9-24.

Barbara Smith notes that founding the Revolution on "We the people" ironically facilitated the tendency between 1776 and the 1780s of controlling the forces unleashed by the Revolution: "That revolutionary fact provided a rationale for suppressing crowds, channeling participation into the process of the vote, and closing down available terrain outside that chosen form." Barbara C. Smith, *Food Riots and the American Revolution*, 51 WM. & MARY Q. 3, 34 (1994). In 1804, on the day before his ill-fated duel, Alexander Hamilton epitomized concerns over the direct involvement of the people by characterizing Democracy as America's "real Disease" and "poison." Letter from Alexander Hamilton to Theodore Sedgwick (July 10, 1804), *in* 26 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 12, at 309.

53. PHILLIP S. FONER, THE DEMOCRATIC-REPUBLICAN SOCIETIES, 1790-1800: A DOCUMENTARY SOURCEBOOK OF CONSTITUTIONS, DECLARATIONS, ADDRESSES, RESOLUTIONS, AND TOASTS 40 (1976). Significantly, the strongest charge against democratic-republican societies was, in the words of condemnation used by George Washington, their "self-created" nature that undermined lawful authority and invoked extra-constitutional power. *See id.* at 31; *see also id.* at 24-40; RUSSELL L. HANSON, THE DEMOCRATIC IMAGINATION IN AMERICA: CONVERSATIONS WITH OUR PAST 83-88 (1985).

54. The literature is enormous. Two of the most influential studies that have shaped modern scholarship, however, are BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (1967), and WOOD, *supra* note 21. For assessments of the influence of Wood's *Creation of the American Republic* on our understanding of American constitutional history, see *The Creation of the American Republic, 1776-1787: A Symposium of Views and Reviews*, 44 Wm. & Mary Q. 549 (1987), and Flaherty, *supra* note 35, at 523-90.

constitution-making.[55] A second, related erroneous assumption considers the Federal Constitution the matured understanding of how to frame constitutions.[56] Both the duration and content of the debate over the implications of popular sovereignty challenge these assumptions. The eighteenth century marked the beginning—not the end—of how Americans approached the task of creating written constitutions.[57] Moreover, an examination of constitution-making from the

55. This assumption underlies Gordon Wood's argument that while Americans experimented with radical constitutional arrangements after the Revolution, they rejected such understandings relatively soon and invented "a new science of politics" that culminated in the Federal Constitution. *See* WOOD, *supra* note 21; *see also* CONKIN, *supra* note 11, at 177 (finding that, between 1776 and 1789, "popular sovereignty matured in America into enduring institutions"); JAMES WILLARD HURST, THE GROWTH OF AMERICAN LAW: THE LAW MAKERS 224 (1950) (stating that the time of the formation and ratification of the Federal Constitution was the "classic" period in American constitution-making); KAMMEN, *supra* note 52, at 104 (stating that 1776 to 1787 marked America's "most creative phase of constitution-making"); DONALD S. LUTZ, THE ORIGINS OF AMERICAN CONSTITUTIONALISM 5-6 (1988) (stating that the Federal Constitution "represents a kind of historical culmination" and "the critical expression of the American constitutional tradition"); Bruce Ackerman & Neal Katyal, *Our Unconventional Founding*, 62 U. CHI. L. REV. 475, 572 (1995) (stating that "the Founding" of the Federal Constitution served "as a great precedent in the ongoing practice of popular sovereignty"); Herman J. Belz, *Constitutionalism and the American Founding*, *in* THE FRAMING AND RATIFICATION OF THE CONSTITUTION 346 (Leonard W. Levy & Dennis J. Mahoney eds., 1987) (stating that the Federal Constitution "signified climax and fulfillment of the Revolution"); Thad W. Tate, *The Social Contract in America, 1774-1787: Revolutionary Theory as a Conservative Instrument*, 22 WM. & MARY Q. 375, 391 (1965) (finding social contract theory largely constrained by the 1780s); Wood, *supra* note 18, at 926 (arguing that basic ideas of American constitutionalism, including "the process of popular ratification," were "realized" before the drafting of the Federal Constitution). Contributing to an exaggerated sense of the importance of the formation of the Federal Constitution on constitutional ideas is the tendency of scholars to speak in terms of "the Founding" and "the 'Critical Period.'" *See, e.g.*, Flaherty, *supra* note 35, at 527 n.17.

56. *See* scholarship discussed in Christian G. Fritz, *The American Constitutional Tradition Revisited: Preliminary Observations on State Constitution-Making in the Nineteenth Century West*, 25 RUTGERS L.J. 945, 952-62 (1994); *see also* CONKIN, *supra* note 11, at 177 (finding that the Federal Constitution "came as close as possible to an emerging majority view on the best form for a 'republican' government"); Ryerson, *supra* note 29, at 98 (stating that the Federal Constitution has been "regarded almost universally by historians as the quintessential expression of political wisdom of the American people"). Even a critique of the ahistorical nature of much recent constitutional work essentially equates "American constitutionalism" with the ideas surrounding the Federal Constitution. *See* Flaherty, *supra* note 35. Moreover, Flaherty concludes that "recent work on the many steps leading to 1787 contributes to a growing literature that, taken together, views the Founding as a union of ideological trends rather than the triumph of any one." *Id.* at 549; *see also id.* at 585.

57. For all of their interpretative differences, both Pocock and Wood see the Federal Constitution as an endpoint. *See* WOOD, *supra* note 21, at 606 (arguing that the Federal Constitution marked "the end of classical politics" in America); J.G.A. POCOCK, THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC RE-

Revolution through the nineteenth century demonstrates that the Federal Constitution represented only one approach to constitution-making, and not an inevitable model.

The intellectual origins of the Revolution and the Federal Constitution are widely explored for their key insights into the American constitutional experience. Examining these events is important, but it runs the risk of obscuring an issue that bridged the Revolution and the Federal Constitution and continued to challenge Americans: the consequences for constitution-making and constitutional revision of basing government on popular sovereignty.[58] Whatever the intellectual and philosophical background of the Revolution and the Federal Constitution (which is varied, complex, and much disputed by scholars), it cannot be denied that after 1776 all American constitutions would be founded on popular sovereignty.[59] In fact, the constitutions written after the Revolution—both the Federal Constitution and the state

PUBLICAN TRADITION 462 (1975) (arguing that the Federal Constitution should be regarded as the "last act of the civic Renaissance").

58. A number of scholars, while identifying a continuing struggle over popular sovereignty, have tended to see it as primarily an issue of political rather than constitutional debate. *See, e.g.*, HAROLD M. HYMAN & WILLIAM M. WIECEK, EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT, 1835-1875, at 2 (1982); RODGERS, *supra* note 20, 80-111.

59. Much contemporary scholarship on the American Revolution and the Federal Constitution has re-examined a longstanding view that those two events were primarily, if not exclusively, influenced by the writings of John Locke. Important revisions of this orthodox explanation have included the following: the identification of a civic republicanism as having its roots in the ideas of Aristotle and other classical philosophers as elaborated by later thinkers, especially Niccolo Machiavelli and James Harrington; an exploration of the influence of numerous philosophers of the Enlightenment era besides Locke; attention to the influence of Christian thought—especially biblical notions of covenant in Puritan and Calvinist thought; and the colonial experiences with self-government. For a brief overview of this revisionist scholarship, see Gardner, *supra* note 7, at 189, 192-96. Republicanism, especially, has generated an enormous amount of attention and controversy over its content and role in interpreting American history. *See, e.g.*, THE REPUBLICAN SYNTHESIS REVISITED (Milton M. Klein et al. eds., 1992); Saul A. Cornell, *The Changing Historical Fortunes of the Anti-Federalists*, 84 NW. U. L. REV. 39 (1989); Daniel T. Rodgers, *Republicanism: The Career of a Concept*, 79 J. AM. HIST. 11 (1992); Shalhope, *supra* note 29. In addition, John Phillip Reid has written extensively on how the American Revolution was rooted in a traditional legal and constitutional context. *See* JOHN P. REID, 1-4 CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION (THE AUTHORITY OF RIGHTS (1986), THE AUTHORITY TO TAX (1987), THE AUTHORITY TO LEGISLATE (1991), THE AUTHORITY OF LAW (1993)); JOHN P. REID, THE CONCEPT OF LIBERTY IN THE AGE OF THE AMERICAN REVOLUTION (1988).

Another result of the revisionist scholarship on the Revolution and the Federal Constitution has been to call into question the unity of the intellectual context of those two events. Gordon Wood, most prominently, has argued that 1776 to 1787 marked a dramatic transformation of ideas, the result of which did not make the Federal Constitution the logical or natural culmination of the Revolution. *See* WOOD, *supra* note 21.

constitutions before and after 1787—clearly linked their legitimacy to a sovereign people.[60]

The crucial matter now became one's description and understanding of popular sovereignty. The concerns over the populist aspects of American government that many shared with James Madison did not prompt a repudiation of popular sovereignty; rather, they shaped an expression of popular sovereignty that essentially domesticated and constrained the principle.[61] The Federal Constitution reflected this passive version of popular sovereignty, but it was not inevitable. Indeed, a tradition of "activist popular sovereignty" did not die.[62] Constitution-making in the eighteenth and nineteenth cen-

60. In addition to the fact that the federal and state constitutions served significantly different functions, popular sovereignty in the federal context served to reconfigure the conception of the Union and evade the question of whether the states or the Union were sovereign. *See* ONUF, *supra* note 3, at 157, 191, 200, 207. Still, both state and federal constitutions ultimately rested on the principle that a sovereign people (be they "American" citizens or citizens of individual states) legitimated government. This was Justice Wilson's basic point in his opinion in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 453 (1793)—that underneath the jurisdictional struggle between the federal and state governments lay the fact of a sovereign people that could limit both governments. This was also the same point—to a different effect—that the Anti-Federalist Luther Martin made when he objected to the ratification of the Federal Constitution "by the *people* at large, in their capacity *as individuals*" because the sovereign people of each state had invested their sovereignty in their respective state governments. Luther Martin, The Genuine Information, Delivered to the Legislature of the State of Maryland, Relative to the Proceedings of the General Convention, Held at Philadelphia (1787), *in* 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 172, 193 (Max Farrand ed., New Haven, Conn., Yale Univ. Press 1966) (1787) [hereinafter FARRAND]. Martin concluded "that, in a *federal* government, the *parties* to the compact are not the *people*, as *individuals*, but the States, as States; and that it is by the *States* as States, in their *sovereign* capacity, that the system of government ought to be *ratified*, and not by the *people, as individuals*." *Id.* I thank Jim Kettner for bringing this to my attention.

61. *See* LUTZ, *supra* note 7, at 41, 232-38; MORGAN, *supra* note 13, at 107-11; MOSTOV, *supra* note 11, at 60-62, 68-69; WOOD, *supra* note 21, at 519-36; Flaherty, *supra* note 35, at 523, 547-48; Miller, *supra* note 4, at 99-119; Gordon S. Wood, *Democracy and the Constitution*, *in* HOW DEMOCRATIC IS THE CONSTITUTION? 1, 12-17 (Robert A. Goldwin & William A. Schambra eds., 1980).

62. James A. Henretta, *Foreword: Rethinking the State Constitutional Tradition*, 22 RUTGERS L.J. 819, 826-31 (1991); *see also* FONER, *supra* note 53. Moreover, Martin Flaherty, after underscoring Gordon Wood's central "insight that the Federalists in fundamental ways rejected the republican assumptions especially evident in the first state constitutions," suggests that this rejection was not "total or final." Flaherty, *supra* note 35, at 523, 566.

Many scholars assume that such views were banished to the fringes of respectable discussions of constitutional ideas. One scholar sees a shift in the emergence of an American constitutional tradition from "revolutionary republicans" to "constitutional republicans" after 1787, with the latter emphasizing a more submissive role for the citizen in government. Michael Lienesch, *The Constitutional Tradition: History, Political Action, and Progress in American Political Thought, 1787-1793*, 42 J. POL. 2 (1980). Pauline Maier

turies demonstrates the enunciation of a more radical vision and the persistence of the theoretical legitimacy of such a view. The Federal Constitution marked only one victory, albeit an important one, for forces who favored a passive understanding of popular sovereignty.

The American Revolution cemented popular sovereignty as the foundational principle of government. Indeed, the Declaration of Independence—and most of the American constitutions framed since that time—explicitly identified the people as the legitimate basis of government. The Declaration asserted that "just powers" derived from the consent of the governed and that "the people" could overturn unjust governments.[63] Similar statements in state constitutions expressed "the very heart of the consensus among the victors of 1776."[64] Indeed, by 1779 "no patriotic American could dispute the idea that the people were the ultimate source of all political author-

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identifies a shift in the theoretical understanding of a right of resistance grounded in the American revolutionary tradition by the late 1780s, with a greater concern evidenced about the dangers to liberty posed by the people rather than the executive branches of government. In this context

> it seemed to many that the right of resistance and of revolution had also become outmoded for Americans, at least in the forms they had taken in the past. Direct popular action could be no longer exercised legitimately by those who lived under a constitutional republic, and so could never exhaust the "peaceful means of redress."

Maier, *supra* note 1, at 5. Thad Tate's description of the social contract theory in revolutionary America saw its use as largely giving "legitimacy to a revolutionary course of action." Tate, *supra* note 55, at 391. By the 1780s the use of "new procedures for the new adoption of constitutions demonstrated the tendency of the Revolution to eventuate in legalistic institutions rather than in a body of revolutionary dogma." *Id.*; *see also* ADAMS, *supra* note 19, at 138 (describing the "notable" absence of explicit popular sovereignty statements in the Articles of Confederation and the Federal Constitution); KAHN, *supra* note 52, at 16, 18-23; KAMMEN, *supra* note 52, at 24 (finding that by 1787 "a more conservative" perception of popular sovereignty had emerged); LUTZ, *supra* note 7, at 22; WIEBE, *supra* note 51, at 38-39; WIECEK, *supra* note 36, at 42; Appleby, *supra* note 52, at 65; Herrington, *supra* note 33, at 595; Jennifer Nedelsky, *Democracy, Justice, and the Multiplicity of Voices: Alternatives to the Federalist Vision*, 84 NW. U. L. REV. 232, 240-42 (1989); Harry L. Witte, *Rights, Revolution, and the Paradox of Constitutionalism: The Processes of Constitutional Change of Pennsylvania*, 3 WIDENER J. PUB. L. 383, 474 (1993).

63. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

64. ADAMS, *supra* note 19, at 137. According to Edmund Morgan, after the Revolution Americans established "governments which rested entirely on popular choice," and the Revolution "produced many new affirmations of the idea" particularly in the state constitutions that declared that the government "rested wholly on the popular will." Morgan, *supra*, note 33, at 101.

Although he concludes that the social contract theory became transformed for conservative uses, Thad Tate agrees that at its base it contained the inherent principle "that government should be founded upon and limited by a formal act of popular consent." Tate, *supra* note 55, at 381; *see also* Levinson, *supra* note 7, at 2444.

ity."[65] This widespread belief gives force to Jefferson's disclaimers late in his life that his Declaration of Independence merely reflected "the common sense of the subject."[66] Jefferson remained a lifelong advocate for an expansive view of the principle and for the active role it implied for the people.[67]

Commitment to popular sovereignty remained, even as doubts increased about the prudence of giving the people a direct role in government. By 1787, many drafters and supporters of the Federal Constitution equated state politics and constitutions of the 1770s with "long-feared anarchy" rather than "new-modeled democracy."[68] The recent events of the Shays Rebellion had rekindled fears of anarchy; to many, like John Marshall, "a deep shade" seemed cast over the "bright prospect" for free government made possible with the Revolution.[69] By 1787, "the concept of political liberty, arising from broadly based and *ongoing* participation, seemed somewhat less attractive than it had in 1776."[70]

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65. Barbara C. Smith, The Politics of Price Control in Revolutionary Massachusetts, 1774-1780, at 483 (1983) (unpublished Ph.D. dissertation, Yale University). Ronald Peters concludes that drafters of Massachusetts's 1780 Constitution clearly conceived their society and their constitution as being based on popular sovereignty. *See* RONALD M. PETERS, JR., THE MASSACHUSETTS CONSTITUTION OF 1780: A SOCIAL COMPACT 108 (1978); *see also* CONKIN, *supra* note 11, at 52 (noting the "almost unanimous acceptance of popular sovereignty at the level of abstract principle" after the Revolution).

66. Knud Haakonssen, *From Natural Law to the Rights of Man: A European Perspective on American Debates*, *in* A CULTURE OF RIGHTS: THE BILL OF RIGHTS IN PHILOSOPHY, POLITICS, AND LAW, 1791 AND 1991, at 19, 43 n.54 (Michael J. Lacey & Knud Haakonssen eds., 1991) (quoting Thomas Jefferson).

67. *See* Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), *in* 10 WORKS OF JEFFERSON, *supra* note 28, at 37, 37-45; ADRIENNE KOCH, JEFFERSON AND MADISON: THE GREAT COLLABORATION 62-96 (1964); Charles L. Griswold, Jr., *Rights and Wrongs: Jefferson, Slavery, and Philosophical Quandaries*, *in* A CULTURE OF RIGHTS, *supra* note 66, at 173-75; Merrill D. Peterson, *Mr. Jefferson's 'Sovereignty of the Living Generation,'* 52 VA. Q. REV. 437, 437-47 (1976); Merrill D. Peterson, *Thomas Jefferson, the Founders, and Constitutional Change*, *in* THE AMERICAN FOUNDING: ESSAYS ON THE FORMATION OF THE CONSTITUTION 275 (J. Jackson Barlow et al. eds., 1988) [hereinafter Peterson, THOMAS JEFFERSON]; Herbert Sloan, *"The Earth Belongs in Usufruct to the Living,"* *in* JEFFERSONIAN LEGACIES 281, 281-315 (Peter S. Onuf ed., 1993).

68. Appleby, *supra* note 1, at 802; *see also* RODGERS, *supra* note 20, at 63-66; Jensen, *supra* note 34, at 5-7, 34-35; Gordon S. Wood, *Interests and Disinterestedness in the Making of the Constitution*, *in* BEYOND CONFEDERATION, *supra* note 1, at 69.

69. Letter from John Marshall to James Wilkinson (Jan. 5, 1787), *in* 1 THE PAPERS OF JOHN MARSHALL at 201 (Herbert A. Johnson et al. eds., 1974); *see also* IN DEBT TO SHAYS: THE BICENTENNIAL OF AN AGRARIAN REBELLION (Robert A. Gross ed., 1993); Robert A. Feer, *Shay's Rebellion and the Constitution: A Study in Causation*, 42 NEW ENG. Q. 388 (1969); Myron F. Wehje, *Boston's Response to Disorder in the Commonwealth, 1783-1787*, 12 HIST. J. MASS. 19 (1984).

70. MICHAEL G. KAMMEN, SPHERES OF LIBERTY: CHANGING PERCEPTIONS OF LIBERTY IN AMERICAN CULTURE 38 (1986); *see also* ONUF, *supra* note 3, at 70, 174-75; ROD-

Nonetheless, during the federal convention James Madison described the people as "the fountain of all power," entitled to "alter constitutions as they pleased."[71] After the convention, supporters of the Federal Constitution were equally fulsome in their praise of popular sovereignty, frequently invoking foundational imagery. In *The Federalist No. 49*, Madison proclaimed that the people were "the only legitimate fountain of power, and it is from them that the constitutional charter, under which the several branches of government hold their power, is derived."[72] During the ratification convention for the Federal Constitution in Pennsylvania, James Wilson argued that sovereignty "*resides* in the PEOPLE, as the fountain of government."[73] Even Alexander Hamilton, no friend of the common man, asserted in *The Federalist No. 22* that "[t]he fabric of American empire ought to rest on the solid basis of THE CONSENT OF THE PEOPLE . . . that pure, original fountain of all legitimate authority."[74] Quite simply, all Federalists accepted consent and popular sovereignty as the basis of government, even as they worried about how to ensure the stability of, and infuse wisdom into, such governments.[75]

GERS, *supra* note 20, at 66; Robert F. Williams, *"Experience Must Be Our Only Guide": The State Constitutional Experience of the Framers of the Federal Constitution*, 15 HASTINGS CONST. L.Q. 403, 425-26 (1988).

71. 2 MAX FARRAND, *supra* note 60, at 476.

72. THE FEDERALIST No. 49, at 339 (James Madison) (Jacob E. Cooke ed., 1961). Moreover, Madison in *The Federalist No. 43* declared that "[t]he express authority of the people alone could give due validity to the constitution." THE FEDERALIST No. 43, at 269 (James Madison) (Jacob E. Cooke ed., 1961).

73. James Wilson, Pennsylvania Convention Debate (December 4, 1787), *in* PENNSYLVANIA AND THE FEDERAL CONSTITUTION, 1776-1788, at 316 (John Bach McMaster & Frederick D. Stone eds., Lancaster, Pa., Inquirer Printing & Publ'g Co. 1888). In that same convention, Wilson observed:

> The truth is, that, in our governments, the supreme, absolute, and uncontrollable power *remains* in the people. As our constitutions are superior to our legislatures, so the people are superior to our constitutions. Indeed, the superiority, in this last instance, is much greater; for the people possess over our constitutions control in *act*, as well as right.

Id. at 230, *quoted in* Akhil Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 474 (1994).

74. THE FEDERALIST No. 22, at 146 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). In addition, Hamilton described "the right of the people to alter or abolish the established constitution whenever they find it inconsistent with their happiness" as the "fundamental principle" of republicanism. THE FEDERALIST No. 78, at 527 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

75. *See* KAHN, *supra* note 52, at 14, 16. Despite crucial differences between Federalist and Anti-Federalist thought, Jennifer Nedelsky asserts that "all the federalists accepted the premise that only government by the consent of the governed was legitimate." Nedelsky, *supra* note 62, at 234, 240-42. On Jefferson's and Madison's shared commitment to popular sovereignty despite their differences, see Ong, *supra* note 7, at 112-238.

Declarations of popular sovereignty hardly abated with the ratification of the Federal Constitution. If anything, Americans more fully elaborated its centrality to American government. In his 1790 *Lectures on Law*, James Wilson described popular sovereignty as "the vital principle" of American government that implies "'that the supreme or sovereign power of the society resides in the citizens at large; and that, therefore, they always retain the right of abolishing, altering, or amending their constitution, at whatever time, and in whatever manner, they shall deem it expedient.'"[76] Moreover, the "revolution[ary] principle" that underlay the Federal Constitution was "not a principle of discord, rancor, or war" but rather "a principle of melioration, contentment, and peace."[77] Wilson's view of popular sovereignty, historian Gordon Wood argues, became the basis not only of federalist thought, but of all American thinking about government.[78]

If supporters of the Federal Constitution reiterated popular sovereignty, those with greater reservations about the national government also extolled the principle. Thomas Jefferson enshrined popular sovereignty as the cornerstone of foreign policy when he was Washington's Secretary of State between 1791 and 1793, calling it "the Catholic principle of republicanism, to wit, that every people may establish what form of government they please, and change it as they

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The arch-Federalist Fisher Ames illustrated how one could simultaneously accept popular sovereignty and distrust the people when he addressed the House of Representatives in 1789: "'We are the servants of the people, we are the watchmen, and we should be unfaithful in both characters, if we should so administer the Government as to destroy its great principles and most essential advantages.'" John W. Malsberger, *The Political Thought of Fisher Ames*, 2 J. EARLY REPUBLIC 1, 6 (1982) (quoting Fisher Ames). Edmund Morgan describes how Federalists responded to Patrick Henry's question of why the Constitution spoke of "We the People" rather than "We the States" as follows: "the convention spoke of 'we the People' because it recognized the superiority of the people to the states." MORGAN, *supra* note 13, at 281-82; *see also* SUPREME COURT AND SUPREME LAW 21 (Edmond Cahn ed., 1954).

76. KAMMEN, *supra* note 52, at 30 (quoting James Wilson). In 1793, John Marshall described "the people" as "the source of all power." Letter from John Marshall to Augustine Davis (Oct. 16, 1793), *in* 2 THE PAPERS OF JOHN MARSHALL 1775-1788, *supra* note 69, at 221.

77. KAHN, *supra* note 52, at 58.

78. *See* Wood, *supra* note 16, at 21-22. There would seem to be evidence that Wilson's views in taking "literally and seriously the proposition that the absolute sovereignty of the people is the first principle of republican government" differentiated him from other federalists who embraced a more passive version of popular sovereignty. JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM 139 (1990); *see generally id.* at 96-140.

please."[79] In the state constitutions drafted before 1800, the notion of "consent" was ever-present.[80] Indeed, the "political grammar" in which constitutional issues were discussed from the Revolution through the 1820s reveals that Americans "across the range of political opinion" endorsed popular sovereignty—from "the ultra-nationalist" John Jay calling the people "the sovereigns of the country" to the Anti-Federalist Spenser Roane defining the people as "the only sovereign power."[81] In 1825, despite Madison's growing concerns about the government he largely designed, he described the people's exclusive right to alter constitutions based on popular sovereignty as a "vital" principle "justly the pride of our popular governments."[82] Even Alexis de Tocqueville, who worried in the 1830s that popular sovereignty might lead to "an enslavement of the mind" by focusing authority on the people and "majority opinion," conceded that "the support or acquiescence of the people is required of all established institutions."[83]

The universal support for popular sovereignty after the Revolution naturally led to the question of its implementation. Inherently, the principle possessed both a radical and conservative potential. From the start, popular sovereignty could be considered a real or theoretical principle, and could be described expansively or narrowly.[84] Moreover, those different possibilities were not merely present and acted upon in the period between the Revolution and the Federal Constitution, but long afterwards as well. A series of issues raised by the concept of "a sovereign people" produced tensions in resolving the implications of America's foundational principle.

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79. Thomas Jefferson, *Notes on the Legitimacy of Government*, 24 THE PAPERS OF THOMAS JEFFERSON 802 (John Catanzariti ed., 1990), *quoted in* Michael Lienesh, *Thomas Jefferson and the Democratic Experience: The Origins of the Partisan Press, Popular Political Parties, and Public Opinion*, *in* JEFFERSONIAN LEGACIES, *supra* note 67, at 316, 330.

80. Apparently, state constitutions before 1800 mentioned the word "consent" 127 times. *See* LUTZ, *supra* note 7, at 47, 49; *see also* LUTZ, *supra* note 55, at 81-82.

81. H. Jefferson Powell, *The Political Grammar of Early Constitutional Law*, 71 N.C. L. REV. 949, 986-87 (1993).

82. Ong, *supra* note 7, at 117 (quoting Letter from James Madison to George Thompson (June 30, 1825).

83. Robert P. Kraynak, *Tocqueville's Constitutionalism*, 81 AM. POL. SCI. REV. 1175, 1179 (1987).

84. Donald Lutz has noted that popular sovereignty could be understood by state constitution-makers in a variety of ways that cover many different institutional possibilities. *See* LUTZ, *supra* note 7, at 38; *see also* MOSTOV, *supra* note 11, at 64-68 (discussing the "democratic version" of popular sovereignty advanced by Thomas Jefferson and Thomas Paine); Smith, *supra* note 65, at 483 (arguing that if popular sovereignty was "unquestioned" in the revolutionary period, it was "far from completely defined and understood").

In this regard, much of the scholarly concern over whether Madison and other Framers of the Federal Constitution were true to the spirit of the Revolution misses the point.[85] The Federal Constitution was less an inevitable model of written constitutions as much as one important variation that generated a distinct constitutional tradition. Other views of popular sovereignty and constitutionalism also existed and molded rather different understandings about constitution-making and revision.

An expansive view of popular sovereignty initially surfaced among those who sought a fuller realization of popular sovereignty. The so-called "radical" Pennsylvania Constitution of 1776 provides one early example. This constitution reflected a wider understanding of the principle, not merely in institutional arrangements, but in how it described popular sovereignty. When early state constitutions spoke of the inherent right of the people to change their governments, a good many people took that language literally.[86] As an essayist from the *Federal Gazette* put it in 1789: "The PEOPLE, who are the sovereigns of the State, possess a power to alter *when* and in what *way* they please. To say otherwise . . . is to make the thing created, greater than the power that created it."[87] A year later Samuel Adams chided his cousin John for his moderate description of popular sovereignty: "Is not the *whole* sovereignty, my friend, essentially in the people? . . . Is it not the uncontrollable, essential right of the people to amend and

85. Lance Banning asserts that Madison remained true to the principles of the Revolution, but that by 1787 he worried "that revolutionary governments were so responsive to the wishes of unhampered, temporary state majorities that they endangered the unalienable rights that independence was intended to protect." Lance Banning, *'To Secure these Rights': Patrick Henry, James Madison, and the Revolutionary Legitimacy of the Constitution*, *in* TO SECURE THE BLESSINGS OF LIBERTY: FIRST PRINCIPLES OF THE CONSTITUTION 280, 298 (Sarah Baumgartner Thurow ed., 1988). Thus, Madison only worked to restrain "tyrannical majorities" but never doubted that "majorities should rule—or that the people *would* control the complicated structure raised by the completed constitution." *Id.* at 301.

The point, however, is not Madison's fidelity to the legacy of the Revolution, but that his perception of the experiment with republican governments was much less sanguine than others. Many Anti-Federalists and others did not share Madison's fears and were consequently willing to accord the people a less constrained participatory role in government. *See, e.g.*, HERBERT J. STORING, WHAT THE ANTI-FEDERALISTS WERE FOR (1981); Cecelia M. Kenyon, *Men of Little Faith: The Anti-Federalists on the Nature of Representative Government*, 12 WM. & MARY Q. 3 (1955).

86. Henry Witte asserts that the popular sovereignty clauses in the 1776 Pennsylvania Constitution represented more than "a formal, theoretical basis for government in general, but a power to be claimed by the people in real time and in real places." Witte, *supra* note 62, at 390.

87. Herrington, *supra* note 33, at 577.

alter, or annul their constitution and frame a new one . . . ."[88] Well before the rise of Jacksonian democracy, indeed, as early as 1797 and 1807, assertions were made about the constitutional legitimacy of changing government through the people's "primary capacity."[89]

Such views were associated with an understanding of popular sovereignty by some revolutionaries that posited a more direct role for the people in government.[90] That understanding included a right of resistance located between the extremes of acquiescence and revolution.[91] Such a position supported a belief that the people's inherent right to revise constitutions under popular sovereignty justified bypassing, if not defying, constitutional procedures for revision without invoking the people's ultimate right of revolution based on natural law. Americans invoked this right of resistance during the late eighteenth century and early nineteenth century.[92] According to historian Pauline Maier, the "widespread appeal" of a right of resistance "in the opening decades of the new nation confirms its cogency to a generation of Americans fully immersed in the revolutionary and constitutional traditions of the Anglo-American world."[93]

The 1820s witnessed many assertions of the inherent right of the people to justify movements for constitutional revision that circumvented the legislature or existing procedures for constitutional change. The most notorious claim of a constitutional middle ground was

88. LUTZ, *supra* note 7, at 17.

89. MARVIN E. GETTLEMAN, THE DORR REBELLION: A STUDY IN AMERICAN RADICALISM, 1833-1849, at 11 (1973). In 1818 and 1820 several Rhode Island newspapers asserted the people's "undoubted right" to bypass a legislature reluctant to facilitate constitutional change and in their "sovereign and corporate capacity" to hold conventions to establish a new constitution. PATRICK T. CONLEY, DEMOCRACY IN DECLINE: RHODE ISLAND'S CONSTITUTIONAL DEVELOPMENT, 1776-1841, at 186, 188 (1977).

90. *See* DOUGLASS, *supra* note 34; LUTZ, *supra* note 7, at 1-22; MAIER, *supra* note 35, at 3-26; WOOD, *supra* note 21, at 306-89; Miller, *supra* note 4, at 99, 104; Alan D. Watson, *The Public Meeting in Antebellum North Carolina: The Example of Edgecombe County*, 64 N.C. HIST. REV. 19, 19-42 (1987).

91. *See* ADAMS, *supra* note 19, at 138. In 1777, Benjamin Hichborn posited such a direct authority when he claimed "a power in the people at large, at any time, for any cause, or for no cause, but their own sovereign pleasure, to alter or annihilate both the mode and essence of any former government, and adopt a new one in its stead." STOURZH, ALEXANDER HAMILTON, *supra* note 12, at 56.

92. *See, e.g.*, JAMES M. BANNER, TO THE HARTFORD CONVENTION: THE FEDERALISTS AND THE ORIGINS OF PARTY POLITICS IN MASSACHUSETTS, 1789-1815, at 294-350 (1969); Adrienne Koch & Harry Ammon, *The Virginia and Kentucky Resolutions: An Episode in Jefferson's and Madison's Defense of Civil Liberties*, 5 WM. & MARY Q. 145, 145-76 (1948); Wayne D. Moore, *Reconceiving Interpretive Autonomy: Insights from the Virginia and Kentucky Resolutions*, 11 CONST. COMMENTARY 315, 315-54 (1994); James Morton Smith, *The Grass Roots Origins of the Kentucky Resolutions*, 27 WM. & MARY Q. 221, 221-45 (1970).

93. Maier, *supra* note 1, at 14.

Rhode Island's Dorr Rebellion in 1842. During that struggle, so-called Dorrites would invoke the justification of "peaceable revolution" and infuriate their opponents by asserting a distinction between a "*right* of revolution" as opposed to a "right of *revolution*."[94] They were met by Daniel Webster's response that "[t]he Constitution does not proceed on any *right* of revolution; but does go on the idea that within and under the Constitution, no new form of government can be established in any State, without the authority of the existing government."[95] In the end, the United States Supreme Court sided with Webster and rejected the constitutionality of such a middle ground.[96] In spite of the heated criticism and judicial repudiation of the supposed inherent power of the people to revise their constitutions, the circumvention conventions attracted popular support on the grounds that the people ought to directly participate in constitutional revision.

Although orthodox American constitutional thought ultimately rejected this principle and the infamous related concept of nullification, this does not alter the legitimate place it assumed in contemporary constitutional discourse. That nullification rested on a "CONSTITUTIONAL right" was of "infinite importance" to its adherents who also denied that they were appealing to natural rights or

94. *See* GEORGE M. DENNISON, THE DORR WAR 60-83, 159-61 (1976); GETTLEMAN, *supra* note 89; Robert L. Ciaburri, *The Dorr Rebellion in Rhode Island: The Moderate Phase*, 26 R.I. HIST. 73 (1967); C. Peter Magrath, *Optimistic Democrat: Thomas W. Dorr and the Case of* Luther vs. Borden, 29 R.I. HIST. 94 (1970); John S. Schuchman, *The Political Background of the Political-Question Doctrine: The Judges and the Dorr War*, 16 AM. J. LEGAL HIST. 111 (1972); William M. Wiecek, *'A Peculiar Conservatism' and the Dorr Rebellion: Constitutional Clash in Jacksonian America*, 22 AM. J. LEGAL HIST. 237 (1978); William M. Wiecek, *Popular Sovereignty in the Dorr War—Conservative Counterblast*, 32 R.I. HIST. 35 (1973).

95. George M. Dennison, *An Empire of Liberty: Congressional Attitudes Toward Popular Sovereignty In The Territories, 1787-1867*, 6 MD. HIST. 19, 28 (1975).

96. *See* Luther v. Borden, 48 U.S. (7 How.) 1 (1849). Some scholars, most notably Bruce Ackerman and Akhil Amar in different ways, have asserted the theoretical existence of a constitutional middle ground in terms of the Federal Constitution. *See, e.g.*, BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991); Ackerman & Katyal, *supra* note 55; Amar, *supra* note 7. It is important to distinguish constitutional theorizing (that sometimes draws upon history to inform and advance constitutional positions as part of a normative judgment) from constitutional history (that seeks to understand the past on its own terms without promoting a thesis for ideal constitutional interpretation). Ironically, both Amar and Ackerman focus on the federal level—where the historical experience with a constitutional middle ground was weakest—while largely ignoring the state level and its vibrant tradition of debate and action based on such a middle ground. The extent to which such state experience is relevant to the Federal Constitution is, of course, a theoretical question rather than a historical one.

to the right of revolution.[97] Moreover, when James Madison opposed nullification, he expressly denied the legitimacy of a constitutional middle ground—at least with respect to changing the Federal Constitution.[98] The debate over nullification thus reinforced the vibrancy of constitutional ideas reflective of an expansive view of popular sovereignty. Judged by its contemporary currency and invocation in state constitutional debates, this expansive view of popular sovereignty represented more than a mere "strain of radical democracy."[99]

If the Revolution gave birth to potentially diverse approaches to self-government, the period from 1776 to 1787 witnessed the ascendancy of a more constrained version of popular sovereignty that culminated in the Federal Constitution. Reflecting uncertainty about elections and the representative process, the Federal Framers "placed their hopes for the country's future in giving government a structure that would filter the will of the people and extract a beneficent essence from the raw wishes of the majority."[100] Indeed, the elaborate system of checks and balances and representative government were designed to curb popular sovereignty. The Federal Constitution's silence about the right of the people to resist oppressive government or alter their government at will was not accidental. Such statements—often found in state constitutions—invited a form of public participation the federal drafters were determined to quell.

Both in terms of what they omitted and included in the Constitution, the Framers underscored their passive view of popular sover-

97. *Journal of the Convention of the People of South Carolina: Assembled at Columbia on the 19th November, 1832, and Again, on the 11th March, 1833,* at 60, 62 (Columbia, S.C., A.S. Johnston 1833); *see also* IRVING H. BARTLETT, JOHN C. CALHOUN 139-52 (1993); RICHARD E. ELLIS, THE UNION AT RISK: JACKSONIANISM, DEMOCRACY, STATES' RIGHTS AND THE NULLIFICATION CRISIS (1987); WILLIAM W. FREEHLING, PRELUDE TO CIVIL WAR: THE NULLIFICATION CONTROVERSY IN SOUTH CAROLINA, 1816-1836 (1966).

98. *See* WIEBE, *supra* note 51, at 247-48.

99. HYMAN & WIECEK, *supra* note 58, at 2-6. Their description of a "radical strain" and the subsequent focus of their book suggests it had marginal importance with respect to the development of an American constitutional tradition.

100. Morgan, *supra* note 33, at 111. A proponent of the Federal Constitution in Maryland applauded the complicated national legislature because of its tendency to produce government by "the wisest and best men." Peter S. Onuf, *Maryland: The Small Republic in the New Nation*, *in* RATIFYING THE CONSTITUTION 171, 173 (Michael Allen Gillespie & Michael Lienesch eds., 1989). Jack Rakove notes the Federal Constitution's purpose to "check populist excesses" in examining how the ratification process introduced the new dangers of the power of public opinion. Jack Rakove, *The Structure of Politics at the Accession of George Washington*, *in* BEYOND CONFEDERATION, *supra* note 1, at 261, 293; *see also* LUTZ, *supra* note 7, at 41, 237-38; Donald J. Boudreaux & A.C. Pritchard, *Rewriting the Constitution: An Economic Analysis of the Constitutional Amendment Process*, 62 FORD. L. REV. 115, 139-40 (1993).

eignty. Their product reflected that "power may be derived from the people; but once they elect officials, the power is transmitted; and the people may not resume it unless magistrates abuse their authority."[101] If anything, the failure to declare the people's inherent right of revision and the inclusion of the Guarantee and Domestic Violence Clauses accorded with "a contemporaneous process of delegitimizing the resort to violence by the people as an extralegal means of defending the community interest when government failed to do so."[102] In "formalizing rights" the Framers "had done their best to close down the style of argument most fertile of further rights production."[103]

The key to understanding how the Federalists could celebrate popular sovereignty so fully rested with their transformation of "the people" into an essentially abstract concept. Alexander Hamilton and James Madison could repeatedly invoke popular sovereignty in *The Federalist Papers* because the people were not expected to act in any concrete manner in exercising their inherent powers.[104] "Once the Federalists had conjured an imaginary 'people' who could not challenge the power of the national government, they became ever more bold in declaring that the people had the right to decide, to act, and to overthrow the government whenever they chose to do so."[105] In attributing sovereignty to a fictitious people, the Federalists "reduced the acts of that people to one: the ratification of the Constitution, symbolically interpreted as an act of the people."[106] Thus, the Federalists could celebrate popular sovereignty because "the sovereign people were restrained once the Constitution was ratified."[107]

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101. KAMMEN, *supra* note 52, at 24-25.

102. WIECEK, *supra* note 36, at 42.

103. RODGERS, *supra* note 20, at 66. In rejecting appeals to "*extralegal* rights" harkening back to the revolutionary period, the message seemed clear: "Men were to be induced to think, once more, soberly and legally. The state of nature, only recently discovered, was already being abandoned." *Id.*

104. *See* THE FEDERALIST NOS. 23, 28, 78 (Alexander Hamilton), 39, 49, 63 (James Madison). It has been aptly suggested that Hamilton turned "the formulas and stereotypes of popular government against the logic of popular government." EDWIN MIMMS, JR., THE MAJORITY OF THE PEOPLE 96 (1941).

105. Miller, *supra* note 4, at 99, 104; *see also* WOOD, *supra* note 21, at 532.

106. Miller, *supra* note 4, at 115.

107. Appleby, *supra* note 1, at 804. Indeed, the security of having disarmed the concept of popular sovereignty within the Federal Constitution led Madison to later propose a first amendment to the document that would celebrate popular sovereignty. He proposed "[t]hat there be prefixed to the constitution a declaration, that all power is originally vested in, and consequently derived from, the people . . . . That the people have an indubitable, unalienable, and indefeasible right to reform or change their Government, whenever it be found adverse or inadequate to the purposes of its institution." *See* 1 THE DEBATES AND PROCEEDINGS IN THE CONGRESS OF THE UNITED STATES, WITH AN APPENDIX, CONTAIN-

Epitomizing this passive version of popular sovereignty were the high barriers to revision presented by Article V.[108] One scholar has called Article V's amendment process the "product of diminished faith in the capacity of ordinary folk to be a fully sovereign people."[109] The sheer difficulty of calling future conventions or effecting amendments to the Federal Constitution is amply borne out by its history.[110] With Article V, the Federal Framers successfully precluded the people from acting in their collective capacity and invoking popular sovereignty as a constitutional justification for change.[111] Whether the

ING IMPORTANT STATE PAPERS AND PUBLIC DOCUMENTS AND ALL THE LAWS OF PUBLIC NATURE 433-34 (Washington, Gales & Seator 1834-1856). Madison later said in debate, "My idea of the sovereignty in the people is, that the people can change the Constitution if they please; but while the Constitution exists, they must conform themselves to its dictates." *Id.* at 739. Its "dictates," of course, include the daunting barriers to revision imposed by Article V.

108. Article V provides for a two-step process by which amendments must be proposed by a two-thirds majority of both houses of Congress, and subsequently ratified by three-fourths of the state legislatures or special state conventions called for this purpose. Furthermore, in a provision never yet employed, Article V provides that two-thirds of the states may petition Congress to call a special convention for proposing amendments. *See* U.S. CONST. art. V.

For arguments that revision of the Federal Constitution has occurred outside of the terms of Article V and need not be confined to those provisions, see ACKERMAN, *supra* note 96, and Amar, *supra* note 7, at 1043-1104. For a critique of those views, see Dow, *supra* note 7; Henry Paul Monaghan, *We the People[s], Original Understanding, and Constitutional Amendment*, 96 COLUM. L. REV. 121 (1996).

109. KAMMEN, *supra* note 52, at 29; *see also* CONKIN, *supra* note 11, at 67 (claiming that Article V "violated popular sovereignty" by allowing amendments solely by legislative action); LUTZ, *supra* note 7, at 6-7; Boudreaux & Pritchard, *supra* note 100, at 162; Janet Cornelius, *Popular Sovereignty and Constitutional Change in the United States and Illinois Constitutions*, 80 ILL. HIST. J. 228, 231 (1987) (quoting Walter Dellinger's description of Article V as a "very conservative rendering of the right of revolution"); John R. Vile, *American Views of the Constitutional Amending Process: An Intellectual History of Article V*, 35 AM. J. LEGAL HIST. 44, 48 (1991).

110. From 1791 to 1992, Article V has permitted formal ratification of less than one-third of one percent of the more than 10,000 proposals for change. *See* RICHARD B. BERNSTEIN & JEROME AGEL, AMENDING AMERICA: IF WE LOVE THE CONSTITUTION SO MUCH, WHY DO WE KEEP TRYING TO CHANGE IT? at x (1993). The authors thus estimate that the chances of formal amendment at little better than 1 in 1,000. *See id.* at 169.

111. Madison's qualification of popular sovereignty in his proposed language for a first amendment clearly represented the rejection of a constitutional middle ground in terms of the Federal Constitution. *See supra* note 107. Indeed, John Vile has concluded as much by suggesting that the omission of Madison's proposed language meant "that Americans had come more clearly to distinguish those rights revolutionary in nature that needed no constitutional sanction from those legal in nature and appropriate for inclusion in a constitution." JOHN VILE, CONTEMPORARY QUESTIONS SURROUNDING THE CONSTITUTIONAL AMENDING PROCESS 105 (1993).

Bruce Ackerman's analysis of *The Federalist* demonstrates how ideal representation consisted of "'*the total exclusion of the people in their collective capacity.*'" *See* ACKERMAN, *supra* note 96, at 185 (quoting THE FEDERALIST NO. 63 at 428 (James Madison)

Constitution rejected simple majoritarian government or democracy is less the issue than the fact that its structure clearly worked against an expansive interpretation of popular sovereignty.[112] Indeed, contemporary opponents of the Constitution regarded the diminished role for the people after ratification and the election of representatives as undercutting the inalienable quality of popular sovereignty.[113] In the margin of his copy of the Federal Constitution, George Mason lamented that Article V only gave *Congress* the initiative to revise the Constitution: "[S]hould it prove ever so oppressive, the whole people of America can't make, or even propose alterations to it; a doctrine utterly subversive of the fundamental principles of the rights and liberties of the people."[114]

Like the experience of crafting the Federal Constitution, state constitution-making arguably experienced a similar shift during this period, epitomized by the 1790 revision of Pennsylvania's "radical" 1776 Constitution.[115] Although the radical potential of self-government may well have been considered, and even occasionally mani-

(Jacob E. Cooke ed., 1961)). More than a century earlier, a constitutional commentator considered Article V a "prevalent disregard of immediate popular expression." JAMES SCHOULER, CONSTITUTIONAL STUDIES, STATE AND FEDERAL 185 (1897); *cf.* Levinson, *supra* note 7, at 2444-60.

112. Joyce Appleby sees the framing of the Federal Constitution as a rejection of "simple majoritarian government in America . . . . Despite the celebration of popular sovereignty in America, the sovereign people were restrained once the constitution was ratified. Perhaps nothing in the constitution has worked more against democracy than the amendment process." Appleby, *supra* note 1, at 804.

113. *See, e.g.*, MICHAEL G. KAMMEN, THE ORIGINS OF THE AMERICAN CONSTITUTION: A DOCUMENTARY HISTORY 295 (1986); Russell L. Hanson, *"Commons" and "Commonwealth" at the American Founding: Democratic Republicanism as the New American Hybrid*, *in* CONCEPTUAL CHANGE AND THE CONSTITUTION 165, 185-86 (Terence Ball & J.G.A. Pocock eds., 1988).

Ironically, some opponents of the Federal Constitution viewed Article V optimistically as a mechanism that responded to the principle of the people's right to revision. *See* Kurt T. Lash, *Rejecting Conventional Wisdom: Federalist Ambivalence in the Framing and Implementation of Article V*, 38 AM. J. LEGAL HIST. 197 (1994). Jefferson's initial high hopes for Article V turned to despair by the end of his lifetime. *See* MERRILL D. PETERSON, JEFFERSON AND MADISON AND THE MAKING OF CONSTITUTIONS 16-17 (1987).

114. 2 FARRAND, *supra* note 60, at 629 n.8. For Anti-Federalist concerns that the procedures in Article V were too difficult and intricate, see 2 THE COMPLETE ANTI-FEDERALIST 153, 250-51 (Herbert J. Storing ed., 1981) and 3 *id.* at 19-20, 46-47, 49-50.

Beyond what the shape of Article V suggested about the theoretical place of the people in future constitutional revision, it could also be viewed as a practical necessity, without this high barrier, the political compromises affecting sectional interests and those of the larger versus smaller states would have been far less secure.

115. For a description of the "radical" nature of the Pennsylvania's 1776 Constitution, see Williams, *supra* note 45, at 554-58. With respect to state "constitutional reform" by the 1780s, see WOOD, *supra* note 21, at 430-38.

fested as in Pennsylvania's 1776 Constitution, it never took firm hold on the minds of the post-revolutionary leadership. Constitution-making in the decade following Independence reflected a trial and error process that only belatedly attained a sophisticated and matured understanding. Associated with this development were the immediate post-revolutionary experiences that emphasized the importance of infusing republican governments with stability and virtuous leadership. If some state constitution-making—as in the case of Pennsylvania—consciously flirted with the radical possibilities introduced by the Revolution, such experimentation ended as a short-lived failure. The retrenchment of Pennsylvania's constitution in 1790 formed part of a broader movement that had led to the formation of the Federal Constitution. It marked a more realistic, measured, and wise approach to constitution-making. Indeed, the relative absence of experimentation with institutional arrangements in state constitution-making after 1787 apparently supports this traditional view.[116]

The perception of retreat from Pennsylvania's "radical" 1776 Constitution explains why scholars have discounted the enduring resonance of the expansive dimension of popular sovereignty. That "radical" experiment has consistently been regarded as a failure, which is not surprising given its great differences from the Federal Constitution, "the quintessential expression of the political wisdom of the American people."[117] Clearly the most radical of the revolutionary state constitutions, Pennsylvania's 1776 document called for a unicameral legislature with considerable supremacy, required legislative and public deliberation on measures, annual elections, rotation in office, and periodic review of the government by specially elected overseers. Opposed from the start, its ultimate replacement came in 1790. Scholars arguing for a re-evaluation of Pennsylvania's 1776 Constitution conclude that the thrust of its constitutional ideas was largely dissipated with the 1790 revision.[118]

In expunging more radical constitutional arrangements, however, Pennsylvania's 1790 Constitution perpetuated ideas constituting the core of broader understandings of constitutionalism. While the 1776 Constitution announced the community's right to "alter or abolish" government in such manner as they judged "most conducive to the public weal," the 1790 Constitution declared the people's right "at all times" to "alter, or abolish" government "in such manner as they may

116. *See* WOOD, *supra* note 21, at 430-38; Williams, *supra* note 35, at 43.

117. Ryerson, *supra* note 29, at 95, 98.

118. *See, e.g.*, Ryerson, *supra* note 29, at 95, 131-33; Williams, *supra* note 45, at 581, 585.

think proper," thus reinforcing the people's discretion to act.[119] Those views continued to percolate in late eighteenth century constitutional revision and became even more predominant in the course of the nineteenth century.[120] Importantly, the theoretical basis of an expansive version of popular sovereignty remained unchallenged in the several decades of state constitution-making after the Revolution. Moreover, constitution-making in that period consistently reflected a more dynamic view of popular sovereignty, even as Americans celebrated the Federal Constitution.[121] Ideas, rather than institutional arrangements, formed the crux of the persistence of an alternative constitutional tradition. The vitality of such understandings from the eighteenth century into the early nineteenth century is illustrated by the questions inherent in popular sovereignty that arose as constitution-makers set about their task.

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119. 8 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 286 (William Swindler ed., 1973-1988) [hereinafter SWINDLER]; *see also* Clair W. Keller, *Pennsylvania's Role in the Origin and Defeat of the First Proposed Amendment on Representation*, 112 PENN. MAG. HIST. & BIO. 73, 102 (1988) (noting the failure of Pennsylvania's 1790 Constitution to eliminate "all vestiges of actual representation").

120. *See* Caleb Nelson, *A Re-Evaluation of Scholarly Explanations for the Rise of the Elective Judiciary in Antebellum America,* 37 AM. J. LEGAL HIST. 190, 221 (1993); Gregory G. Schmidt, Republican Visions: Constitutional Thought and Constitutional Revision in the Eastern United States, 1815-1830 (1981) (unpublished Ph.D. dissertation, University of Illinois at Urbana-Champaign).

John Taylor of Caroline's observations on Kentucky's 1792 Constitution prior to its revision in 1799 reflect both the vitality of an expansive view of popular sovereignty and a characterization of the Federal Constitution as a document embracing a more passive version of the principle. Invited by Federal District Judge Harry Innes of Kentucky to offer such criticisms as might help guide delegates to the 1799 Convention, Taylor stressed changes that accorded with his belief in "'the only security for liberty,'" namely, "'by the form of government, to retain in their [the people's] hands, as much political strength, as may be consistent with good order and social happiness.'" Tom K. Barton, *John Taylor of Caroline: Republicanism in the Kentucky Constitution of 1792*, 73 REG. KY. HIST. SOC. 105, 109 (1975) (quoting John Taylor). In the same letter, Taylor also criticized the Federal Constitution (and warned against following its spirit) for embodying an over-reliance on an English "'theory of checking power by power'" instead of "'retaining to the people, as much political weight'" as was safely possible to protect liberty. *Id.* He regarded the Federal Constitution, "'compiled by men in some degree under the impression of old modes of thinking,'" as including ideas of balanced constitutions, "'which the English experiment ought to have exploded.'" *Id.*; *see also* JOAN WELLS COWARD, KENTUCKY IN THE NEW REPUBLIC: THE PROCESS OF CONSTITUTION MAKING 107-08 (1979).

121. One opponent of Ohio's 1802 Constitution bemoaned the fact that "'few constitutions were ever so bepeopled as it is throughout.'" Randolph C. Downes, *Ohio's First Constitution*, 25 NW. OHIO Q. 12, 17 (1953).

For the ways in which Americans celebrated the Federal Constitution, see Lance Banning, *Republican Ideology and the Triumph of the Constitution, 1789-1793*, 31 WM. & MARY Q. 167 (1974), and MICHAEL KAMMEN, A MACHINE THAT WOULD GO OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE 43-94 (1986).

IV. Questions Underlying Popular Sovereignty

A. What Is the Role of Legislatures?

Shortly after the Revolution, all the states confronted the question of how to draft constitutions: Were state legislatures the appropriate body? Almost all of the very first American constitutions were drafted by legislatures during the course of the war. While this practice of legislative drafting prompted criticism leading to its abandonment, it had contemporary claims for its legitimacy beyond the existing political and military exigencies. In the pre-revolutionary period, the colonial assemblies and later the first state legislatures were easily identified with the people because of their struggles against the Royal government and parliament. That context made it natural to regard the legislatures as speaking for the people. Hence, legislatures were initially assumed to have the competence and authority to promulgate constitutions. However, as many increasingly disassociated the legislature from the people, legislatures lost their acceptance as appropriate bodies to create constitutions. With the declining perception of legislatures as the people, the felt need arose for constitutional conventions as constituent assemblies.

Constitutional theorists and historians have regarded this initial use of legislatures as an imperfect and immature understanding of constitution-making.[122] Scholars have argued that constitutions created by legislatures ignored the important distinction between ordinary law and constitutional law.[123] Legislative promulgation of

122. Willi Paul Adams argues that the first state constitutions were essentially drafted as regular statutes. Although drafters were not altogether unaware of the special character of constitutions, their distinction from ordinary law would not be clearly perceived for a few years. *See* ADAMS, *supra* note 19, at 64. In contrast, Russell Caplan asserts that the distinction only emerged belatedly, with the 1780 Massachusetts Constitution as the first instance of a mature understanding. *See* RUSSELL L. CAPLAN, CONSTITUTIONAL BRINKMANSHIP: AMENDING THE CONSTITUTION BY NATIONAL CONVENTION 13 (1988). Donald Lutz argues that the distinction was "only partial" in 1776 and was only fully articulated by Massachusetts in 1780 and New Hampshire in 1784. *See* LUTZ, *supra* note 55, at 99-100; *see also* WOOD, *supra* note 21, at 274-75, 279; Leslie Friedman Goldstein, *Popular Sovereignty, the Origins of Judicial Review, and the Revival of Unwritten Law*, 48 J. POL. 51, 62 (1986). Moreover, in *Popular Consent and Popular Control*, Donald Lutz disputes Bernard Bailyn's claim that Americans prior to the Revolution had begun to distinguish between constitutional and ordinary law. *See* LUTZ, *supra* note 7, at 63-64. Paul Conkin asserts that only when South Carolina elected delegates in 1790 to a "proper" convention, did it attain a "real" constitution. *See* CONKIN, *supra* note 11, at 53.

123. *See* Leonard W. Levy, Seasoned Judgments: The American Constitution, Rights, and History 295-98 (1995). Joyce Appleby regards the lack of veneration of constitutions and the desire to rewrite them as indicating the absence in the 1780s of a "culture of constitutionalism," which included recognizing constitutions as limits on government that re-

constitutions also lacked constitutional sophistication.[124] As the necessities of the war receded and demand for constitutions drafted through constituent assemblies increased, Americans wanted constitutional conventions. Eventually, conventions and popular ratification translated theoretical sovereignty into a concrete expression of governmental structure, organization, and policy.

This conventional view of early American constitution-making bears re-examination of several particulars, not the least of them its assumption that the legislators who drafted those constitutions did not appreciate the distinction between ordinary and constitutional law. By the 1780s, constitution-makers better understood the creation of fundamental law-the need to draft constitutions in specially called conventions that were submitted for popular approval. Belated employment of conventions preserved the crucial distinction between ordinary and constitutional law. New Hampshire and Massachusetts constitution-making foreshadowed this matured understanding. Massachusetts's 1780 Constitution in particular provided "the reconsidered ideal of a 'perfect constitution'" in large part by employing both a constitutional convention and ratification.[125] The Federal Constitution epitomized this approach in American constitution-making.

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strained legislative discretion. *See* Appleby, *supra* note 1, at 800; *see also* Douglass, *supra* note 34, at 126-27; Schmidt, *supra* note 120, at 5. But the lack of veneration and the destabilizing effects that frequent constitutional revision might bring does not necessarily indicate a failure to recognize constitutions as fundamental law. The source of their creation—popular sovereignty—and not how infrequently they were altered gave them their ultimate legitimacy. Thus, frequent changes in constitutions were hardly inconsistent with a clear recognition of the difference between ordinary and constitutional law.

Other scholars rightly emphasize the crucial importance of the distinction between ordinary and constitutional law. Gerald Stourzh regards the "rise of the constitution as the *paramount* law, reigning supreme and therefore invalidating, if procedurally possible, any law of lower level in the hierarchy of legal norms, including 'ordinary' legislator-made law" as "*the* great innovation and achievement of American eighteenth century constitutionalism." Gerald Stourzh, *Constitution: Changing Meanings of the Term from the Early Seventeenth to the Late Eighteenth Century*, *in* CONCEPTUAL CHANGE AND THE CONSTITUTION, *supra* note 113, at 47. The fact that their constitutions distinguished between ordinary law and higher law, rather than the fact that they were written, is what gave the revolutionaries their rightful pride for an innovation in governmental practices. Moreover, Thad Tate argued that the social contract and the idea of constitution as fundamental law were closely linked in American thought, "for it was in its origin in a solemn agreement of the people that made the constitution superior to ordinary legislative acts." Tate, *supra* note 55, at 379.

124. *See* ONUF, *supra* note 3, at 23 (stating that promulgated constitutions that created state governments "subject to frequent alteration lacked legitimacy"); John V. Orth, *North Carolina Constitutional History*, 69 N.C. L. REV. 1759, 1762 (1992).

125. WOOD, *supra* note 21, at 434; *see also* CONKIN, *supra* note 11, at 57 (stating that Massachusetts's 1780 Constitution represented "full compliance with the logic of popular sovereignty"); MORGAN, *supra* note 13, at 258-60; Willi Paul Adams, *The State Constitu-*

Focusing on procedural deficiencies in early constitution-making[126] overlooks the fundamental basis of constitutions—their source of authority. The eventual uniform practice of using conventions as a means to express the people's constituent power has confused the distinction between ordinary and constitutional law on the one hand and what the process of constitution-making reflected about constitutional attitudes on the other. Even before constitution-making followed the routine procedure of reflecting the will of the people through the use of conventions, Americans distinguished between constitutions and statutes.[127] Indeed, historian Bernard Bailyn has observed that prior to the Revolution some Americans acknowledged the fundamentality of constitutions if they were to control government.[128] Moreover, drafters of Pennsylvania's 1776 Constitution sought specifically to bar the legislature from violating its provisions.[129] These insights, however, have been overlooked by the flawed assumption that only after

tions as Analogy and Precedent: The American Experience with Constituent Power Before 1787, 34 AMERIKASTUDIEN 7, 13 (1989); Alexander J. Cella, *The People of Massachusetts, A New Republic, and the Constitution of 1780: The Evolution of Principles of Popular Control of Political Authority, 1774-1780,* 14 SUFFOLK U. L. REV. 975, 990 (1980); Levy, *supra* note 123, at 307 (describing the Massachusetts 1780 Constitution as "the classic American state constitution"); Andrew C. McLaughlin, *American History and American Democracy*, 2 AM. HIST. REV. 255, 264-65 (1915) (describing the 1780 Massachusetts Constitution as "the fully developed constitution, the greatest institution of government which America has produced"); R.R. Palmer, *The People as Constituent Power, in* THE ROLE OF IDEOLOGY IN THE AMERICAN REVOLUTION 76-80 (John R. Howe, Jr. ed., 1970); Paul C. Reardon, *The Massachusetts Constitution Marks a Milestone*, 12 PUBLIUS 45, 45-55 (1982).

126. *See, e.g.*, ADAMS, *supra* note 19, at 63-66, 75, 89 (stating that the use of conventions and ratification formed a "crucial combination" in distinguishing between ordinary and constitutional law); WALTER F. DODD, THE REVISION AND AMENDMENT OF STATE CONSTITUTIONS 1-29 (1910); LUTZ, *supra* note 7, at 63-64, 67-68, 82-84 (linking the absence of conventions and popular ratification with a failure to appreciate the distinction between ordinary and constitutional law); Robert J. Taylor, *Constitution of the Massachusetts Constitution,* 90 PROC. AM. ANTIQUARIAN SOC. 317 (1980).

127. *See* Fletcher M. Green, Constitutional Development in the South Atlantic States, 1776-1860: A Study in the Evolution of Democracy 51-52, 58-60, 66 (1930); Palmer, *supra* note 125, at 75-76. In 1776, voters in two North Carolina counties instructed their legislators on impending constitution-making by noting that political power was of two kinds, one "principal and supreme" possessed "only by the people at large" and the other "derived and inferior" possessed "by the servants they employ." 10 THE COLONIAL RECORDS OF NORTH CAROLINA 870b, 870f (William L. Saunders ed., Raleigh, N.C., Edwards & Broughton Press 1890).

128. *See* BAILYN, *supra* note 54, at 175-84. Edmund Morgan traces the emergence of the distinction back even further, to seventeenth century Leveller criticisms of Parliament. *See* MORGAN, *supra* note 13, at 81.

129. *See* John N. Shaeffer, *Public Consideration of the 1776 Pennsylvania Constitution*, 98 PENN. MAG. HIST. & BIO. 433, 433-35 (1974); *see also* Robert F. Williams, *The State Constitutions of the Founding Decade: Pennsylvania's Radical 1776 Constitution and Its Influences on American Constitutionalism,* 62 TEMP. L. REV. 541, 566, 578 (1989).

the emergence of specially elected conventions did Americans appreciate the distinction between ordinary and constitutional law. This mischaracterization ignored the source that provided constitutions their fundamentality-they were the products of a sovereign people.

Framers of the first state constitutions implicitly located the power of constitution-making in the people when more than half of them failed to include a procedure for future revision or amendment.[130] This omission implied that the people retained an inherent right to revise their constitutions at will, thus making specific procedures unnecessary.

The absence of revision provisions in eighteenth century state constitutions did not prevent later legislative calls for constitutional conventions.[131] Neither did the existence of such procedures prevent legislatures from ignoring them in calling for future constitutional conventions.[132] For example, Connecticut, which elected to remain under its colonial charter after the Revolution, summoned a convention in 1818 under its legislature's "general powers."[133] Such action presumed the people's inherent right of revision.[134]

130. Of the 11 colonies that drafted initial state constitutions (Rhode Island and Connecticut remaining under their colonial charters) Virginia, South Carolina, North Carolina, New Hampshire, New Jersey, and New York had no provisions for future constitutional changes. Pennsylvania (later copied by Vermont in 1777) provided for a septennial possibility of future conventions to consider amendments, and Georgia provided that the legislature might call a convention if a majority of the voters wished. Delaware and Maryland alluded to possible future revision, but did so ambiguously, Delaware providing that changes in the bulk of the constitution could not occur without five-sevenths consent of its assembly and seven members of the legislative council, and Maryland providing that no constitutional changes could be made unless a bill to do so passed the legislature and after the next election was confirmed by the next legislature. Massachusetts's 1780 Constitution simply provided for a vote on the issue of holding another convention in 1795. Thus, of all the first state constitutions drafted, only Pennsylvania and Vermont explicitly provided a procedure for constitutional amendment.

131. See, for example, the constitutional conventions in New York (1801 and 1821), Rhode Island (1824), Virginia (1829 and 1850), South Carolina (1778 and 1790), North Carolina (1835), New Hampshire (1784), and New Jersey (1844). Likewise, the absence of a provision for future constitutional conventions in Delaware's 1776 Constitution—although it alluded to future revision—did not impede a convention in 1791 to draft a new constitution.

132. JAMES QUAYLE DEALEY, GROWTH OF AMERICAN STATE CONSTITUTIONS: FROM 1776 TO THE END OF THE YEAR 1914, at 33, 49 (De Capo Press 1972) (1915); Schmidt, *supra* note 120, at 24; White, *supra* note 27, at 1132, 1137.

133. DEALEY, *supra* note 132, at 42.

134. *See id.* at 32, 41-49; *see also* CHARLES BORGEAUD, ADOPTION AND AMENDMENT OF CONSTITUTIONS IN EUROPE AND AMERICA 181 (1895); Richard L. Mumford, Constitutional Development in the State of Delaware, 1776-1897, at 111 (1968) (unpublished Ph.D. dissertation, University of Delaware).

The first legislatures that "made" constitutions demonstrated—in preambles and addresses—their understanding of popular sovereignty as the source of constitutional authority.[135] Virtually all the first constitutions were justified as "authorized" or "empowered" by the people.[136] New York's 1777 constitution-makers, for example, repeatedly asserted that they acted "in the name and by the authority of the people."[137] Despite being legislators, they spoke with the voice of the people. Such language alluded to popular sovereignty as the basis for constitutional authority, even as the tendency of equating the legislature with the people came under increasing criticism.

Those statements have been discounted because the legislators were not specially elected to constitutional conventions.[138] Scholars have not appreciated the widespread public consultation preceding the first wave of American constitution-making. All but two states whose legislatures framed early constitutions did so after elections held in anticipation of future constitution-making.[139] Even Massachusetts—which pioneered the traditional means of constitution-making (that is, by a convention followed by popular ratification)—legislatively created a constitution after asking and receiving special voter authorization.[140] A few dissenting Massachusetts towns eventually simulated specially elected constitutional conventions.[141] The use of conventions in Massachusetts, however, "originated" in "mistrust" of

135. *See* ADAMS, *supra* note 19, at 64.

136. *See* Goldstein, *supra* note 122, at 51, 59. Willi Paul Adams recognizes this awareness in those drafters who "stressed . . . the representative character of the assembly" that placed the constitutions in force. *Id.* At the same time, however, he infers that those constitution-makers failed to appreciate the distinction between ordinary and constitutional law. In noting the legislative creation of South Carolina's 1788 Constitution, Adams concludes, "Once again, a state constitution had been treated as no more than a series of laws." *Id.* at 72.

137. N.Y. CONST. of 1777, preamble, *reprinted in* 7 SWINDLER, *supra* note 119, at 168-72. Similarly, Pennsylvania's legislators, in drafting its first constitution, described themselves as "the representatives of the freemen of Pennsylvania, in general convention met, for the express purpose" of framing a government. PA. CONST. of 1776, preamble, *reprinted in* 8 SWINDLER, *supra* note 119, at 277. They justified promulgating the constitution "by virtue of the authority vested" in them by their constituents.

138. Thus, while conceding that New Hampshire's Legislature had claimed the people's authority to make a constitution, Willi Paul Adams stresses the fact that their preamble "was phrased in the form typical of a parliamentary resolution." ADAMS, *supra* note 19, at 64, 69. When legislatures suggested the desirability of a convention to draft a constitution, Adams characterizes them as having anticipated "a great step forward in the practical development of modern constitutionalism." *Id.* at 75.

139. *See id.* at 68-93. Only Virginia and New Jersey were the exceptions within the eleven constitution-making states between 1776 and 1780.

140. *See id.* at 90.

141. *See id.*

the legislature rather than in a perceived requirement of popular sovereignty.[142] Likewise, part of the reason for using a special convention to frame Pennsylvania's 1776 Constitution came from a suspicion that the legislature did not represent the true revolutionary sentiments of Pennsylvanians.

Not all of the demand for conventions can be attributed to doubts about how solidly the legislatures supported the cause of independence. Some Americans apparently resisted the legislative creation of constitutions because they distinguished between constitutions and statutes.[143] Nonetheless, many of the first constitution-makers were not confused about the nature of the proper source of a constitution, even if they failed to employ what became the standard mechanism for its creation, the constitutional convention.[144]

An examination of the early demands for special conventions to draft constitutions reveals the people's concern that constitutions should operate as fundamental law. The best known resistance to legislatively created constitutions emerged in Massachusetts in 1776 when several towns rejected that approach, which was proposed and

142. *Id.* at 64-65.

143. *See* Williams, *supra* note 45, at 552, 566. Adams implies it was half the solution for a "true constitutional convention." ADAMS, *supra* note 19, at 79-80, 92.

An anonymous Philadelphia pamphlet in 1776 did declare that conventions "are the only proper bodies to form a Constitution, and Assemblies are the proper bodies to make Laws agreeable to that constitution." *See The Alarm: or, an Address to the People of Pennsylvania on the Late Resolve of Congress, reprinted in* 1 AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA, 1768-1805, at 321, 326 (Charles S. Hyneman & Donald S. Lutz eds., 1983). The basis for the call for a convention, however, primarily rested on the fact the author did not see the present legislature as possessing "the entire confidence of the people." *Id.* at 325. The current legislature was not the "proper body" to make a constitution because it suffered from a series of "disqualification[s], inconsistencies, prejudices, and private interests." *Id.* at 327. Indeed, the common trait of the framers and supporters of the 1776 Pennsylvania Constitution was their status as political outsiders: "Those men, their fathers, and the communities in which they had grown to maturity had been firmly excluded from political power." Ryerson, *supra* note 29, at 99. As such, they hardly felt a close affinity with the existing body that wielded legislative authority.

144. Peter S. Onuf, *State-Making in Revolutionary America: Independent Vermont as a Case Study*, 67 J. AM. HIST. 797, 813 (1981) (stating that one of the "hallmarks of American constitutional development" was the process of identifying "legitimate, constituent authority with the conventions themselves and to grant constitutional as well as temporal priority to these extra legal, supra legal, and temporary organizations").

Gordon Wood writes that Americans experienced "confusion" during the revolutionary period over creating fundamental law, eventually solving this problem by adopting Jefferson's assertion of a special body to frame a constitution, using the Massachusetts and New Hampshire constitutions as models. Americans groped their way to an understanding of creating fundamental law via a shift from their belief that legislatures were the equivalent of the people to increasing suspicion of legislation and legislators. *See* WOOD, *supra* note 18, at 911-26.

ultimately followed by the legislature.[145] The most explicit objections came from Concord, which in October 1776 asserted that the legislature was not "a Body proper to form & Establish a Constitution."[146] They explained their position as follows:

> [F]irst Because we Conceive that a Constitution in its Proper Idea intends a System of Principles Established to Secure the Subject in the Possession & enjoyment of their Rights and Privileges, against any Encroachment of the Governing Part—2d Because the Same Body that forms a Constitution have of Consequence a power to alter it. 3d Because a Constitution alterable by the Supreme Legislative is no Security at all to the Subject against any Encroachment of the Governing part on any or on all of their Rights & privileges.[147]

Their reasons thus assumed that a constitution framed by the legislature would not be fundamental because the legislature retained the power to change the constitution. That assumption, however, ultimately rested on seeing a clear distinction between the people and "the Governing Part." To the extent the legislature did not represent the people, they could hardly invest a constitution with the fundamental status that came from sovereignty. Concerns about the representativeness of the legislature were clearly evident in Massachusetts: the principal objection to the constitution produced by the legislature, for instance, was not its failure to employ a convention, but a perceived malapportionment of the house of representatives.[148]

Thomas Jefferson's criticism of Virginia's 1776 Constitution likewise stemmed from a belief that it did not represent the will of the people. He objected that "no special authority had been delegated by the people to form a permanent constitution," and the convention delegates drafting it "had been elected for the ordinary purposes of legislation only, and at a time when the establishment of a new government had not been proposed or contemplated."[149] What dis-

145. *See* ADAMS, *supra* note 19, at 87-91; Cella, *supra* note 125, at 988-90; Reardon, *supra* note 125, at 50.

146. MASSACHUSETTS, COLONY TO COMMONWEALTH: DOCUMENTS ON THE FORMATION OF ITS CONSTITUTION, 1775-1780, at 44 (Robert J. Taylor ed., 1961) [hereinafter COLONY TO COMMONWEALTH].

147. *Id.* at 45.

148. *See* ADAMS, *supra* note 19, at 91.

149. Letter from Thomas Jefferson to John Hambden Pleasant (April 19, 1824), *in* 10 THE WORKS OF THOMAS JEFFERSON, *supra* note 28, at 302, *quoted in* A.E. Dick Howard, *"For the Common Benefit": Constitutional History in Virginia as a Casebook for the Modern Constitution-Maker,* 54 VA. L. REV. 816, 837 (1968); *see also* PETERSON, *supra* note 113, at 4.

When the legitimacy of New Jersey's 1776 Constitution was challenged in 1802 as not having been popularly ratified, the court likewise noted the lack of a mandate to the legis-

turbed Jefferson more than the absence of popular ratification was that the drafters did not clearly identify the distinctive nature of constitutional law. He expressed the same concerns with respect to the "dangerous doctrine" that the people's acquiescence was sufficient to overcome the absence of authority to frame a constitution in the first place.[150]

B. Must Constitutions Be Popularly Ratified?

Just as scholars argue that legislatively created constitutions cannot be regarded as "true" constitutions, they regard early constitutions as flawed because they lacked popular ratification.[151] However, focusing on the central importance American constitution-makers placed on the source of constitutional law rather than on the need for popular ratification resolves this perceived deficiency. If the paramount authority of constitutions was derived from popular sovereignty, then formal ratification was unnecessary to the extent that constitution-makers embodied the people in their primary capacity. Popular ratification remained consistent with the underlying principle of popular sovereignty because ratification implied the validation of the people who were the ultimate source of political authority. Nonetheless, Americans could and would continue to create constitutions without requiring ratification well into the nineteenth century, and could arguably do so without violating the principle of popular sovereignty. Thus, in the manner in which they invoked the power of the people and described themselves as the people assembled, the constitution-making legislatures responded to the central truth of the Revolution. The practice of legislatures claiming to speak as the people stemmed from a colonial pattern in which popularly elected assemblies took the side of the people in struggles against the colonial

lature to form a constitution, but concluded that the acquiescence by the people resolved the issue. *See* State v. Parkhurst, 9 N.J.L. (4 Halsted) 427 (decided in 1802, but reported in 1828); *see also* ROBERT F. WILLIAMS, THE CONSTITUTIONAL HISTORY OF NEW JERSEY: A REFERENCE GUIDE 5 (1990).

150. *See* Howard, *supra* note 149, at 837.

151. In noting that only 5 of 28 constitutions drafted between 1776 and 1800 had been formally ratified, Donald Lutz concludes Americans were "still groping for the full implications of the distinction" between ordinary and constitutional law by 1800. LUTZ, *supra* note 10, at 83. Many scholars argue that the assumption of popular ratification was integral to proper American constitutionalism. *See* BERNSTEIN & AGEL, *supra* note 120, at 8; CONKIN, *supra* note 15, at 59; LEVY, *supra* note 139, at 295-98; Donald S. Lutz, *From Covenant to Constitution in American Political Thought*, 10 PUBLIUS 101, 121 (1980); John V. Orth, *"Fundamental Principles" in North Carolina Constitutional History*, 69 N.C.L.REV. 1357, 1358 (1969); WOOD, *supra* note 24, at 924.

governors and the King's ministers.[152] With legislatures often perceived as "the people assembled" and not as the "government," it seemed unnecessary to use special conventions.[153]

Despite the frequent creation of constitutions without special conventions during the revolutionary period, some of those initial constitutions incorporated indirect ratification practices that later became standardized. Practices that fell short of formal ratification provide additional, neglected evidence of an early understanding of popular sovereignty that distinguished between ordinary and constitutional law. In Pennsylvania's 1776 Constitution, for example, proposed constitutional amendments required publication for six months before a second convention could ratify them.[154] Thus, even without direct ratification, the people were consulted. Seeking and receiving input from the people apparently satisfied the principle of popular sovereignty. The six-month period provided "for the previous consideration of the people, that they may have an opportunity of instructing their delegates on the subject."[155] Such instruction identified the people as the source of popular authority, a point that that constitution underscored by requiring even ordinary legislation to undergo two successive votes by the legislature.[156]

A second means of indirect popular ratification surfaced in Maryland's 1776 Constitution. That constitution provided for constitu-

152. *See* BERNARD BAILYN, THE ORIGINS OF AMERICAN POLITICS (1968); JACK P. GREENE, THE QUEST FOR POWER: THE LOWER HOUSES OF ASSEMBLY IN THE SOUTHERN ROYAL COLONIES, 1689-1776 (1963); LUTZ, *supra* note 55, at 152.

153. LUTZ, *supra* note 55, at 152 (agreeing with Wood's argument in *The Creation of the American Republic*).

154. *See* PA. CONST. of 1776, § 47, *reprinted in* 8 SWINDLER, *supra* note 119, at 285.

155. *Id.*

156. *See id.* at § 15, *reprinted in* 8 SWINDLER, *supra* note 119, at 281. This feature of the "radical" constitution received particular criticism; a North Carolina constitution-maker in 1776 called it a "'washing in ordure by way of purification.'" Elisha P. Douglass, *Thomas Burke, Disillusioned Democrat*, 26 N.C. HIST. REV. 150, 158 (1950) (quoting Letter from William Hooper to Samuel Johnson (Sept. 1776)).

Even if Pennsylvania took the principle of consultation with the people to an extreme by incorporating it into the process of ordinary lawmaking, other American constitutions routinely allowed constitutional amendments after successive votes of the legislature. *See* S.C. CONST. of 1790, *reprinted in* 8 SWINDLER, *supra* note 119, at 476; DEL. CONST. of 1792, *reprinted in* 2 SWINDLER, *supra* note 119, at 205; GA. CONST. of 1798, *reprinted in* 2 SWINDLER, *supra* note 119, at 452. Even later in the nineteenth century, as the practice of formal ratification grew more commonplace, state constitutions perpetuated a practice of legislative constitutional amendment. *See* MO. CONST. of 1820, art. XII, *reprinted in* 5 SWINDLER, *supra* note 119, at 487; ARK. CONST. of 1836, art. IV, § 35, *reprinted in* 1 SWINDLER, *supra* note 119, at 344; FLA. CONST. of 1838, art. XIV, § 2, *reprinted in* 2 SWINDLER, *supra* note 119, at 328.

tional change after successive votes by the state legislature.[157] The interim period between legislative sessions allowed the people to consider and convey their reactions dealing with the suggested change.[158] Thereafter, the vote by the second legislature provided constitutional validation.[159] Once again, such a process recognized that the people remained the ultimate source of constitutional will, even if their direct action was unnecessary to finalize constitutional change. Moreover, Maryland's 1776 Constitution offered further proof of an early distinction between ordinary and constitutional law. Its bill of rights specifically stated that constitutional changes could not be made by the legislature, but only in accordance with the revision procedures.[160] This language suggested the perception that use of successive votes by the legislature to change the constitution was not merely "legislative" action. Rather, it legitimately brought about constitutional change through the necessary, if indirect, involvement of the people.

Even the earliest calls for direct popular ratification reflect a concern with linking constitutions to the source from which they drew their fundamental power. From the start of the Revolution, some Americans clearly drew a connection between the necessity of consultation and popular sovereignty. A petition to the Massachusetts Legislature from the town of Pittsfield in 1776 claimed "the basic right of the citizenry to pass upon new constitutions."[161] The petition, written by Reverend Thomas Allen, asserted:

> We . . . have always been persuaded that the people are the fountain of power . . . . That the Approbation of the Majority of the people of this fundamental Constitution is absolutely necessary to give Life and being to it . . . . That a Representative Body may form, but cannot impose said fundamental Constitution upon a people. They being but servants of the people cannot be greater than their Masters, & must be responsible to them. If this fundamental Constitution is above the whole Legislature, the Legislature cannot certainly make it, it must be the Approbation of the Majority which gives Life & being to it.[162]

157. *See* MD. CONST. of 1776, § 59, *reprinted in* 4 SWINDLER, *supra* note 119, at 383.

158. *See id.*

159. *See id.* This mechanism for making constitutional amendments has a modern analog: Delaware's present constitution permits amendments after two successive legislative votes without popular ratification. *See* Opinion of the Justices, 264 A.2d 342 (Del. 1970).

160. *See* MD. DECLARATION OF RIGHTS of 1776, § 42, *reprinted in* 4 SWINDLER, *supra* note 119, at 375.

161. Reardon, *supra* note 125, at 49.

162. COLONY TO COMMONWEALTH, *supra* note 146, at 27-28. The town of Lexington also petitioned for ratification. *See* THE POPULAR SOURCES OF POLITICAL AUTHORITY: DOCUMENTS ON THE MASSACHUSETTS CONSTITUTION OF 1780, at 149-51 (Oscar Handlin & Mary Handlin eds., 1966) [hereinafter POPULAR SOURCES].

While Massachusetts pioneered such expressions, Americans elsewhere also desired some form of popular ratification or consultation with the people. New York City mechanics in 1776 protested a proposal for framing a constitution without ratification by the voters, declaring that "[i]nhabitants at large exercise the right which God has given them, in common with all men, to judge whether it be consistent with their interest to accept, or reject, a Constitution framed for that State of which they are members."[163] Moreover, the voters of two North Carolina counties explicitly instructed their legislators to submit the constitution to be drafted by the legislature, to the people "that it may derive its force from the principal supreme power."[164]

Implicitly underlying these calls for popular ratification, however, was a desire to recognize what gave constitutions their paramount authority. In the words of Reverend Allen, if the constitution was "above" the legislature, the people—through ratification—had to breath "life" into fundamental law. The reason the legislature could not "make" a constitution in Massachusetts owed less to the fact that the constitution would subsequently control the legislature than the fact that the legislature was not viewed as the people assembled for the purpose of creating a constitution.[165] Ratification simply recognized that constitutional law stemmed from the people in their sovereign capacity. Popular sovereignty lay at the heart of American constitution-making, not the practice of popular ratification. Notwithstanding a few early objections, it was possible to accept constitutions as fundamental even if they lacked ratification and, initially at least, were produced without special constitutional conventions.

Eventually, mounting criticism similar to that of Reverend Allen and increasing suspicion of legislation and legislators prompted the use of conventions as the appropriate method of wielding the "constituent power" of the people.[166] As the natural identity between the

163. Staughton Lynd, *The Mechanics in New York Politics, 1774-1788*, 5 LAB. HIST. 225, 231 (1964); *see also* BERNARD MASON, THE ROAD TO INDEPENDENCE: THE REVOLUTIONARY MOVEMENT IN NEW YORK, 1773-1777, at 155-59 (1966).

164. *See* 10 THE COLONIAL RECORDS OF NORTH CAROLINA, *supra* note 127, at 870d, 870g; DOUGLASS, *supra* note 34, at 125-29.

165. An analyst of the Pittsfield petition has pointed out that the petitioners asserted that "although the General Court [the legislature] could form a constitution, the legislators could not 'impose said fundamental Constitution upon a people.'" Cella, *supra* note 125, at 988. The crucial issue was perceiving "legislators" as essentially different from the people.

166. In describing how Americans came to understand the creation of fundamental law, Gordon Wood describes the shift from believing legislatures were the equivalent of the people to the increasing suspicion of legislation and legislators. *See* WOOD, *supra* note 21, at 223-24. To the extent that an equivalency between the legislatures and the people be-

legislatures and the people diminished, expectations for the employment of constitutional conventions grew. To some extent, conventions gained what the legislature lost. The transition, however, represented more than merely the transfer of trust and faith from one body to the next. Along with a shift in confidence came a growing awareness of the significance of the convention and its role in American republican government. Conventions eventually symbolized the exercise of the sovereign power as well as the only legitimate means of founding a republican government. To the extent that conventions now viewed themselves as the embodiment of the people, they proceeded in the nineteenth century to promulgate constitutions or constitutional amendments consistent with the principle of popular sovereignty. Indeed, one commentator has described James Madison's position in *The Federalist Papers* as providing authority for a view of conventions as the "perfect substitutes for *the people themselves*."[167]

C. Which People Could Create and Revise Constitutions?

Acknowledging that the people were sovereign raised another issue of early constitution-making: Who were "the people" who could create or revise constitutions? In states that had formerly been colonies, the pre-existing political body provided a natural continuity. However, constitution-making in areas that had not been original colonies directly raised this question. Vermont's experience illustrated the challenge in identifying who was entitled to invoke popular sovereignty. In 1776, the Continental Congress recommended that the colonies reorganize their governments solely on the basis of "the authority of the people."[168] Settlers in the area that is now Vermont responded by proclaiming their right to become an independent state from territory jointly claimed by New Hampshire and New York. In so doing, they asserted popular sovereignty to justify framing a constitution in 1777, citing both the Declaration of Independence and the 1776 congressional resolution. Numerous other separatist movements

came increasingly problematic, Gerald Stourzh identifies written constitutions as acquiring authority and legitimacy through "the *dissociation* of legislature and sovereign power" and the "institutionalization of the constituent power of the people." Gerald Stourzh, *Fundamental Laws and Individual Rights in the 18th Century Constitution*, *in* 5 BICENTENNIAL ESSAY 17, 18 (1984); *see also* ADAMS, *supra* note 19, at 65; 122; LUTZ, *supra* note 55, at 152; WOOD, *supra* note 21, at 306-25, 336-38; Goldstein, *supra* note 138, at 51, 61.

167. ACKERMAN, *supra* note 96, at 177-78.

168. ADAMS, *supra* note 19, at 59-62.

also justified their claims for statehood on the principle of popular sovereignty.[169]

The framework for creating new states initially emerged in the Northwest Ordinance of 1787.[170] Only with Ohio in 1802, however, did Congress establish its model for creating new states. Before then, new states had drafted constitutions without formal congressional authorization.[171] Although congressional enabling acts emerged as a presumptive prerequisite to the formation of constitutions, it hardly became a uniform practice.[172] Indeed, states entering the union in the nineteenth century formed their constitutions as often without explicit congressional consent as they did under congressional enabling acts. That pattern reflected the continuing dynamic of self-determination and popular sovereignty.

However illusive, "the people" was not a mere mythical concept. Rather, popular sovereignty formed the actual basis of republican governments and political action.[173] But even scholars who recognize the centrality of popular sovereignty in American constitution-making have tended to regard popular sovereignty as a fiction or an illusion.[174] This judgment rests on the legacy of the amendment provi-

169. *See* ONUF, *supra* note 3, at 24, 34-35, 63, 65-66.

170. For the Northwest Ordinance generally, see THE NORTHWEST ORDINANCE: ESSAYS ON ITS FORMULATION, PROVISIONS, AND LEGACY (Frederick D. Williams ed., 1989); PETER S. ONUF, STATEHOOD AND UNION: A HISTORY OF THE NORTHWEST ORDINANCE (1987); Arthur Bestor, *Constitutionalism and the Settlement of the West: The Attainment of Consensus, 1754-1784*, *in* THE AMERICAN TERRITORIAL SYSTEM 13, 13-15 (John Porter Bloom ed., 1973); Denis P. Duffey, *The Northwest Ordinance as a Constitutional Document*, 95 COLUM. L. REV. 929 (1995).

171. See, for example, the experiences of Vermont in 1777 and Kentucky in 1792.

172. *See* GORDON M. BAKKEN, ROCKY MOUNTAIN CONSTITUTION MAKING, 1850-1912, at 5 (1987); Dennison, *supra* note 95, at 19-40.

173. *See* MORGAN, *supra* note 13, at 281-84, 306; PETERS, *supra* note 65, at 44-45; RODGERS, *supra* note 20, at 3-11, 13-14. James Wilson's opinion in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), prophetically noted the tendency to confuse the basis of American governments-a sovereign people-with discussions of sovereignty that entailed the state or government. He pointed out that basing the American Revolution on popular sovereignty represented a rejection of the British theory of government, under which, in "legal contemplation," the people "totally disappear." *Id.* at 462. Despite the acceptance of the foundational principle of popular sovereignty, Wilson lamented the political incorrectness of the term the "United States" instead of the "People of the United States":

> The States, rather than the people, for whose sakes the States exist, are frequently the objects which attract and arrest our principal attention. This, I believe, has produced much of the confusion and perplexity, which have appeared in several proceedings and several publications on state politics, and on the politics too, of the United States.

Id.

174. *See* MORGAN, *supra* note 13; MOSTOV, *supra* note 11, at 60-76; ONUF, *supra* note 3, at 38; Miller, *supra* note 4, at 99-119. Gordon Wood recognizes the reality that popular

sions of the Federal Constitution and its tradition of judicial constitutional adjustments in lieu of formal constitutional revision. This historical confinement of "the people" in any practical sense with respect to the Federal Constitution has also led scholars to discount popular sovereignty statements in state constitutions as meaningless or merely rhetorical.[175]

But experiences with popular sovereignty at the level of state constitution-making proved significantly different from those at the federal level. The situation of the Vermont settlers posed the issue of creating an independent political entity based on popular sovereignty for the first time since the colonial conflict with Britain.[176] Yet, the domestic possibilities for constitution-making as a means of substantiating such claims for recognition were only beginning.[177] By 1782, one observer lamented the "epidemic . . . Spirit of making new States."[178]

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sovereignty had for some Americans after the Revolution, but concludes that such a vision lost its efficacy as a constitutional idea with a transformation in thought about politics and constitutions by the late 1780s. *See* WOOD, *supra* note 21, at 344-89, 593-615. As early as 1919, Harold J. Laski described popular sovereignty as an "impossible fiction" if it meant "that the whole people is, in all but executive detail, to govern itself." Harold J. Laski, *The Theory of Popular Sovereignty,* 17 MICH. L. REV. 201, 204 (1919).

175. *See, e.g.*, SUBER, *supra* note 27, at 225-32.

176. *See* ONUF, *supra* note 3, at 127-45. "According to the emerging standards of American constitutionalism, Vermont's claims to self-government became increasingly credible. The 'right' was not derived from history or higher authority; it came from its own constitution." *Id.* at 143.

177. Maine's efforts at independence from Massachusetts raised this issue. The movement for separation, of course, faced a range of political objections from the Massachusetts Legislature. In addition, the separatists were confronted with identifying a discrete "people" justified in invoking popular sovereignty to create an independent status. Unlike Massachusetts, Maine had to rest its claims exclusively on the basis of popular sovereignty. One Maine separatist asserted that "the people alone have an incontestible, unalienable, and indefeasible right to institute governments, and to reform, alter, or totally change the same." ONUF, *supra* note 3, at 29; *see also* JOHN D. BARNHART, VALLEY OF DEMOCRACY: THE FRONTIER VERSUS THE PLANTATION IN THE OHIO VALLEY, 1775-1818, at 45-65 (1953); MARSHALL J. TINKLE, THE CONSTITUTIONAL HISTORY OF MAINE: A REFERENCE GUIDE 1-2 (1992); Harry B. Virgin, *The Constitutional Convention of 1819, in* 2 COLLECTIONS OF THE MAINE HISTORICAL SOCIETY 416 (1906).

Maine also illustrates the wide variety of ways a people capable of self-government and establishing constitutions could be recognized. Maine eventually drafted its constitution after Massachusetts released its claims on that region. Thus, the convention that drafted the Constitution of 1819 met under a statute passed by the Massachusetts legislature rather than a congressional enabling act. The issue of Maine's separation from Massachusetts had generated discussions and conventions for more than thirty years before the achievement of statehood in 1819. Indeed, a convention in 1786 had urged separation, arguing that government "is a very simple, easy thing" and would secure "the good of the people: and the blessings of life." *Id.* at 418.

178. ONUF, *supra* note 3, at 36 (quoting Letter from Hugh Williamson to Governor Martin (Nov. 18, 1782)).

Not all the efforts to invoke the constituent power of the people to create constitutions proved successful. One such ill-fated endeavor took place in the Monongahela River valley, west of the Appalachians in a region claimed both by Pennsylvania and Virginia soon after the Revolution. Settlers in that area petitioned for recognition by the Continental Congress in 1776 as the state of "Westsylvania."[179] Essentially, they claimed that being remote from the seat of government undermined their rights as a free people. Moreover, "having imbibed the highest and most extensive Ideas of Liberty," they claimed they possessed the right to establish a constitution and state responsive to their needs.[180] In the end, Congress simply ignored their petition and the area later became part of Augusta County in Virginia.

Another trans-Appalachian effort to form a new state arose in an area claimed by North Carolina in what is now Tennessee. Settlers in that area also justified their need for separation by their isolation, in this case, from North Carolina's government. In 1784, settlers drafted a declaration of independence and a constitution for a proposed state of "Franklin" that largely drew from the existing North Carolina constitution. The declaration asserted that since the preservation of life, liberty, property, and happiness hinged on separation, they had the "duty and inalienable right" to form themselves into a new and independent state.[181] They articulated the source of the authority for their actions in the first section of their bill of rights: "That all political power is vested in and derived from the people."[182] Interestingly, the convention submitted the constitution for the "serious consideration of the people" for six months.[183] Thereafter, another convention would gather for the "express purpose of adopting it in the name of the people."[184] Even in this constitution, which ultimately came to naught because Congress chose not to undermine North Carolina's claims, the constitution-makers identified themselves as embodying the people. That self-perception proved easier to sustain when the people could express their wishes or even send delegates to a second convention.

179. *See* ADAMS, *supra* note 19, at 94; BARNHART, *supra* note 177, at 49-51.

180. GEORGE H. ALDEN, NEW GOVERNMENTS WEST OF THE ALLEGHANIES BEFORE 1780, at 66 (Madison, Wis., 1897).

181. 9 SWINDLER, *supra* note 119, at 127; *see also* THOMAS P. ABERNETHY, WESTERN LANDS AND THE AMERICAN REVOLUTION 288-310 (1937); BARNHART, *supra* note 177, at 61-65; WILLIAM BREWSTER, THE FOURTEENTH COMMONWEALTHS: VERMONT AND THE STATES THAT FAILED 175-218 (1960).

182. 9 SWINDLER, *supra* note 119, at 128.

183. *Id.* at 135.

184. *Id.*

The future admission of states into the Union, particularly from the western frontier, clearly posed both ticklish political questions as well as new constitutional definitions of "the people" in the process of drafting constitutions.[185] Congress, prompted by the early clamor for new states independent of the original colonies, sought to address the issue in 1787 with the Northwest Ordinance.[186] The Ordinance sought to quantify *when* people became a people. Congress decreed that 5,000 adult free men in a given territory had a valid claim to elect a legislature.[187] Moreover, such a territory could apply for statehood and "be at liberty to form a permanent constitution and state government" when its inhabitants numbered 60,000.[188] Congress granted an exception for territories with less than 60,000 inhabitants if "consistent with the general interests" of the country.[189]

Even in states whose prior colonial status avoided the necessity of identifying where "a people" came from, they still needed to decide which of the people could exercise popular control. Eighteenth century Americans were familiar with the classical distinction between a people (who shared in the moral life of the community) and a public (who participated in governance). Early constitution-makers often associated "the people" with the electorate for purposes of constitution-making, although they sometimes expanded that definition significantly beyond eligible voters.[190] Even if defined as the voters, a secondary question surfaced as to how many voters were needed to speak for "the people." Did a simple numerical majority of the voters constitute the voice of the people or should numbers be balanced by other values, such as property interests? The divisive issue of majoritarianism—a debate that only fully emerged in the nineteenth cen-

185. *See* ADAMS, *supra* note 19, at 96; Dennison, *supra* note 95.

186. *See supra* note 170.

187. *See* FREDERICK E. HOSEN, UNFOLDING WESTWARD IN TREATY AND LAW: LAND DOCUMENTS IN UNITED STATES HISTORY FROM THE APPALACHIANS TO THE PACIFIC, 1783-1934, at 37 (1988). For an in-depth study of territorial constitution-making, see John W. Smurr, Territorial Constitutions: A Legal History of the Frontier Governments Erected by Congress in the American West, 1787-1900 (1960) (unpublished Ph.D. dissertation, Indiana University).

188. HOSEN, *supra* note 187, at 37.

189. *Id.* at 40.

190. *See* CONKIN, *supra* note 11, at 60; Cella, *supra* note 125, at 996; Schmidt, *supra* note 120, at 64; Taylor, *supra* note 126, at 321, 345; *see also* Donald S. Lutz, *Political Participation in Eighteenth Century America*, *in* TOWARD A USABLE PAST 19 (Paul Finkelman & Stephen E. Gottlieb eds., 1991); Robert J. Steinfeld, *Property and Suffrage in the Early American Republic*, 41 STAN. L. REV. 335 (1989).

tury—thus began to manifest itself in the eighteenth century in deciding who the people were.[191]

D. How Should Constitutional Change Occur?

Another issue also made its appearance in the course of early constitution-making: How could constitutional change occur? More specifically, did the people have an inherent right to make changes? Related to the manner and source of constitutional revision were the issues of the frequency and ease of revision.

Those who favored a more expansive view of popular sovereignty insisted on the inherent right of the people to revise constitutions and often referred to phrases advocating popular sovereignty that had been included in many early bills of rights. Such statements had been expressed previously and more famously by Thomas Jefferson in the Declaration of Independence, where he wrote that the people had an inalienable right "to alter or to abolish" their governments whenever they become destructive of their legitimate ends. Jefferson's words were characterized as an assertion of the people's right of revolution based on natural law because they called the people to action in defense of their inalienable rights. Whatever the intellectual sources of the Declaration of Independence,[192] the people's right to take action was definitively cast in that document as the last ditch effort of an oppressed people—the way Americans saw themselves in 1776.

Scholars have been led astray by assuming that statements of popular sovereignty often inserted in eighteenth and nineteenth century state constitutions were essentially comparable to the right of revolution enunciated by Jefferson.[193] From the start, American con-

191. *See* ADAMS, *supra* note 19, at 134; GLENN A. PHELPS, GEORGE WASHINGTON AND AMERICAN CONSTITUTIONALISM 133-34 (1993); Sung Hui Kim, *"We (the Supermajority of) the People": The Development of a Rationale for Written Higher Law in North American Constitutions*, 137 PROC. AM. PHIL. SOC'Y 364 (1993); William E. Nelson, *The Eighteenth Century Constitution As a Basis for Protecting Personal Liberty*, *in* CONSTITUTION AND RIGHTS IN THE EARLY REPUBLIC 48 (William E. Nelson & Robert C. Palmer eds., 1987).

192. The intellectual origins of Jefferson's Declaration have frequently been linked to John Locke. *See* CARL BECKER, THE DECLARATION OF INDEPENDENCE: A STUDY IN THE HISTORY OF IDEAS (1922); MOSTOV, *supra* note 11, at 67; Goldstein, *supra* note 122, at 51, 57 Even those who challenge the Lockean influence on Jefferson describe his invocation of the people's right "to alter or to abolish" as a "natural right of revolution" deriving from the precedent of England's Glorious Revolution of 1688. GARRY WILLS, INVENTING AMERICA: JEFFERSON'S DECLARATION OF INDEPENDENCE 89, 238 (1978).

193. *See* SUBER, *supra* note 27, at 228-31; Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 YALE L.J. 907 (1993); Michael J. Horan, *The Wyoming Constitution: A Centennial Assessment*, 26 LAND & WATER L. REV. 13, 20 (1991); Joseph W. Little & Steven E. Lohr, *Textual History of the Florida Declaration of Rights*, 22

stitution-makers invariably acknowledged the right of the sovereign people of a state to invoke revolution. But they also began to lay the foundation for a constitutional right of revision possessed by the people that did not require a pre-condition of near revolutionary crisis. Indeed, earlier political thinkers who exerted great influence in America advocated non-Lockean formulations of popular sovereignty that clearly invited the possibility of more routine reconsideration of the governmental structure.[194] Such a right would later be characterized as a constitutional right unique to Americans. All peoples had the natural right of revolution, but only Americans possessed the inherent right of legitimate constitutional revision that rested on the popular sovereignty that formed the basis of American republics.[195]

The version of popular sovereignty that evolved in state constitutions clearly expanded the basis upon which the people could act and impliedly gave support for a wide-range of options for doing so. Some of the earliest state constitutions partially echoed the pre-conditions for action suggested by the Declaration of Independence. For example, Virginia's 1776 Constitution spoke of the people's rights when government proved "inadequate" or acted "contrary" to its rightful purposes.[196] Moreover, Maryland's 1776 Constitution identified the people's right to reform "whenever the ends of government are perverted, and public liberty manifestly endangered, and all other means

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STETSON L. REV. 549 (1993); Tom N. McInnis, *Natural Law and the Revolutionary State Constitutions*, 14 LEGAL STUD. F. 351 (1990); Arvel Ponton III, *Sources of Liberty in the Texas Bill of Rights*, 20 ST. MARY'S L.J. 93, 95, 102-03 (1988); Lawrence Schlam, *State Constitutional Amending, Independent Interpretation, and Political Culture: A Case Study in Constitutional Stagnation*, 43 DEPAUL L. REV. 269, 337 n.238 (1994); Torke, *supra* note 27, at 241-43.

194. For example, Algernon Sidney argued that the exercise of popular sovereignty always provided the people with a right to change the governmental form in accordance with changes of "times and things" and to "meet when and where, and dispose of sovereignty as they will." CONKIN, *supra* note 11, at 21. Moreover, in the Putney Debates (Oct. 28, 1647), one speaker presumed "'that all the people, and all nations whatsoever, have a liberty and power to alter and change their constitutions if they find them to be weak and infirm.'" Stephen Holmes, *Precommitment and the Paradox of Democracy*, *in* CONSTITUTIONALISM AND DEMOCRACY 195, 199 (Jon Elster & Rune Slagstad eds., 1988). For the impact of Algernon Sidney among revolutionary and subsequent generations of Americans, particularly those inclined to be a "radical, rebel, or revolutionary," see Caroline Robbins, *Algernon Sidney's Discourses Concerning Government: Textbook of Revolution*, 4 WM. & MARY Q. 267, 295 (1947).

195. Delegates came to call this "the great American doctrine." 2 OFFICIAL REPORT OF THE DEBATES AND PROCEEDINGS IN THE STATE CONVENTION, ASSEMBLED MAY 4, 1853, TO REVISE AND AMEND THE CONSTITUTION OF THE COMMONWEALTH OF MASSACHUSETTS 138 (Boston, White & Potter 1853).

196. VA. CONST. of 1776, bill of rights, § 3, *reprinted in* 10 SWINDLER, *supra* note 119, at 49.

of redress are ineffectual."[197] Relatively soon, however, state constitutions typically incorporated language that justified constitutional revision on less urgent grounds. For example, Massachusetts's 1780 Constitution declared the people's right "to reform, alter, or totally change" government whenever the people's "protection, safety, prosperity, and happiness require it."[198] Delaware's 1792 Constitution anticipated that the people, in order "to advance their happiness," would change their government "as circumstances require, from time to time."[199]

Increasingly, as new states were formed and new constitutions framed in the early nineteenth century, bills of rights announced the people's right "at all times" to alter, reform or abolish their governments.[200] This linguistic shift clearly signaled an expectation that constitutional change remained in the hands of the people without the necessity of dire circumstances that underlay the American Revolution. Moreover, it marked a distinct contrast from the Federal Constitution's structural impediments to constitutional change. Although many constitution-makers were split over the prospect of the ease of constitutional reform, by the 1820s pressure had mounted for institutionalizing the right of ongoing constitutional revision. The manifestation of that pressure took the form of a widespread trend in constitutional conventions to include constitutional amendment provisions in constitutions drafted or revised in the 1820s and 1830s.

If state constitutions from the revolutionary period demonstrated an expanding basis for constitutional change, they had also suggested a broad means of doing so. The concept of an inherent right of revision had implied, from the start of American constitution-making, that

197. MD. CONST. of 1776, art. IV, *reprinted in* 4 SWINDLER, *supra* note 119, at 372. Even Maryland's constitution, however, emphasized that those in government were public servants only holding power as trustees of the people and urged nonresistance to arbitrary government and oppression.

198. MASS. CONST. of 1780, declaration of rights, art. VII, *reprinted in* 5 SWINDLER, *supra* note 119, at 94.

199. DEL. CONST. of 1792, preamble, *reprinted in* 2 SWINDLER, *supra* note 119, at 205.

200. *See, e.g.*, OHIO CONST. of 1802, art. VIII, § 1, *reprinted in* 7 SWINDLER, *supra* note 119, at 553; IND. CONST. of 1816, art. I, § 2, *reprinted in* 3 SWINDLER, *supra* note 119, at 365; MISS. CONST. of 1817, art. I, § 2, *reprinted in* 5 SWINDLER, *supra* note 119, at 348; CONN. CONST. of 1818, art. I, § 2, *reprinted in* 2 SWINDLER, *supra* note 119, at 144; ALA. CONST. of 1819, art. I, § 2, *reprinted in* 1 SWINDLER, *supra* note 119, at 31. Note also that Maine's 1819 Constitution spoke of allowing the people's right to revise "when their safety and happiness require it." ME. CONST. of 1819, art. I, § 2, *reprinted in* 4 SWINDLER, *supra* note 119, at 314. Missouri's 1820 Constitution spoke in terms of the right "whenever it may be necessary to [the people's] safety and happiness." MO. CONST. of 1820, art. XIII, § 2, *reprinted in* 5 SWINDLER, *supra* note 119, at 487.

even without revision provisions, the people still retained such a right. Moreover, the inherent right arguably left the people with the discretion to bypass such procedures even if articulated in a constitution. Quite often, the inherent right of revision statements in state constitutions ended with language stating the right could be invoked in such manner as the people saw fit.[201]

The logic of the declaration—derived as it was from popular sovereignty—thus suggested to some constitution-makers that the people retained a paramount right to effect constitutional change. James Wilson, in the Pennsylvania ratifying convention for the Federal Constitution, broached this idea by describing the consequences of popular sovereignty in America: "'the people may change the constitution whenever and however they please[, this being] a right of which no positive institution can ever deprive them.'"[202] The congressional debates over the admission of new states from the late eighteenth and the early nineteenth centuries clearly drew upon "the belief that American majorities had the inalienable right to change governments at will."[203] Indeed, by the 1820s, the view became "quite prevalent" that "the people alone had the right to promulgate the organic law."[204]

Those taking a more passive view of popular sovereignty disagreed. They took the position, increasingly elaborated and emphasized in the course of the nineteenth century, that change ought (and perhaps could only) occur within authorized procedures. When their opponents cited the people's right to "alter or abolish" government as justifying unconstrained constitutional revision, they replied that such

201. Virginia's 1776 Constitution declared the right could be invoked "in such manner as shall be judged most conducive to the public weal." VA. CONST. of 1776, bill of rights, § 3, *reprinted in* 10 SWINDLER, *supra* note 119, at 49. Pennsylvania's 1790 Constitution spoke of the people's right to alter their government "in such manner as they may think proper." PA. CONST. of 1790, art. IX, § 2, *reprinted in* 8 SWINDLER, *supra* note 119, at 292. Similar language was found in many other state constitutions. *See* TENN. CONST. of 1796, art. I, § 1, *reprinted in* 9 SWINDLER, *supra* note 119, at 152; KY. CONST. of 1799, art. X, § 2, *reprinted in* 4 SWINDLER, *supra* note 119, at 162; IND. CONST. of 1816, art. I, § 2, *reprinted in* 3 SWINDLER, *supra* note 119, at 365; MISS. CONST. of 1817, art. I, § 2, *reprinted in* 5 SWINDLER, *supra* note 119, at 348; CONN. CONST. of 1818, art. I, § 2, *reprinted in* 2 SWINDLER, *supra* note 119, at 144; ALA. CONST. of 1819, art. I, § 2, *reprinted in* 1 SWINDLER, *supra* note 119, at 31.

202. Amar, *supra* note 73, at 474 (quoting James Wilson).

203. Dennison, *supra* note 95, at 19, 23.

204. GREEN, *supra* note 127, at 203. Indeed, objections were raised to the possibility of a periodic call for constitutional conventions in Indiana's 1816 Constitution on the ground that it impliedly threatened the people's inherent right to call a convention between those times. *See* Ruth E. Brayton, The Constitution of 1816, at 208 (1929) (unpublished M.A. thesis, Indiana University).

language only represented a theoretical statement of popular sovereignty. Moreover, opponents of constitutional change insisted on a pre-condition of dire circumstances and "sought to characterize reform as a revolutionary movement."[205]

Constitution-makers also differed over the benefits and dangers inherent in more frequent revision, and to a lesser extent the relative ease of change. Those embracing a broader view of popular sovereignty advanced the revolutionary principle that the preservation of republican governments required a "frequent recurrence to fundamental principles." American familiarity with the principle came from political thinkers who had posited that "'all human Constitutions are subject to Corruption and must perish, unless they are *timely renewed* by reducing them to their first Principles.'"[206] This injunction

205. Dickson D. Bruce, Jr., *The Conservative Use of History in Early National Virginia*, 19 S. STUD. 128, 134, 138, 145 (1980).

Abraham Lincoln in his first inaugural address epitomized the position for a passive version of popular sovereignty in the context of the Federal Constitution. Lincoln deliberately asserted an either/or choice between revolution and constitutional amendment under Article V. *See* 4 COLLECTED WORKS OF ABRAHAM LINCOLN 269 (Roy P. Basler ed., 1953-1955). Prior to the Civil War, however, Lincoln had expressed a version of the right of revolution not only in more sympathetic terms, but without a pre-condition of dire circumstances. In 1848, in the midst of conflict between the United States and Mexico over Texas, Lincoln asserted:

> Any people anywhere, being inclined and having the power, have the *right* to rise up, and shake off the existing government, and form a new one that suits them better. This is a most valuable,—a most sacred right—a right, which we hope and believe, is to liberate the world. Nor is this right confined to cases in which the whole people of an existing government, may chose to exercise it. Any portion of such people that *can*, *may* revolutionize, and make their *own*, of so much of the territory as they inhabit. More than this, a *majority* of any portion of such people may revolutionize, putting down a *minority*, intermingled with, or near them, who may oppose their movement.

1 *id.* at 438. By the summer of 1861, however, Lincoln's description underwent considerable change.

> The right of revolution, is never a legal right. The very term implied the breaking, and not the abiding by, organic law. At most, it is but a moral right, when exercised for a morally justifiable cause. When exercised without such a cause revolution is no right, but simply a wicked exercise of physical power.

4 *id.* at 434. For the ways in which the advent of the Civil War transformed understandings about its revolutionary nature, see JAMES M. MCPHERSON, ABRAHAM LINCOLN AND THE SECOND AMERICAN REVOLUTION 23-42 (1990).

The debate over the admission of new states also reveals a split between those who "insisted that American majorities had the right to create or change a government at will" and those who "believed as fervently that the forms had to be observed." Dennison, *supra* note 95, at 19, 22, 24.

206. *Quoted in* WOOD, *supra* note 21, at 34; *see also* STOURZH, *supra* note 12, at 34-37. Stourzh points out that "first principles" in eighteenth century parlance could mean the natural law fundamentals of political society, as well as the earliest or first ideas in a historical sense, which were susceptible to decay over time. *See id.* at 10-11.

stemmed from a belief that republican government rested on the virtue of the people who, by avoiding vice and corruption, might postpone the inevitable decline of all governments.[207] Recurring to the integrity of ideas that underlay government was a step in the right direction. Nonetheless, as drawn from these pre-revolutionary writers, such a conception of a "frequent recurrence" was incompatible with the modern idea of constitutional revision because all governments were deemed subject to natural decline.[208] The best a "frequent recurrence" to first principles might do was to stave off the inevitable.

With the American Revolution, however, the principle gradually assumed a significantly different purpose, one linked to popular sovereignty and the role of the people in government. As Willi Paul Adams observed:

> Having shifted the source of legitimate government from the grace of God to the sovereignty of the people was not enough to avoid a cycle of oppression and revolution. The people had to insist on a permanent role and be ready to intervene in the political process before it came to a violent halt.[209]

Thus, the "frequent recurrence" declaration in early constitutions was no mere "moralistic rhetorical appeal" but a serious reminder of the importance of timely reforms of the constitutional system. The bills of rights for the first constitutions of Virginia, North Carolina, Pennsylvania, Vermont, and Massachusetts, as well as for New Hampshire's second constitution, all proclaimed the importance of such a "recurrence" to preserving republics.[210] The preservation of republics depended on maintaining public and private virtue, and one means of doing so was to keep the implications and importance of "fundamental principles" alive in the minds of the people. But equally important

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207. See POCOCK, *supra* note 57, at 462-552; WOOD, *supra* note 21, at 65-70.

208. *See* Pocock, *supra* note 57, at 75-80.

209. ADAMS, *supra* note 19, at 142-43; *see also* Peterson, THOMAS JEFFERSON, *supra* note 67, at 275-93. *But see* Kenyon, *supra* note 85, at 84-121 (regarding the phrase "frequent recurrence" in early state constitutions to be more a reminder to the people of the ethical and aspirational goals of government rather than an invitation to the people to take a more active role in changing government).

210. *See* VA. DECLARATION of RIGHTS of 1776, § 15, *reprinted in* 10 SWINDLER, *supra* note 119, at 50; N.C. DECLARATION OF RIGHTS, § 21, *reprinted in* 7 SWINDLER, *supra* note 119, at 403; PA. DECLARATION OF RIGHTS of 1776, § 14, *reprinted in* 8 SWINDLER, *supra* note 119, at 279; VT. DECLARATION OR RIGHTS of 1777, § 16, *reprinted in* 9 SWINDLER, *supra* note 119, at 490; MASS. DECLARATION OF RIGHTS of 1780, art. XVIII, *reprinted in* 5 SWINDLER, *supra* note 119, at 95; N.H. BILL OF RIGHTS of 1784, § 38, *reprinted in* 6 SWINDLER, *supra* note 119, at 347; *see also* ADAMS, *supra* note 19, at 142-44; STOURZH, *supra* note 12, at 9-37; Orth, *supra* note 124.

was their participation in ongoing revision and formal constitutional adjustment.[211]

Insisting on regular and frequent consideration of constitutional issues ultimately implied a more encompassing view of popular sovereignty because it linked positive benefits to the potentially destabilizing process of reconsidering the constitution. Pennsylvania's first constitution responded to this constitutional principle by incorporating a revision mechanism that dated back to classical Greek and Roman times. The constitution provided for the meeting of a Council of Censors in 1783 and every seven years thereafter.[212] Its standing inquiry was whether "the constitution has been preserved inviolate in every part" and whether "the legislative and executive branches of the government have performed their duty as guardians of the people."[213] The Council could call a convention to meet within two years of their septennial meeting given "an absolute necessity of amending any article of the constitution which may be defective, explaining such as may be thought not clearly expressed, and of adding such as are necessary for the preservation of the rights and happiness of the people."[214] Two persons from each city and county composed the council, a two-thirds vote of which was needed for a convention.[215]

The council's monitoring of constitutional government thus served a dual function, namely, to correct potential abuses as well as to facilitate modifications deemed necessary with experience and the passage of time. The periodic nature of the council epitomized the stated principle that a "frequent recurrence" was "absolutely necessary to preserve the blessings of liberty."[216] Beyond specifying a process for constitutional revision, the system of the Council of Censors also gave them a positive, ongoing role in preserving republican government.

Not everyone embraced such a notion of "frequent recurrence." To those inclined to favor a more passive description of popular sovereignty, a "frequent recurrence" threatened to undermine governmen-

211. A petition from Albemarle County lauded the Declaration of Rights of Virginia's 1776 Constitution, but raised a series of objections, among the most important being the absence of a regular mode of assembling the people to make changes in government. *See* Howard, *supra* note 149, at 828.

212. *See* PA. CONST. of 1776, § 47, *reprinted in* 8 SWINDLER, *supra* note 119, at 285.

213. *Id.* For the theory behind the Council of Censors, see Lutz, *supra* note 7, at 129-49.

214. PA. CONST. of 1776, § 47, *reprinted in* 8 SWINDLER, *supra* note 119, at 285.

215. *See id.*

216. PA. DECLARATION OF RIGHTS of 1776, § 14, *reprinted in* 8 SWINDLER, *supra* note 119, at 279.

tal stability rather than preserve it.[217] Underlying the resistance to the principle was the relative degree of faith in the people's capacity to exercise popular sovereignty. In some respects, John Adams and Thomas Jefferson represented the division between those who possessed varying degrees of trust in the people. Adams retained a distrust of the common man and did not share Jefferson's "cherishment" and faith in the capacity of the people to act in their best interests.[218] Ultimately, some such underlying faith formed an important part of the calculus among those who asserted a wider view of popular sovereignty.[219]

Those questioning the capacity of the people to achieve responsible changes tended to worry about vested property rights and sought to limit the people's involvement in government, constitution-making, and revision. On the other hand, other constitution-makers expressed far greater confidence in the people. They, too, wished to avoid transient changes, but were more comfortable with the regular involvement of the people in the process of constitutional revision. Rather than constraining popular participation because it might prove unsettling, some even accepted a degree of political "excitement" as the price of republican institutions. A few even touted the benefits of renewed commitment that a vigorous debate over constitutional principles might bring. Underlying this perception of revision was a belief

217. *See* PETERSON, *supra* note 113, at 11-12. The resistance of Federalists, including James Madison, to future federal constitutional conventions was indicative of such fears. *See* BERNSTEIN & AGEL, supra note 110, at 223; THE FEDERALIST NOS. 43, 49 (James Madison); KAMMEN, *supra* note 121, at 58; KOCH, *supra* note 67, at 62-96; LASH, *supra* note 113, at 209, 223; Holmes, *supra* note 194, at 215-18; Peterson, *Thomas Jefferson*, *supra* note 67, at 286; Douglas G. Voegler, *Amending the Constitution by the Article V Convention Method*, 55 N.D. L. REV. 355, 355-408 (1979); *see also* Bruce, *supra* note 205; John W. Malsberger, *The Political Thought of Fisher Ames*, 2 J. EARLY REPUBLIC 1, 1-20 (1982).

218. *See* Joyce Appleby, *Introduction: Jefferson and His Complex Legacy*, *in* JEFFERSONIAN LEGACIES *supra* note 67, at 1, 12 (citing letter from Jefferson to Adams in 1823). Likewise, a split in confidence of the people also existed between Madison and Jefferson. *See* MCCOY, *supra* note 31, at 70-73; Holmes, *supra* note 194, at 216-18; Levinson, *supra* note 7, at 2445-53.

For more on Jefferson's faith in the people, see John L. Larson, *Jefferson's Union and the Problem of Internal Improvements*, *in* JEFFERSONIAN LEGACIES, *supra* note 67, at 340, 346; Gordon S. Wood, *The Trials and Tribulations of Thomas Jefferson*, *in* JEFFERSONIAN LEGACIES *supra* note 67, at 385, 407 (noting Jefferson's "absolute faith" in the people).

219. There was, of course, an early recognition that the promise of republicanism rested upon a virtuous, educated citizenry. *See* WOOD, *supra* note 21, at 65-70. Moreover, theoretical and philosophical questions of the nature of American constitutionalism frequently played against a backdrop of substantive political concerns and issues. Nonetheless, American constitution-makers in the eighteenth and nineteenth centuries spent considerable time seriously exploring the theoretical nature and practical implications of the principle of popular sovereignty.

that the people retained an active role in guarding the meaning of constitutions.

Some opponents of "a frequent recurrence" stressed the importance of stability and permanence as core values that were threatened by an enlarged view of popular sovereignty that encouraged recurring constitutional change. Instead, they favored constitutional adjustments effected by the judiciary rather than through formal constitutional revision. Rejecting Jefferson's call for a "continual reassessment" of government by "the governed," they could find solace in the Supreme Court's decision in *Marbury v. Madison*.[220] Chief Justice John Marshall's assumption of judicial review constituted a welcome alternative to the destabilizing potential of revising the Federal Constitution.[221] For Jefferson, however, Marshall's desire to judicially adapt the Federal Constitution undercut the people's security in formally changing the document. Such an approach converted the Federal Constitution, in Jefferson's eyes, into "'a blank paper by construction.'"[222]

This desire to see the people more actively involved in ongoing constitutional revision was linked to a reluctant acceptance of the Supreme Court as the final arbiter of the Constitution. Historian Phillip Paludan has reminded us that only after the Civil War did the assumption that the Supreme Court was the natural, final interpreter of the Federal Constitution gather momentum.[223] Indeed, the challenges

220. 5 U.S. 118 (1 Cranch 137) (1803). For Hamilton's anticipation of judicial review, see STOURZH, *supra* note 12, at 56-63.

221. *See* Edmond Cahn, *An American Contribution*, *in* SUPREME COURT AND SUPREME LAW, *supra* note 75, at 1, 20-25 (Edmond Cahn ed., 1968).

In *Marbury*, Marshall stressed the people's "original right" to establish government as "the basis on which the whole American fabric has been erected." 5 U.S. at 136. Conspicuously absent, though, was any reference to some direct, ongoing role for the people in changing their government. John Vile has described the history of Article V of the Federal Constitution as "a constant tension" between those who have emphasized the need for formal change and those who have stressed "judicial adaptation." Vile, *supra* note 109, at 67.

In anticipating judicial interpretation of the Federal Constitution, Alexander Hamilton's characterization of judicial review as effectuating the supreme will of the people as declared in the Constitution (rather than being a mark of judicial supremacy) rested on a relatively static notion of the Constitution. *See* THE FEDERALIST NO. 78 (Alexander Hamilton). The "people" had spoken in terms of the Constitution, but they had no ongoing role in developing its meaning.

222. Peterson, *Thomas Jefferson*, *supra* note 67, at 284 (quoting Thomas Jefferson).

223. *See* Phillip Shaw Paludan, *Hercules Unbound: Lincoln, Slavery, and the Intentions of the Framers*, *in* THE CONSTITUTION, LAW, AND AMERICAN LIFE: CRITICAL ASPECTS OF THE NINETEENTH-CENTURY EXPERIENCE 1, 2 (Donald G. Nieman ed., 1992); *see also* HAROLD M. HYMAN, A MORE PERFECT UNION: THE IMPACT OF THE CIVIL WAR AND RECON-

to the national government represented by the Virginia and Kentucky Resolutions (1798-1799), the Hartford Convention (1814-1815), and the Nullification Crisis (1831-1833), had in common their accusation of federal "tyranny." Though traditionally considered part of the struggle to define American federalism, those episodes hinged on a perceived lack of federal constitutional authority. Explicitly, these instances of resistance to, if not defiance of, federal authority denied the United States Supreme Court a monopoly on determining the constitutionality of the national government's actions.[224]

In the end, those who shared Marshall's views relied on the rule of law in general, and the role of judges in particular, as the principal means of protecting property and controlling the potentially rambunctious voice of the people. Chancellor James Kent, a delegate to New York's 1821 constitutional convention, epitomized how suspicion of the people led to a preference for a judicial monopoly over constitutional matters. For Kent there was "a constant tendency in human society" for "the poor to covet and to share the plunder of the rich; in the debtor to relax or avoid the obligation of contracts; in the majority to tyrannize over the minority, and trample down their rights."[225] All that checked this universal tendency was "a vigilant government, and a firm administration of justice."[226] The issues of judicial independence and the judicial monopoly on constitutional interpretation arose most pointedly in later state constitutional debates on the question of whether the judiciary should be elected or appointed. That debate clearly reflected the desire and the dread with which different delegates reacted to assertions that the people should assume greater control over the meaning of constitutionalism.

STRUCTION ON THE CONSTITUTION 4-5 (1973); Larson, *supra* note 218, at 356; Moore, *supra* note 92, at 315.

Even though he concedes "special constitutional responsibility" for the Supreme Court to interpret the Federal Constitution as part of "the necessary logic of popular sovereignty," Conkin insists that under the theory of popular sovereignty, only the people have "a final power to determine what is or is not constitutional." CONKIN, *supra* note 11, at 67, 71.

224. Indeed, when several legislatures responded to the Virginia and Kentucky Resolutions, they explicitly identified the United States Supreme Court as the final interpreter of the Federal Constitution. *See* Goldstein, *supra* note 122, at 51, 67; David Zarefsky & Victoria J. Gallagher, *From "Conflict" to "Constitutional Question": Transformations in Early American Public Discourse*, 76 Q.J. SPEECH 247, 252 (1990).

225. L.H. CLARKE, REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION OF THE STATE OF NEW YORK; HELD AT THE CAPITAL, IN THE CITY OF ALBANY, ON THE 28TH DAY OF AUGUST, 1821, at 221 (New York, J. Seymour 1821).

226. *Id.*

E. Were There Limits to Constitutional Change?

The final issue that stemmed from popular sovereignty received only peripheral attention in the earliest period of constitution-making, but became a central concern of later nineteenth century constitution-makers. Were there limits to constitutional revision, either in terms of what substantively might be included in constitutions or in the procedure of effecting constitutional change? Some scholars have noted that drafters of the earliest bills of rights anticipated the notion that natural law protected certain inalienable rights from interference by the majority.[227] While the battles over majoritarianism lay ahead in the nineteenth century, some eighteenth century constitution-makers also confronted the issue of substantive limits on constitutional revision in the context of federalism. The Federal Constitution's injunction that Congress "guarantee" republican governments in the United States[228] raised questions not only about defining republicanism, but also about the incompatibility of "unrepublican" features in newly-created state constitutions.[229] Another source of substantive restraint on state constitutions, which was crystallized by the Civil War, came in the form of acknowledging the supremacy of the Federal Constitution and repudiating secession and nullification. Procedural limits took the familiar form of denying the people's supposed unfettered right to revise constitutions, and permitting them to do so only in strict accordance with authorized procedures.

The broader context of state constitution-making in new territories also raised the question of potential limitations on both the process and substance of constitution-making. Of what significance was the requirement under enabling acts for new state constitutions to attain congressional approval?[230] In other words, did the absence of popular ratification of constitutions framed under an enabling act imply a different understanding of popular sovereignty in the context of such territorial state-making? If Congress, and not the inhabitants of the territory, needed to ratify a constitution and might insist on specific provisions, what did that suggest about the nature of sovereignty exercised in the creation of such constitutions? Arguably, the lack of popular ratification went beyond the fact that Congress played an in-

227. *See* ADAMS, *supra* note 19, at 144-47; *see also*, CONKIN, *supra* note 11, at 119-28.

228. U.S. CONST. art. IV, § 4.

229. *See* Kermit L. Hall, *Mostly Anchor and Little Sail: The Evolution of American State Constitutions*, *in* TOWARD A USABLE PAST, *supra* note 190, at 388, 392.

230. Kermit Hall raised the question of how the necessity of congressional approval shaped constitutional development. *See* Hall, *supra* note 229, at 392; *see also*, Smurr, *supra* note 187.

tegral role in the statehood process, but constitution-making in the territories also drew from understandings about the nature and power of constitutional conventions in promulgating constitutions. From such a perspective, Congressional approval could be regarded merely as an important formality made necessary by federalism. The context of constitution-making against the backdrop of congressional oversight continued to raise issues of how the expression of popular sovereignty might be fettered.

Inherent in the issue of limitations on revision was the ongoing paradox of popular sovereignty: If the people were truly sovereign, how could one generation limit later ones?[231] Ultimately, the efficacy of such limitations proved independent of the desire or incentive to insert such limits. Moreover, the struggle over limitations raised the issue of sources of constitutional authority outside of a written constitution. Since constitutions rested on the authority of the people, could natural law outside of constitutions check or limit them? Underlying this question was a struggle between those who sought to insulate property interests and those who wanted to affect property in the name of public regulation.

The broad debate over the issues underlying popular sovereignty produced competing characterizations: theoretical abstraction versus practical political principle. Those favoring an abstract statement tended to insist upon adherence to established provisions for constitutional change. Their opponents, however, argued that popular sovereignty meant that the people could invoke an inherent right to alter or abolish their constitutions independent of established procedures or legislative authority.

The continuing resonance that a broader view of popular sovereignty had for constitution-makers is well illustrated by revisions to existing constitutions. In many respects this phase proved especially insightful because it entailed more "mature" experiences than the initial efforts at framing constitutions. Thus, the status of ideas and expansive views of popular sovereignty in this later period are especially useful because they emerged from an America experienced with constitution-making. In particular, the preambles to these constitutions, the statements of popular sovereignty, the revision provisions in the text, and the practice of popular ratification offer important insights

231. For the intellectual origins of the paradox and its resultant tension between majoritarianism and constitutional limits on majorities, see Holmes, *supra* note 194, at 195-240. Jefferson, for one, specifically rejected that "'one generation of men has the right to bind another.'" *Id.* at 203 (quoting Thomas Jefferson).

into how those constitution-makers understood conventions and popular sovereignty.

Later efforts at constitutional changes, unlike the initial creation of constitutions through legislatures, all involved constitutional conventions. Thus, when the Georgia conventions meeting in 1789 and 1798 included preambles, their language of self-perception, that is, of their power and of their purpose, bears noting. In 1789 they called themselves "delegates from the people, in convention met" who could "ratify and confirm" the present constitution "by virtue of the powers in us vested for that purpose."[232] Nine years later, their draft constitution stated that as the "delegates of the people of the State of Georgia, chosen and authorized by them to revise, alter or amend" the constitution they, therefore, ratified their present work as the new constitution.[233] Likewise, delegates to New York's 1801 constitutional convention, after enumerating the changes they were making to the 1777 Constitution, referred to their assembled purpose: to ordain the present document as New York's new constitution "in the name and by the authority of the people of this state."[234]

In the bills of rights for these revised constitutions, the pattern of statements of popular sovereignty and the need for a frequent recurrence to fundamental principles roughly continued as it had in the earliest constitutions. In some cases, as in Pennsylvania's 1790 Constitution, the expression received an even broader and more radical articulation. Likewise, while New Hampshire's 1776 Constitution lacked any statement about popular sovereignty, the state's second constitution in 1784 not only identified the inherent power of the people as the basis of government, but further specified the conditions under which the people would invoke that power. After explaining the proper objects of government, the bill of rights declared that "whenever the ends of government are perverted, and public liberty manifestly endangered, and all other means of redress are ineffectual, the people may, and of right ought to, reform the old, or establish a new government."[235] Furthermore, the provision described the "doctrine of non-resistance against arbitrary power, and oppression" as "absurd, slavish, and destructive of the good and happiness of mankind."[236] Such echoes of a more expansionist view of popular sover-

232. GA. CONST. of 1789, preamble, *reprinted in* 2 SWINDLER, *supra* note 119, at 452.
233. GA. CONST. of 1798, *reprinted in* 2 SWINDLER, *supra* note 119, at 466.
234. N.Y. CONST. of 1801, *reprinted in* 7 SWINDLER, *supra* note 119, at 180.
235. N.H. CONST. of 1784, § 10, *reprinted in* 6 SWINDLER, *supra* note 119, at 345.
236. *Id.*

eignty continued through the end of the eighteenth century and well into the nineteenth century.

The provisions for constitutional revision and change in the constitutions framed by subsequent conventions are also revealing. Conventions that produced a second, or in some cases a third, state constitution illustrate the earliest widespread pattern of inserting provisions for constitutional amendment. Moreover, even if popular sovereignty implied a right of the people to gather in a convention and revise their governments, this second wave of constitution-making also saw an increased attention to establishing both the possibility and the mechanics of holding future conventions. Ironically, this greater specification of procedures for amendment and revision eventually had the effect of giving opponents of a more expansive view of popular sovereignty ammunition in their efforts to constrain the role of the people in constitutional revision. At the very least, specific mechanisms for amendment and revision raised the question of their effect on the broad statements of the people's inherent right to "alter or abolish" their governments.[237]

The emerging pattern with respect to constitutional amendments took the form of requiring legislatively initiated constitutional change that became valid without formal ratification. The constitutions of South Carolina (1790), Delaware (1792), and Georgia (1798), for example, all followed this approach. The typical provision called for successive votes of two legislatures (usually of two-thirds, but sometimes three-fourths vote) with a distinct interval during which the people could react to proposed changes. The provisions usually required "publicity" or at least "publication" of the proposed changes.[238] Georgia's 1798 Constitution mandated that suggested changes be published at least six months prior to the general election of the second legislature.[239]

With respect to future conventions, the second wave of constitutional revision displayed another pattern of more frequently specifying how and when such future conventions might meet. Georgia's 1789 Constitution provided that each county would send three dele-

237. Such an implication was raised in 1780 when the Town of Roxbury, Massachusetts advocated a formalized means of constitutional revision so that "the people might recur to first principles in a Regular Way, without hazarding a Revolution in the Government." POPULAR SOURCES, *supra* note 162, at 793.

238. *See, e.g.*, S.C. CONST. of 1790, art. XI, *reprinted in* 8 SWINDLER, *supra* note 119, at 481-82 (speaking of "publicity"); DEL. CONST. of 1792, art. X, *reprinted in* 2 SWINDLER, *supra* note 119, at 214 (speaking of "publication").

239. GA. CONST. of 1798, art. IV, § 15, *reprinted in* 2 SWINDLER, *supra* note 119, at 466.

gates to a convention in 1794 and only proceed to consider revisions if the delegates agreed by two-thirds vote that alterations were necessary.[240] Kentucky's 1792 Constitution, however, placed the issue of another convention before the people in 1797, providing that one would be held if a majority of the electorate agreed in two successive years.[241] However, if such majorities were not attained, the provision still permitted a convention if two-thirds of the legislature agreed.[242] Delaware's 1792 Constitution provided a variation by making the people the exclusive trigger for future conventions. It stated that an "unexceptional" means of doing so was to vote for a convention at general elections.[243] Those opposed to an expansive view of popular sovereignty eventually could cite such specific procedures as the only route to future conventions. Those in favor could note that those same constitutions often retained statements of the inherent right of the people to revise their governments.

The persistence of an expansive understanding of popular sovereignty and its relationship to constitutional revision by conventions was also demonstrated by the general absence of popular ratification. Between 1779 and 1801, eight different states revisited their original constitutions by holding subsequent conventions.[244] Of the eight

240. *See* GA. CONST. of 1789, art. IV, § 7, *reprinted in* 2 SWINDLER, *supra* note 119, at 455.

241. *See* KY. CONST. of 1792, art. XI, *reprinted in* 4 SWINDLER, *supra* note 119, at 149. The effort to create a constitution for Kentucky involved over ten conventions held from 1776 to 1792. See JOAN WELLS COWARD, KENTUCKY IN THE NEW REPUBLIC: THE PROCESS OF CONSTITUTION MAKING (1979); LOWELL H. HARRISON, JOHN BRECKINRIDGE: JEFFERSONIAN REPUBLICAN, 93-113 (1969); Pratt Byrd, *The Kentucky Frontier in 1792*, 25 FILSON CLUB HIST. Q. 181-203, 286-94 (1951); Ethelbert D. Warfield, *The Constitutional Aspects of Kentucky's Struggle for Autonomy, 1784-1792*, *in* 4 PAPERS OF THE AMERICAN HISTORICAL ASSOCIATION 349, 349-65 (1890). James Madison also advised members of the 1792 convention about how to draft their constitution. *See* Letter from James Madison to Caleb Wallace (August 23, 1785), *in* 8 THE PAPERS OF JAMES MADISON, *supra* note 49, at 355-56.

Slavery had become a crucial issue before the 1792 convention met. Indeed, the *Kentucky Gazette* during the 1780s had repeatedly proposed to constitutionally abolish slavery. See Byrd, *supra*, at 193-94. Instead, the convention drafted a guarantee for slavery after a motion to abolish slavery failed by a vote of 26 to 16. The controversy over slavery also affected the provisions for future revision. Notwithstanding the declaration of the people's inherent right of revision, the revision provision succeeded in staving off efforts to hold a second convention before 1797. *See* George L. Willis, Sr., *History of Kentucky Constitutions and Constitutional Conventions*, 28 REG. KY. STATE HIST. SOC'Y 305 (1930); 29 REG. KY. STATE HIST. SOC'Y 52 (1931).

242. *See* KY. CONST. of 1792, art. XI, *reprinted in* 4 SWINDLER, *supra* note 119, at 149.

243. *See* DEL. CONST. of 1792, art. X, *reprinted in* 2 SWINDLER, *supra* note 119, at 214.

244. Some of the states held more than a single convention during the period 1779-1801: New Hampshire (1779, 1784, and 1792), Vermont (1786 and 1793), and Georgia (1789 and 1798).

states, only New Hampshire, which from the start had shared the practice with Massachusetts, submitted its constitution for formal ratification.[245] Thus, while Americans had come to accept the necessity of using constituent assemblies of conventions to frame constitutions, they clearly had not embraced the theoretical need for popular ratification. Indeed, not only were second and third generation constitutions promulgated, but their provisions for future constitutional conventions were also silent about ratification. These delegates saw themselves as appropriately exercising the sovereignty of the people within the context of constitutional conventions. For the most part, Americans agreed.

The most dramatic evidence of the persistence of an expansive view of popular sovereignty arose when Americans circumvented existing procedures for constitutional change and invoked their inherent powers. If conventions became the established mechanism for creating or revising constitutions relatively soon, their use left unresolved who had the power to call them. Six of the first eleven colonies to frame constitutions left the question open by not expressly addressing the issue of future constitutional revision. Only three of the remaining five were explicit about using constitutional conventions. Pennsylvania's 1776 Constitution put the issue of a future convention in the hands of a Council that met every seven years and could call a convention after a two-thirds vote.[246] Georgia's 1777 Constitution required a majority of the voters in each county to petition for a convention, after which the legislature would call one.[247] Finally, Massachusetts's 1780 Constitution provided for a two-thirds vote of the voters in 1795, before another convention would be held.[248] Even the existence of future revision provisions, however, raised the question of their binding nature.

That issue directly arose in Pennsylvania in response to dissatisfaction with the "radical" 1776 Constitution. Efforts by opponents of that constitution were stymied by their inability to muster the two-

245. Georgia's 1789 Constitution, while not formally ratified, evidenced the concern with public consultation, even if indirectly, by calling for a second convention to ratify the work of the first convention.

246. *See* PA. CONST. of 1776, § 47, *reprinted in* 8 SWINDLER, *supra* note 119, at 285. Vermont followed this procedure in its 1777 Constitution and employed it well into the nineteenth century, only abolishing the Council of Censors in 1870. *See* WILLIAM C. HILL, THE CONSTITUTIONAL HISTORY OF VERMONT: A REFERENCE GUIDE 6-19 (1992).

247. *See* GA. CONST. of 1777, art. LXIII, *reprinted in* 2 SWINDLER, *supra* note 119, at 449.

248. *See* MASS. CONST. of 1780, ch. VI, art. X, *reprinted in* 5 SWINDLER, *supra* note 119, at 108.

thirds required vote of the Council before holding a new convention.[249] Eventually, in defiance of the constitutional provision, the legislature itself called for a convention in 1789, which drafted the Pennsylvania Constitution of 1790. Interestingly, this departure from established constitutional procedures to effect constitutional revision came about by conservatives frustrated by a state of affairs generated by the "radical" constitution. Indeed, a similar reaction by the more conservative voices had likewise circumvented the provisions for revision of the Articles of Confederation by calling the federal constitutional convention and justifying their action based on popular sovereignty.[250] When the pre-eminent nineteenth century commentator on constitutional conventions, who opposed an expansive view of popular sovereignty, considered the revision of Pennsylvania's 1776 Constitution, he reluctantly concluded that the origin of the 1789 convention had been "wholly illegitimate."[251] The change of Pennsylvania's 1776 Constitution by "a constitutionally dubious agent"[252] ultimately rested on invoking the inherent power of people to revise their constitutions. Indeed, an editorial in the *Federal Gazette* explicitly asserted the transcendent power of popular sovereignty to achieve constitutional change outside of textual procedures: "This power of electing a convention at all times, to alter the constitution of a state, is [a] never dormant—never ceasing—uncontrollable right of the people."[253]

249. *See* ROBERT L. BRUNHOUSE, THE COUNTER-REVOLUTION IN PENNSYLVANIA, 1776-1790, at 18-38, 53-60, 156-63, 221-27 (1942); Ryerson, *supra* note 29, at 122-27.

250. *See* ACKERMAN, *supra* note 96, at 173-74, 176. James Madison frankly conceded that the call for a federal constitutional convention had been characterized as "extraconstitutional." *See* Letter from James Madison to Edmund Pendleton (Feb. 24, 1787), *in* 9 THE PAPERS OF JAMES MADISON, *supra* note 49, at 294.

251. JOHN A. JAMESON, A TREATISE ON CONSTITUTIONAL CONVENTIONS: THEIR HISTORY, POWERS AND MODES OF PROCEEDING 216 (New York, De Capo Press 1872) (4th ed. 1887). Although he clearly sympathized with the constitutional reformers struggling against the Council of Censors, Jameson concluded their method of constitutional change involved a "flagrant usurpation" on the part of the legislature. *Id.* at 217. He denied that action could not be justified "except by affirming the legal right of the inhabitants of a given territory, organized as a body politic, to meet at will, as individuals, without the authority of law, and, on their own claim that they are the people of the State, to dictate to the government such changes in its laws, constitution, or policy, as they may deem desirable." *Id.* Thus, for Jameson, departure from constitutional revision procedures rested on a claim of the inherent right of the people to revise governments and implied a justification of circumvention conventions.

252. Ryerson, *supra* note 29, at 130; *see also* Schmidt, *supra* note 120, at 24.

253. Herrington, *supra* note 33, at 605 (quoting editorial by "A Freeman," FEDERAL GAZETTE, March 27, 1789). The inherent right of "the *sovereign people alone*" to alter, amend, or abolish their government was acknowledged by a committee of Pennsylvania's

If those who sought to confine the scope of popular sovereignty in the name of the people nonetheless occasionally resorted to its authority to make constitutional changes outside of normal channels, less conservative-minded individuals were even less reticent to invoke popular sovereignty. Indeed, they proceeded to do so in far more dramatic ways including calling for constitutional conventions unauthorized by legislatures. These "circumvention conventions" played an important role in the nineteenth century.[254] Justification of such conventions squarely rested on a view of popular sovereignty that identified an inherent right in the people to assemble and effect legitimate constitutional changes.

The political background to circumvention conventions was an early nineteenth century reaction to the disparity in political representation typical of many early state constitutions. The western regions of many states, though experiencing rapid growth, remained underrepresented in a constitutional apportionment formula that favored the older eastern portions of the states. In North Carolina and Virginia, frustrated efforts at constitutional reform led to circumvention. In 1816, citing the inherent right of the people to revise their governments, Virginia delegates gathered in what was known as the Staunton Convention to initiate a constitutional convention that would revise the existing fundamental law.[255]

The recurrence of circumvention techniques during the 1820s and 1830s in North Carolina, Maryland, Georgia, Virginia, and Pennsylvania not only reflected a degree of frustrated constitutional reform, but also illustrated the constitutional understanding that gave the people a role in constitutional revision well outside of the established procedures for constitutional change.[256] Even more important

legislature in 1805. *See* Roy H. Akagi, *The Pennsylvania Constitution of 1838*, 48 PA. MAG. HIST. 301, 304 (1924).

254. George Parkinson evidently coined the expression "circumvention convention" in Antebellum State Constitution Making: Retention, Circumvention, Revision (1972) (unpublished Ph.D. dissertation, University of Wisconsin).

255. *See* GREEN, *supra* note 127, at 203-15; Parkinson, *supra* note 254, at 35-42; Robert P. Sutton, The Virginia Constitutional Convention of 1829-1830: A Profile Analysis of Late Jeffersonian Virginia 62-64 (1967) (unpublished Ph.D. dissertation, University of Virginia).

256. *See* William K. Boyd, *The Antecedents of the North Carolina Convention of 1835*, 9 S. ATLANTIC Q. 160 (1910); *see also* DEMOCRACY, LIBERTY, AND PROPERTY, *supra* note 2, at 3-17, 125-42, 271-85; GREEN, *supra* note 127, at 99-253; Fletcher M. Green, *Cycles of American Democracy*, 48 MISS. VALLEY HIST. REV. 3, 10-11 (1978); James A. Henretta, *The Rise and Decline of "Democratic-Republicanism": Political Rights in New York and the Several States, 1800-1915*, 53 ALB. L. REV. 819 (1989); Parkinson, *supra* note 254; Schmidt, *supra* note 120, at 97; Sutton, *supra* note 255, at 62, 64; Watson, *supra* note 90, at 19-42; WESTERN CAROLINIAN (Salisbury, N.C.), Nov. 25, Dec. 2, 9, 23, & 30, 1823, Jan. 6, 1824.

than actual circumvention conventions and direct action taken by the people were the prevalent articulated justifications of such potential action.[257] Whether used by "outsiders" or conservatives under the threat of domination by radicals, the notion of direct intervention by the people remained alive in the constitutional discourse of the nineteenth century.

Conclusion

Between the Revolution and the 1830s, state constitutions and those who framed and revised them willingly accepted the proposition of inherent political power vested in the people. This proposition, along with its concomitant implication of the people's right to change their government or even abolish it, remained relatively uncontroversial until some groups invoked those words to take constitutional revision into their own hands. Despite earlier episodes of circumvention conventions, it was the Dorr Rebellion in 1841 that precipitated explicit debate on the validity of an expansive view of popular sovereignty. Thomas Dorr and his adherents in Rhode Island justified their right to initiate constitutional revision outside the authority of the existing state government as consistent with the principle of popular sovereignty. That principle, they argued, provided a constitutional middle ground between revision authorized by existing governments and constitutions and the ultimate right of revolution based on sheer power.

In the aftermath of the Dorr Rebellion, opponents of the expansive view of popular sovereignty, including the United States Supreme Court, rejected such a constitutional middle ground. Their position denied that the people had inherent rights of revision, and held that constitutional revision could legitimately take place only as authorized by existing governmental authorities and in compliance with established procedures. Anything else, they argued, constituted revolution. Such a view, of course, reflected the constrained version of popular sovereignty embodied in the Federal Constitution, with its explicit and rigid requirements for constitutional change.

257. *See* PETER J. GALIE, THE CONSTITUTIONAL HISTORY OF NEW YORK: A REFERENCE GUIDE 96-97, 279-81 (1991); GETTLEMAN, *supra* note 89, at 20; Boyd, *supra* note 256, at 171; Howard, *supra* note 149, at 816, 846; Mumford, supra note 134, at 108; Sutton, *supra* note 255, at 108; *Proceedings of the Friends of Convention, at a Meeting Held in Raleigh, December, 1822* (Raleigh, N.C., 1822), *microformed on* Records of the States of the United States, Series C, Reel 2, Unit 1.

If the Dorr Rebellion stimulated an explicit rebuttal and repudiation of the expansive view of popular sovereignty drawn from state constitutional practice, the Civil War put such views under extraordinary pressure. After the War, those who ventured to insist on the inherent rights of the people to alter or abolish government found themselves accused of courting war, anarchy, secessionist views, and placing society at the mercy of centripetal forces. Moreover, those who advocated an expansive view of popular sovereignty in the decades after the war also saw themselves branded as militant populists who endangered the social fabric of American society in ways akin to socialists, communists, immigrants, and trade union forces. Those who repudiated the implications of an expansive view of popular sovereignty increasingly insisted on making stability and order the predominant constitutional values.

Despite the reaction stimulated by the Dorr Rebellion and the impact of the Civil War, debates in nineteenth century conventions reveal the persistent elaboration of a constitutional position in defense of the implications of an expansive view of popular sovereignty. In the end, the opponents of an activist view of popular sovereignty succeeded in undermining claims of a legitimate constitutional middle ground. Moreover, they carried the day by insisting on procedural regularity as indispensable to constitutionally valid expressions of popular sovereignty. While that legacy of proceduralism may be deemed a salutary one, America's experience with written constitutions shows it was far from inevitable.