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Constitutionalism—the idea that a written constitution reflects the will of the sovereign people—both empowers and limits American government. It underlies our boast that unlike other nations, ours is one of law, and not of men. We consider this constitutionalism the ultimate justification of our polity and trace it back as an unbroken chain to the founding years of our nation.

But proclaiming that historical linkage for today's constitutionalism assumes that after the American Revolution, inhabitants of a territory larger than Europe, with many different traditions, uniformly understood how a government based on the people would operate under a written constitution. According to this conventional view, the experience of the Federal Constitution proves that singular vision. The constitutional vision of 1787 supposedly survived the Civil War and persists into the current millennium.

This constitutional view assumes that what emerged at the highly unusual federal constitutional convention in Philadelphia in 1787 reflected Americans' general experience with written constitutions before the Civil War. That conclusion, however, does not draw upon the vast and diverse experience of state constitution-making. Nor does it take into account the many disputes at the state and national level involving different perceptions about constitutional government.

This Article examines how historians, political scientists, and legal scholars express this received understanding of American government based on written constitutions. Fundamental assumptions made about our early constitutional experience are inaccurate. Those assumptions impoverish our constitutional discourse by denying us the capacity to see that the history of American constitutions is dynamic, not an elaboration of a static idea from 1787.

An American constitutionalism understood through the lens of a single, federal constitutional convention presents both a comforting standard and an

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historical quandary. The standard lets us believe that the Federal Constitution proves that America's diversity—its broad geographic, cultural, political, and economic diversities—was united in a single test of legitimate constitutional government both then and today. The quandary is that the American experience with constitution-making before the Civil War had no such unity. Indeed, the supposed standard of constitutional governments, enabled and guided by the people, possessed very different meanings for Americans depending on the time, place, and context of their constitutional efforts.

Despite problematic support in the historical record, the standard account of American constitutionalism remains an unshaken canon of American history, law, and political science. Focusing intensively on American constitutional thought during a narrow set of "critical" years, most scholarship implies that little can be learned elsewhere. Compared to the federal convention in 1787, other American conventions to frame or revise constitutions are largely of passing interest even though they number more than one hundred from Independence to the Civil War.¹

This Article focuses on the pervasive conceptual framework that unites much of the literature on American constitutionalism. Even as scholars vigorously engage in interpretative differences, their disputes largely remain within an overarching intellectual construct that rests on widely shared and embedded assumptions. The evidence that calls this conventional account into question is beyond the scope of this Article; that is the burden of a wider study nearing completion by the author that examines the broader context of the cross-currents of American constitutionalism before the Civil War. The present objective is to raise the level of consciousness about the hold that the conventional account has exerted on the imagination of scholars across numerous disciplines and only hints at the incomplete nature of that account. This forms a necessary first step before we might begin to rethink the history and theory of American constitutionalism.

I. THE CONVENTIONAL STORY

The conventional view of how American constitutionalism developed identifies a crucial transition in ideas between Independence and the Federal Constitution. That shift is the focus of historian Gordon Wood's influential

1. It seems peculiar to make a "tradition" of constitution-making out of the formation and revision of the Articles of Confederation while simultaneously ignoring the extensive constitution-making in the states.

book *The Creation of the American Republic, 1776-1787*.² Wood finds that although Americans toyed with ideas after the Revolution, they soon invented a new “science of politics.”³ This “science” represented the matured understanding of how to create popularly-based governments through constitutional conventions and popular ratification, exemplified in the Federal Constitution.

Wood implies that the Federal Constitution demonstrated a consensus among Americans about constitutions and their formation—an “American” constitutionalism.⁴ The vast literature analyzing American constitutionalism, whether by historians, political scientists, or legal scholars, begins with this common thread. Few challenge that the Federal Constitution marked the endpoint of constitutional ideas from 1776 to 1787.⁵ Few dispute that the

2. GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787* (1969) [hereinafter WOOD, *THE CREATION OF THE AMERICAN REPUBLIC*]. Wood’s tome has been called the “indispensable book” and the “classic study” on the period from the Revolution to the Federal Constitution. See Stephen A. Conrad, *The Rhetorical Constitution of “Civil Society” at the Founding: One Lawyer’s Anxious Vision*, 72 IND. L.J. 335, 368 (1997); Michael Les Benedict, *Constitutional History and Constitutional Theory: Reflections on Ackerman, Reconstruction, and the Transformation of the American Constitution*, 108 YALE L.J. 2011, 2032 (1999).

3. For Wood’s discussion of the “American science of politics,” see WOOD, *THE CREATION OF THE AMERICAN REPUBLIC*, *supra* note 2, at 593-615; see also Gordon S. Wood, *The Origins of the Bill of Rights*, 101 PROC. AM. ANTIQUARIAN SOC’Y 255, 264 (1992).

4. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC*, *supra* note 2. In fairness to Wood, *The Creation of the American Republic* focused on the period 1776 to 1787. Although the Federal Constitution formed the endpoint for his study, Wood implied that American thinking about written constitutions by the late 1780s held a determining influence on subsequent American history. *Id.* Scholars examining periods after the formation of the Federal Constitution routinely extrapolate from Wood’s study and assume the influence of the ideas Wood attributes to the 1780s. Wood’s study did not examine later constitutional disputes and debates in constitutional conventions both before and after the Civil War that suggest the constitutional understandings of the 1780s did not predominate in later periods.

5. Characterizing the Confederation period (1776-1787) as pivotal for American constitutionalism is widespread. See, e.g., MICHAEL KAMMEN, *SOVEREIGNTY AND LIBERTY: CONSTITUTIONAL DISCOURSE IN AMERICAN CULTURE* 104 (1988) (describing 1776 to 1787 as America’s “most creative phase of formal constitution-making”); DONALD S. LUTZ, *POPULAR CONSENT AND POPULAR CONTROL: WHIG POLITICAL THEORY IN THE EARLY STATE CONSTITUTIONS* 214 (1980) [hereinafter LUTZ, *POPULAR CONSENT*] (asserting that American political theory only overcame its “serious problems” by 1787); ROBERT E. SHALHOPE, *THE ROOTS OF DEMOCRACY: AMERICAN THOUGHT AND CULTURE, 1760-1800*, at 84 (1990) (considering 1776 to 1787 as “the most creative period of constitutional development” in America); Horst Dippel, *The Changing Idea of Popular Sovereignty in Early American*

Federal Constitution reflected the "matured" understanding of Americans at the Founding about the nature of written constitutions. Few are uncomfortable with the story of how Americans came to venerate that constitution. Even the federal and state courts routinely rely on the interpretative authority of *The Creation of the American Republic*.⁶

The traditional narrative embeds three assumptions that deeply influence American constitutional history and theory. The first assumption sees an intellectual shift from 1776 to 1787 during which Americans gradually

Constitutionalism: Breaking Away From European Patterns, 16 J. EARLY REPUBLIC 21, 44 (1996) (asserting American constitutionalism "passed through only a brief period of more radical expressions and aspirations in 1776" but "rather quickly found its way back to legal and political arguments" with a more tempered role for the people); Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 COLUM. L. REV. 523, 527 n.17 (1995) (calling 1776 to 1787 "the 'Critical Period'"); Michael Lienesch, *The Constitutional Tradition: History, Political Action, and Progress in American Political Thought, 1787-1793*, 42 J. POL. 2, 17 (1980) (characterizing a shift from "Revolutionary republicans" before the Federal Constitution to "Constitutional republicans" after 1787); Robert W. Scheef, "Public Citizens" and the Constitution: Bridging the Gap Between Popular Sovereignty and Original Intent, 69 FORDHAM L. REV. 2201, 2204 n.14 (2001) (endorsing the view that the Confederation period was "critical"). Even scholars disagreeing with interpretations of the "critical period" regard 1776 to 1787 as the crucial period in American constitutionalism. See, e.g., Eric M. Freedman, *Why Constitutional Lawyers and Historians Should Take A Fresh Look At The Emergence Of The Constitution From The Confederation Period: The Case Of The Drafting Of The Articles Of Confederation*, 60 TENN. L. REV. 783 (1993).

Scholarship attributing special significance to the Confederation period dates back to the nineteenth century, including JOHN FISKE, *THE CRITICAL PERIOD OF AMERICAN HISTORY, 1783-1789* (1888). See also ANDREW C. McLAUGHLIN, *THE CONFEDERATION AND THE CONSTITUTION, 1783-1789*, at 962 (1905); Edward S. Corwin, *The Progress of Constitutional Theory Between the Declaration of Independence and the Meeting of the Philadelphia Convention*, 30 AM. HIST. REV. 511 (1925).

6. For federal courts, see, e.g., *Alden v. Maine*, 527 U.S. 706, 768-69 (1999); *Clinton v. City of New York*, 524 U.S. 417, 450 (1998); *United States v. Winstar Corp.*, 518 U.S. 839, 872 (1996); *United States Term Limits v. Thornton*, 514 U.S. 779, 826 n.38, 911 (1995); *United States v. Lopez*, 514 U.S. 549, 575-77 (1995); *Freytag v. Commissioner*, 501 U.S. 868, 883, 905 n.4 (1991); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 523 (1989); *Plaut v. Spendthrift Farm, Inc.*, 1 F.3d 1487, 1491 n.6 (6th Cir. 1993); *Ameron, Inc. v. U.S. Army Corps of Engineers*, 787 F.2d 875, 894 (3d Cir. 1986); *Republican Party of Connecticut v. Tashjian*, 770 F.2d 265, 275, 286 (2d Cir. 1985); *Chadha v. Immigration & Naturalization Service*, 634 F.2d 408, 422 n.13 (9th Cir. 1980). For state courts, see, e.g., *Missouri Coalition for the Environment v. Joint Commission on Administrative Rules*, 948 S.W.2d 125, 134-35 (Mo. 1997); *DeRolph v. State*, 754 N.E.2d 1184, 1203 (Ohio 2001); *Smothers v. Gresham Transfer, Inc.*, 23 P.3d 333, 346 (Or. 2001); *In re Advisory Opinion to the Governor*, 732 A.2d 55, 81 n.10, 92 (R.I. 1999); *Brigham v. State*, 692 A.2d 384, 392 (Vt. 1997).

recognized that the people's sovereignty⁷ granted written constitutions the status of fundamental law. That assumption places the shift too late. Americans understood that the people's sovereignty gave their constitutions legitimacy from the start of the Revolution. They legitimated their governments, as they justified their Revolution, on the same principle: the sovereign authority of the people.

The second assumption is that a "mature" view of constitutions required a specific process of constitution-making, such as that used to adopt the Federal Constitution. But this assumption tells only part of the story by identifying the authority of the people as a procedural value, not a substantive one. But to most American constitution-makers, including the Federal Framers, the people's sovereignty was a *constitutional* principle. The legitimacy of their governments—both state as well as federal—rested not on the procedural device of a constitutional convention, but on the people exercising their sovereign will, which, over time, came to be associated with such conventions. Still, the range for legitimate constitution-making and revision extended beyond adherence to formal process. Indeed, Americans before the Civil War were familiar with circumventing revision procedures which had a constitutional (not simply political or extra-constitutional) justification, one grounded on whether the action expressed the sovereign's will, not whether the sovereign followed a given procedure.

The third questionable assumption is that widespread agreement on this "mature" constitutional view became the settled norm of American constitutionalism. Yet, much of consequence to constitutionalism occurred after 1787. Before the Civil War, state constitution-makers continued to debate whether a collectivity, "the people," needed to express their sovereignty through formal, established procedures. This dynamic and often heated discussion reflected conflicting constitutional viewpoints. Until the Civil War, no coalescing, unified vision emerged.

7. The people's sovereignty is the theory and practice of associating the legitimacy of written constitutions and the governments they create with "the people." Although not commonly used by contemporaries, the term the "people's sovereignty" is preferable to "popular sovereignty." "Popular sovereignty" has a pejorative association with the extension of slavery to the territories in the nineteenth century and the modern connotation of transient popular whims. In addition, the alternative use of the "people's sovereignty" captures the serious thought that Americans before the Civil War gave to how a collective entity, the people, could act as sovereign.

A. Transformation of Constitutional Thought

Few today question that the Confederation period witnessed a crucial intellectual transformation. Most assume that American revolutionaries initially lacked a critical appreciation of what became the essence of American constitutionalism: the distinction between ordinary and fundamental law. In the midst of war-time exigencies, the provisional revolutionary bodies that displaced British authority failed to recognize the significant difference between passing ordinary laws dealing with day-to-day matters and creating a constitution as fundamental law. An understanding of fundamental law, conceived as resting on the sovereignty of the people and forming a check on government itself, supposedly developed late in the Confederation period. According to Gordon Wood, while many Revolutionaries considered the first state constitutions fundamental "in theory," considerable "confusion" remained about constitutions as checks on government.⁸ The "problem" for Americans in the 1780s "was to refine and to make effective the distinction between fundamental and statutory law."⁹ Americans paid "lip service" to this distinction in 1776, but were unclear about "the precise nature of a constitution."¹⁰ Some Americans during the Confederation period anticipated a modern conception of constitutions, but for most, key constitutional ideas were in transition.¹¹

Legal scholar Akhil Amar supports Wood and considers the first efforts at state constitution-making "vocal dress rehearsals" setting "the stage for the great act of popular sovereignty" of the federal convention.¹² Between 1776 and 1789, according to historian Paul Conkin, the people's sovereignty "matured in America into enduring institutions,"¹³ a shift in understanding

8. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC*, *supra* note 2, at 273-74.

9. *Id.* at 275.

10. *Id.*

11. *Id.* at 280-82. An important exception to this assumption is the work of Marc Kruman. See MARC W. KRUMAN, *BETWEEN AUTHORITY AND LIBERTY: STATE CONSTITUTION MAKING IN REVOLUTIONARY AMERICA* (1997); see also Christian G. Fritz, *Alternative Visions of American Constitutionalism: Popular Sovereignty and the Early American Constitutional Debate*, 24 *HASTINGS CONST. L.Q.* 287, 322-29 (1997).

12. Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 *YALE L.J.* 1425, 1438-39 (1987).

13. PAUL K. CONKIN, *SELF-EVIDENT TRUTHS: BEING A DISCOURSE ON THE ORIGINS AND DEVELOPMENT OF AMERICAN GOVERNMENT—POPULAR SOVEREIGNTY, NATURAL RIGHTS, AND BALANCE AND SEPARATION OF POWERS* 67 (1974).

other historians share.¹⁴ For historian Jack Rakove, it was the Federal Framers who "released the genie of popular sovereignty."¹⁵

B. Matured Procedural Understanding

The first assumption of historians, political scientists, and legal scholars that Americans changed their view of constitutional government after the Revolution is not unreasonable. The revolutionary assertion that the people would rule met the harsh reality of actually governing America during the Confederation period. This is where the second assumption becomes important. It asserts that the assumed changes in American views led to a "mature" vision of how the people, as the American sovereign, would rule through constitutions. This understanding supposedly developed during the Confederation period.

In 1950, the dean of modern American legal historians, Willard Hurst, described American constitution-making as reaching "its climax" in the creation of the Federal Constitution.¹⁶ Despite interpretative differences, historians Gordon Wood and J.G.A. Pocock both consider the Federal Constitution an endpoint: for Wood the Federal Constitution was "the end of classical politics" in America,¹⁷ for Pocock it marked the "last act of the civic Renaissance."¹⁸

In his classic work, *The Age of the Democratic Revolution*,¹⁹ historian R. R. Palmer argues that the use of constitutional conventions became part of a mature understanding of how the people, as sovereign, authorized and limited government.²⁰ Gordon Wood supports this analysis in *The Creation of the American Republic*. The combined use of constitutional conventions and popular ratification was the process whereby constitutions went from

14. See, e.g., Dippel, *supra* note 5, at 22.

15. Jack N. Rakove, *Fidelity Through History (Or to it)*, 65 *FORDHAM L. REV.* 1587, 1603 (1997) [hereinafter Rakove, *Fidelity Through History (Or to it)*].

16. JAMES WILLARD HURST, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS* 224 (1950).

17. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC*, *supra* note 2, at 606.

18. J.G.A. POCOCK, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* 462 (1975).

19. R. R. PALMER, *THE AGE OF THE DEMOCRATIC REVOLUTION: A POLITICAL HISTORY OF EUROPE AND AMERICA, 1760-1800* (1959).

20. *Id.* at 213-35.

idea to reality as fundamental authority and replaced the tentative and uncertain steps of pre-1787 American constitution-making.²¹

Political scientist Donald Lutz, for example, argued that only when constitutions drafted by conventions were ratified by the people could one "realistically speak of constitutions being treated as fundamental law."²² Another political scientist, John Vile, concluded that Americans eventually traced the basis of their government "to a convention representative of the people" which was "superior to ordinary legislative bodies" as a source for legitimate constitutions.²³ Historians also agree.²⁴ Jack Rakove asserts that only the pattern of a constitutional convention followed by popular ratification made it possible "to lay a powerful foundation" for the Federal Constitution's "ultimate legal supremacy" and gave the people's sovereignty "a new and more potent meaning."²⁵

Likewise, legal scholars assume that constitutional conventions became necessary in framing fundamental law of written constitutions. For example, Thomas Grey concludes that the first state constitutions were enacted as ordinary legislation, but by 1787 Americans "worked out the notion that a constitution should be framed and promulgated by a special convention and

21. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC*, *supra* note 2, at 259-343, 363-89, 519-64; *see also* BRUCE A. ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 214-16 (1991) [hereinafter ACKERMAN, *FOUNDATIONS*]; WILLI PAUL ADAMS, *THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA* 63-98 (1980); PALMER, *supra* note 19, at 214-17; Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043, 1056-60 (1988) [hereinafter Amar, *Philadelphia Revisited*]; Robert J. Martineau, *The Mandatory Referendum on Calling a State Constitutional Convention: Enforcing the People's Right to Reform Their Government*, 31 OHIO ST. L.J. 421, 422 (1970).

22. LUTZ, *POPULAR CONSENT*, *supra* note 5, at 67-68; *see also* Carlos E. Gonzalez, *Reinterpreting Statutory Interpretation*, 74 N.C. L. REV. 585, 658 (1996) (relying on Lutz that constitution-making required popular ratification).

23. John R. Vile, *Three Kinds of Constitutional Founding and Change: The Convention Model and Its Alternatives*, 46 POL. RES. Q. 881, 887 (1993).

24. *See, e.g.*, DON E. FEHRENBACHER, *CONSTITUTIONS AND CONSTITUTIONALISM IN THE SLAVEHOLDING SOUTH* 2 (1989); Gerald Stourzh, *Constitution: Changing Meanings of the Term from the Early Seventeenth to the Late Eighteenth Century*, in *CONCEPTUAL CHANGE AND THE CONSTITUTION* 35, 47 (Terence Ball & J.G.A. Pocock eds., 1988).

25. Jack N. Rakove, *The Super-Legality of the Constitution, or, a Federalist Critique of Bruce Ackerman's Neo-Federalism*, 108 YALE L.J. 1931, 1943 (1999) [hereinafter Rakove, *A Federalist Critique*] (relying on Wood's interpretation).

then submitted to the people as a whole for ratification."²⁶ And Robert Williams describes "the idea of a specialized constitutional convention . . . followed by a separate mechanism for popular ratification" as becoming "an accepted procedure by 1787."²⁷

C. Shared Understanding

The third assumption about the Confederation period is that the Federal Constitution expressed the American understanding of written constitutions. In analyzing Federalist views of government in the 1780s, Gordon Wood does not suggest they were universally held during the ratification debate.²⁸ However, Wood and many other historians treat constitution-making and revision after 1787 as variations on a theme expressed by the Federal Constitution. Bernard Bailyn epitomizes this view in describing the Federal Constitution as "the final" expression of revolutionary ideology.²⁹

In concluding the Federalists "broke in important ways with the definition of republican government that was embodied in the early state constitutions," Donald Lutz, like Gordon Wood, leaves the impression that the Federalists established a new paradigm for American constitution-making.³⁰ Likewise, Jack Rakove explains that their concept of ratification

26. Thomas C. Grey, *The Original Understanding and the Unwritten Constitution, in TOWARD A MORE PERFECT UNION: SIX ESSAYS ON THE CONSTITUTION* 145, 155 (Neil L. York ed., 1988).

27. 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, 579 (1989); see also ACKERMAN, *FOUNDATIONS*, *supra* note 21, at 216 (agreeing with Wood that constitutional conventions became the legitimate means of constitution-making by the 1780s).

28. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC*, *supra* note 2, at 471-518.

29. BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 321 (2d ed. 1992); see also Herman Belz, *Constitutionalism and the American Founding*, in *THE FRAMING AND RATIFICATION OF THE CONSTITUTION* 333, 346 (Leonard W. Levy & Dennis J. Mahoney eds., 1987) (asserting the Federal Constitution signified the "fulfillment of the Revolution"); 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* 95, 98 n.3 (Ronald Hoffman & Peter J. Albert eds., 1981) (regarding the Federal Constitution as "the quintessential expression of political wisdom of the American people").

30. LUTZ, *POPULAR CONSENT*, *supra* note 5, at 237; see also Bruce Ackerman, *Revolution on a Human Scale*, 108 YALE L.J. 2279, 2297 (1999) (attributing to Federalists "a very distinctive understanding" of government).

"rested on a superior grasp of the nature of constitutionalism" that constituted "a new understanding that drew upon elements of thought that had been available in 1776 but that had not been adequately synthesized or appreciated" until the 1780s.³¹

This break from earlier constitution-making is routinely seen as ushering in "the critical expression of the American constitutional tradition."³² Paul Conkin suggested that the Federal Constitution "came as close as possible to an emerging majority view on the best form for a 'republican' government."³³ For Rakove, the origins of "the supreme authority" of the people's sovereignty can "be traced to the mixture of theoretical and political concerns that converged in 1787."³⁴ Legal scholars also see the Federal Founding "as a great precedent in the ongoing practice" of the people's sovereignty.³⁵

The work of political scientists most directly challenges the idea of a constitutional consensus by suggesting that multiple conceptions of constitutionalism emerged with the Revolution.³⁶ Donald Lutz, for example, sees the first state constitutions that allowed for more direct popular control of government as being "superseded" by a more restrictive Federalist understanding in 1787.³⁷ Moreover, Daniel Elazar argues that three separate concepts of American constitutionalism emerged by 1787.³⁸ Ultimately,

31. Rakove, *A Federalist Critique*, *supra* note 25, at 1945; *see also* Jack N. Rakove, *Thinking Like a Constitution*, 24 J. EARLY REPUBLIC 1, 17-18 (2004) [hereinafter Rakove, *Thinking Like a Constitution*] (asserting that only by 1787 did "the concept of the written constitution as supreme law" gain "acceptance").

32. DONALD S. LUTZ, *THE ORIGINS OF AMERICAN CONSTITUTIONALISM* 6 (1988) [hereinafter LUTZ, *THE ORIGINS*].

33. CONKIN, *supra* note 13, at 177.

34. Rakove, *Fidelity Through History (Or to it)*, *supra* note 15, at 1602.

35. Bruce Ackerman & Neal Katyal, *Our Unconventional Founding*, 62 U. CHI. L. REV. 475, 572 (1995); *see also* Flaherty, *supra* note 5, at 549 (assessing a "growing literature" on the Federal Constitution that "views the Founding as a union of ideological trends").

36. Such insights have made little impact on the conventional view, most likely because alternative views are associated with state constitution-making, which is largely deemed a lesser form of constitutionalism than federal constitution-making.

37. LUTZ, *POPULAR CONSENT*, *supra* note 5, at 214.

38. DANIEL J. ELAZAR, *THE AMERICAN CONSTITUTIONAL TRADITION* 109-10 (1988). Elazar's three concepts of constitutionalism were: 1) a Whig tradition that emphasized direct, active, and continuous popular control over the legislature; 2) a Madisonian concept that wrestled with problems of an extended republic and majority tyranny, but concluded that all powers of the government came from the people; and 3) a Hamiltonian "managerial" approach that emphasized virtual rather than actual representation and stressed executive leadership. *Id.*

however, Elazar lends support to the view that American constitutionalism reached the height of its creativity in the 1780s by considering subsequent constitution-making a derivation of those initial constitutional patterns.³⁹

The combination of the three assumptions about the Confederation period reinforces the orthodox constitutionalism of today: that the use of special constitutional conventions followed by popular ratification distinguishes fundamental law of constitutions from ordinary acts of the legislature. This model for constitution-making assumes that it took Americans until the 1780s to develop a "correct" understanding of the people's sovereignty.⁴⁰ Most modern observers question the constitutional legitimacy of the earliest American constitutions that emerged without special conventions followed by ratification. For example, Jack Rakove thinks that early state constitutions had "no authority greater than ordinary acts"⁴¹ of the legislature because "a true constitution had to be framed by a body appointed for that purpose alone, and then ratified by the people."⁴² Researchers in the three relevant disciplines agree that state constitution-makers in the early revolutionary period failed to distinguish fundamental from ordinary law because they did not use procedures later associated with the creation of constitutions.⁴³ According to this view, Americans during the

For Elazar, the Federal Constitution embodied the Madisonian conception while many state constitutions reflected the Whig tradition. *Id.* at 110.

39. *Id.* at 115-20.

40. See, e.g., SIMEON E. BALDWIN, *MODERN POLITICAL INSTITUTIONS* 46 (Boston, Little, Brown & Co. 1898) (asserting that Massachusetts's 1780 constitution is one of the earliest "true Constitutions" because it required popular ratification). The notion that fundamental law requires a constitutional convention dates back to Andrew C. McLaughlin, *American History and American Democracy*, 20 AM. HIST. REV. 255, 264-65 (1915) (claiming Massachusetts's 1780 constitution "rested on the fully developed convention, the greatest institution of government which America has produced").

41. JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 129 (1996).

42. Rakove, *Thinking Like a Constitution*, *supra* note 31, at 13.

43. See, e.g., ADAMS, *supra* note 21, at 64, 69, 72, 75; ELISHA P. DOUGLASS, *REBELS AND DEMOCRATS: THE STRUGGLE FOR EQUAL POLITICAL RIGHTS AND MAJORITY RULE DURING THE AMERICAN REVOLUTION* 132 (1955); LUTZ, *THE ORIGINS*, *supra* note 32, at 99, 121; FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 148-49 (1985); FORREST McDONALD, *STATES' RIGHTS AND THE UNION: IMPERIUM IN IMPERIO, 1776-1876*, at 8 (2000); Christopher Collier, *The Fundamental Orders of Connecticut and American Constitutionalism*, 21 CONN. L. REV. 863 (1989); Edward F. Hennessey, *The Extraordinary Massachusetts Constitution of 1780*, 14 SUFFOLK U. L. REV. 873, 874 (1980); Kevin D. Leitao, *Rhode Island's Forgotten Bill of Rights*, 1 ROGER