

HASTINGS CONSTITUTIONAL LAW QUARTERLY

VOLUME 27

WINTER 2000

NUMBER 2

American Constitution-Making: The Neglected State Constitutional Sources

Marsha L. Baum
Christian G. Fritz



Reprinted from
HASTINGS CONSTITUTIONAL LAW QUARTERLY
Volume 27, Winter 2000, Number 2
Copyright 2000, Hastings College of Law

ARTICLES

American Constitution-Making: The Neglected State Constitutional Sources

By MARSHA L. BAUM* AND CHRISTIAN G. FRITZ**

I. Introduction

During the first wave of American constitution-making and six years before the formation of the the Federal constitution, an unusual series of books made their appearance: comprehensive compilations of existing state constitutions.¹ These compilations not only provided models and constitutional text for American constitution makers, but initially served to announce the republican governments Americans had established after the Revolution. These compilations have considerable significance for American constitutional history and law, and have been largely overlooked legal sources.

Although the eighteenth-century genesis of these volumes can largely be traced to John Adams, their publication marked the advent of a constitutional literature that flourished throughout the nineteenth-century. Through their titles, content, and form, these compilations offer clues about how Americans thought about framing

© 1999 MARSHA L. BAUM AND CHRISTIAN G. FRITZ

* Associate Professor of Law and Director of the Law Library, University of New Mexico.

** Professor of Law, University of New Mexico.

The Authors gratefully acknowledge the critical readings of earlier versions of this article by James W. Ellis, Joseph Franaszek, and Marlene Keller as well as assistance from Robert Mead on the Bibliographic Appendix. The Authors would also like to acknowledge the invaluable BIBLIOGRAPHY of Morris Cohen which has been used to verify many of the items in the Bibliographic Appendix.

1. In his monumental six-volume BIBLIOGRAPHY OF EARLY AMERICAN LAW, Morris Cohen notes most, but not all, of the constitutional compilations and their various editions included in this article's Bibliographic App. Cohen does not indicate physical dimensions of the compilations. Morris L. Cohen, BIBLIOGRAPHY OF EARLY AMERICAN LAW (1998). Items in the Bibliographic Appendix refer to Cohen and include numbers that correspond with items listed in Cohen's BIBLIOGRAPHY. The absence of such a reference signifies that the item is not listed in Cohen's BIBLIOGRAPHY. It should be noted that the coverage of Cohen's BIBLIOGRAPHY extends only through 1860.

fundamental law. Moreover, compilations were widely available to the 170 different constitutional conventions that met between the Revolution and the end of the nineteenth-century.² Their presence and use, as well as perceived utility, is suggestive of how convention delegates approached the process of constitution-making. Constitution makers were aware of the work produced by their peers and utilized those sources to assist in framing constitutions. Ultimately, constitutional compilations contribute further evidence demonstrating the existence of a rich culture of nineteenth-century constitution-making.

Beyond the impact compilations had on the work of American constitution makers, their appearance suggest how Americans conceived of written constitutions. Although the compilations' impact on constitution-makers can be traced more directly than on the general public, it seems evident that compilations were not primarily read by drafters. The literature of constitutional compilations reveals that eighteenth and especially nineteenth-century Americans took a deeper interest in their written constitutions than previously suspected.

How American constitution-makers approached their task is a matter of both contemporary legal importance and historical interest. Many current state constitutions largely remain a product of nineteenth-century (and, in the case of Massachusetts, even eighteenth-century) constitution-making. With increased attention given to state constitutions as sources of constitutional guidance and rights "independent" of the Federal Constitution, the result is renewed interest in the text and context of state constitution-making.³ Unfortunately, the lack of examination of state constitution-making nationally and over sufficiently long periods of American history has contributed to an incomplete and somewhat distorted picture of state constitutions and constitutionalism.⁴ Frequently the subject of pejorative comparisons

2. For the number of conventions that met from the Revolutionary period through the 20th century, see Albert L. Sturm, *The Development of American State Constitutions*, 12 *PUBLIUS* 57, 82 (1982).

3. See generally Robert F. Williams, *STATE CONSTITUTIONAL LAW: CASES AND MATERIALS* (2d ed. 1993) and Jennifer Friesen, *STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS, AND DEFENSES* (2d ed. 1996).

4. See Christian G. Fritz, *The American Constitutional Tradition Revisited: Preliminary Observations On State Constitution-Making In The Nineteenth-Century West*, 25 *RUTGERS L.J.* 945, 952-956 (1994). Moreover, Lawrence Friedman reminds us that despite the individuality of states, "close study of state constitutional history can be, and often is, a way to see the country as a whole." *State Constitutions and Criminal Justice in the Late Nineteenth Century*, 53 *ALB. L. REV.* 265, 281 (1989).

to the Federal Constitution and its widely admired and illustrious tradition of constitutionalism, state constitutions have largely suffered as lesser forms of constitutions, more akin to "constitutional legislation" than "true" constitutions.⁵ Scholars have neglected the history of specific state constitutions as well as state constitution making, generally impeding an appreciation and understanding of these documents. Particularly helpful would be a broader study of American constitution-making that explored how delegates understood their task of drafting state constitutions. Although such a study is underway, the present article examines the distinct sources relied upon by many, if not most, American constitution-makers, and which had a broad appeal to Americans generally.⁶

II. The Emergence and Use of Constitutional Compilations

A. A Political Purpose

Essentially, compilations were pocket-sized volumes that contained the full text of all the state constitutions existing at the time of its publication. The literature of compilations, expanded to include what might be called partial compilations, did not reproduce the full text of all existing state constitutions, but instead included selected state constitutions or compared selected constitutional topics.⁷ Eventually, some works provided full text, charts, and topically arranged information to facilitate a comparison of constitutional approaches.⁸ The overwhelming number of compilations found in the Bibliographic Appendix, however, are references to full text compilations.⁹ From the start, however, editors and publishers of compilations inserted additional information. An early compilation published in Philadelphia, for example, included not only the state constitutions "of the Several Independent States of America," but also a copy of the Declaration of

5. Fritz, *supra* note 4, at 957-62.

6. One of the authors, Christian Fritz, is currently engaged in that broader study of American constitution-making from the Revolution until the end of the 19th century. That study analyzes the existing debates of all the state constitutional conventions of that period as well as accounts of such conventions. For some preliminary findings, see Fritz, *supra* note 4 and Christian G. Fritz, *Alternative Visions of Constitutionalism: Popular Sovereignty and the Early American Constitutional Debate*, 24 HASTINGS CONST. L.Q. 287 (1997).

7. For partial compilations in the Bibliographic App., see items Nos. 18, 20, 41, 45, 50, 55, 57, 58, 60, 62, 67, 71, 72, 75, 79, 81, 83, 85, 88, 89, 93, 95, 97, 99, and 102.

8. One such compilation was the work compiled by Franklin Benjamin Hough in 1871-1872. See Bibliographic App., item No. 105.

9. All the items listed in the Bibliographic App. except for those noted in note 7 are full text state compilations.

Independence, the Articles of Confederation and the treaty between Great Britain and United States.¹⁰

The earliest identified compilation was published in French in Philadelphia in 1778.¹¹ Between 1778 and the federal constitutional convention in the summer of 1787, three editions and one reprint of state constitutional compilations had been published in America.¹² In addition, one new edition and five different reprints of the earlier American published compilation appeared in England, Scotland, and Ireland all before 1787.¹³ European interest in the republican experiment in constitution-making was reflected not only by the early 1778 edition, but by a Dutch edition published in Dordrecht in 1781-1782, yet another French edition published in Paris in 1783, and a German edition of collected American state constitutions published in Dessau and Leipzig in 1785.¹⁴ Benjamin Franklin's hand can be detected in the French editions, particularly the 1783 edition which appeared while Franklin was America's ambassador to the French Court.¹⁵ John Adams, however, proved the major impetus for the earliest compilation in English. That compilation ultimately reflected John Adams' concern about America's political status in the wake of the Revolution and desired to make interesting and important documents more widely available.

Congress dispatched Adams to Europe in early 1780 as America's Minister to France and the Netherlands in order to negotiate Anglo-American peace and commercial treaties. He came armed with copies of the Report he had drafted the previous summer which became the basis of Massachusetts' 1780 constitution. French interest in American constitution-making created a demand for copies of the post-Revolutionary state constitutions. While Adams distributed his Report, he also wrote Congress in February 1780 asking for copies of other state constitutions. He noted the great "[c]uriosity throughout all Europe to see our new Constitutions" and the fact that "those already published in the Languages of Europe" have done America "much Honor."¹⁶ Seven months later, Adams reiterated his concern about

10. Bibliographic App., item No. 7.

11. See Cohen, *supra* note 1, at 605. See Bibliographic App., item no. 1. Much of the material in this compilation had evidently been originally printed in Edmé Jacques Genet, *AFFAIRES DE L'ANGLETERRE ET DE L'AMERIQUE (1776-1783)*. See John Adams, in 10 *THE PAPERS OF JOHN ADAMS* 178 n. 1 (Robert J. Taylor, ed., 1977-1996).

12. Bibliographic App., item Nos. 2, 6, 12, and 14.

13. Bibliographic App., item Nos. 4, 5, 7, 8, 9, and 10.

14. Bibliographic Appendix, item Nos. 3, 11, and 13.

15. See Cohen, *supra* note 1, at 605, entry 3033.

16. *THE PAPERS OF JOHN ADAMS*, *supra* note 11, at 379 n. 1.

making the texts of American constitutions more widely available when he wrote from Amsterdam in September of 1780 to request that Congress publish an edition of those state constitutions. He lamented the high level of ignorance about "our Affairs" and the widespread tendency of Europeans to "consider the American Resistance, as a desultory Rage of a few Enthusiasts, without order, Discipline, Law or Government."¹⁷ After scouring bookstores and finding only a few copies of the early French language edition published in Philadelphia in 1778, Adams insisted that, "Nothing would Serve our cause more than having a compleat Edition of the American Constitutions, correctly printed in English, by order of Congress, and sent to Europe, as well as Sold in America."¹⁸ This time, Congress acted relatively promptly after receiving Adams' suggestion, and in December of 1780, appointed a three-person committee "to collect and cause to be published 200 correct copies" of the Declaration of Independence, the Articles of Confederation, the "alliances" between the United States and Britain as well as "the constitutions or forms of governments" of the states.¹⁹ By January 1781, the committee had gathered most of the state constitutions and Congress' authorized edition of them was published in Philadelphia by May of 1781.²⁰ Eventually, a second edition—based on Congress' compilation—was published in Boston in 1785.²¹

Although both the 1781 and 1785 compilations contained information that early American constitution-makers would draw upon in their drafting process, they also clearly advanced Adams' wider political purpose. By authorizing these publications, Congress announced to the world that the states of the United States and Americans constituted a new nation. The works not only provided content that people—particularly Europeans—might find interesting, but they underscored the legitimate place Americans sought to claim among

17. *Id.* at 176.

18. *Id.*

19. 18 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789 1217 (Worthington Chauncey Ford ed., 1904-1937). The three members of the committee appointed on December 29, 1780 were Thomas Bee, delegate from South Carolina, John Witherspoon, delegate from New Jersey, and Oliver Wolcott, delegate from Connecticut.

20. Bibliographic App., item no. 2; Letter from Oliver Wolcott to Johnathan Trumbull (January 9, 1781), in 5 LETTERS OF MEMBERS OF THE CONTINENTAL CONGRESS, at 525 (Edmund C. Burnett, ed., 1921-1936); 20 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, *supra* note 19, at 475. It may be that more than the 200 copies originally ordered were published since Congress approved payment to the printer, Francis Bailey, in the amount of \$160, but ultimately paid him \$800 for the work. *See id.* at 535, 543.

21. Bibliographic App., item No. 12.

other nations. Including treaty material in the early compilations reminded readers of the consequences of the American Revolution: the emergence of a government that desperately sought to be taken seriously by Europe. The struggle for national respect and credibility that had begun with the Revolution continued long after the cessation of hostilities with Britain.²² The dignity of the American nation and that of the diplomats sent to various European courts would suffer considerable slights in the years to come, but constitutional compilations served as one of the early ways of showing America's credentials for membership in the international arena.²³

In this context, the efforts of Benjamin Franklin to encourage the very first compilation in French, and especially the second edition published in Paris in 1783, have wider significance. Likewise, the widespread reprinting of the 1781 compilation in London in 1782 and 1783, in Glasgow in 1783, and in Dublin in 1783, contributed to advance the political status of America. The first London publication, as opposed to a mere re-printing, of an American constitutional compilation tellingly included a number of additional documents beyond the expected constitutional text. The compilation, printed by J. Stockdale in 1783 with a preface and dedication by the Reverend William Jackson, included "the Non-Importation Agreement; and the Petition of Congress to the King Delivered by Mr. Penn. With an appendix, containing the Treaties Between His Most Christian Majesty and the United States of America; the Provisional Treaty with America; and (never before published) an authentic copy of the treaty concluded between their High Mightiness the States-General, and the United States of America."²⁴

As evidence of explicit recognition of America's status as new nation, it is not surprising that inclusion of treaty material invariably formed part of the compilations published in the 1780s and 1790s. By the 1800s, however, such references to the Treaty with Britain largely dropped out of the titles, reflecting the distance America had traveled in its quest to be recognized as a nation state. Instead, the material, in

22. For the diplomatic trials and tribulations of the new American nation, see James H. Hutson, *JOHN ADAMS AND THE DIPLOMACY OF THE AMERICAN REVOLUTION* (1980) and Samuel Flagg Bemis, *A DIPLOMATIC HISTORY OF THE UNITED STATES* 65-110 (rev. ed., 1942).

23. One of the more dramatic and humiliating instances of dismissive treatment by European powers was the infamous XYZ affair, in which the French Foreign Minister refused to deal with American diplomats in the late 1790s without first receiving bribes. See generally William Stinchcombe, *THE XYZ AFFAIR* (1980) and Stanley Elkins & Eric McKittrick, *THE AGE OF FEDERALISM: THE EARLY AMERICAN REPUBLIC* 549-79 (1993).

24. Bibliographic App., item No. 10.

addition to texts of the state constitutions, tended to include a broader range of national legal sources such as the Articles of Confederation, the Federal Constitution, the Declaration of Independence, and occasionally, George Washington's Farewell address.

B. Broader American Appeal

Compilations eventually developed into works that Americans demanded. Some evidence for this conclusion comes from the frequency with which multiple versions of a given compilation were published in different places in the same year. Moreover, the same compilation title was often published year after year, even without the impetus of including newly-created constitutions. The patten of publication and sheer numbers of compilations reveal that the market for them extended well beyond constitutional convention delegates.²⁵ Publishers would hardly have maintained their non-stop pace of publication had there not been an on-going interest in compilations that generated some degree of profit.

There is additional evidence that compilations were widely marketed to the American public and not merely specialized publications intended primarily for convention delegates. There is little correlation between when constitutional conventions met and the appearance of new editions of compilations. Indeed, the ratio of compilations published to conventions held was much higher in the Revolutionary period to the early national period than it would be later in the nineteenth-century when more conventions met.²⁶ For example, in the first quarter of the nineteenth-century, some fourteen conventions met, during which period thirty compilations were published; while from 1826 to 1850, when the number of constitutional conventions more than doubled (up to thirty-eight), only twenty-eight compilations appeared. In the period of greatest activity of constitution-mak-

25. Bibliographic App. . Between the American Revolution and the end of the nineteenth-century more than ninety different editions and versions of constitutional compilations were published.

26. Occurrence of constitutional conventions and appearances of compilations.

Period	Number of Conventions	Number of Compilations
Before 1801	26	18
1801 to 1825	14	30
1826 to 1850	38	28
1851 to 1875	67	15
1876 to 1900	25	4

Source: For number and distribution of conventions, see Sturm, *supra* note 2, at 83; for dates of compilations, see Bibliographic App.

ing, from 1851 to 1875, when sixty-seven conventions met, only fifteen compilations made their appearance. If compilations had been primarily marketed to delegates framing state constitutions, then many more editions would have appeared during the most active periods of constitution-making.

Moreover, with only two exceptions, the printers of compilations did not print the convention debates. This lack of a connection also suggests a wider intended market for compilations because printers for debates frequently enjoyed the lucrative privilege of publishing official state materials. Indeed, published debates were invariably published by the official state printer or a printer chosen by the convention. In only two cases, New York's 1867 and 1894 constitutional conventions, did the printers of the convention debates also publish compilation material. In both cases, the convention or the legislature ordered certain material to be prepared for the convention's use.²⁷ In 1867, Benjamin Hough published under "the Direction of a Committee" of the New York convention of that year a copy of the state's constitution and "a Comparative Arrangement of the Constitutional Provisions of Other States Classified by their Subjects."²⁸ Likewise, prior to New York's 1894 convention, George Glynn published a compilation of state constitutional texts under the direction of the New York legislature.²⁹ In both cases, the publishers of the compilation materials were also awarded the contract for publishing the debates.³⁰ The overwhelming number of conventions drew upon compilations already in print, making such direction by conventions or the legislature prior to a convention relatively rare. Thus, for example, New York's 1821 convention had available two different compilations published in 1820, Pennsylvania's 1837 convention had access to a compilation published in 1835, and New York's 1846 convention had access to a compilation published in 1845.³¹

The pattern of publication and the place of publication further supports the existence of a general market for compilations. Al-

27. Bibliographic App., item Nos. 104 and 109.

28. Bibliographic App., item No.104.

29. Bibliographic App., item No.109.

30. New York's 1867-1868 convention debates were published by Weed, Parson & Company of Albany while the state's 1894 convention debates were published by The Argus Company, also of Albany.

31. Bibliographic App., item Nos. 39, 40, 58, and 70. In addition, as part of a manual prepared at the order of New York's 1846 convention, delegates had access to the constitutions of New Jersey, Louisiana, Florida, Texas, Missouri and Iowa. See *MANUAL FOR THE USE OF THE CONVENTION TO REVISE THE CONSTITUTION OF THE STATE OF NEW YORK, CONVENEED AT ALBANY, JUNE 1, 1846* (1846).

though it might be expected that the largest number of compilations would be published in the major population centers or political capitols, such as Philadelphia, New York City, Albany, and Washington, D.C.; it is worth noting that several dozen different printers were involved in publishing compilations in those cities. More significantly, however, compilations were also commonly printed far and wide in other towns. While the publication of compilations in Boston, Newark, Baltimore, and Richmond might not be unexpected, more unlikely places of publication included: Warsaw, New York; Winchester, Virginia; Exeter, New Hampshire; and Gettysburg, Pennsylvania.³²

Indicative of the widespread publication of compilations outside metropolitan or government centers was Thomas T. Skillman's publication in Lexington, Kentucky. Between 1813 and 1826, Skillman published five separate editions of a constitutional compilation and reprinted one of those editions twice.³³ Lexington was hardly a center of the publishing world in America at the time and the appearance of Skillman's compilations were unrelated to constitutional revision in Kentucky. Kentucky's last constitutional convention, before Skillman began publishing his compilations, convened in 1799, and the next convention did not meet until 1848. Clearly, Skillman's decision to publish was not to serve a convention's need, but to meet public demand. A plausible reason for this demand was that Americans since the Revolution heralded the fact that republican governments rested on the foundation of the sovereign "people" and thus inevitably placed demands upon their conduct and behavior. Americans were keenly aware that the Declaration of Independence and the initial efforts to establish republican forms of governments marked an important departure from the experience of earlier generations and the Old World. In embracing the challenge of crafting republican governments, the potential constitutional implications for the role of "the people" was never far from the surface.³⁴

C. Early Pattern of Borrowing

Compilations facilitated the first wave of constitution-making after the Revolution and produced an enduring trait of American constitution-making: a clear instinct for comparison, modeling, and

32. For the compilations published in: Warsaw, New York; Winchester, Virginia; Exeter, New Hampshire; and, Gettysburg, Pennsylvania; see respectively Bibliographic App., item Nos. 60, 30, 27, and 29.

33. Bibliographic App., item Nos. 32, 37, 44, 46, 47, and 48.

34. See Fritz, *ALTERNATIVE VISIONS OF CONSTITUTIONALISM*, *supra* note 6, at 290-304.

borrowing. Newspapers regularly published the texts of state constitutions, which were subjected to close analysis and scrutiny by revolutionary constitution-makers.³⁵ The committee drafting North Carolina's 1776 constitution studied copies of the recently adopted constitutions of Virginia, Maryland, and Pennsylvania that had been sent to it by North Carolina's delegate to the Continental Congress, William Hooper.³⁶ The speed with which Delaware's 1776 constitution and declaration of rights emerged rested largely on access to a published version of Pennsylvania's declaration of rights and an unpublished first draft of Maryland's declaration.³⁷ Pennsylvania's drafters, in turn, had earlier relied heavily upon Virginia's declaration.³⁸ Settlers in Vermont in 1777, taking the initiative to draft a state constitution, were influenced by the Pennsylvania 1776 constitution sent to them by a Philadelphia physician who recommended it as a model.³⁹ When John Adams assumed the principal role of drafting Massachusetts's constitution in 1779, he benefited from existing state constitutions. Indeed, after being elected a delegate to the constitutional convention, Adams reflected that their work would inevitably draw from earlier state constitutions. Although happy "of having a share in this great Work," he wrote Benjamin Rush that it was "impossible for Us to acquire any Honour, as so many fine Examples have been recently set Us."⁴⁰ Indeed, his final draft, particularly in the declaration of rights, shows the signs of his borrowing.⁴¹

As Kentuckians began thinking about drafting a constitution in the 1780s, they sent letters asking for advice from many sources, including Thomas Jefferson and James Madison. Although dispensing

35. See Marc W. Kruman, *BETWEEN AUTHORITY AND LIBERTY: STATE CONSTITUTION MAKING IN REVOLUTIONARY AMERICA* 18 (1997).

36. See John V. Orth, *Fundamental Principles in North Carolina Constitutional History*, 69 N.C. L. REV. 1357, 1358 (1991) and John V. Orth, *North Carolina Constitutional History*, 70 N.C. L. REV. 1759, 1761 and 1765 (1992).

37. See Willi Paul Adams, *THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA* 75-76 (Rita Kimber & Robert Kimber trans., 1980).

38. See *id.* at 79.

39. The physician was Thomas Young and his letter to "the Inhabitants of Vermont" with advice about their prospective constitution-making was printed as a handbill and widely distributed. See Paul Gillies, *Not Quite a State of Nature: Derivations of Early Vermont Law*, 23 VT. L. REV. 99, 106-07 (1998). See also Adams, *supra* note 37, at 93-94; William C. Hill, *THE VERMONT STATE CONSTITUTION: A REFERENCE GUIDE* 4 (1992).

40. Letter from John Adams to Benjamin Rush (Sept. 10, 1779), in 8 *THE PAPERS OF JOHN ADAMS*, *supra* note 11, at 140.

41. See Robert J. Taylor, *Construction of the Massachusetts Constitution*, 90 PROC. AM. ANTIQUARIAN SOC'Y 317, 330-31 (1980) and 8 *THE PAPERS OF JOHN ADAMS*, *supra* note 11, at 228-271.