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Foreword: Out from Under the Shadow of the Federal Constitution: An Overlooked American Constitutionalism

Christian G Fritz, *University of New Mexico - Main Campus*

FOREWORD: OUT FROM UNDER THE SHADOW OF THE FEDERAL CONSTITUTION: AN OVERLOOKED AMERICAN CONSTITUTIONALISM

Christian G. Fritz[*]

I. INTRODUCTION

Most scholars of constitutional law and history equate American constitutionalism with the Federal Constitution. This spotlight on the Federal Constitution rests on a series of modern assumptions that elevate the status of the Federal Constitution over the rich history of state constitutions, and inevitably neglect the central constitutional tenet of the American Revolution—the sovereignty of the people. Viewing American constitutionalism from the perspective of the constitutional legacy of the Revolution suggests a modified paradigm in which state constitutions play a critical role in our understanding the full meaning of American constitutionalism. The American Revolution established that henceforth, in America, governments rested on the sovereignty of the people. All American patriots accepted the fact that the foundational source of governmental power derived from the collective sovereignty of the people. Consensus on this principle, however, *did not* produce a consensus on what that principle meant or how the principle might be employed. At times, post-Revolutionary Americans emphasized an actual, active, and ongoing role for the people while at other times the collective sovereign was depicted in more theoretical, passive, and residual terms. In short, all could agree on the

* Professor of Law, Keleher & McLeod Professor (2010–2012), University of New Mexico. This is a revised version of the 21st Annual State Constitutional Law Lecture delivered at Rutgers School of Law—Camden on February 1, 2010. The author would like to thank Michael Browde, Joe Franaszek, and Marlene Keller for their very helpful comments on earlier versions of this essay.

sovereignty of the people, but just what that principle meant eluded a shared understanding.[1]

A broader conception of American "constitutionalism" requires coming to terms with the constitutional legacy of the Revolution—the sovereignty of the people—and allows for a full exploration of the varied experiences of all of America's written constitutions. The challenges presented by the concept of a collective sovereign during the early years of the American republic were more profound than most commentators have acknowledged. There was, of course, the basic question of identity: who were the people,[2] and how did one recognize when they had spoken authoritatively? The idea of a collective sovereign introduced a tension and implicit challenge to one of the most sacrosanct constitutional values that we take for granted today—the rule of law as written and enforced by elected officials. The acknowledgment of sovereignty linked to the authority of the people opened up the possibility that the collective sovereign might be expressed without such constraints. The claims for a broader popular authority—reflected in the slogan of *vox populi, vox dei* (the voice of the people is the voice of God) and its corollary commitment to the rule of raw majoritarianism—would today be rejected out-of-hand as inconsistent with our notion of codified proceduralism as one of the cornerstones of the modern notion of the rule of law. Such a perspective was hardly so clear, unequivocal, and uncontested during the early years of our Republic. Initially, the powerful constitutional idea and vocabulary of a collective sovereign as often expressed in the Post-Revolutionary period pushed and pulled people in various ways and produced a far more complicated calculus than we are willing to entertain today. Nonetheless, the historical experience with written constitutions in America suggests that the rule of law, as written and administered by representatives of the people, was not so inevitable to all Americans of

1. *See* CHRISTIAN G. FRITZ, AMERICAN SOVEREIGNS: THE PEOPLE AND AMERICA'S CONSTITUTIONAL TRADITION BEFORE THE CIVIL WAR (2008).

2. While American revolutionaries spoke with one voice in affirming the sovereignty of the people, they lacked a singular voice about who counted as "the people." Initially, "the people"—at least to the extent that term correlated to holders of the franchise—excluded women, those lacking property, Native Americans, and African Americans—even as the Revolution stimulated challenges to such exclusion. The inherently dynamic process of an expanding definition of "the people"—clearly implicating the issue of slavery—forms part of the broader and important story of how American political life became more democratic. *See generally* GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION (1992); GARY B. NASH, THE UNKNOWN AMERICAN REVOLUTION: THE UNRULY BIRTH OF DEMOCRACY AND THE STRUGGLE TO CREATE AMERICA (2005).

earlier generations, particularly among those willing to extend the logic of the sovereignty of the people to its fullest extent.

This Article starts by describing the conventional paradigm of American constitutionalism, which is focused on the creation and interpretation of the Federal Constitution. That view, however, fails to consider the rich American experience with the formulation and revision of state constitutions, while elevating the Federal Constitution as the ultimate American model. The Article then suggests why a more complete paradigm that fully integrates state constitution-making facilitates our understanding of the meaning of the early struggle of the American people to exercise their constitutionally-based "sovereign" power to govern themselves, in all of its shapes and forms. That understanding is important as we continue to grapple with the legitimacy of invoking the direct and affirmative exercise of that sovereignty in the context of modern political life.

II. THE CONVENTIONAL PARADIGM OF AMERICAN CONSTITUTIONALISM

The study of American constitutional history has long been dominated by the study of the Framers of the Federal Constitution, the document they produced, and its subsequent interpretation.[3] Those interested in the political theory of American constitutional government routinely limit themselves to the ideas of the Framers and the debates surrounding the ratification of the

3. The standard texts on American constitutional history are illustrative. *See, e.g.*, MICHAEL LES BENEDICT, THE BLESSINGS OF LIBERTY: A CONCISE HISTORY OF THE CONSTITUTION OF THE UNITED STATES (1996) (while ostensibly discussing "American constitutionalism" Benedict devotes barely three pages of his nearly 400-page work to state constitutions); ALFRED H. KELLY ET AL., THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT (6th ed. 1983); FORREST MCDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION (1985); MELVIN I. UROFSKY, A MARCH OF LIBERTY: A CONSTITUTIONAL HISTORY OF THE UNITED STATES (1988); *see also* BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY (Richard Beeman et al. eds., 1987); THE FRAMING AND RATIFICATION OF THE CONSTITUTION (Leonard W. Levy & Dennis J. Mahoney eds., 1987); Peter S. Onuf, *Reflections on the Founding: Constitutional Historiography in Bicentennial Perspective*, 46 WM. & MARY Q. 341 (1989).

Robert Williams describes the study of American constitutional law as being "dominated by a virtually exclusive focus on the federal Constitution and its judicial interpretation." ROBERT F. WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS 1 (2009); *see also* Christian G. Fritz, *The American Constitutional Tradition Revisited: Preliminary Observations on State Constitution-Making in the Nineteenth Century West*, 25 RUTGERS L.J. 945, 957–60 (1994) (noting the tendency to regard Federal Constitution as a paradigm for all constitution-making in America).

Federal Constitution.[4] Indeed, the study of *The Federalist Papers* has become a cottage industry, a major sub-field of American constitutional thought.[5] Thus, for most scholars, political thinking about the Federal Constitution remains the basic, if not exclusive, source for understanding "American" constitutionalism.[6]

Imbedded in the conventional paradigm is the widely accepted belief that American constitutionalism experienced a crucial transition of ideas between Independence and the framing of the Federal Constitution, best exemplified in Gordon Wood's extremely influential book *The Creation of the American Republic, 1776–1787*.[7] Wood believes that although Americans toyed with different ideas after the Revolution, the Federal Constitution of 1787 represented a new "science of politics"—a matured understanding of how to

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4. *See, e.g.*, CONSTITUTIONALISM: THE PHILOSOPHICAL DIMENSION (Alan S. Rosenbaum ed., 1988); DAVID A.J. RICHARDS, FOUNDATIONS OF AMERICAN CONSTITUTIONALISM (1989); JAMES R. STONER, JR., COMMON-LAW LIBERTY: RETHINKING AMERICAN CONSTITUTIONALISM 5 (2003) ("Any account of American constitutionalism, after all, must explain what it is about the Constitution that raises it above ordinary politics . . . ."); RATIFYING THE CONSTITUTION (Michael Allen Gillespie & Michael Lienesch eds., 1989); *see also* Alison L. Lacroix, *The Authority for Federalism: Madison's Negative and the Origins of Federal Ideology*, 28 LAW & HIST. REV. 451, 452 (2010) (noting the scholarly tendency to regard the Philadelphia Convention as "a sui generis moment of genius that set the terms of debate" and to disregard attempts to consider it within the broader temporal context).

5. *See, e.g.*, DAVID F. EPSTEIN, THE POLITICAL THEORY OF *THE FEDERALIST* (1984); SAVING THE REVOLUTION: *THE FEDERALIST PAPERS* AND THE AMERICAN FOUNDING (Charles R. Kesler ed., 1987); THE ENDURING FEDERALIST (Charles A. Beard ed., 1948); MORTON WHITE, PHILOSOPHY, *THE FEDERALIST*, AND THE CONSTITUTION (1987); GARY WILLS, EXPLAINING AMERICA: THE FEDERALIST (1981); Alpheus Thomas Mason, *The Federalist—A Split Personality*, 57 AM. HIST. REV. 625 (1952); Douglass Adair, "*That Politics May Be Reduced to a Science": David Hume, James Madison, and the Tenth* Federalist, 20 HUNTINGTON LIBR. Q. 343 (1957).

6. *See, e.g.*, DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789–1888 (1985). Even when constitutional law scholars have criticized the emphasis given to the role of the courts in the constitutional system, the focus invariably remains on the *Federal* Constitution. *See* CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION (1993). The leading textbooks on constitutional law also reflect that focus. *See, e.g.*, CONSTITUTIONAL LAW (Kathleen M. Sullivan & Gerald Gunther eds., 16th ed. 2007); CONSTITUTIONAL LAW (Geoffrey R. Stone et al. eds., 2d ed. 1991); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW (2d ed., 1988).

7. GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787 (1969). Wood's work has been called the "indispensable book" and the "classic study" on the period from the Revolution to the Federal Constitution. *See* 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); Stephen A. Conrad, *The Rhetorical Constitution of "Civil Society" at the Founding: One Lawyer's Anxious Vision*, 72 IND. L.J. 335, 368 (1997).

create popularly-based governments through constitutional conventions and popular ratification that had garnered a consensus among Americans about constitutions and their formation.[8] In fairness to Wood, his work 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 was fully formed. Scholars examining periods after the formation of the Federal Constitution routinely extrapolate from Wood's study and assume the prevailing influence in these later periods of the ideas Wood attributes to the 1780s.

The overwhelming majority of the modern literature analyzing American constitutionalism, whether by historians, political scientists, or legal scholars, accepts the Wood paradigm, despite the fact that later constitutional disputes and debates in state constitutional conventions before the Civil War (which Wood's study did not examine) demonstrate that the federal model of 1787 did not hold sway in later periods.[9]

Few authors challenge that the Federal Constitution marked the endpoint of constitutional ideas from 1776 to 1787 or that the Federal Constitution reflected the "matured" understanding of Americans at the Founding about the nature of written constitutions.[10] Consequently, it is hardly surprising that federal and state courts routinely embrace *The Creation of the American*

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8. See WOOD, *supra* note 7, at 593–615, for Wood's discussion of the "American science of politics." *See also* Gordon S. Wood, *The Origins of the Bill of Rights*, 101 PROC. AM. ANTIQUARIAN SOCIETY 255 (1992).

9. *See* FRITZ, *supra* note 1.

10. Christian G. Fritz, *Fallacies of American Constitutionalism*, 35 RUTGERS L. J. 1327, 1329–30 (2004). Characterizing the Confederation period (1776–1787) as pivotal for American constitutionalism is widespread. *See, e.g.,* DONALD S. LUTZ, POPULAR CONSENT AND POPULAR CONTROL 214 (1980) (asserting that American political theory only overcame its "serious problems" by 1787); ROBERT E. SHALHOPE, THE ROOTS OF DEMOCRACY 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 Constitutionalism: Breaking Away From European Patterns*, 16 J. EARLY REPUBLIC 21, 44 (1996) ("After the first wave of American constitution making . . . American constitutionalism rather quickly found its way back to legal and political arguments mostly originating in the English revolutions of the seventeenth century and in British political and constitutional debate since the days of the Glorious Revolution."); Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 COLUM. L. REV. 523, 527–28, 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).

Republic as reflecting the proper viewpoint of American constitutionalism.[11] Even so, a distinct and rich state constitutional tradition resting on the authority of the people always existed, and has continued to develop throughout our history. Thus, any attempt to describe American constitutionalism must also include the rich and varied experiences of the creation and amendment of state constitutions.

Nonetheless, the prevailing sense remains that events at the state level are of little significance for understanding American constitutionalism, and there are three circumstances that reinforce that general viewpoint: first is the natural pre-eminence of the Federal Constitution in the wake of the historical growth of federal power and the expansion of federal constitutional rights; second is the denigration of the importance of the first post-revolutionary state constitutions; and third is the failure to appreciate that the different shape and content of modern state constitutions does not detract from the importance of the traditions that have developed in their formation and amendment. A fair evaluation of each frees us from the exclusive focus on the Federal Constitution and opens a path to a more complete understanding of American constitutionalism, which includes, as it must, the rich tradition found in the history of state constitutions and the struggle over the role of the people as the collective sovereign.

A. The Pre-eminence of the Federal Constitution

During its first seventy-five years of existence, the national government created under the Federal Constitution played a relatively small role in the lives of most Americans.[12] Until the Civil War (and even after), state and local governments created by and operating under state constitutions had a far larger role in the lives of their citizens. The historian Phillip Paludan has summarized the pre-Civil War situation as follows:

> The national government did not tax the public at large. It had no powers in matters of health, education, welfare, morals, sanitation, safety, or local

11. For a list of federal court citations illustrating such practice, see Fritz, *supra* note 10, at 1330 n.6.

12. As Don Fehrenbacher has put it, nineteenth-century state constitution-making "is completely *terra incognita* for most Americans in spite of the fact that until well after the Civil War, state governments had considerably more influence than the federal government on social institutions, economic enterprise, and the quality of American life." DON E. FEHRENBACHER, CONSTITUTIONS AND CONSTITUTIONALISM IN THE SLAVEHOLDING SOUTH 2 (1989).

> transportation. In short, practically every activity that affected the lives of Americans was the province of either state or local government—and more often than not it was local.[13]

Moreover, as legal historian Lawrence Friedman noted, "during most of American history, economic and social development—not to mention conflict and dispute—centered on the states."[14] In contrast, "little was expected of the national government" during the nineteenth century.[15]

After the Civil War, and more particularly during the course of the twentieth century, the development of federal power under the Federal Constitution, coupled with the growth of federal judicial review and the expansion of the Federal Bill of Rights as a primary protector of individuals from the unwarranted actions of state government, has led to an historical focus on federal rather than state constitutional matters. As the historian Richard Beeman has noted:

> Within the historical community in general there has been an understandable inclination to go where the action is, and the steady growth of federal power has quite naturally led historians to conclude that most of the action has been occurring within the various branches of the federal government.[16]

Given the over-arching and pervasive presence of the national government in the lives of Americans today, it is understandable that the constitution under whose authority that government has expanded would garner the most attention, with the result that the Federal Constitution has become the symbol of American constitutionalism.[17] The perceived primacy of the Federal Constitution in the lives of modern Americans, however, does

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13. Phillip S. Paludan, *The American Civil War Considered as a Crisis in Law and Order*, 77 AM. HIST. REV. 1013, 1021 (1972).

14. Lawrence M. Friedman, *State Constitutions in Historical Perspective*, 496 ANNALS AM. ACAD. POL. & SOC. SCI. 33, 34 (1988) (noting that for a considerable time Washington, D.C. was "not the nerve center of the nation, but more like a dinosaur's tiny mind, a clump of nerves in a vast, decentralized body").

15. Stephen M. Griffin, *Constitutionalism in the United States: From Theory to Politics*, 10 OXFORD J. LEGAL STUD. 200, 210 (1990).

16. Richard Beeman, *Introduction*, *in* BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY 3, 18 (Richard Beeman et al. eds., 1987).

17. See MICHAEL KAMMEN, A MACHINE THAT WOULD GO OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE (1986), for a discussion of how the Federal Constitution predominates in the popular iconography of American constitutionalism.

not justify the widespread neglect of the history of state constitution-making as part of the tradition of American constitutionalism.

B. Historical Reputation of the First State Constitutions

Most modern observers question the constitutional legitimacy of the earliest American constitutions that emerged without special conventions followed by ratification. Historians, political scientists, and legal scholars largely agree that state constitution-makers in the early revolutionary period failed to distinguish fundamental law from ordinary law because they did not use procedures later associated with the creation of constitutions.[18] According to this view, Americans during the Revolutionary period either experienced confusion about creating fundamental law or "unfamiliarity with constitution-making."[19] The political scientist Donald Lutz asserts that "the distinction between normal legislation and extraordinary political acts such as the design and approval of constitutions was only partial in 1776."[20] The historian Jack Rakove considers the early state constitutions "not truly constitutional at all,"[21] because they "rested on no authority greater than ordinary acts of legislation."[22] Early state constitution-makers were engaged in "a hasty experiment" at a time when they had not yet "fully learned to regard a written constitution as supreme fundamental law."[23] Thus, the first

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18. WILLI PAUL ADAMS, THE FIRST AMERICAN CONSTITUTIONS 64, 69, 72, 75 (1980); AKHIL REED AMAR, AMERICA'S CONSTITUTION 287 (2005) ("[A] strong argument could be made . . . that these [first state] constitutions were little more than fancy statutes."); FORREST MCDONALD, STATES' RIGHTS AND THE UNION 8 (2000); Peter S. Onuf, *State-Making in Revolutionary America: Independent Vermont as a Case Study*, 67 J. AM. HIST. 797, 813 (1981).

19. Gordon S. Wood, Foreword, *State Constitution-Making in the American Revolution*, 24 RUTGERS L.J. 911, 914 (1993); John V. Orth, *"Fundamental Principles" in North Carolina Constitutional History*, 69 N.C. L. REV. 1357, 1358 (1991).

20. DONALD S. LUTZ, THE ORIGINS OF AMERICAN CONSTITUTIONALISM 99 (1988). Because the first state constitutions were not "written by specially elected conventions and ratified by the people," Lutz rejected the view that Americans appreciated fundamental law from the start of the Revolution. *See* LUTZ, *supra* note 10, at 64; *see also* RUSSELL L. CAPLAN, CONSTITUTIONAL BRINKMANSHIP: AMENDING THE CONSTITUTION BY NATIONAL CONVENTION 12–13 (1988) (describing most state constitutions as ordinary legislation); Orth, *supra* note 19, at 1358 (asserting the distinction between ordinary and fundamental law "not yet clearly marked" by 1776).

21. Jack N. Rakove, *The Super-Legality of the Constitution, or, a Federalist Critique of Bruce Ackerman's Neo-Federalism*, 108 YALE L.J. 1931, 1944 (1999).

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

23. Rakove, *supra* note 21, at 1940.

state constitutions lacked constitutional legitimacy because "a true constitution had to be framed by a body appointed for that purpose alone, and then ratified by the people."[24]

To the extent early state constitution-making departed from the expected procedural steps embodied in the federal model, those first state constitutions invite denigration that is wholly unjustified. Although some Americans at the time called for constitutional conventions and others for popular ratification, most of America's first constitutions were drafted under exigent circumstances by revolutionary conventions without ratification. The revolutionary conventions made executive, legislative, and even judicial decisions and drafted the constitution for the revolutionary government. The consent of the people supporting the revolutionary cause gave these conventions their authority, including the power to promulgate constitutions. Only after these constitutions established governments for the new states would formal legislative branches emerge.[25]

Early American constitution-makers knew what made a constitution legitimate.[26] Many traced their new constitutions' legitimacy to special elections that preceded the conventions. The people elected these conventions with knowledge that one thing the convention could do was write the constitution. A legitimate constitution depended on whether the sovereign people authorized it, not whether a particular procedure was used or whether revolutionary conventions were free of other responsibilities, such as passing ordinary legislation. It was the people as the collective sovereign who authorized drafting those first constitutions that gave them their legitimacy, not whether they used procedures that matched what was later understood to be necessary to create fundamental law.[27]

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24. Jack N. Rakove, *Thinking Like a Constitution*, 24 J. EARLY REPUBLIC 1, 13 (2004). These assessments, based on the lack of the convention/ratification model in the early state constitutions, fail to acknowledge that the early state constitutional methodologies persisted long after the so-called federal "model" of 1787. Thus, the assumptions underlying the canonical story of constitutional developments from 1776 to 1787 have encouraged a presentism that assumes a (nonexistent) straight and inexorable line between the ideas of the Federal Founding and our ideas of constitutionalism today.

25. FRITZ, *supra* note 1, at 33.

26. Even some who question the legitimacy of the early state constitutions acknowledge that the provincial congresses enacting them "were not altogether unaware of the special character of these 'laws.'" ADAMS, *supra* note 18, at 64.

27. *See* MARC W. KRUMAN, BETWEEN AUTHORITY AND LIBERTY: STATE CONSTITUTION MAKING IN REVOLUTIONARY AMERICA 1–33 (1997); Christian G. Fritz, *Alternative Visions of American Constitutionalism: Popular Sovereignty and the Early American Constitutional Debate*, 24 HASTINGS CONST. L.Q. 322–29 (1997). While some Americans objected to constitutions framed without popular ratification or a special convention, this was not a

The revolutionaries focused on substance, not form, in drafting constitutions. All but two of the eleven first state constitutions emerged from revolutionary conventions after representatives to those bodies were specially elected for that purpose or elected with the common understanding that they would create a constitution for the state. The two states that did not hold elections before their legislatures promulgated their initial constitutions were South Carolina and Virginia. Even without such elections, people in those states assumed that by electing representatives in favor of independence they were also authorizing the creation of a constitution, albeit a temporary one.[28] Indeed, Americans widely accepted that the people were the source of constitutions even if they disagreed about the process of constitution-making.[29]

Today the idea that we know the will of the sovereign primarily through the use of specific formal procedures—such as elections and constitutional amendment—seems self-evident. For the revolutionary generation this was not immediately apparent. The recent experience of their successful revolution clearly taught them that proceduralism was not the *only* way to recognize when the sovereign had spoken. Often during the Revolution there was no way that traditionally accepted procedures could lend legitimacy to their struggle. Proceduralism provided one way, but not the only way, to confirm that the people had expressed their will. But with military victory, applying the principle of the collective sovereign's ability to act directly, without the aid of procedural verification, became a growing source of dispute for America's leaders, and between those leaders and some of their constituents.

One instance of the supple utility of the authority of the people to overcome supposedly mandatory procedures came with the revision of Pennsylvania's 1776 Constitution. Critics of that constitution were stymied in their efforts for constitutional change. They had been unable to muster the constitutional requirement of a two-thirds vote by a Council of Censors that only met every seven years to consider whether or not to hold a new constitutional convention. By 1790 those critics controlled the legislature and they bypassed the 1776 Constitution's requirements for constitutional change by initiating a convention themselves. They argued that "the people" as the sovereign could replace the existing constitution without following its

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common concern during the initial period of constitution-making and invariably arose as an afterthought. FRITZ, *supra* note 1, at 35.

28. FRITZ, *supra* note 1, at 34.

29. FRITZ, *supra* note 1, at 31–35.

procedures, and called for elections of delegates to a constitutional convention that created a new constitution for the state.[30] This was precisely the same tactic that had been used to replace the Articles of Confederation with the Federal Constitution.[31]

It is important to appreciate that for Americans of earlier generations the issue of constitutional revision and change was not so clear or simple as it is often depicted today. Americans living before the Civil War acknowledged the role and utilization of procedure and process in the course of framing or changing constitutions. Importantly however, Americans engaged in constitution-making before the Civil War did not assume that using such procedures was the *exclusive means* through which constitutional change could be accomplished by invoking the sovereign authority of the people.

Thus, the lack of a uniform convention/ratification system for state constitutional creation in the early days of the republic is not grounds for ignoring the rich traditions developed in early state constitution-making, rooted in the sovereignty of the people. Any complete description of American constitutionalism must take into account the force of those early successful efforts at a constitutional order founded on the authority of a collective sovereign.

C. Modern Reputation of State Constitutions

The Federal Constitution exhibits two key characteristics: brevity and permanence. In contrast, what characterizes most state constitutions today is the amount of detail (often referred to as "constitutional legislation") coupled with an ease and frequency of amendment. The length and detail of many of state constitutions is often contrasted unfavorably with the much shorter Federal Constitution,[32] supposedly free of such constitutional legislation.[33]

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30. For background about Pennsylvania's constitution-making in 1790, see ROBERT L. BRUNHOUSE, THE COUNTER-REVOLUTION IN PENNSYLVANIA: 1776–1790, at 221–27 (1971); J. PAUL SELSAM, THE PENNSYLVANIA CONSTITUTION OF 1776: A STUDY IN REVOLUTIONARY DEMOCRACY (1936); THE MINUTES OF THE CONVENTION THAT FRAMED THE PRESENT CONSTITUTION OF PENNSYLVANIA, *reprinted in* THE PROCEEDINGS RELATIVE TO CALLING THE CONVENTIONS OF 1776 AND 1790, at 129, 133 (Harrisburg, John S. Wiestling 1825).

31. FRITZ, *supra* note 1, at 138–41.

32. Critics point to provisions like those that forfeit legislative office for accepting a railroad pass, without considering the value of such passes and the contemporary purpose of such provisions to prevent railroads from corrupting the legislative process. *See, e.g.*, N.M. CONST. of 1912, art. IV, § 37, *reprinted in* 7 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 97, 104 (William F. Swindler ed., 1979); *see also* OKLA. CONST. art. XX, § 2 (providing a "flash test" for kerosene oil used for illuminating purposes).

The existence of constitutional legislation strikes the modern constitutional commentator as incongruous in a document considered to be fundamental law and whose rightful character is presumed to be concerned with more general principles and broad outlines for governmental operation.[34] The legal historian Willard Hurst, writing in 1950, anticipated scholars of today when he asserted that an ideal constitution only contained "fundamentals" and that constitutional legislation undermined the "dignity" of state constitutions.[35] The legal scholar A.E. Dick Howard also captured this view when he observed:

> Whatever the reasons for the great length and detail of the typical state constitution, commentators speak with one voice when they submit that such detail is simply not compatible with *the traditional assumption* that a constitution is properly the repository of the fundamental ordering principles of society, and that all else should be left to the statute books.[36]

The second perceived praiseworthy characteristic of the Federal Constitution—its permanence—has also helped to undermine the reputation of state constitutions as fundamental law because of their ease and frequency of revision. John Vile, a political scientist and a leading scholar of the

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33. G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 10 (1998) (noting that the typical state constitution is more than three times the length of the Federal Constitution). While the Federal Constitution contains less legislative matter than do many state constitutions, it is hardly free of constitutional legislation, including its provisions protecting slavery. U.S. CONST. art. I, § 9, cl. 1 ("The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person."); *see also* U.S. CONST. art. I, § 8 ("The Congress shall have Power . . . To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures . . . To provide for the Punishment of counterfeiting the Securities and current Coin of the United States . . .").

34. WILLIAMS, *supra* note 3, at 24 ("There is the view that a state constitution should legitimately limit itself to provisions structuring and allocating governmental powers and limiting those powers to protect the people.").

35. JAMES WILLARD HURST, THE GROWTH OF AMERICAN LAW 201–03 (1950); *see also* Kermit L. Hall, *Mostly Anchor and Little Sail: The Evolution of American State Constitutions*, *in* TOWARD A USABLE PAST: LIBERTY UNDER STATE CONSTITUTIONS 388, 403 (Paul Finkelman & Stephen E. Gottlieb eds., 1991) (concluding that as nineteenth century state constitutions became more code-like they lost their quality and significance as constitutional documents in comparison with the Federal Constitution).

36. 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, 866 (1968) (emphasis added).

Federal Constitution's revision process, has commented favorably on the adoption by the Federal Framers of a constitutional revision process, operating in "vivid contrast" to the states' experience with more frequent constitutional changes.[37] His assumption that infrequent constitutional change best accords with the nature of constitutionalism is shared by many other scholars who believe that the frequent change of state constitutions "denigrates" them and signifies a constitution's ill health.[38] Indeed, more than a few scholars have questioned whether today's state constitutions—given their detail and frequent amendment—even deserve the name "constitutions."[39]

A normative argument can certainly be made for avoiding frequent and continual constitutional changes, but one cannot ignore the counter view that ease of revision serves important purposes at the state level and is premised on a foundational principle of American constitutionalism: the right of the people to alter their governments at will. Ultimately, Americans developed competing views over the ease of amending constitutions, while agreeing that their constitutions would continue to improve.[40]

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37. John R. Vile, *American Views of the Constitutional Amending Process: An Intellectual History of Article V*, 35 AM. J. LEGAL HIST. 44, 68 (1991).

38. Michael G. Colantuono, Comment, *The Revision of American State Constitutions: Legislative Power, Popular Sovereignty, and Constitutional Change*, 75 CAL. L. REV. 1473, 1509–10 (1987); *see also* HURST, *supra* note 35, at 202–03; MICHAEL KAMMEN, SOVEREIGNTY AND LIBERTY: CONSTITUTIONAL DISCOURSE IN AMERICAN CULTURE 150–51 (1988); Hall, *supra* note 35, at 395; Howard, *supra* note 36, at 863–65; Morton Keller, *The Politics of State Constitutional Revision, 1820–1930*, *in* THE CONSTITUTIONAL CONVENTION AS AN AMENDING DEVICE 67, 69 (Kermit L. Hall et al. eds., 1981) (concluding that state constitutional conventions have been primarily "arenas (and by no means ideally representative or responsible ones) for the clash of particular interests, and not devices whereby lasting principles and large socioeconomic developments can be enshrined in the commonwealths' basic laws.").

39. *See, e.g.*, James A. Gardner, *What is a State Constitution?*, 24 RUTGERS L. J. 1025, 1025–1026 (2003) ("[T]o put it bluntly, [state constitutions] are not 'constitutions' as we understand the term.").

40. For a discussion about Madison's emphasis on stability versus Jefferson's willingness to accept regular changes, see ADRIENNE KOCH, JEFFERSON AND MADISON 62–96 (1964); MERRILL D. PETERSON , JEFFERSON AND MADISON AND THE MAKING OF CONSTITUTIONS 11–12 (1987); JOHN R. VILE, THE CONSTITUTIONAL AMENDING PROCESS IN AMERICAN POLITICAL THOUGHT 59–78 (1992).

On the idea of improvements in constitution-making, see, for example, Letter from John Marshall to Arthur Lee (Apr. 17, 1784), *in* 1 THE PAPERS OF JOHN MARSHALL 120 (Herbert A. Johnson et al. eds., 1974) (expressing the view that new constitution-making might now proceed with "more experience & less prejudice" than that which marked America's first written constitutions); THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 118 (William Peden ed., 1955) ("[Virginia's 1776 constitution] was formed when we were new and

The critics of ease in amendment fail to appreciate the manner in which state constitution-making served as a vibrant and shifting arena for crucial constitutional conversations of an engaged citizenry. The key to understanding the growing length of nineteenth and early twentieth-century constitutions lies in their framers' understanding that one of the principal purposes of the constitutions they were drafting was to impose limits—substantive as well as procedural—on the powers of state legislatures. Although post-eighteenth century state constitution-makers debated the value of adopting so-called constitutional legislation, ultimately convention delegates defended the need for and propriety of placing such material in the fundamental law of the states when necessary to constrain state or private institutional power. Restraining corporations and limiting governmental debt provided the most dramatic nineteenth century expression of the need for constitution-based constraints. In the case of controlling corporate power, including railroads, conventions asserted that legislatures were institutionally incapable of responding. Moreover, many delegates regarded the control of corporations and debt as matters on which the people had given conventions a mandate to act.[41]

For many state constitutional delegates, the constitutional control of particular legislative matters was less of a departure from authentic constitution-making than was the need to address challenges and problems unknown to the eighteenth century Federal Framers. The reputation of James Madison and his contemporaries hardly intimidated subsequent state constitutional delegates. They felt perfectly prepared for the task of constitution-making because the nature of the enterprise had substantially changed since the "early days of the republic" when "government was yet but an experiment."[42] Thus, contrary to the hero worship frequently

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unexperienced in the science of government."); Letter from James Madison to Caleb Wallace (Aug. 23, 1785), *in* 8 THE PAPERS OF JAMES MADISON 355 (William T. Hutchinson et al. eds., 1973) (advising potential Kentucky constitution-makers to preserve the means of future revision because they inevitably lacked "the same lights for framing a good establishment now" as they would "have 15 or 20 Years hence").

41. *See* Fritz, *supra* note 3, at 968; STEPHEN M. GRIFFIN, AMERICAN CONSTITUTIONALISM 33–42 (1996); JOHN J. DINAN, THE AMERICAN STATE CONSTITUTIONAL TRADITION (2006) (providing the most comprehensive analysis of the extant state constitutional convention debates and how state constitution-makers wrestled with fundamental questions—some addressed in the federal convention and others not).

42. OFFICIAL REPORT OF THE DEBATES AND PROCEEDINGS IN THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEVADA 563–64 (San Francisco, Frank Eastman 1866); *see also* 1 DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF CALIFORNIA 203 (Sacramento, State Printing 1880) [hereinafter DEBATES AND PROCEEDINGS

encountered in today's perception of the Federal Framers, nineteenth century convention delegates perceived their work as part of a progressive science of constitution-making, as they confronted more difficult and sophisticated issues of economic and commercial regulation than those faced by the country's first constitution-makers.[43] And in so doing, they built upon and enriched the tradition of American constitutionalism—a value that must be recognized and appreciated as an important part of that tradition.

III. A MORE COMPLETE PARADIGM OF AMERICAN CONSTITUTIONALISM

A. The Often-Ignored Early Tradition

After the Revolution, Americans were committed to the principle that *all* the constitutions they drafted to establish their new governments had to rest on the concept of a sovereign source linked to the people. In the course of drafting state constitutions, identifying the sovereign was relatively straightforward: the people of each state formed the collective sovereign behind each state constitution. In the case of the Federal Constitution drafted in 1787, identifying its sovereign source proved to be a more challenging question. That Constitution divided governmental power between the national and state governments, and that division created a puzzle in identifying the sovereign of the Federal Constitution. The Federal Constitution initially invited two different views of the collective sovereign that underlay that Constitution—either the people of the discrete states acting collectively, or one undifferentiated national American people. Ultimately three iterations of that sovereign source were advanced before the Civil War—the national people, the people in the states collectively, or the states themselves. Despite the different possibilities, the key point is that in both the federal and state context the central question remained how to identify the sovereign that underlay the written Constitution.

OF THE CALIFORNIA CONSTITUTIONAL CONVENTION] ("[Virginia's 1829 convention] no more serve[s] to illustrate the present machinery of constitutional conventions than the lumbering old family coaches they used to ride to the capitol in, are like the railroad cars and steamers in which the same journeys are now performed.").

43. Christian G. Fritz, *Constitution Making in the Nineteenth Century American West*, *in* LAW FOR THE BEAVER, LAW FOR THE ELEPHANT: ESSAYS IN THE LEGAL HISTORY OF THE NORTH AMERICAN WEST 292, 302–304 (John McLaren, Hamar Foster & Chet Orloff eds., 1992). See DINAN, *supra* note 41, at 32–47, for nineteenth century debates over amendment and revision provisions.

Most importantly, there were *many more* instances of struggles over the legitimating authority of the collective sovereign at the *state* level both before and after the Federal Constitution than were ever raised with respect to the Federal Constitution. Indeed, the very attribute that is used to discredit state constitutions (their frequent revision) made it more likely that such questions of constitutionalism would arise in the state context. Thus, the study of state constitutions provides substantially greater opportunities to explore how Americans have struggled over the constitutional authority of "the people."

After declaring independence, Americans saw themselves as revolutionaries, but not as rebels. They maintained this distinction because they had exercised a people's collective right to cast off an abusive king—George III. But in rejecting the king, Americans had no ready replacement with a traditional claim on their loyalty. Few American revolutionaries worried about this. In creating governments to replace those established under the authority of the king, Americans saw themselves as the sovereign, giving rise to a distinctive constitutionalism in America that would prove extraordinarily powerful and difficult to control.

America's theory of government did not break novel intellectual ground. The idea of basing government on the people's authority and consent had clear seventeenth- and eighteenth-century roots, extending as far back as the Glorious Revolution.[44] Even before Independence, some supporters of the American cause in Britain saw the colonists' struggle as vindicating "the rights of sovereignty . . . in the people themselves."[45] Thus, American revolutionaries did not discover the people's sovereignty. Rather, they inherited that idea and put it to powerful use.[46] Actually building governments on that foundation, however, was new to world history. As a South Carolina pamphleteer observed, Americans could fashion their own governments because they had freed themselves from "the control of

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44. On the English origins of the sovereignty of the people and consent as the basis of government, see JOHN PHILLIP REID, 3 CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION 97–101, 107–10 (1991).

45. JACK P. GREENE, PERIPHERIES AND CENTER: CONSTITUTIONAL DEVELOPMENT IN THE EXTENDED POLITIES OF THE BRITISH EMPIRE AND THE UNITED STATES 1607–1788, at 203 (1986) (quoting the English radical John Cartwright).

46. *See* R. R. PALMER, 1 THE AGE OF THE DEMOCRATIC REVOLUTION: A POLITICAL HISTORY OF EUROPE AND AMERICA, 1760–1800, at 213–35 (1959); Thad W. Tate, *The Will of the People in Eighteenth-Century America*, *in* THE WILL OF THE PEOPLE: THE LEGACY OF GEORGE MASON 21, 21–54 (George R. Johnson, Jr. ed., 1991).

hereditary rulers and arbitrary force."[47] It made America's revolution, John Adams noted in 1776, "the most compleat, unexpected, and remarkable of any in the History of Nations."[48] Their chief innovation and enduring constitutional legacy came from actually involving the people in forming and re-forming new governments.[49] Yet, the profound question remained of how much power would they permit themselves to exert.

The British Constitution was a product of tradition and history and was not enacted, but simply existed. The written American constitutions were the express and unilateral orders of the new American sovereign—the people. The written nature of American constitutions was a crucial characteristic of the process of establishing governments, making state constitutional revisions a valuable window into the minds of American sovereigns.[50]

Written state constitutions adopted in the 1770s reflected Americans' belief that they could, as Thomas Paine explained in *Common Sense*,

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47. Philodemus (Thomas Tudor Tucker), *Conciliatory Hints, Attempting, by a Fair State of Matters, to Remove Party Prejudice*, *in* 1 AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA, 1760–1805, at 629 (Charles S. Hyneman & Donald S Lutz eds., 1983); *see also* DANIEL J. HULSEBOSCH, CONSTITUTING EMPIRE: NEW YORK AND THE TRANSFORMATION OF CONSTITUTIONALISM IN THE ATLANTIC WORLD, 1664–1830, at 170 (2005) ("Not since the English Civil War had Anglophone people tried to frame a republic: a representative government with no king."); PAULINE MAIER, AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE 34–35 (1997) ("In 1776, there were no regular, 'republican' governments . . . in which all authority rested on popular choice and none on heredity title."); WOOD, *supra* note 2, at 243 ("Americans . . . became the first society in the modern world to bring ordinary people into the affairs of government—not just as voters but as actual rulers.").

48. Letter from John Adams to William Cushing (June 9, 1776), *in* 4 LETTERS OF DELEGATES TO CONGRESS, 1774–1789, at 177, 178 (Paul H. Smith ed., 1979).

49. On the theoretical role of "the people" under English constitutionalism, see REID, *supra* note 44, at 109 (describing the people's sovereignty as "mere theory"). For the American constitutional contribution, see R.R. Palmer, *The People as Constituent Power*, *in* THE ROLE OF IDEOLOGY IN THE AMERICAN REVOLUTION 73 (John R. Howe, Jr. ed., 1970); Gerald Stourzh, *Constitution: Changing Meanings of the Term from the Early Seventeenth to the Late Eighteenth Century*, *in* CONCEPTUAL CHANGE AND THE CONSTITUTION 35 (Terence Ball & J.G.A. Pocock eds., 1988); Thad W. Tate, *The Social Contract in America, 1774–1787: Revolutionary Theory as a Conservative Instrument*, 22 WM & MARY Q. 375 (1965).

50. *See* Wayne Franklin, *The U.S. Constitution and the Textuality of American Culture*, *in* WRITING A NATIONAL IDENTITY 9, 10 (Vivien Hart & Shannon C. Stimson eds., 1993) (asserting that Americans had "virtually no practical experience" in drafting written constitutions before 1776); JEFFERSON POWELL, LANGUAGES OF POWER: A SOURCE BOOK OF EARLY AMERICAN CONSTITUTIONAL HISTORY 4 (1991) (noting a connection between the written nature of American constitutions, their legal supremacy, and their ability to define the forms and limits of governmental power). See LUTZ, *supra* note 20, at 23–49, for earlier experience with constitutional texts,.

exercise their "power to begin the world over again."[51] A congressional delegate from Connecticut, Oliver Wolcott, described America's constitution-making in 1776 as a "Real" and not a theoretical expression of the people's will.[52] In a Fourth of July oration in 1778, historian David Ramsay captured the challenge of America's constitutions: "We are the first people in the world who have had it in their power to choose their own form of government."[53]

Defining "constitutionalism" to include the underlying source of legitimacy on which written constitutions rest in America directs our attention to the constitutional legacy of the American Revolution. That legacy, of course, entailed the recognition of sovereignty of the people not only as the justification for independence, but also as the indispensable basis for the new American governments created in the wake of the Revolution. The written constitutions that created those governments—both at the state and ultimately at the national level—rest on the idea of a collective sovereign: the American people.[54]

The authority of the people as the justification for the new governments created in the wake of the Revolution was universally shared and accepted by American patriots. Much more problematic and difficult was grappling with the implications of a collective sovereign, including identifying who "the people" were, what they could do and how one knew when "the people" had acted or "spoken." These questions were enormously important, and the answers led to some ambiguity, but included powerful ideas of great consequence.

The ambiguity surfaced repeatedly in the course of the struggle to control the meaning of the collective sovereign within American

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51. Thomas Paine, *Common Sense* (1776), *in* 2 THE COMPLETE WRITINGS OF THOMAS PAINE 45 (Philip S. Foner ed., 1945).

52. Letter from Oliver Wolcott to Samuel Lyman (May 16, 1776), *in* 1 LETTERS OF MEMBERS OF THE CONTINENTAL CONGRESS 449 (Edmund C. Burnett ed., 1921).

53. David Ramsay, An Oration on the Advantages of American Independence, Address Before a Public Assembly of the Inhabitants of Charleston, South Carolina (July 4, 1778), *in* PRINCIPLES AND ACTS OF THE REVOLUTION IN AMERICA 374, 379 (Hezekiah Niles ed., 1876).

54. The replacement of the king's sovereignty with the collective sovereign—the people—was most dramatically symbolized when a crowd of American patriots and soldiers pulled down the statue of George III in Battery Park in New York City after the Declaration of Independence was publicly read at the direction of the Continental Congress. *See* BARNET SCHECTER, THE BATTLE FOR NEW YORK 102–03 (2002); Charles D. Desbler, *How the Declaration Was Received in the Old Thirteen*, 85 HARPER'S NEW MONTHLY MAG. 165, 172 (1892); Arthur S. Marks, *The Statute of King George III in New York and the Iconology of Regicide*, 13 AM. ART J. 61 (1981).

constitutionalism because "the people" potentially played overlapping roles under a written constitution. First, the people acted as the empowering sovereign when they created, amended, revised, or even abolished the constitution. As the collective sovereign, however, the people were not limited in revising their constitution through constitutional revision procedures. As the sovereign, they were ultimately free to use and invoke their authority as they saw fit.

In creating the new American constitutions, the people also created a structure for a republican form of government. Because government was subordinate to the people and representatives were the people's agents, the people might act in a second, more focused capacity as "the ruler" to monitor the constitutional order established under their authority. One way they did this—but not the only way—was through the electoral process in which they selected legislative representatives and state executives. These elections were not acts by a "sovereign." They were simply choices by "the ruler" to designate agents to run the government, much the way a sovereign king might select ministers. As electors, they could refuse to continue those agents of government in office for any reason.

American constitutions also accommodated a role for the people as "the ruled." In this third capacity the people—as individuals or in groups—had rights granted by the constitution to express their views on the policy and conduct of the government or even on the constitutionality of government actions. In so acting they did not act with the authority of the collective sovereign. When the people petitioned government or assembled to express their views, they were simply engaged in a political role anticipated for the people in governments framed by constitutional authority. After the fact, it is possible to identify how the idea of a collective sovereign lent itself to these varying understandings of the role of "the people." At the time, however, eighteenth-century Americans were rarely explicit about these multiple roles.

Differentiating among the people acting as the collective sovereign, as "the rulers" or as "the ruled" was not easy because the distinctions were subtle. Thus, it should not be surprising that Americans before the Civil War struggled mightily to come to terms with the constitutionalism launched by the Declaration of Independence. Ideas of a collective sovereign were expounded and acted upon in the course of winning the Revolution, but the different roles the people might play as a consequence of accepting the concept of a collective sovereign were not a figment of the revolutionary imagination. The belief that the people collectively ruled could be sustained despite the knowledge that "government is always something other than the

actual people who are governed by it, [and] that governors and governed cannot be in fact identical."[55]

Americans believed that the people were simultaneously the sovereign and the ruled during the constitution-making of the revolutionary era. This raised the question of whether the people, as the newly recognized sovereign in America, could ever "oppress" itself, justifying the right of revolution that Americans had exercised in 1776. As expressed in the Declaration of Independence, natural law taught that the people were "endowed by their Creator with certain unalienable Rights" and could alter or abolish government "destructive" of those rights.[56] For Thomas Jefferson the Declaration was the last-ditch effort of an oppressed people—the position many Americans saw themselves in 1776. Jefferson's litany of colonial grievances showed that Americans met their burden to exercise the natural law right of revolution. Invoking the right of revolution in the wake of declaring Independence implicitly assumed the existence of two parties to the contract, one of whose breach warranted Independence. But as America's new constitutions merged the ruler and ruled into one, they created anomalies in how and whether the right of revolution might apply in post-revolutionary America.

The constitutional logic of recognizing the people as the sovereign may have suggested that the right of revolution no longer applied in America. This did not develop instantly or uniformly after the establishment of American governments. Some of the first state constitutions included "alter or abolish" provisions that mirrored the traditional right of revolution. For example, Maryland's 1776 bill of rights acknowledged that "whenever the ends of government are perverted, and public liberty manifestly endangered, and all other means of redress are ineffectual," the people could "reform the old, or establish a new government."[57]

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55. EDMUND S. MORGAN, INVENTING THE PEOPLE 282 (1988).

56. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). Both natural law and English constitutional doctrine provided a basis for the colonists to exercise a right to revolt against a monarch's oppression. *See* FRITZ, *supra* note 1, at 13–14.

57. MD. CONST. of 1776, Decl. of Rights, art. 4, *in* THE DECISIVE BLOW IS STRUCK: A FACSIMILE EDITION OF THE PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF 1776 AND THE FIRST MARYLAND CONSTITUTION (Edward C. Papenfuse & Gregory A Stiverson eds., 1977). Even state constitutions like Maryland's—which resembled a traditional right of revolution harkening back to the natural law precondition of oppression—were not necessarily interpreted after the Revolution as limiting their use. In 1787, Maryland's legislators debated whether that state's 1776 "alter or abolish" provision could only be used by the people if they were oppressed. Some Maryland legislators agreed that the people could resist their governors if those officials subverted the purposes of government as declared in the constitution. Yet this

Other state constitutions adopted different versions of this right to "alter or abolish" that did not sound like the traditional right of revolution. For example, Virginia's 1776 Constitution spoke only of the people's right to change government "inadequate" or "contrary" to its rightful purposes, while Pennsylvania's 1776 Constitution spoke of the people being able to "alter, or abolish" government in any manner "judged most conducive" to the public welfare.[58]

Increasingly, however, as Americans included it in their state constitutions, the right of revolution came to be seen as a *constitutional* principle permitting the people as sovereign to control government and revise their constitutions without limit. In this way the right broke loose from its traditional moorings of resistance to oppression. The alter or abolish provisions could now be read with a different meaning so that it was consistent with the constitutional principle that in America, the sovereign was the people.[59]

Significantly, while such an "alter or abolish" provision failed to make its way into the Federal Constitution, Federalists—and most prominently James Madison—clearly identified the source of authority of their drafting of a constitution as resting on the sovereignty of the people. Madison repeatedly argued that the Federal Constitution drafted in Philadelphia would only come

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extreme situation was not an indispensable precondition. One legislator, William Paca, noted that the Revolution established that government's "power is derived from the people . . . to be exercised for their welfare and happiness . . . ." Letter from William Paca to Alexander Contee Hanson (May 10, 1787), *in* REPRESENTATIVE GOVERNMENT AND THE REVOLUTION: THE MARYLAND CONSTITUTIONAL CRISIS OF 1787, at 107, 117 (Melvin Yazawa ed., 1975). As "the judges" of when they think "it is not so employed," the people could "announce it by memorials, remonstrances, or instructions." *Id.* Government officials risked being voted out of office if they ignored such efforts "or if the magnitude of the case requires it" the people could resume "the powers of government." *Id.* Thus, in one breath, Paca canvassed the possibilities of the people acting as "the ruled" by exerting political pressure, "the ruler" by exercising their electoral power, and the collective sovereign if they reclaimed their ultimate sovereignty.

58. VA. CONST. of 1776, Bill of Rights, § 3, *in* 7 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 3812–13 (Francis Newton Thorpe ed. 1909) [hereinafter FEDERAL AND STATE CONSTITUTIONS]; PA. CONST. of 1776, *in* 5 FEDERAL AND STATE CONSTITUTIONS, *supra*, at 3081, 3083. Subsequent state constitutions drafted long after the Federal Constitution continued to express the people's freedom to alter or abolish governments, provisions that persist into the twentieth century. For example, Oklahoma's present constitution, adopted in 1907, identifies the right of the people to "alter or reform" government whenever the "public good may require it." OKLA. CONST. art. II, § 1; *see also* Fritz, *supra* note 10, at 1353–54.

59. FRITZ, *supra* note 1, at 27–31.

to life with the "breath" of the sovereign people.[60] Moreover, he made it clear that whatever irregularities there might have been in altering America's first Federal Constitution—the Articles of Confederation—the sovereignty of the people would cure any of those procedural defects.[61]

B. The Persistence of An Active Exercise of the People's Sovereignty

This understanding of constitutionalism as including the source of legitimacy derived from "the people" was not confined to the founding generation. It persists today as the reason why we attribute legitimacy to written constitutions as fundamental law, and why questions of constitutionalism continue to challenge Americans as the heirs of the constitutional legacy left by the Revolutionary generation. Indeed such questions will continue to confront American society as long as the sovereignty of the people remains our constitutional touchstone. In coming to terms with that history and constitutional legacy, the experience of state constitutions is not merely part of the debate over American constitutionalism. Rather, state constitutions are the focal point and the principal arena within which conversations and debate over questions of constitutionalism have taken place (and will continue to take place). In the final analysis, that fact offers the compelling justification for a constitutional paradigm that puts state constitutions front and center.

Re-orienting our conventional frame of reference challenges the assumption that American constitutionalism developed in a "straight-line" from 1787. Instead of confining our interest to what fifty-five delegates drafted in Philadelphia in the summer of 1787, attention is now due to the thousands of delegates grappling with constitution-making in well over two hundred state constitutional conventions since the Revolution. That wider framework will force us to acknowledge that a so-called "American"

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60. *See, e.g.*, James Madison (June 5, 1787) *in* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 126 (Max Farrand ed., rev. ed., 1966); James Madison (July 23, 1787) *in* 2 RECORDS OF THE FEDERAL CONVENTION, *supra*, at 93. Nine years after the Federal convention, Madison described the draft constitution as "nothing but a dead letter, until life and validity were breathed into it, by the voice of the people, speaking through the several state conventions." James Madison, Debate in the House of Representatives (Apr. 6, 1796), *in* 16 THE PAPERS OF JAMES MADISON, *supra* note 40, at 296.

61. As Madison put it during the Federal convention, "The people were in fact, the fountain of all power, and by resorting to them, all difficulties were got over. They could alter constitutions as they pleased. It was a principle in the Bills of rights, that first principles might be resorted to." James Madison (Aug. 31, 1787), *in* 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 60, at 476.

constitutionalism cannot be distilled from the experience with the Federal Constitution alone.

In drafting and revising nineteenth century constitutions, American constitution-makers repeatedly acknowledged that "alter or abolish" provisions were "*practical*" principles that gave American republics their "*distinctive* character."[62] In Virginia's 1829 convention, James Monroe observed,

> Ours is a Government of the people: it may properly be called self-government. I wish it may be preserved forever in the hands of the people. Our revolution was prosecuted on those principles, and all the Constitutions which have been adopted in this country are founded on the same basis.[63]

In Pennsylvania's 1837 constitutional convention, one delegate described the "alter or abolish" provision as "a living and governing principle" and asserted that the people "have never parted with their inalienable right to alter, reform, or abolish their government."[64] Even delegates who refused "to join in the wild shout—*Vox Populi, Vox Dei*—the voice of the people, is the voice of God!" believed, along with "every true republican" that "the people are the only true source, from which power can emanate."[65]

Debate over a proposal for a ten-year moratorium on constitutional amendments in Pennsylvania's 1837 convention reflected the consensus about the sovereign authority in America. Such a moratorium, asserted one

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62. PROCEEDINGS AND DEBATES OF THE VIRGINIA STATE CONVENTION OF 1829–1830 TO WHICH ARE SUBJOINED, THE NEW CONSTITUTION OF VIRGINIA AND THE VOTES OF THE PEOPLE 56 (1830) [hereinafter PROCEEDINGS AND DEBATES OF THE VIRGINIA STATE CONVENTION]; *see also* DEBATE ON THE CONVENTION QUESTION, IN THE HOUSE OF COMMONS OF THE LEGISLATURE OF NORTH CAROLINA, DECEMBER 18 AND 19, 1821, at 56 (1822) (J.S. Smith insisting that the people's right "to alter their constitution at pleasure" must be accompanied with a "remedy" to "act upon it"); PROCEEDINGS AND DEBATES OF THE CONVENTION OF THE COMMONWEALTH OF PENNSYLVANIA, TO PROPOSE AMENDMENTS TO THE CONSTITUTION, COMMENCED AND HELD AT HARRISBURG, ON THE SECOND DAY OF MAY, 1837, at I:116 , XII:92 (1837–1839) [hereinafter PROCEEDINGS AND DEBATES OF THE CONVENTION OF THE COMMONWEALTH OF PENNSYLVANIA] (Earle asserting that "more order" and "stability of laws" existed under state constitutions in which "the people enjoyed practical sovereignty" and Brown taking it "for granted" that "any rules" the convention thought "proper to lay down in reference to future changes in the fundamental law, will be disregarded by the people . . . at any time when a change shall appear to them to be desirable").

63. PROCEEDINGS AND DEBATES OF THE VIRGINIA STATE CONVENTION, *supra* note 62.

64. PROCEEDINGS AND DEBATES OF THE CONVENTION OF THE COMMONWEALTH OF PENNSYLVANIA, *supra* note 62, at IV:328, I:343 (G.W. Woodward).

65. *Id.* at VII:169 (James C. Biddle).

delegate, conflicted with the people's inherent "right to alter, reform or abolish their government, in such manner as they may think proper."[66] Accordingly, "[w]hen the people feel the need of a change, and see in [their] constitution the assertion of their right to make such change, whenever they may deem fit, they will not always wait five or nine years, for the opportunity of doing it in a particular mode."[67] Preserving "peace, order, and republican government" meant giving "the people the sovereignty" and "its exercise at all times."[68] Although frequently disagreeing with the first speaker, another delegate joined in opposing the moratorium. Equally "averse to tying up the hands of the people," he thought, "they ought not to be debarred from having their wishes carried into effect," whenever they wanted to change the constitution.[69] By a substantial majority the convention rejected the ten-year time limit.[70]

By the late 1830s, Americans had considerable experience drawing upon the people's inherent authority to justify constitutional revision in the absence of provisions for change or which did not follow constitutional procedures. In 1837, James Buchanan—a lawyer, U.S. senator from Pennsylvania, and future Democratic President—justified constitutional conventions meeting under the direct authority of the sovereignty of the people.[71] The issue of the constitutional authority of the sovereign people surfaced repeatedly during the post-revolutionary era when western territories sought statehood.[72] Tensions were longstanding between the rights of the people in territorial regions to act on their own initiative versus the authority of Congress to control the process under the Northwest Ordinance. Thus, when congressional debate turned to the issue of Michigan's admission as a state in 1837, claims for the right of "the people" to sanction self-government were hardly new. Without waiting for Congress to pass an enabling act inviting the Michigan territory to organize itself for statehood, the territory drafted a constitution in a constitutional convention held in 1835. Speaking on the floor of Congress, Buchanan described the situation of a people confronted by a legislature that persistently refused to reform voting

66. *Id.* at XII:230 (Thomas Earle).

67. *Id.*

68. *Id.* at XII: 231.

69. *Id.* at XII: 232 (James Porter).

70. The vote was 78 against and 35 in favor. *See* LAURA J. SCALIA, AMERICA'S JEFFERSONIAN EXPERIMENT 6 (1999) (identifying the "meaning of America's commitment to popular sovereignty" as "frequently the primary" agenda issue of constitutional conventions meeting before the Civil War).

71. CONG. GLOBE, 24TH CONG., 2D SESS. 314 (1837).

72. FRITZ, *supra* note 1, at 47–79.

rights and political representation. Under those circumstances, Buchanan would seek "to persuade the people to hold a convention of their own" and "call upon them peaceably and quietly to exert their own sovereign authority in effecting a change in their form of government." Such a step, he insisted, was not "sedition or rebellion."[73]

Although the Civil War altered the terms of constitutional debate and shaped how Americans thought about the nature of the Union and the sovereign source of the Federal Constitution, it did not dispose of the question of legitimizing the authority of "the people" in revising state constitutions.[74] This question arose early in the course of California's 1878 constitutional convention when the seating of a delegate was challenged. The issue was whether an elected delegate who also served as a district court judge could participate in the convention, given a provision of the existing 1849 constitution that made such judges "ineligible to any other office" than a judicial office during their term.[75] At one level, the debate focused on interpreting the word "office" and the applicability of the constitutional provision, but the issue also prompted an extended discussion of the convention's ability to invoke revolutionary constitutionalism.[76] The deeper issue entailed the relevance, impact, and authority of a pre-existing constitutional provision on a later constitutional convention. During the debate the question widened to whether the convention manifested the people's collective sovereignty and was therefore beyond the control of a legislature, an enabling act, or even a pre-existing constitution.[77] At the same time the question was raised whether constitutional conventions were constrained to act in accordance with provisions that triggered their existence.[78]

The debate over the power and role of the convention was framed by a committee's majority report that recommended seating the delegate.[79] The majority report interpreted the intent of the 1849 constitutional provision as preventing judges from using their position to advance themselves in the executive or legislative departments. It rejected as an overly narrow and

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73. CONG. GLOBE, 24TH CONG., 2D SESS. 314 (1837).

74. *See* 1 DEBATES AND PROCEEDINGS OF THE CALIFORNIA CONSTITUTIONAL CONVENTION, *supra* note 42, at 172–216.

75. CAL. CONST. of 1849, art. VI, § 16, *in* 1 FEDERAL AND STATE CONSTITUTIONS 391, 401 (Francis Newton Thorpe ed., 1909).

76. 1 DEBATES AND PROCEEDINGS OF THE CALIFORNIA CONSTITUTIONAL CONVENTION, *supra* note 42, at 172–216.

77. *Id.* at 183–84, 190–91, 200, 210.

78. *Id.* at 175, 199, 204, 211.

79. *Id.* at 216.

literal interpretation that membership in the present convention constituted an "office," observing that the 1849 constitution did not "anticipate what should be done under a succeeding Constitution."[80]

The majority report emphasized the extraordinary nature of a convention. The convention worked on a different level than the "everyday operations" of the executive, legislative, or judicial branches.[81] Rather, a convention:

> outranks them all; it is their creator, and fixes limits to their spheres of action, and boundaries to their powers. It is occasional, exceptional, brief, and peculiar; it represents the people in their primary capacity, and forms the organic, fundamental, and paramount law of state. Its members are mere agents or delegates of the people, and they have no power to adopt or create, but, at most, can only propose and present to the people a draft of a constitution for their adoption or rejection.[82]

Therefore, confusing the process of making "new organic law" with normal governmental operations was akin to mistaking the architect of "a grand edifice with the people who subsequently occupy it."[83] The breadth of the provision on constitutional revision left the people "free to select whom they pleased."[84] Likewise, the statute calling the convention had no "limitation or restriction."[85] In the final analysis, the majority could not "assume for a moment that the Convention which framed the present [1849] Constitution intended to trammel the succeeding generation in any such manner in the formation of a new or revised organic law."[86]

A minority report of the committee, on the other hand, claimed that the majority embraced a discredited theory of the sovereignty of constitutional conventions, a theory the minority expressly rejected. The minority acknowledged the people as the basis of government and their right to change that government, but in terms that presupposed adherence to procedure. Constitutional conventions could express public opinion, but conventions that swept aside constitutions and reduced society "into its individual elements" simply implied "revolution."[87] The minority did not

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80. *Id.* at 172.
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.* at 173.
87. *Id.* at 175.

countenance such a convention nor would they accept the implication that "every provision of the present Constitution, regulating the calling and purpose of this Convention, may be ignored at will."[88] Rather, the existing constitution continued to bind the present convention.

In the end, nineteenth century state constitutional delegates continued to disagree about the powers of conventions. On one hand, those who argued for a more expansive potential stressed the authority of the collective sovereign and the role of convention delegates as representatives of this ultimate constitutional power. Their opponents emphasized the pre-existing authority of prior constitutions as the manifestation of that collective sovereignty. They insisted that until existing constitutions were changed through the procedures spelled out in those documents, conventions possessed the limited power of merely making suggestions that required formal ratification by the people. Both the expansive and constrained views of the collective sovereign drew from debates over the authority of the people unleashed with the Revolution. Most important, these late nineteenth century debates clearly demonstrate that the Federal Constitution's framing did not end the dialogue over American constitutionalism.

Indeed, California also provides an even more recent example of the persistence of questions of constitutionalism during the debate over the state's budget crisis, exacerbated by written constitutional provisions that constrain that state government's choices in dealing with its budget.[89] At one point in the debate some suggested bypassing existing constitutional revision procedures by invoking the authority of the people. To many, such "circumvention" of revision provisions simply seems beyond the "constitutional pale." The fact that California's constitution specifies the procedures for its revision seems—from the perspective of our modern assumptions of proceduralism—to settle the matter. The point is not that the practice of earlier generations of Americans in granting substantive authority for "the people" to act directly and circumvent procedures necessarily justifies the flirtation with circumvention in the present California debate or that present day assumptions about proceduralism preclude such circumvention. Rather, the debate illustrates the enduring presence of competing questions of constitutionalism that take us back to the issue of the underlying source of constitutional legitimacy and the scope of the authority of the people.

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88. *Id.*

89. CAL CONST. art. XIII (limiting taxes and imposing a two-thirds legislative vote in order to adopt the budget and raise taxes.)

IV. CONCLUSION

In elevating the Federal Constitution to the status of the one true model of American constitutionalism, modern scholars and commentators ignore the significance of state constitutional developments. In doing so, they discount the deeply rooted commitment—derived from the Revolutionary era—to the overarching authority of the people as the collective sovereign. Indeed, in a good number of the early state constitutions the principle was expressly articulated that the sovereign people framing those constitutions reserved to themselves the power to exercise that sovereignty whenever they were dissatisfied with their governments. It is that historically-grounded notion of the direct and active power of the collective sovereign potentially exercised by the people that is lost in the traditional paradigm of American constitutionalism, and what must be included in a more accurate understanding of that concept.

Modern scholars and commentators have been comfortable ignoring what can be learned from state constitutional history because there is no "alter or abolish" clause in the Federal Constitution acknowledging the active constitutional role of the people beyond the election of their government. That fact is coupled with the knowledge that the Federal Framers gathered in Philadelphia in 1787 were fully aware of the dangers presented by Shays Rebellion in Western Massachusetts, and other such incidents where "the people" sought to exercise their sovereign control over government. While committed to the sovereignty of the people, they were perhaps consciously creating a government where the direct and active exercise of that sovereignty would be carefully circumscribed by constitutionally declared procedural requirements for change.[90]

A more direct and active form of the sovereignty of the people—the driving principle of the American Revolution—may have appeared to be tamed by the structural and procedural constraints of the Federal Constitution. However, it took the experience of the Civil War to cement proceduralism in federal constitutional jurisprudence. Moreover, the possible exercise of that more direct and active expression of a collective sovereign remained a vibrant concept within the history of American state constitutions, both before and after 1787, and persists into the present day. Clearly, 1787 was neither the starting point, nor the end point, of American constitutionalism. It is only by recognizing and integrating the longer history

90. *See* FRITZ, *supra* note 1, at 119–52.

of state constitution-making and revision that we can forge a comprehensive and more accurate paradigm of American constitutionalism. Doing so not only corrects the historical record; it also may help us arrive at a more reasoned conversation over what should be a continual debate over questions that involve the value of increased direct citizen participation in government—through the use of the tools of the initiative and referendum, liberalized processes of constitutional amendment, or proportional representation, just to name a few examples.