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CONSTITUTIONALISM

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# FALLACIES OF AMERICAN CONSTITUTIONALISM

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

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

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

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

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

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

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

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

## I. THE CONVENTIONAL STORY

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

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

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

Wood implies that the Federal Constitution demonstrated a consensus among Americans about constitutions and their formation—an “American” constitutionalism.<sup>4</sup> The vast literature analyzing American constitutionalism, whether by historians, political scientists, or legal scholars, begins with this common thread. Few challenge that the Federal Constitution marked the endpoint of constitutional ideas from 1776 to 1787.<sup>5</sup> Few dispute that the

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

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

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

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

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

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

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

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

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

recognized that the people's sovereignty<sup>7</sup> granted written constitutions the status of fundamental law. That assumption places the shift too late. Americans understood that the people's sovereignty gave their constitutions legitimacy from the start of the Revolution. They legitimated their governments, as they justified their Revolution, on the same principle: the sovereign authority of the people.

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

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

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

### A. Transformation of Constitutional Thought

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

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

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

9. *Id.* at 275.

10. *Id.*

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

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

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

other historians share.<sup>14</sup> For historian Jack Rakove, it was the Federal Framers who “released the genie of popular sovereignty.”<sup>15</sup>

*B. Matured Procedural Understanding*

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

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

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

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

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

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

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

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

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

20. *Id.* at 213-35.



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

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

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

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

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

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

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

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

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

### C. *Shared Understanding*

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

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

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

27. Robert F. Williams, *The State Constitutions of the Founding Decade: Pennsylvania's Radical 1776 Constitution and Its Influences on American Constitutionalism*, 62 *TEMP. L. REV.* 541, 579 (1989); see also ACKERMAN, *FOUNDATIONS*, *supra* note 21, at 216 (agreeing with Wood that constitutional conventions became the legitimate means of constitution-making by the 1780s).

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

29. BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 321 (2d ed. 1992); see also Herman Belz, *Constitutionalism and the American Founding*, in *THE FRAMING AND RATIFICATION OF THE CONSTITUTION* 333, 346 (Leonard W. Levy & Dennis J. Mahoney eds., 1987) (asserting the Federal Constitution signified the "fulfillment of the Revolution"); Richard Alan Ryerson, *Republican Theory and Partisan Reality in Revolutionary Pennsylvania: Toward a New View of the Constitutionalist Party*, in *SOVEREIGN STATES IN AN AGE OF UNCERTAINTY* 95, 98 n.3 (Ronald Hoffman & Peter J. Albert eds., 1981) (regarding the Federal Constitution as "the quintessential expression of political wisdom of the American people").

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

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

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

The work of political scientists most directly challenges the idea of a constitutional consensus by suggesting that multiple conceptions of constitutionalism emerged with the Revolution.<sup>36</sup> Donald Lutz, for example, sees the first state constitutions that allowed for more direct popular control of government as being “superseded” by a more restrictive Federalist understanding in 1787.<sup>37</sup> Moreover, Daniel Elazar argues that three separate concepts of American constitutionalism emerged by 1787.<sup>38</sup> Ultimately,

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

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

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

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

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

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

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

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

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

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

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

39. *Id.* at 115-20.

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

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

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

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

revolutionary period either experienced "confusion"<sup>44</sup> about creating fundamental law or "unfamiliarity with constitution-making."<sup>45</sup> Like Gordon Wood, most scholars regard the early state constitution-makers as reformers engaged in "a hasty experiment" who had not "fully learned to regard a written constitution as supreme fundamental law."<sup>46</sup> As a result, "the original unratified state constitutions were not truly constitutional at all."<sup>47</sup> 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."<sup>48</sup>

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WILLIAMS U. L. REV. 31, 34 n.6 (1996); Peter S. Onuf, *State-Making in Revolutionary America: Independent Vermont as a Case Study*, 67 J. AM. HIST. 797, 813 (1981) [hereinafter Onuf, *State-Making in Revolutionary America*]; Albert L. Sturm, *The Development of American State Constitutions*, 12 PUBLIUS 57, 60 (1982).

44. Gordon S. Wood, *Foreword: State Constitution-Making in the American Revolution*, 24 RUTGERS L.J. 911, 921 (1993).

45. John V. Orth, "Fundamental Principles" in *North Carolina Constitutional History*, 69 N.C. L. REV. 1357, 1358 (1991). In the nineteenth century, John Alexander Jameson asserted that "the science of [c]onstitution making" of the revolutionary period was "in its infancy." See JOHN ALEXANDER JAMESON, A TREATISE ON CONSTITUTIONAL CONVENTIONS: THEIR HISTORY, POWERS AND MODES OF PROCEEDING 118 (4th ed. Chicago, Callaghan & Co. 1887) [hereinafter JAMESON, A TREATISE ON CONSTITUTIONAL CONVENTIONS]. Jameson's treatise has heavily influenced twentieth century scholars. He single-mindedly argued that "the people" possessed no inherent authority to frame or alter constitutions. *Id.* at 656-59. Contemporary reviewers noted that Jameson's account was not an even-handed evaluation of the historical evidence. BERNARD J. SAGE (P.C. CENTZ, BARRISTER), THE REPUBLIC OF REPUBLICS, OR AMERICAN FEDERAL LIBERTY 580 (5th ed. N.Y., The Gould Publ'g House 1881) (noting that Jameson "comes to his work with a cherished theory. Assuming his premises, culling such facts of constitutional history as suit him, and arguing logically, he finally reaches the conclusions he desires"); HAROLD M. HYMAN & WILLIAM M. WIECEK, EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT, 1835-1875, at 352-53 (1982); FRANCIS N. THORPE, IN MEMORIAM: JOHN ALEXANDER JAMESON, LL.D 3, at 17-20 (Phila., Am. Acad. Pol. & Soc. Sci. 1890).

46. Rakove, *A Federalist Critique*, *supra* note 25, at 1940.

47. *Id.* at 1944; see also RUSSELL L. CAPLAN, CONSTITUTIONAL BRINKSMANSHIP: AMENDING THE CONSTITUTION BY NATIONAL CONVENTION 13 (1988) (describing most state constitutions as ordinary legislation); Orth, *supra* note 45, at 1358 (asserting the distinction between ordinary and fundamental law "not yet clearly marked" by 1776).

48. LUTZ, THE ORIGINS, *supra* note 32, at 99. Because the first state constitutions were not "written by specially elected conventions and ratified by the people," Lutz rejected Bernard Bailyn's assessment that Americans appreciated fundamental law from the start of the Revolution. See LUTZ, POPULAR CONSENT, *supra* note 5, at 64. *Contra* BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 175-84 (1967).

Such assessments of state constitution-making, however, are not confined to the revolutionary period. The failure of the early constitutions to live up to the supposed model of constitution-making epitomized by the Federal Constitution continues to cast a shadow over the study of the development of state constitutions after 1787 to the extent that state experience departs from “true” canons of constitutionalism approved by the Federal Framers. Moreover, the three assumptions underlying the canonical story of constitutional developments from 1776 to 1787 have encouraged a “presentism” that seeks a straight and undeviating line between ideas of the Federal Founding and our ideas of constitutionalism today. From today’s perspective, it is hard to believe that American state constitution-makers felt authorized to dodge the guiding hand of procedures that the federal constitutional experience insists is the essence of constitutionalism.

## II. IMPLICATIONS OF THE CONVENTIONAL ACCOUNT

Accepting assumptions about the Confederation period creates a lens that colors our view of American constitutionalism. For example, our commitment to proceduralism today is based on a belief that it was a common element in revolutionary-era constitutionalism. Likewise, the assumptions underlying our view of constitution-making during the Confederation period have converted the experience of writing and adopting the Federal Constitution into the quintessence of “American” constitutionalism.

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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 21, at 64; *see also* CHARLES S. LOBINGIER, *THE PEOPLE’S LAW OR POPULAR PARTICIPATION IN LAW-MAKING, FROM ANCIENT FOLK-MOOT TO MODERN REFERENDUM; A STUDY IN THE EVOLUTION OF DEMOCRACY AND DIRECT LEGISLATION* 138 (1909) (stating it would be a “great mistake” to suppose that popular ratification was not considered during the revolutionary period); Donald S. Lutz, *From Covenant to Constitution in American Political Thought*, 10 *PUBLIUS* 101, 121 (1980) (asserting that although “the concept of a constitution as a higher law limiting government would not be adopted as an operating constitutional principle until the nineteenth century . . . the concept was present during the eighteenth century”).

A. *Legitimate Constitutional Revision Equated with Proceduralism*

The model for legitimate constitution-making today is a government-convened constitutional convention followed by popular ratification.<sup>49</sup> Implicit in the traditional view is the notion that the sovereign people need the consent or at least acquiescence of the existing government before revising their constitutions. Willard Hurst captured this idea by suggesting that in matters of constitutional change, "the legislature held the key to the convention door."<sup>50</sup> Even those identifying "wide latitude" for the people's inherent authority to change constitutions concede that the people "cannot do it in a spontaneous manner, but only through some agent authorized to speak for all of them."<sup>51</sup> One writer insists that "armed revolt" is "the only recourse open to a people who want to exercise their right to reform their government" when the legislature refuses to act.<sup>52</sup> Another assumes that Congress would be "obliged to call a convention" if a majority of the American voters so petitioned.<sup>53</sup>

In addition to the need for a government-sanctioned convention to frame constitutions or make constitutional revision, the conventional account requires strict adherence to constitutional revision provisions. George Washington's *Farewell Address* in 1796 best expressed this position. Washington acknowledged that the "basis of our political systems is the right of the people to make and to alter their constitutions of government," but he insisted that any constitution was "sacredly obligatory" on the people until

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49. Onuf, *State-Making in Revolutionary America*, *supra* note 43, at 813 (asserting "one of the hallmarks of American constitutional development . . . was to identify legitimate, constituent authority with the conventions themselves").

50. HURST, *supra* note 16.

51. Thomas R. White, *Amendment and Revision of State Constitutions*, 100 U. PA. L. REV. 1132, 1138-39 (1952).

52. Martineau, *supra* note 21, at 433; *see also* Michael G. Colantuono, *The Revision of American State Constitutions: Legislative Power, Popular Sovereignty, and Constitutional Change*, 75 CAL. L. REV. 1473 (1987); Richard P. Cole, *Orthodoxy and Heresy: The Nineteenth Century History of the Rule of Law Reconsidered*, 32 IND. L. REV. 1335 (1999).

53. Akhil Reed Amar, *Popular Sovereignty and Constitutional Amendment*, in *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT* 89 n.1 (Sanford Levinson ed., 1995) [hereinafter *Amar, Popular Sovereignty*]; *see also* Note, *State Constitutional Change: The Constitutional Convention*, 54 VA. L. REV. 995 (1968) (asserting that state legislatures are duty-bound to call a convention if the people speak through a referendum).

changed “by an explicit and authentic act of the whole people.”<sup>54</sup> That “explicit and authentic” act for Washington could only occur through established procedural channels. Any other constitutional change was revolutionary. For some scholars this is the “essence” of constitutionalism: “[T]he idea that political life ought to be carried on according to procedures and rules . . . beyond politics: procedures in other words that are fundamental.”<sup>55</sup> Indeed, many writers cannot imagine constitutionalism unbounded by proceduralism.<sup>56</sup> Accordingly, the American constitutional tradition simply does not recognize legitimate constitutional change outside of existing procedures. The tenacious hold of proceduralism today is illustrated by the reception of the idea that federal constitutional changes are possible outside of the provisions for revision in Article V.

Although not the first scholars to make the suggestion,<sup>57</sup> both Bruce Ackerman<sup>58</sup> and Akhil Amar<sup>59</sup> consider altering the Federal Constitution outside of Article V legitimate as a matter of constitutional theory. Ackerman argues that “higher lawmaking” by the people could effect

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54. See 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897, at 217 (James D. Richardson ed., 1896).

55. Herman Belz, *The New Left Attack on Constitutionalism*, in A LIVING CONSTITUTION OR FUNDAMENTAL LAW? AMERICAN CONSTITUTIONALISM IN HISTORICAL PERSPECTIVE 129 (Herman Belz ed., 1998) [hereinafter Belz, *The New Left Attack on Constitutionalism*].

56. See, e.g., Note, *supra* note 53, at 1005.

57. See, e.g., John W. Hempelmann, *Convening a Constitutional Convention in Washington Through The Use of The Popular Initiative*, 45 WASH. L. REV. 535, 546-47 (1970) (identifying the people’s sovereignty as a traditional foundational principle giving the people a right to revise their constitutions and rejecting binding nature of procedures for constitutional revision); Wilfred Ritz, *The Original Purpose and Present Utility of the Ninth Amendment*, 25 WASH. & LEE L. REV. 1, 16-17 (1968) (arguing the reserved powers of the people justify a circumvention convention should Congress fail to issue a call for a convention after the requisite number of states have petitioned); see also Stephen Keogh, *Formal and Informal Constitutional Lawmaking in the United States in the Winter of 1860-1861*, 8 J. LEGAL HIST. 275, 285-95 (1987) (discussing efforts to amend the Federal Constitution outside of the provisions of Article V during the Civil War era).

58. ACKERMAN, FOUNDATIONS, *supra* note 21, at 41-50, 267-69 (arguing Article V exclusivity undermines three fundamental constitutional transformations or “constitutional moments” of the Federal Constitution—adoption of the Federal Constitution, ratification of the Fourteenth Amendment, and the shift of constitutional doctrine accompanying the New Deal).

59. Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 457-58 (1994) [hereinafter Amar, *The Consent of the Governed*]; see also Amar, *Philadelphia Revisited*, *supra* note 21, at 1044.



legitimate changes during crucial constitutional “moments,” bypassing the need for Article V during periods of “normal politics.”<sup>60</sup> Amar, however, suggests the people have the right to make constitutional changes if a majority so desires and ratifies a proposed amendment.<sup>61</sup> Although both Ackerman and Amar invoke history, the thrust of their analyses reflects their hopes for constitutionalism today rather than how Americans understood it in the past. They tend to find a “textual home” in the Federal Constitution for their views.<sup>62</sup>

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60. Bruce Ackerman, *Higher Lawmaking*, in *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT* 63, 77-82 (Sanford Levinson ed., 1995). Ackerman distinguishes five stages of higher lawmaking, which he applies to the Founding of the Federal Constitution. BRUCE A. ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 32-68 (1998) [hereinafter *ACKERMAN, TRANSFORMATIONS*].

Nearly 130 years before Ackerman, the legal writer Sydney George Fisher anticipated a “dualist” model of constitutional change. See SYDNEY GEORGE FISHER, *THE TRIAL OF THE CONSTITUTION* 33-34 (Phila., J.B. Lippincott & Co. 1862) (describing normal “quiet times” when “abstract questions of government do not interest the people. . . . [A]nd they cannot be induced to entertain them or act upon them at all”). Fisher also alluded to a higher constitutionalism justifying change outside Article V. See *id.* at 75 (asserting that the fundamental principles establishing government “are of so high and important a nature” that they remain outside the ability of the legislature to change them “except for grave and obvious reasons, and with the assent of the people, given either expressly by votes or impliedly by silence,—by acquiescence”).

61. Amar, *Popular Sovereignty*, *supra* note 53, at 89 n.1; see also Amar, *The Consent of the Governed*, *supra* note 59, at 482 (elaborating on the majoritarian principle in constitutional revision).

62. ACKERMAN, *TRANSFORMATIONS*, *supra* note 60, at 6 (advancing “a normative argument” of American constitutionalism and identifying Article V); AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* (1998) (identifying first ten amendments); see also Lackland H. Bloom, Jr., *Long Live the Bill of Rights! Long Live Akhil Reed Amar’s The Bill of Rights*, 33 U. RICH. L. REV. 313, 314 (1999) (considering “the central tenet” of Amar’s scholarship the “belief that things do tend to fit together, at least in our Constitution, our constitutional history, and perhaps even more remarkably, our constitutional law as well”); Robert Higgs, *On Ackerman’s Justification of Irregular Constitutional Change: Is Any Vice You Get Away With a Virtue?*, 10 CONST. POL. ECON. 375 (1999) (describing *We the People* as a contribution to “the moral philosophy of constitutional law”); Frank I. Michelman, *Constitutional Authorship by the People*, 74 NOTRE DAME L. REV. 1605, 1622 (1999) (identifying Ackerman as a constitutional theorist); Peter S. Onuf, *Who are “We The People”?* Bruce Ackerman, Thomas Jefferson, and the Problem of Revolutionary Reform, 10 CONST. POL. ECON. 397, 398 (1999) (asserting that *We the People* is “an inspiring civic mythology”); Rakove, *A Federalist Critique*, *supra* note 25, at 1936 (finding Ackerman applying history “to support a theory of constitutionalism” that “is still driven by primarily normative concerns”).

That Article V might be optional for federal constitutional change stimulated considerable controversy.<sup>63</sup> The leading treatise on American constitutional law flatly rejects the idea that the Federal Constitution can be legitimately amended outside of Article V procedures.<sup>64</sup> Many others agree.<sup>65</sup>

That view, however, confronts the most celebrated example of a constitutional change circumventing established procedures: the formation and ratification of the Federal Constitution. Scholars, of course, concede that the Federal Constitution was not adopted by the procedures specified by the

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Indeed, other work on the exclusivity of Article V, especially by legal scholars, focuses on theory and policy rather than on historical experience and practice. See, e.g., Brannon P. Denning, *Means to Amend: Theories of Constitutional Change*, 65 TENN. L. REV. 155 (1997); John Harrison, *The Lawfulness of the Reconstruction Amendments*, 68 U. CHI. L. REV. 375 (2001).

63. For critiques of Ackerman's and Amar's theories, see Andrew Arato, *Forms of Constitution Making and Theories of Democracy*, 17 CARDOZO L. REV. 191, 210-14 (1995); William E. Forbath, *Constitutional Change and the Politics of History*, 108 YALE L.J. 1917, 1923-24 (1999) [hereinafter Forbath, *Constitutional Change*]; Stephen M. Griffin, *The Problem of Constitutional Change*, 70 TUL. L. REV. 2121, 2121, 2159-66 (1996) [hereinafter Griffin, *The Problem of Constitutional Change*]; Brett W. King, *Wild Political Dreaming: Historical Context, Popular Sovereignty, and Supermajority Rules*, 2 U. PA. J. CONST. L. 609 (2000); Jack N. Rakove, *Two Foxes in the Forest of History*, 11 YALE J.L. & HUMAN. 191 (1999); Symposium, *Commentaries on Akhil Reed Amar's The Bill of Rights: Creation and Reconstruction*, 33 U. RICH. L. REV. 289 (1999); *Symposium*, 10 CONST. POL. ECON. 355-414 (1999).

Some have suggested that whether Article V is the exclusive means of constitutional revision misses the point. See Sanford Levinson, *Transitions*, 108 YALE L.J. 2215, 2223 (1999) (asserting "only professional lawyers believe in the professional narrative" of the exclusivity of Article V and that "no political scientist has taken it seriously for years"); see also Sanford Levinson, *Constitutional Imperfection, Judicial Misinterpretation, and the Politics of Constitutional Amendment: Thoughts Generated by Some Current Proposals to Amend the Constitution*, 1996 BYU L. REV. 611, 613 n.7.

64. See 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 107 (3d ed. 2000) (arguing a constitutional change must be "consistent with the Constitution itself").

65. See, e.g., DAVID E. KYVIG, *EXPLICIT AND AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION, 1776-1995*, at 314 (1996) (doubting legitimacy of change without formal amendment); Frederick Schauer, *Amending the Presuppositions of a Constitution*, in *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT* 145, 147-48 (Sanford Levinson ed., 1995) (considering changes outside of Article V "decidedly not constitutional or legal"); Arato, *supra* note 63, at 211 (regarding amendment outside Article V as "extremely problematic"); John R. Vile, *Legally Amending the United States Constitution: The Exclusivity of Article V's Mechanisms*, 21 CUMB. L. REV. 271, 274 (1991) (asserting Article V the exclusive means of amendment).

Articles of Confederation.<sup>66</sup> Despite the irregularity of its framing, virtually everyone grants the Federal Constitution legitimacy, though not because circumvention of procedures was constitutionally justified. The belief that constitutionally legitimate changes must adhere to established procedures has a devoted following. As Abraham Lincoln explained in his first inaugural address: If they grew “weary of the existing government,” the people’s option was either to “exercise their *constitutional* right of amending it, or their *revolutionary* right to . . . overthrow it.”<sup>67</sup> Nineteenth-century treatise writer John Alexander Jameson saw a similar binary choice.<sup>68</sup> For him, constitutional change was “revolutionary” whether by a breach of constitutional procedures or by violent acts of resistance.<sup>69</sup> Circumventing a constitution’s revision procedures was “illegitimate.”<sup>70</sup> Like armed revolution it had to “rest, for its warrant, on . . . physical power, necessity, or natural equity.”<sup>71</sup> As such, most analysts consider the Federal Founding justified though not on a constitutional principle. The Framers vindicated themselves by the “necessities of the [time].”<sup>72</sup> Ackerman points to the political support enjoyed by the Framers,<sup>73</sup> while Rakove identifies “a

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66. See, e.g., JAMESON, A TREATISE ON CONSTITUTIONAL CONVENTIONS, *supra* note 45, at 305 (acknowledging the irregularity of the Federal Constitution’s adoption); Rakove, *A Federalist Critique*, *supra* note 25, at 1938 (concluding the Framers acted “on ‘revolution principles’” rather than “existing rules”); see also Ackerman & Katyal, *supra* note 35, at 562 (asserting the Framers acted illegally, but with “quasi-direct democracy”); Amar, *The Consent of the Governed*, *supra* note 59, at 465 (arguing that the Federal Constitution was lawfully adopted, for even if Federal Framers took actions inconsistent with the Articles of Confederation, “inconsistency is not illegality”); Richard S. Kay, *The Illegality of the Constitution*, 4 CONST. COMMENT. 57 (1987); Rakove, *A Federalist Critique*, *supra* note 25, at 1931, 1938, 1945 (considering the Constitution’s formation more a matter of “super-legality” or “extra-legality” than of illegality).

67. Abraham Lincoln, First Inaugural Address—Final (Mar. 4, 1861), in 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 269 (Roy P. Basler ed., 1953).

68. JAMESON, A TREATISE ON CONSTITUTIONAL CONVENTIONS, *supra* note 45, at 101.

69. *Id.*

70. *Id.* at 105.

71. *Id.* at 101; see also James Gray Pope, *Republican Moments: The Role of Direct Popular Power in the American Constitutional Order*, 139 U. PA. L. REV. 287, 326-27 (1990) (asserting the people’s ongoing right to act directly rooted in a right of resistance and revolution based on natural law, rather than constitutionally justified by the people’s sovereignty).

72. JAMESON, A TREATISE ON CONSTITUTIONAL CONVENTIONS, *supra* note 45, at 305.

73. See ACKERMAN, TRANSFORMATIONS, *supra* note 60, at 10-15. Ackerman considers the Founding justified by subsequent political legitimation, not constitutional authority at the

mature, fully articulated concept of constitutionalism.”<sup>74</sup> It would be unfair to consider the “violation of entrenched, legalistic norms . . . the signal feature of the Federalists’ ratification strategy.”<sup>75</sup>

Whatever procedural difficulties might have attended the Federal Framing, once established, the Federal Constitution—as well as state constitutions—supposedly passed a great divide. Although the people were the sovereign source of constitutions, when they established governments, they reputedly constrained or limited their sovereign authority. As historian Herman Belz has concluded, in America, “while the people have been the constituent power, their power to govern,” based on the people’s sovereignty, “has been limited by their own constitutional creation.”<sup>76</sup> Indeed, the idea that any inherent constitutional right of action remained in the people after they established governments under a constitution has been a recurring theme of the conventional account since the nineteenth-century.<sup>77</sup>

#### B. “American” Constitutionalism is Defined by the Federal Constitution

The assumption that the Federal Constitution epitomizes a developed, widely-held, “matured” constitutionalism is the starting point for American constitutional history today. Supposedly, little of consequence to the theory of constitutionalism has occurred since 1787, leading us to equate the Federal Constitution with “American Constitutionalism.”<sup>78</sup> Standard surveys

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time. *Id.*; see also Forbath, *Constitutional Change*, *supra* note 63, at 1919 (asserting that changes outside of Article V rest on “moral and political grounds” and not legitimate constitutionalism).

74. Rakove, *A Federalist Critique*, *supra* note 25, at 1931, 1945-46.

75. *Id.* at 1946.

76. See Belz, *The New Left Attack on Constitutionalism*, *supra* note 55, at 140.

77. See JAMESON, *A TREATISE ON CONSTITUTIONAL CONVENTIONS*, *supra* note 45, at 100 (“A government, once founded, is the people, as organized for the attainment of the ends of government.”).

78. See, e.g., A LIVING CONSTITUTION OR FUNDAMENTAL LAW? AMERICAN CONSTITUTIONALISM IN HISTORICAL PERSPECTIVE, *supra* note 55; Joyce Appleby, *The American Heritage: The Heirs and the Disinherited*, 74 J. AM. HIST. 798, 800, 804 (1987); Mark A. Graber, *The Constitution as a Whole: A Partial Political Science Perspective*, 33 U. RICH. L. REV. 343, 345-48 (1999); Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147, 1156-59 (1993); Dorothy Ross, *Historical Consciousness in Nineteenth-Century America*, 89 AM. HIST. REV. 909, 911-12 (1984); Joseph Vining, *Theorists’ Belief: A Comment on the Moral Tradition of American Constitutionalism*, 72 NOTRE DAME L. REV. 15, 16 (1996).

of American constitutional history take this focus.<sup>79</sup> So, too, do critics of the ahistorical nature of constitutional writing.<sup>80</sup>

This federal concentration neglects state constitutions, which purportedly offer little insight into the American constitutional tradition.<sup>81</sup> Historian Michael Kammen's study of "constitutionalism in American political culture" contains only passing reference to state constitutions<sup>82</sup> while Bruce Ackerman's examination of the constitutional practice of popular sovereignty in American history is preoccupied with the Federal Constitution.<sup>83</sup> Recent forums on constitutionalism largely ignore the state constitutional experience and even scholars concerned about the "static" nature of constitutional studies adopt the standard equation.<sup>84</sup>

When Americans see the words "the Constitution," what comes to mind is the federal one.<sup>85</sup> Americans of the 1820s were probably more apt to associate constitutionalism with their state constitutions. It is different today. A national poll in 1988 found that only 44% of Americans realized they even

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79. See MICHAEL LES BENEDICT, *THE BLESSINGS OF LIBERTY: A CONCISE HISTORY OF THE CONSTITUTION OF THE UNITED STATES* (1996); ALFRED H. KELLY ET AL., *THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT* (6th ed. 1983); MELVIN UROFSKY, *A MARCH OF LIBERTY: A CONSTITUTIONAL HISTORY OF THE UNITED STATES* (1988). For a major essay collection on constitutional amendment in the United States focusing on the national Constitution, see *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT* (Sanford Levinson ed., 1995).

80. Flaherty, *supra* note 5.

81. Making the Federal Constitution the exemplar of American constitutionalism is a late twentieth-century phenomenon. Nineteenth and early twentieth century scholarship paid much attention to state constitutional developments, finding it central to American constitutionalism. Even some twentieth century scholarship, however, seeks a redress of the neglect of state constitution-making. See *infra* section III.A.

82. MICHAEL G. KAMMEN, *A MACHINE THAT WOULD GO OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE* 11 (1987) [hereinafter KAMMEN, *THE CONSTITUTION IN AMERICAN CULTURE*].

83. ACKERMAN, *FOUNDATIONS*, *supra* note 21, at 216-18, 266-94; see also Appleby, *supra* note 78; Donald J. Pisani, *Promotion and Regulation: Constitutionalism and the American Economy*, 74 *J. AM. HIST.* 740 (1987).

84. See *Forum: The Founders and the States*, 16 *LAW & HIST. REV.* 527 (1998); William E. Forbath, Symposium, *Moments of Change: Transformation in American Constitutionalism*, 108 *YALE L.J.* 1917 (1999). The one exception in the latter symposium is Jack Rakove's article. See Rakove, *A Federalist Critique*, *supra* note 25, at 1941-44; see also Griffin, *The Problem of Constitutional Change*, *supra* note 63, at 2124, 2129.

85. See, e.g., Herman Belz, *Constitutional and Legal History in the 1980s*, in *A LIVING CONSTITUTION OR FUNDAMENTAL LAW? AMERICAN CONSTITUTIONALISM IN HISTORICAL PERSPECTIVE*, *supra* note 55, at 165-99.

had a state constitution.<sup>86</sup> Yet the academic literature repeatedly reminds us that during much of American history, government activity primarily occurred at the state and not the federal level.<sup>87</sup>

Differences between the state constitutional experience and the assumed federal paradigm have jaundiced interpretations of state constitution-making. The frequency of change in state constitutions and their greater length and detail distinguish them from their federal counterpart.<sup>88</sup> The content and malleability of state constitutions supposedly signal their ineffective operation.<sup>89</sup> They seem “something less than a ‘real’ constitution such as the U.S. [C]onstitution, but something more than a statute.”<sup>90</sup> Even those seeking a shift away from the federal focus attribute the neglect of state constitutions to their reputation of “relative unimportance” in contrast to the national document’s “success.”<sup>91</sup> State constitutionalism is frequently considered unworthy of study on its own terms as an expression of the American

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86. See Michael J. Horan, *The Wyoming Constitution: A Centennial Assessment*, 26 LAND & WATER L. REV. 13, 15 (1991).

87. See, e.g., FEHRENBACHER, *supra* note 24, at 2 (asserting that long 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”); Lawrence M. Friedman, *State Constitutions in Historical Perspective*, 496 ANNALS AM. ACAD. POL. & SOC. SCI. 33, 34 (1988) (noting that for much of its existence the federal government 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”); Stephen M. Griffin, *Constitutionalism in the United States: From Theory to Politics*, 10 OX. J. LEGAL STUD. 200, 210-11 (1990) [hereinafter Griffin, *Constitutionalism in the United States*] (identifying the predominance of state governance for much of American history); Phillip S. Paludan, *The American Civil War Considered as a Crisis in Law and Order*, 77 AM. HIST. REV. 1013, 1021 (1972) (asserting that before the Civil War “practically every activity that affected the lives of Americans was the province of either state or local government”).

88. Christian G. Fritz, *The American Constitutional Tradition Revisited: Preliminary Observations on State Constitution-Making in the Nineteenth-Century West*, 25 RUTGERS L.J. 945, 952-60 (1994) (noting tendency of scholars to focus on those characteristics).

89. See, e.g., Griffin, *Constitutionalism in the United States*, *supra* note 87, at 211; see also KAMMEN, *THE CONSTITUTION IN AMERICAN CULTURE*, *supra* note 82, at 20, 189 (identifying the use of the “organic” metaphor for the Federal Constitution by those fearing “a glut of constitutional amendments” and favoring “slow and evolutionary change”).

90. James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 833 (1992).

91. Kermit L. Hall, *Mostly Anchor and Little Sail: The Evolution of American State Constitutions*, in *TOWARD A USABLE PAST: LIBERTY UNDER STATE CONSTITUTIONS* 410-11 (Paul Finkelman & Stephen E. Gottlieb eds., 1991).

constitutional tradition. Rather, the state experience is significant for the contrast it offers to the main story provided by the Federal Constitution.<sup>92</sup>

### III. LIMITATIONS OF THE CONVENTIONAL ACCOUNT

The standard narrative of American constitutionalism inadequately explains how Americans engaged in drafting, revising, and debating the meaning of written constitutions. Much of that experience is either ignored or dismissed as being aberrational and of no meaningful consequence to "American" constitutionalism. This is influenced by a belief that state constitution-making, before and after 1787, produced a lesser form of constitutionalism. Not only is that assumption extremely questionable, but integrating the state and federal practice of writing constitutions better accounts for the historical record.

#### A. Discounting State Constitutional Experience

The "exalted place" of the Federal Constitution in America obscures "the great significance which our State constitutions possess, not only as integral elements of our federal system, but especially as factors in the growth of American constitutional law," observed political scientist William Morey in 1893.<sup>93</sup> He reflected the view of earlier Americans that

constitutional life has been lived quite as much in the state as in the nation, in the branches as much as in the trunk [and] that the life of the average citizen has probably more points of contact with the life of the state government than with that of the central government.<sup>94</sup>

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92. See, e.g., AN UNCERTAIN TRADITION: CONSTITUTIONALISM AND THE HISTORY OF THE SOUTH (Kermit L. Hall & James W. Ely, Jr. eds., 1989) (largely analyzing "American" constitutional tradition through southern reaction to the Federal Constitution); see also Morton Keller, *The Politics of State Constitutional Revision, 1820-1930*, in THE CONSTITUTIONAL CONVENTION AS AN AMENDING DEVICE 67-87 (Kermit L. Hall et al. eds., 1981).

93. William C. Morey, *The First State Constitutions*, 4 ANNALS AM. ACAD. POL. & SOC. SCI. 201, 201 (1893).

94. J. Franklin Jameson, *An Introduction to the Study of the Constitutional and Political History of the States*, in MUNICIPAL GOVERNMENT AND LAND TENURE 188 (Baltimore, Johns Hopkins Univ. 1886).

The irony, remarked historian J. Franklin Jameson in 1886, was that “when it comes to writing our constitutional history, we neglect all this.”<sup>95</sup> Jameson insisted that a “constitutional history of the United States” would not be written “until scholars, well-trained in historical learning and mature in political thought, take up the constitutional history of our [states], one by one, and show the world the treasures of political instruction to be derived from them.”<sup>96</sup> State constitutions illustrate the history of “the progress of democracy” in America.<sup>97</sup> Although writers at the turn of the century feared that they had not yet sufficiently probed state constitutionalism, their attention to state constitutional developments far surpassed the attention that we give it today.<sup>98</sup> Still, an increasing number of legal scholars currently suggest the value of the state experience. For Robert Williams, state constitution-making played “a major formative influence on the constitutional philosophy of most of the Framers.”<sup>99</sup> Others also encourage widening constitutional analysis beyond the Federal Constitution. Before the Civil War, American constitutional law “in any real functional sense . . . is

95. *Id.*

96. *Id.* at 189.

97. Elmer Herbert Meyer, *The Constitution of Colorado*, 2 IOWA J. HIST. & POL. 256, 256 (1904).

98. Nineteenth century and early twentieth century writers on American constitutionalism appreciated state constitution-making more than do modern scholars. See, e.g., HENRY HITCHCOCK, *AMERICAN STATE CONSTITUTIONS: A STUDY OF THEIR GROWTH* (n.p. 1887); ROGER SHERMAN HOAR, *CONSTITUTIONAL CONVENTIONS: THEIR NATURE, POWERS, AND LIMITATIONS* (1917); GEORGE E. HOWARD, *AN INTRODUCTION TO THE LOCAL CONSTITUTIONAL HISTORY OF THE UNITED STATES* (Baltimore, Johns Hopkins Univ. 1889); LOBINGIER, *supra* note 48; JAMES SCHOULER, *CONSTITUTIONAL STUDIES, STATE AND FEDERAL* (N.Y., Dodd, Mead & Co. 1897); FREDERIC STIMSON, *THE LAW OF THE FEDERAL AND STATE CONSTITUTIONS OF THE UNITED STATES* (1908).

99. Robert F. Williams, “*Experience Must Be Our Only Guide*”: *The State Constitutional Experience of the Framers of the Federal Constitution*, 15 HASTINGS CONST. L.Q. 403, 427 (1988); see also Robert F. Williams, *Introduction: State Constitutional Law in Ohio and the Nation*, 16 U. TOL. L. REV. 391 (1985) (asserting state constitutions form a broader constitutional tradition); Robert F. Williams, *State Constitutional Law Processes*, 24 WM. & MARY L. REV. 169, 180-81 (1983). Williams pioneered the study of state constitutional law, publishing the first course book devoted to the topic. See ROBERT F. WILLIAMS, *STATE CONSTITUTIONAL LAW: CASES AND MATERIALS* (3d ed. 1999). Williams, along with his colleague G. Alan Tarr, founded a Center for State Constitutional Studies at Rutgers University–Camden, prompting numerous other centers dedicated to study the state constitutional experience. See also JENNIFER FRIESEN, *STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS AND DEFENSES* (2d ed. 1996) (facilitating state constitutional study).



American state constitutional law," commented Morton Horwitz.<sup>100</sup> "[T]o understand constitutional ideology before the Civil War, we must study constitutional law at the state level."<sup>101</sup> For Paul Kahn "each state constitution represents, in a large measure, an effort to realize within the bounds of a particular time and space a common ideal of American constitutionalism."<sup>102</sup> Legal historian Lawrence Friedman observes that "close study of state constitutional history can be, and often is, a way to see the country as a whole."<sup>103</sup>

Despite renewed interest in the history of state constitutions, the recent literature, as well as that produced in the past, is inherently limited. Studies assessing state constitution-making examine regions and selected time periods with little attempt to offer an overview of the state constitutional experience nationally.<sup>104</sup> Good research on specific constitutions or states exists,<sup>105</sup> but insights from that work cannot be extrapolated to the experience of states generally.<sup>106</sup> The few treatments that take a broader sweep tend not to probe the thinking of the thousands of American constitution-makers since the Revolution.<sup>107</sup> Instead, they devote most their attention to structural

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100. Morton J. Horwitz, *Republican Origins of Constitutionalism*, in TOWARD A USABLE PAST: LIBERTY UNDER STATE CONSTITUTIONS, *supra* note 91, at 148.

101. *Id.*

102. Kahn, *supra* note 78, at 1166.

103. Lawrence M. Friedman, *State Constitutions and Criminal Justice in the Late Nineteenth Century*, 53 ALB. L. REV. 265, 281 (1989). For compilations concentrating on the constitutional experience at the state level, see, e.g., AN UNCERTAIN TRADITION: CONSTITUTIONALISM AND THE HISTORY OF THE SOUTH, *supra* note 92 and TOWARD A USABLE PAST: LIBERTY UNDER STATE CONSTITUTIONS, *supra* note 91.

104. See, e.g., GORDON M. BAKKEN, ROCKY MOUNTAIN CONSTITUTION MAKING, 1850-1912 (1987); FEHRENBACHER, *supra* note 24; FLETCHER M. GREEN, CONSTITUTIONAL DEVELOPMENT IN THE SOUTH ATLANTIC STATES, 1776-1860 (1930) [hereinafter GREEN, CONSTITUTIONAL DEVELOPMENT]; JOHN D. HICKS, THE CONSTITUTIONS OF THE NORTHWEST STATES (1923).

105. See, e.g., DENNIS C. COLSON, IDAHO'S CONSTITUTION: THE TIE THAT BINDS (1991); DAVID A. JOHNSON, FOUNDING THE FAR WEST: CALIFORNIA, OREGON AND NEVADA, 1840-1890 (1992); RONALD M. PETERS, JR., THE MASSACHUSETTS CONSTITUTION OF 1780: A SOCIAL COMPACT (1978).

106. On the comparative limits of such studies, see Christian G. Fritz, *Rethinking the American Constitutional Tradition: National Dimensions in the Formation of State Constitutions*, 26 RUTGERS L.J. 969 (1995).

107. See, e.g., JAMES QUAYLE DEALEY, GROWTH OF AMERICAN STATE CONSTITUTIONS; FROM 1776 TO THE END OF THE YEAR 1914 (reprint 1972) (1915); WALTER F. DODD, THE REVISION AND AMENDMENT OF STATE CONSTITUTIONS (1910) [hereinafter DODD, THE

changes and the evolution of the constitutional process. Extensive use of the debates of nineteenth-century constitutional conventions is more the exception than the rule.<sup>108</sup> Too few scholars consider debates over constitution-making after the Federal Constitution significant to "American" constitutionalism.<sup>109</sup>

### B. *Inconsistent with Actual Practice*

The traditional account of American constitutionalism persists notwithstanding a contrary experience with constitution-making after 1787. The supposedly "mature" view that legitimate constitutions require constitutional conventions followed by popular ratification only became standardized decades after 1787. Not only were few state constitutions popularly ratified before the Federal Constitution, but many state constitutions after 1787 were promulgated without ratification.<sup>110</sup> For

REVISION AND AMENDMENT OF STATE CONSTITUTIONS]; HOAR, *supra* note 98; Walter F. Dodd, *The Function of a State Constitution*, 30 POL. SCI. Q. 201 (1915); Sturm, *supra* note 43. Even recent scholarship shares this orientation. See, e.g., ELAZAR, *supra* note 38; CONSTITUTIONAL POLITICS IN THE STATES: CONTEMPORARY CONTROVERSIES AND HISTORICAL PATTERNS (G. Alan Tarr ed., 1996); G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS (1998); Daniel J. Elazar, *The Principles and Traditions Underlying State Constitutions*, 12 PUBLIUS 11 (1982).

108. See JOHNSON, *supra* note 105; DANIEL T. RODGERS, CONTESTED TRUTHS: KEYWORDS IN AMERICAN POLITICS SINCE INDEPENDENCE (1987); LAURA J. SCALIA, THE REMAKING OF STATE CONSTITUTIONS: THE USES OF LIBERALISM IN DESIGNING ELECTORAL LAWS, 1820-1850 (1998); James A. Henretta, *The Rise and Decline of "Democratic-Republicanism" Political Rights in New York and the Several States, 1800-1915*, in LIBERTY UNDER STATE CONSTITUTIONS, *supra* note 91, at 50; Alan Jones, *Republicanism, Railroads and Nineteenth Century Midwestern Constitutionalism*, in TOWARD A USABLE PAST: LIBERTY, PROPERTY, AND GOVERNMENT: CONSTITUTIONAL INTERPRETATION BEFORE THE NEW DEAL 239 (Ellen Frankel Paul & Howard Dickman eds., 1989); John Dinan, *Framing a "People's Government": State Constitution-Making in the Progressive Era*, 30 RUTGERS L.J. 933 (1999); Robert J. Steinfeld, *Property and Suffrage in the Early American Republic*, 41 STAN. L. REV. 335 (1989); Bayrd Still, *An Interpretation of the Statehood Process, 1800 to 1850*, 23 MISS. VALLEY HIST. REV. 189 (1936).

109. The historian Pauline Maier is an exception. See Pauline Maier, *The Road Not Taken: Nullification, John C. Calhoun, and the Revolutionary Tradition in South Carolina*, 82 S. C. HIST. MAG. 1 (1981).

110. LUTZ, THE ORIGINS, *supra* note 32, at 105 (noting that of the states forming the American union before the Federal Constitution, only Massachusetts (1780) and New Hampshire (1784) were drafted by a convention and submitted for ratification). For other means by which "the people" could manifest their will besides formal ratification, see John N.

example, only one of the seven constitutions that formed states out of the Northwest Territory between 1801 and 1830 was ratified by the people.<sup>111</sup> Political scientist Albert Sturm calculated that of the 119 constitutions created between 1776 and 1900, 45 constitutions (roughly 38%) were adopted without popular ratification.<sup>112</sup> More than half of the non-ratified constitutions were promulgated after 1800.<sup>113</sup> Donald Lutz found the use of conventions and ratification in constitution-making "an isolated instance" well into the nineteenth-century.<sup>114</sup> Some even assert that it took until the twentieth century for popular ratification to become the normal process.<sup>115</sup> The frequent practice of disregarding constitution-making after 1787 that departs from the "true" model of the Federal Founding leaves a biased sample for the study of American constitutionalism.<sup>116</sup>

Another inconvenient fact for the mythology of American constitution-making is constitutional circumvention. Studies have long documented numerous instances—if not a tendency toward—constitutional revision bypassing established constitutional procedures.<sup>117</sup> Many early twentieth

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*Shaeffer, Public Consideration of the 1776 Pennsylvania Constitution*, 98 PA. MAG. HIST. & BIOG. 415 (1974).

111. DEALEY, *supra* note 107, at 44 (claiming popular ratification only became precedent in congressional enabling acts by 1857).

112. Sturm, *supra* note 43, at 58.

113. *Id.*

114. LUTZ, POPULAR CONSENT, *supra* note 5, at 67-68, 83; *see also* SCHOUER, *supra* note 98, at 212 (asserting that popular ratification only emerged "slowly" in America).

115. *See* Ernest R. Bartley, *Methods of Constitutional Change*, in MAJOR PROBLEMS IN STATE CONSTITUTIONAL REVISION 21, 35-36 (W. Brook Graves ed., 1960).

116. *See* Fritz, *supra* note 88, at 957-60 (noting tendency to regard the Federal Constitution as a paradigm).

117. *See* GREEN, CONSTITUTIONAL DEVELOPMENT, *supra* note 104, at 105-41, 201-304; RODGERS, *supra* note 108, at 92-101 (noting that many nineteenth-century constitutional conventions considered themselves "the people"); Henretta, *supra* note 108, at 62; William K. Boyd, *The Antecedents of the North Carolina Convention of 1835 (pts. 1-2)*, 9 S. ATL. Q. 83, 161, 169-70 (1910) (discussing circumvention efforts before 1835); Fletcher M. Green, *Cycles of American Democracy*, 48 MISS. VALLEY HIST. REV. 3, 10-11 (1961); A. Clarke Hagensick, *Revolution or Reform in 1836: Maryland's Preface to the Dorr Rebellion*, 57 MD. HIST. MAG. 346, 346-49 (Dec. 1962); Richard L. Mumford, *Constitutional Development in the State of Delaware, 1776-1897*, at 108 (1968) (unpublished Ph.D. dissertation, University of Delaware) (on file with author) (noting belief in Delaware in 1791 of the right of the people to hold conventions independent of the legislature); George P. Parkinson, Jr., *Antebellum State Constitution-Making: Retention, Circumvention, Revision* 35-57, 66-180 (1972) (unpublished Ph.D. dissertation, University of Wisconsin); Gregory G. Schmidt, *Republican Visions: Constitutional Thought and Constitutional Revision in the Eastern United States, 1815-1830*,

century scholars attributed the validity of circumvention conventions to their authorization by "the people," regardless of acts of the government.<sup>118</sup> Neither political radicals nor conservatives held a monopoly on circumvention. Adoption of the Federal Constitution through circumvention provided a precedent for state constitution-makers.

Many courts take a practical approach to circumvention.<sup>119</sup> Kentucky's 1966 controversy over the legitimacy of a circumvention of the state constitution's procedure for revision is a case in point.<sup>120</sup> The 1891 Kentucky Constitution required the legislature to give notice in two successive sessions of an intent to convene a constitutional convention.<sup>121</sup> Instead, the legislature created a "Constitutional Revision Assembly" that drafted a new constitution.<sup>122</sup> After voter ratification, a legal challenge claimed that the 1891 constitution provided the exclusive means for its alteration.<sup>123</sup>

In *Gatewood v. Matthews*, a majority of Kentucky's highest appellate court disagreed.<sup>124</sup> "The power of the people to change the Constitution is plenary, and the existence of one mode for exercising that power does not preclude all others."<sup>125</sup> The majority explained that the provision in the state's bill of rights (proclaiming Kentuckians' ability to "alter or abolish" their state government) reflected the people's inherent sovereign authority to change constitutions.<sup>126</sup> This authority was no "mere relic, a museum piece without meaning or substance as a viable principle of free government."<sup>127</sup> Under the 1891 Kentucky Constitution, the legislature was a "messenger or

at 24 (1981) (unpublished Ph.D. dissertation, University of Illinois at Urbana-Champaign) (on file with author) (identifying circumvention as part of the American constitutional experience beginning in 1776 and invoked by conservatives as well as radicals).

118. See, e.g., DODD, *THE REVISION AND AMENDMENT OF STATE CONSTITUTIONS*, *supra* note 107, at 220-21; HOAR, *supra* note 98.

119. Milton Yawitz, *The Legal Effect Under American Decisions of an Alleged Irregularity in the Adoption of a Constitution or Constitutional Amendment*, 10 ST. LOUIS L. REV. 279, 297 (1925) (finding judiciary "guided by the American ideal of pragmatism" when dealing with irregularities in formation or change of constitutions in cases before the 1920s); see also Colantuono, *supra* note 52, at 1480 n.45, 1492-93 n.137 (identifying twentieth century cases upholding constitutional circumvention).

120. *Gatewood v. Matthews*, 403 S.W.2d 716 (Ky. 1966).

121. *Id.* at 718.

122. *Id.* at 717.

123. *Id.* at 718.

124. *Id.* at 719.

125. *Id.*

126. *Id.* at 720.

127. *Id.*

conduit" for the people to trigger constitutional revision.<sup>128</sup> It was sufficient if the people gave the revised constitution "life by their own direct action."<sup>129</sup>

Troubled by the majority's use of "expediency" to legitimize the newly proposed constitution, a lone dissenter considered the court's opinion "contrary to logic and legal precedent."<sup>130</sup> The "alter or abolish" provision of the 1891 constitution simply reflected "political philosophy" or "a cocky boast of a sovereign people."<sup>131</sup> In either case the provision would collapse of its own impracticality.<sup>132</sup> "It provides no plan of implementation. Who are 'the people?' Certainly, they are not the legislature. Under this section how do 'they' (the people) act?"<sup>133</sup>

The dissent's concerns, as well as the majority's confidence that the people could meaningfully act as the sovereign, illustrates the substantial gap between constitutionalism today and its actual practice in American history. Today's orthodoxy teaches that legitimate constitutions must be drafted by special conventions and ratified by the people. But this test for legitimacy is of modern vintage. This view was present, but hardly formed the universally shared belief of Americans in the 1780s, the 1800s, or even by the 1840s. Using a convention with popular ratification was certainly one accepted method to create a constitution, but it was not until the twentieth century that American constitutionalism insisted it was the *only* way that a people adopted a legitimate constitution.

Similarly, before the Civil War it was not widely believed that the only legitimate way to amend a constitution was to use the procedures the constitution specified for amendment. Some Americans did believe that legitimate constitutional amendment required adherence to procedures. But the actual practice of constitutional amendment in America for much of its history was not uniform. Amendments were routinely made in circumvention of the procedures specified by the constitution to be amended.

Today, we are puzzled by the explanation of Americans that their Revolution and the many constitutions they wrote thereafter were substantive acts by a sovereign people. As sovereign, the people could legitimately ignore or fail to use given constitutional revision procedures. For modern scholars, the people's sovereignty is rhetorical, a political principle, not a

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128. *Id.*

129. *Id.*

130. *Id.* at 722 (Hill, J., dissenting).

131. *Id.* at 723 (Hill, J., dissenting).

132. *Id.* (Hill, J., dissenting).

133. *Id.* (Hill, J., dissenting).

constitutional one, a “fiction,” even if a crucial one.<sup>134</sup> Relatively few are willing to grant the principle practical, as opposed to theoretical, importance.<sup>135</sup> In American constitutionalism today, the people’s sovereignty is rarely taken seriously, even though Americans repeatedly advanced it as justifying constitution-making and revisions prior to the Civil War.

In fact, during much of the history of American constitutions the people’s sovereignty was the undisputed foundation of American constitutionalism. The key to legitimacy was not whether a particular procedure was used, but whether that procedure expressed the people’s sovereignty. Constitutional conventions and popular ratification could do this, but so could and so did many other devices. Even for the Federal Founders, the substantive value of the people as sovereign was crucial. Unlike today’s understanding of constitutionalism, it was not the “form” or procedure that conveyed constitutional legitimacy.<sup>136</sup> Only a substantive act by the people exerting their sovereignty—the people’s sovereignty—could make a constitution legitimate.

The real conflict then, centered not on the necessity of substantive expression of the people’s sovereignty, but rather a disagreement over how the sovereign could express its will. On this issue, Americans developed competing views that produced an important tension between adherence to proceduralism and the direct invocation of the people’s sovereignty. Although deeply rooted in our constitutional history, this tension is all but forgotten today.

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134. EDMUND S. MORGAN, *INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA* 255 (1988) [hereinafter MORGAN, *INVENTING THE PEOPLE*]; see also Belz, *The New Left Attack on Constitutionalism*, *supra* note 55, at 140-41; Randy E. Barnett, *Constitutional Legitimacy*, 103 COLUM. L. REV. 111, 117, 128-29 (2003); Andrew Shankman, *Malcontents and the Tertium Quids: The Battle to Define Democracy in Jeffersonian Philadelphia*, 19 J. EARLY REPUBLIC 43 (1999).

135. *Contra* PETERS, *supra* note 105, at 44-45 n.2 (“The people of Massachusetts believed that an entity, ‘the people’ had real existence and political relevance.”); RODGERS, *supra* note 108, at 6, 227 (stressing the practical importance that the people’s sovereignty had for debates over American government).

136. A failure to appreciate this distinction has misled scholars. Even in a nuanced study of the formation of the Federal Constitution, an historian asserts that James Madison advocated popular ratification because “he clearly believed that the authority of a constitution depended on the form of its promulgation.” RAKOVE, *supra* note 41, at 101. For Madison and many other Americans, however, it was not the “form” that conveyed constitutional legitimacy, but the substance of the sovereign people’s authority. *Id.*

An example of how the lens of the Federal Founding distorts our understanding of American constitutionalism is the interpretation of the 1840s Rhode Island constitutional crisis. At issue was state legislator and lawyer Thomas Dorr's use of the people's sovereignty to justify reapportioning legislative representation and expanding the franchise through a constitutional convention convened without the consent of Rhode Island's existing government. Virtually all scholars assume that Dorr's arguments for constitutional circumvention were illegitimate.<sup>137</sup> Trying to change the constitution in defiance of established procedures was extra-legal and insurrectionary, giving rise to the name the episode acquired—"Dorr's Rebellion."<sup>138</sup> But describing Dorr's concept of constitutional change as illegitimate is not based on what many Americans believed at the time. Rather, it stems from how scholars think the Federal Framers might have viewed it. Ultimately, we are trapped in the analytical framework of the conventional story.<sup>139</sup>

#### IV. THE MISSING INSIGHT OF THE CONVENTIONAL ACCOUNT

Contrary to the accepted view, the 1780s did not end the debate over how fundamental law could be created or how the people could exercise their sovereignty. Rather, the consensus that united Americans in declaring Independence and establishing new governments—the people's sovereignty—did not prevent them from disagreeing about how the people expressed their sovereignty, particularly in creating written constitutions.

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137. See, e.g., PATRICK T. CONLEY, *DEMOCRACY IN DECLINE: RHODE ISLAND'S CONSTITUTIONAL DEVELOPMENT, 1776-1841*, at 317 (1977) (asserting the People's Constitution reflected a "radical doctrine of popular constituent sovereignty"); GEORGE M. DENNISON, *THE DORR WAR: REPUBLICANISM ON TRIAL, 1831-1861*, at 139 (1976) (suggesting Dorr's views anachronistic by 1842); MARVIN E. GETTLEMAN, *THE DORR REBELLION, A STUDY IN AMERICAN RADICALISM: 1833-1849*, at 131 (1973) (claiming Dorr's "political viewpoint always had a large component of fantasy"); ARTHUR MAY MOWRY, *THE DORR WAR: THE CONSTITUTIONAL STRUGGLE IN RHODE ISLAND 298-99* (1901) (considering Dorr's position unjustified and unnecessary); WILLIAM M. WIECEK, *THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION* 116 (1972) (describing Dorr's legal argument as "political theory"); Leitao, *supra* note 43, at 58 n.66 (denying validity of Dorr's position and considering it "an extreme version of popular sovereignty").

138. See, e.g., GETTLEMAN, *THE DORR REBELLION*, *supra* note 137.

139. See, e.g., Symposium, *The Legacy of the Federalist Papers*, 16 HARV. J.L. & PUB. POL'Y 1 (1993).

For many Americans after Independence, constitutional and governmental authority remained a substantive and not procedural matter. Believing that the will of the people could be readily determined independent of the existing government, they were unwilling to use procedural regularity as a litmus test for whether the sovereign had spoken. As sovereign, the people could validate actions outside the framework of procedural norms and even without the government's concurrence. This expansive view of constitutional change emphasized the substantive values inherent in the people's sovereignty.

Other Americans—many who eventually supported the Federal Constitution—insisted that formal procedures exclusively expressed the sovereign's will. Fearing the people could authorize overly democratic constitutions, they sought strict adherence to procedures in order to validate the people's will. This constrained view of constitutional change used procedure as the test of legitimacy. It also implied the existing government would guarantee a faithful application of procedure.<sup>140</sup>

The expansive, substantive and the constrained, procedural tests of legitimate constitutional change were not exclusive. The constrained, procedural approach comfortably fit within an expansive, substantive test. Many American constitution-makers believed that constitutions did not have to be promulgated as the constrained, procedural view suggested. For them, strict proceduralism was not necessary for the people to act. Complying with stated procedures was one way for the people to express their sovereignty, but not the only way.

Both expansive and constrained views drew their strength from the Revolution. Both were legitimate. Initial state constitution-making often reflected the more expansive view. Although the Federal Constitution embodied a more constrained view, its formation *did not* eclipse the expansive view of constitution-making. Rather, the substantial constitution-making and revision in the states thereafter illustrates the persistence of expansive views and their resonance for Americans.

The hold that the traditional story has on our constitutional imagination owes a great deal to Gordon Wood. Wood's interpretation of the Confederation period has led other scholars to conclude that the Federal Constitution was "a reaction to the 'democratic excesses' of the

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140. Wythe Holt has described Akhil Amar's concept of the people's sovereignty as "quite genteel, to say nothing of legalistic, orderly, and managed" since that version required a government-sponsored convention. Wythe W. Holt, Jr., *We Some of the People: Akhil Reed Amar and the Original Intent of the Bill of Rights*, 33 U. RICH. L. REV. 377, 381 (1999).



Confederation period—an attempt, in effect, to terminate the republican moment and reestablish politics-as-normal within a framework of representative government.”<sup>141</sup> According to the conventional view, the Federal Framers were resolving a crisis stemming from the failure of the first state constitutions.<sup>142</sup>

Central to Wood’s interpretation is the supposed disappearance of non-procedural constitutionalism.<sup>143</sup> Our concept of constitutionalism today does

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141. Pope, *supra* note 71, at 324. Wood argues that by 1787, “the evils coming out of the states” prepared the Federal Framers as well as the public for “the wholesale reform of the federal government.” Gordon S. Wood, “*Motives at Philadelphia*”: A Comment on Slonim, 16 LAW & HIST. REV. 553, 556 (1998). Supporters of the Federal Constitution “appropriated and exploited the language that more rightly belonged to their opponents” and resisted “the thrust of the Revolution with the rhetoric of the Revolution.” WOOD, THE CREATION OF THE AMERICAN REPUBLIC, *supra* note 2, at 562. Historians and legal scholars have largely agreed with Wood’s interpretation. See, e.g., MORGAN, INVENTING THE PEOPLE, *supra* note 134, at 255 (arguing that early state legislatures triggered a rethinking, but not a repudiation, of the people’s sovereignty); SHALHOPE, *supra* note 5, at 97-98 (asserting that legislatures’ abuses and excesses engendered “fear and suspicion”); Gonzalez, *supra* note 22, at 652 (relying on Wood that “American thinking” about the people’s sovereignty “underwent a radical transformation between 1776 and 1787”); Griffin, *The Problem of Constitutional Change*, *supra* note 63, at 2129 (relying on Wood that there was “a close relationship between the idea of American constitutionalism and [a] Federalist conception of politics”); Shankman, *supra* note 134, at 69 (asserting “an orthodoxy of constitution-making” achieved “real legitimacy” during the 1780s).

142. See, e.g., Peter S. Onuf, *Rights Under the Articles of the Confederation*, in TO SECURE THE BLESSINGS OF LIBERTY: RIGHTS IN AMERICAN HISTORY 72-73 (Josephine F. Pacheco ed., 1993) [hereinafter TO SECURE THE BLESSINGS OF LIBERTY] (asserting “failures of the state constitutions” and “excesses of the state governments” in the Confederation period); Barnett, *supra* note 134, at 128 (claiming early American state governments a “near-disastrous experimentation with legislative supremacy” and that by 1787 Federal Framers “were pretty well convinced that pure majority rule or democracy was a bad idea”); Charles F. Hobson, *The Origins of Judicial Review: A Historian’s Explanation*, 56 WASH. & LEE L. REV. 811, 815 (1999) (asserting state legislatures “enacted a profusion of ill-digested, inaccurate, confusing, and, even worse, unjust laws that threatened the whole experiment in republican government”); Gerald N. Magliocca, *Veto! The Jacksonian Revolution in Constitutional Law*, 78 NEB. L. REV. 205, 213 (1999) (relying on Wood that state legislatures had “notorious” reputations during the Confederation period “for their *ex post facto* measures and arbitrary confiscatory statutes that eroded public confidence in self-governance”); Shlomo Slonim, *Motives at Philadelphia, 1787: Gordon Wood’s Neo-Beardian Thesis Reexamined*, 16 LAW & HIST. REV. 527, 551 (1998) (“The United States in 1787 was on the verge of disintegration, and the Federalists boldly set the nation on the road of national cohesion and integration through the medium of a new constitution.”).

143. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, *supra* note 2, at 342-43.

not deal with the possibility of a legitimate non-procedural constitutionalism because we assume from Wood's description of the rise of a more constrained proceduralism that the constitutionalism of the early revolutionary period has been dead for over two centuries.<sup>144</sup> But the historical record of constitution-making following the period of Wood's study fails to confirm this assumption. The records of nearly a hundred constitutional conventions after 1787 belie the assumption that non-procedural constitutionalism died with the birth of the Federal Constitution. In fact, the extensive time and attention the architects and supporters of the Federal Constitution devoted to the issue suggests it was certainly not dead in the years after ratification.<sup>145</sup> In the years following the Constitution's adoption, Americans continued to dispute, both at the federal and state level, whether constitutional procedures could limit the powers of the sovereign—the people—who created those constitutions. While Americans did use constitutional procedures for change, for many those steps were simply useful, not indispensable. They were not the *only* legitimate tools available for a sovereign to express its will.<sup>146</sup> They disputed vigorously, and as the Civil War approached, even forcibly over whether the only tools available for change were provided by a procedure guaranteed by an existing government.

Proof is lacking that after 1787 states recognized as legitimate only changes made in accord with pre-established procedures. Americans did change their constitutions using such procedures, but going around them was equally effective and legitimate in many instances. Analysis of American constitutionalism today, focusing on the ideas and developments of the Confederation period, neglects to examine whether the themes of that period continued after the Federal Constitution's adoption.<sup>147</sup> The result is that the

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144. See, e.g., Note, *supra* note 53, at 1005.

145. See, e.g., WOOD, THE CREATION OF THE AMERICAN REPUBLIC, *supra* note 2, at 389; Dippel, *supra* note 5, at 37; Shankman, *supra* note 134, at 69. See generally REPRESENTATIVE GOVERNMENT AND THE REVOLUTION: THE MARYLAND CONSTITUTIONAL CRISIS OF 1787 (Melvin Yazawa ed., 1975).

146. The difficulty of imagining a role for the people leads some to deny the traditional sovereignty of a constituent people. See, e.g., Barnett, *supra* note 134, at 129 (asserting that “[u]nder the prevailing theory of ‘popular sovereignty,’ the legislature is thought of as the people personified, entitled to exercise all the powers of a sovereign people”). But this view undercuts both the government and the constitution as a creature of the sovereign people. Nonetheless, Barnett's description exemplifies the modern acceptance of a more constrained understanding of the people's sovereignty.

147. One ironic example is how Jack Rakove criticized Bruce Ackerman's framing of “constitutional moments.” Rakove considers Ackerman's focus on 1786 to 1789 overly

traditional characterization of American constitutional thinking in the 1780s suffers from an overly narrow timeframe. It fails to examine whether the pre-1787 expansive view survived the Confederation and unduly glorifies the formation and ratification of the Federal Constitution in American constitutionalism.<sup>148</sup>

#### *A. Benefits of a Broader Perspective*

The conventional account, however, is more incomplete than false.<sup>149</sup> Its insights are still valuable if supplemented by a broader framework. That wider frame of reference would probe the full range of American constitution-making before the Civil War, without relying on the tenuous assumptions that permeate the traditional understanding based on the Federal Constitution. Looking past those assumptions and to the full American experience with written constitutions may take us to a new plateau of understanding. From this vantage point, many events and constitutional practices now marginalized might assume a new significance and integrity in American constitutionalism.

Although the accepted picture of American constitutionalism has firm roots in the study of the 1780s, this limited focus engenders ill-considered disputes and fractured scholarship that could be informed by a broader view of American constitutionalism that can reconcile and integrate conflicting

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narrow. Rakove, *A Federalist Critique*, *supra* note 25, at 1933 n.6. Yet, in suggesting a time period including the drafting of the state constitutions in the mid-1770s, Rakove adopts the conventional timeframe that assumes the Federal Founding formed a natural constitutional endpoint. Rakove considers 1776-1789 a period of "sustained transition" in the emergence of a new constitutional order. *Id.* at 1940 n.23.

148. Some scholars, prominently Daniel Rodgers and Edmund Morgan, identify important ambiguities in the people's sovereignty that simultaneously gave the concept weight and rendered it particularly slippery in political discourse. See MORGAN, *INVENTING THE PEOPLE*, *supra* note 134; RODGERS, *supra* note 108; Edmund S. Morgan, *The Problem of Popular Sovereignty*, in *ASPECTS OF AMERICAN LIBERTY: PHILOSOPHICAL, HISTORICAL AND POLITICAL ADDRESSES PRESENTED AT AN OBSERVANCE OF THE BICENTENNIAL YEAR OF AMERICAN INDEPENDENCE BY THE AMERICAN PHILOSOPHICAL SOCIETY, APRIL 22-24 1976*, at 102 (1977) (asserting that ascertaining the will of the people after revolution "has agitated statesmen, philosophers, and politicians since the seventeenth century and still remains a burning question, for no one has yet found a satisfactory answer to it").

149. When scholars disagree about revolutionary era constitutionalism and the significance of the Federal Constitution, the debate appears to pit explanations vying for historical validity. Yet closer examination shows that competing interpretations frequently offer partial rather than more correct or incorrect explanations.

interpretations. For example, scholars vigorously dispute whether the period from Independence to the Federal Constitution is best described as one of consensus or conflict and whether the Federal Constitution rejected the ideas of the Revolution.<sup>150</sup> Did the Federal Framers “betray” or remain “true” to the Revolution’s ideals?<sup>151</sup>

Simply because the Federal Constitution can be read to restrict the people’s ability to revise it does not warrant characterizing the Framers as reactionaries who repudiated the Revolution. Supporters of the Federal Constitution were squarely within the revolutionary tradition. But so were their opponents. The Federal Framers, like their opponents, equated the legitimacy of the Constitution with whether it was established by the sovereign—the people. While the Framers felt that once ratified, the Constitution could not be changed without taking steps specified for amendment, other Americans disagreed. One could acknowledge that using a constitutionally-specified procedure for amendment would change the Constitution, if that procedure reflected an act by the people as sovereign. But that approach was not the exclusive means of constitutional change for many Americans. Other acts by the people as sovereign could, and did, legitimately change constitutions. As such, the existence of restrictive procedures for constitutional revision in the Federal Constitution were not agreed-upon features of a legitimate constitution, constituting a “mature” understanding shared by all Americans.<sup>152</sup> For many Americans, other

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150. See, e.g., Scheef, *supra* note 5, at 2206, 2226 (adoption of the Federal Constitution reflected “a substantial consensus” of Americans consistent with “the consensus understanding” reached in the Federal Constitution); Slonim, *supra* note 142, at 527 (describing competing scholarly characterizations of the Federal Constitution as either a “counterrevolution, a reaction to the leveling propensities unleashed by the Revolution” or a “conclave of patriots dedicated to the preservation of the Union”). Some scholars assert that Federalists manipulated the people’s sovereignty to dispense with sovereignty entirely. See, e.g., Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism after Garcia*, 1985 SUP. CT. REV. 341, 346-59 (1985).

151. On the question of James Madison, for example, see Lance Banning, “*To Secure these Rights*”: Patrick Henry, James Madison, and the Revolutionary Legitimacy of the Constitution, in *TO SECURE THE BLESSINGS OF LIBERTY*, *supra* note 142, at 280.

152. In this context it is worth noting that Laurence Tribe’s argument that circumvention of Article V is inconsistent with the text and structure of the Federal Constitution, See TRIBE, *supra* note 64, at 107, differs from the question of whether the American constitutional tradition with written constitutions legitimates a non-exclusive understanding of Article V. Tribe’s insistence that the only constitutionally legitimate means of altering the Federal Constitution is necessarily “government-driven,” however, is consistent with a constrained view of the implication of the people’s sovereignty for constitutional

procedures that reflected the people's sovereignty could suffice and they rejected the straight-jacket that the proponents of the Federal Constitution sought to put on the people as sovereign.

As a result, debates over whether the Framers sought a "counter revolution" or produced a constitution as part of a "thermidorian" reaction engage in a very selective reading of the Confederation period.<sup>153</sup> Constrained as well as expansive views of the people's sovereignty emerged with the Revolution and persisted long after the Confederation period in the making of American constitutions. Likewise, the long-standing debate over whether (and to what extent) the Federal Framers were economically motivated or remained "true" to their revolutionary principles neglects that same essential tension of whether the people as sovereign was a substantive or procedural value.<sup>154</sup> The preoccupation with "consistency" of those for or against the Federal Constitution to the Revolution's heritage manufactures a problem. The views of both proponents and opponents of the Federal Constitution were perfectly compatible with the dynamic nature of the sovereignty of the people.<sup>155</sup> The same oversight is true of studies

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revision that emerged after the Revolution. *Id.* at 106. Crucially, such a view was not the only one that gained currency and legitimacy. Tribe's failure to appreciate the legitimate tension in views over what the people's sovereignty could mean in terms of a constitutional principle from the time of the Revolution leads him to conclude that only "meta-constitutional" rules outside the constitutional order itself might justify amendment not complying with Article V. *Id.* at 109-10.

153. See, e.g., LARRY E. TISE, *THE AMERICAN COUNTERREVOLUTION: A RETREAT FROM LIBERTY, 1783-1800* (1998); John P. Kaminski, *Rights: What Did the Framers of the Bill of Rights Intend?*, in *TO SECURE THE BLESSINGS OF LIBERTY*, *supra* note 142, at 105. *But see* BERNARD BAILYN, *TO BEGIN THE WORLD ANEW: THE GENIUS AND AMBIGUITIES OF THE AMERICAN FOUNDERS* 97 (2003) (rejecting the "fashionable" view of the Federal Constitution as "the conservative reversal of the idealism of the early years of the Revolution, a Thermidor").

154. See, e.g., James E. Viator, *Give Me That Old-Time Historiography: Charles Beard and the Study of the Constitution*, 36 *LOY. L. REV.* 981 (1991); James E. Viator, *Give Me that Old-Time Historiography: Charles Beard and the Study of the Constitution, Part II*, 43 *LOY. L. REV.* 311 (1997); see also Holt, *supra* note 140, at 387 (asserting Federal Constitution designed to protect "the propertied"). A Beardian or economic analysis of the Framers' motives, however, is not necessary to explain the position—held by Madison and others—of a more constrained view of the people's sovereignty.

155. James Martin, for example, in discussing Federalist thought, describes the constrained view of the people's sovereignty, including denial of the inherent authority of the people to act after the creation of government. James P. Martin, *When Repression Is Democratic and Constitutional: The Federalist Theory of Representation and the Seditious Act*

questioning whether the revolutionary period was one of either consensus or conflict. The disagreement over constitutional ideas for most Americans was accommodated within a general consensus on the fundamental principle of the people's sovereignty. That the people exercised sovereignty that legitimated written constitutions and established new governments formed the essence of that consensus.

James Madison's thinking provides an example of how recognizing a constitutional tension in views about the implications of the people's sovereignty might advance our understanding. Jack Rakove criticizes Bruce Ackerman for selectively reading *The Federalist* and in particular for not addressing Madison's ambiguity in both endorsing the invocation of the people's sovereignty and expressing concern that future invocations might create too large a role for the people in constitutional change.<sup>156</sup> Rakove notes Madison's frank appeal to "the people" in No. 40 to cure "antecedent errors and irregularities" in how the federal convention had been assembled.<sup>157</sup> At the same time Madison expressed his worry in Nos. 49 and 50 about "the people" invoking their sovereignty.<sup>158</sup> Rakove concludes that

[a] historical account of either Madison's thinking in particular or Federalist theory in general should seek a way either to reconcile these tensions or examine their incompatibility. A theory of constitutional change that picks and chooses the texts that best support its position may still be good theory,

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of 1798, 66 U. CHI. L. REV. 117 (1999). However, Martin ignores advocates of an expansive view asserting that the people could act on their own initiative. For a scholar capturing the dynamic nature the people's sovereignty, see David N. Mayer, *The English Radical Whig Origins of American Constitutionalism*, 70 WASH. U. L.Q. 131, 207 (1992) (identifying America's "revolutionary achievement" as eventually seeing that the "source of law" was "not merely the description of what is and has been, but rather the measure of what ought and ought not to be").

156. Rakove, *A Federalist Critique*, *supra* note 25, at 1953-57.

157. *Id.* at 1953 (quoting THE FEDERALIST NO. 40, at 265-66 (James Madison) (Jacob E. Cooke ed., 1961) (asserting Federal Framers knew that since the Federal Constitution "was to be submitted to the people themselves, the disapprobation of this supreme authority would destroy it for ever; its approbation blot out all antecedent errors and irregularities").

158. THE FEDERALIST NO. 49, at 339 (James Madison) (conceding "a constitutional road to the decision of the people, ought to be marked out, and kept open, for certain great and extraordinary occasions" but arguing against too frequent "recurrence to the people"); *Id.* NO. 50, at 343-47 (James Madison) (arguing against constitutional revision through "periodical appeals" to the people).

but its strengths may lie elsewhere than in its justice to the historical record.<sup>159</sup>

It is possible to reconcile the tensions in Madison's thought by recognizing that they stemmed from the inherent nature of the American constitutional experience with the people's sovereignty. The resort to the people's sovereignty in justifying the Federal Founding drew from an understanding of the constitutional principle that lay at the heart of the Revolution and had expansive implications. Even as the Federalists (Madison in particular) invoked the people's sovereignty, they gravitated towards a more constrained view of the people and their constitutional authority. That gravitation took place in terms of the role the people should play in political affairs as well as future constitutional changes that might rest on the sovereignty of the people. Those concerns help explain the more constrained view many Federalists took about future changes in the Federal Constitution and their expectations for Article V. As Rakove rightly observes, Madison's thinking at the time of the Federal Founding reflects a distinct theme that "the interested, opinionated, and impassioned impulses of the people would be the preponderant sources of constitutional disequilibria."<sup>160</sup> As such, "the last possibility that he wanted to contemplate was that the people would ever be called upon to speak so vigorously again."<sup>161</sup>

We can begin to rethink American constitutionalism only by letting go of the tenuous assumptions and recognizing the incomplete nature of the conventional account. Broadening a perspective to include more events, practices, and time periods as relevant to "American" constitutionalism is a daunting task, but will be rewarded by an account more reflective of how Americans struggled with the implications of their sovereignty. This broader view reveals our constitutional tradition as richer, having a wider spectrum of ideas than we thought, and embracing a more dynamic range of constitutional possibilities from the start of the Revolution.

## V. POSTSCRIPT

The broader, non-procedural idea of what makes a constitution legitimate has been lost to us today. That the people can act as sovereign without their

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159. Rakove, *A Federalist Critique*, *supra* note 25, at 1957.

160. *Id.*

161. *Id.*

decision requiring validation by a governmentally-required procedure seems unimaginable and tantamount to anarchy. But as this Article suggests, the vision of the American people—a collectivity—acting as a sovereign did not die suddenly in 1787. It persisted for many decades after the Federal Founding. It was an issue at stake in the Civil War, and it survived even that constitutional meltdown. Arguably, remnants of that vision still persist, although as obscure references tucked into the corners of our constitutional discourse.

The case of *U.S. Term Limits v. Thornton*<sup>162</sup> provides a glimpse at that older vision. The case embroiled the Supreme Court Justices in addressing a classic question of constitutionalism: who was the sovereign who acted to give legitimacy to the Federal Constitution?<sup>163</sup> The question arose from an initiative passed by the people of Arkansas to amend their state constitution so that no person could appear on the Arkansas ballot for the U.S. House of Representatives after serving three terms in that body.<sup>164</sup> Could the people of Arkansas impose this requirement on the U.S. Representatives from that state?<sup>165</sup> Or were the Article I requirements for U.S. Representatives the exclusive criteria for office?<sup>166</sup>

While the Court split 5-4 on these issues, the Justices applied a remarkably uniform understanding of the issue of constitutionalism inherent in the case. For Justice Stevens, writing for the Court, the Arkansas people acted through the formal procedures required to express their sovereign will and their decision constituted an action by the state.<sup>167</sup> The issue boiled down to whether a state could impose additional requirements, or whether the requirements adopted by the people of the nation as a whole in Article I of the Constitution would prevail.<sup>168</sup> The Court asserted that only this “whole people” could change the qualifications for Congress and thus rejected the Arkansas term limit on congressional office.<sup>169</sup> A state could not come between the people and their national representatives by imposing additional

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162. 514 U.S. 779 (1995).

163. See *id.* at 794-828; *id.* at 838-45 (Kennedy, J., concurring); *id.* at 845-919 (Thomas, J., dissenting).

164. *Id.* at 783.

165. *Id.* at 787.

166. *Id.*

167. *Id.* at 822 n.32, 829.

168. *Id.* at 787.

169. *Id.* at 804-05, 837-38.



qualifications for federal office.<sup>170</sup> Justice Kennedy concurred that the "whole people" of the United States set the standard in Article I.<sup>171</sup> The people of Arkansas could not establish a different one for themselves.

Justice Thomas, writing for the dissent, proposed a different vision of who legitimated the United States Constitution. It was "the people of each individual State, not the consent of the undifferentiated people of the Nation as a whole."<sup>172</sup> By acting as sovereign and not individually, but rather as members of a pre-existing body called a state, they could retain the power to decide on additional qualifications for federal office if the national constitution they agreed to was silent on the issue.<sup>173</sup> This was not the state coming between the people and their national government; rather it was the people taking action to facilitate their representation in the federal union.

Both the majority and the dissent agreed that the Federal Constitution was authorized by the people having acted as sovereign. However, they disagreed as to how this was accomplished and what implications followed from that fact. While extensively digging into the historical record of the Confederation period for guidance, the Justices essentially talked past one another, each side assuming there was only one expression of constitutionalism. All were searching for a unified vision of the Constitution, unchanging since 1787 and reflected in *an* intent of the Framers. The justices failed to engage one another because it was inconceivable that the historical record would disclose not one, but two or more answers the Framers might give to the question of how the people as sovereign could legitimate government.

The Founders were not of one mind on how the people legitimately expressed their sovereignty to create fundamental law. Their disagreements

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170. Writing for the majority, Justice Stevens explained that the states lost the power to set their own standards in 1787 when "the people of the United States" as a whole ratified the Constitution, even though meeting in separate state conventions. *Id.* at 821. The Federal Constitution created the right of the "people of the United States" to be represented in Congress, subject to the qualifications exclusively defined by Article I as to who could represent them. Because congressional representation was a new right created by the Constitution itself, it did not exist before ratification, so setting qualifications for congressional representatives was not a power reserved to the states under the Tenth Amendment. *Id. passim.*

171. In his concurring opinion, Justice Kennedy wrote, "it is well settled that the whole people of the United States asserted their political identity and unity of purpose when they created the federal system." *Id.* at 838 (Kennedy, J., concurring).

172. *Id.* at 846 (Thomas, J., dissenting).

173. *Id.* at 848, 853 (Thomas, J., dissenting).

did not end with adoption of the Federal Constitution in 1787. Americans struggled with the question of how the people, as sovereign, could create both a national government and state governments in considering the 1787 proposal of the Philadelphia convention, in Supreme Court decisions arising thereafter, and in a series of constitutional controversies from the 1790s to the 1830s.<sup>174</sup> At the time of ratification, two distinct and competing ideas of constitutionalism emerged. The first, posited by James Madison and shared by many Federalists during the ratification struggle, viewed the Constitution's foundation as "the people, not as individuals composing one entire nation; but as composing the distinct and independent States to which they respectively belong."<sup>175</sup> The competing vision at the time was endorsed by John Jay,<sup>176</sup> and later celebrated most memorably by Daniel Webster.<sup>177</sup> It grounded the national government's sovereignty, like Madison, on "the people." Webster, however, described the American people as a unified whole or "the people of the United States."<sup>178</sup>

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174. See, e.g., *McCulloch v. Maryland*, 17 U.S. 316 (1819); *Chisholm v. Georgia*, 2 U.S. 419 (1793); DAVID F. ERICSON, *THE SHAPING OF AMERICAN LIBERALISM: THE DEBATES OVER RATIFICATION, NULLIFICATION, AND SLAVERY* (1993); KAMMEN, *THE CONSTITUTION IN AMERICAN CULTURE*, *supra* note 82; Christian G. Fritz, *A Constitutional Middle-Ground Between Revision and Revolution: A Reevaluation of the Nullification Crisis and the Virginia and Kentucky Resolutions through the Lens of Popular Sovereignty*, in *LAW AS CULTURE & CULTURE AS LAW: ESSAYS IN HONOR OF JOHN PHILLIP REID* 158-226 (Hendrik Hartog & William E. Nelson eds., 2000).

175. THE FEDERALIST NO. 39, at 253-54 (James Madison) (Jacob E. Cooke ed., 1961); see also WILLIAM RAWLE, *A VIEW OF THE CONSTITUTION OF THE UNITED STATES* 29 (2d ed. 1829) (describing the Federal Founding as "the people of the states" uniting with one another); Letter from John Taylor to Thomas Jefferson (June 25, 1798), in *THE PAPERS OF THOMAS JEFFERSON, VOLUME 30, 1 JANUARY 1798 TO 31 JANUARY 1799*, at 434 (Barbara B. Oberg et al. eds., 2003) (describing "the people in state conventions" as "the contracting parties" of the Federal Constitution).

176. *Chisholm v. Georgia*, 2 U.S. 419, 470 (1793) (describing the Federal Constitution as established by "the people in their collective and national capacity").

177. *Second Reply to Hayne* (Jan. 26-27, 1830), *The Papers of Daniel Webster, Speeches and Formal Writings, Volume 1, 1800-1830*, at 330 (Charles M. Wiltse ed., 1986).

178. *Id.* A third concept arose after the Confederation period and grew in strength up to the Civil War. Articulated most ardently by southern "states rights" advocates, it placed "the actual sovereign power" of the Constitution "in the several States, who created it, in their separate and distinct political character." See *South Carolina Exposition, Committee Report*, in *THE PAPERS OF JOHN C. CALHOUN VOLUME X, 1825-1829*, at 497, 499 (Clyde N. Wilson & W. Edwin Hemphill eds., 1977); see also Speech of Robert Y. Hayne (Jan. 27, 1830), in *THE WEBSTER-HAYNE DEBATE ON THE NATURE OF THE UNION, SELECTED DOCUMENTS* 167 (Herman Belz ed., 2000) (asserting that the Federal Constitution had been framed "by the States acting

For Justice Thomas, the appropriate understanding of the Constitution's legitimacy was founded on the Madisonian vision.<sup>179</sup> Justice Stevens, for the majority, found legitimacy in the Websterian formulation.<sup>180</sup> Both majority and dissent iterated the same constitutional principle—that in America, the people were the sovereign.<sup>181</sup> Both readily embraced the people's sovereignty as the source of legitimacy for the federal government.<sup>182</sup> But by expecting to find in 1787 only one concept of what this meant, the Justices failed to grapple with the essential fact that general agreement over the people's sovereignty implied two different possibilities, each having legitimacy grounded in our constitutional tradition.

The Court's commitment to the people's sovereignty, however, demonstrated an even deeper shared assumption going to the heart of our current understanding of constitutionalism. While the majority, concurrence, and dissent described the underlying sovereignty of the Federal Constitution in different terms, each equated government (either the state of Arkansas or the national government) with the expression of that sovereignty. None of the justices (nor scholarly commentators for that matter) considered that any expression of the people's sovereignty might have life and legitimacy *outside* the channel of established government. Our constitutional procedure is so deeply engrained that we cannot imagine "the people" acting independent of the sanction of government. It seems beyond any reasonable conception of constitutionalism that "a people" could legitimately circumvent procedures and act on their own initiative.

And yet, the substantive, not procedural value, of the people's sovereignty is an integral part of our historical tradition with constitution-making and revision. An expansive understanding of the people's sovereignty may seem untenable and unwise today, but the merits of that position are a different matter than denying that such a view ever existed. An awareness that the Court takes a constrained understanding of constitutionalism for granted, by equating the people (however described) with the government, will not make our differences in interpreting the Federal Constitution vanish. But liberation from a singular view that assumes constitutionalism refracted through the lens of the Federal Constitution is the

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in their sovereign capacity"). The Civil War's rejection of secession practically discounted this view of constitutionalism.

179. *U.S. Term Limits v. Thornton*, 514 U.S. 779, 846 (1995).

180. *Id.* at 821-22.

181. *Id.* at 821, 838-39, 846-47.

182. *Id.*

history of the American experience with written constitutions would remind us that the values we embrace today are not inevitable.

Focusing our attention on the whole of our constitutional tradition will remove the blinders that have tunneled our vision and can help rehabilitate our crippled constitutional discourse. Indeed, in many of the more difficult areas of constitutional law, the Framers were less than clear on the particular application of the general principles upon which they could agree, thus leaving it to future generations to apply those principles to the new and unforeseen circumstances which confront us as a people. Indeed, a recognition of the legitimacy of the competing visions by both the majority and the dissenters in *Term Limits* would have led to a richer discourse, and perhaps greater consensus on how those principles should be applied in the context of modern attempts by states to term limit its federal office seekers.

A broader focus on how constitutionalism was reflected in state constitution-making proceedings from 1787 to the Civil War may not alter our conclusions on a constitution's meaning. But it may suggest considerations other than assigning judges the role of historical sleuths, looking for the one correct view said to be reflected in the adoption of the Federal Constitution.<sup>183</sup> Wherever we come out on the question of what it means that in America "the people" are the sovereign, we would certainly profit from a dialogue acknowledging that 1787 was neither the starting point, nor the end point, of American constitution-making.

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183. For example, a richer appreciation of separation of powers, as developed in state as well as federal constitutional jurisprudence might also have enhanced the Supreme Court's consideration of such modern inventions as the Federal Sentencing Commission. *See Mistretta v. United States*, 488 U.S. 361 (1989). The same might also obtain with respect to the great, open-ended, rights-conferring Due Process and Equal Protection Clauses, which had their roots in earlier state constitutions, and are replicated in later ones. The failure of the federal discourse over the scope of those rights to even acknowledge the presence of a rich state constitutional jurisprudence in those areas deprives decision-makers of much data and information that would enhance the discussion and sharpen our understandings.