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Recovering the Lost Worlds of America's Written Constitutions

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RECOVERING THE LOST WORLDS OF AMERICA'S WRITTEN CONSTITUTIONS

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I. INTRODUCTION

The story of American constitutionalism invariably focuses on the formation of the federal Constitution. Supposedly, 1787 marked a culmination in thought following the confusion Americans experienced with written constitutions after the Revolution. In the traditional view, the federal Constitution resolved early uncertainties about the meaning of American constitutionalism and became the definitive model for subsequent constitution-making.[1] Because state constitution-making both before and after 1787 frequently departed from the federal model, scholars typically assume that the state experience is principally instructive for its contrast with the federal Constitution.[2]

Re-examining how the American Revolution prompted constitutional understandings, and how those understandings grew and developed in the states, both before and after adoption of the federal Constitution, casts serious doubt on the conventional story. The American experience with written constitutions in the states demonstrates a continuity with, as well as a crucial departure from, British law that developed America's distinctive constitutionalism.

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[1] The principal foundation for this view is GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, at 467 (1969).

[2] *See, e.g.*, AN UNCERTAIN TRADITION: CONSTITUTIONALISM AND THE HISTORY OF THE SOUTH 3, 4–5 (Kermit L. Hall & James W. Ely, Jr. eds., 1989) (analyzing an "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, 68–70 (Kermit L. Hall et al. eds., 1981) (discussing the value of diversity between state and federal constitutions in deciphering the proper place of state constitutions in American government).

This essay explores the ways in which American constitutionalism in the states was, and continues to be, more than just a precursor or contrast to the federal "ideal," but a rich and dynamic tradition in itself. State constitutionalism springs from our colonial inheritance, but underwent a uniquely American shift from a belief in a right of revolution based in natural law to the notion of a central role of "the people" as the ultimate sovereign. The people's role found expression in written constitutions and took shape in the constitutional transformation from the conventional right of revolution to the right of the people to alter or abolish the constitutional order under which they chose to be governed. The right to "alter or abolish" established a central and ongoing role for constitutional change in American government.

Indeed, the exercise of the people's right to bring about constitutional change—even if contrary to established constitutional procedures—is one of the hallmarks of American constitutionalism. The rediscovery and reexamination of these lost worlds can only enrich the continuing debate as we define and apply our singular brand of constitutionalism to the new problems which confront us as a people.

II. COLONIAL INHERITANCE AND UNDERSTANDING OF "THE RIGHT OF REVOLUTION" IN 1776

The traditional model of government that Americans inherited on the eve of their Revolution rested on the concept of government as a theoretical and implied bargain between the King and the people. Reciprocal duties existed on each side. A King protecting his subjects was due allegiance; establishing the basis of a contractual relationship between the monarch and his subjects. Under this relationship, the people retained the ability to cancel the implied contract—through a right of revolution—if the King failed to provide protection. Americans drew upon this right when they accused George III of breaching the implied contract of government, thereby releasing the American people from their duty of allegiance.

The Declaration of Independence proclaimed the right to "alter or abolish" government whenever government "becomes destructive" of its rightful ends.[3] Leaders of the American Revolution identified

[3] THE DECLARATION OF INDEPENDENCE (U.S. 1776), *reprinted in* 1 THE FEDERAL AND STATE CONSTITUTIONS: COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 4 (Francis Newton Thorpe ed., 1906) [hereinafter FEDERAL AND STATE CONSTITUTIONS].

such a right with the well-recognized justifications of both natural law and British constitutional understandings.[4] At the same time, Americans identified the sovereignty of the people as the basis for the legitimacy of their new governments. Creating governments under that theory departed from the model of government as a bargain between the governed and their governors. This different basis of what legitimated governments led to provocative reconsiderations of how one viewed the relationship between the people and the government.

The natural law right of revolution, as expressed by John Locke, had significant prerequisites.[5] Locke suggested the right arose only in the most dire of circumstances. This Lockean concept provided one approach to the revolt against the King. On the eve of the American Revolution, Alexander Hamilton justified recourse "to the law of nature" when "the first principles of civil society are violated" and "the rights of a whole people are invaded."[6] He described the boundaries of the theory: natural law justified revolution only when

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[4] Although scholars have primarily focused on the natural law basis of the Declaration of Independence, John Phillip Reid has thoroughly documented the legal and constitutional basis for the positions and actions taken by the American revolutionaries. *See generally* JOHN PHILLIP REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION (4 Vols.). From that perspective, Reid has argued that American appeals to natural law were unnecessary, in effect making the Declaration of Independence "irrelevan[t]" as a justification for the Revolution. *See* John Phillip Reid, *The Irrelevance of the Declaration, in* LAW IN THE AMERICAN REVOLUTION AND THE REVOLUTION IN THE LAW 46, 48 (Hendrik Hartog ed., 1981) [hereinafter REVOLUTION IN THE LAW]. Necessary or not, Americans continued to invoke natural law, frequently joining such invocations with legal and constitutional justifications for their revolution, as for example, when, in 1776, New Hampshire's constitution-makers observed that their actions stemmed from a deprivation "of our natural and constitutional rights and privileges." N.H. CONST. of 1776, PREAMBLE, *reprinted in* FEDERAL AND STATE CONSTITUTIONS, *supra* note 3, IV, at 2451; JOHN PHILLIP REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY OF RIGHTS 89 (1986) [hereinafter THE AUTHORITY OF RIGHTS] (acknowledging that "everyone agreed" that the right to self defense was a natural right); REVOLUTION IN THE LAW, *supra*, at 49–50; Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843 (1978). For the belated rise in the status attributed to the Declaration by Americans, see PAULINE MAIER, AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE 154–55, 208 (1997).

[5] Locke's theory also distinguished the community of the people acting for themselves (the constituent sovereignty) from the authority of government to act on behalf of the people (ordinary sovereignty). *See, e.g.*, JULIE MOSTOV, POWER, PROCESS, AND POPULAR SOVEREIGNTY 55–60 (1992); PAUL K. CONKIN, SELF-EVIDENT TRUTHS: BEING A DISCOURSE ON THE ORIGINS AND DEVELOPMENT OF THE FIRST PRINCIPLES OF AMERICAN GOVERNMENT—POPULAR SOVEREIGNTY, NATURAL RIGHTS, AND BALANCE AND SEPARATION OF POWERS 22–23 (1974); Richard Buel, Jr., *Democracy and the American Revolution: A Frame of Reference*, 21 WM. & MARY Q. 165, 176 (1964).

[6] Alexander Hamilton, *The Farmer Refuted* (1775), *reprinted in* 1 THE PAPERS OF ALEXANDER HAMILTON, 1768-1778, at 136 (Harold C. Syrett ed., 1961) [hereinafter 1 THE PAPERS OF ALEXANDER HAMILTON].

the existing order violated the people's collective rights.[7] In the Declaration of Independence, Thomas Jefferson considered the people "endowed by their Creator with certain unalienable Rights," including the right to alter or to abolish governments destructive of the legitimate ends of government.[8] These words are often associated with Locke's justification for the right of revolution.[9] Jefferson cast that document in the desperate language of an oppressed people—the position in which Americans saw themselves in 1776.[10] Jefferson's catalog of colonial grievances demonstrated that Americans had met the pre-conditions for the right of revolution.

Even if Jefferson's Declaration rested on the Lockean right of revolution, there was another basis that could justify independence. By the 1760s, English law developed conditions and limits for what William Blackstone, in his *Commentaries on the Laws of England,* called "the *law* of redress against public oppression."[11] Like the natural law right of revolution, the constitutional law of redress embodied a right of the people collectively to resist. It rested on a contractual relationship between the people and the government to preserve the public's welfare. This original contract, with its reciprocal duties of protection and allegiance, was "a central dogma in English and British constitutional law since time immemorial."[12]

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[7] *See* MOSTOV, *supra* note 5, at 59 (observing that if such a theory "provided a way of limiting the arbitrary power of the government, it also offered a way of preventing popular consent from becoming too direct or overt"); EDMUND S. MORGAN, INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA 151 (1988) (describing the need to tame the sovereignty of the people so as not "to invite subversion either of the social order or of the accompanying political authority it was designed to support").

[8] *See* THE DECLARATION OF INDEPENDENCE, *reprinted in* FEDERAL AND STATE CONSTITUTIONS, *supra* note 3, I, at 3–4.

[9] *See, e.g.*, A. E. Dick Howard, *From Mason to Modern Times: 200 Years of American Rights, in* THE LEGACY OF GEORGE MASON 95, 98 (Josephine F. Pacheco ed., 1983).

[10] The intellectual origins of Jefferson's Declaration have frequently been linked to John Locke. *See, e.g.*, MOSTOV, *supra* note 5, at 67; CARL BECKER, THE DECLARATION OF INDEPENDENCE: A STUDY IN THE HISTORY OF POLITICAL IDEAS 27 (5th ed. 1951); Leslie Friedman Goldstein, *Popular Sovereignty, the Origins of Judicial Review, and the Revival of Unwritten Law*, 48 J. POL. 51, 57 (1986). Even those who challenge the Lockean influence on Jefferson describe his invocation of the people's right to alter or to abolish as a natural right of revolution deriving from the precedent of England's Glorious Revolution of 1688. *See, e.g.*, GARY WILLS, INVENTING AMERICA: JEFFERSON'S DECLARATION OF INDEPENDENCE 89 (1978). For additional citations to the literature disputing the sources of the Declaration, see David Armitage, *The Declaration of Independence and International Law*, 59 WM. & MARY Q. 39, 41 n.8 (2002).

[11] WILLIAM BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND 238 (U. of Chicago Press 1979) (1765).

[12] REVOLUTION IN THE LAW, *supra* note 4, at 72. The execution of Charles I for breaching his compacts with the English and Scottish nations formed a vivid historical reminder to Americans of their rights under the original contract. *See id.* at 72–73. John Reid has

Alexander Hamilton referred to the right of redress in 1775, noting, "the origin of all civil government. . .must be a voluntary compact, between the rulers and the ruled."[13] Such government only possessed powers "necessary for the security of the *absolute rights*" of the people.[14] A government forfeited political powers, and the people reclaimed these powers, if that government breached the trust reflected in this constitutional contract.[15] This well-recognized British right of redress justified resistance to unconstitutional acts of government, including extra-legal action or collective activity designed to achieve constitutionally legitimate goals. The people could pursue that remedy even in the face of opposition by the existing government.[16] The right to resist was the "ultimate" right on which British liberty rested.[17] "Unconstitutional legislative commands could be ignored and arbitrary legislative commands could be opposed with force."[18] This right was often described in

written extensively on this contractual basis, including a distinction between two different contracts: the Lockean "social contract" and the non-Lockean "original contract." *See* John Phillip Reid, *"In Our Contracted Sphere": The Constitutional Contract, the Stamp Act Crisis, and the Coming of the American Revolution*, 76 COLUM. L. REV. 21, 22–23 (1976); THE AUTHORITY OF RIGHTS, *supra* note 4, at 132–34. *See also* BLACKSTONE, *supra* note 11, at 47–48, 183, 238.

[13] 1 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 6, at 88.

[14] *Id.*

[15] Even so, some seventeenth century English thinkers, well known to American revolutionaries, suggested the application of the right of revolution on lesser grounds. *See, e.g.*, CONKIN, *supra* note 5, at 20–21 (quoting Algernon Sidney's argument that the exercise of the people's sovereignty always provided the people with a right to change government in accordance with changes of "times and things" and to "meet when and where, and dispose of sovereignty as they will"); Caroline Robbins, *Algernon Sidney's Discourses Concerning Government: Textbook of Revolution*, 4 WM. & MARY Q. 267–96 (1947) (describing the impact of Algernon Sidney among the American revolutionaries); Stephen Holmes, *Precommitment and the Paradox of Democracy*, *in* CONSTITUTIONALISM AND DEMOCRACY 199 (Jon Elster & Rune Slagstad eds., 1988) (quoting a speaker in British parliamentary debates (Oct. 28, 1647) asserting that "all the people, and all nations whatsoever, have a liberty and power to alter and change their constitutions if they find them to be weak and infirm"); PAULINE MAIER, FROM RESISTANCE TO REVOLUTION: COLONIAL RADICALS AND THE DEVELOPMENT OF AMERICAN OPPOSITION TO BRITAIN, 1765-1776, at 35 (1972) (quoting John Milton's assertion that the people might keep or overthrow their King *"though no tyrant*, merely by the liberty and right of free born Men, to be governed as seems to them best"). Importantly, however, American revolutionaries did not rely on such views, but justified independence under the conventional pre-conditions for the right of revolution.

[16] MAIER, *supra* note 15, at 27–28; PAULINE MAIER, THE OLD REVOLUTIONARIES: POLITICAL LIVES IN THE AGE OF SAMUEL ADAMS 27 (1980); Pauline Maier, *Freedom, Revolution, and Resistance to Authority, 1776-1976*, *in* FREEDOM IN AMERICA: A 200-YEAR PERSPECTIVE 25–42 (Norman A. Graebner ed., 1977); JOHN PHILLIP REID, THE CONCEPT OF REPRESENTATION IN THE AGE OF THE AMERICAN REVOLUTION 85 (1989); John Phillip Reid, *In a Defensive Rage: The Uses of the Mob, the Justification in Law, and the Coming of the American Revolution*, 49 N.Y.U. L. REV. 1043, 1062–63 (1974); WOOD, *supra* note 1, at 320–21.

[17] JOHN PHILLIP REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY TO LEGISLATE 140 (1986) [hereinafter THE AUTHORITY TO LEGISLATE].

[18] *Id.*

obligatory terms that suggested the duty—not just the right—of the people to resist unconstitutional acts.[19]

Everyone agreed that breach of the constitutional contract by one party released the other party.[20] More troublesome was "how serious violations had to be to end the contract or permit armed resistance."[21] The inherent vagueness of the unwritten British Constitution complicated the question.[22] The British Constitution was not "a set of directives adopted by the people granting government its prerogatives and limiting its powers."[23] It functioned more as "a way of thinking and arguing about authority, an outline of governmental goals and principles derived from existing institutions, laws, and customs, and drawn by deduction from the patterns by which they functioned."[24] While this amorphousness might have benefited British politics, it produced something of a muddle in understanding the right of resistance when commentators felt it "best" to keep such rights "somewhat imprecise."[25] As a reviewer in the *Scots Magazine* declared in 1763: "May the right of resistance in the people be for ever supposed! [M]ay it never be defined or explained!"[26]

As with the right of revolution under natural law, the right to resistance had limitations. It was not an individual right.[27] It belonged to the community as a whole, as one of the parties to the constitutional contract. It could not be invoked as a means of first resort or response to trivial or casual errors of government.[28] In his *Commentaries*, Blackstone also suggested that use of the right of

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[19] THE AUTHORITY OF RIGHTS, *supra* note 4, at 112. *See also* MAIER, *supra* note 15, at 27–28.

[20] THE AUTHORITY TO LEGISLATE, *supra* note 17, at 121. Given the analogy to contract, there was an odd absence of mutuality in addressing potential breaches. What right the people had to act in theory if the King breached the contract seemed reasonably clear, but what actions were practically open to the King in the event the people, as the "other party to the contract," breached were far from clear.

[21] *Id.*

[22] THE AUTHORITY OF RIGHTS, *supra* note 4, at 10.

[23] JOHN PHILLIP REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: ABRIDGED EDITION 3 (1995).

[24] *Id.*

[25] THE AUTHORITY OF RIGHTS, *supra* note 4, at 10–11.

[26] *Id.* at 11.

[27] As a result, the people's "right to preserve their rights by force and even rebellion against constituted authority" naturally existed as a collective right. *Id.* at 111. *See also* THE AUTHORITY TO LEGISLATE, *supra* note 17, at 427–28 n.31; MAIER, *supra* note 15, at 33–34.

[28] Although some commentators suggested the right existed even if Parliament "jeopardized the constitution," a more common iteration underscored the need for oppression and tyranny as a basis for the right. *See* THE AUTHORITY TO LEGISLATE, *supra* note 17, at 121; MAIER, *supra* note 15, at 33–35.

resistance was "*extraordinary*," for example, when the King broke the original contract, violated "the fundamental laws," or withdrew from the kingdom.[29] During the Stamp Act crisis of the 1760s, the Massachusetts Provincial Congress invoked the British right of resistance. Resistance was justified when freedom was "'invaded by the hand of oppression, and trampled on by the merciless feet of tyranny.'"[30] George III's "tyranny" warranted the withdrawal of the allegiance of Americans to him under the original constitutional contract. The "indictment" in the Declaration of Independence of George III had its roots in the constitutional right of revolution.[31]

The justification for independence thus comfortably rested on the period's conventional theories. The American revolutionaries based their revolution on the people's collective right to cast off a corrupt monarch. It was both their natural right against tyranny and their British constitutional right of redress from their sovereign's oppression. But the process of creating new governments in America to replace those under the aegis of the British monarch created another problem and produced different understandings. It gave rise to an American theory of legitimate government.

In rejecting kingship during their Revolution, Americans embraced the concept that the people were the rightful sovereign, rather than a monarch. Americans embraced the concept that the people themselves had become and would remain the rightful sovereign. Having taken this step, they were unwilling to return to the colonial fold, nor did they envision surrendering the sovereignty they now claimed. They justified this stand on a theory aptly described as the people's sovereignty.[32] This theory associated the

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[29] BLACKSTONE, *supra* note 11, at 238, 243.

[30] THE AUTHORITY OF RIGHTS, *supra* note 4, at 112. As the colonial crisis deepened, some imperialists conceded the colonists' collective right of resistance, but sought to deny its application to the legislature. American Whigs refused to accept such a limitation, seeing the threat to their liberties coming not from the King, but rather from Parliament. *Id.*

[31] REVOLUTION IN THE LAW, *supra* note 4, at 84–87. During the crisis leading up to the Revolution, Americans focused on what they perceived to be the corruption of ministers and advisors misleading the King. Only relatively late in the day—for example in the Declaration of Independence—would George III be singled out as personally responsible for violating the constitutional contract. *See, e.g.*, BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 124–25, 128–29 (1967).

[32] 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 "people's sovereignty" is preferable to "popular sovereignty." "Popular sovereignty" has acquired 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.

legitimacy of written constitutions and the governments created by those constitutions with the authority granted by the people.

But such a collectivity of the people posed a puzzle: how could the people act as one, like a traditional sovereign? From the time of the Revolution, this question generated conflict and had profound implications for American constitutionalism. One position asserted that this collective sovereign expressed its will only through the use of procedural mechanisms. After creating governments based on their power as sovereign, the people would henceforth be bound by the constitution. Others considered this viewpoint an overly narrow conception of the people's sovereignty. For them, collective sovereignty meant that "the people" could express their will directly—just as they did during the Revolution—without using formal procedures before every move, if they decided it inconvenient. Government was subordinate to "the people," who, although normally quiet and acquiescent, could, when they desired, act as the ultimate sovereign and invoke their inherent authority to rule directly and independently of the existing government.[33] These competing views of the people's sovereignty drew strength from the central political truth of the Revolution. In America, the people collectively were the sovereign.

The idea that the people were the sovereign both gave life and authority to the governments Americans erected after independence. It also suggested that the new American sovereign retained power over those governments, including the ability to destroy their new creation. The underlying principle of American constitution-making that gave Americans considerable pride—governments that rested on the people's sovereignty—also introduced the worrisome potential of their undoing.

III. THE SIGNIFICANCE OF WRITTEN CONSTITUTIONS

In noting how American conceptions of constitutions after the Revolution departed from traditional British understandings, scholars have focused on an emerging American belief that

[33] To the extent that such ideas seem like "constitutional dinosaurs," applying a different perspective to the examination of the historical strata of writings and documents on America's past reveals large numbers of fossils from constitutional dinosaurs—ideas seriously discussed, considered and acted upon, but which are foreign to our present constitutional understandings. That perspective is facilitated by the examination of the considerable experience with constitution-making and revision in the states before and after 1787, supplementing the traditional preoccupation with the framing of the federal Constitution.

constitutions constituted fundamental law.[34] That is, the growing distinction between ordinary and fundamental law led to a recognition that American constitutions limited government and political power. That notion significantly departed from the idea of parliamentary sovereignty that would fully emerge in Britain in the nineteenth century. As important as the concept of fundamental law was—particularly as written constitutions became judicially enforceable—the focus on this one aspect of American constitutionalism has overlooked an equally significant departure that characterized American constitution-making after the Revolution.

The seventeenth and eighteenth centuries witnessed substantial drafting of constitutional texts in the Anglo-American world.[35] But constitutional text as the self-conscious expression of a collective people speaking as the sovereign and giving direction to government was different. Written constitutions framed after declaring independence embodied the explicit, self-created and unilateral orders by the new American sovereign—the people. In America, government owed its life to its creator—the people—rather than a supposed arrangement between the people and their governors or king. Moreover, in America, written constitutions—and not custom and traditional understandings—provided the basis for constitutional principles and were an expression of what the sovereign people wanted from their governments and governors. The significance of the characteristic of written-ness in this context underscored that the constitutions and the governments Americans established were manifestations of the people's sovereignty. If not reduced to writing, how could one know that the sovereign people had spoken? As a consequence, from the moment of their creation, written constitutions initiated a unique American constitutionalism.

In the end, American constitutions were written enactments, unlike the British constitution, which was not enacted, but simply existed as a product of tradition and history. The written constitutions that Americans adopted in the 1770s revealed with dramatic clarity—in a way the world had rarely seen previously—the belief that governments were the creature of the sovereign power that produced them. And in America, this sovereign was the

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[34] *See, e.g.*, WOOD, *supra* note 1, at 259–60, 266–68.

[35] *See generally* DONALD S. LUTZ, THE ORIGINS OF AMERICAN CONSTITUTIONALISM (1988) (providing an overview of the larger context within which American constitution-making occurred).

people. In a Fourth of July oration in 1778, the historian David Ramsay captured the novel implications of America's written constitutions: "We are the first people in the world who have had it in their power to choose their own form of government."[36] Until the American Revolution, constitutions had been "forced on all other nations" or "formed by accident, caprice" or "prevailing practices."[37] A decade later, Ramsay considered the rejection of a "social compact between the people and their rulers" by America's constitution-makers as their major achievement.[38] Instead, the American revolutionaries rested their governments on "the majesty of the people."[39] Likewise, James Madison identified "the legitimate authority of the people" rather than "the usurped power of kings" as the critical difference between American constitutions and those of the Old World.[40] In Europe, constitutions provided examples of power granting liberty, while in America the reverse was true; constitutions were "charters of power granted by liberty."[41] Thus, the self-conscious choice of government by a widely scattered "people" necessarily entailed a written constitution, a critical feature that surfaced with revolutionary constitution-making.

The prospect of the people in the various colonies gathering to exercise their sovereign power to create governments was as important to the revolutionaries as independence itself. More than a month before drafting the Declaration of Independence, Thomas Jefferson hoped Congress might recess. This break would enable delegates to return home and help establish the "form of government" the people in each state would authorize, which was, Jefferson noted, "the whole object of the present controversy."[42] When Massachusetts began its constitution-making, John Adams agonized over where he should go. Congressional delegates at Philadelphia would guide the movement for independence, but state constitution drafters in Boston would affect "the Lives and Liberties of Millions, born and unborn."[43] The revolutionaries were living

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[36] *See* PRINCIPLES AND ACTS OF THE REVOLUTION IN AMERICA 68 (Hezekiah Niles ed., 1822).

[37] *Id.*

[38] DAVID RAMSAY, 1 THE HISTORY OF THE AMERICAN REVOLUTION 330 (Lester H. Cohen ed., Liberty Fund 1990) (1789).

[39] *Id.* at 326.

[40] JAMES MADISON, FOR THE NATIONAL GAZETTE, Jan. 18, 1792, *reprinted in* 14 THE PAPERS OF JAMES MADISON 192 (Robert A. Rutland et al. eds., 1983).

[41] *Id.* at 191.

[42] Letter from Thomas Jefferson to Thomas Nelson, May 16, 1776, *in* 1 THE PAPERS OF THOMAS JEFFERSON 292 (Julian P. Boyd ed., 1950).

[43] Letter from John Adams to William Cushing, June 9, 1776, *in* 4 THE PAPERS OF JOHN ADAMS 244–45 (Robert J. Taylor ed., 1979) [hereinafter 4 THE PAPERS OF JOHN ADAMS].

"when the greatest Philosophers and Lawgivers of Antiquity would have wished to have lived."[44]

As students of history, the leaders of the American Revolution feared that public order might depend upon force wielded by the government against the people—an unacceptable option in light of their revolt against the King's tyranny. But the opposite danger—public disorder—was equally troubling. They saw their task in writing the first state constitutions as achieving stability without resorting to coercive practices and powers that undermined republican governments.[45] Some revolutionaries, like John Adams, hoped that the structure of their new constitutions would inculcate virtue in the people, tempering irrational action disruptive of public order. "It is the Form of Government, which gives the decisive Colour to the Manners of the People" Adams declared in 1776.[46] "Under a well regulated Commonwealth, the People must be wise virtuous and cannot be otherwise."[47]

In the midst of a revolutionary war, American constitution-makers contrasted their new forms of government with the monarch they rejected. They expressed this contrast forcefully in the constitutions they wrote. Uniformly, they emphasized the power and the wisdom of the new American sovereign—the people. They drafted these texts based on their hopes and expectations rather than the experience they gained after years of war and struggle. Some would later look back, fearing that the new sovereign, while eminently better than the monarch, was susceptible to "the Flames of Passion" which undermined sufficiently "vigorous" new government.[48] Over time, some of these leaders experienced second thoughts: not about the people as the sovereign, but regarding how one might know when the sovereign had spoken. The words used in some of the revolutionary constitutions—cast in the days when rule by the people was a simple proposition—would later return to

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[44] Letter from John Adams to John Penn, Mar. 27, 1776, *in* 4 THE PAPERS OF JOHN ADAMS, *supra* note 43, at 78–79. *See also* Letter from George Washington to John Augustine Washington, May 31-June 4, 1776, *in* 4 THE PAPERS OF GEORGE WASHINGTON 411–12 (W.W. Abbot & Dorothy Twohig eds., 1991) (asserting that state constitutions could "render Million's happy, or Miserable"); Letter from Francis Lightfoot Lee to Landon Carter, Nov. 9, 1776, *in* 5 LETTERS OF DELEGATES TO CONGRESS: 1774-1789, at 461, 463 (Paul H. Smith ed., 1979) (characterizing constitution-writing as seeming to "employ every pen").

[45] *See, e.g.*, JOSEPH J. ELLIS, FOUNDING BROTHERS: THE REVOLUTIONARY GENERATION 7–8, 89, 246 (2000) (emphasizing the revolutionary commitment to avoiding government coercion).

[46] Letter from John Adams to Mercy Otis Warren, Jan. 8, 1776, *in* 3 THE PAPERS OF JOHN ADAMS 397–98 (Robert J. Taylor ed., 1979).

[47] *Id.*

[48] Letter from John Adams to Samuel Freeman, Apr. 27, 1777, *in* 5 THE PAPERS OF JOHN ADAMS 161 (Robert J. Taylor ed., 1983).

confront and confound Americans increasingly concerned about rule by the people.[49]

IV. AMERICANIZATION OF THE RIGHT OF REVOLUTION

In making their constitutions after declaring independence, Americans believed the people acted directly and unilaterally to create new governments to protect their welfare. This meant that in American governments, the people were simultaneously the sovereign and the subject. This twist, wrought by the Revolution, undermined the applicability of the British constitutional view of contract between the people and their rulers. In America where the ruler and the sovereign, the people, were one and the same, could such a sovereign ever "oppress" itself, giving rise to the right of revolution that the American colonists exercised in 1776?

All of America's revolutionary-era constitutions assumed that the inherent sovereignty of the people legitimated and controlled government. Many did so without specifically providing such a right. Other first constitutions explicitly provided for this right of the people to alter or abolish government.[50] As the young Continental army officer, John Laurens, put it, writing from Valley Forge in 1778, the power to revise constitutions was "inherent only in the people."[51] Laurens' statement was a truism for American revolutionaries who consistently identified the legitimacy of their governments with the same source that had justified Independence—the sovereign people. That belief led many Americans to view "alter or abolish" provisions differently than they

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[49] The extent to which many of the principles embodied in American constitutions had antecedents and even parallels to rights recognized under the British legal and constitutional tradition has obscured the significance of their embodiment in written constitutions. For some of the pre-Revolutionary iterations of the people's sovereignty, the right to change government, the status of governors as servants of the people and the purposes of government, see THE AUTHORITY TO LEGISLATE, *supra* note 17, at 107–10.

[50] Scholars have dismissed the language of "alter and abolish" provisions as merely declarative because such communal rights provisions lacked the apparent judicial enforceability of specific enumerations of individual civil rights. *See, e.g.*, JOHN J. DINAN, KEEPING THE PEOPLE'S LIBERTIES: LEGISLATORS, CITIZENS, AND JUDGES AS GUARDIANS OF RIGHTS 6 (1998); LUTZ, *supra* note 35, at 58–59; Robert C. Palmer, *Liberties as Constitutional Provisions, 1776-1791*, *in* CONSTITUTION AND RIGHTS IN THE EARLY AMERICAN REPUBLIC 55, 61, 63–64, 68–69 (William E. Nelson & Robert C. Palmer eds., 1987); Howard, *supra* note 9, at 102; DONALD S. LUTZ, POPULAR CONSENT AND POPULAR CONTROL: WHIG POLITICAL THEORY IN THE EARLY STATE CONSTITUTIONS 61–62 (1980); John V. Orth, *"Fundamental Principles" in North Carolina Constitutional History*, 69 N.C. L. REV. 1357, 1358–59 (1991); A. E. Dick Howard, *"For the Common Benefit": Constitutional History in Virginia as a Casebook for the Modern Constitution-Maker*, 54 VA. L. REV. 816, 823 (1968).

[51] Letter from John Laurens to Henry Laurens, May 12, 1778, *in* 8 THE PAPERS OF HENRY LAURENS 296 (George C. Rogers, Jr. et al. eds., 1980).

had before the Revolution. Those provisions now signified the ongoing, inherent right that the people had—as the sovereign—to control government.[52]

As a result of the Revolution, Americans transformed the language of the revolutionaries' right to "alter or abolish" government into an ongoing, inherent right of the people, as sovereign, to revise their constitutions.[53] Unlike the significant preconditions for casting off oppressive rule, "alter or abolish" provisions in American constitutions implied that the people, as the sovereign, could act whenever they chose to change or adjust their governments. In the hands of American constitution-makers, the right of revolution broke loose from its traditional moorings of resistance to oppression and yielded different meanings based on the constitutional principle that sovereignty, in America, remained in the people.

The need during the Revolution to draft constitutions legitimizing new governments exposed Americans to that process and led many to regard their role as sovereign as a continuing right and obligation. Creating written constitutions struck many Americans as merely the expression, but not the exhaustion, of their role as

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[52] The "alter or abolish" provisions have often been considered part of the "natural law tradition," or as merely philosophical or political statements. *See, e.g.*, STEVEN ROSSWURM, ARMS, COUNTRY, AND CLASS: THE PHILADELPHIA MILITIA AND "LOWER SORT" DURING THE AMERICAN REVOLUTION, 1775-1783, at 106 (1987); A.E. DICK HOWARD, 2 COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 823–24 (1974); ELISHA P. DOUGLASS, REBELS AND DEMOCRATS: THE STRUGGLE FOR EQUAL POLITICAL RIGHTS AND MAJORITY RULE DURING THE AMERICAN REVOLUTION 69 (1955); *The Preamble and Declaration of Rights of the Pennsylvania Constitution, reprinted in* 26 DICK. L. REV. 29, 36–37 (1921); Tom N. McInnis, *Natural Law and the Revolutionary State Constitutions*, 14 LEGAL STUD. F. 351, 370 (1990); PETER SUBER, THE PARADOX OF SELF-AMENDMENT: A STUDY OF LOGIC, LAW, OMNIPOTENCE, AND CHANGE 228, 231–32 (1990). Some scholars, however, have observed that many Americans took the language of the people's inherent right to change their governments literally. *See, e.g.*, Harry L. Witte, *Rights, Revolution, and the Paradox of Constitutionalism: The Processes of Constitutional Change in Pennsylvania*, 3 WIDENER J. PUB. L. 383, 390 (1993); Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 458 (1994); Matthew J. Herrington, *Popular Sovereignty in Pennsylvania 1776-1791*, 67 TEMP. L. REV. 575, 605–07 (1994).

[53] Scholars have largely overlooked this transformation and assume that the American "alter or abolish" constitutional provisions continued to reflect the right of revolution enunciated by Jefferson. *See, e.g.*, McInnis, *supra* note 52; Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 YALE L.J. 907, 940 (1993); SUBER, *supra* note 52, at 228; Arvel (Rod) Ponton III, *Sources of Liberty in the Texas Bill of Rights*, 20 ST. MARY'S L.J. 93, 103 (1988); Joseph W. Little & Steven E. Lohr, *Textual History of the Florida Declaration of Rights*, 22 STETSON L. REV. 549, 563–65 (1993); Lawrence Schlam, *State Constitutional Amending, Independent Interpretation, and Political Culture: A Case Study in Constitutional Stagnation*, 43 DEPAUL L. REV. 269, 337 n.238 (1994); Michael J. Horan, *The Wyoming Constitution: A Centennial Assessment*, 26 LAND & WATER L. REV. 13, 20 (1991); James W. Torke, *Assessing the Ackerman and Amar Theses: Notes on Extratexual Constitutional Change*, 4 WIDENER J. PUB. L. 229, 241 (1994).

sovereign. For many Americans, sovereignty, like life, liberty and property, was an unstated, but an equally inalienable, right. For them, it made no sense that governments created by the sovereign people might assume the people's sovereignty. Such views drove many traditional American leaders to imagine the horrors of "democratic excess" if government could not control the people's sovereignty. Some American leaders in the post-revolutionary years returned to the outdated contract analogy and, at times, conceived of the government as having sovereignty independent of the people.[54] Nonetheless, the constitutional logic of recognizing the people, not the king, as the sovereign called into question the relevance of a right of revolution in America. This appreciation neither developed instantly nor uniformly after the establishment of the new American governments. Some of the first state constitutions included "alter or abolish" provisions that sounded like the traditional right of revolution. For example, Maryland's 1776 constitution provided for the people's right to reform the constitution "whenever the ends of government are perverted, and public liberty manifestly endangered, and all other means of redress are ineffectual."[55] New Hampshire's bill of rights borrowed that same language in 1784.[56] Other state constitutions, however, adopted different versions of the right to "alter or abolish" government. These provisions justified the continuing ability of the people to revise constitutions regardless of the traditional pre-conditions for the right of revolution. For example, Virginia's 1776 constitution protected the right to respond if government behaved "contrary" to its rightful purposes or proved "inadequate."[57] The right to "alter, or abolish" government in Pennsylvania's 1776 constitution permitted its exercise in the manner "judged most conducive to the public weal."[58] For some, these provisions could justify the people acting outside governmental institutions

[54] Indeed, at times some of those leaders asserted that the people's sovereignty only existed during the exercise of the franchise, after which the government, for all practical purposes, possessed sovereignty until the next election.

[55] MD. CONST. of 1776, DECLARATION OF RIGHTS, § IV, *reprinted in* FEDERAL AND STATE CONSTITUTIONS, *supra* note 3, III, at 1687.

[56] N.H. CONST. of 1784, BILL OF RIGHTS, art. X, *reprinted in* FEDERAL AND STATE CONSTITUTIONS, *supra* note 3, IV, at 2455. Both Maryland's and New Hampshire's constitutions, however, emphasized the subordinate relationship of those in government service to the people and urged non-resistance to arbitrary government and oppression.

[57] VA. CONST. of 1776, BILL OF RIGHTS, § 3, *reprinted in* FEDERAL AND STATE CONSTITUTIONS, *supra* note 3, VII, at 3813.

[58] PA. CONST. of 1776, A DECLARATION OF THE RIGHTS OF THE INHABITANTS OF THE COMMONWEALTH, OR STATE OF PENNSYLVANIA, art. V, *reprinted in* FEDERAL AND STATE CONSTITUTIONS, *supra* note 3, V, at 3083.

whenever they wished—even without strict compliance with existing procedures for constitutional revision—to alter written constitutions. The people's sovereignty was the ultimate reason for the legitimacy of a role the people lacked under the British constitution.

Only five of the eleven states that drafted initial constitutions had bills of rights with "alter or abolish" provisions.[59] As bills of rights became a common feature of American constitutions, the "alter or abolish" provisions were more frequently inserted. They reflected a diverse basis for invoking the people's inherent right of revision. State constitutions with "alter or abolish" provisions harkening back to the requirement of oppression to trigger a right of revolution came to be interpreted after the Revolution by some not as a limitation, but as one extreme example of the people's right to supersede government consistent with their ability to do so on lesser grounds. In 1787, Maryland's legislators debated that precise issue in terms of that state's "alter or abolish" provision.[60] The people could resist their governors, some legislators acknowledged, if those officials subverted the purposes of government. But this example of the most important need to alter or abolish government did not limit the people. Their hands were not tied until liberty was in "*manifest* danger" because waiting until then might well be "too late."[61] One legislator noted that the Revolution established that government's "power is derived from the people. . .to be exercised for their welfare and happiness" and as such "the people are the judges, and when they think it is not so employed they may speak and announce it by memorials, remonstrances, or instructions."[62] If the government disregarded these efforts, the people could then reject the offending officials at the next election "or if the magnitude of the case requires it. . .resum[e] the powers of government" themselves.[63]

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[59] Only Virginia, Pennsylvania, North Carolina, Maryland, Delaware and Massachusetts inserted bills of rights in the first constitutions they drafted, and all but North Carolina's contained "alter or abolish" provisions. The first constitutions of New York, New Jersey, South Carolina, Georgia and New Hampshire did not include bills of rights. Rhode Island and Connecticut retained their colonial charters.

[60] Melvin Yazawa, *Introduction* to REPRESENTATIVE GOVERNMENT AND THE REVOLUTION: THE MARYLAND CONSTITUTIONAL CRISIS OF 1787, at 22–23 (Melvin Yazawa ed., 1975) [hereinafter MARYLAND CONSTITUTIONAL CRISIS]. Gordon Wood considers the Maryland controversy the "most important constitutional debate of the Confederation period prior to the meeting of the Philadelphia Convention." WOOD, *supra* note 1, at 369–70.

[61] Letter from Samuel Chase to His Constituents, Feb. 9, 1787, *reprinted in* MARYLAND CONSTITUTIONAL CRISIS, *supra* note 60, at 59–60.

[62] Letter from William Paca to Alexander Contee Hanson, May 10, 1787, *reprinted in id.* at 117.

[63] *Id.*

V. PERSISTENCE OF REVOLUTIONARY-ERA CONSTITUTIONAL IDEAS

The alter or abolish provisions of the first state constitutions were frequently considered to reflect the American view that the people in a republic—like a king in a monarchy—had plenary authority as sovereign. This interpretation persisted from the post-revolutionary period up to the Civil War. From the conventional understanding that the people could act at one discrete moment if subject to a tyrant's oppression, the American theory of the people's sovereignty suggested that the people had a collective, on-going and inherent authority to change the constitution. Even two "conservative" constitutions of the post-revolutionary period, Massachusetts's of 1780 and Pennsylvania's in 1790, allowed for the people's inherent right of revision.[64] Massachusetts protected the people's right "to reform, alter, or totally change" government whenever their "happiness require[d] it," such as for their "protection, safety, [or] prosperity."[65] Pennsylvania secured the inherent right of the people "at all times" to "alter, reform, or abolish their government, in such manner as they may think proper."[66] The preamble to Delaware's 1792 bill of rights insured that the people had an inherent right "as circumstances require, from time to time [to], alter their constitution of government."[67] When Connecticut replaced its colonial charter with a constitution in 1818, it safeguarded the people's inherent right "at all times. . .to alter their form of government in such a manner as they may think expedient."[68]

Long after the federal Constitution in 1787, the people's sovereignty, having been the justification for the Revolution and revolutionary-era constitutionalism, played a dominant role in Americans' view of their constitutions and of the relationship between the people and their governments. The federal Constitution did not eclipse the American understanding that the people controlled the constitution. This view resonated in

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[64] The characterization of conservatism comes from an assessment of how widely political democracy was extended under the structure of those constitutions. *See, e.g.*, WOOD, *supra* note 1, at 438; LUTZ, *supra* note 35, at 129.

[65] MASS. CONST. of 1780, DECLARATION OF RIGHTS, art. VII, *reprinted in* FEDERAL AND STATE CONSTITUTIONS, *supra* note 3, III, at 1890.

[66] PA. CONST. of 1790, art. IX, § 2, *reprinted in* FEDERAL AND STATE CONSTITUTIONS, *supra* note 3, V, at 3100. Pennsylvania's language would be retained in its constitution of 1838. *See* PA. CONST. of 1838, art. VIII, § 2, *reprinted in id.* at 3113.

[67] DEL. CONST. of 1792, PREAMBLE, *reprinted in* FEDERAL AND STATE CONSTITUTIONS, *supra* note 3, I, at 568. That language would also be retained in the State's 1831 constitution as well. *Id.* at 582.

[68] CONN. CONST. of 1818, art. I, § 2, *reprinted in id.* at 537.

subsequent constitution-making and revision up to the Civil War. For example, constitutions drafted by states achieving statehood after the original thirteen colonies described the people's inherent right to change or abolish their governments. Such authority was not limited by British constitutional doctrines or natural law theories. Kentucky's 1792 constitutional text established a government for the people's "peace, safety, and happiness" which the people could "alter, reform, or abolish. . .in such manner as they may think proper."[69] Four years later, Tennessee's bill of rights reflected the same language as Kentucky's constitution.[70] When Ohio drafted its constitution in 1802, it recognized that the people "have at all times a complete power to alter, reform, or abolish their government, whenever they may deem it necessary."[71] Subsequent constitutions drafted through the 1830s similarly expressed the people's freedom to alter or abolish governments.[72] Indeed, alter or abolish provisions routinely found their way into state constitutions during the nineteenth century and have persisted into the twentieth century as well.[73]

Modern scholars usually dismiss alter or abolish provisions as glittering generalities. Nonetheless, many Americans before the Civil War construed these provisions differently than we do today

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[69] KY. CONST. of 1792, art. XII, § 2, *reprinted in* FEDERAL AND STATE CONSTITUTIONS, *supra* note 3, III, at 1274. This language was largely retained in Kentucky's later constitutions of 1799 and 1850. *See id.* at 1289, 1312.

[70] TENN. CONST. of 1796, art. XI, § 1, *reprinted in* FEDERAL AND STATE CONSTITUTIONS, *supra note* 3, VI, at 3422.

[71] OHIO CONST. of 1802, art. VIII, § 1, *reprinted in* FEDERAL AND STATE CONSTITUTIONS, *supra* note 3, V, at 2909.

[72] See IND. CONST. of 1816, art. I, § 2, *reprinted in* FEDERAL AND STATE CONSTITUTIONS, *supra* note 3, II, at 1058 ("in such manner as they may think proper"); MISS. CONST. of 1817, art. I, § 2, *reprinted in* FEDERAL AND STATE CONSTITUTIONS, *supra* note 3, IV, at 2033 ("in such manner as they may think expedient"); ME. CONST. of 1819, art. I, § 2, *reprinted in* FEDERAL AND STATE CONSTITUTIONS, *supra* note 3, III, at 1646 ("when their safety and happiness require it"); ALA. CONST. of 1819, art. I, § 2, *reprinted in* FEDERAL AND STATE CONSTITUTIONS, *supra* note 3, I, at 96 ("as they may think expedient"); MO. CONST. of 1820, art. XIII, § 2, *reprinted in* FEDERAL AND STATE CONSTITUTIONS, *supra* note 3, IV, at 2163 ("whenever it may be necessary to their safety and happiness"); MICH. CONST. of 1835, art. I, § 2, *reprinted in* FEDERAL AND STATE CONSTITUTIONS, *supra* note 3, IV, at 1930 ("whenever the public good requires it"); ARK. CONST. of 1836, art. II, § 2, *reprinted in* FEDERAL AND STATE CONSTITUTIONS, *supra* note 3, I, at 269 ("in such manner as they may think proper"); TEX. CONST. of 1836, DECLARATION OF RIGHTS, § 2, *reprinted in* FEDERAL AND STATE CONSTITUTIONS, *supra* note 3, VI, at 3542 ("in such manner as they may think proper"); FLA. CONST. of 1838, art. I, § 2, *reprinted in* FEDERAL AND STATE CONSTITUTIONS, *supra* note 3, II, at 664 ("in such manner as they may deem expedient").

[73] *See, e.g.*, Oklahoma's present 1907 constitution that identifies the right of the people to "alter or reform" government "whenever the public good may require it." OKLA. CONST. of 1907, art. II, § 1, *reprinted in* 8 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 97 (William F. Swindler ed., 1979).

and believed they justified action by the people as a whole. The alter or abolish provisions signified a relationship between the people and their governments that Americans accepted as part of their revolutionary constitutional heritage. All peoples had the natural right of revolution, but only Americans possessed the inherent right of legitimate constitutional revision. That constitutional right rested on the people's sovereignty and was enshrined in written constitutions that formed the basis of American republics. Not only did the people have constitutional sovereignty in America, but in the aftermath of the Revolution, the range in which they could exercise that authority did not require a last-ditch revolutionary effort of a desperate people.

When American revolutionaries contemplated revising their first efforts at constitutions, they were not fearful. Many welcomed the opportunity, believing that preserving republican governments required a "frequent recurrence" to the "fundamental principles" that informed their initial constitution-making.[74] This eagerness to consider anew the basis for government reflected an eighteenth century understanding that "Constitutions are subject to Corruption and must perish, unless they are *timely renewed*."[75] For Americans this entailed going back to the "first principles" underlying the previous constitution. By continually tailoring the constitution to ensure its fit, and especially by avoiding vice and corruption, they hoped to postpone the inevitable decline of all governments.[76] Of course, this attitude is foreign to us today. At least in the federal constitutional context, we shy away from taking another look at the whole document, seeming to consider it about as perfect as politics will allow.

The American Revolution led to a different take on delaying the feared inevitable decline of government order. After the Revolution, "frequent recurrence" increasingly became associated with progressive constitutional developments, implicitly giving the

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[74] Christian G. Fritz, *Alternative Visions of American Constitutionalism: Popular Sovereignty and the Early American Constitutional Debate*, 24 HASTINGS CONST. L.Q. 287, 342–44 (1997).

[75] WOOD, *supra* note 1, at 34. *See also* GERALD STOURZH, ALEXANDER HAMILTON AND THE IDEA OF REPUBLICAN GOVERNMENT 34–37 (1970).

[76] WOOD, *supra* note 1, at 65–70 (describing the belief of American revolutionary leaders that republics ultimately rested on a demonstration of sufficient self restraints and "public virtue" by the people); J.G.A. POCOCK, THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION 527 (1975) (identifying a civic tradition that stressed the vital need and yet fragile nature of maintaining virtue in republics as providing "a powerful impulse to the American Revolution").

people responsibility for monitoring the political process.[77] The revolutionary-era constitutions of Virginia, North Carolina and Massachusetts, as well as New Hampshire's second constitution, all underscored the importance of timely reforms of such a "recurrence."[78] The preservation of republics depended on maintaining public and private virtue, accomplished in part by refreshing the people's memory of the implications and importance of "fundamental principles." It was equally important to encourage popular participation in on-going revision and formal constitutional adjustment.[79] As "Demophilus" from Philadelphia argued in 1776, a periodic examination of the constitution kept the government in "*the hands of* THE PEOPLE."[80] Nonetheless, for those with less confidence in the people, the notion of a "frequent recurrence" to "fundamental principles" seemed to undermine rather than preserve governmental stability.[81]

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[77] STOURZH, *supra* note 75, at 9–37 (documenting the progression of American constitutionalism in the eighteenth century); Orth, *supra* note 50, at 1357–59; John N. Shaeffer, *Public Consideration of the 1776 Pennsylvania Constitution*, 98 PA. MAG. HIST. & BIOG. 415, 434 (1974); WILLI PAUL ADAMS, THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA 142–43 (1980); Merrill D. Peterson, *Thomas Jefferson, the Founders, and Constitutional Change, in* THE AMERICAN FOUNDING: ESSAYS ON THE FORMATION OF THE CONSTITUTION 275–293 (J. Jackson Barlow et al. eds., 1988); Cecelia M. Kenyon, *Constitutionalism in Revolutionary America, in* CONSTITUTIONALISM: NOMOS XX 114–21 (1979).

[78] *See* VA. CONST. of 1776, BILL OF RIGHTS, § 15, *reprinted in* FEDERAL AND STATE CONSTITUTIONS, *supra* note 3, VII, at 3814; N.C. CONST. of 1776, DECLARATION OF RIGHTS, § 21, *reprinted in* FEDERAL AND STATE CONSTITUTIONS, *supra* note 3, V, at 2788; PA. CONST. of 1776, DECLARATION OF RIGHTS, § 14, *reprinted in* FEDERAL AND STATE CONSTITUTIONS, *supra* note 3, V, at 3083; VT. CONST. of 1777, DECLARATION OF RIGHTS, § 16, *reprinted in* FEDERAL AND STATE CONSTITUTIONS, *supra* note 3, VI, at 3741; MASS. CONST. of 1780, DECLARATION OF RIGHTS, art. XVIII, *reprinted in* FEDERAL AND STATE CONSTITUTIONS, *supra* note 3, III, at 1892; N.H. CONST. of 1784, BILL OF RIGHTS, art. XXXVIII, *reprinted in* FEDERAL AND STATE CONSTITUTIONS, *supra* note 3, IV, at 2457.

[79] *See* Howard, *supra* note 50, at 828–29.

[80] Demophilus, *The Genuine Principles of the Ancient Saxon, or English [,] Constitution, in* 1 AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA 1760-1805, at 363 (Charles S. Hyneman & Donald S. Lutz eds., 1983).

[81] *See* MERRILL D. PETERSON, JEFFERSON AND MADISON AND THE MAKING OF CONSTITUTIONS 11–12 (1987). The resistance of federalists, including James Madison, to future federal constitutional conventions was indicative of such fears. *See* MICHAEL KAMMEN, A MACHINE THAT WOULD GO OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE 58 (1986); Peterson, *supra* note 77, at 286; Kurt T. Lash, *Rejecting Conventional Wisdom: Federalist Ambivalence in the Framing and Implementation of Article V*, 38 AM. J. LEGAL HIST. 209, 223 (1994) (explaining the reluctance of calling a second constitutional convention); THE FEDERALIST NOS. 43, 49 (James Madison) (Jacob E. Cooke ed., 1961); ADRIENNE KOCH, JEFFERSON AND MADISON: THE GREAT COLLABORATION 70–71 (Adrienne Koch & William Peden eds., 1950); RICHARD B. BERNSTEIN & JEROME AGEL, AMENDING AMERICA: IF WE LOVE THE CONSTITUTION SO MUCH, WHY DO WE KEEP TRYING TO CHANGE IT? 223 (1993). *See generally* Douglas G. Voegler, *Amending the Constitution by the Article V Convention Method*, 55 N.D. L. REV. 355, 364, 388 (1979); Holmes, *supra* note 15, at 196; Dickson D. Bruce, Jr.,

But how could such recurrence occur in the absence of specific procedures for revision in the constitution to be changed? The first American constitutions suggested that the people retained the authority to change constitutions even without revision provisions. The people's inherent rights arguably authorized them to bypass procedures in the constitution, particularly since so many constitutions stated that revision could occur in any manner the people saw fit.[82] Bypassing procedures were founded on the people's sovereignty. If the people were the sovereign, they necessarily had a paramount right to effect constitutional change. James Wilson supported this idea, describing the consequences of the people's sovereignty in America: "the people may change the constitutions whenever and however they please," he wrote, this being "a right" as sovereign that no one could "ever deprive them."[83]

The actual practice of American constitution-making and revising demonstrates how Americans practiced their sovereignty as a people. From the start of American constitution-making, the omission of specific provisions for constitutional revision proved no obstacle to change. Americans routinely justified revision by citing the people's inherent right as sovereign to change their minds.[84]

The Conservative Use of History in Early National Virginia, 19 S. STUD. 128–46 (1980); John W. Malsberger, *The Political Thought of Fisher Ames*, 2 J. EARLY REPUBLIC 1–20 (1982). Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, *in* RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT 246 (Sanford Levinson ed., 1995).

[82] Virginia's 1776 constitution declared the right could be invoked "in such manner as shall be judged most conducive to the public weal," and Pennsylvania's 1790 constitution spoke of the people's right to alter their government "in such manner as they may think proper." *See* VA. CONST. of 1776, BILL OF RIGHTS, § 3, *reprinted in* FEDERAL AND STATE CONSTITUTIONS, *supra* note 3, VII, at 3813; PA. CONST. of 1790, art. IX, § 2, *reprinted in* FEDERAL AND STATE CONSTITUTIONS, *supra* note 3, V, at 3100. Similar language was found in many other state constitutions. *See* TENN. CONST. of 1796, art. XI, § 1, *reprinted in* FEDERAL AND STATE CONSTITUTIONS, *supra* note 3, VI, at 3422 ("in such manner as they may think proper"); KY. CONST. of 1799, art. X, § 2, *reprinted in* FEDERAL AND STATE CONSTITUTIONS, *supra* note 3, III, at 1289 ("in such manner as they may think proper"); IND. CONST. of 1816, art. I, § 2, *reprinted in* FEDERAL AND STATE CONSTITUTIONS, *supra* note 3, II, at 1058 ("in such manner as they may think proper"); MISS. CONST. of 1817, art. I, § 2, *reprinted in* FEDERAL AND STATE CONSTITUTIONS, *supra* note 3, IV, at 2033 ("in such manner as they may think expedient"); CONN. CONST. of 1818, art. I, § 2, *reprinted in* FEDERAL AND STATE CONSTITUTIONS, *supra* note 3, I, at 537 ("in such manner as they may think expedient"); ALA. CONST. of 1819, art. I, § 2, *reprinted in* FEDERAL AND STATE CONSTITUTIONS, *supra* note 3, I, at 96 ("in such manner as they may think expedient").

[83] Amar, *supra* note 52, at 474 (quoting 2 ELLIOT'S DEBATES 432).

[84] *See, e.g.*, JAMES QUAYLE DEALEY, GROWTH OF AMERICAN STATE CONSTITUTIONS: FROM 1776 TO THE END OF THE YEAR 1914, at 32 (Da Capo Press 1972) (1915); J.B. THAYER, MEMORANDUM ON THE LEGAL EFFECT OF OPINIONS GIVEN BY JUDGES TO THE EXECUTIVE AND THE LEGISLATURE UNDER CERTAIN AMERICAN CONSTITUTIONS 47, 49 (1885); A. Clarke Hagensick, *Revolution or Reform in 1836: Maryland's Preface to the Dorr Rebellion*, 57 MD. HIST. MAG. 346, 352 (1962); William K. Boyd, *The Antecedents of the North Carolina*

For example, Delaware's 1776 constitution—although it alluded in general terms to future revision—lacked a specific provision for future constitutional conventions. That did not prevent a convention in 1791 from drafting a new constitution. After noting that "all government originates from the people" and invoking the constitution's "alter or abolish" provision, the Federalist-dominated legislature concluded that "the exercise of the power of altering and amending the constitution" in the stipulated fashion "would not be productive of all the valuable purposes intended by a revision, nor be so satisfactory and agreeable to our constituents."[85] Although pressured to call the convention, Delaware's government relied on a broad interpretation of the state's "alter or abolish" provision. The state's bill of rights described the people's right "to establish a new, or reform the old Government" whenever its ends were "perverted, and public Liberty manifestly endangered."[86] Such pre-conditions would arguably have been difficult to establish in 1791.[87] Nonetheless, as "Curtius" explained in the *Delaware Gazette* during the debate over holding a convention, the people had an "inherent power" to "reform" an imperfect constitution.[88] According to another writer, the convention would be armed "'with the uncontrollable authority of the people.'"[89] Indeed, on July 30, 1791, "Phileleutheros" addressed the public, saying that if representatives

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Convention of 1835, 9 S. ATL. Q. 83, 161, 169–70 (1910) (discussing circumvention efforts before 1835); William W. Thornton, *The Constitutional Convention of 1850*, *in* REPORT OF THE SIXTH ANNUAL MEETING OF THE STATE BAR OF INDIANA 152–94 (1902); Amar, *supra* note 52, at 481. Constitutional conventions in New York (1801, 1821, 1826), Connecticut (1818), Massachusetts (1821), Georgia (1833, 1839), Maryland (1850), Rhode Island (1824), Virginia (1829, 1850), South Carolina (1778, 1790), North Carolina (1835), New Hampshire (1784) and New Jersey (1844) were all held without a preexisting constitutional provision providing for their call by the legislature. *See* DEALEY, *supra*, at 41–49; WALTER F. DODD, THE REVISION AND AMENDMENT OF STATE CONSTITUTIONS (1910); PETER J. GALIE, THE NEW YORK STATE CONSTITUTION: A REFERENCE GUIDE 6–13 (1991); PATRICK T. CONLEY, DEMOCRACY IN DECLINE: RHODE ISLAND'S CONSTITUTIONAL DEVELOPMENT 1776-1841, at 202–13 (1977); 1 HOWARD, *supra* note 52, at 9–13. Connecticut's legislature, which initially elected to remain under its colonial charter after the revolution, eventually summoned a convention in 1818 under what it called its "general powers." DEALEY, *supra*, at 41.

[85] PROCEEDINGS OF THE HOUSE OF ASSEMBLY OF THE DELAWARE STATE 1781-1792 AND OF THE CONSTITUTIONAL CONVENTION OF 1792, at 832–33 (Claudia L. Bushman et al. eds., 1988).

[86] DEL. CONST. of 1776, DECLARATION OF RIGHTS AND FUNDAMENTAL RULES, § 5, *reprinted in* 2 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 198 (William F. Swindler ed., 1973).

[87] Dan Friedman, *Tracing the Lineage: Textual and Conceptual Similarities in the Revolutionary-Era State Declarations of Rights of Virginia, Maryland, and Delaware*, 33 RUTGERS L.J. 929, 954 (2002); Richard Lynch Mumford, *Constitutional Development in the State of Delaware, 1776-1897*, at 108 (1968) (unpublished Ph.D. dissertation, U. of Del.) (on file with author).

[88] Mumford, *supra* note 87, at 110 (citation omitted).

[89] *Id.* at 111 (citation omitted).

failed to call a convention "'then do it yourself providing a majority does wish it.'"[90]

Even when constitutions specified procedures for constitutional change, a good many Americans did not consider those provisions an exclusive method for revision. Legislatures ignored such provisions and called for constitutional conventions, seeing no inconsistency with the methods the constitution provided for revision.[91] Constitutional change that took place in the absence of procedures did not violate the preexisting constitution. It was inconsistent with American constitutionalism at this early period to believe that a constitution could trump the will of its makers. Since government could no longer be regarded as the British Constitution's bargain between rulers and the ruled, but rather a declaration by the people themselves, no one could bind the people to specified revision procedures.[92]

VI. THE ROLE OF PROCEDURALISM IN AMERICAN CONSTITUTIONAL REVISION

Competing views on the meaning of constitutionalism—as founded on America's written constitutions—surfaced with the Revolution and remained in tension throughout the period up to the Civil War. One view emphasized the unbounded nature of the people's sovereign authority to change their constitutions, using

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[90] *Id.* at 108 (citation omitted).

[91] *See* DEALEY, *supra* note 84, at 33, 49; Roy H. Akagi, *The Pennsylvania Constitution of 1838*, 48 PA. MAG. HIST. 301–33 (1924); FLETCHER M. GREEN, CONSTITUTIONAL DEVELOPMENT IN THE SOUTH ATLANTIC STATES, 1776-1860 (1930); Thomas Raeburn White, *Amendment and Revision of State Constitutions*, 100 U. PA. L. REV. 1132, 1135–36 (1952); Fletcher M. Green, *Cycles of American Democracy*, 48 MISS. VALLEY HIST. REV. 3–23 (1961) [hereinafter CYCLES OF DEMOCRACY]; George P. Parkinson, *Antebellum State Constitution-Making: Retention, Circumvention, Revision* (1972) (unpublished Ph.D. Dissertation, U. of Wisc.) (on file with author); John N. Shaeffer, *Georgia's 1789 Constitution: Was it Adopted in Defiance of the Constitutional Amending Process?* 61 GA. HIST. Q. 329–41 (1977); Gregory G. Schmidt, *Republican Visions: Constitutional Thought and Constitutional Revision in the Eastern United States, 1815-1830*, at 24 (1981) (unpublished Ph.D. dissertation, U. of Ill. at Urbana-Champaign) (on file with author); 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 129–30 (Ronald Hoffman & Peter J. Albert eds., 1981); Michael G. Colantuono, *The Revision of American State Constitutions: Legislative Power, Popular Sovereignty, and Constitutional Change*, 75 CAL. L. REV. 1473, 1479–81 (1987); Amar, *supra* note 52, at 481–82. Indeed, the legitimacy of "[t]he majority" of the the people to overcome constitutional provisions would even surface on the Overland Trail. *See* John Phillip Reid, *Governance of the Elephant: Constitutional Theory on the Overland Trail*, 5 HASTINGS CONST. L.Q. 421, 437 (1978).

[92] *See* DEALEY, *supra* note 84, at 25–26, 32–33. *See also* Mumford, *supra* note 87, at 111; CHARLES BORGEAUD, ADOPTION AND AMENDMENT OF CONSTITUTIONS IN EUROPE AND AMERICA 181–82 (Charles D. Haxen trans., 1895).

that authority to supply legitimacy for changes in their name. Another view distinguished the revolutionary act of independence from the establishment of republican governments resting on the sovereign people. Those holding this second view asserted that the creation of popular governments effectively transferred sovereignty to the people's representatives, and in the course of doing so, the people could, if they chose, bind themselves in the future.

The very first American constitutions largely lacked procedural constraints or requirements. Of the eleven colonies that drafted new constitutions after the Revolution, only Pennsylvania and Massachusetts explicitly set out a procedure for constitutional amendment.[93] Delaware and Maryland alluded to the possibility of future revision,[94] while Georgia authorized the legislature to call a convention if a majority of the voters in a majority of counties so desired.[95] The remaining six first state constitutions—which included Virginia, South Carolina, North Carolina, New Hampshire, New Jersey and New York—lacked any provisions for future constitutional change. The "alter or abolish" provisions in their constitutions recognized that the people's inherent authority to alter their constitutions formed the backdrop to constitutional drafting at the time.

After the 1820s, state constitutions gradually specified means and procedures for constitutional revision. Often revision provisions specified successive acts of the legislature and approval by a supermajority.[96] This shift toward procedural devices for constitutional

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[93] Pennsylvania's 1776 constitution provided for the possibility of future conventions every seven years to consider amendments, while Massachusetts's 1780 constitution provided for a vote on the issue of holding another convention in 1795, as well as a process for constitutional amendments involving approval by successive legislatures and the people. *See* PA. CONST. of 1776, sec. 47, *reprinted in* FEDERAL AND STATE CONSTITUTIONS, *supra* note 3, V, at 3091–92; MASS. CONST. of 1780, ch. VI, art. X, *reprinted in* FEDERAL AND STATE CONSTITUTIONS, *supra* note 3, III, at 1911.

[94] Delaware required a supermajority consent of its Assembly and its Legislative Council for constitutional changes, while Maryland provided that no constitutional changes could be made unless a bill to do so passed successive legislatures. *See* DEL. CONST. of 1776, art. XXX, *reprinted in* FEDERAL AND STATE CONSTITUTIONS, *supra* note 3, I, at 568; MD. CONST. of 1776, DECLARATION OF RIGHTS, art. LIX, *reprinted in* FEDERAL AND STATE CONSTITUTIONS, *supra* note 3, III, at 1701.

[95] GA. CONST. of 1777, art. LXIII, *reprinted in* FEDERAL AND STATE CONSTITUTIONS, *supra* note 3, II, at 785.

[96] *See, e.g.*, N.Y. CONST. of 1821, art. VIII, § 1, *reprinted in* FEDERAL AND STATE CONSTITUTIONS, *supra* note 3, V, at 2650; MASS. CONST. of 1780, ARTICLES OF AMENDMENT, art. IX, *reprinted in* FEDERAL AND STATE CONSTITUTIONS, *supra* note 3, III, at 1913; N.C. CONST. of 1776, AMENDMENTS TO THE CONSTITUTION OF 1776, art. IV, § 1, *reprinted in* FEDERAL AND STATE CONSTITUTIONS, *supra* note 3, V, at 2798; PA. CONST. of 1838, art. X, *reprinted in* FEDERAL AND STATE CONSTITUTIONS, *supra* note 3, V, at 3115; R.I. CONST. of 1842, art. XIII, *reprinted in* FEDERAL AND STATE CONSTITUTIONS, *supra* note 3, V, at 3234.

revision is seen today as inconsistent with constitutional clauses in the same constitutions memorializing the people's inherent right to "alter or abolish" the constitution. Today we consider "alter or abolish" provisions as unenforceable rhetoric, but regard procedural requirements as mandatory, having compelling and binding force.

Today's resolution of this apparent contradiction was not the one that Americans who wrote these constitutions necessarily accepted. For many Americans, the "alter or abolish" provisions had practical effect. They frequently relied on this right, considering the procedural mechanism an optional and convenient device to exercise their right to "alter or abolish." But the procedures were not exclusive of other ways the people could "alter or abolish" the existing constitution. These Americans considered the "alter or abolish" provisions as stating a principle with roots back to the American founding. They were not inclined to see in that founding that the people had relinquished their sovereignty.

The depth of today's commitment to proceduralism makes it difficult to accept that Americans routinely bypassed established revision procedures and initiated constitutional change without the consent of the existing government. The actual practice of American constitution-making and revision before the Civil War is hard to reconcile with our belief today that a constitution is premised on proceduralism.[97] Our constitutional history indicates that changes without use of established procedures were not necessarily considered aberrations or illegitimate. Both successful—and unsuccessful—circumvention of constitutional revision provisions prior to the Civil War amply demonstrates this.

A. The Constitutional Crisis in Rhode Island

The most famous effort of the people to revise their state constitution directly, outside of normal procedures, occurred in Rhode Island during the 1840s. At the time of the American Revolution, Rhode Island was one of two states that retained its colonial charter rather than frame a new constitution.[98] By 1840, the Charter's restrictions on representation and the franchise led to a vastly malapportioned legislature and the disenfranchisement of

[97] Note, *State Constitutional Change: The Constitutional Convention*, 54 VA. L. REV. 995, 1004–05 (1968).

[98] The other state that retained its colonial charter was Connecticut. *See* CONLEY, *supra* note 84, at 61 n.10, 62.

more than half of the adult (white) male population.[99]

Like some of the first state constitutions, there was no mechanism for constitutional revision under the Charter. The malapportioned legislature refused to call a constitutional convention to change the Charter, and possibly put themselves out of office. The first effort to replace the Charter occurred in 1777, and reform and petition efforts to alter representative apportionment and expand the franchise began in 1796.[100] Those efforts were met with decades of frustration. Matters reached a constitutional crisis in 1841. In that year, Thomas Dorr, a lawyer, former legislator, and reformer, prompted the election of delegates to a convention to draft a "People's Constitution," bypassing the existing government.[101] That constitution established a government under which Dorr was elected Governor. The People's Constitution received the ratification of nearly 14,000 adult (white) males—more than had ever participated in any Rhode Island election. That vote challenged the legitimacy of the Charter government, for whom less than half the white population could vote.[102] Representing the sovereign of the state, convention delegates justified their actions as that of the people acting to "alter or abolish" a government that had ceased to work for their benefit.

In terms of constitutional law, the episode is remembered for a case largely generated by the Charter government's efforts to prosecute Dorr and his supporters. In *Luther v. Borden*, the Supreme Court avoided deciding the constitutional issue of the

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[99] For the background leading to the constitutional crisis in Rhode Island in the 1840s, see generally CONLEY, *supra* note 84. The 1663 Charter established representation based on townships. Newport received six representatives, the towns of Providence, Warwick and Portsmouth received four representatives apiece, and each town incorporated after 1663 received two representatives. Over time, differences in growth produced both under-representation and over-representation based on population. By 1840, rapidly expanding towns accounted for over half of Rhode Island's population, but elected only a third of the representatives. The apportionment system thus rewarded static and declining towns at the expense of towns experiencing population growth. *See* PETER J. COLEMAN, THE TRANSFORMATION OF RHODE ISLAND 1790-1860, at 254–57 (1963). The Charter also stipulated that only "freemen" could vote. In the seventeenth century, the General Assembly required a "freeman" to have a "Competent Estate." In the eighteenth century, this equated to ownership or a life interest in a minimal amount of real property. The abundance of land in the colonial period meant that most adult males could vote, but land shortage in the post-revolutionary generation effectively disenfranchised many potential voters. The question then shifted to expanding the franchise on a basis other than property ownership. *See id.* at 258–59, 272.

[100] *See id.* at 262–63; CONLEY, *supra* note 84, at 166.

[101] *See* CONLEY, *supra* note 84, at 304–05.

[102] *See* COLEMAN, *supra* note 99, at 272. Dorr became an advocate for public regulation of banks after being appointed, in 1836, to a legislative commission to investigate state banking practices. *See id.* at 197–98.

people's right to act upon their inherent right to revise constitutions. Instead, the court declined to involve itself in "political questions."[103] By the time the Supreme Court decided *Luther v. Borden*, the proponents of the People's Constitution had been militarily defeated by the Charter government.

Scholars view the events surrounding the *Luther* case as essentially a political controversy. Dorr's position seems constitutionally untenable today. Virtually all scholars who have considered the incident assume that Dorr's argument for constitutional circumvention was a quaint curiosity and altogether illegitimate.[104] Trying to change the constitution without the consent of the existing government seems to be extralegal and insurrectionary, thus giving rise to the name associated with the episode today, "Dorr's Rebellion." This name, however, reflects our modern understanding of constitutional change. Because we read Dorr and his supporters' words with today's sensibilities, rather than those of Americans past, Dorr's concept of constitutional change seems illegitimate. But it was not so for a substantial number of Americans and Rhode Islanders. At the time, Dorr's opponents seemed to be assaulting the concept that as sovereign, the people could "alter or abolish" a government that ceased to serve the people. The rejection of that idea seemed revolutionary to Dorr and his supporters.

What is most notable about contemporary reaction to the Rhode Island dispute is how Dorr's many followers were surprised about what happened. Indeed, followers spoke of their "astonishment" at having "to vindicate. . .the great principle" on which the American Revolution "turned."[105] They could scarcely imagine a denial of what they called "settled and preconceived notions of the rights and power of the people" to "set up and pull down" governments "by any

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[103] Luther v. Borden, 48 U.S. (7 How.) 1, 56 (1849).

[104] *See, e.g.*, ARTHUR MAY MOWRY, THE DORR WAR OR 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"); 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"); GEORGE M. DENNISON, THE DORR WAR: REPUBLICANISM ON TRIAL, 1831-1861, at 139 (1976) (suggesting Dorr's views anachronistic by 1842); CONLEY, *supra* note 84, at 317–18 (asserting that Dorr's view was a "radical doctrine of popular constituent sovereignty"); Kevin D. Leitao, *Rhode Island's Forgotten Bill of Rights*, 1 ROGER WILLIAMS U. L. REV. 31, 57 n.66 (1996) (denying validity of Dorr's position and considering it "an extreme version of popular sovereignty").

[105] INTERFERENCE OF THE EXECUTIVE IN THE AFFAIRS OF RHODE ISLAND, 28th Cong., H.R. Rep. No. 546, at 25 (1844).

authentic act of their sovereign will."[106] How could leaders of the Charter government deny the people's sovereignty? In truth, those leaders did not deny the authority of the sovereign people, but took the position that the people could not act independent of the legislature established by the Charter.

The drafters of Dorr's constitution, and their defiance of the Rhode Island government, seem unusual to us today. We can sympathize with Dorr's plight, while rejecting his actions as beyond the constitutional pale. Applying our current view of constitutionalism and the sanctity of procedure, we condemn Dorr and his supporters to their plight. It seems they got their just deserts. In our condemnation, however, we fail to consider why Dorr's deviation from procedure was not legitimate when done by the sovereign,—the people—but it was legitimate when done with the consent of existing governmental institutions.

B. Legacy and Practice of Circumvention of Procedure

The process of ignoring or overlooking established procedures by deliberative and orderly action is sometimes called "circumvention." Circumvention is not unusual in American constitutional history. Yet, there is some irony that Americans take pride in the fact that procedures to change the federal Constitution are faithfully used, while much constitution-making and revision during the eighteenth and nineteenth centuries ignored the very procedures that state constitutions established for such amendments. One finds examples of circumvention sprinkled throughout our history of revising constitutions.

The repudiation of Pennsylvania's 1776 constitution in 1790 provides an early example of circumventing existing constitutional amendment procedures by relying on the inherent authority of the people. The effort to revise the 1776 constitution began almost from the date of its creation. The constitution's opponents disliked its egalitarian streak.[107] That constitution provided a very broad franchise; mandatory rotation and minimal requirements for public office; public referenda for legislation; a strong unicameral

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[106] *Id.*

[107] For opposition to the 1776 constitution, see generally Ryerson, *supra* note 91; ROBERT L. BRUNHOUSE, THE COUNTER-REVOLUTION IN PENNSYLVANIA 1776-1790 (1971); DAVID F. HAWKE, IN THE MIDST OF A REVOLUTION (1961); 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 (1989). *See also* Schmidt, *supra* note 91, at 24.

legislature; a weak executive with no veto power; and a term limited judiciary. Moreover, the constitution repeatedly suggested that government and its officials were subordinate to the people, subject to the people's vigilant scrutiny.[108]

The 1776 constitution provided for its amendment by a convention every seven years if a Council of Censors agreed to convene such a body.[109] When the Council failed to convene a revision convention in 1783, advocates for constitutional change in the legislature passed a resolution for a convention.[110] The legislature justified its action by paraphrasing and adding a gloss on the Pennsylvania constitution's "alter or abolish" provision:

> that the people have at all times an inherent right to alter and amend the form of government, in such manner as they shall think proper; and also that they are not and cannot be limited to any certain rule or mode of accomplishing the same, but may make choice of such method as to them may appear best adapted to the end proposed.[111]

On September 15, 1789, after publicizing their recommendation for a convention, the legislature announced it:

> had taken the opinion of the people (although in an informal way), and being satisfied that a majority of the people were desirous of exercising the right of self-government by revising the constitution, adopted a resolution to the effect that a convention to amend and revise the constitution should be called.[112]

Indeed, a convention was called. The legislature announced that the 1776 constitution's established procedure for constitutional revision could be discarded because it was "not only unequal and unnecessarily expensive, but too dilatory" to produce needed changes.[113]

As directed by the legislature, a constitutional convention met

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[108] PA. CONST. of 1776, DECLARATION OF RIGHTS, arts. III, IV, V, VI, XIV, XVI, *reprinted in* FEDERAL AND STATE CONSTITUTIONS, *supra* note 3, V, at 3082–84.

[109] *See id.* § 47, at 3091–92.

[110] The resolution passed on March 24, 1789. THE PROCEEDINGS RELATIVE TO CALLING THE CONVENTIONS OF 1776 AND 1790, at 129–130 (Harrisburg, Pa., John S. Wiestling 1826) [hereinafter PROCEEDINGS].

[111] *Id.* at 129.

[112] White, *supra* note 91, at 1136.

[113] PROCEEDINGS, *supra* note 110, at 133. *See also* Clair W. Keller, *Pennsylvania's Role in the Origin and Defeat of the First Proposed Amendment on Representation*, 112 PA. MAG. HIST. & BIOG. 73, 102 (1988) (quoting Letter from John Hall to Tench Coxe, Sept. 24, 1789, asserting that "the last sinew of skunk and anti-federalism is cut, provided we can carry good men who will make the proper alterations and amendments in the [1776] constitution.").

and proposed a new constitution that was considered less egalitarian.[114] Curiously, the new 1790 constitution provided no procedures for future constitutional revision, though it retained the "alter or abolish" provision from the 1776 constitution.[115] Subsequently, when a committee of the Pennsylvania legislature in 1805 considered petitions to reform the 1790 constitution, it agreed that "it is the prerogative of the *sovereign people alone* to alter, amend or abolish their government."[116]

Scholars examining the 1789 convention see it as "wholly illegitimate" and a "constitutionally dubious agent," despite the fact that the 1790 constitution guided affairs in the state until 1838.[117] Few people at the time of the 1789 revisions, however, questioned the right to dispense with established procedures. Many individuals applauded changes outside of existing procedures. One newspaper editorial noted that the power to elect a convention at any time "'to alter the constitution of a state, is a never dormant—never ceasing—uncontrouable right of the people.'"[118] Circumvention was not uncommon and aberrant to Americans of the late eighteenth and early nineteenth centuries. Constitution-makers provided many examples of circumvention.[119]

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[114] The 1790 constitution established an upper house for the legislature, replaced the twelve-person Executive Council with an elected Governor having a veto, and provided for unlimited judicial tenure subject to good behavior. In addition, the new bill of rights grew from sixteen to twenty six sections, reflecting an increase of individual constitutional protections and a diminishment of collective rights of "the people." While the "alter or abolish" provision remained, the constitution no longer emphasized the importance, right and duty of the people to scrutinize government. Changes in the 1790 constitution offered those who felt vulnerable under the 1776 constitution greater protection from "misguided" legislation and political democracy. *See* BRUNHOUSE, *supra* note 107, at 227; Ryerson, *supra* note 91, at 127–31.

[115] PA. CONST. of 1790, art. IX, § 2, *reprinted in* FEDERAL AND STATE CONSTITUTIONS, *supra* note 3, V, at 3100.

[116] Akagi, *supra* note 91, at 303 (citation omitted).

[117] *See* JOHN ALEXANDER JAMESON, A TREATISE ON THE PRINCIPLES OF AMERICAN CONSTITUTIONAL LAW AND LEGISLATION: THE CONSTITUTIONAL CONVENTION; ITS HISTORY, POWERS, AND MODES OF PROCEEDING 215 (2nd ed. 1869); Ryerson, *supra* note 91, at 130. *See generally* PA. CONST. of 1838, *reprinted in* FEDERAL AND STATE CONSTITUTIONS, *supra* note 3, V, at 3104.

[118] Herrington, *supra* note 52, at 605 (quoting "A Freeman," FEDERAL GAZETTE, Mar. 27, 1789).

[119] *See* Boyd, *supra* note 84, at 169–70 (discussing circumvention efforts before 1835); GREEN, *supra* note 91, at 105–41, 201–304; CYCLES OF DEMOCRACY, *supra* note 91, at 10–11; Hagensick, *supra* note 84, at 346 (discussing two attempts to alter Maryland's state constitution in 1960); Mumford, *supra* note 87, at 108 (noting belief in Delaware in 1791 of the right of the people to hold conventions independent of the legislature); Parkinson, *supra* note 91, at 35–57, 66–180; Schmidt, *supra* note 91, at 24 (identifying circumvention as part of the American constitutional experience beginning in 1776 and invoked by conservatives as well as radicals); DANIEL T. RODGERS, CONTESTED TRUTHS: KEYWORDS IN AMERICAN POLITICS SINCE INDEPENDENCE 92–101 (1987) (noting that many nineteenth century constitutional conventions considered themselves "the people"); James A. Henretta, *The Rise and Decline of*

Observing that circumvention has a respectable pedigree is not an overstatement. The 1787 federal constitutional convention formed one of the earliest precedents for such "circumvention conventions." Advocates for a federal convention realized they were proceeding without procedural regularity and with "questionable" constitutionality.[120] Madison and other framers justified both the convention and the constitution as legitimate exercises in circumvention. They pointed out that, notwithstanding the existing procedures, the people, as the sovereign in America, had a paramount right to "alter or abolish" a defective government. As Madison explained during the convention: "The people were in fact, the fountain of all power, and by resorting to them, all difficulties" were resolved.[121] "They could alter constitutions as they pleased" without regard for established procedures.[122] In the course of publicly defending the federal Constitution during the ratification debates, Madison asserted that the Framers knew that because the draft 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."[123] Similar arguments continued to be made in the context of other American constitution-making and revision. One need look no further to understand the vibrancy of the on-going tension between a commitment to proceduralism and a dedication to the people's power as the sovereign than Kentucky's 1966 controversy over the legitimacy of a circumvention of the state constitution's procedure for revision.[124]

Kentucky's 1891 constitution required the legislature to give

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"Democratic-Republicanism": Political Rights in New York and the Several States, 1800-1915, *in* TOWARD A USABLE PAST: LIBERTY UNDER STATE CONSTITUTIONS 62 (Paul Finkelman & Steven E. Gottlieb eds., 1991).

[120] *See, e.g.*, Letter from John Jay to George Washington, Jan. 7, 1787, *in* 4 THE PAPERS OF GEORGE WASHINGTON 503 (W.W. Abbot & Dorothy Twohig eds., 1995); Letter from Henry Knox to George Washington, Jan. 14, 1787, *in id.* at 503; Letter from George Washington to John Jay, Mar. 10, 1787, *in* 5 THE PAPERS OF GEORGE WASHINGTON 80 (Dorothy Twohig ed., 1997); Letter from James Madison to Edmund Randolph, Feb. 18, 1787, *in* 9 THE PAPERS OF JAMES MADISON 271–72 (Robert A. Rutland & William M.E. Rachal eds., 1975).

[121] James Madison, Aug. 31, 1787, *in* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 476 (Max Farrand ed., 1966).

[122] *Id.*

[123] THE FEDERALIST NO. 40, at 265–66 (James Madison) (Jacob E. Cooke ed., 1961).

[124] *See* Gatewood v. Matthews, 403 S.W.2d 716, 721–22 (Ky. 1966) (holding that a bill allowing the General Assembly to propose revisions to the constitution—made by the Constitution Revision Assembly for approval by the voters—was constitutional because the people still maintained the right to call for a change and the constitution did not indicate that specified procedures were exclusive). *See* Ken Gormley & Rhonda G. Hartman, *The Kentucky Bill of Rights: A Bicentennial Celebration*, 80 KY. L.J. 1, 28–29 (1991).

notice in two successive sessions of an intent to convene a constitutional convention.[125] Instead, the legislature created a "Constitutional Revision Assembly" that drafted a new constitution. After voter ratification, a legal challenge claimed that the 1891 constitution provided the exclusive means for its alteration. In *Gatewood v. Matthews*, a majority of Kentucky's highest appellate court disagreed. "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."[126] The majority explained that the provision in the 1891 constitution on Kentuckians' ability to "alter or abolish" their state government reflected the people's inherent sovereign authority to change constitutions. This was not a "mere relic, a museum piece without meaning or substance as a viable principle of free government."[127] Under Kentucky's 1891 constitution, the legislature was only a "messenger or conduit" for the people to trigger constitutional revision. But if the people acted in another manner, that was sufficient. The people would "give the revised constitution life by their own direct action."[128]

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."[129] The "alter or abolish" provision of the 1891 constitution simply reflected "political philosophy" or "a cocky boast of a sovereign people."[130] In either case, the provision would collapse of its own impracticality. "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?"[131] The difficulties identified by the dissent, as well as the majority's confidence that the people could act as the sovereign in a meaningful way, illustrate the long-standing tension in the American experience with adopting and revising written constitutions.

VII. CONCLUSION

Our present day assumption that constitutional understandings arising with the American Revolution were discarded with the

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[125] *Gatewood*, 403 S.W.2d at 718.
[126] *Id.* at 719.
[127] *Id.* at 720.
[128] *Id.*
[129] *Id.* at 722–23 (Hill, J., dissenting).
[130] *Id.* at 723 (Hill, J., dissenting).
[131] *Id.* (Hill, J., dissenting).

adoption of the federal Constitution is contradicted by constitution-making after 1787. Both the experience and practice of constitution-making after 1787 reveals continuity with revolutionary era constitution-making. The idea that the collective sovereignty of the people remained an inherent, yet effective source of authority, emerged with the Revolution and flourished as a principle that would not die—even as other Americans sought to make process the touchstone of American constitutionalism. Expressions of the people's inherent authority were woven into the text of Revolutionary era constitutions as well as those framed much later. Contrary to what we believe today, such language—including the "alter or abolish" provisions—were not impractical ideas that no one took seriously. Rather, they reaffirmed for many Americans that in America the people were sovereign. Moreover, our modern belief—that enumerated procedures for constitutional revision signaled a unified understanding of the people's role in constitutional change—is also questionable. Even as some Americans sought the reassurance of procedures and hoped to bind the sovereign people, that authority resisted being constrained. Americans could agree that the use of procedures might well identify an expression of the will of the sovereign. But they did not necessarily agree that such an approach exhausted the means by which a sovereign people could manifest their authority.

The competing views of constitutionalism were not necessarily inconsistent with one another. The proceduralist view fit comfortably within an understanding that emphasized the people's inherent authority and recognized the broader range of legitimate constitution-making and revision encompassed by circumvention. Before the Civil War, both of those views remained in tension; one had not vanquished the other. Many Americans did not consider, as we do today, that procedures superseded statements of the people's sovereignty. Competing views of constitutionalism co-existed in constitutions and constitution-making from the time of the Revolution though the period before the Civil War.

Nonetheless, our dual presumptions—that the sovereign people naturally receded to take a limited constitutional role once constitutions were established, and that constitutional proceduralism is the only legitimate method of constitutional change—has come at a high cost. The result of those presumptions has meant that we have limited ourselves to truncated accounts of American history—a history in which the people's sovereignty and written constitutions were understood far differently than they are

today.[132] The tensions between competing understandings of the sovereignty of the people formed a distinctive feature not only of the historical development of American constitutionalism, but continues to shape debates over the current meaning of constitutionalism. A failure to appreciate the repeated invocation by the people of their authority has not only narrowed our understanding of our constitutional history, but has impoverished our constitutional discourse and denied us the benefits of the essential dynamism inherent in the history of American constitutions.

What our history reveals is a richer texture of America's constitutional experience than contemporary constitutional theory suggests. To the extent that proceduralism dominates our thinking about constitutionalism, it needs to be reexamined in the light of our history and constitutional practice—particularly at the state level. The suggestion advanced in this essay is that the experience with state constitutions is an important, and often overlooked, part of our constitutional legacy. If we start to uncover the richer tradition which our history reveals about constitutions, we will also reconnect with a wider spectrum of ideas.[133] A broader view might discourage the tendency to justify constitutional theory by selective use of our constitutional history. Appreciating the legitimacy of competing constitutional views would not only elevate the level of our constitutional debate, but also more faithfully reflect our constitutional past.

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[132] Christine Desan, in a similar vein, describes once vibrant and meaningful constitutional ideas becoming "ghosts" for later generations. *See* Christine A. Desan, *The Constitutional Commitment to Legislative Adjudication in the Early American Tradition*, 111 HARV. L. REV. 1381, 1383–85 (1998) (discussing an early tradition of legislative adjudication). *See also* Reid, *supra* note 16, at 1076 (appreciating the constitutionality of mobs during the American Revolution is difficult because "we are all latent tories").

[133] For a preliminary exploration of constitutional roads not taken with respect to the federal Constitution, see Robin West, *Tom Paine's Constitution*, 89 VA. L. REV 1413, 1433–61 (2003).