1-1-1994

The American Constitutional Tradition Revisited: Preliminary Observations on State Constitution-Making in the Nineteenth Century West

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THE AMERICAN CONSTITUTIONAL TRADITION REVISITED: PRELIMINARY OBSERVATIONS ON STATE CONSTITUTION-MAKING IN THE NINETEENTH-CENTURY WEST

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I. INTRODUCTION

When historians and legal scholars speak of an American constitutional tradition, they invariably have the Federal Constitution in mind.[1] Indeed, viewing constitutional history and theory through the lens of the federal document has long seemed natural and self-evident. For most twentieth-century Americans, the predominance of the national government has made the United States Constitution the symbol of constitutionalism. Even those scholars who agree that dominant national power is largely a twentieth-century development often focus on the federal level[2] and persistently ignore the state constitutional experience.[3] Such focus and consequent neglect stems from continued reliance on a

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1. A cursory glance through KERMIT L. HALL, A COMPREHENSIVE BIBLIOGRAPHY OF AMERICAN CONSTITUTIONAL AND LEGAL HISTORY, 1896-1979 (1984 & Supp. 1991) reveals the overwhelming focus on the Federal Constitution. *See also* ROBERT GOEHLERT, UNITED STATES CONSTITUTIONAL HISTORY: A SELECTED BIBLIOGRAPHY OF BOOKS (1988); A SELECTED BIBLIOGRAPHY OF AMERICAN CONSTITUTIONAL HISTORY (Stephen M. Millett ed., 1975).

2. There are signs that the singular focus on federal constitutional development is undergoing some reevaluation by scholars. *See, e.g.*, James A. Henretta, *Foreword: Rethinking the State Constitutional Tradition*, 22 RUTGERS L.J. 819 (1991).

3. Revealingly, nineteenth-century and early twentieth-century writers on American constitutionalism display much greater appreciation of the value of state constitution-making than most twentieth-century scholarship. *See, e.g.*, HENRY HITCHCOCK, AMERICAN STATE CONSTITUTIONS: A STUDY OF THEIR GROWTH (New York, G.P. Putnam's Sons 1887); ROGER S. HOAR, CONSTITUTIONAL CONVENTIONS: THEIR NATURE, POWERS, AND LIMITATIONS (1917); GEORGE E. HOWARD, AN INTRODUCTION TO THE LOCAL CONSTITUTIONAL HISTORY OF THE UNITED STATES (Baltimore, Johns Hopkins Univ.1889); CHARLES S. LOBINGIER, THE PEOPLE'S LAW OR POPULAR PARTICIPATION IN LAW MAKING (1909); JAMES SCHOULER, CONSTITUTIONAL STUDIES, STATE AND FEDERAL (New York, Dodd & Mead 1897); FREDERIC STIMSON, THE LAW OF THE FEDERAL AND STATE CONSTITUTIONS OF THE UNITED STATES (1908).

series of assumptions critical to perceptions of American constitutional history and theory.

The emphasis on the Federal Constitution stems from a belief that it represents the most authentic source, and the most meaningful expression, of written constitutions in America. That conclusion—with its concomitant justification for neglecting state constitution-making—follows from three interrelated but highly questionable assumptions. The first is that the Federal Constitution is the paradigm of written constitutions. The second is that state constitution-making has largely been an uncreative, unthinking process of borrowing constitutional provisions from the Federal Constitution and other states. The third assumption is that the critical thinking about constitutions initiated by the American Revolution culminated in the formation of the Federal Constitution. Collectively, these three assumptions have made the Federal Constitution the standard against which all other constitutions are measured, and have dismissed nineteenth-century state constitution-making as largely irrelevant to an American constitutional tradition.[4]

This Article first examines how these three assumptions arise and then challenges their validity in the context of nineteenth-century constitution-making in the American West.[5] The reported debates from

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4. In fact, no federal *tradition* of constitution-making exists, given that only one national constitutional convention has taken place. Moreover, even amendment of the Federal Constitution has occurred infrequently given the procedural difficulties embodied in Article V. Article V provides for a two-step process by which amendments must be proposed by a two-thirds majority of both houses of Congress, and subsequently ratified by three-fourths of the state legislatures or special state conventions called for this purpose. Furthermore, in a provision never yet employed, Article V provides that two-thirds of the states may petition Congress to call a special convention for proposing amendments.

In contrast, formal constitution-making developed an early and active tradition at the state level. Well over 200 state constitutional conventions have been held since the eighteenth century, and vigorous use has been made of the amendment and other constitutional processes for revision. *See* Albert L. Sturm, *The Development of American State Constitutions*, 12 PUBLIUS 57, 57-84 (1982) [hereinafter Sturm, *Development of American State Constitutions*]; Albert L. Sturm, *State Constitutions, in* 6 DICTIONARY OF AMERICAN HISTORY 390 (rev. ed. 1976). As a result, the American tradition of constitution-making can rightly be called a state development.

5. My definition of the American West includes the Far West, the Pacific Northwest, the Rocky Mountain states, and even some of the Great Plains states. The greatest attention has been given to seven state constitutional conventions between 1849 and 1889 for which reports of the convention debates exist. These states are: California (1849 and 1878 conventions), Oregon (1857), Nevada (1864), South Dakota (1885 and 1889 conventions), Wyoming (1889), Idaho (1889), and North Dakota (1889).

nineteenth-century constitutional conventions in the American West reveal much about how delegates approached and performed their duties as constitution-makers as well as the delegates' struggles with the theoretical underpinnings of republican governments.[6] From their perspective, the unquestioned assumptions associated with the present-day emphasis on the Federal Constitution move to the background and the tradition of state constitution-making takes its proper place in the foreground of the American constitutional tradition.

II. CONSTITUTIONALISM AND A CONSTITUTIONAL TRADITION

Before examining the specific assumptions that have contributed to a missing dimension in American constitution-making and its tradition, it is useful to explore the meaning of the terms "constitutionalism" and an American "constitutional tradition."

A. Constitutionalism

Constitutionalism, of course, has many facets and can accurately be defined in a number of ways.[7] For example, a common understanding of constitutionalism focuses on the role played by the Supreme Court as the final interpreter of the Federal Constitution and often explores the exercise of judicial review in relation to the demands of democratic

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The Western states' constitutional experience provides a manageable scope for this Article, but it seems likely that the Article's findings are not limited to the West. Indeed, this Article presents preliminary findings which are consistent with my ongoing broader study of state constitution-making from the late eighteenth century to the turn of the twentieth century. That wider study examines both the self-perception of convention delegates engaged in the process of framing or revising constitutions and the debate over the implications of popular sovereignty for the role the people were to play in constitutional government. In fact, my broader state constitution project is yielding two different studies. One traces the debates over the meaning of popular sovereignty conducted in constitutional conventions from the revolutionary period to the end of the nineteenth century. The second examines how delegates understood their task as constitution-makers, the nature and content of written constitutions, and the implementation of those ideas into fundamental law. Both studies primarily draw from the extant debates of constitutional conventions during the period.

6. *See infra* notes 66-90, 112-48, 180-201 and accompanying text.

7. *See, e.g.*, CONSTITUTIONALISM: THE PHILOSOPHICAL DIMENSION (Alan S. Rosenbaum ed., 1988); DONALD S. LUTZ, THE ORIGINS OF AMERICAN CONSTITUTIONALISM (1988); Gerhard Casper, *Changing Concepts of Constitutionalism: 18th to 20th Century*, 1989 SUP. CT. REV. 311; Gerald Stourzh, *Constitution: Changing Meanings of the Term From the Early Seventeenth to the Late Eighteenth Century, in* CONCEPTUAL CHANGE AND THE CONSTITUTION 35-54 (Terence Ball & J.G.A. Pocock eds., 1988).

government. This definition reflects the current importance of the Federal Constitution in American government and the Supreme Court's role in the constitutional order. In contrast, a definition more reflective of nineteenth-century circumstances should emphasize the self-perception of constitution-makers and their participation in an active process of constitutional framing and revision. Moreover, defining constitutionalism in a nineteenth-century sense necessarily implies a self-consciously created higher law controlling and restricting government by means of a written constitution.

Central to such a definition is the difference between ordinary statutes promulgated by the legislature and a higher law embodied in a written constitution. The distinction rests on the concept that statutes are the normal product of a governmental process involving action by political representatives of the people, while a constitution expresses the will of the people in an extraordinary way involving the exercise of popular sovereignty. Therefore, as Americans distinguished between ordinary and constitutional law, they acknowledged that legislatures could not create constitutions.[8]

Out of this recognition emerged the practice of a constitutional convention, a special body that provided the means of translating the principle of popular sovereignty into practice.[9] Delegates to such constituent assemblies engaged in a process that allowed the people to

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8. Gerald Stourzh has noted how the new state constitutions gained authority and legitimacy as written texts through "the *dissociation* of legislature and sovereign power" and "the institutionalization of the constituent power of the people." Gerald Stourzh, *Fundamental Laws and Individual Rights in the 18th Century Constitution*, *in* BICENTENNIAL ESSAY NO. 5, at 17, 18 (1984).

9. *See* HOAR, *supra* note 3, at 99-100; EDMUND S. MORGAN, INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA 89-93, 119-121, 256-62 (1988); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 306-43 (1969); Willi P. Adams, *The State Constitutions as Analogy and Precedent: The American Experience with Constituent Power before 1787*, 34 AMERIKASTUDIEN 7 (1989); Peter S. Onuf, *State Politics and Republican Virtue, Religion, Education, and Morality in Early American Federalism*, *in* TOWARD A USABLE PAST: LIBERTY UNDER STATE CONSTITUTIONS 802-15 (Paul Finkelman & Stephen E. Gottlieb eds., 1991) [hereinafter TOWARD A USABLE PAST]; R.R. Palmer, *The People as Constituent Power*, *in* THE ROLE OF IDEOLOGY IN THE AMERICAN REVOLUTION 73-82 (John R. Howe, Jr. ed., 1970); Paul C. Reardon, *The Massachusetts Constitution Marks a Milestone*, 12 PUBLIUS 45, 50 (1982); Barbara C. Smith, The Politics of Price Control in Revolutionary Massachusetts, 1774-1780, at 188-93, 480-523 (1983) (unpublished Ph.D. dissertation, Yale University).

craft restrictions on the state and exert their sovereign powers over the normal operation of government.[10]

Constitutionalism, so defined, was uniquely American in two important respects. First, Americans accepted that written constitutions predominated over all other sources of law derived from the state. Despite the rich legacy of English law, the American Revolution broke new ground in constitutional thought. That departure consisted of the unequivocal distinction between ordinary and constitutional law, with the latter legally enforceable and enjoying unquestioned superiority as legal authority.[11] The source of that distinction was the assertion of popular sovereignty and the acknowledgment that the legitimate power of the state derived solely from the people.[12]

Popular sovereignty as the basic axiom of the new American republics underscored the second distinctive feature of constitutionalism in America: the self-conscious process of creating constitutions.[13]

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10. Bruce Ackerman notes that *The Federalist Papers* "treats constitutional conventions as if they were perfect substitutes for *the people themselves*." BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 177-78 (1991).

11. *See* Joyce Appleby, *The American Heritage: The Heirs and the Disinherited*, 74 J. AM. HIST. 798 (1987); Stourzh, *supra* note 7; Thad W. Tate, *The Social Contract in America, 1774-1787: Revolutionary Theory as a Conservative Instrument*, 22 WM. & MARY Q. 375, 379 (1965); Gordon S. Wood, *Foreword: State Constitution-Making in the American Revolution*, 24 RUTGERS L.J. 911, 917-21 (1993).

12. With respect to the American Revolutionary theory of popular sovereignty, see DONALD S. LUTZ, POPULAR CONSENT AND POPULAR CONTROL: WHIG POLITICAL THEORY IN THE EARLY STATE CONSTITUTIONS (1980); THE POPULAR SOURCES OF POLITICAL AUTHORITY: DOCUMENTS ON THE MASSACHUSETTS CONSTITUTION OF 1780 (Oscar Handlin & Mary F. Handlin eds., 1966); WOOD, *supra* note 9, at 344-89.

13. Ideas about higher or fundamental law in English history supported arguments positing the existence of restraints on the prerogative of kings or the power of parliamentary government. However, the unwritten restraints of the English constitutional tradition have never achieved the hierarchical status of an enforceable supreme law that written constitutions in the United States quickly attained after the American Revolution. *See* EDWARD S. CORWIN, THE HIGHER LAW BACKGROUND OF AMERICAN CONSTITUTIONAL LAW (1955); J.W. GOUGH, FUNDAMENTAL LAW IN ENGLISH CONSTITUTIONAL HISTORY (1955); J.G.A. POCOCK, THE ANCIENT CONSTITUTION AND THE FEUDAL LAW (1957); WOOD, *supra* note 9, at 259-305.

Notions of a higher law, frequently associated with the "Ancient Constitution," were inevitably shrouded in history, custom, and practice. John Phillip Reid has persuasively argued that the theoretical basis of the Ancient Constitution actually rested on consent and "prescription" rather than merely upon continuity and "presumption." John P. Reid, *The Jurisprudence of Liberty: The Ancient Constitution in the Legal Historiography of the Seventeenth and Eighteenth Centuries*, *in* THE ROOTS OF LIBERTY: MAGNA CARTA, ANCIENT CONSTITUTION, AND THE ANGLO-AMERICAN TRADITION OF RULE OF LAW 176 (Ellis Sandoz ed., 1993).

The fact remains, however, that the potential limits the Ancient Constitution placed on government were not conceived of as the self-conscious product of a given group of

American fundamental law clearly represented the self-conscious product of the people through the agency of delegates acting in a constitutional convention. The people, in this sense, both made and unmade government. The people imposed the constitutional limitations that governed their relations until they decided to change those restrictions. Throughout the nation's history, some Americans wanted stability above all else and lobbied to restrain constitutional revision. Still, the fact remained that, in America, constitutions were made at discrete times and places under the express authority of the people. As James Wilson observed in 1790, constitutions were the act of the people themselves and "in their hands [a constitution] is as clay in the hands of a potter: they have the right to mould, to preserve, to improve, to refine, and to finish it as they please."[14]

B. Constitutional Tradition

The implications of the distinctive attributes of American constitutionalism—the authority of written constitutions and their man-made quality—became the focus of debate in nineteenth-century constitutional conventions. Legally enforceable constitutions, as a supreme law, had an undeniable practical importance, yet the accepted theoretical paradigm raised numerous questions about the role "the people" ought to play in constitution-making. Indeed, one of the principal struggles in nineteenth-century conventions revolved around

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people. The perception of a constitution as the self-conscious product of a group of people necessarily includes the capacity of the people (however one understands "the people"), to subsequently alter that higher law by another self-conscious act of will. Whatever the Ancient Constitution meant to English lawyers in the seventeenth and eighteenth centuries, it did not imply a malleability similar to that enjoyed by American written constitutions.

14. 1 JAMES WILSON, THE WORKS OF JAMES WILSON 304 (Robert G. McCloskey ed., 1967), *quoted in* Wood, *supra* note 11, at 918. Daniel Rogers has observed that:

> [The American Revolution] set men talking seriously, that governments were *made*; that human beings (and their most basic rights) predated the political forums they had constructed; that having made their governments once, they could tear them up, dissolve political society into its individual, constituent atoms, if they chose, and make their governments anew—all this lay deeply imbedded in the post-independence language of American politics.

DANIEL T. ROGERS, CONTESTED TRUTHS: KEYWORDS IN AMERICAN POLITICS SINCE INDEPENDENCE 112 (1987); *see also, e.g.*, WILLI P. ADAMS, THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA 139-44 (1980); LUTZ, *supra* note 7; MORGAN, *supra* note 9, at 263-287; WOOD, *supra* note 9, at 306-89, 519-64, 593-615; Gordon S. Wood, *A Political Ideology of the Founders*, *in* TOWARD A MORE PERFECT UNION: SIX ESSAYS ON THE CONSTITUTION 7, 7-27 (Neil L. York ed., 1988).

the concept of popular sovereignty, i.e., how to define "the people," how to ascertain when their will was manifested, and how they were to participate in the self-conscious process of limiting government and creating fundamental law. In part, these issues raised questions about the nature and power of conventions themselves, the limits of constitutional revision, and the ongoing role the people retained for future revision. Each of these questions involved implementation of the basic theoretical principle of popular sovereignty in the practical context of constitution-making.

The actual practices and approaches of state constitution-makers—rather than merely the debates over the meaning of popular sovereignty—produced a constitutional tradition. By constitutional tradition, I mean the broader experience with constitution-making, including how delegates proceeded and how they perceived the nature and purpose of written constitutions over time. In some sense, tracing the practice of constitution-making reflects the development of a cultural understanding among delegates of the meaning and place of written constitutions in America. In the end, both the debates over popular sovereignty and the ongoing process of nineteenth-century constitution-making form the core of practices, attitudes, and ideas that have been missing in our understanding of American constitutionalism and an American constitutional tradition.

III. THE FOCUS ON THE FEDERAL CONSTITUTION AND ITS UNDERLYING ASSUMPTIONS

American constitutional history has long been nearly synonymous with a study of the Framers of the Federal Constitution, the document they produced, and its subsequent interpretation.[15] Little attention has been devoted by constitutional historians to the evolving constitutional

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15. The standard texts on American constitutional history reveal this emphasis. *See, e.g.*, ALFRED H. KELLY ET AL., THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT (6th ed. 1983); MELVIN I. UROFSKY, A MARCH OF LIBERTY: A CONSTITUTIONAL HISTORY OF THE UNITED STATES (1988); *see also supra* note 1 and accompanying text.

Moreover, the studies appearing around the bicentennial of the Federal Constitution continued to equate the study of the Federal Constitution with an "American" constitutional tradition. *See, e.g.*, BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY (Richard R. Beeman et al. eds., 1987) [hereinafter BEYOND CONFEDERATION]; THE FRAMING AND RATIFICATION OF THE CONSTITUTION (Leonard W. Levy & Dennis J. Mahoney eds., 1987); MICHAEL KAMMEN, A MACHINE THAT WOULD GO OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE (1986); FORREST MCDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTIONS (1985); Peter S. Onuf, *Reflections on the Founding: Constitutional Historiography in Bicentennial Perspective*, 46 WM. & MARY Q. 341 (1989).

thought of delegates to state constitutional conventions as revealed in the debates of their proceedings.[16]

The possible relevance of the delegates' thought to American constitutionalism has received even less attention. State constitutional experience is often examined only to illustrate how that experience undergirds the Federal Constitution or fits within a constitutional tradition established by 1787.[17] Bruce Ackerman's *We the People: Foundations* is just one recent example of a study that implicitly dismisses the state constitutional experience as having any relevance for understanding "American" constitutionalism.[18]

Constitutional theorists have remained even more focused on the federal level. Those interested in the political theory of American constitutional government routinely limit themselves to the ideas of the Framers and the debates surrounding the ratification of the Federal Constitution.[19] The study of *The Federalist Papers* has become a major sub-field of American constitutional thought.[20] In contrast, there are

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16. Such debates have been drawn upon to illuminate discrete subjects and in studies of individual states, *see, e.g.*, DENNIS C. COLSON, IDAHO'S CONSTITUTION: THE TIE THAT BINDS (1991); Kermit L. Hall, *The Judiciary on Trial: State Constitutional Reform and the Rise of an Elected Judiciary, 1846-1860*, 45 HISTORIAN 337 (1983); Caleb Nelson, *A Re-Evaluation of Scholarly Explanations for the Rise of the Elective Judiciary in Antebellum America*, 37 AM. J. LEGAL HIST. 190 (1993), but not for the purpose of collectively analyzing nineteenth-century state constitution-makers' thought.

Nearly 30 years ago, Merrill Peterson suggested the potential richness of nineteenth-century state constitutional convention debates by editing a selection of debates from the 1820s. DEMOCRACY, LIBERTY, AND PROPERTY: THE STATE CONSTITUTIONAL CONVENTIONS OF THE 1820S (Merrill D. Peterson ed., 1966).

17. *See, e.g.*, DANIEL J. ELAZAR, THE AMERICAN CONSTITUTIONAL TRADITION 107-23 (1988); LUTZ, *supra* note 7; REPUBLICANISM, REPRESENTATION AND CONSENT: VIEWS OF THE FOUNDING ERA (Daniel J. Elazar ed., 1979).

18. ACKERMAN, *supra* note 10 *passim*; *see also* PAUL W. KAHN, LEGITIMACY AND HISTORY: SELF-GOVERNMENT IN AMERICAN CONSTITUTIONAL THEORY (1992). Indeed, the basic assumption underlying Professor James Gardner's recent critique of state constitutionalism is that "constitutionalism" means the interpretation and understanding of the Federal Constitution. *See* James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 767-78, 812-30 (1992). For a recent discussion and critique of Professor Gardner's article and Gardner's reply, see Roundtable, *Responses to James A. Gardner,* The Failed Discourse of State Constitutionalism, 90 MICH. L. REV. 761 (1992), 24 RUTGERS L.J. 927-1055 (1993) [hereinafter Roundtable].

19. *See, e.g.*, CONSTITUTIONALISM: THE PHILOSOPHICAL DIMENSION, *supra* note 7; MICHAEL A. GILLESPIE & MICHAEL LIENESCH, RATIFYING THE CONSTITUTION (1989); JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY (1990); DAVID A. RICHARDS, FOUNDATIONS OF AMERICAN CONSTITUTIONALISM (1989); JAMES R. STONER, JR., COMMON LAW AND LIBERAL THEORY: COKE, HOBBES, AND THE ORIGINS OF AMERICAN CONSTITUTIONALISM (1992).

20. *See, e.g.*, CHARLES A. BEARD, THE ENDURING FEDERALIST (1948); DAVID F. EPSTEIN, THE POLITICAL THEORY OF *THE FEDERALIST* (1984); ALBERT FURTWANGLER, THE

relatively few studies examining the philosophical basis and intellectual framework of state constitution-making.[21] Most studies have been limited to specific states or conventions and only occasionally have scholars focused on regional constitution-making.[22] Broad studies of American state constitutional development are few in number, generally outdated, and do not examine the collective thought of nineteenth-century constitution-makers.[23] For most scholars, political thinking about the Federal Constitution is the basic, if not exclusive, source for understanding "American" constitutional thought.

Legal scholars have gone furthest in equating the Federal Constitution with the American constitutional tradition.[24] Until quite

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AUTHORITY OF PUBLIUS: A READING OF THE FEDERALIST PAPERS (1984); THOMAS L. PANGLE, THE SPIRIT OF MODERN REPUBLICANISM: THE MORAL VISION OF THE AMERICAN FOUNDERS AND THE PHILOSOPHY OF LOCKE (1988); SAVING THE REVOLUTION: THE FEDERALIST PAPERS AND THE AMERICAN FOUNDING (Charles R. Kesler ed., 1987); GARY WILLS, EXPLAINING AMERICA: *THE FEDERALIST* (1981); MORTON WHITE, PHILOSOPHY, *THE FEDERALIST*, AND THE CONSTITUTION (1987); Douglas Adair, *"That Politics May Be Reduced To A Science": David Hume, James Madison, and the Tenth* Federalist, 20 HUNTINGTON LIBR. Q. 343 (1957); A.T. Mason, *The Federalist—A Split Personality*, 57 AM. HIST. REV. 634 (1952);

21. Of the studies that do explore the intellectual framework of state constitution-making, most deal with the eighteenth century. *See, e.g.*, ADAMS, *supra* note 14; LUTZ, *supra* note 7; RONALD M. PETERS, JR., THE MASSACHUSETTS CONSTITUTION OF 1780: A SOCIAL COMPACT (1978).

One study that seeks to understand the ideological context of nineteenth-century constitution-makers in three states is DAVID A. JOHNSON, FOUNDING THE FAR WEST: CALIFORNIA, OREGON AND NEVADA, 1840-1890 (1992).

22. *See, e.g.*, GORDON M. BAKKEN, ROCKY MOUNTAIN CONSTITUTION MAKING, 1850-1912 (1987); DON E. FEHRENBACHER, CONSTITUTIONS AND CONSTITUTIONALISM IN THE SLAVEHOLDING SOUTH (1989); FLETCHER M. GREEN, CONSTITUTIONAL DEVELOPMENT IN THE SOUTH ATLANTIC STATES, 1776-1860: A STUDY IN THE EVOLUTION OF DEMOCRACY (1930); JOHN D. HICKS, THE CONSTITUTIONS OF THE NORTHWEST STATES (1923); AN UNCERTAIN TRADITION: CONSTITUTIONALISM AND THE HISTORY OF THE SOUTH (Kermit L. Hall & James W. Ely, Jr. eds., 1989); John L. Bell, Jr., Constitutions and Politics: Constitutional Revision in the South Atlantic States, 1864-1902 (1969) (unpublished Ph.D. dissertation, University of North Carolina); Gregory G. Schmidt, Republican Visions: Constitutional Thought and Constitutional Revision in the Eastern United States, 1815-1830 (1981) (unpublished Ph.D. dissertation, University of Illinois at Urbana-Champaign); John W. Smurr, Territorial Constitutions: A Legal History of the Frontier Governments Erected by Congress in the American West, 1787-1900 (1960) (unpublished Ph.D. dissertation, Indiana University).

23. *See, e.g.*, JAMES Q. DEALEY, GROWTH OF AMERICAN STATE CONSTITUTIONS; FROM 1776 TO THE END OF THE YEAR 1914 (1915); WALTER F. DODD, THE REVISION AND AMENDMENT OF STATE CONSTITUTIONS (1910); HITCHCOCK, *supra* note 3; HOAR, *supra* note 3; JOHN A. JAMESON, A TREATISE ON CONSTITUTIONAL CONVENTIONS; THEIR HISTORY, POWERS, AND MODES OF PROCEEDING (Chicago, Callghan & Co. 1866).

24. A good example is DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789-1888 (1985). Even when constitutional law scholars have criticized the emphasis given to the role of the courts in the constitutional system,

recently, constitutional law was, and to a large extent still is, defined by the decisions of the United States Supreme Court.[25] The first case book on American state constitutional law was not published until 1988.[26] Moreover, the resurgence of legal scholars' interest in state constitutions stems primarily from the argument that state constitutions can offer independent grounds for broader protection of individual rights and liberties than the Federal Constitution.[27] The extensive literature generated by the debate over the role of state constitutions has focused on whether they should receive independent attention, why this is so, and how this should be reduced to practice.[28]

Unfortunately, much of the recent scholarship stimulated by the debate over independent state constitutional grounds has done little to advance our understanding of the thought of nineteenth-century constitution-makers. Rarely penetrating the surface of state constitutions, many studies miss the complex heritage of ideas and concerns that preoccupied state constitution-makers. Frequently, a concern with legal consequences hampers the study of state constitutions in their historical context. Those debating the issues of

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the focus invariably remains on the *Federal* Constitution. *See, e.g.*, CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION (1993).

25. The leading textbooks on constitutional law reflect that focus. *See, e.g.*, CONSTITUTIONAL LAW (Gerald Gunther ed., 11th ed. 1985); CONSTITUTIONAL LAW (Geoffrey R. Stone et al. eds., 1986); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW (2d ed. 1988). Even constitutional commentary written from a Marxist perspective shares this focus on the Federal Constitution. *See* MARK TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW (1988).

26. ROBERT F. WILLIAMS, CASES AND MATERIALS ON STATE CONSTITUTIONAL LAW (1988). The second edition of Professor Williams' casebook was published in 1993.

27. *See, e.g.*, William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); Hans Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379 (1980).

28. *See, e.g.*, Gardner, *supra* note 18; Roundtable, *supra* note 18. In a reply to various responses to his article, Professor Gardner emphasizes the role of state constitutions in a "framework of federalism" in which state courts monitor the protection of individual rights:

> [S]tate constitutions duplicate federal constitutional provisions to institutionalize a monitoring process whereby state courts "shadow" federal court rulings. That is, an identical state constitutional provision invites (and perhaps compels) state courts to consider the rulings of federal courts on the same subject and to come to an independent judgment on the merits. In so doing, state courts perform the liberty-protective functions assigned to them by federalism: they monitor the actions of the national government, and if necessary intervene.

James A. Gardner, *What Is a State Constitution?*, 24 RUTGERS L.J. 1025, 1054 (1993); *see also Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324 (1982); *The Emergence of State Constitutional Law*, 63 TEX. L. REV. 959 (1985); *State Constitutional Jurisprudence*, 15 HASTINGS CONST. L.Q. 391 (1988).

independent state constitutional grounds primarily want to know if the historical development of state constitutions demonstrates a broader protection for personal rights than the Federal Constitution. But scholarship seeking a "usable past" in the context of current legal and constitutional controversies misses a deeper historical inquiry.[29] Namely, how did state constitution-making emerge and develop over the course of the nineteenth century? More importantly, how might the states' experience prompt us to rethink a top-heavy (federal constitutional) view of American constitutional history and constitutionalism?[30]

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29. *See, e.g.*, TOWARD A USABLE PAST, *supra* note 9. Indeed, in an essay in *Toward a Usable Past*, Morton Horwitz warns "against the dangers of a certain kind of lawyer's history, which involves roaming through history looking for one's friends." Morton Horwitz, *Republican Origins of Constitutionalism, in* TOWARD A USABLE PAST, *supra* note 9, at 148.

30. *See infra* Part IV. At one level, the focus on the Federal Constitution is understandable because of its dominant and widespread role in the American constitutional order. The rise of federal power and the exercise of judicial review by the United States Supreme Court has made the Federal Constitution the key document in American history. An historian has observed that: "Within the historical community in general there has been an understandable inclination to go where the action is, and the steady growth of federal power has quite naturally led historians to conclude that most of the action has been occurring within the various branches of the federal government." Richard R. Beeman, *Introduction, in* BEYOND CONFEDERATION, *supra* note 15, at 18.

Still, the overwhelming attention to the Federal Constitution is curious given the importance of federalism to the nature of American government. One scholar has described the Federal Constitution as an "incomplete" document because of its dependence on state powers and the mechanisms for federalism in order to function adequately. Donald S. Lutz, *The Purposes of American State Constitutions*, 12 PUBLIUS 38, 38-42 (1982); *see also* DANIEL J. ELAZAR, EXPLORING FEDERALISM 128-32 (1987); Martin Diamond, *What the Framers Meant by Federalism, in* A NATION OF STATES (Robert A. Goldwin ed., 2d. ed. 1974); Donald S. Lutz, *The United States Constitution as an Incomplete Document*, 496 ANNALS AM. ACAD. POL. & SOC. SCI. 23 (1988).

In the late nineteenth century the most prominent American constitutional commentator, Thomas M. Cooley, warned against the failure to recognize that state constitutions were integral to the theory of American government.

> This is sometimes overlooked, and the federal system and the state system are discussed as if each was complete in itself, instead of being, as each is, the necessary compliment of the other; and, in thus discussing them, we get one-sided and imperfect views, which lead us into dangerous errors.

Thomas M. Cooley, *Comparative Merits of Written and Prescriptive Constitutions*, 2 HARV. L. REV. 341, 344 (1889).

The focus on the Federal Constitution is also curious given the much greater experience with constitution-making at the state level, *see* Sturm, *Development of American State Constitutions*, *supra* note 4, at 57-98, and the predominant importance of state governments for most Americans. For most of the nineteenth century the experience and contact individuals had with government was overwhelmingly local in orientation. Long before the Civil War "the states' adequacy to cope with almost any public want was

A. *Scholars' Tendency to View Formation and Structure of Federal Constitution as the Paradigm*

The first erroneous assumption underlying the federal constitutional focus rests on scholars' tendency to see the formation of the Federal Constitution as the paradigm for American constitution-making.[31] Indeed, Michael Kammen has shown how the Federal Constitution predominated in the popular iconography of American constitutionalism.[32] The United States Constitution has generally served

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accepted in American constitutionalism." HAROLD M. HYMAN, A MORE PERFECT UNION: THE IMPACT OF THE CIVIL WAR AND RECONSTRUCTION ON THE CONSTITUTION 307 (1973). City, county, and state governments largely controlled the governmental powers that bore an immediate impact on peoples' lives. For most of American history "economic and social development—not to mention conflict and dispute—centered on the states." Lawrence M. Friedman, *State Constitutions in Historical Perspective*, 496 ANNALS AM. ACAD. POL. & SOC. SCI. 33, 34 (1988); *see also* FEHRENBACHER, *supra* note 22, at 2 (state constitutional history has been neglected, notwithstanding the considerably greater influence state governments had on social and economic affairs in American life until well after Civil War); Stephen M. Griffin, *Constitutionalism in the United States: From Theory to Politics*, 18 OXFORD J. LEGAL STUD. 200, 207-11 (1990) (nineteenth-century state governments and constitutions bore the weight of enormous social and economic changes).

31. The following observation of A.E. Dick Howard is common to many constitutional scholars:

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

A.E. Dick Howard, *"For the Common Benefit": Constitutional History in Virginia as a Casebook for the Modern Constitution-Maker*, 54 VA. L. REV. 816, 866 (1968). *See generally* ACKERMAN, *supra* note 10; Akhil R. Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425 (1987); Gardner, *supra* note 18; Kermit L. Hall, *Mostly Anchor and Little Sail: The Evolution of American State Constitutions*, *in* TOWARD A USABLE PAST, *supra* note 9, at 388, 410-11; Morton Keller, *The Politics of State Constitutional Revision, 1820-1930*, *in* THE CONSTITUTIONAL CONVENTION AS AN AMENDING DEVICE 67 (Kermit L. Hall et al. eds., 1981); John R. Vile, *American Views on the Constitutional Amending Process: An Intellectual History of Article V*, 35 AM. J. LEGAL HIST. 44 (1991).

32. *See* KAMMEN, *supra* note 15. One measure of how the Federal Constitution dominates our thinking is the acceptance of Chief Justice John Marshall's description of a constitution in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) as a self-evident definition. If, like Chief Justice Marshall, one believes that the Federal Constitution is most appropriately suited to furthering the objectives of American constitutional government, then perhaps the Federal Constitution ought to function as the paradigm of written constitutions. That is a normative question somewhat beyond the scope of this Article; however, an historical inquiry into the values and traditions that state constitution-makers developed and endorsed in the course of the nineteenth century can

as the model against which all other written constitutions have been measured. Using the Federal Constitution to define the ideal nature and characteristics of a written constitution has inevitably left the state constitutions falling short in comparison. An ideal sets the standard against which all other examples in kind are measured.

As a model, the Federal Constitution exhibits two dominant characteristics: brevity and permanence. The short length of the Federal Constitution arises from its avoidance of legislative detail and the employment of broad, general statements of powers and principles. By and large, scholars have accepted John Marshall's definition of a written constitution in *McCulloch v. Maryland*.[33] Marshall dismissed the idea that a constitution should contain "an accurate detail of all the subdivisions of which its great powers will admit" because it would then "partake of a prolixity of a legal code" and "would, probably, never be understood by the public."[34] Rather, the nature of a constitution "requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves."[35]

Notwithstanding the fact that the Federal Constitution contained some legislative detail, most notably dealing with the protection of slavery, it primarily embodied "fundamentals" rather than constitutional legislation. As state constitutions lengthened during the nineteenth century, the contrast between the brevity of the Federal Constitution and state fundamental law became dramatic. The legal historian Willard Hurst, writing in 1950, epitomized much of the reaction and assessment of twentieth-century scholars by asserting that an ideal constitution only

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provide insight concerning the content of the goals of American constitutional government and the means for achieving those goals.

Constitutional historians have long been aware that Marshall had a distinct political vision of America's future and promoted that understanding vigorously and effectively as Chief Justice during the early national period. *See* ROBERT K. FAULKNER, THE JURISPRUDENCE OF JOHN MARSHALL (1968); JOHN MARSHALL'S DEFENSE OF MCCULLOCH V. MARYLAND (Gerald Gunther ed., 1969); G. EDWARD WHITE, THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES 7-34 (1976) [hereinafter WHITE, AMERICAN JUDICIAL TRADITION]. Marshall's most admiring biographer provided a portrait that underscored the Chief Justice's personal and political skills in crafting an enduring legacy for strong national government. ALBERT J. BEVERIDGE, THE LIFE OF JOHN MARSHALL (1916-19). Moreover, his jurisprudence and judicial style have received much critical attention. *See, e.g.*, G. EDWARD WHITE, 3 HISTORY OF THE SUPREME COURT OF THE UNITED STATE: THE MARSHALL COURT AND CULTURAL CHANGE, 1815-35 (1988); Susan L. Bloch & Maeva Marcus, *John Marshall's Selective Use of History in* Marbury v. Madison, 1986 WIS. L. REV. 301.

33. 17 U.S. (4 Wheat.) 316 (1819).

34. *Id.* at 407.

35. *Id.*

contained "fundamentals."[36] The nineteenth-century trend of constitutional legislation simply undermined the "dignity" of constitutions.[37] For Hurst and many other scholars, state constitution-making largely reflected a political process involving partisan issues.[38] As such, the activities of state constitutional conventions were unlikely to contribute to American constitutional thought or development. Some have even described the product of nineteenth-century constitution-making as "statutes masking as constitutions."[39]

The second praiseworthy characteristic of the Federal Constitution, its permanence, has also helped denigrate the significance of state constitutions. A leading scholar of the Federal Constitution's revision process has commented favorably on the balance the Framers struck in developing a procedure restraining constitutional amendment in "vivid contrast" with the states' experience of more frequent constitutional changes.[40] His inference of the Framers' greater wisdom is clear; so is the assumption that infrequent constitutional change best accords with the nature of constitutionalism. Many scholars have suggested that frequent change of state constitutions "denigrates" them and signifies a constitution's ill health.[41] An underlying notion of veneration for the stability of a written constitution underlies much of the commentary on the experience of state constitutions. By using the stability or permanence of the Federal Constitution as a criterion, scholars decide

36. JAMES W. HURST, THE GROWTH OF AMERICAN LAW: THE LAW MAKERS 202-03 (1950). Kermit Hall also argues that as nineteenth-century constitutions grew longer and more code-like they lost their quality and significance as constitutional documents and paled in comparison to the Federal Constitution. Hall, *supra* note 31, at 403.

37. HURST, *supra* note 36, at 202-03.

38. *See, e.g., id.* at 218-46; HAROLD M. HYMAN & WILLIAM M. WIECEK, EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT, 1835-1875, at 356-57 (1982); Keller, *supra* note 31, at 67; Robert F. Williams, *State Constitutional Law Processes*, 24 WM. & MARY L. REV. 169, 175-77 (1983); Bell, *supra* note 22.

39. Note, *The Constitutional Convention, Its Nature and Powers—And the Amending Procedure*, 1966 UTAH L. REV. 390, 415 (quoting John J. Flynn, *The Crisis of Federalism: Who Is Responsible?*, 51 A.B.A. J. 229, 232 (1965)).

40. Vile, *supra* note 31, at 68. For a review and critique of proposed non-Article V methods of amending the Federal Constitution, see John R. Vile, *Legally Amending the United States Constitution: The Exclusivity of Article V's Mechanisms*, 21 CUMB. L. REV. 271 (1991).

41. Michael G. Colantuono, Comment, *The Revision of American State Constitutions: Legislative Power, Popular Sovereignty, and Constitutional Change*, 75 CAL. L. REV. 1473, 1510 (1987); *see also* HURST, *supra* note 36, at 202-03; MICHAEL G. KAMMEN, SOVEREIGNTY AND LIBERTY: CONSTITUTIONAL DISCOURSE IN AMERICAN CULTURE 150-51 (1988); Griffin, *supra* note 30, at 206; Hall, *supra* note 31, at 395; Howard, *supra* note 31, at 863-65; Keller, *supra* note 31, at 71-75; Z. Melissa Lawrence, Comment, *Constitutional Revision by Amendment—A Louisiana Tradition*, 51 LA. L. REV. 849, 860 (1991).

that state constitutions fall short of the federal model. This presumption of the Federal Constitution as the model for written constitutions has undermined the significance of state constitutional experience.

B. Misplaced Focus on Products Rather Than Process of State Constitutional Conventions

The second erroneous assumption about state constitutions is that they result from an uncreative, unthinking borrowing process. This assumption stems from the tendency to study the products of state constitutional conventions rather than the creative process itself. The failure to probe the thought and self-perception of nineteenth-century constitution-makers overlooks ideas and constitutional understandings that departed from traditional notions associated with the Federal Constitution. The influence of the Federal Constitution paradigm has discouraged in-depth study of state constitution-making and perpetuated the humble reputation of state constitutions. Using the Federal Constitution's twin characteristics of brevity and permanence as the touchstone for valid constitutions, it was, and remains, unnecessary for scholars to go beyond the surface of the texts of nineteenth-century documents in order to conclude they were less authentic constitutions.

As a result, many have concluded that nineteenth-century state constitutions generally lacked creativity and were largely the result of expedient borrowing and imitation. A cursory examination of the nineteenth-century documents reveals many similarities in provisions and language. Moreover, the text of state constitutions rarely displayed strikingly original contributions to governmental structures or political theory. The superficial similarity helps explain why scholars have concluded that "unthinking"[42] borrowing occurred or that state constitution-makers were "more imitative than experimental."[43] Daniel Elazar has noted that many scholars have slighted the political theory underlying state constitutions as merely derivative or as a "wordy patchwork of compromises having little rhyme or reason."[44]

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42. Lawrence M. Friedman, *State Constitutions and Criminal Justice in the Late Nineteenth Century*, *in* TOWARD A USABLE PAST, *supra* note 9, at 271.

43. FEHRENBACHER, *supra* note 22, at 29; *see also* John W. Mauer, *State Constitutions in a Time of Crisis: The Case of the Texas Constitution of 1876*, 68 TEX. L. REV. 1615, 1617 (1990) (the drafting of American state constitutions has largely been an imitative process).

44. ELAZAR, *supra* note 17, at 108.

C. *Formation of Federal Constitution as Crucial Period of American Constitutional Thought*

The third erroneous but common assumption about American constitutional history reinforces the first two assumptions. Specifically, the assumption consists of the belief that the era leading up to the drafting of the Federal Constitution formed the crucial developmental period of American constitutional thought. Thus, little of importance with respect to constitutionalism and constitutional tradition occurred thereafter. Constitution-making reputedly culminated in 1787. Tracing the origins of American constitutional government back to the Revolution, scholars have devoted much attention to this era and, in particular, to the period from 1776 to 1787. Gordon Wood's study of the transformation of republican ideology is a prominent example.[45] In his narrative of the evolution of ideas and intellectual shifts accompanying American efforts to implement republicanism after 1776, Wood assumes that the emergence and development of ideas about a constitution's nature, construction, and ratification was largely completed by 1787.[46] The federal constitutional convention, in other words, marked the culmination of American ideas about putting popular sovereignty into practice by means of a written constitution. Thereafter, constitution-making and the processes it entailed were merely variations on a theme worked out by the Framers in 1787.[47]

Despite considerable debate over the interpretation of the American Revolutionary period, scholars largely share the sense that 1787 (or perhaps the ratification of the Bill of Rights in 1791) marked the endpoint for working out crucial ideas surrounding American

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45. WOOD, *supra* note 9 *passim*.

46. Wood asserts that the ratification of the Federal Constitution marked "the end of classical politics in America." *Id.* at 606; *see also* KAMMEN, *supra* note 41, at 104 (1776 to 1787 marked America's "most creative phase of constitution-making"); LUTZ, *supra* note 7, at 5-6 (Federal Constitution "represents a kind of historical culmination" and "the critical expression of the American constitutional tradition"); Herman Belz, *Constitutional and the American Founding*, *in* THE FRAMING AND RATIFICATION OF THE CONSTITUTION, *supra* note 15, at 346 (Federal Constitution "signified climax and fulfillment of the Revolution"); Tate, *supra* note 11, at 391 (social contract theory largely constrained by 1780s); Wood, *supra* note 11, at 926 (basic ideas of American constitutionalism, including "the process of popular ratification" were "realized" before the drafting of the Federal Constitution).

47. Daniel Elazar contributes to this perspective by identifying the emergence of three "general conceptions of constitutionalism" by 1787 out of which six patterns of state constitution-making would flow thereafter. ELAZAR, *supra* note 17, at 107-23.

constitution-making.[48] Perhaps Willard Hurst provided the lead when he called the formation and ratification of the Federal Constitution the "classic" period in American constitution-making.[49] Many scholars have pointed to the formation of the 1780 Massachusetts Constitution as anticipating the federal convention's procedure: specially elected delegates draft a constitution in a convention; the document produced at the convention is subsequently ratified by "the people."[50] Even so, describing Massachusetts's early use of a constitutional convention only served to emphasize how the federal convention would become the quintessential model for subsequent American constitution-making.[51] In short, the assessment of the significance and development of American constitutional thought has taken place in too narrow a time frame.

IV. MISPLACED ASSUMPTIONS AND CONSTITUTION-MAKING IN THE AMERICAN WEST

A. *Assumption of the Federal Constitutional Paradigm and Constitutional Legislation*

The trend towards longer state constitutions due to the inclusion of increasing amounts of constitutional legislation was debated and ultimately justified by state convention delegates in constitutional terms. Many nineteenth-century delegates appreciated the brevity of the Federal Constitution and they ultimately deviated from that model's form with deep ambivalence. It is less significant that delegates expressed a preference for brief constitutions than that they suppressed such inclinations and instead developed a reasoned basis for including constitutional legislation. State constitution-makers redefined an American constitution's import and appearance, and then developed a theoretical justification for constitutional legislation.

Delegates who drafted constitutions far in excess of Marshall's prescription of merely marking "great outlines" sometimes based their actions on important changes in American life. Moreover, much of the

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48. *See, e.g.*, ACKERMAN, *supra* note 10 *passim*; ADAMS, *supra* note 14, at 64; ELAZAR, *supra* note 17, at 107-23; LUTZ, *supra* note 7, at 69; LUTZ, *supra* note 12, at 68.

49. HURST, *supra* note 36, at 224.

50. *See* MORGAN, *supra* note 9, at 258-60; Adams, *supra* note 9, at 13-17; Roger S. Hoar, *The Invention of Constitutional Conventions*, 1918 CONST. REV. 97, 97-100; Palmer, *supra* note 9, at 76-80; Reardon, *supra* note 9, at 45-55.

51. After noting that the Massachusetts procedure was prompted by public pressure, Morgan writes: "In the years that followed, such assertions became common throughout the states, as constitutional conventions became the accepted way of placing the people above their government." MORGAN, *supra* note 9, at 260.

added length of constitutions stemmed from a distinctly nineteenth-century understanding of the respective powers of state and federal governments. For many delegates, the shift in the nature and content of constitutions marked a progressive evolution in constitutional thought. Nineteenth-century constitutions simply expressed a better understanding of republican principles than had Revolutionary era constitutions.

Scholarly articles on state constitution-making reflect the extent to which this view of constitutions has been overlooked. Even modern scholars who have seriously studied state constitutions find it difficult to view those documents on their own terms.[52] Missing in the scholarly critique of long and detailed constitutions is a recognition that nineteenth-century delegates found constitutional legitimacy, and not merely a rationalization, for such constitutions.

Two speeches to the North Dakota constitutional convention of 1889 provide an indication of how the process of constitution-making had developed in the Western states by the late nineteenth century. One was given by the former governor of the Dakotas, the other by an eminent constitutional law scholar. Both men addressed the nature of constitutional conventions and how constitution-making had changed over time. Each paid homage to the ideal of a brief, pithy constitution while rejecting the practical possibility of attaining such a goal given the convention's task.

The former governor, Arthur Mellette, described "the original idea and theory of what a constitution should contain" as one that embodied "as little legislation as possible" and "nothing but fundamental principles."[53] Such an approach may have sufficed for the Revolutionary and early national periods of the country's history, but the nineteenth century had brought inescapable changes to American politics: "[A]s the interests of the people have become more and more complex; as our commercial relations have extended and . . . our legislation [becomes] more difficult in every direction, the states have adopted the idea of embracing in their fundamental law as much legislation as they can with safety [include] . . . ."[54]

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52. *See, e.g.*, Gardner, *supra* note 18, at 780-94, 818-20, 823-30 (state constitutional discourse is impoverished and state courts have failed to develop a language in which it is possible to intelligibly debate the meaning of a state's constitution).

53. OFFICIAL REPORT OF THE PROCEEDINGS AND DEBATES OF THE FIRST CONSTITUTIONAL CONVENTION OF NORTH DAKOTA, ASSEMBLED IN THE CITY OF BISMARCK, JULY 4 TO AUGUST 17, 1889, at 45 (Bismarck, Tribune State Printers 1889) [hereinafter NORTH DAKOTA DEBATES].

54. *Id.*

Thomas Cooley, author of *Constitutional Limitations*[55] and one of the most influential constitutional law authorities of his day,[56] next spoke to the convention. He observed that the "intricacy of constitution-building" has increased "and it becomes necessary to do many things now that were not important" in an earlier period and "that would even have been irrelevant [to the Framers]."[57] The North Dakota delegates had the advantage of the experience and history of American constitution-making, but Cooley advised the convention: "Don't, in your constitution-making, legislate too much."[58] Cooley principally worried about retaining legislative flexibility to deal with changing problems and believed that the delegates should avoid radical constitutional experimentation. Yet, by his own admission, the kind of streamlined constitution of Hamilton's and Jefferson's day was no longer appropriate for North Dakota in 1889. The delegates did not follow Cooley's advice about pithy constitutions. Instead, extreme length, detail, and much constitutional legislation characterized the constitution they produced. In those respects, North Dakota's constitution exemplified late nineteenth-century Western constitution-making.[59]

1. The Purpose of Constitutions From State Convention Delegates' Perspective

The key to explaining the growing length of nineteenth-century constitutions lies in the delegates' understanding of the purpose of constitutions. There was common agreement that the nature and object of constitutions extended beyond fundamental principles to what

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55. THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION (Boston, Little Brown 1868).

56. *See generally* CLYDE E. JACOBS, LAW WRITERS AND THE COURTS: THE INFLUENCE OF THOMAS M. COOLEY, CHRISTOPHER G. TIEDEMAN AND JOHN F. DILLON UPON AMERICAN CONSTITUTIONAL LAW (1954); ALAN R. JONES, THE CONSTITUTIONAL CONSERVATISM OF THOMAS MCINTYRE COOLEY: A STUDY IN THE HISTORY OF IDEAS (1987); WHITE, AMERICAN JUDICIAL TRADITION, *supra* note 32, at 109-28; Alan R. Jones, *Thomas M. Cooley and the Michigan Supreme Court: 1865-1885*, 10 AM. J. LEGAL HIST. 97 (1966). At the time of the convention, Cooley also served as chairman of the Interstate Commerce Commission.

57. NORTH DAKOTA DEBATES, *supra* note 53, at 66.

58. *Id.*

59. One of the most important reasons for long state constitutions was the Tenth Amendment. If state governments were limited in the powers reserved to them by the Tenth Amendment, their residual powers had to be specified; that process alone resulted in longer constitutions, not to mention bills of rights. Nonetheless, plaudits for short constitutions were heard from the start of constitution-making in the nineteenth century.

delegates called constitutional legislation. Delegates willingly assumed an institutional role that occasionally supplanted the ordinary legislature.

But the underlying purpose of constitutional legislation and the significance assigned to delegates' legislature-like role remains uncertain. There were a number of different possibilities. Some delegates regarded constitutions primarily as the means to control and restrict the legislature. Some also viewed constitutional law as a restriction imposed by the people on themselves. For others, constitutions enshrined the moral goals for society.

The central purpose of constitutions as expressed by nineteenth-century delegates is to constrain the powers of the government and the legislature in particular. This understanding rested on a concept of federalism which reflected a truth in the nineteenth century that is hard to recapture given the pervasive presence of national power today. Nineteenth-century delegates made a crucial distinction: the Federal Constitution created a government "of expressed delegated powers"; state governments were limited by "a constitution of restrictions."[60]

State governments had plenary power excepting what the people chose to withhold.[61] The state legislature's virtual omnipotence stemmed from the operation of popular sovereignty at the state level. The state legislature was "but the creature of that supreme power—the people" and must be "limited by the [state's] Constitution."[62] As one delegate put it: "The legislature of the state can do anything, unless it is restrained by its constitution."[63]

Delegates expressed concerns about constitutional legislation, but tempered that response with a belief that some legislating was not only legitimate, but absolutely necessary to the work of a convention. Insight into this tension emerges from an examination of the debate over prohibiting the creation of lotteries in the 1849 California Constitution. The issue of appropriate constitutional legislation initially arose with respect to a provision that prohibited lotteries as well as protected the right of peaceable assembly. One delegate objected to including these

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60. REPORT OF THE DEBATES IN THE CONVENTION OF CALIFORNIA ON THE FORMATION OF THE STATE CONSTITUTION IN SEPTEMBER AND OCTOBER, 1849, at 52 (Washington, D.C., J.T. Towers 1850) (comments of Mr. McCarver) [hereinafter REPORT OF THE 1849 CALIFORNIA CONVENTION].

61. *See, e.g.*, 1 DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF CALIFORNIA, CONVENED AT THE CITY OF SACRAMENTO, SATURDAY, SEPTEMBER 28, 1878, at 209 (Sacramento, State Office 1880-81) [hereinafter CALIFORNIA DEBATES].

62. 1 *id.* at 826.

63. 1 PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF IDAHO: 1889, at 343 (Caldwell, Caxton Publishers 1912) [hereinafter IDAHO DEBATES]. Delegates to western conventions, particularly after the Civil War, expressly understood that the Federal Constitution also stood as a limitation to state power.

matters in a bill of rights since it was "improper to insert legislative enactments" in a constitution.[64] In other words, a lottery prohibition was a legislative matter whereas a convention ought to lay down "the broad fundamental principles of a republican form of government, without . . . [depriving] . . . the people of the right to pass such laws, not inconsistent with those principles, as they thought proper."[65] On the other hand, proponents of adding the lottery prohibition to the constitutional text argued that if constraining the legislature's power formed a constitutional objective, the prohibition "fixes a very important limit upon those powers."[66]

Ultimately, the most persuasive argument fused the prevailing views of a constitution's central purpose by describing the prohibition as an important moral restriction on the legislature that ought to become part of the state's fundamental law. Furthermore, the state should not "adopt an immoral system of taxation as a source of revenue. The best policy for governments, as well as individuals, is a strict adherence to legitimate and honorable means of support."[67] The convention evidently agreed.[68]

The debate over the lottery provisions also recognized the legitimacy of lawmaking in the process of drafting a constitution. Resolving the most important issues—political, economic, or moral—that faced a state formed one of the functions of fundamental law. One delegate expressed this in terms of a mandate to the convention: "The people of California have sent you here to make a Constitution for them. . . . In making this Constitution, they expect you to settle many important questions relative to the interests and wants of the people of this country."[69] This attitude not only implied that many substantive issues were appropriate

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64. REPORT OF THE 1849 CALIFORNIA CONVENTION, *supra* note 60, at 42. Another delegate generally opposed the prohibition because lotteries might become an important source of revenue to be implemented at the discretion of future legislatures. The argument reflects the view that a constitution's primary purpose is to express the fundamental law.

65. *Id.* at 91. One delegate rhetorically responded to the assertion that the convention should not make laws by asking: "[A]re we not here to make a Constitution—the strongest law known under our system of government. That Constitution only requires the sanction of the people to become the fundamental law of the country. Other laws, passed by the Legislature, will be subservient to it." *Id.* at 93.

66. *Id.* at 92.

67. *Id.* at 93.

68. Article IV, § 27 of the 1849 California Constitution read: "No lottery shall be authorized by this State, nor shall the sale of lottery tickets be allowed." CAL. CONST. of 1849, art. IV, § 27.

69. REPORT OF THE 1849 CALIFORNIA CONVENTION, *supra* note 60, at 183.

concerns for a constitutional convention, but that the settlement of certain issues actually required constitutional action.[70]

The refrain of legislation versus constitutional provision continued to echo through the debates of nineteenth-century conventions.[71] Gradually, however, such concerns underwent a change with more forthright justifications for legislating and a growing suspicion, if not outright distrust, of legislatures. Moreover, the growing collective experience of nineteenth-century constitution-making provided an increasingly confident expression of the theoretical legitimacy and appropriateness of inserting greater and greater detail in constitutions.

Ultimately, a widespread distrust of legislatures convinced delegates to let conventions speak with a definitive voice on important governmental issues. On some issues, consensus made this approach less susceptible to the criticism of invading the prerogative of the legislature. Whether or not delegates agreed on an appropriate response, ultimately their preference for specific, written provisions accounted for the behavior of many conventions.[72]

The trend favoring incorporation of legislative detail in constitutions continued in the 1878 California convention, but these later California delegates did more than simply agree that some policy issues belonged in the constitution. They also explicitly asserted another institutional role: the convention should settle political issues by constitutionalizing them. Indicative of this self-consciously political approach to constitution-making was the first appearance in any Western state constitutional convention debate of the phrase "constitutional legislation."[73]

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70. The argument for incorporating legislative matters in the constitution, if they were important enough, surfaced in the debates over community property. This issue, along with the prohibition of lotteries, found its way into the constitution when a majority of delegates agreed that the matter should not be left to the legislature. *See* CAL. CONST. of 1849, art. XI, § 14.

71. *See, e.g.*, ANDREW J. MARSH, OFFICIAL REPORT OF THE DEBATES AND PROCEEDINGS IN THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEVADA, ASSEMBLED AT CARSON CITY, JULY 4, 1864, TO FORM A CONSTITUTION AND STATE GOVERNMENT 44, 245, 367 (San Francisco, Frank Eastman 1864) [hereinafter NEVADA DEBATES]; 1 CALIFORNIA DEBATES, *supra* note 61, at 295, 398, 403, 488; 1 DAKOTA CONSTITUTIONAL CONVENTION, HELD AT SIOUX FALLS, SEPTEMBER, 1885, at 165 (Huron, South Dakota, Huronite Printing Co. 1907) [hereinafter SOUTH DAKOTA DEBATES]; JOURNAL AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF WYOMING BEGUN AT THE CITY OF CHEYENNE ON SEPTEMBER 2, 1889, AND CONCLUDED SEPTEMBER 30, 1889, at 445 (Cheyenne, Daily Sun Printing 1893) [hereinafter WYOMING DEBATES]; 1 IDAHO DEBATES, *supra* note 63, at 226.

72. In Nevada's 1864 convention, one delegate did not want provisions "written in the sand, but written on parchment." NEVADA DEBATES, *supra* note 71, at 264.

73. 1 CALIFORNIA DEBATES, *supra* note 61, at 473.

Restraining corporations and limiting governmental debt provided the most dramatic expression of the role of the conventions acting in lieu of legislatures. In the case of controlling corporate power, including the railroad companies, conventions claimed that legislatures were institutionally unable to respond. Moreover, many delegates regarded the control of corporations and debt as matters on which the people had given conventions a mandate to act. The debate over regulating corporate power produced heated arguments as some delegates characterized corporations as a positive force for economic development while others viewed them as inherently evil and protected by corrupt legislators.[74] During this debate both a distrust of the legislature and an explicit acceptance of constitutional legislation emerged as part of the convention's sense of its broader role.

The chairman of the corporation committee captured the lack of faith in the legislature by characterizing constitutional provisions regulating railroads "for the protection of the people" by taking "from the halls of legislation the corrupting influence of corporate power" as a "stamp upon the organic law of California."[75] Given the enormous economic impact of corporate power, the chairman thought that "constitutional conventions should provide a means whereby all railroad companies may be controlled."[76] Specific and detailed provisions did not phase many delegates who frankly admitted that they rendered the constitution "to a certain extent a code."[77]

In identifying the basis of agreement on political issues before the convention, delegates described themselves in revealing terms. Some spoke of being "law-makers" and others distinguished between the people "for whom we come here to legislate" and "the home corporations or the foreign corporations."[78] Indeed, many delegates considered their participation in the revision of California's constitution as part of a political and moral mandate to effect specific changes. As one delegate put it:

> The men who own the banks, the men who run the banks, are not the men who voted for me; . . . the men who voted for me are the men who have been swindled, are the men who have felt and do feel the great wrongs of this evil irresponsibility in these corporation managers, and [who] with their votes asked me to come here and do what I could to remedy this evil of

74. For the debate over corporations and corporate power, see 1 *id.* at 376-626.

75. 1 *id.* at 377.

76. 1 *id.* at 380; *see* 1 IDAHO DEBATES, *supra* note 63, at 520, 676, 884; 2 *id.* at 1515; 1 SOUTH DAKOTA DEBATES, *supra* note 71, at 179, 332-37; WYOMING DEBATES, *supra* note 71, at 417, 668.

77. 1 CALIFORNIA DEBATES, *supra* note 61, at 440.

> irresponsible corporate management, and for one I am here to do it, and right now.[79]

Such attitudes insured a high degree of partisanship in the convention.

The Wyoming constitutional convention of 1889 also sheds light on the process of late nineteenth-century constitution-making and the breakdown of an initial resolve to avoid constitutional legislation. By organizing itself into seventeen standing committees, the convention practically insured its consideration of many provisions that went beyond the broad and general principles of an idealized, short constitution.

In the early stages of the convention, delegates expressed the "great importance" of not interfering "with matters which may be left to the legislature."[80] Notwithstanding this goal, it soon became evident that individual delegates and the convention as a whole routinely made exceptions for important matters. Moreover, a relatively liberal definition of "important" extended far beyond the major political issues of the day. Indeed, one of the first departures from the goal of a non-legislative constitution entailed a provision that voided contracts in which an employee waived any right to recover damages for death or injury. In conceding the legislative quality of the provision, one delegate sought its inclusion because "we cannot be too careful in protecting the rights of the great laboring classes."[81]

Rather quickly, the convention agreed to numerous detailed provisions—even novel ones—if they seemed helpful or beneficial to state government. When some delegates objected to defining water "appropriation" in the constitution, others, while admitting it smacked of legislation, thought such definitional language might avoid ambiguity later.[82]

Once established, the pattern of including detailed provisions proved hard to break even if an occasional delegate declared: "We are here to make a constitution and not for legislation."[83] Eventually, the practice of constitutional legislation itself helped justify provisions. With respect to an eight-hour work-day limitation, a delegate acknowledged "that this is legislation, but we have done considerable legislation, and this covers but one or two lines in the constitution."[84] Toward the close of

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78. 1 *id.* at 384.
79. 1 *id.* at 397.
80. WYOMING DEBATES, *supra* note 71, at 445; *see also id.* at 498-501.
81. *Id.* at 445.
82. *Id.* at 501-02.
83. *Id.* at 581.
84. *Id.* at 608; *see also id.* at 668.

Wyoming's convention, this rationale became increasingly persuasive, as, for example, in the debate over a provision prohibiting corporations from disclaiming liability for injuries to their employees. As one delegate noted: "You may say, is not this pure legislation? What if it is. We have voted for a great many things here that are legislation, and if we are going to have legislation here at all, let us get the best there is."[85]

The justification for constitutional legislation received a boost in the Idaho convention when a delegate denied that innovations on the jury system should be left to the legislature. He suggested that the convention's composition gave it a special mandate. "The territory has never been represented as it is represented here today."[86] Another delegate expressed a similar unwillingness to let the legislature "pass upon something I consider of such vast importance to the people that it should be engrafted in the organic law of the land."[87]

Thus, from California's first convention in 1849 to the Western States' conventions of the late 1880s, delegates recognized that one of the principal purposes of the constitutions they were drafting was the expression of limitations—substantive as well as procedural—on the powers of state legislatures.[88] Nonetheless, some delegates emphasized a positive role for conventions as well, and strove to place "directory" provisions in constitutions expressly granting the legislature discretion to enact laws encompassing a wide range of activities.[89] The directory provisions were inherently contrary to the concept of a state constitution. If state governments exercised the residual power remaining after specific limitations imposed by the constitution, it was theoretically unnecessary to spell out such residual powers.

Advocates of directory provisions (who sometimes succeeded in getting them adopted) were not ignorant of the theoretical principles that underlay nineteenth-century constitution-making. Rather, they displayed a shrewd appreciation for the process of constitutional interpretation and a pragmatic concern that the judiciary might frustrate their efforts at lawmaking. When convention delegates could agree on the need for

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85. *Id.* at 797.

86. 1 IDAHO DEBATES, *supra* note 63, at 218.

87. 1 *id.* at 228.

88. *See, e.g.*, 1 CALIFORNIA DEBATES, *supra* note 61, at 242, 440; 2 *id.* at 810, 837, 917; REPORT OF THE 1849 CALIFORNIA CONVENTION, *supra* note 60, at 52-53, 201; 1 IDAHO DEBATES, *supra* note 63, at 343; NEVADA DEBATES, *supra* note 71, at 367; NORTH DAKOTA DEBATES, *supra* note 53, at 91; 1 SOUTH DAKOTA DEBATES, *supra* note 71, at 555-57; WYOMING DEBATES, *supra* note 71, at 668.

89. These efforts generated some rather interesting discussions on the contemporary nature of federalism. *See, e.g.*, 3 CALIFORNIA DEBATES, *supra* note 61, at 1316; REPORT OF THE 1849 CALIFORNIA CONVENTION, *supra* note 60, at 52-53; NORTH DAKOTA DEBATES, *supra* note 53, at 133; WYOMING DEBATES, *supra* note 71, at 721-24.

constitutional legislation, they embedded their political choices, and detailed instructions, into the fundamental law. In the absence of consensus or the requisite support, a directory provision seemed the best alternative. On one occasion in 1878, a California delegate provided a glimpse of one reason some delegates supported directory provisions. He argued that while the legislature might well have certain powers, the state's supreme court would make the final determination. Therefore, if the constitution indicated "that the legislature shall have the power to do some certain things, . . . no court in the State of California would ever go behind that declaration in the constitution."[90] Thus, far from being slow students of American government, the delegates' justification of directory provisions showed a sensitivity to the process of constitutional government and judicial review.

2. The Permanence of Constitutions and the Benefits of Recurring Constitutional Revision

Assuming the characteristic of permanence associated with the Federal Constitution is inherent to all written constitutions overlooks a contrary constitutional tradition that stemmed from the eighteenth century and persisted throughout much of the nineteenth century. The American Revolution stimulated thinking about popular sovereignty in ways that encouraged relatively frequent constitutional revision through a reexamination of fundamental principles. Thomas Jefferson became the most prominent advocate of the benefits of recurring, generational constitutional revision that would reaffirm and recommit each generation to basic constitutional principles.[91] Jefferson accepted the central distinction between ordinary law and constitutions, but saw constitutional government drawing strength, not weakness, from the frequency of the people's involvement in constitutional revision. He preferred such a process to the monopoly the federal judiciary

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90. 2 CALIFORNIA DEBATES, *supra* note 61, at 815.

91. *See* Merrill D. Peterson, *Mr. Jefferson's "Sovereignty of the Living Generation"*, 52 VA. Q. REV. 437, 443-47 (1976); *see also* Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), *in* THOMAS JEFFERSON, WRITINGS 1395, 1402 (Library of America ed. 1984) ("And lastly, let us provide in our constitution for its revision at stated periods. . . . Each generation is as independent as the one preceding, as that was of all which had gone before. It has then, like them, a right to choose for itself the form of government it believes most promotive of its own happiness; . . . and it is for the peace and good of mankind, that a solemn opportunity of doing this every nineteen or twenty years, should be provided by the constitution; so that it may be handed on, with periodical repairs, from generation to generation, to the end of time, if anything human can so long endure.").

increasingly asserted over the Federal Constitution.[92] Scholars have noted Jefferson's views, but they usually conclude that his position was relatively quickly abandoned and thus not part of a conventional approach to American constitution-making.[93] Their conclusion again reflects the belief that the experience and history of the Federal Constitution is the orthodox understanding of written constitutions.

The difficulty of changing the Federal Constitution had the consequence that alterations in the national constitutional order would take place primarily through judicial interpretation rather than by formal constitutional revision.[94] Indeed, the historian Joyce Appleby describes the Federal Constitution as a rejection of "simple majoritarian government" in America and argues that the revision provisions in Article V clearly worked against democracy.[95] Federalists, with help from James Madison and John Marshall, succeeded in claiming a predominant role for the federal courts in constitutional adjustment as well as interpretation of the Federal Constitution.[96] That role would later prompt Woodrow Wilson's remark that the Supreme Court had become a "constitutional convention in continuous session."[97]

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92. *See* Merrill D. Peterson, *Thomas Jefferson, The Founders, and Constitutional Change, in* THE AMERICAN FOUNDING: ESSAYS ON THE FORMATION OF THE CONSTITUTION 275, 287-88 (J. Jackson Barlow et al. eds., 1988).

93. Even Merrill Peterson intimates that Jefferson's idea of generational change was unrealistic. *Id.* at 288.

94. Donald Lutz has argued that the implications of popular sovereignty underlying early state constitutions (that the people had the right to make constitutional changes "with no intermediaries"), especially experience with arbitrary legislatures, deeply influenced the drafters of the Federal Constitution. The result was to make it "difficult, if not impossible in practical terms, to amend the document without the participation of the legislature; and both ratification and amendment were removed enough from direct control by the people to require an extraordinary majority on their part to enforce their will." LUTZ, *supra* note 7, at 7; *see also* RALPH LERNER, THE THINKING REVOLUTIONARY: PRINCIPLE AND PRACTICE IN THE NEW REPUBLIC 91-136 (1979).

95. Appleby, *supra* note 11, at 798, 804. Michael Kammen views Article V as "a product of diminished faith in the capacity of ordinary folk to be a fully sovereign people," KAMMEN, *supra* note 41, at 29, and Walter Dellinger has described it as a "very conservative rendering of the right to revolution." Janet Cornelius, *Popular Sovereignty and Constitutional Change in the United States and Illinois Constitutions*, 80 ILL. HIST. J. 228, 231 (1987).

96. *See* SUPREME COURT AND SUPREME LAW 21-25 (Edmond Cahn ed., 1954); Vile, *supra* note 31, at 48-52. In 1801, Thomas Jefferson claimed that the "very word convention" gave the federalists "the horrors, as in the present democratical spirit of America, they fear they should lose some of the favorite morsels of the constitution." Peterson, *supra* note 92, at 286.

97. Vile, *supra* note 31, at 57-58 (quoting J.W. PELTASON, CORWIN & PELTASON'S UNDERSTANDING THE CONSTITUTION 125 (11th ed. 1988)).

In retrospect, it is clear that those opposed to ongoing constitutional revision as an integral part of the American approach to government prevailed relatively quickly in the country's history—at least as far as the Federal Constitution was concerned. What is not evident is why the experience with the Federal Constitution necessarily constitutes the mainstream position in America's constitutional past. In fact, the state experience marked a significant departure. While Jefferson's constitutional vision gradually faded from discussions of the Federal Constitution and today is considered an anachronism in constitutional theory and practice, his vision assumed considerable importance in the intellectual life of state constitution-making. For much of the nineteenth century, state constitutional conventions witnessed a lively and ongoing debate over the relative role and relationship that the people, legislatures, and constitutional conventions ought to play in the process of constitutional revision. How the value Jefferson placed on continued involvement of the people in affirming and adjusting the fundamental constitutional principles that governed them became transformed into a subversive danger by the late nineteenth century is a complex story traceable in nineteenth-century convention debates.[98]

One aspect of a nineteenth-century tradition that encouraged more frequent constitutional amendment and revision stemmed from the shared sense of many delegates that constitutional revision was part of an ongoing process. Specifically, delegates viewed the nature of constitution-making as a progressive enterprise requiring a readjustment of past practices to conform to present requirements. Progressive constitutional development underscored the importance of building on earlier concepts and practices so as to create ever more sophisticated governmental structures. Implicitly, this understanding meant that constitution-making in the past—even in the glorious Revolutionary period of American history—was less perfect and possibly even crude when compared with "modern" ideas of drafting fundamental law. Indeed, at a basic level, the Civil War underscored the tragic flaw in the constitutional order established by the Federal Constitution.[99] Moreover, even before the war, delegates to state constitutional conventions projected a sense of superiority about their work as constitution-makers. Delegates to early Western State conventions spoke of the progressive nature of constitution-making. By the late nineteenth

98. The absence of a nineteenth-century debate over the significance of frequent recurrence to fundamental principles at the federal level obscured the identity of a constitutional tradition of frequent regeneration at the state level.

99. In other words, the Civil War stemmed from the failure to accommodate the sectional tensions within the Union and to adequately cope with the issue of slavery.

century, delegates expressed an increasingly elaborate sense of the scientific nature of drafting constitutions.

Indeed, one word figured prominently in the constitutional culture of the nineteenth-century American West: progress. Nineteenth-century delegates consistently invoked the idea of progress when speaking of constitutional developments as an integral part of performing their duties as constitution-makers. In debates, delegates frequently regarded "the progress of the age" as the best justification for incorporating a particular provision. This phrase first appeared when a delegate at the 1857 Oregon constitutional convention praised Indiana's new constitution as the best available model.[100] The Indiana Constitution's particularly strong feature was its modern bill of rights that recognized the progress made "since our fathers first formed constitutions."[101] Indiana's bill of rights "nobly reasserts what our fathers said about the natural rights of man to the pursuit of life, liberty and happiness, but she proceeds to assert the civil rights of the citizens as ascertained in those 70 years of progress."[102]

What the Framers said and did about constitutions was only a starting point for delegates later in the nineteenth century. One natural result of this view demythologized the federal Framers. The vaunted genius of Madison and his colleagues hardly intimidated many nineteenth-century delegates. They felt adequate, if not superior, for the task of constitution-making because they believed that the nature of the enterprise had substantially changed. One delegate to the 1864 Nevada convention commented that he did not share the "profound and reverential regard which some profess for the men who assembled in the conventions in the early days of the republic, when the government was yet but an experiment."[103] There were, of course, things "worthy of imitation" in the results of their labors, but he did not regard them with "exalted veneration."[104] Ultimately, the provisions inserted by drafters—"in their wisdom and judgment"—of the most recent state constitutions had greater relevance.[105] Likewise, from the perspective

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100. Indeed, the delegate called the Indiana Constitution "gold refined" and "up with the progress of the age." THE OREGON CONSTITUTION AND PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF 1857, at 101 (Charles H. Carey ed., 1926) [hereinafter OREGON DEBATES].

101. *Id.*

102. *Id.* at 102.

103. NEVADA DEBATES, *supra* note 71, at 564; *see also* WYOMING DEBATES, *supra* note 71, at 422.

104. NEVADA DEBATES, *supra* note 71, at 564.

105. *Id.*

of a delegate to California's 1878 convention, the 1829 Virginia convention seemed like "primitive times."[106] Precedents drawn from the Virginia convention "no more serve to illustrate the present machinery of constitutional conventions than the lumbering old family coaches they used to ride to the capitol in, are like the railroad cars and steamers in which the same journeys are now performed."[107]

Self-consciously, many Western convention delegates saw the absence of certain provisions in the early state constitutions and their presence in later nineteenth-century constitutions as direct evidence of greater constitutional enlightenment. Normally the advancement in constitutional ideas came with time, although occasionally some advances were specifically noted as trends within "the western states."[108] These provisions and the concepts they embraced spanned a wide range of subject matter.

Toward the end of Oregon's 1857 convention, one delegate congratulated his colleagues for embodying a half-century of constitutional experience in several areas and thus "perfecting republican institutions."[109] The constitution, he suggested, by establishing a free school system "starts out in the light of the history of the states which have preceded us [and] in advance of any of the new states of this Union."[110] Moreover, the provisions dealing with corporations and internal improvement were both "wise" and of "modern origin."[111] Experience had suggested the best ways of dealing with the constitutional regulation of the economy and economic forces in the state.

B. Constitutional Borrowing and Lack of Creativity in State Constitution-Making

The scholarly assessment that state constitution-making has not been innovative is partly correct. Virtually all conventions were influenced by earlier constitutions, constitutional experience, practice, and interpretations. Part of that process entailed borrowing provisions from

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106. 1 CALIFORNIA DEBATES, *supra* note 61, at 203 (delegate Barbour's speech on Oct. 5, 1878).

107. 1 *id.*

108. OREGON DEBATES, *supra* note 100, at 302. The "more distinct separation of church and state" was attributed to the Western states, and in particular the Indiana Constitution, according to a delegate of Oregon's 1857 constitutional convention. *Id.*

109. *Id.* at 397.

110. *Id.* at 388.

111. *Id.* at 390.

other constitutions. From the first constitutions drafted by legislatures in the eighteenth century, early constitution-making had a natural effect on later constitutional efforts. Such is the nature of a tradition. Moreover, the tendency to borrow textual provisions received a considerable boost by the early appearance and subsequent widespread use of pocket-sized compilations of existing state constitutions. Published as early as 1781 and eventually in scores of different editions,[112] compilations were present in nearly every nineteenth-century constitutional convention.[113]

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112. Over 70 different editions of state constitutional compilations appeared between 1781 and 1894. Christian G. Fritz, Comprehensive Bibliography of American State Constitutional Compilations Published in the Eighteenth and Nineteenth Centuries (unpublished manuscript, on file with author and the *Rutgers Law Journal*). After 1787, these books routinely included the Federal Constitution, but the content of these was almost exclusively made up of state constitutions. *See, e.g.*, THE CONSTITUTIONS OF THE SIXTEEN STATES WHICH COMPOSE THE CONFEDERATED REPUBLIC OF AMERICA, ACCORDING TO THE LATEST AMENDMENTS . . . TO WHICH ARE PREFIXED, THE DECLARATION OF INDEPENDENCE; ARTICLES OF CONFEDERATION; THE DEFINITIVE TREATY OF PEACE WITH GREAT BRITAIN; AND THE CONSTITUTION OF THE UNITED STATES (Boston, Manning & Loring 1797); THE CONSTITUTIONS OF THE UNITED STATES, ACCORDING TO THE LATEST AMENDMENTS; TO WHICH ARE PREFIXED, THE DECLARATION OF INDEPENDENCE, AND THE FEDERAL CONSTITUTION, WITH THE AMENDMENTS (Newburgh, D. Denniston & H. Craig 1800); THE CONSTITUTIONS OF THE UNITED STATES; ACCORDING TO THE LATEST AMENDMENTS. TO WHICH ARE PREFIXED, THE DECLARATION OF INDEPENDENCE AND THE FEDERAL CONSTITUTIONS (Exeter, Charles Norris & Co. for Edward Little & Co. 1809). The state constitutions were considered a principal source of guidance by delegates to state constitutional conventions. It was natural for later constitution-makers to consult earlier draft constitutions and such compilations provided a ready-made source for comparing existing constitutional provisions.

113. *See, e.g.*, 1 DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF DELAWARE COMMENCING DECEMBER 1, 1896, DOVER, DELAWARE 89, 263 (1958); 1 OFFICIAL REPORT OF DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF INDIANA 41 (Indianapolis, A.H. Brown 1850); OFFICIAL REPORT OF DEBATES IN THE LOUISIANA CONVENTION, AUGUST 5-24, 1844, at 111 (New Orleans, Besancon, Ferguson and Co. 1845); 5 DEBATES OF THE MISSOURI CONSTITUTIONAL CONVENTION OF 1875, at 348 (1930-44); 3 PROCEEDINGS AND DEBATES OF THE CONVENTION OF THE COMMONWEALTH OF PENNSYLVANIA, TO PROPOSE AMENDMENTS TO THE CONSTITUTION, COMMENCED AND HELD AT HARRISBURG, ON THE SECOND DAY OF MAY, 1837, at 3 (Harrisburg, Packer, Barrett, & Parke 1837).

One of the most popular titles for constitutional compilations was THE AMERICAN'S GUIDE; THE CONSTITUTIONS OF THE UNITED STATES OF AMERICA, WITH THE LATEST AMENDMENTS: ALSO, THE DECLARATION OF INDEPENDENCE, ARTICLES OF CONFEDERATION, WITH THE FEDERAL CONSTITUTION, ACTS FOR THE GOVERNMENT OF THE TERRITORIES, WASHINGTON'S FAREWELL ADDRESS, AND THE INAUGURAL SPEECHES OF THE SEVERAL PRESIDENTS (Philadelphia, Joshua Fletcher 1810). There is no modern edition of this work to my knowledge. Other editions appeared in 1813, 1828, 1830, 1832, 1833, 1835, 1838, 1840, 1841, 1849, and 1864. *See* Fritz, *supra* note 112.

But the fact that state constitutions are imitative does not necessarily imply a process of unthinking imitation. States experimented with, and collectively engaged in, a great deal of constitutional revision. Widespread borrowing did not make an uncreative process inevitable. Scholars asserting the imitative nature of state constitutions have ignored the impact of the constitutional compilations.

The dissemination of the compilations necessarily provided a comparative basis for thinking about state constitutions and their creation.[114] Those books provided access to many constitutional models; more importantly, the borrowing process itself raised questions in the delegates' minds about how to identify and draw from the collective constitutional experience.[115] Merely noting the fact that state constitutions contain similar provisions does not reveal how or why particular language was incorporated. Whether such borrowing was unthinking and lacked creativity can only be determined by examining the constitutional convention debates. In fact, the borrowing process in nineteenth-century constitution-making occurred within a broad national awareness of constitutional models and structures.[116] The debates reveal a considerable amount of careful weighing and shifting of provisions from the extant constitutions. Delegates frequently balanced the special needs of a given state or territory against approaches that were becoming an American constitutional trend.[117] Moreover, how delegates understood the judicial interpretation of specific provisions also influenced their choices.[118] Such references indicate the widespread awareness of other state constitutional experience.

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114. *See, e.g.*, REPORT OF THE 1849 CALIFORNIA CONVENTION, *supra* note 60, at 28-31, 40, 56; 1 IDAHO DEBATES, *supra* note 63, at 56, 520, 638, 793; 2 *id.* at 1503, 1600-20; NEVADA DEBATES, *supra* note 71, at 656-57; 1 SOUTH DAKOTA DEBATES, *supra* note 71, at 340; WYOMING DEBATES, *supra* note 71, at 448, 544, 721.

115. *See, e.g.*, 1 CALIFORNIA DEBATES, *supra* note 61, at 256; REPORT OF THE 1849 CALIFORNIA CONVENTION, *supra* note 60, at 51, 379; 1 IDAHO DEBATES, *supra* note 63, at 55, 813; NEVADA DEBATES, *supra* note 71, at 691; WYOMING DEBATES, *supra* note 71, at 605.

116. *See, e.g.*, 2 CALIFORNIA DEBATES, *supra* note 61, at 729-31; REPORT OF THE 1849 CALIFORNIA CONVENTION, *supra* note 60, at 26-27, 310; 2 IDAHO DEBATES, *supra* note 63, at 2039; NEVADA DEBATES, *supra* note 71, at 16, 199, 551-52; 1 SOUTH DAKOTA DEBATES, *supra* note 71, at 349-60.

117. *See, e.g.*, 1 CALIFORNIA DEBATES, *supra* note 61, at 489; 2 *id.* at 960; REPORT OF THE 1849 CALIFORNIA CONVENTION, *supra* note 60, at 113; 1 IDAHO DEBATES, *supra* note 63, at 853-54; 2 *id.* at 1120, 1623; 1 NORTH DAKOTA DEBATES, *supra* note 53, at 103; OREGON DEBATES, *supra* note 100, at 141.

118. *See, e.g.*, 1 CALIFORNIA DEBATES, *supra* note 61, at 185; 3 *id.* at 1279; NEVADA DEBATES, *supra* note 71, at 15-16; *see also* REPORTS OF THE 1863 CONSTITUTIONAL

The awareness of constitutional models and the discussion of their merits often produced a thoughtful process of comparison and borrowing that in turn helped create a shared American constitutional ideology. Most nineteenth-century delegates believed that legitimate constitution-making inevitably entailed a comparative borrowing process. Indeed, they embraced a view of progress that implied that more recent constitutions were improvements on earlier attempts.[119] This vision of constitutional progress was hardly confined to the constitutional history of individual states: increasingly, delegates saw national trends as persuasive authority for constitutional changes. Parochialism never disappeared, but many delegates relied on the existence of American constitutional practices to justify revision.

1. The Process of Borrowing and Western State Conventions

The Western States' experience illustrates the broad context of nineteenth-century constitution-making. A close examination of how Western convention delegates created frames of government dispels the notion that they did so in isolation.[120] Western delegates not only knew of the latest innovations in constitution-making, but had access to all the existing state constitutions as models.

Western conventions drew on preexisting constitutional provisions as an integral part of drafting fundamental law.[121] A recurring theme in

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CONVENTION OF THE TERRITORY OF NEVADA, AS WRITTEN FOR THE *TERRITORIAL ENTERPRISE* BY ANDREW J. MARSH AND SAMUEL L. CLEMENS AND FOR THE *VIRGINIA DAILY UNION* BY AMOS BOWMAN 40 (William C. Miller & Eleanore Bushnell eds., 1972).

119. *See infra* notes 133-41 and accompanying text.

120. Identifying concerns of particular importance to the West—aridity, mineral extraction, and Mormonism, for example—has obscured the extent to which Western conventions participated in a broader, dynamic process of constitutional debate. *See, e.g.*, BAKKEN, *supra* note 22, at 101-03. Bakken sees Rocky Mountain constitution-makers (defined as those in Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Utah, and Wyoming) as essentially responding to their natural environment, particularly their experience with aridity, and to their territorial status. To the extent that he posits any shared constitutionalism, he describes it in terms of an inherited tradition dating back to the Framers.

121. *See, e.g.*, 1 CALIFORNIA DEBATES, *supra* note 61, at 18-31; 2 *id.* at 729-31, 1022; 3 *id.* at 1452; REPORT OF THE 1849 CALIFORNIA CONVENTION, *supra* note 60, at 221; NEVADA DEBATES, *supra* note 71, at 100, 691; 1 SOUTH DAKOTA DEBATES, *supra* note 71, at 349-60. At one point, a delegate, tired of the references to other conventions and constitutions, suggested a different approach. "[I]f the law library could be locked up and all these books that the members bring here thrown out of sight, we could go to work and build a constitution out of our heads, out of our inner consciences." 1 CALIFORNIA DEBATES,

that borrowing process encouraged the present generation of constitution-makers to profit from constitutional experience by incorporating the best ideas from existing documents. Occasionally, the very latest constitutions acquired a special reputation "because they have selected and retained from other constitutions pretty much everything that is worth being retained in a constitution."[122] For example, delegates to California's 1849 convention met having the advantage of more than a half-century of state constitutional experience before them. They actively and self-consciously drew upon that experience. The debates reveal that the most recent state constitutional conventions—in Iowa and New York (both in 1846)—were fresh in the delegates' minds.[123] The 1849 convention also drew on a wide array of other states' constitutional experiences in part because of the cosmopolitan population drawn to California during the Gold Rush. Early in California's 1849 convention, in the context of an argument that a provision should be included because it existed in many other constitutions, a delegate stated that there is "no reason why we should adopt the faults of others. We should rather profit by their experience."[124] He was arguing for a careful comparison and weighing of other states' experience before including the provision in the California Constitution solely on the basis that many other constitutions contained it. In other words, he was arguing against simplistic borrowing of textual provisions.

Delegates frequently consulted treatises on constitutional law and drew on contemporary constitutional activity. In the heated debate of Idaho's 1889 convention over a provision authorizing the taking of private property, one delegate invoked Thomas Cooley's famous treatise on constitutional limitations.[125] California delegates to the 1849 convention were aware of controversies at other conventions, such as Michigan's 1835 convention, and recounted experiences of recently concluded conventions, such as New York's 1846 convention.[126] Oregon's delegates in 1857 referred to recent experience with

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supra note 61, at 256. Since the earliest state constitution-making had not been conducted in isolation, this was truly wishful thinking.

122. 2 CALIFORNIA DEBATES, *supra* note 61, at 1059.

123. REPORT OF THE 1849 CALIFORNIA CONVENTION, *supra* note 60, at 22, 24, 27, 204.

124. *Id.* at 33.

125. 2 IDAHO DEBATES, *supra* note 63, at 1597-98; *see* COOLEY, *supra* note 55. The work went through six editions during Cooley's life time, the sixth edition appearing in 1890.

126. REPORT OF THE 1849 CALIFORNIA CONVENTION, *supra* note 60, at 26-27, 310.

constitution-making in California and Ohio in 1849.[127] Such coincidence heightened the self-awareness of the process and the importance of shared constitution-making. At the end of their convention, Idaho delegates sent a resolution to other contemporaneous conventions declaring their intention "to forever prohibit bigamy, polygamy, and other crimes of the Mormon theocracy."[128]

An important factor in gauging the relevance of another state's experience was the geographical relation to the territory or state currently engaged in constitution-making. Delegates to Nevada's 1864 convention, for instance, were heavily influenced by neighboring California's 1849 constitution and constitutional history.[129] Likewise, Idaho delegates, while receptive to a comprehensive comparative analysis of existing constitutional provisions, placed greater reliance on Rocky Mountain states and Western states, believing those states more closely reflected their own circumstances. Given Idaho's concerns over aridity, mining, and land use, the constitutional experience of Colorado and California carried greater weight than did some of the older Eastern states.[130]

2. A Creative Borrowing Process

The access that Western conventions had to constitutional compilations, legal treatises, and prior practical experience—to the American constitutional tradition—resulted in extensive borrowing of existing provisions in nineteenth-century constitutions. Sometimes borrowing occurred without acknowledgement and can only be detected by linguistical comparisons with other constitutions. More often, delegates were open and self-conscious about incorporating constitutional language. Indeed, the frankness of such borrowing occasionally triggered complaints—such as that of a California delegate

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127 OREGON DEBATES, *supra* note 100, at 59, 68-69.

128. 2 IDAHO DEBATES, *supra* note 63, at 2039. Of course, conventions naturally gravitated toward the existing state constitution when meeting to revise that document. Some delegates to California's 1878 convention conceded that certain issues, such as corporations' negative influences, Chinese immigration, and taxation, had prompted the present convention, but they were unwilling to redesign the entire constitutional fabric of the state. In fact, as debates over hotly contested political issues became protracted, delegates suggested that the 1849 constitution be incorporated by reference whenever possible. *See* CALIFORNIA DEBATES, *supra* note 61 *passim*.

129. NEVADA DEBATES, *supra* note 71, at 16; *see also id.* at 199, 551-52 (references to other conventions that had met in the past 15 years such as those in Massachusetts, Pennsylvania, Ohio, Indiana, and Illinois).

130. 1 IDAHO DEBATES, *supra* note 63, at 853-54; 2 *id.* at 1120.

who wanted to exclude delegates from the library.[131] The expectation of creating a constitution in a context without models was unrealistic—even the Federal Constitution had been drafted in the wake of a decade of state constitution-making.

Despite extensive borrowing, delegates still discussed and wrestled with constitutional ideas in those provisions. Far from being a constraining influence, the multitude of models often presented the challenge of differentiating among options and evaluating the merits of the provisions ultimately selected. Certainly, inertia or momentum—rather than explicit discussions—contributed to the final shape of nineteenth-century state constitutions. What is remarkable, however, is the relatively limited amount of unthinking adoption or mechanical borrowing of constitutional provisions.

California's first bill of rights illustrates the practice of constitutional borrowing.[132] Early in the debate, one delegate chastised his colleagues for "servilely" copying other constitutions rather than drawing "wisdom from the spirit and meaning" of them.[133] Toward the end of the convention yet another delegate lamented a lack of originality. He wanted the preamble to contain "a few lines at least of our own manufacture."[134] The debates demonstrate, however, that delegates understood constitutional issues and the choices being made, and they discussed them at considerable length. Some issues provoked less debate than others because a consensus existed, but such agreement hardly implied static constitutional attitudes or an unthinking perpetuation of past constitutional practices. Many innovative ideas and suggestions were debated but not incorporated into the final product. The debate itself confirms the dynamic process and changing nature of nineteenth-century constitution-making.

The Western constitutional conventions meeting later in the nineteenth century showed similar tendencies to borrow from prior constitutions with one marked difference. Unlike the scattered demands for "originality" in the 1849 California convention, later conventions show little or no concern with this issue. Rather, those later conventions implicitly assumed that such collective and comparative constitution-

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131. *See supra* note 122.

132. *See generally* Christian G. Fritz, *More Than "Shreds and Patches": California's First Bill of Rights*, 17 HASTINGS CONST. L.Q. 13 (1989).

133. REPORT OF THE 1849 CALIFORNIA CONVENTION, *supra* note 60, at 51.

134. *Id.* at 379.

making was not only acceptable but preferable.[135] Instead, the concern shifted to insuring the appropriate basis for constitutional borrowing. A delegate to Oregon's 1857 convention expressed this different attitude: "If there is anything in other constitutions suitable to Oregon, let us take it, but let us not hastily patch it up with contradictory provisions—let the instrument be well considered and read harmonious in all its parts."[136]

Nineteenth-century constitution-makers revealed a strong strain of progressive ideology that translated into a belief in the ongoing improvement of government and constitution-making.[137] Constitutional refinement occurred in part by building on the latest improvements found in other state constitutions. By the time of California's second convention in 1878, Western delegates began their work convinced that the product of their labors would be an amalgam of existing constitutions. Far from facilitating constitution-making, the sheer number of models, increasing over time, created an embarrassment of riches. California's 1878 convention organized itself by creating twenty-five committees, each with responsibility for a certain subject matter. The decision to publish all constitutional proposals created a problem given the vast number of suggestions. Early in the convention one delegate claimed there were "eight or ten or twenty complete drafts of a constitution."[138] Whether these drafts were copies or combinations of other constitutions is unclear, but as a delegate pointed out, under the convention's committee system, all of them "must be cut up and presented as separate propositions, relating to the different articles in the Constitution."[139]

In the final analysis, extended debate over the different constitutional practices of other states helped shape a culture of constitutionalism. That shared constitutional understanding provides insights into the wider

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135. *See, e.g.*, 1 IDAHO DEBATES, *supra* note 63, at 520, 638, 793; 2 *id.* at 1622-23; 1 SOUTH DAKOTA DEBATES, *supra* note 71, at 180-96, 340; WYOMING DEBATES, *supra* note 71, at 448, 721.

136. OREGON DEBATES, *supra* note 100, at 108-09.

137 To the extent that such an approach suggests a "constitutional Darwinism" it should be noted that the process was not characterized by a survival of only the fittest constitutional provisions. While some provisions were indeed deleted because they no longer accorded with the present political or constitutional understandings, the emphasis was on the growing elaboration of provisions and constitutional mechanisms rather than an aggressive paring down of the ever-growing nineteenth-century state constitutions.

138. 1 CALIFORNIA DEBATES, *supra* note 61, at 74.

139. 1 *id.*; *see also* 1 *id.* at 99. By the time of California's second constitutional convention, delegates routinely organized by creating anywhere from one to two dozen separate committees, whose subject matter of concern often followed topics traditionally dealt with in separate articles in earlier constitutions.

process and development of American constitutional thought beyond the experience of the Revolutionary generation.

3. Textual Borrowing and Judicial Interpretation

One overlooked aspect of borrowing in nineteenth-century constitution-making is the judicial significance of taking provisions wholesale from one constitution and incorporating them into another later constitution. It has been noted that delegates occasionally borrowed provisions based on their perception of the judicial consequences of those provisions.[140] In fact, each borrowed provision potentially came with a judicial gloss from state courts that had interpreted that text. Indeed, different state courts might interpret similarly worded provisions differently. The interpretative possibilities and ambiguity among judicial opinions were matters that Western delegates clearly appreciated.

Indeed, interpreting a nineteenth-century "patchwork" constitution posed interesting questions. One delegate to California's 1878 convention raised this issue by stating "a cardinal canon of interpretation of constitutions."[141] Namely, "where a constitutional provision has been incorporated from the constitution of one state into the constitution of another state . . . that the courts invariably turn to the decisions in that [first] state to guide them in their interpretation of the provision."[142] If such a rule of interpretation "universally" prevailed in American states, it casts new light on the historical development of state constitutional law.

Others also saw a connection between borrowed provisions and their interpretation. During Nevada's 1864 convention, one delegate wanted to take advantage of fifteen years of the California Supreme Court's constitutional jurisprudence by modeling Nevada's Constitution on California's 1849 document.[143] Such ideas may have provided natural interpretative guidance to newly created constitutions, but they also suggest that the impact of borrowing went well beyond copying constitutional text.

The best expression of the potential dangers of the "borrowing" process of constitution-making was articulated by a delegate to California's second convention. He accused some of his fellow delegates of having "contracted the fatal habit of browsing through the

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140. *See supra* note 118 and accompanying text.

141. 1 CALIFORNIA DEBATES, *supra* note 61, at 185.

142. 1 *id.*

143. NEVADA DEBATES, *supra* note 71, at 15-16.

organic laws of the other states, borrowing enough to show a want of invention and inventing just enough to show a total want of judgment."[144] He then offered his understanding of the proper basis for constitutional borrowing:

> When there can be found in . . . the organic law of any other state, a terse, unmistakable expression of a broad, universal principle of government . . . it should be presented here for our consideration. But, when the principle of selection is carried to the extent of pressing upon our approval those special exceptional provisions of other organic laws which had their origin and growth in the peculiar circumstances and condition of the community for which they were framed; [they] are wholly unsuited to the political habits, modes of thought, and social wants of our own people.[145]

The California delegate thus reflected an interesting self-perception, namely that delegates perceived themselves as part of a broad American constitutional tradition and simultaneously as "Californians" or "Idahoans" who required distinctive constitutional arrangements.[146]

C. *Western State Constitutional Conventions and the Assumption that the Formation of the Federal Constitution Was the Crucial Period of American Constitutional Thought*

The tendency to focus on constitutional events from the Revolution to the formation of the Federal Constitution has misled scholars about constitutional practices and the development of constitutional ideas.[147] Moreover, the compression of the evolution of American constitutionalism within a dozen years after the Revolution overlooks an ongoing debate over the role of conventions and the implications of popular sovereignty. That debate occupied constitution-makers throughout the nineteenth century and played an important part in the development of American constitutionalism.

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144. 1 CALIFORNIA DEBATES, *supra* note 61, at 489.

145. 1 *id.*

146. *See, e.g.*, REPORT OF THE 1849 CALIFORNIA CONVENTION, *supra* note 60, at 113, 116; 1 IDAHO DEBATES, *supra* note 63, at 55, 290; 2 *id.* at 1120, 1623; NEVADA DEBATES, *supra* note 71, at 18; NORTH DAKOTA DEBATES, *supra* note 53, at 19-20, 103; OREGON DEBATES, *supra* note 100, at 141; WYOMING DEBATES, *supra* note 71, at 605.

147. *See supra* notes 45-51 and accompanying text. The traditional description of popular ratification and its significance is a good example of the dangers of assuming that a relatively modern understanding of constitution-making had been worked out by 1787. *Id.*

1. Formal Popular Ratification

The traditional account of the use of popular ratification in creating written American constitutions assumes that the role of popular ratification in constitution-making was clearly understood by the time of the Federal Constitution. While Massachusetts and a few other states inaugurated the procedure of popular ratification that the federal convention followed, many of the first state constitutions in the 1770s were created by legislatures without popular approval.[148] These lapses in constitutional practice have been explained in terms of an initial "unfamiliarity with constitution-making"[149] or, that in the 1770s "American political thought had not yet worked out the implications of the written constitution."[150] Despite this early trial and error period in drafting constitutions, the process of using a convention, followed by popular vote, was, according to one scholar, "apparently an accepted procedure by 1787."[151] Indeed, an historian of state constitution-making asserts that the perceived necessity of popular ratification emerged reasonably soon after the initial state constitutional experience.[152] Other scholars agree that while those first state constitutions failed to clearly distinguish ordinary and constitutional law, "in the next few years" the need for both constitutional conventions and ratification was understood.[153]

Modern scholars go astray in assuming that popular ratification was an indispensable part of the emerging American understanding of constitutionalism. That understanding hinged on a critical distinction between ordinary statutory law and constitutional law; popular ratification was not, however, an inevitable part of that distinction. Popular ratification was consistent with the underlying principle of popular sovereignty because ratification implied validation by "the

148. *See, e.g.*, ADAMS, *supra* note 14, at 63-98.

149. John V. Orth, Essay, *"Fundamental Principles" in North Carolina Constitutional History*, 69 N.C. L. REV. 1357, 1358 (1991).

150. LUTZ, *supra* note 7, at 82.

151. Robert F. Williams, *The State Constitutions of the Founding Decade: Pennsylvania's Radical 1776 Constitution and Its Influences on American Constitutionalism*, 62 TEMP. L. REV. 541, 579 (1989).

152. ADAMS, *supra* note 14, at 64.

153. Thomas C. Grey, *The Original Understanding and the Unwritten Constitution*, *in* TOWARD A MORE PERFECT UNION: SIX ESSAYS ON THE CONSTITUTION, *supra* note 14, at 155; *see also* Wood, *supra* note 11, at 924 ("When Massachusetts in 1780 and New Hampshire in 1784 wrote new constitutions, the proper pattern of constitution-making and constitution-altering was set: constitutions were formed or changed by specially elected conventions and then placed before the people for ratification.").

people," the ultimate source of political authority. Nonetheless, Americans would create constitutions without requiring popular ratification well into the nineteenth century and arguably did so without violating the principles of popular sovereignty. Popular ratification did not emerge as a common practice in American constitution-making until the 1830s.[154] While consistent with popular sovereignty, ratification was not theoretically mandated by that principle.[155]

In fact, the calls for popular ratification must be seen as part of a broader concern that the people were consulted in the process of constitution-making. The links between the necessity of consultation and popular sovereignty were clear to some Americans from the start of the Revolution. A petition to the Massachusetts legislature from the town of Pittsfield in 1775 claimed "the basic right of the citizenry to pass upon new constitutions."[156] The petition, written by Reverend Thomas Allen, asserted that since "the people are the fountain of power, . . . a representative body may form, but cannot impose said fundamental constitution upon a people."[157] Such representatives, as "servants of the people cannot be greater than their master and must be responsible to them. If this fundamental constitution is above the whole legislature, the legislature cannot certainly make it, it must be the approbation of the majority which gives life and being to it."[158] While Massachusetts led the way in such expressions, Americans in other states also expressed a desire for some form of popular ratification or

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154. Albert Sturm points out that nearly 40% of the 119 state constitutions drafted prior to 1900 were not ratified and that the practice of ratification only became widespread after 1828. Sturm, *Development of American State Constitutions*, *supra* note 4, at 57-58, 66; *see also* DEALEY, *supra* note 23, at 40, 46, 48 (popular ratification not routinely part of constitution-making until 1858); LOBINGIER, *supra* note 3, at 339 (popular ratification only generally accepted after 1830s); SCHOULER, *supra* note 3, at 186, 214-15 (popular ratification only routinely adhered to after 1835); Ernest R. Bartley, *Methods of Constitutional Change*, *in* MAJOR PROBLEMS IN STATE CONSTITUTIONAL REVISION 35 (William B. Graves ed., 1960) (popular ratification only became nearly universal and theoretically demanded in twentieth century); Schmidt, *supra* note 22, at 110 (acceptance of popular ratification emerged between 1815 and 1840).

155. This statement is supported by an analysis of nineteenth-century constitution-making, how delegates perceived constitutional conventions, and how they distinguished between ordinary law and constitutional law. *See supra* note 5. The purpose here, however, is simply to point out that popular ratification had not been resolved and coherently integrated into the process of constitution-making by the time of the drafting and ratification of the Federal Constitution.

156. Reardon, *supra* note 9, at 49.

157. *Id.*

158. *Id.*

consultation with the people. New York City mechanics in 1776 protested a proposal for framing a constitution without ratification by the voters, declaring: "It would be an act of despotism to put it in force by any other means."[159] The voters of several counties in North Carolina made similar demands that same year.[160]

What must be recognized in these calls for popular ratification is the underlying concern and insistence on a distinction between ordinary statutory law and constitutional law. The practice of ratification reflected the recognition that constitutional law derived from the people in their sovereign capacity. Popular sovereignty lay at the heart of American constitution-making, not the use of popular ratification. Indeed, there were early examples of the felt need to provide for indirect popular approval that stopped short of popular ratification. The convention that drafted Pennsylvania's first constitution refused to call for a second convention to ratify its work, but did adjourn for three weeks to allow public consideration and criticism; many of the suggestions advanced by members of the public were incorporated into the final version of the constitution, which the convention alone ratified.[161] The 1776 Pennsylvania Constitution carried forward the notion of consultation when it required that future proposed amendments be published six months before the election of delegates to constitutional conventions "for the previous consideration of the people, that they may have an opportunity of instructing their delegates on the subject."[162] Most important, those constitution-makers who refused to let the document be popularly ratified nonetheless defeated efforts to let Pennsylvania's first state legislature amend the constitution, thus establishing "a valuable precedent to preserve the distinction between constitutional and statutory law."[163] Numerous forms of such consultation—not formal or direct popular ratification—occurred in the Revolutionary period in ways consistent with the principle of popular sovereignty.

Ultimately, maintaining the distinction between ordinary and constitutional law constituted holding faith with popular sovereignty. The difference between "the power to legislate embodied in an elected representative assembly" as opposed to "the power to begin, end, or

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159. Tate, *supra* note 11, at 380.

160. *Id.*

161. John N. Shaeffer, *Public Consideration of the 1776 Pennsylvania Constitution*, 98 PA. MAG. HIST. & BIOG. 415, 415-37 (1974).

162. PA. CONST. of 1776 § 47.

163. Shaeffer, *supra* note 161, at 437; *see also* Adams, *supra* note 9, at 18 (discussing § 47 of the 1776 Pennsylvania Constitution and the import of not allowing the legislature to change the constitution).

alter the government of which that assembly was a part" was a central distinction in the development of the idea of the sovereignty of the people.[164] Indeed, Thomas Jefferson's well-known criticism of the 1776 Virginia Constitution primarily rested on the fact that "no special authority had been delegated by the people to form a permanent constitution," but rather the convention that drafted that constitution "had been elected for the ordinary purposes of legislation only, and at a time when the establishment of a new government had not been proposed or contemplated."[165] Blurring the distinction between ordinary and constitutional law was more disturbing to Jefferson than the absence of popular ratification. When he went on to dispute the "dangerous doctrine" that the people's acquiescence corrected the absence of original authority to frame a constitution, Jefferson was expressing the same concerns.[166]

It was possible to forego formal popular ratification and still maintain the distinction between ordinary versus constitutional law and adhere to popular sovereignty. The key rested on the perception of a constitutional convention: what authority did the delegates possess and what was their relationship to the people? The maintenance of the distinction between ordinary and constitutional law rested on the existence of a constituent power superior to the legislative power, i.e., the delegates' work was "considered the work of the people as opposed to their mere attorneys or representatives."[167]

The perception of conventions was not uniform or free from controversy. Indeed, disputes over its nature form a principal aspect of state constitution-making in the first 125 years of American history. Rather, the point is that, to the extent that conventions were described and considered emanations of popular sovereignty, their work could arguably be placed into effect without popular ratification. The conventions need not be seen as the people themselves, but only as the expression of the people in "their primary capacity."[168] To be sure, Jefferson and other critics demanding formal popular ratification may not have been fully satisfied, but conceiving of conventions as the embodiment of the people permitted the logical inference that the product of such a body was distinct from the ordinary legislative process and was endowed with a sufficient degree of sanction from the people themselves. While there is truth in saying that the use of constitutional

164. MORGAN, *supra* note 9, at 81.
165. Howard, *supra* note 31, at 837.
166. *Id.*
167. MORGAN, *supra* note 9, at 81.
168. *See* 1 CALIFORNIA DEBATES, *supra* note 61, at 194.

conventions became "institutionalized in the public law of the United States" by the 1780s, it remained unclear what role those conventions played in the process of constitution-making.[169] Delegates' perception of the power and utility of conventions in constitution-making was fiercely debated throughout the nineteenth century.

2. The Implications of Popular Sovereignty

The implications of popular sovereignty remained live issues within state constitutional conventions and the doctrine underwent a complex evolution in terms of how that power could and ought to be exercised in American constitution-making.[170] Popular sovereignty underlay the idea that the people could and should make their own governments and held the power to "revise, alter, or abolish" that government "at will."[171] The concept of a constitutional right of revolution had the obvious potential of destabilizing newly established governments if the people remained a force that rightfully could change their government at will. How this underlying right of the people could be exercised, and under what conditions, remained an open question well into the nineteenth century. Indeed, one of the lesser-known dimensions of American constitutional history concerns the rich tradition of circumvention conventions.[172]

169. Palmer, *supra* note 9, at 74.

170. The tendency to consider the formation of the Federal Constitution as the culmination of important constitutional ideas has led scholars to underestimate the power of the doctrine of popular sovereignty in American constitutional thought. The experience of the Federal Constitution and national politics has convinced most historians that the populist or potentially revolutionary implications of popular sovereignty were relatively quickly channeled within an institutional framework and constitutional structure. Moreover, constitutional scholars imply that the institutionalization of popular sovereignty was both inevitable and constitutionally self-evident. *See infra* notes 173-77 and accompanying text. *But see* HYMAN & WIECEK, *supra* note 38, at 5 (notwithstanding the failure of the Dorr Rebellion, "as a constitutional dynamic," popular sovereignty "remained paradoxically more potent than ever").

171. For examples of how popular sovereignty was expressed in some of the first state constitutions, see ADAMS, *supra* note 14, at 135-44.

172. *See* GREEN, *supra* note 22, at 203-10; Roy H. Akagi, *The Pennsylvania Constitution of 1838*, 48 PA. MAG. HIST. 301, 303-04 (1924); William K. Boyd, *The Antecedents of the North Carolina Convention of 1835*, 9 SO. ATL. Q. 161, 169-70 (1910); Fletcher M. Green, *Cycles of American Democracy*, 48 MISS. VALLEY HIST. REV. 3, 10-11 (1961); A. Clarke Hagensick, *Revolution or Reform in 1836: Maryland's Preface to the Dorr Rebellion*, 57 MD. HIST. MAG. 346 (1962); Howard, *supra* note 31, at 846; Bell, *supra* note 22, at 227; George P. Parkinson, Antebellum State Constitution Making: Retention, Circumvention, Revision (1972) (unpublished Ph.D. dissertation, University of Wisconsin).

These conventions were extralegal because they met without legislative approval, but sought their justification on the ground that popular sovereignty gave the people an inherent right to change their constitutions.

Scholars have traditionally characterized the unsuccessful assertion of the people's right to invoke their sovereignty outside established channels of government as an aberration in constitutional government. In the 1840s, Thomas Dorr led a movement for constitutional revision in Rhode Island that resorted to extralegal action after the existing government failed to initiate change. The so-called Dorr Rebellion culminated in a "People's Constitution" framed by his followers outside of the established government. Dorr and his followers justified their revision through a "peaceful revolution" by invoking the doctrine of popular sovereignty and traditional republican principles. The Dorr Rebellion and its aftermath is usually seen as the last significant assertion of a more radical version of popular sovereignty which lost any constitutional respectability when the United States Supreme Court rejected it in *Luther v. Borden*.[173]

Two leading scholars of the Dorr Rebellion, while sharply disagreeing in their interpretation, share the view that the defeat of Dorr's movement followed from the decline of any constitutional legitimacy of the literal use Dorr's followers made of the doctrine of popular sovereignty. George Dennison asserted that, within a decade of the Dorr incident, the idea of "peaceful revolution" had "fallen into disrepute."[174] "After 1857 no one much bothered with popular sovereignty. . . . Some radicals continued to profess loyalty to it as the fundamental principle of American government, but politicians cynically exploited it as a mere vote getting symbol."[175] Likewise, Marvin

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Bruce Ackerman in his analysis of *The Federalist* No. 40 describes the eighteenth-century foundation for what became a nineteenth-century tradition of circumvention conventions:

> [T]he highest form of political expression is not found in formal assemblies arising under preexisting law, but through an "irregular and assumed privilege" of proposing "informal and unauthorized propositions." If such proposals were accepted by irregular, but popularly elected, conventions, we are to understand that *the people themselves*—the words are italicized in the original—had spoken; and if the People approved the revolutionary elite's considered proposals, this could "blot out . . . errors and irregularities."

ACKERMAN, *supra* note 10, at 174 (quoting THE FEDERALIST No. 40 (James Madison)).

173. 48 U.S. (7 How.) 1 (1849).

174. GEORGE M. DENNISON, THE DORR WAR: REPUBLICANISM ON TRIAL, 1831-1861, at 7-8 (1976).

175. *Id.* at 202.

Gettleman suggested that Dorr's supporters lost because they were simply out of step with American constitutional thought: "They were not aware that the revolutionary principles of 1776 had already been ejected from the mainstream of American political conviction."[176] Moreover, the Supreme Court's decision rejecting the constitutional claims of Dorr in *Luther v. Borden* "indelibly registered" Dorr's defeat in American constitutional law and placed his ideas "even further" from "the mainstream of political life."[177]

In actual fact, for much of the nineteenth century, delegates to state constitutional conventions recognized a wide spectrum of constitutional revision. That range of understanding included a constitutional middle ground between revision in strict accordance with established procedures and, on the other hand, extralegal revision justified by the right of revolution. Many nineteenth-century constitution-makers considered this middle ground a constitutionally defensible and legitimate position between the extremes of the ultimate right of revolution and legally sanctioned constitutional revision under the existing government. The position taken by Dorr and his followers in Rhode Island rested on this constitutional middle ground.

Notwithstanding Dorr's failure and the Supreme Court's decision in *Luther v. Borden*, the notion of "peaceful revolution" figured prominently in discussions in constitutional conventions of the latter half of the nineteenth century. In debates throughout the nineteenth century, delegates clashed over the more revolutionary potential of popular sovereignty. The ultimate success of opponents to revolutionary expressions of constitutional authority does not diminish the serious attention that such arguments merit. Those losing arguments constituted a significant strain of constitutional thought for much of the nineteenth century. These ideas are lost to us in the twentieth century not merely because orthodox constitutional thought and tradition have no place for them, but also because American constitutional discourse has largely been defined as only what occurred in the Revolutionary period.

3. Republicanism, the Promise of Democracy, and the 1878 California Constitutional Convention

Closely linked to discussions of the nature of conventions and the implications of popular sovereignty were competing visions of the implications of republicanism and the promise of democracy. Delegates

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176. MARVIN E. GETTLEMAN, THE DORR REBELLION: A STUDY IN AMERICAN RADICALISM, 1833-1849, at 189 (1973).

177. *Id.* at 199.

who viewed the capacity for change in positive terms tended to regard conventions as an expression of popular sovereignty. As such, they accorded conventions powers and characteristics that followed from that status. On the other hand, those who chiefly valued stability saw conventions as potentially dangerous and revolutionary. Such delegates came to believe that conventions were limited by preexisting procedures and the constitutional provisions that called them into being.

An incident raising these far-reaching questions involved restrictions on delegate selection in California's 1878 convention. The issue was whether an elected delegate, also a district court judge, could participate given a provision of the 1849 constitution which made such judges "ineligible to any other office than a judicial office during their term."[178] At one level, debate focused on interpreting the word "office" and the applicability of the constitutional provision,[179] but the issue also provoked a fascinating discussion of whether constitutional conventions were, in some sense, revolutionary.[180] The deeper issue entailed the relevance, impact, and authority of a preexisting constitutional provision on a later constitutional convention. During the debate the question widened to whether the convention manifested popular sovereignty and was therefore beyond the control of a legislature, an enabling act, or even a preexisting constitution.[181] On the other hand, were constitutional conventions constrained to act in accordance with provisions that triggered their existence?[182]

Since establishing the credentials of delegates required a resolution before the convention began its work, this abstract question became the first major issue. Eventually, the convention seated the challenged delegate.[183] The controversy posed a rare instance in the course of constitution-making when such theoretical questions about the power and role of conventions were explicitly raised.

The convention approached this issue in a time-honored way: it appointed a special committee. The committee rendered a majority report recommending seating the delegate as well as a dissenting minority report. These two reports framed the ensuing debate. The majority

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178. CAL. CONST. of 1849 art. VI, § 16.

179. 1 CALIFORNIA DEBATES, *supra* note 61, at 172-216.

180. 1 *id.*

181. 1 *id.* at 183-84, 190-91, 200, 210.

182. 1 *id.* at 175, 199, 204, 211. As noted, the issue was capable of being decided on narrower grounds. Some delegates simply concluded that the pre-existing provision of the 1849 constitution did not apply and that no reason existed, therefore, to exclude the delegate.

183. However, the decision carried only by a vote of 74 to 49. 1 *id.* at 216.

report interpreted the intent of the constitutional provision as preventing judges from using their position to advance themselves in the executive or legislative departments. As such, the provision concerned the operation of the government created by the 1849 constitution and did not "anticipate what should be done under a succeeding Constitution."[184] Therefore, the majority report rejected as an overly narrow and literal interpretation a finding that membership in the present convention constituted an "office."

The majority report emphasized the extraordinary nature of a convention; the convention worked on a different level than the "every-day operations" of the executive, legislative, or judicial branches.[185] Rather, a convention

> outranks them all; it is their creator, and fixes limits to their spheres of action, and boundaries to their powers. It is occasional, exceptional, brief, and peculiar; it represents the people in their primary capacity, and forms the organic, fundamental, and paramount law of state. Its members are mere agents or delegates of the people, and they have no power to adopt or create, but, at most, can only propose and present to the people a draft of a constitution for their adoption or rejection.[186]

Therefore, confusing the process of making "new organic law" with normal governmental operations was akin to mistaking the architect of "a grand edifice with the people who subsequently occupy it."[187]

The authors of the majority report argued that the breadth of the provision on constitutional revision left the people "free to select whom they pleased."[188] Likewise, the statute calling the convention had no "limitation or restriction."[189] Indeed, in the final analysis, the majority could not "assume for a moment that the Convention which framed the present Constitution intended to trammel the succeeding generation in any such manner in the formation of a new or revised organic law."[190]

The minority report, on the other hand, claimed that the majority embraced a discredited theory of the sovereignty of constitutional conventions, a theory the minority expressly rejected. The minority acknowledged the people as the basis of government and their right to change that government, but in terms that were loaded with conservative

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184. 1 *id.* at 172.
185. 1 *id.*
186. 1 *id.*
187. 1 *id.*
188. 1 *id.*
189. 1 *id.*
190. 1 *id.* at 173.

meaning. Constitutional conventions could express public opinion, but conventions that swept aside constitutions and reduced society "into its individual elements" simply implied "revolution."[191] The minority did not countenance such a convention nor would they accept the implication that "every provision of the present Constitution, regulating the calling and purpose of this Convention, may be ignored at will."[192] Rather, the existing constitution continued to bind the present convention.

One argument by delegates stressing the non-revolutionary nature of the 1878 California convention rested on the existence of a state constitution. They suggested that the 1849 California Constitution had already altered the relationship between the people and the convention and that the present body did not represent the people in "their primary capacity."[193] Moreover, simply calling a new convention did not resolve the existing constitution "into chaos."[194] The 1849 California Constitution had continued validity.

Yet conventions implicitly operated with a greater competence than the existing constitution or legislature. Accepting both propositions meant acknowledging the role of constituent assemblies in republican governments as the practical embodiment of popular sovereignty. In the final analysis, resolving the implications of the theoretical commitment to popular sovereignty resisted easy answers because it entailed striking a balance with the American experience in self-government.[195]

In the end, nineteenth-century delegates disagreed over the powers of conventions. On the one hand, those who argued for a revolutionary potential stressed popular sovereignty and the role of the delegates as

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191. 1 *id.* at 175.

192. 1 *id.*

193. 1 *id.* at 194.

194. 1 *id.* at 199.

195. Another example of the sensitivity of those anxious about constitutional change emerged during the 1878 California convention's debate over a section of the bill of rights. The proposed section declared the right of the people "to alter or reform the [constitution] whenever the public good may require it." 3 *id.* at 1167. One delegate objected that such wording encouraged revolution and undermined the authority of the constitution. The "right of revolution is an ultimate right" but "not one to be provided for in the organic law, because it is not supposed that we will embody in the constitution the seeds of its own destruction." 3 *id.*; *see also* 3 *id.* at 1168.

Similarly, some delegates to the South Dakota convention of 1885 worried that language proclaiming the right of the people to "abolish" government might offend Congress. South Dakota was still a territory in 1885; thus, the constitution the South Dakota delegates drafted ultimately required congressional approval. 1 SOUTH DAKOTA DEBATES, *supra* note 71, at 340-62.

representatives of this ultimate political power. Their opponents emphasized the preexisting authority of prior constitutions as the manifestation of that popular sovereignty. They insisted that until existing constitutions were changed through the procedures spelled out in those documents, conventions possessed the limited power of merely making suggestions that required formal ratification by the people. Finally, they denied that delegates representing the people had revolutionary power. Such debates over the meaning of popular sovereignty and the power of constitutional conventions ultimately drew upon a general culture of nineteenth-century constitutionalism rather than anything peculiar to Western constitution-making. Most importantly, those debates are powerful arguments supporting the position that the Federal Constitution's framing did not conclude the American dialogue over essential constitutional questions.

V. CONCLUSION

Western constitutional conventions clearly regarded their work as important and part of a larger American tradition of crafting "fundamental law."[196] Occasionally, contemporary political disputes tended to overshadow this constitutional process. In the debate over the California Constitution's bill of rights in the 1878 California convention, one delegate complained that provisions of major significance were being adopted far too quickly. He compared the care and length of time John Adams took to draft the Preamble and bill of rights of the Massachusetts Constitution with the tendency of his fellow delegates. Unlike the seven months Adams spent composing "in the solitude of his chamber, we seem to think that we can come upon the floor of this convention and suck a stump of lead pencil for five minutes, take an old scrap of paper and prepare any amendment for the constitution of the state."[197] Notwithstanding such occasional complaints, Western constitution-making was hardly a departure from the tradition of nineteenth-century constitution-making initiated by the American Revolution generation.

How Western states created constitutions is revealing in a number of ways. First, it is clear that these states did not fashion their fundamental law in isolation or unaware of constitution-making in the other states. The notion of "frontier" constitution-making must be regarded as a myth. Sophistication among delegates and the work they produced varied, but in the process of drafting constitutions (and on one occasion

196. OREGON DEBATES, *supra* note 100, at 80.

197. 1 CALIFORNIA DEBATES, *supra* note 61, at 441.

revising an existing constitution), delegates to Western conventions demonstrated their connection with broader regional and national developments in constitutionalism.

Second, despite considerable attention to local concerns and substantive issues, Western state conventions disclose numerous similarities in the process and self-perception of constitution-making. These areas of agreement and their significance emerge when attention is shifted from the "westerness" of these conventions to the generic process of constitution-making.[198] In other words, it is necessary to look through the "Western" issues—not to ignore them—in order to focus on issues that challenged all constitutional conventions. Namely, how did Western delegates to conventions perceive their purpose, and the effect of the convention? Answers to these questions suggest that western delegates and constitutional conventions formed part of a broader, developing understanding of the nature and meaning of constitutions.

State constitution-making is central to the American constitutional tradition. State constitutional conventions became the principal forum within which nineteenth-century Americans struggled over the ultimate shape of republican government with respect to the critical issue of what role and power "the people" had in controlling their government. The Federal Constitution provided one possible answer to this fundamental question for governments founded on popular sovereignty. The principle that all legitimate governmental authority rested on the consent of the people could manifest itself in a number of ways, varying the emphasis on the involvement of the people in government and constitutional revision. The system of checks and balances of the Federal Constitution emphasized a circumscribed popular representation and discouraged future constitutional revision.

State constitutions, however, from the eighteenth century and throughout the nineteenth century offered other, sometimes strikingly different, answers to the central question of what role the people would play in constitutional government. Indeed, the nineteenth-century convention debates reveal an ongoing struggle between advocates for a more restricted, more controllable role for the people in government and

198. Many of the regional studies of state constitutionalism, *see supra* note 22, suffer from an overemphasis on the peculiarities or local issues of the region under study. *See also* JOHNSON, *supra* note 21 (positing three distinct political cultures in which constitution-making occurred in California, Oregon, and Nevada); Christian G. Fritz, *Rethinking the American Constitutional Tradition: National Dimensions in the Formation of State Constitutions, in* THE CALIFORNIA SUPREME COURT HISTORICAL SOCIETY YEARBOOK 101-23 (Harry N. Scheiber ed., 1994) (essay review of JOHNSON, *supra* note 21).

those who favored a less restricted and more direct role for the people. The debate over this issue occurred in the states, not only because no further federal conventions were held, but because the issues of governmental control were most relevant at the state level. Moreover, how representation occurred and would be apportioned within government became another important subject of constitutional change. Suffrage and the nature of representation proved to be matters beyond legislative competence and would only be finally determined by state constitutional conventions or through constitutional amendment. The changing nature of representation and the extension of suffrage are only two of many examples of how state constitutions reflect "the progress of democracy" in America.[199]

The issue of the people's role in government became a matter of constitutional theory that underlay virtually all nineteenth-century constitutional conventions producing an ideological split among constitution-makers. Constitutional questions that remained after one defined "the people" included how the people could and should participate in the formation and revision of constitutions and what limit should be placed on the exercise of popular sovereignty. These questions involved an understanding of constitutional conventions, their powers and possible limits, and whether "the people" could act independently of the existing legislature. On all these matters, delegates differed along lines reflecting their assumptions about what the principle of popular sovereignty implied for American republican governments.

How delegates viewed popular sovereignty, constitutional conventions, and constitutional revision influenced more than simply the perception of written constitutions and opinions on the role the people played in constitutional governments. Indeed, many of the important substantive issues that preoccupied state constitution-makers during the nineteenth century turned on finding a constitutional basis for political, economic, or social choices. For example, debates over suffrage routinely involved disputes over whether the vote was a natural or political right. The fierce struggles over the regulation and control of corporations, the allocation of natural resources, and the takings of private property routinely hinged on whether the constitution could grant legislative powers that might interfere with vested contract or property rights. Additionally, debates over support for public education and welfare raised questions about whether and to what extent such governmental funding had constitutional legitimacy.

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199. Elmer H. Meyer, *The Constitution of Colorado*, 2 IOWA J. HIST. & POL. 256 (1902).

Ultimately, state constitution-making challenges the traditional view of the American experience with written constitutions. The underlying basis of American constitutional government and the significance of written constitutions must be reconceptualized after incorporating the thought and self-perception of nineteenth-century state constitution-makers into the American constitutional tradition. This state constitutional tradition is indispensable for correctly assessing the power and meaning of constitutional thought in America. What that collective experience of constitution-making conclusively illustrates is that the formation of the Federal Constitution in 1787 represented only the genesis of American constitutionalism and the American constitutional tradition. Indeed, the eighteenth-century experience of which the Federal Constitution was a part reflected early experimentation with republican constitution-making. The nineteenth century proved to be a time for important development of those concepts, and the states were the locus of that evolution.