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The American tradition of constituent power

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How do "the people" exercise their revolutionary right to replace the existing constitutional order? The conventional answer is that the people act through specially elected constitution-making bodies like constitutional conventions. But what powers must these specially elected institutions—as the representatives of the people—wield? Must they possess the inherent power to, for instance, unilaterally change the ratification requirements? Or, even if they must submit their drafts to a popular referendum, must they have inherent power to pass laws or displace existing government prior to a referendum? These questions have recently re-emerged in constitutional transformations around the world. Constitution-making bodies with broad inherent legal powers—justified as necessary for revolutionary expressions of the popular voice—have allowed strong partisan factions to use constitution-making to consolidate power. Some scholars—citing recent practice—have argued that we should abandon the revolutionary tradition altogether. A recovery of American debates about the powers of constitution-making bodies, however, shows that these runaway bodies are not necessary to a revolutionary expression of constituent power. On the contrary, the American approach to constituent power presents strong reasons why a revolutionary exercise of constituent power requires an elected constitution-making body to be a proposing body with limited legal powers.

Introduction

> [W]henever any Form of Government becomes destructive of [its] ends, it is the right of the People to alter or abolish it, and to institute new Government. . . .[1]

It is an axiom of democratic constitutional theory to say that "the people" hold the sovereign "constituent power" to remake their constitutional order through specialized constitution-making bodies that exist outside the normal legal system.[2] But this

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1 The Declaration of Independence ¶ 2 (U.S. 1776).

2 *See, e.g.*, Gabriel Negretto, *Replacing and Amending Constitutions: The Logic of Constitutional Change in Latin America*, 46 Law & Soc'y Rev. 749 (2012) ("The enactment of a new constitution supposes the irruption

revolutionary concept of constituent power obscures "many complexities."[3] One of the most important complexities—and one that has recently emerged in constitution-making around the world—involves the inherent legal powers and authority of elected constitution-making bodies. Looking to largely forgotten debates from the American tradition of constituent power, this article will argue that the people's revolutionary right to exercise their constituent power does not require—as the conventional wisdom holds—that elected constitution-making assemblies be inherently sovereign, "runaway" bodies with vast inherent legal powers to pass law or displace existing government on their own.[4] Instead, this American debate shows the opposite: There are strong reasons why a revolutionary exercise of constituent power requires an elected constitution-making body to be a body focused solely on proposing constitutional change.

Constituent power in the United States is textually grounded in the "alter or abolish" clauses in many state constitutions' Bills of Rights as well as the Preamble and Ninth, and Tenth Amendment of the US Constitution.[5] But how do we recognize that "the people" have exercised their constituent right to remake the constitutional order if they act outside the law? The dominant answer holds that because the people are too numerous to exercise this power themselves, they exercise their revolutionary right to constituent power by acting through an extraordinary agent: a temporary and elected constitution-making assembly such as a constitutional convention or constituent assembly.[6] This constitution-making body in turn helps to circumvent entrenched elites as well as link the constitution with the limitless constituent power of the people.[7] This model is drawn from the eighteenth-century French and American practice of employing elected constitution-making bodies to draft new constitutions.

But, given their nature as representative of the people, what are the precise powers of elected constitution-making conventions beyond proposing a constitution? As an elected representative of the people, must a convention also possess broad, inherent powers to ignore preexisting law or constraints, for instance, by unilaterally changing the requirements for constitutional ratification? Or, even if it must submit its draft to a popular referendum, must these bodies have the inherent power to pass law, appoint

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of the constituent power of the people, which finds no limits in the existing constitution and implies in practice its legal abrogation.").

3 Mark Tushnet, *Constitution-Making: An Introduction*, 91 Tex. L. Rev. 1987, 1989 (2013).

4 *See, e.g.*, Joel Colon-Rios, *Notes on Democracy and Constitution-Making*, 9 New Zealand J. Public & Int'l L. 17, 28 (2011) (discussing how a constitution-making body can emerge as a "parallel power that somehow is closer to the true will of the people").

5 *See, e.g.*, Christian Fritz, American Sovereigns: The People and America's Constitutional Tradition Before the Civil War 291 (2008) (discussing textual guarantees of constituent power in the Bills of Rights in American state constitutions); Akhil Amar, *The Consent of the Governed: Constitutional Amendment Outside of Article V*, 94 Colum. L. Rev. 457 (1994) (situating constituent power in the text of the Preamble and the First, Ninth, and Tenth Amendments).

6 See, e.g., Joel Colon-Rios, *The Legitimacy of the Juridical: Constituent Power, Democracy, and the Limits of Constitutional Reform*, 48 Osgoode Hall L.J. 199.

7 William Partlett, *The Elite Threat to Constitutional Transition*, 56 Va. J. Int'l L. 407 (2016).

new officials, or displace existing institutions? Or, can these powers be limited consistently with constituent power?

Constituent power theory does not provide clear practical answers to these questions. Constituent power is, however, viewed as a force closely linked with the "right to revolution"[8] and therefore something that requires "no limits in the existing constitution and implies in practice its legal abrogation."[9] Under this revolutionary approach, many argue that elected constitution-making bodies must themselves possess inherent legal powers to issue ordinances with the power of law or displace existing institutions or if they so choose.[10] This approach draws heavily from the eighteenth-century French practice of constitution-making which saw the French National Assembly as not only a proposing body but also a provisional government with the inherent power to pass laws and disband constituted powers even before the passage of a new constitution.

This article will examine the unique American approaches to this question. These largely forgotten debates show that a significant number of prominent American constitutional thinkers and courts reasoned that the proper exercise of the people's constituent power does not require constitutional conventions to be revolutionary bodies with broad, inherent powers to coopt or displace existing legal institutions. On the contrary, they argued that constituent power requires conventions to have the power to *propose* constitutional language but not the unilateral authority to pass laws or alter constitutional arrangements.

Underlying this idea is the agency concept that the people (the "principal") cannot delegate their unlimited power to a body of representatives (the "agent"). A full delegation of the people's constituent power to representatives in a constitution-making convention would mean those representatives would be sovereign and not the people as a whole (therefore undermining the people's voice).[11] Thus, agency principles require that the people only delegate *part* of their sovereign power to a convention—in this case, the power to *propose* a constitution. They reserve the remainder of their sovereign power to ratify or reject the constitutional draft proposed by the constitutional convention.

A recovery of this American idea of an extraordinary constitution-making body as a *proposing body* has significant relevance to a critical, emerging question in the practice of constitutional transformation around the world.[12] In many countries, revolutionary constitution-making bodies have claimed inherent powers to replace the

[8] Joel Colon-Rios & Andrew Hutchinson, *Democracy and Revolution: An Enduring Relationship*, 89 Denv. U. L. Rev. 593, 599 (2012).

[9] Negretto, *supra* note 2, at 751.

[10] Jon Elster, *Forces and Mechanisms in the Constitution-Making Process*, 45 Duke L.J. 364, 375 (1995) (describing the convention as "the King" and the existing authorities as "the kingmaker."); Christian Fritz, American Sovereigns: The People and America's Constitutional Tradition Before the Civil War 291 (2008) (arguing that the idea of rule of law is "inconsistent with the notion that a sovereign people could not be bound even by a fundamental law of their own making").

[11] Raymond Ku, *Consensus of the Governed: The Legitimacy of Constitutional Change*, 64 Fordham L. Rev. 535, 569 (1995).

[12] David Landau & Ros Dixon, *Constraining Constitutional Change*, 50 Wake Forest L. Rev. 859 (2015).

constitutional order. These claims have in turn undermined deliberation and compromise in constitution-making. From Latin America to the former Soviet republics, powerful factions have gained control of the revolutionary constitution-making bodies and then argued that these bodies inherently possess the absolute power to pass laws or displace existing government.[13]

Constitutional theorists have struggled to refute these revolutionary arguments of inherent legal power.[14] One of the most compelling attempts is the creation of the concept of "post-sovereign" constitution-making.[15] This idea completely rejects the revolutionary constitution-making tradition in favor of an approach where the people act through legally constituted bodies. But this approach begs an important question: Must we deny the revolutionary tradition of constituent power altogether to avoid runaway bodies and improve the process of constitution-making?

The recovered American tradition provides an important answer. In particular, the agency approach of the American tradition suggests that runaway or sovereign conventions are actually *incompatible* with a true conception of the revolutionary constituent power of the people. A convention with such inherent powers denies the whole people the right to engage in constitution-making by delegating sovereign power to a group of representatives. A limited constitution-making body that has the power to propose a constitution (and no inherent power to replace or coopt existing institutions), by contrast, actually allows the people to express their sovereign constituent power. This approach therefore helps us understand how a revolutionary tradition of constitution-making can be reconciled with a process of constitutional creation that involves a limited constitutional convention.

To make this argument, this article traces the distinctive American approach to constituent power and the inherent powers of constitution-making bodies. Section 1 will describe the dominant belief that a revolutionary expression of constituent power requires broad inherent powers in constitution-making bodies, the basis for this approach in the practice of French revolutionary constitution-making, and its problems in recent constitution-making practice. Section 2 will begin an understanding of the American agency approach to constituent power, describing how Founding-era Americans saw conventions not as unlimited representatives of the people but instead as proposing bodies. Section 3 will describe nineteenth-century, state-level debates about the powers of conventions and their resolution in important court cases. Section 4 will describe how the secession movement in the American South relied heavily on claims of runaway powers invested in constitutional conventions to avoid deliberation on secession. Section 5 will detail how postbellum scholars and courts strongly

[13] William Partlett, *The Dangers of Popular Constitution-Making*, 38 Brooklyn J. Int'l L. 193 (2012) (analyzing the former Soviet republics); David Landau, *Abusive Constitutionalism*, 47 U.C. Davis L. Rev. 189 (2013) (analyzing Latin American examples).

[14] David Landau, *Constitution-Making Gone Wrong*, 64 Ala. L. Rev. 923, 947–948 (2013) (discussing the difficulty Venezuelan courts faced in countering these arguments).

[15] Andrew Arato, *Redeeming the Still Redeemable: Post Sovereign Constitution Making*, 22 Int'l J. Pol. Culture & Soc'y. 427, 428 (2009) (Andrew Arato describes the new approach as one in which Framers "[a]pply constitutionalism not just to the result but also to the democratic process of constitutionalism.").

advocated the idea that constitutional conventions should have limited power. Section 6 will describe how postbellum state courts have helped contribute to a common law of constituent power that limits the power of state-level conventions. Section 7 will conclude.

1. Constituent power, revolution, and the inherent power of constitution-making bodies

In the revolutionary tradition, a new democratic constitution is an expression of the people's "constituent power," a force which finds "no limits in the existing constitution and implies in practice its legal abrogation."[16] This vision of constitutional replacement as a kind of legal revolution conventionally assumes no place for limited institutions. On the contrary, the exercise of the people's original constituent power through constitutional replacement requires constitution-making bodies with broad, inherent powers in order to free the people to create a new constitution.[17]

1.1. Theory of inherent powers and the French revolutionary tradition

Underlying the perceived revolutionary necessity of inherent legal powers in constitutional convention is a dualist theory of popular action in democratic politics. During periods of ordinary lawmaking, the people (the principal in democratic theory) operate indirectly through *ordinary* representative bodies like legislatures ("constituted" powers) and are limited by judicially enforced constitutional law.[18] The people have "limited engagement in public life" during these times of ordinary politics: citizens vote but otherwise take relatively little account of public affairs.[19] In this form of "lower lawmaking," courts are justified in limiting the actions of ordinary popular agents like legislatures and administrative agencies.

During moments of constitutional lawmaking, however, the people themselves *directly* exercise their sovereign rights of constitutional authorship.[20] This moment of "original constituent power" is necessarily a revolutionary time when "the legal system has come to a point of discontinuity" and requires "forms of politics beyond law."[21] It cannot therefore be cabined within ordinary politics or legality and instead must involve extraordinary institutions like constitutional conventions.[22]

[16] Negretto, *supra* note 2, at 751 (describing how constitutional theory views constitution-making as "a sovereign decision of the people, which should take place only during extraordinary times, as in a revolution or in the midst of a major political crisis.").

[17] Colon-Rios, *supra* note 6, at 236–240 (discussing the importance of unlimited constituent assemblies to a democratic constitution-making moment).

[18] Bruce Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 Yale L.J. 1013 (1984).

[19] *Id.* at 1034.

[20] Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 Yale L.J. 453 (1989).

[21] Laurence Tribe, *A Constitution We Are Amending: In Defense of a Restrained Judicial Role*, 97 Harv. L. Rev. 433, 436 & n.13 (1983).

[22] Bruce Ackerman, We the People: Foundations (1991). Ackerman also avoids openly using the term "constituent power."

These inherent powers might be expressed in various ways. First, in its broadest manifestation, these powers might require that a constitution-making body possess inherent powers to reshape the entire legal landscape, including completely ignoring the ratification requirements or a popular referendum. Most frequently, however, a narrower conception is put forward that an extraordinary constitution-making body must submit its draft to a popular referendum but otherwise has broad inherent powers to pass laws or displace existing government in the period before ratification.

Theorists argue that these inherent powers are the only way to allow "the people" to act in their revolutionary capacity.[23] In particular, an unlimited constitution-making body symbolizes that the constitution is not a "contract, negotiated by appropriate representatives, concluded, signed, and observed" but instead is a product of the people's direct will.[24] To limit constitution-making bodies would deny the people their status as the sovereign in making new constitutional law and frustrate later attempts to justify the constitution as truly an action of "the people."[25] Linked to the limitless constituent power of the newly liberated people, new constitutions would be protected "against erosion by political elites who had failed to gain broad and deep popular support for their innovations."[26]

The perceived necessity of these inherent powers are supported by the French approach to constitution-making. The key theorist in this French revolutionary tradition is Abbé Emmanuel-Joseph Sieyès. In his famous book *What Is the Third Estate?*, Sieyès outlined a dualist vision of constitutionalism that sees the people—or the "the Nation" as he calls them—acting in two capacities in a democracy.[27] The Nation most often acts through "constituted powers" (*pouvoir constitue*) within preestablished rules. In exceptional situations, however, the Nation exercises its sovereign "constituent power" (*pouvoir constituant*) to repudiate all existing legality and establish a new governmental system of "constituted powers," such as a parliament, an executive, or courts.[28]

Sieyès argued that the people's constituent power should be expressed in a period of extraordinary politics involving an assembly that "takes the place of the assembly of the nation."[29] Once the Nation has invested its entire sovereign power in this extraordinary assembly, it is free "from any constitutional forms"[30] and its actions bear the same power as the "common will of the nation itself."[31] It therefore logically follows that the majority in this assembly, acting without limitation in a form of politics

[23] Colon-Rios, *supra* note 6.

[24] Vivien Hart, *Democratic Constitution Making*, 107 U.S. Inst. of Peace, Special Report 1 (2003), *available at* http://www.usip.org/sites/default/files/resources/sr107.pdf.

[25] Paul W. Kahn, Political Theology: Four New Chapters on the Concept of Sovereignty (2011) (explaining how "the state begins and ends with a belief in the sacred character of the popular sovereign").

[26] Ackerman, *supra* note 22, at 10.

[27] Emmanuel-Joseph Sieyès, What Is the Third Estate? (M. Blondel trans., Pall Mall Press, 1963) (1789).

[28] *Id.* at 136–139.

[29] *Id.* at 130.

[30] *Id.* at 131.

[31] *Id.* at 131.

resembling a state of nature, has the power to issue laws or rearrange the organization of power without limitation prior to the passage of a new constitution.[32]

The French revolutionaries implemented Sieyès's dualistic vision in the months and years following the gathering of the Estates-General in Versailles in 1789. The Estates-General was traditionally divided into three medieval orders: the clergy (First Estate), the nobles (Second Estate), and the rest of the French population (Third Estate).[33] Sieyès argued that the Third Estate—or what he called the Nation—should assert their rightful place as the authors of a new French Constitution.[34] On June 10, the Third Estate broke with this preexisting system and invited the clergy and the nobles to join them as a unicameral national assembly.[35] The Third Estate renamed itself the National Assembly on June 17, 1789.[36]

On July 7, the Assembly appointed a committee to write a new constitution and fundamentally reshape the political organization of the French state. On that day, "the Assembly was a constituent Assembly."[37] The Assembly also regarded itself as having a number of inherent lawmaking powers. In August 1789, the National Assembly passed the Declaration of the Rights of Man, declaring that "all sovereignty resides essentially in the nation. No body nor individual may exercise any authority which does not proceed directly from the nation." This Declaration provided the grounding for the claim that the Assembly could not only propose a new constitution but also displace existing institutions prior to the ratification of a new constitution.[38] The National Assembly then proceeded to sweep away preexisting institutions and laws: By the end of 1789, "the three estates of the kingdom no longer existed, provinces had been abolished, the *parlemants* suspended."[39] In 1792, it formally abolished France's last constituted power: the King.[40]

With the fiction of the King's consent no longer necessary, the National Convention enjoyed "full and unqualified powers. By law and in fact it now had dictatorial powers."[41] This all-powerful body then drafted a new constitution in 1793—the Constitution of Year One—and submitted it to the people in a referendum. The concept of an all-powerful body of constitutional revision was codified in Article 116 of

[32] *Id.* at 124 ("[T]he nation is prior to everything. It is the source of everything. Its will is always legal; indeed it is the law itself. Prior to and above the nation, there is only natural law.").

[33] Eric Nelson, *Defining the Fundamental Laws of France: The Proposed First Article of the Third Estate at the French Estates General of 1614*, 115 English Hist. Rev. 1216, 1217 (2000).

[34] *See* Sieyès, *supra* note 27.

[35] Georges Lefebvre, The French Revolution: From Its Origins to 1793, at 112 (Elizabeth Evanson trans., Routledge, 1962) (1930). .

[36] Michael Steven Green, *Legal Revolutions: Six Mistakes About Discontinuity in the Legal Order*, 83 N.C. L. Rev. 331 (2005).

[37] Lefebvre, *supra* note 35, at 114.

[38] Janine Lanza, *"What Is the Law If Not the Expression of the Rights of Man and Reason?" The Champ De Mars Massacre and the Language of the Law*, 19 Law & Hist. Rev. 283 (2001).

[39] Michael Fitzsimmons, The Remaking of France: The National Assembly and the Constitution of 1791, at xi (2002).

[40] *Id.* at 264.

[41] Lefebvre, *supra* note 35, at 265.

the new constitution, describing that a "national convention . . . is formed in like manner as the legislatures, and unites in itself the highest power."[42]

Without external constraint, a succession of groups within the National Convention claimed to embody the absolute power of the people's constituent power. In this way, France's extraordinary constitution-making body itself became the model for the idea of inherent powers in the exercise of revolutionary constitution-making.

1.2. Reality of runaway conventions

The revolutionary necessity of inherent powers in constitution-making institutions has more recently been seen in the practice of constitution-making in Latin America. For instance, the Venezuelan Constitution mandates that a National Constituent Assembly represents the "original constituent power" of the people and therefore it cannot be "obstruct[ed]" by "existing constituted authorities."[43] Furthermore, the Colombian Constitution states that the powers of the ordinary legislature will be "suspended" during the constitution-making process so that "the Assembly may fulfill its functions."[44]

The presence of these inherent powers has had problematic effects. For instance, much as in revolutionary France, Venezuelan President Hugo Chavez claimed that the National Constituent Assembly had vast powers to pass laws and dismiss existing officials.[45] After gaining control of a majority of the convention, Chavez declared that the Constituent Assembly held "original" powers and all existing institutions would have "to subordinate themselves not only to the word but to the concrete fact, before the sovereign mandates that emanate from here, before this center of light."[46] Chavez's Assembly then went on to severely curtail the powers of the existing constituted powers (including the legislature). Although he submitted the draft to the people in a referendum, the Assembly's moves to dismember existing authorities helped to ensure that the Assembly dominated politics for the ensuing referendum. This process did not lead to full participation but instead to "the imposition of the will of one political group upon the others and upon the rest of the population."[47]

However, a growing number of countries have rejected this revolutionary approach to constitution-making. For instance, constitution-makers in Poland, Hungary, and South Africa drafted new constitutions through ordinary institutions that had specific powers and limitations. In many cases, this process was regulated by law or even a preexisting constitution. In South Africa, the Constitutional Court was empowered to review the proposed constitution before it was ratified. Andrew Arato has called this new form of constitution-making "post-sovereign

[42] Henry Lockwood, Constitutional History of France 312 (1890).

[43] Venezuelan Cons., arts. 347 & 349.

[44] Colombia Const., art. 376.

[45] Landau, *supra* note 14, at 946–947.

[46] *Id.* at 946.

[47] Allan R. Brewer-Carias, *The 1999 Venezuelan Constitution-Making Process as an Instrument for Framing the Development of an Authoritarian Political Regime*, *in* Framing the State in Times of Transition 522 (Laurel Miller ed., 2010).

constitution-making" and contrasts it with the revolutionary constitution-making approach.[48] He describes this as a "dramatic *new* method of constitution-making" where "We the People" are identified by "prior electoral and other procedural rules that must be given to the people by elites who thereby constitute them as a people capable of action."[49]

1.3. A key question

To what extent must we abandon concepts of original constituent power and revolutionary constitution-making in order to improve the practical reality of constitution-making? This article will look to the American tradition of constitution-making to answer this question. This tradition demonstrates a different way of thinking about constituent power—one in which the revolutionary expression of the people's constituent power is compatible with an extraordinary constitutional convention that does not possess inherent powers to either ignore a popular referendum or displace existing institutions on its own. This tradition therefore suggests that the revolutionary tradition need not be abandoned.

2. The Founding period

Founding-era Americans strongly believed that the people had the revolutionary constituent power to remake their constitutional order. But they explicitly rejected the possibility that this unlimited power could ever be delegated to a single body of representatives in a convention. Such delegation, they argued, would usurp the sovereignty of the people.[50]

As one colonist stated in 1787, "it would be an absurd surrender of liberty to delegate full powers to any set of men whatever."[51] The Massachusetts General Court proclaimed that "[s]omewhere, a Supreme, Sovereign, absolute, and uncontroulable Power" must exist but this "Power resides, always in the body of the People, and it never was, or can be delegated, to one Man, or few."[52] Gordon Wood explained that Founding-era Americans saw conventions as "legally deficient bod[ies]."[53] In particular, they were developing a special concept of representation in which the "[t]he power of the people outside of government [as] always absolute and untrammeled" but the power of their delegates "could never be."[54] J. G. A. Pocock explained that the early Americans never delegated full power to one body but instead "asserted that there was

[48] Arato, *supra* note 15, at 427.

[49] *Id.* at 437–438.

[50] Daryl Levinson, *Parchment and Politics*, 124 Harv. L. Rev. 657, 666 (2011) (describing how the Founders were particularly worried that "dominant factions of the electorate to capture government for their own selfish ends, including, especially, the oppression of minorities.").

[51] Hartford Conn. Courant, Apr. 2, 1787.

[52] Gordon Wood, Creation of the American Republic, 1776–1787, at 362 (1969).

[53] *Id.* at 312.

[54] *Id.* at 389.

a plurality of modes of exercising power and that every one of these . . . constituted a separated mode in which the people chose to be represented."[55]

In Founding-era America, therefore, the central question of the popular exercise of constituent power was a way to "control and restrict the elected representatives in their power."[56] To do this, representatives in specialized constitutional conventions were seen as exercising limited power that would help the people to ratify a new constitutional document.[57] A prominent South Carolina politician, Thomas Tudor Tucker, relied on agency principles in explaining that all of the people's delegates—even those in a constitutional convention—therefore had limited powers:

> [d]elegates may be sent to a convention with powers, under certain restrictions, to frame a constitution. Delegates are sent to the General Assembly with powers, under certain restrictions prescribed . . . by a previously established compact or constitution to make salutary laws. . . if either one or the other should exceed the powers vested in them, their act is no longer the act of their constituents.[58]

2.1. State constitution-making

State-level constitution-making represented Americans' first experience with the practical exercise of constituent power. During the immediate post-independence period, Americans began to question how to entrench state constitutions beyond the reach of ordinary legislative lawmaking.[59] After initially drafting many constitutions through ordinary legislatures, a specialized constitutional convention gradually emerged as the solution. For instance, in *Notes on the State of Virginia*, Thomas Jefferson argued that a specialized form of politics involving "special conventions" was necessary to allow the people of Virginia to establish "a form of government unalterable by ordinary acts of assembly."[60] In Pennsylvania, radical supporters of a specialized constitution-making convention argued that a convention was the only body capable of formulating a "sett of fundamental rules by which even the supreme power of the state shall be governed."[61]

Founding-era Americans rejected the idea that representatives within these specialized constitutional conventions would have unlimited legal power. Instead, representatives in these irregular constitution-making bodies were screened and limited by constituent instructions from preexisting bodies: towns and counties.[62] Furthermore,

[55] J. G. A. Pocock, The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition 521 (1975).

[56] Wood, *supra* note 52, at 376.

[57] John Jameson, *Early Political Uses of the Word Convention*, 3 Am. Hist. Rev. 477 (1898).

[58] Thomas Tudor Tucker, Conciliatory Hints, Attempting, by a Fair State of Matters, to Remove Party-Prejudices 25–26 (1784).

[59] Wood, *supra* note 52, at 308. In the beginning of the construction of dualism, Americans were particularly interested in how to "put their constitutions beyond the reach of mere legislative acts." *Id.*

[60] *Id.* at 309.

[61] *Id.* at 337.

[62] Kris Kobach, *May "We the People" Speak?: The Forgotten Rule of Constituent Instructions in Amending the Constitution*, 33 U.C. Davis L. Rev. 1, 27–57 (1999).

these constitutional conventions had no power beyond proposing a constitution. In Delaware, radicals argued that if a specialized convention went beyond its delegated powers of proposing a new constitutional order, it would become a body of "usurpers and tyrants."[63] Implicitly speaking in the language of agency law, they were careful to stress that the convention had to be convened for this "especial purpose" so as not to leave the people "with no rights at all."[64] They argued that this body was to be "invested with powers to form a plan of government only, and not to execute it after it is framed. For nothing can be a greater violation of reason and natural rights, than for men to give authority to themselves."[65] Thus, they saw a clear division of power between legislatures and assemblies: "[c]onventions . . . are the only proper bodies to *form* a constitution, and Assemblies are the proper bodies to make Laws agreeable to that constitution."[66]

This emerging conception of constituent power is perhaps best exemplified in the process of constitution-making in Massachusetts. The people of Massachusetts did not see the power of the people exercised by "any other entity than the people as a whole."[67] Thus, they simply did not see the "drafting of the constitution [as] a site of constituent activity."[68] They instead argued that constituent power cannot be delegated because framers become "greater than the people who send them" and obtain "uncontroulable Dominion over their constituents."[69] They also simply saw constituent power as simply "inalienable."[70] Thus, the Massachusetts constitutional convention itself only had the power to propose a constitution; the Massachusetts Constitution went into effect only after having been approved by the people acting through their towns.[71]

2.2. Federal constitution-making

This same view of constitutional conventions as proposing bodies emerged at the federal level. The Philadelphia Convention has become famous for ignoring limitations on its powers; for that reason it has been compared with the French National Assembly. But the Philadelphia Convention had *no* inherent powers to reshape the existing American constitutional order. It could not—as the French National Assembly did—claim the authority to unilaterally disband existing institutions such as the Continental Congress or itself call into existence the ratifying conventions.

63 Wood, *supra* note 52, at 333.

64 *Id.* at 337.

65 *Id.* at 338.

66 *Id.*

67 Jeffrey Lenowitz, *Why Ratification? Constituent Power and The Unexamined Procedure*, in Le Pouvoir Constituent et l'europe 25 (Oliver Cayla & Pasquale Pasquino, eds. 2011).

68 *Id.* at 26.

69 Statement of Berkshire County Representatives, Nov. 17, 1778.

70 Lenowitz, *supra* note 67, at 26.

71 Willi Paul Adams, The First American Constitutions: Republican Ideology and the Making of the State Constitutions in the Revolutionary Era 93 (1980).

Instead, the Philadelphia Convention was embedded in the existing institutional landscape. The Convention was called into being by the state legislatures and these legislatures closely controlled their representatives or "Commissioners."[72] Perhaps the most famous example are the instructions from the Delaware state legislature that forbade its commissioners "from altering the Fifth Article of the Articles of Confederation, which provided that each state had a single, equal vote in Congress."[73] This instruction was later codified in the future Article V, which does not allow amendments that would rob states of their equal representation in the Senate.

In Federalist 40—which is mistakenly cited as support for the illegality of the ratification process—Madison described the powers of the Philadelphia Convention. Madison first commented that the powers of the Philadelphia Convention "ought, in strictness, to be determined by an inspection of the commissions given to the members by their respective constituents."[74] Madison also explained that the convention was consistently authorized by preexisting bodies. He questioned how the Philadelphia Convention had "usurped" any power when it had been sanctioned by both state legislatures and the Continental Congress.[75]

Furthermore, no state was forced to participate in the new constitutional order without its consent.[76] In fact, Article VII of the new proposed constitution clearly stated that the ratification of the new draft would only bind the states that ratified and "[s]tates could approve or reject as they liked, with no state bound that refused to ratify."[77] In Federalist 43, Madison explained that "no political relation can subsist between the assenting and dissenting States."[78] State legislatures themselves called into existence the ratifying conventions that ultimately signaled consent to the new constitutional document.

Finally, the idea that the Philadelphia Convention was a sovereign, runaway body because it ignored limitations on its proposing power ignores a key fact. This ultra vires decision had no authority until it was later ratified by the Continental Congress as well as the state-created extraordinary ratifying conventions. As George Mason explained, there was no "weight" in the argument that the convention was runaway or illegal because the people ratified the new constitution and the "the fiat is not to be here [in the convention] but in the people."[79] James Wilson explained that the Convention was "at liberty to *propose* any thing" but "authorized to conclude nothing."[80] Charles Pinckney argued that the Convention was "authorized to go any length in *recommending*, which they found necessary to remedy the evils which produced this Convention."[81]

[72] Ackerman, *supra* note 22, at 36.
[73] Kobach, *supra* note 62, at 56.
[74] The Federalist No. 40 (James Madison).
[75] *Id.*
[76] Ku, *supra* note 11, at 569.
[77] Robert Natelson, *Proposing Constitutional Amendments Through a Convention: Rules Governing the Process*, 78 Tenn. L. Rev. 693, 723 (2011).
[78] The Federalist No. 43 (James Madison).
[79] The Constitutional Convention and the Formation of the Union (Winton Solberg, ed.) 159 (1990).
[80] 1 The Records of the Federal Convention of 1787, at 253 (Max Farrand ed., 1966).
[81] Elliot's Debates, Vol. V., at 197.

Thus, the Philadelphia Convention never possessed or even claimed inherent legal power to act as a French-style provisional government and remove existing public officials or pass law. Thus, the American approach to revolutionary constituent power did not require the convention to have inherent legal powers; on the contrary, constituent power theory required that the constitution would only go into effect after gaining consent by the people in a process structured by preexisting authorities.[82] The Convention itself was therefore a proposing body and nothing more.

2.3. Conclusion

Perhaps because of their widely shared suspicion of representative bodies, the Founders clearly rejected the idea that constitutional conventions were anything more than proposing bodies. Nonetheless, influential Founding-era thinkers were concerned about the dangers that *future* constitutional conventions might pose.[83] James Madison attacked the wisdom of providing a mechanism for calling a federal constitutional convention during the drafting debates. Clearly concerned that this body might claim to represent the people and allow a faction to run away with power, he questioned "How [was the] convention to be formed?" "By what rule decide?" and "what [are] the force of its acts?"[84] Madison instead proposed a version of Article V that left the matter of proposing constitutional amendments entirely to Congress and then ratification by the states. Congress, he argued, "will be appointed to execute as well as to amend the Government [and] will probably be careful not to destroy or endanger it."[85]

Furthermore, in response to Thomas Jefferson's argument that the Constitution should be redrawn every generation, Madison worried specifically about the potential problems of conventions dominated by powerful factions. He argued that constitutional replacement was "ticklish" because appeals to the "original power" of the people could allow the "passions" of majoritarian faction to sit in judgment and upset the "constitutional equilibrium."[86] He particularly worried about elected conventions captured by "persons of distinguished character and extensive influence in the community."[87] In those circumstances, he warned, the "passion" and not "reason, alone, of the public ought to regulate government." Madison, however, never explained how to avoid this problem of the embodied sovereign by "interesting too strongly the public passions" in constitutional replacement.[88]

As we will see from the next section, Madison's fears were well-founded. In the nineteenth century, Americans began to argue that constitutional conventions wielded

[82] This theory of legitimacy drew heavily on Lockean conceptions of consent and compact. *See* Thad Tate, The Social Contract in America: 1774–1787: Revolutionary Theory as a Conservative Instrument (1965); Andrew C. McLaughlin, *Social Compact and Constitutional Construction*, 5 Am. Hist. Rev. 467 (1900).

[83] See, e.g., St. George Tucker, 1 Blackstone's Commentaries 371–372 (1803), reprinted in 4 The Founders' Constitution 583 (Philip B. Kurland & Ralph Lerner eds., 1987).

[84] Quoted from Sanford Levinson, *"Veneration" and Constitutional Change*, 21 Tex. Tech L. Rev. 2443, 2446 (1990). James Madison was a strong supporter of supermajority rules.

[85] The Writings of James Madison, vol. 5 321 (Gaillard Hunt ed., 1904).

[86] The Federalist No. 49 (James Madison).

[87] *Id.*

[88] *Id.*

the unlimited constituent power of the people. In response, courts drew on the agency approach to constituent power that sought to ensure that the unlimited power of the people remained in the people and not in constitutional conventions.

3. Antebellum state constitutional replacement: The rise of extraordinary representation

In antebellum nineteenth-century America, state-level constitutional replacement was frequent and contentious. In a period that Henry Monaghan calls the "real heyday of popular sovereignty," Americans mobilized to exercise their constituent power to both replace state constitutions that concentrated power in the hands of a small—often federalist—elite and resist federal power.[89] To do so, many Americans claimed that the "alter and abolish" clauses of their state constitutions gave them the legal right to operate through all-powerful, French-style constitutional conventions.

These claims often ended up in front of courts. In response, courts consistently rejected assertions of the unlimited power of constitutional conventions. These courts rejected claims by resorting to the language of agency law, arguing that the people could never delegate their unlimited constituent power to constitutional conventions. To do otherwise would mean the people were giving up their sovereignty to a body of elected representatives.

3.1. Early expressions of constituent power: 1800–1830

In many states, campaigns for constitutional replacement and a constitutional convention were led by Jeffersonian Republicans seeking to oust Federalist leaders who were constitutionally entrenched in power.[90] Appealing to the precedent of the founding of the US Constitution as well as the general provisions in their constitutional bills of rights about the people's right to alter or abolish their government, they began to assemble in what have been called "circumvention" conventions.[91] As during the late eighteenth century, Americans did not claim that these circumvention conventions had any special legal power as the extraordinary representatives of the people. Instead, these conventions used the "threat" of circumvention to persuade the legislature to call an authorized constitutional convention that would then propose a new constitutional order.

In Connecticut, Jeffersonian Republicans pushed to replace the amended Royal Charter, which provided for no means of formal change and gave near total power to an unelected Legislative Council dominated by a handful of Federalists who "thereby ran the state."[92] To overcome this entrenched power elite, Jeffersonian Republicans called circumvention conventions in Hartford in 1804 and 1814 and declared Connecticut

[89] Henry P. Monaghan, *We the People(s), Original Understanding, and Constitutional Amendment*, 96 Colum. L. Rev. 121, 162 (1996).

[90] George Parkinson, Antebellum State Constitution-Making: Retention, Circumvention, Replacement (1972) (unpublished Dissertation, University of Wisconsin).

[91] *Id.* at 35.

[92] *Id.* at 15–16.

without a constitution.[93] These unauthorized conventions "vaguely hinted at circumventing established government" but ultimately never claimed to have the inherent power to displace existing governmental institutions or make laws.[94] Finally, the Republicans were successfully able to persuade the existing legislature to call a constitutional convention, which drafted a new constitution for the state in 1818. This new constitution was then approved by the people at a referendum.[95]

The success of circumvention conventions in Connecticut spurred on change elsewhere. In Virginia, reformers convened a series of "circumvention" conventions in 1816 and 1826 in Staunton that petitioned the legislature to poll the people in a plebiscite on calling a convention.[96] These circumvention conventions petitioned the legislature to convene an authorized convention. For instance, Frederick County commissioned its delegates to the unauthorized convention to "ask and demand *for the last time,* that facilities be afforded, *by law,* for the assembling of a full and free convention of the good people of this commonwealth, with a view to the establishment of a *representative* democracy on the ruins of the *allegoric tyranny* which now prevails."[97] Finally, the state legislature authorized a vote on the convening of a legally authorized convention. This movement spurred change in other states as well. In Massachusetts, Georgia, North Carolina, and Pennsylvania, legislatures called constitutional conventions which *proposed* new constitutions.[98]

The legal status of these authorized conventions was also placed under scrutiny. In 1833, the House of Representatives of Massachusetts asked the Massachusetts Supreme Court to determine the legal status of legislatively called conventions. The court responded by using the terminology of agency law to describe the limited powers of conventions

> If . . . the people should, by the terms of their vote, decide to call a convention of delegates to consider the expediency of altering the constitution in some particular part thereof, we are of opinion that such delegates would derive their whole authority and commission from such vote; and, upon the general principles governing the delegation of power and authority, they would have no right, under such vote, to act upon and propose amendments in other parts of the constitution not so specified.[99]

The implication was clear: These conventions—although not specified for in the preexisting constitution—were not all powerful. Instead, they represented a partial and limited delegation of the people's sovereign constituent power to alter and amend their constitutional order. In practice, this meant that the legislature could limit the powers of the constitutional convention by including those terms in the act creating the

[93] *Id.* at 17.

[94] *Id.* at 16.

[95] William Fisch, *Constitutional Referendums in the United States of America*, 54 Am. J. Comp. L. 485, 492 (2006).

[96] Parkinson, *supra* note 90, at 40.

[97] Quoted from 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, 846 (1968).

[98] Parkinson, *supra* note 90, at 56.

[99] Opinion of the Justices, 60 Mass. 573, 573 (1833).

convention. The Massachusetts court's agency concept of constituent power would be influential in the future debate.

3.2. Nullification in the South Carolina Court of Appeals

The South Carolina nullification crisis represented the first serious emergence of the concept that an elected constitutional convention wielded the full constituent power of the people and therefore had broad, inherent legal powers.[100] In October 1832, the South Carolina legislature called a state constitutional convention to review congressional tariffs.[101] In March 1833, this Convention nullified these tariffs and passed an ordinance empowering the South Carolina legislature to provide for "suitable oaths or affirmations."[102] Later that year, the legislature passed a law requiring officers of the state militia to swear an oath to South Carolina.[103] An officer challenged the oath as illegal.

South Carolina's counsel argued that a constitutional convention exercised the full constituent power of the people. For this reason, the people of South Carolina acting through a convention had the legal power to enable the legislature to pass the oath because the people's representatives in a constitutional convention are "subject to no *legal* restraint."[104] He grounded this argument on Article 9, Section 1 of the South Carolina Constitution which stated that "*All* power is originally vested in the *people*, and all *free Governments* are founded on *their authority*, and are instituted for their peace, safety and happiness."[105] Because it reflects the will of the people, the "legal authority" of a convention's representatives is "absolutely unlimited."[106] Thus, he argued, a court has no power to strike down a convention ordinance because it would mean determining "the validity of an act of a convention of the people, to whom belongs the paramount and controlling authority."[107]

Opposing counsel rejected the idea that a constitutional convention is the unlimited agent of the people and therefore wields the people's absolute legal power. Instead, he argued, a convention is the limited agent of the people for a specific task. A convention is therefore placed "under many very important restrictions, which curtail its *jurisdiction* over *subjects*, and its *power* in the employment of *means*."[108] These limitations were drawn from the general principles of agency and included the Act of the Legislature that created the convention and the Constitution of South Carolina.

He argued that to hold otherwise would be a "doctrine of despotizm (sic)" that gave too much power to the Constitutional Convention and would endanger "the security

[100] Pauline Maier, *The Road Not Taken: Nullification, John C. Calhoun, and the Revolutionary Tradition in South Carolina*, 82 S.C. Hist. Mag. 1 (1981).
[101] State v. Hunt, 1834 WL 1462, *1 (1834).
[102] *Id.*
[103] *Id.* at *2.
[104] *Id.* at *58.
[105] *Id.*
[106] *Id.*
[107] *Id.*
[108] *Id.* at *24.

and durability of their institutions, the constituent principles of all representative bodies, the distribution of power under our republican forms, and their harmonious action."[109] He argued that an all-powerful convention could succumb to temporary passions like the "revolutionary assemblies of France" and then do all kinds of things that "the people" never would have envisioned, including the "establish[ment] [of] an oligarchy or a monarchy" and the creation of "a Star Chamber to try the obnoxious among their political opponents."[110]

In a series of separate opinions, the Justices on the South Carolina Supreme Court agreed that a constitutional convention was not inherently the unlimited agent of the people. Justice Johnson argued that the people never delegate their full power to one body. To think so, he stated, would lead to a "usurpation of the rights of the people."[111] In particular, to do so would lead to a number of unintended actions by the people, including switching the allegiance of South Carolinians to "the grand Turk, or the Emperor of Russia, or to indulge in any other caprice they might think proper."[112]

Instead, he argued that the people's relationship to the convention was one of a principal to a limited agent. The people therefore had "been invited by the legislature to elect delegates to a convention charged with certain specific powers in relation to certain acts of Congress which were supposed to be unconstitutional and injurious to the interest of the citizens of the State."[113] Thus, the convention was limited on "the common-place principle that the authority of the agent is limited by the powers conferred on him by the principal."[114] He argued that a convention assuming powers that it did not have is just as illegal as "a regularly constituted body which assumes powers not delegated by the people."[115] And, in this situation, any court is "duty bound" to protect the people from their agent.[116]

Justice Harper drew explicitly on the Founding-era conception that the people's legal power was unlimited but that the power of the people's representatives was not. He wrote that it is "fundamental and universally acknowledged" that all "sovereignty resides in the people, and all the authority of government is delegated from them."[117] But he explained that "the sovereign exercises none of the powers of government directly and in person."[118] Thus, the role of the court is to protect the sovereign from usurpation by ensuring that all institutions "act in conformity to the authority which the sovereign has delegated; but the same allegiance binds me to disobey and oppose them, when their acts are not so authorized."[119] He explained that the key mistake

[109] *Id.*
[110] *Id.* at *19, 23.
[111] *Id.* at *180.
[112] *Id.* at *180.
[113] *Id.*
[114] *Id.*
[115] *Id.* at *182.
[116] *Id.* at *182.
[117] *Id.* at *189.
[118] *Id.* at *194.
[119] *Id.* at *189.

that many make is "confounding together the authority attributed by the constitution to the *people*, with that of the *convention*."[120]

He continued, arguing that law was the people's defense against usurpation by their agents.[121] This means that the powers of the convention are "fixed, and it is for the people, if they will, to fix and define them in every particular instance."[122] He provided the example of the federal convention, which was limited in scope to proposing a constitution. To set a precedent that every constitutional convention inherently was an unlimited agent of the people would "render the people distrustful of them and unwilling to assemble them" and hinder appeals "to the people when the highest public interests require their interposition."[123]

3.3. The Dorr rebellion and *Luther v. Borden*

In the years that followed, the concept that constituent power required a constitutional convention to have unlimited legal power grew in influence. In 1836, former Senator and future Vice President George Dallas described a Pennsylvania convention and its members as having "inherent and almost boundless power."[124] He described how the representatives in this convention possessed "every attribute of absolute sovereignty" and may "reorganize our entire system of social existence."[125] In the Illinois Convention of 1847, Onslow Peters made a similar argument when he proclaimed that "[w]e [the members of this convention] are the sovereignty of the state. We are what the people of the State would be, if they were congregated here in one mass-meeting. We are what Louis XIV said he was, 'We are the state.'"[126]

This belief in the extraordinary powers of the people's delegates to act was put into full practice in Rhode Island in 1841. Rhode Island still existed under its royal charter, which entrenched power in an oligarchy of wealthy landowners. After years of popular agitation to replace the Charter through authorized means, a movement of "suffragists" led by Thomas Dorr finally called an unauthorized "people's convention."[127] The representatives in this "people's convention" then claimed the legal power to displace the existing government and frame a new government. In late 1841, this convention passed a new constitution and oversaw elections for a new people's government. In early 1842, Rhode Island had two competing governments.

The Rhode Island governor called on President Tyler to disperse the suffragists. President Tyler responded with appeals for a solution involving an authorized

[120] *Id.* at *199.

[121] *Id.* at *199.

[122] *Id.* at *200. There has been no convention called, I believe, in this or any other State, which was not called for purposes more or less specific, and with powers more or less limited. *Id.*

[123] *Id.* at 202.

[124] Quoted from John Alexander Jameson, A Treatise on the Principles of American Constitutional Law and Legislation: The Constitutional Convention, Its History, Powers, Modes of Proceeding 292 (2d ed. 1869).

[125] *Id.*

[126] *Id.*

[127] Luther v. Borden, 48 U.S. 1 (1849).

constitutional convention. In his first letter to the Rhode Island governor, Tyler encouraged the Rhode Island legislature to compromise and call a convention because the "constituted authorities cannot, for any length of time, resist" the wishes of their people.[128] In his second letter, Tyler addressed the Suffragists and told them that "changes achieved by regular, and, if necessary, repeated appeals to the constituted authorities" are a far preferable option.[129] Tyler's message was heard. In January 1842, the preexisting Rhode Island legislature called a legally authorized convention to draft a new constitution for Rhode Island. This convention framed a new constitution that went into effect in May 1843. Most supporters of the "people's constitution" ultimately defected from their cause and supported this new constitution.[130]

Dorr and his supporters, however, continued to press their belief that the people had the legal right to frame a new government outside the preexisting legal framework by acting through an extraordinary convention.[131] They soon found a perfect test case. At issue in the case was whether the plaintiff—a supporter of the People's Convention—could receive compensation for trespass when the Charter government broke into his house under the authority of a martial law passed before the new "legal" constitution came into effect. The answer hinged on a much larger question: Had the Charter government been legally displaced by Dorr's "people's convention"? In 1851, this claim finally came before the Supreme Court.[132]

The lawyer for the plaintiff—Benjamin Hallett—argued under the Republic Guarantee Clause of the US Constitution that the people's convention had displaced the existing Rhode Island government and the martial law was therefore invalid. He argued that a constitution only limits the *government's* mode of altering or amending the constitution—not the people's mode.[133] He argued that "majority of the people" therefore had a legal right to establish a new written constitution by acting through extraordinary representatives in a runaway constitutional convention that is "independent of the will or sanction of the Legislature."[134]

Hallett grounded this legal right in the Declaration of Independence which gave "a majority of the community" the legal right to reform, alter, or abolish government "in such manner as shall be judged most conducive to the common weal."[135] Hallett also grounded this right on the Bill of Rights adopted by the 1790 Rhode Island Convention

[128] Appendix to Elisha R. Potter, Considerations on the Questions of the Adoption of a Constitution, and Extension of Suffrage in Rhode Island 55 (1842)

[129] *Id.* at 56.

[130] George M. Dennison, The Dorr War: Republicanism on Trial, 1831 to 1861, at 94 (1976). Most of the prominent Suffragists quit the cause, with one asking "Who will fight for any form, when the substance can be gained by peace?"

[131] Potter, *supra* note 128, at 22. ("The ground taken is, that the majority can legally and constitutionally change the government at any time and in any manner; or, in other words, that their supremacy in all things is a fundamental principle of republican law. It has sometimes been called, strangely enough, the doctrine of peaceable revolution.").

[132] Luther v. Borden, 48 U.S. 1 (1849).

[133] Mr. Hallet's Argument in the Rhode Island Causes on the Rights of the People 36 (1848).

[134] *Id.* at 10–11.

[135] *Id.* at 14.

that ratified the federal Constitution. In particular, Hallett argued that the "People's Convention" was legal under the Third Article which stated that "the powers of government may be reassumed by the people, whensoever it shall become necessary to their happiness."[136] On this legal basis, he argued, the action by the Dorr government was not a "revolution by force" but instead "a peaceful change of the organic law."[137]

He characterized the opposing argument as one that adopted the Old World concept that "that the people must stand still until the powers that be shall grant them an approved form of statute law to collect that sovereign will."[138] If the legislature can ultimately block the exercise of this sovereignty, "we are not a free people."[139] Hallett argued that American constitutions are more than just "grants to the people by their rulers."[140] To embrace the principle that the people must act through legally sanctioned bodies is to make "the Revolution of '76 the shame instead of the glory of the nation."[141]

In a famous rebuttal, Daniel Webster argued that only a legally authorized and limited convention could take part in remaking the constitutional order. Legal authorization for a convention was needed, he argued, to ensure that the convention is acting on behalf of the people. To allow a convention with unlimited power, Webster explained, would lead to a government "of the strongest and most numerous."[142]

Webster argued that claims about the inherent power of popular conventions "go wide of the American track."[143] He explained that the American practice clearly required some "authentic mode" for determining that the body was a true agent of the whole people.[144] Any authentic process of popular representation must include results that are "certified to some central power so that the vote may tell."[145]

In support, he cited the American practice as one in which the people could create a constitution-making agent outside the preexisting rules of constitutional change but that this agent must be certified "by an ordinary act of legislation."[146] The Founding practice, he argued, was one in which conventions proposed a new constitution and the people ratified this proposed constitution through an agreed-upon process.[147] He also described how many of the states did not have formal amendment clauses but altered their constitutions through specialized conventions "called by the Legislature."[148] This "regular action" of constituent power, he argued, "places on public liberty the most

[136] *Id.* at 17.
[137] *Id.* at 10.
[138] *Id.* at 62.
[139] *Id.* at 55.
[140] *Id.* at 17.
[141] *Id.* at 29.
[142] Luther v. Borden, 48 U.S. at 27.
[143] *Id.* at 26.
[144] *Id.* at 27.
[145] *Id.* at 40.
[146] Daniel Webster, The Rhode Island Question: Mr. Webster's argument in the Supreme Court of the United States, in the case of Martin Luther vs. Luther M. Borden and others, Jan. 27th, 1848 9 (1848).
[147] *Id.* at 10.
[148] *Id.* at 9.

beautiful face that ever adorned that angel form."[149] He argued that when the people act through authorized law, they can limit their agents and "public authority" is therefore strengthened.[150]

The Supreme Court ultimately held the question whether the people's constitution established a "republican" form of government to be a political question.[151] The Court implicitly agreed with Webster, rejecting the argument that the people had the right to call a "people's convention" outside ordinary law and displace the existing government. It explained that the commands and actions of unauthorized conventions had no legal force and that it had to recognize the "charter government as the lawful established government."[152] The Court therefore implicitly accepted the argument that the only way for the people to exercise their constituent right is by acting through a limited convention.

4. Factional secessionist conventions in the American South

The high-water mark of claims of inherent legal power in constitutional conventions in the USA can be found in the secession conventions of the American South. In fact, constitutional conventions played a central role in the secessionist movement's legal strategy for quick exit from the United States.[153] Almost immediately after Abraham Lincoln's election, pro-secessionists called for constitutional conventions that could exercise the power of the people to secede from the Union. Pro-secessionist majorities in constitutional conventions then exploited these conventions—elected amidst widespread fear of Abraham Lincoln's intentions—to skirt unionist opposition, accelerate secession from the Union, and take over state government.[154]

The use of constitutional conventions for the purposes of secession first emerged in South Carolina. In the weeks after Lincoln's election, unionists sought to delay the hasty calling of a convention in order to "lay the issue more fully before the people."[155] They were unsuccessful: Secessionists in the South Carolina legislature called an immediate convention without a popular vote. One of the leaders of the secession movement admitted the lack of popular support for this action, writing: "I do not believe that

[149] *Id.* at 9.

[150] *Id.* at 9.

[151] Luther v. Borden, 48 U.S. at 39.

[152] *Id.* at 40.

[153] Less than eight months after Lincoln's election, eleven states had seceded from the Union: South Carolina, December 20, 1860; Mississippi, January 9, 1861; Florida, January 10, 1861; Alabama, January 11, 1861; Georgia, January 19, 1861; Louisiana, January 26, 1861; Texas, February 1, 1861; Virginia, April 17, 1861; Arkansas, May 6, 1861; Tennessee, May 7, 1861; North Carolina, May 20, 1861. Taken from H. Newcomb Morse, *The Foundations and Meaning of Secession*, 15 Stetson L. Rev. 436 (1986).

[154] Ralph Wooster, The Secession Conventions of the South 4 (1962) (describing how a Texas convention removed Governor Sam Houston from power for failing to support secession).

[155] Lilian Kibler, *Unionist Sentiment in South Carolina in 1860*, 4 J. Southern Hist. 346, 357 (1938).

the common people understand it, in fact I know that they do not understand it . . . We must make them move and force them to follow."[156]

On December 20, 1860—amidst jostling crowds in the galleries—the South Carolina Convention voted for an ordinance dissolving its ties with the United States.[157] The convention explained that this ordinance was authorized by the legal right of the people "to alter or abolish" their government contained in the Declaration of Independence.[158] Fearing that the people might reject this move to secession, the convention also declared that the secession ordinance did not need a popular ratification vote, declaring "We, therefore, the People of South Carolina, *in convention assembled*" were seceding from the Union.[159]

The assertion of unilateral power by constitutional conventions to secede was highly influential. Conventions in other states were called in "an atmosphere of crisis and haste"[160] and pro-secessionist delegates stressed that there was no need for a ratifying vote from the people about secession. In particular, pro-secessionists stressed the vital need to secede before Lincoln's inauguration on March 4, 1861. For instance, in Alabama's secession convention, William Yancey—a member of the radical pro-slavery group called the "fire eaters"—argued that the powers of the Alabama convention were "supreme . . . because they are the acts of the people acting in their sovereign capacity."[161] He concluded that any "submission of this Ordinance to a popular vote is wrong."[162] Consequently, in the lower south (South Carolina, Mississippi, Florida, Alabama, Georgia, Louisiana), pro-secessionists avoided ratifying the secession ordinances altogether, declaring they had the legal power to do so as "We the People, in convention assembled."

These assertions of power were not just a way of avoiding deliberation on secession; they also became a way for pro-secessionists to displace ordinary government.[163] In South Carolina, the constitutional convention did not dissolve itself after secession. Instead, it took over the South Carolina government, passing an ordinance creating an "executive council" that supplanted the established government.[164] This council grew unpopular as it declared martial law and began to confiscate property. In particular, the convention required that "the whole amount of gold and silver plate in private hands in the state be reported."[165] In response, many people began to call for

[156] *Id.* at 358.

[157] *Id.* at 365.

[158] *Declaration of the Immediate Causes Which Induce and Justify the Secession of South Carolina from the Federal Union*. Avalon Project (1860), *available at* http://avalon.law.yale.edu/19th_century/csa_scarsec.asp.

[159] *Id.*

[160] Daniel W. Crofts, Reluctant Confederates: Upper South Unionists in the Secession Crisis 90 (1989).

[161] William Smith, The History and the Debates of the Convention of the People of Alabama, Begun and Held in the City of Montgomery, on the Seventh Day of January, 1861; In Which is Preserved the Speeches of the Secret Sessions, and Many Valuable State Papers 114 (2000).

[162] *Id.*

[163] Crofts, *supra* note 160 (describing how in the Upper South there was significant opposition to secession).

[164] Laura A. White, *Fate of Calhoun's Sovereign Convention*, 34 Am. Hist. Rev. 757, 759 (1929).

[165] *Id.* at 761.

the restoration of "constitutional government" in South Carolina.[166] For instance, a newspaper in Charleston drew on prior arguments about the limited powers of conventions, arguing that constitutional conventions were not "the people in their highest capacity" but instead were "extraordinary delegates assembled on extraordinary occasions to discharge functions to which the ordinary governments were inadequate or unsuited."[167] The newspaper argued that the convention is not "the creator" of the legislature. On the contrary, both are "instrumentalities of the people, agents to do certain things."[168]

This happened in other states as well. In Texas, the pro-secessionist majority in a constitutional convention issued an ordinance removing the sitting governor—Sam Houston—from office on the grounds that he was a unionist.[169] In Arkansas, the convention transformed itself into a dictatorial provisional government that began to operate through special ordinances. In May 1861, it issued an ordinance calling for the raising of $2 million in war bonds to help the war effort.[170] It also promulgated a new constitution without popular ratification.[171]

To conclude, the point here is not that partisan conventions caused secession; secession and civil war were likely inevitable. But these assertions of unlimited power in conventions did amplify the power of pro-secessionist forces—and speed the rush to secession—by reducing checks and balances. In fact, these conventions caused many of the agency problems that antebellum American courts had been worried about. First, they denied the whole people the ability to deliberate on and ratify the decisions to secede from the Union. Second, they took over the functions of regularly elected government in the name of the people, robbing the people of the checks and balances inherent in their state governments. The next section will show how postbellum courts and treatises further developed the agency approach to constituent power in response to these secession conventions.

5. Postbellum reaction to runaway conventions

The post-Civil War period witnessed continued claims that constitutional conventions inherently exercised the absolute legal power of the people. In response, a series of prominent cases and treatises attacked this idea ruthlessly. Drawing on agency arguments developed by Webster and others, these sources built a considerable body of authority describing why judicial limitation of the powers of a convention was necessary to protect the people from usurpation.

[166] *Id.*
[167] *Id.*
[168] *Id.* at 764.
[169] *Id.*
[170] Bragg v. Tuffts, 6 S.W. 158, 159 (1887).
[171] Danley and Johnson, Ex Parte, 24 Ark. 2 (1862).

5.1. Courts as protectors of the people

In 1873, the Pennsylvania Supreme Court issued a remarkable set of opinions in response to an attempt by a Pennsylvania constitutional convention to claim inherent authority to issue an ordinance specifying five election commissioners.[172] These opinions flatly rejected attempts to argue that conventions wielded inherent legal power.

In striking down the ordinance, the court explained that the language in the Pennsylvania Constitution guaranteeing the people the "inalienable and indefeasible right to alter, reform or abolish their government" did not give a convention this kind of power to appoint officials. Relying on Daniel Webster's argument in *Luther v. Borden*, the court reasoned that only a limited convention was consistent with the exercise of the people's constituent power. [173] The court also explained that a limited convention was the only way for the people to control their constitution-making agent. By "clearly confer[ing]" certain powers on a convention, the "[t]he sacred fire from the altar of the people's authority cannot be snatched by unhallowed hands [of their representatives]."[174]

In a subsequent case, an interjudicial debate arose regarding the powers of conventions. A lower Pennsylvania court reasoned that a convention "[has] absolute power. . . [W]hen once called into operation by proper authority, it cannot be subverted nor restrained by the legislature."[175] This "quasi-revolutionary" character, the court reasoned, is necessary for the convention to carry out the "popular will."[176]

On appeal, the Pennsylvania Supreme Court immediately overruled this reasoning. The Court described how the lower court's conception of full delegation led to the problems of the secession conventions which "ordained secession, dragged states into rebellion against the well-known wishes of their quiet people, and erected in the midst of the nation alien state governments and a Southern Confederacy."[177] It further explained that there is "no subject more momentous or deeply interesting to the people of this state than an assumption of absolute power by their servants."[178] The court reasoned that any claim that "a mere body of deputies" could exercise the people's constituent power was "full of peril" for a free people.[179]

The court argued that the central "fallacy" of the concept of an all-powerful convention argument is that "the convention and the people are identical."[180] The constitutional bill of rights affording people the right to alter and abolish their constitutional orders therefore does not afford a constitutional convention any "inherent" rights but instead "is a reservation of rights out of the general powers of government to [the

[172] Wells v. Bain, 1874 WL 13096 (1873).
[173] *Id.* at *8–13.
[174] *Id.* at *10.
[175] Wood's Appeal, 1874 WL 13128, at *7 (1874).
[176] *Id.*
[177] *Id.* at *13.
[178] *Id.* at *9.
[179] *Id.* at *10.
[180] *Id.* at *11.

people] *themselves*."[181] To see otherwise, would be "to declare the impotency of the people, and the absolute potency of their agents."[182]

The court also held that courts must play an important role in reviewing the processes of constitutional replacement. The liberty of the people, the court argued, "would be suspended by a thread more slender than the hair which held the tyrant's sword over the head of Damocles" if they were unable to "obtain from the courts protection against the usurpation of power by their servants in the convention."[183] Courts are the key institution "to decide" when the convention has exceeded the bounds of law.[184]

5.2. Treatise writers

A series of postbellum treatise writers also attacked the concept that constitutional conventions were inherently runaway bodies that operated with absolute legal power. In fact, the most influential treatise on constitutional conventions—John Jameson's book on constitutional conventions—was written specifically to refute this concept.[185] Jameson argued that the concept that conventions exercised the absolute constituent power of the people and were therefore "absolutely unquestionable, on legal or constitutional grounds" to be one of the "most impudent heresies of our time."[186] He linked it explicitly to the secession conventions prior to the Civil War, arguing that this concept "transformed a loyal community into a band of parricides seeking to pull down the edifice of our liberties."[187] He therefore argued that the legal claim to limitless power in a constitutional convention made it more "menacing to republican liberty than any other in our whole political structure."[188] He argued that this "disorganizing maxim" of extraordinary popular representation was "of modern origin" and not seriously present in the United States prior to "the New York Convention of 1821."[189]

Implicitly drawing on the thinking of the Founding era, Jameson argued that the concept that a convention wielded the limitless power of the people was a logical impossibility. As the only sovereign in a democracy, the people could never delegate their unlimited power to an institutional agent without at the point losing their status as sovereign. Instead, the people could only delegate the exercise of this power "within prescribed limits, or for a determinate time or purpose."[190] He therefore argued that a *constitutional* convention includes "delegates" who act under "a commission, for a purpose ascertained and limited by law or by custom."[191] An American convention

[181] *Id.* at *9.
[182] *Id.* at *9.
[183] *Id.* at *9.
[184] *Id.* at *11.
[185] John Jameson, A Treatise on the Principles of American Constitutional Law and Legislation: The Constitutional Convention; Its History, Powers, and Modes of Proceeding (2d ed., 1869).
[186] *Id.* at 2–3.
[187] *Id.* at 3.
[188] *Id.* at 2.
[189] *Id.* at 295.
[190] *Id.* at 21.
[191] *Id.* at 10.

is therefore always a creature of law and charged with a "definite . . . function" that it "never supplant[] the existing organization" or "govern[]."[192] Jameson contrasted constitutional conventions with revolutionary conventions, which derive their power from "revolutionary force and violence" and are a form of provisional government with absolute powers.[193] Jameson argued that the *legal* right to alter or abolish government must lie "in some body called for that purpose by the rightful law-making power of the State."[194] The language saying that people had the right to do so "in any manner" simply inferred that the people could proceed through law-making bodies or act through force.[195]

Subsequent treatises on constitutional conventions—often written to refute claims of inherent power in state constitutional conventions that were called outside existing amendment provisions—took similar positions. Writing in 1910, Walter Dodd argued that a convention is "a regular organ of the state—neither sovereign nor subordinate to the legislature, but independent within its proper sphere."[196] Echoing the debates at the Founding, he argued that a constitutional convention is the limited agent of the people and therefore "is a body called together for a limited purpose"[197] and does not "in any way supersede the existing constitutional organization."[198]

Roger Hoar's treatise on constitutional conventions was written in response to persistent claims that constitutional conventions in Illinois, Indiana, Massachusetts, Nebraska, and New Hampshire would have absolute legal power.[199] He argued that a constitutional convention does displace the existing institutional and legal framework but is instead a fourth branch of government that is "bound to the framing of a constitution and the passage of necessary rules and ordinances incidental thereto."[200] Hoar argued that although the people are "supreme," they have "no method of expression except through their representatives, the voters."[201] Following Jameson, he argued that the people cannot delegate their full power to a convention "without thereby terminating their own existence as the people."[202] Thus, the only way for the people to act outside law is through force, since by acting "outside the forms of law, they have no power except the power of force to bind those who do not join in the movement."[203]

Finally, writing on the eve of the Virginia Convention (and in response to claims by some that it had absolute legal power), Allen Caperton Braxton described the concept of unlimited powers in a convention to be an "extravagant" idea of "the French

[192] *Id.*
[193] *Id.* at 6.
[194] *Id.* at 232.
[195] *Id.* at 234–236 (arguing that these provisions were an attempt to overcome a belief of Passive Obedience" at the time that it was "sinful" to violently rebel)
[196] Walter Dodd, The Revision and Amendment of State Constitutions 80 (1910).
[197] *Id.* at 72.
[198] *Id.* at 93.
[199] Roger Hoar, Constitutional Conventions: Their Nature, Power, and Limitations vii (1917).
[200] *Id.* at 147.
[201] *Id.* at 21.
[202] *Id.* at 28.
[203] *Id.* at 16.

school" and one that has "never gained a footing in this country, although they have had, and still have advocates."[204] He continued that it would be an "absurdity" for the people to give up their powers to a convention. All French-style conventions are provisional governments, he argued, and "if the powers of the convention are absolute, as is claimed, then is our government an absolute oligarchy and despotism."[205] He described a convention as "nothing more than the normal, legitimate, orderly, and constitutional execution of one of the well-recognized functions and powers which reside in the people, organized as the sovereign body politic."[206]

Braxton saw the people acting by delegating portions of their power to legally limited bodies. He analogized the exercise of constituent power to the agency relationship in an "ordinary business corporation[]."[207] He argued that the people are similar to shareholders in a corporation. Just as shareholders could never "en masse" comprise the board of directors, he argues, the people can never actually delegate full powers to one body. Both, however, "absolutely control" the bodies delegated with the task of government.[208] A convention, therefore, is much like a "Committee on By-laws," which would "in no manner conflict with the existence of the Directory of the corporation, nor would such Committee have any shadow of authority for usurping the powers of the Directory and undertaking to operate and manage the business of the company."[209]

6. The American common law of constituent power

In the last century, American state courts have drawn on these authorities to establish what the Rhode Island Supreme Court has called the "great unwritten common law of the states" which gives people the unenumerated and revolutionary right "*whenever invited by the General Assembly* . . . to alter and amend their constitutions."[210] This common law represents the judicial ratification of the post-Civil War judicial and legal reaction to the idea that conventions have inherent legal powers that cannot be limited.

This common law affords the people a supra-constitutional right to alter or amend their constitutional order through a constitutional convention even if their existing constitution contains no provisions for a constitutional convention. But, to exercise this supra-constitutional legal right, the people must petition their legislatures for a ballot initiative or "convention call" on the question of whether a convention is in order. The details of this convention call or the subsequent law creating the convention (enabling act) then limit the authority of the convention with one exception: A convention may propose constitutional changes that go beyond its limitations if

[204] Allen C. Braxton, *Powers of Conventions*, Va. L. Register 86 (1901).
[205] *Id.* at 91.
[206] *Id.* at 86.
[207] *Id.* at 94.
[208] *Id.*
[209] *Id.* at 95.
[210] In re Constitutional Convention, 1883 WL 3595, at *3 (R.I. 1883).

these changes are later ratified by the people. In building this law, courts have drawn heavily on the agency justifications developed by the individuals, courts, and treatises in the nineteenth century.

6.1. Extratextual right to call a legislatively convened constitutional convention

It is now settled law that the people have the inherent legal power to call a convention by ratifying a legislatively authorized ballot provision that calls a constitutional convention—even if the state constitution does not provide for this option.[211] In 1912, the Indiana Supreme Court explained that this unwritten right to remake the constitution through a constitutional convention stems from the revolutionary right of the people to alter and abolish their constitutional order.[212] The court cited both Jameson and the Pennsylvania Supreme Court in describing a legislatively authorized convention to be "a well-recognized and established practice" in creating a true agent of the people.[213]

In 1935, the Rhode Island Supreme Court became one of the last state supreme courts to accept this common law principle. After surveying Jameson, Hoar, and the decisions of the Pennsylvania Supreme Court,[214] the court concluded that just because the Rhode Island Constitution only contained a provision for constitutional change through legislative proposal did not exclude the ability of the legislature to ask the people if they wanted to convene a constitutional convention.[215]

The court went on to say that the great weight of precedent compelled this decision because a legal process could allow the people to create a true agent.[216] Screening the agent in this way would then allow "an explicit and authentic act to make a new Constitution or to alter the present one."[217] In support the court cited Daniel Webster's argument that "an ordinary act of legislation" is the best way to ascertain that a specialized convention is an authentic agent of the "will of the people."[218]

6.2. Power to limit constitutional conventions through the enabling act

It is also the common law of the states that the terms of the legal authority of the convention in turn limit the powers of the delegates in this constitutional convention.[219] These enabling acts place explicit limitations on the powers of conventions in the name of the sovereign people. For instance, the New Jersey Constitutional Convention Enabling Act

[211] Almost ten states still do not have any provisions in their constitutions about calling a constitutional convention. For instance, Arkansas has recently called a series of conventions despite no provisions in its constitution outlining this procedure.

[212] Ellingham v. Dye, 99 N.E. 1, 8 (Ind. 1912)

[213] *Id.* at 16.

[214] In re Opinion to the Governor, 178 A. 433, 436 (1935).

[215] *Id.* at 440.

[216] *Id.* at 438.

[217] *Id.* at 437–438.

[218] *Id.* at 438.

[219] G. Alan Tarr & Robert F. Williams, *Foreword: Getting From Here to There: Twenty First Century Mechanisms and Opportunities in State Constitutional Reform,* 36 Rutgers L.J. 1075 (2005).

of 1947 stated that "[t]he people in the exercise of their sovereign power may commit their delegates to binding restrictions on the scope and subject matter of such a constituent assembly."[220] It then went on to specify that the convention could propose any constitution that it deemed in the "public interest" *provided* that it did not include any "provision for change in the present territorial limits of the respective counties."[221]

The Rhode Island Supreme Court has explained that the people bind their delegates to the terms of the enabling act when the "General Assembly [] propose[s] the conditions before the election is held, and [] take[s] all necessary steps to bring them to the attention of the people seasonably before the time of voting at the election."[222] This limitation ensures that the people are sovereign and their representatives are not. Courts have explicitly described this relationship as one between a principal and an agent. For instance, the Arkansas Supreme Court explained, "[a]s a principal may limit the authority of his agent, so may the sovereign people of this state limit the authority of their delegates."[223]

Courts have then justified enforcing these limitations as important ways of ensuring that the people retain their ability to limit their representatives. This need not be explicit; in fact, the people can delegate their power to the legislature to limit the power of the convention. The Supreme Court of Louisiana upheld such an arrangement in 1901, stating:

> The people, when they voted for the holding of the convention, voted for it to be held "in accordance with [the act of the legislature]," thus instructing their delegates, elected at the same time, to observe the limitations placed upon the power of the convention by the act of the legislature.[224]

In 1945, the Virginia Supreme Court cited both Jameson and the Pennsylvania Supreme Court in upholding the power of a legislative act to limit a constitutional convention to suffrage provisions for members of the military. The Court argued that the law was the highest form of the popular will. Thus, the legislature acting in its "representative function" can ask the people if they want to limit the powers of a convention.[225] An "affirmative vote" of the people would thereby limit that convention because the "wishes of the people are supreme."[226]

In 1947, the Kentucky Supreme Court upheld the power of the legislature to require a constitutional convention to submit its proposed constitution to a referendum.[227] The Court drew on Jameson and Hoar in explicitly rejecting the concept that a convention possesses inherent powers to ignore or supersede preexisting law.[228] The court reasoned that the people had the right to require the

[220] The Constitutional Convention Enabling Act, ch. 8, N.J. Laws, *available at* http://slic.njstatelib.org/slic_files/searchable_publications/constitution/constitutionv2/NJConst2n935.html.

[221] *Id.*

[222] In re Opinion to the Governor, 55 R.I. 56, 178 A. 433, 452,

[223] Harvey v. Ridgeway, 248 Ark. 35, 44 (1970).

[224] State ex rel. Fortier v. Capdevielle, 104 La. 561, 29 So. 215 (1901).

[225] Staples v. Gilmer, 33 S.E. 2d 49, 55 (Va. 1945).

[226] *Id.*

[227] Gaines v. O'Connell, 204 S.W. 2d 425, 431 (1947).

[228] *Id.* at 430.

convention to submit the draft for ratification in order to "keep a firm hold upon their liberties."[229] The court also explained that by voting on the convention's draft, "the people of the Commonwealth will literally 'ordain and establish' the new Constitution."[230]

In 1949, the Tennessee Supreme Court similarly held that "[i]t is not the legislature who limits the scope of a convention but it is the people themselves who by their vote under the terms of this act limit the scope of the convention."[231] The Tennessee Supreme Court also held that if the people vote to call a constitutional convention under certain terms, the "delegates would derive their whole authority and commission from such vote."[232] Courts therefore would step in to enforce the terms of these limitations.

There is, however, one exception to judicial enforcement of the limitations in enabling acts. This exception involves the situation in which a constitutional convention *proposes* changes that go beyond the enabling act and the people subsequently ratify the language in a referendum.[233] In 1975, the Tennessee Supreme Court upheld a ratified constitutional amendment that strayed beyond the statutory limitations.[234] The court reasoned in the language of agency, acknowledging the settled position that "an affirmative vote for a convention, for limited or unlimited purposes, is a grant by the people to a historic deliberative body to write constitutional, fundamental law as distinguished from statutory law."[235] The court went on to argue that "affirmative *proposals* exceeding the limits heretofore defined" do not, however, "invalidate" these changes.[236] On the contrary, the subsequent referendum vote by the people "ratifies or rejects the word for word end result of the Convention's deliberative effort."[237]

This kind of reasoning echoes that of the Framers about the Philadelphia Convention. That is, constitutional conventions may exceed their delegated limits when two conditions are place. First, when they exceed their limits in proposing constitutional language (and not issuing laws or displacing existing government). Second, when the people ratify this proposed constitutional language. In this capacity, although going beyond its limited powers, the constitutional convention is not acting like a French-style provisional government but instead remains a proposing body.

[229] *Id.* at 432.
[230] *Id.*
[231] Cummings v. Beeler, 223 S.W. 2d 913, 923 (1949).
[232] *Id.* at 924.
[233] Douglas C. Michael, *Pre-election Judicial Review: Taking the Initiative in Voter Protection*, 71 Cal. L. Rev. 1216 (1983) (discussing the advantages of protecting the voters from invalidly convened constitutional conventions).
[234] Snow v. City of Memphis, 527 S.W. 2d 55 (1975).
[235] *Id.* at 64.
[236] *Id.*
[237] *Id.*

6.3. Implied limitations on powers of conventions to issue ordinances

Finally, in cases in which the enabling act does not specifically control a certain type of action, courts have also sought to block conventions from exercising *inherent* powers that are not incidental to their role as proposing bodies helping the people amend and replace the constitution. In 1905, the Alabama Supreme Court drew heavily on the Pennsylvania Supreme Court's long criticism of extraordinary representation in striking down a convention ordinance creating a new courthouse. In response to arguments that the convention wielded the sovereign powers of "the people," the court criticized the idea that the "absolute sovereignty of the people" should be "vested in a body of agents without any known means of transmission or limitation."[238] Instead, the court explained that a convention only has "delegated, and not inherent, rights."[239] A convention, therefore, has no power to adopt "local legislation, pure and simple.[240] The court concluded that it therefore had the duty to strike down this ordinance or establish a "revolutionary precedent" which would serve as "a menace to coming generations in the enjoyment of rights guarantied under a republican form of government."[241]

More recently, the New Mexico Supreme Court blocked a convention from issuing an ordinance to the legislature to disburse funds. The court reasoned that a convention is created "to 'revise or amend' the existing constitution" and "not to legislate."[242] Furthermore, it gives the legislature the power to disburse funds and the convention must be limited to the powers "incident to its own conduct and the performance of its duties and function."[243] These duties, the court argued, were limited to proposing a draft document that would have no validity until it was "submitted to and ratified by the people."[244] In 1972, the Montana Supreme Court held that a constitutional convention possesses no power or authority to receive or expend public funds for voter education beyond the specific requirements and authority found in the Enabling Act. The court rejected the doctrine that a convention was an "inherent, plenary, and sovereign power" and cited Dorr and Hoar for the principle that a convention was limited by the existing constitutional order.[245]

Finally, in 1980, the Arkansas Supreme Court cited Jameson and Hoar in striking down an attempt by the 1979–1980 Convention to specify the proposed ballot form.[246] The court argued that it was not imposing a limitation on the convention. Instead, the court reasoned that the "ultimate sovereign, the people . . . implied that the laws governing general elections be applied."[247] In so doing, it rejected the argument that a

[238] Ex parte Birmingham & A.R. Co., 42 So. 118, 121 (1905) (citing Wood's Appeal).
[239] *Id.* at 120 ("Law is the highest form of a people's will in a state of peaceful government."
[240] Ex parte Birmingham & A.R. Co., 42 So. 118, 125 (1905).
[241] *Id.* at 124.
[242] State v. Evans, 80 N.M. 720, 724 (1969).
[243] *Id.*
[244] *Id.*
[245] Kvaalen v. Graybill, 159 Mont. 190, 206 (Mont. 1972).
[246] Riviere v. Wells, 270 Ark. 206 (1980).
[247] *Id.* at 212.

convention "once convened, is not subject to any branch of the government, and that the convention is responsible only to the electorate."[248] The court stated that the idea of "total autonomy" for a convention was "discarded long ago."[249] For this reason, the court reasoned that "courts should interfere in matters outside the convention's proper functions to stop an ultra vires act as readily as they would stop such an act by any other department of government."[250]

6.4. Conclusion

This largely forgotten American state-level common law of constituent power is the latest manifestation of a unique American approach to the institutional implications of constituent power. Underlying this approach is the idea that for the people to exercise their unlimited constituent power to transcend the preexisting amendment rules of their existing constitutions, they must only delegate part of their sovereign power. This in turn allows the people to better screen the constitution-making agents by ensuring that they will represent the people as a whole and not a partisan faction.

7. Conclusion

This article has looked to largely forgotten nineteenth-century and state-level American debates to understand a key question: Must a constitution-making body have inherent legal powers to be consistent with the people's revolutionary right to constituent power? The arguments that emerge from two centuries of American constitution-making practice consistently show that constituent power does not require these bodies to have inherent legal powers to become French-style provisional governments. Instead, it only requires these bodies to have necessary powers to *propose* new constitutional language for the consideration of the people. This understanding is underpinned by the agency idea that the people cannot remain sovereign and also delegate their full power to a body of representatives. Accordingly, the people can only delegate a part of their power to these bodies and remain sovereign. The approach to the exercise of constituent power yields some key insights.

First, this tradition has clear implications for our conceptual understanding of constituent power. By describing constituent power in agency terms, it helps us better understand why a revolutionary expression of the people's constituent power does not require inherent powers but the opposite: a limited convention that is a proposing body. Limiting the power of convention allows the people more opportunities to screen and monitor their agent—and therefore to retain their constituent power. In particular, it allows the people to control the inherent lawmaking powers of the convention through the limiting terms of the enabling act as well as through the process of

[248] *Id.* at 213.
[249] *Id.* at 216.
[250] *Id.* at 213.

popular ratification. This in turn can help to ensure that that the people have spoken in creating a new constitutional order.

Second, this approach has significant relevance to constitution-making around the world. In particular, it sheds important light on situations in which powerful factions capture specialized constitution-making bodies and deploy constituent power language to claim the inherent legal authority to use the body to dismantle institutions and destroy the opposition.[251] The idea that constituent power requires sovereign conventions has proven highly influential not just in Latin America.[252] For instance, Russian President Boris Yeltsin made significant use of this revolutionary tradition in his own partisan constitution-making process.

The agency-based American approach to constituent power outlined in this article provides a solution to the supposed inevitability of sovereign, runaway conventions. In fact, in certain circumstances, it provides a more effective path to constitutional legitimacy. Hanna Arendt explains how a prolonged and legally structured period of constitution-making—a tradition she also recovers from the American constitution-making tradition—preserves and builds legitimate power by avoiding a system in which one group seeks to eliminate another.[253] This design not only provides "a guarantee against the monopolization of power" but also "provides a kind of mechanism . . . through which new power is constantly generated, without, however, being able to overgrow and expand to the detriment of other centers or sources of power."[254] This in turn is more likely to generate what George Washington called an "explicit and authentic" expression of the people's constituent power.[255]

[251] Partlett, *supra* note 13; William Partlett, Constitution-Making by We the Majority, Brookings Institution Up Front Blog (Nov. 30, 2012), *available at* http://www.brookings.edu/blogs/up-front/posts/2012/11/30-constitution-egypt-partlett.

[252] Joel Colon-Rios, *Carl Schmitt and Constituent Power in Latin American Courts: The Cases of Colombia and Venezuela*, 18 Constellations 365, 369 (2011).

[253] Hannah Arendt, On Revolution 166 (1963).

[254] *Id.* at 152.

[255] Quoted from Kermit Hall, *Book Review of Explicit and Authentic Acts: Amending the US Constitution, 1776–1995*, 41 Am. J. Legal Hist. 487, 487 (1997)