THE AMERICAN TRADITION OF CONSTITUENT POWER

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How do “the people” exercise their “constituent power” to replace the current constitutional order? The conventional answer—drawing heavily on the American Founding period—is that the people act through specialized constitution-making bodies like constitutional conventions in an extralegal form of constitutional politics. Comparative experience, however, suggests self-dealing majorities can dominate these specialized constitution-making bodies, claim to represent the limitless constituent power of the people, and then unilaterally draft new constitutional law that entrenches their power or policies.

This Article will recover the American tradition of constituent power—which is still present in the common law of the American states—that limits the powers of specialized constitution-making bodies. This tradition in turn minimizes a serious agency problem in constitutional replacement: It allows the people (the principal) to better control their representatives (agents) in extraordinary constitution-making bodies. A recovery of this American practice therefore represents an important step in helping revise the universal claim that courts should play no role in constitutional politics. It suggests that judicial review can—in certain contexts—play an important role in ensuring a fuller and more deliberate expression of constituent power in formal constitutional replacement.

Key words: constituent power, constitution-making theory, American constitutional tradition, comparative law, representation, constitutional politics.

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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 . . .

We the People . . . do ordain and establish . . .

All political power is inherent in the people; and government is instituted for their protection, security, and benefit, and to promote their general welfare; and they have the right to alter or reform the same whenever the public good may require it.

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 of the normal legal system. But this extralegal form “constitutional politics” can hold even deeper dangers to democratic constitutionalism than judicial constitution-making. In particular, comparative experience suggests a recurring agency problem: The principal (the people) can lose control of their agent (a specialized

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1 The Declaration of Independence para. 2 (U.S. 1776).
2 U.S. CONST. pmbl. (emphasis added).
3 OKLA. CONST. art. II, § 1.
4 See, e.g. Gabriel Negretto, Replacing and Amending Constitutions: The Logic of Constitutional Change in Latin America, 46 LAW & SOC’Y REV. 749 (“The enactment of a new constitution supposes the irruption of the constituent power of the people, which finds no limits in the existing constitution and implies in practice its legal abrogation.”). Many American constitutional scholars describe the concept of constituent power without using that precise term. See Akhil Amar, Consent of the Governed: Constitutional Amendment Outside Article V, 94 COLUM. L. REV. 457 (1994) (arguing that the American people have a legal right to act outside of institutions and rules in founding a new constitutional government); Sanford Levinson, Our Undemocratic Constitution: Where the Constitution Goes Wrong (And How We the People Can Correct It) (same).
constitution-making body) when that agent is captured by a self-dealing majority that then proceeds to unilaterally reshape the constitutional order to entrench their own power.\(^6\) This Article will recover the forgotten American tradition of constituent power—which is still present in the common law of the American states—that seeks to minimize the changes of this self-dealing by placing specialized constitution-making bodies under legal regulation.

Constituent power—defined as the right of the people to “make and remake the institutional arrangements through which they are governed”\(^7\)—is widely held to be the basis of constitutional law in a democracy.\(^8\) In the United States, constituent power is textually grounded in the “alter or abolish” clauses in many state constitutions’ Bills of Rights as well as the Preamble, Ninth, and Tenth Amendment of the United States Constitution.\(^9\) But the concept of

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\(^6\) Partlett, supra note 3, at ___ (describing how self-interested post-Soviet elites used specialized constitution-making bodies to claim the power to remake their constitutional order); Landau, supra note 3, at 191 (describing how the manipulation of formal constitutional rules to entrench power is “increasingly prevalent” in the international system.).

\(^7\) Martin Loughlin, The Concept of Constituent Power, EUR. J. POL. THEORY 1, 3 (2013).

\(^8\) Trevor Morrison, Lamenting Lochner’s Loss: Randy Barnett’s Case for a Libertarian Constitution, 90 CORNELL L. REV. 839, 843-44 (2005) (“The standard account of American constitutional legitimacy is one of “popular sovereignty”—the idea that “We the People” collectively established the Constitution and bound ourselves and our progeny to it until it is changed.”). Curiously, the term constituent power has been avoided by American constitutional theorists. The concept, however, is the same.


constituent power obscures “many complexities.” Most importantly: How do we recognize that “the people” have exercised their constituent right to remake the constitutional order if they act outside of law? The answer to this question is more than simply academic: “[i]n any given year . . . some 4 or 5 constitutions will be replaced.”

The dominant answer holds that, because the people are too numerous to exercise this power themselves, they exercise their constituent power by acting through an extraordinary agent: A specialized and temporary constitution-making assembly such as a constitutional convention or constituent assembly. Once convened, this institution is at the center of an extraordinary form of constitutional politics that is not bound by either pre-existing laws or limited by judicial review. This constitution-making body in turn helps to trigger open and rational deliberation as well as link the constitution with the limitless Amendment); see also JASON FRANK, CONSTITUENT MOMENTS: ENACTING THE PEOPLE IN POSTREVOLUTIONARY AMERICA (2010).


12 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, 236-240. In the American context, Sanford Levinson argues that a majority has an inherent right to remake the American constitutional order through a federal constitutional convention. SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG 64 (2008).

13 ABBE SIEYES, WHAT IS THE THIRD ESTATE 130-31 (M. Blondel trans. 1963) (explaining how “a body of extraordinary representatives takes the place of the assembly of the nation” because “a large nation cannot physically assemble when extraordinary circumstances make this necessary.”).
constituent power of the people.\textsuperscript{14} This model is often linked to United States constitutional history—where the drafters of the United States Constitution operate through an extraordinary constitutional convention that met in Philadelphia.

This Article will describe how an extralegal institutional agent of the people, however, contains a practical danger: That the specialized constitution-making body itself will become dominated by a self-dealing majority.\textsuperscript{15} This majority can then claim the legal power in the name of the people to do a number of things to dominate the process of constitutional replacement: It could, for instance, rescind the popular ratification requirement altogether or reshape the institutional landscape in order to make ratification more likely.\textsuperscript{16} This self-dealing then undermines the deliberation and the broad consensus of the whole people required for democratic constitutionalism.\textsuperscript{17}

\textsuperscript{14} See Part I \textit{supra}.

\textsuperscript{15} Jeffrey Lenowitz’s recent work has challenged why ratification is even necessary if the people delegate their constituent power to a constitution-making body. \textit{See Why Ratification? Constituent Power and The Unexamined Procedure}, in \textit{Le Pouvoir Constituent et L’Europe}.


\textsuperscript{17} Samuel Issacharoff, \textit{Constitutional Courts and Democratic Hedging}, 99 \textit{GEO. L. J.} 961, 965-66 (2011) (defining democratic constitutionalism as an institutional arrangement that promotes political pluralism by “offer[ing] some prospect of removing from office incumbents who have incurred the wrath of the public.”).
This is more than just speculation. We have seen this abuse of constitution-making emerge in recent comparative experience.\textsuperscript{18} In fact, powerful leaders in both Russia and Venezuela have deliberately called specialized constitution-making bodies into existence to claim the absolute legal power of the people to avoid deliberation and compromise in a constitution-making process.\textsuperscript{19} By dominating these runaway bodies, these leaders have then claimed the legal power to reshape the institutional landscape without interference from courts or other ordinary institutions. The partisan abuse of runaway constitution-making bodies has since spread to other countries.\textsuperscript{20}

This partisan constitution-making is a classic example of the problem of agency costs in representative government.\textsuperscript{21} Agency costs arise whenever a “principal” delegates a task to an “agent” and the agent does not perform actions in accordance with the interest of the principal. In the case of a runaway constitution-making body, the costs arise because the principal (the whole

\textsuperscript{18} Landau, infra note __, at 213 (describing how “constitutional replacement can be a particularly efficient way for political actors to entrench themselves in power and to overcome political opposition, and thus is likely more dangerous than constitutional amendment.”).

\textsuperscript{19} Id. (“constitutional replacement can be a particularly efficient way for political actors to entrench themselves in power and to overcome political opposition, and thus is likely more dangerous than constitutional amendment.”).

\textsuperscript{20} Miklós Bánkuti, Gábor Halmai, & Kim Lane Schepple, \textit{Disabling the Constitution}, 23 J. DEMOCRACY 138 (2012) (discussing how Viktor Orban in Hungary declared the Hungarian Parliament to be a constituent assembly that could replace the Hungarian constitutional order).

\textsuperscript{21} Akhil Amar, \textit{The Bill of Rights as Constitution}, 100 Yale L.J. 1131, 1145-46 (1991) (discussing how the Framers sought to minimize the “agency cost” problem of government of “self-dealing” where government “servants” may be tempted to usurp the power of their “masters,” the people.).
people) loses control of its agent (the constitution-making body) when dominated by a self-dealing majority. To reduce these costs—and ensure that the constitution represents the constituent power of the whole people—requires aligning the incentives of the agents with the principal by creating mechanisms that 1) “screen” constitution-making agents to make sure they are widely representative of the whole people and 2) “monitor their performance . . . [by] disciplin[ing]” constitution-making agents “who do not follow the principal’s instructions.”

This Article will describe how the American tradition of constituent power solves this agency problem. In particular, the American tradition distinguishes between the power of the people themselves and the power of the people’s agent (a specialized constitution-making body). In this tradition, the people’s constituent power can never be limited by pre-existing rules but the power of the people’s representatives in specialized constitution-making bodies must be limited. This conception remains extant today in in the common law of the American states that limits the power of constitutional conventions.

During the Founding era, Americans did not need judicial review to limit the power of specialized constitution-making conventions. There was a broad consensus amongst the Founders that the people had the constituent power to act

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outside of established amendment rules by acting through specialized constitutional conventions but these conventions never exercised the unlimited power of the people. Founding-era Americans were particularly worried that a “faction” would dominate a representative institution and usurp the sovereign power of “the people at large.”

To minimize this agency problem of factional self-dealing in constitutional politics, specialized constitutional conventions were screened and monitored by constituent instructions from pre-existing institutions (towns or states). Furthermore, specialized constitutional conventions had the power to “propose anything” but were “authorized to conclude nothing;” this meant that “the people” could always reject the agent’s draft through ratification if the agent acted outside of its mandate.

During the mid-nineteenth century and onward, however, this consensus broke down as radicals began to argue that true constituent power required the delegation of the people’s unlimited power to a constitutional convention. In a series of important court cases, litigants began to argue that the people’s constitutional right to “alter and abolish” their constitutional orders within their

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23 Gordon Wood, The Creation of the American Republic 376 (describing how the central question of popular sovereignty for Founding-era Americans was a way to “control and restrict the elected representatives in their power.”).

24 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).

state constitutions required constitutional conventions to be all powerful.\textsuperscript{26} These arguments culminated in the early 1860s, when pro-secessionists called runaway constitutional conventions to avoid popular deliberation (and referendums) on secession and, in many places, to displace existing government in the confederate states.\textsuperscript{27}

In response to the persistence of these claims in the post-Civil War era, American state courts painstakingly constructed—through a process of learning and borrowing—a “common law” of constituent power to combat claims that specialized constitution-making bodies were the all-powerful agents of the people.\textsuperscript{28} It is now settled law that the people of each state have an unwritten legal right to alter their constitutions outside of pre-existing constitutional amendment rules by acting through extraordinary constitutional conventions. But courts have held that these conventions can be legally limited. In particular, they must be legally authorized by the state legislature in popularly ratified enabling acts. Furthermore, state courts have then moved to police the limits that these enabling acts place on the actions of constitutional conventions. This judicial review, however, is time-limited: Courts have limited this review of the powers of conventions to \textit{pre-ratification} review. Thus, a draft constitution that is

\textsuperscript{26} See Part IV \textit{supra}.
\textsuperscript{27} See Part V \textit{supra}.
\textsuperscript{28} See Part VI \textit{supra}.
ratified by the people is valid—in this case, the people have ratified the actions of an ultra vires agent.

This common law of constituent power helps to reduce the agency costs of popular representation in constitutional replacement. In particular, this law helps ensure that the principal (the people) can control its agent (a constitutional convention).29 First, by requiring a law to create a constitutional convention, courts can help to screen potential agents claiming to represent the people. Second, by blocking claims of absolute legal power in constitutional conventions, courts can monitor and discipline agents acting outside the scope of their authority to ensure that the people have a meaningful change to review the draft. This law therefore slows down the constitution-making process, increases incentives to compromise, and therefore helps to align the incentives of the people and its agent by maximizing popular consent to the constitution-making body’s draft.30

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30 David Landau, Abusive Constitutionalism, supra note 3, at 39 (further arguing that temporality means that “temporary spikes” in popularity cannot be exploited to entrench power); ANDREW ARATO, CIVIL SOCIETY, LEGITIMACY, AND CONSTITUTION 252 (2000) (“the temporal gap between two democratic procedures provides special opportunities for a public discussion that now has a complete proposal available, one that can still be changed by those sufficiently active and organized.”).
A recovery of the American tradition of constituent power and its continued presence in the common law of the American states is an important finding. It suggests that the universal normative claim that constitutional replacement should be completely extralegal is false. In particular, it suggests that in certain contexts courts might be required to protect “the people” against usurpation by striking down the *ultra vires* ordinances and actions of self-dealing conventions. Thus, this American common law of constituent power helps us begin to understand the limited ways in which courts can productively intervene in constitutional politics to improve the expression of the popular voice—and not to suppress it. This recovery therefore is the beginning of a much larger research agenda that looks at the role of courts in improving the politics of formal constitutional change.

To make this argument, this Article will be divided into seven parts. Part I will explain how the dominant theory of constituent power prioritizes extraordinary institutions like constitutional conventions that operate outside the existing legal order. Part II will describe how specialized constitution-making assemblies have been exploited to avoid checks and balances in constitution-making. Part III will describe how Founding-era Americans clearly saw the

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danger of extraordinary representation in constitution-making conventions. Part IV will describe early antebellum judicial opinions rejecting arguments that the people have an absolute legal right to act through all-powerful constitution-making bodies. Part V will describe how the secessionist movement in the American South relied heavily on extraordinary constitutional conventions to avoid deliberation in secession. Part VI will detail how post-bellum treatise writers and courts consolidated the idea that constitutional conventions did not exercise the sovereign power of the people. Part VII will describe how these postbellum authorities have helped contribute to a contemporary American common law of constituent power. Part VII will conclude.

I. CONSTITUENT POWER AND SPECIALIZED CONSTITUTION-MAKING BODIES

In a democracy, a new constitution is seen as the product of the people’s “constituent power,” a force which finds “no limits in the existing constitution and implies in practice its legal abrogation.”

32 Gabriel Negretto, Replacing and Amending Constitutions: The Logic of Constitutional Change in Latin America, 46 LAW & SOC’Y REV. 749, 751 (2012) (describing 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).

constitutional replacement as a kind of legal revolution sees no place for judicial review. Instead, constitutional replacement requires extralegal institutions and an open form of constitutional politics that will free “the people” to create a new constitution. Drawing historical support from their centrality during the American Founding period, this open process of constitutional politics and its extraordinary institutions are seen as critical in both symbolically tying the constitution to “We the People” and encouraging a rational, deliberative discussion free of short-term, political self-interest.

A. Constitutional politics

Underlying the conception of the people as the “constituent power” is a dualist vision of popular agency in democratic politics. During “ordinary politics,” the people (the principal) operate indirectly through ordinary representative agents like legislatures (“constituted” powers) and are limited by judicially enforced constitutional law. The people have “limited engagement in public life” during these times of ordinary politics: citizens vote but otherwise

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35 ACKERMAN, LIBERAL REVOLUTION, at 49 (describing how extraordinary institutions like conventions can “offer[] an opportunity for a victorious movement to make a collective effort both to frame their fundamental principles and to mobilize broad popular support for their crucial initiatives.”).

take relatively little account of public affairs.\textsuperscript{37} This form of “lower lawmaking” is carried out through representation; private interest groups, bureaucracies, and political parties ultimately drive policy.\textsuperscript{38} For this reason, courts are justified in reviewing the actions of ordinary popular agents like legislatures and administrative agencies.

During moments of “constitutional politics”, however, the people themselves (the principal) awake and directly assert their sovereign rights of constitutional authorship.\textsuperscript{39} This moment of “constituent power” cannot be cabined within ordinary politics or legality and instead is characterized by extraordinary institutions like constitutional conventions and referendums.\textsuperscript{40} Specialized mechanisms allow “mobilized deliberation” where the people speak as one with a special force and create “higher” law.\textsuperscript{41}

Constitutional politics is therefore “a sign that the legal system has come to a point of discontinuity” and requires “forms of politics beyond law.”\textsuperscript{42} In this special form of “constitutional politics,” ordinary institutions like courts “whose behavior is to be regulated by the constitution ought not to be part of the

\begin{footnotesize}
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\item Id. at 1034.
\item Id. at 1041 (1984).
\item Bruce Ackerman, Constitutional Politics/Constitutional Law, 99 Yale L. J. 453, 461 (1989).
\item Bruce Ackerman, \textit{We the People: Foundations} 266–94 (1991). Ackerman also avoids openly using the term constituent power.
\item Id. at 285–88.
\end{enumerate}
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constitution-making process.”

Allowing courts to review constitution-making could allow courts to entrench themselves (or favored elites) against popular constituent attempts to replace the constitution. Judicial involvement in formal constitutional replacement therefore undermines the “integrity” of formal constitutional replacement by allowing courts to block attempts by the people to overturn “judicial” constitution-making.

Finally, many argue that constitutional politics involves political questions that simply do not involve judicially cognizable standards for making decisions. For example, the Supreme Court explained that the decision of whether an amendment had lapsed required “an appraisal of a great variety of relevant conditions, political, social and economic.”

Even limited substantive judicial review of the politics of constitution-making would therefore be very difficult to limit. Laurence Tribe worries that judicial review of questions of procedure will inevitably lead courts to rule on substance and “unequivocally subordinate the amendment process to the legal system it is intended to override.

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44 Jack Balkin & Sanford Levinson, Understanding the Constitutional Revolution, 87 Va. L. Rev. 1045 (2001) (discussing “partisan entrenchment” as the process by which successful electoral parties appoint judges who will interpret the Constitution in order to protect their majority).
and would thus gravely threaten the integrity of the entire structure."\(^{47}\) The unique position of formal constitutional change, he argues, counsels “broad deference on procedural as well as substantive aspects of amendment ratification.”\(^{48}\)

B. A specialized constitution-making body

What agent do “the people” use to exercise their legal right to revolution in this extralegal form of constitutional politics? Most argue that the best agent for the people is a specialized constitution-making body.\(^{49}\) Because “the people” themselves are too numerous to gather and create a new constitution, they must choose representatives to do so.\(^{50}\) Theorists make two arguments for why specialized and extralegal agents are the best way for the people to create a new constitution: They increase the chance of rational deliberation and ensure that the constitution becomes a symbol of popular expression.

First, theorists argue that a body of extraordinary representatives is more likely to promote rational deliberation about the new constitutional order. The leading theorist of constitution-making, Jon Elster, argues that a specialized

\(^{47}\) Laurence Tribe, *A Constitution We Are Amending*, supra note __, at 442. 
\(^{48}\) At 445. 
\(^{49}\) Joel Colon-Rios, *Notes on Democracy and Constitution-Making*, (arguing that a specialized constituent assembly is the most democratic way to found a constitution). 
\(^{50}\) Id.
body is more likely to produce a document that would reflect “the predominance of reason over interest”\(^5\) because it would dissolve itself after it had drafted the constitution.\(^6\) The members of the assembly would essentially be formulating constitutional norms behind a “veil of ignorance” that encourages principle rather than partisan self-interest.\(^5\) Furthermore, a specialized body would encourage constitutional legitimacy because the constitution would not be “a mere bargain amongst interest groups” but instead “the outcome of rational argument about the common good.”\(^4\) Ruth Gavison argues that “[i]f the members of the assembly are people who are not directly involved in day-to-day politics, it is likely that their judgment will be less clouded by their own immediate political interests.”\(^5\)

By contrast, parliamentary constitution-making would likely lead to self-interested dealing by members of Parliament who would inevitably produce “soft

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\(^6\) Gabriel Negretto, *Making Constitutions: Presidents, Parties, and Institutional Choice in Latin America* 49-52 (2013) (discussing a cooperative approach where constituent assemblies are staffed by rational actors who would draft constitutional rules in order to capture the overall benefits of cooperation, including economic development, the durability of democracy, effective government, or political legitimacy.).


constitutional norms” that would be “too easy for a parliamentary majority” to alter. In fact, any “series of ad hoc modifications” inherently involved in parliamentary constitution-making would “greviously compromise[]” the status of constitutional norms. Jon Elster argues that parliamentary constitution-making would allow individual legislators to “serve as a judge in its own cause” and give the legislature plenary power to amend the constitution through parliamentary process. This kind of parliamentary self-dealing could therefore undermine the separation of powers by creating a weak president or judicial system. It could also lead to future majorities in the legislative branch seeking to entrench their power through a process of parliamentary constitution-making. As Elster has put it, “assemblies with this dual role obviously have a conflict of interest: they are being asked to propose a scheme that will, among other things, regulate their own place in the political system.”

56 BRUCE ACKERMAN, THE FUTURE OF LIBERAL REVOLUTION 63.
57 Id. at 61 (1991).
59 Elster, Forces and Mechanisms, supra note __, at 381. This draws on the argument of Rawls that constitutional conventions involve constitution-makers legislating from behind a veil of ignorance.
60 Jon Elster, Role of Institutional Interest in East European Constitution-Making, 5 E. EUR. CONST. REV. 64, 65 (1996) (arguing that parliamentary constitution-making gives precedence to legislatures at the expense of presidents and courts and the “obvious implication is that constitutions ought to be written by specially convened constituent assemblies rather than by institutions that will be involved in ordinary post-constitutional politics”).
61 Elster “Ways of Constitution-Making”, above n 5, at 134. Almost by definition, the old regime is part of the problem that a constituent assembly is convened to solve. There would
Second, theorists argue that a specialized and extralegal constitution-making agent is a powerful revolutionary symbol that “the people” have acted.\textsuperscript{62} In particular, a specialized, extralegal body symbolizes that the constitution is not seen as a “contract, negotiated by appropriate representatives, concluded, signed, and observed” but instead is a product of the people’s direct will.\textsuperscript{63} Specialized constituent assemblies and constitutional conventions therefore emerge as the only way to symbolically “giv[e] the public a voice in constitution-making.”\textsuperscript{64} To limit them through law—or to place the constituent power in ordinary institutions like parliaments—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.”\textsuperscript{65}

This symbolism in turn will foster a sense of “ownership that comes from sharing authorship.”\textsuperscript{66} In other words, constitution-making through a convention helps to transform the constitution into “a popular symbol of the revolutionary generation’s achievement”\textsuperscript{67} that will actually capture a “mandate from the

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\item[\textsuperscript{62}] Hart, Constitution-Making, supra note __, at 3.
\item[\textsuperscript{63}] Hart, Constitution-Making, supra note __, at 3.
\item[\textsuperscript{64}] Hart, Constitution Making and the Right to Take Part in a Public Affair, supra note __, at 32.
\item[\textsuperscript{65}] 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.”)
\item[\textsuperscript{66}] Hart, Constitution-Making, at 4.
\item[\textsuperscript{67}] ACKERMAN, LIBERAL REVOLUTION, supra note __, at 53.
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people.”

Linked to the limitless constituent power of the newly liberated people, popularly created constitutional orders would be protected “against erosion by political elites who had failed to gain broad and deep popular support for their innovations.”

Such irregular popular participation helps to ‘legitimate’ the new constitutional order, promote awareness, acceptance and assertion of human rights and promote democratic governance at the outset . . . to promote ‘human development’ . . . to close social and political gaps . . . to promote reconciliation and the amelioration of widely shared grievances . . . [and] to eliminate discrimination.

C. Historical support: The Philadelphia Precedent

The advantages of an extralegal form of constitutional politics and a specialized constitution-making body draw historical support from the role of the Philadelphia Convention in transforming the United States Constitution into a long-lasting symbol of revolutionary popular expression during the age of American liberal revolution. This “Philadelphia precedent” stresses how “We the People” spoke through a specialized constitutional convention meeting in 1787 in Philadelphia through an extralegal form of politics which broke with the pre-existing amendment rules contained in the Articles of Confederation.

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68 Id. at 54.
69 ACKERMAN, supra note __, at 10.
71 Lawrence G. Sager, The Birth Logic of a Democratic Constitution, in CONSTITUTIONAL CULTURE AND DEMOCRATIC RULE 111 (John Ferejohn, Jack Rakove, &
The Philadelphia precedent then looms large in the work of the leading constitution-making theorists. Jon Elster cites the Philadelphia Convention as the inspiration for his normative theory of democratic constitution-making through extraordinary conventions. Elster explains that the Philadelphia Convention serves a “model” for the normative conclusion that conventions in a form of unconstrained politics are the best way to reduce scope for “institutional interest.”

Bruce Ackerman’s work also stresses the importance of extralegality in the American revolutionary period. He argues that the Philadelphia Convention’s break with prior legality helped to initiate a period of “mobilized deliberation” where the people were able to speak with a special force and create “higher” law. For Ackerman, one of the marks of constitutional politics is that it cannot “be cabined within a neat legalistic understanding.” Richard Kay argues that the extralegality is a hallmark of activating the “constituent authority”

Jonathan Riley, eds., 2001) (describing the role of this historical narrative in our “constitutional folklore”).
73 Elster, Forces and Mechanisms, at 395. See also David Landau, Constitution-Making Gone Wrong, 64 ALA. L. REV. 923 (2013) (discussing how Elster sees constraints on specialized constitution-making as “unlikely to work in practice and does not recommend any of these as part of his normative recommendations.”).
75 Id. at 285–88.
76 ACKERMAN, TRANSFORMATIONS, supra note __, at 263–264.
of the people which “must be located outside of the pre-existing legal order.”

He argues that was the Philadelphia Convention’s “prior break with legality” that invested the United States Constitution “with the power it still exerts over us.”

D. Conclusion

The dominant conception of democratic constitutional replacement therefore prioritizes an extralegal form of constitutional politics and specialized constitution-making bodies. This extraordinary process is thought to encourage both a symbolic expression of the popular voice as well as rational deliberation on a new constitution. This argument draws force from the role that Philadelphia Convention played in creating the United States Constitution: A higher law form of constitutional law that stems from popular freely determined “reflection and choice” and not from “accident and force.”

The next section will look to recent comparative experience of extraordinary constitutional conventions to suggest that these specialized bodies do not necessarily promote symbolic expressions of popular voice or rational deliberation. Instead, when placed outside the legal order, they can become runaway bodies that do the opposite, creating divisive and partisan constitutions.

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78 Kay, Illegality, supra note __, at 58. The concept of the American Constitution as illegal is widespread.
79 THE FEDERALIST NO. 1 (Alexander Hamilton).
that undermine the broad consensus and rational deliberation necessary to effective constitution-making.

II. THE REALITY: SOVEREIGN CONVENTIONS AND PARTISAN CONSTITUTION-MAKING

Constitutional replacement has become a pervasive part of modern political life. Recent comparative experience reveals, however, that the extralegal institutions that come with it have not always yielded a rational and broad based deliberation that ultimately unleashes the symbolic will of the people. Instead, in certain contexts, an extralegal process can create serious agency problems: The principal (the people) can lose control of their agent (a specialized constitution-making body) when that agent is captured by a self-interested majority that then proceeds to unilaterally reshape the constitutional order in the name of the people.

This section will describe this runaway agent problem in both Russia and Venezuela. In both countries, powerful leaders deliberately called specialized constitution-making bodies to avoid deliberation and to secure their

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80 Tom Ginsburg, Zachary Elkins, & Justin Blount, Does the Process of Constitution-Making Matter?, 5 ANN. REV. L. & SOC. SCI. 201, 202 (2009) (estimating that “in any given year, by our estimate, some 4 or 5 constitutions will be replaced, 10 to 15 will be amended, and another 20 or so proposals for revision will be under consideration.”).

power into the future. In the short term, calling for a specialized body for constitutional replacement provided an opportunity to argue that they had the legal power to avoid key institutional barriers. In the long term, partisan control of this specialized constitution-making body and constitutional replacement allowed “a temporary political majority (in the society and in the legislature) . . . to extend its hold on power into the future, when its members may no longer enjoy majority status.”82 This “anticompetitive” use of formal constitutional design then insulates powerful factions from “the [future] risk of successful challenge.”83 This, in turn, has helped leaders in these countries to foster “self-enforcing stability” and semi-authoritarian regimes.84

A. Russia

My own previous work has described this abuse of constitutional politics in Russia.85 In the early 1990s, President Boris Yeltsin faced strong

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84 Michael Albertus & Viktor Menaldo, The Political Economy of Autocratic Constitutions 1 in Constitutions in Authoritarian Regimes (Tom Ginsburg & Alberto Simser, eds., 2013) (discussing how formal constitutional rules can play an important role in authoritarian and semi-authoritarian regimes).
parliamentary and judicial opposition in his push for a strong presidential system that could carry out an ambitious—and increasingly unpopular—program of economic reforms. In particular, the elected Russian Parliament had a monopoly over constitutional replacement under the old Soviet-era Russian Constitution and refused to give President Yeltsin the formal powers that he wanted.

To circumvent this opposition and to avoid compromise, President Yeltsin argued that the Russian people had a legal right to draft a new constitution outside of the existing order. To exercise this right, he called for a referendum that would ask the people if they had confidence in him or in Parliament. After a little more than 50% of Russian voters said they had “confidence” in President Yeltsin, Yeltsin claimed that he was the extraordinary representative of the people and therefore had the legal power to completely reshape the institutional apparatus of the Russian state. He then convened an appointed constitutional convention to reframe the institutional framework of the government in his own interests.

Yeltsin then claimed that this constitutional convention represented the people and therefore displaced the existing government in Russia. He then used his control of this institution to unilaterally draft a constitution that pushed

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86 Partlett, Dangers of Popular Constitution-Making, supra note __, at 217.
87 Id. at 217-218.
significant power to the Russian President. In fact, the Constitutional Convention was tightly controlled by a cadre of Yeltsin supporters who helped ensure that the draft it produced would push near total power to the Russian President. In a subsequent decree dissolving the Parliament as well as regional legislatures, Yeltsin cited his support in the referendum, a result that had the “highest possible legal force across the entire Russian nation.” He also pointed to the constitutional convention as the new government and the only legitimate source of new constitutional norms.

This process, however, did not create a constitution that became a symbol of the Russian people’s constituent power. Instead, key members of the Russian Parliament (and their supporters) refused to recognize the legitimacy of President Yeltsin’s actions and remained in session. In response, Yeltsin ultimately ordered the Russian Army to forcibly storm the Russian Parliament. In the aftermath of these actions, the Constitution was not a symbol of popular unity but instead was seen as a way to restore order and “avoid civil war.”

Finally, Yeltsin’s domination of Russian politics rendered the referendum on the new constitution largely meaningless. Arguing that the convention had full legal power, Yeltsin proceeded to issue decrees that would ensure that the

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88 Partlett, Separation of Powers Without Checks and Balances, supra note ___ at 105-110.
89 Id. at 131.
90 Id. at 134.

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people would approve his authoritarian constitution. In particular, Yeltsin banned any criticism of the draft constitution in the period leading up to the ratification vote. The exploitation of the lack of checks and balances in constitutional politics therefore became a convenient strategy for President Boris Yeltsin to build a constitutional system that concentrated near-dictatorial formal power in the hands of the Russian President.

B. Venezuela

The abuse of specialized constitution-making bodies later spread to Latin America. In Venezuela, President Hugo Chavez was able to sweep away parliamentary opposition by convening a National Constituent Assembly that he claimed would allow the people to remake their own constitution.

After being elected President in 1999, Chavez realized that he could not amend his way to power through the constitutionally mandated legislative path because his party did not control enough seats in the legislature. Instead of waiting for new elections, he issued a decree calling for a referendum to ask the people whether to call a constituent assembly to “transform the state and to create a new juridical order that would allow for the effective functioning of a

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91 Id. at 130-135.
92 Landau, Constitution-Making, supra note ___, at __.
social and participatory form of democracy.” Although this decree violated the Constitution, Chavez’s lawyers argued that the description of Venezuela as a democracy in the preamble to the Constitution gave the people the unenumerated right to exercise their constituent power outside of pre-existing rules. The Venezuela Supreme Court upheld Chavez’s agreed, reasoning that that the people’s constituent power is “prior and superior to the established juridical order” and therefore cannot be limited by the existing constitution.

After writing the electoral rules in way that gave his party a majority of the seats in the Constituent Assembly, Chavez’s supporters dominated the newly convoked Constituent Assembly. Chavez declared this Constituent Assembly to have absolute legal power 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.” Chavez’s Assembly then went on to intimidate and weaken the powers of the existing constituted powers. It first threatened to disband the Supreme Court if it interfered with the Constituent Assembly’s work. It next formally dissolved the

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94 Id. at 371.
95 Landau, Constitution-Making Gone Wrong, supra note ___, at 946.
existing legislature and replaced it with a “National Legislative Commission chosen by the Constituent Assembly.”

Under significant pressure, the Venezuelan Supreme Court accepted Chavez’s revolutionary argument that extraordinary representation could not be legally constrained by the court. The court agreed, holding that the National Constituent Assembly is “not a derivative power” and thus “cannot be subject to the limits of the existing judicial order, including the current Constitution.” It also noted the populist authority of the Constituent Assembly, commenting that the “convoking of the Colombian Constituent Assembly was preceded by a very broad consensus, in whose formation intervened the President of the Republic and the principal political forces, pushed by the initiatives of civil society.” With control of this unlimited Constituent Assembly, Chavez reshaped the institutional landscape of the country in his own interests. In Venezuela, constitution-making process and particularly institutional capture of the 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.”

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96 Id. at 948.
97 Id. at 947–48.
98 Id. at 948.
C. Conclusion

Comparative experience therefore suggests that extralegal constitution-making bodies can carry significant agency costs. In both cases, partisan runaway bodies helped provide legal arguments for reduced checks on the power of temporary majorities and also helped ensure popular ratification of constitutions that entrenched the power of self-interested factions. These agency cost problems remain salient today. In contemporary Hungary, Viktor Orban’s Fidesz party has sought to avoid judicial checks on its power by claiming that its super-majority in the Parliament—the product of election rules that converted 53% of the vote into a two third majority—has transformed the parliament into a constituent assembly that can reshape the constitutional order without limitation.100 The Fidesz party has then gone on to use constitutional law to consolidate its power. Constitutional replacement—and the possibilities of extralegal constitution-making bodies that comes with it—can therefore be an opportunity for self-interested leaders and parties eager to avoid checks and to consolidate their power. Parts III though VI will explain how the Americans have developed a tradition of constituent power that seeks to minimize the agency costs associated with constitutional replacement, while also giving the people the opportunity to exercise their constituent power.

100 Miklós Bánkuti, Gábor Halmai, & Kim Lane Scheppelle, Disabling the Constitution, 23 J. DEMOCRACY 138 (2012).
III. THE FOUNDING-ERA REJECTION OF EXTRAORDINARY REPRESENTATION

This abuse of the absolute legal powers of runaway constitution-making bodies would not have been surprising to the American Founders. Revolutionary Americans strongly believed that the people had unlimited constituent power to remake their constitutional order. But they explicitly rejected the possibility that this unlimited power could ever be delegated to a body of representatives. Such delegation, they argued, would usurp the sovereignty of the people.101

As one colonist stated in 1787, “it would be an absurd surrender of liberty to delegate full powers to any set of men whatever.”102 The Massachusetts General court proclaimed that “[s]omewhere, a Supreme, Sovereign, absolute, and uncontrollable 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.”103 Gordon Wood explained that Americans therefore developed 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

101 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.”).

102 Hartford Conn. Courant, Apr. 2, 1787.

delegates “could never be.” J. G. A. Pocock explained that the early Americans never delegated full power to one body but instead “asserted that there was 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.”

In Founding-era America, therefore, the central question of the popular exercise of constituent power, therefore, was a way to “control and restrict the elected representatives in their power.” 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. A prominent South Carolina politician, Thomas Tudor Tucker, explained 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

104 WOOD, supra note __, at 389.
106 WOOD, supra note __, at 376.
107 John Jameson, Early Political Uses of the Word Convention, 3 AM. HIST. REV. 477 (1898) (describing how Founding-era Americans drew their understanding of constitutional conventions from English practice and saw them as proposing bodies without legal power). This is in stark contrast with the French Revolution where the National Convention was seen as an unlimited representative of the people’s sovereign powers. The idea that a convention has unlimited power was found in Emmanuel Sieyes’s WHAT IS THE THIRD ESTATE? (M. Blondel trans. 1963). He explains how “a body of extraordinary representatives takes the place of the assembly of the nation.” Id. at 130. This extraordinary body is in the “same position as the nation with respect of independence from any constitutional forms.” Id. at 131.
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.\footnote{THOMAS TUDOR TUCKER, CONCILIATORY HINTS, ATTEMPTING, BY A FAIR STATE OF MATTERS, TO REMOVE PARTY-PREJUDICES 25–26 (1784).}

A. 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 these constitutional norms beyond the reach of ordinary legislative lawmaking.\footnote{WOOD, supra note __, 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.” \textit{Id}.} A specialized constitutional convention gradually emerged as the solution. For instance, in \textit{Notes on the State of Virginia}, Thomas Jefferson argued that a specialized form of politics involving “special conventions” was necessary to allow the people to establish “a form of government unalterable by ordinary acts of assembly.”\footnote{WOOD, supra note __, at 309.} 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.”\footnote{\textit{Id.} at 337.}
Founding-era Americans never seriously entertained the idea, however, 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 pre-existing bodies: towns and counties.\footnote{112} Furthermore, 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 framing the constitutional form of government, it would become a body of “usurpers and tyrants.”\footnote{113} 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.”\footnote{114} 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.”\footnote{115} Thus, they saw a clear division of power between legislatures and assemblies: “[c]onventions . . . are the only proper bodies to form a

\footnote{112} 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).
\footnote{113} Id. at 333.
\footnote{114} Id. at 337.
\footnote{115} Id. at 338.
constitution, and Assemblies are the proper bodies to make Laws agreeable to that constitution. 116

This conception of constituent power is perhaps best exemplified in the writing of the well-known Berkshire constitutionalists of Massachusetts. They did not see the power of the people exercised by “any other entity than the people as a whole.” 117 Thus, they simply did not see the “drafting of the constitution [as] a site of constituent activity.” 118 The Berkshire Constitutionalists instead argued that constituent power cannot be delegated because framers become “greater than the people who send them” and obtain “uncontrollable Dominion over their constituents.” 119 They also simply saw constituent power as simply “inalienable.” 120 A constitution therefore only became binding after a ratification process that signaled consent. 121

B. Federal constitution-making

This same view of constitutional conventions played out at the federal level. The Philadelphia Convention itself was created by the state legislatures.

116 Id.
118 Id. at 26.
119 Statement of Berkshire County Representatives, Nov. 17, 1778.
121 Id.
Furthermore, the representatives or “Commissioners” at the Philadelphia Convention were constrained by clear legal mandates from their state legislatures.\textsuperscript{122} Perhaps the most famous example is 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.”\textsuperscript{123} This instruction became codified in the future Article V, which does not allow amendments that would rob states of their equal representation in the Senate.

Furthermore, the Philadelphia Convention had no powers to reshape the American federal constitutional order without ratification from the people acting through legislatively authorized conventions. The Philadelphia Convention was therefore never seen as an assembly wielding the full constituent power of the people.\textsuperscript{124} James Wilson stated that the Convention was “authorized to conclude nothing” but was “at liberty to propose any thing.”\textsuperscript{125} Charles Pickney confirmed

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\footnotesize 122 ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS, at 36 (describing how the Virginia delegation was tasked with “devising and discussing all such alterations and further provisions, as may be necessary to render the Federal Constitution adequate . . . reporting such an act for that purpose, to the United States in Congress, as, when agreed to by them, and duly confirmed by the several states, will effectually provide for the same.”).

\footnotesize 123 Kris Kobach, May “We the People” Speak?: The Forgotten Rule of Constituent Instructions in Amending the Constitution, 33 U.C. DAVIS L. REV. 1, 56 (1999).

\footnotesize 124 When it became clear that many delegates wanted to abandon the Articles altogether, two delegates challenged the authority of the Convention to exceed the Congress’s mandate and completely replace the Articles of Confederation. Larry Kramer, Madison’s Audience, 112 HARV. L. REV. 611, 640 (1999).

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this sentiment, arguing that the Convention is “authorized to go any length in recommending, which they found necessary to remedy the evils which produced this Convention.” George Mason did not see any “weight” in the argument that the convention was illegal because “the fiat is not to be here but in the people.” Finally, in his final speech to the Convention, Benjamin Franklin explained that the proposed constitution was subject to both congressional approval and ratification by the states.

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.” Madison also explained that the convention was consistently authorized by pre-existing bodies. He questioned how the Philadelphia convention had “usurped” any power when it had been sanctioned by both state legislatures and the Continental Congress.

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126 Elliot’s Debates, Vol. V., at 197.
127 Id. at 216.
129 Federalist 40 (James Madison).
130 Id. (“let me then ask what sentence he has in reserve for the twelve States who usurped the power of sending deputies to the convention, a body utterly unknown to their constitutions; for Congress, who recommended the appointment of this body, equally unknown to
Finally, only ratification bound a state to the Philadelphia draft. No state was forced to participate in the new constitutional order without its consent. 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.” In Federalist 43, Madison explained that “no political relation can subsist between the assenting and dissenting States.” Thus, Founding-era constitution-making was a bottom-up process of gaining consent to a set of rules through pre-existing bodies, rather than the actions of specialized bodies acting outside of the existing legal framework.

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131 Raymond Ku, *Consensus of the Governed: The Legitimacy of Constitutional Change*, 64 Fordham L. Rev. 535, 569 (1995) (describing how the early Americans saw constitution-making to be “legitimate if it is accomplished through procedural devices that safeguard minority rights and it represents the will of the people as a whole”).


133 *Federalist* 43 (James Madison). Wilson discusses the right of the majority in constitutional foundation. “If the act of original association be infringed, or the intention of those who united under it be violated; the minority are still obliged to suffer the majority to do as they think proper; but are not obliged to submit to the new government. They have a right to retire, to sell their lands, and to carry off their effects.” James Wilson, *Lectures on Law*, ch. 10.

C. Conclusion

Because of their widely shared suspicion of representative bodies, there was never any need to judicially limit the powers of the specialized constitution-making bodies. Nonetheless, influential revolutionary-era thinkers were concerned about the dangers that future constitutional conventions might pose.135 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 runaway with power, he questioned “How [was the] convention to be formed?” “By what rule decide?” and “what [are] the force of its acts?”136 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.”137

135 See, e.g., St. George Tucker, 1 Blackstone's Commentaries 371–72 (1803), reprinted in 4 The Founders' Constitution 583 (Philip B. Kurland & Ralph Lerner eds., 1987) (“A change in governments in other countries is almost always attended with convulsions which threaten its entire dissolution; and with scenes of horror, which deter mankind from any attempt to correct abuses, or remove oppressions until they have become altogether intolerable.”).


137 5 The Writings of James Madison 321 (Gaillard Hunt ed., 1904). For a fuller description of overall ambivalence of the Federalists to constitutional conventions, see Kurt Lash,
Furthermore, in response to Thomas Jefferson’s argument that the Constitution should be redrawn every generation, Madison worried specifically about the potential agency costs created by factional conventions. 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.”\footnote{THE FEDERALIST 49 (James Madison) (arguing against Thomas Jefferson’s idea that the constitution should be replaced every generation). Underlying this idea is the American idea that “it is a mistake to assume that equal citizens in a democracy will always act for the public good.” Ku at 569.} He particularly worried about elected conventions captured by “persons of distinguished character and extensive influence in the community.”\footnote{THE FEDERALIST 49 (James Madison).} 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.\footnote{Id.}

As we will see from the next section, Madison’s fears were well-founded. In the nineteenth century, litigants began to make arguments to courts that constitutional conventions wielded the unlimited constituent power of the people. In response, courts began to build a common law that sought to ensure that the

unlimited power of the people remained in the people and not in constitutional conventions.

IV. 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 to resist federal power. 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 constitutional conventions.

Courts consistently rejected assertions of the unlimited power of constitutional conventions. At the heart of this rejection was the Founding-era insight that the people never delegate their unlimited constituent power to constitutional conventions. To do otherwise would lead to the agency problem of self-dealing by runaway conventions which could then do anything without

141 Henry P. Monaghan, We the People(s), Original Understanding, and Constitutional Amendment, 96 Colum. L. Rev. 121, 162 (1996).
the broad-based deliberation and consensus at the basis of a successful process of
democratic constitution-making.

A. Early expressions of constituent power: 1800 - 1830

Early expressions of constituent power followed the Founding-era precedent by ignoring pre-existing rules for constitutional change but did so through legislatively authorized conventions. 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. Appealing to the precedent of the founding of the United States 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. As during the late eighteenth century, Americans did not claim that the representatives in these 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 a constitutional convention.

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143 Id. at 35.
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.”144 Because established government would not give away their power, Jeffersonian Republicans responded by meeting in circumvention conventions in Hartford in 1804 and 1814 and declaring Connecticut without a constitution.145 These unauthorized conventions “vaguely hinted at circumventing established government” but ultimately sought to work through the legislature.146 Finally, in 1818, the Republicans were successfully able to persuade the legislature to call a constitutional convention, which drafted a new constitution for the state in 1818.

This success of legislative constitutional replacement 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.147 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

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144 Id. at 15-16.
145 Id. at 17.
146 Id. at 16.
147 Id. at 40.
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."\(^{148}\) 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 created constitutional conventions which proposed new constitutions.\(^{149}\)

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 describing these conventions in terms of agency law:

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.\(^{150}\)

The implication was clear: These conventions—although not specified for in the pre-existing constitution—were not all powerful. Instead, they represented a


\(^{149}\) Parkinson, supra note __, at 56.

\(^{150}\) Opinion of the Justices, 60 Mass. 573, 573 (1833).
partial and limited delegation of the people’s sovereign constituent power to alter and amend their constitutional order. The Massachusetts Court’s agency concept of constituent power would be influential in the future development of a common law of constituent power.

B. Nullification in the South Carolina Court of Appeals

The first serious emergence of the concept that an elected constitutional convention wielded the full constituent power of the people and therefore had absolute legal power can be found in the South Carolina nullification crisis. In October 1832, the South Carolina legislature called a state constitutional convention to review Congressional tariffs. In March 1833, this Convention nullified these tariffs and passed an ordinance empowering the South Carolina legislature to provide for “suitable oaths or affirmations.” Later that year, the legislature passed a law requiring officers of the state militia to swear an oath to South Carolina. 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

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153 Id.
154 Id. at *2.
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.”\(^\text{155}\) 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.”\(^\text{156}\) Because it reflects the will of the people, the “legal authority” of a convention’s representatives is “absolutely unlimited.”\(^\text{157}\) 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.”\(^\text{158}\)

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.”\(^\text{159}\) These limitations were drawn from the general

\(^{155}\) Id. at *58.  
\(^{156}\) Id.  
\(^{157}\) Id.  
\(^{158}\) Id.  
\(^{159}\) Id. at *24.
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 and durability of their institutions, the constituent principles of all representative bodies, the distribution of power under our republican forms, and their harmonious action.”\textsuperscript{160} 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.”\textsuperscript{161}

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.”\textsuperscript{162} In particular, to do so would lead to a number of unintended actions by the people, including switching the allegiance

\textsuperscript{160} \textit{Id.}
\textsuperscript{161} \textit{Id.} at *19, 23.
\textsuperscript{162} \textit{Id.} at *180.
of South Carolinians to “the grand Turk, or the Emperor of Russia, or to indulge in any other caprice they might think proper.”

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.” 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.” 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.” And, in this situation, any court is “duty bound” to protect the individual from powers not delegated by the people.

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

163 Id. at *180.
164 Id.
165 Id.
166 Id. at *182.
167 Id. at *182.
of government is delegated from them.” 168 But he explained that “the sovereign exercises none of the powers of government directly and in person.” 169 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.” 170 He explained that the key mistake that many make is “confounding together the authority attributed by the constitution to the people, with that of the convention.” 171

He continued, arguing that law was the people’s defense against usurpation by their agents. 172 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.” 173 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”

168 Id. at *189.
169 Id. at *194.
170 Id. at *189.
171 Id. at *199.
172 Id. at *199.
173 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.
and hinder appeals “to the people when the highest public interests require their interposition.”\textsuperscript{174}

\textbf{B. The Dorr Rebellion and Luther v. Borden}

In the years that followed, the concept of extraordinary representation through a constitutional convention 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.”\textsuperscript{175} He described how the representatives in this convention possessed “every attribute of absolute sovereignty” and may “reorganize our entire system of social existence.”\textsuperscript{176} 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.’”\textsuperscript{177}

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

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\textsuperscript{174} Id. at 202.
\textsuperscript{175} Quoted from \textit{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).
\textsuperscript{176} Id.
\textsuperscript{177} Id.
\end{flushright}
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.” 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 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. 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. Tyler’s message was heard. In January 1842, the pre-existing Rhode Island legislature called a legally authorized convention to draft a new constitution for

179 Appendix to Elisha R. Potter, Considerations on the Questions of the Adoption of a Constitution, and Extension of Suffrage in Rhode Island 55 (1842)
180 Id. at 56.
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.\footnote{George M. Dennison, The Dorr War: Republicanism on Trial, at 94. 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?”}

Dorr and his supporters, however, continued to press their belief that the people had the legal right to frame a new government outside of the pre-existing legal framework by acting through an extraordinary convention.\footnote{“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.” Elisha Potter, supra note __, at 22.} 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.\footnote{Luther v. Borden, 48 U.S. 1 (1849).}

The lawyer for the Plaintiff—Benjamin Hallett—argued that the people’s convention had displaced the existing Rhode Island government and the martial law was invalid. He argued that a constitution only limits the government’s
“mode” of altering or amending the constitution—not the people’s mode.\textsuperscript{184} 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 constitutional convention and “independent of the will or sanction of the Legislature.”\textsuperscript{185}

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.”\textsuperscript{186} Hallett also grounded this right on the Bill of Rights adopted by the 1790 Rhode Island Convention 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, whenever it shall become necessary to their happiness.”\textsuperscript{187} 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.”\textsuperscript{188}

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\textsuperscript{184} Id. at 40.
\textsuperscript{185} MR. HALLET’S ARGUMENT IN THE RHODE ISLAND CAUSES ON THE RIGHTS OF THE PEOPLE 10–11 (1848)
\textsuperscript{186} Id. at 14.
\textsuperscript{187} Id. at 17.
\textsuperscript{188} Id. at 10. Hallett explained how the counsel for plaintiff had requested a populist jury instruction instructing the jury that a majority of Rhode Islanders “had the right to reassume the powers of government, and establish a written constitution and frame of a republican form of government” independent of the existing constituted authorities. Id. at 6. The proposed instruction further charged the jury that the exercise of this right made the pre-existing charter government “null and void.” Id. at 6.
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.”\textsuperscript{189} If the legislature can ultimately block the exercise of this sovereignty, “we are not a free people.”\textsuperscript{190} Hallett argued that American constitutions are more than just “grants to the people by their rulers.”\textsuperscript{191} 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.”\textsuperscript{192}

In a famous rebuttal, Daniel Webster argued that only a legally authorized 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 to represent the people without any legal sanction, Webster explained, could lead to a series of “[t]umultous assemblages,” that would yield “a stormy South American liberty, supported by arms to-day and crushed by arms tomorrow.”\textsuperscript{193} In particular, this process would lead to a series of partisan conventions that represent the passions “of the most numerous for the moment.”\textsuperscript{194}

\textsuperscript{189} Id. at 62.  
\textsuperscript{190} Id. at 55.  
\textsuperscript{191} Id. at 17.  
\textsuperscript{192} Id. at 29.  
\textsuperscript{193} Id.  
\textsuperscript{194} Id. at 43.
Webster argued that any attempts to create bodies that represent the people outside of law veer “as widely from the American track as the pole is from the track of the sun.” He explained that the American practice clearly required some “authentic way” of determining that the body was a true agent of the whole people. This connection between the voice of the people and its authentic agent, he argued, is “not so easily discovered.” Any authentic process of popular representation (even limited) must be determined through “law” and the “results are to be certified to the central power by some certain rule . . . in some clear and definite form.”

In support, he cited American history where the people could create a constitution-making agent outside the pre-existing rules of constitutional change but that this agent must be certified “by an ordinary act of legislation.” The Founding, he argued, was one where pre-existing bodies like the Continental Congress and the state legislatures authorized and limited the actions of the Philadelphia Convention in reframing the federal government. He also described how many of the states did not have formal amendment clauses but

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195 *Id.* at 40.
196 *Id.* at 44. He continues, arguing that “will of the people must prevail, but that there must be some mode of finding out that will. The people here are as sovereign as the crowned heads at Laybach, but their will is not so easily discovered. They cannot issue a ukase or edict.” *Id.* at 32.
197 Luther v. Borden, 48 U.S. 1, 32 (1849).
198 *Id.* at 40.
199 *Id.* at 43.
200 *Id.*
altered their constitutions through specialized conventions “called by the Legislature.” This “regular action” of constituent power, he argued, “places on public liberty the most beautiful face that ever adorned that angel form.” He argued that when the people act through authorized law, they can limit their agents and “the stream of public authority . . . has the strength of the Missouri . . . [and] produces no tumult, no violence, and no wrong.”

The Supreme Court ultimately agreed with Webster, rejecting the argument that the people had the right to call a “people’s convention” outside of ordinary law and then displace the existing government. It explained that the commands and actions of unauthorized conventions had no legal force. The Court therefore implicitly accepted the argument that the only way for the people to exercise their constituent right to legally change their government is by acting through a lawfully created convention.

\begin{itemize}
\item \textsuperscript{201} \textit{Id.}
\item \textsuperscript{202} \textit{Id.} at 42.
\item \textsuperscript{203} \textit{Id.}
\item \textsuperscript{204} Luther v. Borden, 48 U.S. 1, 40 (1849).
\item \textsuperscript{205} The Supreme Court held that it would not review the actions of President Tyler in recognizing the lawful government of Rhode Island. 48 US 1, 43. The Court did however uphold the Circuit Court’s ruling that the state of Rhode Island had the power to call for a period of martial law in 1842. \textit{Id.} at 46. In so ruling, the Court also said that the Circuit had correctly recognized that it was bound to recognize that government as the “paramount and established authority of the State.” \textit{Id.} at 46.
\end{itemize}
V. FACTIONAL SECESSIONIST CONVENTIONS IN THE AMERICAN SOUTH

The high water mark of claims of absolute legal power in constitutional conventions in the United States can be found in the secession conventions of the American South. In fact, constitutional conventions played a central role in the pro-secessionist movement’s legal strategy for avoiding deliberation and debate in their goals of seceding from the United States.\footnote{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).} 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.\footnote{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).}

The exploitation of the sovereign convention model was first exercised 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.” 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 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.  

On December 20, 1860—amidst jostling crowds in the galleries—the South Carolina Convention voted to issue an ordinance dissolving its ties with the United States. The Convention explained that its action was based on the legal right of the people “to alter or abolish” their government contained in the Declaration of Independence. 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.

The South Carolina convention set the pattern. Conventions in other states were called in “an atmosphere of crisis and haste” and pro-secessionist

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208 Lilian Kibler, Unionist Sentiment in South Carolina in 1860, 4 J. SOUTHERN HIST. 346, 357 (1938).
209 Id. at 358.
210 Id. at 365.
212 Id.
213 (Reluctant Confederates, 90).
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 wishes of the pro-secession majority in the Alabama convention are “supreme . . . because they are the acts of the people acting in their sovereign capacity.”

He concluded that any “submission of this Ordinance to a popular vote is wrong.” Consequently, in the lower south (South Carolina, Mississippi, Florida, Alabama, Georgia, Louisiana), pro-secessionists avoid ratifying conventions altogether; the resulting secession ordinances also referred to “We the People, in convention assembled.”

These partisan conventions were not just a way of avoiding deliberation on secession; they also became a way for pro-secessionists to displace ordinary government. In South Carolina, the constitutional convention did not dissolve itself after secession. Instead, it took over South Carolina government, passing an ordinance creating an “executive council” that supplanted the established

214 Smith, supra note __, at 114.
215 Id.
216 DANIEL W. CROFTS, RELUCTANT CONFEDERATES: UPPER SOUTH UNIONISTS IN THE SECESSION CRISIS (describing how in the Upper South there was significant opposition to secession).
government. 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.” In response, many people began to call for the restoration of “constitutional government” in South Carolina. A pro-Unionist newspaper in Charleston argued 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.” 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.”

This happened in other states as well. In Texas, the pro-secessionist majority in the constitutional convention issued an ordinance removing the sitting governor—Sam Houston—from office on the grounds that he was a unionist. In Arkansas, the Convention transformed itself into a dictatorial provisional government that began to operate through special ordinances. In

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217 Laura A. White, Fate of Calhoun’s Sovereign Convention, 34 AM. HIST. REV. 757, 759 (1929).
218 Id. at 761.
219 Id.
220 Laura A. White, Fate of Calhoun’s Sovereign Convention, 34 AM. HIST. REV. 757, 763 (1929).
221 Id. at 764.
222 Id.
May 1861, it issued an ordinance calling for the raising of $2 million dollars in war bonds to help the war effort. It also promulgated a new constitution without popular ratification.

To conclude, the point here is not that partisan conventions caused secession; secession and civil war may were likely inevitable. But these partisan conventions did amplify the power of pro-secessionist forces—and speed the rush to secession—by reducing checks on the power of the pro-secessionists. In fact, these conventions caused many of the agency problems that many antebellum American courts had been worried about. First, they denied the 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 ability to hold their government accountable through checks and balances. The next section will show how postbellum courts and treatises developed a basis for a common law of constituent power in response to these secession conventions.

223 Bragg v. Tuffs, 6 S.W. 158, 159 (1887).
224 Danley and Johnson, Ex Parte, 24 Ark. 2 (1862) (suit by the sitting governor arguing that a provision in the existing constitution requiring an election in 1862 was not valid because the convention had not put the constitution to a ratification vote).
VI. POST-BELLUM REACTION TO EXTRAORDINARY REPRESENTATION

The post-Civil War period witnessed a strong reaction against claims that constitutional conventions inherently exercised the absolute legal power of the people. As members of constitutional conventions continued to make these claims, a series of prominent cases and treatises attacked this idea ruthlessly. Drawing on arguments developed by Webster and others, these sources built a considerable body of authority describing why judicial limitation of the powers of convention was necessary to protect the people from usurpation. In so doing, they helped build the basis for the contemporary common law of constituent power.

A. 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 pass an ordinance that conflicted with the convention’s enabling act.225 These opinions asserted a critical role for the judiciary in curbing attempts by elected constitutional conventions to claim to wield inherent popular power.

In striking down the ordinance, the Court explained that the constituent power language in the Pennsylvania Constitution guaranteeing the people the “inalienable and indefeasible right to alter, reform or abolish their government”

did not give people the right to act completely outside the pre-existing legal order through a constitutional convention. Instead, the Court argued that it allowed the people to change their constitution in three ways: 1) the “mode provided in the Constitution,” 2) “[a] law, as the instrumental process of raising the body for revision and conveying to it the powers of the people”; and 3) “a revolution.”  The Court described the first two as legal and the final option as relying solely on force.

Relying on Daniel Webster’s argument in *Luther v. Borden*, the Court reasoned that only an “authorized form” could speak for the “whole people” in the exercise of the people’s constituent power. The Court also explained that a legally authorized convention would also allow 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].”

In a subsequent case, another debate arose about the relationship between the people and their constitution-making agent. A Pennsylvania court reasoned that a convention “[has] absolute power. . . [W]hen once called into operation by

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226 *Id.* at 47.
227 *Id.*
228 *Id.* at 53.
229 *Id.* at 10.
proper authority, it cannot be subverted nor restrained by the legislature.”\textsuperscript{230} This “quasi-revolutionary” character, the court reasoned, is necessary for the convention to carry out the “popular will.”\textsuperscript{231}

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.”\textsuperscript{232} 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.”\textsuperscript{233} 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.\textsuperscript{234}

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.”\textsuperscript{235} The bill of rights provision affording people the right to alter and abolish their constitutional orders therefore does not afford a constitution any

\begin{itemize}
\item \textsuperscript{230} \textit{WOOD'S APPEAL}, 1874 WL 13128, at *7 (1874).
\item \textsuperscript{231} \textit{Id.}
\item \textsuperscript{232} \textit{Id.} at *13.
\item \textsuperscript{233} \textit{Appeal of Woods}, 1874 WL 13128, *9 (1874).
\item \textsuperscript{234} \textit{Id.} at *10.
\item \textsuperscript{235} \textit{Id.} at *11.
\end{itemize}
“inherent” rights but instead “is a reservation of rights out of the general powers of government to [the people] themselves.” To see otherwise, would be “to declare the impotency of the people, and the absolute potency of their agents.”

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.” Courts are the key institution “to decide” when the convention has exceeded the bounds of law.

The United States Supreme Court also endorsed this understanding of constituent power in 1891. The Court stated that Webster’s oral argument in Luther v. Borden was “a masterly statement” and argued “that our liberty is the liberty secured by the regular action of popular power, taking place and ascertained in accordance with legal and authentic modes.” The Court argued that the American system proceeds upon “orderly action under the authority of existing governments, proceedings outside of which are not contemplated by our

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236 Id. at *9.
237 Id. at *9.
238 Id. at *9.
239 Id. at *11.
In support, the Court argued that this approach helped protect the whole people against the “sudden impulses of mere majorities.”

B. Treatise writers

A series of post-bellum treatise writers also attacked the concept that constitutional conventions operated with absolute legal power. In fact, the most influential treatise on constitutional conventions—John Jameson’s book on constitutional conventions—was written to refute this concept. 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.” 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.”

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241 Duncan, 139 U.S. at 461.
242 Id. at 461.
244 Id. at 2-3.
245 Id. at 3. Jameson also speculated that “it is difficult to resist the conviction, that the assertion of that theory [of populist extraordinary representation] was connected with the great conspiracy which culminated in the late Secession war. Was it foreseen, that to carry out the design of disrupting the Union, with an appearance of constitutional right, new conceptions must become prevalent, as to the powers of the bodies by which alone the design could be accomplished.” Jameson, Early Political Uses, supra note __, at 309, n.1.
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.”\textsuperscript{246} 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.”\textsuperscript{247}

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.”\textsuperscript{248} He therefore argued that a \textit{constitutional} convention includes “delegates” who act under “a commission, for a purpose ascertained and limited by law or by custom.”\textsuperscript{249} An American convention is therefore always a creature of law and charged with a “definite . . . function” that it “never supplant[] the existing organization” or “govern[].”\textsuperscript{250} Jameson contrasted constitutional conventions with revolutionary conventions, which derive their power from “revolutionary force and violence” and are a form of provisional government

\textsuperscript{246} Jameson, \textit{Constitutional Convention}, at 2.
\textsuperscript{247} \textit{Id.} at 295.
\textsuperscript{248} \textit{Id.} at 21.
\textsuperscript{249} \textit{Id.} at 10.
\textsuperscript{250} \textit{Id.}
with absolute powers.\footnote{Id. at 6.} 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.”\footnote{Id. at 232.} 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.\footnote{Id. at 234–36 (arguing that these provisions were an attempt to overcome a belief of Passive Obedience” at the time that it was “sinful” to violently rebel)}

Subsequent treatises on constitutional conventions—often written to refute claims of inherent power in state constitutional conventions that were called outside of 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.”\footnote{WALTER DODD, THE REVISION AND AMENDMENT OF STATE CONSTITUTIONS 80 (1910).} 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”\footnote{Id. at 72.} and does not “in any way supersede the existing constitutional organization”\footnote{Id. at 93.}

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. He argued that a constitutional convention does not exist outside the existing 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.” Hoar argued that although the people are “supreme,” they have “no method of expression except through their representatives, the voters.” Following Jameson, he argued that the people cannot delegate their full power to a convention “without thereby terminating their own existence as the people.” Thus, the only way for the people to act outside of 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.”

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 extraordinary representation in a convention to be an “extravagant” idea of “the French school” and one that has “never gained a

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258 Id. at 147.
259 Id. at 21.
260 Id. at 28.
261 (16, Hoar).
footing in this country, although they have had, and still have advocates.”262 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 and “if the powers of the convention are absolute, as is claimed, then is our government an absolute oligarchy and despotism.”263 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.”264

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[].”265 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.266 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

263 Id. at 91.
264 Id. at 86.
265 Id. at 94.
266 Id.
Directory and undertaking to operate and manage the business of the company.”

VI. 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 right “whenever invited by the General Assembly . . . to alter and amend their constitutions.” This common law is the modern manifestation of the American tradition of constituent power. It is also a reminder of the critical importance of courts in limiting claims of absolute legal power in constitutional politics.

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 actions of the convention. The Maryland Supreme Court acknowledged that it is an

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267 Id. at 95.
268 In Re Constitutional Convention, 1883 WL 3595, at *3 (RI. 1883).
“anomaly” that “[a] supraconstitutional right require[s] the assistance of constitutional authority [the legislature]” but “that is what exists.” In building this law, courts have not included particularly broad explanations; they have instead drawn heavily on the agency justifications developed by the courts and treatises in the nineteenth century.

A. Extratextual right to call a legislatively convened constitutional convention

It is now settled 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. In 1912, the Indiana Supreme Court explained that this unwritten right to remake the constitution through a constitutional convention stems from the constituent right of the people to alter and abolish their constitutional order. 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.

269 Board of Sup’rs of Elections for Anne Arundel County v. Attorney General, 246 Md. 417, 432 (1967).
270 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.
271 Ellingham v. Dye, 99 N.E. 1, 8 (Ind. 1912)
272 At 16.
In 1935, the Rhode Island Supreme Court became one of the last state supreme courts to accept this common law. After surveying Jameson, Hoar, and the decisions of the Pennsylvania Supreme Court, 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. Following Jameson, the Court argued that the principle of “expressio unius est exclusion alteris” is not best applied to constitutions.

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. 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.” 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 agents of the “will of the people.”

B. The people limit the power of their constitutional conventions through ratifying the enabling act

273 In Re Opinion To The Governor, 178 A. 433, 436 (1935).
274 At 440.
275 At 438.
276 At 437-38.
277 At 438.
It is also the common law of the states that the terms of the legal authority of the convention in turn limits the powers of the delegates in this constitutional convention. 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 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.” 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.”

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.” This limitation ensures that the people are sovereign and their representatives are not. Courts have explicitly described this

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278 36 Rutgers L.J. 1075.
280 Id.
281 In re Opinion to the Governor, 55 R.I. 56, 178 A. 433, 452,
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.”

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.

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. An “affirmative vote” of the people

\[\text{282 Harvey v. Ridgeway, 248 Ark. 35, 44 (1970).}\]
\[\text{283 State ex rel. Fortier v. Capdevielle, 104 La. 561, 29 So. 215 (1901).}\]
\[\text{284 Staples v. Gilmer, 33 S.E.2d 49, 55 (Va. 1945).}\]
would thereby limit that convention because the “wishes of the people are supreme.”

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. The Court drew on Jameson and Hoar in explicitly rejecting the concept that a convention possesses inherent powers. The Court reasoned that the people had the right to require the convention to submit the draft for ratification in order to “keep a firm hold upon their liberties.” 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.” Thus, the court was situating constituent power not in the extraordinary body but in the process of ratification.

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

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285 Id.
286 Gaines v. O’Connell, 204 S.W.2d 425, 406 (1947) (explaining that the directive said that “‘Before any Constitution agreed upon by a convention that may be called pursuant to this Act and to Section 258 of the present Constitution shall take effect and become operative, the same shall be submitted to the qualified voters of this Commonwealth, after at least ninety days’ notice, and ratified by a majority of those voting.’”).
287 Gaines v. O’Connell, 204 S.W.2d 425, 430 (1947) (Arguing that this inherent power argument could only be seen in “revolutionary conventions”)
288 Id. at 432.
289 Id.
convention.” 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.” Courts therefore would step in to enforce the terms of these limitations.

C. Implied limitations on powers of conventions to issue ordinances

Furthermore, in cases where 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 advisory bodies helping the people amend 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.” Instead, the Court explained that a convention only has “delegated, and not inherent, rights.” A convention,

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290 Cummings v. Beeler, 223 S.W. 2d 913, 923 (1949).
291 Cummings v. Beeler at 177.
292 Ex parte Birmingham & A.R. Co., 42 So. 118, 121 (1905) (citing Wood’s Appeal).
293 At 120 (“Law is the highest form of a people's will in a state of peaceful government.”)
therefore, has no power to adopt “local legislation, pure and simple.” 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.”

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.” 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.”

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.” 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,

\[294\] Ex parte Birmingham & A.R. Co., 42 So. 118, 125 (1905).
\[295\] Id. at 124.
\[298\] Id.
and sovereign power” and cited Dorr and Hoar for the principle that a convention was limited by the existing constitutional order.\footnote{Kvaalen v. Graybill, 159 Mont. 190, 206 (Mont. 1972).}

Finally, in 1980, the Arkansas Supreme Court cited Jameson and Hoar in striking down an attempt by the 1979-80 Convention to specify the proposed ballot form.\footnote{Riviere v. Wells, 270 Ark. 206 (1980).} The Court argued that the court 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.”\footnote{Id. at 212.} In so doing, they rejected the argument that a convention “once convened, is not subject to any branch of the government, and that the convention is responsible only to the electorate.”\footnote{Id. at 213.} The Court stated that the idea of “total autonomy” for a convention was “discarded long ago.”\footnote{Id. at 216.} 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.”\footnote{Id. at 213.}

D. Limitations on judicial review

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\footnote{299 Kvaalen v. Graybill, 159 Mont. 190, 206 (Mont. 1972).}
\footnote{300 Id. at 212.}
\footnote{301 Id. at 213.}
\footnote{302 Id. at 216.}
\footnote{303 Id. at 213.}
It is also settled law that courts will exercise this power of judicial review only prior to a ratification election. 305 Doctrinally, courts have broadly held that ratification renders procedural irregularities an unreviewable “political question.” 306 This doctrine also makes sense from an agency law perspective because when the people have approved a constitutional draft, they can be seen to have ratified the ultra vires actions of their agent.

We see this ratification-style language in court opinions. The Nebraska Supreme Court explained that once the people had ratified something it was “those provisions by which the people have consented to place restrictions upon their own power in adopting amendments to the Constitution should not be so construed.” 307 The Pennsylvania Supreme Court explained that there must be consideration of “time when a judicial investigation must be applied for, if it is not to be deemed too late for consideration.” 308 The Court explained that “approval by the people gives unattackable validity to the Constitution or amendment submitted to them.” 309

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306 This principle is consistent with other courts who exercise judicial control of constitution-making. Golak Nath, (1967) 2 S.C.R. at 765 (prospective ruling in saying that the Basic Structure doctrine would not apply to constitutional amendments that were already in place).

307 State v. Winnett, 110 N. W. 1113, 1116 (1907).

308 Armstrong v. King, 126 A. 263, 266 (1924)

309 Armstrong v. King, 126 A. 263, 268 (1924)
Timing was also critical in the ratification of the current Georgia Constitution. In 1943, the Georgia legislature created a commission to draft a new constitution. The legislature then approved the commission’s draft and the Georgia voters ratified it in 1945. Despite the fact that this was not an elected constitutional convention and therefore not the proper agent for creating a constitution, the Court upheld this constitution, arguing that the people could operate outside formal amendment rules under the state’s “alter and abolish” language. The Court implicitly drew on the language of James Wilson and George Mason in saying that “[t]he fiat of the people, and only the fiat of the people, can breathe life into a constitution.” The Court explained that “[u]nder our system of government the method of expressing the will of the people is by voting in a legally held election.” The court concluded that this irregular method was legal—and not revolutionary—because the people had ratified the draft within the “legal machinery in operation at the time” of the state.

E. Conclusion

This American state-level common law of constituent power is therefore the modern manifestation of the American tradition of constituent power. It

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311 At 329-329.
312 At 334.
313 At 334.
allows the people to exercise their unlimited constituent power to legally transcend the pre-existing amendment rules of their existing constitutions but in a way that helps to reduce the agency costs in delegating constitution-making power to a representative body. In particular, this common law allows the people to better screen the constitution-making agents by ensuring that they will represent the whole people and not a partisan faction of the people. It also provides a good way of monitoring a convention by striking down ultra vires ordinances.

VII. CONCLUSION

This Article has sought to recover the American tradition of constituent power. From the Founding period to the current state-level common law of constituent power, Americans have sought to ensure that the people can exercise their constituent power to replace their constitutional order without constraint but also control the representative bodies that carry out this task. The recovery of this American tradition therefore yields a series of insights.

First, this tradition has clear implications for our understanding of “dualist” politics in America. On one hand, it confirms that constitutional politics are different from ordinary politics: The American tradition allows the people to legally act in violation of pre-existing constitutional rules in
constitutional politics. Thus, it suggests that that the constituent power tradition has not disappeared in the United States and there is a level of politics that does exist above ordinary politics. On the other hand, it also shows that there is not a clear separation between ordinary and constitutional politics. Although constitutional politics might operate in violation of existing amendment rules, it does not take place outside of ordinary politics or institutions altogether. Instead, the people exercise their constituent right to remake their order through ordinary law.

The necessity of merging constitutional politics with ordinary politics stems from shows the fact that the agency problem of factions applies equally to constitutional politics as it does to ordinary politics. In particular, we have seen that specialized constitution-making bodies are not always less self-interested and more rational; on the contrary, there is always the possibility that an extraordinary convention will be captured by a partisan majority and then dominate the process of constitution-making can pose serious problems to democratic constitutionalism.

The solution to these agency costs is the same as well. Madison and the other Founders famously argued that the best way to avoid these agency costs

\[314\] Christianity Fritz, American Sovereigns: The People and America’s Constitutional Tradition Before the Civil War 291 (2008) (arguing that constituent power has been replaced by a rule of law approach which is “inconsistent with the notion that a sovereign people could not be bound even by a fundamental law of their own making”).

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was through the creation of a system of institutional filtration and deliberation. The American tradition of constituent power—and its current common law of constitution-making—helps apply a similar logic to constitution-making. In particular, this common law slows down the process of constitution-making and gives the people more opportunities to screen and monitor their agents. This in turn leads to a more consensual process where the constitutional order will include “impartial institutions” that reflect the interests of the whole people (including minority groups).

Second, this common law helps us understand a normative justification for why courts should play a role in constitutional replacement. This insight therefore contributes to a deeper understanding of what Andrew Arato calls a “post-sovereign” model of constitutional replacement—one where the constituent power “is not embodied in a single law or organ with the plenitude of power” but instead is a process where all bodies in constitution-making are “brought under legal rules.” In particular, the agency problem outlined in this

315 David Landau, *Abusive Constitutionalism*, 39 U.C. Davis L. Rev. ___ at 39 (forthcoming) (further arguing that temporality means that “temporary spikes” in popularity cannot be exploited to entrench power); ANDREW ARATO, CIVIL SOCIETY, LEGITIMACY, AND CONSTITUTION 252 (2000) (“the temporal gap between two democratic procedures provides special opportunities for a public discussion that now has a complete proposal available, one that can still be changed by those sufficiently active and organized.”).

316 CHRISTOPHER EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT 19 (2001). As Andrew Arato has written, this application of the principles of “constitutionalism” helps ensure a more rational process of consensus building in constitution-making.

Article provides a compelling justification for the importance of courts in limiting the power of specialized constitution-making bodies.

This insight also contributes to a much larger research agenda that investigates the role of courts in not just constitutional replacement but also constitutional amendment. Courts around the world are rapidly adopting doctrines that declare constitutional amendments “unconstitutional” for violating key foundational norms in a democracy. 318 Perhaps most recently, the constitutional court in Colombia has struck down constitution-making attempts as attempts to undermine checks and balances that are at the heart of pluralistic democratic governance. 319

This judicialization of constitutional politics, however, requires additional analysis. 320 What types of judicial review are courts employing? How are courts implementing these decisions? And what doctrinal tools are courts deploying to limit their involvement and avoid over-politicization? 321 By

constituent power — best exemplified in South Africa — is a multi-stage process involving round tables, elected parliaments, and constitutional courts).


319 Carlos Bernal-Pulido, Unconstitutional Constitutional Amendments in the Case study of Colombia: An Analysis of the Justification and Meaning of the Constitutional Replacement Doctrine, 11 INT’L J. CONST. L. 339 (2013);


321 Wall Street Journal, Thailand’s Democracy Under Siege, Nov. 27, 2013. Available at
answering these types of questions, future work can begin to look at where courts can actually solve concrete problems in constitution-making without playing a counter-majoritarian role. Only then can we better understand the complex—but still under-researched—dynamics of the judicial regulation of constitutional politics and therefore ensure that constitutional change is more deliberative and ultimately produces a document that is a symbol of broad-based popular consensus.

http://online.wsj.com/news/articles/SB10001424052702304017204579223420181984300 (discussing the Royalist capture of the court system).