

ARTICLES

THE CONSTITUTIONAL CONVENTION AND CONSTITUTIONAL CHANGE: A REVISIONIST HISTORY

by
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How do we change the Federal Constitution? Article V tells us that we can amend the Constitution by calling a national convention to propose changes and then ratifying those proposals in state conventions. Conventions play this role because they represent the people in their sovereign capacity, as we learn when we read McCulloch v. Maryland.

What is not often discussed is that Article V itself contains another mechanism for constitutional change. In fact, Article V permits both conventions and legislatures to be used for amendment, and, as it happens, all but one of the 27 amendments to the Constitution have been made by legislatures. If conventions alone represent the people in their sovereign capacity, then why don't we actually use them to change the Federal Constitution? Are we to conclude that most of the amendments are in some way defective?

To show why Article V might have permitted the use of legislatures to amend the Constitution, this Article examines a series of political texts on the convention written between the seventeenth and eighteenth centuries. Writers in this line defended the power of Parliament or the American colonial assemblies to

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alter the frame of government. From their point of view, the people could be present in the legislature, and when they were, the legislature could establish fundamental law.

This perspective helps to explain the rightful place of constitutional change by government. The people can be represented by the institutions of government, and when they are, those institutions can claim an authority to alter the Constitution. In this sense, the popular sovereignty described in McCulloch is dynamic: it can be present in different institutions at different times. Presidents have repeatedly claimed just this authority. From the perspective of the writers examined here, the legislature could too. It was when corruption stopped up legislative routes of popular constitutional change that the people could move outside government entirely, to a convention, where they might alter the Constitution to better secure their property and liberty.

The history set out here directly challenges the orthodox historical account, based largely on the work of Gordon Wood, that has dominated the legal academy for nearly 50 years. It focuses on the same key state—Pennsylvania—and argues in detail that Wood’s interpretation of the use of the convention there is incorrect. The Article emphasizes political context rather than ideology, and in so doing offers a more nuanced, and more realistic, view of the place of the convention in American constitutional change.

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INTRODUCTION

How do we change the Federal Constitution? Article V tell us that we can change the Constitution by convention. A federal convention is called to propose changes, and those proposals become law when ratified by a sufficient number of state conventions.¹

Conventions play this role because they represent the people in their sovereign capacity. As Chief Justice John Marshall put it in *McCulloch v. Maryland*, it was in conventions that the proposed Federal Constitution “was submitted to the people.”² Indeed, “assembling in Convention” was “the only manner in which they” could act “safely, effectively, and wisely, on such a subject.”³ A leading treatise on conventions agrees, and extends the point to state constitutions. Under “the American system of government,” the treatise states, it is “a special agency,” the “Constitutional Convention,” that “frames our Constitutions” and “is charged with maturing the needed amendments.”⁴

Constitutional conventions are often said to be an American invention, a by-product of the movement to replace colonial charters with written constitutions in

¹ Article V states, in relevant part:

The Congress, whenever two thirds of both houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several states, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress.

U.S. CONST. art. V.

² *McCulloch v. Maryland*, 17 U.S. 316, 403 (1819).

³ *Id.*

⁴ JOHN ALEXANDER JAMESON, A TREATISE ON CONSTITUTIONAL CONVENTIONS 1, 2 (4th ed., Chicago, Callaghan & Co. 1887).

the early stages of the Revolutionary War.⁵ In the spring of 1776, as Pennsylvanians considered how best to frame a state constitution, a writer calling himself Demophilus urged that the danger of tyranny would be abated if “every article of the constitution or *sett of fundamental rules*” governing “the supreme power of the state” were “formed by a convention of the delegates of the people, appointed for that express purpose.”⁶ Several years later, Thomas Jefferson also recommended a convention as “the proper remedy” “to fix” Virginia’s constitution and “amend its defects.”⁷ A convention, he thought, might be able to “bind up the several branches of government by certain laws”—something the first state constitution had failed to do—while avoiding “an appeal to the people, or in other words a rebellion.”⁸

The problem with this account is that we have not actually used conventions to amend the Constitution. Of its 27 amendments, none were proposed by a national convention.⁹ They all were proposed by Congress, as Article V also allows. Only one amendment, the Twenty-First, ending Prohibition, was approved by conventions in three-fourths of the states.¹⁰ State legislatures ratified the rest in compliance with Article V. In this sense, a good deal of our Constitution is not convention-based. This includes its most important parts: The Bill of Rights rests on the merest legislative authority. We have changed parts of the original Constitution (a document ratified by conventions) by the votes of Congress and state legislatures.¹¹ And legislatures far outstrip conventions in the amending of state constitutions.¹² One

⁵ *E.g.*, Roger John Traynor, *The Amending System of the United States Constitution, An Historical and Legal Analysis 1* (1927) (unpublished Ph.D. dissertation, University of California at Berkeley).

⁶ DEMOPHILUS, *THE GENUINE PRINCIPLES OF THE ANCIENT SAXON, OR ENGLISH CONSTITUTION 4* (Philadelphia, Robert Bell 1776).

⁷ THOMAS JEFFERSON, *NOTES ON THE STATE OF VIRGINIA 129* (William Peden ed., 1982) (1787).

⁸ *Id.* Jefferson argued that the state legislature could actually amend the existing Virginia Constitution, since the Provincial Convention that adopted this constitution had acted as an informal legislative assembly. *See id.* at 121–22.

⁹ The dearth is not for lack of trying. An older study found 356 state applications for an Article V Convention. Frank J. Souraf, *The Political Potential of an Amending Convention*, in *THE CONSTITUTIONAL CONVENTION AS AN AMENDING DEVICE 113, 114* (Kermit L. Hall et al. eds., 1981); *see also* James Stasny, *The Constitutional Convention Provision of Article V: Historical Perspective*, 1 *COOLEY L. REV.* 73, 73–75 (1982).

¹⁰ This is one of the amendments whose method of ratification is included in the text. U.S. CONST. amend. XXI, § 3.

¹¹ For example, Article II, Section 1, which describes the method of electing the President and Vice President, was changed by the Twelfth Amendment and subsequently by the Twentieth and Twenty-Fifth Amendments—all proposed and ratified by legislatures. U.S. CONST. art. II, § 1, *amended by* U.S. CONST. amends. XII, XX, XXV.

¹² Ninety percent of the amendments to state constitutions between 1992 and 2000 were proposed by legislatures. Most states use referenda to ratify proposed amendments. Gerald

senses a mismatch. If, as we learned in law school, the people are present in their sovereign capacity in the convention, then why have we used conventions only once when formally amending the Federal Constitution—and then only to vindicate the very sublunary right to drink?

What we lack is an account of the constitutional convention that explains why they should be so rarely used for formal constitutional change. Existing scholarship largely declines to supply such an account. This is not a matter of describing particular “constitutional moments,” that is, extraordinary, creative episodes of “self-conscious acts of constitutional creation” in which the “spokesmen for the People refused to follow the path for constitutional revision set out by their predecessors.”¹³ The formal “path for constitutional revision” set out by the framers is precisely what we want to understand. Nor is it a matter of explaining, on structural, institutional, or jurisprudential grounds, why most constitutional change occurs outside Article V.¹⁴ For what we want to know, at least in part, is *something about Article V itself*: why it should permit the use of both conventions and legislatures to formally amend the Constitution.

This Article offers an historical account of the convention that answers these questions. The key theoretical idea in the account is that *popular sovereignty is dynamic*: it moves between institutions, both in and out of government. Building on an approach Keith Whittington has applied to the president,¹⁵ this Article describes how English and American politicians have competed for an authority to alter fundamental law by claiming to represent the people, and then have harnessed the political institutions they controlled to that end. Often this evolved into a contest between the authority of the legislature and that of an extra-legal, quasi-legislative body, such as a convention.¹⁶

Benjamin, *Constitutional Amendment and Revision*, in 3 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY: THE AGENDA OF STATE CONSTITUTIONAL REFORM 177, 181 (G. Alan Tarr & Robert F. Williams eds., 2006).

¹³ BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 44 (1991). Ackerman draws on Gordon Wood’s account of the convention, which I will be criticizing here. *See id.* at 174–75, 216.

¹⁴ *See, e.g.*, Richard Albert, *Constitutional Disuse or Desuetude: The Case of Article V*, 94 B.U. L. REV. 1029, 1045–46 (2014); Aziz Z. Huq, *The Function of Article V*, 162 U. PA. L. REV. 1165, 1167 (2014); Jason Mazzone, *Amending the Amendment Procedures of Article V*, 13 DUKE J. CONST. L. & PUB. POL’Y, 115, 117–18 (2018); David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457, 1458 (2001).

¹⁵ KEITH E. WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY* 16–19 (2007).

¹⁶ *See id.* at 5 (“The judiciary is not the sole guardian of our constitutional inheritance, and interpretive authority under the Constitution has varied over time. At some points in American history, the Court has been able to make strong claims on its own behalf At other points,

The time period under study runs from the mid-seventeenth to the late-eighteenth century, which might be described as the infancy of the constitutional convention. Over this 150-year period, politicians and writers employed a number of different arguments to claim an authority to act on behalf of the people, but most of these arguments can be reduced to what Zephyr Teachout has called “the anti-corruption principle”: the norm that government ought to advance *public* interests rather than the *private* interests of those in power.¹⁷ Early American conventions functioned as a safety valve within this framework. If corruption stopped up governmental mechanisms of popular constitutional change, the convention was available so as to avoid (as Jefferson put it) “an appeal to the people, or in other words a rebellion.”¹⁸ Though conventions tended to pose greater risks for political elites than legislative amendments, they posed fewer risks than armed rebellion. Of course, conventions were also corruptible. Writers emphasized their informal proceedings and their indefinite powers, which seemed, inevitably, to expand. Worst of all, conventions tended to be populated by the wrong men: radicals, zealots, and unpropertied, dependent men, who were particularly susceptible to corruption. By emphasizing these defects, politicians in government struggled to reclaim popular authority from conventions.

What follows is an effort to ground this view of the convention in a set of historical texts. Part I sets out what I call the “orthodox” view of the convention, drawing in particular on the scholarship of Gordon S. Wood and Richard Tuck.¹⁹ Part II opens my case for an alternative, focusing on a strand of seventeenth-century English political writing about the convention and its relationship to Parliament in matters of royal succession and governmental change. Set in context, this writing reveals a dynamic struggle for the authority that flowed from a claim to represent the people. Part III describes how this conception of the convention was adapted to an American context in which the legislative assembly traditionally enjoyed a claim to represent the King’s American subjects. I show how, in Pennsylvania, a Provincial Convention emerged as an alternative to a House of Assembly suspected of self-dealing and excessive entanglement with imperial officials. Finally, Part IV draws on this account to interpret the framing and ratification of Article V with a goal of making sense of the respective roles it assigns the legislature and the convention.

however, elected officials have strongly asserted their own authority to interpret constitutional meaning . . .”).

¹⁷ Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 373–74 (2009); see also LAWRENCE LESSIG, *REPUBLIC LOST* 128–31 (2d ed. 2015). In this respect, one could add Article V to the list of anti-corruption clauses Teachout identifies in the Constitution. Teachout, *supra*, at 355.

¹⁸ JEFFERSON, *supra* note 7, at 129.

¹⁹ See RICHARD TUCK, *THE SLEEPING SOVEREIGN: THE INVENTION OF MODERN DEMOCRACY* 181–248 (2015); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787*, at 306–43 (1998).

I. THE ORTHODOX VIEW OF THE CONSTITUTIONAL CONVENTION

The account of the constitutional convention set out here is a revisionist account. It is not, strictly speaking, a “reply” to any particular author or piece of scholarship, but it is targeted, and in this Part, I describe the basic features of the view of the convention I intend to target. I call this view the “orthodox” view. Though we might connect the orthodox view to a number of different writers, here I focus on two very influential intellectual historians: Gordon S. Wood and Richard Tuck. Both Wood and Tuck describe the eighteenth-century constitutional convention as embodying the American people in their sovereign capacity, although their work differs somewhat in its methodology and sources.

Gordon Wood’s account of the American constitutional convention begins with English practice, where he observes the expression’s ancient use in describing a variety of English assemblies, converging by the eighteenth century on “some sort of defective Parliament” whose representation of the nation was “imperfect” “because of the absence of the King.”²⁰ Conventions, says Wood, were “[n]ot . . . necessarily illegal,” since they were closely associated with a right to assemble and petition the legally constituted government to address the people’s grievances.²¹ This frame allows Wood to group conventions with other “adjuncts” of government that emerged in the mid-1760s in America, principally the associations and committees tasked with enforcing patriot boycotts of British goods.²² These bodies were all legally deficient in the sense that they were not authorized by colonial charter, but they were, some men argued, nonetheless *constitutional*, because the people always possessed a right to assemble and present their grievances, and to provide for the protection of property when government failed to respect rights secured by charter and the common law.²³

As one of these extra-legal, popular bodies, free from royal influence or corruption, conventions were suited to framing a people’s fundamental law in the form of a written constitution. Legislative assemblies could not claim the same status. Focusing on the case of Pennsylvania, where this view was expressed the most clearly, Wood reasoned that “[i]t was the very historical and legal inferiority of a convention to a legislature that compelled the radicals to argue that a convention was ‘in a special manner the epitome of the People,’ that, in fact, only a convention could make the people of Pennsylvania ‘a *legal people*.’”²⁴ But the view was not unique to Penn-

²⁰ WOOD, *supra* note 19, at 311.

²¹ *Id.* at 312.

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 337.

sylvania. The attitude eventually prevailed to such a degree that, wrote Wood, “governments formed by other means actually seemed to have no constitution at all.”²⁵ At the center of the account is a neat connection between the legal deficiency of the convention and the privileged status it assumed in relation to the sovereign people. In this sense, Wood sees *institutional* boundaries working to clarify a *theoretical* distinction between fundamental and ordinary law rather than the other way around.²⁶ This puts the convention at the center of a story about the emergence of an American conception of fundamental law.

Richard Tuck’s 2012 Seeley Lectures, collected and expanded in *The Sleeping Sovereign*, provide a theoretical grounding for the institutional role Wood assigns to the convention. Tuck argues that an important strand of modern political writing distinguished *sovereignty* from *government*.²⁷ His principal example is Thomas Hobbes, who argued in *De Cive* [On the Citizen] that (in Tuck’s formulation) a people could be sovereign without being “involved at all in the ordinary business of government” if they determined by majority vote “who should rule on its behalf and how in general they should behave and then retire[d] into the shadows.”²⁸ This view is the source of what Tuck calls in his title “modern democracy,” insofar as modern commercial states could not require the people to act in their sovereign capacity in the administration of everyday government, as ancient theories of direct democracy are often described.²⁹ Indeed, as we know from other studies, America’s “cosmopolitan” elites hoped the nation would become a leading commercial state in the Atlantic world.³⁰ It might not survive otherwise. Hobbes’s conception of democracy thus fit their purposes well, and Tuck maintains that it was this conception Americans institutionalized when they distinguished conventions from legislative bodies,

²⁵ *Id.* at 342.

²⁶ *See id.* at 306–07; *see also* DAVID E. KYVIG, EXPLICIT AND AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION, 1776–1995, at 23–24 (1996). *But see* MARC W. KRUMAN, BETWEEN AUTHORITY AND LIBERTY: STATE CONSTITUTION MAKING IN REVOLUTIONARY AMERICA 7, 32–33 (1997) (arguing that Americans distinguished fundamental and ordinary law from the beginning of the Revolution).

²⁷ TUCK, *supra* note 19, at 249.

²⁸ *Id.* at ix–x.

²⁹ *Id.* at 6 (“The objection to ancient democracy in a modern state had always been presented as primarily logistical (so to speak), in that the citizens of a modern state could not physically gather together or could not find the time to do so. But implicit in this as an objection was the conviction that the gathering would be to discuss legislation.”); *id.* at 8. (“[O]nce it was recognised that . . . important acts of democratic sovereignty were by their very nature infrequent, the way was open to recreate democracy in a modern setting . . .”).

³⁰ *See, e.g.*, MAX M. EDLING, A REVOLUTION IN FAVOR OF GOVERNMENT: ORIGINS OF THE U.S. CONSTITUTION AND THE MAKING OF THE AMERICAN STATE 3–5 (2003); Daniel J. Hulsebosch, *A Discrete and Cosmopolitan Minority: The Loyalists, the Atlantic World, and the Origins of Judicial Review*, 81 CHI.-KENT L. REV. 825, 825 (2006).

reserving the special task of framing constitutions for popular conventions and plebiscites.³¹ In this sense, American constitutions were “democratic” even if they did not involve the people in the ordinary, everyday business of government.³²

The orthodox view is not without support, but neither is it without cost, and as with all theories, one must try to get a sense of whether the price is worth paying. Some of the implications are striking. If, as Wood argues, it was widely believed by the 1780s that “[o]nly ‘a Convention of Delegates chosen by the people for that express purpose and no other’ . . . could establish or alter a constitution” and that “governments formed by other means actually seemed to have no constitution at all,” then we must conclude that the several states that did *not* employ conventions to frame their constitutions were regarded as not having constitutions, though some of these frames were retained for decades.³³ And it would seem to follow that if “[n]o legislative assembly, however representative,” could represent the whole people in their sovereign capacity, then any legislative alteration of a constitution would imply a regime of legislative supremacy or legislative sovereignty, a status we ascribe to the modern British Parliament, which is said to enjoy a “right to make or unmake any law whatever.”³⁴ In short, there is no fundamental law at all, in the sense of a body of law that binds *government*, if constitutions are not framed by bodies *outside of government* like the convention (or by a method even more popular, like the plebiscite). Apparently, we should regard the many governmental changes to our constitutions as *ultra vires*. Indeed, legal scholars have already drawn this conclusion in commentaries on Tuck’s work, describing judicial review as “popular sovereignty’s frustration.”³⁵ But judicial review is only the beginning of it, since constitutional change occurs in every branch of government.

Even more problematic—frightening, really—is the idea that the democratic credentials of the United States could consist in the meetings of a series of state conventions held nearly 250 years ago, even if the people are now excluded from

³¹ EDLING, *supra* note 30, at 107–09, 178–81, 183–93.

³² *See id.* at 13, 23; *see also* DANIEL LEE, POPULAR SOVEREIGNTY IN EARLY MODERN CONSTITUTIONAL THOUGHT 312–15 (Martin Loughlin et al. eds., 2016).

³³ TUCK, *supra* note 19, at 197 & n.20, 213–15 (on the case of Rhode Island, whose charter constitution lasted until 1842); WOOD, *supra* note 19, at 328, 342 (quoting the South Carolina legislature).

³⁴ A. V. DICEY & K.C., HON. D.C.L., INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION xviii (8th ed. 1915) (internal citations and quotations omitted); WOOD, *supra* note 19, at 328 (“No legislative assembly, however representative, seemed capable of satisfying the demands and grievances of large numbers of Americans. And it was this dissatisfaction and the suspicion it engendered, as much as the idea of fundamental law, that explained the prominence that one kind of convention existing outside of the normal representative legislature gained in American thought.”).

³⁵ David Singh Grewal & Jedediah Purdy, *The Original Theory of Constitutionalism*, 127 YALE L.J. 666, 683 (2018).

any hand in the government under which they live. Citing Jean Bodin, whom Tuck regards as an early proponent of the sovereignty/government distinction, Tuck explains that “it might be the case that on a day-to-day basis we [i.e., the sovereign people] *are ordered around by a king or an assembly* of some kind, and *there may be no recourse to any other institution* to protect us from those orders.”³⁶ If this is meant to describe the popular sovereignty for which American patriots revolted from the British empire, it is simply unrecognizable. Indeed, it bears far closer resemblance to what the revolutionary elite called “slavery”: the absence of any control over one’s property or any security of personal liberty.³⁷ The result, in short, is a perfect inversion of American revolutionary thought.

For purposes of clarity, then, we might summarize the orthodox view by the following propositions:

- (1) No legislative assembly, however representative, can represent the people in their sovereign capacity.
- (2) Since legislatures cannot represent the people in this sense, legislative framing or alteration of a constitution implies legislative supremacy or legislative sovereignty, rather than popular sovereignty.
- (3) Conventions are necessary to give concrete effect to popular sovereignty and to create fundamental law, that is, law binding government.
- (4) Constitutional change must occur by convention and plebiscite.
- (5) The popular, “democratic” character of the new American governments consists in the fact that they framed their governments in a convention and could possibly “awake” and reframe it.

A list of propositions cannot capture the complexity of either Wood or Tuck’s account. But if the picture is a fair one, it should be clear the orthodox theory comes at a steep price indeed. It requires concessions that many will regard as non-negotiable. Even scholars willing to compromise on everything, at least in principle, will demand the evidence justify it; and here the evidence is more mixed than the leading historical literature suggests. English and American writers have long maintained that legislatures *can* alter constitutions if those bodies mount a persuasive claim to represent the interests of the whole people. It is for this reason that legislatures can be included in Article V.

³⁶ TUCK, *supra* note 19, at 26–27 (emphasis added).

³⁷ See ALAN TAYLOR, *AMERICAN REVOLUTIONS: A CONTINENTAL HISTORY, 1750–1804*, at 91–119 (2016).

II. THE CONVENTION IN SEVENTEENTH-CENTURY ENGLAND

What is the origin of the English constitutional convention as Americans of the eighteenth century knew it? This Part makes a brief incursion into English politics and political writing in the seventeenth century when the two most important conventions in modern English history occurred: the Convention of 1660 and the Convention Parliament of 1689. Both bodies handled issues of succession of power.

To understand why conventions were employed to handle these issues and what their authority was in the minds of English politicians, we have to begin about 50 years earlier, in the 1620s, with the struggle between the Stuart monarchs and Parliament's common lawyers over what royalists called "sovereignty" and the lawyers called "prerogative," an authority or set of authorities to be used to promote the well-being of the nation.³⁸ Common lawyers emphasized that Parliament stood for the whole nation, so that if the King failed to discharge his duty to protect the people, Parliament could do so on its own, whatever the King's constitutional rights.³⁹ But turnabout is fair play, and years later, much the same argument was used *against* the Long Parliament, which sat for over a decade beginning in the 1640s.⁴⁰ Parliament, just like the monarch, might be corrupted by the private interests of elites and fail to promote the interests of the people.⁴¹ It was in these circumstances that the sovereignty of the people had to be exercised by a temporary body outside of government entirely—such as the convention.

I begin in Part II.A with a discussion of English writing about conventions under the Stuarts and the Commonwealth. Part II.B turns to English politics and political writing in the period of the Glorious Revolution. A reading of English sources with which Americans were familiar shows, quite clearly, that the English located popular sovereignty both inside and outside government, depending on whether government advanced the interests of the people.

A. *The Struggle over Popular Sovereignty Under the Stuarts and the Commonwealth*

To get a better sense of the dynamic quality of popular sovereignty, we should begin with the emergence of a doctrine of parliamentary sovereignty in seventeenth century England, for much that would later be said by Americans on behalf of the

³⁸ See FRANCIS D. WORMUTH, *THE ROYAL PREROGATIVE 1603–1649*, at 34–36, 54–59 (1939).

³⁹ MARGARET ATWOOD JUDSON, *THE CRISIS OF THE CONSTITUTION* 279 (1949).

⁴⁰ EDMUND S. MORGAN, *INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA* 80–81 (1988).

⁴¹ See LEE, *supra* note 32, at 302 ("What is most striking is that even the House of Commons itself—a body ostensibly assembled to represent the whole 'commonaltie' or 'universality' of the people . . . became . . . an object of suspicion as an anti-populist tool of elite manipulation and exclusion.").

people in convention was said then by Englishmen on behalf of the people in Parliament. The rowdy Parliaments of the 1620s were opposed to the King's handling of monopolies (exclusive royal privileges granted to particular subjects), religion, and foreign policy—all matters traditionally regarded as within the prerogative of the monarch.⁴² “Prerogative” was a fraught term, but here it refers to a domain of policy-making in which the monarch was thought to enjoy a discretion unbounded by ordinary law, subject only to the advice of his ministers and his own judgment about what would best promote the welfare of his subjects.⁴³ Nevertheless, Parliament began to hear the “grievances” of the people on these matters.⁴⁴ It staked its claim to do so on grounds that it represented the whole nation, and that when the King's government became corrupted and acted to promote the private interests of ministers and royal favorites, Parliament was obligated to protect the people's welfare and to secure their liberties under the ancient constitution.⁴⁵ To this end, Parliament developed procedures (and extended or adapted some existing ones) to accommodate deliberation on matters that had traditionally belonged to the King and his council. Thus, according to one classic account, members used their control of committees to seize the “initiative” from the Crown in directing parliamentary proceedings, enabling them to investigate matters (like monopolies) the Crown did not want Parliament to discuss; and, having discovered crimes, members employed parliamentary judicature, quasi-legal proceedings like impeachment, to try royal favorites for alleged crimes against the nation.⁴⁶ The Committee of Grievances, in particular, seized for members of the parliamentary opposition (such as it was) the

⁴² See, e.g., JUDSON, *supra* note 39, at 281–83; J.R. TANNER, ENGLISH CONSTITUTIONAL CONFLICTS OF THE SEVENTEENTH CENTURY 1603–1689, at 47–67 (1971).

⁴³ JUDSON, *supra* note 39, at 23–34; WORMUTH, *supra* note 38, at 54–60. “Prerogative” in this sense served as a kind of conceptual bridge between the Roman law principle that the prince was free from the law (*legibus soluti*) and the constitutional framework of the English common lawyers.

⁴⁴ COLIN G.C. TITE, IMPEACHMENT AND PARLIAMENTARY JUDICATURE IN EARLY STUART ENGLAND 83–114 (1974); STEPHEN D. WHITE, SIR EDWARD COKE AND “THE GRIEVANCES OF THE COMMONWEALTH,” 1621–1628, at 27–45 (1979).

⁴⁵ JUDSON, *supra* note 39, at 298–99.

⁴⁶ Elizabeth Read Foster, *The Procedure of the House of Commons Against Patents and Monopolies, 1621–1624*, in CONFLICT IN STUART ENGLAND 57, 75–78 (William Appleton Aiken & Basil Duke Henning eds., 1960); see also WHITE, *supra* note 44, at 33–34, 142–83; Wallace Notestein, *The Winning of the Initiative by the House of Commons* (1924), reprinted in STUDIES IN HISTORY: BRITISH ACADEMY LECTURES 145, 172, 177–78 (Lucy S. Sutherland ed., 1966). For a recent appraisal of Notestein's lecture, see ALAN CROMARTIE, THE CONSTITUTIONALIST REVOLUTION: AN ESSAY ON THE HISTORY OF ENGLAND, 1450–1642, at 189–90 (Quentin Skinner & James Tully eds., 2006). A more critical assessment by a specialist in procedure can be found in Sheila Lambert, *Procedure in the House of Commons in the Early Stuart Period*, 95 ENG. HIST. REV. 753, 757 (1980).

King's traditional power to answer his subjects' petitions.⁴⁷ Thus, although it lacks the *élan* of the constitutional convention, we should also count the legislative committee as giving the sovereignty of the English people an active, concrete form.

1. Henry Parker's Observations

English pamphleteers continued to describe Parliament in these terms during the Civil War and under the Commonwealth government that followed. Consider Henry Parker's widely circulated defense in 1642 of (what we now call) parliamentary sovereignty, *Observations upon some of his Majesties late Answers and Expresses*.⁴⁸ Parker began by observing that it was "the people" who conferred authority on kings and that they did so with a particular purpose: preserving their own well-being.⁴⁹ "*Salus Populi*," the welfare of the people, was the "Paramount Law" to which the King's "Prerogative it selfe . . . is subservient."⁵⁰ On the same reasoning, Parliament was "higher" even than the King, since the people were not "so properly the Author as the essence it selfe of Parliaments."⁵¹ This connection naturally suited Parliament to securing the people's welfare, and consequently "publike safety and liberty could not be so effectually provided for by Monarchs till Parliaments were constituted, for the supplying of all defects in that Government."⁵² Parliaments were also well constructed to avoid corruption. Since Parliaments comprised "the many eyes of so many choyce Gentlemen out of all parts," they naturally acted to promote the "great interest . . . in common justice and tranquility," rather than the private interests of a few men; and the procedures employed in modern Parliaments made their delib-

⁴⁷ MORGAN, *supra* note 40, at 224–26. As Morgan points out, the same argument could be directed against Parliament if it failed to remedy the grievances of the people. In this way, petitioning was an institutional means by which sovereignty could be forced out of government entirely. Petitions allowed private petitioners to compete with their representatives for the claim to represent the people.

⁴⁸ HENRY PARKER, *OBSERVATIONS UPON SOME OF HIS MAJESTIES LATE ANSWERS AND EXPRESSES* 1 (London 1642). On the relationship between the people and Parliament in Parker's text, see LEE, *supra* note 32, at 294 ("Parliament, then, just is 'the people,' and 'parliamentary sovereignty' just is 'popular sovereignty.'"); J. W. GOUGH, *FUNDAMENTAL LAW IN ENGLISH CONSTITUTIONAL HISTORY* 85–86 (Fred B. Rothman & Co. 1985) (1955) (similar); JUDSON, *supra* note 39, at 416 (similar).

⁴⁹ PARKER, *supra* note 48, at 1–2. As Parker puts it, the people are both the efficient and final causes of regal authority. *Id.* at 2.

⁵⁰ *Id.* at 3.

⁵¹ *Id.* at 5. As Parker frames it, because the community creates the King, and because *quicquid efficit tale, est magis tale* [whatever creates a thing of such kind, is more of that kind], it follows that the King is *singulis Major, universis minor* [greater than any individual person, but less than the whole community]; while to the extent that the Kingdom is the essence and cause of Parliaments, the Kingdom *is* Parliament, since *magis tale [est] ipsum quid quod efficit tale* [anything that creates a thing of such kind, is itself that kind]. *Id.* at 2, 5.

⁵² *Id.* at 5.

erations “more vigorous” and “more orderly” than those of any other body, including the “distracted and irregular” proceedings of other popular assemblies.⁵³ So constituted, Parker reasoned, Parliament gave “publike Councils,” in contrast to the ministry’s “private advice,” which bent towards private interest.⁵⁴

But didn’t the King convene Parliament as his own court? If so, then what was Parliament’s constitutional status without the King? King Charles had recently fled London; could the Parliament meet without his authorization and presence? By withdrawing himself, Parker conceded, the King “*denies the assembly of the Lords and Commons . . . to be rightly named a Parliament,*” legally rendering them “*a meere convention of so many private men.*”⁵⁵ Yet this “formalitie of Law” did not deprive its members of all authority; if the King withdrew following the “ill Counsail” of his ministers, so that “they might defeat this Parliament,” its members had a right to act to “sav[e] themselves and the whole state.”⁵⁶ While in the “ordinary cases,” neither Parliament nor King could make a law without the consent of the other, “where this ordinary course cannot be taken for the preventing of publike mischiefes, any extraordinary course . . . may justly be taken and executed,” so that “the people may without disloyalty save themselves.”⁵⁷

In sum, Henry Parker’s Parliament stood for the whole nation; its purpose was to secure the welfare and liberties of that nation; its composition and formal procedures suited it to this public purpose, more than any other governmental body. And where corruption led the King to fail in his own obligation to secure the welfare and liberties of the people, Parliament could act in his place and cure that defect. To be sure, as a matter of law, only the King could issue the writs to summon Parliament, and his presence was necessary for it to do business.⁵⁸ It was important to Parker that the people act through a lawfully constituted Parliament, summoned by the King and conducted in accordance with proper procedure, in order to avoid “mob rule” and to ensure the people “wielded” their sovereignty “in an orderly way.”⁵⁹ But this did not imply that if the King refused to call Parliament, dissolved it, or withdrew, Lords and Common were entirely powerless to act. They might act as a “convention.”

⁵³ *Id.* at 11, 13–14.

⁵⁴ *Id.* at 25–26, 30.

⁵⁵ *Id.* at 7 (second emphasis added).

⁵⁶ *Id.* at 7, 10.

⁵⁷ *Id.* at 16.

⁵⁸ *Id.* at 7.

⁵⁹ JUDSON, *supra* note 39, at 426 (describing Parker’s views).

2. *The Levellers' Agreement*

It was in the late 1640s, after the Long Parliament had sat for nearly a decade, that English writers began to challenge the popular basis of its authority. The “Levellers” were an English faction that, among other things, proposed to reform Parliament to make it more representative of the nation.⁶⁰ They collected their proposals in an *Agreement Prepared for the People of England*, which was to be submitted to every English hundred (an ancient subdivision of a county) and ward (a subdivision of a city) so that all persons might voluntarily consent to it, thus providing the English people, in the words of historian Edmund S. Morgan, “a way of exercising their sovereignty outside Parliament and with a necessary superiority to Parliament.”⁶¹ In addition to immediately dissolving the Long Parliament (“many inconveniences,” said the authors, had arisen from “the long continuance of the same persons in supreme Authority”) and re-apportioning its seats, the Agreement prohibited any officer of the government from serving as a representative so that “no factions [could be] made to maintaine corrupt interests.”⁶² The newly constituted Parliament would “have the Supreme trust in order to the preservation and Government of the whole,” including the “erecting & abolishing of Courts of Justice, and publique Offices” as well as passing laws and giving final judgment in all civil and criminal cases.⁶³ To ensure that it acted to promote truly public interests, Parliament would be expressly prohibited from doing anything to “take away any [of] the Foundations of common Right, Liberty and Safety,” to “levell mens Estates, destroy Propriety, or make all things common,” or to promote religious factions by passing laws that infringed on the right of conscience (excepting, of course, the unhappy Catholics).⁶⁴

The Levellers’ *Agreement* suggests that it was concerns about the representativeness of Parliament, about its corruption and failure to protect the people’s interests, that led to a search for other institutions in which the people might assert their sovereignty. In 1648, the New Model Army, in which a number of Levellers served, purged the Commons of its Presbyterian members, a move that commanders justified by claiming that the *army* was now more representative of the nation as a whole

⁶⁰ LEE, *supra* note 32, at 299–300.

⁶¹ MORGAN, *supra* note 40, at 68; *see also* JOHN RUSHWORTH, AN AGREEMENT PREPARED FOR THE PEOPLE OF ENGLAND 18 (London 1648).

⁶² RUSHWORTH, *supra* note 61, at 8, 16.

⁶³ *Id.* at 22. On the power to give judgment, the *Agreement* provided, “[t]hat the Representative may not give judgement upon any mans person or estate, where no Law hath before provided; save onely in calling to Accompt [account], and punishing publick Officers for abusing or failing their Trust.” *Id.* at 23.

⁶⁴ *Id.* at 24–25.

than Parliament.⁶⁵ The remainder, the so-called “Rump” Parliament, sought to re-establish Parliament’s claim to stand for the people.⁶⁶

3. *Isaac Penington, The Fundamental Right, Safety and Liberty of the People*

Writing several years later, Isaac Penington, Jr., whose father had served in the Long Parliament, endorsed Parker’s view that the people were sovereign in Parliament, but now with several caveats.⁶⁷ Of principal importance, Penington thought, was that Parliament remain separate from the administration of government. “They who are to govern by *Laws* should have little or no hand in making the *Laws* they are to govern by,” he wrote, since they would be likely to make laws benefiting themselves, as “Man respects himself in what he does.”⁶⁸ In particular, Parliaments that sat for a long period of time were in danger of “contracting a *particular Interest*,” distinct from the public interest, and of seeking to advance that interest by “*improper Work*,” namely, “becoming Administrators in the present Government.”⁶⁹ In the end, long Parliaments would “swallow[] up the *ordinary course of . . . speedy, free and impartial Justice* by the administration and execution of the *Laws*.”⁷⁰ The proper work of a Parliament, then, was not administration, but “*chusing, establishing or altering Governments, Laws or Governors*,” that is, “*CONSTITUTIVE POWER*” or “*ALTERATIVE POWER*.”⁷¹ Parliament was “an *extraordinary, legislative, alterative, corrective Power* above the *ordinary standing Power*.”⁷² In this respect, it was essential that Parliament “consist of *the Body of the People*” rather than the governors, as the people knew best where government was failing; Parliament should remedy its grievances and dissolve before corruption could set in.⁷³ If it continued, there would eventually be need for a body “to stand between the people and them [i.e., Parliament],” just as Parliament had stood “between the people and *Kingly Power*”—a body Penington might have called a “convention.”⁷⁴

⁶⁵ On Pride’s Purge, see, e.g., MARK KISHLANSKY, *A MONARCHY TRANSFORMED: BRITAIN 1603–1714*, at 184–85 (1996). On the popular authority of Parliament versus the army, see MORGAN, *supra* note 40, at 64–66, 74–75.

⁶⁶ MORGAN, *supra* note 40, 73–75.

⁶⁷ ISAAC PENINGTON, JR., *THE FUNDAMENTAL RIGHT, SAFETY AND LIBERTY OF THE PEOPLE* 2 (London, John Macock 1651).

⁶⁸ *Id.* at 3.

⁶⁹ *Id.* at 11–12; see also *id.* at 17 (distinguishing “the *Legislative Power*” from “the *Administrative Power*”). Penington was hardly unusual among writers of the period in endorsing a separation of the legislature and the administration. MORGAN, *supra* note 40, at 85 & n.17.

⁷⁰ PENINGTON, *supra* note 67, at 12.

⁷¹ *Id.* at 4–5.

⁷² *Id.* at 13.

⁷³ *Id.* at 6–7, 13.

⁷⁴ *Id.* at 13. Penington did not use the term “convention” in this context.

Among English politicians and writers who endorsed popular sovereignty, then, the location of sovereignty was contested and depended on whether an institution could persuasively be said to represent the whole English nation or, instead, to advance only the private interests of a part or faction. *Corruption* formed the centerpiece of arguments for relocating popular sovereignty from one institution of government to another (from King and council to Parliament) and from within government to institutions outside government (from Commons to the army or to the people assembled in local communities). Parliament's particular authority to establish or alter government was staked on an elision of *legislative* and *extraordinary* power: making laws was not part of the ordinary administration of government, but a formal, orderly means by which the people could remedy or cure the defects of government. When Parliament itself began to exhibit those defects, however, it laid itself open to charges that another institution, one outside government entirely, better possessed this extraordinary corrective power.

B. "Meere" Conventions, Constitutional Conventions, and Convention Parliaments: Popular Sovereignty in the Glorious Revolution

The dynamic quality of popular sovereignty evident in this period of English political writing exposes a basic ambiguity in the status of the convention. We might usefully distinguish what Henry Parker called "a meere convention" from a constitutional convention. A *mere* convention is an assembly of Lords and Commons without the King or one that was not called by the King's writ.⁷⁵ Its authority is a product of necessity alone; absent a lawfully convened Parliament, a convention must do the Parliament's proper business of constituting or altering government, and sometimes even the work of government itself.⁷⁶ In contrast, a *constitutional* convention is an assembly whose authority to establish government is a result of the fact (if it is a fact) that it represents the people as a sovereign political community.⁷⁷ The constitutional convention may be formed alongside, or in place of, a lawfully convened Parliament, although in that case it cannot be justified by necessity as the mere convention is.⁷⁸ When one reads of English conventions in this period, one must try to determine which of these senses is meant. The first sense of "convention"

⁷⁵ PARKER, *supra* note 48, at 7.

⁷⁶ In this respect, the mere convention resembles what Jameson called the "Revolutionary Convention," which he described as "*dehors* the law" and deriving "their powers, if justifiably, from necessity." JAMESON, *supra* note 4, at 6.

⁷⁷ *Id.* at 2.

⁷⁸ This does not imply that the constitutional convention is necessarily illegal. As I use the term, an Article V convention would be both legal and a "constitutional convention." Some constitutional conventions are legal, while some are mere conventions; and some mere conventions are not constitutional conventions.

is consistent with locating popular sovereignty in Parliament, while the second denies the sovereign people are present there.

Beginning in the 1650s we encounter English writers endorsing the idea that the people were present in their sovereign capacity *only* within a convention, although it is not always clear and one must read carefully. For example, in the opening pages of *Politica Sacra et Civilis*, George Lawson maintained that “[i]f the Government be dissolved, and the Communitie yet remains united, the People may make use of *such an Assembly as a Parliament*, to alter the former Government and constitute a new.”⁷⁹ That such an Assembly may be used only if government is dissolved does suggest a mere convention. Lawson, a moderate Episcopalian minister, had sided with the parliamentarians during the Civil War, arguing that Parliament could preserve the welfare of the people if the King declined to do so.⁸⁰ On this basis we might expect Lawson to endorse a parliamentary power to alter government. Yet Lawson regarded government under the Rump Parliament as “a mere usurpation of authority” since it had been established by the army’s use of force.⁸¹ Parliament, properly understood, was an organ of government whose authority properly rested on the people but which itself lacked what Lawson called “real majesty”—that is, the sovereignty that belonged to the people and in virtue of which they could establish government. Thus it was, Lawson argued, “above the Power of a Parliament” to alter government.⁸² The “Assembly” he proposed for that purpose was a constitutional convention, that is, an assembly of the political community that possessed the sovereignty Parliament lacked.

Lawson’s distinction between *government*, embodied by Parliament, and *sovereignty*, embodied by a special assembly, evokes the writing of several contemporaries. As Tuck has shown, Hobbes drew the same distinction several years earlier in *De Cive* as did the politician (and briefly Massachusetts imperial governor) Sir Henry Vane in his 1656 pamphlet, *A Healing Question*.⁸³ We can also find the distinction in the radical pamphlet literature published some 30 years later, around the time of the Glorious Revolution.⁸⁴ There, writers located the sovereignty of the people outside of government in a temporary, *ad hoc* assembly; governments in the modern

⁷⁹ GEORGE LAWSON, *POLITICA SACRA & CIVILIS* 35 (London 1660) (emphasis added).

⁸⁰ JULIAN H. FRANKLIN, *JOHN LOCKE AND THE THEORY OF SOVEREIGNTY* 53–54 (1978).

⁸¹ *Id.* at 55.

⁸² LAWSON, *supra* note 79, at 35–36.

⁸³ See TUCK, *supra* note 19, at 91–92. Vane proposed the use of a “General Council, or Convention of faithful, honest, and discerning men” to settle on a form of government to follow the Protectorate. He described this Council or Convention as representing the people “in their highest state of Sovereignty” HENRY VANE, *A HEALING QUESTION* 20 (London 1656); see also MORGAN, *supra* note 40, at 89–90.

⁸⁴ See, e.g., JOHN HUMFREY, *ADVICE BEFORE IT BE TOO LATE: OR, A BRIEVATE FOR THE CONVENTION* 3 (London 1688) (“The *Delivering* us from *Poperie*, is contained in the *Setling* our Religion; and *That* being a Work of great length, is the business more properly of a *Parliament*;

world had to be conducted by the people's representatives, and as one such organ of ordinary government, Parliament lacked the authority to alter its own form.

But this was one strand of thinking. The connection these writers drew between conventions and popular sovereignty was hardly a necessary one, and others rejected or even reversed it.⁸⁵ As a general matter, pamphlet-writers exhibited less concern with elaborating a coherent theory than with how they could use ideas to frame or nudge what was politically possible.⁸⁶ Politicians refused to concede that Parliament lacked a power to alter or frame government; if these men supported the use of a convention, then it was only the expedient "mere" convention. As Richard Tuck acknowledges, Vane's proposals for a constitutional convention "were not picked up" and the conventions of 1660 and 1689 simply "turned into regular Parliaments once the issues of the succession were dealt with."⁸⁷

Conservative Whigs in particular insisted on Parliament's power to alter government so as to preserve the power of the English nobility who sat in its House of Lords.⁸⁸ "For what," asked one writer, "is the business of Parliaments but the alteration, either by adding, or taking away, part of the Government, either in Church or State?" Indeed, he thought, "every Act of Parliament is an alteration."⁸⁹ Conventions of men could not obviate this work. Only "God himself" could frame a gov-

but *This* is a thing must be done by the *Community*, and consequently by those that are the Representatives of it, a *Convention*, so called, (in regard to a Higher Capacity hereunto) and not a *Parliament*; for that represents the People, not as in a *Community*, but as in a *Commonwealth* . . ."); A BRIEF COLLECTION OF SOME MEMORANDUMS: OR, THINGS HUMBLY OFFERED TO THE CONSIDERATION OF THE MEMBERS OF THE GREAT CONVENTION, AND OF THE SUCCEEDING PARLIAMENT 7 (London 1689) ("To the *Great Convention*, which although it consists of the same Lords . . . and of the same Commons . . . [as] in Parliament: Yet being the Representative of the whole Kingdom gathered together in an extraordinary case and manner, and for extraordinary ends, it seemeth to be something greater, and of greater power, than a Parliament.").

⁸⁵ See NATHANIEL FIENNES, *MONARCHY ASSERTED TO BE THE BEST, MOST ANTIENT, AND LEGALL FORM OF GOVERNMENT* 73 (London 1660) (contrasting "[a] Parliament" elected by "Writs sent unto [the people] for the election of their representatives," who "[carry] on the publick affairs of the Nation," with "a convention of select Persons . . . unchosen by the people, to whom all power was devolv'd, and who had even a right to have perpetuated themselves").

⁸⁶ See LOIS G. SCHWOERER, *THE DECLARATION OF RIGHTS, 1689*, at 161–62 (Johns Hopkins Univ. Press 1981) (1689) ("Like tracts printed at the time of the Exclusion Crisis, these tracts of 1688–89 sometimes combined illogically several theories."); see also *id.* at 168 (observing that the Convention of 1689 rejected many ideas in the radical pamphlet literature, in part due to "the political acuity of the members").

⁸⁷ TUCK, *supra* 19, at 186–87.

⁸⁸ MORGAN, *supra* note 40, at 79.

⁸⁹ A LETTER FROM A PERSON OF QUALITY, TO HIS FRIEND IN THE COUNTRY 25 (London 1675).

ernment that would remain unchanged by “Time, emergencie of Affairs, [or] variation of humane Things.”⁹⁰ For Parliament to adequately exercise this power, argued the earl of Shaftesbury in an address to the Lords, it was essential that “you keep your Station” and “maintain your rights.”⁹¹ The Lords’ guidance was crucial for preserving order and preventing corruption, since the electorate were men “of a mean and abject Fortune in the World,” “subject not only to disorders and quarrels, but to be misguided . . . by their ignorance, and total want of that discerning faculty” and being “Corrupted and Seduced by the inveiglements of a little Mony, or a Pot of Ale.”⁹² A popular convention without Lords to check its proceedings would inevitably slouch toward corruption.

Sentiments like these had enough traction so that when James II fled London in the winter of 1688, opening the way for Prince William, who had invaded England at the head of a Dutch army, the lords mounting a provisional government were primarily concerned with how they could call a legal *Parliament*.⁹³ James had issued the necessary writs, but then cancelled them and burnt the undelivered ones, dropping the Great Seal of England in the Thames on his way out of town, so that (he said) “[t]he meeting of a Parliament cannot be authorized.”⁹⁴ The extravagance was of little use if succession was thought to be the business of conventions. A young

⁹⁰ *Id.* at 26; see also George Savile, *Political Thoughts and Reflections*, in THE COMPLETE WORKS OF GEORGE SAVILE, FIRST MARQUESS OF HALIFAX 211 (Walter Raleigh ed., 1912) (“A Constitution cannot make itself; some body made it, not at once but at several times. . . . [A]nd without suiting itself to differing Times and Circumstances, it could not live.”). Halifax fashioned this point into an attack on the very idea of fundamental law, which he regarded as “unintelligible.” *Id.* As we will see, Americans did not draw the same inference.

⁹¹ ANTHONY ASHLEY COOPER, EARL OF SHAFTESBURY, NOTES TAKEN IN SHORT-HAND OF A SPEECH IN THE HOUSE OF LORDS ON THE DEBATES OF APPOINTING A DAY FOR HEARING DR. SHIRLEY’S CAUSE 3 (London 1675).

⁹² ANTHONY ASHLEY COOPER, EARL OF SHAFTESBURY, SOME OBSERVATIONS CONCERNING THE REGULATING OF ELECTIONS FOR PARLIAMENT 11 (London 1689). To my knowledge it was J.G.A. Pocock who first linked the series of texts cited in this paragraph, suggesting they were part of an effort by Shaftesbury to scare country lords with the prospect of court rule under a standing army. J.G.A. Pocock, *Machiavelli, Harrington, and English Political Ideologies in the Eighteenth Century*, 22 WM. & MARY Q. 549, 563–64 (1965). Edmund Morgan, in contrast, reads the texts as reflecting the embrace of a “cautious” popular sovereignty in which the people’s “betters” retained an important constitutional role. MORGAN, *supra* note 40, at 104.

⁹³ See SCHWOERER, *supra* note 86, at 132–35.

⁹⁴ 2 THE CORRESPONDENCE OF HENRY HYDE, EARL OF CLARENDON 226 n.* (Samuel Weller Singer ed., London 1828); see also SCHWOERER, *supra* note 86, at 126. A leading proposal was to treat James’s flight as ceding or abdicating the crown, authorizing William to act as a *de facto* monarch and thus to call a legal Parliament. William refused this course because it was inconsistent with the reasons he professed for invading England in his *Declaration of Reasons*. See THE DECLARATION OF HIS HIGHNES WILLIAM HENRY 6–7 (Hague, Arnout Leers 1688) (calling for a Parliament to be held to protect the protestant religion and rights of English subjects).

nobleman and close friend of John Locke⁹⁵ did propose that the lords call a convention, but when members of the Convention Parliament met in early 1689, they “showed none of the certainty” of the radical pamphleteers and theoretical writers about the precise nature of their authority in comparison to a Parliament.⁹⁶ Was theirs a *mere* convention, or a *constitutional* convention? The situation was ambiguous. Predictably, the Convention Parliament mimicked formal parliamentary procedures, leading Locke to complain that by employing such “slow methods,” aimed at “mending some faults piece meale,” they risked wasting an opportunity to “set up a constitution that may be lasting for the security of civill rights and the liberty and property of all subjects of the nation.”⁹⁷ Yet it proved difficult for the Convention Parliament to lay claim to such an expansive authority. Late into its proceedings, leading Tories challenged its representative credentials. If the people were indeed sovereign, observed Sir Robert Sawyer, then the Convention Parliament could not act on their behalf for half of its membership, the Lords, represented “their own estate only,” and its Commons had been elected by but a fraction of England’s men, women, and children.⁹⁸

By 1689, it was clear that a convention could be employed to establish or alter government. But Englishmen continued to assert that Parliament might do the same, and the relative status of Parliament and convention simply depended on the circumstances. The advantages of Parliament were its composition, its formal proceedings, its possession of legislative power, and its traditional role in answering grievances and providing extraordinary remedies. The advantages of a convention were that it offered a more representative apportionment, the absence of the King (and his veto), and the absence of corruption, private interests, and faction. But the balance of advantage could be contested. While a convention might be framed as expressing the sovereignty of the people, so might a Parliament: the matter was up for dispute. Sovereignty was dynamic.

⁹⁵ The nobleman was Thomas Herbert, earl of Pembroke. SCHWOERER, *supra* note 86, at 135.

⁹⁶ MORGAN, *supra* note 40, at 110. It should be noted as well that alongside contemporary writings of radical Whigs, parliamentary tracts of the Civil War era, including those by Henry Parker, were republished and circulated. SCHWOERER, *supra* note 86, at 155.

⁹⁷ Letter from John Locke (Jan. 1689), *reprinted in* TUCK, *supra* note 19, at 184–85; *see also* SCHWOERER, *supra* note 86, at 171 (“The assembly was, strictly speaking, an illegal body, but efforts to preserve legal forms were made.”). Carefully read, Locke’s letter does not imply that Parliament was incapable of establishing a government, only that its procedures were unsuited to the task.

⁹⁸ SCHWOERER, *supra* note 86, at 179. The point, it should be noted, invited an angry rebuke. *Id.*; *see also* Lois G. Schwoerer, *A Journall of the Convention at Westminster Begun the 22 of January 1688/9*, 49 BULL. INST. HIST. RES. 242, 252 (1976).

III. THE CONVENTION IN EIGHTEENTH-CENTURY AMERICA

Americans held conventions from an early date. As early as 1689, they described meetings of the colonial legislature without the governor or council as “conventions,” a usage and timing suggestive of the influence of the contemporary Convention Parliament.⁹⁹ We can find evidence of a similar influence nearly a hundred years later. Most of the state constitutions formed in 1776 and 1777 were framed and enacted by bodies called conventions.¹⁰⁰ Among these bodies, however, there were significant differences. The Provincial Convention that framed and adopted the Virginia Constitution, for example, was primarily a revolutionary assembly, combining (what we would call) legislative, executive, and judicial powers; and the great planters of Virginia, who composed its members, framed a constitution without any “express authority from the people.”¹⁰¹ Voters in New York chose men for its “Provincial Congress” for the express purpose of framing and adopting a constitution;¹⁰² upon convening, the body duly changed its name to “Provincial Convention” and enacted a constitution, though it also engaged in some wartime governance.¹⁰³ Other states employed *both* a convention and the legislature to frame a constitution, and some used only the legislature.¹⁰⁴ In Connecticut, for example,

⁹⁹ J. Franklin Jameson, *The Early Political Uses of the Word Convention*, 3 AM. HIST. REV. 477, 478 (1898).

¹⁰⁰ See, e.g., WILLI PAUL ADAMS, *THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA 64–90* (Rita Kimber & Robert Kimber trans., 2001); WALTER FAIRLEIGH DODD, *THE REVISION AND AMENDMENT OF STATE CONSTITUTIONS 3–25* (1910); JAMESON, *supra* note 4, at 119–45; KRUMAN, *supra* note 26, at 15–33; KYVIG, *supra* note 26, at 23–30.

¹⁰¹ DODD, *supra* note 100, at 24. Like Virginia, South Carolina and New Jersey adopted their first state constitutions in a revolutionary assembly, usually described as a “provincial congress.” E.g., ADAMS, *supra* note 100, at 68–72. In short, in all three colonies (South Carolina, New Jersey, and Virginia), the same body (1) framed a constitution, (2) adopted the constitution, and (3) conducted revolutionary governance.

¹⁰² 1 JOURNALS OF THE PROVINCIAL CONGRESS, PROVINCIAL CONVENTION, COMMITTEE OF SAFETY AND COUNCIL OF SAFETY OF THE STATE OF NEW YORK, 1775–1776–1777, at 838, 856, 866 (Albany, Thurlow Weed 1842).

¹⁰³ The Convention met for about another month and handled a variety of matters related to the war effort. *Id.*; see also JAMESON, *supra* note 4, at 138 & n.2. In contrast, the national Continental Congress kept the name “Congress,” though some delegates regarded it as analogous to the English Convention Parliament of 1689. See JERRILYN GREENE MARSTON, *KING AND CONGRESS: THE TRANSFER OF POLITICAL LEGITIMACY, 1774–1776*, at 81 (1987).

¹⁰⁴ Colonies whose legislatures framed or adopted a state constitution were South Carolina (the second constitution), Connecticut, and Rhode Island. Although Massachusetts is most often associated with the framing of a constitution by convention and ratification by popular vote, its first proposed constitution was framed by a convention consisting of the two houses of the legislature sitting together. KRUMAN, *supra* note 26, at 16, 30–32. As we will see below,

the legislative assembly merely reauthorized the colonial charter, thereby giving it popular sanction.¹⁰⁵ As the jurist Roger Traynor observed in his doctoral dissertation on this subject, Americans' "[n]otions of fundamental law, contract theories, and beliefs that 'the constitution in a free state is fix'd'" did not prevent them from making such changes as they themselves felt necessary," for which they sometimes used "their legislative bodies."¹⁰⁶

The variety of purposes to which "conventions" were put makes it difficult to attribute a particular significance to their use. I try to get a handle on this question by approaching it politically, rather than institutionally. Although, as Marc Kruman has forcefully argued, Americans readily distinguished constitutions from ordinary legislation, they did not readily distinguish the authority of the assembly to frame a constitution from that of a convention; and the precise authority an assembly could claim over a constitution depended on provincial politics and political culture.¹⁰⁷ This does not imply that whether a state decided to call a convention to frame a constitution was merely a matter of "ordinary politics."¹⁰⁸ Instead, the *meaning* that political conflict took on and the justification it was understood to offer for holding a convention (or not) grew out of received ideas about corruption and popular sovereignty that will be familiar to us from our study of English political writing.

I develop this position in the following two sections. First, in Part III.A, I argue that the elites who emerged to lead the Revolution had filled the lower houses of colonial legislatures for decades before 1776. These men lay outside the metropolitan power structure but dominated provincial political bodies.¹⁰⁹ From this perspective, an imperial policy that displaced the colonial assembly appeared to threaten the "privilege" elites enjoyed, under their charters, to tax themselves. This cast the *assembly* as representing the American people.

Second, in Part III.B I study the call for a constitutional convention in Pennsylvania, on which Gordon Wood focused much of his attention. In most colonies, the chartered legislature could not convene in 1775 and 1776, and these colonies had to resort to a convention as a matter of necessity. Thus these bodies were what I have called "mere" conventions. It was only in colonies, whose charter assemblies

Pennsylvania's lower house, the Assembly, also proposed to host a convention for framing a state constitution.

¹⁰⁵ The Connecticut Charter, like the Rhode Island Charter, permitted freemen of the colony to elect a governor. ADAMS, *supra* note 100, at 64.

¹⁰⁶ Traynor, *supra* note 5, at 32–33.

¹⁰⁷ See KRUMAN, *supra* note 26, at 32–33 (arguing that the use of a convention depended on "the kind of government in place during the revolutionary crisis").

¹⁰⁸ G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 57 (1998). The view that first state constitutions were the product of "ordinary politics" rather than deliberation or political theory is associated with Alan Tarr. *Id.* at 57–58.

¹⁰⁹ MICHAL JAN ROZBICKI, CULTURE AND LIBERTY IN THE AGE OF THE AMERICAN REVOLUTION 56–64 (2011).

continued to meet, that a case for a constitutional convention had to be made. This case revolved around the same themes that characterized conflicts over popular sovereignty in seventeenth-century England: corruption and representativeness. Thus, when concerns were expressed that framers might engage in self-dealing or constitutionalize the private interests of a powerful faction, rather than the public good, men tended to emphasize the distinction between a charter assembly and a convention.

It is relatively easy to produce endorsements of the constitutional convention from leading Americans. But to understand these endorsements—to understand the scope of their defense of the convention—we have to put them in context. Was a convention being advocated out of necessity? Was it being advocated, instead, because of some kind of perceived defect in the legislative assembly? And if there was a defect, what was it? Might it be cured, or did the author intend to deny that a legislative assembly could *ever* express the will of the sovereign people? For example, in response to a letter from the Provincial Convention of Massachusetts in June of 1775, “setting forth the difficulties they labour under, for want of a regular form of Government,” John Adams suggested that “Congress ought now to recommend to the People of every Colony to call such Conventions immediately and set up Governments of their own,” offering what appears to be a broad endorsement of the use of conventions; yet when the resolution he drafted and fought for was finally issued a year later, recommending to the colonies that they frame new governments, it gave that task to “assemblies *and* conventions,” dropping, perhaps, assumptions that had applied in particular to the state of affairs in Massachusetts.¹¹⁰

A. *The Colonial Assembly in Political Context*

To understand how Americans received and employed English distinctions, one has to begin with the place of the lower house of the colonial legislature in the political life of the colony. Assemblies were especially important to American elites, who spoke of the “privileges” they enjoyed by governing themselves there.¹¹¹ Most important, of course, was the control that lower houses exerted over the purse, which they used with great effect to check the ambitions of imperial governors and the allies.¹¹² Elites substantiated their claim to represent the people of their colony by

¹¹⁰ 3 DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS 351–52 (L.H. Butterfield ed., 1961) (response to June 1775 letter from the Provincial Convention in Massachusetts); 4 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 342, 357–58 (Worthington Chauncey Ford ed., 1906) (1776) (emphasis added) (final resolution and preamble). On the uncertainty of Adams’s views, see DODD, *supra* note 100, at 26 n.61.

¹¹¹ ROZBICKI, *supra* note 109, at 115–16, 143–44.

¹¹² JACK P. GREENE, THE QUEST FOR POWER: THE LOWER HOUSES OF ASSEMBLY IN THE SOUTHERN ROYAL COLONIES 1689–1776, at 49 (1963); Christine A. Desan, *The Constitutional Commitment to Legislative Adjudication in the Early American Tradition*, 111 HARV. L. REV. 1381,

hearing petitions and redressing grievances—legislative functions that had served a similar role in the decades preceding the English Civil War, as discussed above.¹¹³ When, during the imperial crisis that began in the mid-1760s, American pamphleteers wrote about the need to bring security to liberty and property, it was this legislative privilege they had most in mind: the privilege to decide when to grant money to the Crown by an act of the colonial assembly.¹¹⁴

From this perspective, American patriots were actually at odds with positions English parliamentarians had earlier staked out in their own struggles with the King. Although English writers had asserted that *Parliament* possessed an exclusive power to grant the King supply (taxation), American assemblies now sought to retain for themselves the right to grant the property of American subjects.¹¹⁵ And while Parliament had asserted an authority to investigate the abuse of special privileges granted by the King and to dissolve those privileges when Commons judged it to be in the public interest, Americans asserted that the privilege of convening in their assembly, granted to colonists by the King's charter, was indefeasible and immune from parliamentary interference.¹¹⁶ Parliament's powers over taxation and grievance thus significantly overlapped with privileges claimed by colonial elites for their own assemblies. Until the imperial crisis began in earnest in the 1760s, however, no one

1391 (1998); see JOSH CHAFETZ, *CONGRESS'S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS* 45–77, 92–93 (2017).

¹¹³ On petitions in American colonial assemblies, see MORGAN, *supra* note 40, at 223–30; Maggie McKinley, *Petitioning and the Making of the Administrative State*, 127 *YALE L.J.* 1538, 1558–59 (2018).

¹¹⁴ See JACK P. GREENE, *THE CONSTITUTIONAL ORIGINS OF THE AMERICAN REVOLUTION* 73–76 (2011); JOHN PHILLIP REID, *CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION* 4, 8–9, 15–20, 33–39 (abr. ed. 1995).

¹¹⁵ See, e.g., *Debate on Mr. Burke's Resolutions for Conciliation with America*, in 1 *AMERICAN ARCHIVES*, FOURTH SERIES 1745, 1776 n.* (Peter Force ed., Washington, M. St. Clair Clarke & Peter Force 1837) (“[I]t was denied that the *American Assemblies* ever had a legal power of granting a revenue to the Crown. This they insisted to be the privilege of Parliament only; and a privilege which could not be communicated to any other body whatsoever. In support of this doctrine, they quoted the following clause from that palladium of the *English Constitution*, and of the rights and liberties of the subject, commonly called, the Bill, or Declaration, of Rights”); see also REID, *supra* note 114, at 26, 35–36 (describing the British metropolitan perspective on taxation); Barbara A. Black, *The Constitution of Empire: The Case for the Colonists*, 124 *U. PA. L. REV.* 1157, 1200 (1976).

¹¹⁶ *Bill for the Better Regulating the Government of the Province of Massachusetts Bay*, in 1 *AMERICAN ARCHIVES*, *supra* note 115, at 71 (Speech of Welbore Ellis) (stating that “chartered rights are by no means those sacred things which never can or ought to be altered,” and that they might be altered “if the Supreme Legislature find [them] . . . unfit and inconvenient”); see also CHARLES HOWARD MCILWAIN, *THE AMERICAN REVOLUTION: A CONSTITUTIONAL INTERPRETATION* 179–85 (1923); Matthew Steilen, *How to Think Constitutionally About Prerogative: A Study of Early American Usage*, 66 *BUFF. L. REV.* 557, 571–72, 588–91 (2018); Traynor, *supra* note 5, at 5–13, 22, 33.

had resolved the priority of these competing jurisdictional claims.¹¹⁷ One imperial administrator who saw the conflict described the constitution of the British empire as “dangerously uncertain.”¹¹⁸

Americans also had experience “out of doors,” in informal associations operating outside of legal government. As we have seen, there was a dynamic quality to popular sovereignty in English politics, and American politicians in and out of government also competed with one another by asserting that the institutions they controlled were more representative of the people.¹¹⁹ A number of colonies possessed long-standing traditions of popular action by so-called “regulators” and mobs, and colonial elites sometimes sought to co-opt these groups or to lead them personally.¹²⁰ The “associations” and committees that arose in the early stages of the Revolution advanced the same claims to justify their actions: they sought to bring security to the liberty and property of Americans against parliamentary and ministerial oppression.¹²¹ The question raised in each colony was the relative constitutional status of these bodies and the assemblies authorized by the colony charter. Where a royal governor dissolved the colonial assembly or fled the state (as Governor Tryon of New York and Lord Dunmore of Virginia did early in the conflict),¹²² colonial elites could persuasively argue that it was *necessary* for the defense of liberty and property to form a convention, since it was legally impossible to convene the assembly.¹²³ Thus, what I have called “mere conventions” were employed in New York and Virginia to frame constitutions in 1776 and 1777.¹²⁴ Americans could point to English precedent in support of these institutions.¹²⁵

But these popular bodies were generally regarded as extraconstitutional and had to justify their claims to authority. Assemblies, in contrast, had a firm constitutional

¹¹⁷ See MORGAN, *supra* note 40, at 140–48, 237–38, 243–44.

¹¹⁸ See THOMAS POWNALL, *THE ADMINISTRATION OF THE COLONIES* 45–46 (4th ed. London 1768).

¹¹⁹ See MORGAN, *supra* note 40, at 134–40.

¹²⁰ See, e.g., TAYLOR, *supra* note 37, at 38, 70–71. In Pennsylvania, a prominent example of a colonial elite leading radical informal popular groups was Thomas McKean. After heading various informal committees during the Revolution, McKean became the state’s first chief justice. See ROBERDEAU BUCHANAN, *LIFE OF THE HON. THOMAS MCKEAN* 18, 54 (Lancaster, Inquirer Printing Co. 1890).

¹²¹ T.H. BREEN, *AMERICAN INSURGENTS, AMERICAN PATRIOTS: THE REVOLUTION OF THE PEOPLE* 162, 204 (2010).

¹²² CHARLES RAMSDALL LINGLEY, *THE TRANSITION IN VIRGINIA FROM COLONY TO COMMONWEALTH* 158–59 (1910); BERNARD MASON, *THE ROAD TO INDEPENDENCE: THE REVOLUTIONARY MOVEMENT IN NEW YORK, 1773–1777*, at 213–49 (1966).

¹²³ See, e.g., JEFFERSON, *supra* note 7, at 121 (describing the basis for forming a Virginia Convention).

¹²⁴ For accounts of these conventions in New York and Virginia, see, for example, LINGLEY, *supra* note 122, at 137–77; MASON, *supra* note 122, at 213–49.

¹²⁵ See *supra* Part I.

basis in the provincial political mind and a long history of advocating on behalf of American subjects against imperial power. This was the baseline against which popular conventions' claims to authority would be measured.

B. The Emergence of a Provincial Convention in Revolutionary Pennsylvania

The next three sections describe the relationship between the provincial Assembly and Convention in Pennsylvania at the opening of the war. In contrast to New York and Virginia, events in Pennsylvania did pose the question of whether a "constitutional convention" was necessary to frame a new government. The colony's Charter of 1701 obligated the Assembly to convene yearly in October, although the Governor did possess a power to call special sessions.¹²⁶ The Assembly also controlled how long it sat, since the Governor was denied a power to adjourn, dissolve or prorogue it, as royal governors did in other colonies.¹²⁷ As we will see, it was the representativeness and corruption of the Assembly that became the basis of claims that a Provincial Convention should be held to frame a new state constitution. In response, defenders of the Assembly characterized the popular committees calling for a convention as unrepresentative and mob-like and emphasized that it was the Assembly's constitutional authority to redress the grievances of the people. Thus, we see the principal themes of English political writing about Parliaments and Conventions and the authority to alter the frame of government.

1. 1774–1775: The Politics of the Assembly and the Perceived Need for a Provincial Convention

When news arrived in May 1774 of the passage of the Coercive Acts, which closed the port of Boston in retribution for the Tea Party, the Pennsylvania Assembly had adjourned and was not in session.¹²⁸ At first, Governor John Penn declined to call a special session, but when he observed the success of Philadelphia radicals in gathering support for a "Provincial Convention" to select delegates to the proposed Continental Congress, he summoned the Assembly on the pretext of responding to

¹²⁶ JOAN DE LOURDES LEONARD, *THE ORGANIZATION AND PROCEDURE OF THE PENNSYLVANIA ASSEMBLY, 1682–1776*, at 9–10 (1949), *reprinted from* 72 PA. MAG. HIST. & BIO. 215 (1948); William Penn, *Charter of Privileges Granted by William Penn, Esq; to the Inhabitants of Pennsylvania and Territories*, in *A COLLECTION OF CHARTERS AND OTHER PUBLICK ACTS RELATING TO THE PROVINCE OF PENNSYLVANIA* 42, 43 (Philadelphia, B. Franklin 1740) ("For the well governing of this Province and Territories, there shall be an Assembly yearly chosen, by the Freemen thereof, to consist of *Four* Persons out of each County, of most Note for Virtue, Wisdom and Ability, (or of a greater Number at any Time, as the Governor and Assembly shall agree) upon the *First Day of October* forever . . .").

¹²⁷ LEONARD, *supra* note 126, at 8.

¹²⁸ See J. PAUL SELSAM, *THE PENNSYLVANIA CONSTITUTION OF 1776: A STUDY IN REVOLUTIONARY DEMOCRACY* 50–55 (1936); THEODORE THAYER, *PENNSYLVANIA POLITICS AND THE GROWTH OF DEMOCRACY 1740–1775*, at 155–57 (1953).

Indian warfare in the western counties.¹²⁹ As a result, it was in Pennsylvania, and Pennsylvania alone, that the colonial Assembly met *at the same time* as successive Provincial Conventions.¹³⁰ This brought the Assembly and Convention into open competition for control over the movement to resist British imperial policy. In staking out its ground, the Convention could not easily avail itself of an argument from necessity, since the Assembly continued to meet and the government continued to function.

In the early stages of this conflict, the crucial distinction between the two bodies was political rather than constitutional. The Assembly was dominated by conservative and moderate Quakers.¹³¹ At the time of the Coercive Acts, Quakers and their allies held over one-half of the seats, despite constituting only one-tenth of the colony's population, and most of these lawmakers were "veterans" of multiple sessions.¹³² Part of the reason for their dominance was the malapportionment of seats in the Assembly: The three eastern counties on the Delaware River elected twenty-four of the forty seats and Philadelphia elected two, but the western counties elected only fourteen.¹³³ Lancaster County, for example, had the same population of Philadelphia County but only half its representation.¹³⁴ Over the course of the eighteenth century, malapportionment had become a deliberate policy in the Assembly.¹³⁵ The Quaker party had sought to entrench itself against the Scotch-Irish Presbyterians settling on the western frontier. As a leading study puts it, "the Friends' fear of a Presbyterian challenge to many decades of tolerant, pacific Quaker government grew from a concern in the 1730s and 1740s to an obsession in the 1750s and 1760s," transforming the party into "a narrowly partisan faction."¹³⁶ In the 1760s, a Quaker-controlled Assembly even sought to use its power to convert Pennsylvania from a proprietary to a royal colony, in defiance of the Scotch-Irish, whose experience in Ireland had left them with a distrust of royal government.¹³⁷ The Assembly forwarded a petition to the colony's agent in London advocating the change, but the speaker, himself a moderate Quaker, doubted whether the Assembly

¹²⁹ THAYER, *supra* note 128, at 158.

¹³⁰ RICHARD ALAN RYERSON, *THE REVOLUTION HAS NOW BEGUN: THE RADICAL COMMITTEES OF PHILADELPHIA, 1765–1776*, at 53 (1978).

¹³¹ *See id.* at 8–11.

¹³² *Id.* at 10, 13–14 (analysis of the denominational status of Pennsylvania assemblymen in 1773–1774).

¹³³ *Id.* at 12.

¹³⁴ *Id.* at 12–13.

¹³⁵ *Id.* at 7–8, 10, 12–13.

¹³⁶ *Id.* at 17.

¹³⁷ THAYER, *supra* note 128, at 94.

possessed that authority: “he was of the Opinion the House had no right to delegate their Powers . . . to alter or change the Government.”¹³⁸

Generally speaking, then, leading Pennsylvania Quakers were distrustful of the popular resistance to British policy, and as the imperial crisis unfolded they used their control of the Assembly to buttress the existing political and social order.¹³⁹ To lead this effort, the Assembly selected “ultraconservative” Joseph Galloway as its Speaker.¹⁴⁰ The Speaker had significant formal and informal power; he controlled the Assembly’s agenda, assigned members to the standing committees responsible for drafting bills and investigating grievances, and generally acted “as the impartial guardian of the dignity and orderly action of the House.”¹⁴¹ Galloway identified the Quaker party with the authority of the Assembly itself, thereby “confound[ing] Pennsylvania’s political interests with the interests of its assemblymen.”¹⁴² Those who opposed them were mere “mobs.”¹⁴³

In contrast to the Assembly, which was long dominated by the same figures, popular bodies like the Provincial Convention brought thousands of new men into Pennsylvania government.¹⁴⁴ Generally speaking, these new men were drawn to a different politics. A significant number of those serving in popular bodies were radicals and demonstrated a greater willingness to publicly criticize imperial government and aggressively resist its policies.¹⁴⁵ In this effort they sought to coordinate with patriots in other colonies. Thus, for example, when the legislatures of Virginia, Massachusetts, Rhode Island, and Connecticut wrote to the Pennsylvania Assembly, requesting that it establish a committee devoted to “intercolonial communication concerning the imperial crisis,” Speaker Galloway declined, referring the matter instead to the Assembly’s standing committee of correspondence¹⁴⁶ on which he

¹³⁸ *Votes and Proceedings of the House of Representatives of the Province of Pennsylvania, in PENNSYLVANIA ARCHIVES, EIGHTH SERIES 5682* (Charles F. Hoban ed., 1935). Thanks to Julian Davis Mortenson for bringing this to my attention.

¹³⁹ See JAMES H. HUTSON, *PENNSYLVANIA POLITICS 1746–1770: THE MOVEMENT FOR ROYAL GOVERNMENT AND ITS CONSEQUENCES 200–02* (1972) (describing the transformation of the Quaker party from a “country” party to a “court” party). There is also evidence of complex and surprising political alliances. For example, the “White Oaks,” an association of Philadelphia shipwrights, largely workingmen, allied with the conservative Quakers and Benjamin Franklin, opposing American resistance to the Stamp Act. James H. Hutson, *An Investigation of the Inarticulate: Philadelphia’s White Oaks*, 28 WM. & MARY Q. 3, 20–23 (1971).

¹⁴⁰ RYERSON, *supra* note 130, at 15.

¹⁴¹ LEONARD, *supra* note 126, at 16–21; see also RYERSON, *supra* note 130, at 15.

¹⁴² RYERSON, *supra* note 130, at 17.

¹⁴³ On Quaker condemnation of “mobs,” see ANNE M. OUSTERHOUT, *A STATE DIVIDED: OPPOSITION IN PENNSYLVANIA TO THE AMERICAN REVOLUTION* 18 (1987).

¹⁴⁴ RYERSON, *supra* note 130, at 4–5; cf. BREEN, *supra* note 121, at 173–74, 197–206 (describing this development in other colonies).

¹⁴⁵ RYERSON, *supra* note 130, at 45–52.

¹⁴⁶ *Id.* at 22.

served *ex officio* and whose majority were members of the Quaker party.¹⁴⁷ Around the same time, however, an informal meeting of Philadelphians established a *popular* committee of correspondence, selecting (among others) several radicals as members.¹⁴⁸ When the Assembly's standing committee then sought to temper messages issued by the popular committee, they were chastised in a patriot newspaper by a writer who desired to know by "whose authority did they act?"¹⁴⁹ Apparently the more representative, consultative and patriot-led popular committee could assert an exclusive jurisdiction over correspondence with other colonies relating to the crisis.¹⁵⁰ Even an Assembly committee could be outflanked by a popular, informal one, if the legislature appeared diverted by factional interests.

Still, in the early stages of the conflict, the Assembly seems to have been the preferred organ for acting on Pennsylvanians' grievances with imperial policy. The popular committee of correspondence chose the Anglican minister William Smith to draft its message to Boston, and to the chagrin of the radicals, Smith cautioned that his popular committee could not in fact speak for the people of Pennsylvania.¹⁵¹ Even after it was decided that a Continental Congress would be held, members of a subsequent popular committee agreed that "the most suitable agent for choosing congressional delegates was the Pennsylvania Assembly, convened in formal session."¹⁵² Since "Governor Penn would not summon the Assembly," however, another agent was necessary.¹⁵³ John Dickinson suggested a provincial convention be used, but despite the need for some such body, others balked, expressing hope that

¹⁴⁷ *Id.* at 263; LEONARD, *supra* note 126, at 27.

¹⁴⁸ RYERSON, *supra* note 130, at 40–42.

¹⁴⁹ *Remarks on the Preceding Letter, in 1 AMERICAN ARCHIVES, supra* note 115, at 486 n.* ("It does not appear by what authority these gentlemen have taken upon themselves to act as a Committee of Correspondence for the Province on this affair. The papers give an account of a more numerous Committee, composed of men of very different characters.").

¹⁵⁰ *See id.* For membership of the Assembly's standing Committee of Correspondence, see RYERSON, *supra* note 130, at 263 ("Members of the 1773–74 Assembly Session: Seniority and Standing Committee Assignments"). The mandate of the legislative committee related to "communications with the Provincial Agent who resided in London in order to supervise provincial affairs there." LEONARD, *supra* note 126, at 27.

¹⁵¹ *See Letter from the Committee of Philadelphia to the Committee of Boston, in 1 AMERICAN ARCHIVES, supra* note 115, at 341 ("[Y]ou are considered as suffering in the general cause. But what further advice to offer on this sad occasion, is a matter of the greatest difficulty, which not only requires more mature deliberation, but also that we should take the necessary measures to obtain the general sentiments of our fellow-inhabitants of this Province . . ."); THAYER, *supra* note 128, at 156.

¹⁵² RYERSON, *supra* note 130, at 47; Charles Thomson Memorandum Book, 1754–1774, at 159–62, <https://digitallibrary.hsp.org/index.php/Detail/objects/14230>.

¹⁵³ RYERSON, *supra* note 130, at 47.

a more legitimate method would be employed.¹⁵⁴ The best method was for the Assembly to hear grievances.¹⁵⁵ If there was a place for a convention, then, it was to determine popular sentiment and then work in conjunction with the Assembly. There was a “necessity of the closest union among ourselves [i.e., Pennsylvanians] both in sentiment and action,” which a convention could provide better than a malapportioned Assembly.¹⁵⁶ Thus it was decided that a Convention would be elected, which could then instruct the Assembly about the views of Pennsylvanians on a proposed continental boycott.

The Assembly, soon called back into session by Governor Penn, never consented to this subsidiary role for a Provincial Convention.¹⁵⁷ When the Convention forwarded the Assembly a list of proposed delegates to the Continental Congress, along with instructions for the delegates, the Assembly ignored them, choosing its own slate of delegates (from among its members) and drafting its own instructions for them.¹⁵⁸ Writing under the pseudonym “A Freeman,” Speaker Galloway challenged the representative legitimacy of the Convention; its members, he wrote, had been elected by popular county committees, “where, it is notorious, not one fourth of the freeholders attend.”¹⁵⁹

Early conflict between the Assembly and the Provincial Convention affirmed two principles of the English constitutional order: first, that the Assembly was the constitutional means for the people of Pennsylvania to seek redress for their grievances with government; and second, that the Assembly’s primacy in this respect *could be contested*, and lawful bodies (such as legislative committees) supplanted by popular bodies. This contest was waged, at least in part, on representative credentials. The Assembly’s malapportionment and corruption—its identification of the interests of Pennsylvanians with those of its Quaker representatives, who desired to

¹⁵⁴ As Ryerson puts it:

Dickinson’s proposal encountered stiff opposition from several quarters. Opponents of the plan all favored requesting Joseph Galloway to convene the Assembly unofficially to name Pennsylvania’s delegates [to the Continental Congress]. . . . [The various opponents] all favored cautious, traditional protests because their entire careers had taught them that any criticism of governmental authority must take the most legitimate form possible.

Id. at 48.

¹⁵⁵ *Id.* at 50.

¹⁵⁶ *Circular Letter*, PA. PACKET, July 4, 1774, at 3, reprinted in RYERSON, *supra* note 130, at 55.

¹⁵⁷ RYERSON, *supra* note 130, at 60; THAYER, *supra* note 128, at 158.

¹⁵⁸ RYERSON, *supra* note 130, at 61–62; THAYER, *supra* note 128, at 159–60.

¹⁵⁹ *Paper Signed “a Freeman,” Handed About Among the Members of the House on the 21st, Against the Appointment and Proceedings of the Convention*, in 1 AMERICAN ARCHIVES, *supra* note 115, at 608 (“The Committees are appointed at county meetings, where, it is notorious, not one fourth of the freeholders attend. The resolutions are previously drawn up by some zealous partizan, perhaps by some fiery spirit, ambitiously solicitous of forcing himself into public notice . . .”).

remain in power—worked to undermine its traditional authority. At the same time, the practice of constructing popular provincial bodies from counties and religious congregations enhanced their legitimacy.¹⁶⁰

2. *1776: The Assembly and the Provincial Convention Struggle over the Independence Movement*

The contest between the Assembly and Convention over independence in early 1776 illustrates the same themes. Even at this late date, months after the outbreak of hostilities, there was little agreement about the relative authority of the Assembly and Provincial Convention and in particular whether the Assembly might frame a state constitution. James Wilson described public opinion as divided. “Some said that the Assembly were adequate to the Purpose of adopting a new Government,” he wrote, while some maintained they could do so only after receiving “new Powers from the People,” and others denied even this would suffice.¹⁶¹

Propagandists directed their energies to showing that their preferred body was most representative of the people. The Assembly’s opponents emphasized that it was malapportioned and elected by a privileged few. “Do not mechanicks and farmers constitute ninety-nine out of a hundred people of America?” asked a writer. Why, then, should they “be excluded from having any share in the choice of their rulers, or forms of government”?¹⁶² Other critics accused representatives of pursuing their own interests and the interests of imperial officials.¹⁶³ Yet it was also possible to charge popular committees with being unrepresentative of Pennsylvanians. Elections in February 1776 delivered control over the Philadelphia Committee of Observation to the “mechanics” faction, that is, city “craftsmen, shopkeepers, and petty retailers,” whose politics were distinctively radical.¹⁶⁴ Did they represent the people of Pennsylvania?

¹⁶⁰ See ADAMS, *supra* note 100, at 27–28, 31.

¹⁶¹ *Letter of Hon. James Wilson to Gen. Horatio Gates, 1776*, 36 PA. MAG. HIST. & BIOGRAPHY 473, 474–75 (1912).

¹⁶² *Queries Addressed to the Writer Who Signs Himself Cato*, PA. PACKET, Mar. 18, 1776, at 2.

¹⁶³ See, e.g., RYERSON, *supra* note 130, at 160, 169; *Extracts from the Diary of Dr. James Clitherall, 1776*, 22 PA. MAG. HIST. & BIOGRAPHY 468, 469 (1898) (“The Proprietary, John Penn, and most of the gentlemen of the city attached to his interest, were against [independence] lest the form of government should be changed, and they would no more acknowledge the old officers of the government.”); *To the People*, PA. PACKET, June 24, 1776, at 1 (describing the provincial “Tories and Crown Officers” opposed to independence and who “aim only to be continued in office”).

¹⁶⁴ RYERSON, *supra* note 130, at 156–57, 184–85, 199–200; see also HUTSON, *supra* note 139, at 230–31 (defining “mechanics” as those who “worked with their hands,” including some “businessmen”).

On May 15, 1776, the Second Continental Congress recommended that “Assemblies and Conventions” in each colony form new state governments.¹⁶⁵ Although public opinion broke in favor of independence, Pennsylvanians could still defend the Assembly’s authority to frame the new government. At a meeting of some 4,000 Philadelphians at the State House Yard on May 20, where various resolutions in favor of independence were loudly approved, only one failed to receive unanimous assent: “That the present House of Assembly was not elected for the purpose of forming a new government,” and that it could not form a government without “assuming arbitrary power.”¹⁶⁶ At the same time, the meeting approved a “Protest” that urged assemblymen *not* to form a new government, on grounds that the Assembly acted under the authority of “our mortal enemy, the King of *Great-Britain*” and that its members were “influenced, . . . either by Connexions with, or pecuniary Employments under” the Governor, who held his office by “the said King’s Commission.”¹⁶⁷ As such, the Assembly did not act with “the *Authority of the People*.”¹⁶⁸ The Assembly *could* represent the people, at least in principle, but *this* Assembly did not, since it was badly malapportioned and its members entangled with imperial officials.¹⁶⁹ If popular sovereignty was dynamic, it was corruption that drove it from the Assembly’s hands.

As the contest matured, radical Whigs in favor of independence settled on two lines of attack against anti-independence moderates and Tories in the Assembly.¹⁷⁰ They argued, first, that since the power to instruct delegates traditionally lay with the people themselves, and not their representatives, the Assembly lacked authority to instruct Pennsylvania’s delegates in the Continental Congress to oppose independence.¹⁷¹ A popular convention was therefore necessary to determine proper instructions—a body radicals counted on controlling.¹⁷² Second, at the same time,

¹⁶⁵ For the text of the May 15 Resolution and Preamble, see 4 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 110, at 357–58.

¹⁶⁶ SELSAM, *supra* note 128, at 117. The lone dissenter was Isaac Gray. *Id.* at 177 n.86; see also EXTRACTS FROM THE DIARY OF CHRISTOPHER MARSHALL KEPT IN PHILADELPHIA AND LANCASTER DURING THE AMERICAN REVOLUTION, 1774–1781, at 72–73 (William Duane ed., Albany, Joel Musell 1877).

¹⁶⁷ *Votes and Proceedings of the House of Representatives of the Province of Pennsylvania*, in PENNSYLVANIA ARCHIVES, *supra* note 138, at 7514–15 [hereinafter *Votes and Proceedings of the House*]. Several petitions were submitted in response to the “Protest,” including an “Address and Remonstrance” signed by six thousand people, which attacked the “[a]llegations” in the Protest as baseless. SELSAM, *supra* note 128, at 122.

¹⁶⁸ *Votes and Proceedings of the House*, *supra* note 167, at 7515; SELSAM, *supra* note 128, at 118.

¹⁶⁹ *Votes and Proceedings of the House*, *supra* note 167, at 7515.

¹⁷⁰ RYERSON, *supra* note 130, at 158.

¹⁷¹ See, e.g., *To the Apologist*, PA. EVENING POST, Mar. 5, 1776, at 2, reprinted in THAYER, *supra* note 128, at 178 (“The right of instructing lies with the constituents, and them only . . .”).

¹⁷² THAYER, *supra* note 128, at 177–78.

radicals sought to gain control of the Assembly by pushing it to add seats in districts they were likely to capture.¹⁷³ If the Assembly were reapportioned, and radicals succeeded in capturing a majority, then the Assembly could instruct Pennsylvania's continental delegates to favor independence. Of course, a more representative Assembly would also undercut one of the principle arguments in favor of a convention. Thus, when the Assembly agreed to add 17 seats in early March, it touched off a heated debate about whether a Provincial Convention would still be necessary.

a. Cato's Letters

The most illustrative of the print exchanges on this topic involved "Cato," "the Forester" and "Cassandra," part of the "wordy war" over independence that gripped the Pennsylvania press in March and April of 1776.¹⁷⁴ "Cato" was the Anglican minister William Smith, who in 1774 had drafted the letter to Boston from the first popular committee of correspondence.¹⁷⁵ In that case he had merely cautioned that his committee did not represent Pennsylvanians, but he now went on the attack against the tendency of these popular bodies to assert control of public affairs.¹⁷⁶ Committees, Cato wrote, were seeking to expand their authority by "prostituting the cry of publick necessity"—the standard justification, recall, for the mere convention—in an effort "to cloak an ambition" of "a total destruction of our charter Constitution" and an assumption of all the powers of government, "our whole domestick police, with Legislative as well as Executive authority."¹⁷⁷ To this end the committees openly attacked their own government, impugning "the majesty of the people of *Pennsylvania* . . . in the persons of their legal Representatives."¹⁷⁸ "Real majesty," of course, was the term George Lawson had used for the people's sovereignty; but unlike Lawson, Cato located that sovereignty *in the assembly*, where the people were represented. Cato reminded his audience of the "great privilege" that the people of Pennsylvania enjoyed in that assembly, which was to "meet when they

¹⁷³ *Id.* at 178.

¹⁷⁴ *Id.* at 178. Wood places this exchange at the center of his own account of the development of the convention. WOOD, *supra* note 19, at 333–35.

¹⁷⁵ RYERSON, *supra* note 130, at 167.

¹⁷⁶ *Id.* at 43.

¹⁷⁷ *To the People of Pennsylvania.—Letter I*, in 5 AMERICAN ARCHIVE, FOURTH SERIES 125 (Peter Force ed., Washington, M. St. Clair Clarke & Peter Force 1844) [hereinafter *Letter I*, 5 AMERICAN ARCHIVES]; see also *Queries Addressed to the Writer Who Signs Himself Cato*, PA. PACKET, *supra* note, 162 at 2. On the issue of the necessity of a convention, see *To the People of Pennsylvania.—Letter III*, in 5 AMERICAN ARCHIVE, *supra*, at 443 [hereinafter *Letter III*, 5 AMERICAN ARCHIVES].

¹⁷⁸ *Letter I*, 5 AMERICAN ARCHIVES, *supra* note 177, at 125.

please, and sit as long as they judge necessary,” a “privilege . . . with which our public business has been transacted” while other states’ assemblies were dissolved and the people “driven into the measures of Conventions.”¹⁷⁹

Not only was there no real need—no necessity—to justify a convention, since the Assembly continued to meet, but the Assembly was a far preferable body for protecting liberty and property, since conventions were given to arbitrary proceedings. “[D]oes any other Colony,” asked Cato, “whose Assemblies can exercise their authority, ever think of committing the conduct of affairs to Conventions?”¹⁸⁰ Conventions gave control over vital public decisions to a mere few; “does not the bare mention” of this fact, asked Cato, “further convince you that your liberties can nowhere be so safe as in the hands of your Representatives in Assembly?”¹⁸¹ Informal bodies of men were likely, Cato suggested in another letter, to “frame oppressive laws for the sake of the power and wealth which they might derive to themselves by carrying such laws into execution.”¹⁸² In this way, bodies like conventions reproduced the faults of “Democracy or Republican Government” in which “[t]he spirit of one faction was suppressed only by that of a succeeding faction.”¹⁸³ Their proceedings did not preserve the public peace or bring security to rights. Instead, they threatened to corrupt the judgment of the people’s representatives in the Assembly.¹⁸⁴

In short, the traditional justification for a convention was missing, while Pennsylvania’s popular committees had sought to govern arbitrarily and to promote private, factional interests, rather than public interest and government under law.

b. The Forester and Cassandra

Neither “the Forester” (Thomas Paine) nor “Cassandra” (James Cannon, a leading radical) challenged Cato’s basic assumption that the Assembly enjoyed a *prima facie* right to frame Pennsylvania’s new government and that a Provincial Convention had to be justified either by necessity or by the corruption of the legislature. The Forester thought these conditions plainly satisfied. “[I]f the body of the

¹⁷⁹ *Id.* at 126.

¹⁸⁰ *Id.*

¹⁸¹ *Letter III*, 5 AMERICAN ARCHIVES, *supra* note 177, at 444.

¹⁸² *To the People of Pennsylvania—Letter VII*, in 5 AMERICAN ARCHIVES, *supra* note 177, at 852.

¹⁸³ *Id.*

¹⁸⁴ *See Letter III*, 5 AMERICAN ARCHIVES, *supra* note 177, at 443 (“[O]ur Assembly may now be permitted to exercise their own judgment, without further attempts to intimidate them [T]he chief resentment levelled against them, appears to be on account of their instructions to their Delegates [to the Constitutional Convention, not to vote for independence]. These . . . stand as an insurmountable barrier in the way of their destructive purposes, and I trust will continue so to stand till removed by the clear sense of an uncorrupted majority of the good people of this Province.”).

people had thought," he wrote, that "by sitting under the embarrassment of oaths, and entangled with Government and Governors," the Assembly "[is] not so perfectly free as [it] ought to be," then they had "both the right and the power to place even the whole authority of the Assembly in any body of men they please."¹⁸⁵ The Assembly was corrupted by the desire of its Quaker leadership to maintain their position in the existing government and by the methods by which they administered this government. The people knew full well, he observed, that "bribery and corruption" were "the machine by which they [the government] effect all their plans."¹⁸⁶ Paine's characteristic verve was on full display. In these circumstances, there could be no question that a Provincial Convention was the proper body to frame a new state constitution. "The Forester" made no mention of Henry Parker, but he might have, for Parker's defense of parliamentary sovereignty had acknowledged that a convention of lords and commons could protect the people if the ministry had corrupted the King.¹⁸⁷

Cassandra took up the defense of Pennsylvania's popular bodies, which he thought immune to the corruption affecting the Assembly. The Provincial Convention had been elected by a broad segment of Pennsylvanians, freeing them from "the channel of corruption" and making them the proper bodies to conduct the "publick business" and "secure the people from undue influence" by royal administrators.¹⁸⁸ Popular bodies acted in the public interest, while the Assembly did not. As everyone knew, the Assembly could convene at its own discretion, but was there a "single measure that can be pursued"? The Assembly could not legislate without the Governor's assent, and by denying his consent the Governor had rendered the Assembly powerless to protect the people's rights. "[O]ur Legislatures are dependant on our very enemy," Cassandra wrote, while Parliament and King were independent of American assemblies, allowing Parliament to "enslave[]" Americans.¹⁸⁹ Far from protecting Pennsylvanians' property, the "aristocratical junto" in the Assembly had joined in Parliament's plan to "make the common and middle class of people their

¹⁸⁵ *Letter I: To Cato*, PA. GAZETTE, Apr. 3, 1776, at 1, reprinted in 5 AMERICAN ARCHIVES, *supra* note 177, at 530 [hereinafter *To Cato*, 5 AMERICAN ARCHIVES].

¹⁸⁶ *To Cato*, 5 AMERICAN ARCHIVES, *supra* note 185, at 531.

¹⁸⁷ PARKER, *supra* note 48, at 10.

¹⁸⁸ *Cassandra to Cato*, PA. PACKET, Mar. 25, 1776, at 1, reprinted in 5 AMERICAN ARCHIVES, *supra* note 177, at 432. This was not an uncommon argument. See, e.g., *Letter from the General Committee, at Charleston, S.C., to the New-York Committee (Mar. 1, 1775)*, in 2 AMERICAN ARCHIVES, FOURTH SERIES 1, 3 (Peter Force ed., Washington, M. St. Clair Clark & Peter Force 1839) ("[W]e find, that the larger this representation is, the less the danger of corruption and influence; the more is sly deceit deterred from venturing its efforts; and the more weight goes with every determination.").

¹⁸⁹ *Cassandra to Cato II*, in 5 AMERICAN ARCHIVES, *supra* note 177, at 923.

beasts of burden.”¹⁹⁰ But Pennsylvania’s noble “freemen” refused “to be ridden by a King, Lords, and Commons.”¹⁹¹

The Cato-Forester-Cassandra exchange clearly reproduced principal strands of thought from writings about popular sovereignty in mid-seventeenth century England. Precisely who gained the upper hand is difficult to say. When elections to the Assembly’s new seats were held in early May, moderates prevailed in enough districts to preserve a two-vote majority for those opposed to independence.¹⁹² Frustrated radicals shifted their strategy. They now focused their attack on voter qualification requirements, which they said had prevented the people from being heard.¹⁹³ Eventually, pro-independence representatives stopped attending the Assembly, depriving it of a quorum.¹⁹⁴ The Assembly, they argued, had abandoned the public at a time of great danger to the people, and in these conditions a convention was necessary. “Like James the Second,” wrote one radical, “they have abdicated the government, and by their own act of desertion and cowardice have laid the Provincial Conference under the necessity of taking instant charge of affairs.”¹⁹⁵ By the fall, the Assembly had stopped meeting, and the Provincial Convention took up the tasks of framing a constitution and governing the state.

c. An Ambiguous Alarm

The concern that members of the Assembly would act simply to perpetuate themselves in power was, at bottom, a concern about self-dealing and corruption. If entrusted with framing government, the Quaker leadership in the Assembly would require an uncommon virtue to establish a system that posed any risk to their control. “[M]ost men,” wrote Demophilus, “will sacrifice heaven and earth . . . to establish a power in themselves to tyrannize over the persons and properties of others.”¹⁹⁶ A convention was necessary to prevent this.

The primary worry of the radicals proposing a convention was self-dealing by the Quaker party and its allies, not the “new men” who filled the popular bodies and Provincial Conventions. One risks misunderstanding radical writing about conventions by abstracting from this political context. Yet pushed to its limit, these concerns could be detached from Pennsylvania politics and fashioned into a more general theory of conventions and fundamental law. One can detect this shift in a pamphlet published around the time of a May 15 Congressional Resolution called

¹⁹⁰ *Id.* at 921.

¹⁹¹ *Id.*

¹⁹² THAYER, *supra* note 128, at 179.

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 182. Conservatives would shortly employ the same strategy to undermine the government formed under the new state constitution several months later.

¹⁹⁵ *To the People*, PA. PACKET, *supra* note 163, at 2.

¹⁹⁶ DEMOPHILIUS, *supra* note 6, at 4 (quotation marks omitted).

The Alarm, which Gordon Wood treats as illustrative of a new American understanding of popular sovereignty.¹⁹⁷

The author of *The Alarm* began with a point not unlike one the Forester had made in March. The Assembly had no power to frame a constitution, he asserted, since the authority it possessed derived from “the royal charter of our enemy,” which had authorized Pennsylvanians to convene a legislative assembly.¹⁹⁸ During the imperial crisis, patriot writers had emphasized the royal basis of colonial charters as a means of insulating them from parliamentary interference, drawing analogies to Magna Carta.¹⁹⁹ *The Alarm* reversed this reasoning: Since the charters were issued by the King’s prerogative, the Pennsylvania Assembly expressed his authority, rather than the people’s. Viewed in this perspective, the Assembly was merely an organ of imperial administration, and as imperial administrators (rather than delegates of the sovereign people), assemblymen could have “no more the power of suppressing the authority they sit by, than they have of creating it.”²⁰⁰

A sense that the Assembly expressed the sovereignty of the people is missing from *The Alarm*. This was not simply a point about the corrupt conduct of its leadership. If the Assembly could frame a new government, the author reasoned, then “every legislative body would have the power of suppressing a constitution at will.”²⁰¹ The very possibility of fundamental law seemed to require the use of a convention to frame the state constitution.

But even the author of *The Alarm* couldn’t fully separate himself from Pennsylvania’s unique politics. The dangers of self-dealing and corruption run throughout the short pamphlet. “Were the present House of Assembly to be suffered by their own act to suppress the *old* authority derived from the *Crown*, they might afterwards suppress the new authority received from the people,” leaving “the people at last *no* right at all.”²⁰² Decades of oligarchic rule sensitized the radicals to the prospect of a return of the elites and their entrenchment at the expense of the new men now leading the independence movement.²⁰³ *The Alarm* also rejected the suggestion that the Assembly act as a convention, as some of its members now proposed,

¹⁹⁷ See WOOD, *supra* note 19, at 337.

¹⁹⁸ THE ALARM: OR, AN ADDRESS TO THE PEOPLE OF PENNSYLVANIA, ON THE LATE RESOLVE OF CONGRESS, FOR TOTALLY SUPPRESSING ALL POWER AND AUTHORITY DERIVED FROM THE CROWN OF GREAT-BRITAIN 1 (May 1776) [hereinafter THE ALARM].

¹⁹⁹ See Steilen, *supra* note 116, at 588–91.

²⁰⁰ THE ALARM, *supra* note 198, at 1.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ See Douglas McNeil Arnold, Political Ideology and the Internal Revolution in Pennsylvania, 1776–1790, at 254–56 (1976) (unpublished Ph.D. dissertation, Princeton University). On the oligarchic rule of the Quaker party, see RYERSON, *supra* note 130, at 5.

since “[t]he undue influence and partial connexions” which they had to royal government “render[ed] them *unfit* persons to be trusted with powers” to frame a government.²⁰⁴

In this sense *The Alarm* was an ambiguous pamphlet. The proposition that government was necessarily incompetent to frame its own fundamental law was present, though it was not expounded at any length or decisively insisted on. Of apparently equal importance was the argument that self-dealing and corruption rendered the Pennsylvania Assembly unfit to frame a constitution. The second principle—anti-corruption—goes nearly as far as the first. Yet it leaves open the possibility of legislative framing of fundamental law.

3. 1777–1787: Resistance to the Pennsylvania Constitution of 1776

The victory of the radicals in Pennsylvania succeeded in bringing new men into Pennsylvania government for the next 15 years.²⁰⁵ In late September, the Provincial Convention adopted the new state constitution without submitting it to the people for ratification; it granted broad powers to a unicameral Assembly, but expressly prohibited that body from altering the constitution.²⁰⁶ Radicals may have been seeking to cement their gains against reactionary measures from the state’s disappointed moderates and conservatives who had now joined together in an “Anti-Constitutionalist” or “Republican” party.²⁰⁷ Unlike constitutions in several other states, Pennsylvania’s constitution did contain an express mechanism for formal amendment. Every seven years the counties and cities were to elect men to a “council of censors,” which was “to enquire whether the constitution has been preserved inviolate” and given the “power to call a convention” by two-thirds vote “if there appear to them an absolute necessity of amending.”²⁰⁸ Despite this provision, however, Pennsylvanians petitioned the legislature to call a convention, and three times between 1776 and 1790 it resolved to do so.²⁰⁹ In contrast, a report issued by the first Council of Censors in 1783 resulted in no changes to the constitution, though the

²⁰⁴ THE ALARM, *supra* note 198, at 3. On the proposal that the Assembly itself hold a convention, see THAYER, *supra* note 128, at 182.

²⁰⁵ THAYER, *supra* note 128, at 196.

²⁰⁶ *Id.* at 192–97.

²⁰⁷ *Id.* at 193; ROBERT L. BRUNHOUSE, THE COUNTER-REVOLUTION IN PENNSYLVANIA 1776–1790, at 27–38 (1942).

²⁰⁸ PA. CONST. of 1776, § 47 (LLMC 2019).

²⁰⁹ Traynor, *supra* note 5, at 51 & n.58; Harry L. Witte, *Rights, Revolution, and the Paradox of Constitutionalism: The Processes of Constitutional Change in Pennsylvania*, 3 WIDENER J. PUB. L. 383, 432–33 (1993).

council concluded the legislature had exceeded its powers.²¹⁰ Finally, in 1789, the legislature called a convention and it adopted a new state constitution.²¹¹

Other states utilized a variety of procedures to amend their first state constitutions. Delaware, Maryland, and South Carolina authorized the legislature to amend their constitutions, although the first two states required multiple votes or a supermajority and made some provisions unamendable entirely.²¹² Some states included no provision at all for amending their constitutions, though they generally included an implied reservation of rights to the people to alter government if it ceased to work for “the common benefit, protection and security, of the people.”²¹³ A final group of state constitutions included provisions for calling a convention, just as the Pennsylvania Constitution of 1776 did.²¹⁴

IV. AMENDING THE FEDERAL CONSTITUTION: THE ROLE OF THE CONVENTION IN ARTICLE V

We have now largely completed our study of the development of the constitutional convention in seventeenth-century England and late eighteenth-century America. Our attention has been directed at a particular strand of thinking about the authority of the convention and its relationship to government; according to this thinking, government may represent the people in their sovereign capacity, but when government is corrupt or there is a serious danger that those in power will act primarily to continue themselves in power, the people may use a popular convention to alter government so as to secure their property and liberty from arbitrary deprivation. And while the correlation of theory to practice is generally imperfect, the periods under study do evidence political struggles waged in just these terms. Poli-

²¹⁰ See THE PROCEEDINGS RELATIVE TO CALLING THE CONVENTIONS OF 1776 AND 1790, at 83–113 (Harrisburg, John S. Wiestling 1825); Edward S. Corwin, *The Progress of Constitutional Theory Between the Declaration of Independence and the Meeting of the Philadelphia Convention*, 30 AM. HIST. REV. 511, 519–20 (1925).

²¹¹ See BRUNHOUSE, *supra* note 207, at 221–27.

²¹² DE. CONST. of 1776, art. 30 (LLMC 2019) (“No other Part of this Constitution shall be altered, changed or diminished without the Consent of five Parts in seven of the Assembly and seven Members of the Legislative Council.”); MD. CONST. of 1776, art. LIX (LLMC 2019) (“That this Form of Government, and the Declaration of Rights, and no part thereof, shall be altered, changed, or abolished, unless a bill . . . shall pass the General Assembly, and be published at least three months before a new election, and shall be confirmed by the General Assembly, after a new election of Delegates . . .”).

²¹³ VA. CONST. of 1776, DECLARATION OF RIGHTS, § 3, 1 Va. Stat. 47 (1823).

²¹⁴ DODD, *supra* note 100, at 26–29; Traynor, *supra* note 5, at 61–62; see also John Dinan, “The Earth Belongs Always to the Living Generation”: *The Development of State Constitutional Amendment and Revision Procedures*, 62 REV. POL. 645, 651 (2000).

ticians compete with one another by claiming to act on behalf of the people—including by altering fundamental law. This competition gives a dynamic quality to popular sovereignty.

In this Part, I want to use this framework to examine the place of the convention in the Federal Constitution, and in particular Article V. Men leading the movement for a stronger federal government saw it as a means of controlling the work of factions in state legislatures.²¹⁵ Factions, as Madison defined them, promoted the private interests of a particular group rather than the common good; their domination of the legislature and use of its powers to advance their interests is what we have been calling “corruption.”²¹⁶ Since corruption was a problem in the state legislatures, we would expect the men seeking to strengthen the federal government to make use of a different body, one resistant to the corruption affecting the state legislatures.

The Articles of Confederation, the instrument under which the then existing Confederation Congress derived its powers, could only be amended by *legislatures*. Article XIII stipulated that no “alteration” should be made unless agreed to in Congress and “afterwards confirmed” by every state legislature.²¹⁷ Repeated efforts to amend the Articles under this provision were frustrated. In 1782, for example, while the war was still ongoing, Rhode Island defeated Robert Morris’s drive to give Congress the power to levy an impost; its state politics were dominated by “a fiery agrarian democrat, David Howell,” who opposed the measure.²¹⁸ In response, New York called for a convention; but in 1786, when Rhode Island finally came around, New York was flush with tax revenue and decided to kill the national impost itself.²¹⁹ A perception that state legislatures were impeding amendments that would serve the national interest led to calls for conventions. Between 1782 and 1786 a number of states asked Congress to call a convention to consider amendments or called for one themselves, despite the fact that the Articles made no provision for such an institution.²²⁰ Still, there were doubts about the form such a body would assume. Speaking

²¹⁵ See, e.g., James Madison, *Vices of the Political System of the United States, April 1787*, FOUNDERS ONLINE, <https://founders.archives.gov/documents/Madison/01-09-02-0187> (last visited Feb. 3, 2020). For a leading interpretation of *Vices*, and of the larger movement for a federal government that focuses on faction in state legislatures, see JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 28–34 (1996).

²¹⁶ Madison, *supra* note 215.

²¹⁷ ARTICLES OF CONFEDERATION of 1781, art. XIII.

²¹⁸ RICHARD BEEMAN, *PLAIN, HONEST MEN: THE MAKING OF THE AMERICAN CONSTITUTION* 12 (2009); see also KYVIG, *supra* note 26, at 38; RAKOVE, *supra* note 215, at 25.

²¹⁹ BEEMAN, *supra* note 218, at 15; MICHAEL J. KLARMAN, *THE FRAMER’S COUP: THE MAKING OF THE UNITED STATES CONSTITUTION* 24–32 (2016).

²²⁰ See, e.g., 25 *JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789*, at 951–52 (Gaillard Hunt ed., 1922); Stasny, *supra* note 9, at 76–77.

in Congress, Madison and Alexander Hamilton opposed calling “partial conventions,” which excluded some states, on grounds that it would encourage the formation of state blocs in national politics.²²¹

At the Philadelphia Convention as well, as delegates thought through how they would seek popular authorization for the radical plan of government they were forming in secret, there was no clear preference for using popular bodies rather than legislatures. Notably, not a single delegate seconded Governor Morris’s suggestion that the proposed Constitution be submitted to a *national* convention for ratification.²²² The proposal would have to be submitted to state bodies of some kind. Delegates were divided over whether those bodies should be state legislatures or state conventions.²²³ Ultimately, the decision to employ state conventions was driven by a concern that legislatures would be attacked as incompetent to amend their *state* constitutions, which would be impliedly amended by the adoption of a superior Federal Constitution.²²⁴ Since state legislatures would be limiting their own power by ratifying the creation of a superior, national legislature, Federalists sitting in the state legislatures would leave themselves open to charges of self-dealing and to concomitant arguments that the legislature did not act on behalf of the people. To lessen this risk, Article VII provided for the submission of the proposed Constitution to state conventions.²²⁵

The proposed Constitution also included an express mechanism for its own Amendment, namely, Article V. In considering why Article V empowers both legislatures and conventions to amend the Constitution, it is essential to keep in mind that the ground was shifted by the creation of the national legislature, Congress. Madison saw Congress in particular as alleviating the harms of corruption in the state legislatures, and its design reflected, in numerous ways, the anti-corruption principle.²²⁶ If Congress succeeded in having this effect, then both it and state legislatures might be employed to amend the Federal Constitution. Madison consequently saw no need for a national framing convention at all, and believed a Congress full of public-minded statesmen should be the *only* deliberative body to propose amendments. A national convention was an uncertain thing, lacking any

²²¹ See 25 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 952 (Gaillard Hunt ed., 1922).

²²² 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 93 (Max Farrand ed., 1911) [hereinafter RECORDS OF THE FEDERAL CONVENTION].

²²³ See *id.*

²²⁴ See RAKOVE, *supra* note 215, at 103–06; Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside of Article V*, 55 U. CHI. L. REV. 1043, 1049 (1988).

²²⁵ U.S. CONST. art. VII (“The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.”).

²²⁶ See RAKOVE, *supra* note 215, at 47–56; Teachout, *supra* note 17, at 348 (discussing Madison’s view that the Philadelphia Convention was necessitated by “corruption in the legislative councils”).

careful institutional design and (although he did not say this) the weight that an august, national legislative assembly like his new Congress would have. A badly drawn convention might *introduce* faction and corruption. If a national convention were to be used, it would presumably have to be regulated by Congress to ensure that it employed the kind of public deliberation that conferred legitimacy on government.²²⁷

A. *The Philadelphia Convention and the Framing of Article V*

It is well known that contemporaries regarded the difficulty of amending the Articles of Confederation as one of its chief defects.²²⁸ When Congress called for a convention to be held at Philadelphia in the summer of 1787, “for the sole and express purpose of revising the Articles,” its resolution began by citing the unanimity requirement in Article XIII.²²⁹ From today’s perspective, one expects to learn that the plans proffered at Philadelphia all included amendment provisions more liberal than the Articles, but this was not in fact the case. Of the two plans traditionally most studied, the Virginia Plan introduced by Edmund Randolph and the New Jersey plan introduced by William Paterson, only the former included an amendment provision at all, and it was aspirational, suggesting rather meekly that “provision ought to be made for the amendment of the Articles of the Union whensoever it shall seem necessary,” even without the assent of the national legislature.²³⁰ When this resolution came up for discussion in the convention’s Committee of the Whole, several delegates expressed doubt that it was necessary.²³¹ The several state constitutions that omitted amendment procedures, including the Virginia Constitution itself, had not proved defective in this regard; the problem was including a procedure that proved impossible to execute, as had the Articles, with the effect of frustrating change altogether.²³² An amendment procedure required careful design.

What of the other plans of government aired at the convention? Charles Pinckney presented a plan on May 29th; in Max Farrand’s reconstructed version, the

²²⁷ On Madison’s view that public opinion conferred legitimacy on republican government, see COLLEEN A. SHEEHAN, *JAMES MADISON AND THE SPIRIT OF REPUBLICAN SELF-GOVERNMENT* 80–83 (2009).

²²⁸ BEEMAN, *supra* note 218, at 9; KLARMAN, *supra* note 219 at 25; *see also* RAKOVE, *supra* note 215, at 25–28.

²²⁹ 32 *JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789*, at 73–74 (Roscoe R. Hill ed., 1936).

²³⁰ 1 *RECORDS OF THE FEDERAL CONVENTION*, *supra* note 222, at 22 (Madison). As the New Jersey Plan was framed as an amendment to the Articles, it left Article XIII in effect. *Id.* at 243–45.

²³¹ *Id.* at 121, 202.

²³² Jefferson concluded that the Virginia legislature could change the state’s constitution, and thus Virginia’s constitution, though it contained no formal amendment procedure, might be read to have impliedly allowed for legislative amendment. JEFFERSON, *supra* note 7, at 121–23.

Pinckney plan mandated that its terms be “inviolably observed unless altered as before directed,” apparently referring to a prior clause requiring the assent of an as-yet-undetermined number of states to “invest future additional powers” in Congress.²³³ On June 18th, Alexander Hamilton described a plan of government to the delegates and apparently omitted mention of an amendment mechanism.²³⁴ A text Hamilton provided to Madison at the close of the convention, illustrating “the Constitution which he *would have wished* to be proposed by the Convention,” did contain a provision for amendment, but it was nearly identical to Article V and likely added as an afterthought; by mid-June, when Hamilton actually presented his plan, amendment was not yet a hotly disputed topic.²³⁵ Thus, even if there was widespread agreement at the opening of the Philadelphia Convention that amending a constitution should require less than unanimous consent, there was apparently no sense that this necessitated an express provision in the text or what such a provision should look like.²³⁶

Article V really began to take shape only with the work of the Committee of Detail, which convened in late July. Just as it did with other resolutions in the Virginia Plan, this committee transformed general language (e.g., “the constitution should be amended whenever necessary”) into a specific and narrower institutional form.²³⁷ William Ewald has recently reaffirmed Farrand’s conclusion that the committee’s amendment provision appears first in John Rutledge’s handwriting, as an annotation to a draft prepared by Edmund Randolph.²³⁸ Rutledge’s proposal provided that upon application by two-thirds of the state legislatures, the national legislature would “call a Convn. to revise or alter ye Articles of Union.”²³⁹ Subsequent

²³³ 3 RECORDS OF THE FEDERAL CONVENTION, *supra* note 222, at 609. The prior clause read, “*The assent of the Legislature of . . . States shall be sufficient to invest future additional powers in U. S. in C. ass. and shall bind the whole confederacy.*” *Id.* There is some uncertainty about Pinckney’s plan. In 1818, Pinckney mailed John Quincy Adams drafts of what he believed was the plan he presented at the opening of the Convention, although Farrand doubts this could have been that text. *Id.* at 595, 601–04. The 1818 draft contains language very close to Article V. *See id.* at 601.

²³⁴ *See* 1 RECORDS OF THE FEDERAL CONVENTION, *supra* note 222, at 281–311; Variant Texts of the Plan Presented by Alexander Hamilton to the Federal Convention, THE AVALON PROJECT, YALE LAW SCHOOL (2008) http://avalon.law.yale.edu/18th_century/hamtexta.asp.

²³⁵ 3 RECORDS OF THE FEDERAL CONVENTION, *supra* note 222, at 617–19 (emphasis added).

²³⁶ Postponing the part of the resolution obviating the assent of the national legislature, the Virginia plan’s resolution calling for an amendment provision passed without dissent on July 23, 1787. 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 222, at 87.

²³⁷ William Ewald, *The Committee of Detail*, 28 CONST. COMMENT. 197, 210 (2012).

²³⁸ *Id.* at 220, 237, 250 n.140.

²³⁹ 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 222, at 148.

drafts in James Wilson's handwriting preserved this basic structure, which was reported to the full convention as Article XIX of the committee's draft.²⁴⁰

When the Committee of the Whole turned its attention to this proposal, it seemed to reawaken conflicts between proponents of national power and local power that had dominated the first phase of the convention.²⁴¹ Now, concern was expressed that allied states would form blocs and use the amendment process to force changes in the national constitution that effectively nullified provisions in other state constitutions. Thus, "Grumbletonian" Elbridge Gerry, who earlier had favored including an amendment procedure, now worried aloud that the proposed mechanism might be used to "subvert the State-Constitutions altogether."²⁴² Historian Richard Beeman has remarked that Gerry's objection made little sense, but if one assumes a convention would be free, or even just inclined, to reject constraints imposed on it by state legislatures, the worry is indeed understandable.²⁴³ There would be no opportunity for states to defeat an amendment in ratification.

These kinds of concerns, which resurfaced several times as the convention advanced, led Madison to propose splitting the amendment process into two phases: a proposal phase and a ratification phase.²⁴⁴ State bodies—legislatures or conventions—would be exclusively used during the ratification phase, and the assent of three-fourths of those bodies would be required to give an amendment legal effect. This provided increased protection for states. At the same time, Madison moved that "the legislature of the U – S –" be given the power to propose amendments.²⁴⁵ Although the point was not included in his notes, requiring a supermajority vote in a House whose apportionment reflected slave populations and in an equally apportioned Senate would further protect state interests. Nonetheless, Rutledge immediately objected that he could not support "a power by which the articles relating to slaves might be altered by the States not interested in that property and prejudiced against it."²⁴⁶ The objection is hard to understand, given that Madison's two-stage procedure was more protective of states than the one Rutledge himself had penned while on the Committee of Detail.²⁴⁷ He asked to amend Madison's proposal to immunize from amendment the Slave Trade and Direct Taxes Clauses of Article I,

²⁴⁰ *Id.* at 174, 188; Paul J. Scheips, *The Significance and Adoption of Article V of the Constitution*, 26 NOTRE DAME LAW. 46, 53 (1950).

²⁴¹ *See, e.g.*, RAKOVE, *supra* note 215, at 70–83.

²⁴² 1 RECORDS OF THE FEDERAL CONVENTION, *supra* note 222, at 122 (Gerry favors); 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 222, at 557–58 (Gerry opposes and voices objection); TAYLOR, *supra* note 37, at 376 ("Grumbletonian").

²⁴³ BEEMAN, *supra* note 218, at 338.

²⁴⁴ 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 222, at 559.

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *Id.*

both of which protected slavery.²⁴⁸ The amended motion passed, nine states in favor, with only Delaware opposed and New Hampshire divided.²⁴⁹ Thus Congress's power to propose amendments passed into the text alongside one of the Constitution's express protections of slavery.²⁵⁰

Late in the convention, George Mason objected to Congress possessing the sole power to propose amendments, reasoning that an "oppressive" Congress might frustrate the process entirely even if the people supported it. Elbridge Gerry moved to add to a second proposal mechanism, namely, a national convention called at the request of two-thirds of the states. This would return a national convention to the text. Madison worried aloud that a national convention would raise difficult questions about procedure and form, alluding to familiar worries about irregular proceedings in informal popular bodies—and perhaps to unspoken worries about the membership of those bodies as well. Nevertheless, Gerry's motion carried without opposition, and Article V assumed its final form.²⁵¹

Gerald Gunther has characterized the framing of Article V as a struggle between advocates of nationalism and localism.²⁵² Today we would want to emphasize more than Gunther the relationship between localism and slavery. What is missing, however, on either account, is any concern with using conventions to give amendments popular authority. Two sorts of conventions are in Article V: state conventions and the national convention. Neither was added to invest an amendment with popular authority. State conventions were added to protect state constitutions from abrogation by amendments to the national Constitution. Since state legislatures were also competent for this purpose, however, they were included as well.²⁵³ The national convention had been initially proposed as a framing and enacting body for amendments but was stripped of this function by the addition of state ratifying bodies. Its

²⁴⁸ On the connection between the Direct Taxes Clause and slavery, see Bruce Ackerman, *Taxation and the Constitution*, 99 COLUM. L. REV. 1, 10 (1999).

²⁴⁹ *Id.*

²⁵⁰ Advocates of local power continued to object to the amendment mechanism, which led to the additional immunization for Senate apportionment. 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 222, at 630–31; JOHN R. VILE, *THE CONSTITUTIONAL AMENDING PROCESS IN AMERICAN POLITICAL THOUGHT* 30–31 (1992); Scheips, *supra* note 240, at 57–59.

²⁵¹ *Id.* at 559, 629–30.

²⁵² Gerald Gunther, *The Convention Method of Amending the United States Constitution*, 14 GA. L. REV. 1, 14 (1979). On June 11, Mason had expressed support for the amendment resolution in the Virginia Plan, including its exclusion of national legislative consent, since "they may abuse their power." 1 RECORDS OF THE FEDERAL CONVENTION, *supra* note 222, at 203. He objected to Madison's proposed amendment of the Committee of Detail proposal on similar grounds. 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 222, at 629.

²⁵³ Charles Pinckney observed of Article V and the procedure in his own plan, which provided for amendment by agreement of a certain number of state legislatures, that "[t]he principles" of the two systems "are precisely the same." He made no mention of the presence of conventions in Article V. 3 RECORDS OF THE FEDERAL CONVENTION, *supra* note 222, at 120.

role in the final form of Article V was to provide a means for proposing amendments if Congress became “oppressive” or stymied popular calls for change—a role we have seen ascribed to conventions throughout this Article. In this final form, then, the national convention did not function to convey the sovereign authority of the people. In sum, the debate conveys no sense that conventions were added to Article V to ensure that amendments enjoyed the status of *fundamental law*. A supermajority of legislatures could confer this status just as well.

The convention’s deliberations also reflect a view that legislatures enjoyed certain advantages over conventions as amending bodies. Legislatures were more formal in their proceedings, had limited powers, and were more likely to be filled by gentlemen, even if state legislatures in recent years did have too many of the “new men.” Madison, for one, hoped the national legislature would address some of these defects. For a group of men concerned with maintaining peace and order and preserving their place in government, it was sensible to provide for constitutional change in institutions whose formal proceedings they could expect to direct.

B. Ratification

Ratification transformed the debate over amendment that occurred in Philadelphia, nearly inverting it. In states where Anti-Federalists succeeded in being elected in large numbers to the state convention, men used the floor to air a somewhat different set of concerns than had been voiced at Philadelphia.²⁵⁴ Rather than worry that Article V would permit a group of allied states to nullify the constitution of a different state, Anti-Federalists focused on how *difficult* it would be to amend the national Constitution.²⁵⁵ Thus Patrick Henry complained in his opening remarks at the Virginia Ratifying Convention that “[t]he way to amendment is in my conception, shut.”²⁵⁶ The problem was that three-fourths of the states “must ultimately agree to any amendments”; the opportunities for “unworthy characters” to prevent the adoption or even proposal of amendments limiting their own power was therefore great. Henry’s speech was acknowledged to be nearly impossible to transcribe, and the recorder in the Virginia Convention could only sit near the door,

²⁵⁴ This is true of Virginia, which I examine below. See also LORRI GLOVER, *THE FATE OF THE REVOLUTION: VIRGINIANS DEBATE THE CONSTITUTION* 90–92 (2016).

²⁵⁵ Sanford Levinson, “Veneration” and Constitutional Change: James Madison Confronts the Possibility of Constitutional Amendment, 21 TEX. TECH L. REV. 2443, 2447 (1990); see also *Federal Farmer*, No. 4, 12 Oct. 1787, in 4 THE FOUNDERS’ CONSTITUTION 579 (Philip B. Kurland & Ralph Lerner eds., 1987).

²⁵⁶ 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 76 (Jonathan Elliot ed., Washington 1836) [hereinafter THE DEBATES].

where it was difficult to hear.²⁵⁷ But even so he caught a bit of Henry's characteristic bluster: "To suppose that so large a number as three-fourths of the states will concur, is to suppose that they will possess genius, intelligence and integrity, approaching to miraculous."²⁵⁸ Giving control of amendment to "one tenth part of the population" was antidemocratic.²⁵⁹

The requirement of unanimous consent for amendment of the Articles of Confederation left Federalists with a natural rejoinder: The present system was even more anti-democratic. Madison expressed disbelief that Henry could protest the difficulty of amending the Constitution when "the thirteenth article of the confederation expressly require[s] that no alteration shall be made without the unanimous consent of all the states."²⁶⁰ If it was antidemocratic to let one-quarter of the states block an amendment, nothing was "more perniciously improvident and injudicious, than [the Articles'] submission of the will of the majority to the most trifling minority."²⁶¹ Just to refresh his audience, Madison adduced the example of "the petty state of Rhode Island," a "little state" that had blocked necessary improvements in the Articles, at great cost and danger to Virginia and the union during a time of war.²⁶² Henry knew well the difficulty created by Congress's reliance on state requisitions; he had served as Virginia's first governor and struggled to supply the needed troops and supplies.²⁶³ In fairness to Henry, his point was probably different: that *if* there were to be a true national legislature with a power of taxation, democratic principles demanded an easier method of amendment than Article V proposed. Nevertheless, Madison had landed his punch; Federalists in other conventions made the point as well.²⁶⁴

Federalist elites adduced Article V in acknowledgement of the need for amendment, thus undercutting Anti-Federalist demands for changes before ratification.²⁶⁵

²⁵⁷ On the transcription of the debates, and on using these legislative records generally, see MARY SARAH BILDER, *MADISON'S HAND: REVISING THE CONSTITUTIONAL CONVENTION* 167 (2015).

²⁵⁸ 3 *THE DEBATES*, *supra* note 256, at 77.

²⁵⁹ *Id.* The anti-democratic quality of the proposed Federal Constitution was noted by a number of Anti-Federalist writers. See, e.g., Levinson, *supra* note 255, at 2447 ("[W]e shall perceive that the general government, in this part [i.e., the executive], will have a strong tendency to aristocracy, or the government of the few.").

²⁶⁰ 3 *THE DEBATES*, *supra* note 256, at 110.

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ RICHARD R. BEEMAN, *PATRICK HENRY: A BIOGRAPHY* 111 (New York, McGraw-Hill 1974).

²⁶⁴ See, e.g., 2 *THE DEBATES*, *supra* note 256, at 197.

²⁶⁵ On the Anti-Federalist demand for "previous" or "conditional" amendments in Virginia, see GLOVER, *supra* note 254, at 41, 48–49. For a Federalist argument that Article V would permit subsequent amendments, see, e.g., 2 *THE DEBATES*, *supra* note 256, at 116 (Rufus King).

In Number 43 of *The Federalist*, published several months before the Virginia Ratifying Convention, Publius (Madison) observed in measured tones that “useful alterations will be suggested by experience.”²⁶⁶ Edmund Pendleton, presiding at the Virginia Convention, agreed that, using Article V, “errors which shall have been experienced” could be removed.²⁶⁷ The men of the bar and bench would have found the argument familiar; writers had long claimed the wisdom of experience as a great advantage of the common law.²⁶⁸ Speakers paired praise of incremental, experienced-based change with a reminder of the alternative. In the Massachusetts Convention, Charles Jarvis observed that a constitutional method of amendment would lessen the likelihood of revolutionary change and “blood” (a point that was also often made about judicial review).²⁶⁹ Jarvis’s point touched on what was a deep fear among Federalists of violent, radical constitutional change, a phenomenon they seemed to connect to the importance of “firm government” and the execution of law.²⁷⁰ Thus, in the Pennsylvania Ratifying Convention, James Iredell praised the Constitution for including a “regular[]” method of amendment so that recourse to “civil war” would be unnecessary.²⁷¹ At the same time, the method did not permit the constitution to be amended “quite so easily, which would be extremely impolitic.”²⁷² Although it allowed for change, Publius said, the proposed Constitution “guards equally against that extreme facility, which would render the Constitution *too mutable*.”²⁷³ The procedure in Article V had been calibrated so as to avoid both extremes—impossibility of change and ease of change—both of which posed serious risks. In short, said Pendleton, it was “an easy and quiet method of reforming what may be found amiss,” so that if the people’s agents in government acted corruptly, “from motives of self-interest,” the people could “assemble in convention” and “punish those servants, who have perverted powers designed for our happiness, to their own emolument.”²⁷⁴ If government became corrupt, the convention was available, just as it had been in the past, but now legalized and incorporated into a defined procedure, reducing the risk of serious disorder and violence.

²⁶⁶ THE FEDERALIST NO. 43, at 315–17 (James Madison).

²⁶⁷ 3 THE DEBATES, *supra* note 256, at 291.

²⁶⁸ See GERALD POSTEMA, BENTHAM AND THE COMMON LAW TRADITION 63–65 (1989) (describing the view that the common law contained the “[w]isdom of the ages”).

²⁶⁹ 2 THE DEBATES, *supra* note 256, at 130 (Jarvis). George Mason had made the same point at the Philadelphia Convention. 1 RECORDS OF THE FEDERAL CONVENTION, *supra* note 222, at 203. Delegates made precisely the same point in favor of judicial review—that it would avoid violent conflict over the structure of government. Steilen, *supra* note 116, at 521 (describing an argument in the Virginia Convention by John Marshall).

²⁷⁰ Levinson, *supra* note 255, at 2450.

²⁷¹ 4 THE DEBATES, *supra* note 256, at 182.

²⁷² *Id.*

²⁷³ THE FEDERALIST NO. 43, at 315 (James Madison) (emphasis added).

²⁷⁴ 3 THE DEBATES, *supra* note 256, at 66.

Beyond this, there was little extended discussion of Article V. There was no effort to engage with the tradition of political writing on legal change, including by Locke, Machiavelli, the English jurist Matthew Hale, and Montesquieu—authors with whom the founding generation was familiar.²⁷⁵ Nor did men consider alternative amendment procedures. The major exception is Number 49 of *The Federalist*, in which Publius describes a method of amendment proposed by Thomas Jefferson in *Notes on the State of Virginia*.²⁷⁶ Jefferson's proposal provided that "two of the three branches of government" could call a convention "for altering this constitution, or correcting breaches of it."²⁷⁷ Publius, assuming that the method would result in "frequent appeals," objects that it "would carry an implication of some defect in the government [and] in a great measure, deprive the government of that veneration which time bestows" and which history shows necessary for "stability."²⁷⁸ Tellingly, however, the "greatest objection" Publius has to Jefferson's proposal is that legislators would win election to the convention and bring party politics with them, ensuring that amendment would never "turn on the true merits of the question."²⁷⁹

The objection clearly also applies to national conventions of the kind mentioned in Article V, since national conventions would also lack the protections against party politics that Madison believed Congress possessed. It would seem, then, that despite the parallel treatment of convention and Congress in the text of Article V, Madison continued to assume that amendments would normally be proposed by Congress. He must have regarded national conventions just as George Mason had described them: necessary for when Congress became oppressive and prevented amendment. They were, in short, a stop-gap. The primary institution for proposing amendments would be an august national legislature.

CONCLUSION: THE FALL—AND RISE—OF THE CONVENTION IN AMERICAN CONSTITUTIONAL THOUGHT

Much more could be said about the convention in America, but here's the work I think we have completed. We have reexamined political writings dating from the infancy of the constitutional convention and identified a series of these writings that treat popular sovereignty as dynamic. From the beginning of a doctrine of popular sovereignty in English political and legal thought, multiple political bodies were competing for the authority that flowed from representing the people in their sovereign capacity. Politicians used a variety of arguments to that end, but if there was

²⁷⁵ See VILE, *supra* note 250, at 2–17.

²⁷⁶ JEFFERSON, *supra* note 7, at 221–22. *Notes* was first completed after Jefferson's term as Governor of Virginia, sometime in 1781.

²⁷⁷ *Id.* at 304.

²⁷⁸ THE FEDERALIST NO. 49, at 349 (James Madison). This is Levinson's point. Levinson, *supra* note 255, at 2450–54.

²⁷⁹ THE FEDERALIST NO. 49, at 350–51 (James Madison).

a master argument, it was that other bodies acted to promote the private interests of persons in power, rather than public interest. In a word, they were corrupt.

Looking forward from the end of this study, at the turn of the nineteenth century, gives the impression of a fork in the road. Historians of state constitutions report the increased use of conventions in the nineteenth century to “bypass entrenched legislative interests”²⁸⁰—a form of corruption for which they had been used in the eighteenth century, as we have seen. But some of the same problems emerged within conventions themselves. According to historian Morton Keller, “none of these gatherings may be said to have resolved the issues that confronted them,” and by the late-nineteenth century, special interests had seized control of state conventions.²⁸¹ Over the long run, some states shifted the process of amendment away from conventions, which were dominated by factions and special interests, toward legislatures, voter initiatives and referenda, and non-partisan commissions. Thus, legislatures came to dominate the amendment of state constitutions. More generally, governmental change of both state and federal constitutional law has become a familiar practice.

At the same time, even if the use of constitutional conventions ultimately declined, their place in our constitutional thinking has remained firm. From the period of ratification, Federalists used the constitutional convention as a means to establish the supremacy of the national government over the states.²⁸² As part of this effort, Federalists insisted on the presence of the people in the ratifying conventions and their absence from all branches of government, which might compete with conventions and thus impugn the authority of the Federal Constitution. The canonization of Chief Justice John Marshall’s opinions in the early twentieth century cemented this understanding of the convention for many generations of American lawyers. By reaffirming this exclusive jurisdiction for the convention, lawyers also placed express textual changes to the Constitution practically out of reach, thereby enhancing the control of courts of law, the executive and the administration over constitutional change, in which lawyers play key roles.

This, I suspect, is the origin of the orthodox theory of the constitutional convention. The revisionist theory, in contrast, situates the convention alongside a range of governmental bodies, all of which can compete for an authority to alter fundamental law. None of this implies a rejection of popular sovereignty. It implies what even the most casual observation of our politics reveals: that politicians compete for authority by claiming to represent the people and that on this basis go about using their powers to make changes to our fundamental law.

²⁸⁰ Dinan, *supra* note 214, at 659, 662–63, 673.

²⁸¹ Morton Keller, *The Politics of State Constitutional Revision, 1820–1830*, in *THE CONSTITUTIONAL CONVENTION AS AN AMENDING DEVICE* 67, 70–73 (Hall et al. eds., 1981).

²⁸² See, e.g., *McCulloch v. Maryland*, 17 U.S. 316, 403–04 (1819).