Popular Sovereignty and Constitutional Amendment

by

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(abridged)

> *We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights. That Governments deriv[e] their Just powers from the consent of the governed. That whenever any Form of Government becomes destructive of [its] ends, it is the right of the People to alter or abolish it, and to institute new Government, laying its foundations on such principles and organizing its Powers in such form, as to them shall seem most likely to effect their Safety and Happiness.*

IF UNDERSTOOD--and taken seriously--these words from the Declaration of Independence require a fundamental rethinking of conventional understandings of the U.S. Constitution. Concretely: the U.S. Constitution is a far more majoritarian and populist document than we have generally thought; and We the People of the United States have a legal right to alter our government--to amend our Constitution--via a majoritarian and populist mechanism akin to a national referendum, even though that mechanism is not explicitly specified in Article V. [1]

What Article V Does Not Say and Cannot Do

Let us first consider the text of Article V [2] and., more particularly, what it does *not* say: that it is the *only* way to amend the Constitution. Of course, we often read the enumeration of one mode (or in this case four modes, if we multiply the two Article V mechanisms for proposing amendments by the two Article V mechanisms for ratifying them) as impliedly precluding any other modes. Congress, for example, cannot pass laws other than via bicameralism and presentment. But there is an alternative way of understanding the implied exclusivity of Article V. It enumerates the only mode(s) by which ordinary *government*-- Congress and state legislatures--can change the Constitution, and thereby free themselves from various limits on their power imposed by the Constitution itself. (Without Article V, government would have no such power.) [3] But under this alternative view, Article V nowhere prevents the *People* themselves, acting apart from ordinary government, from exercising their legal right to alter or abolish government, via the proper legal procedures. Article V presupposes this background right of the People, and does nothing to interfere with it. It merely specifies how ordinary government can amend the Constitution *without* recurring to the People themselves, the true and sovereign source of all lawful power.

The conventional view of Article V sees it as *implementing* Jefferson's formulation of consent by the governed, rather than supplementing it; but this makes hash of Jefferson's

language and logic. Article V is *government*- driven: If exclusive, it gives ordinary government officials-- Congress and state legislatures--a monopoly on initiating the process of constitutional amendment. By contrast, Jefferson's self-evident truth is *People*-driven. It cannot be satisfied by a government monopoly on amendment, for the government might simply block any constitutional change that limits government's power, even if strongly desired by the People. (Elections for government officials do not solve this problem; in the 1780s, not all members of the polity were even eligible to vote for, say, state senators, who in turn helped elect U.S. senators; but all members of the polity--"freemen," in 1787--were by definition part of "the People" eligible to participate in People-driven constitutional change.) [4]

Second, and related, Article V is *minoritarian.* Precisely because ordinary government is distrusted, it may not amend the Constitution without amassing an extraordinary bloc of government officials. A mere minority of officials may often stymie constitutional change. But as we shall see below, Jefferson's self-evident truth was universally understood in 1787 as *majoritarian.* A simple majority of the People themselves--members of the polity--had a legal right to alter government and amend constitutions. If exclusive, Article V betrays this right.

There are, then, two plausible interpretations of Article V: (1) the conventional reading that it enumerates the only mode(s) by which the Constitution may be amended, and (2) an alternative reading that it enumerates the only mode(s) by which *ordinary government* may amend the Constitution. How shall we decide which is the better reading? By widening our focus beyond the narrow text of Article V, to consider other parts of the original Constitution, various glossing provisions of the federal Bill of Rights, and various Article V analogues in state constitutions.

Widening our frame will also help cure an underlying anxiety that, I think, may wrongly tilt lawyers toward the conventional reading of Article V exclusivity. The Constitution is supreme law, and the legal rules it establishes for its own amendment are of unsurpassed importance, for these rules define the conditions under which all other constitutional norms may be legally displaced. It is comforting to believe that Article V lays down these all-important legal rules with precision. If we stick close to Article V, we are safe; if we go beyond it, we are at sea.

But this is an optical illusion. Article V is far less precise than we might expect. What voting rule must an Article V proposing convention follow? What apportionment ratio? Can an amendment modify the rules of amendment themselves? If so, couldn't the "equal suffrage" rules be easily evaded by two successive "ordinary" amendments, the first of which repealed the equal suffrage rules of Article V, and the second of which reapportioned the Senate? Could a legitimate amendment generally purport to make itself (or any other random provision of the Constitution) immune from further amendment? If so, wouldn't that clearly violate the legal right of future generations to alter their

government? Wouldn't the same be true of an amendment that effectively entrenched itself from further revision by, say, outlawing criticism of existing law? But if *that* would be unconstitutional, haven't we in effect made the narrow and hard core of our First Amendment itself unamendable?

If determinate answers to these and other questions exist, they lie outside Article V, narrowly construed--in other provisions of the Constitution, in the overall structure and popular sovereignty spirit of the document, in the history of its creation and amendment, and in the history of the creation and amendment of analogous legal documents, such as state constitutions. And once we consult these sources, we will find that we are in fact *not* at sea. The very sources that render Article V rules determinate also clarify the equally determinate rules for People-driven, majoritarian amendment outside Article V. By 1787, at least, the legal rules underlying Jefferson's right of the People to alter or abolish were no murkier or more mysterious than those encoded in Article V.

What the Rest of the Constitution Does Say and Do

In considering the "Constitution" as a whole, we must remember that it is not simply a text, but an act: the founding and constituting--in the Preamble's phrase, the "ordain[ing]" and "establish[ing]"--of a new nation and a new regime of governance. And more: This act of founding, of constitution, was--and was universally understood to be in 1787--itself an act of "the People" exercising and implementing their "self-evident" right to "alter or abolish" existing government "and to institute new government, laying its foundations on such principles and organizing its Powers in such form, as to them shall seem most likely to effect their Safety and Happiness." What does the act of constituting say and do--for it does by saying and says by doing--about the legal right of We the People to alter or abolish what We have legally ordained and established?

The Legality of the Constitution

One camp of modern scholars might quickly answer, "Nothing at all." For some claim that the Constitution of 1787 was itself the product of an illegal process; if true, then its genealogy tells us nothing about the People's *legal* right to alter or abolish. [5] Under this "illegal" argument, the Constitution was a second American revolution, different only from the first, and its 1776 Declaration, in that the second was bloodless.

In contrast to the Declaration, however, the Constitution submitted itself to a popular vote in each state, under principles of majority rule. Unlike American Loyalists in 1776 who took up arms against the Declaration, the loyal opposition to the Constitution in 1787 fought the good fight in conventions and not on battlefields. And when outvoted often by simple majorities--anti -Federalists in every single state in the end accepted the outcome because, deep down, they too understood the Federalists' claim that the Constitution had been *legally* ratified. [6]

But not before trying to brand the proposed Constitution "illegal" early in the game. The "illegal" gambit took two forms, but both gambits properly failed.

LEGALITY AND THE CONFEDERATION

The first gambit focused on the inconsistency between Article VII of the proposed

Constitution and Article XIII of the Articles of Confederation. Begin with Article VII, the last section of the Constitution, which explains its first section, the Preamble. The Preamble says that "We the People *do* ordain and establish this Constitution," and Article VII says *how* we do this:

> The Ratification of the Convention of nine States shall be sufficient for the Establishment of this Constitution between the States so ratifying the same. [7]

Now contrast Article XIII of the Articles of Confederation:

> And the Articles of this confederation shall be inviolably observed by every state, and the Union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them; unless such alteration be agreed to in a congress of the United States, and be afterwards confirmed by the legislatures of every state.

These provisions are undeniably inconsistent. The Constitution speaks of nine states; the Articles, of all thirteen. The Constitution relies on state conventions, yet the Articles require approval by state legislatures. But inconsistency is not illegality. The Articles of Confederation were nothing more than a tight treaty among thirteen otherwise independent states--a self-described "firm *league* of friendship" in which each state expressly "retains its sovereignty." Like the later Congress of Vienna, its "Congress" was merely an international assembly of ambassadors, sent, recallable, and paid by state governments with each state casting a single vote as a state. It nowhere described itself as a "government" or "legislature," or its pronouncements as "law." By 1787, the Articles had been routinely and flagrantly violated on all sides. [8] And under well-established legal principles in 1787, these material breaches freed each compacting party--each state--to disregard the pact, if it so chose. Thus, Blackstone wrote in his best-selling *Commentaries* that in a "foederate alliance"--that is, a confederation, or league of otherwise sovereign states--an infringement of fundamental conditions "would certainly rescind the compact." [9]

Nor does Article XIII's declaration that "the Union shall be perpetual" change the analysis, for in fact this clause was itself yoked to a mandate that the Articles "shall be inviolably observed by every state." Following standard principles of international law, each of these yoked mandates was a condition of the other. When inviolable observation lapsed, so did perpetual union under the Articles. (Indeed, international law principles help explain why perpetuity and inviolability were pointedly paired.) To put the point another way, the key point about the Articles was that it was a league, a treaty. The word *perpetual* said what kind of league it would be: the strongest, the firmest of leagues--as leagues go--but a league nonetheless. And the rule Blackstone invoked applied to all leagues, weak or strong, firm or mushy. In the words of the Swiss jurist Emmerich de

Vattel, whose *Law of Nations* was widely read and cited in America, "several sovereign and independent states may unite themselves together by a perpetual confederacy without each in particular ceasing to be a perfect state."[10]

Here, then, is a powerful rejoinder to the first "illegal" gambit: The Constitution did not "illegally" depart from Article XIII, because that Article and the other Articles of Confederation were by 1787 no longer legally binding for any state that chose to exercise its legal right to rescind the compact. This powerful rejoinder is no mere twentieth century fabrication. On the contrary, when pressed, leading law-trained friends of the Constitution repeatedly resorted to this rejoinder in 1787-88.

Space limitations prevent laying out all of the evidence in this venue. Consider, though, the following four statements by James Madison to the Philadelphia convention, [11] the first delivered on June 5: "As far as the Articles of Union were to be considered as a Treaty only of a particular sort, among the Governments of Independent States, the doctrine might be set up that a breach of any one article, by any of the parties, absolved the other parties from the whole obligation." [12] And two weeks later: "Clearly, according to the Expositors of the law of Nations, . . . a breach of any one article, by any one party, leaves all the other parties at liberty, to consider the whole [compact] as' dissolved.... [T]he violations of the federal articles had been numerous & notorious.... He did not wish to draw any rigid inferences from these observations." [13] On June 30, and more tartly: "In reply to the appeal of Mr. E. to the faith plighted in the existing federal compact, he remarked that the party claiming from others an adherence to a common engagement ought at least to be guiltless itself of a violation." [14] And later still, on July 23, when Madison may well have his copy of Blackstone in hand as he sharply distinguished, as had Blackstone, "between a *league or treaty*, and a *Constitution"*: "The doctrine laid down by the law of Nations, in the case of treaties is that a breach of any one article by any of the parties, frees the other parties from their engagements. In the case of a union of people under one Constitution, the nature of the pact has always been understood to exclude such an interpretation." [15]

To be sure, substantial political delicacy was involved in making this argument. To mention only one problem, conclusive establishment of the relevant breaches in effect dissolving the confederation would have required lots of awkward and nasty finger pointing--hardly the kind of thing conducive to the launching of a new nation in the spirit of harmony and goodwill. Madison's arguments, especially when presented publicly later in *The Federalist*, were thus restrained and cautious. But politics aside, the argument was, legally, an apparent winner. Indeed, not a single anti-Federalist, to my knowledge, contradicted Madison and other Federalists on this key point. [16] When the issue was joined, the anti-Federalists caved; when pressed to put up or shut up, they shut up. [17]

LEGALITY AND STATE CONSTITUTIONS

But the very failure of the first "illegal" gambit leads to the second, far more interesting one. If indeed the Articles of Confederation were a mere treaty among otherwise independent nations, [18] we must carefully consider the laws of these nations--the thirteen states--and their relation to the Constitution. Undeniably, the U.S. Constitution, when

adopted, would effect important changes in the internal governance of each state. The key question thus became: By what legal right would Article VII ratification of the Constitution in the, say, Maryland convention alter the existing Maryland Constitution? The Maryland Constitution of 1776 had its own explicit amendment clause, and it, too, looked rather different from the federal Constitution's Article VII:

> That this Form of government, and the Declaration of Rights, and no part thereof, shall be altered, changed, or abolished, unless a bill so to alter, change or abolish the same 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, in the first session after such new election. [19]

Note the obvious differences between this Maryland Constitution clause, and the U.S. Constitution's Article VII. The Maryland clause requires two votes; Article VII, one. The Maryland clause looks to the ordinary government; Article VII, a special convention of the people of Maryland.

Here, then, was the anti-Federalists' second "illegal" gambit: (1) The Maryland Constitution clause specified the exclusive mode by which the Maryland Constitution could be lawfully altered or abolished. (2) Ratification of the federal Constitution in Maryland would indeed alter important aspects of the state constitution. But (3) the Article VII ratification mechanism did not satisfy the Maryland exclusive clause. Thus, ratification via Article VII would be illegal under preexisting and binding Maryland law.

But once again, the Federalists had a compelling rejoinder.

Popular Sovereignty

In the Philadelphia convention, Maryland's Daniel Carroll "mentioned the mode of altering the Constitution of Maryland pointed out therein, and that no other mode could be pursued in that state." [20] But listen carefully to Madison's bold yet lawyerly reply: "The difficulty in Maryland was no greater than in other States, where no mode of change was pointed out by the Constitution.... The people were, in fact, the fountain of all power, and by resorting to them, all difficulties were got over. They could alter constitutions as they pleased. It was a principle in the Bills of rights that first principles might be resorted to." [21]

Whereas Carroll read the Maryland amendment clause as the exclusive mode of lawful constitutional change--"no other mode could be pursued"--Madison read it more narrowly; it specified only the way *ordinary government* could amend the constitution (by two ordinary votes of two ordinary legislatures) but did not exclude the People themselves--"the fountain of all power"--from altering or abolishing their government "as they pleased." Especially revealing is Madison's analogy to those sister states of Maryland--

such as Madison's own Virginia--"where no mode of change was pointed out by the [state] Constitution." Surely, Madison suggested, that did not mean that the Constitution could never be changed. It meant only that the People themselves--and not ordinary government--could amend. And so the addition of the Maryland clause gave ordinary government an amending power it would not otherwise have had, but it was not best understood as depriving the People of their preexisting legal right to alter or abolish at will. For that preexisting right, proclaimed Madison, was one of the "first principles" of the legal order. [22]

During the ratification period, the Carroll-Madison exchange was in effect reenacted in several states--this time in the public spotlight. Pointing to state constitutions, various leading anti -Federalists played the "state illegality" card, to be met in turn by Madisonian responses, including those in *The Federalist*, Nos. 22, 39, 40, and 78. [23]

The most important such response was that of James Wilson during the Pennsylvania ratifying convention. Though less famous today than some of his companions, Wilson deserves our most careful attention. He was one of only six men to sign both the Declaration of Independence and the Constitution. At Philadelphia, he played a role second--if that--only to Madison. As Gordon Wood has written, Wilson was the Federalists' preeminent popular sovereignty theorist; [24] and it was his hand that first penned the bold first three words of the Constitution, "We the People." [25] In the 1780s, Wilson was universally regarded as perhaps the most brilliant, scholarly, and visionary lawyer in America; he delivered the most important and celebrated lectures on law ever given in eighteenth-century America and was a natural choice by President Washington when picking the initial membership of the U.S. Supreme Court.

Wilson dominated the Pennsylvania ratifying convention in a one-man tour de force. Early on, he laid down first principles:

> There necessarily exists, in every government, a power from which there is no appeal, and which, for that reason, may be termed supreme, absolute, and uncontrollable.
>
> Perhaps some politician, who has not considered with sufficient accuracy our political systems, would answer that, in our governments, the supreme power was vested in the constitutions.... This opinion approaches a step nearer to the truth, but does not reach it. The truth is, that in our governments, the supreme, absolute, and uncontrollable power remains in the people. As our constitutions are superior to our legislatures, so the people are superior to our constitutions. Indeed the superiority, in this last instance, is much greater; for the people possess over our constitution,

> control in act, as well as right.
>
> The consequence is, the people may change the constitutions whenever and however they please. This is a right of which no positive institution can ever deprive them. [26]

Wilson's elaboration of the popular sovereignty rejoinder was not some newly minted, half-baked, ad hoc apology for Article VII. Rather, as his immediate audience well understood, Wilson's speech built on arguments he and his allies had been crafting in Pennsylvania for almost a decade. As early as 1777, they had articulated--and acted upon--the theory that the Pennsylvania amendment clause was not exclusive, and that popular sovereignty first principles required that the People themselves, acting in special conventions, retain the right to amend their Constitution at any time and for any reason. [27]

Declarations of Rights

Here, then, was the Federalists' emphatic popular sovereignty rejoinder to the anti-Federalists' second "illegal" gambit. Now that we understand its substance, we must investigate its source. From whence did the Federalists derive these "first principles" ?

Recall once again Madison's precise, lawyerly response to Carroll: "It was a principle in the Bills of rights, that first principles might be resorted to. " Madison was of course not referring to what we today call "the Bill of Rights"--the first set of amendments to the federal Constitution--for *that* bill was not even proposed until 1789. What, then, did Madison have in mind? The bill of rights of each state. And when we closely examine the various bills of rights and declarations of rights issuing from the states between 1776 and 1790, we will see a dramatic pattern: Each state had explicitly endorsed at least one statement--and in many cases several--that established popular sovereignty as that state's legal cornerstone. These formulations both overlapped and varied. Again, space considerations prevent offering more than a tip of the iceberg. [28]

Consider, though, the opening chords of Virginia's Declaration of Rights-the first and most influential of all the state declarations, adopted in June 1776, one month before Jefferson's Declaration. Among the "rights ... of the good people of Virginia" constituting "the basis and foundation of government" were these:

> Sec. 2. That all Power is vested in I and consequently derived from, people....
>
> Sec. 3 ...of all the various modes and forms of government, that is best which is capable of producing the greatest degree of happiness and safety....
>
> [W]hen any government shall be found inadequate or contrary to these purposes, a majority of the community hath an

> indubitable, inalienable, and indefeasable right to reform, alter, or abolish it, in such manner as shall be judged most conducive to the public weal. [29]

As the Federalist statesman and historian David Ramsay gushed in his 1791 History of the American Revolution: "It is true, from the infancy of political knowledge in the United States; there were many defects in their [state] forms of government; but in one thing they were all perfect. They left the people in the power of altering and amending them, whenever they pleased." [30]

To be sure, the language of state constitutions differed, and at least some omitted specific language of a right of the People to alter or abolish in favor of more general pronouncements of popular sovereignty. If the various state declarations were legislative codes, then we might well read them narrowly, under principles of *expressio unius.* But these state declarations were emphatically not legislative codes. They did not claim to create new rights but to declare ones the People already had, in reason or in custom. [31] By their very nature, not all the rights of the People could be specified, and so it would be silly to make too much of a silence or omission--especially if omitted language merely clarified a logical corollary of explicit language, as the right of the People to alter or abolish logically flowed from popular sovereignty. (The later federal Ninth Amendment would explicitly confirm the silliness of reading Bills of Rights in narrow *expressio unius* fashion.) These declarations were quasi-judicial utterances, declaring the true common law--common to all American states.

At the very least, a contrary inference--i.e., that the People were without the right to alter their government--should require an emphatically clear, explicit rejection of Virginia's (and every state's) premise of popular sovereignty. None of the states came close to this, unless the reader falls into the *expressio unius* trap.

Majority Rule

One clever counter ploy to this Federalist rejoinder would try to read the various state amendment clauses not as excluding, but as implementing--exclusively!--the People's right to alter or abolish. But this clever counter ploy fails. The Maryland amendment clause empowered ordinary government--the legislature--and not the People themselves. [32] In both Massachusetts and Pennsylvania, the amendment clause specified certain dates for amendment in Massachusetts, 1795; in Pennsylvania, every seven years--whereas first principles required that the People be able to alter or abolish at any time. Sensing this, an anti-Federalist pamphleteer who played the illegality gambit in Massachusetts explicitly conceded that 1795 was not exclusive, and need not be read as such. [33] But by similar grammatical logic, the entire amendment clause was nonexclusive; its date was syntactically intertwined with its other rules, and so the concession gave away the game

But far more fundamentally, the Massachusetts clause could not be considered as implementing first principles since the clause expressly required a supermajority of popular support--and so too, --with the Pennsylvania clause [34] --whereas first principles required that a simple majority of the People be empowered to alter or abolish. This simple majority could occur in a "convention" of the People; popular sovereignty theory, for good reasons, [35] sharply distinguished special conventions chosen in a special election of the entire polity, for the sole purpose of effecting constitutional change--from ordinary, everyday legislatures, and assimilated these special convention assemblies to "the People" themselves. But first principles clearly demanded that a simple, deliberate majority of the polity--50 percent plus one--would suffice. The Massachusetts and Pennsylvania clauses clearly failed this requirement, and thus had to be viewed as nonexclusive as a matter of first principles.

The majority rule corollary of popular sovereignty and the right to alter or abolish appeared most obviously in George Mason's celebrated Virginia Declaration, with its explicit emphasis on the "indubitable, unalienable, and indefeasible" right of "a *majority* of the community." No other state declaration addressed the issue explicitly, and clearly none explicitly took issue with Virginia's Declaration.

This last point is not some lawyer's trick to prevail only by shifting the burden of proof. In the 1780s, the special status of majority rule was extraordinarily well understood. Both as a general default rule in the absence of specific language to the contrary, and as a specific corollary of popular sovereignty, it literally went without saying in a variety of declarations precisely because it was so obvious. Thus, Jefferson's 1776 Declaration spoke only of "the right of the People to alter or abolish" without specifying a precise voting rule; but clearly Jefferson believed that popular sovereignty, best understood, meant majority rule--it went without saying. Indeed, for Jefferson "the first principle of Republicanism is, that the lex majoris partis is the fundamental law of every society of equal rights." This entailed "consider[ing] the will of the society enounced by the majority . as sacred as if unanimous." [36]

These views were near universal in the 1780s, for anyone who had read Locke knew that majority rule stood as a basic default principle of all assemblies. [37] But more concretely: Americans understood the unique status of majority rule for implementing popular sovereignty and the right to alter or abolish. [38]

Even anti-Federalists shared this belief in majority rule as a clear corollary of popular sovereignty. Thus we find the very same Pennsylvania anti-Federalists who tried to play the "illegal" card appearing to concede in the very next paragraph that perhaps the Pennsylvania Constitution could be altered if "a majority of the people should evidence a wish for such a change." [39] (The anti-Federalists denied that such a majority had evidenced such a desire, pointing to the low voter turnout in electing convention delegates; the obvious Federalist counterargument would be that in a properly called

election, a majority of those voting--not of those eligible--should prevail.) So too, Federal Farmer, perhaps the leading anti-Federalist pamphleteer, wrote that "it will not be denied, that the people have a right to change the government when the majority chuse it, if not restrained by some existing compact" [40] i.e., a valid treaty. In Virginia the firebrand Patrick Henry seemed to concede that the proposed Constitution's Article V was in theory not exclusive--a point to which we shall return--but worried that in practice it would be. [41] And if exclusive as a practical matter, it would, Henry argued, clearly violate first principles, for a popular majority might not prevail under it. Henry quoted Virginia's Third Declaration verbatim, stressing its commitment to simple majority rule, and labeling it "the genius of democracy." [42]

Perhaps most clear and most dramatic of all were the words of the great James Wilson in his 1790 lectures on law in a passage that was as clear then as it is unknown now:

> As to the people, however, in whom sovereign power resides, . . . [f]rom their authority the constitution originates: for their safety and felicity it is established; in their hands it is clay in the hands of the potter: they have the right to mould, to preserve, to improve, to refine, and to finish as they please. If so; can it be doubted, that they have the right likewise to change it? A majority of the society is sufficient for this purpose. [43]

So much for the Founders' words. If we turn instead to their deeds, we see an even more vivid picture. Article VII as a text nowhere specified that within each state convention a simple majority would rule. But this was the universal understanding in every state. I know of not a single leading anti-Federalist who tried to claim that, somehow, the convention should follow supermajoritarian--that is, minority veto--principles. On the contrary, men such as Patrick Henry explicitly conceded that they "must submit" to the opinion of the convention "majority. [44] And in state after state, anti-Federalists in the final analysis acted on this understanding, accepting the legitimacy of the ultimate outcome. The point here, though often overlooked today, is absolutely vital, for in many states the convention vote was a squeaker: 30-27 in New York; 187-168 in Massachusetts; 57-47 in New Hampshire; and 89-79 in Henry's own Virginia, for example. With so many clever and ardent folk opposed to ratification, why did no one try to make hay of the omission in the text of Article VII? *Because majority rule really did go without saying.* [45]

The Meaning of the Constitution

Though setting out merely to establish the basic legality of the act of constitution, before closely parsing the text of constitution, we have in fact done much more. We have seen how that act itself reflected and embodied--self-consciously--first principles of the legal order, popular sovereignty and majority rule. Further, we have confronted various state constitutional clauses that look remarkably like our federal Article V and seem, at first

blush, to set out the exclusive mode of state constitutional amendment. But after more careful inspection, we learned that these Article V analogues were and are not best read as exclusive. As a matter of first principles the polity had retained the legal right to alter or abolish outside these analogues, by simple majority vote.

And so the obvious question is: Why is the same not true for Article V itself? Why does not a simple majority of the national People--for the Constitution forms one national People from the formerly distinct thirteen state peoples--retain an analogous legal right to alter or abolish its Constitution outside Article V? [46] (Once again, Article V cannot be read as *implementing* that right, because it is both *government*--driven and *minoritarian:* its rules may well thwart sensible constitutional changes strongly desired by a deliberate majority of the American polity.)

There are indeed clear texts in the U.S. Constitution--texts outside Article V but very much inside (indeed, fundamental to) the Constitution, understood as a unified document--that confirm the right we have rediscovered. When properly read, these texts say the very same thing and serve the very same function at the national level as the state declarations in the context of state Article V analogues.

THE PREAMBLE

Begin at the beginning. Do not the words "We the People of the United States . . . do ordain and establish this Constitution" say it all? What We, acting by simple majority in convention assembled (see Article VII), have ordained and established, cannot We, acting similarly) alter or abolish? Of course, because the Constitution formed previously separate state peoples into one continental People--Americans!--by substituting a true (and self-described) Constitution for a true (arid self-described) league, the relevant majority after ordainment and establishment should be national, not state by state, as it was before ordainment and establishment, under Article VII. An easy modern day analog comes from corporate law: Company A and company B agree to merge, with the merger approved by lawful majorities of each company's shareholders; but after merger, we look to the lawful majority of shareholders of the newly formed company, United A&B. (And we should not forget that Massachusetts, New Jersey and Connecticut had themselves each been formed by mergers of previously separate colonies, prior to the American Revolution.) To be sure, the Constitution redefined the relevant polity, but that redefinition cannot change the basic nature of popular sovereignty. If it did, no state prior to 1787 could have been grounded on popular sovereignty, for every new day brought a slight redefinition of the polity, with sonic voters dying and others coming of age, with western borders being relentlessly pushed back and new settlers brought in.

But, of course, every text finds itself embedded in a historical context. Did the Founders themselves recognize the Preamble as a textual declaration of popular sovereignty and the People's right to alter or abolish? Indubitably. Once more I can present only a fraction

of the relevant evidence, [47] beginning with the man who wrote the first draft of the Preamble, James Wilson: "What is the necessary consequence [of the Preamble]? Those who ordain and establish have the power, if they think proper, to repeal and annul." [48]

And listen to Edmund Pendleton, the great lawyer who headed the Virginia ratifying convention, as he evoked the Preamble to prove that the People would retain a legal right to alter or abolish. Article V, said Pendleton, simply set out *one* "easy and quiet" mechanism of amendment; but because it was government -driven, it could not be exclusive:

> We, the people, possessing all power, form a government, such as we think will secure happiness and suppose, in adopting this plan, we should be mistaken in the end; where is the cause of alarm on that quarter? In the same plan we point out an easy and quiet method of reforming what may be found amiss. No, but, say gentlemen, we have put the introduction of that method in the hands of our servants, who will interrupt it from motives of self' interest. What then? . . . Who shall dare to resist the people? No, we will assemble in Convention; wholly recall our delegated powers, or reform them so as to prevent such abuse; and punish those servants who have perverted powers, designed for our happiness, to their own emolument .[49]

The leader of the Virginia anti-Federalists, Patrick Henry, appeared to concede Pendleton's legal analysis, but predicted that a federal standing army would prevent the People from ever exercising their legal right to "assemble" in convention. [50] In light of the Pendleton-Henry exchange,, the declaration issued by the entire Virginia convention to accompany its ratification takes on added significance: "The powers granted under the Constitution, being derived from the people of the United States, may be resumed by them, whenever the same shall be perverted to their injury or oppression. " [51]

And if we need still further proof, we shall find it in the first Congress, where James Madison proposed various "declaratory and restrictive" amendments to the Constitution. [52] Although our federal Bill of Rights was eventually tacked on to the end of the original document, Madison initially proposed to interweave new clauses directly into the original fabric. One of these proposals was to append a prefix to the Preamble, which included the following: "That the people have an indubitable, unalienable and indefeasible right to reform or change their government." [53] Not one representative quarreled with Madison on the substance of this claim, but the prefix was eventually dropped precisely because its detractors deemed it redundant, given the broad meaning of the Preamble itself. [54]

THE NINTH AND TENTH AMENDMENTS

Closely related to the Preamble were words that eventually became the Ninth and Tenth Amendments:

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.
>
> The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

Conventional wisdom misses this close triangular interrelation. The Ninth is said to be about unenumerated individual rights, like personal privacy; the Tenth, about federalism; and the Preamble, about something else again. But look again at these texts. All are at their core about popular sovereignty All, indeed, explicitly invoke "the people." In the Preamble, "We the people ... *do*" exercise our right and power of popular sovereignty, and in the Ninth and Tenth amendments, expressly "retain" and "reserve" our "right" and "power" to do it again. If the Ninth is mainly about individual rights, why does it not speak of individual "persons" rather than the collective "people" ? If the Tenth is only about states' rights, why does it stand back to back with the Ninth, and what are its last three words doing there, mirroring the Preamble's first three? In fact, both amendments trace their lineage to declarations in the ratifying conventions, including New York's, with strong Popular sovereignty overtones:

> That the powers of government may be reassumed by the People, when so ever it shall become necessary to their Happiness; that every Power, Jurisdiction and right, which is not by the said Constitution clearly delegated to the Congress of the United States, or the departments of the government thereof, remains to the People of the several States, or to their respective state governments to whom they may have granted the same. [55]

Similarity, James Wilson had emphasized that the people, who "never part with the whole" of their "original power, may always say, WE *reserve* the right to do what we please." [56]

THE RIGHT OF THE PEOPLE TO ASSEMBLE

The popular sovereignty motif sounded by the words "the People" in the Preamble and Amendments Nine arid Ten should alert us to the words and music elsewhere in the Constitution. Arid once alerted, we hear yet another clear affirmation of the first principles of majority-rule popular sovereignty: the First Amendment "right of the people to assemble."

As Gordon Wood has observed, "conventions ... of the people ... were closely allied in English thought with the people's right to assemble for example, we find Blackstone describing how in 1688 the British people, through Parliament, "assemble[d]" in "Convention." [57] Arid in revolutionary America, we almost invariably find the ideas arid words "people," "assemble," arid "convention" tightly clustered in discussions of popular sovereignty. [58] Recall Edmund Pendleton's pointed phrase that if dissatisfied with Article V, "the people" will "assemble in convention " -clustered words repeated by Patrick Henry in his apparent concession of the point. Members of the First Congress clearly understood all this in 1789, as evidenced by a casual reference in Congress itself to "assembling in convention." [59]

Thus, a core meaning of "the right of the people to assemble" in 1789 was their right to assemble *in convention."* [60] To be sure, this was not the only meaning, for the text radiated beyond this core, just as the text of the Ninth Amendment radiated beyond the core right of the People to popular sovereignty. But there is no doubt that in both places the words "the people" do indeed mean-at least-just that.

Objections and Conclusions

I thus state the following theorem: Just as first principles and various state declarations required us to rethink and ultimately reject the seeming exclusivity of state analogues to Article V, so too do first principles and various other parts of the federal Constitution require us to abandon the seeming exclusivity of Article V itself.

If this is correct, we need to seriously rethink much of constitutional law. But as I have learned over the years, many doubt its validity. I take up some of the possible objections. [61]

The Novelty Objection

This can be summarized as follows: Given the magnitude of the claim, which goes to the very essence of our constitutional order, why has it not been offered before or, even more to the point, acted upon by my beloved "People" ? It has not, and they have not. Thus it is just too novel to be true.

Not surprisingly, I disagree. Even if one stipulates that my theorem is novel to most contemporary readers, it would surely have not been so to "We the People" of 1787 who did ordain and establish our Constitution. As I hope I have shown, they understood and self- consciously acted upon the theorem and its underlying principle of majority-rule popular sovereignty. Perhaps the impression of "novelty" is, alas, a result of ignorance of the thought of our constitutional ancestors.

Our entire perspective on the place of majority rule in our Constitution may be askew, in part because of our post-*Locbner* preoccupation with the "countermajoritarian difficulty" posed by judicial review and, concomitantly, the emphasis on the "majoritarian" nature of

Congress and state legislatures. Instead of dwelling on the relationship between legislatures and courts, we need to see how the People ordained the supreme law by majority-rule popular sovereignty. And we must ask if the People can do this again.

Indeed, we have spent far too little attention generally pondering the processes of constitutional change. Analytically, much of our constitutional order exists in the shadow of constitutional amendment rules, yet these rules have received far less serious theoretical attention than their special status demands. And to understand how the Constitution can be legally amended, we must better understand how it was legally brought into existence. The majoritarian Preamble and Article VII--literally the original Constitution's textual and performative alpha and omega--stand on an analytically higher plane than "countermajoritarian" provisions such as those in Article III.

When sophisticated theorists do touch on the Preamble, or Article VII, it is too often with a cynical smirk on their lips: who but a rube could take seriously the winkingly democratic phrase "We the People"' But--Charles Beard notwithstanding--the act of the constitution was not some antidemocratic, Thermidorian counterrevolution, akin to a coup d'etat, but was instead the most participatory and majoritarian event the planet had ever seen (and lawful to boot). Looking backward from today, we see all the painful exclusions--of women, of slaves--but often miss the breadth of inclusion, looking backward from 1787. Americans did not receive their supreme law from On High, from some Great Man claiming a pipeline to God--Moses, Solon, Lycurgus--or from some conclave of fifty-five demigods in Philadelphia (which merely proposed a piece of paper). Nor did Americans simply inherit their supreme law from immemorial custom. Rather, Americans did ordain and establish their supreme law--peacefully, deliberately, and lawfully by majority-rule popular sovereignty. The act electrified Europe and doomed the ancien regime. The novelty objection, in short, suffers from remarkable amnesia concerning the Constitution's words and deeds.

The obvious overlaps between state declaration of rights and the federal bill should remind us of the general importance of the state constitutional experience in shaping American constitutional discourse. Yet here, too, the mainstream suffers from amnesia. To my knowledge, no modern legal scholar has carefully examined the state Article V analogues from 1787 and pondered their significance for Article V itself And perhaps because of the pervasive nationalism of today's law schools, few constitutional scholars are even aware of the dramatic pattern of majority-rule popular sovereignty in amending state constitutions after 1787.

As Massachusetts Assistant Attorney General Roger Sherman Hoar documented in a 1917 book, innumerable amendments to state constitutions occurred in a wide variety of states in the nineteenth century by modes of state popular action not explicitly authorized by preexisting state constitutions, and often in the teeth of what at first seemed exclusive

Article V analogues. [62] In short, in both word and deed, majority-rule popular sovereignty was alive and well throughout the nineteenth century, if we only know where to look.

The Deliberation Objection

Another objection: Does the theorem mean that the majority can do anything, it wants? Instantaneously? Surely majority rule must at least be deliberate rather than whimsical. And so multiple vote and minority veto rules should be permitted, as long as they truly do induce deliberation.

It does not necessarily follow from the theorem that the majority can simply do whatever it likes. Majority rule does not necessarily imply majority will or majority whim. James Wilson, for example, clearly stated that the People stood *under* God and natural law; and that a majority was not entitled to do simply whatever it pleased. [63] There is no paradox or contradiction here. Wilson is simply reminding us that, just as Parliament as sovereign was both supreme legislature and supreme judiciary in England, so in America were the People. As judges they were indeed bound by the higher law of God; but legally, they were the earthly judges of that law, the True and Ultimate Supreme Court. Sitting in their judicial capacity, they had duties as well as rights, and could not simply do whatever they pleased if doing so would indeed trench on inviolable rights. And in exercising their judicial judgment, as in exercising their legislative will, the People act by simple majorities--as do inferior legislators and courts, as a general rule. (The Supreme Court, under Article Ill., acts by majority rule among the justices; but that does not mean that, in theory, the justices may simply do whatever they please.)

In order to properly deliberate--legislatively as well as judicially--the People must indeed be exposed to and must engage opposing ideas; the majority should attempt to reason with and persuade dissenters, and vice versa. Majority-rule popular sovereignty presupposes a deliberate majority of the collective "People," not a mere mathematical concatenation of atomized "persons." In the words of Publius' opening sentence: "You are called upon to *deliberate* on a new Constitution for the United States." [64]

Because the requisite convocations and deliberations could not occur en masse in 1787 among all voters, the Founders relied on smaller conventions to speak as and for the People. Direct special election for a single purpose would minimize the "agency gap" between convention and electors; but the convention could carry on extended deliberations and discussions that would be difficult in the polity at large. In 1787, a referendum would have been a less true index of the will and judgment of a deliberate majority, given that many voters in the referendum would not have had the benefit of focused discussion from the most articulate proponents of varying views.

Today, because of vast improvements in communication and transportation technology--radio, television, cable, fiber-optics, electronic town meetings, etc.--there may be ways to

retain the deliberation of the convention while providing for even more direct popular participation, akin to referenda. There thus remains considerable room for flexibility in implementing the deliberation requirement, including, perhaps, a requirement for two separate votes, spaced far enough apart to allow true conversation and conversion to occur) and for second thoughts to cool fleeting fancy. But there can be no similar compromise on the principle of simple majority rule. As the framing generation well understood, and modern political science has reaffirmed, simple majority rule has unique mathematical properties. It is the only workable voting rule that treats all voters and all policy proposals equally. [65] And once it is abandoned, there is no logical stopping point between, say, a 50 percent plus *two* rule, and a 99.9 percent rule. And the latter, of course, surely is not rule by the People.

Thus, in the pregnant phrase "deliberate majority," there is no unique mechanism for ensuring deliberation, but majority rule does have a unique instantiation. The people must talk, listen, and vote, and that takes time. (The people's right to alter or abolish "at any time" cannot, by its very nature, be instantaneous.) But when they do vote, a majority, however small, must in the end prevail over a minority.

The Individual Rights Objection

But what about individual rights? In the end, individual rights in our system are, and should be, the products of ultimately majoritarian processes. Once again, there is nothing paradoxical about this. Sloppy philosophical rhetoric notwithstanding, there is nothing in the ontological character of a "right" that requires that it be vested in an "individual" or "minority *against* the “majority." It is perfectly intelligible to speak of majority rights. And historically, many of the most important rights in the federal Bill of Rights and its state counterparts have been majoritarian rights of the people. Through majoritarian processes, We the People have also recognized rights of individuals and minorities, and extended the right to be part of We the Polity to formerly excluded elements of society such as black men and women of all races.

Conventional wisdom emphasizing "countermajoritarian" judicial review to protect unpopular rights is also shortsighted. Presidents select judges, and presidents are elected by majorities. In the long run, rights will only be safe if they are understood and accepted by the polity, and not just the judges.

The individual rights objection may also prove too much, for at least some variants are opposed to any amendment of certain rights. But the question before the house is not *whether* amendment can occur, but *how*. Why do individual rightists trust government with the power to amend but not the People? To be sure, government must act with supermajorities--but that is precisely because government officials often have interests separate from their constituents, in ways that often threaten liberty.

The Geographic Objection

But doesn't Article V exist to protect geographic minorities? No. Analytically, the rules of Article V may be satisfied even if an amendment is fiercely opposed in one geographic section of the country. And the analytic point has powerful empirical support. The leading political science study of the federal amendments since the Founding, authored by Alan Grimes, concludes that a dominant "characteristic of amendment politics has been the sectional or regional aspect of the political struggle." [66] The very titles of Grimes' chapters are devastating to the geographic objection. Amendments One through Twelve are labeled the "Southern Amendments"; Thirteen through Fifteen, the "Northern Amendments"; Sixteen through Nineteen, the "Western Amendments"; and Twenty-three through Twenty-six, the "Urban Amendments."

Indeed, the Framers explicitly rejected the premise underlying the geographic objection. In response to concerns at Philadelphia that one day, the population of western states would overwhelm the East, James Wilson proclaimed:

> Conceiving that all men wherever placed have equal rights and are equally entitled to confidence, [I view] without apprehension the period when a few States should contain the superior number of people. The majority of people wherein found ought in all questions to govern the minority. If the interior country should acquire the majority they will not only have the right, but will. avail themselves of it whether we will or no. [67]

That a majority within a polity should rule, regardless of geographic distribution, is confirmed not just by the leading Founder's words but--here too--by the act of constitution itself. Georgia's Article V analogue required a majority within each Georgia county and yet the analogue, like those of its sister states, was supplanted by Article VII's simple majority vote of the state convention as a whole regardless of geography. [68]

The Federalism Objection

But are states within the union truly akin in counties within states? Perhaps the theorem is indeed true as a matter of state constitutional law; but doesn't the federal--or, at least, mixed-nature of our continental union render state Article V analogues ultimately *not* analogous?

Here, at last, we come to the hardest objection to my theorem. We have reached a fork in the road,, and must choose one of three paths. And that choice will make all the difference.

Path no. I was Jefferson Davis': The people of each state remained sovereign even after union, and as such, retained the inalienable right notwithstanding Article V--to alter or

abolish their government, and even withdraw from the Union, by simple majority-rule popular sovereignty state by state.

Path no. 2 was James Wilson's: After ratification under Article VII, We the People became--if we were not already before--a truly continental people. As far as the continental Constitution was concerned, majority-rule popular sovereignty outside Article V meant a national majority. State peoples continued to exist, and in effect enjoy sovereign powers over their own state legislatures and state constitutions. And thus, for state constitutional purposes, state peoples continue to retain the right to alter or abolish outside their state Article V analogue. But the state peoples are clearly subordinate to the national People, just as state constitutions are subordinate to the national Constitution. The people of a single state may not nullify the federal government's action but the national People may. Unilateral secession by the part is void, but the whole People can peacefully agree to divide, just as they can agree to merge with other peoples--for example, by admitting Texas.

Path no. 3 was James Madison's: Ordinary government under the Constitution was neither wholly "national" nor purely "federal"--federal" here meaning league like, as in the Articles of Confederation. As with ordinary government, so too with constitutional amendment. Neither the people of each state nor the People of the nation were wholly sovereign. Sovereignty had somehow been divided, with Article V embodying the precise--exclusive--terms of the division.

Which path is most plausible? Not, I think, Jefferson Davis'. For the text of the Constitution made clear in Article VI that any state constitutional. provision-- if adopted by majority-rule popular sovereignty in a state--was clearly inferior to the federal Constitution. And Article V makes clear that a state people can be bound by a federal amendment even if that state people in state convention explicitly reject the amendment. (Here, Article V differs dramatically from Article VII) Both of these provisions are logically inconsistent with the sovereignty of the people of each state. And if we examine the Constitution of 1787 as an act, and not a mere text, we will find no one--on either side of ratification---asserting that after ratification a state people could unilaterally secede at will. [69]

That leaves us with a choice between the Constitution's two greatest architects, James Madison and James Wilson. And on this vital question, Wilson--though less celebrated and studied today--was the truer prophet, seeing further and more clearly. Wilson built his argument axiomatically on the idea that sovereignty was absolute and indivisible. This view was almost universally held in the 1780s. Divided sovereignty was seen as logical contradiction, a "solecism." [70] Indeed, as far as 1 can tell, Madison was the only major figure who believed in it.

Why did virtually no one follow Madison's lead in this point? Perhaps because they understood that "divided" or "mixed" popular sovereignty was no popular sovereignty. A fundamental principle for republican government was that the majority should rule, and divided sovereignty betrayed that fundamental principle. The formal principle of popular sovereignty, in other words, cannot tell us whether we should be a state people, or a national People, but it does insist that we be one or the other. (And since Davis was wrong, Wilson must be right.) For if sovereignty can indeed be divided--as only Madison believed--then We the People today cannot control our fate. This is not popular self-rule; it is rule from the cold graves of dead men of constitutions past. Self-evidently, that is not what Jefferson meant in 1776, what Wilson meant in 1787, or what we should accept today.

Endnotes

1. Specifically, I believe that Congress would be obliged to call a convention to propose amendments if a majority of American voters so petition; and that an amendment could be lawfully ratified by a simple majority of the American electorate.

2 For the text of Article V, see this volume, p. 5.

3 Gordon Wood, *The Creation of the American Republic* (Chapel Hill: University of North Carolina Press, 1969), pp. 273, 276, 277, 290, 306, 337.

4 Ibid., p. 289. The problem remains, even today, If a legislator in any given district refuses to support a constitutional change voters favor, voters in that district can throw the rascal out only by depriving the district of legislative seniority and clout, in a kind of prisoner's dilemma.

5. See, e.g., Bruce Ackerman, "The Storrs Lectures: Discovering the Constitution," *Yale Law Journal* 93 (1984): 1013, 1058 (ratification of the Constitution was, under preexisting law, "plainly illegal"); Richard S. Kay, "The Illegality of the Constitution," *Constitutional Commentary* 4 (1987): 57.

6. The "illegal" argument cannot account for any of this.

7. U.S. Constitution, Art. VII (emphasis added). I add this emphasis to highlight the connection between the Preamble and Article VII.

8 See, e.g., James Madison, "Vices of the Political System," in Marvin Meyers, ed., *The Mind of the Founder* (Indianapolis, Ind.: Bobbs-Merrill, 198 1), pp. 57-59.

9. William Blackstone, *Commentaries,* 1:97 note (added in 1766 ed.).

10. Emmerich de Vattel, *The Law of Nations* (London, 1760), bk. 1, chap. 1, sec. 10. The leading modern historian of the era, Gordon Wood, agrees with my assessment of the Articles here. See Wood, *The Creation of the American Republic,* p. 355.

11. These ideas were first developed by Madison in his now-famous critique, "Vices of the Political System." They would be developed further for public consumption in *The Federalist,* No. 43.

12, Max Farrand, ed., *The Records of the Federal Convention of 1787* (New Haven: Yale University Press, 1937), 1:122-23.

13. Ibid., 1:315.

14, Ibid., 1:485. "Mr. E" is Oliver Ellsworth.

15, Ibid., 2:93.

16, Alexander Hamilton had expressed some early reservations about the breached treaty argument at Philadelphia. Farrand, *Records,* 1:324. But these had apparently lapsed by the time of his Publian collaboration with Madison.

17 As states' rightists, most anti-Federalists were hardly in a position to rebut the states' rights gloss placed on the Articles by the breached treaty rejoinder, and by the Constitution's own Article VII. See note 18, below.

18 The legally independent status of the states prior to adoption of the Constitution is supported by all the major legal documents of the era, and by broad historical evidence. For 150 years prior to independence, the individual colonies had of course been separate, having been founded at different times and with different, unique charters and forms of government. The Declaration of Independence proclaimed itself in the name of "free and independent states"--independent even of each other, save as they chose to concert their action. Given the predominance of Montesquieu's vision that a single republic could not extend over a vast geographic, cultural, and climatic range, it is somewhat fanciful to think that, legally, a continental nation was formed in 1776 with virtually no discussion, and with the patriots' continental assembly pointedly calling itself a "congress." The language of individual state constitutions, and the centrality accorded them by revolutionary Americans, further attests to the independence and sovereignty of states prior to 1788. So, too, the Treaty of Peace with Britain recognized the legal independence of individual states. Finally-and revealingly-so did Article VII of the Constitution itself, which made clear that prior to joining the Constitution's "more perfect union" each state spoke for itself and only itself, and was legally free to go its own way. Further supporting documentation and analysis appears in Akhil R. Amar, "Of Sovereignty and Federalism," Yale Law journal 96 (1987): 1425, 1444-62, and in Wood, *The Creation of the American Republic,* 354-59.

19. Maryland Constitution of 1776, Art. 59.

20. Farrand, *Records,* 2:475.

21. Ibid., 2:476.

22 Versions of Madison's argument were replicated at Philadelphia by Alexander Hamilton, no friend of popular government, and by George Mason. See Amar, "Consent of the Governed," p. 471.

23. *The Federalist,* No. 78 was, of course, written by Hamilton, as was No. 22. Hamilton's willingness to endorse "the fundamental principle of republican government which admits the right of the people to alter or abolish the established constitution whenever they find it inconsistent with their happiness" only underscores the extent of the

consensus on this crucial point.

24. Wood, *The Creation of the American Republic*, p. 530 ("more boldly and fully than anyone else, Wilson developed the [popular sovereignty] argument that would eventually become the basis of all Federalist thinking. ").

25. Farrand, *Records,* 2: IS 0.

26. Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* (1901), 2:432 (emphasis added).

27. See Geoffrey Seed, *James Wilson* (1978), pp. 123-24; and the eye-opening essay by Matthew Herrington, *Temple L. Rev.* (Vol. 67, Summer, 1994, p. 575)

28. For further elaboration and documentation, see Amar, "The Consent of the Governed," pp. 475-81.

29. Virginia Constitution of 1776 (Declaration of Bights), preamble, sees. 2-3 (emphasis added).

30. Russell and Russell (1793 reprint, Athenian House, 1968) 1:355; first edition quoted in Wood, *The Creation of the American Republic,* pp. 613-14.

31. In the words of the anti-Federalist pamphleteer the Federal Farmer, declarations change the nature of things, or create new truths." Letters from the Federal Farmer (16), in Herbert Storing, ed., The Complete Anti-Federalist (Chicago: University of Chicago Press, 1981), 2:324. For more elaboration of this declaratory theory, see Akhil R. Amar, "The Bill of Rights and the Fourteenth Amendment," Yale Law journal 101 (1992): 1193, 1205-12.

32 So too with Delaware and South Carolina.

33. A Republican Federalist (3), in Storing, 4:172.

34. New Hampshire's Article V analogue, based on the Massachusetts model, also had this defect; and likewise specified a certain date for amendment.

35. I have explored these reasons in detail elsewhere. Simply put, there are far fewer agency costs between convention and people--much like today's presidential electors. See: Amar, "Philadelphia Revisited," *University of Chicago Law Review* 55 (1988): 1043, 1094-95.

36. Paul Leicester Ford, ed., *The Writings of Thomas Jefferson* (1899), 10:89 (Letter of June 13, 1817, to Baron F. H. Alexander Von Humbolt). Further elaboration of Jefferson's commitment to majoritarianism can be found in Amar, "The Consent of the Governed," 482-83.

37. See John Locke, *Second Treatise,* sec. 96; Jefferson, *Notes on the State of Virginia ("Lex majoris partis* is founded in common law as well as common right. It is the natural law of every assembly of men") (citing Brooke, Hakewell, and Pufendorf); Wood, *The Creation of the American Republic,* pp. 62-64 (citing Bernard Wishy, "John Locke and the Spirit of '76," *Political Science Quarterly* 73 (1958): 413-25; Walter Berns, "The Constitution as a Bill of Fights," in *How Does the Constitution Secure Rights?,* ed. Robert Goldwin and William Schambra (1985), 58-59; Wilmore Kendall, *John Locke*

and the Doctrine of Majority Rule (1959). See also Russell Caplan, *Constitutional Brinksmanship* (New York: Oxford University Press, 1988), pp. 120-21.

38. For many examples, sec Amar, "The Consent of the Governed," pp. 483-85.

39. The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to their Constituents, in Storing, 3:145, 149.

40. Letters from the Federal Farmer (17), in Storing, 2:330, 336.

41. Elliot, *The Debates,* 3: 51.

42. Ibid., 3:49-5 1. See also ibid., 3:5 5 (stressing simple majority rule for constitutional amendment).

43. *The Works of James Wilson,* Robert G. McCloskey, ed. (1967), 1:304. For further discussion of majority rule, see 1:242, 2:507-9.

44. Elliot, *The Debates,* 3:50.

45. Actually Edmund Randolph in the Virginia convention did say something, when he thought that the anti-Federalist minority might try to break a quorum: "An idea of refusing to admit to the decision of the majority is destructive Of every republican principle." *Elliot's Debates 3:597.*

46. I intentionally gloss over some important federalism issues here, which I have addressed in considerable derail elsewhere, and to which I shall return at the end of this essay.

47. For elaboration see Amar,, "The Consent of the Governed," pp. 489-92.

48. Ibid., 2:434-35 (emphasis in original).

49. lbid., 3: 37, Logic suggests that Pendleton is referring here to a convention *outside*

Article V, *see* Amar, "Philadelphia Revisited," pp. 1056-57.

50. Elliot, The Debates, 3:51.

51. Ibid., 1:327

52. *Documentary History of the Constitution of the United States of America* (Washington: Department of Stare, 1894) 2:321.

5 3 Bernard Schwartz, ed., *The Bill of Rights* (New York: McGraw Hill, 1971) 2:1026.

54. See Amar, "The Consent of the Governed," pp. 491-92, for elaboration.

55. Elliot, *The Debates,* 1:327.

56. Ibid., 3:437 (emphasis added).

57. Blackstone, *Commentaries,* 1:147-48.

58. Further documentation appears in Amar, "Philadelphia Revisited," 1058-60; and

Akhil Reed Amar, "The Bill of Rights as a Constitution," *Yale Law Journal* l00 (1991) 1131, 1152-55

59. Schwartz. 21:1022 (remarks of John Page).

60 See also Barron v. Baltimore, 32 U. S. (7 Pet. 843, 250-5 1 (1833) ("a convention would have been assembled' to amend state constitutions); McCulloch v. Mar-viand, 17 U.S. (4 Wheat.) 326, 403 (1819) ("the people assembled" in "convention" in the "several states" to ratify constitution).

61. For further discussion of these and other objections, see Amar, "The Consent of the Governed," pp. 494-508

62 Roger Sherman Hoar, *Constitutional Conventions* (Boston: Little, Brown, 1917), pp. 39-40. This book is a must read for those who continue to have doubts about the nonexclusivity of state Article V analogues.

63 *The Works of James Wilson,* 7:153.

64. *The Federalist*, No. I (Alexander Hamilton) ed. Clinton Rossiter (New York: Mentor 1961), p. 33 (emphasis added).

65. See Kenneth 0. May, "A Set of Independent Necessary and Sufficient Conditions for Simple Majority Decision," *Econometrica* 20 (1952): 680, 683: simple majority rule is the only mechanism that does not (1) favor one individual over another, (2) favor one alternative or another, (3) fail to generate a definite result in some situation, or (4) fail to respond positively to individual preferences.

66 Alan P. Grimes, *Democracy and the Amendments to the Constitution* (New York: University Press of America, 1987), p. 26.

67. Farrand, *Records,* 1:605.

68. Georgia Constitution of 1777, Art, 63.

69. For more documentation, see Amar, "Of Sovereignty and Federalism," pp. 1425, 1457-66. For analysis of the geostrategic logic undergirding all this, see Akhil R. Amar, "Some New World Lessons for the Old World," *University of Chicago Law Review* 58 (1991): 483, 485-91.

70. See Amar, "Philadelphia Revisited," p. 1063, n. 71; Wood, *The Creation of the American Republic*, p. 345.
