

# Popular Constitutionalism in State and Nation<sup>1</sup>

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## TABLE OF CONTENTS

I.	INTRODUCTION.....	238
II.	THE POPULAR ROLE IN AMERICAN CONSTITUTIONALISM .....	238
III.	FEDERAL CONSTITUTIONAL CHANGE AND POPULAR CONSTITUTIONALISM: THE FOUNDING PERIOD .....	240
IV.	CONSTITUTIONAL CHANGE UNDER ARTICLE V.....	245
V.	POPULAR CONSTITUTIONALISM AND ARTICLE V .....	248
VI.	FEDERAL CONSTITUTIONAL CHANGE OUTSIDE OF ARTICLE V? .....	250
	A. <i>Akhil Amar</i> .....	250
	B. <i>Bruce Ackerman</i> .....	252
VII.	STATE CONSTITUTIONAL CHANGE AND POPULAR CONSTITUTIONALISM.....	255
VIII.	STATE CONSTITUTIONAL CREATION AND POPULAR CONSTITUTIONALISM .....	257
IX.	THE POPULAR ROLE IN AUTHORIZING THE WRITING OF CONSTITUTIONS .....	258
X.	THE POPULAR ROLE IN APPROVING CONSTITUTIONS .....	260
XI.	POPULAR CONSTITUTIONALISM AND STATE CONSTITUTIONAL DESIGN .....	262
XII.	STATE CONSTITUTIONAL REVISION AND POPULAR CONSTITUTIONALISM.....	264
XIII.	THE PROPOSAL OF STATE CONSTITUTIONAL AMENDMENTS AND POPULAR CONSTITUTIONALISM.....	269
XIV.	THE RATIFICATION OF STATE CONSTITUTIONAL AMENDMENTS AND POPULAR CONSTITUTIONALISM.....	274
XV.	STATE CONSTITUTIONALISM AS POPULAR CONSTITUTIONALISM .....	275
XVI.	CONCLUDING THOUGHTS.....	276

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## I. INTRODUCTION

In 2013 Emily Zackin published *Looking for Rights in All the Wrong Places*, a book detailing the development of positive-rights guarantees in state constitutions.<sup>2</sup> Had she not done so, I might have been tempted to entitle this Article *Looking for Popular Constitutionalism in All the Wrong Places*. The literature on popular constitutionalism has focused exclusively on the federal Constitution and has found, perhaps unsurprisingly, relatively few episodes of popular constitutionalism, particularly in recent years.<sup>3</sup> Proponents of popular constitutionalism have been forced to conflate it with departmentalism in order to be able to suggest its relevance in the present day.<sup>4</sup> Yet if one turns one's attention to the American states, a very different picture emerges. As this Article demonstrates, popular constitutionalism has flourished in the states, with popular conventions creating new constitutions and revising old ones, particularly in the nineteenth century, and with the people in the twentieth and twenty-first centuries ratifying (and in states with the constitutional initiative, proposing as well) myriad changes, both major and minor, to state constitutions. Whereas popular constitutionalism at the federal level has been episodic, involving popular movements acting outside the normal political channels, the states have institutionalized popular constitutionalism, providing regular opportunities for popular influence on the substance and interpretation of state constitutions; and majorities within the states have proved willing, even eager, to avail themselves of those opportunities.<sup>5</sup>

This Article looks first at popular constitutionalism at the federal level, considering both the limited opportunities for popular input via the Article V amendment procedures and the similarly limited opportunities outside those procedures. It then turns to the opportunities available to state publics under their state constitutions, noting the myriad constitutionally prescribed opportunities for popular constitutionalism and in the effect of those opportunities in discouraging the use of extraconstitutional mechanisms for popular input. It concludes by considering the implications of the dual state and federal constitutional traditions for thinking about the role that the people play—and should play—in American constitutionalism.

## II. THE POPULAR ROLE IN AMERICAN CONSTITUTIONALISM

The creation of constitutions and—where necessary—their revision (replacement) or amendment are among the most fundamental tasks that a

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<sup>2</sup> See generally EMILY ZACKIN, *LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA'S POSITIVE RIGHTS* (2013).

<sup>3</sup> See, e.g., BRUCE ACKERMAN, *1 WE THE PEOPLE: FOUNDATIONS* (1991) [hereinafter ACKERMAN, *FOUNDATIONS*].

<sup>4</sup> Larry Kramer, *Response*, 81 CHI.-KENT L. REV. 1173, 1182 (2006) [hereinafter Kramer, *Response*].

<sup>5</sup> See *infra* notes 57–68 and accompanying text.

political society can undertake. From the very outset, it was understood that it was the people who should undertake these tasks of constitutional creation, revision, and amendment. The right of the people to create and revise their systems of government was recognized in the Declaration of Independence, enshrined in state constitutions, and endorsed by political figures from across the political spectrum. James Madison, though hardly a proponent of frequent recurrence to the people on constitutional matters, proposed that the right of the people to create and re-create their fundamental law be enshrined in the federal Constitution; and although this provision was dropped by the House committee that reviewed his proposed Bill of Rights, the change did not signal disagreement about the people's right to make and unmake constitutions.<sup>6</sup> What does this right entail? It means, at a minimum, that the people have the power to decide whether or not to create or revise a constitution; that they should determine its contents or choose those who engage in drafting the constitution; and that they should vote, again either directly or indirectly, on whether to adopt what the drafters propose. The popular role might also extend, perhaps more controversially, to a power to instruct those they elect as their convention delegates as to what the draft constitution should or should not contain.<sup>7</sup> Finally, the recognition of this popular authority carries with it

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<sup>6</sup> Madison's proposal, which drew on a similar provision in the Virginia Declaration of Rights, read: "That the people have an indubitable, unalienable, and inalienable right to reform or change their government, whenever it is found adverse or inadequate to the purposes of its institution." Madison proposed that all the rights guarantees he was proposing be inserted into the body of the Constitution. Perhaps this provision, as well as the other declaration of principle that he sought to place at the beginning of the Constitution, were eliminated when the decision was made to append the bill of rights to the Constitution. See *CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS 11–14* (Helen E. Veit et al. eds., 1991). For Madison's famed skepticism about frequent constitutional change, see *THE FEDERALIST NO. 49* (James Madison). For Thomas Jefferson's enthusiasm for periodic recurrence to the people for constitutional change, see Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), in *THE PORTABLE THOMAS JEFFERSON 552, 559* (Merrill D. Peterson ed., 1975). Jefferson wrote in the same letter:

Some men look at constitutions with sanctimonious reverence, and deem them like the ark of the covenant, too sacred to be touched. They ascribe to the men of the preceding age a wisdom more than human, and suppose what they did to be beyond amendment. I knew that age well; I belonged to it, and labored with it. It was very like the present, but without the experience of the present; and forty years of experience in government is worth a century of book-reading . . . .

*Id.* at 558–59.

<sup>7</sup> This might occur at either the federal or state level. At the Philadelphia Convention of 1787, for example, George Read of Delaware "remind[ed] the Committee that the deputies from Delaware were restrained by their commission from assenting to any change of the rule of suffrage, and in case such a change should be fixed on, it might become their duty to retire from the Convention." JAMES MADISON, *NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787*, at 37 (W.W. Norton & Co., 1987) (1840). In 1776, three delegates to the Maryland Convention resigned because they could not adhere to the instructions of

the implication that other means of changing or revising constitutions, if they are not authorized or ratified by the people, are illegitimate.

Before proceeding, a preliminary point deserves mention. This Article focuses on the popular role in constitutional creation, revision, and amendment, but the line between revision and amendment can be an uncertain one. When the Thirteenth, Fourteenth, and Fifteenth Amendments were added to the federal Constitution after the Civil War, did these amendments fundamentally change the government and political society, so that they should be seen as a revision of the document? Similarly, when the Pennsylvania convention of 1967–68 proposed numerous changes, including an entirely new judicial article, but retained substantial portions of the state's 1874 constitution, did it in doing so propose a new constitution? There are no easy answers to these questions. My rather mundane solution is to treat as amendments those changes that became part of a constitution by the amendment process prescribed by that constitution.

### III. FEDERAL CONSTITUTIONAL CHANGE AND POPULAR CONSTITUTIONALISM: THE FOUNDING PERIOD

The initial constitution created for the United States, the Articles of Confederation, failed miserably, and its failure as a frame of government was matched by its failure in terms of popular constitutionalism.<sup>8</sup> That the Continental Congress did not involve the citizenry in creating the Articles is perhaps understandable, given the dire military situation the country faced, although most states during the Revolutionary War did find it possible to enlist the people in the creation of their constitutions.<sup>9</sup> Be that as it may, the Articles of Confederation was completed in 1777 by the Continental Congress, a body not specially elected for constitution-making, and became the operating constitution for the new Union even prior to formal ratification. Ratification required the consent of all thirteen states, but in most instances the approval of

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their constituents. See MARC W. KRUMAN, *BETWEEN AUTHORITY AND LIBERTY: STATE CONSTITUTION MAKING IN REVOLUTIONARY AMERICA* 76–81 (1997). Limiting the agenda of a constitutional convention, which has occurred frequently in the states, is another means of controlling what delegates discuss and propose.

<sup>8</sup>Peter S. Onuf, *The First Federal Constitution: The Articles of Confederation*, in *THE FRAMING AND RATIFICATION OF THE CONSTITUTION* 82, 82 (Leonard W. Levy & Dennis J. Mahoney eds., 1987).

<sup>9</sup>For example, the New York legislature that drafted the state's constitution was almost constantly on the run from British forces—two members wryly suggested that it might be better “‘first to endeavor to secure a State to govern, before we established a form to govern it by’—and fear of invasion prompted the New Jersey legislature to frame and adopt a constitution in less than two weeks.” See G. ALAN TARR, *UNDERSTANDING STATE CONSTITUTIONS* 63 (1998) [hereinafter TARR, *UNDERSTANDING*] (quoting WILLI PAUL ADAMS, *THE FIRST AMERICAN CONSTITUTIONS: REPUBLIC IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA* 85–86 (Rita Kimber & Robert Kimber trans., Univ. of N.C. Press 1980) (1973)).

the states' delegates in the Congress, who were not selected for this specific purpose, was deemed sufficient.<sup>10</sup> Some states' delegates were concerned that they lacked authority and delayed signing the Articles until they had received formal approval from their legislatures.<sup>11</sup>

Article XIII of the Articles of Confederation required that constitutional amendments receive the unanimous approval of all thirteen state legislatures.<sup>12</sup> This proved an insuperable barrier to reform, so no amendments to the Articles were ever adopted.<sup>13</sup> Yet by the time Maryland became the thirteenth state to sign the Articles in 1781, its deficiencies were already manifest—one commentator wryly described the Articles Congress as a mere “burlesque on government, and a most severe satire on the wisdom and sagacity of the people”—and efforts to correct its deficiencies had already commenced.<sup>14</sup> These efforts foundered, however, on the requirement of state unanimity. For example, Congress in 1781 submitted an amendment to the states to strengthen the fiscal powers of Congress, but Rhode Island blocked the effort by rejecting the amendment.<sup>15</sup> This failure encouraged more radical steps. The delegates at the irregularly called Annapolis Convention of 1786, which met to deal with the commercial problems of the Confederation, unanimously petitioned Congress for a convention to explore possible remedies for the full panoply of defects of the Articles.<sup>16</sup> Concerns about the deficiencies of state constitutions, about violations of those constitutions by state legislatures, and about the breakdown of order in the states, exemplified by Shay's Rebellion, gave further impetus to these calls for reform.<sup>17</sup> By February, 1787, after eight states had already appointed delegates to the Philadelphia convention, Congress somewhat reluctantly gave its blessing to the meeting, authorizing the convention to propose such amendments to the Articles as would render it “adequate to the exigencies of the union.”<sup>18</sup> In doing so, it signed the death warrant for the Articles of Confederation.<sup>19</sup>

Despite its “total exclusion of the people in their collective capacity,”<sup>20</sup> the United States Constitution fares far better than the Articles in terms of popular constitutionalism. The delegates to the Philadelphia Convention were selected

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<sup>10</sup> Onuf, *supra* note 8, at 82.

<sup>11</sup> *Id.* at 82–83.

<sup>12</sup> ARTICLES OF CONFEDERATION of 1781, art. XIII, para. 1.

<sup>13</sup> Jack N. Rakove, *The Road to Philadelphia, 1781–1787*, in *THE FRAMING AND RATIFICATION OF THE CONSTITUTION*, *supra* note 8, at 98, 99.

<sup>14</sup> Onuf, *supra* note 8, at 83.

<sup>15</sup> Rakove, *supra* note 13, at 102–03.

<sup>16</sup> *Id.* at 108–10.

<sup>17</sup> *See generally* CALVIN H. JOHNSON, *RIGHTEOUS ANGER AT THE WICKED STATES: THE MEANING OF THE FOUNDERS' CONSTITUTION* (2005).

<sup>18</sup> Rakove, *supra* note 13, at 109. For a discussion of the political maneuverings leading up to the Philadelphia Convention of 1787, see *id.* at 102–03.

<sup>19</sup> *Id.* at 103–04.

<sup>20</sup> THE FEDERALIST NO. 63, at 387 (James Madison) (Clinton Rossiter ed., 1961) (emphasis omitted).

for the express purpose of constitutional reform by the people's representatives in state legislatures.<sup>21</sup> The document that the delegates drafted was submitted to conventions specially elected for the purpose, giving the people in the various states an indirect control over whether or not to ratify the Constitution; and even after ratification by the requisite nine states, the Constitution took effect only in those states that had ratified the document.<sup>22</sup> The selection of delegates for the ratifying conventions was as democratic as the voting laws in the states allowed, which is to say quite democratic, as most states expanded suffrage as a result of the Revolution.<sup>23</sup> Still, the vote for delegates to the ratifying conventions excluded women (with a limited exception in New Jersey), slaves, and free males who failed to meet state property requirements or other qualifications for voting.<sup>24</sup> Some states, such as Connecticut and Massachusetts, recognizing the fundamental character of what was at stake, expanded the franchise to include property-less persons who were excluded from voting for the state legislature.<sup>25</sup> Yet even in those states that did not expand their electorate for the occasion, those eligible to vote included more than sixty percent of adult white males.<sup>26</sup>

More interesting are the implications of the Constitution's creation and ratification for popular constitutionalism. It is an oft-told tale. The delegates to the Philadelphia Convention exceeded their congressional mandate, crafting an entirely new constitution rather than submitting amendments to the Articles of Confederation. They also departed from the Articles' requirement of unanimous ratification, requiring the approval of only nine states for the Constitution to take effect; and they departed from the procedure specified in the Articles, providing that conventions rather than state legislatures ratify the changes they were proposing. Their actions raise two questions. Were the founders justified in undertaking what Bruce Ackerman has rightly labeled a "revolutionary redefinition of the rules of the game," rules that had been adopted only a few years earlier by all thirteen states?<sup>27</sup> And if the founders could legitimately ignore constitutionally prescribed procedures for

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<sup>21</sup> The suspicious Rhode Island legislature refused to send any delegates to the convention. Christopher Klein, *7 Things You May Not Know About the Constitutional Convention*, HISTORY.COM (Sept. 17, 2012), <http://www.history.com/news/7-things-you-may-not-know-about-the-constitutional-convention> [<https://perma.cc/K2HE-AZFW>].

<sup>22</sup> U.S. CONST. art. VII.

<sup>23</sup> For a discussion of the selection of delegates for the ratifying conventions, see generally ADAMS, *supra* note 9.

<sup>24</sup> On the right of women property-owners to vote in New Jersey, see ROBERT F. WILLIAMS, *THE NEW JERSEY STATE CONSTITUTION* 11, 51 (updated ed. 1997).

<sup>25</sup> On the legal qualifications for voting in the states during the late eighteenth century, see ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 8–21 (2000). On the expansion of the electorate for choosing delegates to the Connecticut and Massachusetts conventions, see PAULINE MAIER, *RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787–1788*, at 125–54 (2010).

<sup>26</sup> See, e.g., KEYSSAR, *supra* note 25; MAIER, *supra* note 25.

<sup>27</sup> ACKERMAN, *FOUNDATIONS*, *supra* note 3, at 168.

constitutional change, did their example provide a precedent for future generations of constitutional reformers to do the same?

The Federalists, those favoring the Constitution, sought to preclude that latter possibility, even as they defended their extraconstitutional actions. Responding to the charge of illegality—or at least extraconstitutionality—James Madison in *The Federalist No. 43* denied the authority of the Articles to bind the convention delegates.<sup>28</sup> For one thing, “in many of the States [the Articles] had received no higher sanction than a mere legislative ratification” and thus resembled a treaty more than a constitution.<sup>29</sup> This was important, he maintained, because although the Articles mandated that it “shall be inviolably observed by every state,” in fact it had frequently been breached by the parties to this “treaty,” and under the principles of international law, breaches of a treaty absolve the parties of their obligations under it.<sup>30</sup> This argument seems more clever than sound, particularly since the delegates met in Philadelphia under the authority of the Articles Congress. Madison also argued that the delegates had been faithful to their charge, which was to make such alterations of the Articles of Confederation as would “render the Constitution of the federal government adequate to the exigencies [of government and the preservation] of the Union.”<sup>31</sup> The charge itself, he insisted, contained a contradiction in that there were no changes that could be made that would render the Articles adequate to the exigencies of government, and so the delegates reasonably chose accomplishment of the end over adherence to the means proposed by the Articles Congress.<sup>32</sup> Yet the very term that we use for those who crafted the Constitution—“the Founders”—indicates our recognition that the delegates were not merely following the mandate of the Congress.

Madison acknowledged that the convention did depart from its instructions in opting for ratification by nine states rather than thirteen, but he stressed that requiring unanimous ratification “would have subjected the essential interests of the whole to the caprice or corruption of a single member.”<sup>33</sup> Practical concerns also influenced other delegates at the Philadelphia Convention. They noted that a ratifying convention was a single body, whereas ratification by state legislatures would in most states require the approval of two bodies (both houses of bicameral legislatures), and that the state legislatures would lose power as a result of the new constitution and therefore would likely oppose it.<sup>34</sup> But ultimately, Madison appealed to the “absolute necessity of the case; to the great principle of self-preservation; to the transcendent law of nature and of nature’s God, which declares that the safety and happiness of the society are

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<sup>28</sup> THE FEDERALIST NO. 43, at 271 (James Madison) (Clinton Rossiter ed., 1961).

<sup>29</sup> *Id.* at 279.

<sup>30</sup> ARTICLES OF CONFEDERATION OF 1781, art. XIII, para. 1.

<sup>31</sup> THE FEDERALIST NO. 40, at 247 (James Madison) (Clinton Rossiter ed., 1961).

<sup>32</sup> *Id.*

<sup>33</sup> THE FEDERALIST NO. 43, *supra* note 28, at 279.

<sup>34</sup> MADISON, *supra* note 7, at 70–71.

the objects at which all political institutions aim and to which all such institutions must be sacrificed.”<sup>35</sup> Edmund Randolph advanced a similar argument at the Philadelphia convention. Responding to concerns about “a want of power”, he declared that he “was not scrupulous on the point of power. When the salvation of the Republic was at stake, it would be treason to our trust, not to propose what we found necessary.”<sup>36</sup> Besides, the want of power was not crucial because the Convention was merely offering proposals, with the ultimate determination to be made by the people themselves. Thus, Madison concluded that the Constitution “is to be of no more consequence than the paper on which it is written, unless it be stamped with the approbation of those to whom it is addressed.”<sup>37</sup> Ultimately, then, it was the will of the people that was determinative.

This invocation of the authority of the people connects Madison’s arguments with Larry Kramer’s popular constitutionalism.<sup>38</sup> Like Kramer, Madison and his colleagues endorse constitutional change occurring outside the parameters of what the existing government required for such change, and they do so in the name of the people, who have the ultimate authority to vindicate their actions.<sup>39</sup> Like Kramer, they view this power of the people as decisive, even though the government created by the Articles had at least some claim to democratic legitimacy, given that the Articles were adopted by all the states only a few years earlier.<sup>40</sup> However, unlike Kramer, they seek to cabin such extraconstitutional practices.<sup>41</sup> Circumvention of constitutional forms was justified in 1787 only by the absolute necessity of the case, because “the salvation of the Republic was at stake.”<sup>42</sup> But normal situations do not justify extraordinary remedies. Of course, that leaves unanswered the questions of who determines when an “absolute necessity” exists and on what bases.<sup>43</sup> Thus later commentators, like Bruce Ackerman, have pointed to the irregularities at the Founding to justify irregularities at later stages in the nation’s constitutional development.<sup>44</sup>

Madison’s endorsement of the extraordinary actions taken in Philadelphia is all the more striking when one recalls his adamant opposition to a second

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<sup>35</sup> THE FEDERALIST NO. 43, *supra* note 28, at 279.

<sup>36</sup> MADISON, *supra* note 7, at 127. Even George Mason, who ultimately became an Anti-Federalist, concurred: “He thought with his colleague Mr. R[andolph] that there were besides certain crises [sic], in which all the ordinary cautions yielded to public necessity.” *Id.* at 157.

<sup>37</sup> THE FEDERALIST NO. 40, *supra* note 31, at 252.

<sup>38</sup> See generally LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 962–67 (2004) [hereinafter KRAMER, THE PEOPLE THEMSELVES].

<sup>39</sup> See generally MADISON, *supra* note 7.

<sup>40</sup> See generally *id.*

<sup>41</sup> See generally *id.*

<sup>42</sup> *Id.* at 127.

<sup>43</sup> See generally MADISON, *supra* note 7.

<sup>44</sup> ACKERMAN, FOUNDATIONS, *supra* note 3, at 37–44, 165–69.



constitutional convention, proposed by opponents of the Constitution as a way of “improving upon” the work of the Philadelphia Convention, and his more general reluctance to refer constitutional questions to the people.<sup>45</sup> Even though he felt obliged to propose the Bill of Rights in the first Congress, his tepid support for amendments during the ratification period reflected real doubts about their utility, and his aim throughout the process was primarily to head off amendments that might cripple the new government.<sup>46</sup> This is reflected in both what he took and what he did not take from the lists of amendments submitted by the state ratifying conventions. In particular, Madison omitted proposals that introduced structural changes or curtailed the powers of the federal government, and he successfully opposed amending the Constitution to limit the federal government to those powers “expressly” conferred upon it.<sup>47</sup>

#### IV. CONSTITUTIONAL CHANGE UNDER ARTICLE V

Article V specifies two methods of proposing amendments to the Constitution: proposal by a two-thirds majority in each house of Congress or proposal by a constitutional convention, to be called by Congress upon application by two-thirds of the state legislatures.<sup>48</sup> In providing alternative modes of amendment, it prevents members of Congress from blocking needed reforms, even if those changes might affect congressional power. Article V also authorizes two methods of ratifying amendments: approval by the legislatures of three-quarters of the states or by specially elected conventions in three-quarters of the states, investing Congress with the power in each instance to choose between these two modes of ratification.<sup>49</sup> In doing so, the Constitution repudiates the unanimity requirement of the Articles of Confederation, and it also allows Congress to bypass state legislatures if it is perceived that they might, for self-interested reasons, block needed reforms.<sup>50</sup>

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<sup>45</sup> See THE FEDERALIST NOS. 49, 50 (James Madison).

<sup>46</sup> ROBERT A. GOLDWIN, FROM PARCHMENT TO POWER: HOW JAMES MADISON USED THE BILL OF RIGHTS TO SAVE THE CONSTITUTION (1997).

<sup>47</sup> See generally GOLDWIN, *supra* note 46, at 140–53. Madison did not believe that the Bill of Rights restricted federal power because federal actions invading those rights would have been *ultra vires*, beyond the powers conferred by the enumeration of powers.

<sup>48</sup> U.S. CONST. art. V.

<sup>49</sup> *Id.*

<sup>50</sup> The only time that Congress has designated that specially elected conventions be used was in the ratification of the Twenty-First Amendment, which repealed the Eighteenth Amendment and Prohibition. DAVID E. KYVIG, EXPLICIT AND AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION, 1776–1995, at 282–87 (1996). Congress did so because the legislatures in many states were malapportioned to favor rural interests, and it was in rural areas that support for prohibition was strongest. Reliance on conventions promoted popular constitutionalism because most states included on the ballot whether delegates were pro- or anti-ratification (or some, uncommitted). See RUSSELL L. CAPLAN, CONSTITUTIONAL BRINKSMANSHIP: AMENDING THE CONSTITUTION BY NATIONAL

Madison describes these arrangements as striking the proper balance. “It guards equally against that extreme facility, which would render the Constitution too mutable; and that extreme difficulty, which might perpetuate its discovered faults.”<sup>51</sup> Later commentators have disputed that assessment, finding the Article V process exceedingly difficult.<sup>52</sup> Finally, Article V imposes two limitations on the amendment power, prohibiting amendments prior to 1808 that would interfere with the slave trade and guaranteeing that no state can be deprived without its consent of its equal representation in the Senate.<sup>53</sup> These limitations are now of only historical interest.

Neither Article V nor any other part of the Constitution deals directly with constitutional revision. Such replacement of the Constitution could occur extraconstitutionally, relying on the people’s right to replace their governments recognized in the Declaration of Independence; or it could possibly occur through a constitutional convention called under Article V, although that provision only authorizes “call[ing] a Convention for proposing Amendments,” so the form of the Constitution would remain even though amendments had transformed the system of government. Some academics have championed fundamental reform, but despite periodic public disenchantment with the federal government, there has never been a significant popular movement favoring constitutional revision.<sup>54</sup>

There have been few Article V amendments as well. If one excludes the first fifteen years under the new Constitution as a period for adding a Bill of Rights and remedying problems that became apparent immediately after ratification, there have been only fifteen amendments in more than two centuries, fewer than one every fourteen years.<sup>55</sup> Most of these amendments

CONVENTION 126 (1988). Also, during the 1932 election, eleven states had referenda on whether to repeal the Eighteenth Amendment, all of which passed easily. As a result, conventions on repeal did not deliberate but merely voted—the New Hampshire convention, for example, lasted seventeen minutes. See KYVIG, *supra*, at 282, 286.

<sup>51</sup> THE FEDERALIST NO. 43, *supra* note 28, at 278.

<sup>52</sup> See, e.g., SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION 159–66 (2006) [hereinafter LEVINSON, OUR UNDEMOCRATIC CONSTITUTION]. See generally Stephen M. Griffin, *Constitutionalism in the United States: From Theory to Practice*, in RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT (Sanford Levinson ed., 1995).

<sup>53</sup> U.S. CONST. art. V.

<sup>54</sup> *Id.* Over the last half century, the leading academic proposals for constitutional revision have included JAMES MACGREGOR BURNS, THE DEADLOCK OF DEMOCRACY: FOUR-PARTY POLITICS IN AMERICA (1963); LEVINSON, OUR UNDEMOCRATIC CONSTITUTION, *supra* note 52; and JAMES L. SUNDQUIST, CONSTITUTIONAL REFORM AND EFFECTIVE GOVERNMENT (rev. ed. 1992).

<sup>55</sup> The Eleventh Amendment was adopted to overturn *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), in which the U.S. Supreme Court held that the Constitution permitted the resident of one state to sue the government of another state in federal court. The Twelfth Amendment was adopted to remedy the problem with the Electoral College that produced a tie vote in the election of 1800. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 69 (1996); Paul Boudreaux, *The Electoral College and Its Meager Federalism*, 88 MARQ.

were adopted at key divides in the nation's history—three during Reconstruction, four during the Progressive Era, and four during the Great Society Era—and so for long stretches of American history, there were no additions to the Constitution.<sup>56</sup> This relative infrequency contrasts sharply with the pattern in the states—state constitutions have been amended on average about 1.23 times per year, and amendment has been constant rather than episodic.<sup>57</sup> It also contrasts with the pattern in other countries. In a study of amendment patterns in thirty countries, Donald Lutz found that the United States had the eighth lowest rate of amendment, and the ranking would be even lower if one eliminated the founding period from consideration.<sup>58</sup>

What accounts for this infrequency of amendment? For one thing, one of the two modes of proposing amendments—the convention method—has faded into obsolescence: there has not been a federal convention since 1787.<sup>59</sup> In part, this reflects procedural uncertainties that Madison himself recognized during the constitutional convention: how many delegates should there be, how should they be apportioned, and how should they be selected?<sup>60</sup> These questions are answerable, but Congress has chosen not to answer them, thereby increasing the uncertainty over, and reducing the likelihood of, a convention. In part, the disappearance of the convention option reflects fears, real or manufactured, of what such a convention might produce, with dire warnings about runaway conventions and the repeal of fundamental rights. These fears are likely groundless, given the states' success with constitutional conventions, but they have had an effect nonetheless.<sup>61</sup> There is considerable irony here. The Virginia Plan proposed that a system of amendment be created that did not involve Congress, and the convention mode was the only one approved until late in the Philadelphia Convention.<sup>62</sup> Not until the last week did the delegates authorize Congress to propose amendments, responding to

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L. REV. 195, 197 (2004); Mark Strasser, Chisholm, *The Eleventh Amendment, and Sovereign Immunity: On Alden's Return to Confederation Principles*, 28 FLA. ST. U. L. REV. 605, 606, 617 (2001).

<sup>56</sup> See generally David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457, 1458–90 (2001).

<sup>57</sup> Donald S. Lutz, *Patterns in the Amending of American State Constitutions*, in CONSTITUTIONAL POLITICS IN THE STATES: CONTEMPORARY CONTROVERSIES AND HISTORICAL PATTERNS 24, 34–35 (G. Alan Tarr ed., 1996) [hereinafter Lutz, *Patterns*].

<sup>58</sup> Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, in RESPONDING TO IMPERFECTION, *supra* note 52, at 237, 261 tbl.11 [hereinafter Lutz, *Toward a Theory*].

<sup>59</sup> Michael A. Almond, Comment, *Amendment by Convention: Our Next Constitutional Crisis?*, 53 N.C. L. REV. 491, 493 (1975).

<sup>60</sup> MADISON, *supra* note 7, at 37–38.

<sup>61</sup> Illustrative of the panicked reaction to the possibility of a constitutional convention is CAPLAN, *supra* note 50. For a valuable corrective, see generally PAUL J. WEBER & BARBARA A. PERRY, UNFOUNDED FEARS: MYTHS AND REALITIES OF A CONSTITUTIONAL CONVENTION (1989).

<sup>62</sup> Almond, *supra* note 59, at 497 n.26.

Alexander Hamilton's contention that those in government would be better able to detect defects in the Constitution.<sup>63</sup>

Another reason for the infrequency of federal constitutional amendments is the difficulty of the remaining mode of amendment: Lutz's study concluded that it was the second most difficult amendment process in the thirty countries he studied.<sup>64</sup> The difficulty lies less with the super-majority of state legislatures or conventions required for ratification than with the requirement of two-thirds majorities in both houses of Congress.<sup>65</sup> The states have failed to ratify only six amendments sent to them by Congress, but Congress has proposed only thirty-three amendments in 225 years.<sup>66</sup> This might be viewed as vindicating the concern expressed in the Philadelphia Convention that Congress could too often frustrate the popular desire for amendments. There have been proposals periodically to amend Article V to facilitate constitutional amendment, but these efforts have attracted little support and enjoyed no success.<sup>67</sup>

A final reason for the infrequency of amendment is the aura that surrounds the Constitution and those who created it. Madison argued in *The Federalist No. 49* that "frequent appeals [to the people] would, in great measure, deprive the government of that veneration which time bestows on everything, and without which perhaps the wisest and freest governments would not possess the requisite stability."<sup>68</sup> Yet his argument may have succeeded all too well, insofar as later majorities have been intimidated from seeking to improve upon what they have inherited. This is important because an absence of formal amendment is not necessarily the same as an absence of constitutional change. It may be that constitutional change is occurring but that the change is through other mechanisms in which the people have less of a role, such as through judicial rulings or legislative or executive actions. The choice may not be between constitutional change and an unchanged Constitution but rather between constitutional change consistent with popular constitutionalism and constitutional change inconsistent with it.

## V. POPULAR CONSTITUTIONALISM AND ARTICLE V

The stringent requirements of Article V promote popular constitutionalism insofar as they ensure that all constitutional amendments enjoy broad popular

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<sup>63</sup> KYVIG, *supra* note 50, at ch. 3.

<sup>64</sup> Lutz, *Toward a Theory*, *supra* note 58, at 260.

<sup>65</sup> U.S. CONST. art. V.

<sup>66</sup> The amendments rejected in the states include the Congressional Apportionment Amendment, Titles of Nobility Amendment, Corwin Amendment, Child Labor Amendment, the Equal Rights Amendment, and the District of Columbia Statehood Amendment. *See generally* KYVIG, *supra* note 50.

<sup>67</sup> JOHN R. VILE, *ENCYCLOPEDIA OF CONSTITUTIONAL AMENDMENTS, PROPOSED AMENDMENTS, AND AMENDING ISSUES, 1789-1995*, at 9-11 (1996).

<sup>68</sup> THE FEDERALIST NO. 49, at 314 (James Madison) (Clinton Rossiter ed., 1961).

support. This is reflected in the history of their adoption. The Bill of Rights was adopted because of widespread popular concern about the absence of rights guarantees in the proposed Constitution—indeed, the Constitution likely would have been defeated had the Federalists not promised to introduce amendments after its adoption.<sup>69</sup> The Reconstruction Amendments emerged out of a savage war fought to secure “a new birth of freedom.”<sup>70</sup> Some amendments originated in mass popular movements—for example, the Eighteenth Amendment (imposing Prohibition) and the Nineteenth Amendment (securing woman suffrage).<sup>71</sup> Others reflected either a broad bipartisan reform consensus—for example, the Sixteenth Amendment (authorizing an income tax) and the Seventeenth Amendment (instituting popular election of senators)—or the views of a dominant political coalition—for example, the Twenty-second Amendment (limiting presidents to two terms).<sup>72</sup> Still others, while not originating in popular movements, nonetheless enjoyed broad support and were ratified within a year of their submission to state legislatures. These included the Eleventh Amendment (reversing a Supreme Court ruling that allowed citizens of one state to sue another state), the Twelfth Amendment (reforming the operation of the Electoral College), the Twenty-third Amendment (permitting residents of the District of Columbia to vote for presidential electors), and the Twenty-sixth Amendment (extending the right to vote to eighteen-year-olds).<sup>73</sup>

Yet many significant constitutional changes have occurred outside Article V procedures. Any list of the most significant constitutional changes since the adoption of the Bill of Rights would include the expansion of presidential power, the expansion of national power more generally, the rise of the administrative state, the elimination of slavery, and invalidation of the system of racial subordination that it engendered. Of these changes, only the elimination of slavery occurred primarily through formal constitutional amendment, and even then it followed the Emancipation Proclamation and a bloody Civil War. Constitutional amendments have largely dealt with other issues. Since 1792, five have nationalized and expanded the franchise, four have dealt with the perennial issue of presidential selection and succession, five have served to overturn Supreme Court rulings, and two have involved a failed experiment with Prohibition.<sup>74</sup> So although all federal constitutional

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<sup>69</sup> See, e.g., GOLDWIN, *supra* note 46, at 140–53.

<sup>70</sup> President Abraham Lincoln, The Gettysburg Address (Nov. 19, 1863), in ABRAHAM LINCOLN: HIS SPEECHES AND WRITINGS 734 (Roy P. Basler ed., 1969).

<sup>71</sup> See ALAN P. GRIMES, DEMOCRACY AND THE AMENDMENTS TO THE CONSTITUTION (1978).

<sup>72</sup> See *id.* at 66–81, 113–24.

<sup>73</sup> See *id.* at 18–30, 126–29, 141–46. On the politics surrounding the constitutional amendments, see generally *id.*; KYVIG, *supra* note 50.

<sup>74</sup> The Fifteenth, Nineteenth, Twenty-Third, Twenty-Fourth, and Twenty-Sixth amendments have expanded the franchise. The Twelfth, Twentieth, Twenty-Second, and Twenty-Fifth have addressed presidential election and succession. See U.S. CONST. amend.

amendments have involved popular constitutionalism, this does not mean that all major constitutional changes have.

## VI. FEDERAL CONSTITUTIONAL CHANGE OUTSIDE OF ARTICLE V?

### A. *Akhil Amar*

In recent decades, two well-known scholars, Akhil Amar and Bruce Ackerman, have argued that the opportunities for popular constitutionalism under the federal Constitution are broader than they may initially appear, because Article V does not exhaust the means by which the people can amend the federal Constitution. For Amar, Article V elaborates the mechanisms by which those in government may amend the Constitution, but it “neither limits nor empowers the People themselves.”<sup>75</sup> The people had the right to form, alter, or abolish governments prior to the adoption of the Constitution, and they did not forfeit this right when the Constitution was ratified.<sup>76</sup> What does this non-exclusivity of Article V mean in practice? According to Amar, the people can call conventions without following Article V procedures, and through these conventions they can transition to a new constitution and government or can introduce changes in the existing constitution and government.<sup>77</sup> In addition, they can, by majority vote in a referendum, approve or reject proposed amendments, thus circumventing both the modes of ratification specified in Article V and its federalism and extraordinary-majority requirements.<sup>78</sup> In doing so, Amar insists, the people would merely be emulating the example of the founders, who channeled “the theretofore supra-legal right of revolution into precise and peaceful legal procedures.”<sup>79</sup>

As a statement of the right of the people outside the Constitution, Amar’s claim is unexceptionable: the Declaration of Independence recognizes that the

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XI–XXVI. The Eleventh, Fourteenth, Sixteenth, Twenty-Fourth, and Twenty-Sixth amendments all overturned Supreme Court decisions. See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 70–71 (1996) (stating that the Eleventh Amendment overturned *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793)); *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 664–66 (1966) (stating that the Fourteenth Amendment overturned *Breedlove v. Suttles*, 302 U.S. 277 (1937)); *Eisner v. Macomber*, 252 U.S. 189, 205–06 (1920) (stating that the Sixteenth Amendment overturned *Pollock v. Farmers’ Loan & Tr. Co.*, 158 U.S. 601 (1895)). The Eighteenth and Twenty-First amendments deal with Prohibition. U.S. CONST. amend. XVIII, *repealed* by U.S. CONST. amend. XXI.

<sup>75</sup> Akhil Reed Amar advances his theory in *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043, 1055 (1988) [hereinafter Amar, *Philadelphia Revisited*], and *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457 (1994).

<sup>76</sup> Amar, *Philadelphia Revisited*, *supra* note 75, at 1053.

<sup>77</sup> *Id.* at 1045–60.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* (emphasis added).

people's right to form and alter governments is inalienable.<sup>80</sup> But Amar's claim is that the right of the people to institute constitutional change outside Article V is not extraconstitutional but rather consistent with the Constitution.<sup>81</sup> Underlying his position is a belief that fundamentally the Constitution is predicated on popular sovereignty.<sup>82</sup> Whereas the extraordinary majorities required by Article V may serve as a check on the people's representatives, who may be ignorant of or disdainful of the popular will, they are not required when the people act directly.<sup>83</sup> Thus, ratification by a national majority in a referendum poses no problems in terms of federalism, because the aim of the Constitution was that "the cool and deliberate sense of the community" should prevail, rather than that sense be subordinated to claims of state sovereignty.<sup>84</sup> In support, Amar points to the influential Virginia Declaration of Rights, where the declaration of the right of the people to alter or abolish their governments was followed by a provision locating that right in "a majority of the community."<sup>85</sup> Similarly, Amar contends that popular conventions called outside Article V are not problematic because they are consistent with other provisions of the Constitution.<sup>86</sup> These include the Preamble, which recognizes the right of the people to form or abolish a constitution; the First Amendment, which arguably contemplated such conventions when it guaranteed "the right of the people peaceably to assemble, and to petition the Government for a redress of grievances"; and the Ninth and Tenth Amendments, which recognize "the people" do "retain" and "reserve" their "right" and "power" to exercise their popular sovereignty.<sup>87</sup>

Amar's effort to expand the opportunities for popular constitutionalism under the Constitution ultimately fails.<sup>88</sup> The people may not have given up their extraconstitutional right to alter or abolish their government—the right to

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<sup>80</sup> THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("[G]overnments are instituted among men, deriving their just powers from the consent of the governed [and] whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute a new government . . .").

<sup>81</sup> See Amar, *Philadelphia Revisited*, *supra* note 75, at 1054.

<sup>82</sup> *Id.* at 1060.

<sup>83</sup> *Id.* at 1040.

<sup>84</sup> THE FEDERALIST NO. 63, *supra* note 20, at 384. In making this claim, Amar can also point to *The Federalist No. 45* in which Madison excoriates those who would prefer the sovereignty of the states over the "happiness of the people of America," noting that "as far as the sovereignty of the States cannot be reconciled to the happiness of the people, the voice of every good citizen must be, Let the former be sacrificed to the latter." THE FEDERALIST NO. 45, at 288–89 (James Madison) (Clinton Rossiter ed., 1961).

<sup>85</sup> Amar, *Philadelphia Revisited*, *supra* note 75, at 1051 (quoting Virginia Declaration of Rights art. 3).

<sup>86</sup> *Id.* at 1056–58.

<sup>87</sup> *Id.*; U.S. CONST. pmb., amends. I, IX, X.

<sup>88</sup> This paragraph relies primarily on David R. Dow, *When Words Mean What We Believe They Say: The Case of Article V*, 76 IOWA L. REV. 1–66 (1990); and chapter 6 of JOHN R. VILE, CONTEMPORARY QUESTIONS SURROUNDING THE CONSTITUTIONAL AMENDING PROCESS 97 (1993) [hereinafter VILE, CONTEMPORARY QUESTIONS].

revolution is inalienable—but in undertaking such change *under the Constitution*, they are bound by the Constitution they ratified. On its face, the language of Article V is exclusive and conclusive, whereas the provisions that Amar gathers in support of his thesis are very broad and do not speak directly about the amendment process.<sup>89</sup> Furthermore, in the debates at the Philadelphia Convention and in the state ratifying conventions, there is no evidence that Article V was not viewed as setting out the exclusive means of amending the Constitution. The same holds true of *The Federalist*. Indeed, James Madison seems to anticipate and reject Amar’s argument, noting that “the supreme and ultimate authority would reside in the *majority* of the people of the Union,” as Amar suggests, if the mode of amendment were simply national in character; but he then describes the amendment process as “neither wholly *national* nor wholly *federal*.”<sup>90</sup> As George Washington put it in his Farewell Address in 1796: Although “the right of the people to make and alter their constitutions of government” is undoubted, constitutions were “sacredly obligatory” until changed “by an explicit and authentic act of the whole people” occurring through established channels for change.<sup>91</sup> Until then, “[t]he very idea of the power and the right of the people to establish government presupposes the duty of every individual to obey the established government.”<sup>92</sup> In the face of such evidence, it is difficult for a textualist or an originalist to expand the opportunities for popular constitutionalism beyond what Article V provides.

### B. Bruce Ackerman

This does not pose a problem for Bruce Ackerman, who is neither a textualist nor an originalist.<sup>93</sup> Article V may provide the mechanisms by which constitutional changes are usually adopted, but not all constitutional change has taken that form. In particular, Ackerman identifies three episodes<sup>94</sup> in American history when major constitutional transformations occurred without constitutional formalities being observed. These include: (1) the Founding itself, when the Philadelphia Convention exceeded its mandate and restructured ratification procedures in order to revise the existing constitution;

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<sup>89</sup> See Amar, *Philadelphia Revisited*, *supra* note 75, at 1056–58.

<sup>90</sup> THE FEDERALIST NO. 39, at 246 (James Madison) (Clinton Rossiter ed., 1961).

<sup>91</sup> President George Washington, Farewell Address (1796), [http://avalon.law.yale.edu/18th\\_century/washing.asp](http://avalon.law.yale.edu/18th_century/washing.asp) [<https://perma.cc/PL2N-FCDJ>].

<sup>92</sup> *Id.*

<sup>93</sup> Ackerman outlines his theory in *WE THE PEOPLE: FOUNDATIONS*, *supra* note 3, and elaborates its historical underpinnings in *BRUCE ACKERMAN, 2 WE THE PEOPLE: TRANSFORMATIONS* (1998).

<sup>94</sup> Ackerman’s identification and discussion of these three transformations can be found in *WE THE PEOPLE: FOUNDATIONS*, *supra* note 3, at ch. 3. He later identifies a fourth transformation in *BRUCE ACKERMAN, 3 WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION* (2014) (describing the civil rights movement and other events culminating in the Supreme Court’s seminal decision in *Brown v. Board of Education*, 347 U.S. 483 (1954)).



(2) Reconstruction, when the Republican Congress after the election of 1866 forced the Southern states to ratify the far-reaching Fourteenth Amendment as a condition for reclaiming their equal status in the Union; and (3) the New Deal era, when the landslide reelection of Franklin Roosevelt in 1936 and his threat to pack the Supreme Court prompted the Justices to cease their opposition to the President's economic initiatives, and a series of appointments to the Court confirmed and solidified the new understanding of federal power.<sup>95</sup> Ackerman's narrative thus diverges from most historical accounts,<sup>96</sup> which grudgingly acknowledge the Founders' irregularities but maintain that the Reconstruction Congress followed Article V in introducing its constitutional changes and that the New Deal conflict was resolved not by constitutional change but by the Supreme Court returning to the more generous—and, for most commentators, more appropriate—understanding of federal power pioneered by Chief Justice John Marshall. For Ackerman, the standard account unduly minimizes the discontinuities in the nation's constitutional history, ignoring that “both Reconstruction Republicans and New Deal Democrats [were] engaging in self-conscious acts of constitutional creation that rivaled the Founding Federalists' in their scope and depth.”<sup>97</sup> In addition, it downplays the distinctive role played by the people in authorizing and approving these constitutional revisions.<sup>98</sup> In both instances the new constitutional regimes that emerged were the product of

interbranch struggle and popular mobilization [that] made the elections of 1866 and 1936 decisive events in constitutional history. On both occasions, the reformers returned to Washington with a clear victory at the polls. They proceeded to proclaim that the election results gave them a “mandate from the People,” and that the time had come for the conservative branches to end their constitutional resistance.<sup>99</sup>

Thus the alternative mode of constitutional amendment that Ackerman describes involves presentation of a clear constitutional choice by either Congress (as in 1866) or the President (as in 1936), intense popular mobilization over the issue in a political campaign, and a clear verdict from the people in a national election.<sup>100</sup>

Ackerman's revisionist account is not merely an attempt to correct the historical record. Rather, he views the actions of the Founders as establishing a precedent for “irregular” modes of constitutional change, legitimating the

<sup>95</sup> ACKERMAN, FOUNDATIONS, *supra* note 3, at ch. 3.

<sup>96</sup> *See, e.g.*, EDWARD S. CORWIN, THE COMMERCE POWER VERSUS STATES RIGHTS (1936); SOTIRIOS A. BARBER, THE FALLACIES OF STATES' RIGHTS (2013).

<sup>97</sup> ACKERMAN, FOUNDATIONS, *supra* note 3, at 44. He disparages the claim that the New Deal Court merely returned to the Marshall Court's jurisprudence as “the New Deal myth of rediscovery.” *Id.* at 63.

<sup>98</sup> *Id.* at 48.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at ch. 10.

creation of new constitutional regimes during Reconstruction and during the 1930s and, presumably, at future points as well.<sup>101</sup> For if the needs of the nation could justify ignoring constitutionally prescribed forms in 1787, they could likewise justify an evasion of Article V requirements or their state equivalents at later points in time. Madison, in *The Federalist No. 49*, cautions against multiplying appeals to the people, asserting that the conditions that promote successful constitution-making occur only infrequently.<sup>102</sup> When such appeals take place, as he states in another paper, no change can occur “[u]ntil the people have, by some solemn and authoritative act, annulled or changed the established form.”<sup>103</sup> Nonetheless, “a constitutional road to the decision of the people ought to be marked out and kept open, for certain great and extraordinary occasions.”<sup>104</sup> Ackerman asserts that on those occasions the people need not adhere to the “constitutional road” established by the fundamental law but may engage in higher law-making through other means.<sup>105</sup>

In advancing this argument, Ackerman is at pains to distinguish between higher law-making and ordinary law-making and to insist that the gravity and consequences of higher law-making demand public-spirited deliberation.<sup>106</sup> He asserts that the modern system of constitutional change, pioneered in the New Deal crisis, meets that standard.<sup>107</sup> Under this system the President claims a mandate based on his electoral success, Congress under the President’s leadership enacts transformative statutes that challenge the fundamentals of the existing constitutional regime, the Supreme Court invalidates those challenges to the constitutional order, and the issue of constitutional regime change is taken to the people in a critical election, where the mobilized people render their verdict at the polls.<sup>108</sup> The public support for such regime change, Ackerman argues, must be deep, broad, and decisive; if it is, then the constitutional change that results is as legitimate as any changes pursued through Article V.<sup>109</sup>

Historians and legal scholars have quarreled about whether the conditions Ackerman sets out were met in the election of 1936—David Dow, for example, dismisses “Ackerman’s theory [as] an example of bad history being

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<sup>101</sup> As Ackerman notes, “[s]urely the American People have not yet pronounced the last word on their constitutional identity?” *Id.* at 23. Ackerman defines a “constitutional regime” as “the matrix of institutional relationships and fundamental values that are usually taken as the constitutional baseline in normal political life.” *Id.* at 59.

<sup>102</sup> THE FEDERALIST NO. 49, *supra* note 68, at 314–15.

<sup>103</sup> THE FEDERALIST NO. 78, at 470 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

<sup>104</sup> THE FEDERALIST NO. 49, *supra* note 68, at 314.

<sup>105</sup> ACKERMAN, FOUNDATIONS, *supra* note 3, at ch. 10.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 268.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at ch. 10.

used for questionable reasons”—and I shall not resolve that conflict here.<sup>110</sup> Let me instead highlight three aspects of Ackerman’s argument. First, the mode of constitutional change that Ackerman endorses differs dramatically from that outlined in Article V. Both the President and the Supreme Court play a role in Ackerman’s amendment process—indeed, the President may take the lead in defining constitutional issues and mobilizing public support—whereas they have no official role under Article V.<sup>111</sup> The emphasis on federalism under Article V is replaced by an appeal to a national political majority under Ackerman’s version; the people play a direct role in constitutional change, as the critical election is seen as a referendum to decide between two constitutional visions, whereas the people play no direct role under Article V.<sup>112</sup> Second, one can view Ackerman’s as a more popular version of constitutional change, enhancing opportunities for popular constitutionalism, yet it is easy to overstate how fundamental a change Ackerman is contemplating. He acknowledges that most constitutional change is not transformative and will continue to occur through the mechanisms established by Article V.<sup>113</sup> He cites as an example the Twenty-sixth Amendment, which extended the right to vote to eighteen-year-olds, portraying it as a super-statute that had a narrow function and neither mobilized the public nor served as a prelude to further constitutional developments.<sup>114</sup> Yet if the occasions for transformative constitutional change are rare, arising only two or three times since the Founding, then the opportunities for popular constitutionalism at the federal level remain circumscribed at best, even if one accepts Ackerman’s argument. Finally, one can accept Ackerman’s historical account of past departures from constitutional requirements without endorsing his claim that these justify future departures. What held for popular constitutionalism likewise holds for Ackerman as well: historical practice does not confer constitutional legitimacy.<sup>115</sup>

## VII. STATE CONSTITUTIONAL CHANGE AND POPULAR CONSTITUTIONALISM

If the opportunities for popular constitutionalism in constitutional creation and re-creation are limited at the federal level, they are abundant in the states;

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<sup>110</sup> David R. Dow, *The Plain Meaning of Article V*, in RESPONDING TO IMPERFECTION, *supra* note 52, at 117, 135.

<sup>111</sup> ACKERMAN, FOUNDATIONS, *supra* note 3, at ch. 10.

<sup>112</sup> *Id.* at 32–33.

<sup>113</sup> *Id.* at 6–7.

<sup>114</sup> *Id.* at 91.

<sup>115</sup> For a more detailed critique of Ackerman’s argument, see VILE, CONTEMPORARY QUESTIONS, *supra* note 88, at ch. 5.

and the people in the various states have taken full advantage of them.<sup>116</sup> The people play a direct role in the creation of their state constitutions, in almost all instances electing the convention delegates that draft the constitutions and ratifying or rejecting their work via popular referendum.<sup>117</sup> The people in the states have also proved willing to engage in constitutional revision, having adopted 145 state constitutions, usually employing the same processes for revision as for the creation of their initial constitutions, and they have considered but rejected many more constitutions.<sup>118</sup> More than one-third of state constitutions today date from the twentieth century.<sup>119</sup> Finally, the people have devised multiple modes of amendment to facilitate the proposal of constitutional changes, and in forty-nine states (Delaware being the lone exception) they have provided for ratification by popular referendum.<sup>120</sup> They have made extensive use of these processes of amendment, with more than 10,000 amendments proposed to current state constitutions and more than 6,500 adopted, an average of more than 120 amendments per state.<sup>121</sup> The people in some states have been particularly active: for example, the 1901 Alabama Constitution now has more than 580 amendments, and the 1982 Georgia Constitution was amended during its first decade more times than the Federal Constitution has been during its entire history.<sup>122</sup> From a different angle, the constitutional amendment rate per state is about 1.25 amendments per year, whereas the federal constitutional amendment rate is .13.<sup>123</sup> Thus, if there is a complaint at the state level, it is not the difficulty but the ease of amendment.

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<sup>116</sup> See *Table 1.1: General Information on State Constitutions*, in BOOK OF THE STATES 2013, at 12 (2013), [http://knowledgecenter.csg.org/kc/system/files/1.1\\_2013\\_0.pdf](http://knowledgecenter.csg.org/kc/system/files/1.1_2013_0.pdf) [<https://perma.cc/G5AB-WM9V>] [hereinafter BOOK OF THE STATES 2013, *Table 1.1*].

<sup>117</sup> *Table 1.2: Constitutional Amendment Procedure: By the Legislature*, in BOOK OF THE STATES 2013, *supra* note 116, at 14, [http://knowledgecenter.csg.org/kc/system/files/1.2\\_2013.pdf](http://knowledgecenter.csg.org/kc/system/files/1.2_2013.pdf) [<https://perma.cc/2NNS-GA94>] [hereinafter BOOK OF THE STATES 2013, *Table 1.2*].

<sup>118</sup> BOOK OF THE STATES 2013, *Table 1.1*, *supra* note 116

<sup>119</sup> *Id.*

<sup>120</sup> BOOK OF THE STATES 2013, *Table 1.2*, *supra* note 117; see also DEL. CONST. art. XVI, § 1.

<sup>121</sup> TARR, UNDERSTANDING, *supra* note 9, at 24. These figures actually underestimate the number of state constitutional amendments, because earlier state constitutions were also heavily amended. See *id.* “For example, in 1980, three years before adopting a new constitution, Georgia submitted to its voters 137 proposed amendments—16 general amendments and 121 local amendments; and Louisiana’s constitution of 1921 was amended 536 times before its replacement in 1974.” *Id.*

<sup>122</sup> *Id.* at 6, 24.

<sup>123</sup> Lutz, *Toward a Theory*, *supra* note 58, at 261 tbl.11.

### VIII. STATE CONSTITUTIONAL CREATION AND POPULAR CONSTITUTIONALISM

The states have developed a thoroughly popular process for constitutional creation and constitutional revision.<sup>124</sup> Typically the people vote on whether to hold a constitutional convention, they elect the delegates to that convention, and they vote on whether to ratify the convention's handiwork.<sup>125</sup> This process did not exist in the late eighteenth century, when the people in the states were devising their initial constitutions.<sup>126</sup> Rather, it is the product of considered political choice and itself represents an important expression of popular constitutionalism whereby the people deliberately chose the procedure by which they would create and re-create their constitutions. Aside from the adoption of constitutions in the original thirteen states, the creation of state constitutions has generally been tied to the process of admission to the Union, with the drafting of constitutions and their submission to Congress being one of the steps in gaining admission.<sup>127</sup> The hope of admission has influenced the deliberations and choices of the convention delegates.<sup>128</sup> Article IV, Section 3 of the U.S. Constitution, in "empowering Congress to admit new states to the Union, in effect, [gave] it the power to establish the conditions under which [states would] be admitted."<sup>129</sup> In the enabling acts by which it authorized prospective states to write constitutions and apply for statehood, Congress has imposed conditions on the substance of state constitutions, and state constitution-makers have had to meet those conditions in order to secure a favorable vote on admission.<sup>130</sup> If the proposed constitution contained provisions of which Congress or the President disapproved, either branch could refuse to approve the legislation admitting the state until the offending provisions were removed or altered.<sup>131</sup> For example, after Arizona proposed a constitution that included the recall of judges, President William Howard Taft vetoed the statehood bill, forcing Arizona to delete the provision; however,

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<sup>124</sup> Although it is useful to separate the creation of state constitutions from their revision, there is some overlap, and this is reflected in the discussion in this section. See *infra* Part XII.

<sup>125</sup> See WALTER F. DODD, *THE REVISION AND AMENDMENT OF STATE CONSTITUTIONS* 21–25 (1910). When states revise their constitutions, the people may also determine in their authorization of the convention how comprehensive the revision is by taking certain subjects off the table or by requiring that they address certain issues, although they cannot dictate how the delegates shall resolve those issues. See *infra* Part XI.

<sup>126</sup> DODD, *supra* note 125, at 21–25.

<sup>127</sup> See TARR, *UNDERSTANDING*, *supra* note 9, at 39–41.

<sup>128</sup> See *id.*

<sup>129</sup> *Id.*

<sup>130</sup> For a discussion on the requirements imposed as conditions for admission, see Eric Biber, *The Price of Admission: Causes, Effects, and Patterns of Conditions Imposed on States Entering the Union*, 46 *AM. J. LEGAL HIST.* 119, 120–29 (2004).

<sup>131</sup> *Id.*

once admitted, Arizona immediately amended its constitution to reinstate recall of judges.<sup>132</sup>

### IX. THE POPULAR ROLE IN AUTHORIZING THE WRITING OF CONSTITUTIONS

The people in the states began creating constitutions in 1776, with New Hampshire, South Carolina, and New Jersey drafting theirs even prior to independence.<sup>133</sup> Given the novelty of the task and the pressures under which the states were operating, it is not surprising that procedures varied from state to state.<sup>134</sup> However, a consensus quickly developed that the state legislature lacked the authority to create a constitution.<sup>135</sup> In the words of a delegate to the Pennsylvania convention of 1776: “[L]egislative bodies of men have no more the power of suppressing the authority they sit by, than they have of creating it, otherwise every legislative body would have the power of suppressing a constitution at will.”<sup>136</sup> In addition, there was concern that legislators might have “entrenched interests potentially subversive of the public good,” so a temporary body elected by the people, which would not benefit from what they wrote, was preferable.<sup>137</sup> Early on, the states sought popular authorization by informing voters that they were choosing legislators who would likely vote on independence and, if called upon, would create a constitution.<sup>138</sup> As the New Hampshire Constitution of 1776 noted in its preamble, those who framed it were “appointed by the free suffrages of the people . . . and authorized . . . to establish some form of government.”<sup>139</sup> The Council of Safety in North Carolina resolved

that it be recommended to the good people of this now Independent State of North Carolina to pay the greatest attention to the Election to be held on the fifteenth of October next . . . [as] it will be the business of the Delegates then

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<sup>132</sup> TARR, UNDERSTANDING, *supra* note 9, at 41.

<sup>133</sup> *Id.* at 61.

<sup>134</sup> *See id.* at 60–67.

<sup>135</sup> Historians disagree about whether any of the bodies that drafted the initial state constitutions were ordinary legislatures. Compare KRUMAN, *supra* note 7, at ch. 2, with DODD, *supra* note 125, at 38–39, and GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787, at 307 (1969). Whatever the case may be, the states almost immediately moved away from legislative drafting of constitutions.

<sup>136</sup> KYVIG, *supra* note 50, at 24.

<sup>137</sup> KRUMAN, *supra* note 7, at 158.

<sup>138</sup> *See generally id.*

<sup>139</sup> N.H. CONST. pmb. (1776).

chosen not only to make Laws for the good Government of, but also to form a Constitution for this State.<sup>140</sup>

The people in some states also sought to instruct their representatives as to what the constitution should contain, asserting that legislators should act as the agents of the people rather than acting according to discretion once given authority by the people.<sup>141</sup> When constituents in Maryland prepared instructions for their representatives, some representatives requested a meeting and, when they were unable to persuade their constituents to withdraw the instructions, those representatives resigned.<sup>142</sup> In 1776, the Pennsylvania legislature pioneered an alternative approach, ordering copies of the proposed constitution be printed and distributed, while suspending legislative consideration of the constitution for eleven days so that the people had the opportunity to voice their views.<sup>143</sup> Objections were raised to the short period for public debate, and these had an effect.<sup>144</sup> When Pennsylvania revised its constitution in 1790, the convention adjourned from February to August to allow public consideration of its work prior to final adoption.<sup>145</sup>

The means eventually chosen to enlist the people in constitutional creation was the constitutional convention, a body popularly elected for the sole purpose of drafting a constitution or proposing constitutional amendments. The convention was, as Gordon Wood has observed, “a totally new contribution to politics” that “institutionalized and legitimized revolution.”<sup>146</sup> By virtue of their special election, convention delegates were clothed with popular authority to undertake a specific task, and Pennsylvania even temporarily relaxed suffrage requirements so that the whole people could participate in this act of authorization.<sup>147</sup> Since 1776 the states have held 233 constitutional conventions, and even if a state constitution lacked provisions for constitutional amendment or revision, the state legislature was assumed to have the power to call conventions.<sup>148</sup> On occasion there have been

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<sup>140</sup> DODD, *supra* note 125, at 13. For a similar approach in other states, see CHRISTIAN G. FRITZ, *AMERICAN SOVEREIGNS: THE PEOPLE AND AMERICA’S CONSTITUTIONAL TRADITION BEFORE THE CIVIL WAR* 34 (2008).

<sup>141</sup> KRUMAN, *supra* note 7, at 78–79.

<sup>142</sup> *Id.* Four of the seven initial state constitutions that had declarations of rights included the right to instruct representatives.

<sup>143</sup> DODD, *supra* note 125, at 15–16.

<sup>144</sup> *Id.* at 16.

<sup>145</sup> *Id.* at 63.

<sup>146</sup> WOOD, *supra* note 135, at 613–14.

<sup>147</sup> KRUMAN, *supra* note 7, at 26.

<sup>148</sup> For discussion of the creation of the earliest state constitutions, see ADAMS, *supra* note 9, ch. 3; KRUMAN, *supra* note 7, at ch. 2. For a comprehensive treatment of conventions and their legal status, see JOHN A. JAMESON, *A TREATISE ON CONSTITUTIONAL CONVENTIONS; THEIR HISTORY, POWERS, AND MODES OF PROCEEDING* (4th ed. 1887). The frequency of conventions has differed widely from state to state. See JOHN J. DINAN, *THE AMERICAN STATE CONSTITUTIONAL TRADITION* 7–11 (2006) [hereinafter DINAN, *STATE*

irregularities. Voters approved conventions in New Hampshire in 1861 and 1864, in Iowa in 1920, and in Maryland in 1950, but none were held; New York approved a convention in 1886 but delayed convening it until 1894.<sup>149</sup> The people in several prospective states also called conventions and wrote constitutions without congressional authorization—a form of state popular constitutionalism that anticipates Akhil Amar’s argument about the non-exclusivity of Article V.<sup>150</sup> However, when these extralegal conventions wrote state constitutions, it was understood that popular ratification and subsequent congressional approval rendered the defects of the process harmless.<sup>151</sup> Finally, on occasion state legislatures have declared themselves constitutional conventions and proposed constitutions for popular ratification. This occurred twice in the twentieth century, in Texas in 1974<sup>152</sup> and in Louisiana in 1992.<sup>153</sup> In the former case the people authorized the legislature to act as a convention,<sup>154</sup> but in the latter case Louisiana short-circuited both of the popular controls over constitution-making: the choice as to whether or not to call a convention and the popular selection of delegates for that purpose.<sup>155</sup> In both Texas and Louisiana the people decisively rejected the proposed constitutions, and in Louisiana the governor apologized publicly for the circumvention of established procedures.<sup>156</sup>

## X. THE POPULAR ROLE IN APPROVING CONSTITUTIONS

Many of the initial state constitutions were adopted without any thought of popular ratification, perhaps because of the novelty of the endeavor: after all, the creation of constitutions resembled the enactment of statutes, a process that did not require popular approval after the fact. However, some states did seek

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CONSTITUTIONAL TRADITION]. New Hampshire has called the most with seventeen, four states have had more than ten, and twenty-two states have had five or more, including ten of the original thirteen states and all eleven states of the Confederacy. *Id.* But ten states have had only a single convention. *Id.*

<sup>149</sup> CAPLAN, *supra* note 50, at 115.

<sup>150</sup> For a discussion of these unauthorized conventions and their legal status, see JAMESON, *supra* note 148, at ch. 4.

<sup>151</sup> *Id.*

<sup>152</sup> For a description and history of the Texas proposal in 1974–1975, see Mary Lucia Barras & Houston Daniel, *Constitutional Convention of 1974*, TEX. ST. HIST. ASS’N (June 12, 2010), <https://www.tshaonline.org/handbook/online/articles/mjc07> [<https://perma.cc/JC6D-S8R9>].

<sup>153</sup> For an accounting of the Louisiana public’s rejection of the proposed constitution, see Janice C. May, *State Constitutional Reforms: Recent Experiences*, MADISON REV., Fall 1997, at 12, 16, [http://heartland.org/sites/all/modules/custom/heartland\\_migration/files/pdfs/5135.pdf](http://heartland.org/sites/all/modules/custom/heartland_migration/files/pdfs/5135.pdf) [<https://perma.cc/66VT-9UDY>].

<sup>154</sup> Barras & Daniel, *supra* note 152.

<sup>155</sup> May, *supra* note 153, at 16.

<sup>156</sup> For a description and history of the Texas proposal in 1974–1975, see Barras & Daniel, *supra* note 152. For an accounting of the Louisiana public’s rejection of the proposed constitution, see May, *supra* note 153, at 16.



to ensure popular input into constitutional deliberations through the instruction of delegates or by circulating the drafts of constitutions for popular comment before they were finalized.<sup>157</sup> Georgia even provided for successive conventions to frame and revise its 1789 constitution, with a third convention elected to ratify it.<sup>158</sup> In 1778 Massachusetts became the first state to seek popular ratification of a constitution, as the Massachusetts General Court (legislature) sent its proposed constitution to town meetings throughout the state.<sup>159</sup> The people, however, rejected the document by a 9,972 to 2,083 vote.<sup>160</sup> In the wake of that decisive verdict, the General Court asked the town meetings whether they wanted the legislature or a specially elected convention to draw up the constitution, and when the town meetings chose the latter, a convention was called.<sup>161</sup> Its handiwork was submitted to the town meetings in 1780, and this time a constitution was adopted.<sup>162</sup>

Even after Massachusetts pioneered popular ratification and New Hampshire emulated its example, the practice was slow to take hold. Most states outside New England did not have town meetings, and this complicated the task of consulting the people, although New Hampshire showed it was not impossible by submitting its 1792 constitution to a direct vote of the people.<sup>163</sup> Nonetheless, progress was slow and uneven: only one of the seven constitutions establishing new states in the Northwest Territory between 1801 and 1830 was ratified by the people.<sup>164</sup> During the 1830s, seven of ten conventions submitted their work for popular approval, and from 1840–1860 all conventions did so.<sup>165</sup> But most of the southern states that seceded did not submit their new constitutions for popular ratification, nor did six of the eleven southern states revising their constitutions after the conclusion of the Civil War.<sup>166</sup> At the turn of the twentieth century, most southern states that were seeking to disenfranchise African-Americans and poor whites refused to submit their revised constitutions for ratification, presumably because they might be defeated.<sup>167</sup> Indeed, Mississippi and South Carolina even failed to submit the convention call to popular approval, fearing that voters might block their disenfranchisement.<sup>168</sup> These departures from the requirements of

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<sup>157</sup> See discussion *supra* Part IX.

<sup>158</sup> DODD, *supra* note 125, at 42.

<sup>159</sup> RONALD M. PETERS, JR., THE MASSACHUSETTS CONSTITUTION OF 1780: A SOCIAL COMPACT 13 (1978).

<sup>160</sup> These figures derive from *id.* at 19.

<sup>161</sup> *Id.* at 20.

<sup>162</sup> *Id.* at 21. It may be coincidence, but the Massachusetts Constitution, the first constitution ratified by the people, is also the oldest operating constitution in the world. *Id.* at 13.

<sup>163</sup> See DODD, *supra* note 125, at 62–63.

<sup>164</sup> *Id.* at 62–66.

<sup>165</sup> *Id.* at 64–65.

<sup>166</sup> *Id.* at 66.

<sup>167</sup> DINAN, STATE CONSTITUTIONAL TRADITION, *supra* note 148, at 21–22.

<sup>168</sup> *Id.* at 17–18.

popular constitutionalism underscore the importance of ratification for maintaining democratic rule. Altogether, of the 119 constitutions adopted between 1776 and 1900, forty-five of them (38%) took effect without popular ratification.<sup>169</sup> It was only in the twentieth century that popular ratification became a standard feature of state constitutional creation and revision.<sup>170</sup>

## XI. POPULAR CONSTITUTIONALISM AND STATE CONSTITUTIONAL DESIGN

Almost two centuries separate when New Hampshire created the first state constitution to when the fiftieth state, Hawaii, created its first constitution.<sup>171</sup> During this period the other forty-eight states adopted their first constitutions: fourteen in the eighteenth century, seventeen in the first half of the nineteenth century, fifteen in the latter half of the nineteenth century, and four during the twentieth century.<sup>172</sup> During this same period thirty-one states revised their original constitutions, including fifteen in the twentieth century; and the majority of states have had three or more constitutions.<sup>173</sup> The fact that constitutional creation and revision have occurred over such an extended period has affected the contents and design of those constitutions, because over time understandings of what a good state constitution should include have changed dramatically.<sup>174</sup> The people in a state can decide whether their constitution should be a short framework document, as was typical in the late eighteenth century;<sup>175</sup> a detailed instrument of government, as was typical in the latter part of the nineteenth century;<sup>176</sup> or a more streamlined document, as was typical in the twentieth century.<sup>177</sup> They can determine which subjects are appropriate to include in the constitution and which are not, and in particular they can decide whether or not to insert detailed policy prescriptions in their

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<sup>169</sup> FRITZ, *supra* note 140, at 34.

<sup>170</sup> DODD, *supra* note 125, at 65–71 (discussing how popular ratification “became the exception rather than the rule in the Southern States” during the civil war period).

<sup>171</sup> See BOOK OF THE STATES 2013, *Table 1.1*, *supra* note 116.

<sup>172</sup> *Id.* Connecticut and Rhode Island retained their colonial charters as their constitutions, while excising royalist features, and did not adopt new constitutions until 1818 and 1842 respectively. William F. Swindler, *Seedtime of an American Judiciary: From Independence to the Constitution*, 17 WM. & MARY L. REV. 503, 506 & n.12 (1976). I here count the constitutions they adopted in the nineteenth century as their first constitutions.

<sup>173</sup> BOOK OF THE STATES 2013, *Table 1.1*, *supra* note 116.

<sup>174</sup> For a pioneering account of changing understandings of state constitutional design, see generally Daniel J. Elazar, *The Principles and Traditions Underlying State Constitution*, 12 PUBLIUS 11 (1982); see also G. Alan Tarr, *Models and Fashions in State Constitutionalism*, 1998 WIS. L. REV. 729.

<sup>175</sup> TARR, UNDERSTANDING, *supra* note 9, at 117.

<sup>176</sup> *Id.* at 118–21.

<sup>177</sup> *Id.* at 132–33.

documents.<sup>178</sup> They can seek to reduce corruption and the power of special interests by imposing procedural restrictions designed to promote greater transparency, by restricting the use of special laws where general laws are possible, and by imposing restrictions on legislatures or by transferring their power elsewhere.<sup>179</sup> They can decide whether to constitutionalize matters, withdrawing them altogether from legislative consideration, or they can grant broad discretion to the people's representatives.<sup>180</sup> They can decide whether to speak in general terms or in detailed prescriptions, thereby affecting the range of discretion available to legislators and other government officials.<sup>181</sup> They can create opportunities for direct popular oversight and input through direct democracy, or they can rely on the system of representation to ensure accountability to the public.<sup>182</sup> Thus the people do not merely have the authority to create and re-create state constitutions, but also to create quite different charters and quite different systems of government.<sup>183</sup>

The people's power to frame state constitutions also enables them to influence constitutional interpretation. The people can frame state provisions with specificity to reduce the need for interpretation—for example, several states during the latter half of the nineteenth century added provisions expressly prohibiting aid to religious institutions and/or religious schools.<sup>184</sup> The people can also insert provisions to overturn disfavored judicial interpretations, as California and Massachusetts did in reinstating the death penalty.<sup>185</sup> In addition, they can change their constitutions to preclude disfavored judicial interpretations—consider the proliferation of state provisions defining marriage in the wake of *Goodridge v. Department of Public Health*.<sup>186</sup> The people can include provisions directing how courts should interpret the constitution, as Florida did when it required the state's courts to interpret the state ban on unreasonable search or seizure no more broadly than the U.S. Supreme Court interpreted the Fourth Amendment.<sup>187</sup>

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<sup>178</sup> See G. Alan Tarr, *Explaining State Constitutional Change*, 60 WAYNE L. REV. 10–11 (2014) [hereinafter Tarr, *Explaining*].

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> For a detailed discussion, see TARR, UNDERSTANDING, *supra* note 9, at 118–21, 132–34.

<sup>184</sup> See generally G. Alan Tarr, *Church and State in the States*, 64 WASH. L. REV. 73 (1989).

<sup>185</sup> On the reinstatement of the death penalty, see CAL. CONST. art. I, § 27, overruling *People v. Anderson*, 493 P.2d 880, 899 (Cal. 1972), and MASS. CONST. art. CXVI, overruling *Dist. Attorney v. Watson*, 411 N.E.2d 1274, 1286–87 (Mass. 1980). On state constitutional prohibitions of same-sex marriage, see *50 States with Legal Gay Marriage*, PROCON.ORG, <http://gaymarriage.procon.org/view.resource.php?resourceID=004857> [https://perma.cc/EE8U-673V] (last updated July 1, 2015).

<sup>186</sup> *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 948 (Mass. 2003).

<sup>187</sup> For Florida's "lockstep" requirement, see FLA. CONST. art. I, § 12.

Finally, the more recent the constitution is adopted by the people, the more likely they are to have anticipated current problems and dealt with them in the constitutional text. The availability of directly pertinent constitutional language means that there is less need for creative judicial interpretation to apply constitutional principles to contemporary concerns.

## XII. STATE CONSTITUTIONAL REVISION AND POPULAR CONSTITUTIONALISM

Initially, state constitutional revision and the right to revolution were intertwined in constitutional thought. Thus, Christian Fritz observes that “as Americans included it in their constitutions, the right of revolution came to be seen as a constitutional principle permitting the people as the sovereign to control government and revise their constitutions without limit.”<sup>188</sup> The popular role in both revision and revolution was expressly recognized in state constitutions. By 1850, more than eighty percent of state constitutions acknowledged that “political society is derived from the people and established with their consent,”<sup>189</sup> and more than half expressly stated that “the people . . . have the inherent, sole, and exclusive right of regulating the internal government . . . and of altering and abolishing their constitution and form of government whenever it may be necessary to their safety and happiness.”<sup>190</sup> Yet over time constitutional revision became understood as the more capacious notion, because revolution was justified only by governmental oppression, whereas revision was justified whenever the people concluded that constitutional change would improve their situation.<sup>191</sup> Indeed, recourse to the people through constitutional revision became a key feature of state politics in the nineteenth century.<sup>192</sup> In part, these appeals to the people were backward-looking, based on the belief that a frequent recurrence to first principles would encourage popular attachment to the constitution and ensure constitutional fidelity.<sup>193</sup> But in part they were forward-looking, based on the premise of progress in constitutional thinking and on the need to adapt the basic law to changing circumstances and attitudes.<sup>194</sup> As Thomas Jefferson put it: “We might as well require a man to wear still the coat which fitted him when a boy,

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<sup>188</sup> FRITZ, *supra* note 140, at 25.

<sup>189</sup> LAURA J. SCALIA, *AMERICA’S JEFFERSONIAN EXPERIMENT: REMAKING STATE CONSTITUTIONS 1820–1850*, at 25 (1999) (quoting DEL. CONST. pmb1. (1792)).

<sup>190</sup> *Id.* (alterations in original) (quoting MO. CONST. art. XIII, § 2 (1820)).

<sup>191</sup> See *infra* Part XII.

<sup>192</sup> See FRITZ, *supra* note 140, at 54.

<sup>193</sup> See *id.*

<sup>194</sup> SCALIA, *supra* note 189, at 132.

as civilized society to remain ever under the regimen of their barbarous ancestors.”<sup>195</sup>

The most common procedure for state constitutional revision involves the people’s representatives in the legislature referring to the people the question of whether to call a convention. In some states the legislature can propose a convention by a simple majority vote<sup>196</sup>; in others, the requirement is two-thirds.<sup>197</sup> Whichever the procedure, if the people concur, they then elect convention delegates; and if it is to be a limited convention, they may place restrictions on the matters that the delegates can address.<sup>198</sup> Ultimately the people approve or reject the delegates’ proposal or proposals.<sup>199</sup>

Forty-one states specify the procedure for calling conventions in their constitutions, and in the remaining states it is understood that legislatures possess that power as part of their plenary legislative power.<sup>200</sup> Within this framework there is considerable interstate variation. In authorizing a convention, two states—Illinois and Nebraska—require a three-fifths vote in the legislature for a popular referendum on calling a convention, and South Dakota likewise requires a three-quarters vote but dispenses with the referendum.<sup>201</sup> Twenty states require a two-thirds legislative vote, and in five of these no popular vote is required, while sixteen states require only a majority vote in the legislature for a popular referendum on a convention.<sup>202</sup> As to the popular vote for a convention, in those states that require such a vote, twenty-one require a majority of those voting on the question, with Kentucky and Nebraska also specifying a minimum turnout.<sup>203</sup> But some states require

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<sup>195</sup> Letter from U.S. President Thomas Jefferson to Samuel Kercheval (July 12, 1816), [http://www.constitution.org/tj/ltr/1816/ltr\\_18160712\\_kercheval.html](http://www.constitution.org/tj/ltr/1816/ltr_18160712_kercheval.html) [<https://perma.cc/AJ8F-RKKS>]; see also FRITZ, *supra* note 140, at 54–55.

<sup>196</sup> ALA. CONST. art. XVIII, § 284.

<sup>197</sup> MD. CONST. art. XIV, § 2; N.H. CONST. art. 100(c).

<sup>198</sup> See MD. CONST. art. XIV, § 1.

<sup>199</sup> Gerald Benjamin, *Constitutional Amendment and Revision*, in 3 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY: THE AGENDA OF STATE CONSTITUTIONAL REFORM 177, 199–200 (G. Alan Tarr & Robert F. Williams eds., 2006). A convention may, at its discretion, decide to submit its work as a single question or as multiple questions. The advantage of the latter approach is that it avoids having a constitution rejected because it includes one or a few controversial provisions. *Id.* at 199.

<sup>200</sup> *Id.* at 192. In 1883, the Rhode Island Supreme Court ruled that a convention could not be called in the state because the constitution gave no express authority for revision by a convention, a position since overturned by Article XIV, Section 2 of the state’s current constitution adopted in 1973, which was modeled on the People’s Constitution. *In re Constitutional Convention*, 14 R.I. 649, 653–54 (1883); see also PATRICK T. CONLEY & ROBERT G. FLANDERS, JR., *THE RHODE ISLAND STATE CONSTITUTION* 292 (2011) (discussing the shift to limited constitutional conventions).

<sup>201</sup> *E.g.*, ILL. CONST. art. XIV, § 1; NEB. CONST. art. XVI, § 1; S.D. CONST. art. XXIII, § 2.

<sup>202</sup> BOOK OF THE STATES 2013, *Table 1.2*, *supra* note 117 (for authorizing constitutional conventions detailing these requirements).

<sup>203</sup> *Id.*

more than a simple majority. For example, Illinois requires that three-fifths of those voting on the question approve a convention.<sup>204</sup> Ten states require a positive vote by a majority of those voting in the election, so ballot fatigue can affect the outcome: in Michigan, for example, the people voted overwhelmingly for a convention in 1898 and 1904, but the majority was of those voting on the question, not of those voting at the election.<sup>205</sup> Finally, in order to ratify the convention's work, twenty-one states require a simple majority on the question or questions, but Minnesota demands a three-fifths positive vote, and New Hampshire two-thirds.<sup>206</sup> Colorado requires a majority of those voting in the election, and Hawaii too imposes a turnout requirement.<sup>207</sup>

The states have also developed mechanisms for calling conventions whereby the people can circumvent the state legislature if it is unwilling to act.<sup>208</sup> In its 1776 constitution Pennsylvania created the Council of Censors, an elected body similar to a grand jury, which met every seven years to determine whether the constitution was being violated and could either propose amendments or call a constitutional convention.<sup>209</sup> Vermont copied Pennsylvania's effort to "institutionalize and routinize constitutional reassessment,"<sup>210</sup> and although the Council of Censors failed in Pennsylvania and was eliminated in the 1790<sup>211</sup> constitution, it continued to operate with some success in Vermont until 1869.<sup>212</sup> In several states the people have proven to be good Jeffersonians, placing in their constitutions the requirement that the people be consulted to vote at regular intervals on whether to call a convention.<sup>213</sup> The Massachusetts Constitution of 1780 pioneered the practice, providing for a popular vote in 1795, and the New Hampshire Constitution of 1784 required that the convention question be submitted to voters every seven years. (In New Hampshire, this was vitally important, because the constitution did not authorize any other mode of constitutional change). Today, fourteen states provide for a periodic vote on whether to call a convention, with eight states posing the question every twenty years, four every ten years, Michigan every sixteen years, and Hawaii every nine years.<sup>214</sup> Florida, Montana, and

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<sup>204</sup> ILL. CONST. art. XIV, § 1(c).

<sup>205</sup> DODD, *supra* note 125, at 53.

<sup>206</sup> MINN. CONST. art. IX, § 3; N.H. CONST. art. 100(c).

<sup>207</sup> This account of state legal requirements relies on Benjamin, *supra* note 199, at 192–200.

<sup>208</sup> PA. CONST. § 47 (1776).

<sup>209</sup> *Id.*

<sup>210</sup> See KYVIG, *supra* note 50, at 32.

<sup>211</sup> See Lutz, *Patterns*, *supra* note 57, at 140.

<sup>212</sup> KYVIG, *supra* note 50, at 32. On the operation of the Council of Censors, see DONALD S. LUTZ, POPULAR CONSENT AND POPULAR CONTROL: WHIG POLITICAL THEORY IN THE EARLY STATE CONSTITUTIONS 130–32 (1980) [hereinafter LUTZ, POPULAR CONSENT].

<sup>213</sup> See Benjamin, *supra* note 199, at 127.

<sup>214</sup> See *id.* at 193–210.

South Dakota allow the people to call constitutional conventions via the initiative, though so far none has been convened through that procedure.<sup>215</sup>

Although the people in the states have taken advantage of these opportunities to call conventions and revise their constitutions or to reject proposed revisions, the level of this activity has varied over time. The nineteenth century saw a great deal of constitutional revision, but during the twentieth and twenty-first centuries, only twelve states have revised their constitutions, although five states did adopt their first—and only—constitutions. During the nineteenth century, states held 144 constitutional conventions, but since then only sixty-four.<sup>216</sup> During the twentieth century, the period of greatest activity was from 1963–1976, when seven states adopted new constitutions in the wake of the Supreme Court’s reapportionment rulings and voters rejected six constitutions proposed by conventions and three others submitted by state legislatures.<sup>217</sup> Since 1970, the outcome of votes on automatic convention calls has been positive only four times.<sup>218</sup> In part, these negative votes may reflect a popular distrust of constitutional revision, which is increasingly seen as dominated by the same political elites and special interests that dominate ordinary politics.<sup>219</sup> In part, however, the rejection of

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<sup>215</sup> FLA. CONST. art. XI, § 4; MONT. CONST. art. XIV, § 2; S.D. CONST. art. XXIII, § 2.

<sup>216</sup> DINAN, STATE CONSTITUTIONAL TRADITION, *supra* note 148, at 8 tbl.1-1.

<sup>217</sup> The key Supreme Court ruling compelling reapportionment of both houses of state legislatures on a “one person one vote” basis was *Reynolds v. Sims*, 377 U.S. 533, 588 (1964). The states in which constitutions proposed by conventions were rejected include Arkansas (1970), Maryland (1968), New Mexico (1969), New York (1967), and Rhode Island (1968). States in which constitutions submitted by legislatures were rejected include Idaho (1970), and Oregon (1970). See Tarr, *Explaining*, *supra* note 178, at 16 n.34, 18. For a study of the dynamics in both the successful and unsuccessful conventions, see ELMER E. CORNWELL, JR. ET AL., STATE CONSTITUTIONAL CONVENTIONS: THE POLITICS OF THE REVISION PROCESS IN SEVEN STATES (1975).

<sup>218</sup> See Benjamin, *supra* note 199, at 177–210.

<sup>219</sup> As I have noted elsewhere:

Perhaps the most striking trend is toward the professionalization of state constitutional change. Illustrative of this shift is the decline of the constitutional convention. In the nineteenth century, conventions served as a mechanism for popular influence on politics, often called by reluctant officials in response to popular pressures. But in the twentieth century far fewer conventions have been called, and their character has changed. Typically, it has been political elites and professional reformers who have campaigned for constitutional revision, with the populace reduced to rejecting convention calls and proposed constitutions to register its distrust of a process that it no longer feels it controls. The professionalization of state constitutional change is also evident in the increasing use of constitutional commissions, expert bodies established without popular input, to set the agenda of constitutional change, identifying the problems that deserve attention and the appropriate solutions to those problems.

TARR, UNDERSTANDING, *supra* note 9, at 170; see also Thomas Gais & Gerald Benjamin, *Public Discontent and the Decline of Deliberation: A Dilemma in State Constitutional*

conventions may reflect a popular preference for piecemeal rather than comprehensive reform, as the decline in constitutional revision has been accompanied by an increase in state constitutional amendment, in which the people likewise play the key role. Whatever the cause, no state has revised its constitution in more than a quarter century.

If the people have the power to revise constitutions, can they emulate the Philadelphia Convention by ignoring established procedures in the process? Christian Fritz has nicely framed the issue:

The people's sovereignty justified constitutional change when constitutions (state or federal) were silent about the means for revision or when it seemed appropriate to bypass existing procedures. More controversial was the notion that such change could occur independent of the existing government, in particular without the permission of the legislature.<sup>220</sup>

The prime example of this was the so-called Dorr Rebellion in Rhode Island.<sup>221</sup> Sixty-five years after independence, Rhode Island continued to be governed under the charter of 1663, with popular agitation for constitutional change stymied by an intransigent legislature and a severely restricted franchise.<sup>222</sup> In response, in 1841, an extralegal People's Convention was called, with delegates selected by an expanded electorate.<sup>223</sup> The convention prepared a draft constitution, and then adjourned in October to allow for popular comment.<sup>224</sup> It reconvened in mid-November to finalize the constitution, and in December 1841, nearly 14,000 people ratified the People's Constitution.<sup>225</sup> In 1842, elections were held under the People's Constitution, and Thomas Dorr was elected governor.<sup>226</sup> These developments led the legislature to call a Landholders' Convention, which completed a new constitution in early 1842.<sup>227</sup> However, the document, which made some concessions to the Dorrites, was rejected in a close vote.<sup>228</sup> An election was

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*Reform*, 68 TEMP. L. REV. 1291 (1995) (discussing the decline in public engagement in the constitutional reform process).

<sup>220</sup> FRITZ, *supra* note 140, at 240. The preeminent nineteenth-century commentator on state constitutions, John Jameson, condemned the People's Convention, insisting that constitutional conventions were to operate under the authority of law and constitutions and not above them. Those that did not he termed revolutionary conventions. See JAMESON, *supra* note 148, at 6–9.

<sup>221</sup> See generally FRITZ, *supra* note 140, at 246–54 (discussing the Dorr Rebellion); see also ERIK J. CHAPUT, THE PEOPLE'S MARTYR: THOMAS WILSON DORR AND HIS 1842 RHODE ISLAND REBELLION (2013) (providing further background on the Dorr Rebellion).

<sup>222</sup> See FRITZ, *supra* note 140, at 246.

<sup>223</sup> *Id.* at 251–56.

<sup>224</sup> See CHAPUT, *supra* note 221, at 54.

<sup>225</sup> *Id.* at 76–77.

<sup>226</sup> *Id.* at 4.

<sup>227</sup> *Id.* at 53.

<sup>228</sup> *Id.* at 84–85.



then held under the old constitution, resulting in two state governments competing for authority.<sup>229</sup>

The state legislature under the old constitution called for another constitutional convention, which in 1843 proposed a revised constitution that offered concessions to the opponents of the 1663 charter.<sup>230</sup> This constitution was ratified, although many of Dorr's supporters boycotted the vote, so that it received less than half the votes that the People's Constitution had.<sup>231</sup> Dorr was imprisoned for his part in the attempted overthrow of the charter, and in *Luther v. Borden*,<sup>232</sup> his attempt to gain vindication before the U.S. Supreme Court failed. His compatriots may have lost the battle, but they did win the war, as the Rhode Island General Assembly would not have called the 1843 convention nor offered concessions on apportionment and the franchise absent the Dorr Rebellion.<sup>233</sup>

Yet the Rhode Island example stands out precisely because it is so atypical. The Dorrites had to circumvent the malapportioned and unrepresentative legislature because its members controlled the legal path to constitutional reform and refused to call a convention that might divest them of their privileges. But in no other state did the people attempt to circumvent malapportioned state legislatures, even when population shifts made the overrepresentation of rural interests particularly egregious, perhaps because state constitutions provided other means for seeking constitutional change or because extralegal efforts seemed futile or inappropriate in a mature political society. Whatever the explanation, the Supreme Court's "one person, one vote" rulings have removed the obstacle of unrepresentative legislatures, and the proliferation of constitutionally prescribed opportunities for popular constitutionalism makes resorting to extralegal means unnecessary

### XIII. THE PROPOSAL OF STATE CONSTITUTIONAL AMENDMENTS AND POPULAR CONSTITUTIONALISM

Only eight of the initial state constitutions specified procedures for amendment.<sup>234</sup> The Delaware and New Jersey constitutions declared certain key provisions altogether immune from alteration.<sup>235</sup> Several early nineteenth-century state constitutions likewise did not expressly provide for amendment, perhaps assuming that the legislature had the inherent power to call

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<sup>229</sup> *Id.* at 2–3.

<sup>230</sup> CHAPUT, *supra* note 221, at 2–3.

<sup>231</sup> *See id.* at 85.

<sup>232</sup> *Luther v. Borden*, 48 U.S. (7 How.) 1, 88 (1849).

<sup>233</sup> FRITZ, *supra* note 140, at 254.

<sup>234</sup> TARR, UNDERSTANDING, *supra* note 9, at 73–74. States without amendment procedures in the late eighteenth century included: New Jersey, New York, Virginia, North Carolina, Connecticut, and Rhode Island. *See id.* at 74.

<sup>235</sup> DEL. CONST. art. XXX (1776); N.J. CONST. art. XXII (1776).

conventions.<sup>236</sup> In some instances, the failure to include amendment provisions proved controversial: at a town meeting in Lexington, one person objected to the absence of an amendment provision in the proposed 1778 Massachusetts constitution, insisting it was necessary to “give satisfaction to the people; and be a happy means, under providence, of preventing popular commotions, mobs, bloodshed, and civil war.”<sup>237</sup>

Of those early constitutions that addressed the subject, some made constitutional change exceedingly difficult. For example, the Delaware Constitution of 1776 permitted amendments only with the concurrence of five-sevenths of the lower house of the legislature and seven-ninths of the legislative council. The Maryland Constitution of 1776 required that amendments twice receive a two-thirds vote in the legislature, with an election intervening.<sup>238</sup> But over time the processes of constitutional amendment changed to make it easier for the people to amend their constitutions by simplifying the procedures for amendment, by adding further modes of amendment, and by reducing the percentage of voters necessary to ratify amendments.

Initially, several states concluded that the same objections that applied to legislatures writing constitutions applied to their amending constitutions, and so the constitutions of Pennsylvania (1776), Vermont (1777), Georgia (1777), Massachusetts (1780), and New Hampshire (1784) expressly prohibited legislative amendment, relying instead on constitutional conventions.<sup>239</sup> Indeed, in New Hampshire the constitutional convention remained the only mechanism for proposing amendments until 1964. But with the development of popular ratification this objection lost much of its force, and over time roughly ninety percent of state constitutional amendments have been proposed through state legislatures.<sup>240</sup>

Many states initially required passage of proposed amendments in two successive legislative sessions with an intervening election, so that the people could by their votes express their views on proposed amendments, and fifteen states retain some form of that requirement today.<sup>241</sup> Although the two-session requirement does give the people a chance to render a verdict by unseating

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<sup>236</sup>New states admitted to the Union without amendment provisions in their constitutions included Ohio (1802), Louisiana (1812), Indiana (1816), and Illinois (1818). See FRITZ, *supra* note 140, at 384 n.24.

<sup>237</sup>KYVIG, *supra* note 50, at 30.

<sup>238</sup>DEL. CONST. art. XXX (1776); MD. CONST. art. LIX (1776). On constitutional amendment under early state constitutions, see KRUMAN, *supra* note 7, at 14, 81; see also LUTZ, POPULAR CONSENT, *supra* note 212, at 81.

<sup>239</sup>PA. CONST. § 47 (1776); VT. CONST. art. II, § XLIV (1777); GA. CONST. art. LXIII (1777); MASS CONST. art. X (1780); N.H. CONST. art. C (1784).

<sup>240</sup>Benjamin, *supra* note 199, at 181.

<sup>241</sup>DINAN, STATE CONSTITUTIONAL TRADITION, *supra* note 148, at 14. These states include: Delaware, Connecticut, Hawaii, Indiana, Iowa, Massachusetts, Nevada, New Jersey, New York, Pennsylvania, South Carolina, Tennessee, Vermont, Virginia, and Wisconsin. *Id.*

legislators, it also slows the effort to address pressing problems, particularly in states whose legislature only meets biennially. The remaining thirty-five states, confident that popular ratification ensures sufficient popular control, have dispensed with dual passage.<sup>242</sup> Yet considerable variation remains, as states may authorize proposing amendments by a supermajority in two legislative sessions, by supermajority in a single session, by a simple majority in two sessions, or by a simple majority in a single session.<sup>243</sup> In fact, four states—Connecticut, Hawaii, New Jersey, and Pennsylvania—have combined the alternatives, permitting proposal by simple majorities in two sessions or by an extraordinary majority in a single session.<sup>244</sup>

Most state constitutions also provide modes of amendment that do not require legislative approval, lest the people be stymied by legislators' hostility to changes that might adversely affect them. The earliest of these was the constitutional convention, which could be used for amendment, as well as for revision; most states permit limited, as well as unlimited, conventions. This only partially solved the problem, however, because a legislature that was adverse to proposing needed amendments might also resist calling a convention, particularly when the convention could be expected to remedy malapportionment resulting from population growth and population shifts in the state. Georgia sought to address the problem by obliging the legislature to call a convention if petitioned to do so by a majority of state's citizens in a majority of its counties.<sup>245</sup> Nonetheless, the costs of conventions and the intransigence of legislators prompted a search for other alternatives.

During the twentieth century, states multiplied modes of proposal and eased requirements for proposal and ratification, thereby facilitating constitutional amendment. The first reform was the constitutional initiative, now in use in eighteen states, which allows proposed amendments to be placed on the ballot without legislative approval.<sup>246</sup> The people are central throughout

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<sup>242</sup> *Id.*

<sup>243</sup> *Id.*

<sup>244</sup> KRUMAN, *supra* note 7, at 55–57; Benjamin, *supra* note 199, at 182.

<sup>245</sup> KYVIG, *supra* note 50, at 31. Even if the people could persuade the legislature to call a convention, the legislature controlled the apportionment of seats in the convention, making substantial reform difficult. For examples of this, see JOHN J. DINAN, *THE VIRGINIA STATE CONSTITUTION 244–48* (Oxford Univ. Press 2011) (2005); *see also* JOHN V. ORTH & PAUL MARTIN NEWBY, *THE NORTH CAROLINA STATE CONSTITUTION 199* (2d ed. 2013) (discussing how North Carolina apportioned seats at convention).

<sup>246</sup> These states include: Arizona; Arkansas; California; Colorado; Florida; Illinois; Massachusetts; Michigan; Mississippi; Missouri; Montana; Nebraska; Nevada; North Dakota; Ohio; Oklahoma; Oregon; and South Dakota. Two of these states—Massachusetts and Mississippi—employ what is known as the indirect initiative, which significantly increases the difficulty of amendment by initiative. In Massachusetts, an initiative proposal is not placed on the ballot unless it is passed by at least one-quarter of the state legislature in two consecutive sessions. In Mississippi, an initiative may be placed on the ballot without legislative action, but the legislature can place an amended version on the ballot alongside the initial proposal, and voters choose not only whether to ratify the initiative

the process of proposal and ratification. Individuals or groups within the populace decide what measures to propose, the people by signing or refusing to sign petitions determine whether proposals appear on the ballot, and at election the people determine whether the measures appearing on the ballot should be ratified. The constitutional initiative was initially adopted by Oregon in 1902, and twelve other states also adopted it during the Progressive Era.<sup>247</sup> Four more states adopted the constitutional initiative during the wave of constitution-making that followed the U.S. Supreme Court's "one person, one vote" rulings,<sup>248</sup> and in 1992, Mississippi adopted the constitutional initiative for a second time, seventy years after its supreme court had struck down its initiative as unconstitutional.<sup>249</sup> From 2008–2014, seventy-eight constitutional initiatives appeared on the ballot, and thirty-four of them were approved. Nonetheless, most amendments are proposed by state legislatures—during the same period, legislatures proposed 522 amendments, and these amendments enjoyed a far higher rate of success (382 ratified).<sup>250</sup>

Finally, in adopting its 1968 constitution, Florida provided for the convening in ten years and every twenty years thereafter of a Constitutional Revision Commission, which has the power to place proposals for amendment on the ballot without prior legislative scrutiny.<sup>251</sup> This thirty-seven-member commission—fifteen appointed by the governor, nine each by the house speaker and the senate president, and three by the chief justice of the supreme court—was authorized to address all constitutional issues and to propose constitutional changes directly to the people.<sup>252</sup> In 1998, Florida extended this model, creating by amendment a Taxation and Budget Reform Commission, which met in 2008 and meets every twenty years thereafter.<sup>253</sup> This commission, all of whose twenty-nine members are appointed by the governor, the speaker of the house, or the president of the senate, likewise is authorized

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proposal, but also between the two versions of the proposal. These requirements have made amendment by initiative difficult—Mississippi, for example, has had only two measures placed on the ballot via constitutional initiative, and of these failed adoption. See INITIATIVE & REFERENDUM INST., <http://iandrinstitute.org/Mississippi.htm> [<https://perma.cc/M257-P6RK>].

<sup>247</sup> *History of Initiative & Referendum in Oregon*, BALLOTPEDIA, [https://ballotpedia.org/History\\_of\\_Initiative\\_%26\\_Referendum\\_in\\_Oregon](https://ballotpedia.org/History_of_Initiative_%26_Referendum_in_Oregon) [<https://perma.cc/3J23-THJH>].

<sup>248</sup> The Supreme Court ruled that both houses of state legislatures should be apportioned on the basis of "one person, one vote" in *Reynolds v. Sims*, 377 U.S. 553, 588 (1964). On the impetus this ruling provided for state constitutional change, see Tarr, *Explaining*, *supra* note 178, at 28–29.

<sup>249</sup> *Power v. Robertson*, 93 So. 769, 777 (Miss. 1922).

<sup>250</sup> See *2014 Ballot Measures*, BALLOTPEDIA, [https://ballotpedia.org/2014\\_ballot\\_measures](https://ballotpedia.org/2014_ballot_measures) [<https://perma.cc/W8TJ-Z82L>] (discussing an overview of 2014 ballot measures). See generally DINAN, STATE CONSTITUTIONAL TRADITION, *supra* note 148 (compiling data of constitutional changes).

<sup>251</sup> FLA. CONST. art. XI, § 2.

<sup>252</sup> *Id.*

<sup>253</sup> *Id.* § 6.

to submit directly to the people amendments dealing with fiscal matters and budgetary processes.<sup>254</sup>

On initial inspection, the Florida commissions may appear to attenuate the role of the people in constitutional change, because the people play no direct role in choosing their members or crafting the proposals that are submitted for ratification.<sup>255</sup> Yet the adoption of these mechanisms for proposing amendments hardly signaled a rejection of popular constitutionalism. In addition to authorizing the two commissions to propose amendments, Florida continues to provide for proposal of amendments by the legislature, by constitutional initiative (added at the same time the Constitutional Commission was), and by constitutional convention. Moreover, the commissions have learned to consult public opinion in undertaking their deliberations. After all proposals were rejected in 1978, the Constitutional Revision Commission in 1998 supplemented its regular meetings with public hearings throughout the state to ensure that public opinion was reflected in their proposals.<sup>256</sup> Perhaps as a result, eight of its nine proposals were ratified by the voters.<sup>257</sup>

The proliferation of mechanisms for proposing amendments and the easing of requirements for proposing them has promoted a dramatic expansion of state constitutional amendment during the twentieth and twenty-first centuries. (Other factors as well have contributed to the decline of revision and the rise of amendment.)<sup>258</sup> Still, as noted, about ninety percent of state constitutional amendments are proposed by state legislatures.<sup>259</sup> Moreover, legislatively proposed amendments enjoy a considerably higher success rate than those proposed by other means, such as the constitutional initiative. Let us turn now to the ratification process for state constitutional amendments.

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<sup>254</sup> *Id.*

<sup>255</sup> See Robert F. Williams, *Is Constitutional Revision Success Worth Its Popular Sovereignty Price?*, 52 FLA. L. REV. 249, 249–73 (2000).

<sup>256</sup> Rebecca Mae Salokar, *Constitutional Revision in Florida: Planning, Politics, Policy, and Publicity*, in 1 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY: THE POLITICS OF STATE CONSTITUTIONAL REFORM 19, 19 (G. Alan Tarr & Robert F. Williams eds., 2006).

<sup>257</sup> For an analysis of the factors contributing to the commission's success, see *id.* at 26–51.

<sup>258</sup> See generally Gerald Benjamin & Thomas Gais, *Constitutional Conventionphobia*, 1 HOFSTRA L. & POL'Y SYMP. 53 (1996) (discussing the aversion to constitutional conventions in state constitutional change); Robert F. Williams, *Are State Constitutional Conventions Things of the Past? The Increasing Role of the Constitutional Commission in State Constitutional Change*, 1 HOFSTRA L. & POL'Y SYMP. 1 (1996) (discussing the increasing role of constitutional commissions in state constitutional change).

<sup>259</sup> See DINAN, STATE CONSTITUTIONAL TRADITION, *supra* note 148, at 1.

#### XIV. THE RATIFICATION OF STATE CONSTITUTIONAL AMENDMENTS AND POPULAR CONSTITUTIONALISM

The Connecticut Constitution of 1818 was the first state constitution to provide for popular ratification of amendments. Today, forty-nine states provide for popular ratification of state constitutional amendments, with the majority required for ratification regardless of how the amendment is proposed.<sup>260</sup> Forty-three states require ratification by a majority of those voting on the amendment, with Nevada requiring that voters approve amendments in two separate elections before they take effect.<sup>261</sup> However, some states make ratification more difficult. A few states impose a turnout requirement, similar to the requirement for a quorum in legislative sessions. For example, Hawaii requires that those voting on the amendment include either a majority of those voting in the general election or the equivalent of thirty percent of those registered if a special election is used,<sup>262</sup> while Nebraska requires that the majority for the amendment also exceed thirty-five percent of those voting in the election.<sup>263</sup> Minnesota<sup>264</sup> and Wyoming<sup>265</sup> require passage by a majority of those voting in the election. Tennessee requires that the vote take place at a general election in which the governor is to be elected, with passage of the amendment requiring a majority of those voting in the gubernatorial election.<sup>266</sup> Two states require passage by super-majorities: New Hampshire, a two-thirds vote,<sup>267</sup> and Illinois, either a majority of those voting in the election or three-fifths of those voting on the question.<sup>268</sup> Finally, New Mexico requires higher popular majorities to amend provisions on the franchise or education, than to pass other amendments.<sup>269</sup>

In some instances when ratification requirements have proved too burdensome, political forces sought to circumvent the requirements. At the dawn of the twentieth century, when ratification of amendments required a majority of those voting in the election, raising the possibility of defeat by ballot roll-off, political parties in Ohio made approval of amendments part of the party ballot, so that those voting a straight-party ticket would be counted as

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<sup>260</sup> See *Delaware Constitution*, BALLOTPEDIA, [https://ballotpedia.org/Delaware\\_Constitution](https://ballotpedia.org/Delaware_Constitution) [<https://perma.cc/W6DW-UHTT>]. Delaware is the lone exception. Its constitution can be amended by a two-thirds vote by two consecutive legislatures without any ratifying vote by the people. *Id.*

<sup>261</sup> NEV. CONST. art. XVI, § 1.

<sup>262</sup> HAW. CONST. art. XVII, § 1.

<sup>263</sup> NEB. CONST. art. III-4.

<sup>264</sup> MINN. CONST. art. IX, § 1.

<sup>265</sup> WYO. CONST. art. XX, § 1.

<sup>266</sup> TENN. CONST. art. XI, § 3.

<sup>267</sup> N.H. CONST. art. 100(c).

<sup>268</sup> ILL. CONST. art. XIV, § 1(c).

<sup>269</sup> N.M. CONST. art. XIX, § 1; see also Benjamin, *supra* note 199, at 185 (discussing substantive limits on and special majorities required for amending constitutions).

voting for ratification.<sup>270</sup> And in Illinois, constitutional reform forces, after many failed attempts, were able to adopt a “Gateway Amendment” that made it easier to amend the state constitution.<sup>271</sup> But for the most part, the easing of ratification requirements to facilitate amendment has occurred through normal constitutional channels. Thus, during the nineteenth century, constitutional conventions eased requirements in order to permit constitutional change in response to shifts in population within their states, and in the twentieth century, they did so to overcome entrenched interests and facilitate enactment of popular measures. So whereas at the outset of the twentieth century, two states required a supermajority for ratification and eleven required a majority of those voting in the election, by its conclusion only one state required a supermajority of voters to approve amendments, and only five required approval by a majority of voters in the election.<sup>272</sup>

#### XV. STATE CONSTITUTIONALISM AS POPULAR CONSTITUTIONALISM

The state experience with constitutional change displays a commitment to popular constitutionalism, reflected in institutions that give the people a direct role in constitutional creation and change, and in constitutional reforms designed to empower current popular majorities. Of course, not all the reforms enhanced the popular role in constitutional amendment—the people’s votes were determinative even before several were enacted—but they did tend to make it easier for a numerical majority of the people to work its constitutional will. Opponents sometimes objected that this easing of the requirements for amendment made their state constitutions not merely “flexible but absolutely wobbly” and worried that they “open[ed] the door to a pure and absolute democracy.”<sup>273</sup> But these objections were generally unavailing, because most states had constitutionally committed themselves to popular constitutionalism. Illustrative of the provisions reflecting this is Section 2 of the New Jersey Bill of Rights, found in both the state’s 1844 and 1947 constitutions: “All political power is inherent in the people. Government is instituted for the protection, security, and benefit of the people, and *they have the right at all times to alter or reform the same, whenever the public good may require it.*”<sup>274</sup> So insofar as efforts to facilitate constitutional change excited opposition, that opposition was based less on principled objections to popular constitutionalism than on an obdurate desire to hold onto partisan or regional advantages safeguarded by existing arrangements.

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<sup>270</sup> See STEVEN H. STEINGLASS & GINO J. SCARSELLI, *THE OHIO STATE CONSTITUTION: A REFERENCE GUIDE 44* (Oxford Univ. Press 2011) (2004).

<sup>271</sup> ANN M. LOUSIN, *THE ILLINOIS STATE CONSTITUTION: A REFERENCE GUIDE 23* (2010).

<sup>272</sup> DINAN, *STATE CONSTITUTIONAL TRADITION*, *supra* note 148, at 56–58.

<sup>273</sup> *Id.* at 55 (quoting Walter Wixson, a delegate to the 1907–1908 Michigan Convention).

<sup>274</sup> N.J. CONST. art. I, § 2 (emphasis added).

## XVI. CONCLUDING THOUGHTS

In *The Federalist No. 43*, James Madison contended that Article V struck the proper balance between “that extreme facility, which would render the Constitution too mutable; and that extreme difficulty, which might perpetuate its discovered faults[;]”<sup>275</sup> and certainly the Federal Constitution is easier to amend than its predecessor. But with a few notable exceptions, such as the two decades following ratification, Reconstruction, and the Progressive Era, formal constitutional change has proven difficult. One might attribute the infrequency of amendment to the wisdom of the Constitution’s drafters, and there is doubtless some truth to that, although the Founders themselves hardly viewed the Constitution as perfect.<sup>276</sup> But it is more likely that the infrequency of amendment is not a reliable indicator of constitutional change. Such change has occurred, but it has occurred outside the channels prescribed in Article V: through political practice, constitutional construction, and creative judicial interpretation.<sup>277</sup>

Indeed, one commentator has suggested that “[i]n its initial commitment to a written constitution and some version of rule-of-law constitutionalism at the national level and its later turn to complete reliance on non-Article V means to cope with significant constitutional change, the United States is unique.”<sup>278</sup> Insofar as this is the case, it raises legitimacy questions, and these have been endlessly debated. But for our purposes, the reliance on constitutional change outside Article V is important because of the questions it raises about whether the people’s authority over their Constitution has become attenuated. This requires an examination of how—and to what extent—the people continue to participate in constitutional change, constitutional interpretation, and defense of the Constitution against misinterpretation or unwanted change. Indeed, one may view the debate over advocates of popular constitutionalism and proponents of judicial supremacy—what Larry Kramer characterized as the

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<sup>275</sup> THE FEDERALIST NO. 43, *supra* note 28, at 278.

<sup>276</sup> As George Washington observed in a letter to Lafayette on February 7, 1788:

We are not to expect perfection in this world; but mankind, in modern times, have apparently made some progress in the science of government. Should that which is now offered to the People of America, be found on experiment less perfect than it can be made, a Constitutional door is left open for its amelioration.

<sup>29</sup> THE WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES 1745–1799, at 411 (John C. Fitzpatrick ed., 1939).

<sup>277</sup> See generally KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING (1999) (discussing constitutional construction); Sanford Levinson, *How Many Times Has the United States Constitution Been Amended?* (A) <26; (B) 26; (C) 27; (D) >27: *Accounting for Constitutional Change, in* RESPONDING TO IMPERFECTION, *supra* note 52 (discussing constitutional change outside of Article V channels).

<sup>278</sup> See Griffin, *supra* note 52, at 58.



key conflict—as fundamentally a dispute over who will control non-Article V constitutional change.<sup>279</sup>

Looking at state constitutions, one encounters a vastly different situation. As Alexander Hamilton reassured his readers in *The Federalist No. 21*, the Federal Constitution “could be no impediment to reforms of State Constitutions by a majority of the people in a legal and peaceable mode. That right would remain undiminished. The guaranty could only operate against changes to be effected by violence.”<sup>280</sup> As this Article has shown, state popular majorities have accepted Hamilton’s implicit invitation. The number of state constitutions testifies to the people’s involvement in constitutional creation and revision, and the frequency of amendment shows that the people continue to participate in constitutional change even after the taste for revision has abated. This is not to say that political practice, constitutional construction, and creative judicial interpretation do not also produce state constitutional change. One can, for example, view the “new judicial federalism” as an attempt to introduce at the state level the sort of interpretive creativity pioneered by the U.S. Supreme Court.<sup>281</sup> In addition, interstate differences in the frequency of state constitutional amendment and revision suggest that the balance between formal and informal change has varied from state to state and from era to era.

Despite these caveats, one can identify two distinct constitutional traditions in the United States. The federal constitutional experience is rooted in a Madisonian skepticism about constitutional change and about recurrence to the people to resolve constitutional disputes.<sup>282</sup> On occasion, as Bruce Ackerman has shown, constitutional crises have encouraged popular involvement in resolving constitutional conflicts, acting outside Article V.<sup>283</sup>

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<sup>279</sup> This is reflected in the subtitle of *The People Themselves*, that is, *Popular Constitutionalism and Judicial Review*. Kramer concludes his book by noting:

[A] strong case can be made for easing the difficulty of amendment[s] . . . [but] there is very little chance of revising the U.S. Constitution [for this purpose] . . . given the cumbersomeness of our existing amendment process [so w]e simply have to live with the jerry-built system of accountability that evolved for us in practice.

KRAMER, *THE PEOPLE THEMSELVES*, *supra* note 38, at 251 (footnote omitted).

<sup>280</sup> *THE FEDERALIST NO. 21*, at 140 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

<sup>281</sup> See TARR, *UNDERSTANDING*, *supra* note 9, at 162–70; see also ROBERT F. WILLIAMS, *THE LAW OF AMERICAN STATE CONSTITUTIONS* 113–34 (2009).

<sup>282</sup> Larry Kramer rightly insists Madison’s views on constitutional change are more complex than a simple reliance on *The Federalist Nos. 49* and *50* might suggest:

Yet it would be wrong to read Madison as repudiating or disavowing popular constitutionalism. Quite the contrary, as a careful reading makes clear, Madison—like Jefferson, like everyone else at the time—took the principle for granted. His quarrel was not with the idea of popular constitutionalism, but with how best to make it operational.

KRAMER, *THE PEOPLE THEMSELVES*, *supra* note 38, at 45.

<sup>283</sup> ACKERMAN, *FOUNDATIONS*, *supra* note 3, at 266–69.

But most constitutional change nationally has occurred with little direct popular participation. This is not to say that federal constitutional change has ignored popular views. Barry Friedman, among others, has argued that:

Ultimately, it is the people (and the people alone) who must decide what the Constitution means. Judicial review provides a catalyst and method for them to do so. Over time, through a dialogue with the justices, the Constitution comes to reflect the considered judgment of the American people regarding their most fundamental values. It frequently is the case that when judges rely on the Constitution to invalidate the actions of the other branches of government, they are enforcing the will of the American people.<sup>284</sup>

Nonetheless, there is a fundamental difference between “constitutional doctrine tend[ing] to track public opinion”<sup>285</sup> on high-salience issues on which the people have strong views, even if one assumes that the influence of the people on the Court is unidirectional, and ensuring, in Kramer’s words, that “the people retain authority in the day-to-day administration of fundamental law.”<sup>286</sup> How to do this remains an issue for popular constitutionalists. Kramer admits that “[m]obs were fine in their context and in their time, but no one, least of all me, is suggesting that this is a good way to go about doing things today.”<sup>287</sup> Rather, he describes his “goal” as “restor[ing] a true departmental system” as proposed by Madison and Jefferson.<sup>288</sup> But this solution is itself problematic—as Saikrishna Prakash and John Yoo have observed: “Departmentalism, whatever its merits, cannot have grand populist pretensions, for it says absolutely nothing about the people’s constitutional role.”<sup>289</sup> Nonetheless, Kramer’s embrace of departmentalism acknowledges that if popular constitutionalism is to be more than episodic at the federal level, there must be institutions through which the people can act.

The state constitutional experience, in contrast, reveals a Jeffersonian openness to constitutional change and a commitment to frequent recurrence to

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<sup>284</sup> BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* 367–68 (2010); see also JEFFREY ROSEN, *THE MOST DEMOCRATIC BRANCH: HOW THE COURTS SERVE AMERICA*, at xii (2006) (“[C]ourts for most of American history have tended to reflect the constitutional views of majorities.”). The analyses of Friedman and Rosen build on Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 280, 285 (1957) (“[T]he policy views dominant on the Court are never for long out of line with the policy views dominant among the lawmaking majorities of the United States.”).

<sup>285</sup> Tom Donnelly, *Making Popular Constitutionalism Work*, 2012 WIS. L. REV. 159, 162.

<sup>286</sup> Larry D. Kramer, *Popular Constitutionalism, Circa 2004*, 92 CALIF. L. REV. 959, 961 n.3 (2004).

<sup>287</sup> Kramer, *Response*, *supra* note 4, at 1175.

<sup>288</sup> *Id.* at 1180.

<sup>289</sup> Saikrishna Prakash & John Yoo, *Against Interpretive Supremacy*, 103 MICH. L. REV. 1539, 1545 (2005) (reviewing KRAMER, *THE PEOPLE THEMSELVES*, *supra* note 38).

the people, actively involving them in constitutional creation, revision, and amendment. To facilitate this, the states have developed institutions through which the people can regularly act, and where obstacles have arisen limiting popular involvement in constitutional matters, the states have modified their institutions to facilitate such involvement. As a result, whereas popular constitutionalism at the federal level is episodic, popular constitutionalism in the states is ongoing, and this gives a distinctive character to state popular constitutionalism.<sup>290</sup>

To understand this, consider once again how two of its leading advocates have portrayed popular constitutionalism at the federal level. Bruce Ackerman depicts popular constitutionalism as involving a mobilized populace acting when questions of fundamental constitutional import arise—thus “rarely, and under special constitutional conditions”—distinguishing sharply between such “higher lawmaking” and the ordinary politics of governmental action.<sup>291</sup> Larry Kramer too describes a normally quiescent populace that is roused to action by constitutional crises or by controversial governmental actions, such as the Alien and Sedition Acts, that threaten constitutional values.<sup>292</sup> Underlying both these portrayals is an understanding of constitutions as fundamental law, establishing a political framework and declaring matters of political principle rather than detailing the specifics of public policy. In short, constitutional politics—including popular constitutionalism—is differentiated from normal politics.

But few state constitutions fit that description. They do, of course, establish the institutions of state government and proclaim fundamental principles, but they likewise include detailed policy prescriptions and numerous restrictions, both substantive and procedural, on the exercise of state power.<sup>293</sup> In part, this reflects the legal character of state constitutions: because state legislative power is plenary, constitution-makers have had to specify the limits imposed on that power, and they have done so in great detail. In part, this reflects political choice: distrust of state legislatures has led the people in the various states to constitutionalize matters rather than leave them to legislative discretion.<sup>294</sup> In part, the availability of mechanisms for

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<sup>290</sup> See generally DONALD S. LUTZ, *PRINCIPLES OF CONSTITUTIONAL DESIGN* 148 (2006) (“[T]he amendment process—[is] a window into both the reality of political systems and the political theory or theories of constitutionalism underlying them.”). Donald Lutz has found that the length of constitutions correlates with the frequency of amendment, presumably because “the more provisions a constitution has, the more targets there are for amendment, and the more likely the constitution will be targeted because it deals with too many details that are subject to change.” Lutz, *Toward a Theory*, *supra* note 58, at 244.

<sup>291</sup> ACKERMAN, *FOUNDATIONS*, *supra* note 3, at 6. Ackerman sharply distinguishes in Chapter One this “dualist democracy” from the “monistic democracy” espoused by many commentators on the U.S. Constitution. See *id.* at 3–33.

<sup>292</sup> See KRAMER, *THE PEOPLE THEMSELVES*, *supra* note 38, at 3–5, 110, 189–90.

<sup>293</sup> See TARR, *UNDERSTANDING*, *supra* note 9, at 111–21.

<sup>294</sup> *Id.* at 125–26, 157–61.

constitutional change that do not involve the state legislature—ranging from constitutional conventions to the constitutional initiative to Florida’s commissions—has provided ready means for constitutionalizing policy choices. The fact that in most states it is not much harder to qualify constitutional initiatives for the ballot than to do so with statutory initiatives encourages initiative sponsors to choose the constitutional route, regardless of the narrowness of the policy being adopted.<sup>295</sup> In sum, state constitutions are not merely frameworks of government but also instruments of governance, and so state constitutional politics is not decisively different from ordinary state politics.

This in turn affects the operation of popular constitutionalism in the states. The number and frequency of proposed amendments means that most do not achieve the salience or generate the sustained public debate that Ackerman contemplates for dualist democracy. For the most part, popular constitutionalism in the states is a continuation rather than an alternative to ordinary politics. Is that enough?

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<sup>295</sup> See *Signature, Geographic Distribution and Single Subject (SS) Requirements for Initiative Petitions*, INITIATIVE & REFERENDUM INST., <http://www.iandrinstitute.org/docs/Almanac-Signature-and-SS-and-GD-Requirements.pdf> [<https://perma.cc/YVJ9-RA6D>].