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Representational Structures Through Which We the People Ratify Constitutions: The Troubling Original Understanding of the Constitution's Ratification Clauses

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TABLE OF CONTENTS

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INTRODUCTION

Judicial review is democratically suspect. It involves unelected courts nullifying statutes passed by the democratically elected legislative branch. The orthodox and principal justification for judicial review, however, advances a solidly pro-democratic counternarrative. Judicial review, it argues, does not involve unelected courts trumping the elected legislative branch, but rather "We the People" trumping our legislative agents. Legislatures are mere representatives. The popular sovereign is

the genuine article. When a court engages in judicial review, it merely enforces the law sanctioned by We the People over the law generated by the second best, the stand-in, the place holder, the legislative agents of We the People. First articulated by Alexander Hamilton in 1788, the orthodox pro-democratic justification for judicial review is older than the Constitution itself.[1] It remains vital today. Recently, it was reconfirmed and rejuvenated in Keith Whittington's much cited work arguing in favor of original understanding constitutional interpretation.[2]

This Article, however, raises new reasons to doubt the viability of the orthodox justification for judicial review as applied to the Constitution's twenty-seven amendments.[3] In examining the legitimacy of judicial review and, more broadly, the idea that the Constitution emanates from We the People, many constitutional scholars have failed to take into account crucial differences between ratification of the Constitution's main body and ratification of the amendments. That failure has obscured serious problems for the orthodox view as applied to the amendments. This Article exposes key reasons why the case for the orthodoxy becomes particularly difficult when applied to constitutional amendments. It does this by offering a detailed examination of the original understanding of Articles VII and V of the Constitution, the clauses specifying procedures for ratification of the Constitution's main body and amendments.

The orthodox justification for judicial review hinges on the notion that constitutional norms emanate from We the People. The Supreme Court

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[1] *See* THE FEDERALIST NO. 78, at 464, 467 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (arguing in favor of judicial review on grounds that courts enforcing constitutional norms over statutory norms amounts to courts enforcing norms emanating from People over norms emanating from legislative body); *see also* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803) (justifying judicial review as Court enforcing "the original and supreme will" of popular sovereign, expressed in Constitution, over the will of legislature, expressed in ordinary legislation); William Van Alstyne, *A Critical Guide to* Marbury v. Madison, 1969 DUKE L. J. 1, 16-17; Thomas E. Baker, *Exercising the Amendment Power to Disapprove of Supreme Court Decisions: A Proposal for a "Republican Veto,"* 22 HASTINGS CONST. L.Q. 325, 326-27 (1995) (suggesting Marshallian view that judicial review involves not courts trumping Congress, but constitutional norms generated by popular sovereign trumping conflicting norms generated by legislatures or administrative agencies).

[2] KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW (1999) (arguing in favor of original understanding constitutional interpretation and judicial review based on theory of potential popular sovereignty).

[3] The recent proposed federal constitutional amendment to limit the legal definition of marriage demonstrates that the use of constitutional amendments to strike down conflicting statutes is always of potential practical consequence. *See* Elisabeth Bumiller, *Bush Backs Ban In Constitution on Gay Marriage*, N.Y. TIMES, Feb. 25, 2004, at A1.

and constitutional law scholars have all but canonized the popular sovereignty pedigree of constitutional norms.[4] More modern Supreme Court statements have both reinforced the orthodoxy and, in a significant augmentation, extended it from the Constitution's main body to explicitly encompass constitutional amendments.[5] Scholarly commentary usually tracks the Court's pronouncements on the sources of constitutional textual norms.[6]

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[4] *See* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat) 304, 324 (1816) ("The constitution of the United States was ordained and established, not by the states in their sovereign capacities, but emphatically, as the preamble of the constitution declares, by 'the people of the United States.'"); *see also* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819); Ware v. Hylton, 3 U.S. (3 Dall.) 199, 236 (1796) ("There can be no limitation on the power of the people of the United States. By their authority . . . the constitution of the United States was established . . . ."); Chisolm v. Georgia, 2 U.S. (2 Dall.) 419, 470-71 (1793) ("[T]he people, in their collective and national capacity, established the present Constitution . . . .").

> [W]hen, "in order to form a more perfect union," it was deemed necessary to change this alliance [the Articles of Confederation] into an effective government, possessing great and sovereign powers, and acting directly on the people, the necessity of referring it to the people, and of deriving its powers directly from them, was felt and acknowledged by all. *The government of the Union, then . . . is, emphatically, and truly, a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit.*

McCullough, 17 U.S. (4 Wheat) at 404 (emphasis added).

[5] *See* Frontiero v. Richardson, 411 U.S. 677, 692 (1973) (Powell, J., concurring) ("If this Amendment [the proposed Equal Rights Amendment then under consideration by the state legislatures] is duly adopted, *it will represent the will of the people* accomplished in the manner prescribed by the Constitution [in Article V].") (emphasis added); Dillon v. Gloss, 256 U.S. 368, 374 (1921); Hawke v. Smith, 253 U.S. 221, 226-27 (1920) ("Both methods of ratification [of amendments under Article V], by Legislatures or conventions, call for action by deliberative assemblages representative of the people, *which it was assumed would voice the will of the people.*") (emphasis added).

> [T]he people of the United States, by whom the Constitution was ordained and established, have made it a condition to amending that instrument that amendment be submitted to representative assemblies in the several states and be ratified by three-fourths of them. The plain meaning of this is (a) that *all amendments must have the sanction of the people of the United States, the original fountain of power, acting through representative assemblies, and (b) that ratification by these assemblies in three-fourths of the states shall be taken as a decisive expression of the people's will and be binding on all.*

Dillon, 256 U.S. at 374 (emphasis added).

[6] *See* Edwin S. Corwin, *The 'Higher Law' Background of American Constitutional Law*: 42 HARV. L. REV. 149, 151-52, 409 (1928-29).

> [I]t was 'ordained' by 'the people of the United States'. . . . [T]he Constitution of the United States . . . is assumed to have proceeded immediately from the people . . . . [I]n the American written constitution, higher law at last attained a form which made possible the attribution to it of an entirely new sort of validity, the

Despite judicial and scholarly incantations, the orthodox view has always faced nagging doubts. The Constitution's main body was not ratified via direct referendum-style consultation with We the People. In accord with Article VII, the Constitution was ratified by specially organized representative bodies, or conventions, in each ratifying state. Anytime the sanction of the popular sovereign is mediated through a representational structure, questions will arise. Did the Article VII ratifying conventions really operate as representational structures through which We the People ratified the Constitution's main body? Or were they a ruse of elites who appropriated the language of popular sovereignty in order to engineer ratification of their centralizing constitution against the will of We the People?[7]

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validity of a statute emanating from the sovereign people.

Id. Recent scholarly work reinforces or reflects Corwin's orthodox articulation, and often applies the orthodoxy to constitutional amendments. *See* BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 69, 267 (1991) [hereinafter ACKERMAN, FOUNDATIONS]; BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 15 (1998) (explaining that Article V authorizes constitutional amendment "in the name of the People"); WAYNE D. MOORE, CONSTITUTIONAL RIGHTS AND POWERS OF THE PEOPLE 4-5, 58-59, 77-84 (1996) (discussing idea that We the People are authors of Constitution and how We the People act "through" legislative bodies to amend Constitution under Article V); JOHN R. VILE, CONTEMPORARY QUESTIONS SURROUNDING THE CONSTITUTIONAL AMENDING PROCESS 114-15 (1993) ("Previous commentators on the amending process understood that, when it came to amending the Constitution, sovereignty [of the people] would not be exercised by . . . the people acting through the requisite majorities established in Article V."); Akhil Reed Amar, *The Supreme Court, 1999 Term-Forward: The Document and the Doctrine*, 114 HARV. L. REV. 26, 26, 29, 36, 38, 43, 49, 84-85 (2000); Brendon Troy Ishikawa, *Everything You Always Wanted to Know About How Amendments Are Made, But Were Afraid to Ask*, 24 HASTINGS CONST. L.Q. 545, 555 (1997) ("Both the Preamble and Article V articulate a form of government that derives its authority from the people through the actions of state constitutional conventions or legislatures."); Richard S. Kay, *The Creation of Constitutions in Canada and the United States*, 7 CAN.-U.S. L.J. 111, 132-36 (1984); James Grey Pope, *An Approach to State Constitutional Interpretation*, 24 RUTGERS L.J. 985, 988 n.24 (1993) ("In American constitutionalism, the question of legitimacy is answered by the claim that the Constitution is law because 'We the People,' exercising our popular sovereignty, made it law."); Lawrence Sager, *The Incorrigible Constitution*, 65 N.Y.U. L. REV. 893, 900 (1990).

[7] Courts and most constitutional scholars operate under the presumption that the main body of the Constitution does in fact possess a legitimate popular sovereignty pedigree, and that the Article VII ratification conventions did embody We the People. A hard to ignore cluster of constitutionalists, however, persistently disagrees. These scholars doubt that ratification by Article VII conventions conferred a legitimate popular sovereignty pedigree on the main body of the Constitution. *Compare* ACKERMAN, FOUNDATIONS, *supra* note 6, at 201-02 (suggesting that historians have moved away from Beardian approach to founding), *and* ALFRED H. KELLY ET AL., THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT 115 (6th ed. 1983) ("Beard's thesis in its original formulation has long since been disproved."), *with* Pope, *supra* note 6, at 994 n.54 ("The facile tendency to assert that Beard has been conclusively 'refuted' is groundless."). Emblematic of this controversy is the debate over electoral participation in the ratification

The orthodox view has always had a surefire rejoinder against such doubts. As we will see, the historical record reveals that during the founding period all sides in the debate over the Constitution sincerely believed that ratification of the Constitution's main body by Article VII conventions would stamp the Constitution with an unimpeachable popular sovereignty pedigree. Thus, even if some may question whether We the People actually ratified the Constitution, there is no doubt that those who drafted, debated, and voted on the Constitution's main body believed that ratification via Article VII's ratification conventions would be tantamount to ratification by We the People. Reliance on this original understanding rationalizes judicial review where a clause in the main body of the Constitution trumps a statute enacted by Congress. Such an understanding gives courts plausible cover for maintaining that judicial review of this kind is not the anti-democratic act of an unelected court trumping an elected Congress, but rather the pro-democratic phenomenon of We the People trumping the legislative agents.[8]

This original intent-based justification for judicial review runs into serious problems, however, when we turn to the Constitution's twenty-seven amendments. Unlike the main body of the Constitution, the amendments (save one) were not ratified by conventions of the sort used to ratify the Constitution's main body.[9] Instead, pursuant to Article V,

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process. On one side, Charles Beard pointed to very low turnout as evidence of the dim view of the Founding. *See* CHARLES BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION 239-52 (1939) (concluding that less than one-fifth of population possessed right of suffrage). On the other hand, proponents of a more optimistic view of the Founding effectively rebut the Beardian interpretation of low electoral participation. *See* ROBERT E. BROWN, CHARLES BEARD AND THE CONSTITUTION: A CRITICAL ANALYSIS OF "AN ECONOMIC INTERPRETATION OF THE CONSTITUTION" 197 (1956) (arguing that unpropertied persons were not excluded, and that Beard's low turnout figures are misleading because they are given in terms of entire population as opposed to adult males); Bruce Ackerman & Neal Katyal, *Our Unconventional Founding*, 62 U. CHI. L. REV. 475, 564-65 n.255 (1995) (admitting that, even setting aside exclusion of females and non-whites, turnout for elections of delegates to various state ratifying conventions was "unspectacular," but citing DINKIN, VOTING IN REVOLUTIONARY AMERICA: A STUDY OF ELECTIONS IN THE ORIGINAL THIRTEEN STATES, 1776-1789 (1982), for uncharacteristically high rates of enfranchisement of white males for elections of delegates to ratifying conventions); Amar, *supra* note 6, at 35 (arguing that electorates which chose delegates to state ratifying conventions were broadest and most inclusive in history); Akhil Reed Amar, *A Few Thoughts on Constitutionalism, Textualism, and Populism*, 65 FORDHAM L. REV. 1657, 1657 (1997) (same).

[8] This original-understanding based rationalization of judicial review does not dispel all controversy regarding judicial review. It does, however, offer a plausible justification for judicial review.

[9] The Twenty-First Amendment, repealing Prohibition, is the only amendment that was ratified by conventions rather than by ordinary state legislatures. JOHN R. VILE, ENCYCLOPEDIA OF CONSTITUTIONAL AMENDMENTS, PROPOSED AMENDMENTS, AND AMENDING ISSUES, 1789-1995, at 319 (1996).

the amendments were ratified by a far more pedestrian kind of representational structure — ordinary state legislative bodies. The same kinds of questions that haunt ratification of the Constitution's main body apply to the amendments. Did the state legislatures that ratified the amendments operate properly as representational structures through which We the People acted to ratify the amendments? Or did they ratify the amendments absent any evidence of a popular consensus sanctioning ratification, or even in contradiction to a popular consensus opposing ratification?[10] Against lingering doubts over the popular sovereignty pedigree of the Constitution's main body, the orthodoxy relies on its trump card: the founding generation sincerely believed that ratification of the main body of the Constitution via Article VII conventions would be tantamount to ratification by We the People. Ultimately, however, this argument cannot dispel doubts over the popular sovereignty pedigree of the amendments.

As this Article demonstrates, the founding generation did *not* conclude that ratification of constitutional amendments by ordinary state legislatures would be tantamount to ratification by We the People. As such, judicial review often lacks a plausible original understanding-based justification. Thus, when the Supreme Court uses an amendment of questionable current majoritarian support to strike down a recently passed and majoritarian statute, the Court has no original understanding-based grounds to claim that nothing more than We the People trumping legislative agents has occurred.

A complete analysis begins with the original understanding of conventions versus legislatures as representational structures though which the popular sovereign could ratify constitutional norms. The founding generation uniformly believed that only conventions, and not ordinary legislative bodies, were capable of embodying the popular sovereign for purposes of ratifying constitutional norms. Constitutional norms ratified by conventions would count as constitutional norms ratified by We the People. Constitutional norms ratified by ordinary legislatures, however, would lack a legitimate popular sovereignty pedigree. Based on this reasoning, the drafters of Article VII selected

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[10] Some amendments appear to have been ratified prior to the formation of a popular consensus sanctioning ratification, and even in contradiction to a developed popular consensus opposing ratification. *See* Carlos E. González, *Popular Sovereign Generated Versus Government Institution Generated Constitutional Norms: When Does a Constitutional Amendment Not Amend the Constitution?*, 80 WASH. U. L.Q. 127, 186 (2002) (arguing that several constitutional amendments have been ratified under conditions that cast serious doubt over their popular sovereignty pedigree).

ratification by specially elected conventions and pointedly rejected ratification by ordinary legislative bodies.[11] When it came time to draft and debate Article V, however, the Framers did something antagonistic to their faith in conventions and suspicion of legislatures: they included a clause in Article V permitting ratification of constitutional amendments by ordinary legislatures.[12]

How are we to mesh the original understanding that only conventions could embody We the People for purposes of ratifying constitutional norms with the fact that Article V permits legislative ratification of amendments? Conventional wisdom has uncritically assumed that original understanding must have maintained that ratification of amendments by legislatures would be tantamount to ratification by We the People.[13] Close examination of the historical record, however, reveals no substantial evidence to support this assumption. The most plausible and supported reading of the historical record is that the founding generation simply did not confront or decide one way or another whether legislatively ratified constitutional amendments would bear a legitimate popular sovereignty pedigree.[14]

The historical record is compatible with three possible understandings of the sources of constitutional amendments.[15] First, the historical record does not completely rule out the possibility that some in the founding era may have privately believed that legislatively ratified constitutional amendments would bear a legitimate popular sovereignty pedigree. Such beliefs, however, were never vocalized or memorialized. Moreover, as we will see, there are strong reasons to conclude that such thinking was all but nonexistent, and certainly was not a catalyst driving Article V's allowance for legislative ratification of amendments. If this

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[11] *See infra* Part I.B.1.

[12] *See infra* Part II.B.1.

[13] Though Articles VII and V both regulate the ratification of constitutional norms, courts and scholars have never viewed them together. As a result, courts and scholars have failed to see why, contrary to orthodox assumptions, original understanding did not maintain that legislatively ratified amendments would emanate from We the People.

[14] On the one hand, original understanding clearly maintained that only conventions could ratify constitutional norms in the name of We the People. On the other hand, Article V permitted legislative ratification of constitutional amendments. The magnitude of this incongruity cannot be understated. Permitting legislative ratification of constitutional amendments may constitute the Philadelphia drafting convention's biggest unintentional blunder. Only after the Constitution had been ratified, when the first Congress began to debate the set of proposed amendments that would become the Bill of Rights, was the blunder exposed.

[15] Two of the three, including the most plausible and supported reading of the record, are at odds with the orthodox notion that constitutional amendments emanate from or enjoy the sanction of the popular sovereign.

were civil litigation, the evidence supporting the allegation that the founding generation concluded that legislative ratification of constitutional amendments would be tantamount to ratification by We the People would be insufficient to send the case to the jury.[16]

The historical record also does not rule out a second possible original understanding. The record is compatible with the idea that those who drafted and ratified Article V contemplated that amendments ratified by ordinary legislatures would *not* count as ratified by We the People. Lacking a legitimate popular sovereignty pedigree, legislatively ratified amendments would be hierarchically inferior to constitutional norms ratified by We the People embodied in conventions. This, of course, is the exact opposite of the orthodox idea that all amendments emanate from We the People.

Finally, and surprisingly, the historical record is compatible with the notion that there was no original understanding on Article V's allowance for legislative ratification of amendments. In other words, the founding generation simply did not squarely consider or determine one way or another whether legislatively ratified amendments would count as ratified by We the People. The presence of an option for legislative ratification of constitutional amendments does not signal that the founding generation had concluded that legislatures were capable of speaking as We the People embodied for purposes of ratifying amendments. It instead signals that the drafters and ratifiers of Article V had unwittingly created an amendment process at odds with the widely held belief that only conventions could speak as We the People.[17] Quite

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[16] *See, e.g.*, Bailey v. County of Georgetown, 94 F.3d 152, 157 (4th Cir. 1996) ("A motion for directed verdict may be defeated, and an issue submitted to the jury, only when that issue 'is supported by substantial evidence which shows a probability and not a mere possibility of proof.'"); E. Auto Distrib. v. Peugeot Motors of Am., Inc., 795 F.2d 329, 335 (4th Cir. 1986) ("A mere scintilla of evidence is insufficient to defeat a motion for directed verdict. Rather, an issue can only be submitted to a jury when it is supported by substantial evidence which shows a probability and not a mere possibility of proof.") (citation omitted).

[17] As detailed herein, practical realities, rather than ideological or theoretical commitments, probably explain the inclusion of the legislature ratification clause in Article V. The inclusion of an option for legislative ratification of constitutional amendments does not suggest that the founders had suddenly abandoned their opposition to legislatures as representational structures through which We the People ratify constitutional norms. It instead evidences the effects of time pressure, fatigue at the end of the convention, and a realization that issues other than the popular sovereignty pedigree of hypothetical amendments to a constitution that itself had not even been submitted for ratification, were of much greater practical and immediate import. A side-by-side comparison of the debates over Articles VII and V reveals contrasting facets of the founders' thinking. The debate over Article VII methods for ratifying new constitutional norms was exceptional, principled, thorough, and enlightened. The debate over Article V's mechanism for

obviously, this third reading of the historical record is not helpful to the orthodox notion that all amendments emanate from the popular sovereign.

When the evidence for each of the three possible versions of original understanding is compared, the body of evidence substantiating the third version is manifestly more powerful than that favoring the first two. Neither of the first two possible readings finds any meaningful support in the historical record. As such, they can never rise above the rank of speculative possibilities. The third reading of original understanding, however, is supported by a constellation of mutually reinforcing circumstantial evidence from the drafting, debate, and ratification of the Constitution, and strong direct evidence from the early post-ratification period.

The evidence from the early post-ratification period may be the most important and intriguing. Just one year after ratification of the Constitution, the First Congress began debate on the set of amendments that would become the Bill of Rights. As introduced in the House of Representatives, the proposed amendments were to be ratified by ordinary legislatures. Congressman Roger Sherman, who had also been a delegate to the Philadelphia drafting convention, opened the House of Representatives debate on the amendments with a bombshell argument: if ratified by legislatures rather than conventions, the proposed amendments, unlike the convention-ratified main body of the Constitution, would lack a popular sovereignty pedigree and would, therefore, be inferior to the main body of the Constitution.[18]

Sherman's bombshell argument and the debate it provoked strongly supports the thesis that the founding generation did not form a judgment one way or another on whether legislative ratification of amendments would be tantamount to ratification by We the People. Had the founding generation considered and formed an understanding on this issue, Sherman's bombshell would have been a dud and been quickly dismissed as a dead-end issue delaying debate over the substance of the Bill of Rights. The opposite occurred. Sherman's bombshell sent the House into a quandary of extended and intense

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ratification of constitutional amendments, however, shows that haste and expedience were the order of the day. One really cannot appreciate the inattention marking the Article V debate unless one simultaneously understands the extensiveness and thoroughness of the Article VII debate.

[18] Perhaps because previous work has not viewed Articles VII and V together, Sherman's bombshell argument has not received sufficient attention from constitutional scholars.

debate. Some sided with Sherman's thinking. Others vigorously opposed the Sherman thesis. The very fact that an extended and vigorous debate occurred substantiates the notion that the question of whether legislative ratification of amendments would be tantamount to ratification by We the People had not been answered during the drafting, debate, and ratification of the Constitution. There simply was no original understanding on this question.[19]

Inclusion of an option for legislative ratification in Article V left not only the First Congress, but also future generations, with a constitutional Gordian knot. As Sherman framed the issue, if ordinary legislatures are incompetent to ratify constitutional norms in the name of We the People, how can legislatively ratified amendments have the same constitutional force as the main body of the convention-ratified Constitution? Framed in terms of judicial review, if the original understanding does not support the notion that legislatively ratified constitutional amendments ipso facto possess a popular sovereignty pedigree, what justifies allowing an amendment to trump a statute? The Gordian knot creates tremendous problems for the legitimacy of judicial review as applied to constitutional amendments. There may be ways to justify judicial review involving legislatively ratified amendments that do not depend on the orthodox assumption that all constitutional amendments bear a popular sovereignty pedigree.[20] However, reliance on the assumption that original understanding maintained that all amendments emanate from We the People is no longer an option.

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[19] In addition, the debate following on Sherman's bombshell confirms that the Constitution's drafters blundered in permitting ratification of constitutional amendments by ordinary legislatures. On the one hand, the Constitution's drafters were committed to the idea that only conventions, and not legislatures, could ratify constitutional norms in the name of We the People. Based on this belief, the drafters of Article VII studiously avoided ratification of the Constitution's main body by legislatures and instead insisted on ratification by conventions. On the other hand, the Constitution's drafters included a clause in Article V permitting ordinary legislatures to ratify constitutional norms. It was not until Article V was first put to use that any serious thought was given to its problematic legislature ratification clause.

[20] Here is one possibility: The popular sovereignty pedigree of constitutional amendments might be rooted in something other than ratification in compliance with Article V procedures. It could, for example, be rooted in evidence that the electorate had formed a consensus in support of ratification of some particular amendment. The social fact of a popular supporting consensus, and not the mere legal event of ratification by state legislatures, would be the thing that brands the amendment with a legitimate popular sovereignty pedigree, and justifies a court using that amendment to trump a conflicting statute. This Article focuses on the problems with the orthodox justification for judicial review as applied to constitutional amendments. I reserve for future work an exploration of alternatives to the orthodox view that might work as a substitute for the orthodox justification.

The remainder of the Article is organized as follows: Part I offers a thorough examination of the original understanding of Article VII and ratification of the Constitution's main body. Part II turns to Article V and the sparse and confused original understanding of the sources of constitutional amendments. Part III parses the congressional debate over legislative ratification of the Bill of Rights pursuant to Article V. Part IV offers concluding remarks.

I. REPRESENTATIONAL STRUCTURES THROUGH WHICH WE THE PEOPLE RATIFY CONSTITUTIONS: THE ORIGINAL UNDERSTANDING OF ARTICLE VII

Article VII

> The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the states so ratifying the Same.[21]

The original understanding of Article VII of the Constitution is relatively uncontroversial. American constitution-builders of the Founding period almost universally espoused the idea that constitutional norms should emanate from the popular sovereign.[22] Exactly how the People might ratify constitutional norms, however, was an issue of considerable uncertainty in the eleven years leading up to the drafting of the federal Constitution in 1787. In adopting Article VII, the drafters of the Constitution offered an unequivocal statement on the representational structures that could legitimately speak as We the People for purposes of constitution ratification. Only specially elected, popular constituent conventions, and not ordinary legislatures, were thought of as an adequate medium through which the sovereign People could sanction and ratify constitutional norms.

A. The Revolutionary Era Understanding of Constitution Ratification

When the delegates to the Constitutional Convention convened in Philadelphia in May of 1787, they brought with them a body of accumulated experience and learning regarding higher law norms. Higher law norms limiting and defining government authority had been developing both in and out of colonial America for some time.[23] The true

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[21] U.S. CONST. art. VII.

[22] *See infra* notes 26-27 and accompanying text.

[23] Professor Kyvig provides an excellent brief overview of the development of constitutionalism. *See* DAVID E. KYVIG, EXPLICIT AND AUTHENTIC ACTS: AMENDING THE

explosion of constitutionalism in America, however, would wait until the policy-forcing events of the American Revolution in the 1770s.[24] By the time the Revolution rolled around, the idea that higher law norms framed the institutional structure of government and defined its powers could boast a long genealogy.[25] Definitive answers to several questions, however, remained. Who is sovereign? Who creates constitutional norms? By what processes are constitutional norms to be enacted? The first two questions found quick and decisive answers in the Revolutionary era. During that period, Americans cleanly rejected the British notion that sovereignty rested in Parliament, and, instead, firmly embraced the republican notion that sovereignty rests with the People.[26] Moreover, they had come to believe that if sovereignty rests with the People, then higher law constitutional norms should be sourced in the

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U.S. CONSTITUTION, 1776-1995, at 1-18 (1996). In England, higher law norms trace their lineage to the Magna Carta in 1215. *See id.* at 4. The seventeenth and early eighteenth centuries, however, finally saw the emergence of "a clear and stable" set of higher constitutional law norms in England. *See id.* at 5-11 (naming 1628 Petition of Right, 1653 Instrument of Government, 1689 Bill of Rights, and 1701 Act of Settlement, as composing meaningful higher law constitutional order); *see also* WILLI PAUL ADAMS, THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA 8-10 (1980) (stating that Bill of Rights of 1689, Act of Toleration of 1689, Triennial Act of 1694, Act of Settlement of 1701, and Septennial Act of 1716, were important components in British constitution). In the American colonies, written higher law norms were present from the very beginning in the form of colonial charters and the Mayflower Compact. These pubescent higher law norms were augmented through the seventeenth and eighteenth centuries with increasing concessions of autonomy and self-governance extended to colonists in the proprietary colonies. *See* KYVIG, *supra* at 11-14; A. E. Dick Howard, *Rights in Passage: English Liberties in Early America*, *in* THE BILL OF RIGHTS AND THE STATES 3-9 (Patrick T. Conley & John P. Kaminski eds., 1992) (reviewing early American higher law in form of colonial charters).

[24] Gordon Wood lists "the modern idea of a constitution as a written document, the device of a convention for creating and amending constitutions, the process of popular ratification, and the practice of judicial review" as the ultimate legacy of the 1770s-1780s American explosion in constitutionalism. Gordon S. Wood, *Forward: State Constitution Making in the American Revolution*, 24 RUTGERS L.J. 911, 926 (1993).

[25] *See* ADAMS, *supra* note 23, at 18-19 n.29 (referring to colonial charters as constitutional documents limiting authority of colonial assemblies, and enumerating documents composing colonial charter/constitution); DONALD S. LUTZ, THE ORIGINS OF AMERICAN CONSTITUTIONALISM 98-99 (1988) (enumerating elements of American colonial constitutional tradition that had developed by 1776).

[26] *See* ADAMS, *supra* note 23, at 14-17, 63 (explaining British theory that its power over colonies rested on notion of parliamentary sovereignty, that Revolutionary era Americans began to question parliamentary sovereignty as basis for British authority in colonies, and that by time of revolution "popular sovereignty had emerged as the basic principle of legitimate government."); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 182 (1969) ("It was axiomatic by 1776 'that the only moral foundation of government is, the consent of the people.'").

People.[27]

The crucial question of exactly *how* the popular sovereign was to exercise its right to frame higher law constitutional norms, however, would take a bit more time to sort out.[28] The standard historiography holds that Revolutionary era Americans found ordinary, standing legislative bodies an adequate medium through which the people could act in their sovereign capacity to ratify constitutional norms.[29] In the wake of crumbling royal authority and after revocation of the colonial charters, in May 1776 the Continental Congress urged the colonies to establish new constitutions. In 1776 and 1777, provincial legislative bodies in most of the newly independent states wrote and ratified new constitutions using procedures similar to those used to draft and approve statutes.[30] Thus, in the early period, though constitutions were

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[27] *See* ADAMS, *supra* note 23, at 139 (explaining that Americans in Revolutionary period not only thought of People as sovereign, but also created institutional mechanisms by which People could make and amend constitutions); MARC W. KRUMAN, BETWEEN AUTHORITY AND LIBERTY: STATE CONSTITUTION MAKING IN REVOLUTIONARY AMERICA 20-33 (1997) ("Virtually all agreed [in the Revolutionary Era] that constitution making required special popular sanction."); KYVIG, *supra* note 23, at 20-21 (explaining British idea that Parliament could alter constitutional norms, and American counter arguments that sovereignty rests with People, that constitutions should express will of popular sovereign, and that constitutions, therefore, ought not be alterable by Parliament).

[28] *See* ADAMS, *supra* note 23, at 63 ("But how was this principle [popular sovereignty] to be realized in practice? . . . Somehow 'the people' had to be the originators of the basic law of the land."); KYVIG, *supra* note 23, at 15 ("An abstract concept of the sovereign people's power to set the terms of their constitution was one thing; how that power was actually exercised was quite another."); Wood, *supra* note 24, at 921 ("Everywhere [during the Revolutionary period] there was confusion over how fundamental law was to be created and maintained. What institution or authority could create it?").

[29] *See* ADAMS, *supra* note 23, at 63-64 (explaining that ordinary legislative bodies "considered themselves to be 'the full and free representation of the people' and therefore were thought legitimate makers and ratifiers of the Revolutionary Era state constitutions"); KYVIG, *supra* note 23, at 23 (despite prevalent notion that constitutions should be based on consent of People, popularly elected provincial legislatures did not feel need to seek explicit public sanction for constitutions they created); WOOD, *supra* note 26, at 274, 306 (explaining that to Revolutionary Americans, ordinary legislatures, "legitimate spokesmen for the people," were competent to make and alter constitutions); Ronald M. Peters, *The Written Constitution, in* FOUNDING PRINCIPLES OF AMERICAN GOVERNMENT 171 (George J. Graham, Jr. & Scarlett G. Graham eds., 1977) ("The provincial assemblies assumed it to be proper for them to adopt new constitutions . . . .").

[30] *See* DONALD S. LUTZ, POPULAR CONSENT AND POPULAR CONTROL: WHIG POLITICAL THEORY IN THE EARLY STATE CONSTITUTIONS 60 (1980) (explaining that political theory of Revolutionary era held that members of legislature "were not really distinguished from the people" and that early state constitutions were "written by the legislature"); WOOD, *supra* note 26, at 307 ("In all of the states in 1776 therefore (except in Pennsylvania where the circumstances were peculiar) the constitutions were created by the legislatures, when they were still sitting, or by Revolutionary congresses considered to be legally imperfect legislatures, although still representative of the people."); *see also* ADAMS, *supra* note 23, at

already considered higher law and, therefore, distinct from ordinary statute and common-law principles,[31] they were created by the same legislative bodies and the same processes used to create ordinary legislation.[32]

63-86 (detailing how, in varying ways, legislative assemblies in newly independent states of New Hampshire, South Carolina, Virginia, New Jersey, Connecticut, Rhode Island, Delaware, Pennsylvania, Maryland, North Carolina, Georgia, and New York either transformed existing colonial charters into effective state constitutions, or ratified new state constitutions in name of sovereign People). Only Massachusetts, which did not ratify a constitution until 1780, avoided ratification by an ordinary legislative body. *Id.* at 86-93.

[31] *See* Wood, *supra* note 24, at 917-21 (explaining that, in contrast to English view of constitutional norms as amalgam or assemblage of ordinary norms regulating state, during 1760s and 1770s Americans had come to see constitutional norms as different from and superior to ordinary legislation).

[32] *See* KRUMAN, *supra* note 27, at 20-33 (citing Donald Lutz, Gordon Wood, Willi Paul Adams and J.R. Pole as exponents of standard historiography, and stating that "historians treat the framing of . . . [Revolutionary era] state constitutions as the work of legislatures"); JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 97 (1996) ("All but two of the eleven constitutions written in 1776 and 1777 were drafted by the provincial conventions that acted as surrogate legislatures during the Revolutionary interregnum."). Some have suggested that the issue of the Revolutionary era conception of how the sovereign People were to frame constitutional norms was decided more by the exigencies of the circumstances than deep theoretical convictions. Having declared independence from England and entered into war, the new states needed quickly to establish a new constitutional order. The ordinary standing state legislative bodies stepped into the breach. These bodies drafted and enacted new constitutions by processes essentially indistinguishable from those used to pass ordinary statutes. *See* KRUMAN, *supra* note 27, at 22 (stating that creation of state constitutions by legislatures was largely a result of "the exigencies of war"); Charles S. Hyneman, *Republican Government in America: Its Idea and Its Realization*, *in* FOUNDING PRINCIPLES OF AMERICAN GOVERNMENT 16-17 (George J. Graham, Jr. & Scarlett G. Graham eds., 1977) (referring to impracticability of seeking direct popular approval of Revolutionary era state constitutions and need to "meet an emergency . . . in a hurry"). From this perspective, perhaps Revolutionary era Americans ought not be treated as having made a definitive statement on the processes or representational structures through which the popular sovereign can generate constitutional norms. Still, Revolutionary era Americans considered ordinary legislative bodies capable of embodying the sovereign People in government.

> [M]any Americans in 1776 were hopeful and confident that their representative assemblies . . . could be fair and suitable embodiments of the people-at-large. The elected members would be, in other words, 'an exact epitome of the whole people,' 'an exact miniature of their constituents,' men whom the people could trust to represent their interests.

See WOOD, *supra* note 26, at 162-72. This early faith in legislative bodies made it possible for state legislatures to ratify constitutions in the name of the People without fostering too much dissent. *See* RAKOVE, *supra*, at 97 (acknowledging exigent circumstances of Revolution but stating that "these expedient concerns" were not paramount and that "common assumption" of Revolutionary period was that "a constitution could be drafted and [ratified] legislatively").

An insurgent revisionist view argues that the standard historiography paints an overly simplified and, therefore, inaccurate picture. On the revisionist view, as early as 1776, Americans thought ordinary standing legislatures were deficient as a representational structure through which the popular sovereign could act to create constitutions.[33] The crux of the revisionist view is the notion that the representative bodies that ratified many of the Revolutionary era state constitutions were more like extraordinary conventions than ordinary legislatures.[34]

Despite their disagreements, both the standard and revisionist schools of thought maintain that Americans grew skeptical of ordinary legislatures as representational structures through which the sovereign People could act to ratify constitutional norms.[35] The quarrel centers on

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[33] Indeed, the details may be more complex than the standard view suggests. *See* G. Alan Tarr, Book Review, 28 RUTGERS L.J. 865, 867-68 (1997) (reviewing KRUMAN) (arguing that Kruman's revisionism of standard thesis that ordinary state legislatures ratified Revolutionary era state constitutions is his strongest work).

[34] From the insurgent perspective, many of the provincial congresses that ratified the Revolutionary period state constitutions were "extralegal" bodies operating without legitimate legal sanction that exercised broader authority than the colonial legislatures that had preceded them. In addition, though exercising both extraordinary constitution ratification powers and ordinary legislative powers, the assemblies in several newly independent states ratified new constitutions after special elections had been held. *See* KRUMAN, *supra* note 27, at 20-33 (arguing that provincial congresses in colonies operated more like extraordinary political bodies than like ordinary legislatures, and that Americans believed only such extraordinary bodies, and not ordinary legislatures, could legitimately ratify constitutions in name of sovereign People); KYVIG, *supra* note 23, at 25. Gordon Wood, the principal protagonist of the standard historiography, views the data from the opposite angle. For Wood, the fact that "[s]ome colonies did not even bother to hold elections to bolster the authority of their existing representative bodies . . ." prior to legislative ratification of the new constitutions, supports the notion that legislatures were thought by most capable of ratifying constitutions on behalf of the popular sovereign. WOOD, *supra* note 26, at 307. One noted commentator has taken an agnostic position. As early as 1917, Roger Sherman Hoar noted the irregular nature of the bodies that ratified the early state constitutions. He characterized these bodies as follows: "The legislative bodies above referred to were in some cases legislatures attempting to frame constitutions, and in other cases conventions exercising legislative powers. The distinction is immaterial; they were the only regular legislative bodies of their respective states." ROGER SHERMAN HOAR, CONSTITUTIONAL CONVENTIONS: THEIR NATURE, POWERS, AND LIMITATIONS 4 (1917). In short, whether called legislatures or conventions, the bodies were charged with both ratifying constitutions and enacting ordinary legislation.

[35] My purpose here is not to referee the debate between the standard and revisionist historiographies. It is nonetheless worthwhile to note a few details. The Revolutionary era state constitutions can be grouped into three categories. First, several were approved by organs which appear most like ordinary state legislative bodies, and which used procedures indistinguishable from those used to pass ordinary legislation. Willi Paul Adams recounts that the 1776 state constitutions of New Hampshire, South Carolina, Virginia, and New Jersey, along with statutory substitution of popular rather than royal sovereignty in Connecticut and Rhode Island, were all done by ordinary legislatures operating with ordinary legislative procedures. ADAMS, *supra* note 23, at 66-74. The

exactly when that skepticism first arose.[36] If Americans in 1776 did, in fact, place faith in ordinary legislative bodies as conduits through which the sovereign People approve constitutional norms, that faith would eventually fade.[37] Scholars point to events in Massachusetts as the

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constitutions created in this manner most strongly suggest that ordinary legislatures were thought sufficient as an agent-conduit through which the popular sovereignty might create constitutional norms. Next come a group of constitutions approved by ordinary legislative bodies elected by electorates knowing that the bodies would be charged with the task of creating new constitutions. Maryland, North Carolina, Georgia, and New York in 1777, compose this group. *See id.* at 80-86; *see also* KRUMAN, *supra* note 27, at 20-21 (arguing that New Jersey also falls in this group). Marc Kruman argues these representative bodies were not ordinary legislatures, and that ordinary legislatures therefore did not enjoy the power to create constitutions in the name of the popular sovereign. *See id.* at 21-22. In addition to creating constitutions, however, the legislative assemblies in these states, like the ones in the first group, passed ordinary legislation. In this sense they were akin to ordinary legislatures. Finally, in a third group are those state constitutions created by specially elected "conventions." Unlike the representative bodies in the second group, these were specially elected representative bodies commissioned to create new constitutions, but which had no powers to create ordinary legislation. The use of conventions most strongly suggests that at least some in the revolutionary period were wary of the notion that ordinary legislative bodies could ratify constitutions in the name of the popular sovereign. Delaware and Pennsylvania compose this group. *See* ADAMS, *supra* note 23, at 74-80.

[36] From the standard perspective, "[u]nder the pressure of the moment . . . provincial assemblies adhered to the prevailing Anglo-American republican notion that elected representatives possessed complete authority to act for the people," and in most of the newly independent states in 1776 and 1777, extant legislative bodies drafted and ratified the new state constitutions. KYVIG, *supra* note 23, at 24. The revisionist school, however, can point to evidence suggesting that "[l]egislative constitution-making did not go unopposed . . . " and that a "[d]esire for a more explicit popular sanctioning . . . was stirring . . . ." *Id.* at 24-25. In several states there were early calls for popular constituent conventions to make the new constitutions, instead of ordinary legislatures. One such call arose in Pennsylvania. *See* ADAMS, *supra* note 23, at 77 (discussing demand of independence minded Pennsylvanians that convention, rather than standing Pennsylvania legislative assembly, make new state constitution); *The Alarm: Or, an Address to the People of Pennsylvania on the Late Resolve of Congress* (1776), *in* 1 AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA, 1760-1805, at 321, 326 (Charles S. Hyneman & Donald S. Lutz eds., 1983) (arguing, by Pennsylvania political writer, that only conventions, and not assemblies, are competent to form constitutions). In New York, some even suggested ratification of a new state constitution by popular referendum. *See id.* at 84-85 (recounting objections of New York artisans and mechanics who argued that People, but not legislative assemblies, were empowered to create constitutions); ELISHA P. DOUGLASS, REBELS AND DEMOCRATS: THE STRUGGLE FOR EQUAL POLITICAL RIGHTS AND MAJORITY RULE DURING THE AMERICAN REVOLUTION 61 (1955) (quoting from letter to New York legislative body calling for ratification by popular vote). Similar rumblings concerning legislative approval of constitutions were heard in Virginia, North Carolina, and Massachusetts. *See* KYVIG, *supra* note 23, at 24-27 (reviewing expressions of those favoring popular rather than legislative approval of Revolutionary era state constitutions in Virginia, North Carolina, and Massachusetts). In addition, seeking to bolster the popular sovereignty pedigree of the new state constitutions, in lieu of special constituent conventions, some state assemblies waited until after elections to ratify new state constitutions. *Id.* at 25.

[37] In time, ratification of constitutions by ordinary legislatures would be abandoned in

pivotal turning point away from legislative ratification, towards methods of ratification more closely linked to the popular sovereign. After Massachusetts ratified its first post independence constitution in 1780, ratification of constitutions occurred either via special popular constituent convention or via direct electoral participation, but not by ordinary legislative bodies.[38]

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favor of direct popular ratification or ratification by popular constituent conventions. The transition, however, was neither immediate nor uniform. As late as 1778, the South Carolina legislature, using ordinary legislative procedures, drafted and ratified a second state constitution replacing its 1776 legislature ratified constitution. *See* ADAMS, *supra* note 23, at 70-72; 8 SOURCES AND DOCUMENTS OF U.S. CONSTITUTIONS 468 (William F. Swindler ed., 1979) [hereinafter 8 SOURCES AND DOCUMENTS]. South Carolina's 1776 constitution had also been ratified by a legislative body. *Id.* at 462. Further north, however, the transition away from legislative ratification began as early as 1776. In its attempt to ratify its first post-independence constitution, Massachusetts directly confronted the issue of authority to ratify constitutional norms. Initially, the Massachusetts House of Representatives "followed the universal 1776 pattern of placing actual constitutional decisionmaking in legislative hands" and sought to ratify a constitution on its own. *See* KYVIG, *supra* note 23, at 27. A substantial number of Massachusetts towns opposed legislative ratification, however, with nine towns specifically demanding that the state constitution be created by a specially elected constituent convention. *See id.* at 26-27 (explaining that twenty-three of ninety-six towns objected to legislative ratification; town of Concord and eight others called for special constituent convention); ADAMS, *supra* note 23, at 88-90 (offering detail on objections of Pittsfield, Lexington, and Concord to legislative ratification of constitutions, and their call for either ratification directly by majority of electorate, or by specially elected convention). Ultimately, Massachusetts used neither its legislative assembly, nor a specially elected constituent convention to ratify its first post-independence state constitution. Instead, the decision was placed in the hands of the electorate. In 1778, a proposed constitution drafted by the House of Representatives was submitted to the towns in Massachusetts, where adult male citizens could vote on the document in town meetings. *See* ADAMS, *supra* note 23, at 90 (explaining process of drafting by Massachusetts House of Representatives, submission to towns, and taking and recording of individual votes in towns); KYVIG, *supra* note 23, at 27 (summarizing process of constitution ratification in Massachusetts). Using this procedure, the Massachusetts electorate soundly rejected the proposed constitution. *See id.* (2083 votes in favor and 9972 votes against proposed constitution). Two years later, however, a second proposed constitution drafted by specially elected constitutional convention was approved using the same procedure — submission to individual towns, and a vote by the adult male electorate in the towns. *See* ADAMS, *supra* note 23, at 92-93 (recounting events and process leading to ratification of second proposed Massachusetts state constitution); KYVIG, *supra* note 23, at 28.

[38] Generally, state constitutions ratified in the decades following Massachusetts's use of direct electoral popular constitutional ratification were ratified by popular constituent conventions rather than standing legislatures. *See* WALTER FAIRLEIGH DODD, THE REVISION AND AMENDMENT OF STATE CONSTITUTIONS 39 (1910) ("Since 1784 state constitutions have, with few exceptions, been framed or adopted by conventions chosen by the people for this purpose."); DANIEL T. RODGERS, CONTESTED TRUTHS 87-88 (1987) (explaining that most state constitutions ratified after 1787 were ratified by bodies directly and specially elected for purposes of constitution ratification, offering Georgia and Pennsylvania as examples). New Hampshire mimicked the Massachusetts process, and ratified its second post-independence constitution via submission of a proposed constitution drafted by a special convention to the electorate in the towns. *See* KYVIG, *supra* note 23, at 29. South Carolina is

By the time delegates gathered in 1787 in Philadelphia for the convention that would draft the Constitution, there had existed for some time a clear consensus that sovereignty rests with the People and that constitutional norms should, therefore, emanate from the People. An emerging consensus on the representational structures through which the popular sovereign could ratify constitutional norms, however, was only in its nascent stages. The Philadelphia Convention would both act on and solidify this nascent consensus by decisively choosing conventions over ordinary legislatures to ratify the Constitution, thereby effectively ending the days of ratification of constitutions by ordinary legislatures.[39]

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emblematic of the shift away from legislative ratification. While legislative ratification had been acceptable for the South Carolina constitutions of both 1776 and 1778. *See* 8 SOURCES AND DOCUMENTS, *supra* note 37, at 468. In 1790, a specially elected constituent convention, rather than the legislature, ratified South Carolina's third constitution. *Id.* at 476. In Virginia, where the legislature had promulgated a constitution in 1776, calls came forward to seek popular approval of new constitutions, or at least popular sanction for the existing documents. Thomas Jefferson expressed doubts about the legitimacy of Virginia's 1776 legislatively ratified constitution. Fellow Virginian, James Madison, expressed similar concerns, and in 1784 called for a popular constituent convention to create a new constitution. *See* RAKOVE, *supra* note 32, at 99-101 (reviewing Jefferson and Madison's ideas on Virginia's constitution and more generally on difference between legislative and popular ratification of constitutions). By the early Spring of 1787, Madison had come to believe that any new national constitution should be ratified by the People, rather than merely by legislative bodies. *See id.* at 100 (detailing letter written by James Madison to George Washington in April of 1787 in which Madison wrote, "To give a new system its proper validity and energy, a ratification must be obtained from the people, and not merely from the ordinary authority of the Legislatures."). The use of direct electoral popular ratification of state constitutions came into common use in the 1830s. *See* DODD, *supra*, at 62-66 (recounting use of electoral popular constitution ratification in Massachusetts and New Hampshire in 1780 and 1784, and later its widespread adoption beginning in Connecticut and Maine in 1818 and 1819, and subsequently in most other states); KRUMAN, *supra* note 27, at 33.

[39] *See* ADAMS, *supra* note 23, 63-64 (summarizing transition from Revolutionary era constitutions ratified by state legislatures to Founding era idea that constitutions based on sanction of popular sovereign must be ratified by special popular constituent conventions). The Articles of Confederation, ratified by state legislatures, might at first glance be taken as evidence that ratification of constitutions by ordinary legislative bodies enjoyed continued vitality as late as the early 1780s. Legislative ratification of the Articles of Confederation, however, ought not to be considered relevant. First, the Articles may have been more like a treaty between separate sovereign states than a supreme constitution. *See* Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 465 (1994) [hereinafter *Consent of the Governed*] (arguing that Articles of Confederation was treaty between independent states). *But see* Ackerman & Katyal, *supra* note 7, at 539-58 (rebutting Amarian argument that Articles of Confederation was treaty between independent states). More importantly, even if we consider the Articles of Confederation to have been a constitution, though not ratified by all thirteen states until 1781, it was submitted by the Continental Congress to the state legislatures in November 1777. *See* KYVIG, *supra* note 23, at 35-36 (recounting ratification of Articles of Confederation

B. The Original Understanding of Article VII

The turn away from legislative bodies as ratifiers of constitutional norms, inaugurated in Massachusetts, was confirmed by Article VII of the Federal Constitution. The delegates to the Philadelphia drafting convention, as well as commentators outside of the convention, state legislators, and delegates to the state ratifying conventions that approved the Constitution, were in uniform agreement: ordinary legislative bodies were presumed an inadequate medium through which the popular sovereign could ratify the proposed constitution. Only specially elected popular constituent assemblies or conventions could speak in the name of We the People. Ratification of Article VII by extraordinary conventions codified this widely held belief.

Two features of the Article VII debates augment the thesis that only ratification by extraordinary conventions was thought to equate with ratification by the popular sovereign. First, almost all who spoke or wrote on Article VII explicitly or implicitly espoused the "conventions only" line of thinking. Whether during the Philadelphia Convention, in post-Philadelphia public discourse, or in state ratifying conventions, all presumed that only conventions, and not legislatures, were capable of ratifying the Constitution in the name of We the People. Second, not even the most ardent opponents of ratification by conventions chose to argue that ratification by conventions would not equate with ratification by We the People, or that ratification by ordinary legislative bodies would equate with popular ratification. In other words, even those most motivated to do so did not attack extraordinary conventions as incapable of embodying the popular sovereign. Nor did they paint ordinary legislatures as the embodiment of We the People.

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culminating with Maryland's ratification in 1781); Eric M. Freedman, *Why Constitutional Lawyers and Historians Should Take a Fresh Look at the Emergence of the Constitution from the Confederation Period: The Case of the Drafting of the Articles of Confederation*, 60 TENN. L. REV. 783, 800-01 (1993) (discussing Articles of Confederation submitted by Continental Congress to states in November 1777).

1. Article VII at the Philadelphia Convention[40]

Given the trend of thinking in the 1780s, it may come as little surprise that the delegates to the Philadelphia drafting convention settled on Article VII's convention ratification method.[41] On the other hand, in 1787 it may have been somewhat unclear to many delegates in Philadelphia exactly what mechanism ought to be used for popular ratification of the emerging constitution. To date, only two constitutions, those of Massachusetts and New Hampshire, had been adopted by means other than approval by standing legislatures of one sort or another.[42] The rest of the then-existing constitutions, seventeen in total, had used standing legislative bodies as the representational structure through which the popular sovereign sanctioned constitutions.[43] Given this background, as the delegates gathered in Philadelphia for the convention that would

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[40] Others have provided histories of the Philadelphia Convention's treatment of ratification issues and its debates over Article VII. *See, e.g.*, RAKOVE, *supra* note 32, at 94-108; KYVIG, *supra* note 23, at 42-55. The following Section of this Article draws extensively on both sources. Rakove and Kyvig, however, provide general historical accounts of the Philadelphia Convention's drafting of Article VII. The following section, in contrast, aims to address a very specific question: Did the delegates to the Philadelphia Convention understand that legislatures, special conventions, or both could serve as representational structures through which the popular sovereign could ratify constitutional norms?

[41] *See generally* Robert F. Williams, *"Experience Must Be Our Only Guide": The State Constitutional Experience of the Framers of the Federal Constitution*, 15 HASTINGS CONST. L.Q. 403 (1988) (discussing ways that experience with state constitutions influenced 55 delegates to Philadelphia drafting convention).

[42] It is possible that the Vermont Constitution of 1786 and the Georgia Constitution of 1789 also were not ratified by ordinary legislative bodies. The evidence, however, is ambiguous at best. William Swindler indicates that the Vermont Constitution of 1786 was ratified by the Vermont legislature. *See* 9 SOURCES AND DOCUMENTS OF U.S. CONSTITUTIONS 496 (William F. Swindler ed., 1979). Roger Sherman Hoar, however, differs. Hoar indicates that the Vermont constitution of 1786 was ratified by the same processes used to ratify the Massachusetts Constitution of 1780 and the New Hampshire Constitution of 1784. *See* HOAR, *supra* 34, at 7. The latter two constitutions had been submitted to popular votes for ratification. *See supra* notes 37-38 and accompanying text. Later, however, Hoar seemingly contradicts himself by stating that the Vermont Constitution of 1786 was ratified by a representative body. *See* HOAR, *supra* note 34, at 193. Turning to the Georgia Constitution of 1789, William Swindler indicates that the Georgia Constitution of 1789 was ratified by a "convention." *See* 2 SOURCES AND DOCUMENTS OF U.S. CONSTITUTIONS 419, 455 (William F. Swindler ed., 1979). Hoar indicates that the Georgia Constitution of 1789 was ratified by a representative body other than the body charged with drafting the document. *See* HOAR, *supra* note 34, at 193. Alexander Jameson, however, argues that the Georgia Constitution of 1789 was in truth ratified by the Georgia legislature instead of a constitutional convention. *See* JOHN ALEXANDER JAMESON, THE CONSTITUTIONAL CONVENTION: ITS HISTORY, POWERS, AND MODES OF PROCEEDING 135-36 (1867).

[43] Roger Sherman Hoar lists seventeen different state constitutions that were, in a variety of ways, ratified by state legislative bodies prior to 1780. *See* HOAR, *supra* note 34, at 3-4.

draft the national Constitution, abandonment of legislative ratification methods was not necessarily a foregone conclusion.[44] Though Massachusetts may have instigated the shift away from legislative bodies as ratifiers of constitutional norms seven years prior to the Philadelphia drafting convention,[45] the delegates to the Philadelphia drafting convention may not have perceived this shift as an established trajectory from which deviation was impossible.[46] Only with the benefit of hindsight can we see that the Constitution's drafters solidified the trend set by Massachusetts when they rejected ratification by legislatures.[47]

The debate at the Philadelphia Convention over methods for ratifying the Constitution took place in four phases, lasting from early sessions to the convention's closing days. During each phase, both Federalists and Anti-Federalists spoke in ways that clearly evidence a widespread understanding on the issue of representational structures though which We the People could ratify constitutional norms. All agreed that only extraordinary conventions, but not ordinary legislatures, were competent to act as the conduits through which the popular sovereign could act to ratify the Constitution.

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[44] Moreover, the Massachusetts and New Hampshire experiments with direct electoral constitution ratification in place of legislative ratification had demonstrated serious downside risks. Though constitutions were eventually approved by the electorates in both states, the ratifications took many years. Proposed constitutions were initially rejected by the electorates in Massachusetts and New Hampshire. *See* ADAMS, *supra* note 23, at 70, 91 (discussing rejection of proposed New Hampshire constitution by electorate in 1779, and rejection of proposed Massachusetts constitution by electorate in 1778). In addition, at least in Massachusetts, electoral approval was questionable, as the vote tabulation was marked by suspect vote counting methods. Several of the towns voting on the proposed Massachusetts constitution in 1780 had approved some articles, but rejected others, and instead voted on suggested substitute articles. "[D]esirous of obtaining popular ratification," the Canvassing Committee of the Massachusetts Convention that had drafted the proposed constitution "either discarded the votes on the amended articles or cast them in favor of the original articles." Alexander J. Cella, *The People of Massachusetts, a New Republic, and the Constitution of 1780: The Evolution of Principles of Popular Control of Political Authority 1774-1780*, 14 SUFFOLK U. L. REV. 975, 1004 (1980). Though "there is considerable doubt as to whether several of the articles ever received more than a bare majority . . . the Convention voted that the people of Massachusetts had accepted the submitted Constitution . . . ." *Id.*

[45] *See supra* notes 37-38 and accompanying text.

[46] *See* RAKOVE, *supra* note 32, at 98 (stating that "a concept of popular ratification was certainly available to the framers by the eve of the Federal Convention, but it had yet to evolve into settled doctrine").

[47] *See* Cella, *supra* note 44, at 1005 (indicating that "the Massachusetts method" of constitution creation "anticipated and pointed the way to the Federal Constitutional Convention of 1787 and the United States Constitution of 1789").

a. The Early Debate: Resolution Fifteen

The Philadelphia Convention first touched on the ratification issue on May 29, 1787. On that date, Edmund Randolph, Governor of Virginia and a member of the Virginia delegation, offered fifteen resolutions, which later came to be known as the Virginia Plan.[48] Though a joint product, "it is clear that most of the ideas came from [James] Madison, and were then modified by the other members of the delegation."[49] Initially, it was unclear whether the Virginia delegates intended their resolutions as amendments to the Articles of Confederation or as an

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[48] *See* KYVIG, *supra* note 23, at 44 (recounting submission of "what would come to be referred to as the Virginia plan"); 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 19-23 (Max Farrand ed., Yale, rev. ed. 1937) [hereinafter 1 RECORDS] (detailing James Madison's notes indicating Randolph's submission of fifteen resolutions on May 29, 1787). Charles Pinckney introduced a draft plan of government to the convention on the same day that Randolph offered the Virginia Plan's fifteen resolutions. *See* 1 RECORDS at 16 (indicating that South Carolina delegate Charles Pinckney "laid before the House for their consideration, the draught of a federal government to be agreed upon between the free and independent States of America"). The "Pinckney plan," however, is less useful than the Virginia Plan in assessing the thoughts of delegates on ratification methods in the very earliest stages of the Philadelphia Convention. First, the record of the Philadelphia Convention does not reflect any substantive debate over the Pinckney plan's proposed ratification provision. Instead, the debate focused primarily on the Virginia Plan's proposed ratification provision. Second, it is impossible to know exactly what ratification procedure the Pinckney plan endorsed. Though the Journal of the convention does indicate that Pinckney offered a draft frame of government on May, 29, 1787, it is entirely unclear what was included in that draft. *Id.* The May 29, 1787 records of the Philadelphia Convention do not offer any detail on the Pinckney plan. *See id.* at 15-28 (stating entire record of May 29, 1787); 3 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 595 (Max Farrand ed., Yale, rev. ed. 1937) [hereinafter 3 RECORDS] (appendix D stating that "[w]hen John Quincy Adams was preparing the Journal for publication, the Pinckney Plan was not to be found . . . ."). More than three decades after the Philadelphia drafting convention, Pinckney supplied a written document purporting to be the plan of government that he had proposed to the convention on May 29, 1787. *Id.* at 595, 601 n.1. There is serious doubt, however, as to its validity. *Id.* at 601-04 (outlining Farrand's reasons why document subsequently supplied by Pinckney may not be accurate account of what Pinckney proposed to convention on May 29, 1787); *see also* CHRISTOPHER COLLIER & JAMES LINCOLN COLLIER, DECISION IN PHILADELPHIA: THE CONSTITUTIONAL CONVENTION OF 1787, at 87-101 (1986) [hereinafter COLLIER & COLLIER] (reviewing controversy over Pinckney plan and presenting more sympathetic view of document subsequently provided by Pinckney than Farrand presents). Based on various sources of evidence, Farrand presents what is more likely Pinckney's May 29, 1787 proposal. *See* 3 RECORDS, *supra* at 604-09. This "reconstructed" Pinckney plan includes a cryptic article XVI, which allows an unspecified number of state legislatures to amend the document to "invest future additional Powers in U.S. in C. ass.," but offers no provision governing ratification. *Id.* at 609.

[49] COLLIER & COLLIER, *supra* note 48, at 74; *see also* THE CONSTITUTIONAL CONVENTION AND THE FORMATION OF THE UNION 75 (Winton U. Solberg ed., 1990) (suggesting that James Madison was main architect of Virginia Plan, and that Randolph merely introduced it to convention).

entirely new frame of government.[50] The issue of whether the convention was empowered to propose anything more than amendments to the Articles of Confederation would be a subject of debate throughout the Philadelphia Convention.[51]

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[50] New York delegate Robert Yates indicated that Randolph contemplated his resolutions as supplanting the federated government under the Articles with "a strong *consolidated* union." 1 RECORDS, *supra* note 48, at 24 (including Robert Yates' notes on May 29). Indeed, on their face, Randolph's resolutions called for sweeping change characterized by a greatly enhanced national government quite different from, and perhaps incompatible with, the extant frame of government under the Articles of Confederation. Regarding whether the Randolph resolutions were offered as amendments to or replacements for the Articles of Confederation, David Kyvig states the following: "To call the Virginia resolutions amendments when they so obviously represented plans to change completely the structure of government has been called 'a transparent subterfuge.'" KYVIG, *supra* note 23, at 45. Notably, the fifteenth resolution proposed a method of ratification at variance with the amendment provision of the Articles of Confederation. Article XIII of the Articles of Confederation required that any "alteration" be "confirmed by the *legislatures* of every state." ARTICLES OF CONFEDERATION, art. XIII [hereinafter art. XIII] (emphasis added). The fifteenth resolution called on popular *assemblies*, rather than legislatures, to "consider & decide thereon" the changes that the Philadelphia delegates would ultimately devise. *See infra* text accompanying note 52 (emphasis added). Had Randolph and the other Virginia delegates intended to offer mere amendments to the Articles of Confederation, presumably they would not have deviated from the Articles of Confederation's amendment clause. From this angle it appears that a substitute frame of government was intended. Yet, other words in Randolph's resolutions indicate that only the amendment of the existing Articles of Confederation was intended. Specifically, the fifteenth resolution refers to the previous fourteen as "*amendments* which shall be offered to the Confederation." 1 RECORDS, *supra* note 48, at 22 (emphasis added). In a similar vein, the first resolution stated that "the articles of Confederation ought to be so corrected & enlarged," rather than discarded and replaced. *Id.* at 20. The resolutions illustrate an uncertainty over whether the delegates in Philadelphia were empowered only to devise amendments to the Articles of Confederation or, instead, could propose an entirely new constitutional document. This uncertainty plagued the Philadelphia Convention until its final days.

[51] *See* Ackerman & Katyal, *supra* note 7, at 506-14 (stating that "illegality was leitmotif at the convention from its first days to its last," and reviewing debate between Federalists and Anti-Federalists on whether convention was authorized to offer anything more than suggested amendments to Articles of Confederation); *see also* KYVIG, *supra* note 23, at 46 ("As discussion of the Virginia resolutions proceeded, the delegates vacillated as to whether they were amending the Articles or doing something other"). On May 30, the day after Randolph had offered the Virginia Plan resolutions, the delegates resolved to put aside the controversy of "amendment to" versus a "substitute for" the Articles of Confederation in order to focus on the proper form of government. 1 RECORDS, *supra* note 48, at 33 (indicating that delegates decided to postpone Edmund Randolph's first resolution calling for amendment of Articles of Confederation in order to discuss three substantive issues). On June 18, Alexander Hamilton persuasively argued that the convention was empowered to propose a new constitution, rather than merely propose amendments to the Articles of Confederation. *See* KYVIG, *supra* note 23, at 48-49 (recounting Alexander Hamilton speech of June 18 and stating that after Hamilton's speech "debate proceeded on the merits of various proposals, not whether the convention possessed the power to consider them"); 1 RECORDS, *supra* note 48, at 282-311 (citing James Madison, Robert Yates, Rufus King, and Alexander Hamilton's notes of June 18, all memorializing Hamilton's

As introduced by Randolph, the fifteenth resolution of the Virginia Plan read as follows:

> Resd. That the amendments which shall be offered to the Confederation, by the Convention ought at a proper time, or times, after the approbation of Congress to be submitted to an assembly or assemblies of Representatives, recommended by the several Legislatures to be expressly chosen by the people, to consider & decide thereon.[52]

Whether intended as a ratification provision for amendments to the Articles of Confederation or for an entirely new constitutional document, the fifteenth resolution was unambiguous on the most important, overarching issue. It expressly called for submission of the changes to be proposed by the Philadelphia Convention to "assemblies of Representatives" to "decide thereon."[53] In other words, the fifteenth

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speech). Neither the May 30 resolution nor Hamilton's June 18 speech deterred the delegates from continuing to advocate amendment to the Articles of Confederation. *See, e.g., id.* at 335 (citing James Madison's notes of June 20 and indicating that delegate Oliver Ellsworth stated that "[h]e wished also the plan of the Convention to go forth as an amendment to the articles of Confederation"). This would turn out to be a pivotal issue in the debate over ratification methods. Proponents of legislative ratification often argued that, because the delegates could only propose amendments to the Articles, they had no choice but to adhere to Article XIII's legislative ratification provision.

[52] 1 RECORDS, *supra* note 48, at 22 (indicating Randolph's submission of fifteen resolutions on May 29, 1787).

[53] *Id.* In most other respects the fifteenth resolution was somewhat opaque. Consider, for example, the language "assemblies of Representatives recommended by the several Legislatures to be expressly chosen by the people." *Id.* What is to be chosen by the People, the legislatures that "recommend" the assemblies, or the assemblies themselves? Would "the several Legislatures" or "the people" select the representatives to the "assembly or assemblies"? If the latter, what does it mean for the standing legislatures to "recommend" assemblies that would be "chosen by the people"? Some sort of popular electoral license was obviously envisioned. Yet, the resolution's phraseology also left the door open to some kind of legislative participation as well. The fifteenth resolution's phrasing fails to definitively resolve another key issue. It states that the "amendments" should be "submitted to an assembly or assemblies of Representatives." *Id.* Presumably the former "assembly" refers to a single national ratifying convention, while the latter "assemblies" refers to multiple ratifying conventions organized in each state. Did Randolph and the rest of the Virginia delegation that had drafted the Virginia Plan favor the former or the latter? Or, were they indifferent between the two? The text of the fifteenth resolution offers no clue. The delegates in Philadelphia, however, appear to have presumed that ratifying assemblies would be organized in each state. Not until near the end of the convention would someone argue in favor of a single national ratifying assembly or convention, when some delegates argued that the proposed constitution ought to be submitted to a second national drafting convention. 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 479, 560-61 (Max Farrand ed., Yale, rev. ed. 1937) [hereinafter 2 RECORDS] (indicating that George Mason and Gouverneur Morris argued for second national drafting convention, and on September 10 indicating that Edmund Randolph argued for same). That the Virginia Plan's

resolution sought to mandate ratification by extraordinary assemblies or conventions in the states, instead of ratification by standing state legislatures. This was a decisive break from the legislative ratification stipulated in the Articles of Confederation, which would not be lost in the resolution's ungraceful phraseology. Standing legislatures would be charged with the task of organizing special elections to elect delegates to the assemblies.[54] The assemblies, in turn, would be charged with ratifying whatever constitutional alterations the delegates in Philadelphia ultimately produced.[55]

The delegates first discussed the fifteenth resolution on June 5, 1787. James Madison's notes from that date indicate that the Committee of the Whole considered the following issue:

> [propos. 15] for "recommending conventions under appointment [of

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fifteenth resolution would be marked by a lack of precision on the finer points should come as no surprise. The Philadelphia Convention was just getting underway. The Philadelphia Convention convened on May 14, 1787. A quorum was achieved on May 25, 1787. *See* 1 RECORDS, *supra* note 48, at xi. The Virginia Plan was not presented as a full blown set of constitutional amendments in finished form. It instead served as a set of principles and ideas framing the debate. Nor should too much be made of the fifteenth resolution's ungraceful phraseology. The debate over resolution fifteen was never a lawyerly squabble over word meaning. *See* RAKOVE, *supra* note 32, at 59 ("[T]he Virginia Plan formed the basis of the Convention's first fortnight of debate.").

[54] The delegates rarely mentioned the role of the state legislatures under the Virginia Plan's ratification provision, or the different permutations of the ratification provision that evolved through the proceedings. On the few occasions when they did discuss the topic, they spoke of the state legislatures as having merely the ministerial role of setting up ratifying assemblies and communicating the proposed constitution to such assemblies. *See, e.g.*, 2 RECORDS, *supra* note 53, at 478, 562 (describing Gouverneur Morris and Charles Pinckney's motion for explicitly requiring state legislatures to call ratifying conventions, and on September 10 recording Alexander Hamilton's suggestion that state legislatures refer proposed constitution to ratifying conventions).

[55] At least one delegate, however, appeared confused by resolution fifteen's clumsy wording, and read the resolution as allowing either ordinary legislatures *or* extraordinary assemblies to act as ratifiers of constitutional alterations. *See id.* at 91 (reflecting delegate Hugh Williamson's observation that he "thought the Resoln. (19) [originally resolution 15] so expressed as that it might be submitted either to the Legislatures or to Conventions recommended by the Legislatures"). The delegates discussed the role of the state legislatures towards the end of the convention. On August 31, Gouverneur Morris and Charles Pinckney argued for language that made it unmistakably clear that the state legislatures would be obligated to organize ratifying conventions in their respective states. *See id.* at 478 (recording Morris and Pinckney's motion which required that "the several Legislatures ought to provide for the calling of Conventions within their respective States as speedily as circumstances will permit"). On September 10, Alexander Hamilton advocated allowing state legislatures to review the proposed constitution before passing it on to assemblies or conventions. *See id.* at 562 (recording Alexander Hamilton's suggestion that proposed Constitution should be "communicated to the Legislatures of the several states" by Congress).

the people] to ratify the new Constitution &c." [being taken up.][56]

By the end of that day, four delegates opined on ratification methods in four different ways. Even at this early juncture, however, all delegates accepted that ratification by extraordinary assemblies or conventions would be tantamount to ratification by the popular sovereign, but ratification by ordinary legislatures would not.

Roger Sherman of Connecticut opened the discussion by asserting that the "popular ratification" method proposed by Randolph was "unnecessary" because the Articles of Confederation already provided a method for ratifying amendments by "the assent of Congs. and ratification of the State Legislatures."[57] The form of Sherman's June 5 argument insinuates that he equated ratification by extraordinary assemblies or conventions, but not ratification by standing legislatures, with ratification by the popular sovereign. Consider the full text of Sherman's comments:

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[56] 1 RECORDS, *supra* note 48, at 122 (James Madison's notes). Note Madison's use of the word "conventions" in place of resolution fifteen's usage of the word "assemblies." The delegates at the Philadelphia drafting convention used the words "convention" and "assembly" interchangeably to refer to specially elected representative bodies charged solely with ratification of constitutional norms. Resolution fifteen used the word "assemblies." Article VII's final language, which appeared towards the end of the Philadelphia Convention, used the word "Conventions." The meaning, however, was the same.

[57] *Id.* at 122 (James Madison's notes). Why did Sherman favor ratification by ordinary standing legislatures over Randolph's proposal of ratification by extraordinary assemblies "chosen by the people"? As mentioned earlier, for much of the convention delegates vacillated regarding whether they were empowered merely to offer amendments to the Articles of Confederation, or to do something more. *See supra* note 51. Roger Sherman's remarks evidence this phenomenon. The Articles' amendment provision stipulated that alterations were to be ratified by state legislatures. *See* art. XIII, *supra* note 50. Sherman was among those who believed that the delegates ought to be considering amendments to the Articles, rather than an entirely new constitution. *See* 1 RECORDS, *supra* note 48, at 34-35, 347-48, 350, 487 (stating that "Mr. Sherman, who took his seat on this day . . . seemed however not be [sic] disposed to make too great inroads on the existing system"); Robert Yates' notes of June 20 (indicating that Sherman expressed desire to merely "modify" current system of government); Rufus King's notes of June 20 (indicating same); James Madison's notes of June 30 (indicating that Sherman advocated amending Articles of Confederation to increase power of Congress); Robert Yates' notes of June 30 (indicating same). At the end of the convention, however, Sherman signed the proposed new Constitution. *See* 2 RECORDS, *supra* note 53, at 664 (providing list of delegates who signed proposed Constitution). Accordingly, he also preferred legislative ratification, as stipulated by the Articles. It is not likely that Sherman favored retention of the Articles' legislative ratification requirement on the grounds that legislative ratification would equate with popular ratification. In the first instance, Roger Sherman was not enamored with the idea of popular involvement in government. *Cf.* COLLIER & COLLIER, *supra* note 48, at 99, 279 (suggesting that Roger Sherman was distrusting of ordinary people).

> Mr. Sherman thought such a popular ratification unnecessary. The articles of Confederation providing for changes and alterations with the assent of Congs. and ratification of the State Legislatures.[58]

By "such a popular ratification," Sherman meant resolution fifteen's ratification by popularly elected assemblies or conventions. In framing his argument this way, Sherman implies that ratification by resolution fifteen's particular kind of representative structure — specially elected assemblies or conventions — equates with "popular ratification."

The second half of Sherman's brief June 5 contribution augments the implication. Sherman argued that the Articles of Confederation already stipulated "ratification of the State Legislatures." Here, Sherman conspicuously declines to speak of ratification by ordinary state legislatures as synonymous with ratification by the popular sovereign. In one breath, Sherman speaks of ratification by resolution fifteen's extraordinary assemblies as the equivalent of popular ratification. In the next breath, Sherman speaks of ratification by ordinary legislatures as distinct from popular ratification. Sherman never explicitly stated that only extraordinary assemblies or conventions, and not ordinary legislatures, are capable of embodying We the People for purposes of ratifying constitutional norms. Nonetheless, the way he chose to frame his argument implies just such an understanding.[59] The comments of several delegates throughout the Philadelphia Convention follow a similar pattern and suggest the same understanding.

Madison, who spoke immediately after Sherman, considered ratification by the extraordinary assemblies, as called for in Randolph's fifteenth resolution, "essential."[60] In his mind, the Articles of Confederation were "defective" because they were "resting in many of the States on Legislative sanction only."[61] Rather than the legislative ratification mode favored by Sherman, Madison "thought it indispensable that the new Constitution should be ratified in the most unexceptionable form, and by the supreme authority of the people themselves."[62] Madison's words neatly delineate the crucial difference between ordinary legislatures and extraordinary assemblies as

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[58] 1 RECORDS, *supra* note 48, at 122 (James Madison's notes).

[59] A few years later, during the debate in Congress over the Bill of Rights, Sherman would explicitly state this understanding. *See infra* notes 333, 342 and accompanying text.

[60] 1 RECORDS, *supra* note 48, at 122 (James Madison's notes).

[61] *Id.* at 122 (James Madison's notes).

[62] *Id.* at 123 (James Madison's notes). Also of note, Madison clearly stated in this passage that the delegates were creating a new constitution, rather than a set of amendments to the Articles of Confederation. *Id.*

representational structures through which We the People might act to ratify constitutional norms.[63] For Madison, only the latter could embody We the People for purposes of ratifying new constitutional norms.

Elbridge Gerry of Massachusetts, the next speaker, stood steadfastly opposed to any attempt to seek a popular sanction for the changes to be proposed by the convention. Referring to the popular ratification experience in his home state, Gerry "seemed afraid of referring the new system to them [the People]." The People, Gerry argued, "have the wildest ideas of Government in the world."[64] Though opposed to popular ratification, Gerry, like Sherman, implicitly revealed himself as one who accepted the idea that only ratification by extraordinary assemblies or conventions equates with ratification by the popular sovereign. The clue lies in the following snippet of Gerry's comments:

> Mr. Gerry. Observed that in the Eastern States the Confedn. had been sanctioned by the people themselves.[65]

The passage, however, speaks volumes about Gerry's thinking on the ability of extraordinary assemblies or conventions and ordinary legislatures to embody the popular sovereign for purposes of ratifying constitutional norms. Gerry was referring to the fact that in New Hampshire and Massachusetts the Articles of Confederation had been submitted to the people in their town meetings for their approval. Only after such town meeting plebiscites did the legislatures in those states debate the Articles, and vote to instruct their representatives in the Continental Congress to sign on to the Articles of Confederation.[66] In other states, the Articles were never submitted to the people, but, instead, were approved by standing legislative bodies alone.[67] Gerry spoke of the ratification of the Articles in New Hampshire and Massachusetts as ratifications "by the people themselves." More

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[63] Pierce Butler, delegate from South Carolina, may have agreed with James Madison. Madison's notes of June 5, 1787 do not indicate any contribution by Pierce Butler on resolution fifteen. *See id.* at 122-23. William Pierce's notes of June 5, 1787, however, indicate that Pierce Butler opined that "alteration of the confederation ought not to be confirmed by the different legislatures because they have sworne to support the Government under which they act, and therefore that Deputies should be chosen by the People for the purpose of ratifying it." *Id.* at 128 (William Pierce's notes).

[64] *Id.* at 123 (James Madison's notes).

[65] *Id.*

[66] *See* MERRILL JENSEN, THE ARTICLES OF CONFEDERATION: AN INTERPRETATION OF THE SOCIAL-CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION, 1774-1781, at 188-89 (1940) (discussing ratification process used to ratify Articles of Confederation in New Hampshire and Vermont).

[67] *See id.* at 185-97 (discussing ratification of Articles of Confederation).

importantly, by limiting his description of the states where "the people themselves" had ratified to the two "Eastern states," Gerry insinuates that in the other states, where legislatures alone had ratified, the Articles were not sanctioned by the popular sovereign.

Finally, Rufus King of Massachusetts spoke.[68] Picking up on the theme that Elbridge Gerry had broached, King declared that:

> The people of the Southern States where the federal articles had been ratified by the Legislatures only, had since *impliedly* given their sanction to it.[69]

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[68] King's opening words are of lesser import than the latter part of his statement. He began by recognizing that "the last article of ye Confedn. Rendered the legislature competent to the ratification." 1 RECORDS, *supra* note 48, at 123 (James Madison's notes). King, in other words, acknowledged that article thirteen of the Articles of Confederation stipulated ratification of any alterations by ordinary legislatures. This suggests that King was headed towards siding with Roger Sherman and Elbridge Gerry on the ratification modality issue. King's ensuing words, however, show that he was more closely aligned with Madison than with Sherman and Gerry. First, on the issue of ratification modalities, King "thought notwithstanding [the Articles of Confederation] that there might be a policy in varying the mode" of ratification. *Id.* (James Madison's notes). King, unlike Sherman and Gerry, at least had an open mind as to whether the Articles' legislative ratification modality should be followed. It should be noted that Robert Yates' version of the debate gives a slightly different spin to King's comments. Yates' version depicts King endorsing the idea the Articles of Confederation provided some sort of enforceable right to legislative ratification. *Id.* at 127 (indicating that King stated that "the legislature in every state have a right to confirm any alterations or amendments"). Madison's notes, in contrast, portray King as endorsing the idea that the Articles of Confederation only render legislative ratification one possible mode of ratification. *See id.* at 123 (indicating that King stated that Articles of Confederation "rendered the legislature competent to the ratification" and that "notwithstanding that there might be policy for varying the mode [of amendment]"). William Pierce's brief notes seem to corroborate Yates' version of King's comments. *See id.* at 128-29 ("Mr. King thought that the Convention would be under the necessity of referring the amendments to the different Legislatures, because one of the Articles of the confederation expressly made it necessary"). Whatever King's thinking on whether legislative ratification was compulsory, he went on to stress practical reasons for favoring the popular assemblies or conventions called for by Randolph's fifteenth resolution over the legislative ratification modality required by the Articles. Conventions, argued King, would be more likely than standing state legislative bodies to approve whatever changes the Philadelphia Convention might produce. According to James Madison's notes, King argued as follows: "A Convention being a single house, the adoption may more easily be carried thro' it than thro' the Legislatures where there are several branches. The Legislatures also being to lose power, will be most likely to raise objections." *Id.* at 123 (James Madison's notes).

[69] *Id.* at 123 (James Madison's notes). In one way this passage seems to push King closer to the Sherman and Gerry camp. After all, the passage lends legitimacy to the Articles of Confederation by acknowledging that it had gained a popular sovereignty pedigree, albeit an implied popular sovereignty pedigree. If the People had impliedly consented to the Articles, then perhaps its amendment clause requiring legislative ratification could not be ignored.

This statement demonstrates that King coincided with James Madison on the divergent capacities of ordinary legislatures versus extraordinary assemblies or conventions. Consider the first clause, with proper punctuation: "The People of the Southern States[,] where the federal articles had been ratified by the Legislatures only. . . ."[70] Had King thought that the People could ratify constitutional norms through their ordinary legislatures, he would have described the "Southern States'" ratification of the Articles of Confederation in a slightly different manner. Rather than characterizing those ratifications as "by the Legislatures only," he would have characterized them as "by the People represented by their Legislatures," or as "by the People acting through their legislative representatives." Instead, he styles the ratifications as "by the Legislatures only," detached and separate from the People.

Now, consider the second clause: "had since *impliedly* given their sanction to it." Here, King explicitly expounds on something that Elbridge Gerry had insinuated by omission and contrast earlier in the day. He suggests that "[t]he People of the Southern States" ultimately did consent to the Articles of Confederation. That popular consent, however, was not achieved in the first instance through the medium of legislative ratification, or even via popular election of the ratifying legislative bodies. It was instead achieved over time through popular submission to a constitutional structure that had been ratified by ordinary state legislative bodies. Rather than consenting through their legislatures at the moment of ratification, the People of the "Southern States" had only *subsequently* given an *implied* consent. If King had believed that the popular sovereign could ratify constitutional norms through ordinary legislative bodies, he would have had no need to rely on implied consent over time.

On the first occasion when the delegates debated the issue of constitutional norm ratification, four delegates opined in four distinct ways. James Madison unequivocally favored legislative ratification. For divergent reasons, Roger Sherman and Elbridge Gerry favored ratification by ordinary legislatures. Rufus King was open-minded on the ratification modality, though perhaps favored convention ratification on pragmatic grounds.[71] Even at this early juncture, however, an

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[70] *Id.* Where earlier in the day Elbridge Gerry had referred to ratification of the Articles of Confederation in New Hampshire and Massachusetts by the People assembled in town meetings, King was referring to states to the south of New Hampshire and Massachusetts that had ratified the Articles via legislative action alone.

[71] Only James Madison voiced a strong preference for ratification by extraordinary assemblies, and clearly based his preference on the notion that only ratification by

undercurrent of consensus can be detected. All explicitly or implicitly accepted the idea that ratification by extraordinary assemblies or conventions, but not by ordinary legislatures, would be tantamount to ratification by the popular sovereign. As we will see, this undercurrent of consensus held consistent throughout the convention.

On June 12, the convention, assembled as the Committee of the Whole, voted to adopt the fifteenth resolution.[72] The records for that date do not reflect any substantive debate on the resolution.[73] Three days later, on June 15, William Paterson of New Jersey offered an alternative to Randolph's Virginia Plan.[74] By this point in the convention, it had become clear that the Virginia Plan had established itself as a substitute plan of government aimed at replacing the Articles of Confederation. [75] The competing New Jersey Plan, in contrast, was an attempt to save the Articles by amending them, albeit in a substantial fashion.[76]

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assemblies would equate with ratification by the popular sovereign. Though Rufus King was also amenable to popular ratification by specially elected assemblies, his stated reasons were more pragmatic and less theory driven than Madison's. He emphasized the probability of ratification by specially elected constituent conventions as opposed to standing legislatures, rather than whether conventions or standing legislatures could properly embody the popular sovereign. Against Madison's vigorous endorsement of, and King's lukewarm acquiescence to, ratification by extraordinary assemblies or conventions, Roger Sherman and Elbridge Gerry urged legislative ratification in accord with the extant amendment provision in the Articles of Confederation. Sherman's position was most likely driven by the notion that the delegates were (or ought to be) merely devising amendments to the Articles of Confederation. At the far end of the spectrum Elbridge Gerry distrusted the People, and therefore was adamantly opposed to any attempt at popular sanction via specially elected assemblies. James Wilson and Charles Pinckney also spoke on June 5, but according to James Madison's notes, only on the issue of the number of states needed to ratify proposed constitutional changes. *See id.* at 123-24 (James Madison's notes). Robert Yates' notes, however, briefly indicate that Wilson, echoing Madison, stated that "the people by a convention are the only power that can ratify the proposed system of government." *Id.* at 127 (Robert Yates' notes).

[72] *See id.* at 213-14 (journal record on recorded votes of June 12, 1787, and James Madison's notes).

[73] The vote itself, however, evidences some degree of contention, with five states approving the resolution, three opposing, and two states undecided. *See id.* at 213, 220 (journal record of votes on June 12, 1787, and Robert Yates' notes). Oddly, Madison indicates six states in favor, three against, and two undecided. *See id.* at 214 (James Madison's notes). Perhaps the divided vote foreshadowed that the controversy over the proper method of constitutional norm ratification was far from over.

[74] *See id.* at 241-42 (journal record and James Madison's notes).

[75] The Virginia Plan initially could have been construed as offering mere amendments to the Articles of Confederation. *See supra* notes 50-51 and accompanying text.

[76] *See* 1 RECORDS, *supra* note 48, at 246 (recounting John Lansing's statement that New Jersey Plan was offered "on the basis of amending the federal government, and the other [the Virginia Plan] to be reported as a national government, on propositions which exclude the propriety of amendment"). Bruce Ackerman and Neal Katyal provide a useful discussion of the Virginia Plan as a replacement constitution, and the New Jersey Plan as a

In accord with their different aims — one as a substitute, and the other as a set of amendments — the Virginia and New Jersey plans advocated different ratification procedures. As James Wilson signaled on June 16, ratification under the Virginia Plan was to be "by the people themselves," while ratification under the New Jersey Plan would be "by legislative authorities according to the 13 art: of the confederation."[77] These comments explicitly equate ratification by the extraordinary assemblies with ratification by the popular sovereign, and deny that ratification by standing legislative bodies could equate with ratification by We the People.[78] Moreover, in supporting Randolph's Virginia Plan, Wilson argued that "it will be a further recommendation of Mr. R[andolph]'s plan that it is to be submitted to *them* [the People] and not to the *Legislatures*, for ratification."[79] This passage again shows Wilson speaking of ratification by the popular sovereign and ratification by the extraordinary assemblies called for by Randolph's fifteenth resolution as completely fungible, and speaking of ratification by ordinary standing legislatures as a separate and distinct phenomenon from ratification by We the People.[80]

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set of amendments to the Articles of Confederation. *See* Ackerman & Katyal, *supra* note 7, at 506-09.

[77] 1 RECORDS, *supra* note 48, at 252-53 (indicating James Wilson statement on differences between Virginia and New Jersey plans).

[78] Alexander Hamilton apparently agreed with this reading of Wilson's comments on ratification under the Virginia and New Jersey plans. *See id.* at 269 (reflecting chart of two columns summarizing Wilson's comparison on Virginia and New Jersey plans which states that under Virginia Plan "National Government to be ratified by People" and that under New Jersey Plan "to be ratified by Legislatures").

[79] *Id.* at 253 (James Madison's notes). James Wilson's notes from June 16 hammer home the point. Wilson's notes reflect a two column list of differences between the Virginia and New Jersey plans that served as an outline for his June 16 comments. Item thirteen on Wilson's list states that under the Virginia Plan, "[t]he national Government [is] to be ratified under the authority of the People by Delegates expressly appointed for that purpose," while under the New Jersey Plan, "[t]he alterations in the Confederation must be confirmed by 'the Legislatures of every State.'" *Id.* at 278 (James Wilson's notes).

[80] Comments offered by John Lansing of New York on the same day may evidence a similar line of thinking. In comparing the New Jersey and Virginia plans, Lansing argued as follows: "In the first [the New Jersey Plan], the powers are exercised as flowing from the respective state governments — The second [the Virginia Plan], deriving its authority from the people of the respective states . . . ." *Id.* at 257 (Robert Yates' notes). On its face, Lansing's comment appears to be a reference to the different modes of ratification under the New Jersey and Virginia plans. If so, his comment bears out a presupposition that ratification by a standing state legislature under the New Jersey Plan constitutes the consent not of the People of that state, but rather the consent of the government of the state. In contrast, ratification by an extraordinary assembly in a given state, as the Virginia Plan required, constitutes the consent of the People of that state. It is entirely possible, however, that Lansing's comment addressed not the modes or ratification, but rather the modes of selecting legislative representatives under the New Jersey and Virginia plans. Under the

Three days later, Madison returned the delegates' attention to this line of argument. On June 19, as part of a long discourse on the New Jersey Plan, Madison made the following observation:

> [T]he plan of Mr. Pat-son besides omitting a controul over the states as a general defence of the federal prerogatives was particularly defective in two of its provisions. 1. Its ratification was not to be by the people at large, but by the *Legislatures*. It could not therefore render the acts of Congs. in pursuance of their powers even legally *paramount* to the Acts of the States. . . .[81]

As on June 5, Madison's June 19 wording unequivocally differentiates ratification by a legislative body from ratification by the popular sovereign. To Madison, the two are completely dissimilar phenomena.

One day later, on June 20 Oliver Ellsworth of Connecticut spoke against convention ratification.[82] Madison's notes from that day indicate that Ellsworth:

> wished also the plan of the Convention to go forth as an amendment to the articles of Confederation, since under this idea the authority of the Legislatures could ratify it. . . . If the plan goes forth to the people for ratification several succeeding Conventions within the states would be unavoidable. He did not like these conventions. They were better fitted to pull down than to build up Constitutions.[83]

Ellsworth worried about the chaos that "several succeeding Conventions within the states" would cause. Nonetheless, he explicitly equates sending the proposed Constitution to conventions with sending the Constitution to "the People." Ellsworth, like Sherman and Gerry, was an opponent of the convention ratification method who conceded that

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New Jersey Plan national legislative representatives were to be chosen by the respective state legislatures. Under the Virginia Plan they were to be chosen by the respective state electorates. *Id.* at 252 (James Madison's notes recounting James Wilson's comparison of Virginia and New Jersey plans). Rufus King, Alexander Hamilton, and William Paterson's notes of June 16 seem to reflect that all three took Lansing's comment as a reference to the modes of selecting legislative representatives, rather than the modes of ratification under the New Jersey and Virginia plans. *Id.* at 263, 267, 270 (Notes of Rufus King, Alexander Hamilton and William Paterson recording their understanding of John Lansing's June 16 comments).

[81] *Id.* at 317 (James Madison's notes).

[82] Perhaps because Wilson and Madison's comments on ratification methods on June 16 and 19 were made in the context of longer discussions comparing the Virginia and New Jersey plans, the records of the debates from those days register no immediate dissent to their statements on ratification modalities.

[83] *Id.* at 335 (James Madison's notes).

ratification by assemblies or conventions would be tantamount to ratification by We the People, while ratification by standing legislative bodies would not. In this early stage of debate, seven different delegates — Sherman, Madison, Gerry, King, Paterson, Wilson, and Ellsworth — had all made contributions evidencing their shared underlying assumption that only conventions, but not legislatures, could ratify constitutional norms in the name of We the People.

b. The Middle Debate: Resolution Nineteen

The delegates would not return to the ratification modality issue until July 23, 1787. Ultimately, the debate on this date would prove to be central in shaping what would ultimately become Article VII. James Madison's notes on the crucial July 23 debate over ratification methods are extensive. His notes begin by stating the question under consideration, which had been renumbered from resolution fifteen to resolution nineteen:[84]

> Resol: 19. Referring the new Constitution to Assemblies to be chosen by the people for the express purpose of ratifying it was next taken into consideration.[85]

Picking up where he had left off on June 20, Oliver Ellsworth opened the discussion by moving that the new Constitution "be referred to the Legislatures of the States for ratification."[86]

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[84] In June, the Committee of the Whole had rejected Paterson's New Jersey Plan and reported Randolph's Virginia Plan to the full convention for further discussion. *See id.* at 313, 322 (journal chart showing record of votes on June 19, 1787 and James Madison's notes referring to vote on Randolph's Virginia Plan and Paterson's New Jersey Plan). In this process, Randolph's original fifteenth resolution had been renumbered as the nineteenth resolution. The record of the convention of June 13, 1787, includes a version of Randolph's resolutions as amended. In this amended version, Randolph's original fifteenth resolution, introduced on May 29, 1787, and approved on June 13, 1787, appears as the nineteenth resolution. *See id.* at 232 (journal record). Though the numbering had changed, the wording of the ratification resolution remained essentially as it had been when first introduced.

[85] 2 RECORDS, *supra* note 53, at 88 (James Madison's notes).

[86] *Id.* (James Madison's notes). Outside of the Philadelphia Convention, Ellsworth would take an entirely different stance on assembly versus legislative ratification. Writing under the pseudonym "A Landholder" in the first of thirteen essays advocating ratification of the proposed constitution printed in periodicals in several states, Ellsworth wrote the following:

> The new Constitution for the United States is now before the public, the people are to determine, and the people at large generally determine right, when they have had means of information.

Colonel George Mason of Virginia rose to oppose Ellsworth's motion.[87] The most important part of Mason's statement is the following:

> In some of the States the Govts. were [not] derived from the clear & undisputed authority of the people. This was the case in Virginia. Some of the best & wisest citizens considered the Constitution as established by an assumed authority. A National Constitution derived from such a source would be exposed to the severest criticisms.[88]

These words expand on Elbridge Gerry and Rufus King's June 5 argument regarding legislative ratification of the Articles of Confederation.[89] In declaring that some of the state governments were not "derived from the clear & undisputed authority of the people," Mason was referring to the state constitutions that had been ratified by standing legislative bodies.[90] In stating that these state constitutions had been "established by an assumed authority," Mason unmistakably implies that ratification by ordinary legislatures had failed to confer a

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> It proves the honesty and patriotism of the gentlemen who composed the general Convention, that they chose to submit their system to the people rather than to the legislatures, whose decisions are often influenced by men in the higher departments of government, who have provided well for themselves and dread any change lest they should be injured by its operation. I would not wish to exclude from a State Convention those gentlemen who compose the higher branches of the assemblies in the several states, but choose to see them stand on an even floor with their brethren, where the artifice of a small number cannot negative a vast majority of the people.
>
> This danger was foreseen by the Federal Convention, and they have wisely avoided it by appealing directly to the people.

A Landholder I, *Connecticut Courant* (1787), *in* 13 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 561-63 (John P. Kaminski & Gaspare J. Saladino eds., 1981) [hereinafter 13 DOCUMENTARY HISTORY] (reproducing *A Landholder I* and providing editoral comments on that and other Landholder essays). Ellsworth was not willing to admit the opposition to popular ratification via extraordinary assemblies that he had expressed during the Philadelphia Convention. The essay, however, does posit the assembly ratification method as ratification by "the people rather than the legislature."

[87] Mason's opening comments refer to resolution nineteen's extraordinary assembly ratification as ratification by "the authority of the people." 2 RECORDS, *supra* note 53, at 88 (James Madison's notes). Like Madison and Wilson, Mason begins from the premise that ratification of extraordinary assemblies equates with ratification by We the People, while ratification by ordinary legislatures does not.

[88] *Id.* at 89 (James Madison's notes).

[89] *See supra* text accompanying notes 64-71.

[90] In 1787, all of the extant state constitutions, except Massachusetts and New Hampshire, had been ratified by legislative bodies. *See* HOAR, *supra* note 34, at 3-4.

popular sovereignty pedigree on these state governments.

Elbridge Gerry, the strong advocate for legislative ratification, rose to rebut Mason's arguments favoring convention ratification.[91] He also referred to legislative action to ratify higher law norms. Rather than Mason's focus on state constitutions, however, Gerry reprised an issue raised in earlier debates — legislative ratification of the Articles of Confederation:

> Both the State Govts. & the federal Govt. have been too long acquiesced in, to be now shaken. He considered the [Articles of] Confederation to be paramount to any State Constitution.[92]

Mimicking Rufus King's "implied sanction" theory from June 5, Gerry was arguing that the legislatively ratified Articles of Confederation and state constitutions had acquired a popular sanction via popular acquiescence over time. By rooting the popular sovereignty pedigree of the national and state constitutions in acquiescence over a long period of time, rather than in legislative ratification, Gerry implicitly confesses that ratification by legislatures is not the equivalent of ratification by the People. Acquiescence, and not the original acts of ratification by state legislative bodies, renders the Articles and the state constitutions unshakeable.[93]

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[91] Virginian Edmund Randolph, who had introduced the resolution proposing popular ratification through extraordinary assemblies, spoke immediately following George Mason, and before Elbridge Gerry. The bulk of Randolph's comments at this juncture, however, focused on the practical problems of ratification by legislative bodies dominated by "local demagogues." 2 RECORDS, *supra* note 53, at 89 (James Madison's notes).

Gerry's strong opposition to convention ratification is evidenced by the opening lines of his sharp retort to Mason's arguments. For Gerry, Mason's arguments "prove too much." Mason's presuppositions "prove an unconstitutionality in the present federal [system] & even in some State Govts." *Id.* Acceptance of Mason's (and Madison and Wilson's) premise — ratification by a legislative body is not the equivalent of ratification by the popular sovereign — would lead to an impossible to swallow conclusion that the Articles of Confederation and several state constitutions, all ratified by legislative bodies, were illegitimate. Gerry was playing brinksmanship with the Madison, Wilson, and Mason alliance. He was challenging them to either accept the mind-boggling implications of their basic premise, or recant their premise and undercut the key rationale for favoring ratification by extraordinary assemblies rather than ordinary legislatures. Despite this potent start, Gerry's brinksmanship ultimately proved halfhearted. The remainder of his discourse vacillates between a tepid challenge to, and an implied acceptance of, the Madison/Wilson/Mason postulate.

[92] *Id.* (James Madison's notes).

[93] Gerry's move represents a fatal error. He had just denounced the Madison/Wilson/Mason premise that constitutions ratified by legislatures lack a popular sanction on the ground that it entails unthinkable conclusions — that the Articles of Confederation and most state constitutions are illegitimate. Rather than push forward to argue that ratification by legislatures did in fact imprint the Articles and the state

Gerry's next words proclaimed that "[g]reat confusion would result from a recurrence to the people." Here, Gerry uses "a recurrence to the people" as a synonym for ratification pursuant to resolution nineteen's extraordinary assemblies. Gerry sought to bolster legislative ratification and counter assembly ratification. If he had believed that ratification by legislatures would have been tantamount to ratification by We the People, he certainly would not have tarred that ratification modality by referring to it as "a recurrence to the people" and arguing that it would cause "[g]reat confusion."[94]

Oliver Ellsworth, with his motion favoring the legislative ratification modality hanging in the balance, reinserted himself into the center of the debate. As he had on June 20, and as his ally Elbridge Gerry had done earlier in the day, Ellsworth revealed himself as another opponent of resolution nineteen who nonetheless implicitly conceded that only ratification by resolution nineteen's special assemblies or conventions,

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constitutions with a legitimate popular sovereignty pedigree, and that legislative ratification of newly proposed constitutional norms would do the same, Gerry back-pedals. He roots the popular sovereignty pedigree of legislatively ratified constitutions in popular submission over time. In so doing, he concedes to his opponents all of the ground that he had gained by proposing that their pivotal premise "proves too much." His strategy of rooting the popular sovereignty pedigree of legislatively ratified constitutions in acquiescence over time is a double edged sword. Mostly, however, the blade cuts against legislative ratification. On the one hand, it offers Gerry a way to answer Mason's argument that the state constitutions (and more importantly to Gerry, the Articles of Confederation) ratified by ordinary legislatures lack a popular sovereignty pedigree. On the other hand, it admits the larger underlying point that Mason and other proponents of resolution nineteen's assembly ratification methodology were making — ratification by ordinary legislatures would not imprint the proposed Constitution with a popular sovereignty pedigree, and would therefore subject the proposed Constitution to "the severest criticisms." Gerry may not have liked the logical conclusion that followed from Madison, Wilson, and Mason's premise. He refrained, however, from frontally attacking it by arguing that ordinary legislatures, like extraordinary assemblies or conventions, could operate as representational structures through which the popular sovereign ratifies constitutional norms.

[94] Nathaniel Gorham, a delegate from Massachusetts, spoke immediately after Gerry. Though he "was agst. referring the plan to the Legislatures," his comments never touched directly on the issue of whether legislatures or popularly elected special assemblies could embody the popular sovereign for constitution ratification purposes. He instead enumerated several pragmatic reasons why the assemblies spoken of in resolution nineteen would be better suited to the ratification task than standing state legislatures. 2 RECORDS, *supra* note 53, at 90 (James Madison's notes). Specifically, Gorham argued that delegates to the assemblies or conventions would "discuss the subject more candidly" than members of legislative bodies; that it would be easier to pass a constitution through unicameral assemblies or conventions than bicameral legislatures; that the "ablest men" would more likely be elected to the assemblies or conventions than to legislatures; that the standing legislatures would be distracted by the press of ordinary legislative matters; and that unanimous consent, whether of legislative bodies or of special assemblies, ought not be required. *Id.*

and not ratification by legislatures, would be tantamount to ratification by We the People.

Ellsworth immediately proclaimed his skepticism of the popular sovereign: "[M]ore was to be expected from the Legislatures than from the people."[95] This statement dichotomizes legislatures and the popular sovereign, and posits legislatures not as reflecting or personifying the popular sovereign, but as somehow superior to the popular sovereign. The legislatures are neither representational structures through which the popular sovereign articulates its preferences, nor the embodiment of We the People. Instead, they are institutions which refract and reconfigure unruly popular preferences. Rather than We the People assembled, legislatures are We the People *dis*sembled.

As he continued, Ellsworth further evidenced his implicit acceptance of the Madison/Wilson/Mason premise. Referring to George Mason's comments on the legislatively ratified state constitutions earlier in the same day, Ellsworth offered the following:

> It was said by Col. Mason 1. that the Legislatures have no authority in this case. . . . As to the [Mason's] first point, he observed that a new sett [sic] of ideas seemed to have crept in since the articles of Confederation were established. Conventions of the people, or with power derived expressly from the people were not then thought of. The Legislatures were considered as competent.[96]

Here, Ellsworth acknowledges the evolution in thinking on the capacities of legislatures. In an earlier time, "the Legislatures were considered competent" to ratify constitutions on behalf of the popular sovereign. By 1787, however, "[c]onventions of the people" had come to replace ratification by ordinary legislatures.[97] Ellsworth's effort to deal with this evolution parrots Elbridge Gerry's unavailing attempt to defuse Mason's arguments earlier in the day:

> Their ratification has been acquiesced in without complaint. To Whom have Congs. applied on subsequent occasions for further powers? To the Legislatures; not to the people.[98]

Ellsworth was speaking of the extant legislatively ratified state constitutions.[99] He neither denies the evolution in thinking on

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[95] *Id.* at 91 (James Madison's notes).

[96] *Id.* (James Madison's notes).

[97] *See supra* text accompanying notes 28-39.

[98] 2 RECORDS, *supra* note 53, at 91 (James Madison's notes).

[99] *See supra* note 90.

constitution ratification, nor tries to point out its flaws. Rather than argue against the newer way of thinking, he tries to argue around it. Like his opponent Rufus King on June 5, and his ally Elbridge Gerry earlier in the day on July 23, Ellsworth stresses that Americans had *acquiesced* to constitutions ratified by legislative bodies.[100] Like King and Gerry, Ellsworth conspicuously avoids arguing that the legislative ratification of those constitutions signified popular consent in the first instance. To the contrary, their legitimacy, or any popular sovereignty pedigree they might boast, stems from popular acquiescence subsequent to legislative ratification.

With his next move, Ellsworth continued to argue around, rather than against, the recent evolution in thinking:

> The fact is that we exist at present, and we need not enquire how, as a federal Society, united by a charter one article of which is that alterations therein may be made by the Legislative authority of the States.[101]

In stating that "we exist at present. . . as a federal society, united by a charter," Ellsworth was simply stating that a confederation of states existed under the Articles of Confederation. In stating that "we need not enquire how" the Articles of Confederation came into being, Ellsworth was arguing that questions surrounding how the extant set of constitutional norms came into being ought to be ignored. Unable to directly rebut the thinking on the shortcomings of legislatures as ratifiers of constitutional norms on behalf of the popular sovereign, Ellsworth here attempts a different approach: a plea to simply detour around issues involving the origin and ratification of constitutional norms, and obey the extant constitutional order. In short, popular sovereignty pedigree or not, the law is the law, and the law must be obeyed.

The fact that Ellsworth chose to deploy a "rule of law" argument is significant. Ellsworth and the other extraordinary assembly or convention ratification antagonists would have stood a fighting chance had they been able to assert that ordinary legislative bodies are legitimate representational structures through which We the People might ratify the convention's plan of government. Ellsworth and his confederates, however, knew that nobody would have swallowed such an argument. As Ellsworth had acknowledged, "a new set of ideas seemed to have crept in. . . ," and legislatures were no longer thought

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[100] *See supra* text at notes 69-71, 92-93.

[101] 2 RECORDS, *supra* note 53, at 91 (James Madison's notes).

competent to embody the popular sovereign for purposes of ratifying constitutional norms. As such, Ellsworth was forced to pursue a second-best strategy — the rule of law argument that fidelity to the extant constitutional order overcomes any concern about the popular sovereignty pedigree of constitutional norms ratified by mere legislatures.

As he closes out his monologue, Ellsworth obliterates any remaining doubt about whether he accedes to the Madison/Wilson/Mason premise.

> It has been said that if the confederation is to be observed, the States must *unanimously* concur in the proposed innovations. He [Ellsworth] would answer that if such were the urgency & necessity of our situation as to warrant a new compact among a part of the States, founded on the consent of the people; the same pleas would be equally valid in favor of a partial compact, founded on the consent of the Legislatures.[102]

Ellsworth refers to resolution nineteen's assembly ratification of "the new compact" — the plan of government being drafted by the Philadelphia Convention — as ratification "founded on the consent of the People." Here, Ellsworth follows the by now familiar pattern of treating ratification by extraordinary assemblies as synonymous with ratification "founded on the consent of the people." In contrast, when speaking of the latter "partial compact" — a set of amendments to the Articles of Confederation — Ellsworth chooses not to use ratification "founded on the consent of the Legislatures" as a synonym for popular ratification.[103]

On another plane, Ellsworth's final flourish is nothing short of astonishing. Essentially, Ellsworth was advocating the ratification of the new constitutional norms created at the Philadelphia Convention by a nonunanimous number of state legislatures, as opposed to a nonunanimous number of extraordinary assemblies or conventions. This line of argument represented a complete repudiation of the formalist "rule of law" argument Ellsworth had just finished advocating. The Articles of Confederation required not only legislative ratification of changes, but also unanimous approval of any changes.[104] Ellsworth had just finished arguing in favor of legislative ratification on the grounds

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[102] *Id.* (James Madison's notes).

[103] After Ellsworth had concluded, Hugh Williamson of North Carolina offered some brief remarks unresponsive to Ellsworth's arguments. *See id.* at 93 (James Madison's notes).

[104] *See* art. XIII, *supra* note 50.

that the Articles demanded legislative ratification. He was perfectly willing, however, to accede to nonunanimous approval of any changes despite the fact that the Articles demanded unanimity.[105]

That Ellsworth would have thrown out such a compromise is not surprising. He could sense that the tide favoring resolution nineteen's ratification by assemblies was running against him. Rather than lose everything, he would settle for half a loaf — retention of ratification by standing state legislatures. The astonishing aspect of his suggested compromise comes in its timing. Ellsworth had just finished admonishing his fellow delegates to adhere to the formal amendment provision within the Articles of Confederation.[106] This was a desperate man. He would use any plausible argument to advocate legislative ratification and defeat convention ratification. Against this backdrop, it is particularly significant that Ellsworth never suggested that legislative

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[105] The Virginia Plan's resolution nineteen contradicted the Articles of Confederation's amendment provision in two different ways. As highlighted above, while the Articles required legislative ratification of any alterations, resolution nineteen called for ratification by extraordinary assemblies. *See supra* text accompanying note 50. In addition, while the Articles required that alterations gain the unanimous support of all member state legislatures, resolution nineteen was generally understood as not requiring the unanimous assent of all states in order to ratify the emerging proposed constitution. *See* 1 RECORDS, *supra* note 48, at 123, 127 (indicating that Wilson "hoped the provision for ratifying would be put on such a footing as to admit of such a partial union," and Robert Yates's notes indicating that Wilson argued that "[i]t is possible that not all the states, nay, that not even a majority, will immediately come into the measure; but such as do ratify it will be immediately bound by it . . . ."); 2 RECORDS, *supra* note 53, at 90 (indicating in James Madison's notes that Gorham argued that Articles of Confederation amendment provision required "a unanimous concurrence of the States," and enumerated as one reason for favoring Virginia Plan's ratification by extraordinary assemblies that it would be possible to consider ratification "without waiting for the unanimous concurrence of the States"). Realizing that Article XIII's unanimity requirement could sink any hopes of retaining the Articles' ratification by legislatures, in his final flourish Ellsworth did what any smart politician would do. He offered a compromise. He essentially proposed waiving the Articles' unanimity requirement so long as its legislative ratification requirements were retained. If the condition of the union had grown so dire that alteration by less than unanimous consent of the states was deemed imperative, argued Ellsworth, then the consent of less than all of the state *legislatures* was just as acceptable as the consent of less than all extraordinary *assemblies* organized in the states.

[106] Despite infirmities in its popular sovereignty pedigree stemming from its legislative ratification, the Articles are the law, and the law must be followed. The Articles require legislative ratification, not ratification by popularly elected extraordinary assemblies or conventions. No sooner had Ellsworth finished his "rule of law" lecture than he executed an about-face and advocated abandoning the Articles' unanimity requirement. Retain the legislative ratification requirement because the extant constitutional order so requires, but abandon the extant constitutional order's unanimity requirement because the "urgency & necessity of our situation" so demands. That Ellsworth follows the former with the contradictory latter suggests that his motion favoring ratification by standing legislatures was sinking fast and that he was grasping for any available reed to keep it afloat.

ratification could equate with ratification by We the People.[107]

Rufus King, who had spoken on June 5 regarding the ratification methodology issue, also addressed the convention. King "preferred a reference to the authority of the people expressly delegated to Conventions, as the most certain means of obviating all disputes & doubts concerning the legitimacy of the new Constitution."[108] Ratification by ordinary legislatures, in contrast, would leave "disputes & doubts" as to the new constitution's popular sovereignty pedigree. King's comments went a step further than those of many other delegates. Rather than merely imply that ratification by extraordinary assemblies and ratification by We the People would be one and the same, King explicitly linked the two. In addition, King repeated the idea that the Articles of Confederation had gained a popular sovereignty pedigree not by legislative ratification, but rather by "the acquiescence of the people" over time.[109]

James Madison closed out the July 23 debate on ratification modalities by offering an expanded reprise of his June 5 arguments. He began with the idea that legislative ratification would cause problems regarding necessary changes to the extant state constitutions. Once ratified, the national constitution would conflict with and thereby effectively amend the constitutions of the states.[110] As Madison put it, "the proposed changes. . . would make essential inroads on the State Constitutions."[111] Allowing standing state legislatures to ratify the national constitution, and, in so doing, to effectively amend their conflicting state constitutions,

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[107] Gouverneur Morris of Pennsylvania would not allow Ellsworth's contradictory rhetoric to go unchallenged. Morris argued that Ellsworth's call for less than unanimous ratification of alterations to the Articles of Confederation was "a non sequitur." 2 RECORDS, *supra* note 53, at 92 (James Madison's notes). Consider Morris' comments: "If the Confederation is to be pursued no alterations can be made without the unanimous consent of the Legislatures: Legislative alterations not conformable to the federal compact, would clearly not be valid. The Judges would consider them as null & void." *Id.* (James Madison's notes). Morris grasps that Ellsworth wants to have it both ways. Ellsworth championed both adherence to the Articles regarding ratification by legislatures, and abandonment of the Articles' unanimity requirement. To Morris the choice was binary. Either conform to the Articles of Confederation, which requires that alteration gain the consent of the legislatures in *all* of the states, or abandon the Articles of Confederation, which opens the door to ratification of new constitutional norms by alternative means.

[108] *Id.* (James Madison's notes).

[109] *See supra* text accompanying notes 69-71. As argued above, this tack evinces concurrence with the idea that the popular sovereign does not act through ordinary legislative bodies to ratify constitutional norms. *Id.*

[110] *See* 2 RECORDS, *supra* note 53, at 92 (James Madison's notes) (noting conflict with state constitutions that would arise upon ratification of national constitution).

[111] *Id.* (James Madison's notes).

"would be a novel & dangerous doctrine."[112] It would be "novel and dangerous" because ordinary legislative ratification of the new national constitution, and coincident alterations to the conflicting state constitutions, would leave those alterations without a popular sovereignty pedigree. Legislative ratification would call on legislatures to do something that only the people are empowered to do — alter their state constitutions.[113] Madison thus builds from the premise that ordinary legislative bodies are *not* competent to operate as conduits through which the popular sovereign sanctions constitutional norms. Otherwise, legislative ratification would bestow a popular sovereignty pedigree on both the proposed national constitution and the concomitant alterations to the conflicting state constitutions.[114] In addition, rather than portraying the legislature as an instantiation of the sovereign People, Madison's words posit legislatures and the People as two separate and distinct political entities.

Madison next argued that "[h]e considered the difference between a system founded on the Legislatures only, and one founded on the people, to be the true difference between a *league* or *treaty*, and a *Constitution*."[115] "[A] constitution established by the people themselves," Madison continued, would be superior to and trump any subsequently created conflicting law. In contrast, a mere treaty, "founded on the Legislatures only," could be contravened by the passage of subsequent conflicting legislature-created statute law.[116] The substance of Madison's argument is of secondary importance for present purposes.[117] The salient feature of the argument lies in his deployment of the relevant terminology. There were only two ratification options under

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[112] *Id.* (James Madison's notes).

[113] This argument was especially relevant in states that had not explicitly authorized their legislatures to approve alterations in the Articles of Confederation. As Madison stated, some states legislatures were not empowered "to concur in alterations of the federal Compact." In these states, "a ratification must of necessity be obtained from the people" rather than from the legislatures. *Id.* at 93 (James Madison's notes). Madison also raised this argument on June 5. *See supra* text at notes 60-63.

[114] This set of issues would be raised by opponents of ratification by extraordinary assemblies at a later date. *See infra* Part III.A.

[115] 2 RECORDS, *supra* note 53, at 93 (James Madison's notes).

[116] *Id.* (James Madison's notes).

[117] Others, however, have vigorously debated the substantive import of this passage. Professor Amar argues that this passage supports the thesis that Article VII's ratification by conventions was perfectly legal, despite the fact that Article VII conflicted with Article XIII. *See* Amar, *supra* note 39, at 467. Professors Ackerman and Katyal, in contrast, argue that Article VII was an illegal violation of Article XIII of the Articles of Confederation, despite the substance of Madison's discourse on July 23, 1787, at the Philadelphia Convention. *See* Ackerman & Katyal, *supra* note 7, at 539-45 n.205.

consideration throughout the entire convention — ratification by special assemblies or conventions, as stipulated by resolution nineteen, or ratification by ordinary legislatures, as stipulated both by the Articles of Confederation and by Ellsworth's proposed amendment to resolution nineteen.[118] When Madison spoke of "a system. . . founded on the people," and of "a constitution established by the people themselves," he was referring to ratification of a new constitution pursuant to resolution nineteen's extraordinary assemblies. In contrast, when he spoke of ratification "founded on the Legislatures only," he was referring to Ellsworth's proposed amendment to resolution nineteen.

By now, Madison's word usage should be expected. From the outset, Madison had been the strongest proponent of the Virginia Plan's call for ratification by special assemblies. Equating special assembly ratification with popular ratification was a convenient way to bolster assembly ratification. Moreover, he had deployed a similar usage of the terms on June 5 and June 19.[119] Madison's word usage, however, was much more than a rhetorical ploy, for as we have seen, other delegates used the terms in the exact same way. On June 23, George Mason, Gouverneur Morris, and Rufus King had all spoken of ratification by resolution nineteen's special assemblies or conventions as synonymous with popular ratification, and of legislative ratification as distinct from popular ratification.[120] Even the opponents of resolution nineteen, Oliver Ellsworth and Elbridge Gerry, spoke on July 23 of special assembly ratification and popular ratification interchangeably, and of legislative and popular ratification as separate phenomena.[121] This was not some linguistic sleight of hand on Madison's part, but rather the accepted linguistic norm growing out of the dominant mindset of the era regarding the representational structures capable of embodying We the People for purposes of ratifying constitutional norms.

After Madison concluded his discourse, Ellsworth's motion to amend resolution nineteen was defeated by a count of three states in favor and seven states opposed.[122] The convention then voted to approve resolution nineteen by a count of nine states in favor and only one state

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[118] The delegates never seriously entertained the more direct form of popular sanction, submission of the proposed new constitution to a direct popular vote, that had been used to ratify the Massachusetts and New Hampshire constitutions.

[119] *See supra* text accompanying notes 60-63, 81.

[120] *See supra* text accompanying notes 87-90, 107-09.

[121] *See supra* text accompanying notes 91-107.

[122] *See* 2 RECORDS, *supra* note 53, at 86, 93 (journal record and James Madison's notes).

opposed.[123] With such a lopsided vote, it may have seemed that the debate over legislative versus assembly ratification methods had reached an end. The delegates, however, would pass on the issue one more time.

c. The Late Debate: Article XXI

On July 26, 1787 the delegates voted to submit the approved resolutions, along with Paterson's New Jersey Plan, and Pinckney's plan, to a "Committee of Detail," which was charged with transforming the resolutions into a refined and coherent document.[124] On August 6, the Committee of Detail reported a document back to the convention.[125] That document included the following article:

XXI [XX][126]

> The ratifications of the Conventions of _____ States shall be sufficient to organize this Constitution.[127]

Oddly, the Committee of Detail abandoned the word "assemblies," which had been used in resolutions fifteen and nineteen, in favor of the word "conventions." This was a purely stylistic change, however, as the delegates had used the terms interchangeably throughout the Philadelphia Convention.

The delegates did not discuss Article XXI until the last two days of August. On August 31, the delegates once again wrangled with extraordinary convention versus ordinary legislative ratification.[128] Apparently, a few holdouts for legislative ratification remained. With

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[123] *Id.* at 86, 93-94 (journal record and James Madison's notes).

[124] *See id.* at 85, 87, 95-96, 98, 106, 117, 128 (journal record and James Madison's notes); *see also* 1 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 255 (Merrill Jensen ed., 1976) [hereinafter 1 DOCUMENTARY HISTORY] (stating editor's detail on submission of approved resolutions to Committee of Detail). The Committee of Detail consisted of John Rutledge, Edmund Randolph, Nathaniel Gorham, Oliver Ellsworth, and James Wilson. 2 RECORDS, *supra* note 53, at 97 (journal record); *see also* 1 DOCUMENTARY HISTORY 255 (noting editor's comments on members of Committee of Detail); 1 RECORDS, *supra* note 48, at xxii (Farrand's comments on Committee of Detail).

[125] *See* 2 RECORDS, *supra* note 53, at 176-77, 190 (journal record, James Madison's notes and James McHenry's notes).

[126] Farrand indicates that the articles of the draft constitution reported by the Committee of Detail were misnumbered, with two articles designated as the sixth article. *See id.* at 181 n.5. The roman numeral in brackets indicates the correct rather than actual enumeration.

[127] *Id.* at 189 (James Madison's notes).

[128] On August 30, the delegates debated, but did not decide the number of state conventions needed to ratify the new constitution. *See id.* at 468-69 (James Madison's notes).

Article XXI on the table:

> Mr. Govr. Morris moved to strike out "Conventions of the" after "ratifications" [sic] leaving the States to pursue their own modes of ratification.[129]

Morris hoped that his proposed amendment would increase the probability that the proposed Constitution would ultimately secure ratification.[130] It almost had the opposite effect.[131]

Daniel Carroll of Maryland responded to Morris's motion by pointing out that the Maryland Constitution already specified a method for its amendment, and argued "that no other mode could be pursued in the State."[132] Carroll was alluding to an issue that Madison had mentioned on July 23 — the fact that ratification of the new national constitution by a given state would impliedly amend that state's conflicting constitution. Maryland's Constitution, which had been ratified in 1776, called for amendment by Maryland's ordinary legislative body.[133] To Carroll's way of thinking, Article XXI effectively called for a mode of amending the Maryland Constitution incompatible with that constitution's amendment clause. Later in the August 31 debate, James McHenry, also from Maryland, reinforced the point, by reminding the delegates that "the officers of Govt. in Maryland were under oath to support the mode of alteration prescribed by the Constitution" of that state.[134] In other words, Article XXI required Maryland government officials to violate their oath of office.

These were serious concerns. For opponents of the sweeping changes embodied in the draft national Constitution, Carroll and McHenry's arguments provided a ray of hope. Passage of Morris's amendment would greatly diminish the chance that a national constitution, shifting power from state legislatures to a more powerful national government, could ever be ratified.[135] For this very reason, those sympathetic to

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[129] *Id.* at 475 (James Madison's notes).

[130] In Morris's own words, he meant "to facilitate the adoption of the plan." *Id.* at 476 (James Madison's notes).

[131] Despite having made this motion, Morris was not an opponent of ratification by extraordinary assemblies. He had spoken in favor of assembly ratification on July 23. *See supra* note 107.

[132] 2 RECORDS, *supra* note 53, at 475 (James Madison's notes).

[133] *See* 4 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 383 (William F. Swindler ed., 1975) (discussing Article LIX of Maryland's Constitution of 1776).

[134] 2 RECORDS, *supra* note 53, at 476 (James Madison's notes).

[135] Indeed, the pragmatic King followed Carroll's comments by announcing what already should have been obvious: "[S]triking out 'Conventions' [sic] as the requisite mode was equivalent to giving up the business altogether. Conventions alone, which will avoid

sweeping change knew that Carroll and McHenry's arguments presented a serious threat. The victories the nationalizers had secured at the Philadelphia Convention were placed directly in harms way.

James Madison's speech on July 23 had already provided a way to steer clear of these problems. Madison, of course, would not miss the opportunity to remind Carroll, McHenry, and the rest of the delegates of these ideas. Directly addressing Carroll's concern, Madison argued as follows:

> The difficulty in Maryland was no greater than in other States, where no mode of change was pointed out by the Constitution, and all officers were under oath to support it. The people were in fact, the fountain of all power, and by resorting to them, all difficulties were got over. They could alter constitutions as they pleased. It was a principle in the Bills of rights that first principles might be resorted to.[136]

Formally, Madison was willing to admit that Article XXI's convention ratification method would have *varied* from the Maryland Constitution's amendment provisions. Ratification by extraordinary conventions would not, however, *illegitimately violate* the amendment clauses of that state's constitution, as Carroll had suggested. At the very least, the Maryland Constitution's amendment clause was no obstacle to ratification of a new national constitution via extraordinary conventions.[137] By a resort to "first principles" Madison meant a

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all the obstacles from the complicated formation of the Legislatures, will succeed, and if not positively required by the plan, its enemies will oppose that mode." *Id.* (James Madison's notes). In other words, granting the states the freedom to choose their own methods of ratification, rather than requiring ratification by assemblies or conventions, would have two consequences: First, opponents of the proposed Constitution, including state legislative bodies, would push for legislative rather than convention or assembly ratification. Second, with many states opting for legislative ratification, the proposed constitution would not be ratified. Only after King had spelled out the danger of Morris's amendment did Morris realize his error, and apologetically interject that he had intended his proposed amendment "to facilitate the adoption of the plan." *Id.* (James Madison's notes). Too late. The barn door was open, and the animals were running loose. Getting them back in the barn would take more than King had offered. Later in the day, King would proffer an argument aimed directly at Carroll and McHenry's point that Article XXI effectively called for amendment of state constitutions by a method incompatible with the state constitution amendment clauses. *See infra* text accompanying note 140.

[136] 2 RECORDS, *supra* note 53, at 476 (James Madison's notes).

[137] As the exchange between Professors Ackerman and Katyal on one side and Professor Amar on the other side shows, reasonable minds may disagree on whether Madison's "first principles" argument meant that Article VII's violation of Article XIII was illegal, but nonetheless legitimate, or completely legal. Ackerman and Katyal argue the former, while Amar argues the latter. *Compare* Ackerman & Katyal, *supra* note 7, *with*

recurrence to the principles of popular sovereignty, under which the People in any given state always retained the power to amend their constitution, regardless of the formal methods outlined in the amendment provisions of their constitution.[138] Article XXI's extraordinary conventions provided a mechanism through which the popular sovereign could act. The conventions would embody the popular sovereign in each state and any constitutional norms ratified by those assemblies would, therefore, be ratified by the People. Just as an act of the People could legitimately override the legislative amendment provision of the Articles of Confederation, so, too, could the People in a given state legitimately override the amendment provision in their state constitution. The limitations of a formal amendment clause in a constitution could never detain the People from "altering constitutions as they pleased." A resort to "first principles," in short, eliminated all concerns arising from conflicts between Article XXI and state constitution amendment provisions.[139]

Later in the day, Rufus King would offer comments echoing Madison's thesis. According to Madison's notes of August 31:

> Mr. King observed that the Constitution of Massachusetts was made unalterable till the year 1790, yet this was no difficulty with him. The State must have contemplated a recurrence to first principles before they sent deputies to this Convention.[140]

Amar, *supra* note 39.

[138] Professor Amar has developed this point. *See* Amar, *supra* note 39, at 459-60, 469-75; Akhil Reed Amar, *Philadelphia Revisited, Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043, 1050-56 (1988).

[139] Madison's "first principles" argument on August 31 differed from the version he had laid out on July 23 only in a slight shift in emphasis or purpose. On July 23, Madison had offered a reason to disfavor legislative adoption of constitutional norms. Legislative ratification of a new national constitution, and of concomitant implied alterations to conflicting state constitutions, would leave those alterations without a legitimate popular sovereignty pedigree. Ordinary legislatures, after all, do not embody the popular sovereign. In Madison's words, legislative ratification of constitutional norms "would be a novel & dangerous doctrine." *See infra* text accompanying note 188. On August 31, in contrast, Madison's aim was to defuse a dangerous threat to Article XXI's extraordinary convention ratification method. Article XXI's convention ratification provided a mechanism for a resort to "first principles" by which "all difficulties were got over." For this reason, ratification pursuant to Article XXI's assemblies might contradict the amendment clauses of some state constitutions. It would not, however, illegitimately violate the amendment clauses in those state constitutions. In short, on July 23, Madison had provided a reason to question legislative ratification. On August 31, he provided a reason *not* to question ratification by extraordinary assemblies.

[140] 2 RECORDS, *supra* note 53, at 476-77.

Article XXI would have deviated from the amendment clause of the Massachusetts Constitution as well. No matter, a "recurrence to first principles" overcame any such conflict. Madison's version of the "first principles" argument was a bit more explicit and fleshed out than King's. Both, however, were making the same basic points: extraordinary assemblies or conventions embody the popular sovereign; the popular sovereign always retains the right to alter higher law norms; and, regardless of the formal amendment procedures outlined in extant constitutions, the popular sovereign embodied in assemblies or conventions may legitimately ratify a new frame of government and simultaneously affirm concomitant alterations in conflicting state constitutions.

Only two delegates attempted to rebut Madison's "first principles" thesis. First, as mentioned above, James McHenry, argued that "the officers of Govt. in Maryland were under oath to support the mode of alteration prescribed by the Constitution" of that state.[141] McHenry's brief comment came immediately after Madison had concluded his dissertation. It was a weak rebuttal. Madison had just finished laying out an impressive theory explaining why ratification pursuant to Article XXI's extraordinary assemblies would not violate seemingly conflicting state constitution amendment provisions. In response, McHenry offered no argument explaining why Madison's theory might be lacking, and no reasons why an appeal to "first principles" might not be as relevant as Madison had proposed. Like Oliver Ellsworth on July 23,[142] the best McHenry could muster was an appeal to formalism — the oath to uphold extant legal forms taken by all elected officials must be followed. However, he did not explain why adherence to legal forms ought to trump "first principles."

The reply of Luther Martin, also from Maryland, to Madison's theory was not much stronger than McHenry's. According to Madison's notes:

> Mr. L. Martin insisted on a reference to the State Legislatures. He urged the danger of commotions from a resort to the people & to first principles in which the Governments might be on one side & the people on the other.[143]

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[141] *See supra* text at note 134. Others spoke to the ratification issue on that day. Only McHenry and Martin, however, ventured a rebuttal to Madison's thesis. *See* 2 RECORDS, *supra* note 53, at 475-77.

[142] *See supra* text accompanying note 101.

[143] 2 RECORDS, *supra* note 53, at 476.

At least Martin offered a reason to favor adherence to legal forms over "first principles." Article XXI's ratification methodology entailed "the danger of commotions." Legislative ratification, in contrast, would avoid such "commotions." This was not merely an appeal to the requirements of formal oaths of office. Instead, it was an argument that the turbulence created by a "resort to the people & first principles," via Article XXI's convention ratification method, was too high a price to pay for imprinting the constitutional norms emerging from the Philadelphia Convention with a solid popular sovereignty pedigree.[144]

Notably, however, Martin never argued that Madison's "first principles" thesis was wrong-headed. He never argued that ratification by extraordinary assemblies would not, or that legislative ratification would, equate with ratification by the popular sovereign. Nor did he suggest that the popular sovereign assembled could not override conflicting formal state constitutional amendment provisions.[145] As had been the case throughout the entire debate over ratification modalities, on August 31 the opponents of extraordinary convention ratification never challenged the indomitable premise that the popular sovereign could act to ratify constitutional norms through the representative structure of extraordinary assemblies or conventions. In fact, turning from the arguments that Martin failed to make to those that he chose to make, we find positive evidence that he accepted the Madisonian premise. Martin argued in favor of "a reference to the State Legislatures," and against "a resort to the people & to first principles." Like so many others, he posited legislative ratification as the antonym of "a resort to the people," and Article XXI's convention ratification as the synonym for popular ratification.[146]

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[144] Luther Martin was generally opposed to the proposed constitution that emerged from the Philadelphia Convention. When the Committee of Detail reported a document back to the convention, Martin stated that "he was against the system." *See id.* at 190 (recording James McHenry's notes that Luther Martin's reaction at private meeting among Maryland delegates to document reported by Committee of Detail). After the convention ended, Martin extensively explained his opposition to the proposed constitution in an address to the Maryland legislature. *See* 3 RECORDS, *supra* note 48, at 172-232 (appendix A, CLVIII).

[145] By now, we should not be surprised by these omissions. Even Carroll, who had raised the issue of Article XXI's variance from state constitution amendment clauses, never based his objection to Article XXI on such grounds. Carroll's argument was, like McHenry's, an appeal to formalism, and not a direct rebuttal of the idea that the popular sovereign could act to ratify constitutional norms through the representative structure of extraordinary assemblies or conventions.

[146] After Luther Martin finished, King rose and offered his above mentioned comments repeating the Madisonian "first principles" theory. *See supra* text accompanying note 140. Roger Sherman of Connecticut then moved to postpone further consideration of Article

Later in the day, Gouverneur Morris's motion to allow each state to decide on its own ratification method was defeated by a count of four states in favor, and six states opposed.[147] Finally, Article XXI itself, as amended, was put to a vote and approved.[148]

In the closing days of the Philadelphia Convention the delegates grappled with a series of issues related to ratification: the role of Congress in reviewing the proposed Constitution and transmitting it to the states; the role of state legislatures in transmitting the proposed Constitution to ratifying conventions; whether the state ratifying conventions should be permitted to propose amendments; and whether a second national drafting convention ought to be held after the state conventions had a chance to review the proposed Constitution.[149] After August 31, however, the delegates never again debated ratification by convention versus legislatures.

d. Article VII's Convention Ratification Method Assessed

On September 10, 1787, the delegates again voted on Article XXI. There were no dissenting votes, as the eleven present states unanimously offered their approval.[150] Later that day, the delegates submitted all agreed-upon articles, including Article XXI, to a "Committee of Style and Arrangement."[151] The Committee of Style reported a document back to

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XXI. *See* 2 RECORDS, *supra* note 53, at 477 (James Madison's notes). Sherman had established himself as a proponent of legislative ratification on June 5 by offering a motion to amend the Virginia Plan's resolution fifteen. *See supra* text accompanying note 58. Perhaps sensing the power of the "first principles" argument which King had just reinforced, Sherman hoped to avoid a vote that would have meant final defeat for legislative ratification. It was Sherman's motion, however, that met defeat, with a vote of six states against and five in favor of postponement. *See* 2 RECORDS, *supra* note 53, at 474, 477 (journal record and James Madison's notes).

[147] *See id.* at 474, 477 (journal record and James Madison's notes). The delegates then returned to the issue of the number of states needed to ratify the emerging proposed constitution. After bandying about several options, they settled on nine states, and by a vote of eight states in favor and three opposed, accordingly amended Article XXI. *See id.*

[148] Ten states approved Article XXI. Only one state registered an opposing vote. Maryland, the state represented by convention ratification antagonists Carroll, McHenry, and Martin, was the lone dissenter. Maryland delegate Daniel Jennifer broke from his colleagues and expressed a preference for Article XXI. *See id.* at 477 (James Madison's notes).

[149] *See id.* at 477-80, 559-64 (James Madison's notes of August 31 and September 10). In addition, on September 15, the convention briefly discussed whether a second national drafting convention ought to be held after the state conventions had a chance to review the proposed Constitution. *See id.* at 631-32 (James Madison's notes).

[150] *See id.* at 557, 563 (journal record and James Madison's notes).

[151] *Id.* at 565 (James Madison's notes). Near the end of the day on Friday, September 8, the delegates had agreed to "appoint a Committee of five to revise the style of and arrange

the convention on September 12, which included the following article:

Article VII

> The ratification of the conventions of nine states, shall be sufficient for the establishment of this constitution between the States so ratifying the same.[152]

This is the language that the Philadelphia Convention approved as the ratification clause of their proposed Constitution, and which was used in the states to ratify the Constitution.[153]

The evidence from the Philadelphia Convention on the original understanding of Article VII is overwhelming. In the arguments the delegates made, the way they framed those arguments, and the arguments they chose not to make, the delegates manifested a strong consensus on underlying premises. Ratification by extraordinary assemblies or conventions, but not ordinary legislatures, was thought to equate with ratification by the People. Not one delegate who spoke on the ratification issue ever suggested that the popular sovereign could act through ordinary legislatures. To the contrary, those who spoke to the issue either explicitly or implicitly acknowledged that only extraordinary assemblies or conventions, and not ordinary legislatures, could embody the popular sovereign for purposes of ratifying constitutional norms.[154] Article VII codifies this understanding.

Perhaps the strongest evidence regarding this dominant mindset comes from the arguments that the opponents to ratification by extraordinary assemblies chose not to advance. None of them ever

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the articles agreed to by the House." The Committee of Style was composed of Dr. William Johnson, Alexander Hamilton, Gouverneur Morris, James Madison, and Rufus King. *Id.* at 547, 553, 557 (journal record, James Madison's notes, and James McHenry's notes). The delegates, however, would debate a few remaining issues, including issues related to ratification, on Monday, September 10, before truly submitting the agreed-upon articles to the Committee of Style. *See id.* at 555-64 (journal record and James Madison's notes from July 10, 1787). *See also* 1 DOCUMENTARY HISTORY, *supra* note 124, at 270 (editor's comments on submission of resolutions to Committee of Style and composition of Committee of Style).

[152] *See* 2 RECORDS, *supra* note 53, at 603 (James Madison's copy of report of Committee of Style of September 12, 1787).

[153] *See* U.S. CONST. art. VII.

[154] Excluding, of course, those who spoke on the ratification issue but only alluded to the practical advantages and disadvantages of the two competing ratification methods. *See, e.g.*, 2 RECORDS, *supra* note 53, at 90 (James Madison's notes of July 23 memorializing Nathaniel Gorham's speech in favor of assembly ratification which focused on pragmatic issues, and did not allude to different capacities of legislatures and assemblies as representational structures).

directly challenged the idea that only extraordinary assemblies or conventions, but not legislatures, embody the popular sovereign for purposes of ratifying constitutional norms. Far from attacking the Madison/Wilson/Mason premise, from the earliest stages of the ratification methodology debate through to its conclusion, convention ratification opponents evidenced their concurrence with the dominant understanding on the representational capacities of extraordinary assemblies or conventions versus ordinary legislatures. By choosing to speak in synonymic terms when referring to assembly or convention ratification, and choosing not to speak in synonymic terms when referring to legislative ratification, the proponents of the latter revealed their underlying presuppositions. Roger Sherman contrasted the Articles of Confederation's legislative ratification with resolution fifteen's assembly ratification method, and used the words "popular ratification" to refer to the latter.[155] Similarly, Elbridge Gerry spoke of the assembly ratification method as a way to refer the proposed constitution to the People, whom he generally distrusted.[156] Gerry also based the popular sovereignty pedigree of the legislatively ratified Articles of Confederation and state constitutions on popular "acquiescence," rather than ratification by state legislatures, and thereby implicitly conceded that legislative ratification did not equal popular ratification.[157] Oliver Ellsworth spoke of the assembly ratification method as a way to send the proposed Constitution "to the people for ratification,"[158] and as a way to secure "the consent of the people."[159] He never suggested that legislative ratification might equate with popular ratification. Finally, Daniel Carroll, James McHenry and Luther Martin, the Maryland delegates who opposed convention ratification towards the end of the Philadelphia Convention, offered formalist and pragmatic arguments against assembly ratification. They did nothing to suggest that assembly ratification would not, or that legislative ratification would, constitute ratification by the popular sovereign.

Arch Anti-Federalist Luther Martin had particularly strong motives to favor legislative ratification over assembly ratification, and, therefore, particularly strong reasons to undermine the Madison/Wilson/Mason premise. Adherence to the Articles of Confederation's legislative ratification modality would minimize the possibility that far-reaching

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[155] *See supra* text accompanying notes 58-59.

[156] *See supra* text accompanying notes 65-66.

[157] *See supra* text accompanying notes 65, 92.

[158] *See supra* text accompanying note 83.

[159] *See supra* text accompanying notes 101-02.

nationalizing changes might be approved. As Rufus King had argued on June 5, state legislatures would be less likely to approve ceding their power to an energetic national government than would specially elected assemblies.[160] The fact that Martin neither directly attacked assembly ratification, nor bolstered legislative ratification, with the idea that the former would not equate with popular ratification, while the latter would, is of great significance. His silence on this issue, in short, speaks quite loudly. If persuasive, such a frontal attack could have greatly enhanced the prospects for retaining the Articles' legislative ratification requirement, and thereby minimized the possibility for centralization of governing authority. If persuasive, Martin could have painted the Virginia Plan's assembly ratification measure as nothing more than a ploy to enhance the chances that the sweeping, centralizing changes that the delegates were devising would ultimately be adopted. However, given the pervasive mindset that only extraordinary assemblies or conventions, and not legislatures, could embody the popular sovereign, that line of attack was unavailable.

Without doubt, assembly ratification aided the cause of Federalist proponents of the proposed Constitution by enhancing the probability of ratification. As King articulated, assembly ratification offered the Federalist friends of the emerging Constitution a greater likelihood of success than did legislative ratification.[161] Assembly ratification also offered Federalists a legitimate rationale for rescinding the Articles of Confederation. Under "first principles" logic, because the existing constitutional order under the Articles of Confederation lacked a legitimate popular sovereignty pedigree, the People assembled in extraordinary conventions had absolute authority to annul the existing constitutional order and install a new constitutional order in its place.

There is, nonetheless, ample reason to conclude that assembly ratification was much more than a Federalist stratagem, and that proponents of assembly ratification genuinely believed that legislatures were incapable of embodying the popular sovereign. Principally, had the linkage of popular ratification to assembly ratification been merely a gimmick, the opponents of assembly ratification could have easily exposed it as such. Though presented with ample opportunities, they never attempted to do so. Their silence answers any doubt on whether "first principles" was merely a stratagem or a convenient and

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[160] *See* 1 RECORDS, *supra* note 48, at 123 (James Madison's notes).

[161] *See id.* at 123 (arguing that "[a] Convention being a single house, the adoption may more easily be carried thro' it than thro' the Legislatures where there are several branches. The Legislatures also being to lose power, will be most likely to raise objections.").

masterfully deployed, but altogether sincere, line of argument. Had "first principles" not been sincere, it could have and would have been unmasked. For this reason we can conclude that the general consensus of both proponents and opponents to assembly ratification acknowledged that only extraordinary assemblies or conventions, but not ordinary legislatures, were capable of embodying We the People for purposes of ratifying constitutional norms.

Further, had assembly ratification been merely a Federalist stratagem, those favoring and opposing assembly ratification would have fallen strictly along the axis of those favoring and opposing the proposed centralizing Constitution. Surprisingly, however, the alliances among assembly ratification protagonists versus antagonists were quite disorderly. There was little correlation between favoring or disfavoring the emerging Constitution and favoring or disfavoring convention ratification. It is no surprise that arch Anti-Federalist Luther Martin favored the Articles of Confederation's legislative ratification, or that prominent centralizing Federalist James Madison favored abandoning the Articles' restrictive legislative ratification clause in favor of assembly ratification. The Anti-Federalist versus Federalist axis, however, cannot explain George Mason's views. Mason was an Anti-Federalist who did not sign the proposed Constitution and campaigned against ratification in his home state of Virginia.[162] Though assembly ratification made approval of the document he opposed more likely, he championed assembly ratification at the Philadelphia Convention.[163] On the other side of the coin, Federalists Daniel Carroll and James McHenry of Maryland generally favored the centralizing tendencies of the proposed Constitution that emerged from Philadelphia.[164] Yet, both opposed assembly ratification and favored legislative ratification at the Philadelphia Convention.[165] Something much deeper than strategic considerations appears to have motivated the delegates' views on ratification methodology.

There is one final reason to conclude that assembly ratification was much more than a Federalist stratagem aimed at greasing the wheels of

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[162] *See* 2 RECORDS, *supra* note 53, at 664-65 (record of delegates who signed proposed Constitution); 2 THE COMPLETE ANTI-FEDERALIST 9-18 (Herbert J. Storing ed., 1981) (commenting on Mason and Mason's "Objections to the Constitution of Government Formed by the Convention").

[163] *See supra* text accompanying notes 88-89.

[164] Both signed the proposed Constitution. *See* 2 RECORDS, *supra* note 53, at 664 (record of delegates who signed proposed Constitution).

[165] *See supra* text accompanying notes 132-34.

ratification. If it had not been widely presumed that only assemblies, and not legislatures, could embody the popular sovereign for purposes of ratifying constitutional norms, the delegates in Philadelphia probably would not have dared to offer a substitute plan of government. They, instead, would have offered a set of amendments to the Articles of Confederation. Opponents of the centralizing Constitution that emerged from Philadelphia emphasized that assembly ratification contradicted the Articles of Confederation and state constitution amendment clauses, and that the limited instructions the states had given the delegates, permitted only alteration of the Articles and not the creation of a substitute constitution.[166] Proponents of the proposed Constitution, however, knew that Article VII's popular constituent convention ratification method could give them cover when they returned to their home states to advocate adoption of a substitute constitutional document. More specifically, they knew they could persuasively argue, as they had during the Philadelphia Convention, that the proposed Constitution would be ratified by the People embodied in extraordinary conventions, and that popular ratification obviated the Articles of Confederation and state constitution amendment clauses, as well as the limited instructions given delegates by their states. They knew that this argument could provide cover because they knew that the conceptualization of extraordinary assemblies or conventions as representational structures through which the popular sovereign could approve constitutional norms held great currency. It was not that the proponents of the proposed Constitution could hope to quell all resistance with Madison's "first principles" argument. Dissenters would still be heard. Their dissent, however, would not be based on a refutation of the idea that assemblies, but not legislatures, function as representational structures through which the popular sovereign acts. Instead, opposition would be based, as it had been during the Philadelphia Convention, on appeals to formalism or on a desire to avoid giving the People assembled too strong a voice in creating the new national constitutional order. A battle between formal legal requirements and the sanction of the popular sovereign was a battle that gave the proponents of the proposed Constitution a chance of success, and maybe even the upper hand.

There exists one possible caveat to these otherwise confident conclusions on the original understanding of Article VII's convention

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[166] *See* Ackerman & Katyal, *supra* note 7, at 478-87 (outlining legalistic problems faced by Federalists who advocated ratification of Constitution pursuant to Article VII).

ratification mechanism. Most of what we know about the delegates' debates on the ratification issue in Philadelphia comes to us through James Madison's notes. Perhaps the repeated use of popular ratification as a synonym for ratification by assemblies or conventions does not reflect, as I have argued, an implied acceptance of the idea that assembly ratification equals popular ratification. Perhaps it simply reflects Madison's quirky shorthand, or even worse, a premeditated effort to warp the record. It is possible that the delegates never used popular ratification and ratification by assemblies or conventions synonymously. Perhaps they were quite explicit in differentiating between ratification by assemblies and ratification by the popular sovereign, but Madison failed to accurately record their careful differentiation of terms. The apparent use of these terms as synonyms could have been the result of something as mundane as Madison's rush to record in longhand the rapidly unfolding orations of his fellow delegates. Forced into an economical form of transcription, perhaps Madison simply scribbled "popular ratification" anytime a delegate spoke of ratification by assemblies or conventions under resolutions fifteen or nineteen, or Article XXI.

Three key pieces of evidence render any such scenario a remote possibility, at best. First, Madison's notes are generally considered to be quite reliable and accurate.[167] Second, the record of the Philadelphia Convention does not include a single passage in which a delegate differentiated assembly or convention ratification from popular ratification. If Madison's idiosyncratic note-taking had distorted the comments of delegates, one would expect that his notes would register at least *one* instance where assembly and popular ratification were spoken of in a nonsynonymous way. Madison's notes, however, show the delegates uniformly, consistently, and repeatedly treating popular ratification as a synonym for assembly or convention ratification.

The third and most important piece of data suggesting that Madison's notes on the ratification methodology debates are accurate comes from beyond the four walls of the Philadelphia Convention. As we will see in the next section, almost all commentators spoke of ratification

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[167] Madison's notes are considered reliable. *See* James H. Hutson, *The Creation of the Consitution: The Integrity of the Documentary Record*, *in* INTERPRETING THE CONSTITUTION: THE DEBATE OVER ORIGINAL INTENT 152, 162-68 (Jack Rakove ed., 1990) (stating that Madison's notes are reliable). Only a few have suggested otherwise. *See* SUPPLEMENT TO MAX FARRAND'S THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at xx-xxv (James H. Hutson ed., 1966) (discussing theory espoused by William Crosskey that Madison's notes are not accurate with skepticism, and concluding that "[a] heavy burden of proof rests upon those who would contend that Madison, as editor, progressively corrupted his notes after 1787").

methodologies in the exact same way that Madison's notes indicate that the delegates to the Philadelphia drafting convention spoke. The commentators employed the same approaches in state legislatures and state ratifying conventions, and in public speeches, letters, and opinion pieces published in pamphlets and newspapers. They almost universally referred to ratification by extraordinary assemblies or conventions as equivalent to ratification by the popular sovereign, and referred to ratification by ordinary legislatures as distinct from popular ratification. This way of speaking applied to those who had and had not attended the Philadelphia Convention, as well as those who favored and disfavored convention ratification.

2. Article VII During the Ratification Debates

The discourse on Article VII's ratification methodology after the end of the Philadelphia Convention falls into two main categories. The comments of those who championed ratification of the proposed Constitution, and accordingly stressed Article VII's virtues, make up the first category. As at the Philadelphia Convention, James Madison's post-Convention statements regarding Article VII equated ratification by extraordinary conventions with popular ratification and separated legislative from popular ratification. In *Federalist No. 22*, Madison argued that a key problem with the Articles of Confederation was that "it never had a ratification by the People. . . Resting on no better foundation than the consent of the several legislatures."[168] In *Federalist No. 39*, Madison stated that "the Constitution is to be founded on the assent and ratification of the people of America, given by deputies elected for the special purpose."[169] In *Federalist No. 40*, Madison responded to the Anti-Federalist charge that Article VII contravened Article XIII by arguing that the proposed Constitution "was to be submitted to *the people themselves*, the disapprobation of this supreme authority would destroy it [the proposed Constitution] forever; its approbation blot out antecedent errors and irregularities."[170] Finally, as if there were any doubt, in *Federalist No. 43*, Madison argued that Article VII "speaks for itself. The express authority of the people alone could give due validity to the Constitution." The Articles of Confederation, in contrast, "in many of the States. .. had received no higher sanction than a mere legislative

[168] THE FEDERALIST NO. 22, at 152 (James Madison) (Clinton Rossiter ed., 1961).

[169] THE FEDERALIST NO. 39, at 243 (James Madison) (Clinton Rossiter ed., 1961).

[170] THE FEDERALIST NO. 40, at 253 (James Madison) (Clinton Rossiter ed., 1961).

ratification."[171]

Similarly, James Wilson maintained the same ratification rhetoric he had employed in the Philadelphia Convention. At the Pennsylvania Ratifying Convention, Wilson argued that the People, "ordain and establish" the Constitution through Article VII's extraordinary ratifying conventions.[172] Wilson closed a noted public speech on the proposed Constitution, by stating that "In this CONSTITUTION, *all authority is derived from the* PEOPLE."[173]

Those favoring the proposed Constitution who had not been at the Philadelphia Convention spoke of Article VII's convention ratification in the exact same way as Madison, Wilson, and other delegates in Philadelphia had spoken. Consider, for example, the arguments on ratification methods heard during the Pennsylvania legislature's debate on whether to authorize the extraordinary ratifying convention called for by Article VII. Citing Article XIII of the Articles of Confederation, William Findley, an opponent of the proposed Constitution, questioned whether the Pennsylvania legislature was empowered to call a ratifying convention without first receiving Congress' affirmation of the proposed Constitution.[174] Reprising the formalist arguments that opponents of convention ratification had used in the drafting convention, Findley doubted that the Pennsylvania legislators could ignore Article XIII and look exclusively to Article VII for guidance.[175]

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[171] THE FEDERALIST NO. 43, at 279 (James Madison) (Clinton Rossiter ed., 1961).

[172] Wilson stated the following:

> I had occasion, on the former day [24 November], to mention that the leading principle in politics, and that which pervades the American constitutions, is, that the supreme power resides in the people; this Constitution, Mr. President, opens with a solemn and practical recognition of that principle: "WE THE PEOPLE OF THE UNITED STATES, in order to form a more perfect union, establish justice, &c. DO ORDAIN AND ESTABLISH this constitution, for the United States of America." It is announced in their name, it receives its political existence from their authority — they ordain and establish.

2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 383 (Merrill Jensen ed., 1976) [hereinafter 2 DOCUMENTARY HISTORY] (comments of James Wilson at Pennsylvania ratifying convention on November 28, 1787).

[173] *Id.* at 363 (Thomas Lloyd version of James Wilson public speech of November 26, 1787).

[174] *See id.* at 81-86 (legislator William Findley speaking during the September 28, 1787 debate on whether to authorize ratifying convention).

[175] Article VII's silence on legislative permission reflected the Philadelphia Convention's understanding that Congress would merely review and then transmit the proposed Constitution to the states, and that the state legislatures would then organize ratifying conventions. On September 10, the delegates considered a provision that would have called for Congress to approve the proposed Constitution before forwarding it to the

The supporters of the newly proposed Constitution rose to refute Findley's skepticism. William Robinson openly admitted that Article VII contravened Article XIII.[176] Nonetheless, because "the Federal Convention did not think of amending and altering the present Confederation," the proposed Constitution, sought "recourse to the AUTHORITY OF THE PEOPLE." This was the same kind of "first principles" argument that Madison had stressed at the Philadelphia Convention. Article XIII was irrelevant because the popular sovereign, assembled in Article VII's extraordinary conventions, would sanction alterations in the constitutional order. Moreover, just as the delegates to the Philadelphia Convention had done, Robinson used "the AUTHORITY OF THE PEOPLE" as a synonym for ratification via Article VII's extraordinary conventions. Thomas Fitzsimons followed Robinson with the following:

> They [the delegates to the Philadelphia drafting convention] also saw that what alterations were necessary could not be ratified by the legislatures, as they were incompetent to ordaining a form of government. They knew this belonged to the people only, and that the people only would carry it into effect. What have Congress and the legislatures to do with the proposed Constitution? Nothing, sir, they are but the mere vehicles to convey the information to the people.[177]

Fitzsimons' argument employs popular ratification terminology to refer to Article VII's extraordinary convention ratification method. His argument also indicates that legislative bodies do not ratify constitutional norms on behalf of the People, but merely "convey" proposed constitutional norms to the People assembled in extraordinary conventions.

These same ideas were expressed in the Massachusetts legislature. In arguing against the resolution to call a ratifying convention, Daniel Kilham put forth the formalist argument. The Articles of Confederation, he emphasized, "expressly provide[] that no alteration shall be made

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states. The measure, however, was rejected in favor of wording that called on Congress to merely forward the Constitution to the states without positive or negative comment. *See* 2 RECORDS, *supra* note 53, at 562-63, 579.

[176] *See* 2 DOCUMENTARY HISTORY, *supra* note 171, at 86-88 (noting Legislator William Robinson during September 28, 1787 debate reciting Article XIII and admitting that it did not permit alterations by means other than recommendation by Congress and approval of all state legislatures).

[177] *Id.* at 89 (Legislator Thomas Fitzsimons during September 28, 1787 legislative debate).

unless the same be agreed to in a Congress of the United States, and be afterwards confirmed by the Legislatures of every State."[178] Eleazer Brooks offered the by now familiar "first principles" rebuttal: the delegates to the Philadelphia drafting convention "recommended a system to be considered by the people."[179] Representative Thomas Dawes echoed and amplified the argument:

> The people, said he, will consider this point [Kilham's formalist argument], with all the other proceedings, when in State Convention — and we [the Massachusetts legislature] have no right to deprive them of this privilege; unless we will undertake to think for them in this instance, which they never employed us to do, and which they have reserved for themselves.[180]

Quite obviously, Brooks and Dawes regarded consideration by Article VII's extraordinary conventions to be the equivalent of consideration by the popular sovereign.[181]

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[178] 4 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 135 (John P. Kaminski & Gaspare J. Saladino eds., 1997) [hereinafter 4 DOCUMENTARY HISTORY] (Daniel Kilham's comments on October 27, 1787, in Massachusetts House of Representatives regarding proposed resolution to call statewide constitutional ratifying convention).

[179] *Id.* at 136.

[180] *Id.*

[181] Three other Massachusetts representatives spoke on the issue of convention ratification. Two of the three representatives equated convention ratification with popular ratification. *See id.* at 137-38 (stating Representative Charles Jarvis's arguments in favor of resolution to authorize ratifying convention, and stating that proposed Constitution "ought to be referred — to the bosom of the people"; Representative Theophilus Parson's argument that "the people alone were the proper and immediate judges of the system proposed by the Federal Convention"). Representative William Widgery offered a unique perspective. Perhaps harking back to the method of ratifying the Massachusetts Constitution of 1780, he argued that the proposed Constitution should be sent to the People in town meetings. The "poverty of some towns," he argued, would prevent them from sending delegates to a state ratifying convention. *Id.* at 138. His was one of the very few voices to hint that extraordinary conventions might not perfectly embody the People. His argument, however, falls far short of an indictment of conventions as representational structures through which the popular sovereign ratifies constitutional norms. It instead is an argument regarding the possibility that, due to an idiosyncratic circumstance (the inability of some towns to send delegates), the Massachusetts ratifying convention in particular might not perfectly reflect the popular will. Responding to Widgery's concern that impoverished towns might not be represented at the ratifying convention, the Massachusetts House agreed to pay the delegates to the convention out of state funds. *See id.* (setting forth Nathaniel Gorman's motion so "that every town in the Commonwealth might be enabled to be represented in the Convention . . . for the payment of the pay-roll of the members who may compose the same, out of the publick treasury"). Advocates of the proposed constitution outside of the Massachusetts legislature spoke in the same terms as those in the Massachusetts legislature. The *Boston Gazette*, clearly favoring the proposed Constitution, argued that "The AMERICAN CONSTITUTION is accordingly to be

The expressions in the Virginia and North Carolina conventions were similar in character. At the Virginia Ratifying convention, Henry Lee, George Nicholas, and, of course, James Madison, all Federalist proponents of the proposed Constitution, used the terminology of popular ratification when speaking of ratification by Article VII's extraordinary conventions.[182] George Nicholas, for example, used the term "a reference to the people" as a synonym for ratification by extraordinary conventions, and highlighted the agency problems inherent in ordinary legislative bodies.[183]

In North Carolina, some delegates to the state ratifying conventions invoked the formalist argument to suggest that the delegates to the Philadelphia drafting convention had overstepped their authority in claiming to speak for the People.[184] These assertions were quickly rebuffed by the assertion that the proposed Constitution was submitted to the popular sovereign. These rebuttals presumed that ratification by Article VII's conventions would be tantamount to ratification by the people.[185]

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presented to THE PEOPLE for their adoption or rejection." *Id.* at 167 (citing BOSTON GAZETTE, Oct. 29, 1787).

[182] *See* 9 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 949-50, 995, 999 (John P. Kaminski & Gaspare J. Saladino eds., 1990) [hereinafter 9 DOCUMENTARY HISTORY] (noting comments of Lee, Madison, and Nicholas at Virginia ratifying convention on June 5 and 6, 1788).

[183] In response to arguments against ratification raised by Anti-Federalist Patrick Henry, Nicholas argued as follows:

> But [Patrick Henry] objects to the expression, "we the people," and demands the reason, why they had not said "we the United States of America?" In my opinion the expression is highly proper — It is submitted to the people. . . . We are under great obligation to the Federal Convention for recurring to the people, the source of all power. [Henry's] argument militates against himself; he says, that persons in power never relinquish their powers willingly: If then the State Legislatures would not relinquish part of the powers they now possess, to enable a General Government to support the Union, reference to the people is necessary.

Id. at 999 (noting George Nicholas's comments on June 6, 1788, at Virginia ratifying convention).

[184] *See* 4 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 15-16, 23-24 (1888) [hereinafter 4 ELLIOT'S DEBATES] (noting delegate Caldwell's argument that delegates to Philadelphia convention "had no power, from the people at large, to use their name, or act for them," and noting delegate Joseph Taylor making same argument).

[185] As one delegate argued:

> They say that the delegates to the Federal Convention assumed powers which were not granted them; that they ought not to have used the words We, the people. That they were not the delegates of the people, is universally acknowledged. The Constitution is only a mere proposal. Had it been binding

The arguments that pro-convention ratification actors deployed outside of legislative chambers and ratifying conventions displayed similar reasoning and word usage. In one essay, for example, "A Landholder" argued that the delegates to the Philadelphia Convention "chose to submit their system to the people rather than legislatures."[186] In a private letter, one observer, who was dubious about the Anti-Federalist Article XIII argument against convention ratification, alluded to the questionable popular sovereignty pedigree of the mostly legislatively ratified Articles of Confederation. To him, "the confederation of 1781 was from the first formation of it unsustainable — being unseason'd by wise organization or sound constitutional principle — and in short built upon the unstable breath of State Legislatures. . . ."[187] He celebrated, in contrast, the fact that "the late Convention at Philadelphia have appealed to an higher authority than that with which either Congress of any of our State Legislatures are invested. . . ."[188] As a rebuttal to "slander" that Anti-Federalists lodged against the drafters of the Constitution, essayist "A Patriotic Citizen" argued as follows:

> Let us also recollect that they [the drafters of the Constitution] have appealed to the people at large to judge the uprightness of their conduct, and have submitted to their decision that plan of government which is the result of more than four months of deliberation. . . . If they had had any designs hostile to the liberties of the people, they would rather have endeavoured to procure the ratification of the constitution by the few, for instance by the legislatures of the different states.[189]

> on us, there might be a reason for the objecting. After they finished the plan, they proposed that it should be recommended to the people by the several state legislatures. If the people approve it, it becomes their act. . . . When that is done here, is it not the people of the State of North Carolina that do it, joined with the people of the other states who have adopted it? The expression then is right.

Id. at 24-25 (noting comments of delegate Archibald MacLaine during North Carolina ratification convention). This rebuff is yet another instance in which ratification by conventions is equated with ratification by the popular sovereign.

[186] *See* 13 DOCUMENTARY HISTORY, *supra* note 86, at 562.

[187] 14 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 493 (John P. Kaminski & Gaspare J. Saladino eds., 1983) [hereinafter 14 DOCUMENTARY HISTORY] (citing letter of John Cutting Brown to William Short of Jan. 9, 1788).

[188] *Id.* at 495.

[189] 18 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 9-10 (John P. Kaminski & Gaspare J. Saladino eds., 1995) (citing passages from reproduction of "A Patriotic Citizen" published on May 10, 1788).

The *Massachusetts Centinel*, and several other newspapers in different states, reported the following: "Of the CONSTITUTION two things are certain — The one that it *has* been *ratified by nearly* TWO-THIRDS *of the free people of the United States* — and therefore may be said, to have received THE SANCTION *of* THE PEOPLE."[190]

The second main category of post-Philadelphia Convention commentary on Article VII's ratification methodology comes from opponents of the proposed Constitution. For the most part, Anti-Federalists repeated the formalist argument that Article VII violated either the amendment clauses of the Articles of Confederation and state constitutions or the instructions given to the delegates to the Philadelphia Convention. As we have already seen, Anti-Federalists raised the incompatibility of Article XIII and Article VII in state legislatures during the debates over resolutions authorizing ratifying conventions.[191] Anti-Federalists, however, continually stressed the formalist argument in other public and private fora as well. John Quincy Adams complained that "the whole of the 7th: article, is an open and bare-faced violation of the most sacred engagements which can be formed by human beings. It violates the Confederation, the 13th: article. . . and it violates the constitution of this State."[192] Similarly, Joseph Barrell, a Boston merchant writing under the pseudonym Vox Populi, argued in the *Boston Gazette* that ratification under Article VII involved "an open and avowed violation of a sacred federal constitution."[193] Similarly, in the *American Herald*, Portius rhetorically asked, "[H]ow can Nine States dissolve a System of Government, which Thirteen had instituted, and which the whole Thirteen pledged their faith to each other should not receive any alterations without the consent of and approbation of the whole Thirteen."[194] Pointing to Article VII's conflict with the Massachusetts Constitution's amendment provision, "The Republican Federalist" argued that "A ratification, therefore, of the new Constitution by the State Convention, cannot be binding on the citizens of this State, being directly repugnant to an existing covenant."[195]

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[190] *Id.* at 380 (reproduction of MASS. CENTINEL, June 18, 1788). The *Massachusetts Centinel* was a Boston newspaper. This particular item was reprinted in publications in several states. *See* 14 DOCUMENTARY HISTORY, *supra* note 187, at 380.

[191] *See supra* text accompanying notes 173, 177.

[192] 4 DOCUMENTARY HISTORY, *supra* note 178, at 74 (quoting letter from John Quincy Adams to William Cranch (Oct. 14, 1787)).

[193] *Id.* at 201 (Vox Populi, MASS. GAZETTE, Nov. 6, 1787).

[194] *Id.* at 218 (Portius, AM. HERALD, Nov. 12, 1787).

[195] 5 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 664 (John P. Kaminski & Gaspare J. Saladino eds., 1998) [hereinafter 5 DOCUMENTARY HISTORY]

None of the Anti-Federalists indicated that legislative ratification pursuant to Article XIII would signify ratification by the popular sovereign. Adams, Barrell, "The Republican Federalist," and a host of other Anti-Federalists advancing the formalist argument that Article VII violated the amendment provisions of the extant constitutional order, never hinted at such a conclusion. To the contrary, as had opponents of the convention ratification method at the Philadelphia drafting convention, Anti-Federalists often referred to ratification pursuant to Article VII as ratification by the People. James Monroe of Virginia, who over time had come to oppose ratification of the proposed Constitution,[196] warned as follows: "[T]his plan of government is not submitted for your decision in an ordinary way; not to one branch of the government in its legislative character. . . but to the people to whom it belongs and from whom power originates, in conventions assembled."[197] Similarly, "C.D." argued that "although the people be called to ratify the new plan, the present laws of the union forbid any alteration, without consent of the legislatures."[198] Using an incredulous tone, "The Republican Federalist" exclaimed the following: "The consolidation of the union! . . . To be submitted to the people at large, before it has been *considered* or even *agitated* by Congress, or any of the Legislatures. . . ."[199] Luther Martin, the arch Anti-Federalist who had opposed convention ratification in Philadelphia, informed the Maryland legislature of his opposition to Article VII's ratification mechanism. Martin outlined the formal conflict between Article VII and Article XIII and the amendment clause of the Maryland Constitution.[200] Nonetheless, he admitted that Article VII's ratification by conventions constituted an "appeal to the people at large."[201]

(quoting The Republican Federalist III, MASS. CENTINEL, Jan. 9, 1788).

[196] 9 DOCUMENTARY HISTORY, *supra* note 182, at 845 (editor's comments).

[197] *Id.* at 847 (passage from Monroe-authored pamphlet).

[198] 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 259 (John P. Kaminski & Gaspare J. Saladino eds., 1988) (letter of "C.D." dated Dec. 26, 1787, printed in VA. INDEP. CHRON.).

[199] 5 DOCUMENTARY HISTORY, *supra* note 195, at 591 (Republican Federalist, MASS. CENTINEL, Jan. 2, 1788).

[200] *See* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 162, at 76-77 (highlighting that Article VII conflicted with Article XIII's requirements of Congressional approval and unanimous state legislature ratification, and arguing that Article VII violated Maryland Constitution amendment clause).

[201] *Id.* at 77-78. Martin referred to the convention ratification method as an "appeal to the people" three times. Though critical of Article VII's ratification method, he consistently used the phrase "appeal to the people" as a synonym for ratification by Article VII's extraordinary conventions. The following statements provide examples:

The conclusion that we must draw on the original understanding of Article VII's convention ratification modality is both expected and unexpected. It is expected because it tracks the standard historiography outlined in Part II.A of this Article. Close examination of the record of original understanding indeed reflects that by 1787, the dominant mindset maintained that only extraordinary conventions, and not ordinary legislative bodies, were thought competent to operate as representational structures through which the popular sovereign could ratify constitutional norms.

Somewhat unexpected, however, is the complete hegemony of thinking on this issue. Meaningful dissent from the dominant mindset was nonexistent. Any statements contrary to the hegemonically dominant beliefs that might have been made would have to be classified as idiosyncratic outliers. That we would find a complete absence of disagreement on this issue is quite striking. Federalists and Anti-Federalists, proponents and opponents of convention ratification, delegates in Philadelphia, legislators in state houses, delegates to state ratifying conventions, pamphleteers, and letter writers all concurred on one basic presupposition. The terms of debate never centered on whether conventions did and legislatures did not embody We the People. The terms of the debate over ratification modalities instead centered on whether a decision of the People assembled in specially elected conventions could override the formalities of the Articles of

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> The warm advocates of this system [the proposed Constitution] fearing it would not meet with the approbation of Congress, and determined, even though Congress and the respective State legislatures should disapprove the same, to force it upon them, if possible, through the intervention of the people at large, moved to strike out the words "for their [Congress's] approbation" . . . .

Id. at 76-78.

> Nor do I believe the people in their individual capacity, would ever have expected or desired to have been appealed to on the present occasion, in violation of the rights of their respective States, if the favourers of the proposed constitution, imagining they had a better chance of forcing it to be adopted by a *hasty* appeal to the people at large, who could not be so good judges of the dangerous consequence, had not insisted upon this mode . . . .

Id. at 77-78.

> [T]he attempt to force down this system, although Congress and the respective State legislatures should disapprove, by appealing to the people, and to procure its establishment in a manner totally unconstitutional, has a tendency to set the *State governments* and their *subjects* at *variance* with each other . . . .

Id. at 78.

Confederation and the state constitution amendment clauses, and on the limiting instructions of the delegates in Philadelphia. All agreed that specially elected conventions would operate as the conduit through which We the People could ratify the proposed Constitution. All agreed that ordinary legislatures could not perform this function.

II. REPRESENTATIONAL STRUCTURE THROUGH WHICH WE THE PEOPLE RATIFY CONSTITUTIONAL AMENDMENTS: THE ORIGINAL UNDERSTANDING OF ARTICLE V

Article V

> [A]mendments. . . shall be valid for all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by Conventions in three fourths thereof. . . .[202]

So far, the evidence of original understanding appears quite helpful to the orthodox view on the sources of constitutional norms. According to the orthodox view, constitutional norms emanate from We the People. Article VII was understood as setting up a method by which We the People could (indirectly) ratify constitutional norms. The original understandings reflected in the debates over Article VII, however, create havoc for the orthodoxy once Article V and the process of ratifying constitutional amendments are brought into the picture.

The kernel of the dilemma is this: in the debates over Article VII, the Constitution's drafters, ratifiers, and contemporaneous commentators unwaveringly manifested the understanding that only specially elected conventions, and not ordinary legislatures, could serve as representational structures through which the popular sovereign ratifies constitutional norms. Constitutional norms ratified by the former, but not the latter, count as constitutional norms ratified by We the People. Article V, however, provides that constitutional norms may be ratified by either extraordinary conventions or ordinary state legislatures. How can we square Article V's provision for legislative ratification of constitutional norms with the original understanding of the representational structures through which the popular sovereign may ratify constitutional norms so evident in the debates over Article VII? If the drafters of the Constitution consciously avoided ratification of the Constitution's main body by ordinary legislatures in Article VII, why

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[202] U.S. CONST. art. V.

would they allow ordinary legislatures to ratify constitutional amendments in Article V?

A. Squaring Legislative Ratification of Amendments with the Original Understanding Expressed in Debates over Article VII

Consider three possible answers to these questions. One possibility is that Article V's allowance for legislative ratification of constitutional amendments signals a refinement in the drafters' and ratifiers' understandings on the representational structure issue. Perhaps discussion on constitutional amendment mechanisms triggered a rebirth of the idea that legislative bodies, too, could ratify constitutional norms, or at least constitutional amendments, in the name of We the People. Such an evolution in thinking need not have represented a complete repudiation of the "conventions only" thinking so evident in the debates over Article VII. The evolution could have been nothing more than a special exception applicable only to constitutional amendment ratification under Article V's mechanisms. Thus, perhaps the drafters and ratifiers still firmly believed that ordinary legislatures could not speak as We the People embodied for purposes of ratifying the Constitution. Nonetheless, We the People could sanction legislatures to ratify constitutional amendments as if they embodied We the People. Once the People, acting through Article VII conventions, ratify the Constitution, including Article V and its clause allowing legislative ratification of amendments, the People will have authorized ordinary state legislative bodies to ratify constitutional amendments in the name of We the People. Even though, consistent with "first principles" thinking, ordinary legislatures could not actually embody the popular sovereign, the popular sovereign will have authorized legislative bodies to function *as if* they embody the popular sovereign for purposes of ratifying constitutional amendments. The popular sovereignty pedigree of any legislatively ratified constitutional amendment would not come directly from the fact of legislative ratification. It, instead, would come from the initial act of ratification, which would include a popular sanction for legislative ratification of constitutional amendments. If thinking on the representational structure issue evolved along these lines, the apparent dissonance between Article V's allowance for ordinary legislative ratification of constitutional amendments and representational structure ideas expressed in the debates over Article VII completely dissolves.

The second and third possibilities are based on the notion that despite Article V's allowance for legislative ratification of constitutional

amendments, no evolution in thinking on the representational structures issues occurred. The drafters and ratifiers of the Constitution, in other words, firmly and unwaveringly adhered to the unadulterated version of the idea that only conventions, and not legislatures, could ratify constitutional norms in the name of We the People.

As the second possibility, Article V's allowance provision for the ratification of amendments by ordinary legislatures signals that the drafters and ratifiers meant to provide a way for ordinary government, as opposed to the popular sovereign, to ratify constitutional norms. Any proposed amendment ratified by ordinary legislatures pursuant to Article V indeed would count as part of the Constitution. However, consistent with an unadulterated version of "first principles" thinking, only the constitutional amendments ratified by conventions would bear a legitimate popular sovereignty pedigree. Though counting as valid constitutional norms, constitutional amendments ratified by ordinary legislatures would be subordinate to the provisions ratified by the People embodied by extraordinary conventions. This second possibility is not too different from the first possibility mentioned above. Both posit that the drafters and ratifiers understood that ordinary legislative bodies would be ratifiers of constitutional amendments. The first, however, posits that ordinary legislatures would be authorized to ratify constitutional amendments as if they embodied We the People. The second posits that ordinary legislatures were understood as ratifying constitutional amendments, but not as any kind of actual or authorized embodiment of the People. Thus, on this second possibility, legislatively ratified constitutional amendments would lack any legitimate claim to a popular sovereignty pedigree, and, consequently, would be hierarchically inferior to convention-ratified constitutional norms.

The third possibility is that Article V's provision for ratification of constitutional amendments by ordinary legislatures signals nothing in particular about the original understanding on the representational structure issue. It does not signal that the Framers had modified their understanding of conventions versus legislative bodies as ratifiers of constitutional amendments in the name of the popular sovereign. Nor does it signal an effort to allow ordinary legislatures to create subordinate constitutional norms. Inclusion of amendment ratification by state legislative bodies instead signals that the Framers were imperfect. They sometimes failed to carefully think through the implications of the constitutional provisions they drafted. They sometimes failed to harmonize the wording of the Constitution's provisions with underlying principles. In simplest terms, Article V's

provision for legislative ratification is nothing more and nothing less than a blunder, perhaps knowing and perhaps not, on the part of the Constitution's drafters. Any attempt to square Article V's allowance for legislative ratification of constitutional norms with the original understanding on representational structures through which the popular sovereign may ratify constitutional norms is utterly unavailing. The two cannot be squared because they are fundamentally at odds. Distracted by more immediate issues, and guided by the idiosyncratic nature of discourse over Article V, the drafters and ratifiers of the Constitution never focused on or discussed the irreconcilable rift between their "conventions only" thinking, manifest in Article VII debates, and Article V's provision for legislative ratification of constitutional amendments.

The first and second explanations represent Article V interpretations that dissolve the dissonance between the "first principles"-based thinking expressed during the Article VII debates and Article V's provision for legislative ratification of constitutional amendments. As we will see below, however, it is not likely that either reflects the original understanding of Article V. There exists only weak evidence to support the notion that the drafters and ratifiers intended Article V's provision for legislative ratification of constitutional amendments as a way for ordinary government to supplement the Constitution with a class of hierarchically subordinate constitutional norms. The best evidence for this reading of Article V original understanding comes from the debate in the First Congress over the Bill of Rights. As we will see, however, this evidence is insufficient to conclude that the founding generation had understood that legislatively ratified constitutional amendments would constitute a second class category of constitutional norms, inferior to convention ratified constitutional norms.

The evidence in support of the orthodox reading of Article V is even weaker. There is no solid evidence to support the notion that the drafters or ratifiers of the Constitution had concluded that ratification of the Constitution would authorize ordinary legislatures to act as if they embody We the People for purposes of ratifying constitutional amendments. Nothing in the historical record of original understanding demonstrates that the founding generation had concluded that ratification of amendments by legislative bodies would be tantamount to ratification by We the People.

The evidence instead indicates that the Constitution's drafters and ratifiers simply did not form any concrete understandings on Article V's provision for legislative ratification of constitutional amendments. The clause was drafted at the end of the Philadelphia ratification convention

and was not even subject to formal debate. During the ratification process the clause was largely ignored. To the extent that Article V was discussed during the Philadelphia drafting convention and in the subsequent ratification process, only Article V's federalism and entrenchment — whether Article V made amendment too difficult — were mentioned. With attention diverted to other more immediate and substantial issues, no one during the drafting or ratification periods scrutinized Article V's provision for legislative ratification of constitutional amendments. No one during the drafting or ratification periods focused on the dissonance between Article V's legislative ratification option and the "conventions only" thinking manifest in the debates over Article VII. Simply stated, there was no manifest or widely held original understanding of Article V's provision for legislative ratification of constitutional amendments. There was no thoughtful attempt to reconcile Article V's allowance for legislative ratification of constitutional amendments with the idea that legislative bodies were not competent to ratify constitutional norms on behalf of We the People so prominent in the Article VII debates.

Of the three possible explanations for the conflict mentioned above, the historical record reveals no meaningful discussion of the first or second possibilities at the Philadelphia Convention or during the ratification process. Indeed, it was not until *after* the Constitution had been ratified, and Congress was debating proposal of the Bill of Rights, that any meaningful discussion of the issue can be detected. The post ratification debate in Congress reveals substantial disagreement. One view championed option two, mentioned above — ordinary legislatures could ratify new constitutional norms, but not as We the People embodied, and, therefore, any legislatively ratified constitutional amendments would be hierarchically inferior to the popularly ratified main body of the Constitution. Another view argued option one — constitutional amendments ratified by ordinary legislatures count as constitutional norms ratified by We the People and have the same hierarchic status as the main body of the Constitution. The fact that two different interpretations of Article V were strenuously advocated suggests that option three best captures reality — no consensus (indeed, no consideration) ever emerged from the drafting and ratification of the Constitution on how to mesh Article V's allowance for legislative ratification of constitutional amendments with the widely held notion that legislatures were incompetent to ratify constitutional norms as We the People embodied. Had such a consensus been present, the debate between options one and two would quickly have been quelled by

reference to that presettled concordance. Such was not the case. The debate on this issue in Congress was extensive, heated, and, ultimately, inconclusive.

B. The Original Understanding of Article V

The original understanding of Article VII regarding the representational structures through which the popular sovereign may ratify constitutional norms is quite certain. The original understanding of Article V on the representational structure issue, in contrast, is close to nonexistent. While the representational structure issue was thoroughly plumbed in the debates over Article VII and its precursors, the debates over Article V and its precursors barely touched upon the issue. Article V was the product of two brief and unreflective sessions during the last week of the Philadelphia drafting convention. Those discussions focused almost exclusively on federalism and entrenchment concerns. As a result, the Philadelphia Convention concocted an amendment ratification procedure which allows ordinary state legislatures to ratify constitutional norms — a seeming direct conflict with the representational structure theory underlying Article VII. Moreover, the post-Philadelphia ratification debates were too preoccupied with the substantive content of the proposed Constitution, and too distracted by the federalism and entrenchment issues, to focus on Article V's allowance for legislative ratification of constitutional amendments. To the extent that Article V was discussed during the ratification period, the entrenchment issue, and, to a lesser extent, the federalism issue, both quickly voiced during the Philadelphia Convention, were merely echoed and somewhat amplified by commentators and delegates to ratification conventions.

No one who participated in the ratification debate focused on the incongruity between Article VII's insistence on ratification via conventions and Article V's provision for legislative ratification of constitutional amendments. It is not too extreme to conclude that the Constitution's drafters seriously erred in their formulation of Article V's amendment process, and that the post-Philadelphia ratification debates failed to catch a major flaw in Article V. The error would not be detected until it was too late — the first time that Congress sought to utilize Article V to propose the Bill of Rights for ratification by state legislatures.

1. Article V at the Philadelphia Convention

Though raised at a very early stage, the delegates at the Philadelphia drafting convention barely touched on the substance of the amendment issue before September 10, 1787, one week before the convention concluded its business. Recall that on May 29, Edmund Randolph introduced the Virginia Plan.[203] Among the resolutions Randolph introduced on that day was the following:

> 13. Resd. that provision ought to be made for amendment of the Articles of Union whensoever it shall seem necessary, and that the assent of the National Legislature ought not be required thereto.[204]

Two features are worthy of immediate note. First, resolution thirteen substantially differed from its cousin, resolution fifteen. The latter explicitly embraced a particular mechanism for ratifying constitutional norms — ratification by extraordinary assemblies.[205] The former, in contrast, did not endorse any particular mechanism for ratifying constitutional amendments. It merely endorsed the concept of including an amendment provision in the new set of constitutional norms, and expressed opposition to conditioning amendments on the consent of the national legislative body.[206] The second feature of resolution thirteen worth noting is the one point on which it does take a definite position on the amendment process — the insistence on exclusion of the "National Legislature" from the amendment ratification process. Federalism, as we will see, was never far from the delegates' minds when they debated the amendment ratification mechanism.[207] Madison and the other Virginians probably had federalism concerns in mind in proposing that

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[203] *See supra* text accompanying note 48.

[204] 1 RECORDS, *supra* note 48, at 22 (James Madison's notes).

[205] *See supra* text accompanying notes 53-54.

[206] This disparity is somewhat peculiar. Both resolutions were part of the same proposed plan of government. Both dealt with ratification of constitutional norms. Most importantly, both were probably written, or at least heavily influenced by, James Madison. *See supra* text accompanying note 49. The key theoretical idea behind resolution fifteen was that only ratification of constitutional norms by specially elected assemblies or conventions would lend a new set of constitutional norms a popular sovereignty pedigree. Why, then, did Madison and the rest of the Virginia delegation fail to endorse ratification of constitutional amendments by the same representative structure? Does this omission signal that Madison and his fellow Virginians thought that any future amendments to the new constitution, unlike the new constitution itself, would not need a popular sovereignty pedigree? Or, was the failure to endorse a particular constitutional amendment ratification mechanism in resolution thirteen merely a sign that Madison and company were not too concerned about the particulars of the amendment process?

[207] *See infra* Part II.B.

amendments not hinge on the assent of the national legislature. The effect would be to avoid the possibility of the national legislature stifling constitutional amendments aimed at maintaining the proper state-national government balance of power, or, even worse, the possibility of the national legislature promulgating constitutional amendments that would tilt that balance in its own favor.[208]

a. The Lack of Discussion on Amendment Process

The initial discussions on resolution thirteen were extremely brief. On June 5 and June 11, delegates limited themselves to favoring inclusion of an amendment provision in whatever set of new constitutional norms the convention might eventually propose.[209] On the latter date, George Mason of Virginia hinted at the federalism issue by arguing that "[i]t would be improper to require the consent of the National Legislature, because they may abuse their power, and refuse their assent on that very account."[210] Without further discussion, the Committee of the Whole approved resolution thirteen, but postponed consideration of the language regarding the consent of the national legislature.[211] On June 19, the Committee of the Whole reported the Virginia Plan to the convention.[212] By that date, amendment to the Virginia resolutions had resulted in a renumbering of resolution thirteen as resolution seventeen, which read as follows:

> 17. Resd. that provision ought to be made for the amendment of the Articles of Union whensoever it shall seem necessary.[213]

The language was the same as had been proposed by Randolph on May 29, without the language opposed to conditioning amendment on the consent of the national legislative body. On July 23, the convention

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[208] There is another way to read this feature. We know that the delegates in Philadelphia, generally, and James Madison, in particular, did not think state legislatures could embody We the People for purposes of ratifying a new constitution. Did Madison and the other Virginians have the same idea in mind when drafting resolution thirteen's opposition to conditioning amendments on "assent of the National Legislature"? Perhaps this factor influenced the Virginians. More likely, however, the balance of power between the state and national governments was first in their minds.

[209] *See* 1 RECORDS, *supra* note 48, at 122, 202-03 (James Madison's notes memorializing June 5 statement of Elbridge Gerry, and June 11 statement of George Mason, regarding resolution thirteen).

[210] *Id.* at 203 (James Madison's notes).

[211] *See id.* at 194, 203 (journal record and James Madison's notes).

[212] *See supra* note 84.

[213] *See* 1 RECORDS, *supra* note 48, at 237 (James Madison's notes).

approved the above language, without discussion.[214] On July 26, the convention submitted resolution seventeen, along with the other approved resolutions, to the "Committee of Detail."[215] They did so without having had serious discussions on amendment issues. This is striking when compared to the abundance of discussion on the general ratification resolutions. The delegates had entered into substantive discussions on Article VII precursors on June 5, 16, 19, and 20, and on July 23.[216]

The July 23 session is particularly remarkable. On that date, the delegates engaged in an extensive and heated debate on ratification modalities. They directly confronted popular ratification of the emerging proposed constitution through extraordinary assemblies versus ordinary legislatures in their extended discussion of resolution nineteen.[217] Yet, resolution seventeen, which also came up for consideration on July 23, and which also dealt with the ratification of new constitutional norms, did not rate one single word. The delegates approved resolution seventeen without comment.[218] As deep into the Philadelphia Convention as late July, the delegates were unconcerned with issues related to the process of amendment ratification.

When the Committee of Detail returned its report to the convention, resolution seventeen had been substantially transformed to read as follows:

Article XIX [XVIII][219]

> On the application of the Legislatures of two thirds of the States of the Union, for an amendment of this Constitution, the Legislature of the United States shall call a Convention for that purpose.[220]

Going beyond this mandate, the committee infused Article XIX with elements that had not been present in resolution seventeen — the power of legislatures of two-thirds of the states to call for amendments to the Constitution, and the consequent requirement that the national legislatures call a national constitutional convention to consider such

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[214] *See* 2 RECORDS, *supra* note 53, at 87 (James Madison's notes).

[215] *Id.* at 128; *see also supra* note 124.

[216] *See supra* text accompanying notes 56-166.

[217] *See* discussion *supra* Part I.B.

[218] *See* 2 RECORDS, *supra* note 53, at 87 (James Madison's notes).

[219] *See supra* note 126.

[220] 2 RECORDS, *supra* note 53, at 188 (James Madison's notes of Aug. 6, 1787).

proposed amendments.[221] The committee may well have known that the convention as a whole was preoccupied by larger issues and ambivalent to amendment ratification issues, and that, as a result, any liberties with the amendment clause would not prompt much protestation.[222]

Indeed, evidencing the lack of interest in the amendment ratification issue, on August 30, when the convention finally came to discuss Article XIX, the delegates approved the clause without debate.[223] By contrast, on both August 30 and 31, Article XXI's provisions regulating ratification of

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[221] Taken in isolation, Article XIX might appear the product of unauthorized hubris on the part of the Committee of Detail. In some ways it was. The committee had been commissioned to transform the resolutions that the convention had approved into a draft constitution, not to rewrite the approved resolutions. As we know very little about the deliberations of the Committee of Detail, it is impossible to know precisely why the Committee of Detail took it upon itself to metamorphose resolution seventeen into the seemingly unrelated Article XIX. Given the dearth of discussion on the amendment ratification issue, perhaps the committee felt compelled to give what had been nothing more than a call for inclusion of an amendment provision some concrete process. Moreover, the process written into Article XIX was not entirely pulled from thin air. The delegates had already extensively fleshed out the uses of conventions to ratify constitutional norms on behalf of the popular sovereign in their discussions on the Article VII precursors, resolution fifteen, and resolution nineteen. Though venturing beyond its mandate, the Committee of Detail, conceivably, was taking only minor liberties by applying these ideas to a clause regulating ratification of amendments. As for the other addition — the power of state legislatures to propose amendments — here, too, the committee's liberties might not have been overly presumptuous. The delegates had discussed only one substantive amendment modality issue prior to submitting resolution seventeen to the Committee of Detail. On June 11, George Mason had emphasized the dangers of allowing the national legislature a monopoly over the amendment process. *See* 1 RECORDS *supra* note 48, at 202-03 (James Madison's notes). Perhaps the committee was simply applying the federalism point that Mason had highlighted. By allowing the states a role in proposing amendments, and the national legislature a role in organizing a national constitutional convention to consider proposed amendments, the transformed Article XIX balanced the power of the national and state elements in constitutional revision. The evidence is scant, and it remains entirely possible that the Committee of Detail self-consciously transgressed its mandate in drafting Article XIX.

[222] There is reason to believe that the Committee of Detail took liberties with several of the resolutions that the convention had submitted. *See* WILLIAM LEE MILLER, THE BUSINESS OF MAY NEXT: JAMES MADISON AND THE FOUNDING 83 (1992) ("The Committee of Detail went well beyond mere compiling and drafting; on still disputed points they made decisions about what to propose that narrowed the options."); John C. Hueston, *Altering the Course of the Constitutional Convention: The Role of the Committee of Detail in Establishing the Balance of State and Federal Power*, 100 YALE L.J. 765 (1990) (arguing that Committee of Detail reshaped convention's nationalist resolutions along lines favoring protection of states' rights, and that convention never corrected these alterations due to time pressure).

[223] The only remark came from Gouverneur Morris, who "suggested that the Legislature should be left at liberty to call a Convention, whenever they please." 2 RECORDS, *supra* note 53, at 467-68 (James Madison's notes). Morris's fellow delegates ignored the comment and approved Article XIX without further recorded comment. *Id.* at 468.

the emerging constitution generated substantial heated discussion.[224] As had been the case on July 23,[225] at the end of August, the delegates passed over amendment ratification issues to exhaustively debate general ratification issues.

As September dawned, the delegates still had hardly mentioned constitutional amendment ratification, much less entered into a serious substantive discussion on the issue. Nothing in the record indicates any sort of contemplation or discourse over whether amendments, like the main body of the emerging Constitution, ought to be ratified by the popular sovereign. Nor had any discussion or thought been devoted to the representational structures through which the popular sovereign might ratify constitutional amendments.[226]

b. September 10, 1787: The Introduction of Legislative Amendment Ratification

On September 10, 1787, just seven days before the convention would finalize its official business, the delegates finally broke their drought on deliberation over the amendment ratification process.[227] This would prove to be the crucial date in terms of Article V's legislative amendment option. As we will see, the record from this date does not suggest that the delegates to the Philadelphia Convention had concluded that amendments ratified by ordinary legislatures would count as ratified by We the People. Instead, the record suggests that the delegates never directly confronted this issue. Ratification of amendments by ordinary legislatures was included in what would become Article V in an effort to address concerns over two pragmatic issues that dominated the discussion: the federalism issue of state versus national government powers in the amendment process, and the entrenchment issue of whether amendment would be too hard or too easy to achieve federalism and ease of ratification of constitutional amendments.

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[224] *Id.* at 468-69, 475-79 (James Madison's notes).

[225] *See supra* text accompanying notes 215-17.

[226] At best, one might hypothesize that the Committee of Detail incorporated some of the thinking that had been expressed during the discussions concerning resolutions fifteen and nineteen — the notions that conventions were the only representational structures capable of embodying the popular sovereign for purposes of ratifying the emerging Constitution — into Article XIX's amendment ratification methodology.

[227] 2 RECORDS, *supra* note 53, at 557-59 (James Madison's notes).

(1) The Focus on Federalism and Entrenchment Issues

The opening comments of Elbridge Gerry and, later, Alexander Hamilton, highlight a preoccupation with these two pragmatic issues. Elbridge Gerry began with a motion to reconsider Article XIX, and supporting arguments.[228] Hamilton and Madison offered comments supporting reconsideration.[229] Regarding the federalism issue, Gerry was worried that the amendment provision, as then formulated, could degrade state power.[230] Hamilton had the opposite federalism concern.[231] He thought that the states might use the amendment process to increase their own power at the expense of the national government, and, therefore, sought to add a national legislative power to propose amendments.[232] As a remedy, Hamilton suggested altering Article XIX to allow the national legislature to call amendment conventions whenever two-thirds of both houses concurred. "There could be no danger in giving this power," argued Hamilton, "as the people would finally decide the case."[233] Hamilton also focused on the entrenchment issue. He expressed a preference for Article XIX's nonunanimous amendment process over the Articles of Confederation's requirement of unanimity for alteration. The unanimity requirement for change of the Articles of

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[228] *Id.* at 557-58 (James Madison's notes).

[229] *Id.* at 558 (James Madison's notes).

[230] In support of his motion, Gerry expressed concern that Article XIX would allow a future constitutional convention to "bind the Union to innovations that may subvert the State Constitutions altogether." *Id.* at 557-58 (James Madison's notes).

[231] A feature of Hamilton's opening comments on September 10, unrelated to federalism issues, is also worthy of note. In the closing moments of his speech, Hamilton spoke in a manner already familiar from our review of Article VII original understanding — he equated popular and convention ratification of constitutional norms. Hamilton ended his speech by arguing that granting the national government power to call a constitutional amendment convention posed "no danger" because "the people would finally decide" on any proposed constitutional amendments. *Id.* at 557 (James Madison's notes). Simply stated, Hamilton was using "the people would finally decide" as a synonym for a decision rendered by an Article XIX constitutional amendment convention. The debates over Article VII and its precursor are infested with the use of "decisions of the People" as a synonym for decisions of extraordinary conventions. Oddly, however, Hamilton's use of a "decision of the People" as a synonym for a decision of an amendment ratification convention is the only interchangeable use of the terms found during Philadelphia drafting convention discussions over amendment ratification processes.

[232] Hamilton favorably compared Article XIX of the new Constitution to Article XIII of the Articles of Confederation. The former, unlike the latter, allowed for amendments with less than unanimous agreement of the states. Still, "the mode proposed was not adequate," as Article XIX offered no protection against the states forcing a constitutional amendment convention aimed at ratifying amendments, thus increasing the power of the states. *Id.* at 558 (James Madison's notes).

[233] 2 RECORDS, *supra* note 53, at 558 (James Madison's notes).

Confederation had swung too far towards entrenching the extant constitutional structure. Article XIX's two-thirds requirement, in contrast, offered "an easier mode" for addressing "defects."[234]

Gerry and Hamilton's federalism and entrenchment concerns, along with ambiguities raised by James Madison, convinced nine out of eleven voting delegations to approve Gerry's motion to reconsider Article XIX.[235] When the delegates turned from the motion to reconsider Article XIX to its substantive reconsideration, the focus on federalism and entrenchment continued. Hitting on these intertwined issues, Roger Sherman moved to "add to the Article 'or the Legislature may propose amendments to the several States for their approbation, but no amendments shall be binding until consented to by the several States.'"[236] This was a move to make amendment more difficult by reintroducing into the amendment provision a unanimity requirement reminiscent of Article XIII. It was also a move to protect the sovereignty of a single state from even a supermajority of sister states. Elbridge Gerry, the protector of states' rights, seconded the motion. James Wilson, the nationalist, moved to substitute the approval of only two-thirds of the states in place of Sherman's unanimity requirement. The real battle was over the intertwined federalism and entrenchment issues. The amendment process just happened to be the context within which that battle was waged. The motion failed by a vote of five states opposed and four states in favor. Wilson then moved to substitute the approval of three-fourths of the states in place of Sherman's unanimity requirement. The delegates unanimously approved Wilson's motion.[237]

Sherman and Wilson's motions are interesting as much for what they failed to propose as for what they proposed. Both men were so focused on the federalism and entrenchment issues that they ignored the representational structure issue. Article XIX offered the states a role only in applying to the national legislature for constitutional amendments.

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[234] The full text of this portion of Hamilton's speech reads as follows:

> It had been wished by many and was much to have been desired that an easier mode for introducing amendments had been provided by the Articles of Confederation. It was equally desirable now that an easy mode should be established for supplying defects which will probably appear in the new System.

Id.

[235] Madison found Article XIX's amendment convention language too unspecified. He queried, "How was a Convention to be formed? [B]y what rule decide? [W]hat the force of its acts?" *Id.*

[236] 2 RECORDS, *supra* note 53, at 558 (James Madison's notes).

[237] *Id.* at 559 (James Madison's notes).

Ratification would be performed by a national amendment ratification convention.[238] Motivated by federalism concerns, Sherman's motion aimed to tip the amendment process balance of power toward the states. He was so obsessed with empowering the states to ratify amendments (or not), as opposed to merely propose amendments, that he did not even bother to specify the method by which the states would approve proposed amendments. Apparently, he did not care so much about how the states ratified constitutional amendments, only that they be granted the power to ratify. Moreover, hitting on the related entrenchment issue, by hinging ratification on unanimous approval of the states, Sherman's motion sought to insulate state sovereignty from encroachments of sister states. Making amendment difficult would protect state sovereignty.

Wilson's response to Sherman's motion evinces a similar absorption with the federalism and entrenchment issues. Ignoring the failure to specify the method by which states would ratify constitutional amendments, Wilson focused on the requirement that a unanimity of states approve constitutional amendments. To a nationalist like Wilson, this requirement was too reminiscent of the Articles of Confederation, which had made amendment too difficult. Accordingly, Wilson offered motions aimed at making amendment achievable (the entrenchment issue), and that would result in individual states submitting to the will of a supermajority of sister states' preferences on constitutional amendments (the federalism issue).

It is especially indicative of the dominance of the entrenchment and federalism concerns that Wilson, of all delegates, opted to offer amendments aimed at those issues. Wilson was perhaps the most prominent thinker on issues of popular sovereignty during the Founding period.[239] If any delegate would be inclined to point out Sherman's failure to specify the method by which the states, or, more appropriately, the Peoples of the states, could ratify constitutional amendments, James Wilson was that delegate.[240] But, Wilson's proposed modification to Sherman's motion centered only on entrenchment and federalism. This demonstrates how focused the delegates were on those issues and how that focus obscured the representational structure issue.

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[238] *See supra* text accompanying note 221.

[239] *See* Amar, *Consent of the Governed*, *supra* note 39, at 507 (referring to Wilson as "truer prophet" than even James Madison on popular sovereignty issues).

[240] In the debates over Article VII and its precursors, Wilson had expressed the idea that the popular sovereign could ratify constitutional norms only through extraordinary conventions. *See supra* text accompanying notes 79, 171-72.

(2) The Puzzle of Madison's Legislative Ratification of Amendments

Had the Sherman versus Wilson tussle continued along its course, perhaps the discussion might have worked its way to the neglected representational structure issue. James Madison, however, truncated the discussion by moving to postpone further consideration of Article XIX, as then worded, in order to consider the following proposed substitute amendment clause:

> The Legislature of the U-S- whenever two thirds of both houses shall deem necessary, or on the application of two thirds of the Legislatures of the several States, shall propose amendments to this Constitution, which shall be valid to all intents and purposes as part thereof, when the same shall have been ratified by three fourths at least of the Legislatures of the several States, or by Conventions in three fourths thereof, as one or the other mode of ratification may be proposed by the Legislature of the U.S.[241]

This was the crucial moment when ratification of amendments by ordinary legislatures entered the picture.

Madison's proposal made several fresh alterations.[242] Two are of central importance here.[243] First, Madison added the phrase "which shall be valid to all intents and purposes as part thereof." This passage was ultimately retained in the final version of Article V. On a quick reading, this language may appear to signal that amendments would have the

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[241] 2 RECORDS, *supra* note 53, at 559.

[242] Not everything was entirely new. Madison's proposed language borrowed several elements from Article XIX, amendments to Article XIX, and comments made earlier in the day on September 10. Giving two-thirds of the state legislatures a role in the proposal phase had been part of Article XIX since August 6, the date the Committee of Detail reported a draft constitution to the convention. *See supra* text accompanying note 221. Allowing two-thirds of both houses of the national legislature a role in the proposal phase was lifted from Hamilton's speech in support of reconsideration of Article XIX. *See supra* text accompanying note 233. Allowing three-fourths of the states to ratify proposed amendments came from Sherman and Wilson's motions to amend Article XIX. *See supra* text accompanying notes 80-81.

[243] A third key alteration is also of interest. Madison's proposal took away the power of the state legislatures to call a national constitutional amendment convention. Perhaps Madison deleted this national convention option because, as he stated earlier in the day, he found the concept too unspecified. *See supra* note 234. Alternatively, perhaps he had federalism concerns, regarding balancing federal and state participation in the amendment process, foremost in his mind when he deleted the power of state legislatures to call a national constitutional amendment convention. As Article XIX stood prior to Madison's proposed language, amendments could be ratified by either a national amendment ratification convention, or (pursuant to Sherman and Wilson's alterations) by three-fourths of the states. *See supra* text accompanying notes 221, 236.

same hierarchic status as the main body of the Constitution.[244] On closer inspection, however, this clause cannot have such a meaning. The clause says only that all ratified amendments will be *valid as part* of the Constitution. It says nothing about the *force* of constitutional amendments. If Madison had meant to signal that amendments would have the same force as the main body of the Constitution, he opted for exceedingly obtuse language.[245] Moreover, nothing in the historical record of the Philadelphia Convention or the subsequent ratification process supports the notion that the "valid for all intents and purposes" language addressed the force of constitutional amendments or their hierarchic place in comparison with the main body of the Constitution. Indeed, the post-Philadelphia Convention record demonstrates confusion over the meaning of the "valid for all intents and purposes" clause. After ratification of the Constitution, when Congress debated proposal of the Bill of Rights, there was disagreement and confusion over the meaning of the "valid for all intents and purposes" language. Some thought that this language signaled that amendments had to be incorporated into the body of the Constitution, and that amendments would be on par with the clauses in the Constitution's main body. Others believed that the language did not compel incorporation of amendments into the Constitution's main body and did not mean that amendments would be of equal normative power to the clauses in the main body.[246] This confusion indicates that, prior to ratification, there was no general understanding of the "valid for all intents and purposes" clause. Had there been such a consensus, there would never have been any questioning of the hierarchic status of legislatively ratified amendments.[247]

Second, and most crucial for our purposes here, Madison added new language specifying the methodology by which the states would consider proposed amendments. Amendments would become part of

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[244] In other words, was this Madison's attempt to address the question that he had posed earlier in the day, regarding the "force" of constitutional amendments ratified by a national amendment convention? *See supra* note 234.

[245] Madison's chosen wording merely speaks to the validity of amendments as part of the Constitution. It says nothing about the force of constitutional amendments. Madison's language could possibly be construed as meaning that constitutional amendments would be the normative equals of the Constitution's main body. Such an interpretation falls (just barely) within the boundaries of plausible legal interpretation. That interpretation, however, is not at all compelled by the words Madison chose.

[246] *See* discussion *infra* Part III.A.

[247] If this passage over time has come to stand for the proposition that amendments are the hierarchic equals of the Constitution's main body, it has done so post-ratification of the Constitution and without the support of original understanding.

the Constitution when ratified by conventions or *legislatures* or in three-fourths of the states. The national legislative body would determine which of these two ratification modalities would be utilized for any given proposed amendment.[248]

Madison had been abundantly clear in dichotomizing the two kinds of representational structures in debates over Article VII and its precursors.[249] Legislative bodies simply were not up to the task of embodying We the People for purposes of ratifying constitutional norms. Only extraordinary conventions could fulfill that role. All of the other delegates seemed to agree with these principles. Nonetheless, Madison proposed an amendment provision permitting legislatures to ratify constitutional amendments. Moreover, not one delegate spoke to oppose or even question legislative ratification of amendments. The record reflects no debate at all on the issue.[250] Why on earth would Madison propose language empowering *ordinary state legislative bodies* to ratify proposed constitutional amendments? Why would his fellow delegates fail to challenge or even question such a proposal?

Consider the various possibilities in order. The first possibility is that Madison and the other delegates were effectively recanting their "first principles" rhetoric, and admitting that ordinary legislatures, as well as extraordinary conventions, may operate as conduits through which the popular sovereign ratifies constitutional norms, at least for purposes of ratifying constitutional amendments. Constitutional amendments ratified by ordinary state legislatures would count as constitutional norms ratified by We the People.

For several reasons, this seems highly unlikely. Madison was quite sincere when, during the debates over Article VII and its precursors, he invoked the idea that only extraordinary conventions, and not ordinary legislatures, could embody the popular sovereign for purposes of ratifying constitutional norms. His "first principles" reasoning was much more than disposable rhetoric that could be cast aside once it had served its purpose. As argued above, had the "conventions only" motif been a ruse, opponents of convention ratification would have exposed it as such. Far from empty rhetoric, the "first principles" logic equating convention ratification, but not legislative ratification, with popular ratification was an argument with deep resonance among both

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[248] By adding this language, Madison closed the gap that Sherman and Wilson's amendments to Article XIX had left open. Sherman and Wilson's amendments had added the language allowing three-fourths of the states to ratify proposed amendments.

[249] *See supra* text accompanying notes 61-63, 81, 110-18, 136-39.

[250] 2 RECORDS, *supra* note 53, at 559.

Federalists and Anti-Federalists. Though the language in Madison's proposed substitute amendment clause permitting legislative ratification of constitutional amendments is hard to reconcile with his "first principles" talk, more than one false move is needed to sustain the notion that Madison had completely reversed course on the representational structure issue. The historical record would offer insights into such a momentous reversal in thinking. Yet, the records of both the Philadelphia Convention and the ratification period are devoid of any evidence, beyond Madison's hurriedly drafted constitutional amendment clause, to support the idea that Madison had renounced "first principles" thinking on the representational structure issue.

Yet, before we discard this first possibility, let us extend the benefit of the doubt, and hypothesize its most plausible iteration. Perhaps Madison's puzzling amendment clause does not signal a total renunciation of the idea that extraordinary conventions alone could serve as representational structures through which the popular sovereign could ratify constitutional norms. Perhaps it, instead, evidences an evolution in that line of thinking, or the addition of a corollary. Perhaps Madison and his fellow delegates still believed that extraordinary conventions were the only representational structures that could embody and ratify constitutional norms in the name of the popular sovereign. Acting through Article VII ratifying conventions, however, the popular sovereign could authorize ordinary legislatures to ratify constitutional amendments in the name of the popular sovereign. In other words, We the People (assembled in Article VII extraordinary ratification conventions) would ratify the Constitution, including the provision permitting ordinary legislatures to ratify constitutional amendments. In so doing, We the People would delegate to ordinary legislatures the authority to embody We the People for purposes of ratifying constitutional amendments. Consistent with Madison's "first principles" logic, ordinary legislatures would not actually embody the popular sovereign when ratifying constitutional amendments. Instead, by virtue of popular ratification of the amendment process, state legislatures would be authorized by the popular sovereign to ratify constitutional amendments *as if* they embodied the popular sovereign. As such, even though conventions are the sole representational structures capable of embodying the popular sovereign, any constitutional amendments ratified by ordinary legislatures could, nonetheless, claim a legitimate (albeit indirect) popular sovereignty pedigree.

If this was Madison's thinking, then he had Article VII and "first principles" logic front and center in his mind as he penned the clause permitting state legislatures to ratify proposed constitutional amendments. More broadly, if this was Madison's thinking, then the orthodox vision of the sources of constitutional norms perfectly conforms to original understandings. The body of the Constitution is sourced in We the People via extraordinary conventions embodying the popular sovereign in the original act of ratification. The amendments to the Constitution are sourced in We the People via ordinary state legislatures authorized by the original act of popular ratification to act as though embodying the popular sovereign for purposes of ratifying constitutional amendments.

There is one fatal problem for this neat and tidy way of dissolving the dissonance between the "first principles" insistence on extraordinary conventions as constitutional norm ratifiers in the name of the popular sovereign and amendment ratification by ordinary legislatures: just as with the simpler idea that Madison had completely forgotten or discarded "first principles" logic, the historical record reveals no solid support for the notion that Madison had added a corollary to "first principles" logic. There is no evidence in the record of the Philadelphia drafting convention, nor in the records of subsequent debates during the ratification period, to suggest that Madison, or anyone else, had contemplated or developed such a modification of "first principles" logic. If Madison had added this corollary, we would expect to find some expression memorializing it in the historical record. We would expect to find Madison explaining this significant modification to his fellow delegates during the Philadelphia drafting convention, or thereafter at the Virginia ratification convention, or in his contributions to the Federalist Papers. The historical record, however, divulges no such explanation.

To the contrary, as we have seen, Madison's post-Philadelphia Convention statements did not vary from, add to, expand upon, or in any way change the "first principles" thinking that he had exhibited during the Article VII debates in Philadelphia. He invoked the idea that conventions, and only conventions, could embody the popular sovereign and ratify constitutional norms on behalf of the popular sovereign in an unadulterated fashion long after September 10, chiefly in his Federalist Papers discussions on Article VII.[251] We find no evidence that Madison ever actually thought that ratification of the body of the Constitution by

[251] *See supra* text accompanying notes 167-70.

Article VII's extraordinary conventions could somehow cure what would otherwise be a fatal popular sovereignty pedigree defect in any legislatively ratified constitutional amendments. Is it really possible that such an important modification of "first principles" logic would not manifest itself in significant ways somewhere in the historical record?[252]

Some might be tempted to respond that the silence in the historical record demonstrates that ratification of constitutional amendments by legislatures in fact was understood as tantamount to ratification by We the People. On this line of thinking, when Madison proposed his substitute amendment clause, all present assumed that any amendment ratified by the state legislatures would count as ratified by We the People. So unanimous and uncontroversial was this assumption that no delegate bothered to question or even mention the fact that Madison's proposal permitted legislative ratification of amendments. The silence on the issue, in other words, demonstrates that Madison and the other founders must have understood the ratification of amendments by legislatures as an added a corollary to their standard "conventions only" thinking.

For several reasons this "corollary theory" reading of the historical record is a complete nonstarter. First, the corollary theory depends on questionable methodology for discerning inner thoughts and beliefs. It seeks to ascertain the inner thoughts and beliefs of the Constitution's drafters from the complete lack of evidence outwardly manifesting those thoughts and beliefs. The silence on the issue is taken as proof that all understood that a corollary had been added to standard "conventions only" thinking. Normally, it is not possible to determine inner thoughts and beliefs from the absence of outward manifestations of those thoughts and beliefs.[253]

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[252] Of course, we cannot rule out the possibility that Madison actually did conjure up such a modification to his first principles logic. If he did, he never expressed the argument in a public forum. Even if it could be shown that Madison privately entertained such an addendum to the "conventions only" arguments that he had expressed during Article VII debates, such private thoughts are irrelevant to the original understanding of the sources of constitutional norms.

[253] Consider an example: Assume that the President (1) openly and frequently expresses a belief that only free markets will produce economic prosperity, and (2) has always implemented policies reflecting this belief. Here we have outward manifestations — both expressions and actions — that demonstrate the President's inner belief that only free markets produce prosperity. Now, assume that, for the first time, the President implements a policy of wage and price controls applied to the steel industry, but gives no explanation for the shift away from free market policies. Can we conclude that the President now believes that market control policies will produce prosperity in the steel industry? No. At best, the evidence would leave this open as a possibility. Another possibility would be that the President believes that market control policies will harm

Second, reading the silence in the historical record as proof of the corollary theory fails to take into account the bigger picture. The debates over Article VII constitute one part of the bigger picture. Recall the uniformity and frequency of the statements evidencing the belief that ordinary legislatures are not competent to ratify constitutional norms in the name of the popular sovereign.[254] The presumption must run against the notion that such a strongly and widely held understanding had been modified. The silence of the delegates in Philadelphia cannot work a rebuttal of this presumption. The other part of the bigger picture is the debate over amendment processes leading up to and including September 10, 1787. The amendment issue was all but ignored prior to September 10. The only issues of concern to the delegates on September 10 were federalism and entrenchment. The record reveals no evidence suggesting that the delegates were thinking about the representational structure issue on that day. The conclusion that the delegates, preoccupied with federalism and entrenchment, all understood that their "conventions only" principle had been altered to allow legislatures to ratify amendments in the name of We the People is a leap of faith.

Third, the corollary theory is weaker than alternative explanations for Madison's odd legislative ratification of amendments proposal. We know two things. First, we know that the founding generation believed that only conventions, and not legislatures, were competent to ratify constitutional norms in the name of We the People. Second, we know that Madison, a chief proponent of the "conventions only" approach, proposed ratification of constitutional amendments by legislatures. The corollary theory offers one way to bridge the gap between these two dissonant pieces of data. In explaining dissonant data, however, the task is not to come up with a story that can dissolve the dissonance. Instead, that task is to compare all possible explanations that can dissolve the dissonance, and evaluate which explanation is best supported and most plausible. As we will see below, there are at least two other possible

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prosperity in the steel industry, but will enhance stability, which, for some reason, is of primary importance. The same logic applies to Madison's proposal allowing legislative ratification of constitutional amendments. Madison consistently expressed the belief that legislatures are incompetent to ratify constitutional norms in the name of We the People. He reinforced those words by pushing for an Article VII that did not allow state legislatures to ratify the Constitution. Later, he proposed ratification of constitutional amendments by state legislatures, but offered no explanation for the shift. Are we to conclude that Madison, and others in attendance at Independence Hall, suddenly added a special exception to their "conventions only" beliefs? No. This is but one possibility. Another possibility is that Madison was concerned with other issues — federalism and entrenchment — in proposing legislative ratification.

[254] *See* discussion *supra* Part I.

explanations which can dissolve the dissonance in question. When we compare the "corollary theory" with other explanations, we will see that the "corollary theory" is far less supported and less plausible than at least one of the two other alternatives.

Fourth, and perhaps most important, the "corollary theory" ignores a key piece of direct evidence that strongly militates against it. As discussed in greater detail below, the First Congress directly confronted the issue of whether legislatively ratified constitutional amendments would count as ratification by We the People.[255] The submission of what would later be ratified as the Bill of Rights to state legislatures for ratification provoked a heated and extended debate on this issue in the House of Representatives. If the corollary theory were correct, this debate never would have occurred. The corollary theory works only if the idea that legislatures may ratify constitutional amendments in the name of We the People was so uncontroversial and obviously correct that none of the delegates to the Philadelphia Convention would even bother to mention Madison's proposal for legislative ratification of amendments.[256] If it had been so universally accepted and uncontroversial that it did not even rate a mention in Philadelphia, the question of whether legislatively ratified amendments would bear a popular sovereignty pedigree could not possibly have provoked heated and extended debate in Congress just two years later.

Consider the second possible explanation for Madison's odd legislative ratification of amendments proposal: Madison still firmly believed that ordinary legislatures were not capable of embodying the popular sovereign for purposes of ratifying constitutional norms. Including the language empowering ordinary legislatures to ratify proposed constitutional amendments does not signal that Madison had added a corollary to "first principles" thinking. Instead, it signals that Madison envisioned two tiers of constitutional norms. Legislatively ratified amendments would become part of the Constitution. Due to their legislative ratification, however, they would lack a legitimate popular sovereignty pedigree and, therefore, would be inferior to the constitutional norms ratified by the popular sovereign embodied in ratification conventions or amendment ratification conventions. In other words, Madison anticipated that amendments ratified by ordinary legislatures would "be valid to all intents and purposes as part" of the

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[255] *See* discussion *infra* Part III.

[256] Thus, the failure to mention legislative ratification of amendments — the silence — proves that the delegates in Philadelphia believed that their "conventions only" thinking was modified.

Constitution, but not necessarily of the same hierarchic status as constitutional norms ratified by the popular sovereign assembled in extraordinary ratifying conventions.[257] Legislatively ratified constitutional amendments would count as legitimate constitutional norms and would, therefore, be superior to ordinary statutes and judge-made common law and interpretive doctrine. Legislatively ratified constitutional amendments, however, would be inferior to the main body of the Constitution, which was to be ratified by the popular sovereign as assembled in Article VII ratification conventions. Legislatively ratified constitutional amendments would also be inferior to any constitutional amendments ratified by the popular sovereign assembled in the amendment ratification conventions provided for by Madison's proposed amendment clause.

Like the idea that Madison had developed (and all other delegates silently assented to) a corollary to "first principles" logic, this "two tiers of constitutional norms" interpretation of Madison's proposal for legislative ratification of constitutional amendments can explain away the dissonant data. It tightly meshes the language of Madison's proposed constitutional amendment clause with his "first principles" thinking.[258] Only extraordinary conventions may ratify constitutional norms in the name of We the People. Ordinary legislatures may ratify constitutional norms. Those legislatively ratified constitutional norms, however, will be the product of government and will not carry a popular sovereignty pedigree. For this reason, legislatively ratified constitutional norms will be subordinate to convention-ratified constitutional norms.[259]

Nonetheless, as with the corollary theory, there is nothing in the record of original understanding (other than silence) to suggest that Madison had the two-tier theory in mind. Nowhere do we find evidence confirming that Madison maintained that legislatively ratified amendments would be of a second-tier variety.[260] More importantly, a

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[257] *See supra* text accompanying notes 244-45.

[258] I have outlined an argument favoring this reading of Article V that is not based on original understanding in previous work. *See* González, *supra* note 10.

[259] In the course of debates over Article VII and its precursors, Madison had argued only that ratification by extraordinary conventions, rather than by ordinary legislatures, would lend constitutional norms a popular sovereignty pedigree. He had not, however, taken the further step to assert that ordinary legislatures cannot ratify constitutional norms. Indeed, legislatures had created constitutional norms when they ratified most of the then-extant state constitutions and the Articles of Confederation. *See supra* text accompanying note 30.

[260] After the Constitution had been ratified, Madison eschewed this understanding of legislatively ratified amendments. *See infra* text accompanying notes 334-37.

few years later, during debates in the House of Representatives over proposal of the Bill of Rights, Roger Sherman advanced this exact interpretation of Madison's language permitting legislative ratification of constitutional amendments (which by then had been ratified as part of Article V). Madison (who by then was a member of the House) failed to endorse this reading. Indeed, Madison argued that amendments should have the same force and status as the main body of the Constitution.[261] Thus, while this second possibility offers a reasonable way to mesh the dissonant data of Madison's "first principles" logic with the words of his proposed amendment clause, there is nothing to support the notion that it captures Madison's understanding.

If we compare the first and second possible explanations for the dissonant data, we see that both are supported by the same type of circumstantial evidence — silence. The "corollary theory" would read the silence as showing that all must have understood that "conventions only" thinking is modified to allow legislatures to ratify constitutional amendments in the name of We the People. It is equally plausible, however, to read that silence as evidence supporting the opposite, two-tier thesis. The fact that not one delegate spoke out on Madison's proposal of legislative ratification of amendments shows that all must have understood that legislatively ratified amendments would not bear a popular sovereignty pedigree and, therefore, would be second-tier constitutional norms. Neither the corollary nor the "two-tiered" explanation is supported by any direct evidence. At least the two-tier theory is fully consistent with and operates as the logical extension of standard "conventions only" thinking. The corollary thesis, in contrast, is either at odds with, a special exception to, or a qualification of standard "conventions only" thinking. This incongruity, coupled with the lack of direct evidence demonstrating any alteration in "conventions only" thinking, leaves the corollary theory in a difficult spot. We cannot rule out the corollary theory as impossible. Beyond that, however, there is not much else to recommend it. If this were a civil trial, the corollary theory would not even get to the jury. Because speculation or a mere possibility is insufficient to send a case to a jury, it would be dismissed on directed verdict for lack of supporting evidence.[262]

Turn to the third possible explanation for Madison's proposal for legislative ratification of amendments: Madison's proposal does not reflect anything regarding his original understanding on the

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[261] *See infra* text accompanying note 335.

[262] *See supra* note 16.

representational structure issue. The language empowering state legislatures to ratify constitutional amendments was not intended to repudiate or modify Madison's often expressed sentiment that only extraordinary conventions could ratify constitutional norms in the name of We the People. Nor was it intended as a method for creating a class of constitutional amendments that would be inferior to constitutional norms ratified by the People embodied in extraordinary conventions. Madison's odd allowance for legislative ratification of constitutional amendments had nothing to do with his "first principles" logic one way or the other.

Why is this third explanation more plausible than the first two? To begin, the evidence indicates that Madison's proposed amendment clause was intended as nothing more than an acceptable compromise on the federalism and entrenchment issues that had been the only concern of the delegates when discussing the amendment mechanism. By comparison, nothing in the record supports the idea that the issue of representational structures through which We the People could ratify constitutional amendments was foremost in Madison's mind when devising and offering his proposed amendment provision.

The exchanges preceding Madison's amendment clause centered on the practical federalism and entrenchment issues.[263] As had been the case prior to September 10, 1787, these two issues were the only ones the delegates raised when it came time to discuss the amendment mechanism. As such, they were probably the issues foremost in Madison's mind on September 10 as he scribbled out draft variations on his substitute amendment clause.

The clause that Madison ultimately offered reinforces the idea that federalism and entrenchment were foremost in his mind. The clause transparently offered reasonable compromises to satisfy all concerns on those issues. It gave both the national and state governments a role in amendment proposal and shifted amendment ratification to the states. Because the amendment process would involve both levels of government and be dominated by neither, these features offered something to satisfy both state sovereignty advocates and nationalists. Regarding the entrenchment issue, the clause retained a two-thirds requirement for amendment proposal, and a three-fourths requirement for amendment ratification. These supermajority features placated those who worried that a rule of unanimous consent to amendments would simply repeat the errors of the Articles of Confederation's amendment

[263] *See supra* text accompanying notes 227-39.

clause. At the same time they avoided a system that would allow an easy undoing of the centralizing Constitution's principal provisions.

Other factors buttress the thesis that Madison's amendment provision was primarily motivated by the desire to strike a moderate balance on the federalism and entrenchment axes. The amendment mechanism had always been considered a matter of secondary or even tertiary concern. As such, it was predestined to be treated as a technical matter subjected to less than exacting scrutiny. To the extent that the delegates were inclined to devote time and mental energy to issues of constitutional norm ratification, they argued over the more immediately pertinent issue of methods for ratifying the Constitution. The work of the Philadelphia Convention could stand or fall on the ratification issue. Amendment ratification, in contrast, was relatively remote in both time and importance.

Moreover, consider the late date on which the amendment provision came up for debate. The delegates avoided debate over the amendment mechanism until the closing days of the convention. By the time September 10 rolled around, the delegates were weary. All of the major issues had already been settled by the convention. By September 10, there was no doubt that the convention would propose a centralizing Constitution. As all of the major battles were behind the delegates, there was no great impetus for extended debate or exacting scrutiny of the few secondary issues that remained. After many months of work and with the end clearly in sight, there was little will to debate a highly theoretical issue such as whether legislatively ratified amendments would bear a legitimate popular sovereignty pedigree. The delegates, instead, wanted to reach a workable compromise on the amendment mechanism so that they could wrap up the all but finished Constitution and return home.

The actions of the delegates, or, rather, their inaction, in debating the amendment issue substantiate the point that the amendment mechanism was a secondary issue destined for less than exacting scrutiny. From the very first time that the amendment issue had been raised through September 10, 1787, the delegates declined to devote time or mental energy to the issue. The Virginia Plan's resolution thirteen merely called for the inclusion of an amendment provision, but offered no specifics on mechanics.[264] In contrast, the Virginia Plan's ratification clause, resolution fifteen, was explicit in boldly choosing ratification by assemblies over Article XIII's ratification by ordinary legislatures. The amendment issue, in other words, was an afterthought to the Virginia

[264] *See supra* text accompanying notes 204-05.

delegates who drafted resolution thirteen. At every instance during the convention when the amendment ratification issue arose, the delegates either postponed discussion, or passed the issue with minimal comment.[265] No delegate thought the amendment ratification issue was important enough to merit debate when the Committee of Detail completely rewrote resolution thirteen.[266] Amendment ratification was a minor issue that remained firmly on the convention's back burner all summer long.

On September 10, when they finally devoted time to the amendment clause, their discussion was abrupt and devoid of substantive content. Amazingly, the delegates approved Madison's substitute amendment clause by a vote of nine states to one *without a single recorded word of debate.* The only happening of note between Madison's motion proposing his substitute language and the approving vote was an amendment by John Rutledge of South Carolina adding language that entrenched the Slave Trade Clause.[267] This detail demonstrates the delegates' unwillingness to vigorously engage issues on September 10. The Slave Trade Clause had generated fiery debate earlier in the summer.[268] By September 10, however, either out of exhausted will, a sense that the big compromises had already been sealed, or simply desire to finish work and get out of town, Rutledge's addition entrenching the Slave Trade Clause *did not prompt a single recorded comment.* This fact, in combination with the complete lack of recorded comment or discussion on Madison's proposed substitute amendment clause, leaves the distinct impression that the delegates no longer had the will or mental energy to plumb all implications surrounding Madison's amendment clause. What they needed on September 10 was an amendment clause that would codify reasonable compromises on the federalism and entrenchment issues and permit them to move expeditiously to the close of their work.

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[265] *See supra* text accompanying notes 208-25.

[266] *See supra* text accompanying notes 218-24.

[267] *See* 2 RECORDS, *supra* note 53, at 559.

[268] According to Professor Finkelman, "The debate over the African slave trade was one of the nastiest at the Convention, focusing on the power of Congress to regulate commerce. The issue touched raw nerves among the delegates." Paul Finkelman, *Intentionalism, the Founders and Constitutional Interpretation*, 75 TEX. L. REV. 435, 465-66 (1996) [hereinafter Finkelman, *Intentionalism, the Founders and Constitutional Interpretation*] (reviewing JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION (1996)); *see also* Paul Finkelman, *Affirmative Action for the Master Class: The Creation of the Proslavery Constitution*, 32 AKRON L. REV. 423 (providing exhaustive review of Philadelphia Convention debates directly and indirectly related to slavery issue).

There is ample reason to conclude that the delegates in Philadelphia did not carefully scrutinize and examine how Madison's proposal to allow legislative ratification of amendments might mesh with the widely held "conventions only" thinking on ratification of constitutional norms. Still, the contradiction between the notion that only specially elected conventions could ratify constitutional norms and Madison's proposal for legislative ratification of amendments is fundamental. At first blush, this would seem too big a blunder to miss. If one pauses to consider the role of ideological beliefs in supporting political arguments, however, the blunder is reduced to a completely commonplace and predictable phenomenon.

Political actors marshal ideological beliefs when they help advance a favored policy or defeat a disfavored policy. When we consider the mode of ratification, we see that there were strong practical reasons to make the "conventions only" ideology a centerpiece of the debate. The choice of ratification mechanism was crucial to whether the Constitution would have any chance of securing ratification. The proposed Constitution would take away many of the powers enjoyed by state legislatures and shift those powers to the centralizing government. If the delegates in Philadelphia had opted for ratification by state legislatures, the Constitution would never have been ratified. Specially elected ratification conventions in each state, however, could consider the Constitution without any biasing agency problem and, therefore, might ratify the document. With this reality always in mind, the proponents of the Constitution in Philadelphia, including Madison, called upon an ideological belief that they knew would help them convince their fellow delegates to accept ratification by conventions — the widely held belief that only conventions, but not legislatures, could embody We the People for purposes of ratifying constitutional norms. The "conventions only" ideology, in other words, served to advance the cause of ratification by conventions, an issue of life and death importance for the Constitution.

When it came time to draft an amendment provision, however, there was no real incentive to marshal the "conventions only" ideological belief. Ratification of the Constitution would not hinge on the choice of amendment mechanism in the same way that it would hinge on the choice of ratification mechanisms. Whether or not legislatures would be permitted to ratify amendments was not an issue on which approval of the Constitution might conceivably turn. For this reason, there was no real motivation to mention "conventions only" ideology.

If there were amendment mechanism related issues that might impact on ultimate approval of the Constitution, the intertwined federalism and

entrenchment were those issues. An amendment mechanism that would have shut the states out of the process or made amendment a practical impossibility, for example, would have constituted grounds for rejecting the Constitution in the state ratification conventions. Hence, the delegates in Philadelphia focused on the federalism and entrenchment issues when discussing amendment mechanisms, and Madison offered an amendment clause that transparently struck moderate compromises on the federalism and entrenchment issues. An amendment mechanism with an option for legislative ratification of amendments, in contrast, could not conceivably provide substantial reasons for rejection of the Constitution by state ratifying conventions. Hence, Madison's inclusion of an option for legislative ratification of amendments drew no comment or objection.[269] Pointing out that allowing legislative ratification of amendments was in tension with the widely held "conventions only" ideology would have benefited no one or no issue of consequence at that stage of the Philadelphia Convention. It, therefore, should not surprise us that none of the delegates brought up the representational structures issue when debating the amendment clause.

The phenomenon is very similar to what we see in current politics. Conservatives, for example, maintain a clear ideological commitment to states' rights. They marshal this ideological commitment when it serves to advance certain policies or to defeat other policies. States' rights ideology is often used as an argument against the creation of national legal standards which trump state legal standards. Yet, when the states' rights ideology does not serve the advancement of some particular favored policy, conservatives fail to mention their states' rights ideological commitment. Thus, when a national constitutional amendment attempts to create a national legal definition of marriage, the states' rights ideologues fall silent. The same holds true on the issue of tort reform, where conservatives have tried to push national tort damage limitations through Congress.[270] The presence of a conflict between a states' rights ideology and a policy preference for national standards which trump state standards on the definition of marriage or on tort damages is not evidence that the states' rights ideology has been

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[269] 2 RECORDS, *supra* note 53, at 559.

[270] *See Bush's Next Target: Malpractice Lawyers*, N.Y. TIMES, Feb. 27, 2005, at 31 (discussing Bush administration proposal and Senate bill that would preempt state law to cap damages in medical malpractice cases); *The Many Flavors of Tort Reform*, N.Y. TIMES, Dec. 1, 2002, at A10 (stating that "The Republican Party has always represented itself as the protector of states' rights. It is plainly apparent that those rights only matter when state courts rule in favor of the party's interests" on tort issues).

recanted or modified. Rather, it shows that political actors often advance particular policies at odds with their ideological commitments and that a preference on a particular policy can sometimes prevail over sincerely held ideological commitments.[271] Conservatives still maintain a very real and sincere ideological commitment to states' rights. But, in the context of debate over a definition of marriage or tort damage limitation, today's conservatives have no incentive to raise the states' rights argument.

The Framers of the Constitution were not, in essence, different from the politicians of today. Like today's politicians, the Framers held certain ideological beliefs and understandings. Also like today's politicians, they operated in a world where real policy choices had to be made, and in which absolute fidelity to one's ideological commitments was impossible. Madison championed ratification of the Constitution by conventions rather than legislatures for two reasons. First, he knew that the Constitution would probably not secure ratification by state legislatures. Second, he sincerely believed that legislatures were incompetent to ratify constitutional norms in the name of We the People. When Madison proposed an amendment clause allowing state legislatures to ratify constitutional amendments he did so in reaction to the practical politics of the situation. The battle for ratification of the Constitution's main body by conventions had already been won. The reality on September 10 was that federalism and entrenchment were the sticking points holding up approval of an amendment mechanism. Madison's proposal permitting legislative ratification of amendments does not signal a repudiation or modification of his "convention only" belief any more than does a modern conservative's embrace of a federal constitutional amendment defining marriage or national tort damage caps signal a repudiation or modification of an ideological commitment to states' rights.[272] Though in many ways extraordinary, Madison and his fellow delegates in Philadelphia remained political actors. Political actors propose and champion particular policies at odds with their sincerely held ideological commitments all of the time.

We will never know for certain Madison's inner intent in permitting legislatures to ratify amendments.[273] It would be a mistake, however, to

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[271] This phenomenon is, of course, not the exclusive domain of political conservatives. Politicians of all persuasions will sometimes set aside ideologic commitments when faced with particular issues at odds with those commitments.

[272] To quote Professor Finkelman again, "Much of the Constitution's language was not as carefully thought-out as some judges and constitutional scholars wish. . . ." Finkelman, *Intentionalism, the Founders and Constitutional Interpretation*, *supra* note 268, at 444.

[273] On the one hand, Madison may have been suffering an odd case of "first principles" amnesia. Given the lesser importance of the amendment clause and the desire to quickly

presume that Madison and his fellow delegates must have intended some sort of modifying corollary to the widely held "conventions only" ideology. Nothing in the historical record indicates that Madison or his fellow delegates maintained such an intent or understanding. We cannot say that it is impossible that Madison held such an inner intention. Nor can we conclude that he did. At best, the idea that Madison intended legislative ratification of amendments as a modifying corollary to "conventions only" thinking will remain a speculative possibility.

When we consider the other possible explanations, however, we see that at least one is far more plausible. The late date on which the delegates took up the amendment issue, the secondary import of the amendment mechanism and consequent lack of close scrutiny, the dominance of federalism and entrenchment concerns, the responsiveness of Madison's proposed amendment clause to the federalism and entrenchment concerns, and the lack of an incentive to ensure that the amendment mechanism meshed with "conventions only" ideology, all

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reach consensus on amendment clause language as the Philadelphia Convention drew to a close, Madison may have lost his focus, and therefore failed to realize the tension between first principles and legislative ratification of constitutional amendments. He may have had his mind on purely practical issues. Perhaps he included legislative amendment ratification for the practical reason that, in many cases, legislative ratification would be administratively simple. Amendment ratification conventions would have to be assembled and special elections held before proposed amendments could be considered. Standing legislatures, in contrast, would already be assembled and could consider proposed amendments in the course of ongoing legislative sessions. Having already prevailed on the crucial issue of constitutional ratification by conventions, and therefore no longer maintaining first principles foremost in his mind, perhaps Madison carelessly allowed such practical concerns to drive his pen as he drafted his proposed amendment clause on September 10.

On the other hand, maybe Madison's first principles amnesia was entirely of his own knowing choice. It is possible, in other words, that Madison realized the tension between first principles and legislative ratification of constitutional amendments as he drafted his proposed amendment clause on September 10. For a variety of reasons, however, he may have knowingly and pragmatically chosen to forego perfect consistency between the constitutional ratification and the constitutional amendment ratification clauses. One possibility is that, in unrecorded side-conversations, some delegates, for a variety of conceivable reasons, expressed a desire for legislative amendment ratification. Given the secondary importance of the amendment ratification clause and the late date, a pragmatic Madison, weary from months of arduous debate and already satisfied that the most important issues had been won, may have opted to accede to the preferences of others rather than insist on perfect consistency between the Constitution and constitutional amendment ratification clauses. Importantly, Madison's first principles had decisively prevailed in debate on Article VII. Insisting on consistency between Article VII and the amendment clause would delay passage of the amendment clause and of the proposed Constitution itself. The game had been won. Insisting on an Article V, logically consistent with first principles, would just have been "running up the score." In short, maybe Madison was being a good winner.

point to one conclusion: Madison was doing nothing more and nothing less than what political actors do all of the time. He was advancing a policy initiative in response to the practical exigencies of the moment, despite the tension such an initiative created with his sincerely held ideological commitment. Madison's proposed amendment clause is not indicative of any deep intent or underlying original understanding on the representational structure issue. It is not a carefully crafted meshing of "first principles" thinking with legislative ratification of constitutional amendments. Rather, it reflects practical politics and the reality that, unlike the ratification mechanism, there was really no incentive to ensure that the amendment mechanism conformed to "conventions only" ideology.

c. September 15, 1787: A Continued Focus on Federalism and Entrenchment

At the end of the day on September 10, 1787, the convention reported all approved articles to a Committee of Style.[274] The draft Constitution reported back to the convention by the Committee of Style on September 12 made no substantive change to Madison's amendment article, other than to renumber it as Article V.[275]

On September 15, however, only two days before the convention ended its official business, the delegates agreed to a significant change in the proposal phase of Article V's amendment system. Though significant debate and changes occurred, nothing that transpired on this date suggests that the convention understood that ratification of amendments by ordinary legislatures would be tantamount to ratification by We the People. If anything, the debates on September 15 reinforce the idea that the delegates cared only about federalism and entrenchment when discussing the amendment mechanism.

Roger Sherman opened the discussion that day with a states' rights issue. He expressed a desire to add wording prohibiting amendments that might encroach on states' rights over their "internal police," and prohibiting amendments that might deprive states of their equal representation in the Senate.[276]

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[274] *See* 2 RECORDS, *supra* note 53, at 564-80 (James Madison's notes).

[275] *Id.* at 582, 585-87, 602 (citing journal record, James Madison's notes, and Article V reflected in James Madison's version of draft Constitution reported by Committee of Style to Committee of Whole House on September 12).

[276] *Id.* at 629 (James Madison's notes).

George Mason raised both federalism and entrenchment concerns. He thought Article V was "exceptionable & dangerous" because proposal of amendments depended directly or indirectly on the national legislature, and, therefore, "no amendments of the proper kind would ever be obtained by the people, if the Government should become oppressive."[277] Regarding federalism, Mason was concerned that the national legislature was given direct or indirect gatekeeper power over the proposal of amendments. The national legislature might abuse this power by refusing to forward amendments proposed by the states for ratification. On the entrenchment issue, because the national legislature might not forward proposed amendments to the state, securing amendments would prove impossible, and any defects in the Constitution would effectively be unalterable.

Gouverneur Morris and Elbridge Gerry chimed in on federalism and entrenchment issues by offering an ungainly response to Mason's concerns. They "moved to amend the article so as to require a Convention on application of 2/3 of the Sts."[278] The motion sought to counterbalance the national legislature's gatekeeper power over the proposal phase by giving the states a power to call a national convention.[279] The motion proposed a considerable alteration to the proposal phase of Madison's amendment process. Under Madison's system, two-thirds of the state legislatures could propose amendments, which would then be ratified either by state legislatures or by amendment ratification conventions in the states.[280] Under Morris and Gerry's alteration to Madison's system, two-thirds of the state legislatures could call a national amendment convention empowered only to propose constitutional amendments. The proposed amendments would, in turn, be ratified by either state legislatures or amendment ratification conventions in the states.[281]

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[277] *See id.*

[278] Though vaguely worded, Article XIX's original formulation had permitted two-thirds of the state legislatures to call a national amendment convention empowered to ratify constitutional amendments. *Id.*

[279] Morris and Gerry's motion sought to revive a power of state legislatures similar to that granted by the original wording of Article XIX. *Id.* The motion was an ungainly response to Mason's concerns because, as James Madison correctly pointed out, it did not really bypass the national legislature as a gatekeeper on amendment proposal. As his notes reflect, he "did not see why Congress would not be as much bound to propose amendments applied for by two thirds of the states [Madison's amendment system] as to call a Convention on the like application [Morris and Gerry's alteration]." *Id.* at 629-30 (James Madison's notes).

[280] *See supra* text accompanying note 240.

[281] In short, the original wording of Article XIX allowed a national convention to ratify

Madison reacted with indifference to Morris and Gerry's proposed alteration to his amendment system. He expressed mild concern that "difficulties might arise as to the form, the quorum &c" of an amendment proposal convention. Otherwise, Madison "saw no objection" to the motion.[282] Madison's mild concern is telling. Had his amendment clause outlined a carefully tailored system reflecting fundamental principles, Madison would have vigorously resisted alteration to the procedure he had drafted. Instead, he dispassionately acceded to Morris and Gerry's material alteration. So too did the rest of the delegates, consenting to the motion without debate or opposition.[283] The cavalier reaction to Morris and Gerry's significant alteration lends further credence to the idea that Madison had drafted the amendment clause more in an effort to quickly dispose of a secondary issue than in an effort to cautiously craft a provision reflecting deeply held principles.

Next came two quick motions from Roger Sherman and Elbridge Gerry to alter the ratification aspect of Madison's amendment system. Sherman moved to strike the language requiring that three-fourths of the state legislatures or conventions ratify proposed amendments.[284] The idea was that future drafting conventions should be free to specify the number of state legislatures or conventions needed to ratify amendments, just as the Philadelphia Convention had done with Article VII.[285] Gerry, who had opposed convention-ratification in the debate on Article VII and its precursors,[286] moved to strike out the wording allowing state conventions to ratify proposed amendments, thus leaving state legislatures to ratify all proposed amendments.[287] Sherman and Gerry's motions were defeated by wide margins and without debate.[288]

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amendments. Madison's system had shifted to ratification by state legislatures or conventions. Morris and Gerry's alteration to Madison's system revived the national amendment convention, but shifted its powers from ratification to proposal of amendments. Presumably, however, the national amendment proposing convention would be free to propose any amendment it pleased. Though Morris and Gerry's language did not specify that national amendment proposing conventions would be free to propose any amendment they so desired, this was the way that their wording was understood during the nation's early history. *See* VILE, *supra* note 6, at 57 ("In the first hundred years or so of the nation's history, states that applied for conventions, while undoubtedly stimulated by specific concerns, called for a *general* convention.").

[282] 2 RECORDS, *supra* note 53, at 629-30 (James Madison's notes).

[283] *See id.* at 630 (James Madison's notes).

[284] *See id.*

[285] *See id.*

[286] *See supra* text accompanying notes 64-67, 91-94.

[287] *See* 2 RECORDS, *supra* note 53, at 630 (James Madison's notes).

[288] *See id.*

The final few motions sought to place certain issues beyond the reach of constitutional amendment. Sherman moved to add the language he had alluded to earlier in the day — a ban on amendments interfering with the "internal police" of the states, and on amendments depriving states of equal representation in the Senate.[289] The motion was defeated without debate by a vote of eight states to three.[290] Probably out of frustration over the rejection of his two earlier motions, Sherman then "moved to strike Article V altogether."[291] The motion was defeated without debate by a vote of eight states against, two in favor, and one state delegation divided.[292] Gouverneur Morris then moved the second half of Sherman's entrenchment motion, and without debate or opposition, the convention agreed to add wording prohibiting deprivation of equal representation of the states in the Senate without their consent.[293] At the end of the day on September 15, the entire Constitution came up for a vote, and was approved unanimously by all eleven remaining states.[294]

As had been the case on September 10, the delegates were not disposed to exhaustively probe the deeper meanings of Article V's amendment system. The main concerns again were the intertwined federalism and entrenchment issues. The changes to Article V's wording were related to those issues. Morris and Gerry's ungainly alteration to the proposal phase came in response to Mason's federalism and entrenchment concerns stemming from the national legislature's gatekeeper role. Morris's motion to add language effectively making equal representation of the states in the Senate unamendable also manifestly went to both the federalism and entrenchment issues. Sherman, who had raised the issue, worried that the amendment process might be used "to do things fatal to particular States, as. . . depriving them of their equality in the Senate."[295] Morris's motion protected state sovereignty (the federalism issue) by effectively placing equal representation of the states in the Senate, and the attendant theory that senators would represent states rather than citizens, beyond the reach of

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[289] *Id.*

[290] *See id.* The only comment came from Madison, who cautioned that every state might insist on its own "special provisos" entrenching particular issues against amendment. *Id.*

[291] *Id.*

[292] *See id.* at 630-31 (James Madison's notes).

[293] *See id.* at 631 (James Madison's notes).

[294] *Id.* at 622, 633 (journal record and James Madison's notes).

[295] *Id.* at 629 (James Madison's notes).

the amendment-making process (the entrenchment issue).

Even unsuccessful motions concerned federalism and entrenchment. Sherman's ineffective call for placing state "internal police" beyond the reach of amendment had obvious states' rights overtones. Sherman's other failed motion — the one calling for allowing future drafting conventions to choose the number of states needed to ratify proposed amendments — also may have had federalism and entrenchment motivations. On September 10, Sherman had favored a requirement of unanimous approval of the states to amend.[296] Perhaps he thought that future ratification conventions would demand a very high proportion of states to ratify proposed amendments. On this supposition, amendment would be hard to achieve, and consequently state sovereignty would be protected.

The only parts of the September 15 debate even remotely related to the representational structures issue were Sherman and Gerry's motions to alter the ratification phase. These, after all, were the only motions touching on the ratification, as opposed to proposal, phase of Madison's amendment system. Neither motion spurred discussion. Both were soundly defeated. Even if they had passed, neither motion manifestly related to the issue of representational structures capable of embodying the popular sovereign for purposes of ratifying amendments. As mentioned in the previous paragraph, Sherman's motion may very well have been motivated by federalism and entrenchment concerns.[297]

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[296] *See supra* text accompanying note 236.

[297] It is even possible that Gerry had federalism issues in mind when he proposed his failed motion to delete ratification of amendments by conventions. Had his motion been accepted, state legislatures alone would have been empowered to ratify proposed constitutional amendments. Though a moderate convinced of the need to modify the Articles of Confederation, Gerry favored maintenance of a constitutional system preserving each state's individual sovereignty. *See* GEORGE ATHAN BILLIAS, ELBRIDGE GERRY, FOUNDING FATHER AND REPUBLICAN STATESMAN 186 (1976) (stating that by late August 1789, Gerry had come to oppose proposed Constitution because it strengthened central government too much, and "subverted the independence of the states."). This, at least in part, explains why Gerry favored the Articles of Confederation's legislative amendment provision over Article VII's convention ratification. Following the thinking evident in discussions on Article VII and its predecessors, ratification of constitutional norms by legislative bodies signified constitutional norms ratified by state governments, which in turn, was associated with a constitutional order composed of equally sovereign confederated states. Ratification by conventions, in contrast, signified constitutional norms ratified by the People, which in turn was associated with a constitutional order under which the central government, with its popular sovereignty pedigree, would have supremacy over the state governments. Though Gerry had failed in his attempt to preserve ratification of the Constitution's body by state legislatures, perhaps he was trying to salvage legislative ratification in the amendment phase.

How did the key language allowing both ordinary state legislatures and extraordinary conventions to ratify constitutional amendments become part of Article V? How did that language go unchallenged? The answers rest on a confluence of haste, inattentiveness, and the secondary importance of the amendment issue. The Constitution's amendment provision was the product of two abbreviated discussions during the last week of the summer long Philadelphia Convention. Most of the amendment provision's language came from the hand of James Madison. He proposed a system of amendment that was approved without debate in the middle of the September 10 session. The only challenges to the key clause allowing both legislatures and conventions to ratify constitutional amendments came in motions brought by Sherman and Morris on September 15. Both motions were defeated without debate and by lopsided margins. What limited discussion there was on Article V and its precursors focused mostly on the intertwined federalism and entrenchment issues. None of the delegates thought to question Madison's language allowing both legislatures and conventions to ratify constitutional amendments. None thought to point out that this language contradicted the "first principles" reasoning that Madison and so many others had explicitly and implicitly invoked during the debates over Article VII and its precursors.

Madison and his fellow delegates created a true constitutional Gordian knot — a ratification clause based on the idea that only extraordinary conventions, but not ordinary legislatures, could speak as the popular sovereign when ratifying constitutional norms, coupled with an amendment clause which allowed ordinary legislatures to ratify constitutional norms. This contradiction would not be fully confronted until 1789, when Congress, operating under the newly ratified Constitution, would seek to use Article V for the first time to propose the Bill of Rights.[298] First, however, during the ratification period, Article V would be the subject of debate and commentary in state ratifying conventions and in public discourse over the proposed Constitution.

2. Article V During the Ratification Debates

In sharp contrast to the Philadelphia drafting convention, amendment issues were frequently discussed during the ratification process. The ratification period debate on the amendment issue, however, focused predominantly on the timing of amendment rather than the method of

[298] *See infra* Part III.

amendment. The smaller states of Delaware, New Jersey, Georgia, and Connecticut ratified the proposed Constitution rapidly and without much dispute.[299] In the larger states of Pennsylvania, Virginia, New York, and Massachusetts, and the smaller states of New Hampshire, Maryland, and North and South Carolina, however, the road to ratification was more contentious. In many of those states the amendment timing issue was pivotal. Anti-Federalists in those states often advocated conditioning approval of the Constitution on acceptance of various pre-ratification amendments. Federalists rebutted by arguing in favor of immediate ratification followed by post-ratification amendments pursuant to Article V.[300]

The dominance of the pre- versus post-ratification timing issue did not completely divert attention from the amendment process outlined in Article V. Instead, it altered the contours of debate on the process issue. Stated most simply, discussion of Article V's amendment process was an ancillary outgrowth of the primary pre- versus post-ratification

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[299] *See* KYVIG, *supra* note 23, at 67 (discussing ratification in Delaware, New Jersey, Georgia, and Connecticut, and stating that "[s]everal small states saw little choice but to ratify and, without much division or debate, quickly moved to do so."). Delaware ratified the proposed Constitution on December 7, 1787, and was the first state to ratify. *See* 3 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 41, 110 (Merrill Jensen ed., 1976) (citing Delaware form of ratification and editors comments that "[t]here was no overt opposition to the Constitution in Delaware. . . . Delaware was the first state to ratify the Constitution, the state convention doing so unanimously on 7 December . . . ."). New Jersey ratified the Constitution on December 18, 1787, with little opposition. *Id.* at 125, 184 (citing New Jersey form of ratification and editors notes that "Few jerseymen would openly oppose the ratification of [the] constitution . . . ."). Georgia ratified the proposed Constitution on January 2, 1788, and was the first Southern state to consent. *Id.* at 278 (citing Georgia deed of ratification). Connecticut ratified the proposed Constitution on January 9, 1788. *Id.* at 560-61 (citing Connecticut form of ratification). Unlike Delaware, New Jersey, and Georgia, Connecticut "produced significant opposition to ratification." KYVIG, *supra* note 23, at 67.

[300] Professor Kyvig provides an excellent summary of the debates between Federalists and Anti-Federalists in ratification conventions over the pre- versus post-ratification amendment issue. *See* KYVIG, *supra* note 23, at 66-86. This issue of pre- versus post-ratification amendment was particularly lively in the Virginia ratifying convention. Professors Kaminski and Saladino characterize the Virginia ratifying convention debate as follows:

> Early in the Convention, the debate focused on whether the Constitution should be ratified conditionally, or unconditionally. Federalists argued that the Constitution should be ratified first and that amendments, if needed, should be proposed by the new Congress under the Constitution. Antifederalists wanted the Convention to adopt substantial amendments, which would be sent to the other states for their consideration before ratification of the Constitution.

9 DOCUMENTARY HISTORY, *supra* note 182, at 898 (citing editors' comments on Virginia ratifying convention).

amendment issue. Seeking to bolster their argument for pre-ratification amendment, Anti-Federalists tended to argue that Article V made post-ratification amendment nearly impossible. Federalists favoring immediate ratification without amendment, in contrast, often spoke of Article V as providing an easy and regular method for correcting imperfections in the proposed Constitution. The focus on the entrenchment issue was driven by whether amendments should be made pre- or post-ratification. This dynamic produced no incentive for a focus on the representational structure issue or whether legislatively ratified amendments would count as ratified by We the People.

This phenomenon is exemplified clearly in the debate over Article V in the Virginia ratifying convention.[301] Early in the Virginia ratifying convention, Anti-Federalist Patrick Henry, who advocated pre-ratification amendments, offered a sweeping oration against the proposed Constitution. He criticized Article V as follows:

> To encourage us to adopt it [the proposed Constitution], they tell us that there is a plain, easy way of getting amendments: When I come to contemplate this part, I suppose I am mad, or that my countrymen are so: The way to amendment is, in my conception, shut. Let us consider this plain, easy way: . . . Hence it appears that three-fourths of the states must ultimately agree to any amendment that may be necessary. . . . Two-thirds of the Congress, or of the state legislatures, are necessary to even propose amendments: If one-third of these be unworthy men, they may prevent the application of amendments; but what is destructive and mischievous, is, that three-fourths of the state legislatures, or of State Conventions, must concur in the amendments when proposed: In such numerous bodies, there must necessarily be some designing bad men: To suppose that so large a number as three-fourths of the States will concur, is to suppose that they will possess genius, intelligence, and integrity, approaching to miraculous.[302]

Henry went on to argue that a bare majority in "four of the smallest states" could block amendments, and that "a trifling minority may reject

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[301] *See* KYVIG, *supra* note 23, at 76-77 (arguing that, because evenly balanced between Federalists and Anti-Federalists, Virginia ratifying convention "was a full and cogent debate" and that "[t]he Virginia convention divided, not over whether to accept the Constitution but over previous or subsequent amendment"); Kurt T. Lash, *Rejecting Conventional Wisdom: Federalist Ambivalence in the Framing and Implementation of Article V*, 38 AM. J. LEGAL HIST. 197, 212 (1994) ("The Virginia convention provides the sole recorded instance of sustained discussion regarding Article V.").

[302] 9 DOCUMENTARY HISTORY, *supra* note 182, at 955-56 (citing fragment of Patrick Henry's remarks on June 6, 1788, at Virginia ratifying convention).

the most salutary amendments."[303] Delegate George Nicholas offered the most direct rebuttal to Henry's Article V reprobation:

> The worthy member [Henry] has exclaimed with uncommon vehemence, against the mode provided for securing amendments. He thinks amendments can never be obtained, because so great a number is required to concur. Had it rested solely with Congress, there might have been danger. The Committee will see, that there is another mode provided, besides that which originates with Congress. On application of the Legislatures of two-thirds of the several States, a Convention is to be called to propose amendments, which shall be part of the Constitution, when ratified by the Legislatures of three-fourths of the several States, or by Conventions in three-fourths thereof: It is natural to conclude that those States who will apply for calling the Convention, will concur in the ratification of the proposed amendments. There are strong and cogent reasons operating on my mind, that amendments which shall be agreed to by those States, will be sooner ratified by the rest, than any others that can be proposed.[304]

The exchange between Henry and Nicholas typifies the focus on the entrenchment issue driven by a desire for either pre- or post-ratification changes to the Constitution.

The phenomenon repeated itself in Massachusetts. During that state's ratifying conventions an Anti-Federalist writer argued that Article V made post-ratification amendment near impossible.

> To call a Convention then, two thirds of both houses of the new Congress must deem it necessary, or of the legislatures of two thirds of the several States must make an application to Congress; and can it be doubted that there will not be found such of the new Congress, or of the State legislatures *disposed* to call a Convention *for making amendments*? . . . But supposing a Convention should be called, what are we to expect from it, after having ratified the proceedings of the late federal Convention? . . . If therefore, it is the intention of the Convention of this State to preserve republican principles in the federal government, they must accomplish it *before*, for they never

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[303] *Id.* at 956.

[304] *Id.* at 1002. James Madison also offered a rebuttal of Henry's Article V critique. He highlighted the hypocrisy in Henry's criticism of Article V for requiring three-fourths of the states to approve amendments, while at the same time criticizing Article VII for violating the Articles of Confederation amendment clause requirement of unanimous approval of the states. *Id.* at 990-91.

> can expect to effect it *after* ratification of the new system.[305]

In a similar vein, another Massachusetts opponent of the Constitution asked:

> who is there to be found among us, who can seriously assert, that this Constitution, after ratification and being practised upon, will be so easy of alteration? . . . Where is the probability that three fourths of the States in that Convention, or three fourths of the Legislatures of the different States, whose interests differ scarcely in nothing short of everything, will be so very ready or willing materially to change any part of this System. . . ?[306]

Anti-Federalists in Pennsylvania toed the same line. One wrote that Article V "appears to me to be only a cunning way of saying that no alteration shall ever be made; so that whether it is a good constitution or a bad constitution, it will remain forever unamended."[307]

The friends of the Constitution offered responses similar in nature to George Nicholas's reply to Patrick Henry during the Virginia ratifying convention. In a letter, George Washington rhetorically asked, "Is there not a Constitutional door open for alterations and amendments; & is it not probable that real defects will be as readily discovered after, as before, trial?"[308] Using similar language, one Connecticut observer wrote, "It may be, and Perhaps is certain that the New Constitution is not Perfect. But I observe there is a doore left for amendments."[309] In Pennsylvania, James Wilson argued that "[i]f there are errors [in the Constitution], it should be remembered that the seeds of reformation are sown in the work itself, and a concurrence of two-thirds of the Congress may at any time introduce alterations and amendments."[310]

Though Article V's amendment process had emerged with little scrutiny from hurried sessions at the very end of the Philadelphia drafting convention, during the ratification phase it received significant

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[305] 5 DOCUMENTARY HISTORY, *supra* note 195, at 702 (excerpt from The Republican Federalist IV, MASS. CENTINEL, Jan. 12, 1788).

[306] 4 DOCUMENTARY HISTORY, *supra* note 178, at 157 (citing excerpt from essay of John DeWitt, II, AMERICAN HERALD, Oct. 29, 1787).

[307] 13 DOCUMENTARY HISTORY, *supra* note 86, at 377 (excerpt from An Old Whig I, PHILADELPHIA INDEPENDENT GAZETEER, Oct. 12, 1787).

[308] *Id.* at 381-82 (citing letter from George Washington to Henry Knox (Oct. 15, 1787)).

[309] 15 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 55-56 (John P. Kaminski & Gaspare J. Saladino eds., 1984) (discussing excerpt from A Countryman V, NEW HAVEN GAZETTE, Dec. 20, 1787).

[310] 2 DOCUMENTARY HISTORY, *supra* note 172, at 172 (citing James Wilson, Speech at the State House Yard, Pennsylvania, (Oct. 6, 1787)).

analysis. Proponents and opponents of the proposed Constitution zeroed in on the detailed mechanics of Article V's amendment process in a way that the delegates in Philadelphia had not.[311] What Edmund Pendelton referred to as the "previous and subsequent amendments" issue was the overarching issue that instigated examination of Article V's amendment process.[312] Had the Anti-Federalists not been bent on pre-ratification amendments, they would not have been motivated to argue that post-ratification amendments under Article V would be blocked. They in turn would not have had impetus to proffer close analysis of Article V's amendment proposal and ratification mechanism. The centrality of the timing of amendments, in short, gave the Anti-Federalists the motivation to examine Article V's particulars that had not been present during the closing days of the Philadelphia drafting convention.[313]

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[311] Anti-Federalists tended to focus more closely on the detailed mechanics of Article V's amendment process in their effort to expose it as a complex maze. Federalists tended to offer more superficial analysis on the way to concluding that Article V offered an "easy" path to correction of defects in the Constitution.

[312] 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1201 (John P. Kaminski & Gaspare J. Saladino eds., 1993) [hereinafter 10 DOCUMENTARY HISTORY] (citing fragment of Edmund Pendelton, Speech at Virginia Ratification Convention (June 12, 1788)).

[313] We get a taste of the acrimony and import of the pre- versus post-ratification amendment debate with a clip from another Patrick Henry oratory at the Virginia ratification convention:

> I am constrained to make a few remarks on the absurdity of adopting this system, and relying on the chance of getting it amended afterwards. When it is confessed to be replete with defects, is it not offering to insult your understandings, to attempt to reason you out of the propriety of rejecting it, til it be amended? Does it not insult your judgments to tell you — adopt first, and then amend? Is your rage for novelty so great, that you are first to sign and seal, and then to retract? Is it possible to conceive a greater solecism? I am at a loss what to say. You agree to bind yourselves hand and foot — For the sake of what? — Of being unbound. You go into a dungeon — For what? To get out. Is there no danger when you go in, that the bolts of federal authority shall shut you in?

9 DOCUMENTARY HISTORY, *supra* note 182, at 1070 (fragment of Patrick Henry, Speech at Virginia Ratification Convention (June 9, 1788)). Federalists met Anti-Federalist's alarmist calls for pre-ratification amendment with even-tempered references to Article V. On June 12, at the Virginia ratification convention, Edmund Pendelton addressed Henry's rhetoric as follows:

> Permit me to deliver a few sentiments on the great and important subject of previous and subsequent amendments. When I sat down to read that paper [the proposed Constitution], I did not read it with an expectation that it was perfect, and that no man would object to it. . . . I thought I saw there sown some seeds of disunion. . . . I wish amendments to remove these. But these remote possible

However, because that close analysis of process came in the context of, and was shaped by, the larger debate over pre- versus post-ratification amendment, it was incomplete.[314] The pre- versus post-ratification amendment issue steered debate away from any possible searching consideration of Article V's impact on the representational structure issue. Because the amendment timing issue dominated, Anti-Federalists like Patrick Henry naturally chose to criticize Article V for making post-ratification amendment too difficult. Those who rebutted such critiques followed the lead, and painted Article V as offering an easy and regular way to correct imperfections in the Constitution. The representational structure issue of legislative versus convention ratification had little relevance to the pre-versus post-ratification issue, and was, therefore, passed over. There was no practical impetus for Federalists or Anti-Federalists to focus on the issue of whether legislative ratification of amendments would be tantamount to ratification by We the People. Thus, though significant, the discourse on Article V's amendment process was quite narrow. Propelled by the primary issue of pre- versus post-ratification amendment, and the ancillary issue of whether Article V made amendment unattainable, the ratification period debates on Article V process mostly ignored, or, at best, glossed over, the representational structure issue, much as had the debate during the Philadelphia drafting convention.

Despite the gravitational pull of the pre-versus post-ratification amendment issue, a few cryptic passing allusions to the representational structure issues slipped into ratification period Article V discourse. Very few of these comments directly confronted the issue of whether ordinary legislatures could serve as representational structures through which the popular sovereign could ratify constitutional amendments. Sometimes commentators unintentionally stumbled on the representational structure issue when making other points unrelated to that issue. Consider two typical examples. At the Massachusetts ratification convention, Charles Jarvis challenged opponents of the proposed Constitution to "show another government in which such wise

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errors may be eradicated by the amendatory clause in the Constitution. I see no danger in making the experiment, since the system itself points out an easy mode of removing any errors which shall have been experienced.

10 DOCUMENTARY HISTORY, *supra* note 312, at 1201 (citing fragment of Edmund Pendelton, Speech at Virginia Ratification Convention (June 12, 1788)).

[314] In other words, the pre- versus post-ratification issue created incentives for Anti-Federalists to argue: (1) that Article V made post-ratification amendments too hard, and (2) that Article V allowed an easy and regular mode of amendment.

precaution has been taken, to secure to the people the right of making such alterations and amendments in a peaceable way, as experience shall have proved to be necessary."[315] Jarvis made this statement in the context of his larger point that Article V offered a viable way to correct any defects in the Constitution. His main focus, in other words, was not the representational structure issue, but rather the entrenchment issue.[316] Similarly, at the Pennsylvania convention, regarding Article V, Thomas McKean argued as follows: "If, sir, the people should at any time desire to alter and abolish their government . . . it is their power to do so, and I am happy to observe that the Constitution before us provides a regular mode for that event."[317] McKean's main argument was that the Constitution did not need a Bill of Rights.[318] If the government became oppressive, the People retained the power to alter their government. Article V offered "a regular mode for that event."

Both Jarvis and McKean depicted Article V as offering a process through which the People could ratify constitutional amendments.[319] But, were they suggesting that the People could ratify constitutional amendments through ordinary legislative bodies? The answer is unclear. Jarvis and McKean may have thought that only the convention amendment ratification route offered a way for the People to alter the Constitution. Or, they may have thought that both the convention and legislative ratification routes offered pathways for popular ratification of constitutional amendments. Or, they may not have even thought through the representational structure issue at all. Because Jarvis and McKean's fleeting references to Article V as a way for the People to ratify constitutional amendments failed to differentiate between legislative and convention amendment ratification, we cannot know exactly what they

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[315] 6 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1374 (John P. Kaminski & Gaspare J. Saladino eds., 2000) (quoting fragment of Charles Jarvis, Speech at Massachusetts Ratification Convention (Jan. 31, 1788)). Rufus King posed a similar challenge when he asked opponents to the Constitution "to produce an instance in any other national constitution, where the people had so fair an opportunity to correct any abuse which might take place in the future administration of the government under it." *Id.* at 1373-74.

[316] *See id.* at 1374-75 (quoting fragment of Charles Jarvis, Speech at Massachusetts Ratification Convention (Jan. 31, 1788)).

[317] 2 DOCUMENTARY HISTORY, *supra* note 172, at 387 (citing fragment of Thomas McKean, Speech at Pennsylvania Ratification Convention (Nov. 28, 1787)).

[318] *Id.* at 387.

[319] Jarvis and McKean were not the only ones to speak of Article V as offering a way for the People to amend the Constitution. A Plain Citizen, for example, wrote that Article V "provided for its [the Constitution's] future amendment, in such particulars as the sense of the people may, at any time require." *Id.* at 290 (citing A Plain Citizen, *To the Honorable the Convention of the State of Pennsylvania*, INDEPENDENT GAZETTEER, Nov. 22, 1787).

had in mind.

Other passing allusions to the representational structure issue did differentiate between Article V's legislative and convention ratification modalities. These references tend to support the thesis that only conventions, and not ordinary legislative bodies, could ratify constitutional norms in the name of the popular sovereign. At the Virginia ratification convention, Edmund Randolph argued against pre-ratification amendments by suggesting that post-ratification amendments could be readily secured via Article V's legislative amendment ratification modality.[320] In the course of that argument, Randolph offered the following characterization of Article V: "[T]here is a mode in the Constitution itself to procure amendments, not by reference to the people, but by the interposition of the State Legislature. . ."[321] Randolph's evanescent characterization distinguishes popular ratification of constitutional amendments from ratification of amendments "by the interposition of the State Legislatures." Ratification by state legislatures, in short, did not equate with ratification "by reference to the people."

At the North Carolina ratification convention, James Iredell offered far more than a fleeting reference to the representational structure issues embedded in Article V. He deliberately addressed differences between Article V's legislative and convention amendment ratification modalities:

> Let us attend to the manner in which amendments are made. . . . Any amendments which either Congress shall propose, or which shall be proposed by such general conventions, are afterwards to be submitted to the legislatures of the different states, or conventions called for that purpose, as Congress shall think proper, and, upon ratification of three fourths of the states, will become part of the Constitution. By referring this business to legislatures, expense would be saved; and in general, it may be presumed, they would speak the genuine sense of the people. It may, however, on some occasions, be better to consult an immediate delegation for that special purpose. This is therefore left discretionary.[322]

Iredell's Article V commentary supports the idea that the original understanding was that only extraordinary conventions, but not

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[320] 9 DOCUMENTARY HISTORY, *supra* note 182, at 1092-93 (citing Edmund Randolph, Speech at Virginia Ratification Convention (June 10, 1788)).

[321] *Id.* at 1093.

[322] 4 ELLIOT'S DEBATES, *supra* note 184, at 177 (citing fragment of James Iredell Speech at North Carolina Ratification Convention (July 23, 1788)).

ordinary legislatures, could embody We the People for purposes of ratifying constitutional norms. Consider Iredell's careful choice of words. When passing on proposed constitutional amendments, legislatures will "in general. . . speak the genuine sense of the people." Legislatures, in other words, will usually do what the popular sovereign would do if directly consulted on proposed amendments. Iredell, however, does not go the further step to suggest that legislatures passing on proposed constitutional amendments would embody the popular sovereign, ratify amendments in the name of the popular sovereign, or operate as the popular sovereign assembled. Promulgating the genuine sense of We the People and operating as an embodiment of We the People are two entirely different phenomena. The former involves an agent acting *on behalf of* the principal popular sovereign. The latter involves an agent acting *as* the principal popular sovereign. Iredell opted to employ the former imagery when describing legislative ratification of constitutional amendments. His imagery, however, shifts when he turns to ratification of proposed amendments by conventions. Here, he differentiates convention and legislative ratification of amendments by casting convention ratification as "an immediate delegation" from the popular sovereign. Essentially, Iredell was arguing that ratification of amendments by ordinary legislatures will often be appropriate. Though not the People embodied, ordinary legislatures usually "speak the genuine sense of the people," and offer a more expedient ratification mechanism than conventions. In some cases, however, it may be appropriate or necessary to consult the People assembled in amendment ratification conventions.

Iredell was the only individual during the drafting and ratification periods to squarely and deliberately confront the differences between legislative and convention amendment ratification in Article V. Others glossed over the issue or touched it only by coincidence. Even Iredell, however, did not see the implications of "first principles" thinking on Article V's binary amendment ratification system. More specifically, he failed to address the contradiction between the idea that only conventions could ratify constitutional norms in the name of the People with Article V's allowance for legislative ratification of constitutional amendments. Two factors can explain Iredell's failure to see the contradiction. First, Iredell had not served as delegate to the Philadelphia drafting convention, where "first principles" reasoning had so often been explicitly or implicitly invoked during discussions on

Article VII.[323] Second, Iredell offered his Article V analysis in the context of a broader argument unrelated to "first principles" issues. The main thrust of his argument was that Article V was "one of the greatest beauties" of the proposed Constitution because it offered a regular and institutionalized way to effectuate constitutional change.[324] This line of argument would not steer him towards "first principles" thinking. Iredell's argument captures the phenomenon of the entrenchment issue — whether Article V made amendment too hard — and diverts attention from the representational structure issue.

Iredell can be excused for his failure to address the contradiction between "first principles" and Article V's binary amendment ratification modalities. What, however, are we to make of James Madison? Madison's performance on amendment issues during the ratification debates is just as confounding as it had been during the Philadelphia drafting convention. As in Philadelphia, during the ratification period, Madison failed to acknowledge the constitutional Gordian knot that he had been so instrumental in creating.

Madison's Article V commentary during the ratification period centered on the two issues that had been prominent during the Philadelphia drafting convention discussion on Article V and its precursors — the federalism and entrenchment issues. His references to Article V in his contributions to the Federalist Papers touched on both themes.[325] Regarding the federalism issue, Madison used Article V to hammer home the idea that the proposed Constitution was "neither a national nor a federal constitution, but a composition of both."[326] Anti-Federalists had charged that the proposed Constitution failed "to have preserved the *federal* form, which regards the Union as a *Confederacy* of sovereign states."[327] As an antidote to such charges, in *Federalist No. 39* Madison pointed to both Article VII and Article V as methods for ratifying constitutional norms. Regarding Article VII, Madison wrote the following:

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[323] *See* 3 RECORDS, *supra* note 48, at 557-59 (listing delegates to Philadelphia convention).

[324] *Id.* at 176-77.

[325] In his speeches at the Virginia ratification convention, Madison also touched on the federalism and entrenchment themes, but failed to mention the contradiction between "first principles" thinking and Article V. *See* 9 DOCUMENTARY HISTORY, *supra* note 182, at 990, 996 (citing fragments of James Madison Speech at Virginia Ratification Convention (June 6, 1788)); 10 DOCUMENTARY HISTORY, *supra* note 312 , at 1518 (citing James Madison, Speech at Virginia Ratification Convention (June 25, 1788)).

[326] *See* THE FEDERALIST NO. 39, at 246 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[327] *Id.* at 242-43.

> . . . the Constitution is to be founded on the assent and ratification of the People of America, given by deputies elected for the special purpose. . . this assent and ratification is to be given by the people, not as individuals composing one entire nation, but as composing the distinct and independent States to which they respectively belong. It is to be the assent and ratification of the several States, derived from the supreme authority in each State — the authority of the people themselves. The act, therefore, establishing the Constitution will not be a *national* but a *federal* act.[328]

Later in *Federalist No. 39*, Madison applied the same federalism driven logic to Article V's amendment clause:

> If we try the Constitution by its last relation to the authority by which amendments are to be made, we find it neither wholly *national* nor wholly *federal*. Were it wholly national, the supreme and ultimate authority would reside in the *majority* of the people of the Union; and this authority would be competent at all times, like that of a majority of every national society to alter or abolish its established government. Were it wholly federal, on the other hand, the concurrence of each State in the Union would be essential to every alteration that would be binding on all. The mode provided by the plan of the convention is not founded on either of these principles. In requiring more than a majority, and particularly in computing the proportion by *States*, not by *citizens*, it departs from the national and advances towards the *federal* character. . .[329]

Once again, the federalism issue had diverted attention from a possible examination of the representational structure issue. Madison was so bent on using Article V to combat the Anti-Federalist contention that the proposed Constitution destroyed federalism and state sovereignty that he focused only one facet of Article V — that amendments would be ratified by states rather than citizens. He, once again, had no reason or motivation to focus on the other facet — Article V's allowance for ratification by both legislatures and conventions. Madison's failure to focus on this latter feature in *Federalist No. 39* is particularly striking in light of the fact that in the very same paper he explicitly invoked the representational structure issue when discussing Article VII. Under Article VII, the assent of the various states was to be expressed "not by the legislative authority, but by that of the people themselves."[330] In

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[328] *Id.* at 243.

[329] *Id.* at 246.

[330] *Id.* at 244.

short, Madison's primary focus on the federalism issue did not prevent him from briefly considering Article VII's representational structure angle. When he turned to Article V, however, Madison avoided the representational structure angle altogether.

Madison's contributions to the Federalist Papers touched on Article V only once more. In *Federalist No. 43*, Madison turned from Article V's federalism angle to the entrenchment issue. Madison succinctly argued that the Article V amendment process "guards equally against that extreme facility, which would render the Constitution too mutable; and that extreme difficulty, which might perpetuate its discovered faults."[331] In other words, the Article V amendment process rendered constitutional change neither too easy nor too hard. Madison did not mention Article V's legislative versus convention ratification modalities or the conflict between "first principles" and Article V's allowance for legislative ratification of constitutional amendments. Ironically, however, in the very next paragraph Madison addressed Article VII and directly raised the "first principles" argument. After reciting Article VII verbatim, Madison writes, "This article speaks for itself. The express authority of the people alone could give due validity to the Constitution."[332] Madison's failure to address the dissonance between his "first principles" logic and Article V's legislative ratification modality is even more striking in *Federalist No. 43* than in *Federalist No. 39*. In *Federalist No. 43*, Madison actually placed a "first principles" argument — the boastful claim that Article VII's ratification by extraordinary conventions provided a way to secure "the express authority of the people" — *immediately after* the paragraph on Article V which neglects the "first principles"/Article V dissonance.[333]

As had been the case during the Philadelphia Convention, the issues of import — federalism and entrenchment — did not provide any reason for Madison to focus on Article V's option for legislative ratification of amendments. As we will see in the next part, however, Madison would not be able to pass over the conflict between "first principles" and Article V's allowance for legislative ratification forever.

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[331] *See* THE FEDERALIST NO. 43, *supra* note 171, at 278.

[332] *Id.* at 279.

[333] *Id.*

III. THE POST-RATIFICATION UNCERTAINTY OVER LEGISLATIVE RATIFICATION OF AMENDMENTS

When the First Congress organized in early April of 1789 under the newly ratified Constitution, it did not move immediately to propose the set of rights protecting amendments that would later come to be known as the Bill of Rights. Congress was dominated by Federalists who had opposed amendments during the ratification process. The few Anti-Federalists that had been elected feared that a set of rights-protecting amendments would destroy the possibility of a second constitutional convention that could roll back the centralizing tendencies of the new Constitution. James Madison had opposed amendments as late as the Virginia Ratifying Convention. He, however, had altered his stance by early 1788, when he ran for a House of Representatives seat against James Monroe. Upon election, he became the most outspoken proponent in the House for adoption of a set of rights-protecting amendments.[334] Though Madison began to agitate for amendments in the early weeks of the first Congress, the House did not agree to debate a set of proposed constitutional amendments until mid-August 1789.

A. The Bill of Rights and the Legislative Ratification Controversy

Madison proposed a set of constitutional amendments to the House in a resolution he introduced on June 8.[335] On July 21, the House referred Madison's resolution to a special, select, eleven-man committee. The committee reported back to the House on July 28.[336] Finally, on August 13, the House, assembled as the Committee of the Whole House, voted to consider the set of proposed constitutional amendments that the special committee had reported.[337]

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[334] *See* CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS at ix-xvii (Helen Veit et al., eds., 1991) [hereinafter CREATING THE BILL OF RIGHTS] (noting editors' introduction offering compact but complete summary of events leading to Congress' proposal of Bill of Rights).

[335] *See id.* at 11, 95 (noting James Madison's resolution of June 8, 1789, editors' chronology, and Congressional Register proceedings of August 13, 1789 reflect that Madison offered resolution consisting of proposed set of constitutional amendments).

[336] *See id.* at 6, 29, 102-03 (noting editors' chronology, Congressional Register proceedings of July 21, 1789, and House Committee Report of July 28, 1789, which reflect referral of Madison's resolution to select committee and said committee's report back to House).

[337] *See id.* at 112, 117 (citing Congressional Register proceedings of August 13, 1789, containing Representative Lee's motion for Committee of the Whole House to consider amendments formulated by "committee of eleven" and passage of motion).

Madison's June 8 resolution provided for submission of his proposed constitutional amendments to state legislatures for ratification.[338] The eleven-man committee had done nothing to alter this feature. During the ratification period, from late 1787 through 1788, Madison had invoked the argument that ratification by extraordinary conventions, as opposed to ordinary legislatures, would bestow upon the Constitution a legitimate popular sovereignty pedigree.[339] By mid-1789, however, Madison was proposing legislative ratification of new constitutional norms. Had he (carelessly or knowingly) forgotten his "first principles"?

If he had, Roger Sherman quickly refreshed his recollection. Sherman opened the August 13 House debate with a bombshell argument that brought the chamber, including James Madison, face-to-face with Article V's constitutional Gordian knot. Sherman's opening salvo skipped over the substance of the set of proposed constitutional amendments, and zeroed in on two interconnected technical features. First, as Madison had proposed on June 8, the set of amendments were to be ratified by ordinary state legislatures. Second, also as Madison had proposed on June 8, the constitutional amendments were to be woven into, as opposed to appended to the end of, the text of the existing Constitution.[340] Consider Sherman's opening bombshell arguments regarding legislative ratification and interweaving of amendments into the existing text:

> I believe, mr. chairman, this is not the proper mode of amending the constitution. We ought not to interweave our propositions into the work itself, because it will be destructive of the whole fabric. We might as well endeavor to mix brass, iron and clay, as to incorporate such heterogeneous articles; the one contradictory to the other. Its absurdity will be discovered by comparing it with a law: would any legislature endeavor to introduce into a former act, a subsequent amendment, and let them stand so connected. When an alteration is made in an act, it is done by way of supplement; the latter act always repealing the former in every specified case of difference.

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[338] *See id.* at 11 (citing James Madison's June 8, 1789 resolution).

[339] *See supra* text accompanying notes 60-63, 81, 110-18, 136-39, 167-70.

[340] One commentator suggests that Madison opted for interweaving the proposed amendments into the existing constitutional text because interweaving was compatible with Madison's notion that the structure of government would protect individual rights. *See* Price Marshall, *"A Careless Written Letter" — Situating Amendments in the Federal Constitution*, 51 ARK. L. REV. 95, 106-08 (1998).

> Beside that sir, *it is questionable, whether we have a right to propose amendments in this way. The constitution is an act of the people, and ought to remain entire. But the amendments will be the act of the state governments;* again all the authority we possess, is derived from that instrument; if we mean to destroy the whole and establish a new constitution, we remove the basis on which we mean to build.[341]

Sherman had participated in the Philadelphia ratification convention. The "first principles" talk swirling around Article VII and its precursors had not been lost on him. The second paragraph of Sherman's statement was lifted directly from the "first principles" script. The body of the Constitution, which had been ratified by the popular sovereign assembled in extraordinary conventions, was "an act of the people." A set of constitutional amendments ratified by state legislatures, however, would not be "an act of the people," but, instead, "an act of state governments." The two were separate kinds of legal norms emanating from separate entities. Therefore, interweaving amendments into the body of the Constitution would be like trying to mix compounds that could not be synthesized. Rather than intermingling popular sovereignty pedigree-lacking, legislatively ratified amendments into the text of the body of the Constitution, Sherman proposed tacking the proposed amendments to end of the Constitution. This method would avoid confusion by maintaining the two classes of constitutional norms separated from each other.

How did James Madison experience that moment? Did it finally dawn on him that he had made a serious misstep in drafting what would eventually become Article V's provision allowing legislatures to ratify constitutional amendments? Or, perhaps all along having privately been aware of the contradiction between his call for convention ratification of the Constitution and his language allowing legislative ratification of amendments, did he recognize that a long concealed issue had finally bubbled up to the surface? Or did he, despite Sherman's blunt argument, continue in a state of enigmatic "first principles" amnesia? Whatever his innermost private reaction, he was quick to offer a public counterargument. Speaking immediately after Sherman, Madison stuck by his idea of interweaving amendments into the existing text of the Constitution. He argued that "neatness and propriety" and a desire to make the Constitution "uniform and entire" counseled in favor of interweaving. Appending amendments to the end of the Constitution

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[341] CREATING THE BILL OF RIGHTS, *supra* note 334, at 117 (quoting Congressional Register of August 13, 1789 and comments of Roger Sherman) (emphasis added).

would lead to confusion. Moreover, despite Sherman's suggestion to the contrary, amendments were at least sometimes interwoven into the text of existing statutes, and then passed as a single new statute replacing the existing statute.[342]

The key point of Sherman's bombshell had been the idea that amendments could not be interwoven with the body of the Constitution because legislatively ratified amendments would lack the popular sovereignty pedigree carried by the convention ratified body of the Constitution. Madison's rebuttal, however, mostly sidesteps Sherman's argument, and focuses almost exclusively on issues of, in his own words, "form." Madison offered only a fleeting reference to Sherman's crucial "first principles" point. He stated that if the amendments are interwoven into the proposed amendments, "they will stand upon as good foundation as the original work."[343] What did this statement mean? One possibility is that Madison had recognized Sherman's main point, and was proposing a way to make the problem go away. Consistent with the "conventions only" axiom of "first principles" logic, legislative ratification alone could not place the amendments "upon as good a foundation" as the convention ratified body of the Constitution. By interweaving the proposed amendments into the body of the Constitution, however, the problem could be papered over. Once interwoven into the Constitution's popular sovereignty pedigree bearing fabric, the amendments would appear to be part of the original document, which had been ratified by conventions embodying We the People, and no one would notice their bastardized pedigree.

Alternatively, Madison may have sought to convey the idea that legislatively enacted amendments will enjoy the same popular sovereignty pedigree, and, therefore, have the same normative force as the clauses in the main body of the Constitution. Because they are of the same kind and of the same normative force, the amendments ought to be interwoven into the Constitution's main body, rather than tacked onto the end of the Constitution's main body. Yet, this way of reading Madison's fleeting argument is counterintuitive and reverses the sequences of his syllogism. Madison did not state that amendments are of the same normative force as the body of the Constitution, and therefore should be interwoven into the body. He instead stated that if amendments are interwoven in the body of the Constitution, they will

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[342] *Id.* at 118 (citing Congressional Register of August 13, 1789 and comments of James Madison).

[343] *Id.* (same).

"stand upon as good a foundation" as the main body. The idea that amendments have equal normative force as the body of the Constitution is the conclusion, not the premise, of Madison's argument.[344]

In the end, the passage is fleeting and somewhat cryptic, and it is, therefore, impossible to draw incontrovertible conclusions. Far more telling than the controvertible meaning of Madison's argument is its brevity. Madison did not attempt to explain why Sherman's "first principles" argument was incorrect. He did not attempt to explain why a legislatively ratified amendment could have the same popular sovereignty pedigree, and, therefore, the same normative force, as the convention-ratified main body of the Constitution. He instead focused on "form" and the confusion that might result from tacking amendments to the end of the Constitution's main body. If Madison had a workable way to mesh legislative ratification of amendments with the "first principles" thinking that he had invoked at the Philadelphia drafting convention, and which Roger Sherman was using to skewer him in the halls of Congress, one would expect that Madison would have offered it up with a luxury of detail. In other words, had Madison meant to argue that legislatively ratified amendments would bear a popular sovereignty pedigree on par with that of the convention-ratified main body of the Constitution, he would have offered more than more extensive comments explaining how this could be so. Such an explanation would surely have diffused Sherman's attack and advanced Madison's desire for interweaving the amendments into the Constitution's body.

After Sherman and Madison's initial exchange, numerous House members weighed in on the issue of interweaving versus appending amendments, with several supporting and several opposing Sherman's motion favoring the latter. There was disagreement over whether the interweaving option comported with standard legislative practice, whether the addendum option would produce confusion, and even whether the interweaving option would make it look as though the delegates to the Philadelphia drafting convention had approved a

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[344] The sequence of Madison's argument was not the result of erroneous transcription. Two different transcribers recorded the sequence of Madison's argument identically, albeit with slightly different wording. The Congressional Register records Madison's words as follows: "[I]f [the proposed amendments] are placed on the footing here proposed [interwoven], they will stand upon as good a foundation as the original work [the main body of the Constitution]." *Id.* at 118 (discussing Congressional Register of August 13, 1789). The *Gazette of the United States* records Madison's words as follows: "If these amendments are adopted agreeably to the plan proposed [interwoven], they will stand upon as good a foundation as the other parts of the Constitution and will be sanctioned by equally good authority." *Id.* at 109 (citing *Gazette of the United States* (August 15, 1789)).

substantially different constitution than the one they actually proposed.[345] Several House members focused directly on the "first principles" argument that Sherman had raised.

Three House members who favored Sherman's addendum option advanced a line of argument that seems to have been built on the presumption that legislatures do not operate as an embodiment of the popular sovereign for purposes of ratifying constitutional norms. The major premises in these comments were that ratification of amendments interwoven into the Constitution's fabric would entail repeal of the existing Constitution and ratification of a substitute constitution in its place, and that ordinary legislatures had no authority to ratify a substitute constitution.[346] Building on this reasoning, Representative Samuel Livermore of New Hampshire suggested that "neither this legislature nor all the legislatures in America were authorized to repeal a constitution."[347] Similarly, Michael Jennifer Stone of Maryland argued that "we have no authority to repeal the whole constitution."[348] Finally, James Jackson of Georgia suggested that Congress did not possess power of "repealing the present constitution, and adopting an improved one." He concluded with the following: "The constitution of the union has been ratified and established by the People, let their act remain inviolable."[349]

Livermore, Stone, and Jackson all enunciated variations on the same theme: interweaving amendments would result in a replacement constitution. Legislative bodies do not enjoy the authority to repeal and replace a constitution bearing a legitimate popular sovereignty pedigree. Their implied assumption seems to have been that legislative repeal and replacement is inadmissible because legislatures do not embody the popular sovereign for purposes of ratifying constitutions. Only the popular sovereign assembled in conventions could properly ratify a replacement constitution as the popular sovereign embodied.

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[345] *See id.* at 118-28 (citing Congressional Register of August 13, 1789 and reflecting comments of Representatives Smith, Tucker, Livermore, Vining, Clymer, Stone, Gerry, Benson, Hartley, Page, Jackson, and Seney on Sherman's motion).

[346] *See id.* at 119, 120, 124 (discussing Congressional Register of August 13, 1789 and reflecting comments of Samuel Livermore, Michael Jennifer Stone, and James Jackson).

[347] *Id.* at 124 (discussing Congressional Register of August 13, 1789 and reflecting comments of Samuel Livermore).

[348] *Id.* at 121 (discussing Congressional Register of August 13, 1789 and reflecting comments of Michael Jennifer Stone).

[349] *Id.* at 125 (discussing Congressional Register of August 13, 1789 and reflecting comments of James Jackson).

While Livermore, Stone, and Jackson left their assumptions unstated, Sherman enunciated his with crystal clarity. After a lengthy debate sparked by his objection to interweaving amendments into the Constitution's body, Sherman brought the discussion back to "first principles."

> I contend that [legislatively ratified] amendments made in the way proposed by the committee are void: . . . I would desire gentlemen to consider the authorities upon which the two constitutions [the extant Constitution and amended substitute constitution] are to stand. The original was established by the people at large by conventions chosen by them for the express purpose. The preamble to the constitution declares the act: But will it be a truth in ratifying the next constitution, which is to be done perhaps by the state legislatures, and not conventions chosen for the purpose. Will gentlemen say it is "We the people" in this case, certainly they cannot, for by the present constitution, we nor all the legislatures in the union together, do not possess the power of repealing it: [350]

Sherman had transparently exposed the Gordian knot. Only the People assembled in conventions may ratify constitutions. A replacement constitution, which would result from interweaving the proposed amendments into the Constitution's body, would not bear a popular sovereignty pedigree if ratified by state legislatures. Legislatively ratified amendments would differ in source, and, therefore, in kind, from the Constitution's main body. Hence, if legislatures were to ratify the proposed amendments, the amendments could not be intermingled with the popular sovereignty pedigree bearing body of the Constitution, but would have to be appended to the end of the Constitution.

Elbridge Gerry, another Philadelphia Convention protagonist turned Representative, was the most vocal and loquacious opponent of appending amendments to the end of the existing Constitution. Gerry offered rebuttals to several of the lines of argument advanced in favor of the addendum option.[351] He aimed three separate rebuttals to Sherman's "first principles" based analysis. First, he argued that "[t]he conventions of the states respectively have agreed for the people, that the state legislatures shall be authorized to decide upon amendments in the

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[350] *Id.* at 125-26 (discussing Congressional Register of August 13, 1789 and reflecting comments of Roger Sherman).

[351] *Id.* at 121-22, 127-28 (discussing Congressional Register of August 13, 1789 and reflecting comments of Elbridge Gerry).

manner of a convention."[352] In other words, by ratifying the Constitution, including Article V, through Article VII conventions, the People have authorized ordinary legislatures to ratify constitutional amendments as though embodying the popular sovereign. As discussed in connection with James Madison's initial proposal of legislative ratification of constitutional amendments at the Philadelphia drafting convention, this spin has one key advantage: it offers a perfectly plausible legal interpretation of Article V which dissolves the constitutional Gordian knot that Sherman had finally brought to the fore. In briefest terms, if We the People have authorized ordinary legislatures to ratify amendments as if legislative bodies actually embodied We the People, then the notion that only the We the People assembled in conventions may ratify constitutional norms no longer necessarily means that legislatively ratified constitutional amendments are different in kind and hierarchically inferior to convention-ratified constitutional provisions.

Of course, as also mentioned above, there is absolutely no evidence to suggest that Gerry's perfectly plausible Article V spin in any way reflects the original understanding of Article V's allowance for legislative ratification of constitutional amendments.[353] While a convenient and plausible way to undo the Gordian knot, Gerry's first rebuttal to Sherman's "first principles" based argument is more post-ratification concoction than restatement of pre-ratification Article V original understanding.

Were Gerry's Article V spin reflective of original understanding, Sherman, who had been in attendance at the Philadelphia drafting convention on September 10 and 15, 1787, the days when Article V had been debated, never would have objected to treating legislatively ratified amendments as the equals of the convention-ratified main body of the Constitution. Even if Sherman had somehow misunderstood Article V original understanding, Madison, the key "first principles" proponent and the drafter of Article V's allowance for legislative ratification of constitutional amendments, would have risen to endorse Gerry's Article V spin as declaring the Philadelphia drafting convention's understanding. Madison, however, offered no comment on Gerry's Article V spin.

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[352] *Id.* at 127 (discussing Congressional Register of August 13, 1789 and reflecting comments of Elbridge Gerry).

[353] *See supra* text accompanying notes 248-59.

The most plausible reading of the historical record is that neither the Philadelphia Convention, nor the state ratifying conventions, ever developed the understanding that Elbridge Gerry sought to attribute to Article V on August 13, 1789. A logical post-ratification construction does not equate with an identifiable pre-ratification understanding. There is no pre-ratification evidence to suggest that Gerry's post-ratification concoction reflected original understanding. James Madison's failure to endorse Gerry's post-ratification interpretation of Article V reinforces the point.

Gerry's second rebuttal to Sherman's "first principles" argument goes directly to the dilemma caused by the Article V Gordian knot. Gerry began by posing a rhetorical question that cut to the quick.

> Does he [Sherman] mean to put amendments on this ground, that after they have been ratified by the state legislatures they are not to have the same authority as the original instrument [?]; if this is his meaning, then let him avow it, and if it is well founded, we may save ourselves the trouble of proceeding in the business.[354]

Here were the startling consequences of the Gordian knot laid out in one blunt, concise statement. If only constitutional norms ratified by conventions, but not those ratified by ordinary legislatures, bear a legitimate popular sovereignty pedigree, then legislatively ratified constitutional norms must be different in kind and hierarchically inferior to convention ratified constitutional norms. If hierarchically inferior, legislatively ratified constitutional amendments would be nullified by conflicting pre-existing clauses of the Constitution's convention-ratified main body. Gerry's rhetorical question implies that such a peculiar result could not have been intended.[355]

Sherman had already offered a path around Gerry's second rebuttal. Sherman apparently realized that one possible problematic implication of his "first principles" argument was that legislatively ratified constitutional amendments would be stillborn nullities from their very inception. This problem, however, would not apply to the set of

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[354] CREATING THE BILL OF RIGHTS, *supra* note 334, at 127 (discussing Congressional Register of August 13, 1789 and comments of Elbridge Gerry).

[355] Indeed, there is nothing in the historical record of original understanding to suggest that the drafters or ratifiers of the Constitution ever specifically contemplated that legislatively ratified constitutional amendments would be hierarchically inferior to or nullified by the convention ratified main body of the Constitution. On the other hand, this is a perfectly logical conclusion following from a coupling of the "conventions only" reasoning behind Article VII with Article V's allowance for legislative ratification of constitutional amendments.

proposed amendments under consideration by the House because the proposed amendments did not conflict with anything in the body of the Constitution. In Sherman's words, the proposed amendments did not "lessen the force of any article of the Constitution. . . ."[356] Instead, they merely articulated pre-existing rights and separation of powers principles already embedded in the Constitution's main body.[357] Because they do not conflict with the body of the Constitution, the proposed legislatively ratified amendments would not be a nullity, but rather valid supplements to the Constitution's main body.[358]

Gerry's third rebuttal went beyond an explicit statement of the peculiar consequences of Sherman's "first principles" based argument. He also tried to directly question the crucial "first principles" based idea that legislatures cannot embody the popular sovereign for purposes of ratifying constitutional amendments:

> But for my part I have no doubt but a ratification of the amendments, in any form, would be as valid as any part of the constitution. The legislatures are elected by the people; I know no difference between them and conventions, unless it be that the former will generally be composed of men of higher characters than may be expected in conventions; and in this case, the ratification by the legislatures would have the preference.[359]

Gerry's endorsement of legislatures as the peer of conventions cut against the grain of the then-conventional wisdom. Throughout the Philadelphia drafting convention and the ratification period, the idea that conventions, but not legislatures, could ratify constitutional norms in the name of the popular sovereign had been repeatedly and consistently invoked. Gerry himself had strongly implied such an

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[356] CREATING THE BILL OF RIGHTS, *supra* note 334, at 126 (quoting Congressional Register of August 13, 1789 reflecting comments of Roger Sherman).

[357] Sherman argued as follows: "The amendments reported are a declaration of rights, the people are secure in them whether we declare them or not; the last amendment but one provides that the three branches of government shall each exercise its own rights, this is well secured already . . . ." *Id.* at 126 (quoting Congressional Register of August 13, 1789 reflecting comments of Roger Sherman).

[358] Of course, even Sherman's preemptive path around Gerry's second rebuttal does not address possible future legislatively ratified amendments that would conflict with the Constitution's convention ratified main body. Such legislatively ratified amendments would not, to borrow Gerry's words, "have the same authority as the original instrument." *Id.* at 127 (citing Congressional Register of August 13, 1789 and reflecting comments of Elbridge Gerry).

[359] *Id.* at 127 (citing Congressional Register of August 13, 1789 and reflecting comments of Elbridge Gerry).

understanding on several occasions during the Philadelphia Convention. On June 5 and July 23, 1787, Gerry insinuated that in states where the Articles of Confederation had been legislatively ratified, the document had not been "sanctioned by the people."[360] Also, on July 23, Gerry explicitly referred to convention ratification, but not legislative ratification, of the Constitution as "a recurrence to the People."[361] Most importantly, despite the multiple invocations of "conventions only" reasoning, at no time during the Philadelphia Convention did Gerry, the strident opponent of convention ratification, ever argue that legislatures were the equal of conventions for purposes of ratifying constitutional norms in the name of the popular sovereign.

Why, then, during the debate over proposed constitutional amendments in the House of Representatives, did Gerry suddenly endorse legislatures as the peers of conventions for purposes of ratifying constitutional norms? Often circumstance drives rhetoric. Perhaps having fully comprehended the Article V Gordian knot for the first time, Gerry felt he had little choice but to argue that legislative ratification of constitutional norms would, like convention ratification, equate with popular ratification. If legislative ratification of constitutional norms did not equate with popular ratification, as Sherman's argument implied, every legislatively ratified constitutional amendment might be reduced to a nullity.

B. The Quarrel Over Legislative Ratification of Amendments Assessed

The record of Congress' debates on the first proposed amendments fails to decisively adjudicate the Sherman versus Gerry dispute. Sherman's motion to append amendments onto the end of the Constitution was rejected on August 13.[362] On August 19, however, Sherman "renewed his motion for adding the amendments to the [C]onstitution by way of supplement," and the renewed motion "was carried by two thirds of the house."[363] Unfortunately, the August 19

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[360] *See supra* text accompanying notes 65-67, 92-94.

[361] *See supra* text accompanying note 94.

[362] *See* CREATING THE BILL OF RIGHTS, *supra* note 334, at 128 (citing Congressional Register of August 13, 1789 and noting that "[t]he question on Mr. Sherman's motion was now put and lost.").

[363] *Id.* at 197-98 (discussing Congressional Register of August 19, 1789). Professor Edward Hartnett argues that an acrimonious mood that had emerged amongst members of Congress prompted Madison to compromise on the issue in the interest of securing the House's approval of the substance of the proposed amendments. *See* Edward Hartnett, *A "Uniform and Entire" Constitution; Or, What if Madison Had Won?*, 15 CONST. COMMENT. 251, 256-58 (1998).

debate over Sherman's renewed motion went unrecorded. In addition, as the early Senate met in secret, there exists no recorded Senate debate on the first set of proposed amendments to the Constitution.

Who had the truer understanding of the sources of constitutional norms? Did Sherman's "first principles"-based idea that legislatively ratified constitutional amendments could not enjoy the same hierarchic status as the convention ratified main body of the Constitution (and, therefore, ought not be intermingled into the body of the Constitution) best capture the original understanding on the sources of constitutional norms? Or, did Gerry's belated claim that legislatures, too, could embody and act as the popular sovereign reflect the original understanding? The fact that Sherman's renewed motion was eventually approved by a wide margin in the House provides some support for the notion the Sherman articulated the original understanding. On the other hand, the historical record is incomplete, and the conclusion that the members of the House of Representatives agreed with Sherman's understanding and rejected Gerry's simply because Sherman's motion was eventually approved is weak.

The most plausible reading of the record is that neither Sherman nor Gerry had the most accurate reading of Article V's original understanding. The most plausible reading of the Sherman versus Gerry exchange in the House of Representatives is that it proves the lack of Article V original understanding on the issue of whether legislatively ratified amendments would count as ratified by We the People. The issues surrounding legislative ratification of constitutional amendments simply had not been ventilated, much less conclusively resolved, prior to ratification of the Constitution. Until Sherman raised the issue in 1789, no one had come to grips with the conflict between Article V's allowance for legislative ratification of constitutional amendments and the "first principles" idea that only conventions could ratify constitutional norms as the popular sovereign assembled.

Had Gerry's post hoc reading of Article V reflected the understanding of those who drafted and ratified the Constitution, either Madison or Gerry could have offered a quick and fatal rebuttal to Sherman's objection. They could have simply reminded Sherman that he had been present in Philadelphia on September 10, 1787, when the language permitting legislative ratification of amendments was proposed and approved. They could have refreshed Sherman's recollection on the intent of that provision by reminding Sherman that all present had clearly understood that ratification of amendments by legislatures would brand amendments with a popular sovereignty pedigree. Neither

Madison nor Gerry rebutted Sherman by refreshing his recollection on the original understanding of the delegates to the Philadelphia Convention regarding Article V. They, instead, offered exasperated declarations on the consequences of and ways of evading the Gordian knot that Sherman had pointed out. This buttresses the notion that there really was no pre-ratification understanding on Article V's legislation ratification option.

The same logic applies to Sherman's theory. Had Sherman's "first principles"-based reading of Article V reflected the understanding of those who drafted and ratified the Constitution, he could have quickly ended Gerry's protests by reminding Gerry that he had been in attendance at the Philadelphia Convention when the language permitting legislative ratification of amendments was proposed and approved. Sherman could have refreshed Gerry's recollection on the convention's understanding that legislatively ratified amendments would not bear a popular sovereignty pedigree, and would, therefore, exist as second-tier constitutional norms. The fact that Sherman did not rebut Gerry by reminding him of the original understanding of Article V's allowance for legislative ratification of amendments suggests that there never was such an understanding.

More broadly, the very fact that Sherman and Gerry disagreed on the meaning of Article V's legislative ratification provision in 1789 strongly bolsters the thesis that the issue had not been considered, much less meaningfully debated and resolved, in the course of drafting and ratifying the Constitution in 1787 and 1789. Sherman's motion provoked such an extensive and heated debate in the House of Representatives in 1789 precisely because there was no clear original understanding on legislative ratification of constitutional amendments. Had Article V's provision for legislative ratification of constitutional amendments been carefully considered during the drafting or ratification of the Constitution, Sherman's motion would have been resolved with due speed and without such confusion. Instead, Sherman's motion brought the House of Representatives face-to-face with a Gordian knot that the Founding had unwittingly created and failed to resolve. The divergent interpretations of Article V offered by Sherman and Gerry in 1789 were the result of the lack of original understanding on legislative ratification of amendments and resultant constitutional Gordian knot.

CONCLUSION

At least one thing is unmistakable. The original understanding of the founding generation maintained that only conventions, and not ordinary

legislatures, could serve as representational structures through which We the People might ratify constitutional norms. Yet, how are we to reconcile this understanding with the fact that Article V expressly allows ordinary legislatures to ratify constitutional amendments? The best and most plausible answer is that the two cannot be reconciled, at least not in terms of original understanding.

Elbridge Gerry's proposed solution — legislatures, too, can embody We the People — is seriously flawed. It runs contrary to the numerous implicit and explicit invocations of the idea that only conventions, and not legislatures, can embody the popular sovereign for purposes of ratifying constitutional norms. Gerry's solution cannot be squared with the broad original understanding of the representational structure issue. Moreover, nothing in the historical record indicates that the drafters or ratifiers of the Constitution ever contemplated or debated any modification to this understanding to accommodate legislative ratification of amendments. The Gerry solution to the constitutional Gordian knot appears to be more post-ratification contrivance than pre-ratification original understanding.

Sherman's solution — legislatively ratified constitutional amendments not in conflict with convention ratified constitutional provisions are valid, but hierarchically inferior supplements to the Constitution — is also unsatisfactory. Though not necessarily in direct conflict with the original understanding on the representational structure issue, there is no solid evidence that Sherman's solution was actually contemplated or discussed during the drafting and ratification debates over Article V. Sherman's solution, no less than Gerry's, represents a post-ratification contrivance for coping with the dissonance between Article V's allowance for legislative ratification of constitutional amendments and the "first principles" thinking undergirding Article VII.

The historical record supports the thesis that there was no pre-ratification understanding on how to mesh Article V's legislative ratification of amendments with the widely held understanding that only conventions were competent to ratify constitutional norms in the name of We the People. Legislative ratification of amendments was more the product of practical politics than widely held understandings on the representational structure issue. Its inclusion in Article V does not signal a modification of widely held "conventions only" thinking. Nor does it signal an understanding that legislatively ratified amendments would be treated as second-tier constitutional norms. Instead, it is an instance where the founding generation created and approved a process at odds with sincere and widely held "conventions only" understanding.

The realization that original understanding on legislative ratification of amendments was nonexistent brings us to a fork in the road. One path opts to deal with the constitutional Gordian knot by sweeping it under the rug. One might, to use one of the aforementioned candidates, treat ratification of the Constitution as sanctioning legislatures to ratify constitutional amendments as if they embodied the popular sovereign. While this solution would dissolve the constitutional Gordian knot, it implies a major drawback. It is not supported by any solid historical evidence. It is post-ratification concoction rather than pre-ratification original understanding. If constitutional amendments are to trump the decisions of relatively recent or current Congresses (codified in statutes), then those constitutional norms ought to have an authentic rather than mythic popular sovereignty pedigree.

The other path opts to deal with the constitutional Gordian knot by facing it head on. Rather than invent original understanding myths, this theory admits that the orthodox view on the sources of constitutional amendments is unsupported in the historical record of original understanding. Of course, this second path brings its own major drawback. It raises the possibility, as Roger Sherman argued, that the legislatively ratified constitutional amendments must be treated as different from and hierarchically inferior to the convention-ratified body of the Constitution. It also undermines the orthodox justification for judicial review involving constitutional amendments.

Yet, these drawbacks can be minimized, if not totally eliminated. First, rather than rooting the popular sovereignty pedigree of constitutional amendments in the mere fact of legislative ratification, it could be rooted in other indicia of popular sanction. It would be reasonable to catalogue amendments which reflect a clear deliberated popular consensus as bearing a legitimate popular sovereignty pedigree. The fact that a particular amendment has been ratified by state legislatures should be considered as nothing more than an important piece of evidence in determining whether an amendment resulted from such a consensus. We should not, however, accept the assertion that ratification by state legislatures alone equates with a sanction by We the People.[364] This would be a step towards a more realistic concept of popular sovereignty and of the indicia of popular sanction for constitutional norms. Second, judicial review can be justified on grounds other than the traditional orthodox mythology. Rather than relying on the orthodox mythology of constitutional norms emanating from We the People, we should place

[364] *See* González, *supra* note 10, at 234-37.

more weight on pragmatic justifications for judicial review. Institutional competence, checks and balances, and the need to place certain rights and structural features above the fray of easy alteration via normal politics, should supplant or at least compliment popular sovereignty-based orthodox justifications as a basis for judicial review.