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## **We the People[s], Original Understanding, and Constitutional Amendment**

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# WE THE PEOPLE[S], ORIGINAL UNDERSTANDING, AND CONSTITUTIONAL AMENDMENT

*Henry Paul Monaghan\**

[The Constitution is] neither wholly *national* nor wholly *federal*.<sup>1</sup>

## I. INTRODUCTION

Recent legal and political activity and renewed academic discussion have focused considerable attention on the nature of the federal system that the founders created some two hundred years ago. In two important decisions in the 1994 Term, the Supreme Court addressed this issue. No fewer than fifteen states have recently passed resolutions reasserting the importance of the Tenth Amendment—the constitutional affirmation of the limits on national authority. Additionally, legal academics have advanced arguments intended to alter settled understandings about the constitutional framework established in 1789. This widespread reexamination of the nature and limitations of our federal system has the potential to play a significant role in the current political transformation of our country, and the results of this debate could affect the lives of all Americans.

In this Article, I examine the tensions inherent in the “neither wholly national nor wholly federal” constitutional order created in 1789. I also seek to dispel the notion that historical revisionism can erase the many democracy-restraining features of the Constitution. In doing so, I focus primarily on Article V—the amending provision—which illuminates the state-oriented compromises and democracy-restraining features that were built into the Constitution. I respond directly to Professor Akhil Amar, who has advanced an appealing, but historically groundless, claim that despite Article V, the Framers intended that a simple majority of a national “We the People” could amend the Constitution.<sup>2</sup> Professor Amar’s claim suffers from two deep flaws: It ignores the crucial role reserved for the states in the newly established constitutional order, and it also ignores the fact that the Constitution nowhere contemplates any

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\* Harlan Fiske Stone Professor of Constitutional Law, Columbia University. This Article is dedicated to the memory of Paul Wallace, gone but by his family and his friends never forgotten. I am grateful to the many Columbia Law School students who contributed to this Article. My thanks to members of my seminar on Article V, to my research assistants Ezra Field and Nestor Davidson, and particularly to Elaine Golin for her insightful editing.

1. The Federalist No. 39, at 246 (James Madison) (Clinton Rossiter ed., 1961).

2. See Akhil R. Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 Colum. L. Rev. 457 (1994) [hereinafter *Amar, Consent of the Governed*]; Akhil R. Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. Chi. L. Rev. 1043 (1988) [hereinafter *Amar, Philadelphia Revisited*].

form of direct, unmediated lawmaking or constitution-making by "the People."

### A. *Current Events*

Two important Supreme Court decisions in the 1994 Term struggled with the implications of a constitutional system that is "neither wholly *national* nor wholly *federal*."<sup>3</sup> In *United States v. Lopez*,<sup>4</sup> an opinion laden with citations to *The Federalist* that emphasized the limited nature of national power under the Constitution, a 5-4 majority concluded (to the surprise of most lawyers and judges, but to the absolute delight of many constitutional law teachers) that an act of Congress regulating private conduct exceeded "the authority of Congress '[t]o regulate Commerce . . . among the several States.'"<sup>5</sup> Even the dissenting justices acknowledged *some* (albeit unspecified) limits on congressional authority under the Commerce Clause.<sup>6</sup> *Lopez* underscored the "*federal*" side of the 1789 constitutional understanding.

*U.S. Term Limits, Inc. v. Thornton*,<sup>7</sup> by contrast, underscored the "*national*" side of that understanding. There, in the context of a 5-4 holding that the states could not add qualifications for membership in the Senate or House of Representatives to those established by Article I,<sup>8</sup> the Court focused on even more fundamental questions about the relationship between the federal government and the states. Markedly different views on the nature of the founding were expressed in the concurring and dissenting opinions. For example, in his concurrence, Justice Kennedy said: "In my view . . . it is well settled that the whole people of the United States asserted their political identity and unity of purpose when they created the federal system."<sup>9</sup> Justice Kennedy went on, however, to acknowledge that the Constitution did not abrogate the separate identities of the

3. The Federalist No. 39, at 246 (James Madison) (Clinton Rossiter ed., 1961).

4. 115 S. Ct. 1624 (1995).

5. *Id.* at 1626.

6. See, e.g., *id.* at 1661 (Breyer, J., dissenting) ("To hold this statute constitutional is not to 'obliterate' the 'distinction of what is national and what is local.'").

7. 115 S. Ct. 1842 (1995).

8. See *id.* at 1845 (discussing U.S. Const. art. I, § 2, cl. 2 (qualifications for membership in House of Representatives) and U.S. Const. art. I, § 3, cl. 3 (qualifications for membership in Senate)).

9. *Id.* at 1872 (Kennedy, J., concurring). Justice Kennedy added, "A distinctive character of the National Government, the mark of its legitimacy, is that it owes its existence to the act of the whole people who created it. It must be remembered that the National Government too is republican in essence and in theory." *Id.* (Kennedy, J., concurring).

peoples of the several states;<sup>10</sup> rather, he said, the Constitution embodied “the dual character of the Federal Government.”<sup>11</sup>

Writing in dissent for four justices, Justice Thomas articulated a far more state-centered approach: “The ultimate source of the Constitution’s authority is the consent of the people of each individual State, not the consent of the undifferentiated people of the Nation as a whole.”<sup>12</sup> Justice Thomas insisted that the “Constitution simply does not recognize any mechanism for action by the undifferentiated people of the Nation.”<sup>13</sup>

In a paragraph important for this Article, Justice Thomas added:

In short, the notion of popular sovereignty that undergirds the Constitution does not erase state boundaries, but rather tracks them. *The people of each State obviously did trust their fate to the people of the several States when they consented to the Constitution; not only did they empower the governmental institutions of the United States, but they also agreed to be bound by constitutional amendments that they themselves refused to ratify.* See Art. V . . . . At the same time, however, the people of each State retained their separate political identities. As Chief Justice Marshall put it, “[n]o political dreamer was ever wild enough to think of breaking down the lines which separate the States, and of compounding the American people into one common mass.”<sup>14</sup>

On the other hand, Justice Stevens’s opinion for the Court took a more nationalist view of the founding.<sup>15</sup> Stevens’s opinion included the

10. See *id.* (Kennedy, J., concurring) (“In one sense it is true that ‘the people of each State retained their separate political identities,’ . . . for the Constitution takes care both to preserve the States and to make use of their identities and structures at various points in organizing the federal union.”) (citation omitted).

11. *Id.* (Kennedy, J., concurring) (arguing that, while states retained power, the entire people of the United States “have a political identity as well, one independent of, though consistent with, their identity as citizens of the State of their residence”). Justice Kennedy added: “It must be recognized that “[f]or all the great purposes for which the Federal government was formed, we are one people, with one common country.”” *Id.* (Kennedy, J., concurring) (citations omitted).

12. *Id.* at 1875 (Thomas, J., dissenting).

13. *Id.* at 1877 (Thomas, J., dissenting). Earlier in his dissent, Justice Thomas stated: When they adopted the Federal Constitution, of course, the people of each State surrendered some of their authority to the United States (and hence to entities accountable to the people of other States as well as to themselves). They affirmatively deprived their States of certain powers, see, e.g., Art I, § 10, and they affirmatively conferred certain powers upon the Federal Government, see, e.g., Art. I, § 8. Because the people of the several States are the only true source of power, however, the Federal Government enjoys no authority beyond what the Constitution confers.

*Id.* at 1876 (Thomas, J., dissenting).

14. *Id.* at 1877 (Thomas, J., dissenting) (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 403 (1819)) (emphasis added).

15. See *id.* at 1855 (“[T]he Framers envisioned a uniform national system, rejecting the notion that the Nation was a collection of States, and instead creating a direct link between the National Government and the people of the United States.”).

claim that members of Congress "owe primary allegiance not to the people of a State, but to the people of the Nation."<sup>16</sup>

The debate over the nature of the founding has spread beyond the Supreme Court. Of course, the famous *Contract with America*<sup>17</sup> indicates congressional interest in limiting the role of the national government. Perhaps even more significant, however, are the fifteen recent state resolutions reaffirming the Tenth Amendment,<sup>18</sup> which provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."<sup>19</sup> Two hundred years after the founding, it is surely striking that state governments see a need for such resolutions. The texts of these resolutions suggest a fear that the national government misunderstands the nature of the constitutional bargain struck in 1789. Frequently, the national government is characterized as an "agent" of the states and is accused of having violated the Tenth Amendment.<sup>20</sup> For example, Arizona's legislative resolution stated that it would "serve as notice and demand to the federal government, as our agent, to cease and desist, effective immediately, mandates that are beyond the scope of its constitutionally delegated powers."<sup>21</sup>

The nature of the founding is also a current academic favorite. Professorial interest in "civic republicanism" is one example of this trend.<sup>22</sup> Bruce Ackerman's widely noticed book, *We the People*, is yet another example.<sup>23</sup> Still another version of the founding is embodied in Professor

16. *Id.*

17. See *Contract with America 4* (Ed Gillespie & Bob Schellhas eds., 1994) (one of the "five principles to describe [the Republican] philosophy of American civilization" is "limited government").

18. See Dirk Johnson, *Conspiracy Theories' Impact Reverberates in Legislatures*, N.Y. Times, July 6, 1995, at A1.

19. U.S. Const. amend. X.

20. See Johnson, *supra* note 18, at A1.

21. A Concurrent Resolution Regarding the Tenth Amendment to the United States Constitution and Asserting the Sovereignty of the State of Arizona, H. R. Con. Res. 2015, 42d Leg., 1st Sess., 1995 Ariz. Legis. Serv. A-10 (West).

22. See, e.g., Symposium, *The Republican Civic Tradition*, 97 Yale L.J. 1493 (1988).

23. See 1 Bruce Ackerman, *We the People: Foundations* (1991) [hereinafter Ackerman, *We the People*]. Professor Ackerman proposes a theory of dualist democracy that distinguishes normal politics, which are transacted by representatives, and constitutional politics, which involve the mass of citizens debating fundamental principles. The "neither wholly national nor wholly federal" constitutional framework, Ackerman argues,

deflates the claims of normal officials sitting either in Washington or in the states to speak for the People. . . . The People, in contrast, reveal themselves only through an amendment process [through which] we begin to hear the irregular, but public-spirited and rational, voice of the citizenry, deliberating and deciding on fundamental principle as they did during the conventions of the Revolutionary era.

*Id.* at 185-86. According to Ackerman, transformative constitutional politics need not involve Article V; the New Dealers, for example, "rejected the traditional form of an

Akhil Amar's strongly nationalistic and democratic claim that the 1789 Constitution contemplated that a simple majority of "We the People" could amend the Constitution.<sup>24</sup>

Given current interest in the relationship between state and national power, it is important to examine Amar's claim and the amendment process outlined in Article V in some detail. Article V clearly demonstrates that, in requiring supermajorities to amend the Constitution and in entrenching state equality in the Senate, the original Constitution not only envisaged the continued existence of the states as vital parts of the new constitutional order, but also excluded the people from any direct role in constitution-making.<sup>25</sup>

### B. *Article V*

The place to begin, of course, is with the text of Article V itself.<sup>26</sup> The constitutional text clearly shows that the states were given the key role in approving amendments to the charter of the national government. The supermajority requirement further reinforces the distinctly undemocratic features of the Constitution.

Article V was designed to permit a very small number of states (currently thirteen) containing but a fraction of the total national population to block constitutional change. Constitutional amendments require both initiation and approval by large supermajorities of Congress ("two thirds of both Houses")<sup>27</sup> and of the states ("three fourths of the several

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amendment" and instead relied on the Supreme Court "to elaborate their new activist vision through a series of transformative opinions." *Id.* at 51-52.

24. See Amar, *Consent of the Governed*, *supra* note 2; Amar, *Philadelphia Revisited*, *supra* note 2. For a description of Professor Amar's theory, see *infra* Part II.

25. For an intriguing argument that House Rule XXI, which requires a three-fifths vote to enact any tax increase, violates Article V's protection of state equality of suffrage in the Senate, see Benjamin Lieber & Patrick Brown, Note, *On Supermajorities and the Constitution*, 83 *Geo. L.J.* 2347 (1995).

26. Article V provides that:

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

U.S. Const. art. V.

27. See *id.*; see also *National Prohibition Cases*, 253 U.S. 350, 386 (1920) (holding that what is required is a "vote of two-thirds of the members present—assuming the presence of a quorum—and not a vote of two-thirds of the entire membership, present and absent").

States").<sup>28</sup> Amendments also require an interaction between Congress and the several states. There is no role in the amending process for a national "We the People of the United States." Even after all that, "no State, without its Consent, shall be deprived of equal Suffrage in the Senate."<sup>29</sup>

*Federalist No. 39* has long been understood to provide the canonical explanation for Article V's strongly state-centered (and counter-majoritarian) process. In a famous passage, Madison states that:

[The Constitution] is 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 . . . . 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.<sup>30</sup>

In *Federalist No. 43*, Madison adds that Article V's amendment mechanism "guards . . . against that extreme facility, which would render the Constitution too mutable."<sup>31</sup>

28. U.S. Const. art. V.

29. *Id.*

30. *The Federalist No. 39*, at 246 (James Madison) (Clinton Rossiter ed., 1961).

31. *The Federalist No. 43*, at 278 (James Madison) (Clinton Rossiter ed., 1961); see also *The Federalist No. 85*, at 526 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (noting difficulty of uniting requisite number of state legislatures to achieve amendments).

The difficulty of amending the Constitution through the Article V procedure has long been a topic of intense debate. Over the years, numerous proposals have been advanced to relax Article V's requirements, particularly with respect to the method of ratifying amendments. See, e.g., William S. Livingston, *Federalism and Constitutional Change 248-53* (1956) (noting numerous proposals to reform the amending procedure); Lester B. Orfield, *The Amending of the Federal Constitution 168-221* (Leonard W. Levy ed., Da Capo Press 1971) (1942) (summarizing proposals made during the 1920s and 1930s to improve Article V); John R. Vile, *The Constitutional Amending Process in American Political Thought 137-56* (1992) (discussing Progressive Era commentators' views on amending process). For example, in 1891, John Burgess called the amending process the "first" and "most important" of "three fundamental parts" of a complete constitution. See 1 John W. Burgess, *Political Science and Comparative Constitutional Law 137* (1902). According to Burgess, Article V "failed to accomplish the purpose for which it was constructed"; he suggested an alternative system in which amendments proposed by two successive sessions of Congress could be ratified by a simple majority of state legislatures. See *id.* at 151-52.

The debate over the amendment process has receded substantially following Supreme Court decisions sustaining the New Deal and subsequent civil rights legislation. Despite *United States v. Lopez*, 115 S. Ct. 1624 (1995), it remains clear that virtually all desired political, social, and economic change can now be achieved through ordinary legislation at the national level. See Henry P. Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 *Colum. L. Rev.* 723, 730 (1988) (arguing that "lawyers often fail to appreciate that in virtually every instance the imperatives of the new administrative state triumph[h] over the apparently limiting constitutional provisions"). This result has troubled many commentators, generating wide-ranging debate over what are "proper" modes of

Article V has been almost universally understood to be the exclusive method for amending the Constitution. Recently, however, various versions of *national* popular sovereignty have been advanced as legitimate substitutes. Bruce Ackerman's provocative and widely admired *We the People* argues that at various "constitutional moments," "We the People" have legitimately ignored Article V's state-centered amendment process and amended the Constitution by ratifying decisions taken solely at the national political level.<sup>32</sup> Such a moment occurred in 1788, Ackerman argues elsewhere, when the Constitution was ratified over objections that its method of adoption was clearly illegal under the Articles of Confederation and several existing state constitutions.<sup>33</sup>

While Ackerman advocates amending Article V to institutionalize more directly national popular sovereignty,<sup>34</sup> his colleague, Professor Akhil Amar, insists that no such amendment is necessary. In "Philadelphia Revisited: Amending the Constitution Outside Article V," written in 1988, Amar argued that Article V was intended to restrict only

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constitutional interpretation. Underpinning that debate has been the formal premise that, in theory at least, a "crucial contrast [exists] between ordinary development by [judicial] 'interpretation' and extraordinary development by 'amendment.'" Sanford Levinson, *How Many Times Has the United States Constitution Been Amended?* (A) < 26; (B) 26; (C) 27; (D) > 27: Accounting for Constitutional Change, *in* *Responding to Imperfection: The Theory and Practice of Constitutional Amendment* 13, 14–15 (Sanford Levinson ed., 1995) [hereinafter *Responding to Imperfection*].

32. See Ackerman, *We the People*, *supra* note 23, at 51–52. Ackerman is responding to a concern that he and I share, namely that much of the corpus of existing constitutional law cannot be reconciled persuasively with original understanding. Professor Ackerman makes no claim based upon an original understanding of the 1789 Constitution; he acknowledges that the Framers viewed Article V as the exclusive mechanism for constitutional change. His claim, rather, is grounded in American political practice. See *id.* at 40–57, 175–99; cf. Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 *Harv. L. Rev.* 1221, 1249–78 (1995) (criticizing Ackerman's work on textual and structural grounds). However, Ackerman's theory does have implications for his view of constitutional history. As he recently wrote, the enactment of the Fourteenth Amendment demonstrated that, after the Civil War, "We the People of the *United States* were now a nation that could express itself politically on fundamental matters independently of the will of the individual states." Bruce Ackerman, *Higher Lawmaking*, *in* *Responding to Imperfection*, *supra* note 31, at 63, 78.

33. See generally Bruce Ackerman & Neal Katyal, *Our Unconventional Founding*, 62 *U. Chi. L. Rev.* 475 (1995) (a first rate account of the "illegality" of the founding, and the extent to which Federalists used existing governmental institutions in unconventional ways); cf. Thomas R. Powell, *Changing Constitutional Phrases*, 19 *B.U. L. Rev.* 509, 511 (1939) (arguing that the Constitution became legal only with its ratification by North Carolina and Rhode Island).

34. Article V should be amended, Ackerman believes, to authorize amendment on the basis of a national referendum if the amendment is proposed by a second term president with the assent of two-thirds of both Houses of Congress and if it is ratified by three-fifths of participating voters at the next two successive presidential elections. See Ackerman, *We the People*, *supra* note 23, at 54–55. For criticism of this proposal, see Philip J. Weiser, Note, *Ackerman's Proposal for Popular Constitutional Lawmaking: Can It Realize His Aspirations for Dualist Democracy?*, 68 *N.Y.U. L. Rev.* 907 (1993).



organs of government, thereby expressing the "Peoples'" distrust of their representatives.<sup>35</sup> According to Amar, Article V was not intended to restrict the People of the United States; to the contrary, he insists that a bare majority of the "People" can legally amend the Constitution without regard to the mechanisms specified in the text.<sup>36</sup> Six years later, in "The Consent of the Governed: Constitutional Amendment Outside Article V,"<sup>37</sup> Amar announced that although he had "welcomed and waited for refutation," he was now "more confident about [his] Article V conjecture than [he] was in 1988."<sup>38</sup> The Declaration of Independence and its "evolving meaning between 1776 and 1789," he claims, lead to the conclusion that "We the People of the United States have a legal right . . . to change our Constitution—via a majoritarian and populist mechanism akin to a national referendum."<sup>39</sup> "[W]ith apologies to Fermat," Amar describes this theory of constitutional change as his "First Theorem."<sup>40</sup>

Counterintuitive? Surely. Contrary to Supreme Court precedent? Certainly.<sup>41</sup> Contrary to the understanding of those who, over the last two hundred years, have sought to liberalize formally the process of amendment because they believed that Article V was exclusive? Indeed.<sup>42</sup> Historically correct nonetheless? No. Amar's engaging essays provide us not with history but with his own political philosophy, one that has national popular sovereignty as its "First Theorem." Amar's claims about Article V do, however, provide an excellent lens through which to ex-

35. See Amar, *Philadelphia Revisited*, *supra* note 2, at 1054–55. The justification for this narrow reading of Article V is only faintly made.

36. See *id.* at 1044.

37. See Amar, *Consent of the Governed*, *supra* note 2.

38. *Id.* at 458. However, Amar does not mention two specific criticisms of his "Article V conjecture." See David R. Dow, *When Words Mean What We Believe They Say: The Case of Article V*, 76 *Iowa L. Rev.* 1 (1990); John R. Vile, *Legally Amending the United States Constitution: The Exclusivity of Article V's Mechanisms*, 21 *Cumb. L. Rev.* 271 (1991) [hereinafter Vile, *Legally Amending*].

39. Amar, *Consent of the Governed*, *supra* note 2, at 457.

40. *Id.* at 458.

41. See *Ullman v. United States*, 350 U.S. 422, 428 (1956) ("Nothing new can be put into the Constitution except through the amendatory process. Nothing old can be taken out without the same process."); *Hawke v. Smith*, 253 U.S. 221, 227 (1920) (invalidating an Ohio state constitutional provision requiring a popular referendum on proposed amendments to the United States Constitution, and noting that "[t]he framers of the Constitution might have adopted a different method. Ratification [of proposed constitutional amendments] might have been left to a vote of the people . . ."); *Dodge v. Woolsey*, 59 U.S. (18 How.) 331, 348 (1855) (observing that the Constitution "is supreme over the people of the United States, aggregately and in their separate sovereignties, because they have excluded themselves from any direct or immediate agency in making amendments to it, and have directed that amendments should be made representatively for them").

42. See *supra* note 31.

amine the issue that so troubled Justices Kennedy and Thomas in *Term Limits*, i.e., the nature of the founding.<sup>43</sup>

Part II of this Article describes Amar's textual and historical claims. Part III shows that Amar's nationally defined "We the People" ignores the central feature of the constitutional order established in 1789: federalism. At its creation, the American Constitution rested upon *two* pillars: namely, "We the People" (nationally understood) *and* the several states (i.e., "We the People" thereof) as independent political communities.<sup>44</sup> The result was a constitutional order that, as Madison stated, was "neither wholly *national* nor wholly *federal*."<sup>45</sup> The state-centered Article V reinforces that dualism. To be sure, as Justice Thomas observed, the "people of each state . . . did trust their fate" in the new union to the people of other states by agreeing "to be bound by constitutional amendments that they themselves refused to ratify,"<sup>46</sup> but they did so only on the premise that Article V's requirements would make it very difficult to change the terms according to which the states came together. More specifically, Article V was intended to prevent a simple majority concentrated in a few population-rich states from altering the terms of the union.<sup>47</sup> It defies belief to suppose that when Delaware or any other state entered into the union—irrevocably so, Amar elsewhere tells us<sup>48</sup>—its citizens understood that a bare majority of a national "We the People" (that is, people resid-

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43. See *U.S. Term Limits, Inc. v. Thornton*, 115 S. Ct. 1842 (1995); see also *supra* text accompanying notes 9–11 (discussing Justice Kennedy's concurrence in *Term Limits*).

44. The Constitution "erected a new central government on the hitherto unheard-of dual foundation of the states as integral political entities *and* the people as the ultimate constituent source of power." Thornton Anderson, *Creating the Constitution: The Convention of 1787 and the First Congress* 13 (1993). Of course, that dual foundation has been attacked by strong nationalists throughout our history, including Chief Justice Marshall. See, e.g., *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 404 (1819) ("[T]he People were at perfect liberty to accept or reject [the Constitution]; and their act was final. It required not the affirmance, and could not be negatived, by the State governments."); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803) (noting that the "original and supreme will [of the people] organizes the government").

45. *The Federalist* No. 39, at 246 (James Madison) (Clinton Rossiter ed., 1961).

46. *U.S. Term Limits, Inc.*, 115 S. Ct. at 1877 (Thomas, J., dissenting).

47. "[Amar's claim] could mean that if the citizens of, say, Texas, California, New York, Florida, and Illinois voted overwhelmingly to ratify, it would not matter that mere majorities of voters in the other . . . states voted against ratification." Dow, *supra* note 38, at 30. Under Article V, alteration of the relationship among the peoples of the several states can occur only through action by a "*nationally* distributed majority, though one that legally could consist of a bare numerical majority." Martin Diamond, *Democracy and The Federalist: A Reconsideration of the Framers' Intent*, 53 *Am. Pol. Sci. Rev.* 52, 57 (1959); see also Martin Diamond et al., *The Democratic Republic: An Introduction to American National Government* 99 (1966) (stating that the practical effect of Article V is to "require *nationally distributed* majorities," which ensures "that no amendment could be passed with the support of a few populous states").

48. See Akhil R. Amar, *Of Sovereignty and Federalism*, 96 *Yale L.J.* 1425, 1462 (1987) [hereinafter *Amar, Sovereignty*]. But see Forrest McDonald, *Novo Ordo Seclorum: The Intellectual Origins of the Constitution* 281 (1985) (possibility that secession is constitutionally legitimate was acknowledged by Gouverneur Morris and other Founders).

ing in other states) could terminate their state's very existence. Article V was a vital part of a larger design that ensured that, in the new constitutional order, the individual states would remain independent and important political communities, and that the terms of their union with one another could be altered only if substantial obstacles were overcome.<sup>49</sup>

Additionally, Part III continues the investigation of Amar's claim through the generation subsequent to the Founders. It argues that "We the People" accounts of Article V's non-exclusivity were not part of our pre-Civil War national constitutional jurisprudence. From 1787 to 1861, judges and commentators assumed that the relative mix between "We the People of the United States" and "We the People of the States United" could be altered only in accordance with Article V.

Part IV examines the democracy-restraining nature of the Constitution, viewing Article V as an important part of the Framers' efforts to slow democracy. This Part's purpose rejects an overly majoritarian conception of the original Constitution which seeks support in general slogans such as "We the People" and "popular sovereignty." Indeed, in 1789, the phrase "We the People" was understood to represent the *source* of political authority, not the *mode* of its exercise; popular sovereignty is not once mentioned in the Constitution. Furthermore, numerous scholars have described the Constitution in anti-democratic terms. It is simply a reality that the Constitution was far from a majoritarian document—the Constitution itself does not contemplate any form of direct, unmediated lawmaking by the people—and its status as perhaps the most democratic document of its time cannot hide this fact.

Finally, Part V briefly raises concerns about the contemporary desirability of Amar's "We the Majority"<sup>50</sup> amendment theory. In an electronic age, "call-in" democracy is becoming increasingly feasible. That may not be good news.

## II. AMAR'S CLAIM: NATIONAL POPULAR SOVEREIGNTY

One might ask why, given both the diversity of views expressed about the nature of the founding and my claim that Amar's argument is historically unsound, I have chosen to devote such attention to his arguments. I could, for example, discuss Bruce Ackerman, who also presents an unorthodox view of the amending process.<sup>51</sup> In my opinion, it is Amar's arguments in particular that merit response. First, Ackerman purports to find legitimate constitutional change in the contemporary political consent of "We the People"; Amar, by contrast, attempts to enlist the traditional

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49. "[A]s it is implemented in the United States, the federal principle refutes the principle of majority rule as applied to the problem of constitutional amendment." Livingston, *supra* note 31, at 247.

50. I use the term "We the Majority" throughout to describe a subset of "We the People," i.e., the bare numerical majority which Amar believes is sufficient to effect constitutional change.

51. See *supra* notes 23, 32.

trappings of constitutional legitimacy—historical support and original understanding. In the “legitimacy” of ungrounded history, many bad ideas find their genesis.<sup>52</sup> Second, as noted above, the relevance of this debate is highlighted by the fact that the outcome of recent important Supreme Court cases has turned upon judicial understandings of the original understanding of federalism. Thus, in this Part, I set forth Amar’s arguments, noting and critiquing first his textual claims, and second, his historical ones.

### A. *Amar’s Textual Claims*

Amar’s central claim is that the Constitution “empowers and limits government, [but] it neither limits nor empowers the People themselves.”<sup>53</sup> Specifically, he suggests that a properly called convention or two-thirds of both Houses of Congress could submit amendments to direct popular vote; moreover, he contends that Congress must call a convention upon the request of a bare majority of American voters.<sup>54</sup> “Once this transcendent principle [of national popular sovereignty] is accepted, we are driven to the arresting conclusion that . . . article V is neither necessary nor indeed always sufficient for legitimate constitutional [change].”<sup>55</sup>

To support “We the Majority’s” amending power, Amar makes various textual claims. He first argues that the terms of Article V apply only to *governmentally* proposed amendments, and, to establish this, he draws upon the language of the Preamble and the First, Ninth, and Tenth Amendments.<sup>56</sup> Standing alone, the textual arguments are clearly insubstantial. To restrict Article V to governmentally sponsored amendments is to impose a limitation that the Article does not facially contain.<sup>57</sup> Amar

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52. See, e.g., Barbara O’Brien, *Scary New ‘Isms’ at the Speed of Light*, N.Y. Times, Aug. 30, 1995, at A17 (describing historical “facts” asserted by various fringe political groups, including the theory that the Fourteenth Amendment applies only to African-Americans).

53. Amar, *Philadelphia Revisited*, *supra* note 2, at 1055. Amar’s claim is, of course, one about “right,” not about “power.” See Dow, *supra* note 38, at 54–55 (The question of power “lies in history and on the battlefield,” while an argument that the people can alter the government outside of Article V is “quite specifically a point about rights.”).

54. See Amar, *Philadelphia Revisited*, *supra* note 2, at 1044–45, 1061, 1065.

55. *Id.* at 1071. Practically, of course, this means that what “Amar has done is bypass, for ratification purposes, the states.” Dow, *supra* note 38, at 30. Of course, this understanding of popular sovereignty would permit the majority to disregard *any* provision of the Constitution. See *id.* at 32 n.155; see also Akhil R. Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. Colo. L. Rev. 749 (1994) [hereinafter Amar, *Republican Government*] (carrying his claim still further by adding the Guarantee Clause to his arsenal). In view of what is said herein, no additional discussion of the Guarantee Clause is necessary.

56. See Amar, *Philadelphia Revisited*, *supra* note 2, at 1046.

57. Indeed, it directly contradicts the views of those who believe that Article V was the most revolutionary aspect of the proposed constitution. Heretofore, constitutions either provided no such mechanism, or the amendment processes were, like that of the Articles

proposes to overcome this difficulty by noting that Article V does not explicitly say that it prescribes the "only" amending process.<sup>58</sup> The process of constitutional interpretation would be paralyzed if the simple absence of the qualifier "only" meant that a clause was not "exclusive," as Professor Tribe persuasively shows.<sup>59</sup> Nor is this a new insight. *Marbury v. Madison* long ago rejected such an interpretation.<sup>60</sup> Justice Story also wrote that "[t]here can be no doubt, that an affirmative grant of powers . . . will imply an exclusion of all others."<sup>61</sup>

Equally unavailing is Amar's reference to the language of the Preamble's "We the People." Even assuming that this phrase fully incorporated a conception of a *national* "We the People," itself a controversial proposition, that language, standing alone, cannot dispel the inference that Article V was intended to prescribe the exclusive vehicle for the exercise of whatever sovereignty the national people possessed.<sup>62</sup> There is, after all, nothing textually incoherent about reading the Preamble and Article V together, and of course it is customary to read a text so as to give meaning to all of its parts.

The same analysis applies to Amar's references to the "people" in the Ninth and Tenth (and the First, Second, and Fourth) Amendments.<sup>63</sup>

of Confederation, unworkable. See, e.g., Donald S. Lutz, *The Origins of American Constitutionalism* 110 (1988); Dow, *supra* note 38, at 32 n.157 (only six of the 13 state constitutions passed after the Declaration of Independence included mechanisms for amendment).

58. See Amar, *Philadelphia Revisited*, *supra* note 2, at 1054.

59. See Tribe, *supra* note 32, at 1241-45, 1273-76. *Term Limits* subsequently endorsed an analysis similar to Tribe's with respect to Article 1, § 2. See *U.S. Term Limits, Inc. v. Thornton*, 115 S. Ct. 1842, 1856 (1995) ("[T]he Qualifications Clauses were intended to . . . fix as exclusive the qualifications in the Constitution.").

60. 5 U.S. (1 Cranch) 137, 174 (1803) ("Affirmative words are often, in their operation, negative of other objects than those affirmed; and in this case, a negative or exclusive sense must be given to them or they have no operation at all."). Indeed, in defending *Marbury's* interpretation of the clause defining the Supreme Court's original jurisdiction, Amar himself found that the clause was exclusive, even though it does not explicitly say that it is. See Akhil R. Amar, *Marbury*, Section 13, and the Original Jurisdiction of the Supreme Court, 56 U. Chi. L. Rev. 443, 464 (1989).

61. 3 Joseph Story, *Commentaries on the Constitution of the United States* § 207, at 155 (Carolina Academic Press 1987) (1833).

62. In "Philadelphia Revisited," Amar relies upon the ratification mode specified in Article VII. See Amar, *Philadelphia Revisited*, *supra* note 2, at 1047-54. In "Consent of the Governed," Amar retreats somewhat from these arguments, but continues to maintain that "majoritarian popular sovereignty principles are clearly part of the U.S. Constitution . . . whether one focuses on the very act of ordainment and establishment or on the texts." Amar, *Consent of the Governed*, *supra* note 2, at 458. However, even if we admit that "We the People" of the United States possess some element of national sovereignty, there is nothing to suggest that they can exercise it in a manner inconsistent with Article V.

63. I treat the Bill of Rights here as part of the original Constitution of 1789. Of course, such a concession need not be made. Amar's reference to the Tenth Amendment is rather ironic. In the past that amendment has been invoked to support limits on the content of amendments that could be proposed under Article V. See John R. Vile, *Contemporary Questions Surrounding the Constitutional Amending Process* 131-32

Amar, it should be noted, does not invoke these amendments as implicit modifications of Article V, as others have done.<sup>64</sup> Rather, his claim is that the amendments simply underscore the importance of national popular sovereignty in the original understanding. This claim is especially troublesome.<sup>65</sup> These amendments were state-centered, not nation-centered; they emerged from sustained efforts by the ratifying states to preserve state autonomy against what was perceived to be a powerful national government.<sup>66</sup> It is, therefore, very far from clear that the (lower-cased) "people" referred to in the Bill of Rights are the same as the grand (upper-cased) "People" in the Preamble's "We the People of the United States" (if nationally understood).<sup>67</sup>

The very best that can be said of Amar's textual argument is that one or more of the provisions he cites *might* bear the construction he puts on them. To show that they *do* bear that understanding, however, Professor Amar is forced to look beyond the constitutional text and to consider the contemporary understanding of these provisions.

### B. *Amar's Historical Claims*

What is Amar's historical case? The argument is quite straightforward. Beginning with the Declaration of Independence (which, Amar recognizes, proclaimed only a right of revolution, not a right of amendment by "We the Majority"), Amar argues that the concept of popular sovereignty had evolved by 1789 into a general understanding that a

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(1993) [hereinafter Vile, *Contemporary Questions*]. Amar's argument is, moreover, plainly wrong because the Tenth Amendment "reserved only the non-delegated powers, whereas the amending power had been previously delegated." Orfield, *supra* note 31, at 109; cf. *Term Limits*, 115 S. Ct. at 1854 (concluding that Framers intended Constitution to be exclusive source of qualifications for Congress, and thus " 'divested states' of any power to add qualifications").

64. See, e.g., Selden Bacon, *How the Tenth Amendment Affected the Fifth Article of the Constitution*, 16 Va. L. Rev. 771, 780 (1930) (arguing that the Tenth Amendment shut the "loop-hole of power to wipe out . . . liberties completely and conditionally" that Article V, as written, left open).

65. Orfield, in a discussion of the Ninth and Tenth Amendments, observes that "[n]either amendment confers any affirmative powers on the people, nor clarifies the meaning of the word. Sovereignty or the power to amend can scarcely be derived from them." Orfield, *supra* note 31, at 144.

66. See *infra* text accompanying notes 191–197. The Second Amendment, for example, refers only to state militias; its "people," therefore, are state-centered. See, e.g., Gary Wills, *To Keep and Bear Arms*, N.Y. Rev. Books, Sept. 21, 1995, at 62, 64 (specific language of Second Amendment was designed "to emphasize the state's separate militias" as opposed to the defense of the nation); see also Raoul Berger, *Federalism: The Founders' Design* 77–85 (1987) (strongly espousing a state-centered view of the purpose of the Tenth Amendment).

67. Whether "the people" of the Preamble are the same as "the people" of the amendments has divided commentators. See, e.g., Orfield, *supra* note 31, at 103 n.46. Amar assumes that they are, going to the extent of capitalizing *all* his references to the people. See, e.g., Amar, *Republican Government*, *supra* note 55, at 16.

simple majority of the people could alter the frame of state government whenever it so wished. Numerous supportive citations are given.<sup>68</sup>

Now to the crucial claim: Amar argues that when "We the People" of the separate states ratified the Constitution and became part of a consolidated "We the People" of the United States, the state-developed understanding of popular sovereignty, which increasingly had recognized the right of a bare majority of citizens to amend the state constitutions, became an attribute of the national people.<sup>69</sup> The new Constitution embodied the principle of national popular sovereignty, a principle that, in turn, gave "We the (National) Majority" the authority to change the frame of the national government.<sup>70</sup> This is the heart of the argument. Various flourishes are added in support, such as the impossibility of an *imperium in imperio*, i.e., a state within a state,<sup>71</sup> and the inalienability of the sovereignty of "We the People."<sup>72</sup> In "Consent of the Governed," Amar also produces James Wilson, the Pennsylvania statesman, as the eighteenth-century champion of his version of original understanding.<sup>73</sup>

Amar's Article V claim simply extends an argument he made in an earlier article that also wholly ignores the federal character of the founding.<sup>74</sup> Amar believes that "the so-called 'United States' were really separate nations in 1787—much as the so-called 'United Nations' are today."<sup>75</sup> This position mirrors strongly state-centered accounts of the founding,<sup>76</sup> such as those written by Justice Clarence Thomas and Professor Raoul Berger, which in one form or another insist that the

68. See Amar, *Consent of the Governed*, supra note 2, at 481–87. None of the quotations Amar uses appear in the context of Article V; rather, all suggest that the ratification of the Constitution violated state law or the Articles of Confederation. See *id.* at 486–87 & n.113.

69. See Amar, *Philadelphia Revisited*, supra note 2, at 1062 ("[A]fter Massachusetts adopted the Constitution . . . sovereignty was relocated to The People of the United States, as a whole.").

70. See *id.* at 1047–66.

71. See *id.* at 1063 (at the time of the Constitution's ratification, "[d]ivided sovereignty was almost universally recognized as a theoretical impossibility . . . '*imperium in imperio* . . . [is a] solecism'").

72. See *id.* at 1050 (fundamental principle of American government was that "the People were sovereign, and that a majority of them enjoyed the inalienable legal right . . . to alter or abolish their form of government whenever they pleased").

73. See Amar, *Consent of the Governed*, supra note 2, at 474–75, 506–07. On Wilson, see *infra* note 88.

74. See Amar, *Sovereignty*, supra note 48, at 1437 (arguing that Constitution embodies the idea that true sovereignty lies in the People of the United States).

75. Amar, *Philadelphia Revisited*, supra note 2, at 1049; see also Amar, *Sovereignty*, supra note 48, at 1460 (Before ratification, "the People of each state were indeed sovereign.").

76. One such state-centered account is given by Patrick Henry: "The assent of the people in their collective capacity is not necessary to the formation of a Federal Government." Patrick Henry, *Speech (June 5, 1788) in The Anti-Federalist Papers and the Constitutional Convention Debates* 196, 207 (Ralph Ketcham ed., 1986).

states preceded "We the People of the United States."<sup>77</sup> Unlike Thomas and Berger, however, Amar argues that in ratifying the Constitution in 1789, the "previously separate state Peoples agreed to 'consolidate' themselves into a single continental People [and] . . . to reconstitute themselves into one common sovereignty."<sup>78</sup> The "most important thing that the Constitution constitutes is neither the national government, nor even the supreme law, but one sovereign national People, who may alter their government or supreme law at will."<sup>79</sup> If this is so, it follows that Article V too is subordinate to the will of "one sovereign national People."

However, Amar's two-stage description is internally inconsistent. His stage one account, that prior to ratification the peoples of the various states stood as foreign nations to one another, presents difficulties.<sup>80</sup> If, as he also claims, sovereignty of the people is inalienable,<sup>81</sup> how could the people of any independent state permanently bind future peoples of the same state to the will of a national "We the People"? Amar, in short, cannot explain his rejection of secession.<sup>82</sup> If, on the other hand, "We the People" of Maryland could in 1789 alienate some of their sovereignty, why cannot "We the People" of the United States alienate their sovereignty to the extent prescribed by Article V?

Moreover, Amar's description of when a national "We the People" emerged fits badly both with what we know of the period between 1775 and 1788,<sup>83</sup> and with the text of the Preamble, which seems to assume the prior existence of a "We the People" of the United States.<sup>84</sup> It is clearly inconsistent with the strongly nationalist opinions of Chief Justice Marshall, which posit the existence of a national "We the People" prior to the adoption of the Constitution.<sup>85</sup> Indeed, even before Marshall, that

77. See, e.g., *U.S. Term Limits, Inc. v. Thornton*, 115 S. Ct. 1842, 1875 (1995) (Thomas, J., dissenting); Berger, *supra* note 66, at 21-47.

78. Amar, *Sovereignty*, *supra* note 48, at 1460. Berger rejects these implications. See Berger, *supra* note 66, at 48-76.

79. Amar, *Sovereignty*, *supra* note 48, at 1463 n.163.

80. See Amar, *Philadelphia Revisited*, *supra* note 2, at 1062 ("In 1787, each state was an independent nation.").

81. See *id.* at 1050.

82. See *id.* at 1076. In "Philadelphia Revisited," Amar contends that the long-moribund People who adopted the Constitution could never bind future generations to it. See *id.* at 1072. Yet it seems that that is precisely what the People of the individual states were doing if, as Amar argues, they transferred state sovereignty to the People of the United States and that sovereignty, once transferred, became inalienable. See *id.* at 1050.

83. See, e.g., Ackerman & Katyal, *supra* note 33, at 487-539 (describing the Framers' use of existing national institutions to achieve their goals).

84. See U.S. Const. pmbl.

85. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 403 (1819); see also *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 324 (1816). For Marshall, the fact that the Constitution was ratified by the people voting in their separate states at conventions was a natural administrative convenience. See *McCulloch*, 17 U.S. (4 Wheat.) at 402-04. Professor Beer, a strongly nationalistic writer, endorses a similar criticism of Amar's claims. Beer objects that Amar's claims "jar[ ] with one's knowledge of how a people, a nation, actually comes into existence and with the record of how that happened in America."



conception had surfaced in Supreme Court opinions.<sup>86</sup> And Amar's views also conflict with those of his newly found champion, James Wilson.<sup>87</sup> Wilson apparently "thought of the electorate not in terms of the states but in terms of the whole: as a single, sovereign entity, 'the people of the United States.'"<sup>88</sup> Federalist Thomas Pickering presented that perspective very clearly: "The *people* of the United States form *one nation* . . . altho[ugh] for the more easy and advantageous management of *particular districts*, the people have formed themselves into 13 separate communities, or states."<sup>89</sup>

For us, however, Amar's second stage assumption, national "consolidation" as a result of ratification, is even more important. Here, Amar's claims for the constitutional prerogatives of "We the [National] Majority" extend well beyond those of other devotees of national popular sovereignty, who believe that popular sovereignty operates behind and above the Constitution.<sup>90</sup> Amar believes that the *Constitution itself* legally includes an overriding principle of national popular sovereignty.

Samuel H. Beer, *To Make a Nation: The Rediscovery of American Federalism* 321 (1993). Beer, indeed, wants to locate the emergence of a national "We the People" no later than the revolutionary era. See *id.* at 322.

86. See *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 state constitutions were made, and by their authority the constitution of the United States was established. . . ."); *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 470-71 (1793) (Jay, C.J.) ("the people, in their collective and national capacity, established the present Constitution"); *id.* at 454 (Wilson, J.) (the people "might have announced themselves 'sovereign' people of the United States: but serenely conscious of the *fact*, they avoided the *ostentatious declaration*").

87. See *infra* text accompanying notes 177-187

88. Robert G. McCloskey, James Wilson *in* 1 *The Justices of the United States Supreme Court 1789-1969*, at 79, 88 (Leon Friedman & Fred L. Israel eds., 1989); see also Anderson, *supra* note 44, at 48-50; Geoffrey Seed, James Wilson 79 (1978); Marci A. Hamilton, *Discussion and Decisions*; 69 *N.Y.U. L. Rev.* 477, 531 n.237 (1994). Wilson, most of the time at least, seems to have believed that a national "We the People" existed prior to the adoption of the Constitution, and that it was "subdivided" for some purposes into 13 states. A founding father and Associate Justice of the Supreme Court, Wilson was perhaps the premier legal thinker of his generation.

89. Michael Kammen, *Sovereignty and Liberty: Constitutional Discourse in American Culture* 22 (1988). See generally *id.* at 20-37 (discussing conception of popular sovereignty following independence). For other references to a national "We the People," see *id.* at 22 n.23.

90. A devotee second to none, Professor Samuel Beer, writes: "This constituent sovereign, one must emphasize, was not limited by positive law, not even by the law of the Constitution defining how the Constitution was to be amended, since that law too had been made by the constituent sovereign and so presumably could be overruled by it." Beer, *supra* note 85, at 338. As E.S. Corwin has remarked, the amending power, like all other powers organized in the Constitution, is "a delegated, and hence a limited power." Edward S. Corwin, *The Constitution and What It Means Today* 177 (12th ed. Atheneum 1965) (1920). "The one power known to the Constitution which clearly is not limited by it is that which ordains it—in other words, the original, inalienable power of the people of the United States to determine their own political institutions." *Id.* Like Corwin, upon whom he relies, Beer simply proclaims his conclusion. See Henry P. Monaghan, *The*

Amar's "consolidation" (i.e., national popular sovereignty) claim is clearly inconsistent with Madison in *Federalist No. 39*,<sup>91</sup> and with Hamilton in *Federalist No. 32*, who goes out of his way to deny that any such complete "consolidation" among the peoples of the several states was intended.<sup>92</sup> As Justice Kennedy recognized in *Term Limits*, a difference exists between "complete" and "partial" consolidation.<sup>93</sup> That distinction was well understood by the Founders. Herbert Storing, a widely respected student of the era, wrote that during ratification even the Federalists generally "conceded the historical and legal priority of the states."<sup>94</sup>

Amar's description is also completely contrary to strongly state-centered descriptions of the founding. Like Justice Thomas in *Term*

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Protective Power of the Presidency, 93 Colum. L. Rev. 1, 11 n.44 (1993) (criticizing the lack of analytical rigor in Corwin's work). One searches in vain for any historical analysis of original understanding. No contact—none—is made with the standard American historical works, to say nothing of original source material. As with Corwin, Beer's reliance upon the existence of a national "We the People" comes at the cost of ignoring the founding era's deep commitment to the importance of the states as political communities. Finally, neither writer devotes even one sentence to the institutional implications of their claims for officials (particularly judges) who take an oath to support "this Constitution."

Moreover, there is also a lack of clarity in their claims. Does their view entail the conclusion that "the people of the United States" inexorably means "We the Majority"? Beer and Corwin's lack of clarity is, perhaps, explicable because, unlike Amar, they apparently view popular sovereignty as operating "behind" the constitutional framework, not as a legally operative part of that constitutional order.

91. See *The Federalist No. 39*, at 243–46 (James Madison) (Clinton Rossiter ed., 1961). Just prior to the convention, Madison wrote to Washington, stating his belief that "an individual independence of the States is utterly irreconcilable with the idea of national sovereignty." Letter from James Madison to George Washington (Apr. 16, 1787), in 9 *Papers of James Madison* 382, 383 (Robert A. Rutland et al. eds., 1975).

92. See *The Federalist No. 32*, at 198 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (explaining that "plan of the convention aim[ed] only at a partial union or consolidation").

93. See *U.S. Term Limits, Inc. v. Thornton*, 115 S. Ct. 1842, 1854 (1995) (Kennedy, J., concurring).

94. Herbert J. Storing, *The 'Other' Federalist Papers: A Preliminary Sketch*, 6 *Pol. Sci. Reviewer* 215, 220 (1976); see also Berger, *supra* note 66, at 33, 50–55 (citing remarks by prominent Federalist Chief Justice Marshall). Marshall, whose opinions on the issue generally have a strongly nationalist ring, captured the point in *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122 (1819):

[I]t was neither necessary nor proper to define the powers retained by the States. These powers proceed, not from the people of America, but from the people of the several States; and remain, after the adoption of the constitution, what they were before, except so far as they may be abridged by that instrument.

*Id.* at 193.

*Limits*,<sup>95</sup> Forrest McDonald claims that, even after 1789, "We the People" were understood only as "We the People of the Several States."<sup>96</sup>

To my eyes, neither completely state-centered nor completely nationalist views of the founding capture the original understanding. I believe that Madison got the dominant understanding right.<sup>97</sup> A significant number of Americans simultaneously held—in varying mixtures and intensities—some concept of a "We the People" of the United States *and* (more importantly for my argument) some concept of a "We the People" of Delaware, and so on.<sup>98</sup> Federalism, not national consolidation, was the defining feature of the Constitution of 1787. The "Constitution presupposes that 'the people' have at least two identities: as members of states and as members of the United States."<sup>99</sup> This condition necessarily ex-

95. See *Term Limits*, 115 S. Ct. at 1876 n.1 (Thomas, J., dissenting) (original Preamble to Constitution, which read "We the People of the States of New-Hampshire, Massachusetts, Rhode-Island [etc.]" was "clearer"—style committee's subsequent change to "We the People of the United States" "did not work a substantive change in the Constitution").

96. See McDonald, *supra* note 48, at 280–81 (states were "thirteen political societies"). McDonald echoes the state-centered account of the founding expressed by St. George Tucker in 1803 in the first famous exposition on the meaning of the Constitution. Tucker wrote that the states are "constituent and necessary parts of the federal government," without which "there could be neither a senate, nor a president." St. George Tucker, *View of the Constitution of the United States*, in 1 Blackstone's Commentaries app. note D, at 140, 141–42 (St. George Tucker ed., 1803); see also Berger, *supra* note 66, at 29–35, 58–76.

97. See, e.g., *The Federalist* No. 39, at 243 (James Madison) (Clinton Rossiter ed., 1961) (ratification was by "We the People" of the states). Tench Coxe, an ardent Federalist, wrote that although

the convention propose[s] that it should be the act of the people, yet it is in their capacities as citizens of *the several members of our confederacy*—for they are expressly declared to be 'the people of *the United States*'— . . . and the *general* term of *America*, which is constantly used in speaking of us *as a nation*, is carefully omitted: a pointed view was evidently had to our *existing union*.

Tench Coxe, *A Freeman* I (Jan. 23, 1788), in 15 *The Documentary History of the Ratification of the Constitution* 453, 456–57 (John P. Kaminski & Gaspare J. Saldino eds., 1984) [hereinafter *Documentary History*].

98. Some evidence of the range of conceptions that were held can be found in the multiple meanings given to the word "state." As Madison noted, the word "state" appears to have several different meanings in the Constitution. See James Madison, *The Report of 1800* (Jan. 7, 1800), in 17 *Papers of James Madison*, *supra* note 91, 307, 308–09. In his definition of the term "states," Madison included "the people composing those political societies, in their highest sovereign capacity." *Id.* at 309. In this sense, Madison said "all will at least concur that" the states were parties to the Constitution. See *id.*; see also *Texas v. White*, 74 U.S. (7 Wall.) 700, 720–21 (1869) (discussing various meanings of the word "state"); Wayne D. Moore, *Reconceiving Interpretive Autonomy: Insights from the Virginia and Kentucky Resolutions*, 11 *Const. Commentary* 315, 333–41 (1994).

99. Moore, *supra* note 98, at 352; see, e.g., James Madison, *Remarks in Debate in the House of Representatives* (August 15, 1789), in 1 *Debates and Proceedings in the Congress of the United States* 766, 766–67 (Joseph Gales ed., 1834) (speech in the first Congress on whether the people's right to instruct their representatives should be included in the Constitution). Madison opposed the right to instruct on the ground that "sovereignty" was held by the people as a whole, not "detached bodies" of them. See *id.* at 767.

isted in a constitutional order "neither wholly *national* nor wholly *federal*."<sup>100</sup>

Even if, however, we were to concede that Amar provides the best account of when a national "We the People" of the United States legally (i.e., constitutionally) came into existence,<sup>101</sup> the crucial question is what understanding of sovereignty actually existed in 1789. Contrary to what Amar claims, the understanding was not that "consolidation" had occurred and that any parallel conception of "We the People of New Hampshire, etc." had been eliminated. The reality was considerable confusion, not a first theorem.<sup>102</sup> "Men were always only half aware of where their thought was going . . . ."<sup>103</sup>

On one point, however, there was no confusion. No one believed that a simple majority of people (however defined) in population-rich states could amend the national Constitution. Any such claim ignores the most important structural characteristic of the Founders' Constitution: federalism, which, as Herbert Wechsler wrote, "was the means and price of the formation of the Union."<sup>104</sup> Moreover, Amar's exaltation of the prerogatives of "We the People" cannot be reconciled with the founding generation's abiding fear of the excesses of democracy.<sup>105</sup>

### III. THE AMENDING PROCESS IN 1787

The Constitutional Convention is surely among the best places to begin an examination of original understanding. It is true that the proceedings in the Constitutional Convention were largely unknown to the ratifiers, and I believe that claims for their interpretive significance can readily be exaggerated.<sup>106</sup> Nonetheless, the debates generally constitute some evidence of the general understanding at the time of the ratifica-

100. The Federalist No. 39, at 246 (James Madison) (Clinton Rossiter ed., 1961). A powerful argument exists that, in reality, Amar's strongly nationalistic "We the People" comes into historical existence only at the conclusion of the Civil War, if then.

101. This part of Amar's thesis is addressed in Berger, *supra* note 66, at 48-50 (setting forth argument that the Constitution represented a recognition of national supremacy over state sovereignty). However, Berger goes on to dismantle this argument. See *id.* at 51-76.

102. "I cannot say whether popular sovereignty is most sensibly referred to as a theory, a concept, or simply a shifting set of attitudes." Kammen, *supra* note 89, at 14; see also *id.* at 24-25 (in 1789, many people believed that once people transfer power to officials, it may be reclaimed only for abuse).

103. Gordon S. Wood, *The Creation of the American Republic, 1776-1787*, at 389 (1969). Wood is speaking of the sovereignty of the people and noting that the "new ideas about politics were not the products of extended reasoned analysis . . . ." *Id.*

104. Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 *Colum. L. Rev.* 543, 543 (1954).

105. See *infra* Part IV.

106. See Monaghan, *supra* note 31, at 725 ("The Framers themselves did not intend that their secret deliberations at the constitutional convention would provide authoritative guidance . . . .").

tion, particularly because many of the Convention's members took to the field to defend the proposed new constitutional order. The debates are unmistakably clear on the nature of the founding: The defining issue in the Convention was "Our Federalism."<sup>107</sup> That question also dominated the ratification debates. Both show that Madison's account of the nature of the new constitutional order got the matter quite right: The Constitution established a greatly strengthened national government that stopped far short of national consolidation.

### A. *The Convention*

1. *Defeat of the Strong Nationalists.* — Thornton Anderson's admirable recent study sorts the individual delegates to the Constitutional Convention into three groups: strong nationalists, such as Madison, Hamilton, Wilson, and Gouverneur Morris; die-hard states-rightists, such as Martin, Lansing, and Yates; and moderate nationalists, who were the bulk of the delegates (particularly of those from Connecticut and Delaware). The moderate nationalists were prepared to strengthen the authority of the national government, but they also insisted upon the importance of maintaining the states as independent political societies in the new constitutional order.<sup>108</sup> The strong nationalists were concerned with the disintegration of the national government and the excesses of democracy; because of population disparity, they disliked the provision in the Articles of Confederation for state voting equality.<sup>109</sup> Hamilton and Wilson were strong nationalists, and they remained so throughout their careers.<sup>110</sup> We do not now remember Madison as such. Recalling his contributions to *The Federalist*, his authorship and subsequent defense of the Virginia Resolutions of 1798, and his presidency, we picture a more state-centered founder. But that was a post-1787 Madison. At the Convention, Madison was a strong nationalist.<sup>111</sup> He arrived with the belief

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107. See *Younger v. Harris*, 401 U.S. 37, 44 (1971). On some other matters the delegates were united, especially on the need to protect property against the "ravages" of state legislatures: "The men of Philadelphia were, without exception, men of property." Jack R. Pole, Introduction, in *The American Constitution: For and Against* 1, 11 (Jack R. Pole ed., 1987). The debates in the Convention were real, but they were of the "haves versus the haves" variety. Richard K. Matthews, *If Men Were Angels: James Madison and the Heartless Empire of Reason* 135 (1995).

108. See Anderson, *supra* note 44, at 7-8. Several historical accounts emphasize the "nationalism" of the Convention. See, e.g., William P. Murphy, *The Triumph of Nationalism* (1967) (arguing that the Framers were more nationalist than is generally acknowledged by historians). These accounts are valuable, but they are seriously incomplete. They ignore the Convention's recognition of the central and continuing importance of the states as independent political communities.

109. See Anderson, *supra* note 44, at 44-50.

110. See M.E. Bradford, *Founding Fathers* 39-49, 87-94 (2d ed. 1994) [hereinafter Bradford, *Founding Fathers*] (biographical sketches of Hamilton and Wilson).

111. Lance Banning disputes this in a recent book, arguing that Madison did not significantly alter his views after the Convention. See Evan Cornog, *The Federalist: A New Look at the Misunderstood James Madison and How He Shaped the Republic*, N.Y. Times,

that "only the creation of an effective national government would rescue the states from their own failings."<sup>112</sup> The "ground of [Madison's] thought had shifted, away from the weaknesses of the Union and toward the problems of the states."<sup>113</sup> The "problems of the states" were, of course, the democratic excesses of the state legislatures.<sup>114</sup>

Led by Madison and Wilson, the nationalists opened the Convention with a strong assault upon state prerogative. The states would not be eliminated, of course, but in practical terms they would be reduced to "subordinately useful" administrative districts.<sup>115</sup> The nationalists wanted representation in the Senate based upon population, a congressional veto of all state legislation, and congressional authority to legislate "in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual

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Oct. 29, 1995, § 7 (Book Review), at 39, 39 (reviewing Lance Banning, *The Sacred Fire of Liberty: James Madison and the Founding of the Federal Republic* (1995)) ("Attempting to assign reasons for Madison's change of heart is futile, because no such change took place. . . . Madison was not . . . an ardent nationalist in the early 1780's, as most recent historians have believed."). Even if this is true, Madison was a strong nationalist in the Convention when compared with other members.

112. Jack N. Rakove, *James Madison and the Creation of the American Republic* 44 (Oscar Handlin ed., 1990). Richard Matthews provides a splendid, if ultimately unsympathetic view of Madison's thought. See Matthews, *supra* note 107, at 7-8. Madison's stance reflected his underlying pessimism. A liberal in the (atomistic) Hobbes-Locke mode, Madison's overarching concern was with governmental stability; he sought to ward off dangers to property and the inevitable forces of decay. Madison was quite unlike either Jefferson or Hamilton in that sense. The latter had positive visions: Jefferson of a "democratic pastoral republic"; Hamilton of a "liberal-elite, heroic empire." *Id.*

113. Rakove, *supra* note 112, at 47; see also Matthews, *supra* note 107, at 130-45 (discussing Madison's fear during ratification that populist forces within states could undermine the new Constitution's validity by forcing a second convention or conditioning ratification on a bill of rights).

114. See Rakove, *supra* note 112, at 45. Matthews writes:

Two interrelated problems constituted the core of Madison's assessment: the weakness of the federal government and the ineffectiveness of the state governments in controlling the actions of majorities and therein failing to protect the property rights of individuals. Madison's perception of the democratic nature of the legislative bodies in the various states as a primary defect in the Confederation goes a long way to explain his specific political prescriptions prior to the 1790s.

Matthews, *supra* note 107, at 178.

115. Matthews, *supra* note 107, at 186. Writing to George Washington just prior to the Convention, Madison acknowledged that "a consolidation of the states into one simple republic would be as inexpedient as it is unattainable." Letter, *supra* note 91, at 383. He advocated instead a "middle ground," one that would "at once support a due supremacy of the national authority, and not exclude the local authorities wherever they can be subordinately useful." *Id.* Compare Madison's defense of the states as a check on the national government in *Federalist No. 51*, with his defense of the state legislatures in *Federalist No. 44*, and with his defense of the Virginia Resolutions. See Moore, *supra* note 98, at 333.

Legislation.”<sup>116</sup> The moderate nationalists (joined, of course, by states-rightists) defeated all these proposals.

The most crucial and divisive of these efforts was the demand for representation in the Senate based upon population. That demand nearly brought the Convention to an end.<sup>117</sup> Of course, many delegates wanted the Senate (a term drawn from Roman history) to constitute a bastion shielding “the worthy against the licentious.”<sup>118</sup> But in the Convention the central conflict over the Senate’s composition centered instead on the relationship between the population-rich (large) states and the population-poor (small) states. That struggle was far removed from modern concerns with one person-one vote equality; rather, the conflict was about political power. The population-rich states deeply resented the yoke of state equality imposed by the Articles of Confederation.<sup>119</sup> By contrast, delegates from population-poor states, particularly those from Connecticut and Delaware, feared serious harm to their continued existence as vital, independent political communities should population become the standard for representation in the Senate.<sup>120</sup> The division was sharp and deep. Deadlock occurred; dissolution of the Convention was a serious possibility.<sup>121</sup>

The famous “Connecticut Compromise,” engineered by moderate nationalists Sherman and Ellsworth, provided for two senators from each state, and thus averted a convention-ending deadlock.<sup>122</sup> For many (but by no means all) of its supporters, the Compromise reflected a common perception: “We were however in a peculiar situation. *We were neither the same Nation nor different Nations.* We ought not therefore to pursue the one or the other of these ideas too closely.”<sup>123</sup> So stated Elbridge Gerry, the chairman of the committee that proposed the Compromise. Earlier, Dr. William Johnson of Connecticut had expressed that same perception in clear and memorable terms, terms that express the uncertain implica-

116. Edmund Randolph, Virginia Resolutions (May 29, 1787), in 1 *The Records of the Federal Convention of 1787*, at 20, 21 (Max Farrand ed., 1966) [hereinafter Farrand]; see also Anderson, *supra* note 44, at 44–46 (discussing the objectives of the nationalists).

117. See M.E. Bradford, *Original Intentions on the Making and Ratification of the United States Constitution* 9 (1993) [hereinafter Bradford, *Original Intentions*].

118. Wood, *supra* note 103, at 475 (quoting John Dickinson). Thus, on June 7, 1787, Madison said that “the Senate ought to come from, and represent, the Wealth of the nation.” James Madison, *Remarks in Debate* (June 7, 1787), in 1 Farrand, *supra* note 116, at 158, 158; see also Anderson, *supra* note 44, at 88–89, 94, 97–101 (discussing proposals that wealth be the basis of representation).

119. See Anderson, *supra* note 44, at 45.

120. See *id.* at 59–62.

121. See Max Farrand, *The Framing of the Constitution of the United States* 54–60 (1913) [hereinafter Farrand, *Framing*]. “The smaller States would never agree to the plan on any other principle (than an equality of suffrage in this branch . . .).” Roger Sherman, *Remarks in Debate* (June 11, 1787), in 1 Farrand, *supra* note 116, at 192, 201.

122. See Farrand, *Framing*, *supra* note 121, at 104–06.

123. Elbridge Gerry, *Remarks in Debate* (July 5, 1787), in 1 Farrand, *supra* note 116, at 524, 532 (emphasis added).

tions of a constitution that is “neither wholly national nor wholly federal”:

The controversy must be endless whilst Gentlemen differ in the grounds of their arguments; Those on one side considering the States as districts of people composing one political Society; those on the other considering them as so many political societies. The fact is that the States do exist as political Societies, and a Govt. is to be formed for them in their political capacity, as well as for the individuals composing them. . . . On the whole he thought that as in some respects the States are to be considered in their political capacity, and in others as districts of individual citizens, the two ideas embraced on different sides, instead of being opposed to each other, ought to be combined; that in *one* branch the *people*, ought to be represented; in the *other*, the *States*.<sup>124</sup>

By virtue of the Compromise, the states would continue to function as vital and independent political communities.<sup>125</sup> And with the Compromise in place, however wobbly at first, the Convention would go forward to strengthen the powers of the national government. Nonetheless, in the new constitutional order, the Connecticut Compromise ensured that the states would be part of an “indestructible Union, composed of indestructible States.”<sup>126</sup>

2. *Amendment.* — Resolution 13 of the Virginia Resolutions, the platform from which the attack of the strong nationalists was made, contemplated amendments.<sup>127</sup> The Convention was receptive to the general idea. As early as June 11, George Mason said that “[a]mendments . . . will be necessary, and it will be better to provide for them, in an *easy*, regular

124. Doctor William Johnson, Remarks in Debate (June 29, 1787), in 1 Farrand, *supra* note 116, at 460, 461–62. Interestingly, “[i]n the two weeks of debate on the compromise, some of it quite acrimonious, sovereignty was never mentioned.” Anderson, *supra* note 44, at 68.

125. See Anderson, *supra* note 44, at 63–67. In addition to state equality in the Senate, a provision was added to prevent the formation of new states from the territory of existing states without their consent. The Guarantee Clause also was understood to protect state sovereignty and independence. See Deborah J. Merritt, *Republican Governments and Autonomous States: A New Role for the Guarantee Clause*, 65 U. Colo. L. Rev. 815, 820 (1994). The method of electing senators by the state legislatures protected similar interests. See Anderson, *supra* note 44, at 126–27. In the debates, “[i]t became increasingly clear that the role of the Senate as a defender of the states was the main consideration with most delegates.” *Id.* at 126. On the continuing importance of the states in the new constitutional order, see, e.g., *The Federalist* Nos. 15, 31 (Alexander Hamilton), Nos. 39, 40, 51 (James Madison).

126. *Texas v. White*, 74 U.S. (7 Wall.) 700, 725 (1868). Orfield argues, however, that some or all of the states could be extinguished through Article V and that this result does not contravene the principle of state equality of suffrage. See Orfield, *supra* note 31, at 96–99.

127. See Resolution No. 13 (June 11, 1787), in 1 Farrand, *supra* note 116, at 192, 202 (resolving “for amending the national Constitution hereafter without consent of Natl. Legislature”).



and Constitutional way than to trust to chance and violence."<sup>128</sup> "Easy," however, is a decidedly misleading term. Nothing is "easy" about the processes prescribed by Article V. This was the constitutional design. Article V was a reaction to the rigid unanimity requirement of Article XIII of the Articles of Confederation.<sup>129</sup> In Madison's language, Article XIII resulted in "the absurdity of subjecting the fate of twelve States to the perverseness or corruption of a thirteenth [i.e., Rhode Island]"; the twelve states comprising fifty-nine sixtieths of the people.<sup>130</sup> Article V was thus a compromise between two competing policies—the Constitution must possess a sensible mechanism for change, but the terms of the union among the states were not to be readily altered.<sup>131</sup> Easy, therefore, still meant difficult.

Until the Convention moved to a close, discussion of the amendment process was relatively brief.<sup>132</sup> On August 6, 1787, the Committee of Detail reported<sup>133</sup> an amending mechanism that provided that "on the Application of the Legislatures of two thirds of the States in the Union, the Legislature of the United States shall call a Convention for that Purpose."<sup>134</sup> Whether such a convention could adopt or only propose amendments was unclear, and this apparently alarmed state-centered delegates. Four days later, Elbridge Gerry expressed concern that the proposal would allow a simple majority of a convention to weaken the individual states.<sup>135</sup> The state-sensitive Roger Sherman also objected; obviously drawing upon the Articles of Confederation, he proposed that no amendments "shall be binding until consented to by the several States."<sup>136</sup> Not surprisingly, so inflexible a standard did not succeed.<sup>137</sup>

Madison thereupon moved to eliminate the convention mechanism altogether. He proposed instead congressional authority to propose

128. See *id.* at 202–03.

129. See Articles of Confederation, art. XIII (1781), in 1 Documents of American History 111, 115 (Henry S. Commager & Milton Cantor eds., 10th ed. 1988) ("nor shall any alteration at any time hereafter be made in any of [the Articles] unless such alteration be agreed to in a congress of the united states, and be afterwards confirmed by the legislatures of every state").

130. See The Federalist No. 40, at 251 (James Madison) (Clinton Rossiter ed., 1961); see also Richard B. Bernstein & Jerome Agel, *Amending America* 20–30 (1993) (discussing Madison's frustration with Article XIII of the Articles of Confederation).

131. John Calhoun later emphasized this point strongly. See *infra* note 148 and accompanying text.

132. See, e.g., Anderson, *supra* note 44, at 156.

133. See Farrand, *Framing*, *supra* note 121, at 134.

134. Committee of Detail VIII (proceedings of the Convention, June 19–July 23, 1787), in 2 Farrand, *supra* note 116, at 129, 159.

135. See Elbridge Gerry, *Remarks in Debate* (Sept. 10, 1787), in 2 Farrand, *supra* note 116, at 557, 557–59. By contrast, Hamilton insisted that Congress was more likely than the states to perceive failure in constitutional design. See Vile, *The Amending Process*, *supra* note 31, at 29.

136. Roger Sherman, *Remarks in Debate* (Sept. 10, 1787), in 2 Farrand, *supra* note 116, at 557, 558.

137. See *Debate of Sept. 10, 1787*, in 2 Farrand, *supra* note 116, at 557, 558–59.

amendments by a two-thirds vote or after having received petitions from two-thirds of the states.<sup>138</sup> The end result of that day's debate was the three-fourths rule, a measure proposed by Wilson.<sup>139</sup>

On September 15, only two days before the Convention's end, the present form of Article V was settled. The discussion is illuminating. Sherman again expressed the state-centered fears that underlay the Connecticut Compromise:

Mr. Sherman expressed his fears that three fourths of the States might be brought to do things fatal to particular States, *as abolishing them altogether or depriving them of their equality in the Senate*. He thought it reasonable that the proviso in favor of the States importing slaves should be extended so as to provide that *no State should be affected in its internal police, or deprived of its equality in the Senate*.

Col: Mason thought the plan of amending the Constitution exceptionable & dangerous . . . [because, given the role of Congress] no amendments of the proper kind would ever be obtained by the people, if the Government should become oppressive, as he verily believed would be the case.<sup>140</sup>

In response to Mason's concerns, Gouverneur Morris and Elbridge Gerry moved to amend the article so as to require a convention on the application of two-thirds of the states; that measure passed without contest.<sup>141</sup>

Sherman once again rose to protect states' rights. After his initial motion concerning future constitutional conventions failed, Sherman moved to "annex to the end of the article a further proviso 'that no State shall without its consent be affected in its internal police, or deprived of its equal suffrage in the Senate.'"<sup>142</sup> Madison objected by replying "[b]egin with these special provisos, and every State will insist on them, for their boundaries, exports &c."<sup>143</sup> Sherman's motion failed (3-8), as did his subsequent motion to strike out Article V altogether (2-8).<sup>144</sup>

138. See James Madison, Remarks in Debate (Sept. 10, 1787), in 2 Farrand, *supra* note 116, at 557, 559.

139. See James Wilson, Remarks in Debate (Sept. 10, 1787), in 2 Farrand, *supra* note 116, at 557, 559.

140. Roger Sherman & George Mason, Remarks in Debate (Sept. 15, 1787), in 2 Farrand, *supra* note 116, at 621, 629 (emphasis added).

141. See Debate of Sept. 15, 1787, in 2 Farrand, *supra* note 116, at 621, 629-30.

142. Roger Sherman, Remarks in Debate (Sept. 15, 1787), in 2 Farrand, *supra* note 116, at 621, 630.

143. James Madison, Remarks in Debate (Sept. 15, 1787), in 2 Farrand, *supra* note 116, at 621, 630.

144. See Debate of Sept. 15, 1787, in 2 Farrand, *supra* note 116, at 621, 630-31.

Although the great majority of the delegates had not been willing to grant sweeping immunity to the states against amendment, there was, if not unanimous support for, at least no opposition to, a more limited measure designed to ensure that the states would retain their political independence for perpetuity:

Mr. Govr Morris moved to annex a further proviso—"that no State, without its consent shall be deprived of its equal suffrage in the Senate"

*This motion being dictated by the circulating murmurs of the small States was agreed to without debate, no one opposing it, or on the question, saying no.*<sup>145</sup>

During the entire debate, no hint appeared that Article V was not viewed as the exclusive mode of amendment. It strains credulity even to suggest that a widely shared premise of the debates was that "We the People" (let alone "We the Majority") could amend outside its framework. Moreover, here at the very end of the Convention, Gouverneur Morris, a strong nationalist, moved to entrench state equality in the Senate. The Entrenchment Clause was designed to protect the results of the Connecticut Compromise.<sup>146</sup>

This focus on the states makes it clear that the defeat of the nationalists on the Connecticut compromise was not confined to the Senate or to the structure of the government. Here at the end of the Convention their opponents were relentlessly building the equality of states into the foundations of the system whence it could reassert itself on all future amendments. *The idea of a single national body politic whose people were the source of supreme power, and therefore of the supreme law, was not even a debatable position.*<sup>147</sup>

3. *The Mode of Ratification.* — The Convention agreed upon the mode of ratification even before it had settled upon the amendment process.<sup>148</sup> Here, too, the "idea of a single national body politic [that was]

145. *Id.* at 631 (emphasis added).

146. In "Philadelphia Revisited," Amar notes that the Entrenchment Clause was "no part of the famous 'Connecticut Compromise,'" wrongly implying that it had no connection therewith. Amar, *Philadelphia Revisited*, supra note 2, at 1070 n.97.

147. Anderson, supra note 44, at 160 (emphasis added) (footnote omitted); see also Orfield, supra note 31, at 4 ("Instead of permitting amendment by a single convention, the plan made necessary the participation of the legislatures or conventions of the states."); Tribe, supra note 32, at 1241 ("Article V . . . address[es] how the most fundamental agreements—among the people and their government, . . . may be altered or made. [Article V is] among the provisions that establish the basic framework . . . . [Article V] give[s] to the states a decisive role in ratifying fundamental national commitments . . .").

148. The ratification procedure was approved on August 31, 1787. See *Journal* (Aug. 31, 1787), in 2 *Farrand*, supra note 116, at 471, 472. Furthermore, the general contours of Article VII had been agreed upon even earlier, on July 23, 1787. See James Madison, *Remarks in Debate* (July 23, 1787), in 2 *Farrand*, supra note 116, at 87, 93. Interestingly, Calhoun thought that the constitutional amendment and ratification procedures were substantially identical. See John C. Calhoun, *A Discourse on the Constitution and Government of the United States*, in *A Disquisition on Government and a Discourse on the*

. . . the source of supreme power" is nowhere to be found. Anderson asks:

Why were no voices raised, like Wilson's before the Connecticut compromise, eloquently arguing for the people, not the states, as the foundation of the system? If the prevailing conception had been of one sovereign "people of the United States," as Marshall was later to say, one might expect debate to center on appropriate methods for distinguishing the people's legislative will from their constitutional will. But no such debate took place. Instead, attention centered on the dangers to the separate states and the conditions under which they would agree to be bound by the other states. In this manner the matter of popular sovereignty, whether to implement it or to restrain it, at the national or at the state level, was simply passed over in silence.<sup>149</sup>

Thus, both the processes of amendment and ratification were designed to reflect a constitutional order that was "neither wholly national nor wholly federal."

## B. *State Ratification Debates*

1. *The Dangers of "History Lite."* — I have long been sensitive to the dangers of "History 'Lite'" when law professors write legal "history."<sup>150</sup>

Constitution and Government of the United States 111, 158 (Richard K. Cralle ed., 1968) [hereinafter Calhoun, Discourse] ("nothing is more evident than that the amending power is . . . but a modification of the original creating power, by which the constitution was ordained and established"). But see Anderson, *supra* note 44, at 163 (existence of Articles of Confederation and fears of state legislatures made ratification procedure substantively different from Article V processes).

149. Anderson, *supra* note 44, at 159. Supported by Wilson, Madison was the strongest advocate for a popular role in approving the Constitution, suggesting that ratification should "require the concurrence of a majority of *both* the States and the people." James Madison, Remarks in Debate (Aug. 31, 1787), *in* 2 Farrand, *supra* note 116, at 475, 475 (emphasis added). Madison and Wilson wanted ratification in "the most unexceptionable form, and by the supreme authority of the people themselves." James Madison, Remarks in Debate (June 5, 1787), *in* 1 Farrand, *supra* note 116, at 119, 123; see also James Wilson, Remarks in Debate (June 5, 1787), *in* 1 Farrand, *supra* note 116, at 126, 127 ("the people . . . are the only power that can ratify the proposed system of the new government"). In response to an objection that the Maryland constitution did not permit the proposed ratification procedure, Madison replied,

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.

James Madison, Remarks in Debate (Aug. 31, 1787), *in* 2 Farrand, *supra* note 116, at 475, 476. According to Anderson, however, these references to the "people" "did not denote a single national people as distinguished from the peoples of the separate states, nor did [they] imply any democratic conception of the ongoing political process. The people were used abstractly, much as Locke had used them." Anderson, *supra* note 44, at 166.

150. See, e.g., Martin S. Flaherty, History "Lite" in Modern Constitutionalism, 95 Colum. L. Rev. 523, 524 (1995).

Writing about the relatively bounded doings of the Constitutional Convention is one thing. Writing about the state debates over the ratification of the federal Constitution is an undertaking of quite a different magnitude. Moreover, even professionally trained historians (of which I am *not* one) lack a complete set of materials on the ratification debates.<sup>151</sup>

Examining the available writings to the extent that I (and my seminar class) could, I can find no evidence—none at all—for the proposition that Article V was understood not to be the exclusive method of amendment because of an overriding and widely shared conception of national popular sovereignty. Like the Constitutional Convention, the central focus of the ratification debates concerned the role of the states in the new constitutional order. Article V was proffered as an assurance of the protection afforded by the new Constitution to the peoples of the several states.

2. *The Debates.* — Given the national pride in our Constitution, the struggle over ratification is now generally forgotten. Even though it had the endorsement of George Washington—universally revered (in my judgment, correctly so) and universally expected to lead the new government—the proposed Constitution faced serious ratification obstacles. In four states, New Hampshire, Massachusetts, North Carolina, and New York, the ratifying conventions contained a significant majority of Anti-

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151. Historically, primary reliance has been placed upon the relatively limited range of Elliot's report of the ratification debates in the state conventions. See *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* (Jonathon Elliot ed., 1881) [hereinafter *Elliot's Debates*]. Ten volumes of a comprehensive 23 volume set, entitled *The Documentary History of the Ratification of the Constitution*, have now appeared, which include relevant materials from outside the state convention debates. See *Documentary History*, supra note 97 (Volume I contains some introductory documents; Volumes II to XVI concern the ratification debates in the states; Volumes XVI to XXI will deal with publications of general interest; and Volumes XXII and XXIII are to be on the ratification of the Bill of Rights). The volumes are being published out of numerical sequence. Of central importance here is the fact that one volume on Pennsylvania and three volumes on Virginia are in existence, but the important volumes on ratification in Massachusetts, North Carolina, and New York are still in progress so that other, less complete, sources still must be used. I mention these difficulties because they have a bearing on anyone's work in this area.

The other available materials are selective. Bernard Bailyn's *The Debate on the Constitution* provides a splendid two volume sampling of the writings on the state ratification debates. See Bernard Bailyn, *The Debate on the Constitution* (1993). For background, Philip Kurland and Ralph Lerner's five volume *The Founders' Constitution* collects contemporaneous commentary on the general themes underlying the Constitution, as well as upon each clause of the Constitution. See *The Founders' Constitution* (Philip B. Kurland & Ralph Lerner eds., 1987). Two comprehensive volumes, each with extensive bibliographies, also deal with the ratification process on a state-by-state basis. See *The Constitution and the States: The Role of the Original Thirteen in the Framing and Adoption of the Federal Constitution* (Patrick T. Conley & John P. Kaminski eds., 1988) [hereinafter *The Constitution and The States*]; *Ratifying the Constitution* (Michael A. Gillespie & Michael Lienesch eds., 1989). For a brief account, see Craig R. Smith, *To Form a More Perfect Union* (1993).

Federalist sentiment.<sup>152</sup> A fifth state, Rhode Island, did not even bother to call a convention; the Constitution was submitted directly to—and rejected by—an electorate known to be overwhelmingly hostile.<sup>153</sup> Had the ratification proceedings moved along a different sequence, our Constitution might not have been ratified.<sup>154</sup> (Outright rejection, it should be recalled, was not the only form of opposition. There were numerous calls for a second convention.)<sup>155</sup>

The Constitution's opponents most feared "consolidated" national government.<sup>156</sup> For these critics, "the states [were] primary, . . . they [were] equal, and . . . they possessed the main weight of political power."<sup>157</sup> As Professor Raoul Berger has said, the colonists were "[c]onvinced that the distant British government had oppressed them . . . [and] were little minded to put their trust in a remote federal government."<sup>158</sup>

Responding quickly to Anti-Federalist sentiment, the Federalists deflected the state-centered attack by, in effect, embracing it.<sup>159</sup> Generally, they acknowledged the political and legal priority of the states:<sup>160</sup>

[The] characteristic Federalist position was to deny that the choice lay between confederation and consolidation and to contend that in fact the Constitution provided a new form, partly national and partly federal. This was Publius' argument in *The Federalist*, no. 39. It was Madison's argument in the Virginia ratifying convention. And it was the usual argument of James Wilson himself, who emphasized the strictly limited powers of

152. See, e.g., Ackerman & Katyal, *supra* note 33, at 526–27.

153. See *id.* at 527. In the end, "We the People" of Rhode Island were coerced into joining the Union. See *id.* at 538–39 (an engaging account of steps taken by Congress to force Rhode Island's ratification).

154. See, e.g., Bradford, *Original Intentions*, *supra* note 117, at 39–40 ("bandwagon psychology" was key to ratification). As it was, the Federalists' margin of victory was close: ten votes in Virginia (89–79) and New Hampshire (78–68), and only three in New York (30–27). See Bernstein & Agel, *supra* note 130, at 30.

155. See Scott Lybarger, *The Call for a Second Convention*, in Smith, *supra* note 151, at 17, 18.

156. See, e.g., Herbert J. Storing, *What the Anti-Federalists Were For* 10–11, 15–23 (1981). Robert Rutland states that the Federalists had "undoubtedly underestimated the attachment of citizens to their states." Robert A. Rutland, *The Ordeal of the Constitution: The Antifederalists and the Ratification Struggle of 1787–1788*, at 31 (1983).

157. Storing, *supra* note 156, at 9.

158. Berger, *supra* note 66, at 56.

159. See, e.g., Storing, *supra* note 156, at 11 ("most of the Federalists agreed or professed to agree that consolidation was undesirable"). Had the people believed that states would be reduced to administrative districts, the Constitution would not have been ratified. See *Carter v. Carter Coal Co.*, 298 U.S. 238, 296 (1936).

160. See, e.g., Berger, *supra* note 66, at 68–71 (quoting Sherman saying "[t]he powers vested in the federal government are clearly defined, so that each state will retain its sovereignty in what concerns its own internal government"); Rutland, *supra* note 156, at 26 (paraphrasing Wilson as having said that "[w]hat the framers left unmentioned was done intentionally, to leave unmolested wide areas within the jurisdiction of the state governments where they belonged"); Storing, *supra* note 156, at 12.

the general government and the essential part to be played in it by the states.<sup>161</sup>

Storing elsewhere observes that "it is striking how widely the Federalists adopted the view of the Union as a coming together of sovereign states."<sup>162</sup> The "*nationalists* who met at Philadelphia became *federalists* as they sought to translate their vision of national power and prosperity into a politically acceptable constitutional design."<sup>163</sup>

In *The Federalist*, both Madison and Hamilton vigorously espoused the views of the Convention's moderate nationalists (after all, this Constitution was considerably better than the Articles of Confederation). *Federalist No. 39* was, of course, Madison's powerful statement of the continued importance of the states in the new constitutional order.<sup>164</sup> In *Federalist No. 46*, Madison emphasized the significant protections that the states would possess in the new constitutional order against an overreaching national government.<sup>165</sup> Hamilton expressed similar views. In *Federalist No. 32*, Hamilton categorically denied that the new constitutional order would result in "consolidation": "[A]s the plan of the Convention aims only at a partial union or consolidation, the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, *exclusively* delegated to the United States."<sup>166</sup> Hamilton's discussion of the amendment process in *Federalist No. 85* said that the states would be protected by Article V's supermajority requirements against "the encroachments of the national authority."<sup>167</sup>

At the same time, in the ratification debates, Federalists also freely invoked the rhetoric of popular sovereignty, particularly when responding to charges that the method of ratification of the proposed constitution was "illegal."<sup>168</sup> In "Philadelphia Revisited," Amar argues that the

161. Storing, *supra* note 156, at 12.

162. Herbert J. Storing, *The "Other" Federalist Papers: A Preliminary Sketch*, 6 *Pol. Sci. Rev.* 215, 222 (1976).

163. Cathy D. Matson & Peter S. Onuf, *A Union of Interests* 101 (1990).

164. See *The Federalist No. 39* (James Madison). Given all the evidence discussed in the text, Amar's efforts to paint this essay as "idiosyncratic" pass my understanding. See, e.g., Amar, *Consent of the Governed*, *supra* note 2, at 507; Amar, *Philadelphia Revisited*, *supra* note 2, at 1063-64.

165. See *The Federalist No. 46*, at 297-99 (James Madison) (Clinton Rossiter ed., 1961) (any "unwarrantable measure of the federal government," if "unpopular in particular States," would be met with opposition both "powerful and at hand"). Indeed, in *Federalist No. 51*, Madison went so far as to extol his former nemesis, the state legislatures, which he now portrayed as checking the excesses of the national government. See *The Federalist No. 51*, at 323-24 (James Madison) (Clinton Rossiter ed., 1961) (the state and federal governments "will control each other, at the same time that each will be controlled by itself").

166. *The Federalist No. 32*, at 198 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

167. *The Federalist No. 85*, at 26 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

168. See, e.g., *The Federalist No. 22*, at 152 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (offering, as a critique of the Articles of Confederation, the fact that it "never had a ratification by the PEOPLE"); *The Federalist No. 40*, at 253 (James Madison) (Clinton Rossiter ed., 1961) (noting that the convention "must have borne in mind that as

principle of majority rule convinced the people that adoption of the new Constitution in a manner other than that prescribed by the Articles of Confederation or, more importantly, by their own state constitutions, was nonetheless legal.<sup>169</sup> I believe that Amar here conflates questions of legality and legitimacy.<sup>170</sup> The ratification debates reflected a widespread belief that, whether “illegal” or not, ratification of the new Constitution would establish a legitimate *national* governmental order,<sup>171</sup> and thereby establish a new basis for measuring legality.

3. *State by State.* — On a state by state basis, there is a wide discrepancy in the amount of available material on the ratification. For example, in three states (Delaware, New Jersey, and Georgia) almost no records of the ratifying convention debates exist;<sup>172</sup> in three others (Maryland, New Hampshire, and Connecticut), the records are quite incomplete.<sup>173</sup>

We proceed as best we can. Delaware ratified quickly and unanimously.<sup>174</sup> Pennsylvania, the first large state to ratify, was the scene of the first significant debate;<sup>175</sup> James Wilson was clearly the dominant figure in those proceedings.<sup>176</sup> Despite Amar’s heavy reliance on Wilson for a

the plan to be framed and proposed was to be submitted to *the people themselves*, the disapprobation of this supreme authority would destroy it forever . . .”); see also The Federalist No. 43, at 279–80 (James Madison) (Clinton Rossiter ed., 1961) (claiming that the convention could supersede the Articles of Confederation because “in many States [the Articles] had received no higher sanction than a mere legislative ratification”).

169. See Amar, *Philadelphia Revisited*, supra note 2, at 1050, 1054. On the latter point, see Ackerman and Katyal, supra note 33, at 484–87 (distinguishing two types of state constitutions: “those that contemplated the use of conventions in the process of state revision, and those that did not”).

170. See Richard S. Kay, *The Illegality of the Constitution*, 4 Const. Commentary 57, 60 (1987) (discussing this distinction); see also Ackerman and Katyal, supra note 33, at 539–59 (arguing that the Federalists were not legalists, but revolutionaries). David Dow, by contrast, argues that the question of the Constitution’s “legality” is an empty one. See Dow, supra note 38, at 21. Frederick Schauer describes the debate as “curious.” See Frederick Schauer, *Amending the Presuppositions of a Constitution*, in *Responding to Imperfection*, supra note 31, at 141, 154 n.20.

171. See Storing, supra note 156, at 13–14; see also Tribe, supra note 32, at 1289–92 (arguing that the legality or illegality of the Constitution does determine its legitimacy).

172. See 9 Documentary History, supra note 97, at 7. The proceedings of the Delaware convention have been lost, see *id.* at 105; those of the New Jersey convention consist primarily of minutes, see *id.* at 177–91; and those of the Georgia convention “consist of little more than the bare proceedings for each day and a list of the delegates . . . .” *Id.* at 269.

173. Only four speeches survive from the Connecticut ratification debate, we have one from the debate in New Hampshire, and the only record from Maryland is a summary report. See 2 Elliot’s Debates, supra note 151, at 185–204, 547–56. As noted above, Rhode Island did not even call a ratifying convention. See supra text accompanying note 153.

174. See Bernstein & Agel, supra note 130, at 23.

175. See Paul J. Scudiere, *In Order to Form a More Perfect Union: The United States, 1774–1791*, in *The Constitution and the States*, supra note 151, at 3, 15.

176. See Paul Doutrich, *From Revolution to Constitution: Pennsylvania’s Path to Federalism, 1774–1791*, in *The Constitution and the States*, supra note 151, at 37, 45.



"We the Majority" principle,<sup>177</sup> Wilson provides him with, at best, weak support. Wilson's famous State House Yard Speech of October 6th, given before the state ratification proceedings began, received extensive national circulation as the classic exposition of the Federalist position.<sup>178</sup> Wilson's only reference to Article V in that speech misquoted it, but quite plainly suggests that it was the exclusive mode for amending the national Constitution.<sup>179</sup> It is true that during the ratifying convention, Wilson referred to the supreme power of the people—"a power paramount to every constitution."<sup>180</sup> He seems to have endorsed the concept of a pre-existing national "We the People" who had brought the Constitution into being,<sup>181</sup> and on several occasions he expressed the view that the people have the power to alter, amend, or abolish the Constitution at whatever time and in whatever manner they wish.<sup>182</sup> On these occasions he did not mention Article V, allowing his reader or audience to infer that Article V sufficiently embodies this power of the people so far as a federal system is concerned.<sup>183</sup> Indeed, at the Pennsylvania ratifying convention,

177. See *supra* notes 87–88 and accompanying text.

178. See Smith, *supra* note 151, at 37.

179. See James Wilson's Speech in the State House Yard, Philadelphia (Oct. 6, 1787), *in* 2 Documentary History, *supra* note 97, at 167, 172 ("If there are errors . . . the seeds of reformation are sown in the work itself, and the concurrence of two-thirds of the Congress may at any time introduce alterations and amendments.").

180. Version of Wilson's Speech by Alexander J. Dallas (Nov. 24, 1787), *in* 2 Documentary History, *supra* note 97, at 340, 349.

181. See James Wilson, Remarks at the Pennsylvania Convention (Dec. 11, 1787), *in* 2 Documentary History, *supra* note 97, at 550, 555 ("This . . . is not a government founded upon compact; it is founded upon the power of the people."); James Wilson, Remarks at the Pennsylvania Convention (Nov. 28, 1787), *in* 2 Documentary History, *supra* note 97, at 382, 383 ("Those who ordain and establish have the power, if they think proper, to repeal and annul."); Version of Wilson's Speech by Thomas Lloyd (Nov. 24, 1787), *in* 2 Documentary History, *supra* note 97, at 350, 362 ("[T]he people may change the constitutions whenever and however they please."); see also Moore, *supra* note 98, at 348–52 (contrasting differences and similarities between Madison and Wilson).

182. See, e.g., James Wilson, Of the Study of the Law in the United States, *in* I The Works of James Wilson 69, 77 (Robert G. McCloskey ed., 1967) (the people "retain the right of abolishing, altering, or amending their constitution, at whatever time, and in whatever manner, they shall deem it expedient"). The force of "whatever time"/"whatever manner" in this passage, it should be noted, comes from its contrast to Wilson's statement of Blackstone's view, according to which this right of the people is a "political chimera," and thus revolutionary constitutional change is only legitimate when there is a special "conjunction of circumstances." *Id.* at 77–78. In this respect, constitutional change through Article V would satisfy the principle Wilson describes here, since such change can legitimately occur even without Blackstone's conjunction of circumstances.

183. It is true, however, that Wilson himself may have understood his statements to imply more than what his audience understood. His biographer, Geoffrey Seed, notes that "[o]n more than one . . . occasion Wilson created the suspicion that there was more behind a proposal he was advancing than appeared on the surface. He had a very astute mind, and was aloof and perhaps even secretive by nature . . ." Seed, *supra* note 88, at 28. For a negative assessment of Wilson's character, see Bradford, *Founding Fathers*, *supra* note 110, at 87–88 (describing Wilson as a "philosopher of democracy who attacked slavery and then bought slaves . . . unable to act the part of kinsman to members of his own family

Thomas McKean, the future chief justice of the Pennsylvania Supreme Court, understood Wilson to mean that the power of the people was satisfied by Article V.<sup>184</sup> After the Constitution was adopted, Wilson referred on one occasion to a right of the people to effect constitutional change by simple majority vote, but he did not comment on the relation of this right to Article V or make any direct mention of Article V at all.<sup>185</sup> When he does mention Article V, he never adds that the people can also always amend by simple majority vote.<sup>186</sup> Moreover, throughout the state convention debates, Wilson was at pains to rebut claims that the new Constitution would denigrate the states.<sup>187</sup>

After Pennsylvania's ratification, three small states, New Jersey, Georgia, and Connecticut, ratified in quick succession; in New Jersey and Georgia, the approval was unanimous.<sup>188</sup> In New Hampshire, outnumbered Federalists successfully postponed their convention, hoping to benefit if matters went well in Massachusetts.<sup>189</sup> There, in another convention numerically dominated by Anti-Federalists, a hard contest took place.<sup>190</sup> Fears of "consolidation" and destruction of state independence

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left behind in his native Scotland or to pay his debts to the relatives and friends who launched him on his American career . . . [and never] so interested in the will of the people as in the sponsorship of the 'better sort' in the hopes of making money").

184. In the convention, on November 28, Thomas McKean said: "If, sir, the people should at any time desire to alter and abolish their government, I agree with my honorable colleague [James Wilson] that it is in their power to do so, and I am happy to observe that the Constitution before us provides a regular mode for that event." Thomas McKean, *Remarks at the Pennsylvania Convention* (Nov. 28, 1787), in 2 *Documentary History*, supra note 97, at 382, 387. Note that McKean implies that the Article V power is a power of the people. This undercuts Amar's claim that contemporary understanding distinguished sharply between the people's right to change the Constitution and government-controlled change via Article V. See Amar, *Consent of the Governed*, supra note 2, at 459-60.

185. See James Wilson, *Of Government*, in 1 *The Works of James Wilson*, supra note 182, at 284, 304 ("[a] majority of the society is sufficient" to change the Constitution). Wilson goes on to say, however, that if the majority infringes "the act of original association," or violates "the intention of those who united under it," then the minority is "not obliged to submit to the new government." *Id.*

186. In the Pennsylvania ratification debates, Wilson stated that the state constitution "cannot be amended by any other mode than that which it directs." 2 *Elliot's Debates*, supra note 151, at 457 (statement of James Wilson).

187. Indeed, even in the Constitutional Convention, Wilson stated: "I dont [sic] agree that the Genl. Govt. will swallow up the states . . . . I think they must be preserved they must be continued . . . our Country is too extensive for a single Govt." James Wilson, *Remarks in Debate* (June 19, 1787), in 1 *Farrand*, supra note 116, at 329, 330.

188. See Scudiere, supra note 175, at 15-16.

189. See Jere Daniell, *New Hampshire: Ideology and Hardball*, in *The Constitution and the States*, supra note 151, at 181, 181-82.

190. The *Documentary History* volume for Massachusetts is not yet in print. The usual reference is to Volume 2 of *Elliot's Debates*, supra note 151. More comprehensive, however, is an 1856 volume, which includes *Elliot's Debates*, *Judge Parson's Minutes*, and various songs, letters, and editorials that reflect popular feeling. See *Massachusetts Constitutional Convention of 1788, Debates & Proceedings* (Branford K. Pierce & Charles Hale eds., 1856). Finally, mention should be made of Samuel B. Harding, *The Contest over the Ratification of the Federal Constitution in the State of Massachusetts* (Da Capo

were voiced repeatedly. "[N]o argument . . . has made a deeper impression than this, that [the Constitution] will produce a consolidation of the states," stated Fisher Ames.<sup>191</sup> The Federalists denied these charges.<sup>192</sup> Ames, for example, responded that "[t]he state governments are essential parts of the system . . . . [T]he *senators* represent the *sovereignty of the states*."<sup>193</sup> Massachusetts Federalists finally persuaded the influential but vacillating Anti-Federalist Governor Hancock to support ratification.<sup>194</sup> To deflect calls for a second convention, Federalists agreed to accompany ratification with a list of suggested amendments,<sup>195</sup> and "enjoin[ed] their representatives" to press for their consideration "agreeably to the 5th article of said Constitution."<sup>196</sup> That pattern took hold. After Massachusetts, every ratifying state submitted a list of proposed amendments, each of which, incidentally, included some form of what is now the Tenth Amendment.<sup>197</sup>

In Massachusetts, New York, North Carolina, and Virginia, the Constitution was, at least nominally, considered clause by clause. When we examine those debates, we do not find the slightest suggestion that state equality in the Senate could be obliterated by "We the People," let alone by "We the Majority."<sup>198</sup> In North Carolina, for example, James

Press 1970) (1896), which begins with the debates in the town meetings organized to select delegates. Harding is clearly hostile to the interests of the "lower" classes who opposed ratification. See, e.g., *id.* at 7 ("A more pernicious result of [popular suffrage] was the development and confirmation of the belief, among the masses, that in the framing of a constitution no higher order of intellect is necessary than in the laying out of a country road . . .").

191. 2 Elliot's Debates, *supra* note 151, at 45 (statement of Fisher Ames).

192. See, e.g., *id.* at 37-38 (statement of Judge Dana) ("[T]his was a charge brought against [the constitution] without any foundation in truth.").

193. *Id.* at 46 (statement of Fisher Ames).

194. Popular but indecisive Hancock was, at least in part, induced to act by suggestions that he might become Vice President, indeed maybe even President, if Washington did not run. See Bradford, *Original Intentions*, *supra* note 117, at 51.

195. *Id.*

196. 2 Elliot's Debates, *supra* note 151, at 178.

197. See Smith, *supra* note 151, at 128. "[T]he reservation made explicit by the Tenth Amendment, as Willard Hurst observed, 'represented a political bargain, key terms of which assumed the continuing vitality of the states as prime law makers in most affairs.'" Berger, *supra* note 66, at 87 (quoting Willard Hurst, *The Legitimacy of the Business Corporation in the Law of the United States* 40 (1970)). The expansive conception of the implied powers of the national government in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), is completely irreconcilable with the terms of these proposals. Perhaps *McCulloch's* conception reflects the views of the Federalist-dominated first Congress. See generally *Creating the Bill of Rights* (Helen E. Veit et al. eds., 1991) (documentary record of the first Congress, including extensive materials on the Tenth Amendment).

198. See, e.g., *Federal Farmer*, *Letters to the Republican*, Letter IV (Oct. 28, 1787), *in* 14 *Documentary History*, *supra* note 97, at 42, 47-48 (decrying difficulty of amendments because "no measures can be taken . . . unless two-thirds of the several states shall agree"); Letter from William Grayson to William Short (Nov. 10, 1787), *in* 14 *Documentary History*, *supra* note 97, at 81, 82 (noting that "the little States should be armed with a repulsive quality to preserve their own existence").

Iredell, a future Justice of the Supreme Court, clearly assumed that Article V was the only mode of amendment, and he added that “[i]n order that no consolidation should take place, it is provided that no state shall, by any amendment or alteration, be ever deprived of an equal suffrage in the senate without its own consent.”<sup>199</sup>

More specifically, in the discussions of Article V, no suggestion exists—except perhaps one oblique comment in Virginia by Edmund Pendleton—that Article V could be avoided.<sup>200</sup> This is true both of those who praised the Article and those who criticized it. In Massachusetts, “[a]fter the 5th article was read at the table”:

Mr. KING observed, that he believed gentlemen had not, in their objections to the Constitution, recollected that this article was a part of it; for many of the arguments of gentlemen were founded on the idea of future amendments being impracticable. The honorable gentleman observed on the superior excellence of the proposed Constitution in this particular, and called upon gentlemen 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.

Dr. JARVIS. Mr. President, I cannot suffer the present article to be passed, without rising to express my entire and perfect approbation of it.<sup>201</sup>

At the close of the Massachusetts convention, a delegate remarked that the proposed constitution “is not, like the laws of the Medes and Persians, immutable. The fifth article provides for amendments.”<sup>202</sup>

199. 4 Elliot’s Debates, *supra* note 151, at 177 (statement of James Iredell).

200. Pendleton was not a delegate to the Constitutional Convention, but he was president of the Virginia ratifying convention. In the course of a speech responding to the fear that necessary amendments might not be introduced, he asked:

What then? We will resist, did my friend say? conveying an idea of force. Who shall dare to resist the people? No, we will assemble in Convention; wholly recall our delegated powers, or reform them so as to prevent such abuse; and punish those servants who have perverted powers, designed for our happiness, to their own emolument.

3 Elliot’s Debates, *supra* note 151, at 37 (statement of Edmund Pendleton); see also Vile, *Legally Amending*, *supra* note 38, at 286 (“[W]hatever point Pendleton was making, it is unlikely that he was . . . suggesting that a mere majority of the people would be able to alter the Constitution”). At most, Pendleton seems to have assumed that there would be another convention and another ratification process. This is a far cry from national popular sovereignty, and a still farther cry from “We the Majority.” To my eye, moreover, Pendleton is talking about the right of Virginia to secede through the very process (i.e., a convention) by which it joined the union.

201. 2 Elliot’s Debates, *supra* note 151, at 116 (statements of Rufus King and Charles Jarvis); see also *id.* at 83–84 (statement of James Bowdoin) (arguing that the Constitution, if imperfect, can be amended in one of the modes prescribed); *id.* at 124–25 (statement of Samuel Adams) (favoring amendments and commenting on the difficulty of achieving them under Article V).

202. 2 Elliot’s Debates, *supra* note 151, at 169 (remarks of Samuel Stillman).

Additionally, while many opponents deplored the practical impossibility of amendments, no voice was heard suggesting the availability of amendment by "We the Majority." For example, in a lengthy discussion in the Virginia convention, Patrick Henry decried the fact that a "bare majority" in "four small States" containing "one-twentieth part of the American people" might "prevent the removal of the most grievous inconveniences and oppression, by refusing to accede to amendments."<sup>203</sup> Henry unfavorably compared Article V with the Virginia provision for amendment by a majority of the people:

This, Sir, is the language of democracy; that a majority of the community have a right to alter their Government when found to be oppressive: But how different is the genius of your new Constitution from this? How different from the sentiments of freemen, that a contemptible minority can prevent the good of the majority? If then Gentlemen standing on this ground, are come to that point, that they are willing to bind themselves and their posterity to be oppressed, I am amazed and inexpressibly astonished.<sup>204</sup>

Henry acknowledged that a majority could not alter the national Constitution,<sup>205</sup> and Madison so understood him.<sup>206</sup>

In North Carolina, a similar understanding pervaded the discussion. During the convention, William Davie, a Federalist, stated:

It must be granted that there is no way of obtaining amendments but the mode prescribed in the Constitution; two thirds of the legislatures of the states *in the confederacy* may require Congress to call a convention to propose amendments, or the same proportion of both houses may propose them. . . .

A majority is the rule of republican decisions. It was the voice of a majority of the people of America that gave that system [the Articles of Confederation] validity, and the same authority can and will annul it at any time. Every man of common sense knows that the political power is *political right*.<sup>207</sup>

203. Patrick Henry, Remarks at the Virginia Convention (June 5, 1788), *in* 9 Documentary History, *supra* note 97, at 943, 956.

204. *Id.*; see also Patrick Henry, Remarks at the Virginia Convention (June 24, 1788), *in* 10 Documentary History, *supra* note 97, at 1473, 1480–81 (critiquing unanimity provisions); cf. James Madison, Remarks at the Virginia Convention (June 6, 1788), *in* 9 Documentary History, *supra* note 97, at 970, 991 (critiquing Article XIII of the Articles of Confederation as, *inter alia*, "perniciously improvident and injudicious" in its requirement of unanimity).

205. See Patrick Henry, Remarks at the Virginia Convention (June 24, 1788), *in* 10 Documentary History, *supra* note 97, at 1473, 1480–81; Patrick Henry, Remarks at the Virginia Convention (June 5, 1788), *in* 9 Documentary History, *supra* note 97, at 943, 955–60.

206. See James Madison, Remarks at the Virginia Convention (June 6, 1788), *in* 9 Documentary History, *supra* note 97, at 970, 991 ("He [Henry] complains of this Constitution, because it requires the consent of at least three-fourths of the States to introduce amendments . . .").

207. 4 Elliot's Debates, *supra* note 151, at 236–38 (statement of William Davie).

C. *Amar, History, and Federalism*

Amar cannot escape this history by pointing to “We the People” or “We the Majority” rhetoric used in contexts other than Article V (such as amendments to state constitutions),<sup>208</sup> by reliance upon the Blackstonian concept of the impossibility of an *imperium in imperio*,<sup>209</sup> or by reliance on the inalienability of sovereignty.<sup>210</sup> On the most elementary level, Amar’s “First Theorem” ignores the fact that each citizen holds, in various strengths, ideas that are clearly in tension with one another; indeed, pushed hard, these ideas may be logically contradictory.<sup>211</sup> (Many practicing Catholics, to give an obvious contemporary example, believe contraception and even abortion to be proper.) This condition certainly existed in the intellectually charged founding era. Ideas such as the desirability of popular sovereignty and the wish for a government “neither wholly *national* nor wholly *federal*”<sup>212</sup> pulled in different directions. Moreover, the important concepts (e.g., republicanism, states’ rights, and so on) were “contested,”<sup>213</sup> largely because they were employed as instruments of battle in a struggle over the shape of the emerging polity. Professor Kramnick has observed,

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208. See Amar, *Philadelphia Revisited*, supra note 2, at 1050–51.

209. See *id.* at 1063; Amar, *Sovereignty*, supra note 48, at 1430–35, 1442. It is true that Blackstone’s work was well known in America. See William D. Bader, *Some Thoughts on Blackstone, Precedent, and Originalism*, 19 Vt. L. Rev. 5, 6 (1994). Blackstone’s influence is sharply criticized in H. Jefferson Powell, *The Moral Tradition of American Constitutionalism: A Theological Interpretation* 82–86 (1993). Powell points out that “American lawyers tempered their appreciation of Blackstone’s pedagogical value with an active recognition and rejection of his politics.” *Id.* at 82. Amar ignores the founding era departures from Blackstone’s concept of sovereignty. On the Founders’ rejection of Blackstone’s notion that sovereignty is vested in the legislature, see Wood, supra note 103, at 530.

210. See Amar, *Philadelphia Revisited*, supra note 2, at 1072–74. Amar’s argument on inalienability seems to be based on political theory, and not on the common understanding in 1789. If Amar uses inalienability to mean majority rule, then the Constitution’s numerous provisions requiring supermajorities would seem to undermine the notion that sovereignty is inalienable. See Dow, supra note 38, at 52–53. More importantly, as noted above, Amar never explains how the people of Delaware, or any other state, alienated their prior right to independence from the union once they ratified the Constitution. See supra text accompanying notes 80–82.

211. David Dow effectively criticizes Amar along these lines. See Dow, supra note 38, at 6–10, 26–29, particularly at 26 n.127 (analyzing, and rejecting explicitly, Amar’s inalienability analysis).

212. *The Federalist* No. 39, at 246 (James Madison) (Clinton Rossiter ed., 1961).

213. “[D]uring the eighteenth century,” these terms were “in a state of flux.” McDonald, supra note 48, at 4. For example, the meaning of “republicanism” was contested during the founding era and that meaning has continued to shift until the present day, as can be seen in current academic writings stressing civic republicanism. See Daniel T. Rodgers, *Republicanism: The Career of a Concept*, 79 J. Am. Hist. 11 (1992); Suzanna Sherry, *Responsible Republicanism: Educating for Citizenship*, 62 U. Chi. L. Rev. 131, 135 (1995). Additionally, Bradford’s *Original Intentions* argues that the differences among the regions and individual states should cause us to recognize the idea of *multiple* original intentions and original understandings. See Bradford, supra note 117, at xvi.

Federalists and Antifederalists, in fact, tapped several languages of politics . . . . None dominated the field, and the use of one was compatible with the use of another by the same writer or speaker. . . . There was a profusion and confusion of political tongues among the founders. They lived easily with that clatter; it is we, two hundred and more years later, who chafe at their inconsistency.<sup>214</sup>

For me, however, Amar's central mistake runs much deeper than a failure to recognize the intellectual turbulence of 1789. Amar does not address the structural role of Article V in reinforcing the defining characteristic of the 1789 constitutional order—namely, federalism. His claim thus directly contradicts what can be said with confidence about the founding era. The Framers “preserved the states as separate sources of authority and organs of administration—a point on which they hardly had a choice.”<sup>215</sup>

In two articles totaling 114 pages, Amar's response to the federalism issue is limited to two pages in “Consent of the Governed,” and perhaps a few additional pages that could be said to deal with the topic indirectly.<sup>216</sup> In dealing with the federalism objection, Amar's initial confidence seems to have deserted him.<sup>217</sup> Retreating from his “confident . . . conjecture” of a clear original understanding, Amar now says only that “we” are given a “choice” of three paths: Jefferson Davis's, Madison's, or Wilson's.<sup>218</sup> Focusing on the thoughts of a few individuals as though they fully represent an era seems, to me, to be a dubious historical approach.<sup>219</sup> Be that as it may, even by Amar's own account, his First Theorem was not accepted by the leading thinkers of the day. Amar acknowledges that a common understanding is lacking among his three chosen representatives.<sup>220</sup> Madison stands firmly against him.<sup>221</sup> If Amar views Davis's thought, which does not support his Theorem, as a continuance

214. Isaac Kramnick, *Republicanism and Bourgeois Radicalism: Political Ideology in Late Eighteenth-Century England and America* 261 (1991); see also William M. Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 *Colum. L. Rev.* 782, 822–24 (1995). Treanor notes, in the context of liberalism and republicanism, that modern writers reject “the assumption of a dominant ideological paradigm.” *Id.* at 823.

215. Wechsler, *supra* note 104, at 543.

216. See Amar, *Consent of the Governed*, *supra* note 2, at 506–07. Amar concedes that he “gloss[es] over some important federalism issues,” but notes that he has “addressed [them] in considerable detail elsewhere.” *Id.* at 488 n.15. See generally Amar, *Sovereignty*, *supra* note 48.

217. See *supra* Part II (laying out Amar's argument).

218. See Amar, *Consent of the Governed*, *supra* note 2, at 506–07.

219. For a similar viewpoint, see Bradford, *Original Intentions*, *supra* note 117, at 88 (confusion and misunderstanding have been caused by “the special status to which a selected group of early American leaders have been elevated as the quintessence of what the Founders had in mind.”).

220. See Amar, *Consent of the Governed*, *supra* note 2, at 506–07.

221. See *supra* text accompanying notes 127–147.

of the original understanding in the southern states, the number of Founders who did not accept the First Theorem is very considerable indeed.<sup>222</sup>

Even if Wilson might be read to support Amar's position, he did not represent the thinking of significant numbers of his contemporaries. While Wilson's legal thought was sophisticated and significant,<sup>223</sup> Wilson did not exemplify the thinking of any party or region.<sup>224</sup> Wilson did endorse the view that a simple majority could change the frame of government but did so only twice,<sup>225</sup> and not in the context of Article V. When Wilson did refer to Article V, he seems to have assumed that it prescribed the exclusive mode for constitutional change.<sup>226</sup> Perhaps Wilson did believe in an amendment power by a national "We the Majority." However, if Wilson held such a belief, he did not express it.

#### D. *Subsequent History*

Even if we expand the scope of our inquiry beyond 1787, it is clear that, throughout the nineteenth century, Article V was viewed as the exclusive means of amending the Constitution. Moreover, even within the states, where methods of constitutional change have been more flexible, there is no indication that it has ever been possible to disregard established mechanisms, and to amend state constitutional documents by a bare majority vote of the electorate.

1. *In General.* — The first use of Article V occurred, of course, with the adoption of the Bill of Rights. As is well known, Madison (responding to Anti-Federalist sentiment) was the driving force in securing passage of the amendments.<sup>227</sup> His proposed amendments included a "declaration" that was to be "prefixed to the constitution":

That all power is originally vested in, and consequently derived from the people.

That government is instituted, and ought to be exercised for the benefit of the people; which consists in the enjoyment of

222. Amar finds Davis's belief that the people of each state retained their sovereignty implausible. See Amar, *Consent of the Governed*, supra note 2, at 507.

223. See Robert G. McCloskey, Introduction, in 1 *The Works of James Wilson*, supra note 182, 1, 1–7 (discussing Wilson's contributions to modern legal thought).

224. See id. at 2–3.

225. It is only by implication that these statements can be understood as expressions of the view that the people have the right to amend by simple majority. See James Wilson, Remarks at the Pennsylvania Convention (Nov. 24, 1787), in 2 *Documentary History*, supra note 97, at 350, 362 ("[T]he people may change the constitution [ ] whenever and however they please."); James Wilson, Remarks at the Pennsylvania Convention (Nov. 24, 1787), in 2 *Documentary History*, supra note 97, at 382, 383 ("Those who ordain and establish have the power, if they think proper, to repeal and annul."). See generally Moore, supra note 98, at 348–51 (contrasting differences and similarities between Madison and Wilson).

226. Indeed, in the state convention debates Wilson stated that even the state constitution "cannot be amended by any other mode than that which it directs." 2 *Elliot's Debates*, supra note 151, at 457 (statement of James Wilson).

227. See Smith, supra note 151, at 128–29.



life and liberty, with the right of acquiring and using property, and generally of pursuing and obtaining happiness and safety.

That the people have an indubitable, unalienable, and in-defeasible right to reform or change their government, whenever it be found adverse or inadequate to the purposes of its institution.<sup>228</sup>

The much condensed preamble which was presented to the House when debates began on August 13, 1789,<sup>229</sup> was ultimately rejected without any recorded discussion on August 19.<sup>230</sup> Madison's last provision had already disappeared, yet Amar uses this provision as the basis of his argument.<sup>231</sup> During the debates on the condensed preamble, no suggestion was made that, if adopted, this declaration would have varied the amending process specified in Article V.<sup>232</sup> To the contrary, the assumption seems to have been that Article V sufficiently embodied the people's right to alter their national government. In fact, none of the 200 amendments proposed by the ratifying states concerned Article V.<sup>233</sup> Indeed, when recalcitrant Rhode Island finally ratified in 1791, it actually proposed to restrict further the amendment process by requiring the approval of eleven states.<sup>234</sup>

The nineteenth-century discussion of the amending process was a rich and varied one.<sup>235</sup> One of the most interesting and significant think-

228. Madison Resolution (June 8, 1789), in *Creating The Bill of Rights*, supra note 197, at 11, 11-12.

229. See Elias Boudinet, *Remarks at the House of Representatives Debate (Aug. 13, 1789)*, in 2 *The Bill of Rights: A Documentary History 1066, 1066* (Bernard Schwartz ed., 1971).

230. See *House of Representatives Debate (Aug. 19, 1789)*, in 2 *The Bill of Rights*, supra note 229, at 1125, 1126.

231. See Amar, *Consent of the Governed*, supra note 2, at 491.

232. See *House of Representatives Debate (Aug. 14, 1789)*, in 2 *The Bill of Rights*, supra note 229, at 1076, 1076-77. Moreover in the very speech in which Madison introduced the proposed amendments, he claimed that "the greatest danger lies . . . in the body of the people, operating by the majority against the minority." James Madison, *Remarks at the House of Representatives (June 8, 1789)*, in 2 *The Bill of Rights: A Documentary History*, supra note 229, at 1029, 1029.

233. See *Amendments Proposed by the States*, in *Creating the Bill of Rights*, supra note 197, at 14-28.

234. See Orfield, supra note 31, at 185; Patrick T. Conley, *Rhode Island: First in War, Last in Peace*, in *The Constitution and the States*, supra note 151, at 269, 282.

235. Amar's discussion of the subsequent history of the amendment process is largely confined to a single paragraph. He states that:

Although the ideas presented above may strike modern readers as quixotic, late eighteenth and nineteenth century lawyers would, I believe, have found my account more comprehensible. See, for example, James Madison, *Vices of the Political System of the United States*, in Meyers, *Mind of the Founder* at 82, 85 . . . ("According to Republican Theory, Right and power [are] both vested in the majority"); Federalist 39 (Madison), in *Federalist Papers* at 240, 246 . . . ("Were [the Constitution] 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

ers on this topic was John Calhoun, who is actually cited by Professor Amar in support of his "We the Majority" theory.<sup>236</sup> However, the letter cited concerns the rights of "We the People" of South Carolina,<sup>237</sup> not the right of "We the Majority" of the United States to bypass Article V and impose new restrictions on "We the People" of South Carolina.<sup>238</sup> More to the point, Calhoun's "Discourse" argued strongly that Article V's burdensome processes constituted the *only* way to amend the Constitution; he feared that amendments by a bare majority "would expose the constitution to hasty, inconsiderate, and even sinister amendments."<sup>239</sup> Calhoun argued that once any state had nullified federal legislation as unconstitutional, the national government *must* invoke Article V to acquire the necessary national authority.<sup>240</sup> Pointing to the state-centered and counter-majoritarian characteristics of Article V, Calhoun felt secure that no such "increase" in federal (as against state) power would result by way of amendment.<sup>241</sup> If an increase in federal power did occur, however, that was valid, and secession was the only remaining route for any disaffected state.<sup>242</sup>

Moreover, there were many other diverse thinkers, such as St. George Tucker and Joseph Story, who quite clearly viewed Article V as the exclusive mode for amending the constitution.<sup>243</sup> In his First Inaugural Address, Lincoln summarized the American tradition aptly:

This country, with its institutions, belongs to the people who inhabit it. Whenever they shall grow weary of the existing Government, they can exercise their *constitutional* right of amending it or their *revolutionary* right to dismember or overthrow it. . . .

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established government.") . . . ; John C. Calhoun, Letter to General Hamilton on the subject of State Interposition, in 6 *Works of John C. Calhoun* 144, 146 (D. Appleton, 1855) (similar); 6 Cong Deb 269 (1830) (remarks of Sen. Edward Livingston) . . . .

Amar, Philadelphia Revisited, *supra* note 2, at 1102–03 n.209. Thus, Amar's references are to Madison (especially *Federalist No. 39*), Livingston, and Calhoun. None supports him. The citation of Madison is, to say the least, puzzling. After all, Amar acknowledges throughout that *Federalist No. 39* (indeed, the entire *Federalist*) contradicts his views on the meaning of Article V. See *id.* at 1063–64.

236. See *id.* at 1102–03 n.209.

237. See Letter from John C. Calhoun to General James Hamilton, Jr. (Aug. 28, 1832), in 6 *The Works of John C. Calhoun* 144, 144 (Richard K. Crallé ed., Russell & Russell 1968) (1851–1856) (addressing the right of a state to defend its reserved powers against encroachment by the federal government).

238. In fact, after describing the supposition that there is a collective American people from which the Constitution derives its authority, Calhoun says, "[b]ut, fortunately, th[at] supposition is entirely devoid of truth." *Id.* at 147.

239. Calhoun, *Discourse*, *supra* note 148, at 291.

240. See *id.* at 296–302.

241. See *id.* at 303.

242. See *id.* at 301–02.

243. See Tucker, *supra* note 96, app. note D, at 371 ("Lastly, the fifth article provides the mode by which future amendments to the constitution may be proposed, discussed, and carried into effect, without hazarding a dissolution of the confederacy, or suspending

While I make no recommendation of amendments, I fully recognize the rightful authority of the people over the whole subject, to be exercised in either of the modes prescribed in the instrument itself . . . .<sup>244</sup>

It thus appears that Lincoln did not imagine that the Constitution could be amended other than through the process described in Article V. Lincoln's way of thinking has continued to the present day.<sup>245</sup> As Professor Orfield has said, "[t]he principle that the people are sovereign does not mean that they *can change* the constitution except as provided therein."<sup>246</sup> There have been some dissenters from this view, but in the large majority of instances their appeal has been to norms outside the Constitution.<sup>247</sup> Professor Amar stands alone in believing that the original understanding contemplated amendment by "We the Majority."

2. *State Practice.* — The real heyday of popular sovereignty was not 1789 but a period extending from 1820 to 1880, when activity within the states opened the political process to involvement by a broader spectrum of people.<sup>248</sup> In his stimulating work, *Contested Truths*, Daniel Rodgers recounts that history.<sup>249</sup> Rodgers notes that state constitutional conventions were widespread during this era, and talk of popular sovereignty filled the air: "Where the characteristic text for natural rights was the

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the operations of the existing government. And this may be effectuated in two different modes. . . ."); 3 Story, *supra* note 61, § 960 ("Nor . . . can we too much applaud a constitution which thus provides a safe and peaceable remedy for its own defects . . . ."); *id.* § 955 ("The fifth article of the constitution respects the mode of making amendments to it."); *id.* § 956 ("The great principle . . . is to make the changes practicable, but not too easy . . . .").

One exception to the general view of Article V as exclusive was Sidney George Fisher who, in 1862, denounced Article V as ineffective and urged that Congress could amend on its own. See Sidney G. Fisher, *The Trial of the Constitution* 84–85 (Negro Univ. Press 1969) (1862).

244. First Inaugural Address of Abraham Lincoln (Mar. 4, 1861), in 6 *A Compilation of the Messages and Papers of the Presidents, 1789–1897*, at 10 (James D. Richardson ed., 1899).

245. I am aware of only one proposed amendment—offered to avoid the Civil War—that consciously would have bypassed Article V. See Bernstein & Agel, *supra* note 130, at 86 (referring to Jefferson Davis's proposal to protect slavery). Even that proposal, however, did not invoke a resort to "We the Majority" but instead required all slave states to approve any amendments concerning slavery. See *id.*

246. Orfield, *supra* note 31, at 39 (emphasis added).

247. See, e.g., William Rawle, *A View of the Constitution of the United States of America* 12 (1825) (stating that the amendment processes stipulated in state and federal constitutions are not binding on the people although it is most convenient to adhere to them).

248. The "states have used the popular referendum as the exclusive mode of ratification of amendments to and revision of the state constitutions ever since about 1830." Orfield, *supra* note 31, at 192. In "Philadelphia Revisited" and "Consent of the Governed," Amar makes only a faint appeal to what happened in state constitutional conventions during the nineteenth century. See Amar, *Consent of the Governed*, *supra* note 2, at 498; Amar, *Philadelphia Revisited*, *supra* note 2, at 1053 & n.28, 1066.

249. See generally Daniel T. Rodgers, *Contested Truths: Keywords in American Politics Since Independence* 80–111 (1987).

manifesto, the people's forum was the constitutional convention. Here the claims of the people's sovereignty were concentrated, defined, and fiercely debated."<sup>250</sup> I need not here recount the historical details. Suffice it to say that "We the People," that "massive figure of speech,"<sup>251</sup> constituted "words employed in a battle for admission to politics, for control over its offices, or for power over its policies."<sup>252</sup> Behind this rhetoric, "white, male farmers and mechanics . . . had pushed . . . hard against the older concentrations of power."<sup>253</sup> When others (women, free blacks) sought the same access, the concept of popular sovereignty underwent strain.<sup>254</sup>

Moreover, although "We the Majority" of Illinois may have invoked popular sovereignty in justifying an amendment to their state constitution, they did not necessarily believe that the United States Constitution could be amended by a national "We the Majority." Rodgers states that these state conventions, with one exception, were lawfully called, or else were subsequently approved, by state legislatures.<sup>255</sup> The exception arose out of Rhode Island's well-known "Dorr Rebellion."

Under Rhode Island law (the "Charter"), only landholders and their eldest sons could vote; additionally, the Charter contained no provision for amendment!<sup>256</sup> Seeking to expand this minuscule and malapportioned electorate, Rhode Islanders, including Thomas W. Dorr, called a constitutional convention in 1841 after the state legislature (the "Charter government") had repeatedly refused to do so.<sup>257</sup> A large majority of the (then relevant) "We the People" of Rhode Island adopted the convention's proposal.<sup>258</sup> Nonetheless, the supreme court of the state rejected the new constitution and the Supreme Court of the United States declined to intervene.<sup>259</sup>

Dorr himself directly justified his conduct on the ground that "We the Majority" could alter the frame of government at will.<sup>260</sup> In the Supreme Court, however, his counsel advanced additional grounds. While Dorr's counsel did refer to the right of "We the Majority," he also argued that Dorr's conduct was lawful because the legislature had refused to sanction constitutional change and the Rhode Island Charter provided

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250. *Id.* at 93.

251. *Id.* at 80.

252. *Id.*

253. *Id.* at 102.

254. *See id.* at 108–09.

255. *See id.* at 103.

256. *See id.* at 102, 106. The call for a convention was supported by such groups as manufacturers, merchants, and mechanics. *See id.* at 103. Interestingly, at the time of the ratification of the Constitution, the Rhode Island legislature was widely perceived to be radically democratic. *See Conley, supra note 234, at 269–70.*

257. Rodgers, *supra note 249, at 103.*

258. *See id.*

259. *See id.* at 103–04.

260. *See id.* at 106.

no other way to alter the frame of government.<sup>261</sup> Daniel Webster was among the defenders of the *ancien regime*; he began his argument by categorically acknowledging the principle of popular sovereignty: "Every one believes this" to be "[t]he first" principle.<sup>262</sup> However, Webster specifically invoked Article V to show that popular sovereignty did not invariably entail constitutional change by "We the Majority."<sup>263</sup> Webster insisted that "We the People" of Rhode Island could not go behind their constitutional structure. In this, incidentally, he was supported by Calhoun, who denounced the Dorr government.<sup>264</sup> According to one commentator, Calhoun believed that "[a]llowing the government to accept the right of a simple numerical majority to change a state's constitution would lead to anarchy."<sup>265</sup> Calhoun was perhaps fearful that the legitimization of the Dorr government would induce a belief that, acting outside of Article V, a simple majority of a national "We the People" could threaten slavery.<sup>266</sup>

Professor Amar's description of the Dorr Rebellion is puzzling. It appears in yet another article, one in which he insists that the Founders intended the Guarantee Clause (which Amar refers to as the Republican Government Clause) to "reaffirm[ ] basic principles of popular sovereignty."<sup>267</sup> Amar seeks to avoid the issue of majority rule: "The key issue in the case was not whether the charter regime was Republican, but whether it was a *Government*."<sup>268</sup> Both the Dorr government and the Charter government, Amar says, were "Republican," and the Court wisely avoided choosing between two republican governments.<sup>269</sup> If the Dorr government were recognized, "chaos" would take place, because to do so would invalidate all "governmental action—marriages, land transfers, criminal convictions, and the like—that had taken place in the interim."<sup>270</sup> In fact, it is far from clear that these actions would be invalidated.<sup>271</sup> But Amar's difficulties are deeper than this. No basis exists for

261. See *Luther v. Borden*, 48 U.S. (7 How.) 1, 19–20 (1849).

262. *Id.* at 29.

263. See *id.* at 30.

264. See John R. Vile, *John C. Calhoun on the Guarantee Clause*, 40 S.C. L. Rev. 667, 681–82 (1989).

265. *Id.* at 682.

266. See *id.*

267. Amar, *Republican Government*, *supra* note 55, at 762.

268. *Id.* at 776. Amar considers, but apparently rejects, the argument that the ratification of Dorr's "People's Constitution" was not binding because it did not occur at a regularly called election. See *id.* at 774–75. Webster had made a similar argument: "There must be an authentic mode of ascertaining the public will somehow and somewhere." *Luther v. Borden*, 48 U.S. (7 How.) 20, 31 (1849). This line of argument is utterly unconvincing. No reason exists why the expression of the people's will had to occur at regularly scheduled elections. Such elections may well be reliable barometers of what "We the Majority's" precise will is, but they certainly are not the exclusive determinants thereof. See Amar, *Republican Government*, *supra* note 55, at 776.

269. See Amar, *Republican Government*, *supra* note 55, at 776.

270. *Id.*

271. See, e.g., *Baldy v. Hunter*, 171 U.S. 388, 392–93 (1898) ("[A]cts necessary to peace and good order . . . which would be valid if emanating from a lawful government,

believing that the Charter government met the most minimal requirements of a popular government. By contrast, the Dorrite efforts to change the frame of government were as similar in spirit to the adoption of the American Constitution as any movement for constitutional change that we are likely to see. There had been three elections: the call for the constitutional convention (which has been described as a “carefully organized extralegal election, open to every white male in the state”), ratification by “a second, heavily subscribed, extralegal election,” and finally, a submission to the electorate on the decision to elect officials.<sup>272</sup> Against that backdrop, Amar never explains what claim the Charter government had to be a legitimate government, or even a legal one.<sup>273</sup>

#### IV. “WE THE PEOPLE” AND DEMOCRACY

A second, more subtle, flaw exists in Amar’s historical conception of “We the People”: He ignores the fact that the Constitution was designed to prevent all unmediated lawmaking by the people. He does so by investing the original Constitution with a “democratic quality” that it clearly was not intended to possess.

##### A. *We the People*

*Vox populi, vox Dei.* “We the People” is a concept with a long history.<sup>274</sup> Historically, it was employed to describe the *source* of political authority, not the mode of its exercise. In English history, it was a banner raised in opposition to the divine right of kings,<sup>275</sup> itself a banner that had been raised in resistance to apostolic authority.<sup>276</sup> (As Edmund Morgan points out in his splendid study, *Inventing the People*, “[t]he way to fight divinity is with divinity.”)<sup>277</sup> But the fact that the people have sometimes reigned has never meant that they actually ruled.

“By the eighteenth century [in America], the sovereignty of the people was taken for granted.”<sup>278</sup> However, the actual meaning of this con-

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must be regarded in general as valid if proceeding from an actual, though unlawful government.”).

272. See Rodgers, *supra* note 249, at 103.

273. See *id.* at 102 (“Rhode Island stood alone in having no written constitution. Its legislature possessed in theory a virtually unlimited sphere of action . . .”).

274. “Who, today speaks of ‘We the People,’ other than demagogues, originalists, and Yale law professors?” So wrote Professor Rubinfeld, himself such a professor. Jed Rubinfeld, *Reading the Constitution as Spoken*, 104 *Yale L.J.* 1119, 1147 (1995). Actually, I am not sure that originalists should rely on the concept, and one must note that interest in “We the People” has now spread to the Harvard Law School. See, e.g., Richard D. Parker, *Here the People Rule* 112–15 (1994) (lamenting the fact that the people do not rule).

275. See Edmund S. Morgan, *Inventing the People* 56 (1988).

276. See *id.* at 18.

277. *Id.*

278. *Id.* at 143. I believe it an overstatement to say, as David Dow does, that “the notion of popular sovereignty . . . [is] primarily [of] interest [ ] to academics,” but I agree

cept was subject to debate, even then. No necessary connection existed between popular sovereignty—which is concerned with the source of political authority—and majority rule.<sup>279</sup> Rather, the implications of popular sovereignty evolved over time, and Amar rightly observes that, at the time the Constitution was ratified, Americans increasingly recognized the right of “We the Majority” to change their frame of government.<sup>280</sup>

In terms of the Constitution’s history, “We the People” makes its appearance only late in the Convention’s proceedings.<sup>281</sup> Max Farrand writes:

The articles of confederation formed an agreement “between the States of New Hampshire, Massachusetts, Rhode Island, . . .” and the rest of the thirteen. At one stage of the development of its report, the committee of detail tried in the preamble “We the People of *and* the States of New Hampshire, Massachusetts, Rhode Island,” etc., but later the “and” was dropped out. When the committee of style took up this point they found themselves confronted with a new difficulty. The convention had voted that the new constitution might be ratified by nine states and should go into effect between the states so ratifying, and no human power could name those states in advance. How far this was the controlling factor and what other motives may have been at work, we have no record. The simple fact remains that the committee of style cleverly avoided the difficulty before them by phrasing the preamble:—“We, the People of the United States.”<sup>282</sup>

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that it is “far less important than the principle of majority rule, which concerns us all.” Dow, *supra* note 38, at 13.

279. “A common fallacy confuses the framers’ principle of popular sovereignty, the principle that legitimate power must be derived from the governed, with its exercise through unmediated direct lawmaking.” Hans A. Linde, *Who Is Responsible for Republican Government?*, 65 U. Colo. L. Rev. 709, 719 (1994). The legal failure of the Dorr rebellion can be understood to highlight the distinction between the two. Calboun expressly rejected any effort to reduce popular sovereignty to majority vote, arguing that one should not attribute to a part the qualities of the whole. See Calhoun, *Discourse*, *supra* note 148, at 23–24. Or, as Dow expresses it, “Popular sovereignty is not necessarily *majority* will . . . [Although it] *can* be understood as fifty percent plus one, it can also be understood as a plurality, a supermajority, or even the will of an appointed oligarchy of lawmakers.” Dow, *supra* note 38, at 13.

280. See Amar, *Philadelphia Revisited*, *supra* note 2, at 1050–51. By 1789, a strong but by no means inexorable link existed between majority choice at the state level and “We the People.” Indeed, the Massachusetts Constitution of 1780 had been approved by “We the People,” but ratification was conditioned upon a two-thirds majority. See Ronald M. Peters, Jr., *The Massachusetts Constitution of 1780: A Social Compact* 22–23 (1978).

281. The phrase does, however, appear in the Massachusetts Constitution of 1780. See *Mass. Const. of 1780*, pmbl., *in* 1 *The Federal and State Constitutions, Colonial Charters and Other Organic Laws of the United States* 936, 957 (Ben P. Poole ed., 2d ed. 1924) (“We, therefore, the people of Massachusetts . . . do agree upon, ordain, and establish the following declaration of rights and frame of government . . .”).

282. Farrand, *Framing*, *supra* note 121, at 190–91.

This change was first proposed on September 12th, less than one week before the Convention came to an end.<sup>283</sup>

“Popular sovereignty” is a term that does not appear anywhere in the Constitution or in *The Federalist*, although the terms “popular government” and “popular assemblies” appear in *The Federalist* twenty-six times.<sup>284</sup> In 1942, Lester Orfield wrote that “[t]he Constitution nowhere expressly refers to the people as sovereign. The assertions in the Declaration of Independence of the inalienable rights . . . to alter and abolish the government are nowhere repeated.”<sup>285</sup>

Morgan characterizes the whole idea of “We the People” as a “fiction.”<sup>286</sup> Like comparable fictions, however, this idea has real power because it “create[s] . . . pictures in our heads which make the structures of authority tolerable and understandable.”<sup>287</sup> However, the existence of “a People that acts in identifiable ways and speaks in comprehensible tones” may be simply a “political myth.”<sup>288</sup> To the extent that the concept of “We the People” entails actual hands-on rule, these objections have force—especially because the Constitution does not contemplate the direct participation of “We the People” in ordinary lawmaking.<sup>289</sup> Admittedly, even in the arena of normal politics, the concept cannot be alto-

283. See Report of the Committee of Style (Sept. 12, 1787), in 2 Farrand, *supra* note 116, at 590, 590.

284. See Kammen, *supra* note 89, at 22.

285. Orfield, *supra* note 31, at 143. In fact, in the Constitution “the term sovereignty is totally unknown.” *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 454 (1793) (Wilson, J.).

286. See Morgan, *supra* note 275, at 14; see also Rodgers, *supra* note 249, at 5 (calling terms like this “elusive”).

287. Rodgers, *supra* note 249, at 5.

288. Powell, *supra* note 209, at 200–01; see also Frederick Schauer, *Deliberating About Deliberation*, 90 Mich. L. Rev. 1187, 1196 (1992) (criticizing as “strained” Ackerman’s claims about “what the people were actually talking about in 1787, 1791, 1866, or 1937”). “The basic problem with postulating a theory whereby the political climate yields constitutional text is that reading electoral politics is only slightly less fatuous than reading tea leaves.” Dow, *supra* note 38, at 47.

289. Madison acknowledged that the democracies of Greece and other ancient regimes understood the concept of representation. See *The Federalist* No. 63, at 386–87 (James Madison) (Clinton Rossiter ed., 1961). He then said that “[t]he true distinction between these and the American Governments lies in the total exclusion of the people . . . from any share in the latter.” *Id.* at 387. Madison was not quite right. He overlooked the important role that juries were expected to play in the actual administration of the national government. See Henry P. Monaghan, Book Review, 94 Harv. L. Rev. 296, 309 n.47 (1980) (reviewing Jesse H. Choper, *Judicial Review and the National Political Process* (1980)) (“the jury diffused authority because every governmentally imposed sanction . . . needed the concurrence of 12 citizens”). Indeed, Amar has made this argument himself. See Akhil R. Amar, *The Bill of Rights as a Constitution*, 100 Yale L.J. 1131, 1133 (1991) (“[T]he Bill of Rights . . . ensured that ordinary citizens would participate in the federal administration of justice through various jury-trial provisions . . . .”); Akhil R. Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. Davis L. Rev. 1169, 1169 (1995) (“No idea was more central to our Bill of Rights—indeed, to America’s distinctive regime of government of the people, by the people, and for the people—than the idea of the jury.”).



gether dismissed.<sup>290</sup> Applied to such acts as voting, the idea of "We the People" helps capture our understanding of our experience. Nonetheless, even here the construct cannot be pushed too far. It is, after all, important to recall that in our over 200 years under the Constitution, that Constitution has never seen a national "We the People" vote on anything. For constitutional purposes, voting on every issue, from presidential elections on down, has always been state by state.<sup>291</sup>

Morgan credits Madison with having invented the concept of an "American people" as a vehicle for controlling the Federalists' real opponents: the state legislatures.<sup>292</sup> This seems to be an overstatement if taken literally. Morgan means, I believe, that Madison provided a powerful articulation of a pre-existing concept of a national "We the People." Nonetheless, an adjacent, countervailing, and often contradictory, notion of "We the People of Delaware, of Connecticut," and so on, also existed.<sup>293</sup> During secession, the southern states heavily emphasized that notion. They believed that conventions of "We the People" in each of the several states could sever the bonds of union, just as similar conventions had forged those bonds.<sup>294</sup> Amar's treatment of the secessionist understanding is worth noting:

To take one final example, the theory of Jefferson Davis and his fellow secessionists in 1861 was simple and clear: (1) Article V is not the exclusive mode of legitimate constitutional change; (2) We the People retain the right to alter or abolish our government at any time, and for any reason; (3) We the People exercise this right by simple majority rule in special convention; and (4) the relevant people is the people of each state. This was a theory that hundreds of thousands fought and died for. And, as I understand him, President Lincoln crossed swords with "President" Davis only over proposition Number 4, insisting—quite rightly, in my view—that secession could take place only if approved by a national majority, and not a mere statewide one.<sup>295</sup>

The first prong of this analysis is, I believe, completely wrong. Davis is not talking about "legitimate constitutional change" *within* the framework

290. See, e.g., Kammen, *supra* note 89, at 23.

291. Voting in Congress, even if unanimous, cannot count because "We the People" theorists insist upon a rigorous separation between the People and their representatives.

292. See Morgan, *supra* note 275, at 267. Surprisingly, Amar does not even mention Morgan, whose study ends at the founding, or Rodgers, *supra* note 249, who extends the analysis into the mid-nineteenth century.

293. See Berger, *supra* note 66, at 21–47 (emphasizing "We the People" of the several states).

294. They then came together to form a union of the several Southern States. See William C. Davis, *A Government of Our Own* 5 (1994) (providing a fascinating account of the process and use of the federal Constitution as a model for the confederacy).

295. Amar, *Consent of the Governed*, *supra* note 2, at 499.

of an existing constitutional order. Rather, Davis is talking about seceding *from* that order.<sup>296</sup>

### B. *Democracy and 1789*

In focusing upon "We the People" and the mode by which the Constitution was ratified, most "We the People" devotees invest the Constitution of 1787 with a strongly democratic quality.<sup>297</sup> For example, Professor Amar says:

But—Charles Beard notwithstanding—the act of the constitution was not some antidemocratic, Thermidorian counterrevolution, akin to a coup d'état, but was instead the most participatory and majoritarian event the planet had ever seen (and lawful to boot).<sup>298</sup>

Of course, this supposed opposition is a false one: the most democratic constitution in the world may also have been an effort by the Framers to slow down democracy.<sup>299</sup> But my objection cuts much deeper than that. Amar's summary rejection of a "Thermidorian" description of the Constitution refers only to a single work by Charles Beard. There is a whole school of Progressive historians, including Gordon Wood, who viewed the Constitution in anti-democratic, or at least, democracy-restraining, terms.<sup>300</sup> Professor Wood writes:

296. If Davis "and his fellow secessionists in 1861" carried on a strain of American political thought that had been in existence since 1789, one that stresses "We the People" of the several states, Amar's general thesis, that there was one predominant understanding in 1789, collapses.

297. See, e.g., Beer, *supra* note 85, at 317–25 (arguing that a sovereign American people existed and used their authority to ordain the Constitution).

298. Amar, *Consent of the Governed*, *supra* note 2, at 496.

299. Recall the words of Sherman: "The people immediately should have as little to do as may be about the Government. They want information and are constantly liable to be misled." Roger Sherman, *Remarks in Debate* (May 31, 1787), in 1 Farrand, *supra* note 116, at 45, 48. In contrasting Greek and Roman government with American government, Madison wrote "[t]he true distinction between these and the American Governments lies in the total exclusion of the people in their collective capacity from any share in the latter . . . ." *The Federalist* No. 63, at 387 (James Madison) (Clinton Rossiter ed., 1961). Many writers have been troubled by the difficulty of reconciling popular sovereignty with the governmental processes specified in the Constitution. See, e.g., Lawrence G. Sager, *The Incurable Constitution*, 65 N.Y.U. L. Rev. 893, 894 (1990). The relationship between interest group theory and popular sovereignty is intriguing. On occasion, our supposedly representative government simply ratifies an interest group's program. See, e.g., *Allied Tube & Conduit Corp. v. Indian Head, Inc.* 486 U.S. 492, 501 (1988); *U.S. R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 189–93 (1980) (Brennan, J., dissenting). Additionally, administrative implementation of Congressional policy can be conditioned upon the assent of those regulated. See, e.g., *Wickard v. Fillburn*, 317 U.S. 111, 115–16 (1942).

300. See, e.g., Wood, *supra* note 103. This omission is particularly surprising in view of Amar's treatment of Gordon Wood. At several points, Amar calls Wood the leading historian of the period. See, e.g., Amar, *Republican Government*, *supra* note 56, at 753. Yet, in the very work cited by Amar, Gordon Wood expresses a viewpoint directly contrary to Amar on this crucial point.

[T]he general interpretation of the Progressive generation of historians—that the Constitution was in some sense an aristocratic document designed to curb the democratic excesses of the Revolution—still seems to me to be the most helpful framework for understanding the politics and ideology surrounding the Constitution.<sup>301</sup>

In *The Radicalism of the American Revolution*, Wood once again emphasizes a cultural and economic pattern in which the 1789 Constitution was a temporary interruption of a much wider movement toward equality.<sup>302</sup> “The founding fathers were unsettled and fearful not because the American Revolution had failed but because it had succeeded, and succeeded only too well.”<sup>303</sup>

Wood does not stand alone. Matthews stresses that “[t]he Constitution of 1787, in contrast [to the American Revolution], represented a centralized, rational form of rule, a victory for the ‘government,’ ‘authority’ and ‘power’ over ‘liberty,’ ”<sup>304</sup> a result accomplished by “the total exclusion of the people in their collective capacity” from government that restricted individuals to a “very rare participation.”<sup>305</sup> Isaac Kramnick writes, “Madison’s brilliant achievement [in *The Federalist*] was the appropriation of a word [i.e., republicanism] with unmistakable populist connotations for a governmental structure which, while ultimately based on popular consent, involved a serious diminution of popular par-

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301. Wood, *supra* note 103, at 626. Professor Wood notes that the impetus for constitutional reform at the time of the convention was the “unsteadiness of the people,” and quotes Benjamin Franklin as saying “[w]e have been guarding against an evil that old States are most liable to, *excess of power* in the rulers . . . but our present danger seems to be *defect of obedience* in the subjects.” *Id.* at 432. A wave of new state constitutions—Massachusetts in 1780, New Hampshire in 1784, and Jefferson’s draft for a new constitution in Virginia written in the early 1780s—embraced a more powerful executive as a check on the excesses of the popular branch. See *id.* at 435–36. In debates about reforming the most democratic of the early constitutions, that of Pennsylvania, a group calling itself the Republicans (including James Wilson) argued that an unchecked unitary legislature was as much a threat to liberty as the monarchy had ever been. See *id.* at 438–40. The political turmoil and popular discontent with state governance that dominated the 1780s, Wood concludes, engendered a shift in reform efforts away from a state-by-state effort to check the excesses of democracy, towards a national solution. “It was ‘the vile State governments,’ rather than simply the feebleness of the Confederation, that were the real ‘sources of pollution,’ preventing America from ‘being a nation.’ ” *Id.* at 467. Wood also lays out the more general argument that the impulse for reform revolved around the attempt to save republicanism from itself—the “worthy against the licentious.” See *id.* at 471–75. “Most Revolutionary leaders clung tightly to the concept of a ruling elite, presumably based on merit, but an elite nonetheless—a natural aristocracy embodied in the eighteenth-century ideal of an educated and cultivated gentleman.” *Id.* at 480; see also Anderson, *supra* note 44, at 7, 118 (concluding that Constitutional drafters built undemocratic features into Constitution to bind the excesses of popular will).

302. See Gordon S. Wood, *The Radicalism of the American Revolution* 230–32, 327 (1991). Amar does not cite this work.

303. *Id.* at 368–69.

304. Matthews, *supra* note 107, at 13.

305. David F. Epstein, *The Political Theory of The Federalist* 145 (1984).

tipication."<sup>306</sup> Nearly a century ago, Andrew McLaughlin stated that "[t]he convention was deeply impressed with the extravagances of the populace . . . [and] imbued with reactionary dread of popular fickleness and folly."<sup>307</sup>

Understanding the Constitution as a reaction to the democratic "excesses" of the post-revolutionary era is now deeply ingrained in American thinking, at least outside the law schools.<sup>308</sup> In 1789, "We the People" got little more than the right to vote for one branch of the government every two years. In Hannah Arendt's words, "[o]nly the representatives of the people, not the people themselves, had an opportunity to engage in those activities of expressing, discussing, and deciding which in a positive sense are the activities of freedom."<sup>309</sup> Simply put, "[t]he Convention did not aim at democracy, or even at majority rule. It rejected the notion of popular sovereignty—as anything more than political rhetoric."<sup>310</sup>

Prefiguring Charles Beard, J. Allen Smith's *The Spirit of American Government* is particularly instructive.<sup>311</sup> Smith completely shared Amar's deep commitment to democracy. Smith believed, however, that democracy had little to do with the 1787 Constitution. Fear of democracy, however, did:

This dread of the consequences of popular government was shared to a greater or less extent by nearly all members of that Convention. Their aim was to find a cure for what they conceived to be the evils of an excess of democracy.

"Complaints," says Madison in *The Federalist*, "are everywhere heard from our most considerate and virtuous citizens, equally the friends of public and private faith, and public and personal liberty, that our governments are too unstable, that the public good is disregarded in the conflicts of rival parties, and that measures are too often decided, not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority."

306. Isaac Kramnick, Introduction, in *The Federalist* 11, 41 (Isaac Kramnick ed., 1987); see also Marci A. Hamilton, Discussion and Decisions: A Proposal to Replace the Myth of Self-Rule with an Attorneyship Model of Representation, 69 N.Y.U. L. Rev. 477, 515 (1994) (collecting sources on Madison's elitism).

307. Andrew C. McLaughlin, James Wilson in the Philadelphia Convention, 12 Pol. Sci. Q. 1, 15 (1897). He adds that by contrast, "Wilson . . . was given over to the democratic faith. He was not patronizing to the populace or condescending,—quite the reverse. Filled with the democracy of the next century, he considered himself the servant of the people, and sought to minister to them." Id.

308. But see Kammen, *supra* note 89, at 45–46 ("In the nineteenth century, for example, John Quincy Adams, John C. Calhoun, Edward Everett, and . . . Joseph Story shared a firm belief that the great charter produced in 1787 embodied a fulfillment of the spirit of 1776.")

309. Hannah Arendt, *On Revolution* 235 (Pelican Books 1981) (1963).

310. Anderson, *supra* note 44, at xiv.

311. See J. Allen Smith, *The Spirit of American Government* 40–64, 346–48 (Macmillan 1912) (1907).

This criticism of the American government of the Revolutionary period gives us the point of view of the framers of the Constitution. We should remember, however, that the so-called majority rule to which Madison attributed the evils of that time had nothing in common with majority rule as that term is now understood. Under the laws then in force the suffrage was greatly restricted, while the high property qualifications required for office-holding had the effect in many cases of placing the control of legislation in the hands of the wealthier part of the community. But undemocratic as the system was, it was not sufficiently undemocratic to suit the framers of the Constitution. It was no part of their plan to establish a government which the people could control. In fact, popular control was what they were seeking to avoid.

One means of accomplishing this was to make amendment difficult, and this accordingly was done. We need not be surprised that no provision was made for its original adoption, or subsequent amendment by direct popular vote.<sup>312</sup>

In ending the foregoing paragraph, Smith assails the anti-democratic character of the ratification process. "Let us not forget," Smith adds, "that at no stage of the proceedings was the matter referred directly to the people."<sup>313</sup> Citing Lord Bryce, Smith states that "[o]f one thing we may be reasonably certain—the Constitution did not represent the political views of a majority of the American people—probably not even a majority of those entitled to vote."<sup>314</sup> Anderson echoes this theme, as I have already noted.<sup>315</sup>

Criticism that equates the anti-democratic nature of the ratification process with the amendment process is misguided, however. Ratification was, first and foremost, about federalism—the terms upon which the several states would unite. Second, for its time, ratification by popular convention was a remarkably "democratic" process. Constitutional conventions embodied the sovereignty of the people. "The people chose it for a specific purpose, not to govern, but to set up institutions of government . . . . Such was the theory, and it was a distinctively American one."<sup>316</sup>

That being said, however, the fact remains that the amendment process is open to challenge as decidedly democracy-restraining. Smith

312. *Id.* at 42–43. "Yet the people do not participate in a single stage of the amending process. The Constitution was not directly adopted by the people, nor is it amendable directly by them." Orfield, *supra* note 31, at 215–16. This argument is not as powerful as it appears because it fails to give weight to the Convention as an expression of the people.

313. Smith, *supra* note 311, at 49.

314. *Id.* at 50.

315. See Anderson, *supra* note 44, at 155–63.

316. 1 Robert R. Palmer, *The Age of the Democratic Revolution* 214–15 (1959). Moreover, Orfield notes that the "fact of ratification by such conventions was early asserted to prove the national, rather than the federal, character of the Constitution. This mode of ratification may therefore be described as the national method, and that by the state legislatures as the federal." Orfield, *supra* note 31, at 53.

wrote: "The fact that the people can not directly propose, or even ratify changes in the fundamental law, is a substantial check upon democracy. But in addition to this, another check was provided in the extraordinary majority necessary to amend the Constitution."<sup>317</sup> Smith goes on to state that the fact that "such a small minority . . . [could] prevent reform" is irreconcilable "with the general belief that in this country the majority rules."<sup>318</sup> He added:

An examination of these features of the various state constitutions in force in 1787 shows clearly the reactionary character of the Federal Constitution. It repudiated entirely the doctrine then expressly recognized in some of the states and virtually in all, that a majority of the qualified voters could amend the fundamental law. And not only did it go farther than any state constitution in expressly limiting the power of the majority, but it provided what no state constitution had done—the means by which its limitations on the power of the majority could be enforced.<sup>319</sup>

Anderson correctly notes that "[p]erhaps no other part of the Constitution has been more universally regarded as undemocratic than has the amending article."<sup>320</sup> To be sure, the Constitution reflects popular sovereignty, but it was also designed to ensure that the "people," however conceived, reigned but never ruled. Even more importantly, the Constitution reflected the Framers' fear of direct democracy.<sup>321</sup> The Constitution of 1789 rejected direct lawmaking by the people, both in enacting ordinary legislation and in changing the frame of government.

## V. CURRENT CONCERNS

Amar's historical argument is deeply unpersuasive. Reframed, however, as a matter of contemporary principle, his argument is surely attractive. "Amar equates American constitutionalism with popular sovereignty and popular sovereignty with the immediate, if deliberative, will of the

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317. Smith, *supra* note 311, at 44. During the debates, "[n]o proposal was aimed at guaranteeing the support of a popular majority for amendments. Nor was it suggested that ratification by states containing a majority of the national population should be sufficient." Anderson, *supra* note 44, at 158.

318. Smith, *supra* note 311, at 46.

319. *Id.* at 61–62. Anderson puts it thus:

Why were no voices raised, like Wilson's before the Connecticut compromise, eloquently arguing for the people, not the states, as the foundation of the system? . . . no such debate took place. Instead, attention centered on the dangers to the separate states and the conditions under which they would agree to be bound by the other states.

Anderson, *supra* note 44, at 159.

320. Anderson, *supra* note 44, at 155.

321. See Julian N. Eule, *Judicial Review of Direct Democracy*, 99 *Yale L.J.* 1503, 1522–26 (1990) (discussing Framers' "solutions" to the threat of majority rule).

majority."<sup>322</sup> In any just constitutional order, why should that not be the fundamental principle of the polity?<sup>323</sup>

An adequate response to Amar on these policy grounds would require a lengthy essay, at the very least. Here, I want only to outline my concerns. I acknowledge, of course, that no constitution that consistently frustrates the strongly-held views of a sizeable majority over any significant period of time can claim to be democratic. Having said that, I have considerable doubts about the wisdom of constitution-making by "We the Majority."

Constitutions should not be viewed *sub specie aeternitatis*: to my mind, constitutional regimes should not be ordered with eyes focused too far down the road. Given my skeptical, short-range vision, Amar's proposal is troublesome in contemporary terms, simply because Amar-style popular sovereignty amendments are increasingly technologically feasible.<sup>324</sup> If implemented, Amar's proposal could significantly alter the fundamental frame of government. (After all, Amar nowhere explains why Congress should ever use Article V rather than appeal to call-in democracy.) The role of the states envisaged by the Connecticut Compromise and Article V could be seriously altered, but that, I confess, does not trouble me—particularly with the extensive "devolution" now occurring in the national political process. What does concern me is the potential impact of Amar-style proposals on representative government and on our aspirations for both liberty and equality. At least since Walter Lippmann's work on pub-

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322. Vile, *Legally Amending*, supra note 38, at 303 (citing Amar, *Philadelphia Revisited*, supra note 2, at 1060 n.12). Vile points out that the latter equation is hardly self-evident. See *id.* (citing Max Radin, *The Intermittent Sovereign*, 39 *Yale L.J.* 514, 526 (1930)). However, 13 states do permit initiative amendments by a simple majority of the popular vote. See Lynn A. Baker, *Constitutional Change and Direct Democracy*, 66 *U. Colo. L. Rev.* 143, 149 n.23 (1995).

323. Indeed, I feel almost estopped to object to such a "First Theorem." In my view, the national representatives of "We the People" have effectively transformed the original understanding of the Constitution in virtually every area, from federalism to separation of powers to civil liberties. If I am prepared to accept such transformative changes as part of our constitutional law, as I am, how can I deny that the constitutional order can be rearranged by the People themselves when their view can be known with some confidence? This question poses a difficult problem for me, viewed as a matter of first principle. See Monaghan, supra note 31. Nonetheless, my own intellectual difficulties quite plainly do not establish the positive of Amar's historical case. I also recognize that there is significant current academic interest in the old claim that the Constitution is too difficult to amend. For a discussion of an early proposal to reform Article V, see Orfield, supra note 31, at 168–221.

324. See generally Barry Krusch, *The 21st Century Constitution: A New America for a New Millennium* (1992). This young computer expert proposes that the existing constitutional structure be revised so as to place modern information and communications technologies at its core, and through that process invest ordinary citizens with effective, hands-on political power. See *id.* at 258–76; see also Lawrence K. Grossman, *The Electronic Republic* 158 (1995) (foreseeing Congress's representative role diminishing as modern communications technology allows "more direct citizen involvement through advisory or even binding national referenda and ballot initiatives, and petitions to initiate legislation as well as veto laws already passed").

lic opinion,<sup>325</sup> the role of the “demos” in politics has been a topic of debate. In an era of talk show politics, single issue platforms, and media-oriented presidents and national figures, *Federalist No. 43*'s caution against an “easy” amendment process takes on a special appeal.<sup>326</sup> It is no secret that the “growing popularity of amendment politics [in the last decade] suggests that the people—or those who purport to speak for them—are increasingly dissatisfied with the course of normal politics.”<sup>327</sup> Whereas in the past, popular sovereignty became a battle cry for those expressing yearnings for inclusion into the political and social order,<sup>328</sup> in the hands of current powerholders “We the People” seems likely to justify exclusion, defining what “Real Americans” stand for. Consider the potential results of national “We the Majority” referenda on such issues as school prayer, homosexual rights, affirmative action, Judeo-Christian (or maybe just Christian) values, and so on.

I view such prospects as a “bad” development. “Bad” not simply because the expected results would contradict my own value system (though that is what I expect), but “bad” because “We the Majority” amendments would remove emotionally charged issues from normal politics with its messy but ameliorative compromises. Significant displacement of normal politics by the politics of constitutional amendment would effectively compromise what remains of the underlying premise of representative government.<sup>329</sup> The safeguards for individual liberty and minority rights built into Article V's super-majoritarian and federalism requirements would also be compromised. Additionally, it is probable that a push towards direct democracy would, because of the ideologized character of the amendments, weaken the Constitution as the symbol of national unity and stability.<sup>330</sup> Increased intolerance, not increased tolerance, could be expected.

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325. See generally Walter Lippmann, *Public Opinion* (1922).

326. See *The Federalist No. 43*, at 278–79 (James Madison) (Clinton Rossiter ed., 1961); see also 2 Story, *supra* note 61, at 679 (“The great principle to be sought is to make the changes practicable, but not too easy; to secure due deliberation, and caution . . .”).

327. Bernstein & Agel, *supra* note 130, at 262.

328. See Rodgers, *supra* note 249, at 84–92 (recounting the history of popular sovereignty movements).

329. For a thoughtful examination of the implications of increasingly utilized plebiscites, see Robin Charlow, *Judicial Review, Equal Protection and the Problem with Plebiscites*, 79 *Cornell L. Rev.* 527 (1994). Judge Easterbrook has wondered whether anything is left of the original conception of representative government. See Frank H. Easterbrook, *The State of Madison's Vision of the State: A Public Choice Perspective*, 107 *Harv. L. Rev.* 1328, 1334 (1994) (“Indeed . . . some students of the subject believe . . . that one may understand the voting of public officials solely by reference to their constituents' economic interests.”).

330. “Every tribe needs its totem and its fetish, and the Constitution is ours.” Max Lerner, *Constitution and Court as Symbols*, 46 *Yale L.J.* 1290, 1294 (1937).



Interestingly, Amar distances himself from these consequences of undiluted majoritarianism.<sup>331</sup> In a footnote in "Philadelphia Revisited," he argues that some "popular" amendments might be rejected by courts.<sup>332</sup> In "Consent of the Governed," Amar greatly expands the latter suggestion. He suggests several possible limitations on the amendment power of "We the Majority."<sup>333</sup> First, Amar quotes Wilson in order to make an appeal to natural law<sup>334</sup>—the very kind of appeal which was thrown up against the appointment of Justice Thomas.<sup>335</sup> The difficulties with natural law theories need not be explored here, but it would take yet another article for Amar to demonstrate that his conception of natural law could be employed lawfully to check the will of his "We the Majority." Amar's other arguments turn out to have similar difficulties. He posits an "unamendable" Constitution, i.e., he claims that certain constitutional amendments must be rejected because they do not "fit" the American constitutional order.<sup>336</sup> (Like his appeal to natural law, this proposal has many precursors.)<sup>337</sup> What this amounts to in the end is that Amar seems prepared to permit "We the Majority" to amend only if he has no deep disagreement with the substance of the amendment. "We the Majority" are free to be right, but not free to be wrong. "If Amar believes that there are some decisions the people absolutely cannot make, it seems ironic for him to say that these same people cannot require that constitutional alterations be effected only by the actions of extraordinary majorities."<sup>338</sup> Amar's failure to embrace the consequences of his belief in the authority of "We the Majority" is a basis for doubting that it constitutes the fundamental principle around which the constitutional order should be organized.

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331. Amar has a different perception than I do of what "We the Majority" is likely to do. In "Philadelphia Revisited," he argued that "We the People" might reject unwise amendments: "[T]he People can wield their Philadelphia-II 'sword' of amendment to deter unpopular Article V amendments, and thus preserve the constitutional status quo." Amar, *Philadelphia Revisited*, supra note 2, at 1100–01.

332. *Id.* at 1044–45 n.1 (arguing that amendments that purport to make themselves unamendable or that abolish free speech might be unconstitutional).

333. Professor Amar is so upset by the potential consequences of this theory that, in the end, he virtually rejects it. See Amar, *Consent of the Governed*, supra note 2, at 501–03. Interestingly, he does not develop the point that "We the Majority" must be "rightly informed." See Kammen, supra note 89, at 14–15. Consideration of such a move would require another article.

334. See Amar, *Consent of the Governed*, supra note 2, at 501–02.

335. See Richard W. Wallach, *Essay, Natural Law and Supreme Court Nominees*, N.Y. Law J., Dec. 3, 1992, at 2, 2 ("[v]iews of Judge Thomas expressed prior to the hearing that there is a body of Natural Law available to override the Constitution, disturbed several senators.").

336. See Amar, *Consent of the Governed*, supra note 2, at 505 (an amendment abrogating First Amendment rights would violate first principles of the constitutional order).

337. See Vile, *Legally Amending*, supra note 38, at 281–82.

338. *Id.* at 304.

## CONCLUSION

Amar begins "Consent of the Governed" with the Declaration of Independence. This is illuminating. Jefferson's views on constitutional change—every nineteen years is just about right<sup>339</sup>—evinced a belief in popular sovereignty and the political capacity of the people (some of them, anyway) that is closest to Amar's viewpoint. "Jefferson embraced the chaos, disorder, and uncertainty that comes with his democratic vision of politics," but then "Jefferson was a radical democrat."<sup>340</sup> Madison and Hamilton were not. The close relationship between Madison and Jefferson should not disguise their profound ideological differences.<sup>341</sup> Madison's fundamental concern—like that of the other members of the Constitutional Convention—was to ensure order and stability, thereby protecting property against the demos. Article V is part of a Constitution that reflects a considered attempt to slow down change, and it has been so understood from the very beginning of our constitutional history. In our time, this policy may be a wise one.<sup>342</sup>

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339. See David N. Mayer, *The Constitutional Thought of Thomas Jefferson* 304 (1994). *Federalist No. 43's* caution against easy amendments is a direct response to Jefferson. See *The Federalist No. 43*, at 278–79 (James Madison) (Clinton Rossiter ed., 1961); see also Letter from James Madison to Thomas Jefferson (Feb. 4, 1790), in 13 *Papers of James Madison*, supra note 91, at 18, 20.

340. Matthews, supra note 107, at 24. Madison could write of an "Empire of reason," id. at 9, but, he viewed the capacity of the common man and woman as limited. See id. at 26–47.

341. For an excellent treatment of the differences, see id. at 234–72; see also Mayer, supra note 339, at 300–01.

342. While a simple majority may be adequate for a statutory change, a constitutional change should have something more substantial behind it. "A simple majority may by changes in popular sentiment become a minority." Orfield, supra note 31, at 220. In fact, Amar—despite his disclaimers—would make it easier for the people to amend the Constitution than to secure ordinary legislation. See Vile, *Legally Amending*, supra note 38, at 305–06 & n.171.