

## IN THE ROOM WHERE THE CONSTITUTION HAPPENS

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*Constitution-writing, according to the United Nations, should be participatory, non-exclusionary, and transparent. Recent scholarship has identified group inclusion, or ensuring that a broad swath of enfranchised groups is welcomed into the drafting room, as the lodestar of constitutional process.*

*In making this comparative case—one which has important implications for modern constitution-writing—scholarship provides precious little empirical evidence, particularly from the historical genre. This ignores the benefit of studying the oldest constitution-writing traditions in America and all that can be learned by tracing a practice or idea to its roots.*

*This study, the first monogram on New Hampshire's five constitution-writing processes between 1776-1784, provides needed empirical evidence for linking a constitution's legitimacy to getting all the right groups "in the room where it happened" and suggests further theoretical links between constitutional process and a constitution's medium and long-term legitimacy. It also provides the first detailed telling of the moment when the theory of popular sovereignty was made real through the earliest popular constitution-writing and further participatory innovations not repeated for another 200 years in Africa.*

*This study first reviews relevant extant literature on domestic and comparative constitutionalism before proceeding to an in-depth study of New Hampshire's five constitutional processes. The first process produced a temporary constitution on January 5, 1776. This crude, 911-word document heralded the first epoch of popular sovereignty-inspired constitution-writing. New Hampshire's next three attempts were instituted via popular sovereignty innovations of constitutional conventions, supermajoritarian ratification, direct popular participation in constitution drafting via town recommendations, and special issue constitutional referenda, but all were stillborn. This because each excluded the western-most portion of the state. It was not until the process included representatives from this area "in the room [where the constitution] happened" that a draft was finally ratified in 1784.*

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## INTRODUCTION

In the smash hit Broadway musical *Hamilton*,<sup>1</sup> Aaron Burr obsesses over being excluded from “the room where it happens” when he does not receive a dinner invitation. Over this dinner, emerging Republican leaders Thomas Jefferson and James Madison and staunch Federalist Alexander Hamilton presumably exchange support for their respective pet projects: locating the national capital along the Potomac for the Republicans and establishing a National Bank for Hamilton. The sting of Aaron Burr’s exclusion guides his later actions, prompting him to do whatever it takes to be “in the room where it happens,” ultimately culminating in his infamous duel with Hamilton.<sup>2</sup>

Excluding power brokers from rooms where constitutions happen can also have adverse downstream consequences. These consequences include immediate and long-term impacts on the stability and viability of the constitution and the country. Consequences can include wholesale failure to produce a constitution,<sup>3</sup> the creation of alternative and destructive power structures,<sup>4</sup> and potentially longer-term consequences of shorter-lived democracies<sup>5</sup> or constitutions.<sup>6</sup>

Group inclusion, or welcoming enough enfranchised groups into the drafting room<sup>7</sup> was one of three normative standards for constitution-writing

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1 In 2016 when it premiered on Broadway, *Hamilton* won 16 Tony Awards and the Pulitzer Prize for Drama. The play is based on a National Book Award biography of the same name. RON CHERNOW, *ALEXANDER HAMILTON* (2004).

2 *Id.*

3 See, e.g., Leo Mirani, *Iceland’s Experiment with Crowd-Sourcing its Constitution Just Died*, QUARTZ (Mar. 29, 2013), <https://qz.com/68910/icelands-experiment-with-crowd-sourcing-its-constitution-just-died> [<https://perma.cc/67AR-SCLA>] (discussing how Iceland’s 2008 bankruptcy inspired the government’s decision to enact a new constitution).

4 See, e.g., JONATHAN MORROW, U.S. INSTITUTE FOR PEACE, *IRAQ’S CONSTITUTIONAL PROCESS II: AN OPPORTUNITY LOST*, 2, 4 (2005) (explaining Iraq’s constitutional process post-Saddam).

5 See Todd A. Eisenstadt & Tofiq Maboudi, *Being There is Half the Battle: Group Inclusion, Constitution-Writing, and Democracy*, 52 COMPAR. POL. STUD. 2135 (2019) (analyzing the democratic effects of 195 new constitutions in the last 40 years); see, e.g., GABRIEL L. NEGRETTO, *REDRAFTING CONSTITUTIONS IN DEMOCRATIC ORDERS: THEORETICAL AND COMPARATIVE PERSPECTIVES* 117 (2020) (describing how direct citizen participation after South Africa, Brazil, and Italy adopts constitutions improves liberal democracy in these countries).

6 See DONALD L. HOROWITZ, *CONSTITUTIONAL PROCESS AND DEMOCRATIC COMMITMENT* 113 (2021) (discussing the lack of evidence in what factors make a constitution successful).

7 There are other working definitions of group inclusion, such as that used in Elkins’ et al. work on constitutional endurance that more corresponds with public participation. See ELKINS, GINSBURG

issued by the United Nations in 2009, the other two being transparency and public participation.<sup>8</sup> Beginning with a study performed by this author for the Libyan Drafting Assembly in 2014 that identified group inclusion as the indispensable element for producing a working constitution,<sup>9</sup> a consensus has emerged identifying group inclusion as the essential element of good constitution-writing processes. Recent scholarship has tied greater group inclusion to improvements in liberal democracy during comparative constitutions' lifecycles<sup>10</sup> and extolled the theoretical virtues of broad group inclusivity through elections.<sup>11</sup> At least one scholar has gone so far as to say that participation is *unnecessary* to the success of a constitutional process, but group inclusion essential.<sup>12</sup>

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& MELTON, *infra* note 49, at 8 (defining inclusion as “captur[ing] the degree to which the constitution includes relevant social and political actors, both at the time of drafting and thereafter”) and accompanying text. The definition adopted here, however, is standard in comparative parlance. See HOROWITZ, *supra* note 6, at 92-119 (discussing the importance of inclusion in the political process through real world examples).

- <sup>8</sup> See United Nations, Guidance Note of the Secretary-General: United Nations Assistance to Constitution-making Processes, 1, 4 (2009) (recognizing constitutional-making as “a sovereign national process”) [hereinafter: UN GUIDELINES]:

At the beginning of the 1990s, there seemed to be widespread acceptance among Africans that the process of constitution making had to change. This led to the adoption of the ‘new approach,’ which emphasizes participation and puts great premium on dialogue, debate, consultation, and participation. It is guided by principles including diversity, inclusivity, participation, transparency and openness, autonomy, accountability, and legitimacy . . . . [T]he adoption of the Ugandan constitution in 1995 and that of the constitution of South Africa in 1996 . . . are now considered landmark events in African constitutional history and have generated an impressive body of scholarly literature.

Thomas M. Franck & Arun K. Thiruvengadam, *Norms of International Law Relating to the Constitution-Making Process*, in FRAMING THE STATE IN TIMES OF TRANSITION: CASE STUDIES IN CONSTITUTION MAKING 8 (Laurel E. Miller & Louis Aucoin eds., 2010).

- <sup>9</sup> See Lorianne Updike Toler, *Mapping Constitutional Success*, 4 CAMBRIDGE J. INT'L & COMPAR. L. 1260, 1281-82 (2014) (discussing the importance of inclusion in the constitution drafting process based on a study performed on the Libyan Constitutional Drafting Assembly).
- <sup>10</sup> See GABRIEL L. NEGRETTO, REDRAFTING CONSTITUTIONS IN DEMOCRATIC ORDERS: THEORETICAL AND COMPARATIVE PERSPECTIVES 116-17 (2020) (finding that citizen participation in the election process may be useful in strengthening liberal democracy); see also Eisenstadt & Maboudi, *supra* note 5, at 2135 (discussing the importance of group participation in a democracy).
- <sup>11</sup> See generally HOROWITZ, *supra* note 6, at 92 (discussing how social and ethnic groups may feel included if their representatives were chosen through the election process).
- <sup>12</sup> See Abrak Saati, *The Participation Myth: Outcomes of Participatory Constitution Building Processes on Democracy* (2015) (Ph.D. dissertation, Umeå University) (on file with the Department of Political Science, Umeå University) (explaining that empirical results review that there is no relationship between public participation and increase in the levels of democracy).

Despite the growing body of literature, the links between group inclusion and downstream effects lack empirical evidence. As Don Horowitz writes, “There is very little hard evidence on what process variables correlate with the success of constitution makers in producing either durability of the document or of democracy, but what little there is points strongly to the inclusiveness of an elected constitutional forum.”<sup>13</sup> This paucity of empirical evidence includes that from the historical genre. This is unfortunate, as much can be learned by tracing ideas to their roots. This is especially true for constitutional process, as the oldest constitution-writing processes in America not only introduced most procedures found in modern constitution-writing, but also pre-sage UN standards, including inviting those from marginalized minorities into rooms where the Constitution happened. For instance, Daniel Shay, instigator of Shay’s rebellion in western Massachusetts, was included in the Massachusetts ratifying convention in 1789.<sup>14</sup> This is especially true of New Hampshire’s constitution-writing history, which included forms of public participation not seen again until the 1990s in Africa, and provides a test case of the impact of excluding marginalized groups from a constitutional process.

This study seeks to provide needed empirical evidence linking group inclusion to constitutional legitimacy for the short, medium, and long terms by canvassing New Hampshire’s five constitution-writing processes between 1776-1784. As the first monogram of New Hampshire’s constitution-writing process and the first nuanced telling of New Hampshire’s framing history in fifty years, this article also details the moment in time when popular sovereignty became real through the first modern constitution writing, producing the temporary New Hampshire Constitution of 1776. Although adopted via a rudimentary procedure that bode ill for its legitimacy during its ensuing eight-year life cycle, the 1776 New Hampshire Constitution was the first written constitution in North America and heralded the initial epoch of popular constitution-writing. The next three attempts were produced via popular sovereignty innovations including a constitutional convention, supermajoritarian ratification, and direct popular participation

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<sup>13</sup> HOROWITZ, *supra* note 6, at 113.

<sup>14</sup> THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1109 (John Kaminski et al. eds., 6th vol. 2000); *see generally* PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787-1788, 169 (2010) (noting that towns in Massachusetts chose delegates who felt sympathy for Shay’s Rebellion).

in drafting, but all were stillborn, as each process excluded the western-most portion of the state. It was not until the process included representatives from this area in the constitution-writing body and the ratification base that a draft was finally ratified in 1784.

This paper will proceed in three parts. First, it will outline relevant scholarship for domestic and comparative constitutional procedure. It will then provide a detailed history of New Hampshire's constitution-writing procedure beginning in 1775 when Congress authorized a temporary form of government through to the implementation of the final 1784 constitution. The paper will then outline its descriptive and theoretical contributions and posit that the history detailed herein underscores a link between constitutional process and legitimacy and suggests further linkages between process and endurance.

## I. THEORETICAL BACKGROUND

This paper intervenes in founding historiography and fits between two silos of academic work—domestic and comparative constitutional theory. The dominant historiography of the founding period and how both domestic and comparative constitutional theory addresses constitution-writing processes will be addressed in turn.

### *a. Dominant Founding Historiography: Republicanism*

Responding to progressive and consensus interpretations of the Framing<sup>15</sup> and initiated as an American historical genre by Bernard Bailyn's *Ideological Origins of the American Revolution*, Gordon Wood's *Creation of the American Republic*, and J.G.A. Pocock's *Machiavellian Moment*, Republicanism historiography is based on the premise that ideas have consequences.<sup>16</sup> Revolutionary ideas lead to revolutionary results. Specifically, Republicanism is based on the premise that the Founding generation "dr[ew]

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<sup>15</sup> See, e.g., CHARLES BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION* (1913) (discussing how the structure of the Constitution was created through the motivation of personal interest displayed by the Founding Fathers); RICHARD HOFSTADTER, *THE AMERICAN POLITICAL TRADITION AND THE MEN WHO MADE IT* (1948) (examining the core values of the United States).

<sup>16</sup> BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1969); GORDON WOOD, *CREATION OF THE AMERICAN REPUBLIC* (1969); J.G.A. POCOCK, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* (1975).

deeply on the libertarian thought of the English commonwealthmen, embraced a distinctive set of political and social attitudes and that these attitudes permeated their society.<sup>17</sup> Though it was introduced as far back as 1967, it has dominated American historiography, and particularly Framing historiography, ever since. Most work on the Framing thereafter either conforms or responds to this interpretation, that the Revolution was the product of an ideology. This includes the most important historical work on New Hampshire's framing, Dartmouth historian Jere Daniell's *Experiment in Republicanism*, published in 1970.<sup>18</sup> Written within the Republicanism genre, it remains the most careful work ever published on New Hampshire's early history, canvassing and uncovering rich archival sources, and provides two relevant chapters on constitutional development.<sup>19</sup>

*b. U.S. Constitutional Procedure*

Tomes have been written about the Framing. Historians' scholarship largely focuses on the Philadelphia story, wherein 55 delegates from 12 states met in 1787 behind closed doors to construct a Constitution to replace the Articles of Confederation. Yet this is just Part I (or Part II) of a multi-act play. Pauline Maier's magisterial *Ratification* did much to shift the dialogue and expand the timeline from 1787 to 1789, when the Constitution was ratified by a supermajority of states.<sup>20</sup> However, to this author's knowledge, there is no dedicated monogram on American constitution-writing *procedure* per se, though Jon Elster has written articles discussing American procedure in comparative context.<sup>21</sup>

Some constitutional theorists look to U.S. constitutional procedure to provide a normative basis for their theory of interpretation. In *The Good*

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<sup>17</sup> Robert E. Shalhope, *Republicanism and Early American Historiography*, 39 WM. & MARY Q. 334, 334 (1982).

<sup>18</sup> JERE R. DANIELL, *EXPERIMENT IN REPUBLICANISM: NEW HAMPSHIRE POLITICS AND THE AMERICAN REVOLUTION, 1741-1794* (1970).

<sup>19</sup> *See id.* at 124-179 (discussing the problems of power within state governments and how to reform the constitution).

<sup>20</sup> PAULINE MAIER, *RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787-1788* (2010).

<sup>21</sup> *See, e.g.*, Jon Elster, *Forces and Mechanisms in the Constitution-Making Process*, 45 DUKE L.J. 364 (1995) (discussing how new constitutions are created); Jon Elster, *Constitutional Bootstrapping in Philadelphia and Paris*, in *CONSTITUTIONALISM, IDENTITY, DIFFERENCE, AND LEGITIMACY* 57 (Michel Rosenfeld ed., 1994) (explaining the two processes of constitution making). *See, e.g.*, Jon Elster, *Legislatures as Constituent Assemblies*, in *CONSTITUTIONALISM: NEW CHALLENGES* (Joakim Nergelius ed., 2008) (discussing the relationship between the legislatures and the constitution).

*Constitution*, John McGinnis and Michael Rappaport claim that the U.S. Constitution's supermajoritarian process increases the likelihood that the resultant texts were good, and that such consensus decisions should therefore be preserved.<sup>22</sup> In a similar strain, Keith Whittington bases his normative argument for Originalism in *Constitutional Interpretation* on the procedural innovation of constitutional conventions as the most legitimate means of expressing popular sovereignty in constitution-making, therefore providing justification for preserving its meaning until the next such popular expression of sovereignty.<sup>23</sup> Another author uses American process as a foil in illustrating why some constitutional movements never achieved success.<sup>24</sup>

In contrast to the federal Framing, little has been written about early state constitutional development, and nothing directly on point in nearly fifty years. Gordon Wood addressed state constitutional development in a major section of *Creation of the American Republic*, and dedicated another chapter to the ideological development of constitutional conventions in 1969.<sup>25</sup> Four years later, German historian Willi Paul Adams wrote the major treatise on point in 1973, *Republikanische Verfassung und burgerliche Freiheit*, which was translated into English in 1980, *The First American Constitutions*.<sup>26</sup> There, the first three chapters lay out the procedural history of state constitution-making before shifting to the book's major focus on substantive constitutional provisions and concepts in the Revolutionary age. Together, these two tomes remain the fullest treatments of early state constitutional development to date, though neither is dedicated exclusively to constitutional procedure. More recently, John Dinan wrote about 233 state constitutional conventions in the first chapter of *The American State Constitutional Tradition* in 2006, with bare mentions of early state procedure.<sup>27</sup> The paucity of available information about early constitutional development is represented by a

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<sup>22</sup> JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION (2013).

<sup>23</sup> KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW (1999).

<sup>24</sup> See ROBERT L. TSAI, AMERICA'S FORGOTTEN CONSTITUTIONS: DEFIANT VISIONS OF POWER AND COMMUNITY (2014) (arguing that the Constitution is not a single tradition because of the remaining existents of debates after the ratification).

<sup>25</sup> GORDON WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, 125-256, 306-43 (1969).

<sup>26</sup> WILLI PAUL ADAMS, THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA (2d ed. 2001).

<sup>27</sup> JOHN J. DINAN, THE AMERICAN STATE CONSTITUTIONAL TRADITION 7-28 (2006).

comment in *The Good Constitution*, which lumped all pre-1787 state constitutions along with the Articles of Confederation into the category of “fair constitutions,” its poorest categorization.<sup>28</sup> As will be seen herein, this is far from accurate for at least two of the early state constitutions.

Similar to other states,<sup>29</sup> New Hampshire’s constitutional procedure has received more scholarly attention than multi-state constitutional development. There are two major treatises that cover the constitutional period;<sup>30</sup> most other work relies heavily on these two sources.<sup>31</sup> The first, *The History of New-Hampshire*, was published in 1784 by Exeter clergyman Jeremy Belknap and covers the decade of constitutional development fairly closely.<sup>32</sup> Due to its early publication—the year the New Hampshire Constitution went into effect—by an eyewitness to and frequent commentator on the development of the state’s constitution, its history holds special prominence. Although newer works have supplemented Belknap’s in the intervening two

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<sup>28</sup> MCGINNIS & RAPPAPORT, *supra* note 22, at 26.

<sup>29</sup> See KENNETH OWEN, *POLITICAL COMMUNITY IN REVOLUTIONARY PENNSYLVANIA 1774-1800* (2018) (discussing how popular power affects how people govern); see also J. PAUL SELSAM, *THE PENNSYLVANIA CONSTITUTION OF 1776: A STUDY IN REVOLUTIONARY DEMOCRACY* (1936) (analyzing how the first constitution of Pennsylvania was developed and how democracy is influenced); Robert L. Hilldrup, *The Virginia Convention of 1776* (1935) (Ph.D. dissertation, University of Virginia) (ProQuest) (discussing the revolutionary process to develop Virginia’s constitution); see also MASSACHUSETTS, *COLONY TO COMMONWEALTH: DOCUMENTS ON THE FORMATION OF ITS CONSTITUTION, 1775-1780* (Robert J. Taylor ed., 1961) (examining the formation of the Massachusetts government); *THE POPULAR SOURCE OF POLITICAL AUTHORITY: DOCUMENTS ON THE MASSACHUSETTS CONSTITUTION OF 1780* (Oscar Handlin & Mary Flug Handlin eds., 1966) (analyzing the debates occurring during the drafting of the Massachusetts constitution).

<sup>30</sup> JEREMY BELKNAP, *THE HISTORY OF NEW-HAMPSHIRE* (2d. ed. 1813) (3 volumes); see DANIELL, *supra* note 18, at 48, 196 (discussing the impact of treaties such as the Treaty of Paris on the constitutional process).

<sup>31</sup> In addition to relying heavily on Belknap and Daniell’s histories, *id.*, most other histories are more broad-based and provide little more than mere mentions of New Hampshire’s constitutional development. See *HISTORY OF NEW HAMPSHIRE, FROM ITS FIRST DISCOVERY TO THE YEAR 1830, 170-71, 199-200* (1875) (discussing the process of creating a constitution by using the convention); see also JAMES DUANE SQUIRES, *THE GRANITE STATE OF THE UNITED STATES: A HISTORY OF NEW HAMPSHIRE FROM 1623 TO THE PRESENT 137-38* (1956) (explaining the New Hampshire process of creating a constitution); ELIZABETH FORBES MORISON & ELTING E. MORISON, *NEW HAMPSHIRE: A BICENTENNIAL HISTORY 78-82* (1976) (examining New Hampshire’s constitutional process from its beginning to now); see generally EVERETT STACKPOLE, *HISTORY OF NEW HAMPSHIRE 227-34* (1916) (discussing New Hampshire’s religious history). The last history is the most complete but focuses more on substantive provisions and their impact rather than process.

<sup>32</sup> BELKNAP, *supra* note 30.

and a half centuries, it maintained historical hegemony for the first century after its publication.<sup>33</sup> This was confirmed in 1842, when historian George Barstow essentially regurgitated Belknap's *History* in his own.<sup>34</sup> The second major contribution is Jere Daniell's *Experiment in Republicanism*, discussed above.<sup>35</sup> Other than these two histories, a few other works bear mentioning: there was a fairly detailed reprint of historical records, together with extensive commentary prepared in 1902 by the state in preparation to amend the 1784 document, a dedicated Bicentennial issue of *Historical New Hampshire* offering unique perspectives on the process predating the temporary 1776 constitution,<sup>36</sup> and an introductory chapter detailing constitutional development in *The New Hampshire Constitution* by Oxford University Press.<sup>37</sup> Other than these sources, no major article or book to date has specifically addressed New Hampshire's constitutional procedure in full. This applies especially to addressing New Hampshire's constitutional development in light of the developments in the Upper River Valley and its secession to Vermont, which impacted constitutional development in New Hampshire. Histories of one do not fully address or integrate the other, and vice versa.<sup>38</sup> In short, this is the first full-length article to fully address New Hampshire's constitutional development in full light of all sources and relevant events.

*c. Comparative Constitutional Procedure and The Early States*

In comparative literature, constitutional procedure is no longer the "blank spot" on the theoretical map it once was.<sup>39</sup> The void has been filled

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<sup>33</sup> See e.g., CATALOGUE OF THE BOOKS IN THE LIBRARY OF DARTMOUTH COLLEGE 7 (1825) (citing four copies of the history in the library where it normally had 1-2 copies of almost all other books).

<sup>34</sup> GEORGE BARSTOW, THE HISTORY OF NEW HAMPSHIRE, FROM ITS DISCOVERY, IN 1614, TO THE PASSAGE OF THE TOLERATION ACT, IN 1819 (2d ed. 1853).

<sup>35</sup> DANIELL, *supra* note 18.

<sup>36</sup> Karen E. Andréson, *A Return to Legitimacy: New Hampshire's Constitution of 1776*, Deborah Downs, *The New Hampshire Constitution of 1776: Weathervane of Conservatism*, Richard Noyes, *Time Frame as a Variable in the Fifth Provincial Congress*, 31 HIST. N.H. 155 – 176, 192-217 (Winter 1976).

<sup>37</sup> See LAWRENCE FRIEDMAN, THE NEW HAMPSHIRE STATE CONSTITUTION 3-14 (2d ed. 2015) (discussing how colonial rule, the temporary Constitution of 1776, and the Constitutions of 1778 and 1784 played a role in the development of the constitutional process).

<sup>38</sup> The history that comes closest is DANIELL, *supra* note 18, but his chapters on New Hampshire's constitutional development and that of the Upper River Valley's secession are treated as separate topics and chapters, and does not fully discuss the interplay and influence of one upon the other.

<sup>39</sup> Jon Elster, *Ways of Constitution Making*, in DEMOCRACY'S VICTORY & CRISIS: NO. SYMPOSIUM NO. 93 123, 137 (Axel Hadenius ed., 1994); see Jon Elster, *Forces and Mechanisms in the Constitution-Making*

by scholarship in law, political science, and history.<sup>40</sup> The inquiry into procedure was propelled in large part by the spate of post-colonial constitution-writing in Africa in the 1990s,<sup>41</sup> and particularly the innovations in Uganda and South Africa.<sup>42</sup> In Uganda, innovations included the institution of an appointed and inclusive constitutional commission, which spent four years soliciting 250,000 submissions from a wide swath of Ugandans which were then included in a constitutional draft submitted to the elected constituent assembly.<sup>43</sup> The South African process was also thought to be highly inclusive, with 26 parties producing a preliminary and transitional constitution, and participatory, with strong pre-election civic education and wide-ranging public consultation across all media forms at multiple points in the process producing over 2.2 million submissions.<sup>44</sup> Though impressive, the vastness and irregular formats of the submissions made them largely unusable by transitional authorities.<sup>45</sup> These and other innovations (such as those of the unsuccessful Kenyan process in 2005<sup>46</sup>) predicated the United Nation's adoption of normative standards for constitution-writing when invited to assist in the process by local authorities.<sup>47</sup> According to a UN 2009 guidance note by the Secretary-General, "UN assistance, when requested by national authorities, should be designed to contribute toward inclusive, participatory and transparent processes."<sup>48</sup>

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*Process*, 45 DUKE L.J. 364, 364 (1995) (discussing the process of creating a constitution); see generally Hanna Lerner & David Landau, *Introduction to Comparative Constitution Making: The State of the Field*, in *COMPARATIVE CONSTITUTION MAKING* 1 (Hanna Lerner & David Landau eds., 2019) (discussing the state of field of the constitutional process).

<sup>40</sup> See Andrew Arato, *Revolutions and Constitution Making*, in *COMPARATIVE CONSTITUTION MAKING* 31 (Hanna Lerner & David Landau eds., 2019) (discussing how revolution impacted the constitutional regimes of Central Europe and South Africa).

<sup>41</sup> African states which wrote constitutions at this time include Namibia, Malawi, Uganda, South Africa, Benin, Tanzania, Kenya, and Zimbabwe underwent constitutional reforms. Franck & Thiruvengadam, *supra* note 8, at 7.

<sup>42</sup> *Id.* at 8.

<sup>43</sup> *Id.* at 8-9.

<sup>44</sup> South Africa's Constitutional Process, Report prepared by Libertas Constitutional Consulting for UNDP and Rashad (Apr. 2014) (unpublished manuscript) (on file with the author).

<sup>45</sup> *Id.* at 7.

<sup>46</sup> Kenya's Failed Constitutional Process, Report prepared by Libertas Constitutional Consulting and Rebecca Healey (Apr. 2014) (unpublished manuscript) (on file with the author).

<sup>47</sup> UN GUIDELINES, *supra* note 8, at 2 ("This note provides the guiding principles and framework for UN engagement in constitution-making processes.").

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

Comparative scholarship was quick to justify these standards, beginning with public participation. The authors of a major study on constitutional design, *The Endurance of National Constitutions*, concluded that participation—which they tied to electing the drafting body and public ratification—was one of three features of durable constitutions.<sup>49</sup> In 2011, the major comparative compendium on Constitution-writing opened with an argument that the International Covenant on Civil and Political Rights’ stipulation in Article (1)1 that “all peoples have the right to self-determination” comprehends an international human right to participate in constitution-writing.<sup>50</sup> In conjunction with a local Libyan civil society organization and the United Nations Development Programme, this author reviewed participation in eighteen constitutional processes as part of a comparative study prepared for the Libyan Constitution Drafting Assembly in April of 2014.<sup>51</sup> The next year, Todd Eisenstadt, Carl Levan, and Tofigh Maboudi found that increased levels of public participation—electing the drafting body or direct public debate—increased post-promulgation levels of democracy.<sup>52</sup>

Yet before scholarship on participation reached its zenith, a consensus began to emerge in favor of group inclusion as the most important element of the UN’s trifecta. In 2014, this author published her finding (based on the comparative study performed for Libya) that group inclusion was the most important factor to the success of a constitutional process.<sup>53</sup> Five years later, Eisenstadt and Maboudi changed course and published new data that showed that as between popular participation and group inclusion, “inclusion is what matters” in improving democracy levels.<sup>54</sup> In 2019,

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<sup>49</sup> See ZACKARY ELKINS, TOM GINSBURG & JAMES MELTON, *THE ENDURANCE OF NATIONAL CONSTITUTIONS* 97, 98, 100, 104 (2009) (describing how the public’s involvement in the constitutional process strengthens its enforceability).

<sup>50</sup> Franck & Thiruvengadam, *supra* note 8, at 5.

<sup>51</sup> UNDP-Libertas Constitutional Consulting Comparison Chart, Report prepared by Libertas Constitutional Consulting for UNDP and Rashad (Apr. 2014) (unpublished manuscript on file with the author).

<sup>52</sup> See generally Todd Eisenstadt, Carl Levan & Tofigh Maboudi, *When Talk Trumps Text: The Democratizing Effects of Deliberation during Constitution-Making, 1974-2011*, 109 AM. POL. SCI. REV. 592 (2015) (discussing how reformers of the Constitution should focus on encouraging the public to participate in the constitution-making process).

<sup>53</sup> Updike Toler, *Mapping*, *supra* note 9, at 1284 (“If a constitution-making process is not inclusive, it will not much matter what other choices are made regarding the process, as the exclusion of relevant groups and social segments can unravel an otherwise model process.”).

<sup>54</sup> Eisenstadt & Maboudi, *Being There is Half the Battle*, *supra* note 5, at 2135.

Gabriel Negretto studied inclusive constitutional processes and found similar results.<sup>55</sup> Donald Horowitz' monogram published last year on constitutional process emphasized that inclusivity and consensus—which are difficult to attain together—are key to successful constitutional negotiations.<sup>56</sup> A recent dissertation makes the case that participation is irrelevant, but group inclusion paramount.<sup>57</sup>

Other than a short piece written by this author,<sup>58</sup> none of this literature comprehends U.S. constitutional procedure, especially that on the state-level. As previously discussed, this is odd, considering that many elements of American procedure worked out in the early American states and culminating in the U.S. Constitution presages modern normative standards as promulgated by the UN.<sup>59</sup>

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This article intervenes in Republicanism, demonstrating that the relationship between ideas and events are non-linear, and addresses scholarship in domestic and comparative constitutional theory by providing a case study on the relationship of group inclusion to constitutional legitimacy.

## II. NEW HAMPSHIRE'S CONSTITUTIONAL EXPERIMENTS

Midway through the summer of 1787, Constitutional Convention delegate and Connecticut legal heavyweight Oliver Ellsworth interjected into the debates over modes of ratification that: “[A] new sett [sic] of ideas seemed to have crept in since the articles of Confederation were established. Conventions of the people, or with power derived expressly from the people,

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<sup>55</sup> See, e.g., NEGRETTO, *supra* note 5, at 117 (“[C]ases, such as Brazil’s 1988 constitution and South Africa’s 1996 constitution illustrate the benefits of mixing elite cooperation with popular consultation channels.”).

<sup>56</sup> See HOROWITZ, *supra* note 6, at 92 (“There is an important tradeoff between inclusion and consensus.”).

<sup>57</sup> SAATI, *supra* note 12, at i (“This assumption has not, however, been the subject of systematic or comprehensive analysis. Therefore, the overarching purpose of this thesis is to scrutinize the participation-hypothesis – as it is referred to in this study.”).

<sup>58</sup> See Lorianne Updike Toler, *First Constitutions: American Procedural Influence*, in *COMPARATIVE CONSTITUTION MAKING* 384, 384-407 (Hanna Lerner & David Landau eds., 2019) (discussing influences on the American Constitution system).

<sup>59</sup> UN GUIDELINES, *supra* note 8, at 2.

were not then thought of. The Legislatures were considered as competent. Their ratification has been acquiesced in without complaint.”<sup>60</sup>

From whence did this “new sett [sic] of ideas<sup>61</sup> about Conventions, ratifications, and constitutional procedure derive? How, by July 1787, did this popular sovereignty ideological creep occur? Answering these questions necessarily involves the history of the New Hampshire and Massachusetts state constitutions. The history detailed here will focus on the former and reserve the latter for another time.

New Hampshire constitutional history reveals the true provenance of the constitutional convention as an expression of popular sovereignty. It began not as the idea of a Concord, Massachusetts shoemaker or even with Pennsylvania’s radical republicans, but with Thomas Paine’s *Common Sense*, the May 15, 1776 declaration of Congress inviting colonies-cum-states to craft new governments, and the Declaration of Independence’s sweeping phrases grounding political power in the “consent of the governed.”<sup>62</sup> This compliment of nationally-disseminated writings simultaneously spread the ideas of popular sovereignty, turning the previously held idea that power and authority emanated from the center—the parliamentary sovereignty touted by Blackstone<sup>63</sup>—on its head. Newly empowered, “we the people,” often from the most democratic elements of society in Pennsylvania, Delaware, Massachusetts, and New Hampshire, pressed popular sovereignty’s application into new modes of constitution-making to better represent themselves and their interests.

This article will also stress that popular sovereignty procedure was unavailing in ensuring that New Hampshire’s Constitution crossed the finish line. Doing so required the inclusion of enfranchised groups.

*a. The First Written Constitution: New Hampshire’s Temporary Constitution of 1776*

New Hampshire was the first colony to “take up government,” or write a Constitution.<sup>64</sup> They were also the first to hold a constitutional convention

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<sup>60</sup> James Madison’s *Notes of the Constitutional Convention (July 23, 1787)*, in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 91 (Max Farrand ed., 3d ed. 1911) [hereinafter *Farrand*].

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

<sup>62</sup> THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

<sup>63</sup> 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 143 (Univ. Chi. Press 1979) (1765).

<sup>64</sup> See correspondence between John Adams and James Warren, *infra* note 69.

in its modern form, the first to allow for popular ratification of a constitution, and the first and only colony-cum-state to encourage and incorporate popular participation in the substance of constitution-writing and hold a special issue referendum in their constitutional process. Why all this constitutional experimentation in such a northerly colony?

The root of the first experiment, constitution-writing, began with John Adams and his junto in the 1775 Continental Congress. Almost as the fighting began at Lexington & Concord,<sup>65</sup> John Adams began preaching “new, strange and terrible Doctrines” about constitution-making.<sup>66</sup> The seed of these ideas came from his reading of Enlightenment thinkers<sup>67</sup> studying the Greek, Dutch, and Swiss governments,<sup>68</sup> and were developed in earnest discussions with his closest circle in Boston before and after arriving in Philadelphia.<sup>69</sup> When the May 16, 1775 petition from the desperate, extra-

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<sup>65</sup> The first shots of the Revolution were fired in Lexington on April 19, 1775.

<sup>66</sup> 3 JOHN ADAMS, DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS 352 (L.H. Butterfield et al. eds., 1961) [hereinafter Adams’ Autobiography].

<sup>67</sup> See e.g., *id.* at 358 (having “read Harrington, Sydney, Hobbs, Nedham and Lock”):

I had read Harrington, Sydney, Hobbs, Nedham and Lock, but very little Application to any particular Views: till these Debates in Congress and these Interrogations in public and private, turned my thoughts to those Researches, which produced the Thoughts on Government, the Constitution of Massachusetts, and at length the Defence of the Constitutions of the United States and the Discourses on Davila, Writings which have never done any good to me though some of them undoubtedly contributed to produce the Constitution of New York, the Constitution of the United States, and the last Constitutions of Pennsylvania and Georgia.

<sup>68</sup> *Id.* at 352.

<sup>69</sup> This is exemplified through Adams’ autobiography:

This Subject had engaged much of my Attention before I left Massachusetts, and had been frequently the Subject of Conversation between the two Warrens, Major Hawley and others besides my Colleagues in Congress and lay with great Weight upon my Mind as the most difficult and dangerous Business that We had to do, . . . .

*Id.* at 351.

There is no contemporaneous evidence of these discussions with Boston contemporaries having occurred other than Adams’ recollection in his autobiography nearly 30 years later, which he began to draft in 1802. *Id.* at 253. However, his correspondence with James Warren during Adams’ stints in early Congresses shows that the imperative of “taking up government” was a common, earnest theme between the two friends.):

we dare not Attempt to Form a Civil Constitution or redress our Inconveniencies, least our Attempts should be disapproved of at Philadelphia and that perhaps made a Pretence to Justifie our being left to the Mercy of our Enemies . . . . We are Sensible of the necessity of A Military Force to Oppose the Encroachments and Insults of our Enemies and that to Form

legal Massachusetts government reached Congress requesting permission to set up a “regular[ly] established Government” to deal with the exigencies of war on June 2, 1775, Adams saw his opening.<sup>70</sup> Prosecuting the war required the force of power, and this required a legal foundation.<sup>71</sup> That the theatre of war was then in Massachusetts made her case “most urgent,” but it would not be long before other colonies were in similar straights.<sup>72</sup> Having laid his foundation, Adams came to the point:

[W]ith a View to this Subject I had looked into the Ancient and modern Confederacies for Examples: but they all appeared to me to have been huddled up in a hurry by a few Chiefs. But We had a People of more Intelligence, Curiosity and Enterprise, who must be all consulted, and We must realize the Theories of the Wisest Writers and invite the People, to erect the whole Building with their own hands upon the broadest foundation. That this could be done only by Conventions of Representatives chosen by the People in the several Colonies, in the most exact proportions. That it was my Opinion, that Congress ought now to recommend to the People of every Colony to call such Conventions immediately and set up Governments of

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support and Controul them, A Civil Government is necessary. But how the first is to be Established or the last Formed is a question which is left to Ourselves.

Letter from James Warren to John Adams (Oct. 16, 1774), in 2 PAPERS OF JOHN ADAMS 190-92 (Robert J. Taylor et al. eds., 1977) [hereinafter PJA].

What reason can be given that the question for Assumeing and Exercising (sic.) Govt. has not been started and Agitated in the publick Papers, has any particular policy prevented. It seems to me it would have had good Effects on the Other Colonies. They may hardly believe it so necessary as we know it to be while so little is said about it.

Letter from James Warren to John Adams (Jan. 15, 1775), in 2 PJA 213-14.

The principal objects of our attention, have been the regulation and officering of the army, and arming the men and devising ways and means to support the Enormous Expence Incurred under our present Situation, and these I dare say you can easily Conceive to be attended with many difficulties under the present Circumstances of our Government in which recommendations are to supply the place of Laws, and destitute of Coercive power Exposed to the Caprice of the People, and depending entirely on their virtue for Success . . . The Extream want of the Exercise of fixt settled Government is sufficiently felt here at this time and has produced the assignment of a Time to take that matter under Consideration. Next Tuesday is the time. What will be done I know not. I am Inclined to think they will Vote to assume a Government, but who is to form this Constitution, who is to rig the Ship I can't tell.

Letter from James Warren to John Adams (May 7, 1775), in 3 PJA 3-6. For evidence of conversations with other delegates on the subject of government-creation, see 1775 Sept. 16. Saturday, in 2 ADAMS' AUTOBIOGRAPHY 173-74.

<sup>70</sup> Adams' Autobiography, *supra* note 66, at 351; 2 LIBRARY OF CONG., J CONTINENTAL CONG., 1774-1789, at 112 (1905) [hereinafter JCC].

<sup>71</sup> *See id.* at 352 (discussing how Congress should recommend the colonies to set up governments controlled by the people).

<sup>72</sup> *Id.*

their own, under their own Authority: for the People were the Source of all Authority and Original of all Power.<sup>73</sup>

Although Adams and his Bay Colony friends had seen the necessity for over a year, this preaching was not well received by the [Second] Congress except by a select few.<sup>74</sup> Among this *avant garde* junto was John Sullivan of New Hampshire and John Rutledge of South Carolina.<sup>75</sup>

This junto worked almost immediately to fulfill Adams' prophecy that other states would follow in Massachusetts' steps.<sup>76</sup> Before departing to serve as a general under George Washington in June 1775,<sup>77</sup> Sullivan must have enlisted his New Hampshire peers to the cause. As early as July 8, Meshech Weare, then President pro tempore of the Provincial Congress, wrote the Continental Congress that "the Colony is at Present wholly governed by this [provincial] Congress & the Committee of the respective Towns. But we greatly desire some other Regulations as our present situation is attended with many Difficultys; but shall not attempt any thing of that kind without Direction."<sup>78</sup>

Additionally, Sullivan's successors in Congress formally requested permission to craft a constitution on October 18, 1775.<sup>79</sup> Although Massachusetts' pleas earlier in the summer had not been altogether successful, Congress opting to permit the organization of state government under a modified form of the royal charter,<sup>80</sup> New Hampshire delegates had reason to hope for more. They were, after all, distinct from Massachusetts and any other colony in that they had no charter to fill the power vacuum

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<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* ("[N]ot a very small Number heard [the arguments for taking up government] with apparent Pleasure, and none more than Mr. John Rutledge of South Carolina and Mr. John Sullivan of New Hampshire.").

<sup>76</sup> South Carolinian Delegate John Rutledge also comprised those few who received Adams' preaching with pleasure. Adams' Autobiography, *supra* note 66, at 352. The same day New Hampshire's request to write a constitution was granted, South Carolina delegates also submitted a petition, among "sundry papers" relative to the difficulty of conducting affairs there, to take up government. Debates in Congress (Nov. 3, 1775), *in* 3 JCC 319. The next day, Congress recommended that South Carolina also enact a temporary constitution by a resolution nearly verbatim that sent to New Hampshire. Debates in Congress (Nov. 4, 1775), *in* 3 JCC 326-27.

<sup>77</sup> Adams' Autobiography, *supra* note 66, at 354.

<sup>78</sup> Letter to the Continental Congress (July 8, 1775), *in* 7 NEW-HAMPSHIRE STATE PAPERS 561 [hereinafter NHSP].

<sup>79</sup> *See* Debates in Congress (Oct. 18, 1775), *in* 3 JCC 298 (noting that the delegates of New Hampshire brought the advice for the administration of justice to Congress).

<sup>80</sup> 2 ADAMS' AUTOBIOGRAPHY 353; Debates in Congress (June 9, 1775), *in* 2 JCC 83-84.

created by royal governor John Wentworth's departure on August 24, 1775.<sup>81</sup>

The permission granted New Hampshire to "take up government" was brought about by means of a well-executed feint. New Hampshire delegate John Langdon wrote to New Hampshire Provincial Congress President<sup>82</sup> and Committee of Safety member<sup>83</sup> Matthew Thornton October 2, 1775 urgently requesting a petition "setting forth the absolute necessity" of "tak[ing] Government" to formalize Weare's earlier direct request from either the New Hampshire Convention or Committee of Safety.<sup>84</sup> The Provincial Convention was then not sitting, and the Committee of Safety was overwhelmed with prosecuting the war, having just intercepted a Boston-bound British provision ship.<sup>85</sup> After conveying this and other war business in an October 12, 1775 letter to the New Hampshire delegation in Congress, almost as an afterthought, the Committee of Safety requested the delegates' "diligent Endeavours to procure something to be done relative to our civil Government."<sup>86</sup> Langdon and Josiah Bartlett required no more hint, and, presumably upon receipt, submitted the following fabricated "instructions" from the New Hampshire Provincial Congress to the Continental Congress on October 18, 1775:

We would have you immediately use your utmost endeavours to obtain the advice and direction of the Congress, with respect to a method for our administring [sic] Justice, and regulating our civil police. We press you not to delay this matter, as, its being done speedily, (y.<sup>r</sup> knowledge of our

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<sup>81</sup> BELKNAP, *supra* note 30, at 357. In fact, Bartlett and Langdon wrote home to the Provincial Congress that the lack of a charter in New Hampshire distinguished their case from Massachusetts and resulted in swaying delegates in favor of constitution-writing there, a de facto declaration of independence. Opening the door there rendered Congress more willing to grant permission to other states to craft constitutions despite still having something like a royal charter as they did the very next day for South Carolina. Debates in Congress (Nov. 4, 1775), in 3 JCC 319.

<sup>82</sup> DANIELL, *supra* note 18, at 117-18.

<sup>83</sup> Journal of the Fourth Provincial Congress (May 20, 1775), in 7 NHSP 478.

<sup>84</sup> Letter from [New Hampshire] Delegates in Continental Congress to Matthew Thornton, Esq. on assuming Government, &c. (Oct. 2, 1775), in 7 NHSP 615. Although the letter is signed by both Josiah Bartlett and John Langdon, only Langdon had a hand in it, as the body of the letter indicates that Bartlett was still recuperating from smallpox, and therefore not in attendance. *Id.*

<sup>85</sup> *See generally* Letter from the Provincial Committee of Safety to our Delegates in Continental Congress (Oct. 12, 1775), in 7 NHSP 624 (providing an update on George Washington's handling of the ship and cargo).

<sup>86</sup> *Id.*

circumstances must inform you) will probably prevent the greatest confusion among us.<sup>87</sup>

The historical record reveals four reasons why we can be sure these “instructions” were fabricated wholecloth by the Congressional delegation. First, the interval between the letter sent to Matthew Thornton on October 2 and the petition to Congress on October 18 was quite short, especially given the lag in postal service, and did not provide opportunity for much communication. Secondly, the New Hampshire Provincial Convention was not then in session and could have provided no such instruction.<sup>88</sup> Too, when they did convene two weeks after the petition was submitted on October 31, 1775,<sup>89</sup> they quickly set about to organize a committee to draft the requested petition—a step that would have otherwise been moot.<sup>90</sup> Third, President Thornton was too busy to even broach the idea with the Committee of Safety on which he sat; he informed them on October 16, 1775 that he could likely not attend their impending meeting at Cambridge to consult with an army committee from the Continental Congress because of his wife’s illness.<sup>91</sup> He had been so busy in caretaking that, “my cloase [clothes] has not been off but one night for ten past . . . .”<sup>92</sup> Finally, when Josiah Bartlett and John Langdon wrote to Committee of Safety Chairman William Whipple<sup>93</sup> on October 26, 1775 to report that a congressional committee had been appointed to consider New Hampshire’s request to take up government, they bemoaned the fact that a petition had yet to be sent, a document that would have “help’d the matter [and presumably their guilty consciences] much.”<sup>94</sup> In all, it seems the only “instructions” provided the

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<sup>87</sup> Debates in Congress (Oct. 18, 1775), in 3 JCC 298 (These “instructions” were precipitated by the following: The delegates from New Hampshire laid before the Congress, a part of the instructions delivered to them by their Colony, in the following words: “The delegates from New Hampshire laid before the Congress, a part of the instructions delivered to them by their Colony, in the following words: . . .”).

<sup>88</sup> See Correspondence (Sept. 2, 1775), in 7 NHSP 610 (noting that Provincial Congress was adjourned until October 31st, 1775).

<sup>89</sup> Journal of the Fourth Provincial Congress (Oct. 31, 1775), in 7 NHSP 638.

<sup>90</sup> Journal of the Fourth Provincial Congress (Nov. 3, 1775), in 7 NHSP 641.

<sup>91</sup> Letter from Matthew Thornton to the Committee of Safety (Oct. 16, 1775), in 7 NHSP 625.

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

<sup>93</sup> See Journal of the Second Provincial Congress (May 20, 1775), in 7 NHSP 477-78 (voting for Bartlett, Langdon and Whipple to form a Committee of Safety). His chairmanship is confirmed by the signature of his cover letter to that of Meshech Weare’s to the Continental Congress. Letter from William Whipple to Rev. Dr. John Longdon (July 8, 1775), in 7 NHSP 560-61.

<sup>94</sup> Letter from N.H. Delegates in Congress to William Whipple (Oct. 26, 1775), in 7 NHSP 631.

New Hampshire delegates were Weare's note from the previous summer and the brief encouragement found in the October 12 letter, both of which emboldened the New Hampshire delegates to create "instructions" in service to the larger cause of Independence through constitutional revolution.

But all's well that ends well. As it was, the authorization from Congress to draft a constitution was approved the same day that the New Hampshire Convention took up the matter on November 3, 1775.<sup>95</sup> Though designed to be temporary, Congress' authorization sounded in clear popular sovereignty language:

Resolved, That it be recommended to the provincial Convention of New Hampshire, to call a full and free representation of the people, and that the representatives, if they think it necessary, establish such a form of government, as, in their judgment, will best produce the happiness of the people, and most effectually secure peace and good order in the province, during the continuance of the present dispute between G[reat] Britain and the colonies.<sup>96</sup>

Langdon and Bartlett were ecstatic, no less that their innocent hoax had played out so well, writing home that same day that the motion "carried by a very great majority" thanks to their lobbying efforts in and out of doors.<sup>97</sup>

Their note and Congressional authorization, sent together, did not reach the provincial assembly before they adjourned on November 15, 1775.<sup>98</sup> Even those involved in procuring the authorization were left in the dark: John Sullivan complained to Meshech Weare that he was "never informed" except in "general terms" by his Congressional colleagues that congressional authorization was granted.<sup>99</sup> That Congress' resolve did not reach New Hampshire in a timely fashion meant that the election notices that went out for the Fifth Provincial Congress' election contained provisional instructions:

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<sup>95</sup> Journal of the Fourth Provincial Congress (Nov. 3, 1775), in 7 NHSP 641 ("Voted, That the Honble Matthew Thornton Esq., the Hon. Meshech Weare Esq., Ebenezer Thompson Esq., Mr. Nathaniel Rogers, John Dudley, Wyseman Claggett & Benjamin Giles, Esq. be a committee to bring in a Dra't of a Petition from this Congress to the Continental Congress, setting forth the State of this Colony, and Praying their Direction for some speedy mode of Government & Execution of Justice in this Colony; and that the Committee lay the said Draft before this Congress as soon as may be.").

<sup>96</sup> Debates in Congress (Nov. 3, 1775), in 3 JCC 319.

<sup>97</sup> Letter from Delegates in Continental Congress (Nov. 3, 1775), in 7 NHSP 641-42.

<sup>98</sup> Journal of the Fourth Provincial Congress (Nov. 15, 1775), in 7 NHSP 660-64; DANIELL, *supra* note 18, at 109.

<sup>99</sup> Draft Letter from John Sullivan to Meshech Weare (Dec. 11, 1775), in John Sullivan Papers; John Sullivan to Meshech Weare (Dec. 11, 1775), in 7 NHSP 685, 686.

“. . . in case there should be a recommendation from the Continental Congress for this Colony to Assume Government in any way that will require a . . . house of Representatives, That the said Congress for this Colony be Impowered to Resolve themselves into such a House as may be recommended[.]”<sup>100</sup> This provided no clear electoral mandate to create a constitution; instead, it anticipated that the Continental Congress would recommend a form of government for them to assume rather than leaving the drafting to them. Later, Portsmouth and Grafton county would claim as much in arguing that those elected under the flawed electoral plan were granted no special power to draft a new form of government.<sup>101</sup>

Popular constitutional mandate or no, the Fifth Provincial Congress met as scheduled on December 21, 1775, this time with congressional authorization to assume government in hand.<sup>102</sup> Although not all towns were represented—six towns in Grafton County were notably absent<sup>103</sup>—the Provincial Congress moved quickly to establish regular government as permitted. On December 27, they voted to “take up Government” and appointed a committee of 15 (scaled back to five the next day) to put a plan of government together.<sup>104</sup>

The last act of the Fifth Provincial Congress on January 5, 1776 was to “take up Civil Government,”<sup>105</sup> whereupon a plan of government was

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<sup>100</sup> Journal of the Fourth Provincial Congress (Nov. 14, 1775), in 7 NHSP 657, 660.

<sup>101</sup> *Infra* notes 186-87 and accompanying text. The town of Portsmouth, for their part, thought the times “too unsettled” to draft a Constitution, and instructed their delegates not to partake in the formation of a new government should Congress provide the power. Instructions to the Representatives of Portsmouth, New Hampshire (Dec. 25, 1775), in 7 NHSP 701.

<sup>102</sup> Journal of the Fifth Provincial Congress (Dec. 21, 1775), 7 NHSP 690. Although there is no record of Congress’ authorization and Langdon and Bartlett’s letter in the Fifth Provincial Journal, that they received it is confirmed by a proclamation published soon after the Constitution was crafted: “Whereas the CONGRESS of this Colony have, agreeable to a Recommendation from the Honorable CONTINENTAL CONGRESS, resolved on, and form’d themselves upon a PLAN of GOVERNMENT . . . ” Colony of New New-Hampshire. By the Council and Assembly, A Proclamation (1776), reprinted in DANIELL, *supra* note 18, at 113.

<sup>103</sup> Journal of the Fifth Provincial Congress (December 21, 1775), in 7 NHSP 693. Other towns who did not send representatives included Sandown & Hawke, Nottingham, Madbury, New Durham, the Gore & Wolfborough, Francestown & New Boston, New Britton, Warner, Perrystown & Fisherfield, Rindge, Jaffrey & Peterboro Slip, Winchester, Richmond, Swanzey & Fitzwilliam, and Westmoreland. *Id.* at 690-93.

<sup>104</sup> Journal of the Fifth Provincial Congress (Dec. 27, 1775), in 7 NHSP 703-04.

<sup>105</sup> Note by the Editor, 7 NHSP 710 (“The next and last vote passed by the Fifth Provincial Congress, Exeter January 5th 1776, was ‘That this Congress take up Civil Government.’” (emphasis omitted)).

presented and adopted the same day. This constitution, as it would come to be called,<sup>106</sup> was brief by any standard.<sup>107</sup> A mere 911 words and a temporary expedient, it put a conservative government in place as recommended by Sullivan and the colony's delegates in Philadelphia,<sup>108</sup> and awkwardly omitted many elements of modern constitutions, such as separation of powers and a bill of rights.<sup>109</sup> In short, the first modern Constitution was a rush job crafted by inexperienced legislators with no political theory pretensions,<sup>110</sup> and soon inspired complaints that it had been presumptuous for a colony "so Small & Inconsiderable" to "take the Lead in a Matter of So great Importance."<sup>111</sup>

Rushed and awkward though it was, New Hampshire had taken a momentous step. New Hampshire could have deferred to larger states such as New York and Virginia, which were "much Larger & more opulent."<sup>112</sup> It could have waited for more brilliant minds and labored more diligently to meet the needs of its constituents in crafting their fundamental law. But such a political opportunity was not afforded those who were wiser, better, and bigger. Instead, this small and simple colony responded to the call sounded through the creative cunning of its national correspondents, laboring themselves for independence through constitutional innovations. Great

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Whereas the former resolve referred to putting a plan in place, now the resolve referred to voting the plan into place.

<sup>106</sup> See WILLI PAUL ADAMS, *supra* note 26, at 19. It should be noted that, as writing a plan of government was innovative, such a plan was not yet called a "constitution;" that nomenclature until this point referred to the institutional structure of government rather than a written document. Constitution-writing in the colonies would change the meaning of the word to refer to a written document.

<sup>107</sup> See Lawrence Friedman, *Endurance of State Constitutions: Preliminary Thoughts and Notes on the New Hampshire Constitution*, 60 WAYNE L.R. 203, 209 (calling the 1776 constitution "exceedingly brief—almost an outline").

<sup>108</sup> See Letter from General Sullivan to Meshech Weare, *supra* note 99; Letter from Delegates in Congress, *supra* note 97, at 642.

<sup>109</sup> Deborah Downs, *The New Hampshire Constitution of 1776: Weathervane of Conservatism*, 31 HISTORICAL NEW HAMPSHIRE, 164, 170 (1976). In adopting the 1776 Constitution, the Fifth Provincial Congress made itself the lower house in a bicameral, one-branch system, and elected the upper house from among themselves. NEW HAMPSHIRE CONSTITUTION (1776). They made no provision for an executive, so the president of the Senate, Meshech Weare, fulfilled this role and subsequently also was made head of the judiciary.

<sup>110</sup> Deborah Downs, *The New Hampshire Constitution of 1776: Weathervane of Conservatism*, 31 HISTORICAL NEW HAMPSHIRE, at 175.

<sup>111</sup> Dissent & Protest, *Journal of the House* (Jan. 12, 1776), in 8 NHSP 13, 14.

<sup>112</sup> *Id.*

things were thereby brought to pass. Just as New Hampshire's successful request in Congress paved the way for other states' successful requests,<sup>113</sup> its *avant-garde* constitution-writing normalized the practice for other (better, bigger) states to perfect,<sup>114</sup> ultimately paving the way for Congress' general authorization for all colonies to craft constitutions on May 15, 1776.<sup>115</sup> This declaration, amounting as it did to establishing legal independence, essentially rendered the Declaration of Independence a *fait accompli*. By means of constitution-writing, including its initial advance in New Hampshire, the colonists first *acted* independent before *declaring* themselves so.<sup>116</sup> More, the inauspicious 911 words began the first wave of constitution-writing in the American states and heralded the genesis of constitution-writing worldwide.<sup>117</sup>

*b. The First Constitutional Convention: Pure Popular Sovereignty*

New Hampshire played a key role in general constitutional development—not only in writing the first modern Constitution, but in hosting the first modern constitutional convention. Acting as the focal point for when Enlightenment theory was truly made flesh for the first time, New Hampshire's constitutional history thus provides a prescient view into the time and space when constitutional theory became practice. In this pivotal role, New Hampshire was the first to fully theorize the necessity of a

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<sup>113</sup> South Carolina's request was submitted the same day that New Hampshire's request was approved, and approved the following day. See Journal of the Fourth Provincial Congress (Nov. 4, 1775), in 3 JCC 326-27. A month later, on December 2, 1775, the Committee [presumably of Safety] of Northampton submitted a letter "with sundry papers containing matters of importance" to the Continental Congress. 3 JCC 395. The next day, in addition to approving military operations, the Congress also approved the same resolution in favor of Virginia, 3 JCC 403-04, that they had approved for South Carolina the month before, 3 JCC 320, 326-27.

<sup>114</sup> South Carolina passed its interim Constitution on March 26, 1776, Virginia on June 29, 1776. JOURNALS OF THE PROVINCIAL CONGRESS OF SOUTH CAROLINA, 1775-76, 254-56 (William E. Hemphill & Wylma A. Wates eds., 1960); Virginia Convention Proceedings (June 29, 1776), in THE PROCEEDINGS OF THE CONVENTION OF DELEGATES 78 (Richmond, 1816).

<sup>115</sup> 4 JCC 341, 357-58.

<sup>116</sup> Some recognized this reality, such as the writer of *The People, the Best Governors* out of the Connecticut River Valley when they wrote in January 1777, "But if it be still asserted that the legislative constitution is founded on independency, it will prove, if anything, that this very constitution established independency itself, before it was proclaimed by the congress." Republican, Circular Letter issued by "College Party" (Jan. 30, 1777), reprinted in part in ALICE MARY BALDWIN, THE NEW ENGLAND CLERGY AND THE AMERICAN REVOLUTION 179-80 (2d ed. 1965).

<sup>117</sup> See generally ROBERT F. WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS 42-71 (2009) (identifying two major "waves" of state constitution-making).

constitutional convention as an application of popular sovereignty. This development can only be understood by tracking popular sovereignty ideology and its impact on the evolution of constitutional procedure on the ground.

In 1775, popular sovereignty was conceptually expressed through legislative—which meant parliamentary—supremacy.<sup>118</sup> Whether the legislature represented the collective popular will,<sup>119</sup> the aggregate of each individual will,<sup>120</sup> or acted as agents for the indivisible will of the people,<sup>121</sup> by any account, parliamentary sovereignty in effect reigned supreme.<sup>122</sup> Locke’s popular sovereignty arguments and even those made by Montesquieu legitimized the Glorious Revolution, wherein Parliament installed William and Mary, changing the balance of British power between king and Parliament, leaving the latter with the upper hand.<sup>123</sup> During normal politics, parliamentary will was the legitimate expression of the people’s will in England.<sup>124</sup> Although Locke recognized the right of rebellion and the “people’s” ability to reform and reconstitute government during abnormal politics<sup>125</sup> this “right” had been exercised by Parliament in the Revolution of 1689 with little actual consultation of the people.<sup>126</sup> Other than the usual intermittent voting when a new Parliament was called, the people’s role in such parliamentary sovereignty was theoretical at best. In short, prior to the American Revolution, the theory of popular sovereignty served to legitimate the events of the Glorious Revolution and the rebalance

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<sup>118</sup> WHITTINGTON, *supra* note 23, at 117-23.

<sup>119</sup> JOHN LOCKE, *SECOND TREATISE ON GOVERNMENT* at §§ 97, 99, 134, 136, 143, 149.

<sup>120</sup> WHITTINGTON, *supra* note 23, at 120-21.

<sup>121</sup> *Id.* at 122-23.

<sup>122</sup> BLACKSTONE, *supra* note 63.

<sup>123</sup> See preface, JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 137 (1698) (2003 reprint) (hoping the work is “sufficient to establish the Throne of our Great Restorer, Our present King William; to make good his Title, in the Consent of the People, which being the only one of all lawful Governments . . . [a]nd to justifie to the World, the People of England, whose love of their Just and Natural Rights, with their Resolution to preserve them, saved the Nation when it was on the very brink of Slavery and Ruine”); *but see* Peter Laslett, “Two Treatises of Government’ and the Revolution of 1688, in *TWO TREATISES OF GOVERNMENT*, 45-66 (Peter Laslett ed. 1960) (positing that the first treatise was written prior to 1688, [and much of the second], but still recognizing that despite its antecedent date, it had the *effect* of legitimizing the revolution).

<sup>124</sup> LOCKE, *SECOND TREATISE*, *supra* note 119, at § 243.

<sup>125</sup> *Id.* §§ 149, 214, 220, 221, 243.

<sup>126</sup> Peter Laslett, *supra* note 123, at 45.

of power thereafter, but this theory did nothing to change the role of “the people” or the power they exercised in practice.

Not so in America. Lockean popular sovereignty became more difficult to apply to a Parliament in which Americans had no actual representation.<sup>127</sup> As the colonists began to exercise their right of rebellion in 1775, distancing themselves from Parliament, popular sovereignty at the pre-federal level was conceptually placed in the Continental Congress. This meant that individual colonies felt they could not fully embrace popular sovereignty’s ultimate right of crafting new governments without Congressional sanction.<sup>128</sup>

When, on May 15, 1776, Congress declared that the people in the several colonies could reconstitute their own governments, the spell of parliamentary sovereignty was broken. People—real people, not those who theoretically legitimized the events of 1689—were empowered to claim the ultimate right of popular sovereignty to refashion themselves anew. The proclamation provided in full:

WHEREAS his Britannic Majesty, in conjunction with the lords and commons of Great Britain, has, by a late act of Parliament, excluded the inhabitants of these United Colonies from the protection of his crown; And whereas, no answer, whatever, to the humble petitions of the colonies for redress of grievances and reconciliation with Great Britain, has been or is likely to be given; but, the whole force of that kingdom, aided by foreign mercenaries, is to be exerted for the destruction of the good people of these colonies; And whereas, it appears absolutely irreconcilable to reason and good Conscience, for the people of these colonies now to take the oaths and affirmations necessary for the support of any government under the crown of Great Britain, and it is necessary that the exercise of every kind of authority under the said crown should be totally suppressed, and all the powers of government exerted, under the authority of the people of the colonies, for the preservation of internal peace, virtue, and good order, as well as for the defence of their lives, liberties, and properties, against the hostile invasions and cruel depredations of their enemies; therefore RESOLVED, That it be recommended to the respective assemblies and conventions of the United Colonies, where no government sufficient to the

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<sup>127</sup> This theoretical tension sounds in the colonists’ perennial protest of “no taxation without representation!” *L[ord] C[arden’s] Speech*, LONDON MAGAZINE, OR GENTLEMAN’S MONTHLY 89 (Feb. 1768), as quoted in J.L. Bell, *No Taxation without Representation*, J. OF THE AM. REVOLUTION (May 22, 2013), <https://allthingsliberty.com/2013/05/no-taxation-without-representation-part-2/> [<https://perma.cc/6N29-N755>]; see also WOOD, *supra* note 25, at 162-96 (explaining nature of representation).

<sup>128</sup> DIARY & AUTOBIOGRAPHY, *supra* note 76, at 331 (“the People of the United States, who were all waiting only for the Countenance of Congress, to institute their State Governments”).

exigencies of their affairs have been hitherto established, to adopt such government as shall, in the opinion of the representatives of the people, best conduce to the happiness and safety of their constituents in particular, and American in general.<sup>129</sup>

This right to “totally suppress” royal government and adopt new “government” was celebrated but also handled with awe. Washington, upon hearing the news, captured the sentiments of many in writing: “To form a new Government requires infinite care, & unbounded attention . . . a matter of such moment cannot be the Work of a day.”<sup>130</sup> This momentous declaration not only produced a rash of constitution-writing in the colonies-cum-states, but an important development in the fledging practice of constitution-writing: dedicated constitutional conventions.

The May 15, 1776 declaration and the reconceptualization of popular sovereignty it heralded was also not the work of a day. As referenced above, Adams preached this version of sovereignty in Congress long before it became popular.<sup>131</sup> As later recorded in his Autobiography, as early as June 1775, Adams pontificated to his fellow congressmen that “the People were the Source of all Authority and Original of all Power,” which meant the Congress should invite them to call “Conventions of Representatives” in the several colonies to “erect the whole Building” of government anew.<sup>132</sup> Adams’ “new, strange and terrible Doctrine[s]” found safe harbor in New Hampshire, South Carolina, and, eventually, Virginia as one by one, these colonies were approved by Congress to call a “free and full representation” of the people to claim the ultimate right of popular sovereignty and reconstitute temporary governments, rendering themselves states.<sup>133</sup> As the American people thus gained practical experience “taking up government” and exercising popular sovereignty’s ultimate right (and Congress became

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<sup>129</sup> Journal of the Fourth Provincial Congress (May 10 & 15, 1776), in 4 JCC 342, 357-58. The resolution that permitted the states to take up government passed May 10, and the “preamble” passed May 15. *Id.* For examples of how the resolution and preamble were published and disseminated to the various states, see *infra* note 149.

<sup>130</sup> Letter from George Washington to John Augustine Washington (May 31, 1776), FOUNDERS ONLINE, <https://founders.archives.gov/documents/Washington/03-04-02-0333> [https://perma.cc/8WG4-9WUA]. Washington was reiterating Paine, who had written that the cause of the Americans (he had only just moved from England in 1775) was not “the concern of a day, a year or an age; posterity is virtually involved in the contest, and will be more or less affected, even to the end of time, by the proceedings now.” PAINE, *infra* note 134, at 82.

<sup>131</sup> *Supra* note 66-73 and accompanying text.

<sup>132</sup> 3 DIARY & AUTOBIOGRAPHY, *supra* note 76, at 352.

<sup>133</sup> *Supra* note 96-111 and 113-114 and accompanying text.

used to the practice itself), Thomas Paine's *Common Sense* gave voice to this "new method of thinking."<sup>134</sup> Published in January of 1776—just as the ink on New Hampshire's temporary constitution was dry—and available everywhere, colonists read that independence "means no more . . . than . . . whether we shall make our own laws . . ."<sup>135</sup> Independence was realized in the making of their own laws, something the colonists had already been doing for over a century, but those which did not require the king's approval.<sup>136</sup> Doing so required a "continental form of government."<sup>137</sup> Then Paine proposed a procedure for creating such a government: a Continental Conference, or Provincial convention, composed of two members from each colony that would join together, craft the government, and "[i]mmediately after which, the said conference to dissolve . . ."<sup>138</sup> The body and their work would have "true[] legal authority" in "being impowered by the people."<sup>139</sup> Here was a users' manual for popular sovereignty, American style, in claiming and exercising its ultimate act. It should not be the Continental Congress who would reframe government as Parliament had done a century before, but a separate, purpose-built body.

It was an idea whose time had not quite come. Paine's work provoked the immediate ire of Adams, who penned his own response, *Thoughts on Government*.<sup>140</sup> Yet this work was largely dedicated to providing an alternate model of government for states to pattern in their constitution-writing, rather than a procedure by which constitutions might be written. Though Adams later claimed in his *Autobiography* to have been an early champion of popular "Conventions" authoring constitutions,<sup>141</sup> this may have been the product of a faulty memory, influenced by the role he played in Massachusetts's constitutional convention of 1779-80.<sup>142</sup> In *Thoughts on Government*, written

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<sup>134</sup> THOMAS PAINE, *COMMON SENSE* 82 (1776) (Penguin Books 1986).

<sup>135</sup> *Id.* at 93.

<sup>136</sup> *Id.* at 92.

<sup>137</sup> *Id.* at 94.

<sup>138</sup> *Id.* at 96-97.

<sup>139</sup> *Id.* at 97.

<sup>140</sup> 3 *DIARY & AUTOBIOGRAPHY*, *supra* note 76, at 330-332 (recounting that Paine had borrowed most of his ideas from arguments Adams had already made popular in Congress and his concerns regarding Paine's recommended unicameral government structure, designed to "please the democratic Party in Philadelphia").

<sup>141</sup> 3 *DIARY & AUTOBIOGRAPHY*, *supra* note 76, at 352.

<sup>142</sup> Taylor, *infra* note 203, at 113.

between March 19 and April 20, 1776,<sup>143</sup> Adams seems to have envisioned that a regularly-constituted legislature is the appropriate body to author and amend a Constitution as had Parliament in 1689.<sup>144</sup> Such a procedure was, in fact, followed for the first spat of constitutions, including that for New Hampshire,<sup>145</sup> South Carolina,<sup>146</sup> Virginia,<sup>147</sup> and the Continental Congress in drafting the Articles of Confederation.<sup>148</sup> Although Paine's idea was not immediately deployed, his application of popular sovereignty for constitution-creation percolated and ultimately bore fruit.

The first fruits of Paine's popular sovereignty idea were not seen on the pre-federal stage, but more diffusely, in the pamphlets and editorials written in the Spring and Summer of 1776 by local agitators who employed his concept for their own political purposes. This was aided by the promulgation and wide publication of Congress' May 15, 1776 declaration.<sup>149</sup> The ideas came together in electric fashion, animating political minorities in disparate parts of the United Colonies almost simultaneously to the call for conventions of the people empowered to write constitutions.

The idea of a specially-empowered body separate from the legislature to craft a constitution was first promoted in Pennsylvania in a pamphlet, *The Alarm*.<sup>150</sup> This was no surprise: not only was the colonial capital also the situs

<sup>143</sup> 3 DIARY & AUTOBIOGRAPHY, *supra* note 76, at 331.

<sup>144</sup> JOHN ADAMS, THOUGHTS ON GOVERNMENT APPLICABLE TO THE PRESENT STATE OF THE AMERICAN COLONIES. IN A LETTER FROM A GENTLEMEN TO HIS FRIEND 18 (Dunlap 1776) (“[T]he legislature may at its leisure devise other methods of creating [constitutions], by elections of the people at large, as in Connecticut”).

<sup>145</sup> In Congress at Exeter Jan 5th 1776 (Jan. 5, 1776), in 8 NHSP 2 (voting to take up civil government).

<sup>146</sup> *Journals of the General Assembly and House of Representatives 1776-1780*, 3 (Mar. 26, 1776) (reprinted 1970).

<sup>147</sup> *The Proceedings of the Convention of Delegates Held at the Capitol, in the City of Williamsburg, in the Colony of Virginia*, JOURNAL OF THE CONVENTION 14-43 (May 14-June 12, 1776) (reprinted 1816).

<sup>148</sup> 5 Journals of the Continental Congress 1774-1789, at 546-55 (June 12, 1776) (reprinted 1906).

<sup>149</sup> See THE FREEMAN'S JOURNAL OR NEW-HAMPSHIRE GAZETTE 4 (June 8, 1776) (printing the declaration); THE PENNSYLVANIA JOURNAL AND WEEKLY ADVERTISER 1 (May 22, 1776); THE PENNSYLVANIA GAZETTE 1 (May 22, 1776) (printing the proclamation in full).

<sup>150</sup> THE ALARM: OR, AN ADDRESS TO THE PEOPLE OF PENNSYLVANIA, ON THE LATE RESOLVE OF CONGRESS, FOR TOTALLY SUPPRESSING ALL POWER AND AUTHORITY DERIVED FROM THE CROWN OF GREAT-BRITAIN 1, 1 (May 19, 1776) (“[L]egislative bodies of men have no more power of suppressing the authority they fit by, than they have of creating it, otherwise every legislative body would have the power of suppressing a constitution at will; it is an act which can only be done to them, but cannot be done by them.”); *Serious Questions proposed to all friends to the rights of mankind in Pennsylvania, with suitable Answers*, THE PENNSYLVANIA JOURNAL AND WEEKLY ADVERTISER 1, 1

of the Continental Congress, but Paine wrote *Common Sense* in Philadelphia to “please” the Pennsylvania radicals.<sup>151</sup> The Pennsylvania Democratic Party opposed the Tory-controlled assembly, and they saw Paine’s invention of a separate constitution-writing body as a means towards excluding them from further government office.<sup>152</sup> Although this party was successful in electing a convention tasked only with writing a constitution, as the parallel assembly quickly dissolved, having lost the confidence of the people, the convention that authored Pennsylvania’s September 28, 1776 Constitution also became the *de facto* legislature,<sup>153</sup> and thus did not function as a dedicated constitutional convention in a modern sense. Delaware followed suit and also deployed Paine’s idea in electing a convention to draft its constitution.<sup>154</sup> However, it, too, could not contain itself to that task and operated as a full-fledged legislature during constitution-drafting.<sup>155</sup>

Paine’s popular sovereignty idea found full flowering in New England, where both New Hampshire and then Massachusetts were successfully able to separate the legislative and constitution-making functions into wholly separate bodies. How and whether the ideas of Pennsylvania and Delaware were shared with sister states other than New Hampshire—particularly in Massachusetts—remains to be pursued with greater precision, but the weight of current sources seems to favor a chronology that diverges from previous tellings. Instead of the idea of a convention working its way north from Pennsylvania radicals to New Hampshire’s Connecticut River Valley by way of a shoemaker in Concord, Massachusetts,<sup>156</sup> it instead seems that the idea

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(May 22, 1776) (“For my part I should think it a good precaution to exclude all those who frame the constitutions from ever holding nay office under it.”); DEMOPHILUS, *THE GENUINE PRINCIPLES OF THE ANCIENT SAXON, OR ENGLISH CONSTITUTION*. 4 (Robert Bell, 1776) (“ . . . [L]et every article of the constitution or *sett of fundamental rules* by which even the supreme power of the state shall be governed, be formed by a convention of the delegates of the people, appointed for that express purpose . . .”).

<sup>151</sup> 3 *DIARY & AUTOBIOGRAPHY*, *supra* note 76, at 331.

<sup>152</sup> WOOD, *supra* note 25, at 335-36.

<sup>153</sup> *Id.* at 337-38; *see also* MINUTES OF THE PROCEEDINGS OF THE CONVENTION OF THE STATE OF PENNSYLVANIA 4 (Miller 1776).

<sup>154</sup> WILLI PAUL ADAMS, *THE FIRST AMERICAN CONSTITUTIONS* 72 (1973) (2001).

<sup>155</sup> WOOD, *supra* note 25, at 332-333.

<sup>156</sup> *See* WOOD, *supra* note 25, at 339-43 (describing the idea of a Convention traveling north from Pennsylvania through Massachusetts before reaching New Hampshire); WILLI PAUL ADAMS, *supra* note 26, at 64 (“The town meeting of Concord has been credited by proud local historians with inventing the constitutional convention in October 1776.”). Adams also erroneously identifies

was independently developed by western rebels in New Hampshire, who then traveled south to Concord, Massachusetts. The ideas of the Pennsylvania radicals influenced the substance of the 1777 Vermont Constitution, it being an exact copy of the September 1776 Pennsylvania Constitution through the mediation of Thomas Young's previous friendship with Ethan Allen, leader of the Green Mountain Boys.<sup>157</sup> Though the Vermont Constitution's story is linked to that of the New Hampshire's second constitution of 1784 as will be seen below, it is unknown how the radicals' ideas of a constitutional convention could have been transmitted to Upper Connecticut River Valley rebels in 1776. Not only were none of the radicals' publications republished in New Hampshire, but the Pennsylvania radicals were unknown to those in the remote regions of western New Hampshire, preempting private modes of communication. Despite this, there is some parallel in the reasoning and language of the idea of a separate constitutional convention. This leaves two possibilities: first, either there was communication between Pennsylvania and the Upper River Valley, particularly of *The Alarm*, where language and reasoning best tracks the ideas germinating in the Dartmouth area, or, alternatively, the idea of a constitutional convention arose *sui generis* in the north, prompted only by the popular sovereignty ideas percolating on the national stage and published locally.

This history favors the latter explanation. The popular sovereignty ideas New Hampshirians clearly had at their disposal were contained in *Common Sense*,<sup>158</sup> the November 3rd Congressional authorization for New Hampshire to call a "full and free representation" of the people to enact a temporary

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Massachusetts' convention as "[t]he first true constitutional convention in Western history, a body of representatives elected for the exclusive purpose of framing a constitution[.]" *Id.* at 65. New Hampshire's constitutional convention met on June 10, 1778.

<sup>157</sup> LEWIS HAMILTON MEADER, *THE COUNCIL OF CENSORS* 40 (Providence, 1899). Young and Allen became friends while both lived in Connecticut, and their relationship was rekindled when a delegation was sent from the Green Mountain region to the Continental Congress to negotiate for state independence in 1777. *Id.*; Letter from Thomas Young to the Inhabitants of Vermont (April 11, 1777), in Appendix D, *RECORDS OF THE COUNCIL OF SAFETY AND GOVERNOR AND COUNCIL OF THE STATE OF VERMONT* 394 (1873).

<sup>158</sup> Weekly advertisements began to appear for *Common Sense* on June 29, 1776, which was sold at Benjamin Dearborn's printing shop in Portsmouth. *See e.g.*, *THE FREEMAN'S JOURNAL OR NEW HAMPSHIRE GAZETTE* 4 (Jun 29, 1776) (showing the advertisement of *Common Sense*).

constitution,<sup>159</sup> the May 15th Proclamation,<sup>160</sup> presumably at least some of the writings of Locke, Montesquieu, Rousseau, and Blackstone,<sup>161</sup> and the Declaration of Independence.<sup>162</sup> These works constituted no inconsiderable popular sovereignty library. Paine had proposed a nascent form of a constitutional convention and the November 3rd authorization for a special election hinted at the present “Convention” (a generic term for a representative body that was *not* regularly called by royal authority)<sup>163</sup> to call another representative body into being to draft a form of government.<sup>164</sup> Enlightenment writers theorized about how arbitrary use of power, including changing forms of representation, devolved the people into states of nature wherein they might reformulate governments. This theory was succinctly captured in both the May 15th Proclamation and the Declaration of Independence. The former encouraged colonists to “totally suppress” royal government and empowered them to create new governments where necessary,<sup>165</sup> and the latter opened with talk of dissolving “political bands,” abolishing government when they became destructive to liberty, and instituting new governments.<sup>166</sup>

The story of how these ideas produced the New Hampshire convention began November 14, 1775, when the Fourth Provincial New Hampshire Congress enacted a “plan for representation,” which approved representatives for towns with more than a hundred families, and only one

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159 This Congressional authorization was available to the Fifth Provincial Congress, *supra* note 102, where John Wheelock presented the petition of the Hanover class and that of four other towns, *infra* note 170-74, who very well likely read and copied it.

160 Published in one of the weekly New Hampshire newspapers on June 8, 1776. *THE FREEMAN'S JOURNAL OR NEW HAMPSHIRE GAZETTE* 4 (June 8, 1776).

161 All volumes are found at Dartmouth in 1825 when a catalogue was first published, and sometimes multiple copies were held. *DARTMOUTH CATALOGUE*, *supra* note 33, at 7, 27, 30, 36.

162 *THE FREEMAN'S JOURNAL OR NEW HAMPSHIRE GAZETTE* (July 20, 1776).

163 WOOD, *supra* note 25, at 306-19.

164 *Supra* note 96 and accompanying text.

165 *Supra* note 129 and accompanying text.

166 *DECLARATION OF INDEPENDENCE* (1776) (“We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, --That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.”).

council member from the frontier county of Grafton.<sup>167</sup> Grafton County in 1790 was a huge tract of land covering the northernmost part of the state with its southern limit just south of modern-day Dartmouth College and extending up to Canada and across to modern-day Maine.<sup>168</sup> The assembly that enacted the representative plan was the first in which Grafton County had been afforded *any* representation.<sup>169</sup> However, Grafton County, and particularly the Hanover class, were not satisfied. When the Reverend Eleazar Wheelock, the intrepid College founder, learned of the act's passage, he reacted: "We are in a state of nature, the Constitution thrown out of doors."<sup>170</sup> The six towns in the Upper River Valley—Hanover, Lebanon, Relhan, Canaan, Cardigan, and Grafton—that had been classed together to elect one representative demurred from the election for the Fifth Provincial Congress that was to enact the January 5, 1776 Constitution.<sup>171</sup> Instead, they sent Eleazar's son, John, with a petition laying out the towns' objections to the electoral precept.<sup>172</sup> The towns of Hanover and Lebanon argued that they alone "contain nine hundred souls, a number more than is necessary to be entitled to the privilege of sending a member to Congress" and that the six towns together had more than 1,100 souls.<sup>173</sup> The younger Wheelock requested but one more representative.<sup>174</sup> This petition was summarily "read, understood, and dismissed" by the Fifth Provincial Congress Christmas Day 1775.<sup>175</sup> John thereupon returned home, where his poor

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<sup>167</sup> Journal of the Fourth Provincial Congress (Nov. 18, 1775), in 7 NHSP 656, 657.

<sup>168</sup> 1790 Historical U.S. Counties Map, RANDYMAJORS.ORG <https://www.randymajors.org/maps?x=-71.1034401&y=43.1976339&cx=-71.2865172&cy=43.4967465&zoom=10&state=US&hyear=1790&labels=show> [https://perma.cc/X8WU-CUCH].

<sup>169</sup> FREDERICK CHASE, A HISTORY OF DARTMOUTH COLLEGE AND THE TOWN OF HANOVER NEW HAMPSHIRE 423-24 (John K. Lord, 1891).

<sup>170</sup> BALDWIN, *supra* note 116, at 148.

<sup>171</sup> Electoral Precept, New Hampshire State Archives, Miscellaneous Towns, f. Hanover 1772-1784, n. 878111; CHASE, *supra* note 169, at 424.

<sup>172</sup> CHASE, *supra* note 169, at 424-25, 7 NHSP 658.

<sup>173</sup> John Wheelock to the Provincial Congress (Dec. 25, 1776), *reprinted in* CHASE, *supra* note 169, at 424-25.

<sup>174</sup> *Id.* at 425. The election law's calculus allowed one representative per 100 *families*, which meant that Wheelock was representing that there were 5.5 persons per family, a reasonable conclusion in a frontier region, where single person households were countered by large frontier families.

<sup>175</sup> 7 NHSP 695-96.

treatment and the fact and substance of the January 5 Constitution, enacted *without* the six towns' input,<sup>176</sup> was reported in Lebanon in February 1776.<sup>177</sup>

Grafton County's response to this snub was to persist in ignoring electoral precepts, which they did for the March 1776 session,<sup>178</sup> and to elect a committee to coordinate with other Grafton towns.<sup>179</sup> The committee appears to have achieved initial success, as the Haverhill class joined Hanover's in ignoring the electoral summons for March.<sup>180</sup> In April, letters were sent to other towns to meet at College Hall in Hanover on July 31, 1776.<sup>181</sup> There, the "united committees" from eleven towns voted to approve the "Grafton County Address" which outlined their grievances and invoked some version of Paine's recommendation.<sup>182</sup> The address begins by referencing the Continental Congress' May 15 Proclamation, wherein the current war necessitated assuming "natural right[s] of laying a foundation of Civil Government within and for this Colony."<sup>183</sup> After pontificating on the import of the moment and that of assuring their rights of representation through "establishing a constitution for ourselves and posterity," the author comes to the point: it is time to "abolish the old, and form a new Government upon a republican establishment."<sup>184</sup> Drafting should be done by a representative body elected by the people "*for the purpose of laying a foundation or form of civil Government, throughout the Colony.*"<sup>185</sup> Although a constitution and assembly was just formed not six months previous, the author contends:

[W]hen the members of the said Assembly were elected, the reasons, which make it now necessary that an Assembly should be appointed, did not exist: As the reasons for calling said Assembly then, and the purpose, for which they were appointed, was only of a temporary duration; (viz.) to act in the exigencies of the Colony, under their distressed and difficult circumstances,

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<sup>176</sup> These towns included Hanover, Lebanon, Relhan, Canaan, Cardigan, and Grafton. John Wheelock to the Provincial Congress (Dec. 25, 1776), *reprinted in* CHASE, *supra* note 169, at 425; *cf.* Roll of Fifth Provincial Congress Members (1775), *reprinted in* 7 NHSP 693.

<sup>177</sup> CHASE, *supra* note 169, at 426.

<sup>178</sup> *Id.* at 425–26.

<sup>179</sup> *Id.* at 426.

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

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

<sup>182</sup> *Id.* GRAFTON COUNTY ADDRESS, *reprinted in* 10 NHSP 229–35.

<sup>183</sup> GRAFTON COUNTY ADDRESS, *reprinted in* 10 NHSP 229.

<sup>184</sup> *Id.* at 230.

<sup>185</sup> *Id.* (emphasis added). This language tracked that of *The Alarm's* that a constitution-writing body should have "full authority of the people for that *especial* purpose." THE ALARM, *supra* note 150, at 1 (emphasis in original).

as the case might require. No one we believe thought at that time, they were appointed to institute a lasting plan of Civil Government for the Colony; especially, independent of, and in contradistinction to the Crown of Great Britain; therefore they were not elected for the purpose; and consequently have not the power that an Assembly now ought to have.<sup>186</sup>

Essentially, independence and the May 15 Proclamation changed everything. The temporary January 5 Constitution recognized the sovereignty of the Crown; as such, it could no longer govern a society that was independent of that Crown. Moreover, the May 15 Proclamation called on the colonists to “totally suppress” all forms of royal authority, which presumably would have included the January 5 Constitution. Taken in its strongest sense, the author also lays out a lack of agency argument (similar to the argument by the Pennsylvania radicals), that the plan of representation and accompanying electoral precepts of Nov. 14, 1776 did *not* empower the Fifth Provincial Congress to write a constitution, only that *if* the Congress recommended assuming Government, the body might “be empowered to Resolve themselves” into a House of Representatives.<sup>187</sup> In any event, the body was not empowered to enact a “lasting” constitution, and six months was long enough.

The plan goes on to address the central contention with the temporary Constitution, which is that of its representative basis, adopting as it did the objectionable plan of representation from November 14, 1775.<sup>188</sup> It called for every incorporated town, regardless of size, to be afforded “the same power and privileges,” and therefore have at least one representative in the assembly, and for Council members to be elected at large.<sup>189</sup> Petitioning the current assembly was no remedy. Referencing John Wheelock’s efforts to parley, “it was early done by several towns in the Colony; but to no purpose; as the petitions were rejected, and in a manner treated with contempt.”<sup>190</sup> Rather than submit to the Constitution and its plan of representation, “we are determined not to spend our blood and treasure, in defending against the chains and fetters, that are forged and prepared for us abroad, in order to

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<sup>186</sup> GRAFTON COUNTY ADDRESS, *reprinted in* 10 NHSP 230.

<sup>187</sup> Journal of the Fifth Provincial Congress, 7 NHSP 660; *see also supra* notes 98-101 and accompanying text.

<sup>188</sup> GRAFTON COUNTY ADDRESS, *reprinted in* 10 NHSP 231–33.

<sup>189</sup> *Id.* at 231, 233.

<sup>190</sup> *Id.* at 234.

purchase some of the like kind of our own manufacturing.”<sup>191</sup> As the current Constitution lacked any legal basis now that independence had been declared, the colony was “in a state of nature or anarchy; without law or government.”<sup>192</sup> As such, the power to act was

still in the hands of the people, to whom we address ourselves; and whom we call upon, to exercise the rights and privileges they have to *erect a supreme legislative Court for the Colony*, in order to lay a foundation and plan of government in this critical juncture of affairs: And that we no longer remain, as in a state of nature or anarchy; without law or government.<sup>193</sup>

Such a body would certainly be different from the then-acting Assembly. Its purpose informed the procedure necessary to enact it: in exercising the supreme act of popular sovereignty, it was even more essential that its relation, proportion, and inclusivity of and to the actual populace approach theoretical purity. As before stated, the proposed representative body’s job had a special “purpose” of constitution-writing.<sup>194</sup> It was assumed rather than stated that the current Assembly would operate alongside (it being practically impossible to abolish the former until a new constitution was enacted): that theoretical and practical nicety would be made explicit only by later actors.

The address, written by Bezaleel Woodward, son-in-law to the elder Wheelock and professor and treasurer at the College,<sup>195</sup> evinced a sophisticated understanding of the doctrine of popular sovereignty. It used the theory to point out flaws in its purest application. It emphasized that to achieve a “full and free” representation, “especially, in laying the foundation of government, and establishing a constitution,” popular sovereignty should have full sway, and its science was exacting to ensure that the agent was properly instructed.<sup>196</sup> Then, if the people were empowered to create government anew, they must be accorded with all the powers of a principal, and their agent may not exceed the authority delegated.<sup>197</sup> If the principal’s power changes or is replaced, so, too, must the agent. The address suggests

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<sup>191</sup> *Id.* at 235.

<sup>192</sup> *Id.* at 234.

<sup>193</sup> *Id.* at 234.

<sup>194</sup> *Supra* note 185 and accompanying text.

<sup>195</sup> The author of the address self-identifies near the end of the document. *Id.* at 235.

<sup>196</sup> GRAFTON COUNTY ADDRESS, *reprinted in* 10 NHSP 233.

<sup>197</sup> See GARY LAWSON & GUY SEIDMAN, A GREAT POWER OF ATTORNEY: UNDERSTANDING THE FIDUCIARY CONSTITUTION (2017) for a full treatment of how agency principles were applied at the founding.

that special elections and even a separate drafting body were required to legitimate the constitution and set the stage for later theoretical developments.

The “College Hall” address was published and disseminated widely, sowing popular sovereignty seeds near and far.<sup>198</sup> It was eagerly received and regurgitated by the towns of Actworth, Walpole and Marlow from Cheshire County in their petitions to Exeter for more representation and a new Constitution.<sup>199</sup> Weare was dismayed to receive a copy in Exeter, which he sent along to the New Hampshire delegates in Philadelphia, hoping for sympathy.<sup>200</sup> A Portsmouth polemicist, “Amicus Reipublica,” applied some of its ideas in August 1776 to halting plural office-keeping (then in wide practice), separating the assembly that would vote the regulation in from participating in the assembly to which it applied.<sup>201</sup> “[O]therwise[,] they will be *judges of their own wages*.”<sup>202</sup>

It is likely that the Grafton County, or College Hall Address with its popular sovereignty ideas were exported as far as Middlesex and Worcester Counties in Massachusetts. Responding to the Massachusetts Court’s September 17, 1776 request for consent to draft a Constitution, the town of Concord in Middlesex County responded that “the Supreme Legislative . . . are by no means a Body proper to form & Establish a Constitution, or form of Government . . .”<sup>203</sup> echoing somewhat the language of a “supreme legislative Court” laying a “foundation or form of civil Government” from the Grafton County Address.<sup>204</sup> But here Concord expounds far beyond the Grafton County Address in expanding the vision and extent of popular

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<sup>198</sup> Extract of a letter from Meshech Weare to New Hampshire Delegates in Congress (Dec. 16, 1776), *reprinted in* 10 NHSP 228. See CHASE, *supra* note 169, at 427 (“The address was widely circulated, and produced a profound impression.”); DANIELL, *supra* note 18, at 166 (quoting a letter from Weare wherein he lamented that the College Hall Address had “with great assiduity scattered among the inhabitants of this state.”).

<sup>199</sup> Marlow Town Petition to NH General Court (Dec. 11, 1776), *reprinted in* 12 NHSP 573–74; Town of Walpole to Grievance Committee of the State, *reprinted in* 13 NHSP 602–03; Actwoth Town Petition to NH General Court (Dec. 9, 1776), *reprinted in* 11 NHSP 2.

<sup>200</sup> See Extract of a Letter from Hon. Meshech Weare to New Hampshire Delegates in Congress (Dec. 16, 1776), *reprinted in* 10 NHSP 228 (identifying Exeter as the site where the letter was drafted).

<sup>201</sup> *In Statu Roman . . .*, THE FREEMAN’S JOURNAL OR NEW-HAMPSHIRE GAZETTE 2 (Aug. 3, 1776).

<sup>202</sup> *Id.*

<sup>203</sup> The Returns of Concord (Middlesex County) (Oct. 22, 1776), *reprinted in* MASSACHUSETTS, COLONY TO COMMONWEALTH: DOCUMENTS ON THE FORMATION OF ITS CONSTITUTION, 1775-1780, 45–46 (Robert J. Taylor, ed., 1961) [hereinafter Taylor].

<sup>204</sup> GRAFTON COUNTY ADDRESS, *reprinted in* 10 NHSP 234, 230.

sovereignty-founded constitutions. Legislatures were inappropriate bodies to draft a Constitution because Constitutions were designed to protect “Rights and Privileges.”<sup>205</sup> The enacting body would also have power to alter and amend the Constitution, and such provided “no Security at all to the Subject against any Encroachment of the Governing part on any or on all of their Rights & privileges.”<sup>206</sup> Where the Grafton County Address’ reasons for separating the legislature from the constitution-drafting body were practical and grounded in the want of appropriate representation, Concord’s reasons sounded in theory and applied even when there were no issues with representation. In short, Concord provided normative reasons for Grafton County’s practical problem.

Yet Grafton County never knew of Concord’s brilliance. Although more research is required to investigate the reach of Concord’s Return, it seems it was not published beyond that provided to the town and the Massachusetts General Court: it was presumably unknown until 1917 when a journalist in Boston did a bit of investigative journalism and “discovered” it.<sup>207</sup> Had it been published, its reasoning would likely have been adopted in later town returns or by the Upper River Valley rebels, who were eager and receptive to any arguments in service to their cause. Instead, the simpler, more practical reasoning for a separate convention in the more widely published Worcester County Resolutions of November 26, 1776,<sup>208</sup> seems to have had greater impact. In suggesting a separate drafting body, Worcester reasoned that the General Court was unsuitable because they could not spare the time and attention a Constitution required from the daily demands of legislative business.<sup>209</sup> Therefore, the town voted, “That a State Congress chosen for the *sole purpose* of forming a Constitution of Government is (in the opinion of this Convention) more eligible than an House of Representatives.”<sup>210</sup> The word choice again echoes the Grafton County Address’s language and borrows from their reasoning (both of which may have derived from

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<sup>205</sup> *Supra* note 203.

<sup>206</sup> The Returns of Concord, *reprinted in* Taylor, *supra* note 203, at 45.

<sup>207</sup> Roger Sherman Hoar, *When Concord Invented the Constitutional Convention*, BOSTON EVENING TRANSCRIPT (July 3, 1917).

<sup>208</sup> Worcester County ordered that its resolves be published in “Boston, Worcester, and Hartford NewsPapers, also in Hand Bills.” *Resolutions of Towns in Worcester County* (Nov. 26, 1776), *reprinted in* Taylor, *supra* note 203, at 46–47.

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

<sup>210</sup> *Id.* (emphasis added).

Pennsylvania radicals), especially in the county's earlier finding that Massachusetts' recent plan of representation was "very unequal and unsafe."<sup>211</sup> As will be seen, Worcester's returns likely impacted the ideological progression of a constitutional convention in New Hampshire.

The Grafton County, or College Hall Address, together with the printed proceeds of the next meeting in October<sup>212</sup>—a draft constitution calling not only for town representation of any size but also that the state capital should be more centrally located<sup>213</sup>—were bold moves from the nethermost region of the new United States. Only five years previous, the plain on which Dartmouth College was to rise had been covered with pine trees.<sup>214</sup> The "College Hall" from which the address was named was a temporary, one-story, leaky-roofed building that tripled as College commons, chapel and meetinghouse.<sup>215</sup> As such, it constituted half the college.<sup>216</sup> The other half—comprising dormitory, library, and a preparatory academy—was found in a larger, two-storied structure to the southwest that "annually heaved and sank with the frost."<sup>217</sup> In 1776, the whole of the college was comprised of these two buildings, a barn, and malt, bake, and wash houses, and 200 acres of hay and grain and two thousand fenced-in acres for cattle.<sup>218</sup> This compared to the luxuries in the cobbled capital of Exeter, founded in 1638, provided some background for the contempt with which John Wheelock and his petition had been met there in December of 1775.

The standoff between the better-heeled in Exeter and the rustics in the Upper River Valley continued.<sup>219</sup> On November 27, 1776, nearly a year after John Wheelock's initial snub, Hanover approved the Grafton County Address.<sup>220</sup> Instead of returning delegates on the back of its September 30, 1776 electoral precept, the Hanover Class wrote that they had adopted the

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<sup>211</sup> *Id.*

<sup>212</sup> GRAFTON COUNTY ADDRESS, *reprinted in* 10 NHSP 235.

<sup>213</sup> THE PEOPLE THE BEST GOVERNORS: OR A PLAN OF GOVERNMENT . . . (October 1776), *reprinted as* Appendix D, CHASE, *supra* note 169, at 654–63. Interestingly, part of this draft constitution quotes Paine almost verbatim, evidencing that *Common Sense* was indeed had by the western rebels.  
*Id.*

<sup>214</sup> RALPH NADING HILL, THE COLLEGE ON THE HILL: A DARTMOUTH CHRONICLE 35–36 (1964).

<sup>215</sup> *Id.* at 35–36.

<sup>216</sup> *Id.* at 36.

<sup>217</sup> *Id.*

<sup>218</sup> *Id.* at 35–36.

<sup>219</sup> CHASE, *supra* note 169, at 444.

<sup>220</sup> Proceedings of Town-meetings, Meeting at Hanover (Nov. 27, 1776), *reprinted in* 10 NHSP 236–37.

College Hall address and unanimously demurred sending any representatives to the next legislative session convening December 18, 1776.<sup>221</sup> Twelve Grafton County towns followed suit, with Rumney, Lancaster, and Chesterfield classes alone permitting their representatives to attend,<sup>222</sup> with the latter instructing its representative to “exert yourself to the utmost” to redress the grievances of the county.<sup>223</sup> With essentially the whole of the county refusing to send delegates,<sup>224</sup> President Meshech Weare attempted to intercede, and traveled with a state delegation to the frontier county in February 1777.

Prior to this meeting, designed by the state to promote “peace and harmony,”<sup>225</sup> another circular was published by the College Party in January, reiterating arguments that the New Hampshire constitution became unconstitutional after the state declared independence, the resultant state of nature, and that a “new body that may fix on a plan of government” was required.<sup>226</sup> Additionally, the town of Walpole wrote to the Grievance Committee in Exeter on February 3, 1777 to register their insistence that a new and lasting Plan of Government was needed. The legislative busy-ness of the state may “forbid the dissolution of the present Assembly,” and therefore necessitate the calling of an additional Assembly “for the *express* purpose” of organizing a government, sent thereafter to each town for their “approbation.”<sup>227</sup> Here was Worcester’s practical argument that it was too much for one assembly to do everything rather than Concord’s argument about rights and privileges.

Yet the College Party and the towns they led was not the only party digging in their heels. Prior to his peace mission, Weare complained in his letter to New Hampshire delegates in Congress that the College Party was stirring up “contention & animosities among us at this difficult time.”<sup>228</sup> And

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<sup>221</sup> Electoral Precept for Hanover (Sep. 30, 1776), *reprinted in* 10 NHSP 235–36; Hanover Class Endorsement of Electoral Precept (Nov. 27, 1776), *reprinted in* 12 NHSP 163–64.

<sup>222</sup> CHASE, *supra* note 169, at 430.

<sup>223</sup> Proceedings of Town meetings, *reprinted in* 10 NHSP 239–240.

<sup>224</sup> CHASE, *supra* note 169, at 430.

<sup>225</sup> CHASE, *supra* note 169, at 430.

<sup>226</sup> A Letter from The Republican to the Freeholders and Inhabitants of New Hampshire, *reprinted in id.* at 433.

<sup>227</sup> Letter from the Town of Walpole to the “Committee appointed . . . to hear . . . Grievances” (Feb. 3, 1777), *reprinted in* 13 NHSP 603–04 (emphasis added).

<sup>228</sup> Meshech Weare to New Hampshire Delegates in Congress (Dec. 16, 1776), *reprinted in* 10 NHSP 228.

all for naught, as the requested reform was impossible, the government being “only temporary & the state of matters not allowing a Revisal.”<sup>229</sup>

Weare’s prophecies proved self-fulfilling. Not only were the February 13, 1777 negotiations fruitless, producing a stalemate with the Upper River Valley,<sup>230</sup> but July of that year witnessed the invasion of Burgoyne into what would become the Green Mountain state. The siege and surrender of rebel-held Fort Ticonderoga triggered desperate pleas from Green Mountain authorities, to which New Hampshire and Massachusetts responded.<sup>231</sup> John Stark and a contingent of 2,000 from New Hampshire and Massachusetts, together with the Green Mountain Boys, defeated a detachment sent by Burgoyne to invade Bennington for supplies, helping to pave the way for Burgoyne’s defeat at Saratoga and France entering the war.<sup>232</sup> On a local level, the aid from New Hampshire impacted relations with the Upper River Valley, and, as will be seen, the state’s constitutional development.

The joining of Vermont and New Hampshire against Burgoyne was not the first time interests from either side of the Connecticut river aligned. In addition to seeking fair representation, those east of the Connecticut River also desired to remain connected with those on the western bank. Not only did the families who had settled in the valley have more interaction with each other than with those across the mountains—both the Green to the Southwest and the White to the East—but they were all transplants from the same region in Connecticut and maintained close ties.<sup>233</sup> This despite a 1764 boundary recognizing the Connecticut River as the dividing line between New Hampshire (previously Massachusetts) and New York, which recognized the Green Mountain region as its own.<sup>234</sup> The desire to be bound together by more than blood meant those on both sides of the river would be caught in the crossfires of what would become Vermont’s bid for independence and statehood and the dissatisfaction of Grafton County with

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<sup>229</sup> *Id.*

<sup>230</sup> Proceedings of United Committee Meeting with New Hampshire Representatives, *reprinted in* CHASE, *supra* note 169, at 450.

<sup>231</sup> Letter from Ira Allen to the Committee of Safety in New Hampshire (July 15, 1777), *reprinted in* 10 NHSP 253.

<sup>232</sup> RICHARD KETCHAM, SARATOGA: TURNING POINT OF AMERICA’S REVOLUTION WAR 376–377, 411–418 (1997); GORDON S. WOOD, THE AMERICAN REVOLUTION: A HISTORY 81 (2003); WILLIAM HISTORY CARPENTER, HISTORY OF VERMONT 136–140 (1872).

<sup>233</sup> CHASE, *supra* note 169, at 444–45.

<sup>234</sup> *Id.* at 434–442.

their opportunities for representation under the New Hampshire Constitution.

Towns west of the Green Mountains first met in opposition to New York's territorial claims as early as January 1775 and again in Dorset in January 1776, just as the New Hampshire Constitution and Paine's *Common Sense* went to press.<sup>235</sup> Immediately before the Grafton County Address was approved in the College Hall, their third convention met July 24, 1776 in Dorset.<sup>236</sup> This was the first meeting to which towns east of the mountains were invited, contemplating the possibility of "associating with the Province of New Hampshire."<sup>237</sup> This summons was ignored but for Townsend, and thereafter, the convention began to send out committees of Vermont missionaries to towns in the Upper Valley.<sup>238</sup> At the September 25, 1776 Dorset Convention, 10 eastern towns had joined.<sup>239</sup> The next convention was held in Westminster on the west bank of the Connecticut River, January 15, 1777, just before the New Hampshire officials parleyed with towns on the east side of the river in northerly Grafton County. The Green Mountainers found there that those on the western bank desired to be united with friends on the eastern, but no serious efforts were made until the former had worked out its form of government.<sup>240</sup> Despite the absence of friends and family from those on the east banks and diminished representation from beyond the mountains, the Dorset Convention in Westminster unanimously voted for independence "under the name of New Connecticut"<sup>241</sup> and petitioned Congress for recognition.<sup>242</sup> A delegation was sent to Philadelphia, wherein those from the Green Mountain region "fell in" with the Pennsylvania radicals and Ethan Allen was reunited with his old friend, Dr. Thomas Young.<sup>243</sup> In an open letter to the newly declared state on April 11, 1777, Dr. Young thereupon suggested calling the state Vermont, recommended to

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<sup>235</sup> *Id.* at 443.

<sup>236</sup> *Id.*

<sup>237</sup> *Id.* (emphasis omitted).

<sup>238</sup> *Id.*

<sup>239</sup> *Id.* at 443–444.

<sup>240</sup> Public Defense 10 NHSP 299–300; CHASE, *supra* note 169, at 445.

<sup>241</sup> CHASE, *supra* note 169, at 445 (emphasis omitted).

<sup>242</sup> DECLARATION AND PETITION OF THE INHABITANTS OF THE NEW HAMPSHIRE GRANTS TO CONGRESS (Jan. 15, 1777), *reprinted in* 10 NHSP 242–46.

<sup>243</sup> MEADER, *supra* note 157, at 40.

the state's consideration the Constitution of Pennsylvania as a model, and encouraged them in their petition to Congress.<sup>244</sup>

It is against this background—the declaration of a new state and the controversy with Exeter—that the town of Hanover instructed its delegates, Bezaleel Woodward and Jonathan Freeman, on March 11, 1777 that they were:

by no means to consent to the present plan of representation and form of Government of the Assembly of this State [New Hampshire]. Yet we would not have you consent to any steps towards a separation till every proper measure is taken for a redress or alteration thereof, for the effecting which you are to labor to the utmost of your power.<sup>245</sup>

The town of Orford on the eastern bank also instructed its delegates in April 1777 to pursue “some plan for reconciliation between the Assembly of this State & these towns.”<sup>246</sup> Significantly, it added that delegates were to recommend to the Assembly to issue election writs for a Convention to “agree on a mode of future representation and form a plan of Government.”<sup>247</sup> For the time being, towns on the east side of the river were focused on reconciliation with Exeter and on a new constitution, written by a body separate from the current Assembly. Rather than being solely motivated by theoretical purity, separation from the legislature was based on self-preservation and representation on equal grounds. Theory was used for practical purposes, a move that would be clarified in the coming Convention of the United Committees in June.

This Convention of June 11, 1777 produced another petition, this time with far more demands and a little-veiled secessionist threat. The petition again laid out the grievances of the plan of representation from 1775, reaffirmed the claims of the College Hall Address, and reiterated the belief that the United Towns found themselves in a “[s]tate of nature.”<sup>248</sup> Despite this, the towns were “not only willing but desirous to be again united

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<sup>244</sup> DR. THOMAS YOUNG TO THE INHABITANTS OF VERMONT (April 11, 1777), *reprinted in* RECORDS OF THE COUNCIL OF SAFETY AND GOVERNOR AND COUNCIL OF THE STATE OF VERMONT 394-96 (1875).

<sup>245</sup> Instructions of the Town of Hanover to its Delegates to the United Committees Convention (Mar. 11, 1777), *reprinted in* CHASE, *supra* note 169, at 452.

<sup>246</sup> Instructions of the Town of Orford to its Delegates to the United Committees Convention (circa April 1777), in CHASE, *supra* note 169, at 454.

<sup>247</sup> *Id.*

<sup>248</sup> UNITED COMMITTEES' ADDRESS TO THE ASSEMBLY AT EXETER (June 11, 1777), *reprinted in* 13 NHSP 762-63.

together” with the government in Exeter.<sup>249</sup> The conditions to uniting again were three-fold: 1) one representative per town, 2) a closer capital, and 3) that “the further establishing a permanent Plan of Government in the State be submitted to an Assembly that shall be convened *as aforesaid* for that purpose *only*.”<sup>250</sup> Here was either a re-imagining of the College Hall address, or a clarification of past understanding. The former address called for a new assembly for the “purpose” of writing a Constitution,<sup>251</sup> but it did not specify whether that purpose was singular, or whether the new assembly would also have legislative duties, as did Pennsylvania and Delaware’s constitutional conventions. Orford’s instructions and the petition from the United Towns seems to suggest that the thinking in this regard progressed and became clarified; regardless, by June 1777, the consensus was that assemblies elected to write constitutions should be limited to that purpose, and that purpose only. However transmitted, the “especial” purpose of the Pennsylvania radicals,<sup>252</sup> the “sole” purpose of Worcester County,<sup>253</sup> and the “express” purpose of Walpole<sup>254</sup> became the “only” purpose of the United Committees’ proposed special drafting body.<sup>255</sup> The reasoning here was also largely of a piece, and practical in its origin or result. As the ultimate expression of popular sovereignty, constitution-drafting bodies required special agency from the people, who must be represented with precision. Moreover, a legislative body was simply too busy to devote the requisite time and attention required to write a constitution. Concord, Massachusetts’s highly-refined popular sovereignty theory separating constitutional and legislative functions based in the protection of rights was nowhere to be found.

If the three succinct demands were not met, the United Committee would be forced to “seek after Connection with some other State, or endeavor to obtain relief in some other way.”<sup>256</sup> With the Green Mountain province already having petitioned Congress for statehood in January 1777, this was no idle threat. Indeed, by the time that the Committee met again October 14, 1777 and a delegation sent to Congress with the petition (Burgoyne’s

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<sup>249</sup> *Id.* at 763.

<sup>250</sup> *Id.* (emphasis added).

<sup>251</sup> *Supra* note 185 and accompanying text.

<sup>252</sup> THE ALARM, *supra* note 150, at 1.

<sup>253</sup> Taylor, *supra* note 203, at 47.

<sup>254</sup> 13 NHSP 603.

<sup>255</sup> 13 NHSP 763.

<sup>256</sup> *Id.*

northern campaign having stalled matters),<sup>257</sup> the New Connecticut Convention, “with an increased representation from beyond the [Green] [M]ountains,”<sup>258</sup> had adopted its present name of Vermont and a Constitution modeled after Pennsylvania’s on July 2, 1777.<sup>259</sup> The threat to unite with Vermont had become real.

The Upper Valley’s commissioners were coldly met in Exeter. On November 19, 1777, a committee of both houses established to confer with the delegation (composed of Elisha Payne and Beezaleel Woodward) reported that they had “freely conversed” with the gentlemen, but that though the present form of government was temporary, the “exigencies of the war” prevented time and space to form a new plan of government.<sup>260</sup> Despite sending Payne and Woodward home empty-handed, the House, chaired by Langdon,<sup>261</sup> voted on December 27 to send out electoral precepts recommending that, if the towns & parishes of the state saw fit, they could instruct their representatives at the next election to appoint and call a “full & free Representation of all the people of this State to meet in Convention . . . for the sole purpose of framing & laying a permanent plan or system for the future Government of this State.”<sup>262</sup> The Council did not vote on the matter,<sup>263</sup> as that was prevented by President Weare, who “questioned Langdon’s motives and wanted to postpone” till the close of the war as communicated to the Upper River Valley delegation.<sup>264</sup> Yet as it was only a “recommendation[],” the Council’s approval was not required and the recommendation was included in the electoral precepts to towns.<sup>265</sup> Most towns concurred with the United Committees that a separate convention should be called, and instructed their delegates accordingly.<sup>266</sup> After elections, on February 25, 1778, a Committee of both New Hampshire houses met and agreed that a Constitutional Convention should be elected,

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<sup>257</sup> CHASE, *supra* note 169, at 456.

<sup>258</sup> *Id.* at 457.

<sup>259</sup> MEADER, *supra* note 157, at 39.

<sup>260</sup> Report of the Joint Committee (Nov. 19, 1777), *reprinted in* 13 NHSP 764-65.

<sup>261</sup> DANIELL, *supra* note 18, at 141, 167.

<sup>262</sup> JOURNAL OF THE HOUSE (Dec. 27, 1777), *reprinted in* 8 NHSP 757-758.

<sup>263</sup> JAMES FAIRBANKS COLBY, *MANUAL OF THE CONSTITUTION OF THE STATE OF NEW HAMPSHIRE* 76 (1912).

<sup>264</sup> DANIELL, *supra* note 18, at 167.

<sup>265</sup> *Id.*

<sup>266</sup> *Id.* at 167-68.

convening at Concord on June 10, 1778, and that any proposed plan “not take effect until three quarters of the people of this State” ratified.<sup>267</sup>

By virtue of this performance by Exeter, two of three Upper River Valley demands seem to have succeeded: not only was a convention called, but it met nearer the center of the state—a nod to the request for removal of the capital to points west. Yet representation of each incorporated town was not addressed, and thus the old plan of representation applied, allowing towns one representative per 100 families.<sup>268</sup>

Why the change of collective heart between November 19, 1777 and February 25, 1778? Though the question may be partly answered in a possible rivalry between Langdon and Weare, larger forces were at play. Not only did Vermont amend its constitution and set elections for December, 1777,<sup>269</sup> contemporaneous to the House vote, but the theater of war changed from north to south after the British army’s defeat at Saratoga August 1777. Thus the Upper River Valley’s secession threat grew teeth, and, with the imminent threat of the British removed, the populace could focus on larger political questions.

Despite these olive branches, when the constitutional convention met on June 10, 1778 in Concord, no towns from the New Hampshire Grants showed.<sup>270</sup> They were thus not there to appreciate their achievement—bringing about the first modern constitutional convention.<sup>271</sup> Other than Payne and Woodward feeling the personal sting of rejection, why had the Upper River Valley towns not been soothed by Exeter’s progress? The answers lie to the west.

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<sup>267</sup> JOURNAL OF THE HOUSE (Feb. 25, 1778), *reprinted in* 8 NHSP 774.

<sup>268</sup> Although Daniell believes the demand for each incorporated town to be afforded one representative was achieved, DANIELL, *supra* note 18, at 167-68, he misreads the resolution, specifying that a “full and free representation of all the People of this State be called . . . That each Town, Parish, or Precinct sending a member or members to said Convention pay their own members . . .” meant that each town could send members, and as many as they pleased. JOURNAL OF THE HOUSE (Feb. 25, 1778), *reprinted in* 8 NHSP 774. Rather, the legalese meant that if a town was permitted to send members, the town would have to pay for them. Thus no change was affected in the manner of representation. Such a reading helps to make sense of the Upper River Valley’s disaffection in light of getting some—but not all—of their demands met.

<sup>269</sup> CHASE, *supra* note 169, at 458.

<sup>270</sup> List of Delegates to the 1778 Convention, in 9 NHSP 834-37.

<sup>271</sup> The Massachusetts Court had failed to heed Concord and Worcester’s calls for a constitutional convention, and circulated a draft constitution of their own construction for ratification on February 28, 1778, Taylor, *supra* note 29, at 51, which was summarily and soundly defeated by the towns between May 20-June 8, 1778. *Id.* at 59-89.

As it happened, the timing of Weare's November snub could not have been worse. The Upper River Valley delegation reported on December 24, 1777 to the town of Cardigan.<sup>272</sup> By January 6, 1778 Woodward, under the pen name of "Republican" and likely without the benefit of the House's December 27th vote, made good on the June 11 threat and composed another pamphlet. This advocated for a union of the Upper River Valley towns on "both sides of the river" into a new state.<sup>273</sup> The United Committees met January 28-29, 1778 and most likely discussed the pamphlet, but no surviving records remain.<sup>274</sup> Within two days of adjourning, Woodward seems to have been lobbied by towns west of the river, and called another meeting January 31st.<sup>275</sup> Perhaps sensing what was coming, Hanover instructed its delegates, Woodward being one of them, on February 3, 1778 that they were to pursue no union with Vermont unless Exeter did not agree to the demands submitted in November but also provided the contradictory instruction to "promote as large a union as may be among the people on these Grants."<sup>276</sup> Having swollen to twenty towns from two of the state's five counties,<sup>277</sup> the United Committees met on February 12th and again by adjournment on March 11th in Cornish, Chester County, a day before the Vermont legislature was to meet for the first time across the river in Windsor on March 12th.<sup>278</sup> Having likely received word by the latter date of Exeter's February 25th vote and appreciating that the key demand of town representation was not addressed, union with Vermont was soon under discussion.<sup>279</sup> Not all of the Vermont delegation agreed upon union, whereupon towns on the western side of the river took umbrage and threatened to withdraw and join the "Republican's" proposed Upper River Valley state.<sup>280</sup> To avoid such fallout, it was agreed

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<sup>272</sup> CHASE, *supra* note 169, at 457.

<sup>273</sup> Observations on the Right of Jurisdiction . . . (1778), *reprinted in* 10 NHSP 259-266; CHASE, *supra* note 169, at 458, 459.

<sup>274</sup> *Id.* Although the original source material states that the meeting occurred in June 28-29, 1778, this date is a typographical error.

<sup>275</sup> BEZALEEL WOODWARD TO THE INHABITANTS OF THE NEW HAMPSHIRE GRANTS EAST OF CONNECTICUT RIVER (Jan. 31, 1777), *reprinted in id.* at 458-59.

<sup>276</sup> CHASE, *supra* note 169, at 460. In response to these limiting instructions, Woodward incorporated the college and represented it instead. *Id.* at 460-62.

<sup>277</sup> See 1790 NH Census, 13 NHSP 772.

<sup>278</sup> CHASE, *supra* note 169, at 459.

<sup>279</sup> CHASE, *supra* note 169, at 463. It is possible that Exeter's vote of February 25 acceding to all demands did not reach the Upper River Valley till it was too late.

<sup>280</sup> Ira Allen to the Council and General Assembly of New Hampshire . . . 10 NHSP 291, 292.

to submit the issue to the people, and the Cornish Convention, again under the likely pen of Bazaleel Woodward, drafted articles of union on March 17, 1778.<sup>281</sup> These articles were sent to the towns with the mistaken belief that New Hampshire, who had just voted to grant the College Party's requests and call the first ever constitutional convention, would not object.<sup>282</sup> As will be seen, they did, and vehemently so. But as this fact was thus far unknown to Vermonters, the articles met with the approval of the towns.<sup>283</sup> When the Vermont assembly reconvened on June 11, 1778, a day after towns from the east side of the Connecticut River were to appear in Concord at New Hampshire's constitutional convention, they approved the articles as instructed, and all willing New Hampshire Grant towns (at this point, 16) became part of Vermont.<sup>284</sup>

It is unclear when news of Exeter's partial capitulation reached the Upper River Valley. The December 27th vote encouraging towns to instruct their delegates as to a constitutional convention was likely known to Hanover, and gave them good reason to instruct Woodward to wait on February 3, 1778. Woodward, with his clear understanding of agency principles, was unlikely to violate his instructions on March 12-17 in crafting articles of union until he learned of the February 25th vote omitting the crucial requirement of town representation regardless of population. Too, it is possible that Exeter's February 25 partial capitulation did not reach the Upper River Valley until it was, in any event, too late. Once known, however, this fact was likely not communicated to the thirty-seven of forty-nine Vermont legislators who voted for union, nor by the towns who so instructed them.<sup>285</sup> Standing on principle, those on the east side of the river also felt the clarion call of union with their nearest neighbors whether or not they were victorious in their push to advance constitutional procedure or no. Woodward and his following finally achieved the representation and respect they so craved while also uniting with their friends and family across the river.<sup>286</sup> But it was not to last.

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<sup>281</sup> *Id.*; CHASE, *supra* note 169, at 464; Articles of Union (March 17, 1778), *reprinted in id.* at 464-466. These articles also made suggested edits to the Vermont Constitution.

<sup>282</sup> Ira Allen to the Council and General Assembly of New Hampshire . . . 10 NHSP 291, 292.

<sup>283</sup> Vermont Resolution in General Assembly (June 11, 1778), *reprinted in* 10 NHSP 276-77.

<sup>284</sup> *Id.*

<sup>285</sup> At least, this is what Ira Allen claims in his letter to the New Hampshire Assembly, 10 NHSP 292.

<sup>286</sup> Indeed, in the October session of the Vermont legislature, Woodward was elected clerk and participated on all major committees. CHASE, *supra* note 169, at 474.

In the end, New Hampshire's achievement of a modern constitutional convention whose function was purely separate from any legislative role was anticlimactic. In fact, the day after the first constitutional convention met, the 16 towns in the Upper River Valley who had birthed the concept became part of Vermont. In doing so, they forfeited a constitution created under advanced popular sovereignty theory for a constitution contrived in the same manner as New Hampshire's "illegal" 1776 Constitution, proving they were no ideologues, but pragmatists in search of ideas in service to their aims of influence and representation. Their legacy of the College Party and their sympathizers in the east was not a permanent constitution for New Hampshire (the Concord Convention of 1778 failed), but the procedural innovation of a separate, modern constitutional convention. The procedural innovation was employed again and again by the Granite State until success was obtained in 1784, by Massachusetts for their permanent constitution of 1780, by the United States to both draft and ratify its 1787 constitution, and by many states and countries crafting constitutions thereafter.

*c. New Hampshire's Stillborn Constitutions: A Lesson on Group Inclusion*

Ratifying a constitution in New Hampshire in the early 1780s approached the madness of *Groundhog Day*, with nearly every year producing a failed constitution until success was achieved in 1783. Historians have almost universally attributed these repeated failures to the people's reservations over constitutional content. While that may provide a partial answer, it is by no means complete. Too, the want of popular sovereignty procedure can supply no answers, as New Hampshire was the first to perfect popular sovereignty's application in this regard, with both a separate constitutional convention with special agency *and* popular ratification. More, they were also the first (and only) state to allow and incorporate popular participation through town amendments. The complete picture of New Hampshire's failed 1779, 1781, and 1782 constitutions lies initially in constitutional content, but was increasingly found in the drama playing out on its western borders. This procedural history bears on the importance of group inclusion in constitutional process.

Group inclusion here refers to the breadth of enfranchised groups represented in the drafting room. As the name implies, while "inclusion" generally refers to the individual, "group inclusion" in comparative constitutional law makes references to the inclusion of groups, but adds a

political component, as the referenced “groups” are those which are enfranchised.<sup>287</sup> The deplorable exclusion of unenfranchised peoples in the eighteenth century such as women and slaves (though free blacks in New Hampshire could vote at least some of the time<sup>288</sup>) was an issue of which contemporaries were seized of their own complicit culpability,<sup>289</sup> but presents a topic for another time.

### 1. *The 1779 Stillborn*

Group inclusion played a part in the failed constitution of 1779. Eastern towns evidenced sympathy and fraternity with their western brothers’ concerns over partial representation,<sup>290</sup> and a majority of the state overrode the concerns of Weare and his followers when they voted to grant two demands of the Upper River Valley in holding a constitutional convention in Concord.<sup>291</sup> When town representatives arrived in Concord on June 10, 1778, particularly Meshech Weare, who was summarily made president,<sup>292</sup> they surely noticed crickets chirping where delegates should have been on the Upper River Valley side of the room. In fact, they were missed. Even though absent, their presence was felt, evidenced by the hotly-contested issue of representation: both the issue of town representation and former royal privileges of towns “went heavily,” the former being “largely disputed.”<sup>293</sup>

Without the Upper River Valley, this first Convention was destined for failure almost before it began. They met for a mere week, outlining principles to be incorporated into a draft by an eleven-member committee—four of whom had served on the 1776 seven-member drafting

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<sup>287</sup> HOROWITZ, *supra* note 6, at *passim*.

<sup>288</sup> See 2 Durham Town Records 200 (Dec. 10, 1781), New Hampshire State Library (including “negroes” and “servants” in ratable poles), New Hampshire Census (1790), 13 NHSP 767, 772 (identifying 158 slaves in the state and 630 “other free persons” out of 142,018 persons); See *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 572-73 (1857) (Curtis, J., dissenting) (“At the time of the ratification of the Articles of Confederation, all free native-born inhabitants of the State[] of New Hampshire . . . though descended from African slaves, were not only citizens of th[e] State[], but such of them as had the other necessary qualifications possessed the franchise of electors, on equal terms with other citizens.”).

<sup>289</sup> James Madison’s *Notes of the Constitutional Convention* (July 23, 1787), in 2 Farrand, *supra* note 60, at 221.

<sup>290</sup> THE FREEMAN’S JOURNAL OR NEW-HAMPSHIRE GAZETTE 1 (Nov. 12, 1776).

<sup>291</sup> DANIELL, *supra* note 18, at 167.

<sup>292</sup> Letter from Samuel Philbrick to Josiah Bartlett (June 10, 1778), reprinted in COLBY, *supra* note 263, at 78.

<sup>293</sup> *Id.*

committee<sup>294</sup>—before adjourning to October 13, 1778.<sup>295</sup> It is unclear whether this meeting ever took place, as the next record shows them meeting June 5, 1779, whereupon they approved and published the constitution for three-fourths of towns to ratify before going into effect.<sup>296</sup> When they reconvened September 15, 1779 to count the votes, the constitution had failed.

While town returns are sparse for this constitutional cycle,<sup>297</sup> the Concord Town Records indicate that the 1779 Constitution passed by just one vote, 26-25, and Portsmouth's showed it failed by a vote of 87-2.<sup>298</sup> At least some of the towns' objections must have sounded in a constitution that differed little from its crude 1776 predecessor.<sup>299</sup> It empowered only two, or one and a half branches of government—a bicameral General Court to appoint judges—but no clear executive or executive agencies. It identified no limited or special powers of the Court, and protected five rights: life, liberty, and property, the rights of conscience for Protestants, and trial by jury. Its substance also included the controversial 1775 representative calculus. In short, this "plan of Government" did little to improve on the temporary expedient.

Its failure also sounded in procedure. Although a perfect theoretical reduction of popular sovereignty to constitution-writing, comprehending special elections, a separate convention, and ratification, the 1778-79 New Hampshire draft constitution did not include the right groups as measured either by those participants in the drafting room or in its provisions. The absence of sixteen Grafton towns would have been palpable. The constitution's failure was due more to the procedure that comprised the convention rather than that which it anticipated under a new regime: the limitation of future representation to those towns with 100 families or more was eased somewhat by indicating that those comprised of less families could also send a representative "as they please" or be classed with other towns,

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<sup>294</sup> *Id.* at 79; *cf. id.* at 68.

<sup>295</sup> Letter from Samuel Philbrick to Josiah Bartlett (June 10, 1778), *reprinted in id.* at 79.

<sup>296</sup> Letter from Samuel Philbrick to Josiah Bartlett (June 17, 1778), *reprinted in id.* at 79.

<sup>297</sup> Historical and Statistical Sketch of Croydon 12 (1852) (noting the town's defective records from the period).

<sup>298</sup> Records (Sep. 6, 1779), in CONCORD TOWN RECORDS 1732-1820, 176 (1894); MMS Copy, New Hampshire State Library [hereinafter NHSL], Portsmouth Town Records (Sep. 1779).

<sup>299</sup> A Plan of Government for the State of New Hampshire (June 5, 1779), in 9 NHSP 837-41.

though procedures for such were left unspecified.<sup>300</sup> This was an olive branch to the Upper River Valley, and a significant one.

The desire to bring Grafton back into the fold may also be judged by what happened out-of-doors, and could have been one reason for the long delay between sessions. Indeed, if the actions of President Weare filling up the year between June 1778 and June 1779 is any measure of the Convention's concern, inclusion of the Connecticut River Valley towns was top of mind. Although apprised that something was amiss by their absence June 10-17, 1778 at the Concord Convention, sometime in late June or early July, Weare received sure intelligence of the Upper River Valley's disaffection in the form of a letter from the United Committees accompanying the Vermont resolutions admitting willing New Hampshire Grant towns east of the river into the state.<sup>301</sup>

Blindsided and incensed, Weare got busy. By August 19, 1778, when he wrote to the New Hampshire Delegates in Congress about the matter, Weare had gathered intelligence from the Grants about individual loyalties and gained authorization from the Council and Assembly to involve Congress in resolving the matter.<sup>302</sup> This was quickly followed by a rather testy letter to Governor Chittendon of Vermont, outlining why Vermont had no jurisdiction over the Grants east of the river: not only was New Hampshire's jurisdiction confirmed by historic boundary lines, but most towns sent delegates to the Provincial Congress in 1775 (which enacted the 1776 Constitution), and they yet enjoyed "the same privileges" with others of the state.<sup>303</sup> Weare also reverted to hints of force. He reminded Gov. Chittendon of New Hampshire saving them from Burgoyne's advance, resulting in the victory at Bennington, and indicated that several within the Grants had already applied to New Hampshire for "protection," intimating the use of arms to accomplish that object.<sup>304</sup>

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<sup>300</sup> *Id.* at 839.

<sup>301</sup> Letter from Nehemiah Estabrook to Meshech Weare (June 25, 1778), reprinted in CHASE, *supra* note 169, at 471.

<sup>302</sup> Letter from Weare to Josiah Bartlett and John Wentworth (Aug. 19, 1778), 10 NHSP 278-79; Debates in Congress (Sep. 16, 1778), in 12 JCC 916, 917.

<sup>303</sup> Letter from Weare to Governor Chittenden (Aug. 22, 1778), in 10 NHSP 279-82.

<sup>304</sup> *Id.*

The letters were not without effect. Congress read the letter from Weare on September 16, 1778, along with other evidence from New York,<sup>305</sup> and thought it serious enough to refer it to a committee of the Whole.<sup>306</sup> Its hearing was delayed,<sup>307</sup> but in the meantime, Ethan Allen, leader of the Green Mountain Boys and co-head, with his brother, of the “Bennington” Party, traveled to Philadelphia and promised New Hampshire delegate Josiah Bartlett that he would work towards dissolution of the union with the Upper River Valley, presumably in exchange for Bartlett’s lobbying for Vermont’s recognition in Congress.<sup>308</sup> Allen then returned home and reported to the Vermont state legislature on October 10, 1778 that all that was needed for Congress to recognize Vermont was to disavow the union with the Grants east of the river.<sup>309</sup>

Vermont hastened to comply. After a week of debate in the Assembly over the above, the union was confirmed.<sup>310</sup> However, a day later, on October 21, the assembly voted that the towns east of the river could not be added into an existing county, nor could they create their own.<sup>311</sup> The effect did not prevent their representation in the Assembly, but denied them the ability to organize on the county level as other Vermont counties.<sup>312</sup> The towns on both sides of the river remonstrated through formal protest, and left.<sup>313</sup> Governor Chittenden wrote a short note back to Weare at this point, ensuring him the union had been dissolved, and thanking him for preserving “this Infant State” in the Battle of Bennington.<sup>314</sup> The issue was again submitted to the people via electoral writs for the next assembly, and, based on these returns, the assembly formally dissolved the union with the sixteen

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<sup>305</sup> Letter from Ethan Allen to the Governor, Council, and Representatives of Vermont (Oct. 10, 1778), *in* 10 NHSP 282, 283.

<sup>306</sup> Debates in Congress (Sep. 16, 1778), *in* 12 J. Cont’l Cong. 916–17.

<sup>307</sup> The Committee of the Whole was to meet on Friday, September 18, 1778 according to adjournment, but the case was not heard on this day. *See* Debates in Congress (Sep. 18, 1778), *in* 12 J. Cont’l Cong. 925–28.

<sup>308</sup> Letter from Ethan Allen to Meshech Weare (Oct. 23, 1778), *in* 10 NHSP 287–88; *see* CHASE, *supra* note 169, at 475 (imputing a deal with Bartlett from this letter).

<sup>309</sup> Letter from Ethan Allen to the Governor, Council, and Representatives of Vermont (Oct. 10, 1778), *in* 10 NHSP 282–84.

<sup>310</sup> CHASE, *supra* note 169, at 475.

<sup>311</sup> *Id.*

<sup>312</sup> Votes of the Vermont Assembly (Oct. 21, 1778), *in* 10 NHSP 284.

<sup>313</sup> CHASE, *supra* note 169, at 475–76.

<sup>314</sup> Letter from Governor Chittenden to Meshech Weare (Oct. 23, 1778) *in* 10 NHSP 287.

towns east of the Connecticut River on February 12, 1779.<sup>315</sup> Thus through relatively little effort, Vermont was able to rid themselves of the union they believed impeded their recognition in Congress.

But it was no simple severance. Things became more complicated than either the Bennington or Exeter parties anticipated when the towns east of the river, in leaving Vermont, took with them ten towns *west* of the river.<sup>316</sup> After leaders wrote a treatise defending the integrity of the Grants,<sup>317</sup> twenty-two towns from both sides of the river entertained the possibility of a new state (but hedged that they would join New Hampshire if they could mutually agree on a constitution),<sup>318</sup> then applied to New Hampshire for admission on March 17, 1779.<sup>319</sup> After allowing the people some input through elections,<sup>320</sup> nineteen days after the reconvening of the constitutional convention, the New Hampshire legislature acquiesced on June 24, 1779, provisionally including the towns west of the river subject to Congressional approval.<sup>321</sup>

Thus it was that western dissidents initiated the constitutional cycle of 1778–79, but remained entirely outside the drafting process (that said, the Grants would have been included in the ratification base between June and September 1779). The 1779 Constitution's failure is found in both its rudimentary content and its procedure. The voting public were not ignorant of what was going on in the Grants, impacting many towns in two of the state's five counties.<sup>322</sup> Participants and the public were aware that the drafting process excluded those east of the Connecticut River Valley by virtue of the objectionable 1775 representation plan, that that plan was the reason for the disaffection of western towns to Vermont, and that that plan by and large persisted in the proposed constitution draft (with the notable exception of allowing towns smaller than 100 families a representative),<sup>323</sup>

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<sup>315</sup> Report of a Committee in General Assembly (Feb. 12, 1779), *in* 10 NHSP 333–34.

<sup>316</sup> CHASE, *supra* note 169, at 476.

<sup>317</sup> A PUBLIC DEFENCE OF THE NEW HAMPSHIRE GRANTS (1779).

<sup>318</sup> RESOLVES OF A CONVENTION HELD ON THE NEW HAMPSHIRE GRANTS (Dec. 9, 1778), *in* 10 NHSP 325–27; *see also* Ira Allen to Meshech Weare (Dec. 12, 1778), *in* 10 NHSP 327–29.

<sup>319</sup> PETITION OF JACOB BAILEY AND DAVENPORT PHELPS . . . TO THE STATE OF NEW HAMPSHIRE (Mar. 17, 1779) *in* 10 NHSP 336–37.

<sup>320</sup> Proceedings of the Legislature of New Hampshire, on the Foregoing Petition (Apr. 2, 1779), *in* 10 NHSP 337–38.

<sup>321</sup> Proceedings of the House of Representatives (June 24, 1779), *in* 10 NHSP 338.

<sup>322</sup> DANIELL, *supra* note 18, at 168.

<sup>323</sup> *Supra* note 299 and accompanying text.

perpetuating the beleaguered state's division. The populace sued for peace by rejecting the 1779 constitution, opening the way up for a replacement process and constitution that would be more inclusive.

## 2. *The 1781 Stillborn*

It took another two years before the New Hampshire Assembly approved another constitutional convention, this one to sit perpetually until a constitution was ratified.<sup>324</sup> For this, the content was better, based as it was on the 1780 Massachusetts Constitution. Regardless, townsmen took greater issue with the content this time around, and the shadow of continued trouble in the Grants hung over the process and effectively excluded a large portion of the State.

This period of constitutional quiescence was not so quiet in other regards. It was filled with war in the far-flung south, where one heard tales of battles and burnings.<sup>325</sup> While the weary war continued, New Hampshire, hard-pressed to supply it, was cold, hungry, and even naked. James Sullivan wrote his brother, General John Sullivan, that the citizenry wanted bread for their stomachs and wood for their fires.<sup>326</sup> Eleazar Wheelock, Dartmouth College founder and the presumed head of the College Party, writes piteously about using table and bed linens to clothe his family and school.<sup>327</sup>

The period prior to the next constitutional cycle was also filled with continued turmoil in the Grants, which had been complicated by towns east *and* west of the Connecticut River joining New Hampshire. Confusion reigned, with various states—New Hampshire, Vermont (sometimes, confusingly, called the New Hampshire Grants), New York and Massachusetts—each claiming and exercising jurisdiction on one side of the river or another, or both.<sup>328</sup> Congress appointed a committee to investigate competing claims: then, when the committee failed to fully report on its mission, having traveled to Bennington only, they requested and gained

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<sup>324</sup> COLBY, *supra* note 263, at 85.

<sup>325</sup> Foreword, *Journals of the General Assembly and House of Representatives 1776-1780*, *supra* note 146, at xiv-xvi; WOOD, *REVOLUTION*, *supra* note 232, at 84-85.

<sup>326</sup> James Sullivan to John Sullivan (Aug. 30, 1779), MS, Sullivan Papers, NHHS, f. 24, p. 2.

<sup>327</sup> *See* HILL, *supra* note 214, at 47 ("My family & School are in want of Cloathing [sic] . . . we have cut up all the Sheets Table Cloths under beds Towels &c which could be spared in the House, to cover their nakedness, and have now Scarce a whole linnen [sic] garment in the house and most of them Such as you would not think worth taking from the floor unless for a papermill.").

<sup>328</sup> Resolves of Congress respecting the New Hampshire Grants (Sep. 24, 1779), *in* 10 NHSP 351-55.

permission from interested parties to resolve the dispute, but then delayed again, not having the requisite number of states present.<sup>329</sup> In the meantime, the Allen brothers secretly negotiated with the British to recognize Vermont as an independent country<sup>330</sup> while the Grants themselves acted quite independently.<sup>331</sup> When Congress finally did confer on the issue in September of 1780, resolution was prevented by John Sullivan and others' private sentiments that ran contrary to their states' instructions to lay claim to the entirety of the Grants.<sup>332</sup>

Even before the state legislature turned their thoughts again to constitutional reform in the spring of 1781, tension in the Grants mounted, setting the stage for a repeat performance of the constitutional cycle of 1778–1779. Feeling deeply betrayed by Sullivan's duplicity in seeking to sever the Grants along the river, towns among the Grants arose in violent opposition, this time lead by the lower valley towns rather than Dresden.<sup>333</sup> On January 18, 1781, forty-three towns met in Charlestown on the east side of the river, and a majority of delegates, over virulent opposition, voted in favor of renewing the union with Vermont.<sup>334</sup> By February 22, 1781, the Vermont legislature and Charlestown Convention agreed on articles of union, which would take effect April 5, 1781 after a ratification vote of two-thirds of

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<sup>329</sup> *Id.*; DANIELL, *supra* note 18, at 159; CHASE, *supra* note 169, at 484–85; Resolutions of Congress (June 2, 1780), *in* 10 NHSP 361–62.

<sup>330</sup> *See* Letter from Gen. Jacob Bailey to Meshech Weare (Nov. 6, 1780), *in* 10 NHSP 377–78 (uncovering the negotiations).

<sup>331</sup> CHASE, *supra* note 169, at 483; *see also* Resolutions of Congress (June 2, 1780), *in* 10 NHSP 361–62; Letter of Joseph Marsh, Peter Olcott, and Bezaleel Woodward to the President of Congress (July 20, 1780), *in* 10 NHSP 363–65.

<sup>332</sup> DANIELL, *supra* note 18, at 159–60; CHASE, *supra* note 169, at 488–90. *But see* Letter from Hon. John Sullivan, delegate in Congress, to Meshech Weare (Sep. 16, 1780), *in* 10 NHSP 375–77 (assuring Weare he would be “less violent” in his opposition to New Hampshire embracing the Grants on the east side of the river after learning for himself their desires to remain politically joined).

<sup>333</sup> Proceedings of a Convention at Walpole (Nov. 15, 1780), *in* 10 NHSP 381–83 (“[T]he State of New Hampshire is greatly remiss, if not grossly negligent (to call it by no harsher name) in trusting affairs of such great importance as the settlement of their western boundary, to a committee, some of whom, we conceive, would risk the loss of half the State, rather than New Hampshire should extend their claim west of Connecticut river.”); CHASE, *supra* note 169, at 490–91.

<sup>334</sup> Journal of the Charlestown Convention (Jan. 18, 1781), *in* 10 NHSP 388–93; Protest of a Minority of the Delegates (Jan. 18, 1781), *in* NHSP at 393–94. Chase notes that the report was changed overnight from being in favor of a union with New Hampshire to that of Vermont due to the underhanded “edits” of Ira Allen. CHASE, *supra* note 169, at 492–93; Ira Allen, Secret history of the Charlestown Convention &c., *in* 10 NHSP 394–96.

impacted towns.<sup>335</sup> After the vote was achieved by “most in many and many in all the Towns,”<sup>336</sup> complaints by dissents still loyal to New Hampshire poured in, asking the state for relief of taxes (not being able to collect any), protection from violence, and “[c]atagorical [sic] and conclusive” proofs of reciprocal loyalty.<sup>337</sup>

It is against this backdrop, eight days before the Grants were likely to become part of Vermont, that the New Hampshire House of Representatives in Exeter voted to call another constitutional convention “to settle a Plan of Government” on March 28, 1781.<sup>338</sup> On April 5, the same day the votes were counted determining the statehood of Cheshire and Grafton Counties—effectively two-thirds of the state’s land mass—the Council and House issued its electoral precept for a second constitutional convention. It made vague reference to the trouble in the West:

Whereas the present situation of affairs in this State make it necessary that a full & free Representation of the Inhabitants thereof should meet in Convention for the sole purpose of forming & laying a permanent Plan or system of Government . . . therefore:

Voted & Resolved, That the Honorable the President of the Council issue to *every* Town, Parish & District within that part of this State East of Connecticut River, a Precept recommending them *to elect and choose one or more persons* as they shall judge it expedient to convene in Concord in said State on the first Tuesday of June next for the purpose aforesaid—saving to the small Towns liberty to join two or more together if they see fit, to elect & send one person *to represent them in said Convention*.<sup>339</sup>

Here, finally, by a vote of 31-15, Exeter granted the final demand of the Upper River Valley from 1777: to be afforded a representative for each

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<sup>335</sup> CHASE, *supra* note 169, at 495.

<sup>336</sup> The Selectmen of the town of Swanzey to the General Court (June 9, 1781), *in* 13 NHSP 527–28.

<sup>337</sup> Petition from Walpole, Westmoreland, and Swanzey (May 25, 1781), 13 NHSP 604–06; Selectman of town of Swanzey, *supra* note 336, at 527–28; Sundry Citizens Against a Union with Vermont, etc.: Addressed to the General Court, 1781, (June 8, 1781), *in* 13 NHSP 662–63 (“The memorial of a number of the Inhabitants of the Town of Westmoreland . . . .”); Hinsdale petition to Exeter (July 13, 1781), *in* 12 NHSP 217.

<sup>338</sup> Resolution of the House (Mar. 28, 1781), *in* COLBY, *supra* note 263, at 84–85.

<sup>339</sup> Resolution of the House (April 5, 1781), *in* COLBY, *supra* note 263, at 85 (emphasis added).

incorporated town regardless of size as the standard, rather than the exception. But it was too little too late—four years too late.

In other respects, the procedural form remained a perfection of popular sovereignty, with required ratification (lowered by the convention to a two-thirds bar rather than three-fourths<sup>340</sup>) to compliment the special authority of the convention.<sup>341</sup> The resolution, wholly confirmed the next day by the Council,<sup>342</sup> also made provision for the possible failure of this constitutional cycle, and rendered the convention perpetual until the people should accept a constitution.<sup>343</sup>

It was all a tub to the whale: it did nothing to halt the train of western events. The votes of the Charlestown Convention were counted April 5, 1781 and, with no town dissenting,<sup>344</sup> the Vermont legislature accepted 35 New Hampshire towns and 10 Vermont towns to its June session.<sup>345</sup> Despite the division in the state, the constitutional convention met as planned on June 5, 1781 in the hall above Judge Timothy Walker's store.<sup>346</sup> Unsurprisingly, no Connecticut River Valley delegates from Cheshire or Grafton Counties were elected, a total of 30 towns failing to send any delegation,<sup>347</sup> 10 fewer than the 1778 cycle,<sup>348</sup> setting the stage for a repeat of the 1778-79 constitutional cycle. Indeed, the poor attendance at the convention may be interpreted as an indication of the towns' and delegates' confidence in its ultimate success given the state of affairs within the beleaguered state. Whereas 90 had attended in June of 1778,<sup>349</sup> only 54 attended in June of 1781.<sup>350</sup>

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<sup>340</sup> COLBY, *supra* note 263, at 87.

<sup>341</sup> Resolution of the House (April 5, 1781), *in* COLBY, *supra* note 263, at 85.

<sup>342</sup> *Id.* at 86.

<sup>343</sup> Resolution of the House (April 5, 1781), *in id.* at 85.

<sup>344</sup> Returns of Towns as Recorded in the Cornish Convention (Apr. 5, 1781), *in* 10 NHSP 398–99.

<sup>345</sup> *Id.* at 399-400; CHASE, *supra* note 169, at 496; HILL, *supra* note 214, at 50. Hill sets the number of New Hampshire towns at 34, but reference to the original document, 10 NHSP 400, will indicate that two towns, Morristown and Bath, sent one delegate together, thus the discrepancy.

<sup>346</sup> COLBY, *supra* note 263, at 86. Although Colby ascribes the ownership of the store to John Stevens, Stackpole's account of the location and relocation of Walker's store appears the more credible account. STACKPOLE, *supra* note 31, at 234–35.

<sup>347</sup> COLBY, *supra* note 263, at 86.

<sup>348</sup> 9 NHSP 834–37.

<sup>349</sup> *Id.*

<sup>350</sup> COLBY, *supra* note 263, at 86.

And repeat itself it did. Although the substance of the constitution benefited from that passed by Massachusetts and drafted by John Adams the previous year<sup>351</sup> and the process benefited in their attempt to finally be inclusive, given the facts on the ground, it had little chance of success. Although no journal survives, the historical record reveals that the June Convention elected a chairman, appointed a drafting committee, and adjourned to September 14, 1781.<sup>352</sup> The convention then approved the draft constitution, published 700 copies for distribution, and sent it out for ratification by two-thirds of the towns (rather than three-fourths).<sup>353</sup> Learning from the last cycle and empowered to remain sitting until a constitution was ratified, it followed Massachusetts' procedural innovation and asked for towns to state their reasons for rejection, if any.<sup>354</sup>

Despite all of these safeguards and the improvement the Massachusetts model provided, when the convention met again by adjournment on January 23, 1782, they found that though the votes were "thin" and the returns "few,"<sup>355</sup> that the Constitution had again been rejected.<sup>356</sup> Although Everett Stackpole struggles to find a reason for its defeat, the proposed bill of rights being almost exactly that of the accepted 1783 Constitution,<sup>357</sup> the tells may be found in the town returns. Whereas the 1778 draft had passed by one vote in Concord, this draft failed by a vote of 48 to zero.<sup>358</sup> Among the reasons listed for rejection was "to have a Town Representation."<sup>359</sup> This was a response to a new provision for county conventions to elect representatives, wherein towns with fifty ratable polls could elect one delegate.<sup>360</sup> This was designed as the solution for two problems: the disreputable and uneducated rabble that town representation fostered who

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<sup>351</sup> DANIELL, *supra* note 18, at 171.

<sup>352</sup> COLBY, *supra* note 263, at 87.

<sup>353</sup> *Id.*

<sup>354</sup> *Id.*; For Massachusetts's innovation of direct popular participation, see AN ADDRESS OF THE CONSTITUTIONAL CONVENTION, TO THEIR CONSTITUENTS, 1780, in Taylor, *supra* note 29, at 123. ("It is your *Interest* to revise [the constitution] with the greatest Care and Circumspection, and it is your undoubted *Right*, either to propose such Alterations and Amendments as you shall judge proper, or to give it your own Sanction in its present Form, or, totally to reject it.")

<sup>355</sup> George Atkinson, *To the Inhabitants of New Hampshire*, NEW HAMPSHIRE GAZETTE AND GENERAL ADVERTISER, Feb. 8, 1783, at 1.

<sup>356</sup> COLBY, *supra* note 263, at 87; STACKPOLE, *supra* note 31, at 230.

<sup>357</sup> STACKPOLE, *supra* note 31, at 230.

<sup>358</sup> CONCORD TOWN RECORDS (Jan. 21, 1782), *supra* note 298, at 198–99.

<sup>359</sup> *Id.*

<sup>360</sup> Proposed Constitution of 1781, in 9 NHSP 852, 864.

exhibited behavior ill-fitting of those in power, and that of creating too large an assembly.<sup>361</sup> In light of the reasons for the state's division found in the Grafton County Address, this provision was clearly not designed with inclusivity in mind, and therefore objectionable. Dartmouth historian Jere Daniell writes that the objection over the county convention system of representation elicited the most opposition.<sup>362</sup> In a two-part editorial, "A True Republican," harkening to the old pen name of Woodward,<sup>363</sup> explained that without town representation, parties would form, and towns would be unable to bind their delegates with instructions—an essential instantiation of popular sovereignty ideology.<sup>364</sup> Defective town representation—the central issue of the College Party's campaign of 1776 before leaving the state—was therefore an important substantive reason the 1781 Constitution failed. Inclusivity remained elusive.

But there were other substantive reasons. Concord identified the need for a stronger, unitary executive and popular appointment of militia officers.<sup>365</sup> Durham wanted a litany of changes: to be more inclusive in supporting Christian, not just "protestant" clergy and faith, high qualifications for voters electing higher officers, the ability to be tried in an impartial county, no retrospective laws, defined terms for each legislative session, a legislative veto override, "visible" rather than debt-free estates, allowing each house to determine quorum requirements, procedures for filling vacancies, making all ratable polls (or lowering voter qualifications) eligible to elect County delegates, removing requirements for legislative journal-keeping, prohibiting the governor from building or destroying fortifications without the advice of the Council, identifying a separate treasurer and commissary general for the Council and House, granting the legislature the authority to alter county lines or erect new counties, and eliminating term limits.<sup>366</sup> Epsom voted no on the draft unless the Constitution were amended to allow confiscation of Tory property, lowered property requirements for Councilors, Representatives,

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<sup>361</sup> DANIELL, *supra* note 18, at 172.

<sup>362</sup> DANIELL, *supra* note 18, at 174.

<sup>363</sup> See *supra* note 273 and accompanying text.

<sup>364</sup> NEW HAMPSHIRE GAZETTE (Dec. 1 & 15, 1781). *But see* A Citizen of New Hampshire, NEW HAMPSHIRE GAZETTE (Dec. 8, 22, 1781) (asserting the minority opinion that true representatives would be willing to disobey instructions).

<sup>365</sup> CONCORD TOWN RECORDS (Jan. 21, 1782), *supra* note 298, at 199.

<sup>366</sup> MSS New Hampshire State Archives [hereinafter NHSA], NHT, Annual Meeting Minutes (Nov. 17, Dec. 3, and Dec. 10, 1781), 2 Durham Town Records 195–206.

and voters, and eliminated term limits.<sup>367</sup> Portsmouth's constitutional review committee which included John Langdon had concerns over County Conventions, the manner of returns, and wanted more councilors and representatives—possibly a throw to Western concerns—but were grossly outvoted by 262-5 in favor of the Constitution.<sup>368</sup> Hopkinton elected a committee of nine to review and its records merely note a negative vote “with 70 voters present.”<sup>369</sup>

Despite the presence of other reasons, events in western New Hampshire must have been top of mind. The unpleasantries feature in town records and private letters. In the Durham committee's argument for the ability to change counties to enable a fair trial, they cited Western disaffectors' inability to obtain a fair trial in Grafton or Chester counties as exhibit one.<sup>370</sup> In the letters between clergyman and gentlemen historian Jeremy Belknap and another pastor in Massachusetts that discuss the 1781 Constitution and its chances of success, much more space is devoted to ownership of the Grants.<sup>371</sup> Indeed, prompted in part by Meshech Weare's refusal to comply with requisitions towards war expenses due to Connecticut River town's failure to pay taxes<sup>372</sup> Congress invited a delegation from Vermont to parley with them,<sup>373</sup> then determined on August 21 that an “indispensible preliminary” to their recognition of Vermont's independence was to “explicitly relinquish all demands of lands or jurisdiction on the east side of the . . . Connecticut river.”<sup>374</sup> Vermont promptly ignored Congress' conditions, and, together with 36 on the New Hampshire side of the river, met for the first (and only) time on that side in Charlestown on October 16,

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<sup>367</sup> MSS NHSA, NHT, Annual Meeting Minutes (Dec. 14, 1781), in 1 Epsom Town Records 1727–97, p. 131–32.

<sup>368</sup> MMS copy, NHSL, 3 Portsmouth Town Records 1779-1807 (Nov. 17, Dec. 10, 11, 18, 20, 24, 31, 1781, Jan. 14, 1782) 61–64.

<sup>369</sup> MSS copy, NHSL, 2 Hopkinton Town Records (Jan. 21, 1782) 249.

<sup>370</sup> 2 Durham Town Records 198.

<sup>371</sup> See Belknap Papers, Fifth Series, 2 COLLECTIONS OF THE MASSACHUSETTS HISTORICAL SOCIETY 105–17 (1877) (including letters between Jeremy Belknap to Ebenezer Hazard from September 5, 1781 to Feb. 17, 1782).

<sup>372</sup> Meshech Weare to NH Delegates in Congress (June 20, 1781), in 10 NHSP 401-02; see also CHASE, *supra* note 169, at 470 (grant towns determining to hold on to collected taxes rather than remit to New Hampshire).

<sup>373</sup> Debates in Congress (August 7, 1781), in 21 JCC 836–39.

<sup>374</sup> Debates in Congress (August 21, 1781), in 21 JCC 892.

1781.<sup>375</sup> They elected Elisha Payne as deputy governor, making him Major-General of the state militia, and voted its willingness to comply with Congress' boundaries *after* admission.<sup>376</sup>

Armed conflict was imminent. The minority who opposed Vermont's jurisdiction and asserted New Hampshire's instead were threatened and, on two occasions, jailed.<sup>377</sup> On December 19, 1781, Major-General Payne issued marching orders for Vermont militia, and New Hampshire responded in kind by ordering a draft of 1,000 men.<sup>378</sup> At this point, Washington himself got involved. Having accepted Cornwallis' surrender at Yorktown on October 19, 1781 and in response to Governor Chittenden's November 14, 1781 letter explaining his intrigues with the British and the unions made out of expediency, Washington responded on January 1, 1782.<sup>379</sup> There, Washington encouraged Chittenden to respect the boundaries of Vermont as set by Congress, lest "the necessity of coercion on the part of Congress" be required.<sup>380</sup> This hint of force was used by the Bennington party to induce the Vermont legislature, met in the southwest corner of the state without the benefit of members from the Grants, to unanimously capitulate on February 20, 1782 and limit itself to the boundaries set by Congress, including relinquishing the grants east of the river.<sup>381</sup>

The failure of the 1781 proposed constitution on January 23, 1782, a month before Vermont's final capitulation, should be interpreted against this background of unrest. During the entirety of the 1781–1782 constitutional cycle, the Upper River Valley was then not a part of New Hampshire. The state's energies were consumed with that conflict, which all but came to arms. It is no surprise that, despite many improvements in content, the 1781 constitution failed. True, many towns wanted substantive amendments, but its exclusionary procedure also shares blame. Though its popular sovereignty perfections were complete and the Convention even encouraged substantive participation by the towns, the constitutional process and substance were

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<sup>375</sup> Report of the Council and Assembly of Vermont . . . (Oct. 16, 1781), *in* 10 NHSP 422–26; CHASE, *supra* note 169, at 497.

<sup>376</sup> *Id.*

<sup>377</sup> Petition of Nath'l Bingham and John Grandy, Jun., to the Council and House of Representatives (Nov. 16, 1781), *in* 10 NHSP 435.

<sup>378</sup> CHASE, *supra* note 169, at 499.

<sup>379</sup> George Washington to Thomas Chittenden (Jan. 1, 1782), *in* 1 BELKNAP 392–95.

<sup>380</sup> *Id.*

<sup>381</sup> CHASE, *supra* note 169, at 499–500.

again exclusionary. These aspects of the process have thus far failed to register in histories of the New Hampshire Constitution; however, the 1781 constitutional process can only be understood by panning out to comprehend larger events gripping the state.

### 3. *The 1782 Stillborn*

Despite Vermont's dismissal of the towns east of the river, things remained far from settled in the Grants. Vermont continued to exercise authority east of the river, and the Dresden Party continued to vie for rights and respect, appealing to Congress again and again for aid. Undaunted, the New Hampshire Convention persevered, hoping for more favorable outcomes. Beaten, the Grants were forced into subjection to Exeter's will, which spared them no quarter. Exeter passed an Oath Act targeted at the Grants, excluding most in Grafton and Cheshire Counties from political and constitutional decisions. Whereas the Grants had largely excluded themselves from constitutional processes in protest up to this point, they were now proactively excluded by *Exeter*. Yet this plan backfired, as towns in other counties remonstrated against the Oath Act and voted down or refused to vote on the Constitution. Due to the effective exclusion of the Grants from the Convention and Ratification, the 1782 proposed Constitution failed like its 1778 and 1781 predecessors, this time almost wholly due to exclusion.

When the New Hampshire Constitutional Convention met on January 23, 1782 and learned that their 1781 Constitution had been rejected, they also learned why. Towns not only submitted reasons for rejection, or amendments, but also sent members of the committees who drafted objections to the Convention to enlighten them.<sup>382</sup> This was a significant procedural innovation, allowing as it did for direct popular participation in the constitution's procedure. Although the Massachusetts Constitutional Convention had requested feedback on its constitution,<sup>383</sup> it did not directly interact with spokesmen from the towns, nor did it incorporate any of the received feedback.<sup>384</sup> Thus New Hampshire stands alone among early states

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<sup>382</sup> COLBY, *supra* note 263, at 87–88.

<sup>383</sup> An Address of the Constitutional Convention, to Their Constituents, 1780, in Taylor, *supra* note 69, at 123.

<sup>384</sup> Taylor, *supra* note 69, at 113. Instead, the Massachusetts Convention cheated. Robert Taylor, editor of primary volume of edited documents of the Massachusetts constitutional process provides

as facilitating and incorporating direct popular feedback in its constitution-writing process. Unless the process whereby the federal Bill of Rights was brought about in large measure through proposals by state ratification debates can be counted, such direct popular participation in constitution-writing as occurred in New Hampshire was not repeated again until the 1990s in Africa.<sup>385</sup> In contrast to Massachusetts's non-incorporation of town responses into the final constitution, New Hampshire's Constitutional Convention asked for more of it. Convention President George Atkinson reflected in 1783 that upon receiving town returns for the first time in January of 1782, the Convention asked the towns in the next cycle to "be more explicit, as well as numerous in their returns."<sup>386</sup> The kind and quality of New Hampshire's practical procedural innovation was of a piece with its other popular sovereignty-inspired constitutional procedures of ratification and a separate convention and, as will be seen, was not only path-breaking, but unprecedented globally until very recently.

Upon hearing feedback from the towns, the Convention (for which there are again no extant contemporaneous records) re-commissioned a drafting committee to incorporate town returns and amendments,<sup>387</sup> requested the towns to "send more members,"<sup>388</sup> and adjourned till August 21, 1782.<sup>389</sup> In the meantime, the decision of the Vermont legislature, or a portion of it, disannulling their union with the Grants on the east of the river set the Dresden Party reeling. Regrouping February 22, 1782 upon arrival in Bennington, the delegates from the Grants east of the river called for reconvening the United Committees in Dresden on March 19, 1782.<sup>390</sup> At that meeting, the convention drafted 15 articles of union, the tenth of which specified that all incorporated towns should be represented in the Assembly

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evidence that at least three provisions of the Massachusetts Constitution fell short of the required two-thirds votes needed for ratification. *Id.* To "achieve" the necessary votes for passage of Article III of the Declaration of Rights, providing that towns could expend public monies to support "protestant teachers of piety" in order to further "good order and preservation of civil government," Mass. Dec. of Rights, Art. III, sec. 1 (1780), for which they were 600 votes short, the convention "resorted to manipulation of the totals to secure the required assent." Taylor, *supra* note 29, at 113.

<sup>385</sup> FRAMING THE STATE, *supra* note 8, at 7–11, 30–31, 111–57.

<sup>386</sup> Atkinson, *supra* note 355, at 1.

<sup>387</sup> *Id.*

<sup>388</sup> *Id.*

<sup>389</sup> COLBY, *supra* note 263, at 88.

<sup>390</sup> *Call to the Selectmen of Cornish* (Feb. 22, 1782), in CHASE, *supra* note 169, at 500.

and the Constitutional Convention,<sup>391</sup> perhaps unaware that the plan for representation of the Convention passed in March 1781 that was still in place already provided for the latter.<sup>392</sup> Now possessing the upper hand, the New Hampshire Assembly was not of a mind to be accommodating. Instead, it accepted unconditional surrender only,<sup>393</sup> immediately proceeding to re-assume jurisdictional powers.<sup>394</sup> In retaliation, the Assembly passed an act requiring “all Voters in Town meetings to take an Oath of Eliegiance [sic] to the State. . . .”<sup>395</sup> As will be seen, this effectively excluded Grafton and Cheshire towns from any political and constitutional influence, but also backfired in unprecedented ways and prevented ratification of the Constitution.

Western towns dragged their feet in submitting to New Hampshire authority. Some, like Haverhill, returned immediately to the fold,<sup>396</sup> while others, like the core of the Dresden Party from Hanover and Lebanon, required another year.<sup>397</sup> On July 30, 1782, two-thirds of Westmoreland poles opposed paying taxes to New Hampshire, and five other towns refused to pay any.<sup>398</sup> Confusion reigned in the Grants as the repercussions of Vermont’s decision were felt on both sides of the river, and Vermont continued to also exercise jurisdiction in both places.<sup>399</sup> Four Vermont towns

<sup>391</sup> TERMS OF UNION WITH NEW HAMPSHIRE, *reprinted in* CHASE, *supra* note 169, at 500-01.

<sup>392</sup> *Supra* note 339 and accompanying text.

<sup>393</sup> CHASE, *supra* note 169, at 502.

<sup>394</sup> *See* Proceedings of the General Assembly (Mar. 19, 1782), *in* 8 NHSP 936-937 (re-opening Courts in the Grants).

<sup>395</sup> To the Honourable Council . . . (Feb. 10, 1783), *in* 12 NHSP 741-42; *See also* Proceedings of the General Assembly (June 21, 1782), *in* 8 NHSP 944 (“An Act in addition to an Act passed November the 28th 1781, Entitled ‘An Act for preventing the subjects of his Britannic Majesty and all other persons inimical to the United States of North America from prosecuting actions, serving as Jurors, or acting as Town Officers within this State,—having been read three times, Voted that the same be enacted.”).

<sup>396</sup> *See* A list and Call Roll of the Honble House of Representatives . . . (Mar 13, 1782), *in* 8 NHSP 933-35 (showing Moses Nicholas appearing for Haverhill, written “Moses Dow, Esq”).

<sup>397</sup> Beezaleel Woodward did not appear for Hanover until March 30. *See* CHASE, *supra* note 169, at 507.

<sup>398</sup> Letter from Thomas Sparhawk and Benjamin Bellows to the Committee of Safety (July 30, 1782), *in* 10 NHSP 491-92; *see also* CHASE, *supra* note 169, at 503 (“[T]wo thirds of the people in Westmoreland were against paying taxes; that Richmond, Claremont, Cornish, Plainfield, and Croydon paid none . . .”).

<sup>399</sup> *See* CHASE, *supra* note 169, at 503 (“East of the river confusion reigned. Even Cheshire County, the stronghold of the New Hampshire party, was sadly divided.”). The actions of Vermont in this regard

in June and then another five in November appealed to become part of New Hampshire.<sup>400</sup>

Regardless of the state of the state, the New Hampshire constitutional convention met according to adjournment on August 21, 1782 and approved another draft of the constitution. This time, the plan of representation allowed for one representative per town for every 150 ratable poles (rather than 100 *families*),<sup>401</sup> which came close to the Grafton County Address' demand, repeated in the Dresden Convention's 15 articles of union, for representation for each and every incorporated town.<sup>402</sup> This ended the controversy regarding town representation.<sup>403</sup> In terms of popular sovereignty-based procedure, in addition to calling for two-thirds ratification again, the instructions accompanying this draft called for "any part of the inhabitants" from each town who "disapprove of a particular part" of the constitution to state their objections and reasoning in writing and/or submit them via selectmen and assessors before the Convention was to meet again on the last day of the year.<sup>404</sup> This was a step beyond asking for written objections "if the major part of the" towns voted the Constitution down in the previous draft's instructions.<sup>405</sup> It, together with the more democratic plan of representation indicated the Convention's desire (pragmatic or no) to allow the people to participate.

Though the constitution was rendered more acceptable with its plan of town representation and did even more to permit the people to participate, it failed to make the state whole. This because the 1782 constitutional process excluded representation and ratification from the Grants, this time on Exeter's volition, not the Grants. Although Connecticut Valley towns were slowly returning to the fold, especially beginning in September when

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produced a reprimand from Congress on December 5, 1782. See 23 *Journal of the Continental Congress* 765-66 (discussing the violations of the New Hampshire Grants); see also CHASE, *supra* note 169, at 503 (cataloging the events and repercussions of the events in the Grants).

<sup>400</sup> *Journal of the House* (June 21, 1782), in 8 NHSP 943; see also Request of the Selectmen of Newbury . . . (Nov. 7, 1782), in 10 NHSP 494 (discussion of whether to extend the jurisdiction of New Hampshire over the towns in question).

<sup>401</sup> Proposed Constitution of 1782, in 9 NHSP 886.

<sup>402</sup> *Supra* note 189 and 391 and accompanying text.

<sup>403</sup> Belknap complains of this change, but he spoke only for a minority. See Belknap to Hazard (Nov. 10, 1782), in Belknap Papers, *supra* note 371, at 161 (discussing how "[t]hey . . . spoiled the plan of representation" in his letter).

<sup>404</sup> In Convention (Aug. 21, 1782), in 9 NHSP 895.

<sup>405</sup> In Convention (Sep. 14, 1781), in 9 NHSP 877.

representatives from five more towns appeared in the General Assembly,<sup>406</sup> none of the towns seems to have participated in the writing of the draft constitution. Lebanon approved, sent, then recalled its Convention delegate,<sup>407</sup> possibly upset by the passage of the Oath Act. Likely passed in answer to the many calls from those loyal to the state for harsh measures by the Dresden Party,<sup>408</sup> Exeter enacted the Oath of Fidelity in 1781,<sup>409</sup> which was understood to have been “made for the People in the upper part of the State” to punish and exclude the disloyal.<sup>410</sup>

But the Oath Act did far more than exclude western dissidents. When the Convention met again on December 31, 1782, it was nonplused to discover that “not half the towns within the State made any returns, and those that did, not a fifth part of their inhabitants voted.”<sup>411</sup> The culprit? The Oath Act.<sup>412</sup> Instead of ensuring passage of the Constitution by excluding rebels, voters everywhere refused to take it. The Selectmen of Windham complained that “four fifths of this town” could not “see their way Clear at present to take said Oath.”<sup>413</sup> Towns either failed to vote on the Constitution because there was not agreement on administering the Oath,<sup>414</sup> took the vote over a healthy dissent for including voters who had not taken the Oath,<sup>415</sup> or else limited voting to those who took the Oath and reported

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<sup>406</sup> See A list and a Call Roll of the Hon’ble House of Representatives (Mar. 13, 1782) . . . 8 NHSP 933-35 (noting the addition of three members from the five towns on Sep. 10, 1782).

<sup>407</sup> MSS Copy, NHSL, Lebanon Town Records 78-79 (Sep. 24, Nov. 12, 26, 1782).

<sup>408</sup> *Supra* note 337 and accompanying text.

<sup>409</sup> Belknap to Hazard (Jan. 8, 1783) *in* Belknap Papers, *supra* note 371, at 175 (“About twelve months ago, our legislature thought proper to impose a test oath on all officers . . . . [I]ast summer they extended it to all voters in town meetings.”).

<sup>410</sup> Minutes of Wolfeboro Town Meeting (Jan. 1, 1783), *in* 13 NHSP 30, 31.

<sup>411</sup> Atkinson, *supra* note 355, at 1.

<sup>412</sup> See *Id.* (“One reason for this we find by many of the returns, was that people conceived they were obliged to take a certain oath of allegiance . . . to qualify them to vote”). For evidence of dissatisfaction with the oath act, see, *inter alia*, *Ironsides* 1 NEW HAMPSHIRE GAZETTE AND GENERAL ADVERTISER (Jan. 4, 1783).

<sup>413</sup> Petition of the Subscribers of Windham (Dec. 16, 1782), *in* 13 NHSP 709-10.

<sup>414</sup> See Minutes of New Market Town Meeting (Dec. 9, 1782), *in* 13 NHSP 30 (detailing a dispute over the oath effected a vote on the constitution).

<sup>415</sup> See Minutes of Wolfeboro Town Meeting, *supra* note 410, at 31 (explaining a misunderstanding as to whether the oath applied only to people in the upper part of the state); see also Minutes of Newington Town Meeting (Dec. 12, 1782), *in* 12 NHSP 725-26 (detailing debate amongst citizens whether the oath must be taken or if a representative may be used); Minutes of Newport Town Meeting (June 2, 1783), 13 NHSP 48-49 (“Petitioners did not know till lately that there was a Necessity for Town Inhabitants to take the Oath of Fidelity”).

exceptionally low returns.<sup>416</sup> Windham and New Ipswich petitioned for a repeal of the Act, the latter complaining it “dos not answer the Purposes thereby Intended (but Quite the Reverse) for it dos not separate the Enemies of the State, from its friends but has Greatly Devided and Confusd the People.”<sup>417</sup>

It was not a near miss. Although some towns, such as Durham, Exeter, and Dover, seemed unbothered by the Oath and accepted the draft Constitution,<sup>418</sup> most rejected it, including Concord and Hopkinton.<sup>419</sup> Of all these towns, only Exeter proposed amendments in case of failure, including propositions which attempted to join property with polls to the plan of Representation and increase the number of ratable polls considered per one representative. The overwhelming reason for rejection seemed to be objections to the Oath of Fidelity designed for erstwhile western rebels. While it may have been problematic for being unclear, all seemed to understand that it was designed for the “enemies” in the “upper” portion of the state. Many very likely objected to it because of its exclusionary design. The oath excluded the west, but also excluded those who objected to the exclusion. As a result, the constitution failed ratification yet again.<sup>420</sup>

By order of the convention, its president, George Atkinson, published an editorial in the *New Hampshire Gazette* on February 8, 1783 that, due to low returns wherein 20% of no more than half the towns voted, the constitution would be submitted again to the people without alteration, instructing them that they need not take the Oath of Fidelity in order to vote on the constitution and asking them to be more explicit in their suggested amendments.<sup>421</sup>

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<sup>416</sup> Whereas 262 Portsmouth polls had voted for the 1781 Constitution, Portsmouth Town Records, *supra* note 368, at 64, 82.

<sup>417</sup> Petition of New-Ipswich (Feb. 10, 1783), in 12 NHSP 741-42; Petition of Windham (Dec. 16, 1782), in 13 NHSP 709-10 (“We therefore pray that the . . . Court may repeal . . . the Act).

<sup>418</sup> See MSS, NHSA, 2 Durham Town Records 215 (Nov. 2, 9, 1782), (voting 30-6 in favor of the Constitution); MSS, NHSA, Exeter Records, f. Miscellaneous Papers (1659-1918), Report to Convention Re New Plan of Government (Dec. 16, 1782) (voting 86-2 for the Constitution); MSS Copy, NHSL, 4 Dover Town Records 557-58 (Dec. 9, 1782) (voting unanimously in favor of the Constitution).

<sup>419</sup> *A Member of the Convention*, NEW HAMPSHIRE GAZETTE 1 (Oct. 4, 1783); Concord Town Records 208 (Nov. 29, 1782), *supra* note 298; Hopkinton Town Records, *supra* note 369, at 260 (Nov. 11, 1782).

<sup>420</sup> COLBY, *supra* note 263, at 88 (“Upon the convening of the third session according to adjournment it was found that the proposed constitution had been rejected.”).

<sup>421</sup> Atkinson, *supra* note 355, at 1.

Though New Hampshire's constitutional procedure perfected into practice the theory of popular sovereignty—exceeding the popular sovereignty credentials of any other constitutional process for another 200 years—it failed to be inclusive. This was true substantively and procedurally with each cycle through 1782. The low returns and participation in the 1782 Constitution attested by both Atkinson and historian's tallies more than likely indicate dissatisfaction with such an exclusive process. New Hampshireans knew instinctively that constitutions should unite rather than divide, and they likely objected to any proposition that failed in this respect. As will be seen, as the New Hampshire Grants east of the river returned to full fellowship and participated for the first time in the constitutional process, its prospects brightened.

*d. Constitutional Success: the 1784 Constitution of a Unified New Hampshire*

After several failed attempts, on October 31, 1783,<sup>422</sup> the Constitution was approved and on June 2, 1784, the New Hampshire Constitution went into effect. Though amended several times over, it has endured as the world's second oldest written constitution after the Massachusetts (1780) and the second shortest after the Vermont (1793). Yet with the exception of a few provisions relative to the executive and its council, it is actually an exact copy of the 1782 Constitution that miserably failed—more so than its precursors. Why, then, with so few substantive edits, was it passed and widely held as legitimate in 1784?<sup>423</sup>

The answer does not lie, at least wholly, in the convention's persistence (though it was that) or even in the urgency of the 1776 Constitution's official termination with the April 19, 1782 Treaty of Paris as suggested by some historians.<sup>424</sup> The fuller answer lies in the process' broad group inclusivity and the renewed campaign for its passage that was, itself, a testament to its inclusivity, even and *especially* of western dissidents.

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<sup>422</sup> Report of Town Returns (Oct. 31, 1783) in 9 NHSP 918-19.

<sup>423</sup> CHASE, *supra* note 169, at 507-08 (discussing immediate events after the constitutions adoption).

<sup>424</sup> See, *inter alia*, STACKPOLE, *supra* note 31, at 232-33 (discussing changes in organized religion in New Hampshire). The extension was easily passed by the towns, BELKNAP, HISTORY, *supra* note 30, at 385, and again by the Convention should the proposed Constitution not pass. AN ADDRESS OF THE CONVENTION FOR FRAMING A CONSTITUTION OF GOVERNMENT FOR THE PEOPLE OF NEW-HAMPSHIRE 7 (circa June 1783).

In coordination with Atkinson's February 8, 1783 plea to the populace to engage in the process, Oath or no, a campaign was launched in favor of the Constitution—begun the same day and on the same front page—of the *New Hampshire Gazette*.<sup>425</sup> Written by a “Republican,” it ran February 8 through March 22, 1783.<sup>426</sup> It expertly canvased political theory (including popular sovereignty), the forms of government as set forth by Aristotle, Cicero, and Plato, the virtues of Montesquieu's mixed government, and the American-born importance of separation of powers before laying out a detailed argument in favor of the proposed constitution and decrying the temporary 1776 constitution as “anti-republican and dangerous.”<sup>427</sup> Due to this effort to render the process more inclusive and the people better informed, upon adjourning on June 1, 1783, the convention found the constitution had been accepted by two-thirds of the people in substantial part but for several objections to the style and powers of the governor.<sup>428</sup> The convention's Address accompanying the 1782 proposal and the “alternative” they quickly worked up in June and resubmitted to the people exulted: “Upon examining the Returns, made to us in Convention, respecting the last Plan of Government, sent out for your consideration; we are happy to find that every article, except those which relate to the Executive Department, is accepted by the people.”<sup>429</sup>

The same address admitted to one reason for the plan's passage: “the opportunity PEACE affords for cool and dispassionate consideration.”<sup>430</sup> However, this allusion to peace referred not only to peace for the United States, but also for a united New Hampshire. It may have also been a

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<sup>425</sup> See “Examiner I-VII” in *NEW HAMPSHIRE GAZETTE AND GENERAL ADVERTISER* (Feb. 8-Mar. 22, 1783).

<sup>426</sup> *Id.*

<sup>427</sup> *Id.*; Examiner V, *NEW HAMPSHIRE GAZETTE* 1 (Mar. 8, 1783).

<sup>428</sup> COLBY, *supra* note 263, at 88; that the 1782 plan failed even a majority is confirmed by “A Member of Convention” in 1783. *A Member of Convention*, *NEW HAMPSHIRE GAZETTE* 1 (Oct. 4, 1783); see also *AN ADDRESS OF THE CONVENTION FOR FRAMING A CONSTITUTION OF GOVERNMENT FOR THE PEOPLE OF NEW-HAMPSHIRE* 2, 8 (circa June 1783) (“That the paragraph, in said Constitution, respecting the Governor's salary, be expunged . . .”); see also BELKNAP, *HISTORY*, *supra* note 30, at 385.

<sup>429</sup> *AN ADDRESS*, *supra* note 428, at 2. Surviving town returns from 1783 are sparse, but bear out this telling. Dover Town Records, *supra* note 418, at 563 (Mar. 31, 1783) (records 108 yes votes); Durham Town Records, *supra* note 288, at 219 (Mar. 15, 1783) (voted 57-6 in favor). Hopkinton and Portsmouth records indicate a vote was taken, but do not record it. Hopkinton Town Records, *supra* note 369, at 263-65; Portsmouth Town Records, *supra* note 368, at 88-92.

<sup>430</sup> *AN ADDRESS*, *supra* note 428, at 8.

reference to the new group inclusivity that unification had finally brought, one that the campaign by a “Republican” laid bare: this series was almost surely written by Bezaleel Woodward. This was not the first time Woodward would go by his previous pen name of “Republican:” he used it in two other addresses ascribed to him in both October 1776 and January 1777 when the Upper River Valley was still petitioning Exeter for the rights of representation. Many if not most in the Grants would have known the author, as well as those within power, such as Sullivan, Langdon, and certainly Meshech Weare. Even if they did not know the identity of the author, those in the rank and file of eastern New Hampshire who had read the previous pamphlets would have remembered that the memorable pseudonym was associated with a western rebel. It is even possible that readers recognized his style; after all, the series was written with the same flare and capacious understanding of applied theory, the same expansive and exhaustive rhetoric and reasoning. That this “Republican” was now in favor of the proposed constitution would have signaled that it was an inclusive document, one which unified rather than divided. Further, the placement and timing of Atkinson’s plea and Woodward’s series was clearly coordinated. It had been over a month since the convention had met on December 31, 1782, and Atkinson would not have needed that long to pen his short polemic. But Woodward would have needed as much time to construct his defense of the constitution, which was likely written in one setting if not in quick succession so that it could hang together, each polemic building upon the previous week’s serial.

It is possible that Woodward was recruited by Atkinson, clearly desperate and exasperated by the convention’s lack of success and presciently determined that a superb academic writer and polemicist from the region whose support he needed to engage would help to get the constitution across the high threshold of a two-thirds ratification. But it is equally possible if not more than likely that Woodward was a member of the convention as early as December 31, 1782, and Atkinson and he became natural allies. After all, Woodward shows up as a representative of Hanover in Exeter at their Spring session on March 30, 1783.<sup>431</sup> It is possible he was already in town for the convention’s meeting of December 31, 1782 and stayed to write the series in coordination with Atkinson.

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<sup>431</sup> CHASE, *supra* note 169, at 506-07.

Regardless of his membership as of December 31, 1782, by whatever way or means accomplished, Woodward was certainly a member of the convention that met June 1, 1783.<sup>432</sup> The 1781 electoral precept that called the perpetual convention into being permitted each and every town on the east side of the river in the Grants a seat;<sup>433</sup> this law, coterminous with the convention, was still in effect. Additionally, as another member of the convention observed, a “large proportion” of the Convention’s membership “were different from those first convened.”<sup>434</sup> This would certainly have been true had those on the grants showed up for the convention’s final session. Additionally, as has already been referenced, by March 30, 1783, Woodward had put down the proverbial (and threatened) sword and entered state politics, evidencing a willingness to join the adversary he could not beat and apply his insatiable political energies in a new direction.

The conclusive proof, however, that Woodward was a member of the June 1, 1783 convention is proffered by the polemics exchanged in newspapers between Woodward under the alias “A Citizen of New Hampshire” and “A Watchman” and Meshech Weare under the alias “A Member of Convention” in the closing days of the constitution’s ratification contest as discussed below.<sup>435</sup>

As has been noted, the remaining issues Granite Staters needed to determine after the returns of June 1, 1783 were particulars about the executive. Specifically, the returns showed that the people wanted the governor’s title to change to “president,” his qualified veto stripped, his salary made less secure, his temporary replacement changed, and the selection, name, and powers of the executive council changed.<sup>436</sup> Accordingly, a committee of the convention was tasked to recommend changes, and initially returned to recommend only that the name of the governor be changed to president as was requested by most of the returns.<sup>437</sup> This was thought too specious and the convention, after heated debate, determined that, in addition to changing his title and lowering his salary, the executive would also be stripped of his veto and ability to suspend legislation, prompting

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<sup>432</sup> *Supra* note 428 and accompanying text.

<sup>433</sup> *Supra* note 339 and accompanying text.

<sup>434</sup> *A Member, supra* note 419, at 1.

<sup>435</sup> *Infra* notes 441-55.

<sup>436</sup> *See generally* AN ADDRESS, *supra* note 428, at 2-4.

<sup>437</sup> *A Member, supra* note 419, at 2; *see also* CONCORD TOWN RECORDS 208 (Nov. 29, 1782).

reconsideration, and make him instead a voting member and tie-breaker in the Senate, and reconfigure the privy council into an executive council with two seats reserved for members of the Senate and three for the House, with three members required to make all nominations with the president.<sup>438</sup>

These changes, called the “alteration” were incorporated into the 1782 plan, and both the unaltered and altered plans were sent out, the towns to choose between the two or propose another alternative by October 31, 1783. Whatever plan received a majority vote would win the day.<sup>439</sup> This was sent along with an address from the Convention, as was its practice since its perpetual establishment in 1781.<sup>440</sup>

Yet this address differed in form from its predecessors as well as substance in not being a wholehearted recommendation of the underlying plan, and was objected to by one member of the address’ drafting committee—Meshech Weare.<sup>441</sup> Weare then took it upon himself to write a polemic, published on the front page of the state’s major newspaper during what must have been primetime for town meetings before the October 31, 1783 deadline.<sup>442</sup> There, he critiqued the address as not reflecting the true sentiments of the Convention and being duplicitous in failing to unwaveringly support the “alternative.”<sup>443</sup> Moreover, he saw nothing wrong with the various branches working in “concert” and praised the state’s current chief (him) as a “worthy President cheerfully serving the public, without grasping at wealth or power, or priding himself in vain ostentation.”<sup>444</sup> This self-adulation was socially acceptable only so long as his authorship remained anonymous.

Woodward, disgusted, tore into Weare, also under a pseudonym. “A Citizen of the People” pointed out that previous conventions had been sincere in recommending the former plan, its political branches being separate, and that therefore it would stand to reason that they recommended the “alternative” only because they thought it would gain acceptance by the people.<sup>445</sup> He referenced previous polemics generally written on the subject,

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<sup>438</sup> AN ADDRESS, *supra* note 428, at 2-3; *A Member*, *supra* note 419, at 1.

<sup>439</sup> AN ADDRESS, *supra* note 428, at 6-8.

<sup>440</sup> *A Member*, *supra* note 419, at 1.

<sup>441</sup> *A Watchman*, NEW HAMPSHIRE GAZETTE 1 (Oct. 25, 1783).

<sup>442</sup> *A Member*, *supra* note 419, at 1.

<sup>443</sup> *Id.*

<sup>444</sup> *Id.* at 2.

<sup>445</sup> *A Citizen of New Hampshire*, NEW HAMPSHIRE GAZETTE 2 (Sep. 13, 1783).

and then ridiculed Weare's egotism when he wrote "that the good conduct of the now President, has endeared to us his person and office," comparing him to the "benevolence" of the (notorious) Roman Emperor Vespasian, but that changing names did not change the function of a despot.<sup>446</sup> He then concludes that the writer "fall[s] infinitely short of proving a single point."<sup>447</sup>

This was too much for Weare, and his response rips off the pseudonym masks of "A Citizen of New Hampshire" revealing that not only is Woodward the author, but that he was a member of the convention. Calling the author "the great oracle of political law in New Hampshire," who "assumed the airs of extraordinary knowledge and study" and conceitedly displayed "his own learning and importance," he ridicules the thought of him being "a most learned and important gentleman indeed!"<sup>448</sup> Only one active in New Hampshire politics could have fit this description: Woodward.<sup>449</sup> Further, he identifies "A Citizen of New Hampshire" as also being "A Republican" from the series that ran earlier in the year, which also criticized Weare's government established under the temporary constitution he authored as despotic and more expensive than that of New York.<sup>450</sup> Finally, he confirms that this citizen was not only a member of the convention, but the author of the Address accompanying the 1784 Constitution:

But so intricate is the address, and different from the sense of the Convention, that many it is likely will be at a loss, what determination to form. Might not this gentleman then have some concern for his own honor, instead of being anxious for Convention, if he was one who formed the address?<sup>451</sup>

This detail gives the author credibility about the individual criticized, as it is clear the two worked together not only within the convention, but on the same drafting committee.

Weare concludes with his most personal slight: not only is "A Citizen" arrogant in his erudition, but he aims to fulfill the governorship himself.<sup>452</sup>

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<sup>446</sup> *Id.*

<sup>447</sup> *Id.*

<sup>448</sup> *A Member, supra* note 419, at 1.

<sup>449</sup> The only other New Hampshire citizen to have fit this description would have been Wheelock, founder of Dartmouth, but he died in 1779. HILL, *supra* note 214, at 47.

<sup>450</sup> *A Member, supra* note 419, at 1 ("He refers to the publications which have already been upon the nature of government, many of them no doubt, of his own production.").

<sup>451</sup> *Id.*

<sup>452</sup> *Id.* ("Then we may expect soon to have a perfect model of government. And he may justly expect, for his distinguished abilities and services to be placed at the head of it.").

This is not without merit. After all, as of the 1781 Constitution, Woodward and his colleagues at the College were barred from concurrently serving in political office per the oath section of the constitution barring academics—except in the office of governor.<sup>453</sup> It would make sense that the political ambitions of Woodward, excessively energetic throughout the years of the secessionist movement in the Grants, would need some new target.

And it was a point that seemed to hit close to the truth, as evidenced by Woodward's excoriating response wherein he similarly exposed Weare's cover. Just six days before town returns were due, he hurled a series of epithets masked as questions to "A Member of Convention" that must have been painfully embarrassing: the author, Woodward claims, had been "a steady and zealous advocate for British tyranny, an anti-revolutionist, a foe to independence."<sup>454</sup> He it was who offered the plan which was "deservedly rejected" at the first Convention [of 1778], united with "the famous supporter of Vermont claims" (John Sullivan) and whose ambition it was to "leap from the summit of despotism to the extreme of republicanism, and who under the mask of patriotism, carry secret and hidden designs, dark and mischievous as themselves."<sup>455</sup> The reference to Weare could not be more plain or embarrassing. It was clear from the dueling polemics that each knew the other personally, as many references reveal details that could not have been divined from the text on its face.

In large part thanks to these polemics, the alteration was approved by a "considerable majority," when the Convention met to count the town returns on October 31, 1783, and reached the supermajority two-thirds threshold required for the rest of the document in at least some of the towns.<sup>456</sup> Though myopically focused on their own personal power struggle, Weare and

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<sup>453</sup> N.H. CONSTITUTION (1784) ("No person holding the office of . . . president, professor or instructor of any college . . . shall at the same time have a seat in the senate or house of representatives, or council").

<sup>454</sup> *A Watchman*, NEW HAMPSHIRE GAZETTE, OCT. 25 1783, AT 1.

<sup>455</sup> *Id.*

<sup>456</sup> EDWIN D. SANBORN, HISTORY OF NEW HAMPSHIRE . . . TO THE YEAR 1830, 200 (1875); *see, e.g.*, Concord Town Returns (Sep. 29, 1783) in CONCORD, *supra* note 298, at 212 ("Voted to receive the Constitution of Government as alter'd by the Convention in June Last: Twenty in favour of it and ten against it."); Hopkinton Town Records, *supra* note 369, at 268-69 (Sep. 8, 1783) (voted for the alteration). *But see* Dover Town Records, *supra* note 418, at 572 (Oct. 21, 1783) (voting against the alteration); Durham Town Records, *supra* note 288, at 220 (Aug. 4, 1783) (voting against the alteration); Portsmouth Town Records, *supra* note 368, at 94 (Oct. 20, 1783) (voted for the alteration).

Woodward here do more to get the constitution over the finish line than anything else, as they confirmed to the reading public that the most virulent political enemies of the last eight years were also in favor of the constitution's passing. Though their own polemics evinced a deep animosity between them, if two such disparate characters could come together in favor of the same proposal, it certainly spoke to the plan and its ability to unite. And such broad-based support helped the constitution be passed by the desired majority and into history as the second oldest in-operation constitution in the world.

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New Hampshire forged new constitutional ground by writing the first modern constitution, helping to conceptualize and then hold a modern constitutional convention, and progressing the theory of applied popular sovereignty in constitution-writing to a more advanced stage not seen again until the 1990s. Despite all this, it demonstrated that no matter the theoretical goodness of its process, it lacked the legitimacy needed to cross the finish line until and unless it included all enfranchised groups in the drafting room.

### III. SIGNIFICANCE

This history makes two contributions to the extant literature and frames a hypothesis for further study. First, it provides a detailed history of the instantiation of popular sovereignty through popular constitution-writing. This descriptive account also tells of participation innovations not seen again till the 1990's that in many ways were more advanced than the sophisticated processes in Uganda and South Africa and intervenes in founding historiography. Second, it provides an important case study to an emerging consensus regarding group inclusivity, showing it was essential to the New Hampshire Constitution's legitimacy in the short term, enabling it to cross the finish line. This history also suggests the theoretical impact of group inclusion on a constitution's medium and long-term legitimacy to be explored and tested through further historical and comparative studies.

a. *Descriptive Contributions: The Realization of Popular Sovereignty in New Hampshire and Other Interventions to Founding Historiography.*

New Hampshire's constitutional history thus far has been undersold and undervalued. Given its outsized influence on process-based constitutional innovation, being the situs for three major constitutional innovations (written constitutionalism, constitutional conventions, and direct popular participation in substantive drafting), it has received too little attention. Basic facts are thus unknown or even misunderstood, as well as the state's impact on larger constitutional trends.

One result of this study is to clarify previously misunderstood facts about New Hampshire's constitutional history. These include the New Hampshire delegates in Congress fabricating their "instructions" regarding the urgent need for a Constitution, that Weare was not the political angel Belknap made him out to be,<sup>457</sup> that the last constitution was passed by a super-majority rather than a mere majority, all excepting specific provisions relative to the executive (and even these in many towns were passed by a supermajority), and the participation of both Weare and Woodward in the final 1783 Convention and coordinated public campaign. On a more general level, this account tells the hitherto untold story of western rebel's important role in New Hampshire's constitutional story.

More than correcting the factual record, this account emphasizes the outsized role of New Hampshire in realizing popular sovereignty theory and initiating global constitution-writing. It also intervenes in the way the history of the framing is told during the last sixty years through the lens of republicanism, showing that ideas do not necessarily generate history, but that they can also be used by historical actors in service to other aims.

1. *Popular Sovereignty Becomes Real*

The United States may be first among nations to apply popular sovereignty through constitution-writing,<sup>458</sup> but first there was New Hampshire. Not only was New Hampshire the first to reduce theory to awkward practice with their temporary 1776 Constitution, but it expanded

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<sup>457</sup> BELKNAP, HISTORY, *supra* note 30, at 364.

<sup>458</sup> See WHITTINGTON, *supra* note 23 (explaining the theory that constitutional conventions are the best way for expressing popular sovereignty).

upon the theme many times thereafter in first conceiving and hosting a constitutional convention, requiring ratification, engaging in direct democratic participation in constitutional creation, and innovating with a special referendum. The latter two processes were so exceptional that they were not repeated in like manner until and even went beyond that accomplished in the 1990s in Uganda and South Africa.<sup>459</sup>

With regards to constitutional conventions, it is frequently presumed that they were first conceived by Pennsylvania radicals, who then influenced rebels in Delaware and the Concord shoemaker in Massachusetts, the ideas of the latter then spreading north and appearing in the United Colonies' petition of June 11, 1777. This account unravels that telling. Those in the Upper River Valley may have been influenced by Pennsylvania radicals if anyone in that their reasoning and language is of a piece, but there is presently no evidence for such ideological influence. An alternative reading that is better supported by the facts shows that Pennsylvania radicals and Upper River Valley rebels responded to the same stimuli in similar ways, with the latter reducing its philosophy to writing before Concord and Worcester town returns argued for a constitutional convention. While Worcester's returns to the Massachusetts Court were then published widely, there is again no evidence that Concord's well-reasoned arguments in favor of a constitutional convention were read by anyone other than the General Court and had little to no influence on events outside of Massachusetts, particularly in New Hampshire. Thus the trail of ideological influence traced here runs from John Adams in Congress, the November 3, 1775 permission granted New Hampshire to craft a constitution, Thomas Paine's *Common Sense*, the May 15, 1776 Declaration, the Declaration of Independence, the Grafton County Address, the Worcester County returns, and the United Committee petition of June 11, 1777. New Hampshire should thus be credited with both independently conceiving and bringing to fruition the first constitutional convention. After being used in New Hampshire in 1778 without producing a ratified constitution, a constitutional convention was then successfully employed by Massachusetts in 1779, by the United States

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<sup>459</sup> Cf. South Africa's Constitutional Process, Report Prepared by Libertas Constitutional Consulting for UNDP and Rashad (April 2014) (unpublished manuscript on file with the author) (showing how South Africa's constitutional process is unique among other countries).

in 1787, and became normative constitutional practice in the American States and is frequently employed around the world.<sup>460</sup>

Additionally, New Hampshire should be credited with the first process that allowed and even encouraged direct popular participation in substantive constitution-making. It was crude, but significant. Even if practically driven, New Hampshire could have acted as Massachusetts, who asked towns for feedback on rejected texts and then deigned to incorporate that feedback. Massachusetts here parallels South Africa, which asked for feedback, but then did not incorporate it. In this, the New Hampshire Constitutional Convention was more dogged and honest than both Massachusetts and South Africa, and for this they should receive credit. The public via the towns were also able to participate post-draft, which meant the contributions had a greater and more direct impact on the final text. In this way, New Hampshire's direct public participation went beyond that permitted in Uganda, which was conducted and received pre-draft. They viewed constitution-writing (and getting it across the finish line!) as an iterative process involving the people and the towns, shown in the successive addresses accompanying the 1781 and 1782 plans, which asked for feedback in case of majority dissent, and then, in 1782, in case of *any* dissent, suggesting a level of touching attention to granular democracy. This aspect of their long process has been overlooked even more than the role they played in initiating constitution-writing and the provenance of constitutional conventions.

More, New Hampshire innovated further through conducting a direct constitutional referendum on the contentious issue of executive nomenclature and powers. This innovation provides a model for how to engage the public to resolve deadlock through special constitutional referendums. Constitutional referendums are another tool in the constitutional practitioner's toolkit that have only recently been explored in comparative scholarship,<sup>461</sup> providing further evidence that in some ways, the academic community is only just now understanding some of the elements of normative constitutional process that New Hampshire practiced more than 200 years previous.

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<sup>460</sup> See generally JOHN DINAN, *THE AMERICAN STATE CONSTITUTIONAL TRADITION* (2006) (explaining the origins of the constitutional convention).

<sup>461</sup> See, e.g., Zachary Elkins & Alex Hudson, *The Constitutional Referendum in Historical Perspective*, *COMPARATIVE CONSTITUTION MAKING* (David Landau & Hanna Lerner, eds., 2019).

Finally, New Hampshire's procedural constitutional history as told here makes contributions to both intellectual and founding history more generally. As to the first, it chips away at the foundations of Republicanism as a genre of American historiography. As to the second, it changes some of the generally-accepted sequencing of the American founding story.

## 2. *Non-linear Republicanism*

The detailed story of New Hampshire's constitutional process indicates that the major premise of Republicanism—that ideas produced the Revolution and Framing—was not necessarily always the case. Ideas played a role in bringing about the first written constitution, the first constitutional convention, and the most participatory process the world witnessed for 200 years. However, the ideas of popular sovereignty were largely used in service of pre-determined political outcomes. Like lawyers searching for closing arguments to clinch their client's aims, the Dresden Party used popular sovereignty to facilitate and legitimate their aims of greater representation. (In like manner, the Pennsylvania radicals employed it for similar reasons: to oust the Whigs in the provincial legislature.) Dresden activists proved they were no purists when they abandoned their theory of constitutional conventions and adopted the legislatively-created Vermont Constitution because they were able to achieve the results they craved in terms of representation and influence. Disembodied, ideas were little used by those crafting Revolutionary-Era constitutions.

That said, once an idea won the argument, it created path dependency wherein the political motivations of the actors faded and the ideas continued to justify the procedural innovation. This was true in New Hampshire for both the justification of written constitutions and constitutional conventions. Once constitutions began to be written with the 1776 expedient in New Hampshire, even though such was motivated by Adams' and his political junta to bring about independence, Congress accepted the need for written constitutions more generally and passed the May 15 Declaration. Too, even after western agitators for a constitutional convention in New Hampshire no longer factored into the political calculus for the state (to some extent), conventions became there and in neighboring Massachusetts the way the game was played—because the reasons upon which it was predicated had been accepted as normative.

The implications of all of this for Republicanism is that the devil is in the historical details. The theory that ideas brought about the Revolution is neat, tidy, and beautifully convincing until examined under a microscope. There, it is clear that there is a relationship between ideas and political events, but it is by no means a linear one, and requires non-puritanical actors.

*b. Group Inclusion was Essential to the New Hampshire Constitution's Legitimacy*

This case study on New Hampshire's five constitutional processes suggests a link between group inclusion and constitutional legitimacy. Specifically, it seems to suggest that group inclusion is important in the drafting room and ratification base; that supermajoritarianism is distinct from group inclusion; and that group inclusion can impact the short, medium, and long-term legitimacy of a constitution.

1. *"The room where it happened" in New Hampshire included both the drafting room and the ratification base.*

New Hampshirans would not pass-go on their constitution until both constitution-making groups included western dissidents. It was not enough that state boundaries in 1782 finally included Grafton County, as the 1782 text failed by the most miserable proportions of any draft constitution. However, once the populace knew that western dissidents were invited to participate in ratification by virtue of the oath's discontinuance and that Woodward, the most prominent western "rebel," was working with Atkinson in promoting the Constitution, the same text suddenly gained a broad basis of support, and passed the two-thirds threshold for all but a few provisions on the executive. Further, once New Hampshire knew for certain that Woodward and presumably others from Grafton County were also in the drafting room, the special referendum on the executive finally passed by a "considerable majority."<sup>462</sup> Group inclusion was important for New Hampshirans at the elite and rank and file levels in order for their constitution to cross the finish line.

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<sup>462</sup> *Supra* note 456 and accompanying text.

2. *Supermajoritarianism is not the same as inclusivity.*

Without making any claims about the relationship between constitutional process and substance, this history suggests that if process really can produce normatively superior constitutions as claimed by “The Good Constitution” authors, supermajoritarianism is distinct from inclusivity. In New Hampshire, a supermajority in favor of any constitutional text was achieved only once western dissidents were invited to participate in the process. Getting to a supermajority was not just a matter of political math, either. Exclusion of western dissidents was a problem for those in the east as well as for the dissidents themselves. A majority of easterners refused to vote for the constitution until and unless the west was invited into the room. Thus group inclusion was essential to obtaining supermajority support, demonstrating the distinct roles of supermajoritarianism and inclusivity.

However, supermajoritarian and inclusivity frequently dovetail, and both remain important in achieving consensus. Don Horowitz writes of the level needed for constitutional agreements in his recent book, *Constitutional Process and Democratic Commitment*. While the “omission of any significant group from a constitutional forum can be fatal to the result,” “maximal inclusion,” or getting every group in the room, will likely render consensus elusive.<sup>463</sup> Like Goldilocks’ encounter with the three bears, the balance must be “just right,” or something in between majoritarianism and unanimity. Oliver Ellsworth foresaw this balance in discussing the appropriate threshold for ratification in the Constitutional Convention.<sup>464</sup> In New Hampshire, ratification by three-fourths was quickly dispensed with in the 1778-79 procedure in favor of two-thirds ratification in the 1781-1783 procedures. Although a majority was permitted for the final referendum on the executive, as will be seen below, this majority threshold did not produce a durable agreement. Supermajoritarianism remains important.

3. *Group inclusion likely has short, medium, and long-term ramifications for constitutional legitimacy.*

Getting all of the right groups in “the room where it happened” was necessary for the NH Constitution’s immediate legitimacy, and may have

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<sup>463</sup> HOROWITZ, *supra* note 6, at 92, 94.

<sup>464</sup> *James Madison’s Notes of the Constitutional Convention (July 23, 1787)*, in 2 *Farrand, supra* note 60, at 90-91.

also impacted its medium and long-term legitimacy. The impact of group inclusion on the New Hampshire Constitution's short-term legitimacy is clear from the history detailed in this paper. The impact of group inclusion for medium and long-term legitimacy sounds more in theory and requires further study in order to make specific or general conclusions.

For the near term, the rules for New Hampshire's process—including all of the innovations in popular sovereignty and lowering the threshold for passage from three-fourths to two-thirds—failed to garner the necessary votes to get the constitution across the finish lines. This despite the state's applied use of the popular sovereignty theory to constitution-writing (what today is called public participation) was more advanced than any of its sister states. Even including the role state ratification conventions may have had in drafting the federal Bill of Rights, the extent of public participation in New Hampshire was also more advanced than its federal counterpart or, for that matter, any other constitutional process till the 1990s.

Despite whatever theoretical advancements they made, as seen by George Atkinson's plea of February 8, 1783, though permitted to participate, very few people and towns were exercising that opportunity.<sup>465</sup> As little as ten percent of the population were voting and providing feedback in case of rejection.<sup>466</sup> Regardless of the Constitution's good content (purloined from Massachusetts), the process had so little legitimacy that the people demurred. Of those who did participate, not even a majority endorsed the Constitution.<sup>467</sup>

This all changed once the state was no longer divided and those ousted in the West were included in political and constitutional decision-making. Although the constitution's success had other contributing factors, such as the compelling arguments made in its favor by "A Republican," that such was written by Woodward was a main causal factor in bringing the New Hampshire Constitution into being. So, too, for dispelling the oath-taking requirement. Improving group inclusion was a prerequisite for legitimacy in New Hampshire—not only for the constitution to receive enough votes, but for the people to even engage in the process.

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<sup>465</sup> *Supra* note 421 and accompanying text.

<sup>466</sup> *Id.*

<sup>467</sup> *Supra* note 418-20 and accompanying text.

In New Hampshire, a legitimate constitutional process that included and was accepted by the minority (signaled by Woodward's editorials in its favor and participation in the constitutional convention) led to the legitimacy of the New Hampshire Constitution. It was widely praised at its inauguration<sup>468</sup> and, significantly, accepted by western rebels who put down their swords and allowed themselves to be governed by its precepts.<sup>469</sup> Chase, in his *History of Dartmouth*, indicates that not only did Woodward take up a seat in the assembly in March of 1783 (something he was not permitted after the constitution's enactment, being excluded from holding any office below that of governor by the Constitution), Elisha Payne and Jonathan Freeman, along with others prominent in the College Party "when the contest was over strove for harmony, and gave loyal adherence to the State of New Hampshire."<sup>470</sup> New Hampshire's constitution was legitimated, or rendered acceptable to the political (and constitutional) minority, by its process.

This case study demonstrating that group inclusivity was the most important factor to the New Hampshire Constitution's legitimacy is consistent with the growing literature lauding the importance of group inclusion to successful constitutional processes<sup>471</sup> and the previous comparative research performed by this author. In a study of eighteen different constitutional processes, reviewed in preparation to create a comparative chart developed for Libya's Constitution Drafting Assembly in 2013, group inclusion was by far the most important factor in a constitution crossing the finish line.<sup>472</sup> This even more so than popular participation, then emerging in comparative literature as an international human right and presumed indispensable.<sup>473</sup> New Hampshire's process provides yet another example—significantly from another time period and on a sub-national

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<sup>468</sup> JOSEPH BUCKMINSTER, *A DISCOURSE DELIVERED IN THE FIRST CHURCH OF CHRIST AT PORTSMOUTH* 31 (Robert Gerrish ed., Dec. 11, 1783); *see generally* SAMUEL MCCLINTOCK, *A SERMON ON THE COMMENCEMENT OF THE NEW CONSTITUTION* (Robert Gerrish ed., June 3, 1784); JEREMY BELKNAP, *AN ELECTION SERMON, PREACHED BEFORE THE GENERAL COURT OF NEW-HAMPSHIRE* 34 (Melcher and Osborne eds., June 2, 1785).

<sup>469</sup> CHASE, *supra* note 169, at 508.

<sup>470</sup> *Id.*

<sup>471</sup> *Infra* notes 53-57 and accompanying text.

<sup>472</sup> Lorianne Updike Toler, *Mapping Constitutional Success*, 4 *CAMBRIDGE J. OF INT'L AND PUB. LAW* 1, 1281 (2014).

<sup>473</sup> Vivien Hart, *Constitution Making and the Right to Take Part in a Public Affair* in *FRAMING THE STATE*, *supra* note 8, at 20-54.

level—of a larger trend in constitution-writing: legitimate process leads to legitimate constitutions.

Group inclusion may also have a medium-term impact on legitimacy. Group inclusion plus supermajoritarian rules may help to ensure what Horowitz calls a “durable commitment,”<sup>474</sup> or that the constitution will stay relatively fixed when power next changes hands. This because two or more of the major enfranchised groups have bought into the deal or agreed at least to be bound by the constitutional process and outcome. Even though a group was in the minority at the time of the constitution’s creation, if they were included in the process and agreed in the result, institutional memory will serve to remind them of their buy-in when they later come to power. Even if groups did not buy into the final outcome, if they were included in the process, they are more likely to accept the original deal as fair and be more likely to honor that legitimate framing contract.

If a constitution survives the first change in power, it may endure for more than a generation. If a “generation” is designated for at least 20 years, this would set the constitution up to endure longer than the average constitutional life cycle of 19 years.<sup>475</sup> Thus group inclusion and supermajoritarianism may have the medium-term impact on a constitution’s legitimacy such to render it more durable than the average constitution.

Interestingly, when New Hampshire had the opportunity to amend its constitution for the first time in 1792 (required every seven years by its own provisions<sup>476</sup>), it peeled back almost all of the provisions in the special referendum on the executive that required only a majority vote. The rest of the Constitution, achieved by a more durable consensus based on a supermajority and getting enough groups in the room, had a much higher retention rate, lending support to the premise that non-exclusionary and supermajoritarian constitutional processes may yield more durable constitutions for the medium-term.

When a constitution is legitimate at its framing and then survives the first or even second exchange of power, it can create a political legacy and tradition that is passed down to future generations that honors and prolongs its framing legitimacy. This concept borrows from Michael Dorf’s work

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<sup>474</sup> HOROWITZ, *supra* note 6, at 98.

<sup>475</sup> ELKINS, et al., *supra* note 7, at 1.

<sup>476</sup> N. H. CONST. (1784).

demonstrating that the federal Constitutional Convention's records are frequently used by Supreme Court Justices for reasons other than determining the original public understanding of its provisions.<sup>477</sup> Dorf writes of "ancestral" originalism wherein constitutional interpreters value those principles which have descended to the present day and constitute part of the constitutional and cultural-political inheritance shared by Americans.<sup>478</sup> We value what is old in part *because* it has lasted. If it has endured more than one or two generations, perhaps it is a tradition worth honoring. Constitutional endurance may be viewed as legitimacy over time, where the framing imprimatur of legitimacy is passed down from one generation to the next as are founding myths and legends which serve to bind societies together. This may be true in New Hampshire's case, which is still governed by its bicentennial constitution. However, proving such a tradition is another matter. As Horowitz writes, "very little hard evidence on what process variables correlate with the success of constitution makers in producing either durability or of democracy, but what little there is points strongly to the inclusiveness of an elected constitutional forum."<sup>479</sup> There is more work to be done. What is hinted by New Hampshire's history and other scholarly work—that inclusive constitutional processes may significantly impact constitutional endurance—will provide the hypothesis for further historical case studies for first constitutions in the United States and Europe as well as quantitative studies of more modern constitution-writing, both of which are planned by this author.

## CONCLUSION

This is the first comprehensive study of New Hampshire's constitutional history in fifty years, and the first ever study of New Hampshire's procedural constitutional history between 1776-1784. As such, it provides the first dedicated telling of the moment when popular sovereignty theory was reified

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<sup>477</sup> Michael Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 GEO. L.J. 1765 (1997).

<sup>478</sup> *Id.* at 1801-1803; Compare Jack M. Balkin, *The New Originalism and the Uses of History*, 82 FORD. L. REV. 641 (2013) (explaining how the new originalism is centered around constitutional interpretation and construction) and Jamal Greene, *On the Origins of Originalism*, 88 TEX. L. REV. 1, 64, 82-88 (2009) (utilizing an ethical argument to interpret originalism), and Richard Fallon, *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1200-02 (1987) (arguing that historical uses are weighted more heavily in constitutional interpretation).

<sup>479</sup> HOROWITZ, *supra* note 6, at 113.

through democratic constitution-writing and its evolution thereafter into constitutional conventions and other innovations in participatory constitution-writing not seen again till the 1990s in Africa. Too, it provides a case study on the impact of group inclusion on the short, medium, and long-term legitimacy of a constitution, presenting a hypothesis for further study.