America in the 1780s had constitutions—a baker's dozen of them—but not a culture of constitutionalism. As yet there had developed no special aura around the notion of a constitution... In several states the constitutions themselves had become the focal point of controversy. Veneration of constitutions did not figure prominently in public discourse, and campaigns to rewrite the state constitutions had begun with their ratification. In Pennsylvania pro- and anticonstitutional parties dominated political life until the constitution was rewritten in 1790.1

I. INTRODUCTION

Constitutional scholars have long recognized that many of the features of the United States Constitution were modeled on the earlier state constitutions.2 John Adams indicated contemporary recognition of this with his boast: "I made a Constitution for Massachusetts, which finally made the Constitution of the

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2. See, e.g., Beeman, Introduction to Beyond Confederation: Origins of the Constitution and American National Identity 3, 18 (R. Beeman, S. Botein & E. Carter eds. 1987) ("[I]t is now becoming apparent that it may only be through studies of legal and constitutional development in the individual states that we will be able to discover where we have been.") (emphasis in original); M. FARRAND, The Framing of the Constitution of the United States 128-
Although clearly an oversimplification, Adams's claim contains an important element of truth. Alexander Hamilton, not surprisingly, relied on positive modeling in the very first number of The Federalist, where he assured New Yorkers that the new federal Constitution was an "analogy to your own State constitution. . . ."

This modeling is clear despite current controversies over the reliability of Constitutional Convention records, or their relevance in determining the "intent" of the Framers with respect to specific issues. For example, Justice Frankfurter, in interpreting the federal Constitution's congressional immunity provision, noted: "The provision in the United States Constitution was a reflection of the political principles already firmly established in the States. Three State Constitutions adopted before the Federal Constitution specifically protected the privilege."

The fifty-five delegates who attended the 1787 Constitutional Convention in Philadelphia already had wide experience, either directly or indirectly, with constitutional theory and constitution-making. By the time the Convention met


For example, Peter Hoffer and Natalie Hull have observed:

The transformation of impeachment from a check against monarchical misdeeds to an instrument of republican government was first explored in state governments before 1787, and fully realized in the federal Constitution. Between 1776 and 1787, state politicians drafted and tested various provisions for impeachment. Delegates to the federal convention—Madison, Randolph, Paterson, Mason, and Hamilton—supported by the voices and votes of other knowledgeable state leaders, fashioned national impeachment provisions along lines laid down in the states' constitutions.


4. Adams was probably more accurate when he said in 1788: "What is the Constitution of the United States . . . but that of Massachusetts, New York and Maryland! There is not a feature of it which can not be found in one or the other." C. BOWEN, MIRACLE AT PHILADELPHIA 199 (1966).


There are references, both favorable and unfavorable, to the state constitutions throughout The Federalist. For example, Madison criticized the state constitutions for their failure to separate governmental powers adequately. Id. No. 47, at 316-20 (J. Madison); id. No. 48, at 323-26 (J. Madison). See infra note 220 for a discussion of other references to state constitutions in The Federalist.


9. See generally Williams, "Experience Must Be Our Only Guide": The State Constitutional Experience of the Framers of the Federal Constitution, 15 HASTINGS CONST. L.Q. 403 (1988). One scholar estimated that "one-third to one-half of the members of the federal convention had been members of the conventions which framed the several state constitutions and a very large number of the members of the various ratifying conventions had also had a part in the formation of the respec-
that summer, the thirteen independent states had debated, framed, adopted, rejected, modified, and continued to debate at least twenty state constitutions in the period since 1775. Thus in the decade following Independence, the states, in the words of Jackson Turner Main, "became the laboratories for testing theories, trying the institutions in the various forms that presently appeared in the constitutions of the United States and other countries." Contemporaries of this period understood the experimental nature of those efforts at constitution-making. In 1778, for example, Thomas Paine applauded "the happy opportunity of trying a variety, in order to discover the best... By diversifying the several constitutions, we shall see which State flourish the best, and out of the many posterity may choose a model..."
The "founding decade" of 1776-1787,13 half of it while the Revolution was still in progress,14 included an intense and concentrated focus on written constitutional theory and practice.15 The founding decade witnessed an internal political struggle over, in Carl Becker's terms, "who should rule at home" as well as the Revolutionary War struggle for "home rule."16 Even if some observers reject Becker's assertion that the struggle over who should rule at home began prior to the Revolution, it must be conceded that this struggle was a central focus, together with military victory, during the founding decade.

The real controversies over the first state constitutions had little to do with rights. What was at stake was how the new state governments would be structured and which groups in society would have the dominant policy-making role under the new governments. The question of rights as we think of them today reside in another, and by trying different experiments, the best form will the sooner be found out, as the preference at present rests on conjecture.

*Four Letters on Interesting Subjects* (Philadelphia 1776), reprinted in 1 American Political Writing During the Founding Era, 1760-1805, at 368, 387 (C. Hyneman & D. Lutz eds. 1983). See also D. Hawke, In the Midst of a Revolution 196-97 (1961), quoting contemporary Thomas Smith as writing rather bitterly about the 1776 Pennsylvania constitutional convention, "You know that experimental philosophy was in great repute fifty years ago, and we have a mind to try how the same principles will succeed in politics!"

13. The term "founding decade" was apparently first used by Martin Diamond. See Diamond, Decent, Even Though Democratic, in R. Goldwin & W. Schamba, How Democratic is the Constitution? 18, 24 (1980).

14. When one is reading the first state constitutions, it is easy to forget that most of them were drafted and adopted during wartime. Cecelia Kenyon noted:

It is difficult for us to imagine Washington or Jefferson captured by the British and shot or hanged as traitors, it is even more difficult to remember that every member of the state assemblies or conventions that drafted constitutions was publicly committing himself to the Revolution and therefore placing his life in jeopardy should the Revolution fail.


The issues of independence and military confrontation had a major impact on many of the state constitution drafters, particularly in Pennsylvania and New York. See E. Countryman, A People in Revolution: The American Revolution and Political Society in New York, 1760-1790, at 163-65 (1981). Certainly, no similar statement could be made about the delegates to the Constitutional Convention in 1787.

15. William Morey observed in 1893 that "the most eventful constitution-making epoch in our history was not the year 1787 but an antecedent period extending from 1776 to 1780." Morey, The First State Constitutions, 4 Annals 201, 201 (1893). Harry Cushing asserted: "In the history of the use of the written constitution as a basis of government, no period, so brief has been marked by such activity in constituent proceedings and by such political pathbreaking as the decade of the American Revolution." Cushing, The People the Best Governors, 1 Am. Hist. Rev. 284, 284 (1896). See also B. Wright, Consensus and Continuity, 1776-1787, at 8-9 (1958) (1787 Convention would have been a failure without "the example, experience, and the constructive achievements of 1776 and the years immediately thereafter").


From 1765 to 1776, therefore, two questions, about equally prominent, determined party history. The first was whether essential colonial rights should be maintained; the second was by whom and by what methods they should maintained. The first was the question of home rule; the second was the question, if we may so put it, of who should rule at home.

Id. at 22.
was not at the forefront of these debates.\textsuperscript{17}

Several important points have become much clearer since earlier studies of the first state constitutions. First, we now know that there was far more fundamental controversy, as well as diversity of opinion and interest, in the state constitution-making processes during the founding decade than was earlier thought.\textsuperscript{18} Although we should generally avoid the tendency to analyze historical events on the basis of oversimplified dichotomies,\textsuperscript{19} two competing views of governmental structure emerged in the framing of the state constitutions during the founding decade. Controversy surrounded both substantive questions of state constitutional content and procedural questions concerning the process of drafting and adopting the state constitutions. Social and economic interests, and the political and constitutional theories underlying their alternative visions of state constitutions, were very divergent.

The ultimate outcomes of the state constitutional battles were much closer and less predetermined than has been commonly recognized. Most studies of the early state constitutions focus exclusively on the documents as finally adopted.\textsuperscript{20} Those whose ideas did not prevail have largely been forgotten\textsuperscript{21} in much the same way that the antifederalists were, until recently, forgotten.\textsuperscript{22} Investigating the various constitutional theories and political positions of the time calls for viewing early state constitution-making "from the bottom up,"\textsuperscript{23} or for

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{17} See E. DOUGLASS, supra note 10, at 133.
\item The bills of rights in the first state constitutions were valuable as the basis for restricting the sphere of governmental authority and as expressions of liberal political philosophy, but they did nothing to make government more responsive to the people. The attainment of democracy required political equality and majority rule . . . .
\item Id.
\item See also G. WOOD, supra note 10, at 62 (discussing early understanding of rights). One commentator noted:
\begin{quote}
For a long time, American political theorists and constitutional historians have been looking at things the wrong way around. They have sought the origins of the Bill of Rights, judicial review, and federalism, but they have seldom asked how an organic American view of constitutional government emerged out of the society, politics, and thoughts of the colonial era.
\end{quote}
\item See e.g., Black, The Formation of the First State Constitutions, 7 CONST. REV. 22, 31 (1923) (noting "[r]eady acceptance of closely parallel institutions").
\item Kenyon, Republicanism and Radicalism in the American Revolution: An Old Fashioned Interpretation, 19 WM. & MARY Q. 153, 154-55 (3d Ser. 1962); W. ADAMS, supra note 10, at 147.
\item See, e.g., Morey, supra note 15 (analyzing early state constitutions); Webster, supra note 9 (analyzing early state constitutions).
\item Donald Lutz has pointed out the importance of ideas that were rejected at the state constitutional conventions, in addition to those that were adopted. D. LUTZ, supra note 10, at 1. These rejected ideas undoubtedly were fresh in the minds of the delegates to the federal Constitutional Convention in 1787.
\item See C. KENYON, THE ANTIFEDERALISTS (1966); H. STORING, THE COMPLETE ANTIFEDERALIST (1981). Difficult as it was to collect the materials for the Antifederalists, the task is multiplied many times when one is examining the state constitutions.
\item Lemisch, The American Revolution Seen from the Bottom Up, in TOWARDS A NEW PAST: DISSENTING ESSAYS IN AMERICAN HISTORY 16 (Bernstein ed. 1968).
\end{enumerate}
\end{footnotesize}
"listening to the inarticulate." Despite their relative obscurity today, the unsuccessful arguments in the framing of the state constitutions, and the experience with government structures that seemed not to work well, were not lost on the Philadelphia delegates in 1787. By studying such ideas and institutions, we may find an important alternative perspective on what is too often portrayed as a consensus view of the proper constitution of government during the founding decade.

Historians and political scientists have identified two major "waves" of state constitution-making during the founding decade. A key point in the first wave was the Pennsylvania Constitution of 1776—it was a direct stimulus for the second wave. The Massachusetts Constitution of 1780 was the central feature of the second wave. "The 1780 Massachusetts Constitution," asserted Donald Lutz,

was the most important one written between 1776 and 1789 because it embodied the Whig theory of republican government, which came to dominate state level politics; the 1776 Pennsylvania Constitution was the second most important because it embodied the strongest alternative. The Massachusetts document represented radical Whiggism, moderated somewhat by the form of mixed government if not the actual substance. Pennsylvania Whigs wrote the most radical constitution of the era, one lacking even a bow in the direction of mixed government.

The first wave of state constitutions is generally seen to include those adopted during the first year after Independence. For the most part, legislative bodies hastily drafted these new constitutions at the beginning of the Revolution. These new constitutions did not differ much from the colonial char-
acters they replaced except in providing weakened executive power and, sometimes, including declarations of rights. The drafters gave little consideration to permanency or to structural mechanisms to check the dominant legislatures. South Carolina’s constitution of 1776 contained an absolute gubernatorial veto, but it remained in effect for only two years. Most of these constitutions also created upper houses within their legislative branches. Although the 1776 Pennsylvania Constitution did not fit this basic pattern because it was promulgated in a more leisurely fashion by a convention elected for that purpose and did not include an upper house, it represented the culmination of the first wave and provided a counterpoint for the second wave.

The second wave was much longer than the first, lasting from 1777, when the New York Constitution was adopted, to 1780, when Massachusetts finally adopted its 1780 constitution. The second wave could even be seen as lasting until 1784, when New Hampshire, after much trial and error, adopted its revised state constitution. The state constitutions of the second wave were adopted in a more deliberate fashion, often by specially elected conventions. These second wave documents reflected a direct concern with mechanisms to check the dominant legislative branches.

The Pennsylvania Constitution, adopted in September 1776, played two important roles in the development of American constitutionalism. On the one hand, this constitution, and the political arguments supporting it, provided the basis for persons in most of the states to argue for a simple people’s government that would contain no elements of “aristocracy.” In other words, the document’s lack of effective checks on the powerful unicameral assembly was lauded as imposing no “undemocratic” restraints on the expressed will of the people. Checks and balances of the usual sort, such as an upper house and executive veto, were not part of Pennsylvania’s first constitution.

The 1776 Pennsylvania Constitution appeared to more traditional elements of Revolutionary society—those used to exercising significant power even under colonial administration—as an extreme example of the “leveling spirit” that could be expected to dominate the state governments if Revolutionary republican rhetoric were to be taken seriously in the framing of the state constitutions. This attitude grew stronger as people experienced and observed the Pennsylvania government in action. As such, Pennsylvania’s constitution contributed, together with many other factors, to the stronger checks on legislative power that characterized most of the later and more conservative, state constitutions of the 1770s and 1780s, and it served as a theoretical counterpoint during the Constitutional Convention in 1787. To a certain extent, then, the Pennsylvania Constitution paradoxically fed the “counterrevolution” that some scholars conclude was completed with the adoption of the federal Constitution of 1787.

31. 8 SOURCES AND DOCUMENTS, supra note 28, at 464 (1776 South Carolina Constitution, article VII).
32. See, e.g., 5 SOURCES AND DOCUMENTS, supra note 28, at 92 (1780 Massachusetts Constitution); 7 SOURCES AND DOCUMENTS, supra note 28, at 168 (1777 New York Constitution).
33. 6 SOURCES AND DOCUMENTS, supra note 28, at 344.
The radically democratic Pennsylvania Constitution of 1776, according to Richard Ryerson, "marked the outer limits of the Revolution." It was, therefore, very influential during the founding decade, but not necessarily in positive ways. Because the Continental Congress met in Philadelphia, delegates were aware of the Pennsylvania Constitution, and the controversy surrounding it, and therefore these events received immediate national attention. The constitutions of other states, even draft versions, were published in Philadelphia newspapers, and all of the well-known pamphlets on state constitutions were available to the Continental Congress delegates. Philadelphia thus became the center of state constitutional debate.

Nevertheless, Pennsylvania's constitution was not the only manifestation of a very different vision of the proper structure of government from that which ultimately prevailed. It mirrored a broader debate on the nature of republicanism and the distribution of authority within government. There is evidence of a fairly widespread, radically democratic vision of the proper state constitution, which arose to some extent during the framing of virtually all the state constitutions. Jesse Lemisch, a historian of the "inarticulate," has noted that "there existed in 1776 a body of political thought which did not endorse deference" to traditional elites. Although this assertion is controversial among historians, there is some documentation of this body of thought, particularly in Pennsylvania. Even in the absence of documentation, Lemisch asserts that less articulate people must have shared these ideas "directly out of the experience of their lives."

The Pennsylvania Constitution of 1776, and the political theory supporting it, reflects the less well-known constitutional theory of those whose ideas did not prevail and who, like the antifederalists, have tended to be forgotten in constitutional history.

II. THE PENNSYLVANIA CONSTITUTION OF 1776

The movement in Pennsylvania toward Independence worked to expand

35. W. Adams, supra note 10, at 94 n. 111.

As early as July 1776, Josiah Bartlett of New Hampshire (which had already adopted a state constitution in January 1776) wrote home from Philadelphia to John Langdon, a future delegate to the federal constitutional convention, that the constitutions "of Virginia and New-York are in this city... I shall send them forward, and the Constitutions of the other Colonies as they are formed, as possibly something may be taken from them to amend our own." R. Rutland, The Birth of the Bill of Rights 1776-1791, at 52 (1962) (emphasis in original). Bartlett’s reference to the New York Constitution must have been to a draft version because New York’s Constitution was not finally adopted until April 1777.

dramatically the number and types of people interested in and directly participating in governmental questions in the colonies. Many of these people had not been qualified under the colonial charters to participate in the self-government permitted by England in the colonies. Ryerson noted that ninety per cent of those who served on the Philadelphia committees in 1774-1776 had never before held public office and, but for the 1776 Pennsylvania Constitution, would not have been eligible in the future.\(^4\)

In its resolution of May 10 and 15, 1776,\(^4\) the Second Continental Congress

recommended to the respective assemblies and conventions of the United Colonies, where no government sufficient to the exigencies of their affairs, has 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 America in general.\(^4\)

Now that it was time to frame the new state governments, the stakes surrounding who was to rule at home were very high. Independence, resulting in drastic changes in the political system of the past, was worrisome to those who previously had held power. To those who sought new power, independence without real change in the makeup of political power was not worth the effort. This tension would form the basis for the struggles over framing and implementing state constitutions from 1776-1786. Quite literally, control over the new govern-

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41. The resolution was adopted May 10, 1776 and a preamble was added on May 15, 1776. W. ADAMS, supra note 10, at 61. John Adams served with Edward Rutledge of South Carolina and Richard Henry Lee of Virginia on the committee that drafted the resolution. Id.

42. W. ADAMS, supra note 10, at 61 (quoting 4 JOURNALS OF THE CONTINENTAL CONGRESS 342, 357-58 (1904-37)) (emphasis supplied).

Also on May 15, 1776, James Allen, an anti-Independence member of the Pennsylvania Assembly, wrote in response to the resolution of the Continental Congress: "I think the Assembly of this province, will not consent to change their constitution; and then heigh for a convention! A Convention chosen by the people, will consist of the most fiery Independents; they will have the whole Executive & legislative authority in their hands." Diary of James Allen, Esq., of Philadelphia, Counselor-At-Law, 1770-1778, 9 PA. MAG. HIST. & BIOG. 176, 187 (1885).
ments, which would exercise plenary power without any higher authority, was up for grabs. As historian Elisha Douglass has noted:

Large numbers of those unable to vote or hold political office felt that the primary purpose of the struggle was to abolish the political institutions by which privilege had been maintained in the colonial governments. Thus when the question of home rule was succeeded by the question of who would rule at home, these groups of humbler rebels attempted to obtain equal consideration for themselves by demanding that democratic reforms be written into the new state constitutions.\(^{43}\)

In no state would a greater transition of internal power take place than in Pennsylvania.\(^{44}\) The Pennsylvania Constitution of 1776 reflected the extreme shift in the internal political structure of the state (a shift evidenced especially by the political importance of the city of Philadelphia), and the constitution proved influential beyond the state. The controversies over governmental structure illustrate the wide range of opinion concerning the details of the new state governments within what can be viewed as a consensus on the advisability of "republicanism." As Robert Shalhope has pointed out:

Only one thing was certain, Americans believed that republicanism meant an absence of an aristocracy and a monarchy. Beyond this, agreement vanished—what form a republican government should assume and, more important, what constituted a republican society created disagreement and eventually bitter dissension. This was a consensus that promoted discord rather than harmony. \(\ldots\)^{45}

The Pennsylvania Constitution of 1776 lasted only until 1790. As the focal point of controversy over the proper structure of the new state government, it mirrored the broader debate taking place in the other states during the decade prior to the federal Constitutional Convention of 1787. Benjamin Rush was an opponent of Pennsylvania's radical constitution. The depth of his feelings, which were not unique to him, was revealed when he wrote to Timothy Pickering toward the close of the federal convention: "The new federal government like a new Continental waggon will overset our State dung cart, with all its dirty

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contents... and thereby restore order and happiness to Pennsylvania." These are strong words of condemnation for Pennsylvania's first constitution, the central features of which were strongly supported by many others. Yet, the hostility toward the constitution within the state spilled over to influence constitution-making elsewhere. Moreover, the United States Constitution adopted a structure of government reflecting a political philosophy very different from what prevailed in Pennsylvania from 1776 to 1790. This constituted an implicit, and at times explicit, rejection of Pennsylvania's first constitution. Yet, at the same time, elements of Pennsylvania's early constitutional experience were incorporated into the federal Constitution and became basic elements of American constitutionalism.

Tom Paine's *Common Sense*, probably the most influential political pamphlet in American history, was published in Philadelphia on January 9, 1776. It made a strong case for establishing simple, republican governments, operated by unicameral legislatures with a wide elective franchise in each of the colonies. Paine, an English tradesman, had come to Philadelphia in 1774 and worked with many of the political newcomers (former outsiders) who had recently become active in the revolutionary committees. Together, they developed in Philadelphia an "urban variant of republicanism that fostered egalitarianism as well as economic enterprise."

In *Common Sense*, Paine initiated a "new political language," to portray a "utopian image of an egalitarian republican society." He wrote for a mass audience, appealing to conservatives as well as radicals. This message was of


47. See infra notes 234-42 and accompanying text, for a discussion of the positive influences of the 1776 Pennsylvania Constitution on the federal Constitution.


Interestingly, Benjamin Rush, who apparently suggested that Paine write the pamphlet and who gave it its name, recommended that Paine not discuss republicanism. E. FONER, supra, at 74; B. RUSH, THE AUTOBIOGRAPHY OF BENJAMIN RUSH 113-14 (G. Corner ed. 1948). Jesse Lemisch noted, "Excessive attention to *Common Sense* for its propaganda values has obscured its substantive meaning as an expression of populist democracy." Lemisch, supra note 23, at 25.


52. E. FONER, supra note 49, at xvi. For a wide-ranging critique of Paine's political theories over the years, see Kenyon, *Where Paine Went Wrong*, 45 AM. POL. SCI. REV. 1086 (1951). Kenyon concluded that Paine was "incurably naive." Id. at 1094.

course favorably received by, and articulated the feelings of, many of the newly active political participants, and simply confirmed their recent experiences with the committees and, to a lesser extent, with the prior limited self-government in the colonies. Common Sense reached the mass audience for which Paine aimed; it was read by hundreds of thousands of people and read aloud to many more.54

Because of a unique series of events in Pennsylvania, including opposition to independence55 and revolutionary activities by the political elite, as well as their own preoccupation with national politics,56 Paine's newcomer friends suddenly found themselves with real power.57 "[T]he struggle which began as a movement to commit Pennsylvania to independence . . . soon broadened into an assault upon the state's government."58 Pennsylvania was one of the few states where the radicals successfully formed a coalition of urban working people and interior small farmers.59 After gaining control of Pennsylvania's provincial conference of committees, the "new men" sought to confirm their power by calling for the election of delegates to a constitutional convention.60 An anonymous pamphlet published in Philadelphia in 1776 called for a special convention to draft the constitution, rather than the existing Assembly. That pamphlet was one of the earliest indications of an understanding of a constitution as distinct from ordinary legislation.61

Public debate surrounding the election, with its newly expanded

54. Id. at 79-80.
55. For an exhaustive treatment of opposition to independence in Pennsylvania, including its effect on state constitutional development, see A. OUSTERHOUT, A STATE DIVIDED: OPPOSITION IN PENNSYLVANIA TO THE AMERICAN REVOLUTION (1987).
57. For a thorough review of these events, see generally Ryerson, supra note 34; D. HAWKE, supra note 12.
59. R. KELLEY, supra note 45, at 79. See generally Olton, supra note 50.

The Pennsylvania experience must be contrasted with the failure of rural and urban radicals to unite New York and Massachusetts. See generally E. COUNTRYMAN, supra note 14, at 163-66; Patterson, The Roots of Massachusetts Federalism: Conservative Politics and Political Culture Before 1787, in R. HOFFMAN & P. ALBERT, supra note 11, at 31, 42-43.
60. The conference prepared an address to Pennsylvanians, stating: "Divine Providence is about to grant you a favor which few people have ever enjoyed before; the privilege of choosing Deputies to form a Government under which you are to live. We need not inform you of the importance of the trust you are about to commit to them. . . ." Gibson, The Pennsylvania Provincial Conference of 1776, 58 Pa. Mag. Hist. & Biog. 312, 332 (1934).

61. The Alarm; or, an Address to the People of Pennsylvania on the Late Resolve of Congress, reprinted in 1 AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA, 1760-1805, at 321 (1983). See also Pennsylvania Journal, May 22, 1776, quoted in W. ADAMS, supra note 10, at 63:

Q. Who ought to form a new Constitution?
A. The people.
Q. Should the officers of the old constitution be entrusted with the power of the making of a new one when it becomes necessary?
A. No. Bodies of men have the same selfish attachments as individuals, and they will be claiming powers and prerogatives inconsistent with the liberties of the people.
franchise, included warnings to the voters not to elect propertied representatives. James Cannon, a close friend of Paine, urged the election of common people, and warned that "great and over-grown rich Men will be improper to be trusted, they will be too apt to be framing Distinctions in Society, because they will reap the Benefits of all such Distinctions. . . . Let no man represent you . . . who would be disposed to form any Rank above that of Freeman." A similar argument was made in the March 18, 1776, Pennsylvania Packet:

Do not mechanicks and farmers constitute ninety-nine out of a hundred people in America? If these, by their occupations, are to be excluded from having any share in the choice of their rulers, or forms of government, would it not be best to acknowledge the jurisdiction of the British Parliament, which is composed entirely of Gentlemen?

The elections gave the same group, as well as many "plain countrymen," control of the state constitutional convention that convened on July 15, 1776, at the State House in Philadelphia, now known as Independence Hall.

In the well-known July 1776 pamphlet, Four Letters on Interesting Subjects, the last letter was aimed at the upcoming Pennsylvania constitutional convention. Recently, this pamphlet has been convincingly, though not conclusively, attributed to Paine. Regardless of authorship, however, the pamphlet put the ideas of Common Sense into a more concrete form. Another pamphlet aimed at the 1776 Pennsylvania constitutional convention, The Genuine Principles of the Ancient Saxon or English Constitution, appeared soon thereafter. This pamphlet, anonymously authored by "Demophilus," may have been written by

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62. Gibson, supra note 60, at 331-32; D. Hawke, supra note 12, at 173-74; C. Olton, supra note 50, at 76-77.
63. E. Foner, supra note 49, at 129. A copy of the first page of Cannon's broadside is reprinted, which Foner describes as "one of the finest examples of the egalitarian impulse unleashed by the struggle for independence." Id. at 130. An edited version of the broadside appears in G. Dargo, Law in the New Republic: Private Law and the Public Estate 63-65 (1983). See also Jensen, supra note 40, at 29 (discussing Cannon's broadside); D. Hawke, supra note 12, at 176-77. After this article was completed, I discovered S. Rosswurm, Arms, Country and Class: The Philadelphia Militia and the "Lower Sort" During the American Revolution, 1775-1783 (1987). This book provides an in-depth treatment of political and constitutional developments in Pennsylvania, as part of a larger movement by the Pennsylvania lower classes. Rosswurm discusses Cannon's broadside at 101-103.
64. W. Adams, supra note 10, at 178 (quoting Pennsylvania Packet (March 18, 1776)).
66. Four Letters on Interesting Subjects (Philadelphia 1776), reprinted in 1 American Political Writing During the Founding Era, 1760-1805, at 368 (C. Hyneman & D. Lutz eds. 1983).
68. The Genuine Principles of the Ancient Saxon or English Constitution, reprinted in 1 American Political Writing During the Founding Era, 1760-1805, at 340. Bailyn notes that this pamphlet is based on a 1771 English book by Obadiah Hulme. B. Bailyn, The Ideological
Judge George Bryan. Bryan, though not a delegate to the constitutional convention, apparently participated directly in the drafting of the document. According to Bernard Bailyn, these pamphlets represented the turning point from the 1760-1776 debate over the imperial constitution to the post-1776 debate over the structure of the domestic governments.

Some of Paine's closest friends, including Dr. Thomas Young and Cannon (apparently working with Bryan), drafted Pennsylvania's "ultrademocratic" 1776 constitution. Pennsylvania, in making a virtually complete change of its government, thus was the only colony to experience a true revolution. According to Ryerson, "By late 1776 the Commonwealth of Pennsylvania was perhaps the most vital participatory democracy in the world."

Those who seized power in Pennsylvania and wrote the new constitution had new values. Although these values had pre-Revolutionary origins, they gained new vitality when their adherents took over political power in Pennsylvania. They called for a people's government, unencumbered by interference from what they saw as the "aristocratic" elements of society that would be represented by either a second house of the legislature or a powerful executive, and that would seek to limit the political participation of ordinary people. Any excesses of such a simple government were to be checked by its mandated open-
ness, and required legislative and public deliberation on measures, together with annual elections, rotation in office, and periodic review of legislative activity by specially elected overseers. These "democratic" values and approaches were shared by groups in other states as well, intent on achieving new-found political power. And of course the traditional elites in other states were well aware of the influence of Pennsylvania's democratic movement.

The Pennsylvania convention took over the affairs of government in Pennsylvania and, in addition to other matters, promulgated a Declaration of Rights on August 16, 1776. It made its proposed Frame of Government public on September 5, and, after a brief period for public comment and revision, adopted the final version on September 28.

Pennsylvania's 1776 constitution followed Paine's recommendation and established a "simple" government. Paine later referred to it as "a generous Constitution ... which considers mankind as they came from their maker's hands—a mere man, before it can be known what shall be his fortune or his state. . . ." It contained a separate Declaration of Rights and Frame of Government. The Declaration of Rights was patterned after Virginia's, but Article XII contained among the broadest statements of speech and press freedom: "The people have a right to freedom of speech, and of writing, and publishing their sentiments; therefore the freedom of the press ought not to be restrained." Article XVI provided: "That the people have a right to assemble together, to consult for their common good, to instruct their representatives, and to apply to the legislature for redress of grievances, by address, petition or remonstrance."

Interestingly, the Frame of Government protected various other rights as well. For example, Section 35 specified: "The printing presses shall be free to every person who undertakes to examine the proceedings of the legislature, or any part of government."

76. See infra notes 81-88 and accompanying text for a discussion of the legislative branch and provisions on openness and responsiveness to voters.

77. For a very complete analysis of the changes made during this brief period of public comment, see Shaeffer, Public Consideration of the 1776 Pennsylvania Constitution, 98 PA. MAG. HIST. & BIOG. 415 (1974). Shaeffer stated:

The final frame of government differed from the proposal referred to the people in many significant ways, with two-thirds of the sections substantially modified by the substitution of key words or even entirely new sections. The public had less than a month to reflect on the proposed frame of government, but there was time for criticisms and suggestions to be directed to the convention, which did respond, either positively or negatively, to every criticism published by September 28.

Id. at 419 (footnotes omitted).

78. 2 P. Foner, supra note 12, at 285 (emphasis in original). This statement seems to have been taken from Obadiah Huile's 1771, An Historical Essay on the English Constitution, supra note 68. See S. Rosswurm, supra note 63, at 86-87.

ified in both the Declaration of Rights and the Frame of Government were aimed more at reinforcing republican government than at guaranteeing individual rights:

The Pennsylvania Constitution, even in its declaration of rights, was not oriented directly to individual fulfillment; it considered the communal right to qualify liberties as important as the individual's right to be free from governmental interference. The constitution thus established a republican form of government, majoritarian in emphasis and liberty-enhancing in intention.

* * *

Liberties in this constitution were social contract liberties, all qualified by entry into society. Those provisions that seem unqualifiable, such as the printing presses to be free to examine government, take on a less unique, less expansive flavor when perceived not as personal liberties but rather as provisions necessary to preserve republican government.

Under Section 2 of the Frame of Government, legislative power was placed in a unicameral assembly, often attributed to Benjamin Franklin's influence, but no doubt also an extension of Pennsylvania's familiarity with a unicameral legislature dating from William Penn's Charter of Privileges of 1701. Neither the weak, albeit elected, plural executive (headed by a "president" chosen annually by the Assembly) nor the judiciary had any significant check (such as veto power) on the Assembly. Members of the Supreme Court, though appointed for a seven-year term at a fixed salary, could be removed by the legislature at any time for "misbehavior." The constitution contained provisions aimed at making the Assembly an open deliberative body accountable to the voters. For example,

JOURNALISM Q. 235 (1968) (same). For McKeans's views on treason, see Young, *Treason and its Punishment in Revolutionary Pennsylvania*, 90 PA. MAG. HIST. & BIOG. 287, 300-02, 307 (1966): "Pennsylvania was not a nation at war with another nation, but a country in a state of civil war, and there was no precedent in the books to show what might be done in that case . . ." Id. at 287 (emphasis in original).


81. See A. Aldridge, *supra* note 67, at 69: "Paine's proposals are simple, and they clearly favor the popular elements of society, particularly a provision for a single, democratically elected legislature, a provision which repelled men of property and conservative instincts."


under Sections 13 and 14, Assembly proceedings were open to the public, with votes to be recorded in the published journal of proceedings. Legislators served one-year terms, and could serve no more than four out of any seven years. Before becoming law, most bills had to be printed and distributed to the public and then enacted by the next successive legislative session. Such provisions, except for rotation in office and annual elections, were virtually unknown in other state constitutions of the period. The structure of the legislature, together with the principles of representation reflected in the constitution, represented an attempt to achieve "actual representation" so that a representative would act as if the people had been assembled in one place.

Section 17 of the Pennsylvania Constitution of 1776 established the principle of apportionment by "the number of taxable inhabitants," with regular reapportionment. Property requirements for voting were eliminated, with the franchise defined by the much broader requirement that a voter simply pay taxes. Finally, under Section 47, a Council of Censors was to be elected by the people every seven years to review legislative actions for conformity "to the principles of the constitution," and to propose amendments to the constitution. This review mechanism had been recommended in several of the pamphlets published before the constitutional convention.

Of all the suggested constitutional innovations in Pennsylvania, possibly the most sobering was rejected in the constitutional convention: "That an enormous Proportion of Property vested in a few individuals is dangerous to the Rights, and destructive of the Common Happiness of Mankind; and therefore every free State hath a Right by its Laws to discourage the Possession of such Property." This was an unusual provision, even in radical circles, because "rarely, if ever, did even the most radical question the right of the wealthy to enjoy their possessions undisturbed." Pennsylvania's governmental structure came to be associated with this type of attitude about the evils of accumulating private property, which some feared would lead to "agrarian laws" breaking up and redistributing

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84. Kenyon, supra note 14, at 101, 103. See also W. Adams, supra note 10, at 249-51 (Pennsylvania legislative provisions discussed); J. Selsam, supra note 37, at 184-85, 192 (same); S. Rosswurm, supra note 63, at 105 (earlier demands for these provisions).


88. 1 American Political Writing During the Founding Era 1760-1805, at 362-63, 389 (1983); Shaeffer, supra note 77, at 433-36; M. Vile, Constitutionalism and the Separation of Powers 137 (1967).

89. E. Foner, supra note 49, at 133. On the importance of provisions proposed but not adopted during this period, see D. Lutz, supra note 10, at 1.

90. E. Douglass, supra note 10, at 146. See also S. Rosswurm, supra note 63, at 104.
land holdings, and to other "leveling" measures. The rejected provision seems to bear the mark of Dr. Thomas Young, resembling the radical statements he made in Boston in the 1770s before coming to Philadelphia.

The radical democrats who supported the Pennsylvania Constitution knew that a unicameral legislature was susceptible to excesses, but, in the words of Jesse Lemisch, they sought through the constitution's required popular participation to "check it from below—with more democracy—rather than from above, with less." The Pennsylvania convention had, after all, approved in principle the drafting committee's proposed unicameral legislature "under proper restrictions." Staughton Lynd has noted a similar point of view:

The democratic movement in the American Revolution has usually been associated with the demand for single-chamber legislatures. What the ad hoc bodies of the Revolution signified, however, was the additional insistence that the best of legislatures be continually checked and guided by "the people out of doors," acting through new institutions of their own devising. This was a demand not simply for an end to conventional bicameralism, but for what might perhaps be termed "bicameralism from below."

From the moment it was implemented, controversy raged over whether the Pennsylvania Constitution should be changed. Many qualified persons boycotted the new government by refusing to hold office or to practice law in the courts. This ongoing controversy, which was highly visible and followed by many observers in other states, dominated most elections in Pennsylvania until the 1790 constitution was substituted as part of the overall movement leading to the federal Constitution. This period of controversy generated rich newspaper and pamphlet literature, with Paine contributing several newspaper articles in

91. Many of the traditional elites during the founding decade criticized the "leveling" tendencies of state constitutional theories and state legislative measures. Merrill Jenson recently pointed out that calling someone a "leveler" in the eighteenth century was like calling a person a "communist" in the twentieth century. Jensen, The Sovereign States: Their Antagonisms and Rivalries and Some Consequences, in R. Hoffman & P. Albert, supra note 1, at 226, 229.


94. Shaeffer, supra note 77, at 419.


97. See generally R. Brunhouse, supra note 65, at 17 ("The Constitution became the center of the political warfare. . ."); Ryerson, supra note 34 (tracing controversy surrounding Pennsylvania Constitution); G. Wood, supra note 10, at 226-37, 438-46 (same).


support of the 1776 constitution.\textsuperscript{98} John Dickinson, a future federal convention delegate, attacked the Pennsylvania Constitution in his 1776 \textit{Essay on a Frame of Government for Pennsylvania}.\textsuperscript{99} Benjamin Rush, who had originally encouraged Paine to write \textit{Common Sense}, soon became an opponent of the Pennsylvania Constitution of 1776 and worked to overcome it, writing his criticisms in the 1777 pamphlet \textit{Observations on the Government of Pennsylvania}.\textsuperscript{100} In 1779 he followed up these criticisms with another attack on the constitution in an article in the United States Magazine under the pseudonym of “Sidney.”\textsuperscript{101} At the close of the Revolutionary War, Rush remarked, “The American war is over, but this is far from being the case with the American revolution.”\textsuperscript{102} He later referred to the government under the Pennsylvania Constitution as a “mobocracy.”\textsuperscript{103}

Others, such as Joseph Reed\textsuperscript{104} and Thomas McKean\textsuperscript{105} who had served in the 1776 Delaware Constitutional Convention and who initially opposed the

\textsuperscript{98} See supra note 12 and accompanying text for references to some of these pamphlets and newspaper articles. See also E. Foner, supra note 49, at 142-43 (same).

\textsuperscript{99} Harry Cushing attributed the pamphlet to Dickinson in \textit{The People the Best Governors}, 1 AM. HIST. REV. 284, 284 (1896). J. Paul Selsam disputed Cushing’s attribution of this pamphlet to Dickinson. J. Selsam, supra note 37, at 173-74. But see M. Vile, supra note 88, at 147 n.3 (pamphlet’s importance despite authorship).

Regardless of authorship, however, the pamphlet represents an important part of the public debate over the 1776 Pennsylvania Constitution. On Dickinson’s opposition to the 1776 Pennsylvania Constitution, see R. Ryerson, supra note 40, at 243.

\textsuperscript{100} Rush noted: “It is one thing to understand the principles and another to understand the forms of government. The former are simple; the latter are difficult and complicated.” 1 \textsc{The founders’ constitution} 362 (1987) (emphasis in original). See \textsc{The selected writings of Benjamin Rush} 54 (D. Runes ed. 1947); W. Adams, supra note 10, at 119-20. See also G. Stourzh, \textit{Alexander Hamilton and the Idea of Republican Government} 4-5 (1970) (Rush’s distinction between principles and forms of government discussed). Stourzh observed that principles were important in the debate with England, whereas after the break, “new forms of government were to be established. . . . This grand effort ranged on state level from New Hampshire, in late 1775, to Massachusetts, in 1780; it culminated in the drafting of the Federal constitution.” \textit{Id.} at 5 (emphasis in original). Rush once wrote that the new constitution was considered “by many people to be rather too much upon the democratical order. . . .” Letter from Benjamin Rush to Anthony Wayne (Sept. 24, 1776), quoted in J. Selsam, supra note 37, at 209. On Rush’s \textit{Observations} generally, see D. Hawke, \textsc{Benjamin Rush: Revolutionary Gadfly} 195-202 (1971).

\textsuperscript{101} W. Adams, supra note 10, at 120.

\textsuperscript{102} \textsc{The selected writings of Benjamin Rush}, supra note 100, at 26, quoted in L. Friedman, \textsc{Inventors of the Promised Land} 4 (1975). On November 6, 1778 Rush wrote to David Ramsay of South Carolina that “[t]yranny can now enter our country only in the Shape of a Whig.” \textit{Excerpts from the Papers of Dr. Benjamin Rush}, supra note 82, at 21.

\textsuperscript{103} Letter from Benjamin Rush to John Adams (Jan. 22, 1789), quoted in D. Hawke, supra note 12, at 178. Another interesting characterization of those supporting the constitution was “mobility.” Ford, supra note 56, at 446 (citing \textit{Diary of James Allen, Esq., of Philadelphia, Counsellor-at-Law}, 1770-1778, 9 PA. MAG. HIST. & BIOG. 176, 186 (1885)).

\textsuperscript{104} See generally J. Roche, \textsc{Joseph Reed: A Moderate in the American Revolution} 144-91 (1957).

\textsuperscript{105} See generally J. Coleman, \textsc{Thomas McKean: Forgotten Leader of the Revolution} (1975); G. Rowe, \textsc{Thomas McKean: The Shaping of an American Republicanism} (1978).
1776 Pennsylvania Constitution finally joined the new government. Reed served as president of the weak Supreme Executive Council from 1778 to 1781—the maximum three-year term under Pennsylvania's Constitution. McKean served twenty-two years as chief justice of the Pennsylvania Supreme Court and helped establish an independent judiciary by 1790.

The agitation for change in the Pennsylvania Constitution has been described in detail elsewhere. Briefly, in June 1777, the Assembly resolved to seek advice from the people as to whether to call a new constitutional convention. That idea was shelved because of the immediacy of the war. In November 1778, the Assembly again resolved to "take the sense of the people" on the constitution in a vote to be held the following April. On February 27, 1779, after receiving dozens of petitions with thousands of signatures, the Assembly nonetheless rescinded its resolve. Pressure for revision continued, but another clear opportunity did not present itself until the election of the Council of Censors in 1783.

During the first session of the Council of Censors in 1783, the opponents of the existing constitution were in control. At the end of the first session, the majority (but not the required two-thirds necessary to call a constitutional convention) issued a report that was very critical of the Pennsylvania Constitution, recommending such changes as an upper house, elected governor, and executive veto, and proposing that a constitutional convention be called. The council minority issued a dissenting opinion, warning against an aristocratic government "vested with powers exceeding those which fall to the ordinary lot of kings." In an address to the people prior to a long adjournment, the council majority stated, with respect to the constitution:

We have examined it with candor; we have compared it with the constitutions of other states; we have discovered some of its defects; we have suggested the necessity of abolishing such parts of it as are expensive and burdensome, and dangerous to your liberties, and have with great deference thrown out, for your consideration, such alterations as appear to us to be best calculated to secure to you the blessings of free and equal government.

The majority invoked the lessons of experience in other states: "The proposed alternations are not experiments, but are founded on reason and the experience

106. W. Adams, supra note 10, at 76.
108. See supra note 97 for materials discussing the controversy surrounding the proposed changes to the Pennsylvania Constitution. See generally Gibson, supra note 60 (controversy over proposals to change Pennsylvania Constitution); A. Ousterhout, supra note 55, at 155-228.
110. Smith, supra note 109, at 178.
111. See supra notes 87-88 and accompanying text for a description of the Council of Censors.
112. Proceedings Relative to Calling the Conventions of 1776 and 1790, at 69-77 (1825) [hereinafter Proceedings]; Meador, supra note 87, at 289.
113. Proceedings, supra note 112, at 79.
114. Id. at 80.
of our sister states."  

During the council's six-month adjournment, the majority and minority reports were widely distributed and became the subject of strong public opinions. Benjamin Rush reported in his journal that on a trip to Carlisle, Pennsylvania, he stopped to feed his horses at Buck Tavern in Haverford Township: "The first thing that struck me in [the] house was the Address of the Minority of the Censors pasted on [the] bar—[t]he little fellow seemed hurt at my looking at it." Upon hearing of Rush's opposition to the current constitution, however, the tavern keeper "broke forth, and cursed the minority—the Constitution and the Presbyterians all in a breath."  

During the council's adjournment, the balance of power shifted to the supporters of the Pennsylvania Constitution. When the council reconvened, the new majority rejected the former majority's criticisms of the existing constitution and adjourned, issuing an address to the people explaining why it did not hazard the calling of a convention. . . . Give it a fair and honest trial; and if after all, at the end of another seven years, it shall be found necessary or proper to introduce any changes, they may be brought in, and established upon a full conviction of their usefulness, with harmony and good temper, without noise, tumult or violence. Constitutional change in Pennsylvania thus was forced to wait until 1790, after the federal Constitution was adopted.

III. THE INFLUENCES OF PENNSYLVANIA'S 1776 CONSTITUTION BEYOND PENNSYLVANIA

A. Influences on State Constitutional Development

Interested persons in other states spoke out on both sides of the debate over Pennsylvania's unique constitutional theory and practice. Almost immediately after Common Sense appeared, John Adams published his influential Thoughts on Government as, among other things, a response to Paine. While in Philadelphia at the Continental Congress, Adams had been asked by two North Car-

115. Id. at 82.
117. Meador, supra note 87, at 293.
118. Id. at 294, 295; Proceedings, supra note 112, at 124, 128.
120. Adams wrote in his autobiography, some time later, the following about Common Sense: The other third part relative to a form of Government I considered as flowing from simple Ignorance, and a mere desire to please the democratic Party in Philadelphia, at whose head were Mr. Matlock, Mr. Cannon and Dr. Young. I regretted, however, to see so foolish a plan recommended to the People of the United States, who were all waiting only for the countenance of Congress, to institute their State Governments. I dreaded the Effect so popular a pamphlet might have, among the People, and determined to do all in my Power, to counter Act the effect of it. AUTOBIOGRAPHY AND DIARY (OF JOHN ADAMS) 332-33 (L. Butterfield 3d ed. 1961), quoted in A. ALDRIDGE, supra note 67, at 198.
olina delegates for his thoughts concerning the structure of the new state governments; his response was later published as *Thoughts on Government.*

In his pamphlet, Adams set forth an alternate vision of how the new state governments should be constituted, a vision that was more traditional than the Pennsylvania system. He proposed a model based on "balanced government," or checks and balances, in which bicameralism and executive power counterbalanced the lower house, which "should be in miniature an exact portrait of the people at large. It should think, feel, reason, and act like them." He also advocated property requirements for holding office and voting.

John Adams was highly critical of the Pennsylvania Frame of Government. As Benjamin Rush recalled:

> So great was [Adams's] disapproval of a government composed of a single legislature, that he said to me upon reading the first constitution of Pennsylvania "The people of your state will sooner or later fall upon their knees to the King of Great Britain to take them again under his protection, in order to deliver them from the tyranny of their own government."

Rush wrote to Adams: "From you I learned to discover the danger of the Constitution of Pennsylvania."

Thus, as early as 1776, arising out of Pennsylvania’s constitutional theories, the crucial constitutional issues of the founding decade were joined: How would the new governments be structured? Who would participate in the new governments, directly as office holders, and indirectly as voters? Adams’s ideas ultimately prevailed, while Paine’s ideas carried the day in a few states, primarily Pennsylvania, but influenced constitutional debate in most states.

Interestingly, both Paine in *Common Sense* and Adams in *Thoughts on Gov-*

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121. A. ALDRIDGE, *supra* note 67, at 200. It has recently been asserted that the defense of unicameralism in *Four Letters on Interesting Subjects* was Paine's response to Adams. *Id.*, at 233. See 1 AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA, *supra* note 119, at 384-87 (reprinting *Four Letters on Interesting Subjects*) (defense of unicameralism found in fourth letter).

122. 1 AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA, *supra* note 119, at 403.

123. Adams argued in favor of property qualifications:

> New claims will arise; women will demand a vote; lads from twelve to twenty-one will think their rights not enough attended to; and every man who has not a farthing, will demand an equal voice with any other, in all acts of state. It tends to confound and destroy all distinctions, and prostrate all ranks to one common level.

W. ADAMS, *supra* note 10, at 207.


126. Elisha Douglass concluded that Adams's *Thought on Government* was probably the "paramount guide" for constitution making in at least five states. And, he continued, "When it is considered that the state constitutions, particularly that of Massachusetts—were the greatest single influence on the Federal Constitution, the full importance of the pamphlet should be evident." E. DOUGLASS, *supra* note 10, at 32.

For a full analysis of John Adams's views as they changed during the founding decade, see G. WOOD, *supra* note 10, at 567-92. See also Dorfman, *The Regal Republic of John Adams, 59 POL. SCI. Q. 227 (1944) (tracing development of Adams's political philosophy).
PENNSYLVANIA’S 1776 CONSTITUTION

Government revealed the sense of exhilaration felt by constitution-makers at the beginning of the founding decade. Paine proclaimed:

[W]e have every opportunity and every encouragement before us, to form the noblest purest constitution on the face of the earth. We have it in our power to begin the world over again. A situation similar to the present, hath not happened since the days of Noah until now. The birthday of a new world is at hand. ... 127

Adams's more familiar comment in Thoughts is remarkably similar:

You and I, my dear friend, have been sent into life at a time when the greatest lawgivers of antiquity would have wished to live. How few of the human race have ever enjoyed an opportunity of making an election of government... for themselves or their children! When, before the present epocha, had three millions of people full power and a fair opportunity to form and establish the wisest and happiest government that human wisdom can contrive? 128

Both of these statements reflect an enthusiasm and optimism that would be difficult to find a decade later at the opening of the federal Constitutional Convention. 129 Beyond this shared enthusiasm, however, there was no real consensus between Paine's and Adams's views regarding how the new governments should be structured and who should participate in them.

Because Philadelphia was at the center of state constitutional debate, Pennsylvania's experience was watched with great interest and concern in other states, 130 as well as in Europe. 131 In an effort to avoid adopting a constitution like Pennsylvania's, traditional leaders in various states adopted a strategy of delay. This is sometimes missed by historians who focus on the apparent "rush" to adopt state constitutions after Independence.

In North Carolina, for example, an early 1776 meeting of the Provincial Congress constitutional drafting committee resolved "to establish a purely dem-


128. I American Political Writing During the Founding Era, supra note 119, at 408-09.

129. W. Adams, supra note 10, at 22-26 (describing the "Founding Spirit"); B. Bailyn, supra note 68, at 19-21 (noting the "vast release of American energies"); Kenyon, supra note 14, at 114-15 (describing the "attitude of founding").

130. See J. Selsam, supra note 37, at 215-16 (Maryland man equated Pennsylvania government with "system of slavery"). William Hooper, a North Carolina delegate to the Continental Congress wrote that the Pennsylvania Constitution "made more tories than the whole treasury of Britain would have done in the same space of time." Letter from William Hooper to Joseph Hewes (Oct. 27, 1776), reprinted in, 5 Letters of the Delegates to Congress, 1774-1789, at 407, 410 (P. Smith ed. 1980).

ocratic form of government” and had prepared an anti-aristocratic draft. As a defensive response by conservatives, which has been called a defeat for the “democratic faction,” the constitution-making process was intentionally slowed down. Samuel Johnson wrote on May 2, 1776, that “[a]ffairs have taken a turn within a few days past. All ideas of forming a permanent Constitution are, at this time, laid aside.”

The radical faction in North Carolina had its roots in the back-country Regulator movement of the prior decade. The November 1776 instructions given by Orange and Mecklenburg County to their Provincial Congress delegates reflected the same notions of a simple, popular government as those advocated by Paine and the Pennsylvania Constitutionalists. These instructions were, “taken together . . . among the most complete and articulate statements of democratic aspirations to come out of North Carolina during the Revolutionary period.”

After the delay in drafting a constitution, Thoughts on Government arrived in North Carolina, was considered by the drafting committee, and made its mark. The outcome was a compromise North Carolina constitution, including a bicameral legislature but also an expanded franchise. Merrill Jensen concluded that in the final product of North Carolina’s 1776 constitution, “[m]ore than a fourth of the sections . . . dealt with and embodied reforms that had been demanded by the Regulators.”

One of North Carolina’s delegates to the Continental Congress, also a member of the Provincial Congress working on the North Carolina Constitution, wrote to Samuel Johnson:

You have seen the constitution of Pennsylvania—the motley mixture of limited monarchy and an execrable democracy—a beast without a head. The mob made a second branch of the legislature. Laws subjected to their revisal in order to refine them. A washing in ordure by way of purification. Taverns and dram shops are the councils to which the laws of this state are referred for approbation before they possess a

133. E. DOUGLASS, supra note 10, at 121, 123, 129.
134. Letter from Samuel Johnston to James Iredell (May 2, 1776), quoted in W. ADAMS, supra note 10, at 81-82. A month earlier he had written, “We are going to the devil without knowing how to help ourselves.” Letter from Samuel Johnston to James Iredell (April 4, 1776), quoted in Douglass, supra note 132, at 157.
137. For discussions of The Orange and Mecklenburg County instructions, see E. DOUGLASS, supra note 10, at 125; Douglass, supra note 132, at 159-60; W. ADAMS, supra note 10, at 107, 246-47. The Orange County instructions had been drafted by Thomas Burke, leader of the radical faction in the Provincial Congress. Douglass, supra note 132, at 159. Burke, like Paine, formed the basis for his radical political outlook prior to leaving England. E. DOUGLASS, supra note 10, at 150, 159-60.
binding influence. Elisha Douglass explained that the noted "'washing in ordure' to which [the writer] referred was the provision in the Pennsylvania Constitution that all legislation after passage must be published to the people at large before it could become law." This was what Lynd has referred to as "bicameralism from below." In early 1777, New York's delegates to the Continental Congress in Philadelphia wrote home about the controversy over the Pennsylvania Constitution of 1776:

The unhappy Dispute about their Constitution is the fatal Rock on which they have split, and which threatens them with Destruction. We ardently wish that in our own State the utmost Caution may be used to avoid a like calamity. Every wise Man here wishes that the establishment of new Forms of Government had been deferred. . . .

The committee drafting the New York Constitution, headed by Abraham Yates, Jr. who later became a leading antifederalist, stretched out the process for eight months. Robert R. Livingston, one of New York's leading conservative leaders, contrasted what he viewed as the failure in Pennsylvania with New York's moderate outcome, which he said was made possible by "[s]wimming with a Stream which it is impossible to stem." Concerning Pennsylvania, he continued: "I long ago advised that they should yield to the torrent if they hoped to direct its course—you know nothing but well timed delays, indefatigable industry, and a minute attention to every favourable circumstance, could have prevented our being exactly in their situation." The "stream" to which Livingston referred included pressure from the Committee of Mechanics in New York City and a writer called "Spartanus," who was influenced by

140. Letter from William Hooper to Samuel Johnson (Sept. 1776), quoted in Douglass, supra note 132, at 158. See also Letter from William Hooper to Joseph Hewes (Oct. 27, 1776), reprinted in 5 LETTERS OF THE DELEGATES TO CONGRESS, supra note 130, at 407, 410 (referring to 1776 Pennsylvania Constitution as the "Monster which they called a Government").

141. E. DOUGLASS, supra note 10, at 158 n.33. Hooper recommended the Delaware, South Carolina, and New Jersey constitutions as models. Id. at 159.

142. S. LYND, supra note 95, at 171.


146. Letter from Robert R. Livingston to William Duer (June 12, 1777), quoted in B. MASON, supra note 145, at 231; A. YOUNG, supra note 145, at 15.
Paine. The June 1776 Respectful Address of the Mechanics in Union was a response to a statement by the Provincial Congress that it might adopt a constitution without direct involvement of the people either through a convention or ratification of the finished product.

The Address represents one of the earliest examples, like that in Pennsylvania, of an argument for separating the process of constitution-making from that of ordinary legislation. Further, it reflects some of the early political positions taken on state constitutional issues by "lesser merchants, tradesmen, mechanics, and laborers" and, in addition, it "by implication . . . raised the question of class power and condemned rule by an elite."

New York's 1777 constitution, with its elected governor (for a three-year term with no limit on re-election), Senate, and Council of Revision which could veto bills, represented the beginning of the second wave of state constitution-making. It provided a model based on a blending of governmental powers that appealed to many of those who opposed the Pennsylvania Constitution. The Council of Revision, with Chief Justice John Jay as a member, went on to veto fifty-eight legislative enactments prior to the federal Constitutional Convention. Its veto provision served as a model for the presidential veto in the federal Constitution.

John Jay, who had been one of the principal drafters of New York's 1777 constitution, wrote home in 1779 from Philadelphia to New York's Governor George Clinton:

The exceeding high opinion entertained of your Constitution and the wisdom of your Counsels, has made a deep impression on many People of wealth and Consequence in this State, who are dissatisfied with their own; and unless their opinions should previously be changed, will remove to New York the moment the Enemy leave it.

But New York's moderate 1777 constitution had been a hard-fought victory over those pushing for radical change. John Jay reported that the final product was so delicately balanced that "another turn of the winch would have cracked

147. E. COUNTRYMAN, supra note 14, at 162-64.
148. New York Gazette, June 14, 1776, reprinted in H. NILES, PRINCIPLES AND ACTS OF THE REVOLUTION IN AMERICA 441-44 (1822). This document was apparently influenced by Paine's work. S. LYND, supra note 95, at 92-98. See also W. ADAMS, supra note 10, at 84-85 (discussing Address); E. COUNTRYMAN, supra note 14, at 162-63 (same).
149. B. MASON, supra note 145, at 154-56.
150. Id. at 156, 158. See also Lynd & Young, After Carl Becker, The Mechanics and New York City Politics, 1774-1801, 5 LAB. HIST. 215 (1964) (discussing political activities of New York City mechanics).
152. C. THACH, JR., supra note 151, at 110-16; E. DOUGLASS, supra note 10, at 65.
Alfred Young described the polar positions that led to what he described as the "middle of the road" New York Constitution of 1777. It is representative of the diversity of opinion generally concerning state constitutions during the founding decade:

The [New York] constitution of 1777 retained many "aristocratic" features. . . . At the same time the constitution made several democratic departures from provincial precedent. . . . Had extreme conservatives had their way, they would have gotten elections at four-year intervals by voice voting, an upper house indirectly chosen, a governor elected by an upper house, and a governor with more of the powers of his royal predecessors. Had the most democratic elements had their way, there would have been taxpayer suffrage, a secret ballot for all elections . . . annual election of all state officials, and popular election of county and local officials; furthermore the appointive power would have been vested exclusively in the assembly and the governor's veto power would have been eliminated.155

Maryland constitutional framers in 1776 sought John Dickinson's advice on how to avoid a constitution like Pennsylvania's. Thomas Stone, a Maryland delegate to the Continental Congress, wrote Dickinson that he thought "it not improbable that a well-formed government in a state so near as Maryland might tend to restore the affairs of . . . [Pennsylvania] from that anarchy and confusion which must attend any attempt to execute their present no plan of polity."156 Dickinson did not visit Maryland, but apparently did send his comments on the Maryland draft.157 Despite significant "anti-aristocratic" pressures, Maryland's 1776 constitution ended up being the most conservative of the founding decade.158 Many of the features of radical democracy seen in Pennsylvania were contained in the published constitutional proposal and instructions of the Ann Arundel County militia company to its county's delegates to the convention framing the 1776 constitution. Nevertheless, the delegates, in publishing their response, rejected the radical proposals.159 Furthermore, despite strict property requirements for voting for convention delegates, many radical Ann Arundel County taxpayers and militia members voted by threat of arms.160

154. Quoted in J. MAIN, supra note 10, at 176.
155. A. YOUNG, supra note 145, at 20-21. For similar general descriptions of the opposing viewpoints on state constitutions, see Lemisch, supra note 23, at 11, 16; J. MAIN, supra note 10, at 184-85; B. MASON, supra note 145, at 231-34; Patterson, supra note 59, at 42-43.
157. E. PAPENFUSE & G. STIVERSON, supra note 156, at 5 (unnumbered pages). See also E. DOUGLASS, supra note 10, at 124 (Dickinson's involvement with drafters of Maryland's constitution).
159. Id. at 173.
160. Id. at 170. "A Watchman" wrote in the August 15, 1776 Maryland Gazette:
A constitution formed without this important right of free voting being preserved to the
The experience of Massachusetts from 1776 to 1780 represents the best example of the second wave of state constitution-making. By contrast to most of the other states, including Pennsylvania, the processes leading to the well-known Massachusetts Constitution of 1780 are well documented. The availability of documentation is primarily because of the influence of local governments in the New England political structure at that time. The responses of Massachusetts towns from 1776 to 1780 "on constitutional issues comprise the most important single source for any study of democratic ideas among the common people during the revolutionary period." Willi Paul Adams has asserted that the intensity and sophistication of the public debate on republican constitutionalism in Massachusetts in 1778 rivaled the federal constitutional debate of 1787-1789. It seems, however, that Pennsylvania's less well-documented experience must be a close second.

As one historian has observed, in Massachusetts:

[The] overriding issue of the 1770's was the question of a state constitution. From the very moment the reins of government were taken up by a provincial congress in the fall of 1774, conservatives feared the unchecked democracy it seemed to represent, eagerly sought the reinstatement of the constitution of 1691 which gave coequal powers to a council and a house of representatives, and denounced the various reformist demands for a unicameral legislature and no governor.

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161. Kenyon, supra note 14, at 92 (early state constitution-making process not well documented).


163. D. Lutz, supra note 10, at 75-77.

164. E. Douglass, supra note 10, at 163. The historian of the town of Pittsfield, Massachusetts, noted:

As the anticipations of independence strengthened, what ideas should lie at the foundations of the new States—when the Colonies should assume that rank—became the subject of earnest and often of profound consideration, not only in legislative halls, but in country villages; and not less so were the constitutional provisions by which vitality could best be given to those ideas. We may be sure that rarely anywhere were these subjects earlier or more intelligently discussed than in the little meeting-house under the Pittsfield elm.

1 J. Smith, *History of Pittsfield, Massachusetts* 335 (1869).


166. Patterson, supra note 59, at 39.
Delay became the tactic of proponents of this view.167

The Reverend Thomas Allen, one of the leaders of the radical Berkshire Constitutionalists, was deeply influenced by Paine’s Common Sense.168 In February 1776, he read the pamphlet aloud to the Berkshire Committee of Inspection.169 The Constitutionalists argued for popular participation in the constitution-making process, and against aristocratic limitations on the legislature. The traditional elites, however, labeled the Berkshire Constitutionalists—who had closed the courts—as lawless mobs who sought to avoid paying their debts.170

The Berkshire Constitutionalists fought hard not only for their views of the content of the state constitution, but also for their views of the proper process for adopting a state constitution. In this sense, their arguments for popular involvement in constitution-making are comparable to the earlier Pennsylvania, North Carolina, Maryland, and New York arguments. The pressure for a legitimate state constitution led to the unsuccessful legislatively proposed 1778 Massachusetts Constitution,171 and ultimately, to the famous Massachusetts Constitution of 1780, the oldest American constitution, and a document bearing the personal mark of John Adams.172

Many of the themes contained in Common Sense and implemented in the 1776 Pennsylvania Constitution appeared the same year in New England in the anonymous pamphlet The People The Best Governors.173 The pamphlet warned: “Let it not be said in future generations that money was made by the founders of the American states an essential qualification in the rulers of a free people.”174 Many of the New England clergy, especially the Calvinists, cited this pamphlet in state constitutional debates and sermons.175 The May 19, 1777, instructions of Wilbraham, Massachusetts to the town’s representatives included the follow-

167. Id. “For four more years they succeeded in putting off a constitutional settlement, fearing it would generate, and perhaps even consolidate, social and political revolution.” Id. at 39-40.


170. Hammett, supra note 168, at 514-16; R. TAYLOR, supra note 162, at 80.

171. O. & M. HANDLIN, supra note 162, at 190. This proposed constitution and its rejection are ably discussed in S. PATTERSON, POLITICAL PARTIES IN REVOLUTIONARY MASSACHUSETTS 171-96 (1973).

172. See generally R. PETERS, supra note 3, for a thorough discussion of the Massachusetts Constitution.

173. The author of this pamphlet called himself “a friend to the popular government.” Cushing, supra note 99, at 285. See also E. DOUGLASS, supra note 10, at 15 (comparing the pamphlet with Paine’s ideas).


For materials on the involvement of the clergy in state constitutional debates of the founding decade, see A. BALDWIN, supra note 169, at 79.
ing direction: "That in all their proceedings they have Special recourse (as an assistance) to a Little book or Pamphlet Intitled, The People the best Governors or a Plan of Government, etc. . . ." 176 Similar radically democratic ideas appeared in instructions, newspaper essays, pamphlets, and arguments in state constitutional conventions in all the other states. Even in states where the Pennsylvania model was not adopted, however, its theory and Paine's ideas formed a platform for outsiders pushing for change.

In New Hampshire, several constitutional arguments similar to those raised in Pennsylvania and Massachusetts were made. In the July 1776 "College Hall Address," the towns in Grafton County asserted that they had reverted to a state of nature and: "As for ourselves, 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 purchase some of the like kind of our own manufacturing." 177 The address opposed both property requirements for representatives and the executive veto, and reflected the radically democratic constitutional platform that had prevailed in Pennsylvania and that was reflected in The People The Best Governors. 178

The drafters of the 1776 Pennsylvania Constitution sent copies to representatives of Vermont, who came to Philadelphia to lobby the Continental Congress to recognize their statehood. 179 Dr. Thomas Young, a key Pennsylvanian radical constitutionalist, published a letter, addressed to Vermonter, on April 11 and 12, 1777. Young offered the Pennsylvania Constitution "as a model, which, with very little alteration, will, in my opinion, come as near perfection as anything yet concocted by mankind." 180 Upon their return to Vermont, the representatives took up the question of a state constitution. After concluding that the recent New York Constitution of 1777 was a "horrible example," they proposed a constitution modeled closely after Pennsylvania's. 181

Georgia was the only state other than Pennsylvania and Vermont to adopt a unicameral legislature. Elisha Douglass noted, "Relatively little is known about the Revolutionary movement in Georgia, but from the available evidence

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177. 10 Provential and State Papers of New Hampshire 229-35, quoted in A. Baldwin, supra note 169, at 151.
178. A. Baldwin, supra note 169, at 151-52.
179. W. Adams, supra note 10, at 94.
180. M. Jones, Vermont in the Making, 1750-1777, at 379 (1939, reprint ed. 1968). Appended to Young's letter was a copy of the Continental Congress Resolutions of May 10 and 15, 1776. Id. at 380. Young's letter had been the first to suggest the name "Vermont." Id. at 383-84. For discussion of Young's letter, see also J. Selsam, supra note 37, at 184 n.56. On Vermont during this period, see W. Brewster, The Fourteenth Commonwealths: Vermont and the States That Failed (1960).
181. J. Main, supra note 10, at 177; M. Jones, supra note 180, at 382 ("The straw that broke the opposition to an independent state and overcame the loyalty to New York . . . was the adoption by New York in April of a conservative state constitution"). See also M. Vile, supra note 88, at 140 (discussing Vermont constitution). The Pennsylvania Constitution apparently was influential in the drafting of the constitution of the state of "Frankland." W. Dodd, The Revision and Amendment of State Constitutions 34 n.10 (1910, reprint 1970). On Frankland, see W. Brewster, supra note 180, at 181-96.
it would appear that it was accompanied by an internal revolution comparable to that of Pennsylvania." 182  More recently, however, new information has been uncovered about Georgia’s radical 1777 constitution. This constitution was strongly influenced by Button Gwinnett, one of Georgia’s delegates to the Continental Congress in Philadelphia, where in 1776 he was exposed to the wide range of state constitutional drafts, pamphlets, and arguments. 183  Benjamin Rush noted that Gwinnett had taken the Pennsylvania Constitution back to Georgia. 184  Edward Cashin has recently asserted:

Gwinnett’s legacy to Georgia was the radically democratic constitution of 1777. Gwinnett was president of the convention and chairman of the committee that drafted the constitution; it provided for a unicameral assembly, a plural executive, virtually universal suffrage, and provisions for compulsory voting. One Savannah conservative scoffed at the new constitution as the work of a small clique ‘at a nightly meeting in a Tavern.” 185

Most of the early state constitutions, though expressly recognizing the doctrine of separation of powers, 186 “tended to exalt legislative power at the expense of the executive and the judiciary.” 187  This increased legislative dominance came primarily at the expense of the executive, which had come to be identified with the British Crown, against which the colonial assemblies had struggled but never succeeded in achieving anything more than shared power. 188  With the advent of Independence, this conflict with the colonial executive could be completed; 189  the states were free to structure their governments as they saw fit. James Wilson, a key federal convention delegate, ruefully noted the “excessive partiality” to the state legislature, “into [whose] lap, every good and precious gift was profusely thrown.” 190

Even though bicameral legislatures were created in the majority of states, the lower houses were clearly the most important. 191  Not only was membership

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182. E. DOUGLASS, supra note 10, at 340.
185. Cashin, supra note 183, at 254-55.
188. For a summary of the powers of the colonial executive, see J. MAIN, supra note 10, at 99-103.
189. Id. at 143-44.
190. 1 THE WORKS OF JAMES WILSON 357 (R. McCloskey ed. 1967).
in the lower houses expanded to include "new men" through reapportionment and lower suffrage and office holding requirements, but these bodies also assumed powers formerly exercised by colonial officials.192

The upper houses in the Revolutionary state constitutions were the direct descendants of the colonial governor's councils, which performed both executive and legislative functions.193 After the Revolution, the senators no longer owed their seats to the Crown, but were instead responsible to the electorate.194 Donald Lutz has described the general picture: "The overall result was that senates were somewhat more conservative than lower houses and protected property more carefully; but they failed to provide a consistent check on lower houses, as had been intended."195

The senators began to respond to the electorate in basically the same manner as members of the lower houses were responding. Most states found themselves in the position Alfred Young described in New York:

From a conservative point of view it was apparent that the state constitution was not functioning as it was supposed to... The senators, presumably the protectors of property, "are more eager in the pursuit of popularity than the Assembly," Livingston complained. "The democratical part of the government is always encroaching."196

The governorship was profoundly transformed in the first state constitutions from an instrument of British policy during the colonial period with prerogative powers that included an absolute veto of legislative acts, to a legislatively appointed office almost totally beholden to the newly dominant state legislatures.197 After the newly independent states had struggled so long against powerful governors, it would have been politically impossible for them to then turn around and adopt strong governorships.198

The second wave of state constitution-making during the founding decade clearly established a pattern of gradual transition from early legislative dominance, or "omnipotence," toward an increased role for both the executive and judicial branches. In the early years of the Revolution, the judiciary had almost been forgotten. If anything, it was considered part of the executive power which

192. Id. at 205. See also G. Wood, supra note 10, at 162-63.
194. In addition to indirect elections, other conservative features of state senates included high property qualifications for office, longer terms than the lower house, and staggered terms. D. Lutz, supra note 10, at 89.
195. Id. at 92. See also G. Wood, supra note 10, at 503-04.
196. A. Young, supra note 145, at 62 (citations omitted).
197. S. Fisher, supra note 10, at 17; M. Jensen, supra note 139, at 107; J. Main, supra note 10, at 102.
198. J. Main, supra note 10, at 143-44.
was the target of intense hostility in the early state constitutions.\textsuperscript{199} As experience with the dominant legislative branches developed, however, the judiciary and the executive came to be viewed as a necessary check on legislative encroachments upon the rights guaranteed by the constitutions and upon the prerogatives of the other branches.\textsuperscript{200}

Although the split in Pennsylvania over the constitution, between what came to be known as the Constitutionalist and Republican "parties,"\textsuperscript{201} was the most extreme of any of the states, it reflected in a general sense the controversies that would surround the new state constitutions. The two basic factions that developed in each of the states during the battles over the state constitutions,\textsuperscript{202} and that argued over the franchise, legislative structure, and executive powers, carried over into the legislative politics of the founding decade. In virtually all of the states, two "parties," described by Jackson Turner Main as the "Localists" and the "Cosmopolitans,"\textsuperscript{203} clashed again and again over key legislative issues. These issues included the treatment (and punishment) of Loyalists, price regulation, issuance of paper money, payment of the public debt, taxation policy, debtor/creditor relations, public spending, and a range of social and cultural issues.\textsuperscript{204} Not all states faced all of these issues, or resolved them the same way, but, as Main has observed, the various "states faced many of the same problems,

\textsuperscript{199} D. Robinson, "To the Best of My Ability:"
\textsuperscript{200} G. Wood, \textit{supra} note 10, at 452. On the rise of judicial power during the founding decade, see generally \textit{id.} at 453-63; M. Vile, \textit{supra} note 88, at 157-58.
\textsuperscript{201} R. Kelley, \textit{supra} note 45, at 79-80; Ryerson, \textit{supra} note 34, at 96.
\textsuperscript{202} Pennsylvania provided the clearest example of parties contending over the state constitution. See R. Kelley, \textit{supra} note 45, at 79; R. Ryerson, \textit{supra} note 40, at 251 n.9; J. Selsam, \textit{supra} note 37, at 247. However, early party formation took place over constitutional development in many other states.
\textsuperscript{203} J. Main, \textit{Political Parties Before the Constitution} 24 (1973). Main concluded: Our investigation has disclosed the existence, in every state, of two legislative blocs or parties similarly composed and expressing . . . the same attitudes toward major issues of the period. The "Cosmopolitans" and "Localists" of Massachusetts, Maryland, and the Carolinas appear almost identical with the anti-Clintonians and Clintonians of New York, the Republicans and Constitutionals in Pennsylvania and the Northern Neck and Southside blocs of Virginia. Even the West-East division in New Jersey about 1785 took a similar form, and we can trace the same political alignments in New Hampshire, Connecticut, Rhode Island, and Delaware. \textit{Id.} at 365.


\textit{See generally} A. Becanson, \textit{Prices and Inflation During the American Revolution}:
and these problems stimulated a similar response, notably the emergence in each state of two major, opposing political blocs. According to Gordon Wood, those who found themselves on the losing side on these controversial issues began to realize that these legislative policies "were not the decrees of a tyrannical and irresponsible magistracy, but laws enacted by legislatures which were probably as equally and fairly representative of the people as any legislatures in history." Main concluded that the clashes over these issues "reached a climax in the most momentous question of the decade: the ratification of the Federal Constitution." Main continued that the adoption of the United States Constitution "involved not merely relations between the states and the central government but the many internal disputes that divided the legislatures—paper money, the court system, debts, slavery, taxes, land policy, and ultimately many more."

B. Influences on the Federal Constitution

Pennsylvania's constitutional theory and practice were influential not only in the state constitutional debates of the founding decade, but also in the drafting of the federal Constitution. Those who had fought against Pennsylvania's 1776 constitution, but repeatedly failed to change it, began to turn their sights to the national level to accomplish reform of state governments. Many participants in other states began to follow the same approach. For example, James Wilson of Pennsylvania expressed this view when he spoke before the 1787 Constitutional Convention on June 16th: "Where do the people look at present for relief from the evils of which they complain? Is it from an internal reform of their Govt.? No. Sir, it is from the Natl. Councils that relief is expected." Wilson had been an opponent of the 1776 Pennsylvania Constitution and many of the


205. J. Main, supra note 203, at 321.


207. J. Main, supra note 203, at 79.

208. Id.

209. Id.


legislative policies of the period.\textsuperscript{210} Partly as a result of this opposition, his Philadelphia home was the scene of fatal shootings in a clash between a militia company supporting price regulation and opponents of such legislative policies in 1779.\textsuperscript{211} Following the convention, Wilson told the Pennsylvania ratifying convention that "the greatest potential threats to popular rule were state governments themselves."\textsuperscript{212}

James Madison, a longtime critic of even the relatively moderate Virginia constitution,\textsuperscript{213} noted that it was the problems with how state governments were operating, rather than merely defects in the Articles of Confederation, that led to the federal convention.\textsuperscript{214} Likewise, Edmund Randolph, in introducing the Virginia Plan to the convention, argued: "[O]ur chief danger arises from the democratic parts of our [state] constitutions... None of the constitutions have provided sufficient checks against the democracy."\textsuperscript{215} Madison, like Randolph, singled out state legislatures for criticism. He argued that the state legislative branch had become "omnipotent" because "experience has proved a tendency in our governments to throw all power in to the legislative vortex."\textsuperscript{216} Gouverneur Morris of Pennsylvania targeted his own state's legislature when he argued: "Every man of observation had seen in the democratic branches of the State Legislatures... excesses against personal liberty, private property and personal safety. What qualities are necessary to constitute a check in this case?" He continued: "Ask any man if he confides in the State of Penna. If he will lend his
money or enter into contract? He will tell you no. He sees no stability. He can repose no confidence.”

Madison, Randolph, Wilson, and Morris, who were among the most influential delegates at the Constitutional Convention, saw the existing state constitutions, with Pennsylvania's as the most extreme example, as unable to provide checks against wide-ranging assaults on liberty and property by the relatively unfettered state legislatures. Concluding that meaningful change was unlikely at the state level, they began to see a new federal Constitution as the source of workable restrictions on state legislative action. It was significant for the fate of the Pennsylvania model at the federal convention that the Pennsylvania delegation, which exercised considerable influence at the Convention consisted of persons who opposed the Pennsylvania Constitution of 1776. As yet unable to redraw the constitutional and political framework in Pennsylvania, they looked for relief at the federal convention in Philadelphia.

As issues arose in the convention regarding the structure of the new federal government, most of the fundamental features of the Pennsylvania Constitution were rejected, either explicitly or implicitly. For example, when rotation in office, a key feature of Pennsylvania's constitution, was debated, Gouverneur Morris opposed it, arguing: “A change of men is ever followed by a change of measures. We see this fully exemplified in the vicissitudes among ourselves, particularly in the State of Penna.” In discussing a proposed prohibition on members of the House holding other offices, Wilson was reported to have “observed that the State of Penna. which has gone as far as any State into the policy of fettering power, had not rendered the members of the Legislature ineligible to offices of the Govt.”

In debating the need for some form of executive veto in the federal Constitution, Morris reminded the delegates that:

[the Report of the Council of Censors in Pennsylvania points out that many invasions of the legislative department on the Executive numerous as the latter is, within the short term of seven years, and in a State where a strong party is opposed to the Constitution, and watching every occasion of turning the public sentiments agst. it.]

217. 1 M. FARRAND, supra note 46, at 511-13 (statement of Gouverneur Morris, July 1, 1787).
218. 2 M. FARRAND, supra note 46, at 112-13 (statement of Gouverneur Morris, July 25, 1787).
219. Id. at 288 (statement of James Wilson, Aug. 14, 1787).
220. Id. at 299-300 (statement of Gouverneur Morris, Aug. 15, 1787).

On several occasions in The Federalist, Madison pointed to the Pennsylvania Council of Censors, noting its failure to prevent violations of the constitution. THE FEDERALIST Nos. 48 & 50 (J. Madison) (Modern Library ed. 1937).

Madison addressed the problem of widespread legislative violations of the state constitutions during the founding decade. In his survey of possible defenses against such violations, he described in detail the Pennsylvania Council of Censors, which he characterized as an “important and novel experiment in politics.” THE FEDERALIST No. 50, at 333 (J. Madison) (Modern Library ed. 1937). He concluded, however, that because the Council was split by party faction it could not stem the “spontaneous shoots of an ill-constituted government.” Id., No. 48, at 326. As a result of Pennsylvania being “violently heated and distracted by the rage of party,” Madison stated that “[t]his
Wilson had argued earlier that the federal executive needed an absolute veto because "[w]ithout such a self-defense the Legislature can at any moment sink it into non-existence."\(^{221}\) In contrast to Pennsylvania's plural executive, Wilson also "moved that the Executive consist of a single person."\(^{222}\)

Together, Morris and Wilson played the central role in creating the Presidency during the convention.\(^{223}\) The institution of the President was, of course, the antithesis of Pennsylvania's weak, plural executive branch, in which the President, even amid wartime conditions that required expanded executive authority to mobilize and organize the state's resources, was, in Margaret MacMillan's judgment, "perhaps . . . the most impotent of the war executives."\(^{224}\) At the convention, Wilson advocated an executive power in order to check legislative tyranny:

> The prejudices agst. the Executive resulted from a misapplication of the adage that the parliament was the palladium of liberty. Where the Executive was really formidable, *King and Tyrant*, were naturally associated in the minds of the people; not legislature and tyranny. But where the Executive was not formidable, the two last were most properly associated. . . . He insisted that we had not guarded agst. the danger on this side by a sufficient self-defensive power either to the Executive or Judiciary department.\(^{225}\)

One of the earliest—and most resolute—decisions of the convention was in favor of bicameralism, another direct antithesis of Pennsylvania's frame of government. There was no real controversy over this point. In adopting bicameralism, a key element of the Virginia plan, Madison recalled later that it was only the Pennsylvania delegation that dissented, "probably from complaisance to Docr. Franklin who was understood to be partial to a single House of Legislation."\(^{226}\) George Mason was sure that the "mind of the people of America" was settled . . . in an attachment to more than one branch in the legislature . . . . Their constitutions accord so generally . . . that they seem almost to have been a miracle, or have resulted from the genius of the people. The only exceptions to the establishment of two branches in the Legislature are the State of Pa. and Congs.\(^{227}\)

Although the nature of representation in the two-branch legislature led to the almost fatal large-small state split, and eventually to the Great Compromise, it was clear from the debates that the delegates thought that the federal Senate needed to be a stronger check than state upper houses had been\(^{228}\) on what censorial body, therefore, proves at the same time, by its researches, the existence of the disease, and by its example, the inefficacy of the remedy." *Id.*, No. 50 at 334.

221. 1 M. FARRAND, *supra* note 46, at 98 (statement of James Wilson; June 4, 1787).

222. *Id.* at 65-66 (statement of James Wilson, June 1, 1787).


225. 2 M. FARRAND, *supra* note 46, at 300-01 (statement of James Wilson, Aug. 15, 1787).


227. 1 M. FARRAND, *supra* note 46, at 339 (statement of George Mason, June 20, 1787).

228. Jackson Turner Main concluded that "[e]ven those senates that were intended to be aristo-
many delegates viewed as an "excess of democracy" or "the turbulence and follies of democracy." John Dickinson of Delaware clearly expressed this view.

The convention rejected the idea of annual elections, a central feature of the Pennsylvania and other state constitutions, for the House of Representatives. Randolph of Virginia supported annual elections, but conceded that they "were a source of great mischiefs in the States." On the question of apportionment, Morris opposed Randolph's motion that a census be utilized to apportion the House, arguing that the use of a census "had been found very pernicious in most of the State Constitutions." Pennsylvania had provided the earliest example of such a reapportionment provision. Finally, in supporting the new federal Constitution's direct restrictions on state legislative power, Wilson told the Pennsylvania ratifying convention:

Permit me to make a single observation in this place on the restraints placed on the State governments. If only the following lines were inserted in this constitution, I think it would be worth our adoption:

'No State shall hereafter emit bills of credit;—make anything but gold and silver coin a tender in payment of debts; pass any bills of attainder, ex post facto law, or law impairing the obligation of contracts.' Fatal experience has taught us, dearly taught us the value of these restraints.

Several features of Pennsylvania's constitutional experience found favor among the delegates at the Constitutional Convention. For example, section 9 of the Frame of Government set forth the powers of the legislature, but concluded that it "shall have no power to add to, alter, abolish, or infringe any part of this constitution." This important statement of the principle of constitutional supremacy was unusual in 1776, when most state constitutions were drafted and promulgated by legislatures and could be changed by mere legislative action. Nonetheless, it was embodied in the federal Constitution of 1787.

Pennsylvania's 1776 constitution also had introduced such concepts as the taxpayer franchise, reapportionment based on taxpayer population, and expanded eligibility for office holding—notions that were controversial in 1776 but that, Richard Ryerson reminds us, are now "casually accepted in twentieth-cen-
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He continues: "Pennsylvania was America's cutting edge of democracy, advancing that political condition to a Jacksonian level fifty years before Jackson. . . . Pennsylvania's Constitutionalists contributed dearly and heavily to the equality-of-opportunity democracy that Americans like to think they have created." Even the idea of a specialized constitutional convention itself, followed by a separate mechanism for popular ratification, which was apparently an accepted procedure by 1787, was the product of a painstaking period of trial and error with state constitution-making processes, beginning with Pennsylvania's specially elected constitutional convention in 1776.

Section 17 of the Frame of Government cautioned that "as representation in proportion to the number of taxable inhabitants is the only principle which can at all times secure liberty, and make the voice of a majority of the people the law of the land" and required reapportionment every seven years. Although Gouverneur Morris unsuccessfully opposed a similar provision in the federal Constitution, James Wilson supported what became Article I, section 2 and, in his Lectures on Law in 1790-1791 at the College of Philadelphia, stated:

[A]ll elections ought to be equal. Elections are equal, when a given number of citizens, in one part of the state, choose as many representatives, as are chosen by the same number of citizens, in any other part of the state. In this manner, the proportion of the representatives and of the constituents will remain invariably the same.

One can only speculate on whether or not Wilson's views were formed from his Pennsylvania experience, but the federal provision was clearly patterned on state provisions like Pennsylvania's. Further, Wilson's statement was important enough to be quoted with approval more than 180 years later in the United States Supreme Court's landmark one-person-one-vote decisions.

Wilson was "as familiar as anyone else on the convention floor with impeachment" as a result of his successful 1780 defense of Francis Hopkinson against impeachment under the provisions of the Pennsylvania Constitution. He played an important part, together with Morris and others, in developing the impeachment provisions of the federal Constitution.

It is impossible, of course, to determine with certainty which factors motivated delegates such as Wilson and Morris. Certainly there were various factors. The debates reveal that these two Pennsylvania delegates were knowledgeable about state constitutions other than Pennsylvania's. Morris had even participated, working closely with John Jay, in the drafting of New York's

235. Ryerson, supra note 34, at 132-33.
240. P. HOFFER & N. HULL, supra note 2, at 98.
241. Id. at 81-82.
242. Id. at 98-106.
1777 constitution. Further, both Wilson and Morris obviously viewed most features of Pennsylvania's constitution, and the experience with government operating under it, as distinctly inferior to the constitutions of other states. It seems fair to conclude, therefore, that these delegates' experience in Pennsylvania, with its constitution and the associated political battles, was a major force in shaping their constitutional thinking as expressed at the 1787 convention.

Much of Wilson's well-known support for a powerful, popularly elected president mirrored arguments that were being developed within Pennsylvania by the opponents of the 1776 constitution during the decade before the federal Constitution. Wilson was a prominent member of this opposition group which warned that contrary to the rhetoric of 1776, an unchecked legislative branch could actually constitute a danger to liberty. As this argument evolved, it began to separate government officials from the people themselves and to contend that checks on legislative power were necessary to protect the people's interests from the misuse of power. Checks such as an upper house and a more powerful, single executive elected by the people were portrayed as logical republican mechanisms to represent more effectively the popular will by avoiding the various kinds of legislative abuses. According to republican logic, an elected governor exercising effective power was a representative of the people, while an upper house was necessary to divide legislative power that had been abused. If nothing else, Wilson's argument at the convention recast arguments that Republicans previously had leveled against the 1776 Pennsylvania Constitution.

IV. CONCLUSION: THE IMPORTANCE OF PENNSYLVANIA'S 1776 CONSTITUTION TO AMERICAN CONSTITUTIONALISM

One may question the overall importance of a state constitution that was in effect for only fourteen years and the main features of which were rejected in most other state constitutions and the federal Constitution. Is the 1776 Pennsylvania Constitution simply a relic that has been tossed on the scrap heap of constitutional history and theory?

Historians and political scientists have universally concluded that Pennsylvania's 1776 constitution was a "failure." Nevertheless, such a judgment misses the influence that the Pennsylvania experience had on constitution-making during the founding decade. Paine's Common Sense and the Pennsylvania Constitution of 1776 created both a popular theoretical foundation for a simple, broad-based communitarian republic and a functioning model reflecting the real-

247. See, e.g., Ryerson, supra note 34, at 95-97 & n.1.
ization of the theory in written constitutional form. The Pennsylvania Constitution and Common Sense, together with the political arguments supporting them, provided a basis for argument, almost a platform, for outsiders or traditionally unrepresented people in other states to oppose "aristocratic" elements in the new state constitutions. In recent times, as Jesse Lemisch recognized, Paine's "thought presents an alternative and a standard by which to judge the thought of the other leaders of the Revolution." The Pennsylvania example contributed to what Robert Kelly has identified as the "fiercely egalitarian and republican philosophy [that] swept the working classes." Whatever its weaknesses, the Pennsylvania Constitution of 1776 not only survived tremendous opposition for fourteen years; it also achieved respectable support outside the state.

At the same time, Pennsylvania's first constitution gave many of the opposing political philosophy a model of government so threatening and disturbing that it galvanized them to fight it, both in the other states and, ultimately, during the events leading to the federal Constitution. Pennsylvania's constitution served as the extreme—the spectre—lurking behind the demands for broader political participation in all the states.

Richard Ryerson has concluded that the Pennsylvania Constitution of 1776 ultimately failed because it was based on a vision of society as homogeneous—consisting of "either one or a few very similar interests," and consisting of citizens who would "place their civil obligations ahead of" their individual interests. He argues that many Pennsylvanians during the founding decade came to believe that neither of these premises for constitutional design was accurate.

Ryerson's formulation represents the basic characterization of Whig political philosophy, which during the Revolutionary era was still strongly influenced by notions of a unity of interest in "the people," an unrealistic unity of interest that proved useful in Revolutionary rhetoric directed against Great Britain. This concept, and in some instances, the reality, of popular sovereignty following independence led to the predominant legislative power in the first state constitutions, reflecting the view that, in Gordon Wood's words, "a tyranny by the people was theoretically inconceivable."

In Pennsylvania, however, the requirements of openness in government, rotation in office, passage of ordinary bills through two legislative sessions, and periodic review by a Council of Censors together do seem to reflect an early

248. "The Pennsylvania constitution went farther than any other in putting the principles of the Revolution into specific constitutional form." M. Jensen, The American Revolution Within America 68 (1974). See also R. Kelley, supra note 45, at 77 ("Seen by many as the most radical in the colonies, the Pennsylvania government was designed to set an example of the democratic possibilities inherent in the new independence from royal rule").


250. R. Kelley, supra note 45, at 75.

251. Ryerson, supra note 34, at 130.

252. G. Wood, supra note 10, at 62. See also D. Lutz, supra note 10, at 60-61, 204-07 (traditional Whig theory espoused idea that executive was source of tyranny while legislature acted as protector of people from executive). For this reason, of course, the protection of the people's rights would have been far from the minds of these early constitution drafters. See supra note 17 and accompanying text for a discussion of the early understanding of rights.
awareness of the potential for abuse by a powerful legislature. Jackson Turner Main made the following comment about Pennsylvania’s 1776 legislative procedure requirements: “Prevented from doing harm, [the legislature] might then be trusted with power to do good.” Such provisions hardly attest to a conception of society as homogeneous, in which “tyranny by the people” could not happen. Indeed, the rhetoric surrounding the adoption of the 1776 Pennsylvania Constitution bespoke a clear understanding of, and a desire to capitalize on, the sharp distinctions and conflicts among segments of society. Pennsylvania simply utilized unfamiliar mechanisms for remedying legislative abuses—the more familiar being a second, “upper” house, an executive veto, and an independent judiciary. The Pennsylvania Constitutionalists would, therefore, not fit within Willi Paul Adams’s description of the “realists of 1776,” who “identified different interests and institutionalized them in graduated property qualifications for voting and office holding, in the system of checks and balances, and in the establishment of bicameral legislatures.”

The drafters of the Pennsylvania Constitution of 1776 may not have been motivated primarily by any ideal vision or idea of a homogeneous, virtuous society. They were more likely motivated in large part by a practical, instrumental desire to gain and maintain political advantage—a motivation that led to their peculiar ideal vision of government. They had seized political power and did not want to risk losing it. As James Willard Hurst observed:

Men framed, fought over, and adopted the first state constitutions . . . in an atmosphere of the utmost political realism. They saw they were dealing with the balance of power between interests, and they were frankly skeptical of the permanency of what they had done. . . . Like their successors, the first makers of constitutions saw their work in terms of contests for power and advantage, or the security of power and advantage already won.

The Pennsylvania Constitutionalists associated upper houses, and executive and judicial power with “aristocratic” government, not only in theoretical terms, but in an immediate, practical sense. The class-based, anti-aristocratic rhetoric of the times makes this apparent. For example, a writer in the Pennsylvania Evening Post asserted that “[t]he rich having been used to govern, seem to think it is their right; and the poorer commonality, having hitherto had little or no hand in government, seem to think it does not belong to them to have any.” There is nothing theoretical about this point of view.

Perhaps the most important contribution of Pennsylvania’s 1776 constitu-

253. J. MAIN, supra note 10, at 152. See also W. ADAMS, supra note 10, at 248-50 (discussing state constitutional limitations on Pennsylvania legislature).

254. W. ADAMS, supra note 10, at 229.


257. Pennsylvania Evening Post, July 30, 1776, quoted in W. ADAMS, supra note 10, at 177. See also D. HAWKE, supra note 12, at 184-87 (describing class-based arguments); S. ROSSWURM, supra note 63, at 88-93, 103-08.
tion was to provide a highly visible, national focal point for the competing arguments on the key constitutional issue of the founding decade—namely, the relationship of separation of powers and checks and balances. The Pennsylvania Constitution was acutely aware of the separation of, and the differences among, governmental powers. It was the not yet fully understood concept of checks and balances, which they associated with monarchical government, that they rejected. Vile makes this point as follows:

It is often stated that the Constitution of Pennsylvania did not embody the separation of powers, whereas in fact it was the basis for the whole Constitution. It is the failure to distinguish clearly between the separation of powers on the one hand, and checks and balances on the other, which leads to the confusion. The founders of the 1776 Constitution were bitterly opposed to any semblance of the checks and balances of the monarchical or aristocratic constitution.

As early as 1776, opponents of the Pennsylvania Constitution began to voice concern about the absence of checks in the governmental structure. A writer in the Pennsylvania Gazette criticized the constitution because it had "no distribution power into different hands, that one may check another." Farewell to Liberty," wrote Benjamin Rush in 1777, "when the sacred bulwarks of a Constitution can be invaded by a legislature!"

Executive branch officials serving under the 1776 Constitution saw this crucial distinction when they complained publicly of the legislature's "various measures... which we conceived prejudicial to the State and derogatory to the Constitutional rights of this Board," which tended to "annihilate the powers and usefulness of the Executive part of government..." They warned that they would "never make a voluntary surrender of our privileges, so we will not tamely and silently submit to any invasion of them." These elected officials argued clearly that the separation of powers doctrine was being violated, but in the absence of any mechanism to check those violations, they could only appeal publicly to "[their] mutual constituents, the true source and fountain from whence all [their] authority [was] derived."259

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The criticism was not a detached, theoretical argument. It was, rather, a practical argument made by those who did not want to share power with the newly active elements and who opposed on their merits both the legislative policies being adopted and those they feared would be adopted in the future. For example, Rush argued in 1787 that the defects in many of the state constitutions were due to hasty drafting, but...
based on his intimate experience with constitutionalism in Pennsylvania it is unlikely that he really believed this. Thomas Jefferson had made a similar argument against the Virginia Constitution in 1781 in his *Notes on the State of Virginia.*

The focus on the absence of checks and balances in the 1776 Pennsylvania Constitution continued to take shape, as Wood has argued, "so much so that within a few years the separation and distribution of power had become the major justification for all the constitutional reforms the Republicans proposed." For example, the recommendations of the first session of the Council of Censors in 1783 emphasized the need for an upper house, an elected governor, and an executive veto, much like those contained in the Massachusetts Constitution of 1780. These changes, however, were not made in Pennsylvania until 1790, after adoption of the federal Constitution. Nonetheless, the Pennsylvania example served to stimulate much earlier mechanisms of checks and balances in other states, beginning in New York in 1777, progressing through Massachusetts in 1780, and culminating with the federal Constitution in 1787.

Pennsylvania Chief Justice Robert N.C. Nix, Jr., and Mary Schweitzer are correct when they assert, "Pennsylvania's rich constitutional history—particularly the ten years of debates over the Pennsylvania Constitution of 1776—had undoubted influence upon constitutional thought at the time the federal Constitution was written." Furthermore, an appreciation of Pennsylvania's first constitution, and its specific provisions, is necessary for analyzing properly many contemporary Pennsylvania constitutional law questions. But the 1776 Penn-

unfavorable circumstances. We had just emerged from a corrupted monarchy. Although we understood perfectly the principles of liberty, yet most of us were ignorant of the forms and combinations of power in republics . . . . In our opposition to monarchy, we forgot that the temple of tyranny has two doors. We bolted one of them by proper restraints; but we left the other open, by neglecting to guard against the effects of our own ignorance and licentiousness.

Id.

264. "This constitution was framed when we were new and inexperienced in the science of government. It was the first, too, which was framed in the whole United States. No wonder then that time and trial have discovered very capital defects in it." **THE PORTABLE THOMAS JEFFERSON** 162 (M. Peterson ed. 1975).


267. Paine looked back on the 1790 Pennsylvania Constitution, and compared it with the 1776 document: "The Constitution formed by the Convention of 1776 . . . had many good points in it which were overthrown by the Convention of 1790, under the pretense of making the Constitution conformable to that of the United States. . . ." **Constitution Reform**, in 2 P. FONER, *supra* note 12, at 993.


269. Id. at 153-54.


Pennsylvania Constitution, as we have seen, has a much broader, lasting importance. It represented a model of government that seems quite unrelated to what we now think of as American constitutionalism—one that has almost been forgotten. Its place in the evolution of constitutional ideas in this country, however, should not continue to be overlooked. Although ultimately unsuccessful, it represented an important, and legitimate, early model of government for the newly independent states. This constitution and the experiences with government under it also provided a major stimulus for the federal Constitution and for the development of more effective mechanisms of checks and balances, which are now considered one of America’s unique contributions to constitutional theory and practice.
