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State Constitutions and the Governance Project

> The polis was a way of life, and the politeia, or constitution, was the plan for a way of life. The constitution describes what that life should be like, and the institutions by means of which will be achieved that way of life.
>
> Donald S. Lutz, *The Origins of American Constitutionalism*, 13

From the beginning of our republic through the present day, the constitutions of the American states have defined the structure and strategies of governance in the relevant polities. To understand the foundational power of state regulation, the police power, we need to understand how this power emerges from the ideas and designs of the state constitutions. Allowing for the particulars of individual state constitutions, we can resort to some general lessons and principles that will help define the scope of the project of state constitutionalism in the United States and, with it, the connection between that continuing project and the police power in the American states.

So far as the creation and sustenance of these documents are concerned, state constitutions span a wide spectrum in time, from the period before the establishment of our constitutional republic in the 1780s, as the first state constitutions were adopted, continuing throughout the gradual admission of additional states to the union and through the profound constitutional changes throughout the nineteenth and twentieth centuries.[1] Constitutions were hardly static: State constitutions would be frequently amended, sometimes soon after their original adoption,[2] and this reform project continues to the present day.[3] Despite the vast temporal expanse of this project of state constitution-making, we can still draw some useful lessons from the processes of constitution creation and reform beginning in the revolutionary era and continuing in the decades afterward.[4]

The states' powers to govern were shaped around choices made by the framers of the first and later state constitutions. As to the specific content of these powers, the Tenth Amendment of the US Constitution reserves powers not granted to the national government to the states respectively, or to the people.[5] Yet this amendment says nothing meaningful about what these state powers were to consist of.

Therefore, the basic idea and contours of the powers reserved for the states respectively, or to the people, including the police power, became the sole province of the state constitutions. Those constitutions would come to define the nature and scope of that power, as we will explore in more depth and detail in later chapters. What we want to consider here, drawing upon the history and logic of state constitutional development, is how choices in state constitutions reflect ultimate choices about how best to govern their communities. The core question of state constitutionalism is how to use fundamental law as architecture and as materials to implement the common good and, simultaneously, how best to safeguard individual and group interests and values in the preservation of liberty and private property. In short, state constitutionalism and the state police power are concerned with common matters.

REVOLUTIONARY STATE CONSTITUTIONALISM AND ITS CONSEQUENCES

As the esteemed historian Gordon Wood has taught us, revolutionary-era constitutions delivered what was an essentially new approach to governance in the new republic, an approach that would resonate not only in the creation of the US Constitution, but also in the early evolution of our scheme of American constitutionalism more generally.[6] The period of revolutionary constitutionalism marked a great advance in Americans' conception of the purpose and function of their new government.[7] Naturally, the most urgent task at hand was the colonists' severing of the connection with Great Britain. The efforts to disconnect through structural-formal mechanisms began before the Declaration of Independence and the Revolutionary War. "Prior to independence," writes Alan Tarr, "some colonies viewed the framing of constitutions as a mechanism for promoting a dissolution of ties with Great Britain."[8] This divorce was reflected in the hothouse of constitution-making that took place between the signing of the Declaration of Independence and the Constitutional Convention. Influential leaders worked tirelessly during this period to formulate constitutional structures and techniques.[9]

To be sure, many of these first documents were short and underdeveloped. As James Madison describes them in Federalist No. 47, state constitutions "carry strong marks of the haste, and still stronger of the inexperience, under which they were framed."[10] Whether this haste contributed to a skepticism about the status of the documents as fundamental law is difficult to assess. "In the states," Tarr writes, "reverence for the founders of state constitutions and their handiwork was notably lacking, as the orgy of nineteenth-century constitution-making attests."[11] And yet, when examining these earliest efforts at constitutional creation closely, we can see within them the emergence of a post-independence ideological framework aimed at balancing liberty and governance. As Donald Lutz writes: "Complete foundation documents in their own right, the state constitutions each produced a political system that could deal with the collective problems of their respective peoples …. The early state constitutions thus stand as the fulcrum in American constitutional history."[12]

What "problems" were these early framers trying to solve? Two stand out: First, what structures could they create that would enable good governing, that is, governance that would promote the general welfare of these new American citizens?[13] Second, how could they best ensure that the instruments of good governing would behave in the *public's* interest and, moreover, would not interfere unnecessarily with individual liberty and with private property rights? These goals were prominent not only because liberty and property were worthy objectives in their own right, but because their colonial experience – as well as other matters connected to the forging of new institutions and assumptions about individual and collective behavior (as Madison and other framers wrote about) – had inspired a real fear of potential tyranny and expropriation.[14]

Looking back at this critical period in the formation of constitutions and governmental power, it is important to note that the framers could not have known what was to follow in the few years after these first revolutionary-era constitutions were created. While they were not drafting these constitutions on a blank slate, they could not have expected the deterioration of the confederation and the weakness of the structures and institutions that the framers of the initial Articles of Confederation had constructed.[15] It is commonplace to observe that the framers of the US Constitution, deliberating in the heat of the Philadelphia summer, had learned powerful lessons from watching both the conduct of the states and the processes of constitution-making through which those states' conduct had been enabled.[16] However, it is rarer for historians to probe deeply into questions of how the framers of the state constitutions could have thought about the nature and scope of state legislative and executive powers, not knowing what governance powers the national government would come to have under the US Constitution and, moreover, what the processes and ideas that brought forth the historic and transformative document of 1787 would mean for the exercise of state power on the ground.

Still, there are important lessons we can draw from the dynamic of state and federal constitution-drafting. First, the drafters of the state constitutions expected that the state legislature would have the principal authority, and indeed the main burden, of governing in the interest of their respective state's citizens.[17] They knew also that the primary protector of liberty and property would be the states.[18] However, it is clear from what they said and what they did that they saw the state legislature as the supreme source of legal authority under the state constitution to help implement a well-ordered society and, also, as the prime mechanism for ensuring that the rights of their free people would be protected against encroachment.

The framers of these early constitutions dwelled on – perhaps even obsessed over – the perils of overbearing executive control and the danger it posed to individual liberty, and indeed much of their rhetoric that we have recovered over more than two centuries focuses on these issues.[19] "The evisceration of executive power," historian Jack Rakove writes, "was the most conspicuous aspect of the early state constitutions."[20] However, they were also faced with what was fundamentally a set of practical

issues and were tasked with devising a way to carry out the functions of government to improve the lives and conditions of their state citizens. Improving social and economic conditions was imperative in these revolutionary and post-revolutionary states. The conditions for these improvements could be realized through "the beneficent hand of the state as reaching out to touch every part of the economy."[21]

From this idea of active governance in the pursuit of the common welfare, American historians in the republican tradition have concluded that the revolutionary-era constitutions reflected a distinct theory of government, one that departed from the liberal theory that is so often associated with the forging of the US Constitution.[22] State government power, Gary Gestle has recently written, "derived from a different political principle – one that held the public good in higher esteem than private right."[23] Gordon Wood writes in a similar vein: "The sacrifice of individual interests to the greater good of the whole formed the essence of republicanism and comprehended for Americans the idealistic goal of their Revolution."[24] Pennsylvania, it has been noted, made this objective explicit in its Declaration of Rights, declaring that "government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation or community; and not for the particular emolument or advantage of any single man, family or set of men, who are a part only of that community."[25] In order to implement this greater good, the "state governments possessed a staggering freedom of action" and these powers "could be deployed progressively."[26] The essential idea, expressed in these myriad ways by scholars and contemporary observers, was that the state constitutions reflected an active, public-spirited conception of governing, one that echoed Whiggish political theory as translated into the distinctly American context by the ambitious framers of our first state constitutions and drawing upon the emerging theories of governing.[27]

The challenge for state constitution-makers was to create these broad powers while ensuring that the government would not devolve into a monarchy. Different states tackled these challenges in different ways, with Pennsylvania, for example, going to the extreme of not including the position of governor, New Hampshire not providing a chief executive of any kind, and the inclusion in all early constitutions of some system of separation of powers.[28] Framers were understandably worried about the concentration of power in the executive branch and undertook structural strategies to ameliorate these problems.

In addition to their ambient fear that broad constitutional power would create a roadmap toward a return to monarchical rule, the framers of the first constitutions worried also about the interests of their community members in preserving their prerogatives as free men, including the ability to accumulate and use private property and to enjoy the fruits of liberty, something obviously connected to their quest for independence from Great Britain.[29] Constitutional historiography of this period emphasizes the wide sphere of government regulation and activist governance, but this was only part of the context of this constitution-making. The rendering of broad state governance power does not mean that the framers were ambivalent or agnostic

about protecting private property and individual liberty. The opposite was the case. "The safety of private property from arbitrary governmental requisition," Kruman writes, "was part of the whig culture colonial Englishmen shared with most inhabitants of the realm."[30] Likewise, individual liberty was treasured by colonial citizens, albeit a conception of liberty that was tied to the understandings of the times. The framers cared about property and liberty and, indeed, viewed the state constitutions – along with the US Constitution – as structural bulwarks against evisceration of these valuable rights. The public good and the preservation of private property and ordered liberty were not irreconcilable, at least as viewed by the eighteenth-century constitutional framers. What *was* required were mechanisms to assure the protection of liberty and property, while also investing in state governments the means of governing effectively.[31] Revolutionary-era constitutional framers were therefore aligned around the need to create constitutions as effective governance mechanisms, as means of protecting against the aggrandizement of power by a would-be king and the consolidation of power by factions in and out of government, and also as mechanisms to ensure that the government could function effectively and do the various "things of the utmost importance to the happiness of their respective citizens."[32]

We can draw three conclusions from this fertile period of state constitution-making during the revolutionary era. The first conclusion is that state constitutions "became instruments of government rather than merely frameworks for government."[33] This was reflected in how state constitutions evolved from parchments, sometimes eloquently forged by their creators, to discernible and meaningful governance instruments. Second, and relatedly, they were deeply concerned with issues of power, its nature, and its contours. They could not credibly expect that the national government would have adequate power under the Articles of Confederation to protect health, safety, and the general welfare. And so they looked inward, to their own constitutional structures and legal tools, to ensure that government would have adequate power to govern. Third, they were not content to borrow from their previous British masters the idea of a royal prerogative, however familiar this was to them, and so they worked hard to formulate an idea of governance that would be robust but not unlimited. In their drafting and the accompanying explanations of their project, they pursued twin goals: enabling the government, and especially the stage legislature, to govern effectively; and protecting individual liberty and private property. They faced the dilemma of how to construct mechanisms of power and how to restrain power once assigned, a dilemma, of course, that had become a persistent topic of consideration for political theorists over the centuries and in the lead-up to the creation of the American republic.[34]

In reflecting on the legacy of the state constitution-makers in the revolutionary era, our leading historian of this period writes: "Not only did the formation of the new state constitutions in 1776 establish the basic structures of our political institution, their creation also brought forth the primary conceptions of America's political and constitutional culture that have persisted to the present."[35] Neither the process

nor the ultimate designs of these revolutionary-era constitutions were mechanical or even particularly tentative. They expressed the founders' instincts and preferences for governance strategies in this early, ambitious period. A full understanding of American constitutionalism cannot be accomplished without a close look at state constitution-building in the beginning years of the republic.

SUBORDINATION, CONSENT, AND POPULAR SOVEREIGNTY

The quest to escape from the bootheel of the monarch and to create mechanisms to protect against a reprise in control was paramount to the framers' goals in creating these new constitutions. "Madison's definition of tyranny was the one standard at the time, the arbitrary use of power, that is, contrary to the community's permanent, aggregate interest."[36] Thomas Paine made this point explicit as he "condemned as an arbitrary human invention the division of mankind into kinds and subjects."[37] Bloodied and battered by British domination, the framers thought of strategies to implement new forms of government that would be resistant, if not impervious, to capture by power-hungry individuals acting under asserted authority. As a consequence, "[t]he state constitutions of the 1770s and early 1780s also brimmed with provisions aimed at dismantling the aristocratic elements of the colonial social order."[38]

From this experience, the framers looked to structural mechanisms that would protect against the risk of subordination. These efforts presaged Madison's famous statement in Federalist No. 51: "If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary.... A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions."[39] To be sure, Madison's principal auxiliary precaution, the establishment of a national veto on all disfavored state legislation, failed to garner adequate support.[40] However, Madison and his allies' (including Alexander Hamilton) forceful expressions of concern about state legislative power did succeed in fueling the effort in the Constitutional Convention to create suitable mechanisms for federal power.[41] This was the point, after all, in replacing the Articles of Confederation with a new constitution, one that would have sufficient means to empower a national government to undertake useful tasks on behalf of this nascent nation and manage a group of previously sovereign states.[42] Despite this profoundly important and novel effort at creating a constitution that would ensure a successful United States, there remained risks to private property and individual liberty. After all, the incentives to self-deal and the opportunities for factions to prospect did not disappear with the creation of the US Constitution, so long as individuals lived and worked in their respective states, and were subject to the authority of state governments. Indeed, the scale of state government made factions especially formidable and therefore threatening.

State constitutions remained essential in preserving and nurturing popular sovereignty. They created various structural mechanisms, supplemented as time passed by

national structures and, later, by rights made enforceable by courts. These structures are rightly highlighted when the question is asked, "How did the framers ensure that power would be diffused and managed?" What undergirded these practical components was an idea – a novel idea that was essential to the forging of a new constitutionalism that would be compelling and sustainable. This was the idea of popular consent to government: the idea of popular sovereignty as the foundation of all constitutionally appropriate power.[43] Popular sovereignty was the foundational element in the emergence of a post-revolutionary constitutional ideology. At its core, the emerging constitutionalism of the post-revolutionary era was committed to popular sovereignty as the fulcrum of public authority. Here, the People rule. This was the boldest, most coherent manifestation of America's break from Great Britain's hegemony over the colonies and their prerogatives over the British scheme of constitutional governance. And so, for example, Delaware's Bill of Rights proclaimed: "All Government of Right originates from the people, is founded in Compact only, and instituted solely for the Good of the Whole."[44] Virginia: "All power is vested in, and consequently derived from, the people."[45]

The first state constitutions, and later the US Constitution, embodied the idea that the power lodged in government, at whatever level, was entirely conditional on popular consent. As Donald Lutz writes, "the state constitutions evolved and extended a step in consent theory begun in the colonial charters by blending societal consent with governmental consent. The ratification of a constitution not only established a form of government, but also affirmed the essential sociocultural base upon which the government rested."[46] This logic was radical in important respects. Colonialists had fought hard to secure independence from Great Britain on grounds that were focused on the abuses meted out to them and, relatedly, the burdens imposed without consent or meaningful participation in the activities of government ("taxation without representation").[47] However, it would not have been illogical for the framers to embrace existing sets of government institutions, and especially an elected legislature, but with added mechanisms designed to ensure that it would be more representative and more attuned to the will of the people. More novel was the idea that all power would derive directly from the power of the people, that the government was forged from the idea of popular sovereignty. No colonialist had direct experience with such a scheme, and thus they had to look beyond their experience – to the leading thinkers of government and constitutionalism – to assemble the logic and the strategy. It is in this principal respect that we can speak of the American revolutionaries as developing a new science of government.[48]

In describing popular sovereignty and citizen consent as fundamental ideas in eighteenth- and nineteenth-century American constitutionalism, we generally emphasize the function that these ideas serve in guarding against abuse of power and attacks on well-ordered liberty. However, there is another function that popular sovereignty performs, one that is important for any comprehensive analysis of constitutionalism and public power. **The framers saw popular sovereignty and consent**

as improving the capacity and promise of government to advance the common good. Popular sovereignty is not only about checks on oppressive, arbitrary power, but also about good governing. "Majority will and the common good were inextricably linked" by our constitutions' framers.[49] The people's will in creating governmental institutions to act in their name was a means of advancing the people's welfare. Representative democracy was not just an abstraction that assured that citizens' consent would be respected, but a new structure of governance that would fuel law-making for the public good.[50] These constitutions would ensure "not only that everyone enjoy equality before the law or have an equal voice in government, but also that everyone have an equal share in the fruits of the common enterprise."[51]

The most obvious association between popular sovereignty and good governance is that the people in their manifest choices and in their delegation of responsibility to elected representatives to act in their name and on their behalf could decide ultimately whether and to what extent public officials were acting appropriately. In this sense, the structure of representative government, reflected through the prism of a strong separation of powers, enables citizens to monitor their representatives, thereby assuring that legislators are acting in the public interest and are working effectively to govern in their behalf.[52]

The commitment to popular sovereignty as the fundamental principle undergirding state constitutionalism continued long after the founding period. As a number of state constitutions were amended in the late nineteenth and early twentieth centuries to provide for mechanisms of direct democracy, the connection between popular sovereignty, public-spirited law-making, and accountability was made ever more manifest.[53] Moreover, the relative ease of amendment, and even total reconstruction, was indicative of the enduring commitment to popular sovereignty as a critical component of state constitutionalism, from its origins to the present day.[54]

DEMOCRACY AND REPRESENTATION

With popular sovereignty as the main source legitimizing public authority under the state constitutions, the framers of these documents looked to develop institutions that would implement their vision of good governing and the securing of individual liberty and private property, goals that they understood as compatible, not contradictory.[55] The new constitution had to, as Jennifer Nedelsky writes, "solve the pressing problem of legislative injustice."[56] And later state constitutional reformers looked to sustain these mechanisms through various safeguards and incentive-compatible arrangements. The goal of protecting against subordination and ensuring fidelity to popular sovereignty and the people's will was most clearly manifest in the commitment to an elected legislature – and to the principle that such a legislature would be supreme in the exercise of public power. As Wood writes:

> It was neither the widespread suffrage nor the institution of the electoral process throughout the governments but the appropriation of so much power to the

> people's representatives in the legislatures that made the new governments in 1776 seem to be so much like democracies …. The real importance of the legislatures came from their being the constitutional repository of the democratic element of the society or, in other words, the people themselves.[57]

The principle of legislative supremacy reflected the framers' commitment to democracy as a guiding light around which governmental power was structured. To be sure, the framers were concerned throughout the revolutionary period and for many years afterward with cabining the excesses of democracy.[58] And so we see myriad statements of concern and even opprobrium about democracy as a means of governance.[59] Nonetheless, democracy had more than an ambient influence on how the colonists thought about their new experiment with governance and well-ordered liberty, and it likewise had an influence on some of the design mechanisms in the original constitutions. Efforts to keep the executive branch restrained in its influence over legislative choice found their origins in a commitment to democratic rather than aristocratic decision-making; so, too, did the commitment to rotation in office.

Ultimately, the framers looked to design a mixed government, with different spheres of power, a set of checks and balances, and, significantly, different kinds of electoral mechanisms in order to accomplish multiple ends and objectives in government design.[60] And yet the purpose of this mixed government was not to diminish democracy, but to temper its excesses and organize democratic processes in a way that maintained the best features and aims of a system of governance in the public interest.[61]

SKEPTICISM, STRUCTURE, AND CONSTITUTIONAL RESETS

The creation of new institutions (and adaptations of old ones) to carry out the objectives of good governance and restraints on the exercise of arbitrary power did not usher in a seamless and wholly successful scheme of constitutional governance in the post-revolutionary era. Our framers were imaginative and prodigious constitutional designers, but they were neither oracles nor magicians.

Difficult matters of democracy and representation would come to the center of the stage after the founding period and at various critical junctures in the century that followed. In the Jacksonian period, reformers sought to ameliorate the Whigs' carefully constructed architecture of legislative representation and expertise by introducing distinct checks on government power as well as structural schemes meant to limit the discretion and flexibility of legislators.[62] Emboldened democrats brought to the table a more powerful chief executive and also more conspicuous popular control of governmental institutions, including, significantly, the courts.[63] Such reforms reflected emerging skepticism with the idea expressed by the eighteenth-century Rhode Islander, quoted by Gordon Wood, that "[i]t is in their legislatures … that the members of a commonwealth are united and combined together into one coherent, living body. This is the soul that gives form, life and unity to the commonwealth."[64]

During this period, the role and function of the state legislatures were under particular scrutiny. The framers' resolute faith in the legislatures as instruments of representative democracy faced challenges in the decades following the adoption of the US Constitution and the constitutions of the various states. "As the supposedly representative legislatures drifted away from the people," Wood writes, "men more and more spoke of the legislators' being just other kinds of rulers, liable to the same temptations and abuses rulers through history had shown – all of which made comprehensible the intensifying desire to make the representatives more dependent on the opinion of their constituents and the increasing invocations of 'the collective body of the people' to set against the legislatures."[65]

The concerns with the elected legislatures – in what they did and what they did not do – grew steadily from the time of their creation through to the first decades of the next century. "[W]e now see," wrote Ben Franklin, "that quite as much mischief, if not more, may be done, and as much arbitrary conduct acted, by a legislature."[66] Criticisms of the early state legislatures came from many quarters. Edmund Randolph thought the constitutions too democratic. He wrote that "[o]ur chief danger arises from the democratic parts of our state constitutions …. None of the constitutions have provided sufficient checks against the democracy."[67] Further, as Robert Williams noted in his depiction of early state constitutionalism, "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."[68] "The people's will," writes Wood, "as expressed in their representative legislatures and so much trusted throughout the colonial period suddenly seemed capricious and arbitrary."[69]

Caretakers of these first revolutionary-era constitutions had basically three choices available to them to ensure that the state government would not abuse power and undermine the goal of popular sovereignty and citizen welfare. One was to directly impose a strict limit on the state legislative power, something that could be accomplished by restricting state powers to those explicitly granted and, following that limitation, granting precious few powers. This was, of course, the option taken with the federal government under the US Constitution. A second option was to develop a meaningful scheme of checks and balances to control legislative excess. A final option was to establish a bevy of individual rights designed to restrict official power by interposing suitable bulwarks against government overreach.[70]

In key ways, options one and three relied on a judiciary that could enforce such constraints – a reliance nearly impossible to contemplate at a time when no serious consideration had yet been given to judicial review as an awesome power through which the judiciary could invalidate duly enacted legislation.[71] Moreover, the very idea that legislative power would be limited by resort to external enforcement was hard to square with the principle of plenary legislative power and, perhaps even

more, with the trust citizens had placed in their elected representatives to govern well on behalf of the public interest.[72]

For the time, the most sensible strategy was the middle one, to construct and design governmental institutions that would limit power and, especially, to establish a formal separation of powers. Distributing powers, as Publius would insist at the time that the US Constitution was being debated,[73] would have the effect of erecting barriers that would impede any accumulation of power that might threaten liberty. The separation of powers was truly the sort of "auxiliary precautions" that the framers designed to cabin and channel governmental power away from abuse toward salutary aims. Later, there would be debate about whether and to what extent maintaining this separation of powers would require judicial intervention.[74] But the question of how involved the judiciary would be in the quest for an effective scheme of checks and balances would remain opaque in this era. It was enough to describe the separation of powers as an important mechanism for accomplishing the state constitutions' aims of protecting against subordination, realizing popular sovereignty, and energizing government to govern on behalf of the general will and welfare.

The separation of powers was one of the brilliant and essential contributions of the framers to this new constitutional design.[75] This separation was one element in the larger matter of distribution of powers and the creation of a mixed government system. This was intended to improve the performance of government. There would be, as well, a relationship between this separation of powers and a broad authority given to the government to act. This wide compass, necessary to carry out the core purposes and functions of governance, required guardrails; and, especially before the development of individual rights as judicially enforceable checks on official action, these guardrails were furnished by the separation of powers.

Despite the faith the framers and other theorists put into these structural mechanisms of controlling and channeling power, concern about legislative power and its scope remained. It is important to remember that one of the core precepts of state constitutionalism was that state constitutions, unlike their federal brethren, were documents of limit.[76] This meant that limits would have to be forged from within the structure of governance or from rights and other rules exogenous to the plenary power that was embedded in the document.[77] Broad, indeed awesome, legislative power went hand in glove with this precept.

The most significant efforts to reset the objectives of democracy and connect these objectives to the schemes and structures of representation came during the Progressive era, a period in which reformers were successful in cabining legislative power and in creating rules and institutions to limit, and in some instances reconfigure, legislative power. These reform efforts, which began in the early nineteenth century and continued through the early twentieth, were born of a tension that persisted between the goals of democracy and the goals of representation, of the need to maintain the integrity of popular sovereignty through consent, not only metaphorical (as with the elected legislature) but actual.[78]

Notwithstanding these strong reform efforts and what might appear in the hot gaze of the Jacksonian period and its aftermath to be a withering of legislative power, law-making through elected state legislatures remained resilient – even in the face of serious concern about the performance of state legislatures. Political leaders spent a remarkable amount of time tweaking and repairing legislative structures, but none of this effectively disrupted the view of legislatures as the most promising institutions for safeguarding health and safety and for promoting the people's welfare – a view that we will see supported by the evolution of the police power in the nineteenth century, the subject of Chapter 2. To be sure, this project of legislature improvement and constitutional repair is an important part of the story, especially in our republic's first century. Political officials, acting in a way consistent with the idea of popular sovereignty, developed creative constitutional rules to facilitate good governing and public-regarding initiatives.[79] These include requirements that legislators act for a public purpose and that they not enact special legislation.[80] Later in the century, reformers added balanced budget requirements, the line item veto, and other structural mechanisms that had both the purpose and effect of checking legislative power. Related doctrines developed by courts, such as the public rights doctrine (which was mainly embedded in social constructivist accounts of private property and its protection)[81] and the public trust doctrine,[82] were fashioned to improve legislating. But more than that, it is important to see these doctrines and initiatives as a means of promoting democracy and maintaining the conditions for democratic decision-making. In sum, the state constitutions' framers aspired to create institutions to implement popular will and safeguard popular sovereignty: **It's not only about giving the *state* the power, it is about power to the people.**

LIBERTY AND PROPERTY RIGHTS

The concern with circumscribing threats to liberty and, especially, to private property loomed large in the minds and agendas of revolutionary-era constitutional framers, and it persisted to a large degree afterward. "'Wherever the real power in a Government lies,' [Madison] told Jefferson, 'there is the danger of oppression. In our Governments the real power lies in the majority of the Community, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the constituents.'"[83]

In modern historical literature in the republican tradition, much is made of the rejection of the standard view that our American constitutionalism – here speaking of both the US Constitution and the state constitutions – unequivocally embodied classical liberal theory.[84] In embracing this historical revisionism, we risk neglecting the myriad concerns the framers had with overweening state power and inadequate safeguards of property and liberty.[85] This is even more true of nineteenth-century historiography, where the emphasis is on the progressives' triumph over a static, mechanical view of individual rights through the embrace of

active governance and a wide remit for the police power.[86] Nonetheless, when we look at the construction of state constitutions in the early republic, we see a consistent concern with protecting individual rights,[87] albeit accompanied by some deep uncertainty about the proper institutional mechanisms for undertaking this protection.[88] As new constitutions were introduced and existing constitutions substantially reformed, the concerns with assuring a suitable measure of protection for individual rights, including property and contract and also individual liberty, persisted. While no state constitution forged anything resembling a libertarian vision of sharply limited government and the preservation of sacrosanct individual dominion over real and personal property, state constitutions from the beginning were preoccupied with maintaining an adequate sphere of freedom. These concerns were both ideological and instrumental.[89] They would ensure that individuals be able to develop and utilize the instruments of commerce that would enable them and society to prosper.

With regard to internal constraints on governmental power, the framers were in a dilemma born of the fact that, as individuals whose lived experience was with British constitutionalism, they had a limited structural vocabulary available to them. They could imagine a scheme of rights, although not necessarily enforceable against validly enacted acts of the sovereign. They could imagine a system of separated and divided powers, as described by Montesquieu and other influential thinkers.[90] However, it was hard to envision limits on legislative power built into their constitutional system. Insofar as the state constitutions were always understood as documents of limit, not grant, where then would the limits come? The answer to this persistent question would remain somewhat elusive in the coming decades.

The early and later state constitutions did include various rights provisions.[91] Interestingly, the state police power was included in the declarations in the Pennsylvania constitution of 1776,[92] a choice that may seem structurally clumsy, given the intuitive distinction between a right and a power, but the framers may have done so to make crystal clear that the health, safety, and general welfare of its citizens was an elemental principle of state government and could be expressed as a right of individuals to good governance. After all, rights in this formative era of American constitutionalism commonly focused on the community, rather on the individual.[93]

However conspicuous or inconspicuous rights were in these early constitutions, there remained as an open question whether these rights would be enforceable against governments, either through the judiciary or some other mechanism.[94] For some of the rights delineated, the prospect of external enforcement through judicial review seemed problematic, if not impossible, to contemplate, and there are good reasons to expect that revolutionary-era state citizens and public officials who acted on their behalf saw it as such. Nonetheless, writes, Tarr, "the insusceptibility of various provisions to judicial enforcement was not a flaw, because the declarations were addressed not to the state judiciary primarily but to the people's representatives, who were to be guided by them in legislating, and even more to the liberty-loving and vigilant citizenry that was to oversee the exercise of governmental power."[95]

More robust and meaningful structural safeguards would await Americans' experience with the constitutions and the judiciary, the latter of which would prove vital in maintaining these safeguards by nurturing what inevitably grew from them, as well as maintaining the rights that would function as side constraints on the exercise of legislative and administrative power.

If the framers were so skeptical about including a full collection of rights in their state constitutions, what explains their steadfast effort to include a Bill of Rights in the US Constitution? The juxtaposition between the national and state constitutions in this realm reflects two different approaches to implementing the principle of popular sovereignty. For the national Constitution, the limits on the federal government's powers were sensible from the perspective of the framers (at least those framers whose views prevailed in these debates) because they knew that the residuum of the people's powers and thus their sovereignty would come from powers reserved to the states or to the people respectively. With respect to state constitutions, popular sovereignty would be ensured through careful attention to the structure of representative democracy, that is, to the design and functioning of the legislature; and it would also be protected through a diligent design of separation of powers and also of individual rights. In short, it was the design of the overall structure of the state constitutions that would work to protect popular sovereignty.[96] Moreover, the relative ease of amendment of state constitutions, whether through legislation or plebiscites or through the extraordinary mechanism of constitutional conventions, was a key means of ensuring that popular sovereignty would be safeguarded.

As we can consider the unsteady state of judicial intervention in protecting the people against legislative abuse and excess on the one hand and against legislative weakness on the other, we should focus on the modes of reasoning the courts used to interrogate legislative power. Despite the advent of written constitutions as fulcra of governmental power, federal and state courts were much more comfortable in using the common law as the lodestar source of their decisions. The force of common law reasoning in the first several decades of the nation's history was important in shaping our constitutional discourse, especially before we accumulated a large number of decided cases that could be described accurately as our emerging constitutional law.

The reliance on common law to scrutinize governmental power and interpret individual rights had at least two important effects in the developing constitutionalism of the republic's early years. First, common law reasoning viewed the judge as essentially discovering the law rather than interpreting text, much less making law in any discernible way.[97] Moreover, this discovery looked backward to principles and precedents in the common law as it had developed in merry old England. "Constitutional provisions were better understood as reminders than as enactments."[98] Looking to English law to discern the contents and limits of governmental power was a difficult, if not impossible, task, as, after all, there was no coherent notion of judicial review that would have supported an American court's finding that legislation violated the fundamental law and should thus be struck down. Yet,

even after judicial review was well established in state constitutionalism, as happened fairly early in the process and before Marbury v. Madison,[99] fidelity to a discovery model of judicial decision-making rendered problematic the courts' constitutional decisions in cases where precedent was lacking and in which questions of power and rights were prominent.

A second feature of the common law was also pertinent to early examinations of power and rights, and that is the reliance on considerations of natural rights and natural law.[100] This modality of reasoning was important in shaping how courts examined structural and (especially) rights issues.[101] Accordingly, it became part of the courts' police power jurisprudence, at least until the Lochner era passed into oblivion.

Judicial intervention in constitutional disputes has followed some discernible patterns across the history of state constitutionalism. In his two important books on state constitutional law, Judge Jeff Sutton has described in illuminating detail the ways in which state and federal courts have used (and should use) state constitutional arguments to resolve disputes about power and rights.[102] He reminds us that while judicial review emerged early in our state constitutional history, there was considerable skepticism about the practice, for "[e]arly Americans did not trust judges and preferred that their liberty and other rights rest in the hands of their peers or what was then perceived as the next-best option: legislatures."[103] And yet matters changed over time. Ultimately, Sutton writes, "[t]he country became increasingly comfortable with empowering judges to resolve constitutional cases and with perceiving them as trustworthy agents of the people."[104]

A wealth of scholarship has been devoted to the question of how judicial review and, more specifically, searching scrutiny of legislative action evolved and took hold in the American political culture and in the legal system.[105] Moreover, this is even before we get to the even more voluminous normative scholarship on whether this has been a mainly salutary development.[106] There is little on offer here in this book on this larger question. But one point that is pertinent to this chapter's analysis of state constitutionalism and what we call the good governing project is this: Judicial interventions by the state and federal courts into matters of governmental power and of rights have been shaped in important ways by the fact and the consequences of having written constitutions and, furthermore, having, at the state level, relatively prolix written constitutions. Not only do these long constitutions provide much to grapple with, both at the level of implementation institutions (including legislators, governors, agencies, municipalities, etc.) and at the level of judicial interpretation, but the structure and strategies of judicial intervention are the natural outgrowth of the fact that our government functions within the parameters of written constitutions. Despite the copious amount of modern commentary in the legal literature emphasizing the indeterminacy of text and the ideological sources of judicial decisions,[107] only the most hardcore cynic (or realist, if one prefers) can insist that there is no connection between the fact that we live in a system of written constitutions and

the phenomenon of persistent judicial scrutiny of exercises of official power and inquiries into individual rights and their role as trumps.

GOVERNING STEADILY, AND STURDILY

Foundational principles of state constitutionalism (e.g., popular sovereignty, plenary legislative power) and pragmatically valuable structural mechanisms (e.g., separation of powers, direct democracy, limits on legislative power) are all part of the project of balancing the need for an active state government – active, that is, in its pursuit of the public good – with the need to preserve and safeguard interests essential to the well-being on individuals in the wider community, including the various sticks in the bundle of property rights and individual liberty, in both its positive and negative dimensions. When we measure the success of state constitutions by looking closely at constitutional performance and failure, we should consider how effective these operational principles and structures are in negotiating this balance between common good constitutionalism and individual freedom. This is in essence the measure of what we have called the project of good governing under a state constitutional framework.

A functioning state constitution will also be resolutely attendant to the perturbations of politics, coming from within the state, and also nationally. For a constitution to function well on behalf of the people subject to it, it must be stable. As political scientist Adam Brown writes in a recent book on the relationship between constitutional length and stability:

> Democratic constitutions must balance opposing ideals of democratic responsiveness and constitutional stability. As for stability, constitutions establish the boundaries and rules governing the governing process, providing a sure arena for the otherwise unsure game of politics. To provide this sure arena, constitutions must be so written as to ensure their own permanence.[108]

In recent work that emerges from the insights of modern rational choice political theory, Barry R. Weingast and various co-authors have emphasized key features of constitutional design and performance that are relevant to our discussion here. First, Weingast et al. point out the reasons for having constitutional constraints on political activity. Individuals will reasonably fear that their assets will be expropriated by others and worry, therefore, about subjecting their property and liberty to majoritarian political processes.[109] Enter constitutions. Constitutions create governance instruments that will respond to this rational fear and will guard against unrestricted majoritarianism.[110] Rights are perhaps the clearest and most essential type of such restraints; but so too are structural safeguards, including various checks and balances hardwired into constitutions.

Furthermore, it is important that these countermajoritarian instruments be self-enforcing, that is, not rely on politics or even principally on adjudication to

assuage concerns of the populace. Constitutions create stability in governance, and, likewise, stability in public behavior.[111] It is important to avoid coups and disruptions that would happen if individuals, ever fearful, felt that they needed to act purposively to protect their interests.[112] Ideally, constitutions forge what Weingast et al. call a "self-enforcing equilibrium,"[113] that functions as a means of social insurance to secure the durability of the governing regime and provides for a fertile arena in which commercial transactions and other forms of community intercourse can function. Other institutions (e.g., a system for contracting; an orderly scheme of property rights) are important as well. But constitutions are a necessary condition for the operation of a state that remains efficacious and stable.[114] Without the constitution and its manifest countermajoritarian mechanisms, citizens will view politics as high stake affairs. They will fear, and not without basis, the government and also their fellow citizens. Even short of descending into a Hobbesian state of nature,[115] they will be limited in their willingness to create the conditions and structures for a successful economy; and they will find the establishment of a system of ordered liberty highly problematic. When we look at stakes in particular, the possibility of voice and even visit are not fanciful. States can be expected to compete with one another with institutional architecture. We can expect (and even hope) that this will lead to a race to the top; at the very least, the incentives are directed toward constructing meaningfully stable and efficacious constitutional arrangements.

Key constitutional powers, along with carefully configured rights, are part of the edifice of these constitutional arrangements that aspire to facilitate good governing. This is a normative ideal, but is also explicable on the positive political theory of governmental choice. This is an old idea, going back to ancient thinking about constitutionalism and carrying through the forging of American constitutionalism and our new science of government in the eighteenth century. It is also a *new* idea, as we think systematically about the capacity and potential of state constitutions in safeguarding liberty, facilitating democracy, and promoting the common good through sensible regulation and, in particular, the protection of health, safety, and morals.

To say, then, that the constitution aspires for government to act steadily and sturdily is just a homely way to represent the insight that good governing is a fundamental element of the project of state constitutionalism more generally. These are aspirations. Constitutional developments in the real world well frequently disappoint. To see these constitutions as too-malleable reflections of discrete policy choices or as unstable in that they are buffeted to and fro as the winds of political change blow is to distort the project of state constitutionalism in both a positive and a normative sense. State constitutions matter precisely because they are instruments of governance (albeit incomplete), not just museum pieces that contain an ultimately thin description of governmental ambition, a charge often levied at the US Constitution and many constitutions of other countries.

STATE CONSTITUTIONS AND THE PROJECT OF GOOD GOVERNANCE

In creating the state constitutions and also in reforming them in key respects over the republic's first two centuries, political leaders and ordinary citizens have forged three elements that are critical in understanding the nature and scope of the police power. First, they created in constitutional form an idea of governance that has persisted across political struggles, a Civil War, and a reset in the relationship among levels and institutions of government, and that is that the role and responsibility of state governments is to promote the general welfare. These new constitutions would, as Willi Paul Adams wrote, ensure that "everyone have an equal share in the fruits of the common enterprise."[116] Representative democracy would be in service of popular sovereignty and, further, in the aim of good governing, and, accordingly, the legislature was front and center, in power and in role.[117] This key idea found common ground in Whigs and Federalists, in Jeffersonians and Jacksonian Democrats. And, to telegraph a discussion in a later chapter in this Part, it proved incredibly resilient in the face of a sustained efforts on the part of conservative judges to undermine it through a particular approach to individual liberty and limited government. Second, state constitutions were perhaps most impactful on patterns of American constitutionalism and political choice, most generally in their experimentation with myriad mechanisms of governance structures, both with respect to enabling and limiting public power. By contrast to the US Constitution, where the basic template for government power was set in the terms of the original document (which is not to say that there has not been profound evolution in the actual performance of institutions in exercising this power over 235 years), state constitutions have given us imaginative, albeit occasionally chaotic, mechanisms of governance.[118] We will see as this book proceeds the ways in which these mechanisms have affected the structure and the functions of the police power. But we can say generally that these mechanisms of design have affected state and local governance in many fascinating ways. Third and finally, the actual functioning of governmental actors, wherever they are located, has been a consequence of how the state constitution has framed and shaped governmental power and conduct.[119] Government decision-making can undermine constitutional objectives, as we see when we take a close look at government performance in operation. However, it can also be true in a different context that bad governing derives from poor decisions made in the forging and framing of a state constitution. Garbage in, garbage out.

In any event, good governing as a goal is not a free-floating, politics-less concept. It is teleological, and the relevant governmental purposes that emerge from our constitutional objectives give us the best measure of success or failure. Discerning these objectives is a project of state government, acting in the name and interest of "we the people" of our respective states. And this is the project of national constitutionalism as well. The government here is not limited to courts, but includes all relevant branches and institutions working collaboratively, and through processes

that we view as broadly democratic.[120] As these choices are being made, first in constitutional design and next in implementation, we can and should measure our policies, and the procedures that yield such policies, by reference to these summative objectives. We can then speak coherently of the quality of constitutions and constitutional arrangements; likewise, we can assess constitutional failure. The criteria are forged in the processes of state constitutional development. What it means to say that governing is good or bad is that such governing serves or disserves state constitutional objectives. The police power, as we will explore in more detail, has a general purpose and that is the promotion of good governing consistent with the objectives of state constitutionalism.

A good portion of the analysis of state constitutionalism in this chapter has focused on historical episodes and the political-historical context of choices made in the forging and reforming of state constitutions. Viewed from 10,000 feet, we should see these stories as part of a fundamental governance project. State constitutions grow out of ideas of how public officials should best govern on behalf of we the people; and, as well, ideas of how best to maintain our freedoms and liberties in the face of circumstances in which authority might be invoked, and maybe to our detriment. As an ideal, state constitutions are designed to facilitate good governing. The police power, in its evolution from the beginning to its present, is an instantiation of this basic idea, as we examine in the remainder of this book.

NOTES

1. See generally John Dinan, *State Constitutional Politics: Governing by Amendment in the American States* (2018).
2. For example, the New Jersey Constitution, adopted in 1776, was amended in 1777; the Oklahoma Constitution, adopted in 1907, was amended on the same day it was ratified.
3. The frequency of change – generally, and relative to the US Constitution – confounds serious efforts to warrant an "originalist" approach to state constitutions. We need not dwell on the matter of how exactly the history of state constitutions should specifically impact judicial interpretations or even whether anything like an original public meaning of the police power is possible. It is enough to say here that the very enterprise of originalist state constitution is rendered more problematic than a similar enterprise in interpreting the US Constitution because of the especially dynamic character of state constitutions. For an illuminating discussion of historical evidence in state constitutional law, see Maureen Brady, "Use of Convention History in State Constitutional Law," *Wisc. L. Rev.* 1169 (2022).
4. See Christian Fritz, "Fallacies of American Constitutionalism," 35 *Rutgers L. J.* 1327, 1327 (2004) ("Fundamental assumptions made about our early constitutional experience are inaccurate [in] denying us the capacity to see that the history of American constitutionalism is dynamic, not an elaboration of a static idea from 1787").
5. US Const., *Tenth Amendment*.
6. See generally Gordon S. Wood, *The Creation of the American Republic, 1776–1787* (1998). See also Gordon S. Wood, "Foreword: State Constitution-Making in the American Revolution" 24 *Rutgers L. J.* 911 (1992–93).

7. See generally Willi Paul Adams, *The First American Constitutions: Republican Ideology and the Making of the State Constitutions in the Revolutionary Era* (2001).
8. G. Alan Tarr, *Understanding State Constitutions* 60 (1998).
9. We speak here of state constitution-making as a general enterprise, keeping in mind that the decisions were being made in separate states. However, there were common concerns that animated the framers' efforts. "Some of the similarities," Alan Tarr writes, "found among state constitutions of the era can be traced to the states' common experience of British tyranny, which they understood in terms of a shared republican theory." Tarr, *Understanding State Constitutions*, at 66. This common experience was reflected in similar approaches to a set of common problems. "[A] concern for and consensus on basic issues of political principle did exist, and this contributed to the similarities among the constitution-makers in various states as they sought to give shape and authority to new governments that were consistent with republican principles, protective of rights, and committed to the public good." Ibid., at 91. See also Donald S. Lutz, *The Origins of American Constitutionalism* (1988), at 104 ("the documents display considerable inventiveness, but there are nevertheless strong institutional similarities and a political culture … basic to them all").
10. The Federalist No. 47. Tarr, *Understanding State Constitutions*, at 97. Other commentators give this formation period a more optimistic rendering. Daniel Hulseboch, in his influential account of New York and its role in the transformation of constitutionalism in the colonial era, notes that these documents "contained more than the nuts and bolts of administration. Each constitution also conveyed a vision of how the government related to its citizens and expressed the rights and duties of the people." Daniel Hulseboch, *Constituting Empire: New York and the Transformation of Constitutionalism in the Atlantic World, 1664–1830* 260–61 (2005). This was not undermined by the frequency of amendment in the post-revolutionary period for, as to these documents, "the people revised to reflect changing notions of how government should function each day on the ground." Ibid., at 260.
11. Tarr, *Understanding State Constitutions*, at 97.
12. Lutz, *Origins*, at 97.
13. See Wood, *Creation*, at 53 ("The sacrifice of individual interests to the greater good of the whole formed the essence of republicanism and comprehended for Americans the idealistic goal of their Revolution").
14. Ibid., at 410 ("Wherever the real danger in a government lies," Madison wrote, "there is a danger of oppression").
15. See ibid., at 391–467 (describing the "critical period before the Articles of Confederation were supplanted by the new constitution").
16. The concerns that the citizenry, echoed by the framers in various statements and writings, had with the behavior of state governments was palpable during this period. Despite the persistent and enduring place of the states in the competition of our constitutional republic in this first critical phase leading up to the enactment of the US Constitution, citizens of the new nation remained skeptical about state functioning in this new system. Jack Rakove notes the caution that framers expressed about state governance even while preserving state powers and limiting the national government. "Wilson and Madison," Rakove writes, "held that the states should be confined to their 'proper orbits' around a national 'sun' that they would neither 'warm [n]or enlighten'." Jack Rakove, *Original Meanings: Politics and Ideas in the Making of the U.S. Constitution* 170 (1996). He continues: "Nothing in these arguments suggested that they regarded the states as laboratories of liberty or nurseries of republican citizenship." Ibid. See also ibid., at 165 ("Because

the states bore the brunt of the final and economic problems that the Revolution created, they also offered the most conspicuous target for popular disenchantment with all government").

17. See, e.g., Marc. W. Kruman, *Between Authority & Liberty: State Constitution Making in Revolutionary America* 4 (1997) ("Americans wrote constitutions that enfeebled governors and situated virtually governmental power in the hands of enlarged legislatures more entirely representative of the people").
18. See ibid., at 155 ("Revolutionaries easily combined their understand of the common good with a belief in the inviolability of least at a few individual rights").
19. See generally M. J. C. Vile, *Constitutionalism and the Separation of Powers* (1967).
20. Rakove, *Original Meanings*, at 250.
21. Oscar & Mary Flug Handlin, *Commonwealth: A Study of the Role of Government in the American Economy: Massachusetts, 1774–1861* 52 (1969).
22. See Wood, *Creation*, at 50.
23. See Gary Gerstle, *Liberty and Coercion: The Paradox of American Government* 56 (2015).
24. Wood, *Creation*, at 53.
25. Pennsylvania Constitution of 1776, Declaration of Rights, art. 5. See generally Harvey C. Mansfield, Jr., *Taming the Prince: The Ambivalence of Modern Executive Power* (1989).
26. Wood, *Creation*, at 57.
27. For a good discussion of eighteenth-century Whiggish political theory, see Donald Lutz, *Popular Consent and Popular Control: Whig Political Theory in the Early State Constitutions* (1980).
28. See generally Robert E. Williams & Lawrence Friedman, *The Law of American State Constitutions* 268–74 (2d. 2023). See also Kruman, *Authority & Liberty*, at 132 ("In the eighteenth century, colonists worried about and sought to reduce the governors' executive formal powers"). One rather unusual example illustrating state efforts to prevent monarchical rule comes from New York, a state which was especially struggling with ongoing British presence and military battles at the time and sought to resist encroaching monarchy by vesting in its constitution exceptionally great power into their executive, who retained the right to dismiss the legislature.
29. See generally Jennifer Nedelsky, *Private Property and the Limits of American Constitutionalism: The Madisonian Framework and its Legacy* 6 (1989) ("property was not just an abstract symbol. It was a right whose security was essential to the economic and political success of the new republic").
30. See ibid., at 134.
31. See Adams, *First American Constitutions*, at 311 ("The safety of private property from arbitrary governmental requisition was part of the whig culture colonial Englishmen shared with most inhabitants of the realm").
32. Quoted in Rakove, *Original Meanings*, at 192.
33. See Lutz, *Origins*, at 29.
34. See Vile, *Constitutionalism and the Separation of Powers*.
35. See Wood, "State Constitution-Making," at 911.
36. Wood, *Creation*, at 84.
37. See Adams, *First American Constitutions*, at 103.
38. Joseph Fishkin & William E. Forbath, *The Anti-Oligarchic Constitution: Reconstructing the Economic Foundations of American Democracy* (2022), at 38.
39. The Federalist No. 51, at 269 (James Madison) (Sheridan Books, 2001).
40. On this ill-fated experiment, see Alison LaCroix, "What if Madison Had Won? Imagining a Constitutional World of Legislative Supremacy," 45 *Indiana L. Rev.* 41 (2011).

41. See Gordon S. Wood, *Power and Liberty: Constitutionalism in the American Revolution* 54–73 (2021).
42. See ibid., at 94–99. See also Pauline Maier, *Ratification: The People Debate the Constitution*, 1787–1788 (2010).
43. See generally Bernard Bailyn, *The Ideological Origins of the American Revolution* (1967). The framer most closely identified with the fashioning of popular consent as the fulcrum of constitutional authority was Thomas Jefferson. However, the theme animated most of the framers, including John Adams, James Wilson, Madison, and even most of the anti-federalist skeptics.
44. Del. Bill of Rts., § 1.
45. Va. Declaration of Rts. of 1776, § 2.
46. Lutz, *Popular Consent* at 69.
47. A phrase identified with colonialist James Otis. See Daniel A. Smith, *Tax Crusaders and the Politics of Direct Democracy* (1998).
48. See generally Wood, *Creation*, at 53–57.
49. Lutz, *Origins*, at 29.
50. See Fishkin & Forbath, *Anti-Oligarchic Constitution*, at 37–39.
51. Adams, *First American Constitutions*, at 188.
52. In an interesting reexamination of the separation of powers in state constitutions, state constitutional scholar Jon Marshfield emphasizes the utility of such formal separation of spheres of authority in enabling the citizens to hold their governmental accountable, the idea being that if they knew who were responsible for the particular decisions they would be able to exercise their democratic right to control their government. See Jonathan L. Marshfield, "America's Other Separation of Powers Tradition," 73 *Duke L. J.* (2023).
53. See generally Thomas Goebel, *A Government by the People: Direct Democracy in America, 1890–1940* (2002).
54. For an extended critique of the notion of sovereignty, including a discussion of how limits to authority and mechanisms of accountability make sovereignty conceptually meaningless, see Don Herzog, *Sovereignty RIP* (2020). On popular sovereignty in particular, see ibid., at 269–77 ("We don't have to locate sovereignty somewhere and we needn't pride ourselves on our genius in assigning it to the people. We can instead abandon it").
55. See Jennifer Nedelsky, *Private Property* ("property was not just an abstract symbol. It was a right whose security was essential to the economic and political success of the new republic"). The protection of private property was not motivated by purely libertarian motives. The framers understood that property was necessary to participate with equality in the democratic project. For an especially bold statement of this view, see Fishkin & Forbath, *Anti-Oligarchic Constitution*, at 32–33. "For the revolutionary generation," they write, "political liberty … depended on economic equality… [I]t is no wonder that the revolutionary generation believed republican governments had essential distributional tasks, and that they inscribed such precepts in their founding charters…"
56. Nedelsky, *Private Property*, at 23.
57. Wood, *Creation*, at 163. See also Lutz, *Origins*, at 105: The strong inclination to legislative supremacy is not surprising … The legislature was their protector against governmental tyranny, and they saw it as much more effective than were bills of rights and courts."
58. See generally Richard Hofstadter, *The American Political Tradition* (1957).
59. "Hence it is, that such democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security, or the rights of property; and in general have been as short in their lives as they have been violent in their deaths." The Federalist No. 10, at 46 (James Madison) (Sheridan Books, 2001).

60. Tarr writes: The founders "emphasis on majority rule, together with their use of the less emphatic ought in delineating rights, might seem to indicate a lack of commitment to individual rights … But this conclusion fails to distinguish between violations of rights and legitimate restrictions on them. It also assumes a fundamental incompatibility between majority rule and the protection of rights, as well as between individual rights and the common good." Tarr, *Understanding State Constitutions*, at 80.
61. See, e.g., Jessica Bullman Pozen & Miriam Seifter, "The Democracy Principle in State Constitutionalism," 119 *Mich. L. Rev.* 859 (2021). See also Daniel J. Elazar, "The Principles and Traditions Underlying State Constitutionalism," *Publius*, Winter 1982, at 11–12.
62. On Jacksonian democracy, see Daniel Feller, *The Jacksonian Promise: America, 1815–1840* (1995).
63. See Alexis de Tocqueville, *Democracy in America* 93 (H. C. Mansfield & D. Winthrop trans. 2002). See also Jeffrey S. Sutton, *Who Decides? States as Laboratories of Constitutional Experimentation* 15 (2022).
64. Wood, *Creation*, at 162.
65. Ibid., at 409.
66. Quoted in ibid., at 432.
67. Ibid., at 67, quoting from I Farrand at 26–27.
68. Williams & Friedman, *American State Constitutions*, at 67–78.
69. Wood, *Creation*, at 405.
70. See Rakove, *Original Meanings*, at 289–90.
71. "The notion that judges could invalidate all governmental actions inconsistent with their interpretation of the constitution was simply unknown in the 1770s and early 1780s and would have been considered far beyond the scope of legitimate judicial power." Tarr, *Understanding State Constitutions*, at 72. See also Sylvia Snowiss, *Judicial Review and the Law of the Constitution*, Ch. 2 (1990).
72. See Rakove, *Original Meanings*, at 297–302 (discussing Montesquieu and the role of English political thought in developing early ideas of judicial review). See also Wood, *Creation*, at 454 ("Once the reaction to legislative supremacy had set in … a new appreciation of the role of the judiciary in American politics could begin to emerge").
73. See, The Federalist No. 51.
74. See, e.g., Jesse Choper, *Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court* (1980). See also Z. Payvand Ahdoubt, "Enforcement Lawmaking and Judicial Review," 135 *Harv. L. Rev.* 937 (2022).
75. See Williams & Friedman, *American State Constitutions*, at 267–78. See also Jim Rossi, "Institutional Design and the Lingering Legacy of the Antifederalist Separation of Powers Ideals in the States," 52 *Vand. L. Rev.* 1167 (1999).
76. See Williams & Friedman, *American State Constitutions*, at 281–82. See Client Follow-Up Co. v. Hynes 390 N.E. 2d 847, 847–50 (Ill. 1979).
77. This is referring just to constraints internal to the state. National oversight would be secured through the supremacy of the federal government under the powers granted to them by the US Constitution.
78. See Adams, *First American Constitutions*, at 260: "A pessimistic view of human nature was part of the argument for a system of checks and balances. A carefully thought out scheme of opposing and cooperating institutions could, perhaps, counteract the ill effects of human weakness."
79. On nineteenth century constitutional reforms, see Dinan, *State Constitutional Politics*.
80. See Williams & Friedman, *American State Constitutions*, at 312–14; Sutton, *Who Decides?* at 249–56.

81. See, e.g., James L. Huffman, "The Public Interest in Private Property Rights," 50 *Okla. L. Rev.* 377 (2020).
82. See Erin Ryan, "The Public Trust Doctrine, Property, and Society," in *Handbook of Property, Law, and Society* (Graham, Davies, & Godden eds., 2022).
83. Wood, *Creation*, at 410.
84. See ibid.
85. See, e.g., Nedelsky, *Private Property*, et seq.
86. See Gerstle, *Liberty & Coercion*; Fishkin & Forbath, *Anti-Oligarchic Constitution*; William J. Novak, *New Democracy: The Creation of the Modern American State* (2022).
87. See Wood, *Power & Liberty*, at 36 ("In these new republic constitutions, the Revolutionaries' central aim was to prevent power … from encroaching on liberty").
88. See Tarr, *Understanding State Constitutions*, at 60–63
89. See James W. Ely, Jr., *The Guardian of Every Other Right: A Constitutional History of Property Rights* 42–58 (2008).
90. See generally Vile, *Constitutionalism and the Separation of Powers*.
91. See Tarr, *Understanding State Constitutions*, at 75–82
92. See Penn. Const. of 1776, Declaration III.
93. See Tarr, *Understanding State Constitutions*, at 77–78.
94. See Jason Mazzone, "The Bill of Rights in the Early State Courts," 92 *Minn. L. Rev.* 1 (2007).
95. See Tarr, *Understanding State Constitutions*, at 78.
96. See generally Gordon S. Wood, "State Constitution-Making."
97. See generally Melvin Eisenberg, *The Nature of the Common Law* (1991). See also John M. Finnis, "Natural Law and Legal Reasoning," 38 *Clev. St. L. R.* 1 (1990).
98. See Stuart Banner, *The Decline of Natural Law: How American Lawyers Once Used Natural Law and Why They Stopped* 22 (2021).
99. 5 U.S. 137 (1803).
100. See Banner, *Natural Law*, at 18–45.
101. See, e.g., Randy Barnett, "The Intersection of Natural Rights and Positive Constitutional Law," 25 *Conn. L. Rev.* 853 (1993).
102. See Sutton, *Who Decides?* at 34.
103. See ibid., at 59.
104. Ibid.
105. See Sai Prakash & John Yoo, "The Origins of Judicial Review," 70 *U. Chi. L. Rev.* 887 (2003).
106. See, e.g., Jeremy Waldron, "The Core of the Case Against Judicial Review," 115 *Yale L. J.* 1346 (2006); Larry D. Kramer, "Foreword: We the Court," 115 *Harv. L. Rev.* 4 (2001); Herbert Wechsler, "The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government," 54 *Colum. L. Rev.* 543 (1954).
107. See, e.g., Lee Epstein, et al., *The Behavior of Federal Judges: A Theoretical and Empirical Study of Rational Choice* (2013); Jeffrey Segal & Harold A. Spaeth, *The Supreme Court and the Attitudinal Model* (1993).
108. See, e.g., Mark Tushnet, "Following the Rules Laid Down: A Critique of Interpretation and Neutral Principles," 96 *Harv. L. Rev.* 781 (1983). For a comprehensive survey of the debate, see Brian Leiter, "Legal Indeterminancy," 1 *Legal Theory* 481 (1995).
109. See Barry R. Weingast, "The Political Foundations of Democracy and the Rule of Law, 91 *Amer. Poli. Sci. Rev.* 245 (1997). See also Douglas C. North & Barry R. Weingast, "Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth Century England," 44 *J. Econ. Hist.* 803 (1989).

110. See Barry R. Weingast, "High Stakes to Low Stakes Politics: Should Majoritarians Embrace Countermajoritarian Constitutional Provisions?" (ms. 2022).
111. See, e.g., Rui de Figueiredo & Barry R. Weingast, "Self-Enforcing Federalism," 21 *J. L. Econ. & Org.* 103 (2005).
112. See generally James L. Buchanan & Gordon Tullock, *The Calculus of Consent: The Logical Foundations of Constitutional Democracy* (1962); Peter C. Ordeshook, "Constitutional Stability," 3 *Const. Pol. Econ.* 137 (1992).
113. See Sonia Mittal & Barry R. Weingast, "Self-Enforcing Constitutions: With an Application to Democratic Stability in America's First Century," 10 *J. L. Econ. & Org.* 1 (2011). See also Adam Przeworski, *Democracy and the Market* (1991); Russell Hardin, "Why a Constitution?" in *The Federalist Papers and the New Institutionalism* (Bernard Grofman & Donald Wittman eds., 1989).
114. The idea that a state, with certain characteristics, is necessary to ensure an optimal level of security and liberty is a familiar one in the political theory literature. Indeed, variations of this theme go back to Hobbes and Machiavelli. A valuable recent treatment of some of these general issues is Philip Pettit, *The State* (2022). See also Daren Acemoglu & James Robinson, *Why Nations Fail: The Origins of Power, Prosperity, and Poverty* (2013).
115. See Thomas Hobbes, *The Leviathan* (C. B. MacPherson ed. 1968).
116. Adams, *First American Constitutions*, at 188. See also Daryl J. Levinson, "Parment and Politics: The Positive Puzzle of Constitutional Commitment," 124 *Harv. L. Rev.* 657 (2011).
117. See Wood, *Creation*, at 163; Lutz, *Origins*, at 105.
118. As to the common mission across diverse states, Tarr summarizes the framers' accomplishments thusly: "[A] concern for and consensus on basic issues of political principle did exist, and this contributed to the similarities among early state constitutions. So too did the sense of common purpose among the constitution-makers in various states as they sought to give shape and authority to new governments that were consistent with republican principles, protective of rights, and committed to the public good." Tarr, *Understanding State Constitutions*, at 91.
119. See generally Daniel B. Rodriguez, "State Constitutional Failure," 2011 *U. Ill. L. Rev.*
120. See Michael C. Dorf & Charles F. Sabel, "A Constitution of Democratic Experimentalism," 98 *Colum. L. Rev.* 267 (1998).