

## II. Review Article

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# Rethinking the American Constitutional Tradition: National Dimensions in the Formation of State Constitutions

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David Alan Johnson, *Founding the Far West: California, Oregon, and Nevada, 1840-1890* (Berkeley: University of California Press, 1992)

The study of the American constitutional tradition reflects a curious duality given the central importance of federalism in the United States: an overwhelming preoccupation with the federal constitution in contrast to the comparative neglect of state constitutions. In one respect, the focus of scholarly attention is easily explained in terms of the dominant and pervasive role the federal constitution plays in the American constitutional order. The significance of federal constitutional issues during the nineteenth and twentieth centuries, along with the rise of federal power and the exercise of judicial review by the United States Supreme Court, has made the federal constitution the key document in American history. Thus, the enormous number of studies dealing with the federal constitution is not surprising. Indeed, American constitutional history has long been nearly synonymous with a study of the federal Founding Fathers, the document they produced, and its interpretation.

If historical studies have centered on the federal constitution, political scientists and legal scholars have remained even more focused on the federal level. Those interested in the political theory of American constitutional government routinely limit themselves to the ideas of the federal framers and the debates that surrounded the ratification of the federal constitution.<sup>1</sup> The study of *The Federalist Papers* has become a major subfield of American constitutional thought. In contrast, there are relatively few studies examining the philosophical basis or intellectual framework of state constitution making.<sup>2</sup> Legal scholars have gone the furthest in equating the federal constitution with the American constitutional tradition.<sup>3</sup> Until recently, constitutional law meant to scholars, and largely continues to mean, decisions of the United States Supreme Court.

Indeed, the first case book on state constitutional law only appeared in 1988.<sup>4</sup>

Notwithstanding this federal focus, new interest in state constitutions has come from the legal argument that state constitutions might provide independent grounds for often broader protection of individual rights and liberties than those provided by the federal constitution.<sup>5</sup> Scholars debating the role of state constitutions have mainly focused on whether they should receive independent attention, why this is so, and how this should be reduced to practice.<sup>6</sup> Unfortunately, much of the recent work stimulated by the debate over independent state constitutional grounds has done little to advance our understanding of the thought of nineteenth century constitution makers. Rarely delving behind constitutional text, many studies miss the complex heritage of ideas and concerns that preoccupied state constitution makers.

David Alan Johnson's *Founding the Far West: California, Oregon, and Nevada, 1840-1890* provides a notable departure from the traditional federal focus by examining the political and ideological context of the framing of state constitutions in three far western states. Johnson's achievement lies in his richly textured and nuanced reading of how the three states differed significantly from each other in terms of their political culture and societies, while locating the process of statehood and poststatehood developments within a broader context of western and national events. *Founding the Far West* is a deeply researched, well-written and organized study of the circumstances and manner in which California, Oregon, and Nevada achieved statehood and entered into national life by the late nineteenth century. Anyone interested in the history of those states will profit from Johnson's book and learn much not previously known about their earliest constitution makers. Johnson analyzes the debates within each convention in terms of how issues were introduced and resolved and how certain delegates took leading roles in each body. Moreover, since two of the three states examined, California and Oregon, have played leading roles in the current development of identifying independent state constitutional grounds, greater insight into their constitutional formation has both legal relevance and historical value.<sup>7</sup>

While not strictly a constitutional history, *Founding the Far West* offers important insights into the context of nineteenth century state making. Johnson is mainly interested in what the state-making process

reveals about ideology and political culture, both in terms of how the three regions revealed links to earlier, national trends and the way in which local circumstances produced particularized effects on politics and society. Johnson focuses on how delegates to constitutional conventions in California (1849), Oregon (1857), and Nevada (1864) as "authors of formal charters of government" adapted "familiar political practices to the local conditions they encountered." (p. 2) Sharing "a space in time," settlers "carried to the Far West similar cultural baggage." (p. 3) Nonetheless, Johnson concludes that distinctive ideologies and political cultures prevailed among the people who settled the three regions which, in turn, affected how they drafted their initial constitutions and continued to illuminate the character of each state well into the late nineteenth century.

In the end, *Founding the Far West* exaggerates differences between the three states. More important, it fails to appreciate a constitutional culture broadly shared by nineteenth century constitution makers, including those in the Far West. As such, the study invites reflection on the impact of the collective experience of state constitution making on the constitutional history of the three states examined. Implicit in the existence of a tradition of state constitution making is its potential to force a rethinking of a largely federally dominated tradition of American constitutionalism. Initially, however, an analysis of *Founding the Far West* is in order.

Crucial to Johnson's examination of statehood are the "charter settlers" of each area. These "first effective possessors" of California, Oregon, and Nevada strongly influenced the settlement and subsequent history of each state. Migration to the Pacific Coast departed from the earlier patterns of incremental westward movement. These migrants "acted for different reasons, reasons grounded in their social and psychological backgrounds as well as in their knowledge of (and desires about) what awaited in the California goldfields, the farming valleys of Oregon, and the silver mines of Nevada." The result produced "significant variations on common cultural themes" rather than "the imprinting of a singular version of American society, economy, and politics." Charter settlers embodied "distinct, self-selected 'fragments' of antebellum American culture and society" and thus produced constitutions that reflected "different strains" of nineteenth century ideology and politics. (pp. 3, 6)

Since constitution writers were important charter settlers, Johnson collectively analyzes the delegates to each state's first constitutional convention.<sup>8</sup> An appendix lists the delegates and gives basic biographical information on each. (pp. 354-365) In identifying the activities of delegates, Johnson acknowledges the slippery nature of using occupational labels for much of the nineteenth century. He notes that constitution makers tended, as did other men of their generation, to collect rather than master skills. Thus, the lawyers in California's 1849 convention, for example, "were also merchants, editors, trail guides, soldiers, and, in one case, a physician." (p. 104)

Johnson also includes minibiographies of the handful of delegates within each convention (six apiece in the California and Oregon conventions and four in Nevada's convention). These delegates were leading figures whose speeches, proposals, and presence had "the greatest impact, whether negative or positive." (p. 367) The objective criteria for their selection largely rested on how active they were in debate and to what extent they headed committees. (p. 368) The lives of the leading men personified the particular political strain or "fragment" Johnson associates with each state. These finely wrought portraits of key constitutional convention delegates—many long forgotten today—are the product of considerable detective work in the historical sources and play an integral part in the book's interpretation.

*Founding the Far West* is organized in three parts, within which aspects of the experiences of California, Oregon, and Nevada are analyzed in turn. Part One describes the political, social, and economic context of each region on the eve of state making; Part Two examines the constitutional conventions; Part Three deals with poststatehood developments, tracing the legacy of each state's founding. Johnson also analyzes the voting dynamics and alignments within each convention by using a number of statistical techniques, but appropriately relegates this information to an appendix. (pp. 370-79) The author's organization permits a selective reading focused on a specific state. Thus, those interested only in California could read chapters one, four, and seven as a single narrative unit that meshes together nicely. However, this approach would miss the author's comparative analysis of the three states and what the book suggests about American constitution making in the nineteenth century.

Johnson's structure also reinforces his interpretation of distinct political "fragments" in the three states. In Part One, Johnson offers a portrait of California in the 1830s and 1840s, with an overview of the mission system and its effect on the Native-American population, the world of Hispanic rancheros, and the influx of Anglo-American and European trappers and traders that swelled to a rush of humanity after the discovery of gold in 1848. In contrast to the essentially individualistic, greedy, and acquisitive gold-seekers that California attracted and the 1849 constitution they framed, the farmers who migrated to Oregon brought their families, sought land and modest gains, but largely eschewed commercial success. The result produced a society marked by homogeneity, familiarity and one with considerable community focus and shaped the territory's 1857 constitution.

Politics, however, produced fierce rivalries within Oregon, initially between Methodist missionaries and the Hudson's Bay Company. Later political disputes produced a discourse among Oregon Democrats that harkened back to a strain of eighteenth century classical republicanism by displaying a suspicion of "the liberal, market-oriented, economic individualism identified with Jacksonian Democracy elsewhere." (p. 57) Ultimately, however, the "ingrained habits and customs of long-standing allies and adversaries" flowed over into a "certainty and familiarity" within the territory's convention that replicated "in microcosm" the culture and society of Oregon. (p. 70) The seclusion that produced these qualities differed as much from California as it did from the new society of the Comstock Lode that appeared in Nevada.

Nevada's characteristic qualities arose from its domination by transplanted Californians chasing the dreams and possibilities that Gold Rush California had once seemingly offered individuals. The discovery of the Comstock Lode in 1859 prompted an influx of overwhelmingly single male immigration intent on mineral wealth. The frenetic and unstable activity of this rough society of speculators with a fluctuating population provided yet another striking contrast to the Oregonian experience. On the eve of Nevada's 1864 convention, an economic depression gripped the region and formed the immediate context within which delegates met.

In turning to the actual framing of the first constitutions in Part Two, Johnson relates constitution making to the charter societies of each state. The respective constitution writers may not have been statistically

representative, but in critical ways they "exemplified central features" of each region. Although a "common antebellum political inheritance" existed as a "powerful force" in each convention, Johnson finds the differences that marked each body more significant than what they may have shared as constitution makers. (p. 101) In each convention, how and what the delegates accomplished proved a manifestation of the peculiarities of their distinct charter societies.

In California's 1849 convention, for example, unfamiliarity among delegates and the absence of a political party as an organizing feature in deliberations, accentuated the importance of individual qualities of prominent delegates. Reliance on the constitutions of Iowa and New York as models and the role of six leading delegates were the two factors that "ordered the delegates' behavior." The lives of the leading delegates explained their actions within the convention and the basis for their representativeness as political men of their "time and place in American history." (p. 108) Johnson analyzes four issues that triggered most debate and division within the convention: banking corporations, suffrage, rights of free blacks, and the boundaries of the state. He sees an essential ambivalence in the approach and resolution of these issues. In the end, Johnson concludes that the 1849 constitution was "unremarkable as constitutional doctrine; from beginning to end it merely repeated the received wisdom" although in reaching that result the California delegates "explored, though without resolving, the central dilemmas of their time as only contemporaries could." (p. 138)

Oregon's 1857 convention likewise characterized its region. It mirrored the concerns of a "society of family farmers who, if not eager to escape the emerging world of commerce, finance, and manufacturing, saw in Oregon a chance to engage (and control) this world on their own terms." (p. 139) Like California, delegates sought guidance from existing state constitutions as models (most notably Indiana's constitution), but unlike California the six leading figures in Oregon's convention knew each other well from long involvement in territorial politics. Despite the dominance of Democrats, a breakdown in unity and anti-Democratic opposition produced protracted debates over the judiciary, the relationship between religion and government, immigrants and the rights of citizenship, and banks and corporations.

Johnson sees the manner in which the Oregonian delegates went about their task as more significant than what they produced. Debates

were marked by both a "vestigial political vocabulary" drawing from eighteenth century republicanism and "the growing commitment of nineteenth-century men to a natural-rights liberalism defined in terms of individual self-seeking for economic advantage." Eventually, Oregon's delegates reached "characteristically nineteenth-century constitutional conclusions," but they did so "circuitously, via the dimming passageways of eighteenth-century ideas." (pp. 139-40)

On the other hand, Nevada's convention differed as much "as could be" from events in Oregon. (p. 189) For one thing Nevada's convention met during the Civil War and in the midst of an economic depression. Nevada's delegates appreciated that their convention stemmed from congressional schemes driven by national political concerns. Their work as "wartime service" included "revitalizing the mining economy." Consequently, the convention displayed "the predominance of narrow economic concerns" and assertions of loyalty to the Union. (p. 190)

Nevada's delegates largely came from mining related occupations and were "veterans" of the California Gold Rush possessing "an individualistic producer ethic." (p. 191) A tension existed in the convention between that individualistic ethic and a corporate ethos that anticipated the emergence of heavily financed combinations formed to exploit the state's mineral riches. Specifically, the debates show an undercurrent of conflicting visions for the state that presaged the industrialism and emergence of wage workers in the mining enterprises in the decades to come. The issues of taxation, the judiciary, loyalty to the Union, and subsidy for the construction of the Pacific Railroad produced the most heated debate. Those apparently "unrelated" questions "became multiple sides of a single complex discussion" involving "a shift in conceptions of self, economy, and society: from a society based on the local community to one centered on the nation-state, and from an economy of freely competing individuals to one dependent on an intricate balance of interrelated corporate enterprises." (p. 213)

The final section of *Founding the Far West* traces poststatehood developments and the experiences of the generation following the establishment of statehood. For each region Johnson analyzes the changes in demographics, economic expansion, transportation, and communication that drew each state into an ever greater "incorporation into a national society." Nonetheless, the force of the charter settlers, through the constitutions they framed, "persisted" in the aftermath of



statehood. (p. 233) California, for example, experienced profound changes in population and an emerging industrialism and agribusiness between its first constitution and 1878. Although judging the second convention a self-conscious admission that changes had made the first constitution "obsolete," Johnson views the prevalent "corporate and industrial regime" by the late 1870s as marking "the culmination, not antithesis, of the earlier individualistic order of the gold rush." (p. 236) Despite this link between the two conventions, Johnson sees the first convention as essentially irrelevant to the second and only gives a brief description of its work. The descent of the 1849 convention's six leading men into "historical obscurity" by 1878 epitomized the discontinuity between the two conventions. (p. 258)

In contrast to California, Oregon experienced only a "modest pace of change" in the generation after statehood. (p. 271) Between 1860 and 1880 Oregon's population more than tripled, but apart from Chinese immigration the state largely retained the social, ethnic, and racial homogeneity of its early Anglo-American settlement. Oregon largely owed this continuity of localism and isolation to the belated effect of modernizing trends. Rail transportation and regularized links to national and world markets only connected Oregon in the mid-1880s, some 15 years later than in California. Moreover, the persistent authority of Oregon's early charter settlers contrasted with the California experience. The 1857 constitution makers not only tended to stay in the state but largely remained in "the thick of its public life," underscored by the notable careers enjoyed by the six leading delegates after the convention's end. (p. 271)

Johnson captures Nevada's poststatehood experience with the chapter title, "Industry and Exodus." After 1864, large scale operations financed and controlled by banks and railroads exploited Nevada's mineral resources and helped usher the state into economic modernity. Indeed, the establishment of a branch of the Bank of California in Nevada in the mid-1860s "began an era of concentrated corporate control and rapid industrialization that shaped the state to the end of the nineteenth century." (p. 318) Nostalgia for the individualistic ethic of the California gold miner faded with the sinking realization that mining corporations on the Comstock Lode had developed "an industrial, wage-labor, working class." (p. 320)

The behavior of Nevada's constitution makers conformed to the state's economy and its transitory population. "Just as they had joined in the exodus from California to Nevada in the late 1850s and early 1860s, so did they leave the state they created in 1864 once the promise it had held out to individuals evaporated." (p. 315) Nevada's charter group not only faded from influence after statehood, but in many cases disappeared altogether from the historical record. The obscure endings of the careers of Nevada's four leading constitution makers provides a final fitting contrast to the distinct paths taken by California, Oregon, and Nevada in gaining statehood and national integration.

Despite the merits of *Founding the Far West* in tracing the political and ideological process of state making, it offers exaggerated, contrasting portraits of charter settlers to the three states, particularly with respect to Oregon. Johnson's description of the Oregonian settlers as far less acquisitive than their counterparts in California and Nevada is overstated. True, many of the settlers to Oregon were farmers seeking new homes for their families and thus quite different from many of the gold seekers to California and Nevada with their get-rich-quick mentality. But settlers were undoubtedly drawn to Oregon because they knew that acts of its provisional government (and later the Oregon Donation Land Law) offered the prospect of landownership "on a scale inconceivable in their former homes." (p. 42) This motivation included a measure of acquisitive desire (or greed) that belies the suggestion that Oregon's settlers only possessed "modest material horizons." (p. 270) Indeed, the diaries of the U.S. District Court judge for Oregon—a prominent charter settler of the territory—reveal a man and a society with considerable instincts towards material advancement.<sup>9</sup> In making a valid point about differences in the general outlook between immigrants, it was unnecessary to portray Oregonians as indifferent to wealth.

By far the greatest weakness of *Founding the Far West* is that it overlooks the existence of a shared American tradition and culture in constitution making that influenced how delegates created state constitutions and articulated a constitutional vision. The principal reason for this oversight stems from the book's focus on only three states and its preoccupation with what distinguished state making in those states. Johnson points out that the framers of the three constitutions he studies shared the generational experience of coming of age in the 1830s and 1840s. But in his efforts to ascribe aspects of the peculiar political

culture of each state to how delegates engaged in constitution making, he overlooks broader connections. There were important similarities in constitution making in California, Oregon, and Nevada that formed part of a wider tradition of nineteenth century constitution making.

The context within which delegates approached the process of constitution making extended far beyond the fact that the California, Oregon, and Nevada framers were roughly the same age and shared "a common national identity, institutional memory, recollection of exemplary public events, party symbols and allegiances, and . . . understanding of the legal precedents available to them." (p. 3) Rather, far western constitution makers participated in a wide-ranging exercise in comparative constitution making.

Indeed, simply examining how nineteenth century delegates drafted constitutions shows that virtually no convention in the Far West or elsewhere did so in isolation, but instead they had access to many constitutional models. Johnson notes how the Iowa and New York constitutions influenced California's 1849 constitution makers and the references to Indiana's constitution in Oregon's convention. Such models, however, formed only a small part of comparative constitutional analysis by those delegates and the general pattern of wide-ranging constitutional borrowing that marked constitution making throughout the century. What made such models generally available was a genre of political science literature that has largely been overlooked.

The natural tendency of delegates to be guided by earlier constitutions, constitutional experience, practice, and interpretation received a considerable boost by the early appearance and subsequent widespread use of compilations of all the existing state constitutions. Published as early as 1781 and appearing in scores of different editions, these books found their way into nearly every constitutional convention that met during the nineteenth century.<sup>10</sup> Providing a comparative basis for thinking about state constitutions and their creation clearly underlay their publication. Printed as pocket-sized volumes and occasionally appearing in miniature, compilations easily travelled to remote regions and served as handy reference tools for delegates engaged in constitution making. Thus, despite the physical isolation and primitive conditions of some conventions, they still had access to the accumulated final products of the American experience in drafting written fundamental law. Indeed, both

of California's conventions and the Oregon and Nevada conventions had access to all the extant state constitutions at the time they met.<sup>11</sup>

The western experience in drawing on preexisting constitutional provisions as an integral part of drafting fundamental law is suggestive of constitutional borrowing that hardly occurred haphazardly or without serious reflection. One recurring theme in that borrowing process recognized that the present generation of constitution makers should profit from the constitutional experience of other states and incorporate the best ideas from the existing constitutions. A delegate in California's 1849 convention expressed this view in calling for selective constitutional borrowing. The sheer number of other constitutional examples provided "no reason why we should adopt the faults of others. We should rather profit by their experience."<sup>12</sup> Occasionally, the very latest constitutions acquired a special reputation "because they have selected and retained from other constitutions pretty much everything that is worth being retained in a constitution."<sup>13</sup> This notion of the progressive improvement of constitutions also meshed with the benefits of regular if not frequent constitutional revision.

An analysis of the constitutional sources of California's 1849 bill of rights illustrates the process of borrowing.<sup>14</sup> Despite complaints of "servilely" copying from other constitutions, the convention debates demonstrate that delegates appreciated constitutional choices and discussed them at considerable length.<sup>15</sup> Some issues provoked less debate than others because a consensus existed, but such agreement hardly meant that ideas about constitution making were static or reflected an unthinking perpetuation of past practices. Many more innovative ideas were suggested and debated than found their way into final drafts, and their discussion confirms the fluidity of nineteenth century constitution making.

When California drafted its first constitution, convention delegates had the advantage of more than half a century of state constitution making experience, which they actively and self-consciously used. The most recent conventions of Iowa and New York in 1846 were fresh in the delegates' minds.<sup>16</sup> Indeed, some delegates had actually served as members of other constitutional conventions before coming to California. Yet, it would be a mistake to assume that a cosmopolitan population attracted to California during the Gold Rush accounted for the wide range of consultation with other states' constitutional experiences. Even

without the drawing power of gold other conventions also reveal the widespread and vigorous migration of constitutional ideas.

Indeed, California's second convention in 1878 initiated debates over many constitutional subjects that fully drew on existing state constitutions. The mammoth verbatim transcript of its proceedings for over three months amply documents the wealth of materials drawn upon by the delegates. Extensive comparative analysis of other constitutions formed a regular feature of debate. The chair of the committee that drafted the militia article, for example, defended the provision with a comprehensive overview of other state provisions.<sup>17</sup> Eventually, a delegate exasperated by such references suggested a different approach. "[I]f the law library could be locked up and all these books that the members bring here thrown out of sight, we could go to work and build a constitution out of our heads, out of our inner consciences."<sup>18</sup> Despite the plea for originality, the convention—in common with most nineteenth century conventions—continued to rely heavily on earlier constitutional experience.

Delegates naturally gravitated toward their existing state constitutions when meeting to revise that document, an inclination followed by California's second convention. Delegates agreed that certain issues, such as corporations, the Chinese, and taxation had prompted their meeting, but they were not prepared to redesign the entire constitutional fabric of the state. In fact, as debates over hotly contested political issues became protracted, delegates suggested that the 1849 constitution be incorporated whenever possible, for noncontroversial issues.<sup>19</sup>

The borrowing nature of nineteenth century constitution making also involved the judicial significance of incorporating provisions wholesale from different constitutions. Each borrowed provision had potentially a body of interpretation regarding its meaning, a sort of judicial gloss from state courts that might have interpreted that provision. Indeed, state courts might interpret similarly worded provisions differently. The possibilities of ambiguity or of a specific interpretation based on earlier judicial decisions were matters that far western delegates clearly understood.

In this context, interpreting a nineteenth century "patchwork" constitution posed interesting questions. One delegate to California's 1878 convention raised this issue by stating "a cardinal canon of interpretation of constitutions."<sup>20</sup> Namely, "that where a constitutional provision has been incorporated from the constitution of one state into the

constitution of another state . . . that the courts invariably turn to the decisions in that [first] state to guide them in their interpretation of the provision."<sup>21</sup>

The California delegate did not stand alone in drawing a connection between borrowed provisions and their interpretation. In the course of Nevada's 1864 convention, one delegate favored California's 1849 document as a model since Nevada could then take advantage of 15 years of constitutional jurisprudence by the California Supreme Court.<sup>22</sup> Such ideas naturally provided interpretative guidance to newly created constitutions, but it does, nonetheless, suggest that the impact of "borrowing" in nineteenth century state constitution making went well beyond copying constitutional text.

One delegate to California's second convention expressly warned against the dangers of the "borrowing" process of constitution making. He accused some of his fellow delegates of having "contracted the fatal habit of browsing through the organic laws of the other states, borrowing enough to show a want of invention and inventing just enough to show a total want of judgment."<sup>23</sup> He then offered his understanding of the proper basis for such borrowing.

When there can be found in . . . the organic law of any other state, a terse, unmistakable expression of a broad, universal principle of government . . . it should be presented here for our consideration. But, when the principle of selection is carried to the extent of pressing upon our approval those special exceptional provisions of other organic laws which had their origin and growth in the peculiar circumstances and condition of the community for which they were framed; [they] are wholly unsuited to the political habits, modes of thought, and social wants of our own people.<sup>24</sup>

The California delegate thus reflected an interesting self-perception. Namely, in some ways delegates perceived themselves as members of a broad American constitutional tradition while at the same time they viewed themselves as "Californians" or "Oregonians" and thus requiring distinctive constitutional arrangements.<sup>25</sup>

In the final analysis, the wide awareness of constitutional models and the discussion of their merits often produced a thoughtful process of comparison and borrowing that helped create a shared culture of American constitutionalism. Nineteenth century delegates recognized that

legitimate constitution making inevitably entailed such a process of comparative analysis and borrowing. Indeed, their view of progress implied that more recent constitutions were improvements on earlier attempts. This vision of constitutional progress transcended the constitutional history of individual states: increasingly delegates saw national trends as persuasive authority for constitutional revision. Parochialism and local circumstances never lost their pull, but many delegates acknowledged the existence of American constitutional practices and traditions.

Apart from overlooking a broader tradition of framing nineteenth century constitutions of which California, Oregon, and Nevada were a part, *Founding the Far West* also fails to recognize an ongoing debate over the implications of popular sovereignty that all three conventions reflected. In fact, the inherent nature of constitution making inevitably raised issues and concerns that stemmed from the theoretical foundation of American constitutions. Indeed, this dialog over the meaning of popular sovereignty had begun with the American Revolution and constitutional conventions formed the principal forum within which the constitutional debate was conducted during the nineteenth century. Despite the immediate focus on creating or altering a framework for government and responding to substantive issues of the day, delegates consistently returned (in varying degrees and in ways that showed transitions from the 1820s through the 1890s) to basic underlying questions. Such questions included what were the implications of popular sovereignty, who were "the people," how was their voice defined, what powers did constitutional conventions have, and what was the appropriate scope of constitutional revision.

These questions and their implications for constitution making were rarely discussed explicitly as topics for debate. Rather, they cropped up in the midst of debate over all manner of substantive issues and were often only obliquely present. Identifying such themes is difficult, if not impossible, by examining a few discrete convention debates, but they become evident after a widespread examination of nineteenth century debates. Nonetheless, aspects of these foundational issues can be detected in the debates in California, Oregon, and Nevada. Seen in this light, the far western constitution makers contributed to an ongoing constitutional dialogue the dimensions of which they may not have been

fully aware, but which reflected their participation in a process they shared with America's many other constitution makers.

Overlooking this larger debate results in missing the significance of some positions taken and language used in the western conventions. Johnson's depiction of the experiences of California, Oregon, and Nevada in framing their constitutions as essentially different from one another mutes if not ignores the collective dimension of nineteenth century constitution making. In Oregon's convention, for example, Johnson deftly and correctly identifies language that echoed eighteenth century concerns over the corrupting influence of power, self-serving material advancement rather than disinterestedness, and the need for private and public virtue for the health of republican forms of government. Although Johnson sees such a strain of discussion as distinct to Oregon's convention (in comparison with California and Nevada), in point of fact such language and concerns were not uncommon. Particularly in the context of debates over support for education, the echoes of classical republicanism in terms of the necessity of an educated and virtuous electorate to preserve the health of republics can be found in debates over constitution making from the eighteenth century to the end of the nineteenth century.

Moreover, Johnson's description of a version of classical republicanism epitomized by Oregon delegate Matthew Deady shared much in common with a position held by many mid-nineteenth century delegates about what popular sovereignty implied (or did not) with respect to the role of the people in constitutional government. Deady, explains Johnson, developed a self-identity as a Federalist in the eighteenth century mold of Alexander Hamilton and George Washington. Although Deady had been a staunch Democrat, in 1861 "he made an unexpected (to onlookers remarkable) exit from the party that he identified, with praise before 1861 and scorn thereafter, with the historical figure of Thomas Jefferson." (p. 306) An abhorrence for anarchy and for political disruptions asserting the popular will formed a critical component of Deady's self-proclaimed federalism. Deady accused the author of the Declaration of Independence of being "the model for every disturber of the public peace," claiming that Jefferson's views "contain enough of revolution nullification secession and anarchy to set the four corners of the world by the ears." (p. 306) He linked secession to claims based on popular sovereignty advanced by Jefferson. After the Civil War, Deady continued to reject majoritarianism and the legitimacy of popular



movements (whether the actions of labor organizers or anti-Chinese agitators) that threatened the status quo. His intense "enmity" toward working-class movements stemmed from a fear that they might prevail by virtue of sheer numbers. (p. 307) Deady's concerns about majority will were ultimately connected to how he viewed the people and the principle of popular sovereignty.

In fact, Matthew Deady's mid-nineteenth century federalism did not make him or his language politically anachronistic. Rather, his views (and fears) about the people placed him squarely on one side of an ongoing debate found within constitutional conventions long before Oregon's delegates met in 1857 and that continued in conventions until the end of the nineteenth century. This debate did not split delegates down party lines, but rather in terms of how they understood the meaning of popular sovereignty and its implications for American political life. Some delegates favored the popular aspects of a government that placed ultimate authority in the will of the people, embraced majoritarianism with relatively few reservations, and regarded popular sovereignty as a practical political principle that could be invoked in changing constitutions and governments. They were opposed by delegates, who shared with Matthew Deady a deep-seated suspicion of popular movements, fearing what they called the anarchy of sheer numbers, and who tried to relegate popular sovereignty to an abstract, theoretical principle ultimately subordinated to the existing government.

Constitutional or governmental changes could only, according to this latter group of delegates, be effected through established channels and only if the existing government agreed to the need for change. Their greatest fear lay in the specter of revolution, and they often ridiculed the phrase *vox populi, vox Dei* (the voice of the people is the voice of God) as a foolish exaggeration of the principle of popular sovereignty. The Civil War acted as a watershed for such delegates, underscoring for them the implicit dangers in ideas about popular sovereignty that had led to secession and the war. Deady clearly fell within the camp of opponents of popular sovereignty, including the ridicule of *vox populi* (pp. 306-07), and thus the significance of his attitudes went well beyond his self-defined, mid-nineteenth century Oregonian federalism.

Another foundational question related to popular sovereignty that many nineteenth century convention delegates struggled with entailed how that principle as an expression of popular will should be implement-

ed in provisions for future revision. Central to this issue were conflicting attitudes of delegates over the dangers posed by popular expressions and involvement in government, particularly to vested interests and property rights. Oregon's Matthew Deady represented one end of the spectrum of heightened concern over manifestations of popular sovereignty, which he denigrated as mistaken assertions of "might makes right." (p. 309)

California's 1849 convention provides glimpses of this broader debate over popular sovereignty when delegates discussed the issue of constitutional amendments. Initially, a committee on future revision had proposed that a two-thirds legislative vote be required before an amendment could go to the people for ratification. When a delegate sought to change that provision to a simple majority vote, he triggered a debate that illustrated attitudes towards majoritarianism and demonstrated that divisions among delegates stemming from their views about the implications of popular sovereignty crossed party lines.

James McHall Jones suggested the change to a simple majority because it accorded with "the true democratic rule" that "the majority shall rule," and he argued that if they were "dissatisfied with their constitution, let them, as they may deem fit, alter and amend it."<sup>26</sup> Jones was a lawyer and member of the Whig party.<sup>27</sup> Charles Tyler Botts, another lawyer, but a Democrat, agreed that "in all republican countries" only one way determined "what shall be the fundamental law of the country, and that is by the voice of a majority of the people."<sup>28</sup> Botts also opposed "restraints" on constitutional revision because "nothing is more desirable than that the people should have the liberty to amend their written Constitution according to the progressive improvement under the science of political liberty."<sup>29</sup> Both Jones and Botts were among Johnson's six leading men of the 1849 convention.

Opposition to reducing the vote from two-thirds to a majority came from Whigs as well as Democrats and reflected the same kind of anxiety that Matthew Deady expressed about the disturbing possibilities of majority control. Myron Norton, a Democrat and lawyer, opposed the change because in constitutional revision "every step should be well guarded, and nothing should be done hastily, or under the fluctuating influences of political excitement."<sup>30</sup> A Whig delegate, Francis Lippitt also warned against a "mere transient majority" effecting "transient changes," and he emphasized the need for "checks upon the will of the people."<sup>31</sup> Henry Tefft, of uncertain political affiliation, expressed the

worry of many who wanted a two-thirds vote as a safeguard against "political excitement" when he proclaimed himself "as much in favor of referring all power to the people as any gentleman present, but this constant cry of the people too often assumes the aspect of demagogism."<sup>32</sup> In the end, the convention did not impose a two-thirds voting requirement.<sup>33</sup> California's debate in 1849 over the voting barrier for amendments thus reveals in microcosm one of the underlying issues that split nineteenth century constitutional conventions.

Often, attitudes towards majoritarianism did not explicitly surface in debates over constitutional revision but can still be detected as an undercurrent among delegates. In Oregon's convention, for example, delegates spent little time debating the revision provision. In a final speech summarizing the advantages of the draft constitution, a lawyer and Democrat, Delazon Smith touted an amendment procedure allowing change to "take place quietly, silently."<sup>34</sup> In the course of debating other issues, however, concerns about majoritarianism can be discerned. For example, Smith had earlier suggested that prohibiting the sale of liquor violated natural law and was beyond the capacity of the "majority of the people" and "the sovereignty of the citizens of the territories" to permit such a prohibition in "defiance of the wishes of the minority."<sup>35</sup> Prohibition conjured up "mobs" and "men constantly up everywhere, in arms against and resisting the constitution."<sup>36</sup> However, Hector Campbell, another Democrat and farmer, in the course of defending the right of the legislature to hire a chaplain, alluded to the eighteenth century founding fathers as having "first discovered that new principle in the science of government, . . . which is the cornerstone of democracy and the foundation upon which all the institutions of popular sovereignty rest—that the clearly expressed will of the majority shall rule."<sup>37</sup>

Fears about the potential abuse of popular sovereignty or confidence in its exercise expressed by convention delegates shifted over the course of the nineteenth century. The Dorr Rebellion (a popular movement that challenged the existing government in Rhode Island in the 1840s) and the Civil War had the greatest impact on how nineteenth century delegates debated popular sovereignty. Even during the Civil War, indeed, because of the context, Nevada's delegates addressed this issue. In debating the revision provisions of the 1864 constitution, they repeatedly expressed fears about transitory changes in the document they were framing, but in terms that clearly indicated the unstable times. George Nourse, a lawyer

who had voted for Lincoln in 1860, spoke for many delegates when he favored a two-thirds legislative vote requirement so that "no sudden whirlwind of passion, or feeling, or of fancied interest, shall bring about the hasty adoption of an amendment perhaps radical in its character, and changing important features in our Constitution."<sup>38</sup> That much, reflected current events, but he went on to emphasize the importance of guarding "not only against the hasty action of the people's servants, but also against that of the people themselves" when it came to constitutional revision.<sup>39</sup>

Particularly after the Civil War, some delegates emphasized the need to procedurally constrain constitutional revision as a means of tempering the revolutionary potential of popular sovereignty. Indeed, California's 1878 convention reveals the ill-ease increasingly felt by some delegates about even stating the principle. In the language describing "the right of the people to alter or reform their government whenever the public good may require it" one delegate found "an assertion from which revolutionists forever find at least a shadow of authority."<sup>40</sup> Another delegate in the same convention exemplified how certain constitution makers sought to limit, control, and channel the popular exercise of sovereignty. The "true proposition" of the principle only granted "'the right to alter or reform . . . as provided in the constitution or otherwise, when the cause exists,' defining the direct causes."<sup>41</sup> In addition to restrictions on popular sovereignty the delegate also implied the necessity of dire circumstances as a precondition for constitutional revision.

In the end, *Founding the Far West* is an important scholarly contribution to nineteenth century American history. However, its analysis of how California, Oregon, and Nevada became states identifies a dynamic that fails to capture the tradition of American constitution making. If anything, what those three states shared with other nineteenth century constitution making experiences—given the particular characteristics and differences in each state so well documented by Johnson—underscores the strength of a wider American constitutional tradition. Only when state constitution making is more widely studied can the dimensions of that tradition be understood in ways that will integrate the meaning of the state constitutional experience. So too, the recent interest in state constitutions as documents having an independent source of constitutional authority may curb the ingrained habit of studying

American constitutional law from “the top down” and encourage scholars to bring a less national perspective to both constitutional law and history.

## NOTES

<sup>1</sup>See, for example, Alan S. Rosenbaum, *Constitutionalism: The Philosophical Dimension* (Westport, Conn., 1988); David A. Richards, *Foundations of American Constitutionalism* (New York, 1989); Michael Allen Gillespie and Michael Lienesch, *Ratifying the Constitution* (Lawrence, Kan., 1989); Jennifer Nedelsky, *Private Property and the Limits of American Constitutionalism: The Madisonian Framework and its Legacy* (Chicago, 1990); and James R. Stoner, Jr., *Common Law and Liberal Theory: Coke, Hobbes, and the Origins of American Constitutionalism* (Lawrence, Kan., 1992).

<sup>2</sup>Of the studies that do explore the intellectual framework of state constitution making, most deal with the eighteenth century. See for example, Willi Paul Adams, *The First American Constitutions: Republican Ideology and the Making of the State Constitutions in the Revolutionary Era* (Chapel Hill, N.C., 1980); Donald S. Lutz, *Popular Consent and Popular Control: Whig Political Theory in the Early State Constitutions* (Baton Rouge, La., 1980); and Ronald M. Peters, Jr., *The Massachusetts Constitution of 1780: A Social Compact* (Amherst, Mass., 1978).

<sup>3</sup>A good example is David P. Currie, *The Constitution in the Supreme Court: The First Hundred Years, 1789-1888* (Chicago, 1985). Even when constitutional law scholars have criticized the emphasis given to the role of the courts in the constitutional system, the focus invariably remains on the federal constitution. See for example, Cass R. Sunstein, *The Partial Constitution* (Cambridge, Mass., 1993).

<sup>4</sup>Robert F. Williams, *Cases and Materials on State Constitutional Law* (United States Advisory Commission on Intergovernmental Relations, 1988); and Williams, *State Constitutional Law: Cases and Materials*, 2d ed. (Charlottesville, Va., 1993).

<sup>5</sup>See, for example, William Brennan, "State Constitutions and the Protection of Individual Rights," *Harvard Law Review*, 90:489-504 (1977), and Hans Linde, "First Things First: Rediscovering the States' Bills of Rights," *University of Baltimore Law Review*, 9:379-96 (1980).

<sup>6</sup>See, for example, "Developments in the Law—The Interpretation of State Constitutional Rights," *Harvard Law Review*, 95:1324-1502 (1982); "The Emergence of State Constitutional Law," *Texas Law Review*, 63:959-1318 (1985); "State Constitutional Jurisprudence," *Hastings Constitutional Law Quarterly*, 15:391-478 (1988); and Williams, *State Constitutional Law*, 2d ed. (1993).

<sup>7</sup>The literature on California's constitutional history has recently received renewed attention in Joseph R. Grodin, Calvin R. Massey, and Richard B. Cunningham, eds., *The California State Constitution: A Reference Guide*

(Westport, Conn., 1993); and *Hastings Constitutional Law Quarterly*, 17:1-172 (1989).

<sup>8</sup>Technically, Johnson examines the conventions that drafted constitutions that brought each state into the Union. A constitutional convention in Nevada had met in 1863, but the document it produced was not accepted.

<sup>9</sup>See Malcolm Clark, Jr., ed., *Pharisee Among Philistines: The Diary of Judge Matthew P. Deady, 1871-1892* (Portland, Ore., 1975).

<sup>10</sup>One of the most popular titles for constitutional compilations was *The American's Guide. The Constitutions of the United States of America; with the Latest Amendments; Also the Declaration of Independence, Articles of Confederation, With the Federal Constitution, Acts for the Government of the Territories, Washington's Farewell Address, and the Inaugural Speeches of the Several Presidents* (1810). Other editions appeared in 1828, 1830, 1832, 1833, 1834, 1840, 1841, 1849, and 1864. Another indication of attitudes towards the use of such compilations was the title of one such collection in 1812: *The Freeman's Guide: Containing the Federal Constitution, and the Constitutions of the Different States*. Over 70 different editions of state constitutional compilations appeared between 1781 and 1894.

<sup>11</sup>See J. Ross Browne, *Report of the Debates in the Convention of California on the Formation of the State Constitution in September and October, 1849* (Washington, D.C., 1850), 221; Charles H. Carey, ed., *The Oregon Constitution and Proceedings and Debates of the Constitutional Convention of 1857* (Salem, 1926), 81; Andrew J. Marsh, *Official Report of the Debates and Proceedings in the Constitutional Convention of the State of Nevada, Assembled at Carson City, July 4, 1864, To Form a Constitution and State Government* (San Francisco, 1866), 100; *Debates and Proceedings of the Constitutional Convention of the State of California, convened at the City of Sacramento, Saturday, September 28, 1878* (3 Vols., Sacramento, 1880-1881), Vol. 1, 18-31, Vol. 2, 1,022, and Vol. 3, 1,452.

<sup>12</sup>California, *Debates* (1849), 33.

<sup>13</sup>California, *Debates* (1878-79), Vol. 2, 1,059.

<sup>14</sup>See Christian G. Fritz, "More Than 'Shreds and Patches': California's First Bill of Rights," *Hastings Constitutional Law Quarterly*, 17:13-34 (1989).

<sup>15</sup>California, *Debates* (1849), 51.

<sup>16</sup>California, *Debates* (1849), 26-27, 310. Likewise, Oregon's delegates in 1857 looked to recent experience with constitution making in California and Ohio in 1849. See, Oregon, *Debates* (1857), 59, 68-69.

<sup>17</sup>California, *Debates* (1878-79), Vol. 2, 729-31.

<sup>18</sup>*Id.* Vol. 1, 256.

<sup>19</sup>*Id.*, Vols. 1-3, *passim*.

<sup>20</sup>*Id.*, Vol. 1, 185.

<sup>21</sup>*Id.*

<sup>22</sup>Nevada, *Debates* (1864), 15-16.

<sup>23</sup>California, *Debates* (1878-79), 489.

<sup>24</sup>*Id.*

<sup>25</sup>See, e.g., California, *Debates* (1849), 113, 116; Oregon, *Debates* (1857), 141; Nevada, *Debates* (1864), 18.

<sup>26</sup>California, *Debates* (1849), 355.

<sup>27</sup>Another Whig lawyer in the convention, Elisha Oscar Crosby, also agreed with Jones on the grounds that if a majority of the people could create a constitution, then that same majority ought to have the right to change it. *Id.*

<sup>28</sup>*Id.*, 356.

<sup>29</sup>*Id.*, 355.

<sup>30</sup>*Id.*, 354.

<sup>31</sup>*Id.*, 355, 358.

<sup>32</sup>*Id.*, 357.

<sup>33</sup>*Id.*, 359, 361.

<sup>34</sup>Oregon *Debates* (1857), 391. Smith was also selected by Johnson as one of the six leading figures in Oregon's convention.

<sup>35</sup>*Id.*, 166.

<sup>36</sup>*Id.*, 167.

<sup>37</sup>*Id.*, 297.

<sup>38</sup>Nevada *Debates* (1864), 528.

<sup>39</sup>*Id.*

<sup>40</sup>California *Debates* (1878-79), Vol. 1, 239.

<sup>41</sup>*Id.*