

# *The Influences of Pennsylvania's 1776 Constitution on American Constitutionalism During the Founding Decade*

**T**HE “FOUNDING DECADE” OF 1776-1786<sup>1</sup> included an intense and concentrated focus on written constitutional theory and practice.<sup>2</sup> This decade witnessed the internal political struggle over, in Carl Becker’s terms, “who should rule at home” as well as the Revolutionary war struggle for “home rule.”<sup>3</sup> Even if one does not accept Becker’s assertion that the struggle over who should rule at home began *prior* to the Revolution, it must be conceded that this, together with military victory, proved central to the debate during the founding decade.

Historians and political scientists have identified two major “waves”

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<sup>1</sup> This is Martin Diamond’s term: see Ann Stuart Diamond, “Decent, Even Though Democratic,” in Robert A. Goldwin and William A. Schambra, eds., *How Democratic Is the Constitution?* (Washington, 1980), 24.

<sup>2</sup> William Morey, “The First State Constitutions,” *Annals of the American Academy of Political and Social Science* 4 (1893), 201; Harry Cushing, “The People the Best Governors,” *American Historical Review* 1 (1896), 284.

For summaries of this decade of state constitution-making, see Jackson Turner Main, *The Sovereign States, 1775-1783* (New York, 1973), 143-95; Willi Paul Adams, *The First American Constitutions: Republican Ideology and the Making of the State Constitutions in the Revolutionary Era* (Chapel Hill, 1980), 63-93; Donald S. Lutz, *Popular Consent and Popular Control: Whig Political Theory in the Early State Constitutions* (Baton Rouge, 1980); Gordon S. Wood, *The Creation of the American Republic, 1776-1787* (Chapel Hill, 1969), 125-255; and Elisha P. Douglass, *Rebels and Democrats: The Struggle for Equal Political Rights and Majority Rule During the American Revolution* (Chapel Hill, 1955).

<sup>3</sup> Carl L. Becker, *The History of Political Parties in the Province of New York, 1760-1776* (Madison, 1909), 22.

of state constitution-making during the founding decade.<sup>4</sup> The Pennsylvania Constitution of 1776 was the key point in the first wave and it provided a direct stimulus for the second wave. The Massachusetts Constitution of 1780 was the central feature of the second wave. As political scientist Donald Lutz has observed, the 1780 Massachusetts constitution “was the most important one written between 1776 and 1789 because it embodied the Whig theory of republican government, which came to dominate state level politics,” but the “Pennsylvania Constitution was the second most important because it embodied the strongest alternative.”<sup>5</sup>

The Pennsylvania constitution, adopted in September 1776, played several important roles in the development of American constitutionalism. On the one hand, this constitution, and the political arguments supporting it, provided a model for persons who argued for a simple, people’s government that would contain no elements of “aristocracy.” Supporters of the constitution especially lauded Pennsylvania’s unicameral assembly which, because it was free of any effective checks, imposed no “undemocratic” restraints on the expressed will of the people. Checks and balances of the usual sort, such as an upper house and executive veto, were not present in Pennsylvania’s 1776 frame of government.

On the other hand, the Pennsylvania constitution appeared to more “conservative” elements of Revolutionary society (those used to exercising important power even under colonial administration) as an extreme example of the “levelling spirit” that could be expected to dominate the state governments if Revolutionary republican rhetoric were to be taken seriously in drafting state constitutions. This attitude grew stronger as people experienced and observed the Pennsylvania government in action. As such, Pennsylvania’s constitution contributed to the stronger checks on legislative power that characterized most of the more conservative, later, state constitutions written during the 1770s and 1780s, and it served as the counterpoint during the construction of the federal government structure in 1787. To that extent, then, the Pennsylvania constitution paradoxically fed the

<sup>4</sup> Wood, *Creation of the American Republic*, 435; Lutz, *Popular Consent and Popular Control*, 44-45.

<sup>5</sup> Lutz, *Popular Consent and Popular Control*, 129.

"counterrevolution" that some scholars conclude was completed with the adoption of the federal Constitution of 1787.

The Pennsylvania Constitution of 1776 lasted only until 1790. As the focal point of controversy over the proper structure of the new state government, and as a reflection of a significant internal shift in power during the Revolution,<sup>6</sup> it mirrored a broader debate on the nature of republicanism and the distribution of authority within government that was taking place in the other states. The Pennsylvania Constitution of 1776 was part of a fairly widespread, radically democratic vision of a proper state constitution that arose to some extent during the framing of all of the state constitutions. Jesse Lemisch, a historian of the "inarticulate," has noted that "there existed in 1776 a body of political thought which did not endorse deference" to traditional elites. Although this assertion is controversial among historians, there is some documentation of this body of thought, particularly in Pennsylvania. Even in the absence of documentation, Lemisch asserts that less articulate people must have shared these ideas "directly out of the experience of their lives."<sup>7</sup>

The Pennsylvania constitution excited much opposition both in and out of the state. The depth of feelings against Pennsylvania's radical constitution was expressed pithily by Benjamin Rush when he wrote to Timothy Pickering toward the close of the federal Convention: "The new federal government like a new Continental waggon will upset our State dung cart, with all its dirty contents . . . and

<sup>6</sup> For the pre-independence evidence of this internal power struggle, see Charles H. Lincoln, *The Revolutionary Movement in Pennsylvania, 1760-1776* (Philadelphia, 1901); Charles J. Stille, "Pennsylvania and the Declaration of Independence," *Pennsylvania Magazine of History and Biography* (hereafter, *PMHB*) 13 (1889), 385; and Robert Gough, "Charles H. Lincoln, Carl Becker, and the Origins of the Dual-Revolution Thesis," *William and Mary Quarterly* 38 (1981), 97. On definitions of republicanism, see especially Robert E. Shalhope, "Toward a Republican Synthesis: The Emergence of an Understanding of Republicanism in American Historiography," *William and Mary Quarterly* 29 (1972), 72; and Ruth H. Bloch, "The Constitution and Culture," *William and Mary Quarterly* 44 (1987), 550-55.

<sup>7</sup> Jesse Lemisch, "The American Revolution Seen from the Bottom Up," in Barton J. Bernstein, ed., *Towards a New Past: Dissenting Essays in American History* (New York, 1968), 16. See also Gary B. Nash, "Also There at the Creation: Going Beyond Gordon S. Wood," *William and Mary Quarterly* 44 (1987), 602-11.

thereby restore order and happiness to Pennsylvania.”<sup>8</sup> The hostility toward the constitution within Pennsylvania spilled over to influence constitution-making elsewhere. At the Constitutional Convention of 1787 the delegates proposed a structure of government very different from much of that which prevailed in Pennsylvania from 1776 to 1790. In so doing, the delegates implicitly, and at times explicitly, rejected the political philosophy undergirding Pennsylvania’s first constitution. Yet, at the same time, elements of Pennsylvania’s early constitutional experience were incorporated into the federal Constitution and became basic elements of American constitutionalism.

The Pennsylvania constitution reflected the extreme shift in the internal political structure of the state of Pennsylvania (a shift evidenced especially by the political importance of the city of Philadelphia), and the constitution proved influential beyond the state. Pennsylvania was the only state to experience a true revolution. In the words of Richard Ryerson, “By late 1776 the Commonwealth of Pennsylvania was perhaps the most vital participatory democracy in the world.”<sup>9</sup>

Thomas Paine’s *Common Sense*, which was published in Philadelphia on January 9, 1776, and was widely read throughout the colonies/states, made a strong case for establishing simple, republican governments, featuring unicameral legislatures with a wide elective franchise.<sup>10</sup> Paine’s pamphlet echoed the political revolution underway in Pennsylvania—a revolution in which Paine himself played a conspicuous part. Paine, an English tradesman, had come to Philadelphia

<sup>8</sup> Max Farrand, ed., *The Records of the Federal Convention of 1787* (4 vols., New Haven, 1966 ed.), 4:75.

<sup>9</sup> Richard A. Ryerson, *The Revolution Is Now Begun: The Radical Committees of Philadelphia, 1765-1776* (Philadelphia, 1978), 5.

<sup>10</sup> Philip S. Foner, ed., *The Complete Writings of Thomas Paine* (2 vols., New York, 1969 ed.), 1:4-46; Eric Foner, *Tom Paine and Revolutionary America* (New York, 1976), 75. See also Alfred Owen Aldridge, *Thomas Paine’s American Ideology* (Newark, 1984), 24; and Jack P. Greene, “Paine, America, and the ‘Modernization’ of Political Consciousness,” *Political Science Quarterly* 93 (1978), 84-86.

Interestingly, Benjamin Rush, who apparently suggested he write the pamphlet and who gave it its name, recommended that Paine not discuss republicanism. Foner, *Tom Paine*, 74; George W. Corner, ed., *The Autobiography of Benjamin Rush* (Westport, 1948), 113-14. Jesse Lemisch noted “Excessive attention to *Common Sense* for its propaganda values has obscured its substantive meaning as an expression of populist democracy.” Lemisch, “Bottom Up,” 25.

in 1774, and worked with many of the political newcomers who had recently become active in the city's extra-legal committees organized to protest British policies. Pennsylvania was one of the few states where the radicals successfully formed a coalition of urban working people and interior small farmers.<sup>11</sup>

The emergent political groups sought to confirm their power in a new constitution for Pennsylvania. An anonymous pamphlet published in Philadelphia in 1776 called for a special convention, rather than the existing Assembly, to draft the constitution. This is one of the earliest indications of an understanding of a constitution as distinct from ordinary legislation.<sup>12</sup> After having gained control of Pennsylvania's provincial conference of committees, the "new men" called for an election of delegates to a constitutional convention. Public debate surrounding this election, with its newly expanded franchise, included warnings to voters not to elect propertied representatives. James Cannon, a close friend of Paine, urged the election of common people, and warned "Let no man represent you . . . who would be disposed to form any Rank above that of Freeman."<sup>13</sup> The elections gave the same group, as well as many "plain countrymen," control of the constitutional convention.<sup>14</sup>

Those who seized power in Pennsylvania and wrote the Constitution of 1776 had new values. Although these values had pre-Revolutionary origins, they gained new vitality when their adherents took over political power in Pennsylvania. They called for a people's government, unencumbered by interference from what they saw as the "aristocratic" elements of society that would be represented by a second house of the legislature or by a powerful executive and that

<sup>11</sup> For a description of these people, see Foner, *Tom Paine*, 28-69; Charles S. Olton, *Artisans for Independence: Philadelphia Mechanics and the American Revolution* (Syracuse, 1975); and Robert Kelly, *The Cultural Pattern in American Politics: The First Century* (New York, 1979), 79.

<sup>12</sup> *The Alarm; or, an Address to the People of Pennsylvania on the Late Resolve of Congress*, reprinted in Charles S. Hyneman and Donald S. Lutz, eds., *American Political Writing During the Founding Era, 1760-1805* (2 vols., Indianapolis, 1983), 1:321.

<sup>13</sup> Cannon quoted in Foner, *Tom Paine*, 129. A copy of the first page of Cannon's broadside is reprinted in *ibid.*, 130, where Foner describes it as "one of the finest examples of the egalitarian impulse unleashed by the struggle for independence."

<sup>14</sup> *Ibid.*, 131. This characterization is disputed by Robert Gough, "Notes on the Pennsylvania Revolutionaries of 1776," *PMHB* 96 (1972), 89.

would seek to limit participation by ordinary people in government. Any excesses of such a simple government were to be checked by its mandated openness, and required deliberation, together with annual elections, rotation in office, and periodic review of legislative activity by specially elected overseers. These “democratic” values and approaches were shared by groups in other states as well, intent on achieving new-found political power. This was something of which traditional elites throughout the states were well aware.

Pennsylvania’s 1776 constitution followed Paine’s recommendation and established a “simple” government. Under the frame of government, legislative power resided in a unicameral assembly<sup>15</sup> (often attributed to Benjamin Franklin’s influence,<sup>16</sup> but no doubt also an extension of Pennsylvania’s familiarity with a unicameral legislature dating from William Penn’s Charter of Privileges of 1701). There were virtually no checks on the Assembly, such as veto power, given to the weak, albeit elected, plural executive (headed by a “president” chosen by the Assembly), or the judiciary. Members of the Supreme Court, although appointed for a seven-year term at a fixed salary, could be removed by the legislature at any time for “misbehavior.” The constitution contained provisions aimed at making the Assembly an open deliberative body accountable to the voters. The proceedings of the Assembly were open to the public. Legislators served one-year terms, and could serve no more than four out of seven years. Most bills had to be printed and distributed to the public, and then enacted by the next successive legislative session before becoming law. Such provisions, except for rotation in office, were virtually unknown in other state constitutions of the period.<sup>17</sup>

The constitution established the principle of apportionment by “the

<sup>15</sup> A.O. Aldridge observed: “Paine’s proposals are simple, and they clearly favor the popular elements of society, particularly a provision for a single, democratically elected legislature, a provision which repelled men of property and conservative instincts.” Aldridge, *Thomas Paine’s American Ideology*, 69.

<sup>16</sup> Rosalind A. Branning, *Pennsylvania Constitutional Development* (Pittsburgh, 1960), 14; David Hawke, *In the Midst of A Revolution* (Philadelphia, 1961), 191-92.

<sup>17</sup> See Cecelia M. Kenyon, “Constitutionalism in Revolutionary America,” in Roland J. Pennock and John W. Chapman, eds., *Nomos XX: Constitutionalism* (New York, 1979), 101, 103. See also J. Paul Selsam, *The Pennsylvania Constitution of 1776: A Study in Revolutionary Democracy* (Philadelphia, 1936), 184-85, 192.

number of taxable inhabitants," with regular reapportionment. Property requirements for voting were eliminated, with the much broader requirement that a voter pay taxes substituted in its place.<sup>18</sup> Finally, a Council of Censors was to be elected by the people every seven years to review legislative actions for conformity "to the principles of the constitution," and to propose amendments to the constitution.<sup>19</sup> This review mechanism had been recommended in several of the pamphlets published prior to the constitutional convention.<sup>20</sup>

The "democrats" who supported the constitution knew that a unicameral legislature was susceptible to vices, but in the words of Jesse Lemisch, they sought through the constitution's required popular participation to "check it from below—with more democracy—rather than from above, with less."<sup>21</sup> Staughton Lynd has noted a similar point of view:

The democratic movement in the American Revolution has usually been associated with the demand for single-chamber legislatures. What the ad hoc bodies of the Revolution signified, however, was the additional insistence that the best of legislatures be continually checked and guided by "the people out of doors," acting through new institutions of their own devising. This was a demand not simply for an end to conventional bicameralism, but for what might perhaps be termed "bicameralism from below."<sup>22</sup>

From the moment it was implemented, controversy raged over whether the constitution should be changed. This ongoing controversy, which was highly visible and was followed by many persons in other states, dominated most elections in Pennsylvania until a new constitution was substituted in 1790 as part of the overall movement leading

<sup>18</sup> Paine supported an even broader franchise. See Foner, *Tom Paine*, 142-43.

<sup>19</sup> Lutz, *Popular Consent and Popular Control*, 129-49. See also Lewis H. Meador, "The Council of Censors," *PMHB* 22 (1898), 265.

<sup>20</sup> Hyneman and Lutz, eds., *American Political Writing During the Founding Era*, 1:362-63, 389; M.J.C. Vile, *Constitutionalism and the Separation of Powers* (Oxford, England, 1967), 137.

<sup>21</sup> Lemisch, "Bottom Up," 14-15.

<sup>22</sup> Staughton Lynd, *Intellectual Origins of American Radicalism* (New York, 1968 ed.), 171.

to the federal Constitution.<sup>23</sup> This period of controversy generated a rich newspaper and pamphlet literature, with Paine contributing several newspaper articles in support of the constitution.<sup>24</sup> John Dickinson, a future federal Convention delegate, attacked the 1776 Pennsylvania constitution in his *Essay on a Frame of Government for Pennsylvania* (1776).<sup>25</sup> Benjamin Rush, who had originally encouraged Paine to write *Common Sense*, later referred to the government under the Pennsylvania constitution as a "mobocracy."<sup>26</sup>

Interested persons in other states spoke out on both sides of the debate over Pennsylvania's unique constitutional theory and practice. Almost immediately after *Common Sense* appeared, John Adams published his influential *Thoughts on Government* (1776) as, among other things, a response to Paine.<sup>27</sup> Adams set forth an alternate, more

<sup>23</sup> See generally Richard A. Ryerson, "Republican Theory and Partisan Reality in Revolutionary Pennsylvania: Toward a New View of the Constitutional Party," in Ronald Hoffman and Peter J. Albert, eds., *Sovereign States in an Age of Uncertainty* (Charlottesville, 1981), 95-133; Robert L. Brunhouse, *The Counter-Revolution in Pennsylvania 1776-1790* (Harrisburg, 1942), 17; Wood, *The Creation of the American Republic*, 226-37, 438-46. For a recent argument that the conflicts over the Pennsylvania Constitution of 1776 were essentially religious, see Owen S. Ireland, "The Crux of Politics: Religion and Party in Pennsylvania, 1778-1789," *William and Mary Quarterly* 42 (1985), 453-75.

On the movement for the federal Constitution in Pennsylvania, see John B. McMaster and Frederick D. Stone, eds., *Pennsylvania and the Federal Constitution, 1787-1788* (2 vols., Philadelphia, 1888).

<sup>24</sup> Foner, *Tom Paine*, 142-43.

<sup>25</sup> Harry A. Cushing attributed the pamphlet to Dickinson in "The People the Best Governors," 284. J. Paul Selsam disputes Cushing's attribution of this pamphlet to Dickinson: Selsam, *The Pennsylvania Constitution of 1776*, 173-74. But see Vile, *Constitutionalism*, 147 n. 3. Regardless of authorship, the pamphlet represents an important part of the public debate over the Pennsylvania constitution. On Dickinson's opposition to the Pennsylvania constitution, see Ryerson, *The Revolution Is Now Begun*, 243.

<sup>26</sup> Rush to John Adams, Jan. 22, 1789, in L.H. Butterfield, ed., *The Letters of Benjamin Rush* (2 vols., Princeton, 1951), 1:498.

<sup>27</sup> Hyneman and Lutz, eds., *American Political Writing During the Founding Decade*, 1:401. Adams wrote in his autobiography some time later, about *Common Sense*:

The other third part relative to a form of government I considered as flowing from simple ignorance, and a mere desire to please the democratic party in Philadelphia, at whose head were Mr. Matlock, Mr. Cannon and Dr. Young. I regretted, however, to see so foolish a plan recommended to the People of the United States, who were all waiting only for the countenance of Congress, to institute their State Governments. I dreaded the Effect so popular a pamphlet might have, among the People, and determined to do all in my Power, to counter Act the effect of it.

Lyman H. Butterfield, ed., *The Autobiography and Diary of John Adams* (4 vols., Cambridge, 1961), 3:332-33.

traditional vision of how the new state governments should be constituted. He proposed a model based on "balanced government," or checks and balances, to which bicameralism and executive power were central. He also advocated property requirements for officeholding and voting.<sup>28</sup>

John Adams was also very critical of the Pennsylvania frame of government. Benjamin Rush recalled about Adams:

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

Rush wrote to Adams: "From you I learned to discover the danger of the Constitution of Pennsylvania."<sup>29</sup>

Thus, arising out of Pennsylvania's 1776 constitutional theories, the crucial constitutional issues of the founding decade were joined: How would the new governments be structured? Who would participate in the new governments, directly as officeholders, and indirectly as voters? Adams's ideas would ultimately prevail.

Because Philadelphia was the center of debate over state constitutions, what happened in Pennsylvania was watched with great interest and concern elsewhere.<sup>30</sup> While considering constitutional frameworks, traditional leaders in a number of states adopted a strategy of delay in an effort to avoid a constitution like Pennsylvania's. This is sometimes missed by historians who focus on the apparent "rush"

<sup>28</sup> A.O. Aldridge has attributed *Four Letters on Interesting Subjects* to Paine. Aldridge, *Thomas Paine's American Ideology*, 219. He also asserts that the defense of unicameralism in *Four Letters on Interesting Subjects* was Paine's response to Adams. *Ibid.*, 233. The defense of unicameralism appears in Letter IV. See Hyneman and Lutz, eds., *American Political Writing During the Founding Era*, 1:384-87.

<sup>29</sup> Corner, ed., *The Autobiography of Benjamin Rush*, 142; Rush quoted in Hawke, *In the Midst of a Revolution*, 178; and Rush to Anthony Wayne, Sept. 24, 1776, in Butterfield, ed., *Letters of Benjamin Rush*, 1:114-15.

<sup>30</sup> Selsam, *Pennsylvania Constitution of 1776*, 215. A North Carolina delegate to the Continental Congress wrote that "The Pennsylvania Constitution has made more Tories than the whole treasury of Britain." Elisha P. Douglass, "Thomas Burke, Disillusioned Democrat," *North Carolina Historical Review* 26 (1949), 159 n. 34.

to adopt state constitutions after independence. The committee drafting the New York constitution, for example, delayed the process for eight months.<sup>31</sup>

In early 1777 New York's delegates to the Continental Congress in Philadelphia wrote home about the controversy over the Pennsylvania Constitution of 1776: "We ardently wish that in our own state the utmost caution may be used to avoid a like calamity. Every wise man here wishes that the establishment of new forms of government had been deferred."<sup>32</sup> Robert R. Livingston, one of New York's conservative leaders, contrasted what he viewed as the failure in Pennsylvania with New York's outcome, which he said was made possible by "Swimming with a Stream which it is impossible to stem." Concerning Pennsylvania, he added that he had

long ago advised that they should yield to the torrent if they hoped to direct its course—you know nothing but well timed delays, indefatigable circumstance would have prevented our being in exactly their situation.<sup>33</sup>

New York's 1777 constitution, with its Senate and Council of Revision which could veto bills, represents the beginning of the second wave of state constitution-making. It provided a model that appealed to many of those who opposed the Pennsylvania constitution. While he was in Philadelphia in 1779, John Jay wrote home to New York's governor, George Clinton:

The exceeding high opinion entertained of your Constitution and the wisdom of your Counsels, has made a deep impression on many People of wealth and Consequence in this State, who are dissatisfied with their own; and unless their opinions should be previously changed, will remove to New York the moment the Enemy leave it.<sup>34</sup>

<sup>31</sup> Bernard Mason, *The Road to Independence: The Revolutionary Movement in New York, 1773-1777* (Lexington, 1966), 219-20; Alfred F. Young, *The Democratic Republicans of New York: The Origins, 1763-1797* (Chapel Hill, 1967), 18; and Lutz, *Popular Consent and Popular Control*, 45.

<sup>32</sup> Philip Livingston, James Duane, and William Duer to Abraham TenBroeck, April 29, 1777, quoted in George Dargo, *Law in the New Republic: Private Law and the Public Estate* (New York, 1983), 10.

<sup>33</sup> Robert R. Livingston to William Duer, June 12, 1777, quoted in Young, *Democratic Republicans*, 15.

<sup>34</sup> Jay to Clinton, Oct. 7, 1779, quoted in Charles Thach, Jr., *The Creation of the Presidency, 1775-1789* (Baltimore, reprint ed., 1969), 54. Jay went on to describe the Pennsylvania Constitution of 1776 as "whimsical." *Ibid.*

Maryland constitutional framers in 1776 sought John Dickinson's advice on how to avoid a constitution like Pennsylvania's. Thomas Stone, a Maryland delegate to the Continental Congress, wrote Dickinson that:

I think it not improbable that a well-formed government in a state so near as Maryland might tend to restore the affairs of this [Pennsylvania] from that anarchy and confusion which must attend any attempt to execute their present no plan of polity.<sup>35</sup>

Dickinson did not come to Maryland, but apparently did send his comments on the Maryland draft.<sup>36</sup>

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

You have seen the constitution of Pennsylvania—the motley mixture of limited monarchy and an execrable democracy—a beast without a head. The mob made a second branch of the legislature. Laws [are] subjected to their revisal in order to refine them. A washing in ordure by way of purification. Taverns and dram shops are the councils to which the laws of this state are referred for approbation before they possess a binding influence.<sup>37</sup>

Not all constitution-makers in other states viewed Pennsylvania constitutionalism with alarm. The drafters of the Pennsylvania Constitution of 1776 passed copies of it to representatives of Vermont who came to Philadelphia to lobby the Continental Congress to recognize their statehood. Dr. Thomas Young, one of the key Pennsylvania radical Constitutionalists, published a circular letter, addressed to the Vermont delegation, on April 11 and 12, 1777, in which he espoused the virtues of Pennsylvania's system and encouraged its

<sup>35</sup> Quoted in Edward Papenfuss and Gregory A. Stiverson, eds., *The Decisive Blow Is Struck: A Facsimile Edition of the Proceedings of the Constitutional Convention of 1776 and the First Maryland Convention* (Annapolis, 1977), 4-5 (unnumbered pages).

<sup>36</sup> *ibid.*, 5 (unnumbered pages); Douglass, *Rebels and Democrats*, 124.

<sup>37</sup> Quoted in Douglass, "Thomas Burke," 158. Elisha Douglass explained that the "washing in ordure" to which the North Carolina delegate referred was "the provision in the Pennsylvania constitution that all legislation after passage must be published to the people at large before it could become law." *Ibid.*, 158 n. 33. This is what Staughton Lynd described as "bicameralism from below." Lynd, *Intellectual Origins*, 171.

adoption elsewhere.<sup>38</sup> Upon their return to Vermont, the representatives took up the question of a state constitution, and after concluding that the recent New York Constitution of 1777 was a “horrible example,” they proposed a constitution modeled closely after Pennsylvania’s.<sup>39</sup>

Georgia was the only state other than Pennsylvania (and Vermont) to adopt a unicameral legislature. Its constitution was strongly influenced by Button Gwinnett, one of Georgia’s delegates to the Continental Congress in Philadelphia, where he was exposed to the wide range of state constitutional drafts, pamphlets, and arguments during 1776. Benjamin Rush noted that Gwinnett had taken the Pennsylvania constitution back to Georgia.<sup>40</sup>

Even in states where the Pennsylvania model was not adopted, it and Paine’s ideas formed a platform for outsiders who pushed for change. The tension between the two basic factions which developed in each of the states during the battles over the state constitutions, and which contended over the franchise, legislative structure, and executive powers, continued into the legislative politics of the founding decade.<sup>41</sup> In each of the states, two “parties,” described by Jackson Turner Main as the “Localists” and “Cosmopolitans,” clashed again and again over the key legislative issues.<sup>42</sup> These issues included the treatment (and punishment) of Loyalists, price regulation, issuance of paper money, payment of public debt, taxation policy, debtor/creditor relations, public spending, and a range of social and cultural

<sup>38</sup> Adams, *First American Constitutions*, 94; Matt B. Jones, *Vermont in the Making, 1750-1777* (Hamden, reprint ed., 1968), 339. See also Selsam, *Pennsylvania Constitution of 1776*, 184 n. 56.

<sup>39</sup> Main, *Sovereign States*, 177; Jones, *Vermont*, 382-85; Vile, *Constitutionalism*, 140.

<sup>40</sup> Edward J. Cashin, “‘But Brothers, It Is Our Land We Are Talking About’: Winners and Losers in the Georgia Backcountry,” in Ronald Hoffman, Thad W. Tate, and Peter J. Albert, eds., *An Uncivil War: The Southern Backcountry During the American Revolution* (Charlottesville, 1985), 254-55. See also Harvey H. Jackson, “The Rise of the Western Members: Revolutionary Politics and the Georgia Backcountry,” in *ibid.*, 295-301. Corner, ed., *Autobiography of Benjamin Rush*, 153.

<sup>41</sup> Pennsylvania provided the clearest example of parties contending over the state constitution: Selsam, *Pennsylvania Constitution of 1776*, 247; Ryerson, *The Revolution Is Now Begun*, 251, n. 9; Kelley, *Cultural Pattern*, 79.

<sup>42</sup> Jackson Turner Main, *Political Parties Before the Constitution* (Chapel Hill, 1973), 24, 365.

issues.<sup>43</sup> Not all states faced each of these issues, or resolved them the same way, but as Main has observed, the “states faced many of the same problems, and these problems stimulated a similar response, notably the emergence in each state of two major, opposing political blocs.”<sup>44</sup> According to Gordon Wood, those who found themselves on the losing side on these controversial issues began to realize that these legislative policies “were not the decrees of a tyrannical and irresponsible magistracy, but laws enacted by legislatures which were probably as equally and fairly representative of the people as any legislatures in history.”<sup>45</sup> Main concluded that the clashes over these issues “reached a climax in the most momentous question of the decade: the ratification of the Federal Constitution.” He continued that the adoption of the United States Constitution “involved not merely relations between the states and the central government but the many internal disputes that divided the legislatures—paper money, the court system, debts, slavery, taxes, land policy, and ultimately many more.”<sup>46</sup>

Pennsylvania's constitutional theory and practice was influential not only in the state constitutional debates of the founding decade, but also in the drafting of the federal Constitution. Those who had fought against Pennsylvania's 1776 constitution but failed repeatedly to change it began to turn their sights to the national level to accomplish reform of state governments. Many in other states began to follow the same approach. James Wilson of Pennsylvania expressed this view when he told the Constitutional Convention on June 16:

Where do the people look at present for relief from the evils of which

<sup>43</sup> *Ibid.*, 44-79. See also Forrest McDonald, *Novus Ordo Seclorum? The Intellectual Origins of the Constitution* (Lawrence, 1985), 143-79. For coverage of legislative controversies in Pennsylvania, see Main, *Political Parties*, 174-211. For coverage of specific Pennsylvania legislative issues, see Anne M. Osterhout, “Controlling the Opposition in Pennsylvania During the American Revolution,” *PMHB* 105 (1981), 3; Osterhout, “Pennsylvania Land Confiscations During the Revolution,” *PMHB* 102 (1978), 328; and Lemnel Malovinsky, “Taxation and Continuity in Pennsylvania During the American Revolution,” *PMHB* 104 (1980), 365.

<sup>44</sup> Main, *Political Parties*, 321.

<sup>45</sup> Wood, *Creation of the American Republic*, 404.

<sup>46</sup> Main, *Political Parties*, 79.

they complain? Is it from an internal reform of their Govt.? No. Sir, it is from the Natl. Councils that relief is expected.<sup>47</sup>

Wilson had been an opponent of the 1776 Pennsylvania constitution and many of the legislative policies of the period. In 1779 his Philadelphia home was the scene of fatal shootings in a clash between a militia company supporting price regulation and opponents of such legislative policies.<sup>48</sup> After the Convention Wilson told the Pennsylvania ratifying convention that “the greatest potential threats to popular rule were the state governments themselves.”<sup>49</sup>

James Madison, a longtime critic of even the relatively moderate Virginia constitution, noted that problems with how state governments were operating, rather than only defects in the Articles of Confederation, led to the federal Convention.<sup>50</sup> Likewise, Edmund Randolph, in introducing the Virginia Plan to the Convention, argued: “our chief danger arises from the democratic parts of our [state] constitutions . . . None of the constitutions have provided sufficient checks against the democracy.”<sup>51</sup> Madison, like Randolph, singled out state legislatures for criticism. He insisted that the state legislative branch had become “omnipotent” because “[E]xperience has proved a tendency in our governments to throw all power in to the legislative vortex.”<sup>52</sup> Gouverneur Morris of Pennsylvania targeted his own state’s legislature when he charged: “Every man of observation had seen in the democratic branches of the State Legislatures . . . excesses against personal liberty private property and personal safety. What qualities are necessary to constitute a check in this case?” He contin-

<sup>47</sup> Farrand, ed., *Records of the Federal Convention*, 1:253. See also John Roche, “The Founding Fathers: A Reform Caucus in Action,” *American Political Science Review* 55 (1961), 800.

<sup>48</sup> See generally John K. Alexander, “The Fort Wilson Incident of 1779: A Case Study of the Revolutionary Crowd,” *William and Mary Quarterly* 31 (1974), 589. Robert Brunhouse referred to this event as “the highwater mark of Radical democracy in Pennsylvania during the revolutionary period.” Brunhouse, *Counter-Revolution*, 75.

<sup>49</sup> Wilson quoted in William M. Wiecek, *The Guarantee Clause of the United States Constitution* (Ithaca, 1972), 69.

<sup>50</sup> Farrand, ed., *Records*, 1:134-36.

<sup>51</sup> Farrand, ed., *Records*, 1:26-27.

<sup>52</sup> Farrand, ed., *Records*, 2:35. See also *ibid.*, 74. Richard Ryerson referred to the Pennsylvania Constitution of 1776 as “America’s most un-Madisonian Constitution.” Ryerson, “Republican Theory,” 98.

ued: "Ask any man if he confides in the state of Penna. if he will lend his money or enter into contract? He will tell you no. He sees no stability. He can repose no confidence."<sup>53</sup> Madison, Randolph, and Morris, who were among the most influential delegates at the Convention, saw the existing state constitutions, with Pennsylvania's as the most extreme example, as unable to provide checks against wide-ranging assaults on liberty and property by the relatively unfettered state legislatures. Concluding that meaningful change was unlikely at the state level, they began to see the federal Constitution as the source of workable restrictions on state legislative action. Significant for the fate of the Pennsylvania model at the Convention was that the Pennsylvania delegation, which exercised considerable influence at the Convention due to the strategic geographic and economic place of the state in the new nation and the genius and stature of the Pennsylvania delegates, consisted of persons who opposed the Pennsylvania Constitution of 1776. As yet unable to redraw the constitutional and political framework in Pennsylvania, they looked for relief to the Convention meeting in Philadelphia.

As issues arose in the Convention regarding the structure of the new federal government, most of the fundamental features of the Pennsylvania constitution were rejected, either explicitly or implicitly. For example, when rotation in office—a key feature of Pennsylvania's constitution—was debated, Gouverneur Morris opposed it, arguing: "A change of men is ever followed by a change of measures. We see this fully exemplified in the vicissitudes among ourselves, particularly in the State of Pena."<sup>54</sup> In discussing a proposed prohibition on members of the House holding other offices, Wilson was reported to have "observed that the State of Pena. which has gone as far as any State into the policy of fettering power, had not rendered the members of the Legislature ineligible to offices of the Govt."<sup>55</sup> In debating the need for some form of executive veto in the federal Constitution, Morris reminded the delegates that

The Report of the Council of Censors in Pennsylvania points out the many invasions of the legislative department on the Executive numerous

<sup>53</sup> Farrand, ed., *Records*, 1:511-13.

<sup>54</sup> Farrand, ed., *Records*, 2:112-13.

<sup>55</sup> Farrand, ed., *Records*, 2:288.

as the latter is, within the short term of seven years, and in a State where a strong party is opposed to the Constitution, and watching every occasion of turning the public sentiments agst. it.<sup>56</sup>

Wilson had argued earlier that the federal executive needed an absolute veto because "Without such a self-defense the Legislature can at any moment sink it into non-existence."<sup>57</sup>

Morris and Wilson, together, played the central role in creating the presidency during the Convention.<sup>58</sup> The institution of the President was, of course, the antithesis of the weak, plural Pennsylvania executive branch, where the president, even amid wartime conditions that required expanded executive authority to mobilize and organize the state's resources, was, in Margaret MacMillan's judgment, "perhaps . . . the most impotent of the war executives."<sup>59</sup> At the Convention Wilson spoke out for an executive power to check legislative tyranny:

The prejudices agst. the Executive resulted from a misapplication of the adage that the parliament was the palladium of liberty. Where the Executive was really formidable, *King and Tyrant*, were naturally associated in the minds of the people; not *legislature* and *tyranny*. But where the Executive was not formidable, the two last were most properly associated. . . . He insisted that we had not guarded agst. the danger on this side by a sufficient self-defensive power either to the Executive or Judiciary department<sup>60</sup>

One of the earliest—and most resolute—decisions of the Convention was in favor of bicameralism, another direct antithesis of Pennsylvania's frame of government. There was no real controversy over this point. In adopting bicameralism, a key element of the Virginia Plan, Madison recalled later that it was only the Pennsylvania delegation that dissented, "probably from complaisance to Doctr. Franklin

<sup>56</sup> Farrand, ed., *Records*, 2:299-300. In *The Federalist*, numbers 48 and 50, Madison pointed on several occasions to the Pennsylvania Council of Censors, noting its failure to prevent violations of the constitution.

<sup>57</sup> Farrand, ed., *Records*, 1:98.

<sup>58</sup> Thach, *Creation of the Presidency*, viii-ix, 88, 99.

<sup>59</sup> Margaret Burham MacMillan, *The War Governors in the American Revolution* (New York, 1943), 92.

<sup>60</sup> Farrand, ed., *Records*, 2:300-301.

who was understood to be partial to a single House of Legislation."<sup>61</sup> George Mason was sure that the "mind of the people of America" was

settled . . . in an attachment to more than one branch in the legislature. . . . Their constitutions accord so generally . . . that they seem almost to have been a miracle, or have resulted from the genius of the people. The only exceptions to the establishmt. of two branches in the Legislature are the State of Pa. and Congs.<sup>62</sup>

Although the nature of representation in the two-branch legislature led to the almost fatal split between large and small states, and eventually to the Great Compromise, it was clear from the debates that the delegates thought that the federal Senate needed to be a stronger check than state upper houses had been<sup>63</sup> on what many delegates viewed as an "excess of democracy"<sup>64</sup> or "the turbulence and follies of democracy."<sup>65</sup> John Dickinson of Delaware clearly expressed this view.<sup>66</sup>

The Convention rejected the idea of the annual election, a central feature of the Pennsylvania and other state constitutions, for the House of Representatives. Randolph of Virginia supported annual elections, but conceded that they "were a source of great mischiefs in the States."<sup>67</sup> On the question of apportionment, Gouverneur Morris opposed Randolph's motion that a census be utilized to apportion the House, arguing that the use of a census "had been found very pernicious in most of the State Constitutions."<sup>68</sup> Pennsylvania had

<sup>61</sup> Farrand, ed., *Records*, 1:48.

<sup>62</sup> Farrand, ed., *Records*, 1:339.

<sup>63</sup> Jackson Turner Main concluded that "Even those senates that were intended to be aristocratic were indelibly marked by the vigorous democratic movement." Main, *The Upper House in Revolutionary America, 1763-1788* (Madison, 1967), 99. Donald Lutz reached a similar conclusion: Lutz, *Popular Consent and Popular Control*, 92. See also Young, *Democratic Republicans*, 62.

<sup>64</sup> Farrand, ed., *Records*, 1:48. Elbridge Gerry commented that Daniel Shays's demand for abolition of the Massachusetts Senate and establishment of a powerful unicameral legislature reflected "the wildest ideas of government in the world." See *ibid.*, 123.

<sup>65</sup> The phrase was Edmund Randolph's. See Farrand, ed., *Records*, 1:51. William Pierce recorded Randolph's comments as referring to the "fury of democracy": *ibid.*, 58.

<sup>66</sup> Farrand, ed., *Records*, 1:150, 158.

<sup>67</sup> Farrand, ed., *Records*, 1:360.

<sup>68</sup> Farrand, ed., *Records*, 1:571.

provided the earliest example of such a reapportionment provision. Finally, in supporting the new federal Constitution's direct restrictions on state legislative power, Wilson told the Pennsylvania ratifying convention:

Permit me to make a single observation in this place on the restraints placed on the State governments. If only the following lines were inserted in this constitution, I think it would be worth our adoption: "No State shall hereafter *emit bills of credit*;—make anything but gold and silver coin a *tender* in payment of debts; pass any bills of attainder, ex post facto law, or *law impairing the obligation of contract*." Fatal experience has taught us, dearly taught us, the value of these restraints.<sup>69</sup>

Several features of Pennsylvania's constitutional experience found favor among delegates at the Constitutional Convention. For example, section 9 of the 1776 frame of government set forth the powers of the legislature, but concluded that it "shall have no power to add to, alter, abolish, or infringe any part of this constitution." This important statement of the principle of constitutional supremacy was unusual in 1776 when most state constitutions were drafted and promulgated by legislatures, and could be changed by mere legislative action, but it was embodied in the federal Constitution of 1787. Pennsylvania's first state constitution also had introduced concepts such as the taxpayer franchise, reapportionment based on taxpayer population, and expanded eligibility for officeholding— notions which were controversial in 1776 but, Richard Ryerson reminds us, are now "casually accepted in twentieth-century America."<sup>70</sup>

Section 17 of the Pennsylvania Constitution of 1776 cautioned that "representation in proportion to the number of taxable inhabitants is the only principle which can at all times secure liberty, and make the voice of a majority of the people the law of the land," and required reapportionment every seven years. Although Gouverneur Morris unsuccessfully opposed a similar provision at the Constitutional Convention, James Wilson supported what became Article I, section 2, of the U.S. Constitution and in his "Lectures on Law" in 1790-1791 at the College of Philadelphia stated:

<sup>69</sup> McMaster and Stone, eds., *Pennsylvania and the Federal Constitution, 1787-1788*, 1:349.

<sup>70</sup> Ryerson, "Republican Theory," 132.

[A]ll elections ought to be equal. Elections are equal, when a given number of citizens, in one part of the state, choose as many representatives, as are chosen by the same number of citizens, in any other part of the state. In this manner, the proportion of the representatives and of the constituents will remain invariably the same.<sup>71</sup>

One can only speculate on whether Wilson's views were formed from his Pennsylvania experience, but the federal provision was clearly patterned on state provisions like Pennsylvania's. Further, Wilson's statement was important enough to be quoted with approval more than 180 years later in the United States Supreme Court's landmark one-person-one-vote decisions.<sup>72</sup> Even the idea of a specialized constitutional convention itself, followed by a separate mechanism for popular ratification, which was apparently such an obvious procedure by 1787, was the product of a painstaking period of trial and error with state constitution-making processes beginning with Pennsylvania's specially elected constitutional convention in 1776.<sup>73</sup>

In exploring connections between constitution-making in Pennsylvania and at the Constitutional Convention, it is impossible to be sure what factors motivated delegates such as Wilson and Morris. The debates reveal that these two Pennsylvania delegates were knowledgeable about state constitutions other than Pennsylvania's. Morris had even participated in drafting New York's 1777 constitution.<sup>74</sup> Further, both Wilson and Morris viewed most features of Pennsylvania's constitution, and the experience with government operating under it, as distinctly inferior to the constitutions of other states. It seems fair to conclude, therefore, that these delegates' experience in Pennsylvania with its constitution and the associated political battles was a major force in shaping their constitutional thinking as expressed at the Convention of 1787.

Much of Wilson's well-known support for a powerful, popularly

<sup>71</sup> Robert Green McCloskey, ed., *The Works of James Wilson* (2 vols., Cambridge, 1967), 1:406.

<sup>72</sup> *Westberry v. Sanders*, 376 U.S. 1, 17 (1964); *Reynolds v. Sims*, 377 U.S. 533, 564 n. 41 (1964).

<sup>73</sup> See generally Thad W. Tate, "The Social Contract in America, 1774-1787: Revolutionary Theory as a Conservative Instrument," *William and Mary Quarterly* 22 (1965), 375; and Adams, *First American Constitutions*, 63-98.

<sup>74</sup> Douglas, *Rebels and Democrats*, 63-65.

elected President mirrored the arguments that were being developed within Pennsylvania by the opponents of the 1776 constitution during the decade before the federal Constitution. Wilson was a prominent member of this opposition group, known as Republicans, in Pennsylvania which warned that, contrary to the rhetoric of 1776, an unchecked legislative branch could constitute a danger to liberty. As this argument evolved, it began to separate government officials from the people themselves, and to contend that checks on legislative power were necessary to protect the people's interests from the misuse of power. Checks such as an upper house and a more powerful, single executive elected by the people were portrayed as logical republican mechanisms to represent more effectively the popular will by avoiding the various kinds of legislative abuses. According to Republican logic, an elected governor exercising effective power was a representative of the people, while an upper house was necessary to divide legislative power that had been abused.<sup>75</sup> If nothing else, Wilson's argument at the Convention recast arguments that Republicans previously had levied against the Pennsylvania constitution.

One may question the overall importance of a state constitution that was in effect for only fourteen years and the main features of which were rejected in most of the other state constitutions and the federal Constitution. Is it simply a relic that has been tossed on the scrap heap of constitutional history and theory? Historians and political scientists have universally concluded that Pennsylvania's 1776 constitution was a "failure."<sup>76</sup> Such a judgment misses the influence of the Pennsylvania experience on constitution-making during the founding decade. Paine's *Common Sense* and the Pennsylvania Constitution of 1776 created both a popular theoretical foundation for a simple, broad-based communitarian republic, and an adopted, functioning model reflecting the realization of the theory in written constitutional form.<sup>77</sup> The Pennsylvania constitution and *Common Sense*, together with the political arguments supporting them, provided a basis for argument, almost a platform, for outsiders or traditionally unrepre-

<sup>75</sup> Wood, *Creation of the American Republic*, 438-53.

<sup>76</sup> See Ryerson, "Republican Theory," 95-97, and materials cited at 96 n. 1.

<sup>77</sup> Merrill Jensen, *The American Revolution Within America* (New York, 1974), 68; Kelley, *Cultural Pattern*, 77.

sented people in other states to oppose "aristocratic" elements in the new state constitutions. In recent times, as Jesse Lemisch recognizes, Paine's "thought presents an alternative and a standard by which to judge the thought of the other leaders of the Revolution."<sup>78</sup> The Pennsylvania example contributed to what Robert Kelley has identified as the "fiercely egalitarian and republican philosophy [that] swept the working classes."<sup>79</sup> Whatever its weaknesses, the Pennsylvania Constitution of 1776 did survive tremendous opposition for fourteen years, and achieved respectable support outside the state.

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

Richard Ryerson has concluded that the Pennsylvania Constitution of 1776 ultimately failed because it was based on a vision of society as homogeneous—consisting of "either one or a few very similar interests," and as consisting of citizens who would "place their civil obligations ahead of" their individual interests.<sup>80</sup> He argues that many Pennsylvanians during the founding decade came to believe that neither of these premises for constitutional design were accurate.

Ryerson's formulation represents the basic characterization of Whig political philosophy which during the Revolutionary era was still strongly influenced by notions of a unity of interest in "the people," so evident in Revolutionary rhetoric directed against Great Britain. The concept, and in some instances the reality, of popular sovereignty right after independence led to the predominant legislative power in the first state constitutions, reflecting the view that, in Gordon Wood's words, "a tyranny by the people was theoretically inconceivable."<sup>81</sup>

<sup>78</sup> Lemisch, "Bottom Up," 13.

<sup>79</sup> Kelley, *Cultural Pattern*, 75.

<sup>80</sup> Ryerson, "Republican Theory," 130. The Pennsylvania Constitutionalists would, therefore, not fit within Willi Paul Adams's description of the "realists of 1776," who "identified different interests and institutionalized them in graduated property qualifications for voting and office holding, in the system of checks and balances, and in the establishment of bicameral legislatures." Adams, *First American Constitutions*, 229.

<sup>81</sup> Wood, *Creation of the American Republic*, 62. See also Lutz, *Popular Consent and Popular Control*, 60-61, 204-7; Main, *Sovereign States*, 152; and Adams, *First American Constitutions*, 248-50.

In Pennsylvania, however, the requirements of openness in government, rotation in office, passage of ordinary bills through two legislative sessions, and periodic review by a Council of Censors together do seem to reflect an early awareness of the potential for abuse by a powerful legislature.<sup>82</sup> Such provisions hardly attest to a conception of society as homogeneous, where “tyranny by the people” could not happen. Indeed, the rhetoric surrounding the adoption of the 1776 constitution bespoke a clear understanding of, and desire to capitalize on, the sharp distinctions and conflicts among segments of society. Pennsylvania just utilized unfamiliar mechanisms for remedying legislative abuses. Events in Pennsylvania proved for the whole country that the alternative “checks” were not workable.

The drafters of the Pennsylvania Constitution of 1776 may not have been motivated primarily by any ideal “vision” or idea of a homogeneous, virtuous society.<sup>83</sup> They were more likely motivated in large part by a practical, instrumental desire to gain and maintain political advantage—a motivation that led to their peculiar “ideal” vision of government. They had seized political power, and did not want to risk losing it. They associated upper houses and executive and judicial power with “aristocratic” government, not only in theoretical terms, but in an immediate, practical sense. The class-based, anti-aristocratic rhetoric of the times makes this apparent. Witness the writer in the July 30, 1776, *Pennsylvania Evening Post* who asserted that “The rich having been used to govern, seem to think it is their right; and the poorer commonality, having hitherto had little or no hand in government, seem to think it does not belong to them to have any.”<sup>84</sup> There is nothing theoretical about that point of view.

Perhaps the most important contribution of Pennsylvania’s 1776 constitution was that it provided a highly visible, national focal point

<sup>82</sup> Jackson Turner Main made the following comment about Pennsylvania’s 1776 legislative procedure requirements: “Prevented from doing harm, it [the legislature] might then be trusted with power to do good.” Main, *Sovereign States*, 152.

<sup>83</sup> On the interrelationship between ideology and human behavior, see Gordon S. Wood, “Ideology and the Origins of Liberal America,” *William and Mary Quarterly* 44 (1987), 628-34; and Jay M. Feinman, “The Role of Ideas in Legal History,” *Michigan Law Review* 78 (1980), 722.

<sup>84</sup> Quoted in Adams, *First American Constitutions*, 177. See also Hawke, *In The Midst of a Revolution*, 184-87.

for the competing arguments on the key constitutional issue of the founding decade—namely, the relationship of separation of powers and checks and balances. The Constitutionals were acutely aware of the separation of, and the differences among, governmental powers. It was the not yet fully understood concept of checks and balances, which they associated with monarchical government, that they rejected. M.J.C. Vile makes this point as follows:

It is often stated that the Constitution of Pennsylvania did not embody the separation of powers, whereas in fact it was the basis for the whole Constitution. It is the failure to distinguish clearly between the separation of powers on the one hand, and checks and balances on the other, which leads to the confusion. The founders of the 1776 Constitution were bitterly opposed to any semblance of the checks and balances of the monarchic or aristocratic constitution.<sup>85</sup>

Executive branch officials serving under the 1776 constitution saw this crucial distinction when they complained publicly of the legislature's "various measures . . . which we conceive prejudicial to the State and derogatory to the Constitutional rights of this Board," which tended to "annihilate the powers and usefulness of the Executive part of government." They warned that they would "never make a voluntary surrender of our privileges, so we will not tamely and silently submit to any invasion of them." These *elected* executive officials argued clearly that the separation of powers doctrine was being violated, but in the absence of any mechanism to check these violations, they could only appeal publicly to "our mutual constituents, the true source and fountain from whence all our authority is derived."<sup>86</sup>

As early as 1776 opponents of the Pennsylvania constitution began to voice concern about the absence of checks in the governmental structure. A writer in the October 23, 1776, *Pennsylvania Gazette* criticized the constitution because it had "no *distribution* power into *different* hands, that *one may check another*." The criticism was not a detached, theoretical argument. It was, rather, a practical argument

<sup>85</sup> Vile, *Constitutionalism*, 136.

<sup>86</sup> Pa. Archives, Fourth Series, vol. 111, 838-41, quoted in Thach, *The Creation of the Presidency*, 32.

made by those who did not want to share power with the newly active elements and who opposed on their merits the legislative policies being adopted and which they feared would be adopted in the future.

The focus on the absence of checks and balances in the Pennsylvania constitution continued to take shape, as Wood has argued, "so much so that within a few years the separation and distribution of power had become the major justification for all constitutional reforms the Republicans proposed."<sup>87</sup> The recommendations of the first session of the Council of Censors in 1783, for example, emphasized the need for an upper house and an executive veto, much like those contained in the Massachusetts Constitution of 1780. These changes, however, were not made in Pennsylvania until 1790, after adoption of the federal Constitution. But the Pennsylvania example served to stimulate much earlier movement to mechanisms of checks and balances in other states, beginning in New York in 1777, progressing through Massachusetts in 1780, and culminating with the federal Constitution in 1787.<sup>88</sup>

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

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<sup>87</sup> Wood, *Creation of the American Republic*, 450.

<sup>88</sup> Vile, *Constitutionalism*, 146-54.