

ARTICLES & NOTES

AMERICA'S FORGOTTEN HISTORY OF CONSTITUTIONAL CRISIS

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ABSTRACT

Scholars have insisted that constitutional crisis is rare in American history. They are wrong. Constitutional crisis has been one of the most important constants in American history. The events of January 6, 2021, the assassination attempt on President Trump, and the debate about whether to invoke the Twenty-Fifth Amendment to force President Biden out of office are child's play compared to the constitutional crises this country has endured. Those observations are only surprising because so few scholars have studied constitutional crises at the state level. They are focused on national and international constitutional crises. This Article has three goals. First, it explains why such a narrow view of constitutional crisis is mistaken, given a context where state constitutions are increasingly important. Second, it demonstrates that constitutional crisis at the state level has been a frequent occurrence in American history and describes the most common ways those state constitutional crises have manifested. Finally, it argues that far from being isolated events, these crises have profoundly shaped our legal and constitutional order today and warns that they are a present threat that scholars and policymakers should take seriously.

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I. INTRODUCTION

A losing candidate refuses to concede an election while partisans say they must act decisively to “stop the steal” and march on the capitol.¹ A flaw in security protocols allows an assassin to shoot that candidate when he pursues office later, but that candidate appears to miraculously escape death.² The man holding the chief executive position makes important decisions while a deteriorating physical condition raises questions about his mental fitness.³ Sound familiar? Are you expecting to read yet another article about January 6, 2021, or the 2024 presidential campaign? Fear not. I just described Kentucky’s 1899 gubernatorial campaign.⁴ And it gets better (or

¹ See JAMES C. KLOTTER, WILLIAM GOEBEL: THE POLITICS OF WRATH 88 (1977); *infra* Section IV.C.

² See KLOTTER, *supra* note 1, at 100, 102, 107.

³ See *id.* at 107.

⁴ See generally *id.*

worse depending on your view). William Goebel's triumph when the legislature threw out the election results and installed him as governor was short-lived.⁵ He died from his gunshot wound shortly after being sworn in.⁶ Widespread conspiracy theories convinced many Kentuckians that Goebel's rival ordered his death, and he was indicted as an accessory to murder before fleeing the state.⁷ Such episodes account for far more of America's story than you thought.

In the past few years, fears of a constitutional crisis have reached a fever pitch. First, there was January 6, 2021.⁸ What would have happened if President Trump refused to leave office? What if a Republican Congress had tried to certify President Trump as the winner of the 2020 election? Would Democrats have accepted such an arrangement, and to what extremes might some have gone to rectify the situation? For the first time in American history, the Supreme Court had to consider whether a presidential candidate was disqualified under the Fourteenth Amendment as an insurrectionist.⁹ Second, there was the reception to President Biden's performance in the 2024 campaign's first presidential debate.¹⁰ Even sympathetic observers questioned whether he had the mental capacity for the presidency and whether the Twenty-Fifth Amendment should be invoked to remove him from office.¹¹ Third and finally, a would-be assassin shot President Trump at a rally in Pennsylvania.¹² What would have happened if the bullet had landed just a bit further to the right? Predictions have been dire.¹³

If you are reading this, you are likely concerned about the health of America's constitutional order. As much as I hate to say it, you also probably aren't worried enough. There is another threat just as grave that receives little attention amid our intense focus on national politics. States are every bit as at risk of their own constitutional

⁵ *Id.* at 104, 108.

⁶ *Id.*

⁷ *Id.* at 116.

⁸ *See infra* Section II.B.

⁹ *See* *Trump v. Anderson*, 601 U.S. 100, 106–07, 108 (2024).

¹⁰ Ewan Palmer, *Joe Biden Voters Are Leaning Toward 25th Amendment*, NEWSWEEK (July 11, 2024, 5:44 AM EDT), <https://www.newsweek.com/joe-biden-poll-25th-amendment-vice-president-1923208> [<https://perma.cc/2NGP-Z5UH>].

¹¹ *Id.*

¹² *Trump Survives Assassination Attempt at Campaign Rally, as It Unfolded*, AP NEWS (July 15, 2024, 3:29 AM EST), <https://apnews.com/live/election-biden-trump-campaign-updates-07-13-2024> [<https://perma.cc/3YLW-RVHT>].

¹³ *See infra* Section II.C; Gene Johnson, *At the Trump Rally, It Was Evening Sun, Songs, and Blue Sky. Then Came Bullets, Screams, and Blood*, AP NEWS (July 15, 2024, 10:43 PM EST), <https://apnews.com/article/trump-assassination-attempt-what-happened-734900d303fcfb349162047f8059601> [<https://perma.cc/8SL8-YJQD>].

crises as the federal government is. Constitutional crises have historically been an enormous problem at the state level.¹⁴ State constitutions command less reverence than the federal Constitution does and may be more susceptible to breaking under pressure.¹⁵ And to raise the stakes even higher, state constitutions are now receiving more attention than ever, as is evident in recent pushes to amend several state constitutions to protect abortion access after the U.S. Supreme Court overturned *Roe v. Wade*.¹⁶ With increased visibility will come increased pressure. The kind of pressure that has been too much for many states historically.

At the national level, it feels like our constitutional house is on fire. But it has been haunted for centuries. And the ghost of constitutional-crises past lingers with us. The problem is that few, if any, scholars or citizens appreciate just how scary a place our constitutional house really is. Its secrets include kidnapped judges, attacks on armory buildings, campaigns of politically motivated terrorism, and coup d'états. Focusing on federal or international constitutional crises—as scholars have done—necessarily means ignoring an important part of our constitutional heritage and obscuring some of the biggest risks we face in maintaining our constitutional order. This Article serves as a corrective.

It proceeds in five parts. The first synthesizes the current dialogue around constitutional crisis.¹⁷ It demonstrates that scholars and journalists have almost exclusively focused on the threat of constitutional crisis at the federal level and ignored state constitutional crises. It then demonstrates that state constitutional crises have been common occurrences in our history worthy of scholarly attention. It further explains why state constitutional crises should not be treated as an afterthought when analyzing federal constitutional crises, but should instead be studied on their own terms, especially given the increasing prominence of state constitutions. This sets the stage for the next three parts, which address specific threats of constitutional crisis states have faced historically, and which are a danger now.¹⁸

The second part explores some of the unique election disputes states have faced historically and how those disputes have spiraled

¹⁴ See *infra* Section II.D.

¹⁵ See *infra* Section II.D.

¹⁶ See *infra* Section II.E; *Roe v. Wade*, 410 U.S. 113 (1973), *overruled by* *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022).

¹⁷ See *infra* Part II.

¹⁸ See *infra* Parts III, IV, V.

out of control.¹⁹ To do so, it focuses on the Buckshot War in Pennsylvania. There, Pennsylvanians did not agree on who won legislative and gubernatorial elections. After almost two months of uncertainty, both of the state's political parties purported to elect a speaker of the house, and a large mob came to the capital, threatened to murder prominent officials, and made them run for their lives. The mob took over a state armory. The governor called out the militia and begged the federal government for help, all while wondering whether the head of his militia would serve him or his political enemies.

The third part considers how disagreements about popular sovereignty, who counts as being “the people,” and “liberty” have led state constitutions to break down.²⁰ To do so, it focuses on the Dorr Rebellion in Rhode Island. There, those who wanted to expand suffrage and redistribute political power held an extralegal state constitutional convention after a malapportioned legislature had repeatedly thwarted their proposed reforms. After a majority of Rhode Island's eligible voters ratified the constitution, they attempted to implement the new constitution by force, leading to dueling militias, an attack on a state armory building, and a debate about which side the federal government would support. The second section explains how the crisis resulted from irreconcilable answers to difficult questions state constitutions answer, such as who “the people” are who hold political power and what popular sovereignty means.²¹ Finally, it considers why the issues the Dorr Rebellion raised had continuing relevance for state constitutional law historically and how those issues affect us today.²²

The fourth part considers the many state constitutional crises that combined the election disputes of the Buckshot War and the philosophical disagreements about fundamental constitutional values of the Dorr Rebellion.²³ To do so, it places a special focus on South Carolina during Reconstruction. It demonstrates that a determined minority used every means available to it—including terrorism and voter suppression—to overthrow the lawful government. This was a common phenomenon in the South during Reconstruction. The part again demonstrates how the crisis resulted from divergent views of who “the people” are and what “liberty” and “equality” mean. Finally, it illustrates that South Carolina's

¹⁹ See *infra* Part III.

²⁰ See *infra* Part IV.

²¹ See *infra* Section IV.B.

²² See *infra* Section IV.C.

²³ See *infra* Part V.

constitutional crisis helps us understand many of the other constitutional crises in the region during that era and explains why those crises are especially relevant today after the events of January 6, 2021.

The final part reflects on how state constitutional crises have affected American history and considers how historical constitutional crises relate to the present.²⁴ Far from being isolated occurrences that affect just one state, state constitutional crises have shaped our constitutional order in several important ways. The final part ends with a plea for more scholars to study state constitutional crises, as they are a present threat.

II. THE CURRENT DIALOGUE AROUND CONSTITUTIONAL CRISIS

A. *What is a Constitutional Crisis?*

Constitutions serve several functions. First, they define the rights of citizens.²⁵ Second, they define a government's structure and obligations.²⁶ Third, they express a society's ideals.²⁷ But perhaps most importantly, they enable a society to resolve disputes through a prescribed political process.²⁸ As Professor Jack Balkin, one of the foremost experts on constitutional crisis has written, "[t]he central task of constitutions is to keep disagreement within the boundaries of ordinary politics rather than breaking down into anarchy, violence, or civil war."²⁹ A constitutional crisis therefore occurs when "there is a serious danger that the Constitution is about to fail at [this] central task."³⁰ Professor Keith Whittington advances a similar definition of a constitutional crisis, albeit one that might be slightly broader.³¹ He asserts that "[c]onstitutional crises arise out of the failure, or strong risk of failure, of a constitution to perform its central functions."³²

These definitions help crystallize the stakes of a real constitutional crisis. Too many have taken to calling something a constitutional

²⁴ See *infra* Part VI.

²⁵ See *Constitution FAQs*, NAT'L CONST. CTR., <https://constitutioncenter.org/education/constitution-faqs> [<https://perma.cc/Y5E7-YYG4>].

²⁶ See *id.*

²⁷ See *id.*

²⁸ Jack M. Balkin, *Constitutional Crisis and Constitutional Rot*, 77 MD. L. REV. 147, 147–48 (2017).

²⁹ *Id.*

³⁰ *Id.* Other scholars have advanced similar definitions of constitutional crisis. Keith E. Whittington, *Yet Another Constitutional Crisis?*, 43 WM. & MARY L. REV. 2093, 2099 (2002).

³¹ See Whittington, *supra* note 30, at 2099.

³² *Id.*

crisis when they want to call attention to a perceived serious problem. For example, Chief Justice John Roberts has described the failure to raise salaries for federal judges as a constitutional crisis.³³ A *National Review* columnist declared that President Biden’s attempt to forgive some student loans was a constitutional crisis.³⁴ President Trump’s critics said his conduct in Ukraine had created a constitutional crisis.³⁵ These are all serious issues, but none indicated that America’s constitutional system was about to fail.

Professors Balkin and Sanford Levinson have identified three types of constitutional crisis.³⁶ In the first, “political leaders publicly claim the right to suspend features of the Constitution in order to preserve the overall social order and to meet the exigencies of the moment.”³⁷ They assert that “American constitutional history after George Washington’s inauguration has produced no unequivocal examples of type one crises.”³⁸ However, they also suggest that we have come close, pointing to President Thomas Jefferson’s decision to purchase the Louisiana Territory despite doubting whether doing so was constitutional.³⁹

The second type of constitutional crisis is when “all relevant actors comply with their widely accepted constitutional duties and roles, but following the accepted understandings of the Constitution fails to resolve an existing political crisis or leads to disaster.”⁴⁰ As a rare example of this type of constitutional crisis, they cite President James Buchanan doing nothing to stop the South from seceding from the Union in 1860–61.⁴¹

In the third type of constitutional crisis,

[P]olitical actors believe that their opponents are taking dangerous and illegal steps that endanger the constitutional

³³ JOHN ROBERTS, 2006 YEAR-END REPORT ON THE FEDERAL JUDICIARY 1 (2007), <http://www.supremecourtus.gov/publicinfo/year-end/2006year-endreport.pdf> [<https://perma.cc/DP88-QXWY>] (“That [the failure to raise judicial salaries] is important because the issue has been ignored far too long and has now reached the level of a constitutional crisis that threatens to undermine the strength and independence of the federal judiciary.”).

³⁴ Sarah Schutte, ‘This Is a Constitutional Crisis’, NAT’L REV. (Sept. 30, 2022, 8:39 PM), <https://www.nationalreview.com/corner/this-is-a-constitutional-crisis/> [<https://perma.cc/C7XC-VMSK>].

³⁵ *Trump’s Extortion of Ukraine: A Complete Government Shakedown*, CTR. FOR AM. PROGRESS (Oct. 2, 2019), <https://www.americanprogress.org/article/trumps-extortion-ukraine-complete-government-shakedown/> [<https://perma.cc/7WMH-A745>].

³⁶ Sanford Levinson & Jack M. Balkin, *Constitutional Crises*, 157 U. PA. L. REV. 707, 714 (2009).

³⁷ *Id.* at 721.

³⁸ *Id.* at 724.

³⁹ *See id.* at 723.

⁴⁰ *Id.* at 729.

⁴¹ *Id.* at 730.

foundations of the republic or that threaten to bring about fundamental and unjustified changes. Therefore these steps justify—and generally produce—extraordinary forms of struggle and opposition that go outside the realm of ordinary political jostling and political brinksmanship.⁴²

Professors Balkin and Levinson provide several examples of type three crises. Among others, they cite (1) the disputed 1800 presidential election between Aaron Burr and Thomas Jefferson, (2) the dispute between South Carolina and the federal government over federal tariffs in the 1830s, and (3) struggles between Andrew Johnson and radical Republicans in Congress over Reconstruction.⁴³ Several distinguished scholars have drawn upon Professors Balkin's and Levinson's framework to analyze constitutional crises.⁴⁴

Professor Whittington has asserted that there are two main types of constitutional crisis. The first type are operational crises, which “arise when important political disputes cannot be resolved within the existing constitutional framework.”⁴⁵ Professor Whittington cites international examples, such as standoffs between presidents and legislatures in Latin America leading to military coups, and European parliamentary systems being unable to form a stable government.⁴⁶ He also asserts that the federal Constitution is vulnerable to a crisis because it provides no mechanism to resolve an impasse where the U.S. Senate refuses to confirm a president's appointments and leaves critical posts unfilled.⁴⁷ The second type “arise[s] when important political actors threaten to become no longer willing to abide by existing constitutional arrangements or systematically contradict constitutional proscriptions.”⁴⁸ Professor Whittington suggests that the failure of the Articles of Confederation may have been a crisis of fidelity, but argues it is “difficult to locate in recent events a serious prospect of a crisis of fidelity for the U.S. Constitution.”⁴⁹

Though Professor Whittington and Professors Balkin and Levinson use the term “constitutional crisis” somewhat differently, they all

⁴² *Id.* at 739.

⁴³ *Id.* at 740.

⁴⁴ See, e.g., Gerard N. Magliocca, *The Gold Clause Cases and Constitutional Necessity*, 64 FLA. L. REV. 1243, 1246–47 (2012).

⁴⁵ Whittington, *supra* note 30, at 2101.

⁴⁶ *Id.* at 2103–04.

⁴⁷ *Id.* at 2104–05.

⁴⁸ *Id.* at 2109–10.

⁴⁹ *Id.* at 2113–14.

agree that constitutional crises are rare in American history.⁵⁰ Several journalists and commentators have agreed with this assessment.⁵¹

B. January 6, 2021, and Ensuing Debates

Discussions of constitutional crisis have become urgent since January 6, 2021. After President Trump lost the 2020 presidential election, he refused to concede.⁵² Instead, he argued that he had really won the election and that Democrats were attempting to steal it.⁵³ He pressured election officials in states to change the outcome and mounted court challenges.⁵⁴ When those failed, supporters in Congress disputed the Electoral College vote.⁵⁵ On January 6, 2021, thousands descended upon the White House.⁵⁶ Some wore ballistic helmets and body armor.⁵⁷ In a speech, President Trump urged his supporters to march to the Capitol “peacefully” in one breath, and then in another declared that, “[i]f you don’t fight like hell, you’re not going to have a country anymore.”⁵⁸ In the speech, President Trump informed the crowd that “if Mike Pence does the right thing [and refuses to certify electoral votes], we win the election.”⁵⁹ The crowd went to the Capitol building and rioted, forcing members of Congress to evacuate.⁶⁰ Scholars have agreed that this event either was a

⁵⁰ *Id.* at 2119 (“In reviewing a few of these candidates in this section, I argue that actual constitutional crises have been exceedingly rare, and perhaps even singular, at the national level.”); Levinson & Balkin, *supra* note 36, at 730.

⁵¹ *E.g.*, Lily Rothman, *A True Constitutional Crisis is Rare in American History. Here’s Why*, TIME (May 13, 2019, 10:58 AM ET), <https://time.com/4837850/constitutional-crisis-definition-history/> [<https://perma.cc/P32Q-BS5A>]; Julia Azari & Seth Masket, *The 4 Types of Constitutional Crises*, FIVETHIRTYEIGHT (Feb. 9, 2017, 6:01 AM), <https://fivethirtyeight.com/features/constitutional-crisis/> [<https://perma.cc/J5VR-NDVS>] (“True constitutional crises are rare.”).

⁵² Steve Eder, David D. Kirkpatrick & Mike McIntire, *They Legitimized the Myth of a Stolen Election—and Reaped the Rewards*, N.Y. TIMES (Oct. 23, 2022), <https://www.nytimes.com/2022/10/03/us/politics/republican-election-objectors.html> [<https://perma.cc/LN7Y-9HXG>].

⁵³ *See id.*

⁵⁴ Jack M. Balkin, *How to Do Constitutional Theory While Your House Burns Down*, 101 B.U. L. REV. 1723, 1727–28 (2021).

⁵⁵ Eder et al., *supra* note 52.

⁵⁶ Scott MacFarlane & Cassidy McDonald, *Jan. 6 Timeline: Key Moments from the Attack on the Capitol*, CBS NEWS (Jan. 6, 2023, 11:10 AM EST), <https://www.cbsnews.com/live-updates/jan-6-capitol-riot-timeline-key-moments/> [<https://perma.cc/W2GE-REZE>].

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

constitutional crisis or that it threatened one.⁶¹ We are not finished with that day's implications. Instead, scholars and courts had to consider whether President Trump's conduct that day constituted engagement in an insurrection within the meaning of the Fourteenth Amendment.⁶² These events have not, however, caused scholars to alter their claims that constitutional crises are rare in American history or how they categorize those crises.⁶³

C. The 2024 Presidential Campaign

The 2024 campaign threatened to degenerate into a constitutional crisis. Although there were already worries about President Biden's age before his first debate with President Trump,⁶⁴ President Biden's performance left many observers convinced he lacked the mental capacity to continue as President.⁶⁵ There were even calls to force President Biden out of office with the Twenty-Fifth Amendment.⁶⁶ Those convinced that President Biden lacked the mental capacity to continue holding the presidency asked the difficult question of who was "really" in charge, and whether whatever arrangement prevailed had constitutional legitimacy.⁶⁷ Subsequent days brought fevered speculation about whether President Biden would or wouldn't be the Democratic Party's nominee.⁶⁸

The focus suddenly shifted on July 13, 2024.⁶⁹ That day, President Trump was speaking at a rally in Pennsylvania when a would-be assassin who managed to elude the Secret Service and local law

⁶¹ *E.g.*, Sean M. Kammer, *Reflections on Teaching Constitutional Law in the Midst of Constitutional Crisis*, 67 S.D. L. REV. 194, 194 (2022); William Baude, *The Real Enemies of Democracy*, 109 CAL. L. REV. 2407, 2419 (2021).

⁶² *E.g.*, *Trump v. Anderson*, 601 U.S. 100 (2024); William Baude & Michael Stokes Paulsen, *The Sweep and Force of Section Three*, 172 U. PA. L. REV. 605, 740 (2024).

⁶³ See Balkin, *supra* note 54, at 1730 n.24.

⁶⁴ Kaleigh Rogers, *Americans Were Worried About Biden's Age Long Before the Debate*, ABC NEWS (July 12, 2024, 10:30 AM), <https://abcnews.go.com/538/americans-worried-bidens-age-long-debate/story?id=111858302> [<https://perma.cc/5HRZ-QC64>].

⁶⁵ Kyle Sammin, *Forget About November, Biden Should Resign Today*, PHILA. INQUIRER (July 15, 2024, 11:00 AM ET), <https://www.inquirer.com/opinion/joe-biden-quit-resign-kamala-harris-presidency-unfit-20240715.html> [<https://perma.cc/F7TZ-AP6A>].

⁶⁶ Jeannie Suk Gersen, *This Is What the Twenty-Fifth Amendment Was Designed For*, NEW YORKER (July 3, 2024), <https://www.newyorker.com/news/daily-comment/this-is-what-the-twenty-fifth-amendment-was-designed-for> [<https://perma.cc/2BYC-S24G>].

⁶⁷ See Susan Ferrechio, *President Biden's Decline Raises Questions About Jill Biden's Power*, WASH. TIMES (July 3, 2024), <https://www.washingtontimes.com/news/2024/jul/3/joe-bidens-decline-raises-questions-about-jill-bid/> [<https://perma.cc/EM7D-L7P7>].

⁶⁸ *E.g.*, John King, *Private Efforts to Nudge Biden to Step Aside Continue*, CNN (July 15, 2024, 9:42 PM EDT), <https://www.cnn.com/2024/07/15/politics/private-efforts-biden-step-aside/index.html> [<https://perma.cc/NK34-VFAU>].

⁶⁹ Johnson, *supra* note 13.

enforcement shot President Trump in the ear and killed a supporter.⁷⁰ If President Trump had been facing forward instead of turned briefly to the side, he would likely be dead.⁷¹ In the shooting's aftermath, Americans openly worried about the prospect of a civil war in a way they haven't recently.⁷² Even if these fears seem hyperbolic, it's easy to imagine President Trump's would-be assassination leading to a retaliatory attack on President Biden or another prominent Democrat, and ultimately, to an escalating cycle of violence that paralyzes the country. As of yet, scholars have not indicated that these events alter their perception that constitutional crisis is rare.

D. Gaps in Our Understanding of Constitutional Crisis

While helpful in focusing our attention on true constitutional crises, the current scholarship suffers from a serious flaw. It is almost entirely focused on the federal level,⁷³ if not the international one. That ignores three important realities. First, constitutional crises have been common in American history—at the state level. I include the following as only a partial list of such crises:

- Shays's Rebellion in Massachusetts in 1786–87
- The Buckshot War in Pennsylvania in 1838
- Dorr's Rebellion in Rhode Island in 1842
- Bleeding Kansas in the 1850s
- The Brooks-Baxter War in Arkansas in 1874
- The violent overthrow of Mississippi's government in 1875
- South Carolina's dual government in 1876
- "The Twelve Days that Shook Maine" in 1880
- West Virginia's disputed election of 1888
- Connecticut's disputed election of 1890
- Montana's rival legislatures in 1890
- Colorado's rival legislatures in 1891
- Kansas's rival legislatures in 1893
- New Jersey's rival legislatures in 1894
- Kentucky's disputed election of 1899

⁷⁰ *Id.*

⁷¹ *See id.*

⁷² Joe Durbin, *Panicked Search Terms Spike Online After Trump Rally Shooting: 'Civil War 2'*, N.Y. POST (July 15, 2024, 7:52 PM ET), <https://nypost.com/2024/07/15/us-news/panicked-search-terms-spike-online-after-trump-rally-shooting-civil-war-2/> [<https://perma.cc/NDU7-5ZAZ>].

⁷³ Professor Whittington does mention Dorr's Rebellion as an example of constitutional crisis, but only in passing. *See* Whittington, *supra* note 30, at 2126 n.143.

- The Wilmington insurrection and North Carolina's 1900 white supremacy campaign

Most Americans are unaware of these constitutional crises. They have not received the sustained scholarly attention that crises at the federal constitutional level have. Yet, their consequences have been just as important in American history.

Second, states have abandoned and adopted new constitutions many times. This contrasts with the federal Constitution.⁷⁴ We have had only one federal Constitution since 1789 and seventeen amendments after the Bill of Rights.⁷⁵ This means that most debate about the federal Constitution is over how to interpret it.⁷⁶ Although Professors Balkin and Levinson acknowledge that constitutional design is important in studying constitutional crises,⁷⁷ the prospect of wholesale revision or significant amendment to the federal Constitution is remote. Such changes and revisions have also been rare in American history. But, the only state that has retained its original founding-era constitution is Massachusetts, and that constitution has been amended many more times than the federal Constitution has been.⁷⁸ Meanwhile, South Carolina, which provoked the Civil War and nullification crises Professors Balkin and Levinson describe, has had seven constitutions.⁷⁹ Louisiana has had eleven constitutions.⁸⁰ Michigan and Illinois have had four constitutions.⁸¹ The general rule is that states have had multiple constitutions, some of them dramatically different.⁸² Each new constitutional convention provided new opportunities to solve old problems of constitutional

⁷⁴ Emily Lau, *Fifty Unique, Ever-Changing State Constitutions*, BRENNAN CTR.: STATE CT. REP. (Feb. 10, 2025), <https://statecourtreport.org/our-work/analysis-opinion/fifty-unique-ever-changing-state-constitutions> [perma.cc/RVE7-G95G].

⁷⁵ Kevin Frazier, *State Constitutional Conventions, Explained*, BRENNAN CTR.: STATE CT. REP. (Aug. 6, 2024), <https://statecourtreport.org/our-work/analysis-opinion/state-constitutional-conventions-explained> [perma.cc/7Q57-N7CY]; Lau, *supra* note 74.

⁷⁶ See Levinson & Balkin, *supra* note 36, at 753.

⁷⁷ *Id.* ("Second, and equally important, lawyers taught only the arts of constitutional interpretation, and not the implications of constitutional design, may not have much to contribute to either solving or avoiding genuine type two crises.").

⁷⁸ See *Comprehensive State Constitution Summary – Chart 1*, PUB. AFFS. RSCHG. COUNCIL OF LA. (2019), <https://parlouisiana.org/wp-content/uploads/2020/04/State-Summary-Chart-1.pdf> [https://perma.cc/7X98-K9RN].

⁷⁹ *Preserving South Carolina's State Constitutions*, S.C. DEPT OF ARCHIVES & HIST., <https://scdah.sc.gov/news/2019-11/preserving-south-carolinas-state-constitutions> [https://perma.cc/MR2G-AQ3N]; Joanne Freeman, *Time Line of the Civil War: 1861, Civil War Glass Negatives and Related Prints*, LIBR. OF CONG., <https://www.loc.gov/collections/civil-war-glass-negatives/articles-and-essays/time-line-of-the-civil-war/1861/> [perma.cc/XU3S-2XTZ]; Levinson & Balkin, *supra* note 36, at 740.

⁸⁰ *Comprehensive State Constitution Summary – Chart 1*, *supra* note 78.

⁸¹ *Id.*

⁸² See Frazier, *supra* note 75.

design and new opportunities to create classes of people bitterly opposed to the constitution.

Third, state constitutions have different rights guarantees and structures than the federal Constitution does. The federal Constitution recognizes only negative rights.⁸³ It explains what government must not do *to* citizens.⁸⁴ For example, the First Amendment prevents Congress from establishing a national religion or denying free expression.⁸⁵ The federal Constitution does not, however, say what the government must do *for* citizens.⁸⁶ State constitutions often provide positive rights guarantees.⁸⁷ For example, they often guarantee the right to an education.⁸⁸ They have a greater obligation to ensure a fair electoral process.⁸⁹ For example, the federal Constitution only forbids race and gender discrimination in voting.⁹⁰ However, state constitutions often explicitly forbid gerrymandering⁹¹ and bribery⁹² and promise “free and equal” elections.⁹³ Of course, states have also explicitly burdened the electoral process in ways the federal Constitution has not, such as by requiring literacy tests.⁹⁴ State constitutions have also structured their governments differently from the way the federal Constitution structures the federal government in several respects. Article III federal judges have life tenure and can only be removed through an arduous impeachment process.⁹⁵ State court judges must often run in partisan elections and risk being voted out of office for unpopular

⁸³ Jeffrey Omar Usman, *Good Enough for Government Work: The Interpretation of Positive Constitutional Rights in State Constitutions*, 73 ALB. L. REV. 1459, 1461 (2010).

⁸⁴ *Id.* at 1462.

⁸⁵ U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”).

⁸⁶ Steven J. Heyman, *The First Duty of Government: Protection, Liberty, and the Fourteenth Amendment*, 41 DUKE L.J. 507, 509 (1991).

⁸⁷ Usman, *supra* note 83, at 1461.

⁸⁸ *E.g.*, N.C. CONST. art. I, § 15 (“The people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right.”).

⁸⁹ *See* U.S. CONST. art. I, § 4, cl. 1; *Smiley v. Holm*, 285 U.S. 355, 366 (1932).

⁹⁰ U.S. CONST. amend. XV, § 1 (“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”); U.S. CONST. amend. XIX (“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.”).

⁹¹ *E.g.*, OHIO CONST. art. XI, § 6.

⁹² S.C. CONST. art. II, § 1.

⁹³ *See, e.g.*, IND. CONST. art. II, § 1.

⁹⁴ N.C. CONST. art. VI, § 4 (“Every person presenting himself for registration shall be able to read and write any section of the Constitution in the English language.”).

⁹⁵ *See* U.S. CONST. art. III, § 1; *id.* art. II, § 4; Types of Federal Judges, U.S. CTS., <https://www.uscourts.gov/about-federal-courts/types-federal-judges> [https://perma.cc/ZGW9-G6YK].

decisions.⁹⁶ The federal Constitution defines a unitary executive where the President generally makes the final call on executive branch decisions.⁹⁷ However, states have often chosen to independently elect lieutenant governors and attorneys general, leading to overlapping centers of executive authority.⁹⁸ Perhaps most importantly, the federal Constitution is very difficult to amend. One avenue is for two-thirds of both houses of Congress to propose amendments.⁹⁹ Another is for two-thirds of state legislatures to call a convention to propose amendments.¹⁰⁰ In either case, three-fourths of state legislatures must then ratify amendments.¹⁰¹ But many state constitutions allow citizens to bypass politicians to put amendments on the ballot and allow a majority of voters to ratify them.¹⁰² Likewise, many states require just a simple majority vote to achieve ratification.¹⁰³

Scholars wishing to study state constitutional crises therefore confront a starkly different landscape than scholars studying federal constitutional crises. Moreover, failing to study state constitutional crises impoverishes the very dialogue around constitutional design that scholars have sought.

E. Why State Constitutions Now Matter More than Ever

For the last several decades, state constitutions have been an afterthought. Almost all law schools require students to take a class on the federal Constitution.¹⁰⁴ After considerable research, I have found none that require students to take a class on state constitutions. Some accounts trace this development to the Warren Court adopting an expansive view of the federal Constitution during the 1950s and 1960s.¹⁰⁵ That encouraged litigants to focus rights

⁹⁶ See Marcus Alexander Gadson, *State Constitutional Provisions Allowing Juries to Interpret the Law Are Not as Crazy as They Sound*, 93 ST. JOHN'S L. REV. 1, 14–15 (2019).

⁹⁷ Steven G. Calabresi & Nicholas Terrell, *The Fatally Flawed Theory of the Unbundled Executive*, 93 MINN. L. REV. 1696, 1696–97 (2009).

⁹⁸ See *id.* at 1697, 1708.

⁹⁹ U.S. CONST. art. V.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² Scott L. Kafker & David A. Roscol, *The Eye of a Constitutional Storm: Preelection Review by the State Judiciary of Initiative Amendments to State Constitutions*, 2012 MICH. ST. L. REV. 1279, 1283 (2012).

¹⁰³ E.g., CAL. CONST. art. XVIII, § 4; MICH. CONST. art. XII, § 1; OHIO CONST. art. XVI, § 1.

¹⁰⁴ Katie Eyer, *All Law Students Should Be Educated About State Constitutions*, BRENNAN CTR.: STATE CT. REP. (Sep. 26, 2024), <https://statecourtreport.org/our-work/analysis-opinion/all-law-students-should-be-educated-about-state-constitutions> [https://perma.cc/6G9U-KAFQ].

¹⁰⁵ See Jeffery S. Sutton, *Why Teach—and Why Study—State Constitutional Law*, 34 OKLA. CITY U. L. REV. 165, 169–70 (2009); Morton J. Horwitz, *The Warren Court and the Pursuit of*

claims on the federal Constitution and left little room for state courts to innovate.¹⁰⁶ As a result, the thinking goes, federal constitutional law became more important while state constitutions became less important. In this context, it is understandable that scholars have focused on federal constitutional history or international history to study constitutional crises.

But state constitutions are poised to become much more important for two reasons. First, the federal government is increasingly paralyzed and unable to provide coherent solutions to major challenges.¹⁰⁷ That places the onus on states to make progress on problems like climate change and immigration.¹⁰⁸ Second, the Supreme Court has repudiated an expansive view of the federal Constitution in areas of major public concern.¹⁰⁹ Two areas that quickly come to mind are partisan gerrymandering and abortion. In 2019, the Supreme Court held that partisan gerrymandering claims presented “political questions” that federal courts could not entertain.¹¹⁰ With any hope of federal intervention ended, those challenging gerrymandering were forced to rely on state constitutions, and several state supreme courts have considered the issue after *Rucho v. Common Cause*.¹¹¹ Such cases increase the stakes of state judicial elections. In 2022, the Supreme Court overturned *Roe v. Wade* and permitted states to ban abortion.¹¹² Several state courts have since considered whether their constitutions provide a right to abortion.¹¹³ As of this writing, California, Vermont, Michigan, and Ohio residents have amended their constitutions to explicitly protect

Justice, 50 WASH. & LEE L. REV. 5, 5 (1993); Lynn Adelman & Shelley Fite, *Exercising Judicial Power: A Response to the Wisconsin Supreme Court's Critics*, 91 MARQ. L. REV. 425, 449 (2007).

¹⁰⁶ See Sutton, *supra* note 105, at 170.

¹⁰⁷ See Michael J. Teter, *Gridlock, Legislative Supremacy, and the Problem of Arbitrary Inaction*, 88 NOTRE DAME L. REV. 2217, 2217 (2013).

¹⁰⁸ See Rita Clifton, Lola Oduyeru & Bill Holland, *States Are Laying a Road Map for Climate Leadership*, AM. PROGRESS (Apr. 30, 2020), <https://www.americanprogress.org/article/states-laying-road-map-climate-leadership/>

[<https://perma.cc/PWL3-YTUN>]; Camilo Montoya-Galvez & Fin Gómez, *States Have Ramped up Efforts to Enact Stricter Immigration Laws, Group Finds*, CBS NEWS (Sep. 24, 2024, 9:27 AM EDT), <https://www.cbsnews.com/news/state-immigration-laws-lulac-report/> [<https://perma.cc/WUU6-BQNA>]

¹⁰⁹ See Eyer, *supra* note 104.

¹¹⁰ *Rucho v. Common Cause*, 588 U.S. 684, 707–08 (2019).

¹¹¹ See, e.g., *Harper v. Hall*, 886 S.E.2d 393 (N.C. 2023); *League of Women Voters v. Ohio Redistricting Comm'n*, 192 N.E.3d 379 (Ohio 2022).

¹¹² *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 231–32, 302 (2022).

¹¹³ E.g., *Planned Parenthood Great Nw. v. State*, 522 P.3d 1132, 1147–48 (Idaho 2023); *Planned Parenthood S. Atl. v. State*, 882 S.E.2d 770, 774 (S.C. 2023)

abortion access.¹¹⁴ Already, this morally and politically charged issue has affected how many Americans think about structuring state constitutions.¹¹⁵ Specifically, we have witnessed debates about whether a simple majority of voters should be able to ratify an amendment and under what conditions voters should be able to circumvent the legislature—as they can in many states—to propose amendments.¹¹⁶

With state constitutions bearing the brunt of highly visible rights disputes, Americans will have no choice but to pay more attention to them. This increased focus is welcome in many ways, to scholars of state constitutions especially. But it also means that state constitutions will cope with increased pressure. That makes the history of state constitutional failure I recount here especially relevant.

III. STATE LEVEL ELECTION DISPUTES

Soon after states declared independence and transitioned to popular rule, they experienced election disputes.¹¹⁷ Candidates refused to concede.¹¹⁸ They claimed to be the victim of voter fraud or voter suppression.¹¹⁹ They told supporters not to accept election results.¹²⁰ While the American Revolution was still ongoing, Pennsylvania witnessed a disputed election over a seat in the Supreme Executive Council in 1781.¹²¹ Almost sixty years later, Pennsylvania endured the Buckshot War.¹²² Before the more famous 1800 deadlock between Thomas Jefferson and Aaron Burr at the federal level, New York also experienced a lengthy gubernatorial election dispute in 1792.¹²³ I have chosen to focus on the Buckshot War to illustrate these difficulties.

¹¹⁴ CAL. CONST. art. I, § 1.1; VT. CONST. ch. I, art. 22; MICH. CONST. art. I, § 28; OHIO CONST. art. I, § 22.

¹¹⁵ See Jessica Bulman-Pozen & Miriam Seifter, *The Right to Amend State Constitutions*, 133 YALE L.J. FORUM 191, 206 (2023).

¹¹⁶ See *id.* at 192.

¹¹⁷ See EDWARD FOLEY, *BALLOT BATTLES: THE HISTORY OF DISPUTED ELECTIONS IN THE UNITED STATES* 25 (2016).

¹¹⁸ See, e.g., *id.* at 27–28.

¹¹⁹ See, e.g., *id.*

¹²⁰ See, e.g., *id.* at 52–53.

¹²¹ *Id.* at 26–27.

¹²² *About the Buckshot War*, N.Y. TIMES, December 18, 1887.

¹²³ FOLEY, *supra* note 117, at 50–51.

A. Description of Events

Democrat David Porter and Whig Joseph Ritner (the incumbent) competed for Pennsylvania's governorship in 1838.¹²⁴ The campaign was especially vicious with newspapers making no effort to objectively report the news and openly espousing the cause of their preferred candidates. Porter's opponents called him "the Dodger" for missing so many votes in the legislature.¹²⁵ They insinuated that he was the leader of the Masonic lodge where a man had been murdered,¹²⁶ and claimed he hid assets from creditors, declared bankruptcy, and then retrieved his assets.¹²⁷ They alleged he fathered two children during an extramarital affair, and most unforgivably in the early nineteenth century, suggested that his mistress marry a Black man.¹²⁸ Meanwhile, in an electoral environment rife with racism, Ritner's opponents claimed he was an abolitionist.¹²⁹ Both Democratic and Whig newspapers were confident of victory. One Whig newspaper believed that Ritner would win by at least 14,250 votes.¹³⁰ Meanwhile, a Democratic paper reported that "[n]ot a single doubt exists in the democratic ranks—all concur in the opinion that David Rittenhouse Porter will receive one of the most overwhelming majorities ever known in Pennsylvania."¹³¹

Both sides were in for a rude awakening. Election day yielded uncertainty. Eventually a Whig newspaper acknowledged that Porter was ahead in the official count by about 5,000 votes, but alleged "no one can read the majorities without being convinced of the fact, that great and extensive frauds upon the elective franchise have been committed."¹³² A Whig newspaper even argued that Porter had benefitted from 20,000 illegal votes.¹³³ The Whigs planned to contest the election.¹³⁴ Pennsylvania's 1790 constitution required both houses of the legislature to decide contested gubernatorial

¹²⁴ *About the Buckshot War*, *supra* note 122.

¹²⁵ *The Certifier's vs. Porter's Profanity*, PA. TEL., Aug. 15, 1838.

¹²⁶ *Much Ado About Nothing*, CARLISLE HERALD & EXPOSITOR, June 19, 1838, *reprinted in* PA. TEL., July 4, 1838. After the allegation of murder had been made, the *Carlisle Herald & Expositor* "disclaim[ed] ever intending to say or insinuate that David R. Porter presided over the lodge where Morgan was murdered." *Id.*

¹²⁷ *See Undeniable Proof: Stonebreaker's Affidavit*, PA. TEL., Aug. 15, 1838.

¹²⁸ *The Abolition Hobby-Porter and Amalgamation*, PA. TEL., June 20, 1838.

¹²⁹ *See Gov. Ritner and Abolition*, PA. TEL., Aug. 15, 1838.

¹³⁰ *Estimate of the Result of the Election of 1838—Majorities*, PA. TEL., Aug. 15, 1838.

¹³¹ *The Prospects*, MIFFLINTOWN SPIRIT TIMES, *reprinted in* AM. SENTINEL, June 12, 1838.

¹³² NAT'L GAZETTE (Philadelphia), Oct. 15, 1838.

¹³³ *Vote for Governor*, PA. TEL., Dec. 13, 1838.

¹³⁴ *Stupendous Scheme*, GETTYSBURGH COMPILER, *reprinted in* ALBANY ARGUS, Nov. 28, 1838.

elections.¹³⁵ There was widespread agreement that the Whigs would control the state senate but disagreement about whether they had won the house of representatives.¹³⁶ Resolving the disagreement would come down to whether and how to count votes from the Northern Liberties district in Philadelphia.¹³⁷ The officials in charge of counting votes and creating a final tally were affiliated with political parties, and a majority in the Northern Liberties district were Democrats.¹³⁸ The Democratic judges met without their Whig counterparts and cited alleged irregularities to exclude votes from areas that had favored Whigs.¹³⁹ They produced a final tally that would lead to Democratic control of the house of representatives.¹⁴⁰ Whig judges then met separately and decided to exclude votes from areas that favored Democrats, allegedly “on the grounds of fraud, or because they could not obtain the accurate vote.”¹⁴¹ They produced a final tally that would lead to Whig control of the house of representatives.¹⁴²

Secretary of the Commonwealth Thomas Burrowes decided what to do with the conflicting returns.¹⁴³ He was a Whig.¹⁴⁴ He had demanded an investigation of the election because it “resulted in a manner contrary to all our reasonable calculations and just expectations” and urged Whigs to “treat the election of the 9th inst. as if we had not been defeated” until the investigation was complete.¹⁴⁵

On December 4, 1838, Burrowes announced the returns from the Whig judges in the Northern Liberties district as the official count.¹⁴⁶ Philadelphia Democrats claiming they had won seats tried to introduce the vote tally compiled by the Democratic judges.¹⁴⁷ Thaddeus Stevens, then a Whig member of the house of representatives, moved that the Whig majority elect a speaker, and it elected Thomas Cunningham.¹⁴⁸ Democrats maintaining that they

¹³⁵ PA. CONST. art. II, § 2. This provision of the Constitution of the Commonwealth of Pennsylvania is now found in Article IV. PA. CONST. art. IV, § 2.

¹³⁶ See *About the Buckshot War*, *supra* note 122.

¹³⁷ See *id.*

¹³⁸ See *The Origin of the Difficulty—Philadelphia County*, PA. TEL., Dec. 18, 1838.

¹³⁹ *Id.*

¹⁴⁰ See *id.*

¹⁴¹ See *id.*

¹⁴² *Id.*

¹⁴³ William Henry Egle, *The Buckshot War*, 23 PA. MAG. OF HIST. & BIO. 141–42 (1899).

¹⁴⁴ *About the Buckshot War*, *supra* note 122.

¹⁴⁵ Thomas H. Burrowes, *Address of the Democratic State Committee*, NAT'L GAZETTE (Philadelphia), Oct. 19, 1838.

¹⁴⁶ Egle, *supra* note 143, at 144.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

had a majority retaliated by electing William Hopkins speaker.¹⁴⁹ The two groups claiming to be the house of representatives then attempted to hold session at the same time.¹⁵⁰ A large group in the galleries “applaud[ed] their own speakers and hiss[ed] [at] those of opposite politics.”¹⁵¹

The situation deteriorated into violence later that day in the state senate.¹⁵² A mob of hundreds of men “scaled the bars of the Senate, and threatened personal violence to the Senators.”¹⁵³ Among them was “Balty” Sowers, a “terror and rowdy” known nationally for leading Philadelphia’s “Butcher Boy” gang.¹⁵⁴ They surrounded the senators and cried, “Kill Stevens! Kill Penrose! Kill Burrowes!”¹⁵⁵ Prominent Whigs, including Senate President Charles Penrose and Thaddeus Stevens, escaped by jumping out of the windows.¹⁵⁶ As soon as Penrose left, “the window was surrounded by some seven or eight men, uttering the most atrocious threats of vengeance.”¹⁵⁷ He escaped because he “was fortunately sheltered by the darkness of the night and the shadow of one of the public buildings.”¹⁵⁸ Penrose later alleged that “[the mob’s] transportation had been paid for in masses to the owners of the rail road lines.”¹⁵⁹ According to Penrose, the men were “of desperate fortunes and of atrocious characters—men who had signalized themselves in many a broil, and were distinguished for their personal prowess and open disregard of the laws.”¹⁶⁰

On the night of December 4, 1838, a meeting of about 300 men “hired” and “trained” by Democrats took place at Harrisburg’s courthouse.¹⁶¹ There, some speakers “went so far as to recommend [and] URGE the ASSASSINATION of Messrs. Stevens, Penrose [and] Burrowes while they heaped the most demoniac threats upon our own head.”¹⁶² Some in the crowd offered a \$2,000 reward for

¹⁴⁹ *Id.*

¹⁵⁰ *See id.* at 144–45.

¹⁵¹ *Correspondence of the National Gazette*, NAT’L GAZETTE (Philadelphia), Dec. 6, 1838.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ MARCUS ALEXANDER GADSON, SEDITION: HOW AMERICA’S CONSTITUTIONAL ORDER EMERGED FROM VIOLENT CRISIS 31 (2025).

¹⁵⁵ *About the Buckshot War*, *supra* note 122.

¹⁵⁶ Egle, *supra* note 143, at 146.

¹⁵⁷ *Address of the Honorable C. B. Penrose, Speaker of the State Senate, in Relation to the Difficulties Which Existed at the Convening of the State Legislature in December Last, and in Vindication of the Course Pursued by Himself and the Democratic Members of the Senate to the Freeman of Pennsylvania*, PA. TEL., Apr. 10, 1839.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *The Progress of Outrage and Treason*, PA TEL., Dec. 5, 1838.

¹⁶² *Id.*

murdering Burrowes and Stevens.¹⁶³ Rumors of more violence swirled.¹⁶⁴ One newspaper reported that the state arsenal “has been surrounded and that the rioters are proceeding to the worst excesses of brutal violence.”¹⁶⁵ Days later, another reported that Porter had “reviewed a company of Volunteers” prior to using them in “the Harrisburg war.”¹⁶⁶ It told readers that Porter had set off for Harrisburg. His plan was allegedly to be “inaugurated on [that] Tuesday, and then . . . to issue his Proclamation [if he be not permitted to take his seat peacefully,] calling upon the Military of the Commonwealth to march to Harrisburg, to put down who may oppose him.”¹⁶⁷ With Pennsylvania ready to descend into civil war any day, both bodies claiming to be the house of representatives continued to meet.¹⁶⁸ Before legislatures can govern, they need a quorum of members to be present.¹⁶⁹ Neither body had a quorum. Ritner tried to bolster the Cunningham House’s legitimacy by recognizing it as the legal house of representatives, but the body was still compelled to meet at a nearby hotel.¹⁷⁰

While violence was ongoing, Ritner also sought the federal government’s aid. The federal Constitution guarantees states a “Republican” form of government and promises to protect them from “domestic Violence.”¹⁷¹ The legislature must normally submit the request, but the governor can do so if the legislature is unable to meet.¹⁷² On December 5, 1838, Ritner had written to Edwin Vose Sumner, commander of a federal military post in Pennsylvania.¹⁷³ Ritner explained that the state was experiencing an insurrection.¹⁷⁴ He asked Sumner “to march the troops at your command to Harrisburg, for the protection of the constituted authorities of the Commonwealth, for the suppression of the insurrection, and for the preservation of our republican form of government, agreeably with the Constitution of the United States.”¹⁷⁵ On December 5, 1838, Sumner rejected the request, writing that “[a]s the disturbance at the

¹⁶³ *Id.*

¹⁶⁴ *See Porters’ Arrival Explained*, PA. TEL., Dec. 13, 1838.

¹⁶⁵ *Correspondence of the National Gazette*, *supra* note 151.

¹⁶⁶ *Porters’ Arrival Explained*, *supra* note 164 (second alteration in original).

¹⁶⁷ *Id.*

¹⁶⁸ *House of Representatives*, NAT’L GAZETTE (Philadelphia), Dec. 6, 1838.

¹⁶⁹ Eric R. Daleo, *State Constitutions and Legislative Continuity in a 9/11 World: Surviving an “Enemy Attack”*, 58 DEPAUL L. REV. 919, 947 (2009).

¹⁷⁰ *About the Buckshot War*, *supra* note 122.

¹⁷¹ U.S. CONST. art. IV, § 4.

¹⁷² *Luther v. Borden*, 48 U.S. (7 How.) 1, 43 (1849).

¹⁷³ *Documents*, NAT’L GAZETTE (Philadelphia), Dec. 25, 1838.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

capital of this state appears to proceed from political differences alone, I do not feel that it would be proper for me to interpose my command between the parties.”¹⁷⁶

Ritner appealed to President Martin Van Buren.¹⁷⁷ As support, Ritner provided a statement of facts signed by Senate Whigs about what happened on December 4, 1838, and wrote that neither branch of the legislature could meet at the time due to the violence and intimidation.¹⁷⁸ Ritner’s letter put Van Buren in a difficult predicament.¹⁷⁹ Van Buren was a Democrat and would not have wanted to use the military to undermine the Democratic Party in Pennsylvania.¹⁸⁰ However, by refusing to act when lawless mobs made credible threats to murder prominent Whigs, he risked a perception that he was playing politics while Pennsylvania teetered towards war.¹⁸¹ Perhaps seeking to pass the buck, Van Buren had Secretary of War Joel Poinsett respond.¹⁸² On December 11, 1838, Poinsett backed Sumner’s decision to deny aid.¹⁸³ He gave three justifications.¹⁸⁴ First, he fretted about setting a dangerous precedent by involving federal troops in a “political” contest.¹⁸⁵ Second, Poinsett contended that the request was inappropriate because Ritner had made it instead of the legislature.¹⁸⁶ In his previous letter, Ritner stated that the legislature could not assemble.¹⁸⁷ But Poinsett had received information “which although not official, comes in a form sufficiently authentic to entitle it to credit, [that] it appears that both branches of the legislature were in session in the Capitol of the State on the 8th inst[ant], and transacted business there.”¹⁸⁸ Since Poinsett believed the legislature could meet, the Federal Constitution’s text required *it* to request federal help.¹⁸⁹ Finally, Poinsett argued that the Pennsylvania militia was capable of handling the situation by itself.¹⁹⁰ Poinsett’s letter ended any possibility of federal intervention,

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *See id.*

¹⁸⁰ *See id.*

¹⁸¹ *See id.*

¹⁸² *See id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

but Ritner remained aggrieved.¹⁹¹ He wrote another letter protesting Van Buren's decision and the U.S. House of Representatives investigated.¹⁹²

Ritner did call out the militia.¹⁹³ General Patterson, head of the militia, ordered volunteers to "assemble in winter uniform, with knapsacks, provided with thirteen rounds of buckshot cartridge, and seven rounds of ball cartridge."¹⁹⁴ The order gave the "Buckshot War" its name.¹⁹⁵ But it was unclear whether Patterson would actually support Ritner. The two—along with cabinet members—held a meeting on December 9, 1838.¹⁹⁶ When one cabinet member asked whether Patterson would obey Ritner's orders, Patterson said he would have to consider the specific order.¹⁹⁷ When pressed, Patterson stated that he would refuse to forcibly install a Whig as speaker of the house of representatives, and that he would not permit the militia to fire on the crowds Ritner believed to be in insurrection unless those crowds attacked.¹⁹⁸

The crisis ended when three Whigs left the Cunningham House and joined the Hopkins House.¹⁹⁹ That gave the Hopkins House a quorum, which led even the Whig-controlled Senate to recognize it as the lawful House of Representatives.²⁰⁰ The Whigs also ceased to contest the governorship and Porter was inaugurated.²⁰¹ The Buckshot War was over without any casualties.²⁰²

B. The Buckshot War as a Constitutional Crisis

The Buckshot War saw aggressive mobs bring the government to a standstill, a passionate belief that one political party was planning targeted assassinations of political opponents, and the state militia called out to preserve order.²⁰³ It could have been much worse. One of the Whigs could have been murdered, which might have led to a vicious cycle of reprisals. The Whigs could have continued to maintain their position that Ritner had truly won the gubernatorial

¹⁹¹ *See id.*

¹⁹² *Id.*

¹⁹³ Egle, *supra* note 143, at 149–50.

¹⁹⁴ GADSON, *supra* note 154, at 34.

¹⁹⁵ *See* Egle, *supra* note 143, at 150.

¹⁹⁶ *Id.* at 150–52.

¹⁹⁷ *Id.* at 151.

¹⁹⁸ *Id.* at 151–52.

¹⁹⁹ *See About the Buckshot War*, *supra* note 122.

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *See id.*; FOLEY, *supra* note 117, at 79.

²⁰³ *See* FOLEY, *supra* note 117, at 79.

election and tried to swear him in. Lest that sound hyperbolic, we will see that is exactly what happened in South Carolina during Reconstruction. The militia could have intervened on behalf of one of the candidates. The Buckshot War demonstrates how quickly a seemingly routine election dispute can threaten calamity. It also demonstrates how much constitutional design choices matter. The 1790 Pennsylvania Constitution permitted partisan officials to count ballots and certify winners.²⁰⁴ They had an incentive to make decisions that benefitted their political party even if they were detrimental to the state. A Democrat in the Northern Liberties district would have been skeptical of the decisions by Whig judges and vice versa. This made it difficult for Pennsylvanians to agree on the election results. A second important design choice was to require both houses of the legislature to decide disputed gubernatorial elections.²⁰⁵ This is a recipe for gridlock when both houses are controlled by different parties.

C. The Buckshot War's Relevance

American elections have frequently produced unclear outcomes. The phenomenon of two bodies claiming to be the legally constituted legislature was common in the nineteenth century.²⁰⁶ So were election disputes boiling over into bloodshed. In 1874, two candidates claimed to have won election as Arkansas's governor. The candidate who lost in the official tally eventually led armed followers to take over the state house. The ensuing days saw both men raise militias, and at least twenty men died in battle.²⁰⁷ When the West Virginia legislature installed the Democratic candidate as governor, despite receiving fewer votes in 1888, the Republican candidate held his own inauguration ceremony and marched on the state house with 400 armed supporters.²⁰⁸ Kentucky's 1899 gubernatorial election resulted in two men claiming victory amid accusations of fraud and intimidation.²⁰⁹ One newspaper editor even implored onlookers to "stop the steal."²¹⁰ In the end, the man the legislature selected in the contested election was assassinated shortly after taking office.²¹¹ The

²⁰⁴ *See id.* at 80.

²⁰⁵ *Id.* at 81.

²⁰⁶ *Id.* at 79.

²⁰⁷ Logan Scott Stafford, *Judicial Coup D'état: Mandamus, Quo Warranto and the Original Jurisdiction of the Supreme Court of Arkansas*, 20 U. ARK. LITTLE ROCK L. REV. 891, 972 (1998).

²⁰⁸ FOLEY, *supra* note 117, at 160–61.

²⁰⁹ *Id.* at 169.

²¹⁰ KLOTTER, *supra* note 1, at 88.

²¹¹ *Id.* at 107–08.

man he replaced was accused of orchestrating the attack and indicted for murder before fleeing to Indiana.²¹² I could go on.

One thing we can be assured of is that election disputes will continue. After the 2022 midterms, Republican candidate Kari Lake refused to concede Arizona's gubernatorial election.²¹³ Instead, she insisted that there were 140,000 fraudulent mail-in ballots.²¹⁴ Arizona's legislature was in Republican hands, and as is true in most states, Arizona's election officials openly affiliated with political parties.²¹⁵ The Buckshot War and many other nineteenth-century election disputes give us a glimpse of how a similar episode might end in the future.

IV. DISAGREEMENTS ABOUT FUNDAMENTAL CONSTITUTIONAL VALUES

The Declaration of Independence is famous for saying that "all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of happiness."²¹⁶ That alone raised questions about what constituted "unalienable rights," how to define "liberty," and whether Americans would behave as though all men really were equal. But the Declaration is actually more important for grounding government in popular sovereignty. As the Declaration said, "it is the Right of the People to alter or to abolish [a currently oppressive government], and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness."²¹⁷ Other important questions emerged. Who were "the people"? How should the people go about altering and amending their government? And perhaps most difficult of all, what happens when we disagree on those questions?

²¹² *Id.* at 116.

²¹³ Daniel Dale, *Fact Check: Kari Lake's Continuing False Arizona Election Claims*, CNN (Jan. 31, 2023, 3:43 PM EST), <https://www.cnn.com/2023/01/31/politics/fact-check-kari-lake-140k-fraudulent-ballots> [<https://perma.cc/94XY-T6A4>].

²¹⁴ *Id.*

²¹⁵ 2022 Arizona Legislative Session, https://ballotpedia.org/2022_Arizona_legislative_session [<https://perma.cc/79HL-GZ2M>]; see *Here Are the Results of All Races for Secretary of State in 2022*, NPR (Nov. 8, 2022, 12:01 AM ET), <https://www.npr.org/2022/11/08/1133361718/secretary-of-state-races-election-results-live-2022> [<https://perma.cc/LCK6-5YW4>].

²¹⁶ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

²¹⁷ *Id.*

Before the Articles of Confederation and the federal Constitution, state constitutions began grappling with these questions in 1776.²¹⁸ In some states, there was a consensus about how to answer them.²¹⁹ In others, however, constitutional chaos ensued when different groups tried to ensure their state constitutions incorporated their preferred answers.²²⁰ Rhode Island's Dorr Rebellion provides an important example.

A. Description of Events

Rhode Island did not adopt a new constitution during the founding generation.²²¹ Instead, it continued to operate under its seventeenth-century charter from King Charles II into the nineteenth century.²²² That charter had several objectionable features. First, the legislature was malapportioned.²²³ For example, Jamestown had one representative for every eighteen freemen, while Providence only had one representative for every 275 freemen.²²⁴ Some voters had a hugely disproportionate say in government. Second, the majority of Rhode Island's men could not vote.²²⁵ By 1798, the general assembly elected under the charter required voters to own \$134 in property, have an annual rent income of seven dollars, or be the eldest son of one who did.²²⁶ In the 1830s and 40s, these requirements disenfranchised many factory workers at the same time the Industrial Revolution brought so many to the state.²²⁷ As a result, about sixty percent of Rhode Island's adult white men could not vote,²²⁸ to say nothing of women or Black men. At the same time,

²¹⁸ See Juliana Gisela Dalotto, *American State Constitutions of 1776-1787: The Antecedents of the Necessary [And Proper] Clause*, 14 J. CONST. L. 1315, 1318–19 (2012). Pennsylvania, North Carolina, Virginia, Delaware, Maryland, New Hampshire, New Jersey, and South Carolina adopted constitutions in 1776. W.F. Dodd, *The First State Constitutional Conventions, 1776-1783*, 2 AM. POL. SCI. REV. 545, 546, 552–56 (1908).

²¹⁹ See Dalotto, *supra* note 218, at 1318–19.

²²⁰ See Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749, 751 (1994).

²²¹ ERIK J. CHAPUT, *THE PEOPLE'S MARTYR: THOMAS WILSON DORR AND HIS 1842 RHODE ISLAND REBELLION* 2–3 (2013).

²²² See *id.*

²²³ See THOMAS W. DORR, JOSEPH K. ANGELL, DAVID DANIELS, WILLIAM H. SMITH & CHRISTOPHER ROBINSON, *AN ADDRESS TO THE PEOPLE OF RHODE-ISLAND, FROM THE CONVENTION ASSEMBLED AT PROVIDENCE ON THE 22D DAY OF FEBRUARY, AND AGAIN ON THE 12TH DAY OF MARCH, 1834, TO PROMOTE THE ESTABLISHMENT OF A STATE CONSTITUTION* 22 (1834).

²²⁴ *Id.* at 21.

²²⁵ CHAPUT, *supra* note 221, at 3.

²²⁶ DORR ET AL., *supra* note 223, at 46.

²²⁷ CHAPUT, *supra* note 221, at 16, 51.

²²⁸ *Id.* at 3.

allowing the eldest son of an eligible voter to vote established a hereditary elite who controlled Rhode Island's affairs.²²⁹ An effort to establish a written constitution in 1834 that broadened suffrage and more fairly apportioned the legislature failed.²³⁰ This state of affairs bred resentment. As one newspaper lamented,

We have known a tory, who fled his country in the revolutionary war, and joined her enemies, subsequently return, enjoy the right of franchise, and be elected to responsible offices, because he was rich.

We have seen the man who faced the cannon's mouth in his country's defence, return from the field of battle, bearing honorable scars, driven by law from the ballot box, because he was poor!²³¹

The impression was that how much money a man had mattered more than how patriotic he was when deciding whether he could vote. Malapportionment and a restrictive franchise fostered a cycle which kept a small wealthy elite in power.

Eventually, reformers established the Rhode Island Suffrage Association.²³² In short order, the Association called a convention to draft a new constitution that would guarantee universal male suffrage.²³³ Behind the move was an expansive vision of popular sovereignty.²³⁴ The Suffrage Association resolved that "whenever a majority of the citizens of this State, who are recognized as citizens of the United States, shall, by their delegates in convention assembled, draught a constitution, and the same shall be accepted by their constituents, it will be, to all intents and purposes, the law of the State."²³⁵ In effect, proponents of a new constitution argued that they did not have to go through existing political channels to adopt a constitution, but could act independently.²³⁶ Although charter authorities refused to sanction the proposed convention, the Suffrage Association held elections for delegates based on universal male suffrage and then met.²³⁷ The most famous of the delegates was Thomas Dorr, for whom the rebellion would be named.²³⁸ Dorr was

²²⁹ See DORR ET AL., *supra* note 223, at 46.

²³⁰ CHAPUT, *supra* note 221, at 53.

²³¹ *Things We Have Known*, NEW AGE, Sept. 10, 1841.

²³² CHAPUT, *supra* note 221, at 51.

²³³ *Id.* at 54.

²³⁴ *Id.* at 6.

²³⁵ H.R. REP. NO. 28-546, at 403 (1844).

²³⁶ *See id.*

²³⁷ CHAPUT, *supra* note 221, at 54.

²³⁸ *See id.*

an able lawyer, legislator, and member of the failed 1834 constitutional convention.²³⁹

Delegates agreed on a new “People’s Constitution” at the end of 1841.²⁴⁰ The constitution was a progressive document for its time. It guaranteed all white men²⁴¹ the right to vote, provided for secret ballots in elections, and provided more representation to growing places like Providence in the legislature.²⁴² The convention submitted their constitution for ratification.²⁴³ In early 1842, 13,944 voted in favor of the new constitution and only fifty-two voted against,²⁴⁴ though Rhode Islanders loyal to the charter government refused to participate.²⁴⁵ Still, a majority of Rhode Island’s men had voted to ratify the People’s Constitution.²⁴⁶ In fact, a majority of men eligible to vote under the restrictive charter supported the People’s Constitution.²⁴⁷ At the same time, the legislature called a so-called landholders convention of delegates selected by voters who met the property requirements.²⁴⁸ That constitution went down to defeat at the polls.²⁴⁹

The charter authorities tried to intimidate People’s Constitution supporters. Aware of upcoming elections, politicians calling themselves the “Law and Order” party made it a “high crime and misdemeanor” to “signify that [anyone] will accept any executive, legislative, judicial or ministerial office or offices” in the people’s election.²⁵⁰ Violators would be fined \$2,000 and imprisoned for a year.²⁵¹ The Law and Order party also declared that anyone

²³⁹ *Id.* at 23, 32.

²⁴⁰ *Id.* at 4.

²⁴¹ *Id.* at 59. After considerable debate, the delegates decided not to give Black men the right to vote. *Id.* This generated opposition to the People’s Constitution both inside and out of Rhode Island. *Id.* at 59–60.

²⁴² Paul M. Thompson, *Is There Anything “Legal” About Extralegal Action? The Debate Over Dorr’s Rebellion*, 36 NEW ENG. L. REV. 385, 397–401 (2002); PROPOSED CONSTITUTION OF THE STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS, AS FINALLY ADOPTED BY THE CONVENTION OF THE PEOPLE ASSEMBLED AT PROVIDENCE ON THE 18TH DAY OF NOVEMBER, 1841, art. III, § 6 (1841) [hereinafter THE PEOPLE’S CONST.].

²⁴³ See Thompson, *supra* note 242, at 401.

²⁴⁴ *Id.*; Patrick T. Conley, *The People’s Constitution, THE DORR REBELLION*, <https://library.providence.edu/dorr/constitutions/the-peoples-constitution/> [https://perma.cc/C6DQ-Z84S].

²⁴⁵ See Thompson, *supra* note 242, at 401–02.

²⁴⁶ See CHAPUT, *supra* note 221, at 76–77.

²⁴⁷ JOHN ALEXANDER JAMESON, A TREATISE ON CONSTITUTIONAL CONVENTIONS; THEIR HISTORY, POWERS, AND MODES OF PROCEEDING 220 (4th ed. 1887).

²⁴⁸ See Thompson, *supra* note 242, at 401–02, 414 n.164.

²⁴⁹ CHAPUT, *supra* note 221, at 84–85.

²⁵⁰ Thompson, *supra* note 242, at 419; see *An Act in Relation to Offences Against the Sovereign Power of this State*, NEWPORT MERCURY, Apr. 9, 1842.

²⁵¹ *An Act in Relation to Offences Against the Sovereign Power of this State*, *supra* note 250.

exercising powers of office under the People's Constitution had committed treason and would be subject to life imprisonment.²⁵²

These measures failed to deter Dorr and his supporters.²⁵³ Elections were held under the People's Constitution in 1842.²⁵⁴ Dorr won the governorship and a legislature took office.²⁵⁵ Seeing a potential conflict, the state's governor under the charter, Samuel Ward King, requested federal aid to put down an insurrection and claimed there was insufficient time to convene the legislature.²⁵⁶ He argued the federal government should help because of the same Guarantee Clause that Ritner invoked during the Buckshot War.²⁵⁷ King ignored the important question of whether a state where most white men could not vote and where the legislature was badly malapportioned could claim to be "Republican" in the way Americans in the 1840s understood the term.²⁵⁸

President Tyler denied the request, arguing that he could only intervene in cases of violence, and that as the Dorrists had committed none, he was powerless to act.²⁵⁹ But violence was coming.²⁶⁰ In early May, Dorr held an inauguration.²⁶¹ The procession was intended to send a message.²⁶² A newspaper reported that "a procession, civil and military, was formed of great length, to escort the Governor and

²⁵² *Id.*

²⁵³ See CHAPUT, *supra* note 221, at 87.

²⁵⁴ *Id.* at 93–94.

²⁵⁵ Thompson, *supra* note 242, at 402–03.

²⁵⁶ Letter from Samuel Ward King, R.I. Governor, to John Tyler, U.S. President (Apr. 4, 1842), in A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, VOLUME 4, PART 2: JOHN TYLER, APRIL 4, 1841 TO MARCH 4, 1845 (James D. Richardson ed. 2004), <https://www.gutenberg.org/files/12464/12464-h/12464-h.htm> [<https://perma.cc/JDB5-VYT4>] [hereinafter THE TYLER PAPERS].

²⁵⁷ See *id.*; U.S. CONST. art. IV, § 4.

²⁵⁸ See Letter from Samuel Ward King to John Tyler, *supra* note 256. James Madison, a leading participant at the constitutional convention and author of *The Federalist Papers*, made observations that would both support and undermine the claim that Rhode Island's government was not "Republican." See THE FEDERALIST NOS. 39, 43 (James Madison). In *Federalist* 39, James Madison wrote, "It is *essential* to such a government that it be derived from the great body of the society, not from an inconsiderable proportion, or a favored class of it; otherwise a handful of tyrannical nobles, exercising their oppressions by a delegation of their powers, might aspire to the rank of republicans, and claim for their government the honorable title of republic." THE FEDERALIST NO. 39, at 193 (James Madison). However, in *Federalist* 43, Madison wrote, "As long, therefore, as the existing republican forms are continued by the States, they are guaranteed by the federal Constitution." THE FEDERALIST NO. 43, at 223 (James Madison). This suggests Madison believed that Rhode Island's charter did count as "Republican."

²⁵⁹ See Letter from John Tyler, U.S. President, to Samuel Ward King, R.I. Governor (Apr. 11, 1842) in THE TYLER PAPERS 211, 212; U.S. CONST. art. IV, § 4.

²⁶⁰ Thompson, *supra* note 242, at 403–04.

²⁶¹ *Id.* at 403.

²⁶² See *Late from Rhode Island—No Bloodshed!!—Meeting of the Insurgent Legislature*, AM. SENTINEL, AND MERCANTILE ADVERT. (Philadelphia), May 5, 1842.

members of the legislature elect, to a building prepared for the meeting,” to swear them in.²⁶³

Dorr left Rhode Island and sought support from the federal government and other states.²⁶⁴ Dorr’s time in Washington, D.C. convinced him that “[w]e have the moral & intellectual weight of Congress on our side, and perhaps the numerical weight, after a full and fair discussion; but this I will not positively assert.”²⁶⁵ Dorr understood that the interests of southern slaveholders in upholding slavery threatened any congressional support.²⁶⁶ He lamented some southerners “are with the People of Rhode Island, but not with all People in asserting a principle, which might be construed to take in the southern blacks and to aid the abolitionists.”²⁶⁷

Partly because of Southern objections, Dorr never received enough congressional support to make a difference.²⁶⁸ Senator William Allen of Ohio “proposed resolutions, . . . ultimately rejected, declaring that ‘it is the right of the People of Rhode Island to establish for themselves a constitutional form of State Government . . . provided its form be left republican,’” and “that ‘it is not the right of the Federal Government to interfere in any manner with the people to prevent or discourage them from’” doing so; but that “on the contrary, it is the duty of the Federal Government to guaranty to them, as a State, such Republican form of State Government that, when so established, can be altered or modified.”²⁶⁹ Dorr’s efforts to win over President Tyler in a meeting at the White House failed too.²⁷⁰

Still, Dorr returned to Rhode Island determined to implement the People’s Constitution.²⁷¹ The fact that, during a trip to New York, two labor leaders promised military support may have bolstered his resolve.²⁷² A newspaper reported that he gave an “inflammatory

²⁶³ *See id.*

²⁶⁴ *See* Thompson, *supra* note 242, at 403.

²⁶⁵ Letter from Thomas Wilson Dorr to Aaron White Jr. (May 12, 1842), in THE DORR LETTERS PROJECT, <https://library-projects.providence.edu/dorrletters/view?docId=tei/L0017.xml> [<https://perma.cc/D92S-Y97U>].

²⁶⁶ Letter from Thomas Wilson Dorr to Walter S. Burges (May 12, 1842), in THE DORR LETTERS PROJECT, <https://library-projects.providence.edu/dorrletters/view?docId=tei/L0018.xml> [<https://perma.cc/7RG8-WWZU>].

²⁶⁷ *Id.*

²⁶⁸ *See* Thompson, *supra* note 242, at 402–03, 423–24.

²⁶⁹ GADSON, *supra* note 154, at 51.

²⁷⁰ Letter from Thomas Wilson Dorr to Walter S. Burges, *supra* note 266.

²⁷¹ Thompson, *supra* note 242, at 403–04.

²⁷² *See* Letter from Alex Ming Jr., Colonel 13th Regiment N.Y. State Artillery, and Alexander Craston, Lieutenant Colonel 236 Regiment N.Y. Infantry, to Thomas Wilson Dorr (May 13, 1842), in THE DORR LETTERS PROJECT, <https://library-projects.providence.edu/dorrletters/view?docId=tei/L0020.xml> [<https://perma.cc/84P6-DE86>].

speech,” and that he “drew the sword he had on from its scabbard, and added that it had belonged to an officer who had fallen in Florida, that it had been presented to him by a brother of the fallen man while he was in the city of New York.”²⁷³ Dorr then allegedly said the sword “had been already dyed in blood, and if necessary, would again be dyed in blood, should the suffrage cause demand it.”²⁷⁴ Dorr threatened the federal government to not interfere.²⁷⁵ He emphasized that as

soon as a soldier of the United States shall be set in motion by whatever direction, to act against the People of this State, in aid of the charter government, I shall call for that aid, to oppose all such force, which, I am fully authorized to say will immediately and most cheerfully be tendered to the service of the People of Rhode Island, from the city of New York and from other places. The contest will then become national, and our State the battle ground of American freedom.²⁷⁶

In the early morning of May 18, 1842, Dorr led an attack on the state armory.²⁷⁷ What happened after Dorr demanded surrender of the armory and the commander refused is disputed. In Dorr’s description, his 250 troops had become “separated and partly disorganized,” and one of his most important lieutenants was absent.²⁷⁸ To make matters worse, a dense fog made visibility difficult.²⁷⁹ During the attack, “[a]n ineffectual attempt was made to fire the pieces of artillery,” but they were filled with iron and wood.²⁸⁰ Once the cannons failed to discharge, Dorr called off the attack temporarily, but planned to recommence it under better circumstances.²⁸¹ Dorr insisted that “those who remained would have sacrificed their lives to a man for my protection, I did not doubt, and their subsequent conduct fully confirmed their sincerity.”²⁸²

Charles Coffin Jewett’s account is different in meaningful ways. According to Jewett, Dorr led a force of about 600 men, half of them

²⁷³ *The Artillery Company*, NEWPORT MERCURY, May 21, 1842.

²⁷⁴ *Id.* Dorr later said that his opponents wrongly imputed the line about the sword being “dyed in blood” to him. Letter from Thomas Wilson Dorr to William Simons (August 7, 1842), in THE DORR LETTERS PROJECT, <https://library-projects.providence.edu/dorrletters/view?docId=tei/L0030.xml> [https://perma.cc/8JWV-39M3].

²⁷⁵ See *The Artillery Company*, *supra* note 273.

²⁷⁶ *Id.*

²⁷⁷ *Governor Dorr’s Address*, EVENING POST (N.Y.), May 28, 1842.

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² *Id.*

armed, to demand surrender of the arsenal.²⁸³ When the colonel refused to surrender, “Dorr then ordered the cannon—two six pounders, to be brought within musket shot.”²⁸⁴ When the cannons failed to fire, Dorr evidently “[s]uspect[ed] his men of treachery . . . brandished his sword, and with bitter imprecations seized a match and applied it himself.”²⁸⁵ Still, “[t]he powder flashed harmlessly upon the piece.”²⁸⁶ At that moment, Jewett believed that Dorr “probably saw the truth, that his own followers would not sustain him in his desperate career” and that they “had removed the priming, and crowded the chamber of each piece with wet paper.”²⁸⁷ When charter soldiers rushed into Providence, Dorr ordered his men to defend him to the last, but then ran away.²⁸⁸ With Dorr gone, his inebriated soldiers kept trying to fire the cannons, but “were several times prevented from firing only by some one of them less drunk, who struck off the match with a sword just as it was descending upon the powder.”²⁸⁹

Whichever account one believes, the incident received national attention.²⁹⁰ President Tyler was also aware of it.²⁹¹ He lamented that “Mr. Dorr’s recent proceedings have been of so extravagant a character as almost to extinguish the last hope of a peaceable result,” though he held out hope that Dorr’s attack on the armory was “meant for effect for purposes of intimidation merely.”²⁹²

Dorr fled to New York and somehow escaped capture, despite a \$1,000 bounty.²⁹³ Meanwhile, charter authorities cracked down on Dorr’s supporters. Some employers considered firing workers who supported the People’s Constitution.²⁹⁴ Some of Dorr’s supporters

²⁸³ CHARLES COFFIN JEWETT, *THE CLOSE OF THE LATE REBELLION: IN RHODE-ISLAND. AN EXTRACT FROM A LETTER BY A MASSACHUSETTS MAN RESIDENT IN PROVIDENCE* 8 (2d ed. 1842).

²⁸⁴ *Id.*

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ *Id.* at 8–9.

²⁸⁸ *Id.* at 10–11.

²⁸⁹ *Id.* at 11.

²⁹⁰ *E.g., Very Important From Rhode Island—Rebellion Probably Put Down Without Bloodshed*, DAILY CHRON. & SENTINEL (Augusta), May 24, 1842.

²⁹¹ See Letter from John Tyler, U.S. President, to Elisha Potter (May 20, 1842), in THE TYLER PAPERS, *supra* note 256.

²⁹² *Id.*

²⁹³ Thomas Wilson Dorr, *The People’s Constitution* (June 1842), in THE DORR LETTERS PROJECT, <https://library-projects.providence.edu/dorrletters/view?docId=tei/L0026.xml> [https://perma.cc/6SVS-EHTM].

²⁹⁴ See Letter from William Sprague, U.S. Senator, to John Brown Francis (June 12, 1842), in THE DORR LETTERS PROJECT, <https://library-projects.providence.edu/dorrletters/view?docId=tei/L0053.xml> [https://perma.cc/T9SZ-47EW].

were indicted for treason and imprisoned.²⁹⁵ Despite these setbacks, Dorr planned on returning to Rhode Island to make a stand at Chepachet.²⁹⁶ Men continued to enlist in Dorr's militia.²⁹⁷ King believed an invasion imminent.²⁹⁸ In a letter to Tyler, he asserted that Dorr's men had stolen 1,200 pounds of gunpowder and imposed martial law in Chepachet.²⁹⁹ Writing to J.C. Spencer, President Tyler's secretary of war, Colonel Second Regiment Artillery James Bankhead buttressed these concerns.³⁰⁰ He reported that Dorr's men had collected muskets and cannons and "that a number of men, not citizens of the State, with arms, were in and about Woonsocket and Chepachet."³⁰¹ He believed the outbreak of hostilities to be imminent.³⁰² The charter legislature considered the situation dangerous enough that it placed the state under martial law on June 25, 1842, and raised militia units.³⁰³

The charter authorities also held another constitutional convention, this time with liberalized suffrage requirements to select delegates.³⁰⁴ All adult men who had resided in Rhode Island for three years were eligible to vote for delegates.³⁰⁵ Authorities hoped this would mollify Dorr's supporters.³⁰⁶ The effort bore fruit, for some former supporters of the People's Constitution wrote that they "deem[ed] it expedient fully to acquiesce in the act of the General Assembly, authorizing a call for a new convention to frame a constitution"³⁰⁷

Dorr nonetheless pressed ahead and called the people's legislature into session on July 4, 1842.³⁰⁸ His soldiers occupied a hill a few

²⁹⁵ Letter from Aaron White, Jr. to Thomas Wilson Dorr (June 3, 1842), in THE DORR LETTERS PROJECT, <https://library-projects.providence.edu/dorrletters/view?docId=tei/L0024.xml> [https://perma.cc/34ZM-MQ3F].

²⁹⁶ Letter from Samuel Ward King, R.I. Governor, to John Tyler, U.S. President (June 23, 1842), in THE TYLER PAPERS, *supra* note 256.

²⁹⁷ Letter from William Miller to Thomas Wilson Dorr (June 15, 1842) in THE DORR LETTERS PROJECT, <https://library-projects.providence.edu/dorrletters/view?docId=tei/L0025.xml> [https://perma.cc/F2RT-DPE9].

²⁹⁸ Letter from Samuel Ward King, R.I. Governor, to John Tyler, U.S. President (June 23, 1842), *supra* note 296.

²⁹⁹ *Id.*

³⁰⁰ See Letter from James Bankhead, U.S. Army Colonel Second Regiment Artillery, to John C. Spencer, U.S. Secretary of War (June 22, 1842), in THE TYLER PAPERS, *supra* note 256.

³⁰¹ *Id.*

³⁰² *Id.*

³⁰³ *State of Affairs*, HERALD TIMES (Newport, R.I.), June 30, 1842.

³⁰⁴ See *General Assembly*, NEWPORT MERCURY (R.I.), June 25, 1842.

³⁰⁵ *Id.*

³⁰⁶ See *State of Affairs*, *supra* note 303.

³⁰⁷ See *id.*

³⁰⁸ See *id.*

hundred yards from Chepachet. One newspaper reckoned he had 700 soldiers along with artillery pieces.³⁰⁹ Dorr may very well have been preparing for battle.³¹⁰ After arriving in Chepachet, “[h]e made a furious speech to his men, and avowed his determination upon victory or death.”³¹¹ He issued a proclamation directing “the military of this State, who are in favor of the People’s Constitution, to repair forthwith to head quarters, there to await further orders” and asked “all volunteers and volunteer companies so disposed, to do the same.”³¹² Dorr argued that “[t]he only alternative is an abject submission to a despotism, in its various practical effects, without a parallel in the history of the American states.”³¹³

But slowly, the reality of the situation sank in. On June 27, 1842, he proclaimed that:

Having received such information as induces me to believe that a majority of the friends of the People’s Constitution disapprove of any further forcible measures for its support; and believing that the conflict of arms would, therefore, under existing circumstances, be but a personal controversy among different portions of our citizens; I hereby direct that the military here assembled be dismissed by their respective officers.³¹⁴

Dorr then escaped to Connecticut and ultimately went to New Hampshire.³¹⁵ New Hampshire Democrats welcomed Dorr instead of treating him like a fugitive.³¹⁶ The June 1842 New Hampshire Democratic Party platform accused Tyler of a “flagrant act of usurpation” when Tyler supported overthrowing the people’s government in Rhode Island.³¹⁷ New Hampshire’s governor, Henry Hubbard, also refused King’s request to extradite Dorr.³¹⁸ Hubbard further rebuked King, writing that any “pretended Government in any one State not derived from [the support of the people] is no government at all.”³¹⁹ Any realistic hope of implementing the People’s Constitution, though, had faded.³²⁰ While Dorr was absent, Rhode

³⁰⁹ *Id.*

³¹⁰ *See id.*

³¹¹ *Id.*

³¹² *Id.*

³¹³ *Id.*

³¹⁴ *Id.*

³¹⁵ Letter from Thomas Wilson Dorr to William Simons (August 7, 1842), *supra* note 274.

³¹⁶ *See id.*

³¹⁷ CHAPUT, *supra* note 221, at 163.

³¹⁸ *Id.*

³¹⁹ *Id.*

³²⁰ *See* Thompson, *supra* note 242, at 404.

Island ratified a new constitution which made important—if grudging—concessions to Dorr.³²¹ It allowed native-born men who paid a one-dollar poll tax and had resided in Rhode Island for two years to vote,³²² and made apportionment in the legislature somewhat more equitable.³²³ The crisis was over.

Dorr's ordeal was not. He became the first American found guilty of treason against a state and received a sentence of life imprisonment.³²⁴ The trial begged an important question: who was the true governor of Rhode Island, King or Dorr? At his trial, Dorr tried to argue that the People's Constitution had been ratified and that he was governor under it.³²⁵ That being so, he would not have been attacking the state armory so much as claiming state property he had authority over.³²⁶ In fact, according to this line of thinking, historians should not refer to this situation as "Dorr's Rebellion."³²⁷ A more proper title would arguably be "King's Rebellion," named for Ward King, who opposed Dorr.³²⁸ However, the Rhode Island Supreme Court, which conducted the trial, refused to let Dorr press the argument.³²⁹ Dorr's health deteriorated in prison and he died a few years after being pardoned.³³⁰

Dorr's rebellion did produce one of the more famous cases in constitutional law, *Luther v. Borden*, which suggested that cases involving the Guarantee Clause presented "political questions."³³¹

B. Dorr Rebellion as a Constitutional Crisis

By any measure, these events count as a constitutional crisis. There were competing constitutional conventions.³³² Two different governments claimed to be in place.³³³ Rhode Islanders enlisted in

³²¹ See *id.*

³²² R.I. CONST. of 1842, art. II, § 2. However, foreign-born Americans who had been naturalized still had to own \$134 of property. *Id.*

³²³ Thompson, *supra* note 242, at 404.

³²⁴ Erik J. Chaput, *The "Rhode Island Question" on Trial: The 1844 Treason Trial of Thomas Dorr*, 11 AM. NINETEENTH CENT. HIST. 205 (2010).

³²⁵ *Id.*

³²⁶ See *id.* at 221.

³²⁷ *Id.*

³²⁸ *Id.*

³²⁹ *Id.* at 222.

³³⁰ *Id.* at 226.

³³¹ See *Luther v. Borden*, 48 U.S. (7 How.) 1, 42–43, 46 (1849).

³³² See Thompson, *supra* note 242, at 400–02.

³³³ See Erik J. Chaput, "Let the People Remember!": Rhode Island's Dorr Rebellion and Bay State Politics, 1842–1843, 39 HIST. J. OF MASS. 108, 114 (2011).

rival militias.³³⁴ The only thing that prevented bloodshed was luck and a lack of military competence.

The crisis resulted from a clash of constitutional visions.³³⁵ Both sides would have said they believed in popular sovereignty. But they disagreed on who “the people” were who constituted that sovereign and what powers the people had. Both sides professed to revere the founding fathers who fought the American Revolution.³³⁶ But they disagreed on the implications of that revolution.³³⁷ Neither side gave way because they had fundamentally different views on these issues.³³⁸

Charter authorities drew on old notions that property ownership was a crucial qualification on the right to vote, and hence to be part of the sovereign that selected the government.³³⁹ Before the American Revolution, all colonies except for one required citizens to own property before they could vote.³⁴⁰ The prevailing view both in England and America was that propertyless men were “powerless and dependent” and that “they were nearly always subject to the will of those who commanded resources.”³⁴¹ Ironically enough, William Blackstone believed that allowing men without property to vote would increase the influence of the wealthy and powerful, because “[i]f these persons had votes, they would be tempted to dispose of them under some undue influence or other. This would give a great, an artful, or a wealthy man, a larger share in elections than is consistent with general liberty.”³⁴² John Adams and many other founders agreed with the assessment.³⁴³ Adams likened propertyless men to women who depended on their husbands, or children who depended on their parents,³⁴⁴ exactly the sort of people who were not “sovereign” over public affairs. By insisting that only property owners could vote on the legislators who decided whether to call a constitutional convention or on the question of whether to ratify, charter authorities hewed to this conception of who the sovereign was.

³³⁴ *Id.*

³³⁵ *Id.* at 113–14.

³³⁶ *See* Dorr, *supra* note 293.

³³⁷ *See* Chaput, *supra* note 333, at 112.

³³⁸ *See id.*

³³⁹ *See* Robert J. Steinfeld, *Property and Suffrage in the Early Republic*, 41 STAN. L. REV. 335, 339 (1989).

³⁴⁰ *Id.* at 337.

³⁴¹ *Id.* at 340.

³⁴² *Id.*

³⁴³ *See id.* at 341.

³⁴⁴ *Id.*

Dorr and his supporters believed that property ownership was not necessary to vote or be considered as one of “the people.”³⁴⁵ As he asserted in the *Nine Lawyers’ Opinion* defending the People’s Constitution, “[a]t the American Revolution, the sovereign power of this State passed from the king and Parliament of England to the People of this State; not to a portion of them, but to the *whole* people, who succeeded as tenants in common to this power.”³⁴⁶ A comparison between the People’s Constitution and the later Rhode Island Constitution is instructive. The People’s Constitution, mirroring language from the Declaration of Independence, provided: “All men are created free and equal, and are endowed by their Creator with certain natural, inherent and inalienable Rights; among which are life, liberty, the acquisition of property, and the pursuit of happiness. Government cannot create or bestow these rights, which are the gift of God.”³⁴⁷ The eventual Rhode Island Constitution contains no such ringing declaration.³⁴⁸ Dorr’s vision of who “the people” were was much more expansive than the charter authorities’ vision.³⁴⁹ To be sure, it was imperfect. The People’s Constitution did not guarantee Black people the right to vote³⁵⁰ and Dorr dismissed the idea of women voting out of hand.³⁵¹ It further excluded paupers from suffrage.³⁵²

Dorr and the charter government also disagreed about the scope of the people’s power.³⁵³ Dorr asserted that the people had absolute power over whether to create or abandon a constitution.³⁵⁴ They could change the rules without the consent of the rulers.³⁵⁵ He framed the

³⁴⁵ DORR ET AL., *supra* note 223.

³⁴⁶ THOMAS W. DORR, *The Right of the People of Rhode Island to Form a Constitution: The Nine Lawyers’ Opinion* (1842), in BIOGRAPHICAL MEMOIRS OF THREE RHODE ISLAND AUTHORS 66, 69 (Joseph K. Angell, Frances H. (Whipple) McDougall & Catharine R. Williams eds., 1880).

³⁴⁷ THE PEOPLE’S CONST., *supra* note 242, art. I, § 2.

³⁴⁸ See generally R.I. CONST.

³⁴⁹ See DORR, *supra* note 346, at 69.

³⁵⁰ See THE PEOPLE’S CONST., *supra* note 242, art. II, § 1.

³⁵¹ At the failed constitutional convention in 1834, Dorr argued:

With regard to the exclusion of women from the exercise of political power, we are far enough from denying to them the possession of natural rights. It is well known that they formerly exercised the elective franchise in one of the States of this Union—New Jersey; and now that they have ceased to do so, the suspension of their rights rests, not upon any decree of mere force, but upon a just consideration of the best good of society, including that of the sex itself.

See DORR ET AL., *supra* note 223.

³⁵² THE PEOPLE’S CONST., *supra* note 242, art. 2 § 2.

³⁵³ See DORR ET AL., *supra* note 223.

³⁵⁴ DORR, *supra* note 346, at 74.

³⁵⁵ See *id.* at 72.

legislature as the agent of the people.³⁵⁶ Whatever authority it exercised—such as whether to call a constitutional convention—came from them.³⁵⁷ The people had the right to take back the power they had delegated to the legislature at any time.³⁵⁸ Charter authorities believed that government institutions did not merely exercise delegated power from the people, but that they could exercise power *over* the people.³⁵⁹ They believed that only legislatures could legally call a constitutional convention and that until it did so, citizens owed the existing political order their loyalty.³⁶⁰ They justified their views with concerns about order and stability.³⁶¹ Brown University President Francis Wayland claimed that:

If an established government may be overturned on the principles which have been advocated, and in the manner which we have seen attempted, no constitution in the land is worth the parchment on which it is written. The only law that would be known, would soon be the law of force. The only principle of action would come to be the love of plunder. All that would be necessary, in order to establish unlimited power over us, would be, without forms of law, to lay claim to a majority, and assemble a sufficient number of armed men to carry its decisions into effect.³⁶²

Dorr and the charter authorities had conflicting feelings about the American Revolution.³⁶³ Prior to and during the revolution, Americans believed they had a right to resist government and revolt in extreme circumstances.³⁶⁴ Colonists had a contract with the King, whereby they remained loyal and obedient so long as he worked for the common good.³⁶⁵ But when the King breached the contract, they were free from obligations to him.³⁶⁶ The Declaration of Independence endorsed this view.³⁶⁷ It claimed that “Governments are instituted among Men” to secure “unalienable Rights” of “Life, Liberty, and the pursuit of Happiness.”³⁶⁸ But when “any Form of Government

³⁵⁶ *Id.*

³⁵⁷ *Id.* at 73.

³⁵⁸ *Id.* at 72.

³⁵⁹ See Steinfeld, *supra* note 339, at 342.

³⁶⁰ See *id.* at 347; DORR, *supra* note 346, at 69.

³⁶¹ See Steinfeld, *supra* note 339, at 337.

³⁶² FRANCIS WAYLAND, THE AFFAIRS OF RHODE-ISLAND: A DISCOURSE 7 (1842).

³⁶³ See Steinfeld, *supra* note 339, at 338.

³⁶⁴ Thompson, *supra* note 242, at 388–89.

³⁶⁵ *Id.* at 389.

³⁶⁶ *Id.*

³⁶⁷ *Id.* at 408.

³⁶⁸ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

be[came] destructive of these ends, it [wa]s the right of the People to alter or abolish it, and to institute new Government, laying its foundation on such principles . . . as to them shall seem most likely to effect their Safety and Happiness.”³⁶⁹ Before the American Revolution, colonists organized into groups to resist English policies such as the Sons of Liberty, and then used those groups to govern society outside the formal government structure.³⁷⁰ Colonists also organized themselves into mobs to pursue political objectives during the era.³⁷¹ While Americans celebrated these actions initially during the revolution, many expressed unease afterwards.³⁷² Samuel Adams was a famous example.³⁷³ He had played a prominent role in the Boston Tea Party,³⁷⁴ where colonists dumped tea into Boston Harbor before the revolution.³⁷⁵ In the 1780s, though, he urged caution. “County Conventions & popular Committees servd an excellent Purpose when they were first in Practice. No one therefore needs to regret the Share he may then have had in them,” he acknowledged in a letter to Noah Webster.³⁷⁶ But he cautioned that:

[I]t is my Opinion, with Deference to the Opinions of other Men, that as we now have constitutional & regular Governments and all our Men in Authority depend upon the annual & free Elections of the People, we are safe without them. To say the least, they are become useless.³⁷⁷

To be sure, there was a risk that politicians might abuse their powers, just as King George and parliament had.³⁷⁸ Adams believed:

[I]t is happy for us, that under our American Constitutions the Remedy is at hand, & in the Power of the great Body of the People. Due Circumspection & Wisdom at the next Elections will set all right, without the Aid of any self Created Conventions or Societies of Men whatever.³⁷⁹

³⁶⁹ *Id.*

³⁷⁰ Thompson, *supra* note 242, at 391–92.

³⁷¹ See Gordon S. Wood, *A Note on Mobs in the American Revolution*, 23 WM. & MARY Q. 635, 639 (1966).

³⁷² See *id.* at 640–41; Farah Peterson, *Constitutionalism in Unexpected Places*, 106 VA. L. REV. 559, 588–89 (2020).

³⁷³ See Peterson, *supra* note 372, at 589; Thompson, *supra* note 242, at 387.

³⁷⁴ See Roger Roots, *The Framers’ Fourth Amendment Exclusionary Rule: The Mounting Evidence*, 15 NEV. L.J. 42, 75 n.170 (2014).

³⁷⁵ Peterson, *supra* note 372, at 560.

³⁷⁶ See Letter from Samuel Adams to Noah Webster (Apr. 30, 1784), in 1 FOUNDERS’ CONST. 58, 58 (Philip N. Kurland & Ralph Lerner eds., 2001), https://press-pubs.uchicago.edu/founders/print_documents/v1ch2s11.html [<https://perma.cc/8ECS-8SJZ>].

³⁷⁷ *Id.*

³⁷⁸ See *id.*

³⁷⁹ *Id.*; see Thompson, *supra* note 242, at 429–30.

With republican institutions in place, many Americans believed the only legitimate way to work for change was to go through those institutions.³⁸⁰

C. The Dorr Rebellion's Relevance

Dorr's Rebellion has left us with unresolved questions. Both Dorr and the charter authorities would likely agree that a coup d'état happened in Rhode Island. But they would disagree as to who led it. The charter authorities would claim that the People's Constitution resulted from an illegal gathering and that Dorr's efforts to implement it were treasonous.³⁸¹ But Dorr would argue that his march on the armory was an attempt to claim property that was rightfully his and the charter authorities were committing treason by raising a militia to levy war against the People's Constitution.³⁸² In *Luther v. Borden*, the U.S. Supreme Court gave us the political question doctrine in the context of Guarantee Clause claims, but not an answer about whether Dorr or King was governor.³⁸³ In a nod to Dorr, the Court conceded, "No one, we believe, has ever doubted the proposition, that, according to the institutions of this country, the sovereignty in every State resides in the people of the State, and that they may alter and change their form of government at their own pleasure."³⁸⁴

Can state residents adopt a new constitution even if they do not go through the formal channels established in the current constitution? Even after Dorr failed, other Americans gave an affirmative answer in the nineteenth century. Free-State Kansans who believed a proslavery legislature was oppressing them produced their own extralegal constitution and even justified Dorr's actions in so doing.³⁸⁵ What would happen if some states recognized one government and other states another? What if the federal government were unable to form a consensus about which constitution was in effect? This happened in "Bleeding Kansas."³⁸⁶ Dorr's shadow also lingered over the Brooks-Baxter War in Arkansas in 1874. There, a disputed

³⁸⁰ See Thompson, *supra* note 242, at 392–93.

³⁸¹ See *id.* at 417.

³⁸² See generally *id.* at 401–04.

³⁸³ See *Luther v. Borden*, 48 U.S. (7 How.) 1, 42–43, 46–47 (1849).

³⁸⁴ See *id.* at 47.

³⁸⁵ See *Next Tuesday—State Constitution*, HERALD OF FREEDOM (Lawrence, Kan.), Oct. 6, 1855, at 2; Marcus Gadson, *Why Study State Constitutional Law?*, 99 N.Y.U. L. REV. 1924, 1933 (2024).

³⁸⁶ See NICOLE ETCHESON, BLEEDING KANSAS: CONTESTED LIBERTY IN THE CIVIL WAR ERA 91–92, 126 (2004).

election produced two men claiming to be the governor.³⁸⁷ Both men raised militias that fought pitched battles,³⁸⁸ and both appealed to the federal government for aid.³⁸⁹ The incident received national attention, and Americans frequently saw events through the lens of the Dorr Rebellion.³⁹⁰ The *New York Herald* claimed that “[t]he present condition of affairs in Arkansas resembles, in many respects, the situation in Rhode Island during the Dorr rebellion in 1842.”³⁹¹ The article cited President Tyler’s actions in tacitly supporting the Law and Order party and *Luther* in arguing that “[t]he opinions of the statesmen and jurists of the highest and purest character . . . would seem to leave no doubt as to the proper course for the federal authorities to pursue in the Arkansas difficulties.”³⁹² The “proper course” to follow was that “[t]he existing government . . . is considered the one that should be protected and that the President is bound to uphold.”³⁹³

States have a variety of mechanisms to amend constitutions or call conventions, and which method they pick could have drastic consequences.³⁹⁴ Some states require that supermajorities of both houses of a legislature agree on a call for a constitutional convention before it can be submitted to voters.³⁹⁵ Others allow the people

³⁸⁷ See Stafford, *supra* note 207, at 928–29, 954.

³⁸⁸ See *id.* at 972.

³⁸⁹ *Id.* at 955.

³⁹⁰ See, e.g., *The Dorr Rebellion*, N.Y. HERALD, May 10, 1874, at 5; IND. STATE SENTINEL, Tuesday, May 26, 1874, at 4; *Arkansas*, JACKSON WKLY. CITIZEN, April 28, 1874.

³⁹¹ See *The Dorr Rebellion*, *supra* note 390, at 5.

³⁹² *Id.*

³⁹³ *Id.*

³⁹⁴ See John Dinan, *Constitutional Amendment Processes in the 50 States*, BRENNAN CTR.: STATE CT. REP. (July 24, 2023), <https://statecourtreport.org/our-work/analysis-opinion/constitutional-amendment-processes-50-states> [https://perma.cc/44A7-PMS7]; see also Gadson, *supra* note 385, at 1941.

³⁹⁵ E.g., N.C. CONST. art. XIII, § 1 (“No Convention of the People of this State shall ever be called unless by the concurrence of two-thirds of all the members of each house of the General Assembly, and unless the proposition ‘Convention or No Convention’ is first submitted to the qualified voters of the State at the time and in the manner prescribed by the General Assembly. If a majority of the votes cast upon the proposition are in favor of a Convention, it shall assemble on the day prescribed by the General Assembly. The General Assembly shall, in the act submitting the convention proposition, propose limitations upon the authority of the Convention; and if a majority of the votes cast upon the proposition are in favor of a Convention, those limitations shall become binding upon the Convention. Delegates to the Convention shall be elected by the qualified voters at the time and in the manner prescribed in the act of submission. The Convention shall consist of a number of delegates equal to the membership of the House of Representatives of the General Assembly that submits the convention proposition and the delegates shall be apportioned as is the House of Representatives. A Convention shall adopt no ordinance not necessary to the purpose for which the Convention has been called.”).

themselves to decide whether to call a constitutional convention.³⁹⁶ Similarly, some states require the legislature to agree on and propose amendments for ratification³⁹⁷ while other states allow citizens to petition to place amendments on the ballot themselves.³⁹⁸

Behind these seemingly technical amendment procedures lurks the question of what popular sovereignty means today—the same question Dorr raised. States that allow residents to vote on calling a constitutional convention at periodic intervals, or to place amendments on the ballot themselves without the legislature’s or governor’s approval, have committed to a more direct and expansive view of popular sovereignty. States that permit only the legislature to propose amendments or propose calling a convention have committed to a more limited view of popular sovereignty. Driven especially by the need of state constitutions to address abortion after *Dobbs*, Americans from all walks of life have engaged in a passionate debate about how to understand popular sovereignty today.³⁹⁹

³⁹⁶ *E.g.*, FLA. CONST. art. XI, § 4(a) (“The power to call a convention to consider a revision of the entire constitution is reserved to the people. It may be invoked by filing with the custodian of state records a petition, containing a declaration that a constitutional convention is desired, signed by a number of electors in each of one half of the congressional districts of the state, and of the state as a whole, equal to fifteen per cent of the votes cast in each such district respectively and in the state as a whole in the last preceding election of presidential electors.”).

³⁹⁷ *See* VA. CONST. art. XII, § 1 (“Any amendment or amendments to this Constitution may be proposed in the Senate or House of Delegates, and if the same shall be agreed to by a majority of the members elected to each of the two houses, such proposed amendment or amendments shall be entered on their journals, the name of each member and how he voted to be recorded, and referred to the General Assembly at its first regular session held after the next general election of members of the House of Delegates. If at such regular session or any subsequent special session of that General Assembly the proposed amendment or amendments shall be agreed to by a majority of all the members elected to each house, then it shall be the duty of the General Assembly to submit such proposed amendment or amendments to the voters qualified to vote in elections by the people, in such manner as it shall prescribe and not sooner than ninety days after final passage by the General Assembly. If a majority of those voting vote in favor of any amendment, it shall become part of the Constitution on the date prescribed by the General Assembly in submitting the amendment to the voters.”).

³⁹⁸ *See* MICH. CONST. art. XII, § 2 (“Amendments may be proposed to this constitution by petition of the registered electors of this state. Every petition shall include the full text of the proposed amendment, and be signed by registered electors of the state equal in number to at least 10 percent of the total vote cast for all candidates for governor at the last preceding general election at which a governor was elected. Such petitions shall be filed with the person authorized by law to receive the same at least 120 days before the election at which the proposed amendment is to be voted upon.”).

³⁹⁹ *See* Jordan Boyd, *Abortion Radicals Will Expand Their Schemes from Ohio to Your State. Here’s How to Be Ready*, FEDERALIST (Nov. 7, 2023), thefederalist.com/2023/11/07/abortion-radicals-will-expand-their-schemes-from-ohio-to-your-state-heres-how-to-be-ready/ [perma.cc/WUN8-8LMX] (“Republican-controlled states should consider reevaluating the merits of their constitutional amendment process long before they think they will become targets.”); Gadson, *supra* note 385, at 1941 (“We are still wrestling with difficult questions of how to define ‘liberty,’ ‘equality,’ ‘the people,’ and popular sovereignty. Take abortion and gerrymandering, two issues responsible for the fact that state constitutions are increasingly in

V. THE DORR REBELLION MEETS THE BUCKSHOT WAR

America's most famous constitutional crisis is the Civil War. After the war, the country suffered through a steady stream of constitutional crises at the state level as Americans grappled with some of the same questions that vexed them earlier in their history. Who are "the people"? What do "liberty" and "equality" mean? Across the South, a pattern emerged. Southern states initially held on to pre-Civil War answers to these questions and used constitutions to oppress the formerly enslaved.⁴⁰⁰ Then, a coalition of Black people and white Republicans hailing from southern states and elsewhere drafted constitutions that supplied entirely different answers and revolutionized the social order and role of government.⁴⁰¹ White Democrats and conservatives waged war on those constitutions through every means imaginable.⁴⁰² A contested election, violent coup d'état, or both drew national attention. I have chosen to focus on South Carolina's experience.

In 1876, South Carolina experienced one of the most violent and fraudulent elections in American history.⁴⁰³ At the end of it, two men claimed to be governor and two bodies claimed to be the legislature.⁴⁰⁴ Armed men from around the state stood ready to swarm the state house to ensure their preferred candidates took power.⁴⁰⁵ Newspapers from around the country covered the latest developments.⁴⁰⁶ There was a debate at the national level about

the spotlight . . . Does a focus on 'equality' mean avoiding abortion restrictions which uniquely burden women? And do our answers to those questions affect how we define popular sovereignty?").

⁴⁰⁰ See Carroll Rhodes, *Changing the Constitutional Guarantee of Voting Rights From Color-Conscious to Color-Blind: Judicial Activism by the Rehnquist Court*, 16 MISS. COLL. L. REV. 309, 322 (1996) (noting how in post-Civil War America, "[t]he southern states, led by Mississippi, disenfranchised, *en masse*, African-Americans by ingenious constitutional measures such as the poll tax, the head tax, and the literacy test").

⁴⁰¹ See Christopher Abernathy, Jeremiah Bauer, Michael T. Caires, Mari Crabtree, Chris Hayashida-Knight, Krista Kinslow, Ashley Mays, Keith McCall, Ryan Poe, Bradley Proctor et al., *Reconstruction*, in 1 THE AMERICAN YAWP: A MASSIVELY COLLABORATIVE OPEN U.S. HISTORY TEXTBOOK 402, 405–08 (Nicole Turner, Joseph L. Locke & Ben Wright eds., 2019), https://americanyawp.com/text/wp-content/uploads/yawp_v1_open_pdf.pdf [perma.cc/MC5J-WGJV].

⁴⁰² See *id.* at 405, 407, 419.

⁴⁰³ See W. Lewis Burke, *Killing, Cheating, Legislating, and Lying: A History of Voting Rights in South Carolina After the Civil War*, 57 S.C. L. REV. 859, 866 (2006).

⁴⁰⁴ *Id.*

⁴⁰⁵ See Ronald F. King, *Counting Votes: South Carolina's Stolen Election of 1876*, 32 J. INTERDISCIPLINARY HIST. 169, 170 (2001).

⁴⁰⁶ See, e.g., *A Sham Inauguration*, NEWS & COURIER (Charleston, S.C.), Dec. 8, 1876; *The Presidential Contest: South Carolina*, HELENA WKLY. HERALD, Nov. 16, 1876, at 5; *Mr. Hewitt's Card: His Interviews with the President*, STARK DEMOCRAT (Canton, Ohio), Dec. 14, 1876, at 1.

which government to support while both sides pursued federal recognition.⁴⁰⁷ It was a crisis years in the making.

South Carolina had three constitutions in seven years in the period during and after the Civil War.⁴⁰⁸ In this regard, it was similar to other southern states. Georgia had four constitutions in sixteen years.⁴⁰⁹ Arkansas and Alabama had four in fourteen years.⁴¹⁰ Texas had four within fifteen years.⁴¹¹

A. Description of Events

After losing the war, white South Carolinians worked to keep Black people in as near a condition to slavery as possible. As Governor B.F. Perry, whom President Johnson appointed, put it at the state's 1865 constitutional convention, "this is a white man's government, and intended for white men only."⁴¹² Accordingly, South Carolina's 1865 constitution only permitted white people and native South Carolinians to vote.⁴¹³ It attempted to and succeeded at maintaining the pre-Civil War era power structure. The only methods of constitutional change were practically unavailable to Black people.⁴¹⁴ One method was to call a constitutional convention; two-thirds of both the house of representatives and the state senate had to agree to do that.⁴¹⁵ The other was for two-thirds of each house of the legislature to approve amendments in consecutive sessions.⁴¹⁶ But because Black people could not vote, legislators had no reason to take

⁴⁰⁷ See Burke, *supra* note 403, at 866–67; *Details of the Inauguration*, NEWS & COURIER (Charleston, S.C.), Dec. 15, 1876.

⁴⁰⁸ See *South Carolina Constitution Conservation*, S.C. ARCHIVES & HIST. FOUND. <https://sarchivesandhistoryfoundation.org/south-carolina-constitution-conservation/> [https://perma.cc/9KNC-SG2Y].

⁴⁰⁹ See LaVerne W. Hill & Melvin B. Hill, *Georgia Constitution*, NEW GA. ENCYC. (Sept. 29, 2020), <https://www.georgiaencyclopedia.org/articles/government-politics/georgia-constitution/> [https://perma.cc/BX5B-UAX8].

⁴¹⁰ See Kay C. Goss, *Arkansas Constitutions*, ENCYC. ARK. (Nov. 20, 2024), <https://encyclopediaofarkansas.net/entries/arkansas-constitutions-2246/> [https://perma.cc/9YJC-8HNU]; *Alabama's Six Constitutions*, ALA. LEGISLATURE, <https://alison.legislature.state.al.us/alabamas-six-constitutions> [https://perma.cc/9B2P-YBWQ].

⁴¹¹ See *Constitutions of Texas 1824-1876*, TARLTON L. LIBR. (Aug. 15, 2023, 2:03 PM), <https://tarlton.law.utexas.edu/constitutions/timeline> [https://perma.cc/W8QK-NNGX].

⁴¹² JOURNAL OF THE CONVENTION OF THE PEOPLE OF SOUTH CAROLINA, HELD IN COLUMBIA, S.C., SEPTEMBER 1865, 14 (Columbia, S.C., J. A. Selby 1865).

⁴¹³ S.C. CONST. of 1865, art. IV. This constitution required voters to have been citizens of South Carolina for two years or European immigrants who had lived in South Carolina for two years and intended to become U.S. citizens. The constitution also excluded U.S. military personnel from voting. *Id.*

⁴¹⁴ See *id.*

⁴¹⁵ *Id.* art. XII.

⁴¹⁶ *Id.*

their interests into account. They would never agree to change the constitution that kept them in power and their former slaves out of power.

Delegates grudgingly abolished slavery in theory, but legislators later reestablished slavery in fact. Soon after ratifying the constitution, they passed “An Act to establish and regulate the domestic relations of persons of color, and to amend the law in relation to paupers and vagrancy.”⁴¹⁷ The Act attempted to ensure Black people only engaged in menial labor.⁴¹⁸ They could not work in any trade other than husbandry without obtaining a license from a court which would last for only a year.⁴¹⁹ The Act described Black people who entered labor contracts as “servants” and those who employed them as “masters.”⁴²⁰ The “servants” began their day at dawn and worked from sunrise to sundown,⁴²¹ the same as they had done during slavery.⁴²² Black people could not defend themselves against vigilantes preying on them since the law forbade them from owning weapons of any kind.⁴²³

South Carolina white supremacists used other measures to keep Black people in line. “Masters” often refused to provide the compensation their “servants” were supposed to receive under their labor agreements, exposing Black workers to possible vagrancy charges.⁴²⁴ White people closed down Black schools which meant that Black laborers could not read the labor contracts they signed to seek whatever limited legal remedies were available.⁴²⁵ Vigilantes murdered former slaves without fear of punishment. Violence against Black people and unionists was so prevalent in western South Carolina that the U.S. War Department described the situation as “truly alarming” after conducting a formal investigation.⁴²⁶

This state of affairs might have persisted if the political situation in Washington, D.C. had not changed. In the 1866 midterm elections, radical Republicans gained enough seats to pass the Reconstruction

⁴¹⁷ 1865 S.C. Acts 291.

⁴¹⁸ *See id.* at 296.

⁴¹⁹ *See id.* at 299.

⁴²⁰ *Id.*

⁴²¹ *See id.* at 296.

⁴²² *See Interview with Isaiah Butler, in SLAVE NARRATIVES: A FOLK HISTORY OF SLAVERY IN THE UNITED STATES FROM INTERVIEWS WITH FORMER SLAVES* 155, 157–58 (Work Projects Admin. ed., 1941).

⁴²³ *Id.*; *see* 1865 S.C. Acts 275.

⁴²⁴ RICHARD ZUCZEK, *STATE OF REBELLION: RECONSTRUCTION IN SOUTH CAROLINA* 29 (1996); *see* 1865 S.C. Acts 303.

⁴²⁵ *See ZUCZEK, supra* note 424, at 31.

⁴²⁶ *Id.* at 30.

Acts notwithstanding President Johnson's veto.⁴²⁷ The Acts divided the South into five military districts and placed a military commander over them.⁴²⁸ The Acts also required that states draft new constitutions to be readmitted to the Union, and that the conventions that drafted those constitutions be chosen by universal male suffrage.⁴²⁹ The final product had to guarantee universal male suffrage and be supported by a majority of men voting on the issue of ratification.⁴³⁰ State legislatures elected under the new constitutions had to ratify the Fourteenth Amendment.⁴³¹

The prospect of replacing their 1865 constitution terrified South Carolina's conservatives because the state was majority Black.⁴³² One newspaper encapsulated their fears when it observed:

We are met at the very threshold of reconstruction by the spectre of negro domination—the elevation of the poor ignorant slave, to the high seats of legislation—the subjection of the property and intelligence of the country to the domination of its landless serfs.⁴³³

Conservatives schemed about how to defeat a convention.⁴³⁴ Before states could hold a convention, a majority of registered voters had to vote on the question of whether to hold a convention and a majority of voters had to actually vote in favor of holding a convention.⁴³⁵ The *Anderson Intelligencer* shows the two strategies conservatives contemplated.⁴³⁶ One editorial urged white South Carolinians not to vote in the upcoming election.⁴³⁷ It estimated that there were 125,000 voters in South Carolina; 45,000 were white and 80,000 were Black.⁴³⁸ Although Black voters would likely support a convention, there might be a chance to defeat it if all white people refused to

⁴²⁷ See Laura Krugman Ray, *From Prerogative to Accountability: The Amenability of the President to Suit*, 80 KY. L.J. 739, 764 (1993); Travis Crum, *The Superfluous Fifteenth Amendment?*, 114 NW. U. L. REV. 1549, 1553–54, 1594 (2020).

⁴²⁸ Gabriel J. Chin, *The "Voting Rights Act of 1867": The Constitutionality of Federal Regulation of Suffrage During Reconstruction*, 82 N.C. L. REV. 1581, 1590 (2004).

⁴²⁹ See *id.* There could be restrictions on those who had participated in the rebellion. *Id.*

⁴³⁰ See John Harrison, *The Lawfulness of the Reconstruction Amendments*, 68 U. CHI. L. REV. 375, 405–07 (2001).

⁴³¹ *Id.* at 406.

⁴³² See ZUCZEK, *supra* note 424, at 38, 40–41.

⁴³³ See *Convention or No Convention*, ABBEVILLE PRESS (Abbeville, S.C.), Nov. 1, 1867, at 2.

⁴³⁴ See *The Convention—How Shall We Vote?*, ANDERSON INTELLIGENCER (Anderson, S.C.), Oct. 30, 1867, at 2; *The Crisis and Our Duty*, ANDERSON INTELLIGENCER (Anderson, S.C.), Oct. 2, 1867, at 1.

⁴³⁵ Harrison, *supra* note 430, at 405–07.

⁴³⁶ See *The Convention—How Shall We Vote?*, *supra* note 434; *The Crisis and Our Duty*, *supra* note 434.

⁴³⁷ *The Convention—How Shall We Vote?*, *supra* note 434.

⁴³⁸ *Id.*

vote.⁴³⁹ Another editorial in the same paper, however, argued that conservatives should vote so delegates of their ideological persuasion could draft a constitution to their liking.⁴⁴⁰ It described the question of calling a convention as deciding

not the fate of a party merely, nor the disposition which is to be made of a few petty offices, but to determine whether negro license and legalized pillage are to take the place of law and order, and of that noble civilization which is the work of two centuries of Caucasian energy and talent.⁴⁴¹

With the stakes clear, conservatives had no choice but to vote and try to shape the eventual constitution.⁴⁴²

Ultimately, a majority of voters supported calling a convention.⁴⁴³ South Carolina's constitutional convention drew attention for the fact that it was majority Black.⁴⁴⁴ The *Charleston Daily News* observed that “[p]erhaps more than half the members of this convention can testify that they were once held as slaves, bought and sold as property, and legally held as such, under the lash of the task-master—against the injustice of which there was no appeal, either in State or Federal courts.”⁴⁴⁵

Delegates had a fundamentally different constitutional vision than the authors of South Carolina's 1865 constitution had. This becomes clear from the constitution's first provision, which read: “All men are born free and equal—endowed by their Creator with certain inalienable rights, among which are the rights of enjoying and defending their lives and liberties, of acquiring, possessing and protecting property, and of seeking and obtaining their safety and happiness.”⁴⁴⁶ Many Americans today take language about how “all men are created equal” for granted. But delegates to South Carolina's 1868 constitutional convention did not. Earlier versions of South Carolina's constitution from 1776, 1790, and 1861 contained no such declaration.⁴⁴⁷ The first provision in South Carolina's 1868 constitution delineated an important shift in the state's constitutional tradition.

⁴³⁹ *See id.*

⁴⁴⁰ *The Crisis and Our Duty*, *supra* note 434.

⁴⁴¹ *Id.*

⁴⁴² *See id.*

⁴⁴³ *See* ZUCZEK, *supra* note 424, at 41.

⁴⁴⁴ *See id.* at 47–48.

⁴⁴⁵ *Contracts Based on Slaves*, CHARLESTON DAILY NEWS, Jan. 31, 1868, at 1.

⁴⁴⁶ S.C. CONST. of 1868, art. I, § 1.

⁴⁴⁷ *See* S.C. CONST. of 1776, art. I; S.C. CONST. of 1790, art. I; S.C. CONST. of 1861, art. I.

South Carolina's 1868 constitution contained several specific provisions to accomplish its broad mandate of racial equality.⁴⁴⁸ It forbade racial restrictions on the ability to vote.⁴⁴⁹ The constitution ensured that Black men could not lose the vote for petty crimes because it stipulated that "[t]he General Assembly shall never pass any law that will deprive any of the citizens of this State of the right of suffrage except for treason, murder, robbery, or dueling, whereof the person shall have been duly tried and convicted."⁴⁵⁰ Under the constitution, the legislature had to prevent the coercion, bribery, and intimidation that characterized many corrupt elections during the era.⁴⁵¹ Elections going forward would be "free and open."⁴⁵²

South Carolina's 1868 constitution established free public schools for all students without regard to race and compelled children to attend for at least twenty-four months.⁴⁵³ These were fundamental changes to South Carolina society. Before the Civil War, rich white people had sent their children to private schools while most of the rest of the state's children—white as well as Black—received no education.⁴⁵⁴

South Carolina's 1868 constitution created an embryonic welfare state and sought to reform the criminal justice system. Under the constitution, the state had to create "[i]nstitutions for the benefit of the insane, blind, deaf and dumb, and the poor."⁴⁵⁵ The constitution also mandated that counties give aid to the poor.⁴⁵⁶ These provisions constituted a major shift in South Carolina's constitutional thinking. Like the federal Constitution, South Carolina's earlier constitutions specified what the government could not do to citizens, but never indicated what the government had to do on their behalf. South Carolina's new constitution—like many others from the period—embraced a broader vision of what constitutions should do. The constitution succeeded at empowering Black people politically.⁴⁵⁷

⁴⁴⁸ See S.C. CONST. of 1868, art. VIII.

⁴⁴⁹ See *id.* § 2.

⁴⁵⁰ *Id.* § 8.

⁴⁵¹ *Id.* art. I, § 33.

⁴⁵² *Id.* § 31.

⁴⁵³ See *id.* art. X, §§ 5, 10.

⁴⁵⁴ See Bruce W. Eelman, "An Educated and Intelligent People Cannot Be Enslaved": *The Struggle for Common Schools in Antebellum Spartanburg, South Carolina*, 44 HIST. EDUC. Q. 250, 254–55 (2004).

⁴⁵⁵ S.C. CONST. of 1868, art. XI, § 1.

⁴⁵⁶ *Id.* § 5.

⁴⁵⁷ See Eric Foner, *South Carolina's Forgotten Black Political Revolution*, SLATE (Jan. 31, 2018), <https://www.slate.com/human-interest/2018/01/the-many-black-americans-who-held-public-office-during-reconstruction-in-southern-states-like-south-carolina.html> [<https://perma.cc/BDF3-3KTU>].

During these years, 315 Black people served in political office.⁴⁵⁸ Six of them served in U.S. Congress, including Robert Smalls, who earned fame during the Civil War for stealing a Confederate warship and sailing it to Union lines.⁴⁵⁹ The majority of the South Carolina legislature was Black, and two Black men served as lieutenant governor.⁴⁶⁰ Jonathan Jasper Wright became the first Black state supreme court justice in the country.⁴⁶¹

For conservatives and Democrats, this state of affairs was intolerable. They spent years fighting the constitutional vision that produced it and eventually prevailed.⁴⁶² They adopted a number of strategies. First, they appealed to the federal government.⁴⁶³ They wrote *The Respectful Remonstrance, On Behalf of The White People of South Carolina, Against the Constitution of the Late Convention of That State, Now Submitted to Congress for Ratification*.⁴⁶⁴ In their words, the new constitution was “the work of Northern adventurers, Southern renegades and ignorant negroes.”⁴⁶⁵ They alleged that “[n]ot one per centum of the white population of the State approves it, and not two per centum of the negroes who voted for its adoption know any more than a dog, horse, or cat, what his act of voting implied.”⁴⁶⁶ The real issue was that the constitution empowered Black people. So, conservatives left Congress with an ominous warning: “the white people of our State will never quietly submit to negro rule.”⁴⁶⁷

Conservatives and Democrats also used terrorism and violence to overthrow the government. In 1868, the Ku Klux Klan emerged in

⁴⁵⁸ *Id.*

⁴⁵⁹ *Id.*; Rebecca Fraser, *Yearning to Breathe Free: Robert Smalls of South Carolina*, 55 KENT ST. U. PRESS 403, 403–04 (2009) (book review); Myisha Eatmon, *Robert Smalls*, U.S.C., https://www.sc.edu/about/our_history/university_history/presidential_commission/commission_reports/final_report/appendices/appendix-3/smalls-robert/ [perma.cc/59J5-G6WV].

⁴⁶⁰ Foner, *supra* note 457.

⁴⁶¹ Amanda Powers, *Jonathan Jasper Wright: America's First Black State Supreme Court Justice*, BRENNAN CTR. FOR JUST. (Feb. 18, 2022), brennancenter.org/our-work/analysis-opinion/jonathan-jasper-wright-americas-first-black-state-supreme-court-justice [perma.cc/D7A9-35MU]; see *Death of Judge Wright*, NEWS & COURIER (Charleston, S.C.), Feb. 20, 1885.

⁴⁶² See Burke, *supra* note 403, at 864–69; Cole Blease Graham Jr., *The Evolving South Carolina Constitution*, 24 J. POL. SCI. 11, 20–21 (1996).

⁴⁶³ See WADE HAMPTON, JOHN P. THOMAS, JOSEPH DANIEL POPE, F. W. MCMASTER, SAMUEL MCGOWAN & W. M. SHANNON, *THE RESPECTFUL REMONSTRANCE, ON BEHALF OF THE WHITE PEOPLE OF SOUTH CAROLINA, AGAINST THE CONSTITUTION OF THE LATE CONVENTION OF THAT STATE, NOW SUBMITTED TO CONGRESS FOR RATIFICATION* 3 (D.C., Gibon Bros., Printers 1868).

⁴⁶⁴ *Id.*

⁴⁶⁵ *Id.* at 12.

⁴⁶⁶ *Id.*

⁴⁶⁷ *Id.*

South Carolina. The Klan was organized into companies.⁴⁶⁸ Each company had a captain. Members swore an oath to carry out their leaders' orders.⁴⁶⁹ A former member explained that the Klan aimed "to kill out the leaders of the Republican party, and drive them out of the State."⁴⁷⁰ The Klan had a favorable reputation among conservatives.⁴⁷¹ The *Anderson Intelligencer* wrote that the Klan was "a secret organization, conservative in its character and breathing destruction to Radicalism[.]" and "a powerful and lasting instrument of good."⁴⁷²

The Klan tried to win the 1868 election for Democrats by intimidating Black voters. One Black man testified before the South Carolina General Assembly that "the Ku Klux came through our plantation, and said if any of the colored people went to the polls the next day to vote, that they would kill the last one of them."⁴⁷³ Then, on election day, several who had initially braved the Klan threats decided not to vote because "the Democrats had liquor at the box up stairs, and were drinking and going on in such a manner that the colored people were afraid to go up."⁴⁷⁴

On occasion, Democrats participated in the violence without putting on their Klan regalia. One Democrat who helped murder a Black Republican testified that "[c]ommittees were appointed, which met in secret, and they appointed men to patrol in each different neighborhood."⁴⁷⁵ The Democrats did this "[t]o find out where the negroes were holding Union Leagues."⁴⁷⁶ They were to "break them up, kill the leaders, fire into them, and kill the leaders if they could."⁴⁷⁷ These committees had orders to take ballots from Republicans and kill anyone who resisted.⁴⁷⁸ Republicans must have resisted because the Democrat proceeded to describe a scene where

⁴⁶⁸ See W. K. Tolbert, *The Murder of Randolph*, CHARLESTON DAILY NEWS, Feb. 24, 1869, at 4.

⁴⁶⁹ *Id.*

⁴⁷⁰ *Id.*

⁴⁷¹ See Herbert Shapiro, *The Ku Klux Klan During Reconstruction: The South Carolina Episode*, 49 J. NEGRO HIST. 34, 39, 52–53 (1964).

⁴⁷² *The Ku Klux Klan*, EDGEFIELD ADVERTISER, reprinted in ANDERSON INTELLIGENCER, Apr. 1, 1868.

⁴⁷³ *Evidence Taken by the Committee of Investigation of the Third Congressional District, Under the Authority of the State of South Carolina*, 1868-69 Leg., 48th Gen. Assemb., Reg. Sess. 339 (S.C. 1869) (statement of Richard Johnson, resident, S.C. Third Congressional District).

⁴⁷⁴ *Id.* at 340.

⁴⁷⁵ Tolbert, *supra* note 468, at 4.

⁴⁷⁶ *Id.*

⁴⁷⁷ *Id.*

⁴⁷⁸ See *id.*; see generally KAREN L. SHANTON & TYLER L. WOLANIN, CONG. RSCH. SERV., IN12389, ELECTION POLICY FUNDAMENTALS: THE SECRET BALLOT 1, 2 fig.1 (2024).

one Republican had been shot dead and others had run away.⁴⁷⁹ The violence produced results.⁴⁸⁰ At one precinct, where one would normally have expected between four and five hundred Black men to vote, only two Black men were able to vote before Democrats started shooting.⁴⁸¹ The rest of the state saw similar declines in Black turnout.⁴⁸² For example, in Abbeville County, around 4,200 Black men were registered to vote, but only 800 actually voted in 1868's fall elections.⁴⁸³

Black officials were also assassinated during the campaign.⁴⁸⁴ At a Democratic meeting, members debated how to handle B.F. Randolph, a Black man who had proposed that "the forthcoming Constitution shall not itself make any distinction on account of color, and shall provide that no distinction whatever on account of color in any law, legislative or municipal, shall be made in this State."⁴⁸⁵ "Some said[] '[c]ut him up and feed him to the dogs'" while others said "they would box him up, and express him to Governor [of South Carolina] Scott as a present."⁴⁸⁶ Assassins accosted him on a train and shot him.⁴⁸⁷ While he lay on the ground, one of them said, "You said yesterday that negro blood ran in your veins, and you was proud of it; now, God damn you, it is running on the ground."⁴⁸⁸ Although Republicans won statewide in 1868, conservatives and Democrats saw that violence could be an effective path forward.⁴⁸⁹

Indeed, Klan violence became endemic in South Carolina. A Union soldier testified to Congress in 1871 that "outrages" occurred daily.⁴⁹⁰ Men in Klan regalia "go to a colored man's house, take him out and whip him," then "tell him that he must not give any information that he has been whipped," and "that he must make a public renunciation of his republican principles or they will return and kill him."⁴⁹¹ The soldier then testified officials only investigated one white man for

⁴⁷⁹ See Tolbert, *supra* note 468.

⁴⁸⁰ See Shapiro, *supra* note 471, at 38.

⁴⁸¹ Tolbert, *supra* note 468.

⁴⁸² See Shapiro, *supra* note 471, at 38.

⁴⁸³ *Id.*

⁴⁸⁴ *Id.* at 35.

⁴⁸⁵ 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF SOUTH CAROLINA 100–01 (Charleston, S.C., Denny & Perry 1868).

⁴⁸⁶ Tolbert, *supra* note 468, at 4.

⁴⁸⁷ *Id.*

⁴⁸⁸ *Evidence Taken by the Committee of Investigation of the Third Congressional District, Under the Authority of the State of South Carolina*, *supra* note 473, at 388–89.

⁴⁸⁹ See Shapiro, *supra* note 471, at 51–53.

⁴⁹⁰ See H.R. REP. NO. 42-22, pt. 3, at 26–28 (1872).

⁴⁹¹ *Id.* at 27.

participating in these actions.⁴⁹² Nothing came of that investigation because “a number of young men came into court with pistols slung around them.”⁴⁹³ White Republicans were victims too. After receiving a whipping, an elderly man was ordered to come into town during a sheriff’s sale and “publicly renounce his [R]epublican principles.”⁴⁹⁴ He did so even though federal soldiers offered to protect him.⁴⁹⁵

State authorities tried in vain to help. Governor Scott signed a bill authorizing a state militia.⁴⁹⁶ Unfortunately, few white people agreed to serve, leaving the militia vulnerable to the charge that it was a “black militia.”⁴⁹⁷ White newspapers seeded conspiracy theories about the militia.⁴⁹⁸ After calling militia sent to Edgefield as “the *Corps d’Afrique*,” the *Charleston Daily News* claimed that it had gone to the town to “arrest . . . citizens on trumped up charges of being ‘rebel bushwhackers,’” and “members of the Ku-Klux-Klan.”⁴⁹⁹ It then alleged that the militia had tortured an innocent white man into admitting that he was a “bushwacker.”⁵⁰⁰ Conservative white people had two grievances against Black militia units.⁵⁰¹ First, they resented the pride Black militia units gave the Black community.⁵⁰² The *Charleston Daily News* lamented that, when a Black militia unit went to Edgefield, “the negroes of Edgefield became exceedingly jubilant and determined to congratulate the colored soldiers on their great victory.”⁵⁰³ Second, conservative white people resented that the militia provided Black men another economic option other than working for their former owners.⁵⁰⁴ The *Charleston Daily News* bemoaned that “[a]mong the numerous evils which have resulted to the people of Edgefield from this invasion of the county by the negro militia has been the desertion of the fields by the negro laborers.”⁵⁰⁵

Violence between Black militia units and white people broke out in Laurens immediately after the 1870 election.⁵⁰⁶ After a gun

⁴⁹² See *id.* at 28.

⁴⁹³ *Id.* at 28.

⁴⁹⁴ *Id.* at 27.

⁴⁹⁵ See *id.*

⁴⁹⁶ ZUCZEK, *supra* note 424, at 74.

⁴⁹⁷ *Id.*

⁴⁹⁸ See, e.g., *The Edgefield Outrage*, CHARLESTON DAILY NEWS (Charleston, S.C.), July 28, 1869, at 1.

⁴⁹⁹ *Id.*

⁵⁰⁰ *Id.*

⁵⁰¹ See *id.*

⁵⁰² *Id.*

⁵⁰³ *Id.*

⁵⁰⁴ See *id.*; H.R. REP. NO. 42-22, pt. 3, at 28, 483 (1872).

⁵⁰⁵ *The Edgefield Outrage*, *supra* note 498, at 1.

⁵⁰⁶ Shapiro, *supra* note 471, at 40–41.

discharged during a fight, a white mob began shooting at militia in the town.⁵⁰⁷ Several Black people and a few white people died during the fighting and in later events.⁵⁰⁸ One of them was Wade Perrin, a Black legislator.⁵⁰⁹ The white mob pursued him and commanded him to dance, sing, pray, and then run away.⁵¹⁰ While he was running, they shot him in the back.⁵¹¹ Between 2,000 and 2,500 white people confiscated weapons from the armory and occupied it.⁵¹² White residents blamed the Black militia for the violence. In the months before the 1870 elections, the *Daily Phoenix* wrote that “the white people had been subjected to an organized system of disparagement, abuse, and threats of violence to person and property, which had produced that feverish state of feeling incident to a deep sense of outrage and injustice.”⁵¹³ Black people had apparently become so threatening that, “[f]or weeks, whole families had not undressed for bed, so great was the apprehension of midnight negro risings, burnings and butcheries.”⁵¹⁴

The *South Carolina Republican*, however, told a different story. It asserted that a white man deliberately attacked a policeman to provoke him into firing so they would have an excuse to shoot.⁵¹⁵ The paper then described how “[i]t was not three minutes after the first shot was fired before a line of white men had formed across the public square The white men came from every direction, out of stores, out of the court house, and every other place.”⁵¹⁶ Once the armed white people fired on the militia, “White couriers were dispatched on every road, to rouse the people, so that by night at least one thousand men were scouring the country on horseback, and in little squads hunting up Radicals.”⁵¹⁷ These events received national media coverage. The *New York Herald* wrote that “[t]he ‘War of the Races’ in South Carolina did not end with the rebellion, but occasionally bursts forth with its wonted fury.”⁵¹⁸

⁵⁰⁷ *The Laurens Murders*, S.C. REPUBLICAN, Oct. 29, 1870, at 1.

⁵⁰⁸ See Shapiro, *supra* note 471, at 41.

⁵⁰⁹ *Id.*; *The New Regime*, CHARLESTON DAILY NEWS, March 15, 1870, at 1.

⁵¹⁰ REGINALD F. HILDEBRAND, *THE TIMES WERE STRANGE AND STIRRING: METHODIST PREACHERS AND THE CRISIS OF EMANCIPATION* 48 (1995).

⁵¹¹ See *id.*

⁵¹² ZUCZEK, *supra* note 424, at 89.

⁵¹³ J.A. Selby, *The Difficulty in Laurens*, DAILY PHOENIX (Charleston, S.C.), Oct. 25, 1870, at 2.

⁵¹⁴ *Id.*

⁵¹⁵ *The Laurens Murders*, S.C. REPUBLICAN (Columbia, S.C.), Oct. 29, 1870, at 1.

⁵¹⁶ *Id.*

⁵¹⁷ *Id.*

⁵¹⁸ *The War of the Races*, N.Y. HERALD, Oct. 23, 1870, at 6.

Governor Scott declared martial law in four South Carolina counties after ordering militia weapons in Laurens transferred to Columbia.⁵¹⁹ The move was a mistake, as it suggested that if Democrats engaged in enough violence, they could get the governor to neuter the militia. It ensured that the militia was not a serious fighting force and rendered the martial law proclamation dead letter. Unsurprisingly, Klan violence exploded across the state.⁵²⁰ For example, in early 1871, authorities arrested some Black militiamen for allegedly murdering a confederate veteran in Union County.⁵²¹ Dozens of Klansmen stormed into the town, breached the jail, and shot five of the prisoners, two of whom died.⁵²² When a judge ordered the surviving prisoners sent to Columbia for their safety, as many as 1,500 Klansmen captured the town and blocked the exits. They eventually removed the prisoners from the jail and murdered them.⁵²³

The violence decreased for a while later in 1871, though historians debate why. Some have argued that aggressive federal action was the cause.⁵²⁴ In 1871, the federal government stationed more troops in the state and gathered intelligence to better understand the Klan.⁵²⁵ Federal legislation such as the Enforcement Acts of 1870 and 1871 and the Civil Rights Act authorized President Grant to use the military to enforce the law and placed congressional elections under federal supervision.⁵²⁶ The Ku Klux Klan Act permitted Grant to suspend the writ of habeas corpus if necessary.⁵²⁷ Grant eventually suspended the writ in nine South Carolina counties on October 17, 1871.⁵²⁸ Federal authorities arrested hundreds of white people for allegedly participating in the Klan and won dozens of convictions and guilty pleas.⁵²⁹ Citing these actions, one historian claimed that “[t]he limited steps taken by the Federal government were adequate to destroy” the Klan.⁵³⁰ It is true that Klan violence was lower during the end of 1871 and some of 1872 than it had been previously.⁵³¹

⁵¹⁹ ZUCZEK, *supra* note 424, at 89.

⁵²⁰ *See id.* at 90.

⁵²¹ *Id.*

⁵²² *Id.*

⁵²³ *Id.* at 91.

⁵²⁴ *Id.* at 103.

⁵²⁵ *See id.* at 93–94.

⁵²⁶ *See id.* at 95.

⁵²⁷ *See id.* at 98.

⁵²⁸ *Id.*

⁵²⁹ Shapiro, *supra* note 471, at 46; ERIC FONER, RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION 458 (Henry Steele Commager & Richard B. Morris eds. 1988).

⁵³⁰ Shapiro, *supra* note 471, at 46.

⁵³¹ *See ZUCZEK, supra* note 424, at 106–07.

However, law enforcement officials themselves were unsure about whether their efforts had been effective.⁵³² One prosecutor even argued that “orders were given” from persons unknown to end the violence “for the present” and that the Klan would simply “wait ‘until the storms blew over’” to “resume operations.”⁵³³ By the summer of 1872, Klan activity had increased, suggesting that federal intervention had only borne limited fruit.⁵³⁴

All of this was a mere prelude to the events of 1876. White South Carolinians were determined to overthrow the government, but they faced the same problem that had vexed them when they tried to prevent a constitutional convention in 1868.⁵³⁵ A majority of South Carolina’s electorate was Black, and Black voters were Republicans.⁵³⁶ To win the 1876 campaign despite this math, General Martin Gary created a master plan.⁵³⁷ It called upon Democrats to organize themselves into rifle clubs who would wear red shirts at public meetings and on election day.⁵³⁸ These rifle clubs were to be divided into companies, each of which would be led by a captain.⁵³⁹ The plan required the clubs to “parade with banners, mottoes, etc. and keep together so as to make an imposing spectacle.”⁵⁴⁰

The clubs were also to “attend every Radical meeting that we hear of whether they meet at night or in the day time.”⁵⁴¹ At those events, Democrats should be armed and “tell [Republican speakers] *then* and *there* to their faces, that they are liars, thieves and rascals and are only trying to mislead the ignorant negroes and if you get a chance get upon the platform and address the negroes.”⁵⁴² Each rifle club member should have at least thirty rounds of ammunition and each club should have three days’ rations for the horses and men to be stored on the day before the election, so that “they may be prepared at a moments [sic] notice to move to any point in the County when ordered by the Chairman of the Executive Committee [of the Democratic Party].”⁵⁴³ Individuals had an important role to play.

⁵³² *See id.*

⁵³³ *Id.*

⁵³⁴ *See id.* at 107.

⁵³⁵ *See id.* at 208–10.

⁵³⁶ *See* FRANCIS BUTLER SIMKINS & ROBERT HILLIARD WOODY, SOUTH CAROLINA DURING RECONSTRUCTION 496 (1932).

⁵³⁷ *See id.* at 500.

⁵³⁸ *See id.* at 499–500.

⁵³⁹ *Id.* app. at 564.

⁵⁴⁰ *Id.* app. at 568.

⁵⁴¹ *Id.* app. at 566.

⁵⁴² *Id.*

⁵⁴³ *Id.* app. at 564–65.

“Every Democrat must feel honor bound to control the vote of at least one negro, by intimidation, purchase, keeping him away or as each individual may determine, how he may best accomplish it.”⁵⁴⁴ The Ku Klux Klan was back in another form.

Democrats nominated Wade Hampton for governor while Republicans renominated Daniel Chamberlain for reelection.⁵⁴⁵ The campaign would see repeated military style clashes.⁵⁴⁶ Two months before, one of them, D.L. Adams, commander of a Black militia company, was warned that:

[T]he [D]emocrats had made it up in their own minds, and they had organized all over the State, and also had about thirty men from Texas and Mississippi to come in this State, and they were feeding them, organizing all of the white men into certain different clubs, and before the election that there had to be a certain number of niggers killed, leading men, and if they found out after the leading man was [sic] killed that they couldn’t carry the State that way, they were going to kill enough so that they could carry the majority.⁵⁴⁷

Adams testified to Congress regarding a racist attack where white men whipped a drummer boy from his company, then compelled the boy’s mother to whip him again.⁵⁴⁸ Thereafter, shortly before a riot that became known as the Hamburg massacre, Adams received a letter “specifying a dozen or two different names that was in the vicinity of Hamburg [sic] that had to be killed.”⁵⁴⁹ He was on the list.⁵⁵⁰

On July 4, 1876, Adams was leading his company on parade when white men refused to drive their carriage around the parade and had to wait before being let through.⁵⁵¹ They claimed the company had deliberately blocked the road.⁵⁵² Adams received a court summons, but when his trial date arrived, the white people in Hamburg “were getting drunk very fast . . . and saying they were going to kill every God damned nigger in Hamburg [sic] that day, and especially Doc[] Adams; that was myself.”⁵⁵³ Adams became so fearful about his fate

⁵⁴⁴ *Id.* app. at 566.

⁵⁴⁵ *Id.* at 494, 496.

⁵⁴⁶ *See id.* at 495.

⁵⁴⁷ S.C. COMM., DENIAL OF THE ELECTIVE FRANCHISE IN SOUTH CAROLINA AT THE ELECTIONS OF 1875 AND 1876, S. MISC. DOC. NO. 44-48, vol. I, at 45 (1877).

⁵⁴⁸ *See id.* at 46.

⁵⁴⁹ *Id.*

⁵⁵⁰ *See id.*

⁵⁵¹ *Id.* at 35–36.

⁵⁵² *See id.*

⁵⁵³ *Id.* at 37.

that he went to the judge to explain that he was not coming to his hearing to avoid being lynched.⁵⁵⁴ M.C. Butler, who represented the white plaintiffs, demanded that Adams surrender the militia's guns to him; Adams did not comply.⁵⁵⁵ A crowd of white people then surrounded the militia in their drill room and fired at them for half an hour.⁵⁵⁶ At one point, they shot a cannon at the militia.⁵⁵⁷ The white people then closed ranks as though they were about to charge.⁵⁵⁸ The militia returned fire briefly before fleeing the area.⁵⁵⁹

As Adams hid in the town, he heard white people citing political justifications for their killing.⁵⁶⁰ One said, "We are going to redeem South Carolina to-day!"⁵⁶¹ Another said, "By God! [W]e will carry South Carolina now; about the time we kill four or five hundred more we will scare the rest."⁵⁶² At one point, Adams even witnessed white people plundering his home.⁵⁶³ At night, Adams observed white people rounding up Black men and arguing over what to do to them.⁵⁶⁴ Some of the white people wanted to "kill all, because, if we don't, they will give testimony against us some day to come."⁵⁶⁵ Others wanted to kill only specific individuals.⁵⁶⁶ Later in the evening, Butler came and named specific people he wanted killed.⁵⁶⁷ Six men were shot.⁵⁶⁸ National media reports bolster Adams's description. The *New York Herald* wrote that:

This affair, apparently, was as unwarranted and unprovoked as it was barbarous. If one-half that is said in regard to it is true it more than bears out the terrible declaration in General Grant's letter to Governor Chamberlain, in which he avers the utter recklessness and impunity with which negroes are murdered in some of the Southern States.⁵⁶⁹

⁵⁵⁴ *See id.* at 38.

⁵⁵⁵ *See id.* at 39.

⁵⁵⁶ *Id.* at 40.

⁵⁵⁷ *The Hamburg Collision*, ANDERSON INTELLIGENCER (Anderson, S.C.), July 20, 1876.

⁵⁵⁸ S. MISC. DOC. NO. 44-48, vol. I, at 40.

⁵⁵⁹ *Id.* at 40-41.

⁵⁶⁰ *Id.* at 46-47.

⁵⁶¹ *Id.* at 47.

⁵⁶² *Id.*

⁵⁶³ *Id.* at 42-43.

⁵⁶⁴ *See id.*

⁵⁶⁵ *Id.* at 43.

⁵⁶⁶ *Id.* at 43-44.

⁵⁶⁷ *Id.* at 44.

⁵⁶⁸ *Id.* at 44-45.

⁵⁶⁹ *The Hamburg Verdict*, N.Y. HERALD, Aug. 2, 1876.

Other military style clashes happened in Ellenton⁵⁷⁰ and Cainhoy⁵⁷¹ during the 1876 campaign. A more traditional campaign occurred alongside the violence. Democratic nominee Wade Hampton pursued a clever strategy. On one hand, he promised to uphold Black rights.⁵⁷² In an October 7, 1876, speech, Hampton said, “I want to say to my colored friends to bear this in mind: I was the first to advise that rights of all kinds should be conferred upon colored men.”⁵⁷³ Such rhetoric differentiated him from the red shirts and appealed to more moderate voters. On the other hand, there is no evidence Hampton tried to force his supporters to stop the violence.⁵⁷⁴ He would position himself as a reasonable moderate while relying on supporters to suppress enough Black votes for him to win the election.⁵⁷⁵ Given this posture, it is unsurprising that Hampton claimed to know nothing about attacks on Black Republicans in front of Congress.⁵⁷⁶ But this is highly unlikely. Hampton acknowledged that he was in contact with every part of South Carolina.⁵⁷⁷ He had been Gary’s commander during the Civil War and was an important member of South Carolina’s white political establishment.⁵⁷⁸ The best explanation for Hampton’s testimony was that he was reluctant to tell the Congress investigating his election that he had tolerated violence and intimidation.

With election day approaching, Democrats claimed that Republicans would steal the election.⁵⁷⁹ The *Anderson Intelligencer* alleged state officials planned to “arrest the influential men and those who are active in this canvass all over the State [for the Democrats]” on false charges to intimidate Democratic voters.⁵⁸⁰ Indeed, fraud and irregularities occurred. The *News and Courier* reported that groups of Republicans would vote at one polling place,

⁵⁷⁰ See *The Ellenton Riot*, YORKVILLE ENQUIRER, Oct. 26, 1876.

⁵⁷¹ See *The Cainhoy Massacre*, NEWS & HERALD (S.C.), Oct. 26, 1876.

⁵⁷² SELECT COMM. ON THE RECENT ELECTION IN S.C., TESTIMONY, H.R. MISC. DOC. NO. 44-31, pt.1, at 308 (2d Sess. 1876).

⁵⁷³ *Id.* at 310.

⁵⁷⁴ See Fritz Hamer, *Wade Hampton: Conflicted Leader of the Conservative Democracy?*, UNIV. OF S.C. – COLUMBIA 27, 32 (2007).

⁵⁷⁵ See *id.* at 31.

⁵⁷⁶ SELECT COMM. ON THE RECENT ELECTION IN S.C., *supra* note 572, at 311.

⁵⁷⁷ See generally *id.*

⁵⁷⁸ WALTER BRIAN CISCO, WADE HAMPTON: CONFEDERATE WARRIOR, CONSERVATIVE STATESMAN 59 (1st ed. 2009).

⁵⁷⁹ See *More Radical Infamy*, ANDERSON INTELLIGENCER (Anderson, S.C.), Nov. 2, 1876.

⁵⁸⁰ *Id.*

and then travel to another polling place to vote.⁵⁸¹ It also asserted that underage boys had voted Republican.⁵⁸²

Democrats themselves later admitted to fraud and intimidation. At South Carolina's 1895 constitutional convention, "Pitchfork" Ben Tillman asked, "How did we recover our liberty?"⁵⁸³ The answer: "By fraud and violence. We tried to overcome the thirty thousand majority by honest methods, which was a mathematical impossibility."⁵⁸⁴ Historians Francis Butler Simkins and Robert Hilliard Woody later wrote that "[t]here are reputable white men living in South Carolina who boast of having voted 18 or 20 times in the election. Parties of white men on horseback cast their ballots at many polls."⁵⁸⁵

Election day failed to produce clear winners.⁵⁸⁶ The *Port Royal Standard and Commercial* claimed that Chamberlain had been reelected governor by 5,332 votes.⁵⁸⁷ But the *Pickens Sentinel* claimed that Hampton had won by 3,000 votes.⁵⁸⁸ Important legislative races had no agreed-upon winners.⁵⁸⁹ Resolution would take months.⁵⁹⁰ The stakes were high not just for South Carolina, but for the entire country. South Carolina's electors would be critical in determining the presidential race. South Carolina's U.S. Senator would help determine whether Reconstruction continued.

A bewildering array of laws awaited the judges called upon to decide the contested elections.⁵⁹¹ A statute tasked the Board of Canvassers with tallying votes and declaring the highest vote-getter elected.⁵⁹² This seemingly left room for the Board to decide which votes were valid so that it could construct a correct tally. At the same time, South Carolina's constitution provided that "[e]ach House shall judge of the election returns and qualifications of its own

⁵⁸¹ See *How We Lost Darlington*, NEWS & COURIER (Charleston, S.C.), Nov. 10, 1876.

⁵⁸² *Id.*

⁵⁸³ JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF SOUTH CAROLINA 463 (1895).

⁵⁸⁴ See *id.*

⁵⁸⁵ SIMKINS & WOODY, *supra* note 536, at 515.

⁵⁸⁶ See Ronald F. King, *Counting the Votes: South Carolina's Stolen Election of 1876*, 32 J. INTERDISC. HIST. 169, 171 (2001).

⁵⁸⁷ *The Banner County*, PORT ROYAL STANDARD & COM. (Beaufort, S.C.), Nov. 9, 1876.

⁵⁸⁸ *The Elections*, PICKENS SENTINEL (Pickens, S.C.), Nov. 9, 1876.

⁵⁸⁹ See King, *supra* note 586, at 170–71.

⁵⁹⁰ See Michael F. Holt, *The Contentious Election of 1876*, GILDER LEHRMAN INST. AM. HIST., <https://www.gilderlehrman.org/history-resources/essays/contentious-election-1876> [https://perma.cc/9HBE-6TJQ].

⁵⁹¹ See ZUCZEK, *supra* note 424, at 193.

⁵⁹² *Id.*

members.”⁵⁹³ South Carolina’s constitution also required the Secretary of State to forward returns to the legislature, which was to declare the man with the most votes elected governor.⁵⁹⁴ The legislature was responsible for deciding contested elections for governor.⁵⁹⁵ There were broader substantive guarantees at play as well. South Carolina’s constitution promised that elections would be “free and open,” that all citizens had “an equal right to elect offic[ials],” and that elections should be free from “power, bribery, tumult, or improper conduct.”⁵⁹⁶ Partisanship affected how both sides approached resolving the election. The Board of Canvassers was majority Republican and three of its members were seeking reelection.⁵⁹⁷ Republicans understandably favored a larger role for the Board. Democrats might have controlled the legislature if certain men were certified to be the victors, so the Republicans wanted a larger role for the legislature.⁵⁹⁸

Many irregularities did occur. One witness testified to Congress that in Edgefield County,

The polls . . . were blocked, and otherwise crowded by armed democrats, who were uniformed in red shirts, and from one to two pistols buckled on the outside, and some with sixteen-shooters strapped to their sides, the major part of them being mounted on horses, and using threats of a violent nature toward republicans who would present themselves for the purpose of voting the republican ticket.⁵⁹⁹

That witness further testified that red shirts kept between 600 and 800 Republicans from voting and that Edgefield County had reported 3,000 more votes than would have been possible if only registered voters had voted once.⁶⁰⁰ The testimony supports the claim that some men voted multiple times.⁶⁰¹ Several other witnesses testified that fraud and intimidation were widespread.⁶⁰² Democrats argued that the Board of Canvassers had exceeded its mandate by investigating what happened during the election instead of simply counting

⁵⁹³ S.C. CONST. of 1868, art. II, § 14.

⁵⁹⁴ *Id.* art. III, § 4.

⁵⁹⁵ *Id.*

⁵⁹⁶ *Id.* art. I, §§ 31, 33.

⁵⁹⁷ ZUCZEK, *supra* note 424, at 193.

⁵⁹⁸ *See id.*

⁵⁹⁹ SELECT COMM. ON THE RECENT ELECTION IN S.C., TESTIMONY, H.R. MISC. DOC. NO. 44-31, pt.1, at 237 (2d Sess. 1876).

⁶⁰⁰ *Id.*

⁶⁰¹ *See id.*

⁶⁰² *See id.* at 240, 243.

votes.⁶⁰³ The South Carolina Supreme Court agreed and promptly ordered the Board to declare those who had won the most votes duly elected and leave contested elections to the legislature.⁶⁰⁴ On one hand, the decision was defensible because of clear constitutional text leaving contested elections to the legislature.⁶⁰⁵ The constitution provided, "The person having the highest number of votes shall be Governor; but if two or more shall be equal, and highest in votes, the General Assembly shall, during the same session, in the House of Representatives choose one of them Governor *viva voce*."⁶⁰⁶ The constitution also provided that "Each House shall judge of the election returns and qualifications of its own members."⁶⁰⁷ On the other hand, the court failed to consider whether the election had been consistent with the constitution's aforementioned promises of fairness⁶⁰⁸ in light of the fraud and violence.⁶⁰⁹ It also failed to indicate whether the legislature should consider these constitutional provisions when deciding the contested elections.⁶¹⁰

The Board refused to comply with the court's order and did not issue certificates to candidates whose elections depended on votes from Edgefield and Laurens counties because they had evidence of fraud and violence.⁶¹¹ In response, the South Carolina Supreme Court held the board members in contempt and fined them \$1,500 each.⁶¹² They were imprisoned until a federal judge issued a writ of habeas corpus in the case.⁶¹³ The Secretary of State continued to defy the South Carolina Supreme Court and issued certificates to fifty-nine Republicans and fifty-seven Democrats in the house of representatives, and certified a Republican majority in the senate of five seats.⁶¹⁴ The South Carolina Supreme Court responded by issuing certificates to all candidates in the election who got the highest vote totals, including the ones from Edgefield and Laurens counties.⁶¹⁵

⁶⁰³ See ZUCZEK, *supra* note 424, at 193.

⁶⁰⁴ See *id.*

⁶⁰⁵ See S.C. CONST. of 1868 art. III, § 4.

⁶⁰⁶ *Id.*

⁶⁰⁷ *Id.* art. II, § 14.

⁶⁰⁸ See *id.* art. I, §§ 31–33.

⁶⁰⁹ See ZUCZEK, *supra* note 424, at 193.

⁶¹⁰ See *id.*

⁶¹¹ See *id.*

⁶¹² *Id.* at 193–94.

⁶¹³ *Latest from Columbia*, ANDERSON INTELLIGENCER (Anderson, S.C.), Nov. 30, 1876, at 2.

⁶¹⁴ See SIMKINS & WOODY, *supra* note 536, at 527–28.

⁶¹⁵ See *id.* at 527–29; *Latest from Columbia*, *supra* note 613, at 2.

The stage was set for two governments to emerge. It was uncertain whether Republicans or Democrats controlled the legislature.⁶¹⁶ When Democrats marched on the state house, the sergeant-at-arms and U.S. soldiers garrisoning the building refused to let them inside.⁶¹⁷ Republicans behaved like they controlled the house of representatives and commenced proceedings.⁶¹⁸ They elected E.W.M. Mackey as speaker of the house.⁶¹⁹ Republicans then voted to unseat the Democrats from Laurens and Edgefield counties who had received certificates from the South Carolina Supreme Court and seated their Republican opponents instead.⁶²⁰ While this happened, Democrats met at Carolina Hall and elected William Wallace speaker of the house.⁶²¹ South Carolina thus found itself in the same conundrum Pennsylvania did during the Buckshot War in 1838: one state had two legislatures and there was disagreement over which one was legitimate.⁶²²

One way of trying to decide which body was the true house of representatives was to determine which one had a quorum.⁶²³ Before legislatures can perform their duties, more than half of their members must generally be present.⁶²⁴ The constitution set the house's membership at 124.⁶²⁵ In the face of clear constitutional text, Republicans argued that the house of representatives had only 116 members because no lawful elections took place in Edgefield and Laurens counties, which meant they had a quorum with fifty-nine members.⁶²⁶ Democrats, on firmer constitutional ground, argued that the house of representatives must have 124 members and that they alone had a quorum with sixty-three members.⁶²⁷ While that complied with the letter of the constitution, it ignored the inconvenient fact that some of the members had only won through violence and intimidation.

The Wallace House's members attempted to take over the state house.⁶²⁸ Wallace himself even went to the speaker's chair and

⁶¹⁶ See SIMKINS & WOODY, *supra* note 536, at 524.

⁶¹⁷ See *id.* at 523; *Latest from Columbia*, *supra* note 613, at 2.

⁶¹⁸ See *Latest from Columbia*, *supra* note 613, at 2.

⁶¹⁹ *Id.*

⁶²⁰ See *id.*; SIMKINS & WOODY, *supra* note 536, at 523–24.

⁶²¹ SIMKINS & WOODY, *supra* note 536, at 523; *Latest from Columbia*, *supra* note 613, at 2.

⁶²² See *Latest from Columbia*, *supra* note 613, at 2; *About the Buckshot War*, *supra* note 122, at 10.

⁶²³ Daleo, *supra* note 169, at 947–48.

⁶²⁴ *Id.*

⁶²⁵ S.C. CONST. of 1868, art. II, § 4.

⁶²⁶ ZUCZEK, *supra* note 424, at 194–95.

⁶²⁷ *Id.*

⁶²⁸ See *The Combat Deepens*, NEWS & COURIER (Charleston, S.C.), Dec. 4, 1876.

gaveled the house of representatives to order.⁶²⁹ Mackey and the Republican sergeant-at-arms came to the speaker's well and Mackey commanded Wallace, "You will please vacate this seat."⁶³⁰ Wallace replied, "I have been elected by a majority of the House of Representatives of the State of South Carolina, duly sworn in, in the Carolina Hall, on Tuesday, the 28th day of November, instant."⁶³¹ Mackey responded:

"I claim that I was elected Speaker of this House by a legal quorum of members legally sworn in. We do not recognize that any others than those sworn in here on Tuesday last are members of this House, and these men who are visiting this hall without our consent must keep order. I must again demand that you, Gen. Wallace, leave this chair."⁶³²

Wallace replied, "I have already declared that I am the legally elected Speaker of this House, and I must request you to retire."⁶³³ Both men instructed their sergeants-at-arms to enforce their orders to the other man to withdraw.⁶³⁴ Both a Democratic and a Republican sergeant-at-arms moved to carry out those orders while members of each house appeared prepared to fight, but neither Wallace nor Mackey budged.⁶³⁵

The two sides then attempted to hold their legislative session at the same time.⁶³⁶ Both Wallace and Mackey recognized speakers. When two men unsurprisingly spoke at the same time, Wallace called the Republican speaker to order while Mackey called the Democratic speaker to order.⁶³⁷ Outside the state house, rumors of violence swirled.⁶³⁸ The *News and Courier* claimed that a gang of Republicans were ready to start a fight in the state house.⁶³⁹ Meanwhile, Democrats had come to Columbia from across the state.⁶⁴⁰

Chamberlain and Hampton maneuvered for position.⁶⁴¹ The Mackey House inaugurated Chamberlain governor.⁶⁴² The *News and*

⁶²⁹ *The Legislative Lock*, NEWS & COURIER (Charleston, S.C.), Dec. 1, 1876.

⁶³⁰ *Id.*

⁶³¹ *Id.*

⁶³² *Id.*

⁶³³ *Id.*

⁶³⁴ *Id.*

⁶³⁵ *Id.*

⁶³⁶ *Id.*

⁶³⁷ *Id.*

⁶³⁸ See *Forcing the Fighting*, NEWS & COURIER (Charleston, S.C.), Dec. 4, 1876.

⁶³⁹ *Id.*

⁶⁴⁰ *Id.*

⁶⁴¹ *The Dismal Ceremony*, NEWS & COURIER (Charleston, S.C.), Dec. 8, 1876.

⁶⁴² *Id.*

Courier reported that he was “as white as a sheet and trembled visibly as he came to the front” and that only “[o]ne or two persons raised a faint cheer, but it soon subsided.”⁶⁴³ The South Carolina Supreme Court ended any thought of celebration when it declared that the Mackey House was not the lawful house of representatives.⁶⁴⁴ The case arose because Wallace demanded that Mackey deliver returns for the election of governor and lieutenant governor.⁶⁴⁵ When Mackey refused, Wallace petitioned the South Carolina Supreme Court for a writ of mandamus compelling Mackey and the Secretary of State to deliver the returns.⁶⁴⁶ All three justices wrote opinions in the case.⁶⁴⁷ Justice Moses emphasized the South Carolina Constitution’s requirement that the house of representatives comprises 124 people.⁶⁴⁸ Since sixty-three was enough for a quorum, Wallace was “the Speaker of a legally-constituted House of Representatives of South Carolina.”⁶⁴⁹ Justice Wright, the court’s only Black member, wrote that “I presume the object of the government is, or should be, the protection and representation of the people.”⁶⁵⁰ That is, it would be unfair not to represent citizens from Edgefield and Laurens counties.

The Mackey House purported to continue governing.⁶⁵¹ It elected D.T. Corbin to the U.S. Senate.⁶⁵² But, it could not actually fund government because a judge issued a temporary restraining order prohibiting banks where state funds were deposited from paying out funds on order of the Republican state treasurer.⁶⁵³

The Wallace House inaugurated Hampton governor a week after the Mackey House inaugurated Chamberlain.⁶⁵⁴ At first, the atmosphere was “one of intense solemnity,” but then there was “a spontaneous and universal shout” after Hampton was sworn in.⁶⁵⁵ Democrats fired rockets and cannons to mark the occasion.⁶⁵⁶ After the ceremony, Hampton wrote Chamberlain demanding that he “deliver up to me the great seal of State, together with the possession

⁶⁴³ *Id.*

⁶⁴⁴ *Wallace v. Hayne*, 8 S.C. 367, 378 (1876) (Moses, J., concurring).

⁶⁴⁵ *See id.* at 373–74.

⁶⁴⁶ *Id.* at 374 (majority opinion).

⁶⁴⁷ *Id.* at 373, 378, 380 (majority opinion; Willard, J., concurring).

⁶⁴⁸ *Id.* at 376 (majority opinion).

⁶⁴⁹ *Id.*

⁶⁵⁰ *Id.* at 381 (Willard, J., concurring); Powers, *supra* note 461.

⁶⁵¹ *See SIMKINS & WOODY, supra* note 536, at 535.

⁶⁵² *Id.*

⁶⁵³ JNO. S. Reynolds, *NEWS & HERALD* (Winnsboro, S.C.), Dec. 14, 1876.

⁶⁵⁴ *Details of the Inauguration, NEWS & COURIER* (Charleston, S.C.), Dec. 15, 1876.

⁶⁵⁵ *Id.*

⁶⁵⁶ *Id.*

of the Statehouse, the public records and all other matters and things appertaining to said office.”⁶⁵⁷ Chamberlain refused.⁶⁵⁸ The Wallace House also elected M.C. Butler, who had been indicted for participating in the Hamburg massacre, to the U.S. Senate.⁶⁵⁹ Finally, the Wallace House passed a resolution authorizing Hampton to call upon citizens to pay one fourth of the tax they paid the previous year, which would be deducted from future taxes.⁶⁶⁰ This move raised \$119,432.41.⁶⁶¹

Chamberlain and Hampton both sought recognition from the courts.⁶⁶² Two issues distinguished their case from the earlier one recognizing the Wallace House. First, South Carolina’s constitution mandated that both houses of the legislature be present when the speaker of the house opened and published the returns from the gubernatorial election.⁶⁶³ This had not been done.⁶⁶⁴ Second, the constitution required that the legislature in its entirety determine contested elections, and not merely one house of it.⁶⁶⁵ The problem was that the Republicans controlled the state senate while Democrats controlled the house of representatives.⁶⁶⁶ There was no way a divided legislature would unify around one of the candidates. In *Ex Parte Norris*, the South Carolina Supreme Court ruled in Hampton’s favor.⁶⁶⁷ It decided that the most important constitutional question was whether Hampton had received the most votes at the election.⁶⁶⁸ That being true, the requirement for returns to be published in the presence of both houses was a mere procedural technicality which could not thwart the claim of a candidate who had won the most votes.⁶⁶⁹

The opinion was unanimous at first, but then Justice Wright changed his mind.⁶⁷⁰ After “mature deliberation,” he believed that Hampton was not the lawful governor.⁶⁷¹ His dissent argued that requiring both houses to be present when the election returns were

⁶⁵⁷ *Pressing Our Rights*, NEWS & COURIER (Charleston, S.C.), Dec. 19, 1876.

⁶⁵⁸ *Id.*

⁶⁵⁹ SIMKINS & WOODY, *supra* note 536, at 535.

⁶⁶⁰ *Id.*

⁶⁶¹ *Id.*

⁶⁶² *See Ex parte Norris*, 8 S.C. 408, 417 (1876).

⁶⁶³ S.C. CONST. of 1868 art. III, § 4.

⁶⁶⁴ *Ex parte Norris*, 8 S.C. at 428.

⁶⁶⁵ S.C. CONST. of 1868 art. III, § 4.

⁶⁶⁶ *See* SIMKINS & WOODY, *supra* note 536, at 531.

⁶⁶⁷ *Ex parte Norris*, 8 S.C. at 459.

⁶⁶⁸ *Id.* at 457.

⁶⁶⁹ *Id.*

⁶⁷⁰ *Id.* at 459.

⁶⁷¹ *Id.* at 467–68 (Wright, J., dissenting).

submitted was an important substantive safeguard against illegality and fraud.⁶⁷² This was the first time a justice suggested that somebody should look into what happened in Laurens and Edgefield counties.⁶⁷³ The *Charleston News and Courier* later asserted that Wright changed his vote after “[h]e was subjected to a well-organized system of espionage by his political masters who, by persuasion and intimidation, compelled him to sign an order revoking and cancelling the order that he had previously signed,” and that he had merely signed his name to an opinion written by Chamberlain.⁶⁷⁴ I would be surprised if the justices did not endure all manner of lobbying from the candidates or their surrogates, but there is no conclusive evidence Wright acted to please his “political masters.” A more charitable explanation is possible: that Wright faced truly difficult legal questions in a compressed time frame.

Against this backdrop, negotiations in Washington, D.C. took place about whether Samuel Tilden or Rutherford Hayes had won the 1876 presidential election.⁶⁷⁵ After the election, New Jersey Governor Samuel Tilden had won the popular vote but had not secured enough electoral college votes.⁶⁷⁶ There were disputes about electors from Oregon, Louisiana, Florida, and South Carolina.⁶⁷⁷ Congress formed a special commission to resolve the dispute, awarded the contested votes to Hayes, and he became President.⁶⁷⁸

Hampton and Chamberlain both journeyed to Washington, D.C. to lobby for Hayes’s support in person.⁶⁷⁹ Hayes implicitly supported Hampton’s claim to office when he withdrew federal troops from the state house in Columbia.⁶⁸⁰ Chamberlain finally agreed to stand aside on April 11, 1877, though he continued to insist that he had really won the election.⁶⁸¹ South Carolina’s constitutional crisis had ended.

B. South Carolina’s Experience as a Constitutional Crisis

At first glance, it might be tempting to focus on the disputed election of 1876 when describing South Carolina’s constitutional

⁶⁷² *Id.* at 465.

⁶⁷³ *See id.*

⁶⁷⁴ *Death of Judge Wright*, *supra* note 461.

⁶⁷⁵ John Copeland Nagle, *How Not to Count Votes*, 104 COLUM. L. REV. 1732, 1732–33 (2004).

⁶⁷⁶ *See* Gilda Daniels, *Democracy’s Destiny*, 109 CALIF. L. REV. 1067, 1095 n.176 (2021).

⁶⁷⁷ Nagle, *supra* note 675, at 1732–33.

⁶⁷⁸ *See id.* at 1733.

⁶⁷⁹ *See* ZUCZEK, *supra* note 424, at 199–200.

⁶⁸⁰ *See* SIMKINS & WOODY, *supra* note 536, at 540.

⁶⁸¹ *See* ZUCZEK, *supra* note 424, at 201.

crisis. The 1868 constitution failed to provide an effective mechanism to resolve it. The constitution required the legislature to decide disputed elections, but that presupposed that South Carolinians agreed on who should be in the legislature in the first place.⁶⁸² As it happened, they could not even agree on the vote tallies used to select members.⁶⁸³ Unfortunately, there may not be a readily available mechanism to resolve such disputes to the satisfaction of most citizens. If the South Carolina Supreme Court had found that the Board of Canvassers correctly refused to issue certificates to candidates whose elections depended on votes from Edgefield and Laurens counties, it would have left itself vulnerable to charges that it had disenfranchised citizens. But in ordering representatives seated who benefitted from fraud and terrorism, it implicitly disenfranchised other voters. Deciding who should be governor or in the legislature is inherently a political judgment, and the intuition that politically accountable branches should make the final call is defensible. On the other hand, politicians are self-interested. They are liable to resolve election disputes in ways that are best for them, not necessarily best for society. So, if South Carolina's 1868 constitution suffered from a design flaw, it is unclear what the solution would be.

In any event, the real problem was much deeper. South Carolinians could not agree on basic questions such as whether Black people deserved the same rights as white people.⁶⁸⁴ Because the constitution took a definitive stand on the matter—establishing in law and fact Black equality—conservatives and Democrats never viewed the constitution as legitimate. In fact, it was a threat to their way of life and ideals. They never felt bound to pursue change within the constitutional structure because they saw that structure as alien and hostile. With a Black majority constitutionally empowered, the only way to reestablish their dominance was to nullify the constitution. South Carolina's constitutional crisis reflects this harsh reality.

C. South Carolina's Relevance

Other states experienced similar crises during the era. The common denominator among all of them was that many white people were simply unwilling to accept Black people as fellow citizens, let alone leaders. Throughout the South, the Ku Klux Klan and red

⁶⁸² See S.C. CONST. of 1868 art. III, § 4.

⁶⁸³ See *Ex parte Norris*, 8 S.C. 408, 421, 425–26 (1877).

⁶⁸⁴ FONER, *supra* note 529, at 426.

shirts worked to suppress Black voting.⁶⁸⁵ Throughout the South, Democrats and conservatives launched coups against Republican governments.⁶⁸⁶ Many did so in dramatic fashion. In Georgia, the Democratic legislature expelled all Black members.⁶⁸⁷ Mississippi pioneered the Gary Plan that South Carolina conservatives used to retake the government.⁶⁸⁸ Louisiana saw the Colfax Massacre, which left 280 Black people dead, as part of an effort by conservatives to install their preferred candidate in office.⁶⁸⁹ By the end of Reconstruction, white Democrats controlled all southern states.⁶⁹⁰ White supremacy spelled the doom of progressive constitutional experiments across the region.

South Carolina is particularly depressing because it demonstrates that a determined minority willing to use any means necessary can overthrow a state government if it so chooses. That leaves a warning for us at the state level today. If a group were willing to put in more planning and discipline, it might very well succeed where the movement on January 6, 2021, failed.

VI. REFLECTION

State constitutional crises deserve much more attention than they have received. They are incredibly important for us to appreciate and study because they have helped produce our current constitutional order and could be a risk in the future.

A. State Constitutional Crises Have Influenced Constitutional History

State constitutional crises have profoundly shaped American constitutionalism at both the state and federal level. At the state level, constitutional crisis is partly responsible for why state constitutions are, as a rule, significantly easier to amend than the federal Constitution. The federal Constitution requires two-thirds of both the House of Representatives and Senate to propose an amendment and three-quarters of states to ratify, or a convention

⁶⁸⁵ *Id.* at 342–43; SELECT COMM. ON THE RECENT ELECTION IN S.C., TESTIMONY, H.R. MISC. DOC. NO. 44-31, pt.1, at 237 (2d Sess. 1876).

⁶⁸⁶ FONER, *supra* note 529, at 427.

⁶⁸⁷ William Harris Bragg, *Reconstruction in Georgia*, NEW GA. ENCYCL. (Sept. 30, 2020), [https://www.georgiaencyclopedia.org/articles/history-archaeology/reconstruction-in-georgia/\[perma.cc/WEP3-QB8Z\]](https://www.georgiaencyclopedia.org/articles/history-archaeology/reconstruction-in-georgia/[perma.cc/WEP3-QB8Z]).

⁶⁸⁸ SIMKINS & WOODY, *supra* note 536, at 488.

⁶⁸⁹ Baude & Paulsen, *supra* note 61, at 708; *see generally* FONER, *supra* note 529.

⁶⁹⁰ *See* ZUCZEK, *supra* note 424, at 200–01.

called by two-thirds of states to propose an amendment and three quarters of states to ratify.⁶⁹¹ Since the Bill of Rights, the federal Constitution has only been amended seventeen times.⁶⁹² Most methods that states use are more conducive to amendment. Many allow a majority of both houses of the legislature to propose amendments and a majority of voters to ratify.⁶⁹³ Eighteen states allow residents to petition to place amendments on the ballot themselves.⁶⁹⁴ A majority of residents can then ratify.⁶⁹⁵ Fourteen states give voters the choice to call a constitutional convention at regular intervals, say, every ten or twenty years.⁶⁹⁶

This was not inevitable. In the late 1700s, it was actually easier to amend the federal Constitution than it was to amend many state constitutions for a simple reason: several state constitutions provided no method of amendment,⁶⁹⁷ while the federal Constitution did provide for amendment.⁶⁹⁸ In the nineteenth century, state constitutions that did permit amendments made the process much more difficult than it is today.⁶⁹⁹ Connecticut provides one example that many other states followed.⁷⁰⁰ A majority of the house of representatives had to vote to propose an amendment in one session.⁷⁰¹ At the next session, two-thirds of both houses of the legislature had to approve the amendment.⁷⁰² Finally, a majority of Connecticut residents had to vote to ratify.⁷⁰³ Alabama provided another common model for states.⁷⁰⁴ Two-thirds of both houses of the legislature had to propose an amendment.⁷⁰⁵ A majority of voters had to approve the amendment.⁷⁰⁶ Finally, two-thirds of both houses of the legislature had to ratify the amendment.⁷⁰⁷ As the nineteenth century wore on, states tended to eliminate requirements that

⁶⁹¹ U.S. CONST. art. V.

⁶⁹² Dinan, *supra* note 394.

⁶⁹³ *Id.*

⁶⁹⁴ JOHN DINAN, THE AMERICAN STATE CONSTITUTIONAL TRADITION 30–32 (2006).

⁶⁹⁵ *See id.* at 30–31; Dinan, *supra* note 394.

⁶⁹⁶ DINAN, *supra* note 694, at 30–31.

⁶⁹⁷ Dodd, *supra* note 218, at 559.

⁶⁹⁸ U.S. CONST. art. V.

⁶⁹⁹ *See* DINAN, *supra* note 694, at 41.

⁷⁰⁰ *See id.* at 43.

⁷⁰¹ CT. CONST. of 1818, art. XI.

⁷⁰² *Id.*

⁷⁰³ *Id.*; DINAN, *supra* note 694, at 43.

⁷⁰⁴ *See* DINAN, *supra* note 694, at 43.

⁷⁰⁵ ALA. CONST. of 1819, art. VI.

⁷⁰⁶ *Id.*

⁷⁰⁷ *Id.*; *see* DINAN, *supra* note 694, at 43.

legislatures approve amendments in consecutive sessions and that legislative supermajorities approve amendments.⁷⁰⁸

As New Jersey's experience shows, fear of constitutional crisis helped spur this trend. Like several states at the founding, New Jersey's 1776 constitution provided no method of amendment.⁷⁰⁹ Its 1844 constitutional convention initially intended to require a supermajority of both houses of the legislature to propose amendments.⁷¹⁰ But one delegate contended that if you "shut the door against them, and tell them that they cannot make amendments without the consent of two-thirds, [then] he feared the scenes of Rhode Island [the Dorr Rebellion] would be enacted over again."⁷¹¹ The delegates heeded his argument and ended up allowing a simple majority of both houses of the legislature to propose amendments in consecutive sessions and then a majority of voters to ratify.⁷¹² A Kentucky delegate later reflected the prevailing consensus⁷¹³ in state constitutional thought:

Experience teaches that when Constitutions are too difficult to amend, they will be changed in spite of written restrictions. If the disaffection of restless individuals can find vent in voting, it will be harmless; but if, especially, there is any plausible excuse for it, it will gather strength from restraint, and if the Constitution is not destroyed, great disturbances will occur in the State.⁷¹⁴

In addition, state constitutional crises have influenced the development of the *federal* Constitution. For starters, a state constitutional crisis, Shays's Rebellion, was part of the reason the founding fathers drafted the federal Constitution.⁷¹⁵ The Articles of Confederation, drafted in 1777 and ratified by all thirteen states in 1781, was our first attempt at a national charter.⁷¹⁶ But a consensus soon emerged that it was inadequate to meet the country's challenges. Chief among them was instability in the states. To retire its Revolutionary War debt, Massachusetts imposed new taxes.⁷¹⁷

⁷⁰⁸ DINAN, *supra* note 694, at 43–45.

⁷⁰⁹ See Dodd, *supra* note 218, at 559.

⁷¹⁰ See PROCEEDINGS OF THE NEW JERSEY CONSTITUTIONAL CONVENTION OF 1844 54 (1942).

⁷¹¹ *Id.* at 58.

⁷¹² See *id.* at 69; N.J. CONST. of 1844, art. IX.

⁷¹³ See DINAN, *supra* note 694, at 37.

⁷¹⁴ 2 OFFICIAL REPORT OF THE PROCEEDINGS AND DEBATES OF THE KENTUCKY CONSTITUTIONAL CONVENTION OF 1890, 1659 (1890).

⁷¹⁵ MICHAEL J. KLARMAN, FRAMERS' COUP: THE MAKING OF THE UNITED STATES CONSTITUTION 92 (2016).

⁷¹⁶ *Id.* at 13–15.

⁷¹⁷ *Id.* at 88–90.

Residents in central and western Massachusetts responded by closing courts at gunpoint.⁷¹⁸ The legislature failed to redress their grievances and instead passed a Riot Act and permitted the governor to suspend the writ of habeas corpus.⁷¹⁹ Revolutionary War veteran Daniel Shays led a group of rebels to march on Springfield's federal armory.⁷²⁰ Though the attack did not succeed, Massachusetts's government failed to crush the rebellion.⁷²¹ It lacked the money to equip and pay a militia. Private citizens themselves raised the money.⁷²² Eventually, thousands of soldiers did win a confrontation with Shays's men.⁷²³ James Madison spoke for many founders when he wrote: "These events are distressing beyond measure to the zealous friends of the Revolution, and furnish new proofs of the necessity of such a vigour in the Genl. Govt. as will be able to restore health to any diseased part of the federal body."⁷²⁴ A few months later, the founders gathered in Philadelphia to build the stronger federal government Shays's Rebellion exposed the need for.⁷²⁵

State constitutional crises have influenced the interpretation of the federal Constitution. *Luther v. Borden* was the U.S. Supreme Court's first major attempt to interpret the Guarantee Clause.⁷²⁶ Generations of scholars, judges, and lawyers have read it for the proposition that a Guarantee Clause claim is a nonjusticiable political question.⁷²⁷ Regardless of whether that is the best reading of *Luther*, the political question doctrine continues to influence Supreme Court decisions.⁷²⁸ The Court has recently cited the doctrine in resolving challenges to gerrymandered congressional districts.⁷²⁹ Understanding the origin of the political question doctrine—the aftermath of a state-level constitutional crisis—could help courts reassess the circumstances under which the doctrine makes sense.

⁷¹⁸ *Id.* at 90.

⁷¹⁹ *Id.* at 91.

⁷²⁰ *Id.* at 91–92.

⁷²¹ *See id.* at 92–93.

⁷²² *Id.* at 92.

⁷²³ *Id.*

⁷²⁴ *See James Madison to George Muter, 7 January 1787*, NAT'L ARCHIVES: FOUNDERS ONLINE, <https://founders.archives.gov/documents/Madison/01-09-02-0120> [https://perma.cc/U7DL-QBJ6].

⁷²⁵ *See* Christopher Klein, *How Shays' Rebellion Changed America*, HISTORY (Feb. 18, 2025), <https://www.history.com/news/how-shays-rebellion-changed-america> [https://perma.cc/K4RN-NAXX].

⁷²⁶ *See* Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749, 776 (1994).

⁷²⁷ For a thoughtful dissenting view, *see id.* at 753, 776–77, 780.

⁷²⁸ *See, e.g., Rucho v. Common Cause*, 588 U.S. 684, 695–96 (2019).

⁷²⁹ *Id.* at 695–96.

State constitutional crises helped cause the most devastating constitutional crisis at the national level in our history: the Civil War.⁷³⁰ After Dorr's Rebellion, Northern Democrats used Dorr's life sentence as a rallying cry in the 1844 presidential election.⁷³¹ On the eve of the election, 12,000 New Yorkers marched carrying banners reading: "Polk, Dallas, and the Liberation of Dorr."⁷³² Polk was supportive of reforming the franchise in Rhode Island, while his opponent, Henry Clay, condemned Dorr.⁷³³ The issue helped Polk prevail. Once in office, Polk skillfully prosecuted the Mexican War.⁷³⁴ As a result, the United States gained new territory which caused tension as northerners and southerners fought over whether the new land would be open to slavery.⁷³⁵

Amid that tension, Illinois Senator Stephen Douglas settled on popular sovereignty as the solution for Kansas.⁷³⁶ In the Kansas-Nebraska Act he championed, residents of the territory would decide for themselves whether to permit or prohibit slavery.⁷³⁷ Instead of finding peace, Kansas experienced years of conflict.⁷³⁸ During what came to be known as "Bleeding Kansas," Kansans tried and failed to adopt three constitutions before finally succeeding after the Civil War began.⁷³⁹ Abraham Lincoln repeatedly raised the failure of popular sovereignty to settle disagreements over slavery during the famous Lincoln-Douglas debates.⁷⁴⁰ Until then, he had been a backbencher in Congress and a state legislator.⁷⁴¹ But the constitutional chaos in Kansas gave him an issue to make his race with Douglas competitive.⁷⁴² This raised his profile so that he was a credible contender for the presidency in the 1860 election.⁷⁴³ A feeling that Kansas was destined to become a free state made secession more

⁷³⁰ See, e.g., CHAPUT, *supra* note 221, at 213.

⁷³¹ *Id.* at 176.

⁷³² *Id.*

⁷³³ Chaput, *supra* note 333, at 132–34.

⁷³⁴ See CHAPUT, *supra* note 221, at 167, 191, 214.

⁷³⁵ See *id.* at 191–92, 194.

⁷³⁶ NICOLE ETCHESON, BLEEDING KANSAS: CONTESTED LIBERTY IN THE CIVIL WAR ERA 2 (2004).

⁷³⁷ See Barry R. Vickrey, *Lessons in Leadership from Lincoln the Lawyer*, 45 S.D. L. REV. 334, 338 (2000).

⁷³⁸ ETCHESON, *supra* note 736, at 1.

⁷³⁹ See *id.* at 1, 127, 139, 165–66, 178–79, 190, 197, 206.

⁷⁴⁰ See EDWIN SPARKS, *The Lincoln Douglas Debates of 1858*, in COLLECTIONS OF THE ILLINOIS STATE HISTORICAL LIBRARY 304–05, 337 (1908); ETCHESON, *supra* note 736, at 2.

⁷⁴¹ *Lincoln-Douglas Debates*, HISTORY (June 14, 2021), <https://www.history.com/topics/19th-century/lincoln-douglas-debates> [<https://perma.cc/97TX-FZSS>]; *Abraham Lincoln*, WHITE HOUSE HIST. ASS'N, <https://www.whitehousehistory.org/bios/abraham-lincoln> [<https://perma.cc/5UDF-BYVA>].

⁷⁴² See *Lincoln-Douglas Debates*, *supra* note 741; ETCHESON, *supra* note 736, at 2.

⁷⁴³ *Lincoln-Douglas Debates*, *supra* note 741.

attractive to southerners. One Alabama congressman threatened that if Congress did not admit Kansas to the union under a proslavery constitution, “secession must ensue, and he trusted Alabama would be the nucleus of a great Southern confederacy.”⁷⁴⁴

B. The Present Threat of Constitutional Crisis

State constitutional crises are a present threat. We would have been less surprised by January 6, 2021, if we had paid more attention to Oregon in December 2020. Oregon residents angered by the state’s response to COVID-19 forced their way into the legislature and used chemicals and bear spray on officers.⁷⁴⁵ Later, protesters armed with guns moved into the area and tried to break glass doors to get inside.⁷⁴⁶ The 2022 midterm election left uncertainty about whether the Republicans or Democrats would control the Pennsylvania House of Representatives.⁷⁴⁷ The parties disputed which one of them could set special elections that would determine who the majority party was.⁷⁴⁸ If Republicans could set the date and push it back, they could submit important constitutional amendments for ratification, but if Democrats could set the date for as soon as possible, they could likely prevail in those elections and prevent the amendments.⁷⁴⁹ Both a Republican and a Democrat had themselves sworn in as majority leader of the house of representatives.⁷⁵⁰ Thankfully, events did not spiral out of control in these incidents. But they could in the future. Scholars should help citizens and policymakers think through how they can prevent state constitutional crises in the future. The only way they can do that is to abandon the federal and international focus of studies on constitutional crisis and rigorously study the rich history of state constitutional crises. Doing so could help refine or

⁷⁴⁴ *Alexandria: Saturday Morning*, ALEXANDRIA GAZETTE (Va.), Feb. 20, 1858.

⁷⁴⁵ Sara Cline, *Tensions Rise Inside and Outside Oregon’s Capitol*, AP NEWS (Dec. 21, 2020, 9:59 PM PST), <https://apnews.com/article/wildfires-coronavirus-pandemic-oregon-fires-salem-fea5a123958fd88f5e0da4d313bf4c3a> [https://perma.cc/QX5Z-ETX].

⁷⁴⁶ Associated Press, *Gun-Toting Far-Right Protesters Try to Force Their Way into Oregon’s Capitol*, LOS ANGELES TIMES (Dec. 22, 2020, 4:01 AM PT), <https://www.latimes.com/world-nation/story/2020-12-22/tensions-rise-inside-and-outside-of-oregons-capitol> [https://perma.cc/5NYM-JUWE].

⁷⁴⁷ See Holly Otterbein, *Pennsylvania Politics Are Heated. It Soon Could Be Utter Chaos*, POLITICO (Dec. 26, 2022, 7:00 AM EST), <https://www.politico.com/news/2022/12/26/pennsylvania-politics-are-heated-it-soon-could-be-utter-chaos-00075521> [https://perma.cc/P5DB-J58Q].

⁷⁴⁸ *See id.*

⁷⁴⁹ *See id.*

⁷⁵⁰ *Id.*

challenge their thinking on what causes constitutional crises, how to classify them, and how to avoid them.

In subsequent scholarship, Professor Balkin introduces the term “constitutional rot.”⁷⁵¹ The idea is that “constitutional rot is a process of decay in the features of our system of government that maintain it as a healthy democratic republic.”⁷⁵² I believe there is a similar rot in legal education. The only way to keep our constitutional republic truly healthy is to pay attention to state constitutions as well as the federal Constitution. Yet, no law schools require students to take even one course on state constitutional law.⁷⁵³ And as Professors Balkin and Levinson argue, most law school graduates are “completely unprepared” to think about issues of constitutional design.⁷⁵⁴ Because of how difficult it is to amend the federal Constitution, they would probably get few opportunities to flex their design muscles. But where they could conceivably get many opportunities in the coming years is in the states. I believe the study of state constitutional crises is imperative for the long-term health of legal education, the legal profession, and the country at large. May more scholars pursue such work.

⁷⁵¹ Balkin, *supra* note 28, at 150.

⁷⁵² *Id.* at 151.

⁷⁵³ Katie Eyer, *All Law Students Should Be Educated About State Constitutions*, STATE CT. REP. (Sept. 26, 2024), <https://statecourtreport.org/our-work/analysis-opinion/all-law-students-should-be-educated-about-state-constitutions> [<https://perma.cc/27YM-YCTS>].

⁷⁵⁴ See Levinson & Balkin, *supra* note 36, at 753.