CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No : 500-05-065031-013

SUPERIOR COURT

KEITH OWEN HENDERSON

Petitioner

v.

ATTORNEY GENERAL OF QUEBEC

Respondent

&

ATTORNEY GENERAL OF CANADA

Mis en cause

et als

NOTICE OF PRODUCTION OF AN EXPERT REPORT
(art. 402.1 *Code of Civil Procedures*, art. 2809 *Civil Code of Quebec*)

TO:

Me Brent D. Tyler Edifice " La Caserne " 83 St-Paul West Montreal, Quebec H2Y 1Z1	Attorney for Petitioner Keith Owen Henderson
Me Jean-Yves Bernard Bernard, Roy (Justice Québec) 1 Notre-Dame Est, Suite 8.00 Montreal, Quebec H2Y 1Z1	Attorney for Respondent Attorney General of Quebec

TAKE NOTICE that the undersigned attorneys for the Mis en cause Attorney General of Canada have filed in the court record the Expert Report of Dr Richard Steven Kay.

Copy of the said report is attached to the present notice, along with Dr Kay's Curriculum vitae.

DO GOVERN YOURSELVES ACCORDINGLY,

MONTREAL, this 16th day of October, 2013

(s) Attorney General of Canada

Procureur général du Canada /
Attorney General of Canada
Mes Claude Joyal, Warren Newman,
Dominique Guimond et Ian Demers
Attorneys for the Mis en cause

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Attorney General of Canada

PROCUREUR GÉNÉRAL DU CANADA
ATTORNEY GENERAL OF CANADA

September 23, 2013

Expert's Report

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INTRODUCTION AND SCOPE OF ASSIGNMENT

1. I have been asked by the Attorney General of Canada to supply a report on the meaning and force of state constitutional provisions in the United States declaring that all political power resides in "the people" or that "the people" have the right to abolish, alter, and reconstitute governments. I have also been asked about the effect of these provisions on the legal right of a state to alter its relationship with the United States of America. This second inquiry turns on the relative authority of the Constitution of the United States and that of any acts or decisions of a state claimed to represent the will of its people. I understand these questions relate to the constitutional validity and legal scope or effectiveness, in Canada, of An Act Respecting the Exercise of the Fundamental Rights and Prerogatives of the Québec People and the Québec State, S.Q. 2000, c. 46 (Bill 99), enacted by the Legislature of Québec.

SCOPE OF REVIEW

2. This report is based on my knowledge of American constitutional law and, in particular, on the sources cited which I have personally read and reviewed. I have been assisted by Scott Garosshen, a second-year student at the University of Connecticut School of Law, who performed substantive research and helped with the format of text and citations. My analysis is based exclusively on American federal and state law.

STATEMENT OF INDEPENDENCE AND QUALIFICATIONS

3. This report represents my own understanding and honest evaluation of the questions presented based exclusively on my knowledge of the relevant law and learned commentary. I have no personal stake in the outcome of the proceedings in connection with which it was prepared.

4. My qualifications to offer this analysis may be judged by my appended curriculum vita. I have been a scholar of United States constitutional law for forty years and have published extensively in books and law journals in the United States and in other jurisdictions. I have focused my research on the ultimate bases of constitutional authority, as understood from a comparative perspective. I have also taken a consistent interest in various aspects of the constitutional law of Canada. Although this report is exclusively based on American law, I hope my familiarity with Canadian law has allowed me to present my conclusions in a way that helps illuminate the ultimate issues involved.

SUMMARY OF REPORT

5. The report is divided into five sections. Section One provides a brief historical background of the relationship between state and federal constitutions in the United States. Section Two surveys the "popular sovereignty clauses" of the state constitutions, places them in the historical context of their enactment, and attempts to explain their persistence in subsequent constitutions. Section Three summarizes how state courts have understood these provisions and relates them to the formal machinery for constitutional change in state constitutional texts. Section Four deals with the hierarchical relationship between state constitutional power and the constitutional authority of the United States Constitution. More

particularly, it traces the emergence of the current orthodoxy, according to which state law—including state constitutions—is subordinate to the federal constitution, as interpreted by federal courts, and also to constitutionally proper federal law. In light of that prevailing assumption, the state "popular sovereignty" clauses must be interpreted as limited to internal constitutional change. My conclusions are summarized in Section Five.

REPORT

I. The Federal and the State Constitutions in the United States

6. It may be helpful, before considering the nature and effect of declarations of popular sovereignty in American state constitutions, to note briefly the separate and co-ordinate historical development of the state and national legal systems. Prior to the Declaration of Independence of 1776, the thirteen British colonies of southern North America were separate and independent legal entities. One consequence of the emerging conflict between those colonies and the United Kingdom was increasing inter-colony communication and co-operation, resulting in the Continental Congresses of the 1770s. While the colonies declared their independence from the United Kingdom collectively in the famous Declaration, each state also made an individual declaration of independence.[1]

7. Each state also created its own system of government.[2] These state constitutions preceded any national constitution. Until the states approved the Articles of Confederation in

[1] *See, e.g.*, PA. CONST. of 1776, pmbl.

[2] *See infra* note 8. Connecticut retained its colonial charter with minor changes. *See* CONN. CONST. of 1776 (adopting the CONN. CHARTER of 1662 with minor changes). Rhode Island did not adopt any new document and continued to govern under its colonial charter until 1842: PATRICK T. CONLEY & ROBERT G. FLANDERS, JR., THE RHODE ISLAND STATE CONSTITUTION: A REFERENCE GUIDE 23 (2007) (noting that Rhode Island continued to be governed under the R.I. CHARTER of 1663 until the R.I. CONST. of 1842).

1781, they conducted all collective action—including the conduct of the war of independence—under ad hoc arrangements. The Articles accorded some significant powers to the national Congress but their substantive and procedural limitations led to their replacement with the current Constitution of the United States. The Constitution was ratified in 1789 by special purpose assemblies—conventions—that met in each of the states.[3]

8. Constitutional law in the United States, therefore, continues to be of two kinds. On the one hand, the United States Constitution creates and defines the powers of national institutions, while imposing specific limits on the powers of the states. State governments, on the other hand, are defined by the constitutions of each state. Those constitutions are created by the states themselves and they are changeable according to each state's constitutional law—a law that is determined, ultimately, by state courts of last resort. The judgments of those state courts on questions of state law are not subject to review by the federal courts, including the Supreme Court of the United States. The United States Constitution, however, and federal law properly created under that constitution, are still the supreme law of the land. State courts have the last word on the content and meaning of state law but that law must conform to federal law where federal law applies. And, with respect to federal law, the United States Supreme Court is the ultimate authority. I elaborate further on the historical development of the relationship between the state and federal constitutional orders in Section Four of this report.

[3] *See generally* JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION (Burt Franklin, ed., 2d ed. 1974), *available at* http://memory.loc.gov/ammem/amlaw/lwed.html (compiling documents from the state conventions).

II. The Popular Sovereignty Clauses

9. All American state constitutions but one include, typically in their bills of rights, a general statement of principle asserting that the will of the people governed by that constitution is the basis for all political power.[4] These provisions date back to the original state constitutions and they have been copied—usually unreflectively—in slightly different forms in subsequent constitutions of the original states and in the new constitutions of states later admitted to the federal union.

10. Seven states include the popular sovereignty provision only as a clause modifying the declaration of another right.[5] More commonly the principle is stated independently and explicitly. So Article I, Section 1 of the Michigan Constitution of 1964 states: "All political power

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[4] Alabama 1:2; Alaska 1:2; Arizona 2:2; Arkansas 2:1; California 2:1; Colorado 2:1; Connecticut 1:2; Delaware 1:16, 14:1; Florida 1:1; Georgia 1:2, ¶ 1; Hawaii 1:1; Idaho 1:2; Illinois 1:1; Indiana 1:1; Iowa 1:2; Kansas 1:2; Kentucky § 4; Louisiana 1:1; Maine 1:2; Maryland Decl. of Rts., art. 1; Massachusetts pt. 1, art. 5; Michigan 1:1; Minnesota 1:1; Mississippi 3:5; Missouri 1:1; Montana 2:1; Nebraska 1:1; Nevada 1:2; New Hampshire pt. 1, art. 1; New Jersey 1:2; New Mexico 2:2; North Carolina 1:2; North Dakota 1:2; Ohio 1:2; Oklahoma 2:1; Oregon 1:1; Pennsylvania 1:2; Rhode Island 1:1; South Carolina 1:1; South Dakota 6:26; Tennessee 1:1; Texas 1:2; Utah 1:2; Vermont ch. 1, art. 6; Virginia 1:2; Washington 1:1; West Virginia 2:2, 3:2; Wisconsin 1:1; Wyoming 1:1. New York is the only state without such a provision. (Citations to *current* state constitutions will be the name of the state followed, where applicable, by the article and section number.)

The doctrine of popular sovereignty is also implicit in declarations that the constitution is established or ordained by "we the people," a phrase that appears in the preambles to forty-three state constitutions. Slight variations are present in four others (Connecticut, Massachusetts, Ohio and Texas). Three state constitutions (New Hampshire, Vermont and Virginia) do not have preambles.

[5] Three states declare that to secure inalienable rights, "governments are instituted . . . deriving their just powers from the consent of the governed." Illinois 1:1; Nebraska 1:1; Wisconsin 1:1. Delaware prefaces its right to petition and assembly by noting that lawless mobs contravene the principles of republican government, which is "founded on common consent for common good." Delaware 1:16. Delaware also requires all public officers to swear an oath in which they acknowledge "that the powers of this office flow from the people I am privileged to represent." Delaware 14:1. Massachusetts and Vermont declare that, "all power residing originally in the people," Massachusetts pt. 1, art. 5, or "all power being originally inherent in and co[n]sequently derived from the people," Vermont ch. 1, art. 6, therefore public officers are accountable to the people. Minnesota declares that government is for the benefit of the people, "in whom all political power is inherent, . . ." Minnesota 1:1.

is inherent in the people."[6] Beyond, and sometimes in addition to these general pronouncements, thirty-seven state constitutions spell out the logical consequence of such ultimate authority and provide that the people may at any time alter or abolish the constitutional arrangements which they have, for the time being, established.[7] The intensity with which this dogma is expressed varies. Some examples illustrate the range. Many states use language similar to that in Article II, Section 1 of the Arkansas Constitution of 1875:

> All political power is inherent in the people, and government is instituted for their protection, security and benefit; and they have the right to alter, reform or abolish the same in such manner as they may think proper.

Article VII of the Declaration of Rights of the Massachusetts Constitution of 1780 is even more emphatic, providing that:

> [T]he people alone have an incontestable, unalienable, and indefeasible right to institute government; and to reform, alter, or totally change the same, when their protection, safety, prosperity and happiness require it.

And three states—Maryland (Decl. of Rts., art. 6), New Hampshire (pt. 1, art. 10) and Tennessee (1:2)—emphasize the revolutionary implications of this idea with the following additional statement:

> The doctrine of non-resistance against arbitrary power, and oppression, is absurd, slavish and destructive of the good and happiness of mankind.

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[6] *See also* Alabama 1:2; Alaska 1:2; Arizona 2:2; Arkansas 2:1; California 2:1; Colorado 2:1; Connecticut 1:2; Delaware, Preamble; Florida 1:1; Georgia 1:2, ¶ 1; Hawaii 1:1; Idaho 1:2; Indiana 1:1; Iowa 1:2; Kansas 1:2; Kentucky § 4; Louisiana 1:1; Maine 1:2; Maryland Decl. of Rts., art. 1; Mississippi 3:5; Missouri 1:1; Montana 2:1; Nevada 1:2; New Hampshire pt. 1, art. 1; New Jersey 1:2; New Mexico 2:2; North Carolina 1:2; North Dakota 1:2; Ohio 1:2; Oklahoma 2:1; Oregon 1:1; Pennsylvania 1:2; Rhode Island 1:1; South Carolina 1:1; Tennessee 1:1; Texas 1:2; Utah 1:2; Virginia 1:2; Washington 1:1; West Virginia 3:2; Wyoming 1:1.

[7] Alabama 1:2; Arkansas 2:1; California 2:1; Colorado 2:2; Connecticut 1:2; Delaware, Preamble; Georgia 1:2, ¶ 2; Idaho 1:2; Indiana 1:1; Iowa 1:2; Kentucky § 4; Maine 1:2; Maryland Decl. of Rts., arts. 1, 6; Massachusetts pt. 1, art. 7; Minnesota 1:1; Mississippi 3:6; Missouri 1:3; Montana 2:2; Nevada 1:2; New Hampshire pt. 1, art. 10; New Jersey 1:2; North Carolina 1:3; North Dakota 1:2; Ohio 1:2; Oklahoma 2:1; Oregon 1:1; Pennsylvania 1:2; Rhode Island 1:1; South Carolina 1:1; Tennessee 1:1; Texas 1:2; Utah 1:2; Vermont ch. 1, art. 7; Virginia 1:3; West Virginia 3:3; Wyoming 1:1.

11. The origin of these provisions is not difficult to discern. American states began to draft their constitutions in the late eighteenth century and relied heavily on the same ideas that supported those states' actions in separating themselves from the suzerainty of the United Kingdom. In the period immediately before and after the Declaration of Independence in 1776, eleven states drafted new instruments of government and the principle of popular sovereignty was, in one form or another, included in ten of them.[8] When James Madison first proposed the amendments to the United States Constitution that would eventually become the Bill of Rights, he included at the outset, three general principles that were deleted when Congress decided not to alter the Preamble. His resolution provided:

> First. That there be prefixed to the constitution a declaration That all power is originally vested in, and consequently derived from the people. That government is instituted, and ought to be exercised for the benefit of the people; which consists in the enjoyment of life and liberty, with the right of acquiring and using property, and generally of pursuing and obtaining happiness and safety. That the people have an indubitable, unalienable, and indefeasible right to reform or change their government, whenever it be found adverse or inadequate to the purposes of its institution.[9]

These original constitutional provisions echoed in unmistakable terms the most famous formulation of this principle in the Declaration of Independence of 1776:

> [W]henever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government,

[8] DEL. DECL. OF RTS. of 1776, art. I; GA. CONST. of 1777, pmbl.; MD. DECL. OF RTS. of 1776, art. I; MASS. CONST. of 1780, pt. 1, arts. V, VII; N.J. CONST. of 1776, pmbl.; N.Y. CONST. of 1777, art. I; N.C. DECL. OF RTS. of 1776, art. I; PA. DECL. OF RTS. of 1776, arts. IV, V; S.C. CONST. of 1776, pmbl.; VA. DECL. OF RTS. of 1776, §§ 2, 3. New Hampshire adopted a short, provisional constitution without a clear popular sovereignty provision. N.H. CONST. of 1776. Connecticut and Rhode Island retained their colonial charters. *See supra* note 2.

[9] 1 ANNALS OF CONG. 433-34 (1789) (Joseph Gales ed., 1834).

> 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.[10]

12. The belief that political power was legitimate only insofar as it expressed the will of the "people" was almost universally held in the American founding period. The popular will on matters as basic as the shape of the constitution, moreover, could not be expressed through ordinary elected legislatures. But since "the people" also could not exercise its will directly, that will was at its most authentic when expressed in an irregular, non-governmental representative body—namely, the special constitutional convention. [11] Summarizing this development, historian Robert Palmer observed that it meant revolution "had become domesticated in America."[12] When, therefore, the newly independent states decided to commit their first principles to written constitutions, it was natural that general statements of the people's right to institute and to change government were front and center in these texts.

13. Although the idea of the final and illimitable authority of "the people" receded in importance as representative government became the standard of legitimacy in American jurisdictions, the states retained the constitutional provisions endorsing that authority. And the thirty-seven states subsequently admitted to the union almost always included such provisions in their constitutions. That these provisions persisted is unsurprising. Most were part of the

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[10] The Declaration itself borrowed heavily both its ideas and its expression from Locke's Second Treatise. *See* JOHN LOCKE, TREATISE OF CIVIL GOVERNMENT AND A LETTER CONCERNING TOLERATION 146-47, 163-64 (ed. Charles L. Sherman, 1937).

[11] Throughout this report I use the term "constitutional convention" to refer to special-purpose elected assemblies for revising or replacing a constitution. They should not be confused with the "constitutional conventions" of the British legal system and those legal systems based on it, namely unwritten rules and principles of the constitution that are not enforceable in courts of law. The definitive treatment of the emergence of popular sovereignty as the basis of political authority in eighteenth century America and of the elected constitutional convention as the preferred form through which to express that sovereignty is GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787 (1969). *See also* Richard S. Kay, *The Illegality of the Constitution*, 4 CONST. COMM. 57, 71-75 (1987).

[12] ROBERT R. PALMER, THE AGE OF DEMOCRATIC REVOLUTION 231 (1966).

state's Declaration of Rights, which, for obvious political reasons, was sometimes expanded but almost never diminished. And when new states were admitted, they usually modeled their constitutions after existing state constitutions. It is well established that state constitution-writing consists in very substantial part in a process of borrowing, copying, and adjusting the terms of other states' constitutions.[13] The various popular sovereignty provisions closely resemble each other and the same phrases recur over and over again. The exact phrase "All political power is inherent in the people" appears in twenty state constitutions[14] and the nearly identical phrase "All power is inherent in the people" appears in another seven.[15] A third variation—"All political power is vested in and derived from the people"—accounts for another seven.[16] And seventeen states describe the people's right to change the government with the words "alter" and "abolish".[17] The conclusion seems inescapable that, unlike the more specific and likely dickered provisions of state constitutions, these general provisions are entirely uncontroversial and amount to a kind of constitutional "boilerplate."

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[13] *See* ROBERT F. WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS 86-87 (2009).

[14] Alabama 1:2; Alaska 1:2; Arizona 2:2; Arkansas 2:1; California 2:1; Connecticut 1:2; Florida 1:1; Idaho 1:2; Iowa 1:2; Kansas 1:2; Michigan 1:1; Nevada 1:2; New Jersey 1:2; North Dakota 1:2; Ohio 1:2; Oklahoma 2:1; South Dakota 6:26; Texas 1:2; Utah 1:2; Washington 1:1. Hawaii provides that "All political power *of this State* is inherent in the people . . ." Hawaii 1:1 (emphasis added). Minnesota mentions "the people, in whom all political power is inherent . . ." Minnesota 1:1.

[15] Indiana 1:1; Kentucky § 4; Maine 1:2; Oregon 1:1; Pennsylvania 1:2; Tennessee 1:1; Wyoming 1:1.

[16] Virginia and West Virginia insert the word 'consequently.' Virginia 1:2; West Virginia 3:2. Vermont mixes the formulation with the first two and declares "That all power being originally inherent in and consequently derived from the people. . ." Vermont ch. 1, art. 6.

[17] Arkansas 2:1; Colorado 2:2; Idaho 1:2; Kentucky § 4; Maryland Decl. of Rts., art. 1; Mississippi 3:6; Missouri 1:3; Montana 2:2; North Carolina 1:3; Ohio 1:2; Oregon 1:1; Pennsylvania 1:2; Tennessee 1:1; Texas, 1:2; Virginia 1:3; West Virginia 3:3; Wyoming 1:1.

III. The Internal Effect of Popular Sovereignty Provisions

14. The popular sovereignty provisions of state constitutions have served more of a rhetorical than a legal purpose. They are rarely invoked in litigation. Courts use them mostly as a ground for rejecting challenges to legally irregular processes of constitutional amendment or revision. Even in such cases, however, the predominant approach of American courts has been to reaffirm the positive rules for constitutional change provided in the state's existing constitution.

15. The abstract popular sovereignty provisions in state constitutions must be read together with the concrete methods of constitutional change explicitly provided in those texts. One clear sign of that interdependence is the requirement in every state constitution but one that any constitutional amendment or constitutional revision must be approved by popular referendum.[18] And in eighteen states, at least some constitutional amendments may also be proposed by popular initiative.[19] When a petition with the requisite number of signatures is presented, state officials must commence a process that gives the electorate the opportunity to approve or disapprove the proposed change.

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[18] In Delaware, an amendment may be initiated by a two-thirds vote in each house of the legislature. If it is approved by both houses by the same super-majority vote *after the next general election*, then it becomes part of the constitution. Delaware 16:1.

[19] Arizona 21:1; Arkansas 5:1; California 18:3; Colorado 5:1; Florida 11:3; Illinois 14:3; Massachusetts amend. 48, ch. 4, §§ 1-5; Michigan 12:2; Mississippi 15:273; Missouri 12:2(b); Montana 14:9; Nebraska 3:1; Nevada 19:2, cl. 1; North Dakota 3:1; Ohio 2:1; Oklahoma 5:1; Oregon 4:1(2)(a); South Dakota 23:1. Many state constitutions distinguish between limited-subject amendments, which may be promulgated through the initiative-referendum procedure, and wholesale constitutional revisions, which must first be committed to a constitutional convention. *See* William B. Fisch, *Constitutional Referendum in the United States of America*, 54 AM. J. COMP. L. 485, 499-500 (2006).

16. Forty-two state constitutions, moreover, provide for some kind of a constitutional convention to undertake major constitutional revisions.[20] As noted, in the eighteenth century, the special constitutional convention was regarded as the most appropriate vehicle for determining the will of the sovereign people.[21] State constitutions adopt various means of calling a constitutional convention into being. In thirty-nine, the legislature can vote to initiate the process for electing such a convention.[22] Eight seem to allow the people to call a convention by submitting a petition with enough signatures.[23] And fifteen state constitutions automatically submit the question of whether to hold a convention to voters once every set number of years (ranging from nine to twenty).[24]

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[20] Alabama 17:286; Alaska 13:2; Arizona 21:2; California 18:2; Colorado 19:1; Connecticut 13:1; Delaware 16:2; Florida 11:2, 4, 6; Georgia 10:1, ¶ 4; Hawaii 17:2; Idaho 20:3; Illinois 14:1; Iowa 10:3; Kansas 14:2; Kentucky § 258; Louisiana 13:2; Maine 4:15; Maryland 14:2; Michigan 12:3; Minnesota 9:2; Missouri 12:3(a); Montana 14:1; Nebraska 16:2; Nevada 16:2; New Hampshire pt. 2, art. 100(b); New Mexico 19:2; New York 19:2; North Carolina 13:1; North Dakota 3:1; Ohio 16:2; Oklahoma 24:2; Oregon 17:1; Rhode Island 14:2; South Carolina 16:3; South Dakota 23:2; Tennessee 11:3; Utah 23:2; Virginia 12:2; Washington 23:2; West Virginia 14:1; Wisconsin 12:2; Wyoming 20:3.

[21] *See supra* p. 8, ¶ 12.

[22] Alabama 17:286; Alaska 13:2; Arizona 21:2; California 18:2; Colorado 19:1; Connecticut 13:1; Delaware 16:2; Georgia 10:1, ¶ 4; Hawaii 17:2; Idaho 20:3; Illinois 14:1; Iowa 10:3; Kansas 14:2; Kentucky § 258; Louisiana 13:2; Maine 4:15; Michigan 12:3; Minnesota 9:2; Missouri 12:3(a); Montana 14:1; Nebraska 16:2; Nevada 16:2; New Hampshire pt. 2, art. 100(b); New Mexico 19:2; New York 19:2; North Carolina 13:1; Ohio 16:2; Oklahoma 24:2; Oregon 17:1; Rhode Island 14:2; South Carolina 16:3; South Dakota 23:2; Tennessee 11:3; Utah 23:2; Virginia 12:2; Washington 23:2; West Virginia 14:1; Wisconsin 12:2; Wyoming 20:3.

[23] Arizona 21:2, 4:1; Florida 11:4; Michigan 2:9, 12:3; Montana 14:2; North Dakota 3:1; Oklahoma 5:1, 24:2; Oregon 4:1, 17:1; South Dakota 23:1-2. The ambiguity arises because Arizona, Michigan, Oklahoma, Oregon, and South Dakota permit a convention to be called "by law" or "after laws providing for such Convention shall be approved by the people" and also grant the people power to propose laws by initiative but do not expressly state whether these "laws" include those enacted by initiative.

[24] Alaska 13:3 (ten years); Connecticut 13:2 (twenty years); Florida 11:2 (twenty years); Hawaii 17:2 (nine years); Illinois 14:1(b) (twenty years); Iowa 10:3 (ten years); Maryland 14:2 (twenty years); Michigan 12:3 (sixteen years); Missouri 12:3(a) (twenty years); Montana 14:3 (twenty years); New Hampshire pt. 2, art. 100(b) (ten years); New York 19:2 (twenty years); Ohio 16:3 (twenty years); Oklahoma 24:2 (twenty years); Rhode Island 14:2 (ten years). In recent years, such referenda almost always fail. *See* Williams, *supra* note 13, at 388.

17. One could read the popular sovereignty clauses of state constitutions as merely the theoretical underpinning of these formal devices for consulting the will of the people on state constitutional questions. The will of the sovereign controls but its exercise has been channeled and institutionalized through formal procedures. Thus the New Jersey Supreme Court, after quoting its constitutional popular sovereignty provision, went on to note that "there is no machinery in our State, constitutional or statutory," for the people to exercise this power "*on their own initiative.*"[25] And when the political authorities in Indiana, "with no pretense of complying with or proceeding under the provisions of the present constitution for amendment of it," passed a law placing a new draft constitution before the voters, the state Supreme Court—notwithstanding language in the existing constitution recognizing the people's "indefeasible right to alter and reform their government"[26]—upheld an injunction against the referendum.[27] The Court quoted a treatise on constitutional conventions:

> The idea of the people thus restricting themselves in making changes in their Constitution is original, and is one of the most signal evidences that amongst us liberty means, not the giving of rein to passion or to thoughtless impulse, but the exercise of power by the people for the general good, and therefore always under the restraints of law.[28]

[25] *Jackman v. Bodine*, 205 A.2d 713, 723 (N.J. 1964) (emphasis added).

[26] Indiana 1:1.

[27] *Ellingham v. Dye*, 99 N.E. 1 (Ind. 1912).

[28] *Id.* at 7 (quoting JOHN A. JAMESON, A TREATISE ON CONSTITUTIONAL CONVENTIONS: THEIR HISTORY, POWERS, AND MODES OF PROCEEDING 548 (1887)).

The Court also noted that "there has never been a time when the people might not, if they pleased and if they had believed it necessary, have made any change desired in the orderly ways provided."[29]

18. In light of the ample "orderly ways" in which the people may exercise their constituent authority, the constitutional popular sovereignty declarations have had a limited impact on constitutional decision-making. Courts rarely cite them. They arise most often in cases involving the amendment or replacement of a state constitution in a manner not clearly authorized by existing law.

19. Sometimes courts accept these provisions as justification for the otherwise unauthorized constitutional modification. For instance, in a 1935 advisory opinion, the Rhode Island Supreme Court held that the legislature could call a constitutional convention which could draft a new constitution and submit it to the voters even though the existing constitution provided for only one method of amending the constitution—proposal by the *legislature* and ratification by the electorate.[30] The Court relied on Article I, section 1 of the state constitution, which declared the right of the people "to make and alter their constitutions of government" but that provision also stated that an existing constitution was binding "till changed by an explicit and authentic act of the whole people."[31] Notwithstanding this qualification, the Supreme Court found that the constitutional recognition of this right combined with the

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[29] *Id.* at 17. The Court did acknowledge that a proper constitutional convention might be called by the legislature even if not provided for in the constitution. *Id.* at 18.

[30] *In re Opinion to the Governor*, 178 A. 433 (R.I. 1935). The opinion has a full review of other state judgments and commentary on parallel questions as they stood at the time.

[31] *Id.* at 436.

obligation imposed on the legislature in Article IV, section 1 "to pass all laws necessary to carry this constitution into effect" justified the proposed legislation.[32] The Court reasoned that a convention "may be needed, at any time or from time to time, to enable the people by an explicit and authentic act to make a new constitution or to alter the present one."[33]

20. In a 1966 judgment, the Kentucky Court of Appeals held it lawful to put to the voters a new constitution drafted by an appointed Constitutional Revision Assembly, even though the existing constitution made no provision for this procedure.[34] The Court held, in light of the popular sovereignty clause of the state Bill of Rights, that the existing constitutional amendment procedures could not be treated as exclusive:

> So long as the people have due and proper notice and opportunity to acquaint themselves with any revision, and make their choice directly by a free and popular election, their will is supreme, and it is to be done.[35]

Other courts have invoked the popular sovereignty clauses to support a less drastic proposition—that the constitutional rules describing the procedures for initiating or ratifying a constitutional amendment ought to be construed liberally so that mere technical departures do not deprive the people of their chance to make constitutional changes. It is enough, on this

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[32] *Id.* at 457-58.

[33] *Id.* at 437-39; *accord Ellingham*, 99 N.E. at 18; *Stander v. Kelley*, 250 A.2d 474, 478-79 (Pa. 1969).

[34] *Gatewood v. Matthews*, 403 S.W.2d 716 (Ky. 1966).

[35] *Id.* at 721. Judge Hill vigorously dissented, arguing the decision meant that "the present safeguards for the revision and or amendment of the Constitution are now obviously discarded and obsolete" and that any future amendment rules will be "little more than camouflage." *Id.* at 724 (Hill, J., dissenting) . *See also Wheeler v. Bd. of Trustees*, 37 S.E.2d 322 (Ga. 1946) (upholding a new constitution that the legislature presented to voters despite pre-existing constitutional rules requiring a convention for wholesale revision). The Georgia Supreme Court relied on the popular sovereignty clause of the old constitution and the approval by a large majority of the voters.

view, if there has been "substantial compliance" with the governing provisions.[36] This approach has been applied with special force when an irregularly proposed amendment is challenged after it has already been approved in a referendum.[37]

21. But not all courts have held that popular sovereignty clauses legitimate irregular constitutional changes that have been or may be approved by referendum. I have already noted the Indiana case where the legislature was held to have improperly attempted to put a draft constitution to referendum.[38] More dramatically, courts have been willing to hold constitutional amendments invalid even after ratification by the electorate. For instance, the Iowa Supreme Court struck down an amendment to the state constitution instituting prohibition after approval by the voters because the legislature had not twice passed the amendment in identical terms, as required by the constitutional amendment procedure.[39] In response to the citation of Article II, section 1 of the constitution reciting the people's right to "alter or reform" the government, the court insisted that this right had to be exercised "in the manner prescribed in the existing constitution."[40] Quoting Cooley's *Treatise on Constitutional Limitations*, the court declared that the "voice of the people can only be of legal force when expressed at the times and under the conditions which they themselves have prescribed and

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[36] *Buchanan v. Kirkpatrick*, 615 S.W.2d 6, 16 (Mo. 1981); *see also id.* at 10-12; *Harper v. Greely*, 763 P.2d 650, 655 (Mont. 1988); *McCarney v. Meier*, 286 N.W.2d 780, 783-85 (N.D. 1979).

[37] *Larkin v. Gronna*, 285 N.W. 59, 63-64 (N.D. 1939) ("When will is expressed in the manner required, departures from prescribed rules taking place prior to the expression of the will must be grave indeed to set aside the authoritative declaration of the people.").

[38] *See supra* p. 12, ¶ 17 - p. 13, ¶17.

[39] *Koehler v. Hill*, 15 N.W. 609 (Iowa 1883).

[40] *Id.* at 615.

pointed out by the constitution."[41] The Missouri Supreme Court similarly stated that although the constitutional right of the people to alter their government may appear by its terms "unlimited":

> the people, in their wisdom, have usually in their organic law, always of their own making, prescribed limitations upon and defined the course to be pursued in the exercise of this power. Conformity with these requirements is as obligatory upon the whole people as is the duty of the individual to obey the law.[42]

Thus, the formal amendment procedures must be read as "a modification of or limitation upon section 2 [the popular sovereignty provision]."[43]

22. Popular sovereignty clauses have also sometimes been successfully invoked to justify actions by state constitutional conventions that exceeded legislatively imposed limits on their procedures or on the permissible subjects on which they might act. This argument is premised on the idea that these conventions represent the people in their full sovereign authority. One Pennsylvania judge declared that a convention, "*quasi* revolutionary in its character. . . [has] absolute power, so far as may be necessary to carry out the purpose for which [it was] called into existence."[44] It could be neither "subverted nor restrained by the legislature."[45] This position, however, was subsequently repudiated by the Pennsylvania Supreme Court which

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[41] *Id.* at 616; *see also Johnson v. Craft*, 87 So. 375, 385-86 (Ala. 1921); *Graham v. Jones*, 3 So. 2d 761, 782-84 (La. 1941).

[42] *Erwin v. Nolan*, 217 S.W. 837, 839 (Mo. 1920).

[43] *Id.*

[44] *Wood's Appeal*, 75 Pa. 59, 67 (1874).

[45] *Id.* at 68.

insisted that such conventions were governed by controlling legislation.[46] The convention was the "off-spring of *law*. It had no other source or existence."[47] This latter opinion more accurately reflects the prevailing judicial view of the "convention-as-sovereign" argument.[48]

23. Thus, although popular sovereignty provisions of state constitutions have been in force for more than two centuries, their practical application has been marginal at best. Not in every case, but in most cases, recognition of popular sovereignty in the states has been confined to those processes and institutions defined by pre-existing law. Thus, when a litigant argued that Article 10 of the New Hampshire Bill of Rights—preserving the people's right "to reform the old or establish a new government" and condemning "the doctrine of nonresistance against arbitrary power and oppression" as "absurd, slavish and destructive of the good and happiness of mankind"—prevented the legislature from prohibiting activities intended to overthrow the government by force, the state Supreme Court issued a sharp reply.[49] The right in question did not extend to "insurrection and rebellion" for a dissatisfied group when "the adoption of peaceful and orderly changes properly reflecting the will of the people may be accomplished through the existing structure of government."[50]

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[46] *Wells v. Bain*, 79 Pa. 39 (1875).

[47] *Id.* at 48. Note, however, that the Supreme Court also accepted the binding nature of the constitution that the convention produced once it had been approved in a referendum. *Wood's Appeal*, 75 Pa. at 68-69. *See also* Richard S. Kay, *Constituent Authority*, 59 AM J. COMP. L. 715, 728-30 (2011).

[48] *See* Francis H. Heller, *Limiting a Constitutional Convention: The State Precedents*, 3 CARDOZO L. REV. 563, 565-75 (1982).

[49] *Nelson v. Wyman*, 105 A.2d 756 (N.H. 1954).

[50] *Id.* at 770 (upholding a state "subversive activities" law); *see also Scales v. United States*, 367 U.S. 203, 275-78 (1961) (Douglas, J., dissenting).

IV. State Sovereignty and the Federal Union

24. My discussion so far has been confined to the effect of popular sovereignty provisions on the internal government of a state. The effect of such a provision on the relationship between that state and the United States presents an analytically separate question. While a matter of genuine doubt in the early years of the republic, it has now been settled that no state law—constitutional or otherwise—can alter a state's basic relationship to the United States. Consequently, the popular sovereignty provisions under study must be—and are—interpreted as referring only to the *internal* law and institutions of a state and, therefore, as consistent with the supremacy of the federal constitution and law. The "people" referred to in a state constitutional popular sovereignty clause clearly refers to the people of the state in whose constitution it appears. Given the federal system of which those states are a part, the nature of this people's right to change their constitutional situation is subject to two different interpretations. On the one hand, taken literally and in isolation, the "indefeasible" right of the people of, say, Kentucky to "alter, reform or abolish their government in such manner as they may deem proper"[51] might be understood to include the right to replace the existing state government with one that that stands in a different relationship to the United States, or, indeed, has no ties to the United States at all. Alternatively, we might read the people's right in these provisions as limited to the internal institutions and powers of government within the individual state. On this second understanding, the state's relationship with the United States would be subject to a different and superior law, the constitutional law of the United States. That law is necessarily beyond the political reach of the people of any given state.

[51] Kentucky § 4.

25. In fact, a significant period of American constitutional history is defined by the opposition of these two viewpoints. According to the first, ultimate political authority rested in the various peoples of the states. The political authority of this collective assent undergirded the legal authority of the United States including the role of the state governments in the federal system. According to the second viewpoint, United States law and, in particular, the United States Constitution was based on the political authority of a single "people of the United States." The people of any given state had no inherent right to alter, abolish, or reform the law and government of the United States. These two visions of the American polity were in serious contest in the eighty years following ratification of the new constitution in 1789.

26. Two important state documents, the Virginia and Kentucky Resolutions of 1798 and 1799 (written respectively by James Madison and Thomas Jefferson) protested the federal Alien and Sedition Acts. More to our point, they also asserted that a state had the right to "nullify" federal law that, in that state's judgment, violated the federal constitution. Consistent with the theory of the authority of the federal Constitution just described, the resolutions presumed that the states that "formed the constitution," being "sovereign and independent," had the ultimate right to "judge of its infraction."[52] The controversy was put to a judicial test in 1819 in the great case of *M'Culloch v. Maryland*, in which the United States Supreme Court endorsed an expansive reading of the powers of the federal government in upholding the constitutionality of the Bank of the United States.[53] Chief Justice Marshall took account of the state's argument

[52] *Kentucky Resolution* (1799) *reprinted in* 1 DOCUMENTS OF AMERICAN HISTORY 184 (Henry S. Commager ed., 1948).

[53] 17 U.S. (4 Wheat.) 316 (1819).

that the Constitution should be construed "not as emanating from the people, but as the act of sovereign and independent states."[54] Marshall firmly rejected this proposition:

> The government proceeds directly from the people; is 'ordained and established,' in the name of the people; . . . [The] people were at perfect liberty to accept or reject it; and their act was final. It required not the affirmance, and could not be negatived, by the state governments. The constitution, when thus adopted, was of complete obligation, and bound the state sovereignties.[55]

27. Even such a declaration, however, did not put the issue to rest. The theory of the Constitution as a "compact" among sovereign states, ultimately controllable by them persisted in a series of conflicts culminating in the great catastrophe of the American Civil War.[56] In the run-up to the secession of the southern states, the idea that the American union was ultimately founded on the continuing sovereignty of the individual states was naturally prominent. Although the popular sovereignty provisions of the state constitutions were not cited in them, the various secession ordinances routinely repeated their substance. So Tennessee's ordinance "assert[ed] the right, as a free and independent people, to alter, reform, or abolish our form of government in such manner as we think proper."[57] Defenders of the Union explicitly challenged this view of the Constitution, noting inter alia that Article VI declared the Constitution and laws of the United States to be "the supreme law of the land, by which the judges of every state shall be bound, anything in the laws or constitution of the state to the contrary notwithstanding."[58]

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[54] *Id.* at 402.

[55] *Id.* at 403-04.

[56] *See* Richard S. Kay, *Legal Rhetoric and Revolutionary Change*, 7 CARIB. L. REV. 161, 177-79 (1997).

[57] TENN. DECL. OF INDEP. of 1861; *available at* http://www.constitution.org/csa/ordinances_secession.htm #Tennessee.

[58] U.S. CONST. art. VI, cl. 2.

In his inaugural address—delivered after seven states had already declared their secession—President Lincoln insisted that "[n]o state upon its own mere motion can lawfully get out of the Union. . . . I therefore consider that, in view of the Constitution and the laws, the Union is unbroken . . . ."[59]

28. This profound disagreement about the limits of state sovereignty is usually thought to have been decisively settled by the outcome of the war and the passage of the thirteenth, fourteenth and fifteenth amendments to the United States Constitution, which drastically limited the autonomy of the states. The Supreme Court emphatically adopted the restricted vision of state sovereignty in its opinion in *Texas v. White* in which it held void the sale of United States bonds by the secessionist government of Texas.[60] The United States Constitution, the Court held, "makes of the people and states which compose [the United States] one people and one country" resulting in "an indestructible Union, composed of indestructible States."[61] "Considered therefore as transactions under the Constitution, [the secession and all acts giving effect to that secession] were absolutely null. They were utterly without operation in law."[62] Challenges to this view of the relationship between federal and state sovereignties have since that time diminished to near the vanishing point.[63]

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[59] Abraham Lincoln, First Inaugural Address (Mar. 4, 1861) *reprinted in* 4 COLLECTED WORKS OF ABRAHAM LINCOLN 265 (1953).

[60] 74 U.S. (7 Wall.) 700 (1868).

[61] *Id.* at 721, 725.

[62] *Id.* at 726.

[63] *See Cooper v. Aaron*, 358 U.S. 1 (1958) (denouncing a claim by Arkansas officials that they were entitled to resist what they took to be erroneous interpretation of the United States Constitution by the United States Supreme Court). The Court quoted Chief Justice Marshall: "If the legislatures of the several states may, at will, annul the judgments of the court of the United States, and destroy the rights acquired under those judgments, the

29. The supremacy of the United State Constitution manifests itself in holdings that state constitutional provisions are invalid insofar as they contravene the Constitution. Indeed, in at least two cases, state constitutional provisions initiated by popular petition and approved by popular referendum—that is, state constitutional rules that represented the will of the people of that state in a particularly direct way—have been struck down.[64] The state constitution popular sovereignty provisions must be read against this almost uniformly accepted background. They must be understood as referring to the ultimate authority of the people of the various states to change their government only within the limits established by the supreme federal law that binds them. The provisions cannot be read to empower the states to sever those bonds.

30. This interpretation is supported by a more comprehensive examination of the texts of many of the state constitutions.

31. First, the state constitutions are littered with references to the United States, so much so that much of the machinery of state government makes little sense if considered apart from federal law. For example, the Maine Constitution, which declares that the people have "an unalienable and indefeasible right to institute government, and to alter, reform, or totally change the same, when their safety and happiness require it," goes on to mention the United States nineteen times.[65] Furthermore, almost all states constitutions require public officers to take oaths to support both the state constitution *and* the Constitution of the United States.[66]

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constitution itself becomes a solemn mockery . . . ." *Id.* at 18 (quoting *United States v. Peters*, 9 U.S. (5 Cranch) 115, 136 (1809)).

[64] *Reitman v. Mulkey*, 387 U.S. 369 (1969); *Romer v. Evans*, 517 U.S. 620 (1996).

[65] Maine 2:1 (three times); 2:4; art. 4, pt. 1, § 4; art. 4, pt. 3, § 1; art. 4, pt. 3, § 11; art. 5, pt. 1, § 4; art. 5, pt. 1, § 5; art. 5, pt. 1, § 7; 6:5; 7:4; 7:5; 9:1; 9:2; 9:14; 9:14-D (twice); 9:25.

32. Even more relevant to the proper interpretation of popular sovereignty clauses are the common explicit references to the supremacy of the United States Constitution. Nineteen states contain such affirmations.[67] These range from the simple statement in Article II, Section 3 of the Arizona constitution of 1912—"The Constitution of the United States is the supreme law of the land"—to the elaborate statement in Article I, Section 33 of the 1869 Georgia constitution that "every citizen owes paramount allegiance to the Constitution and Government of the United States and no law or ordinance of this State, in contravention or subversion thereof, shall ever have any binding force." Thirteen state constitutions are explicit on the question of any claimed people's right to separate from the Union, insisting that the state is an inseparable part of the United States.[68] Perhaps most revealing is the fact that, in nine of the states with express declarations of the people's right to alter or abolish their government, that right is explicitly qualified by an statement that such changes must be compatible with the United States Constitution. So the relevant provision of the Oklahoma constitution of 1907, Article II, Section 2 reads:

> All political power is inherent in the people; and government is instituted for their protection, security and benefit, and to promote their general welfare; and they have the right to alter or reform the same whenever the public good may require it: Provided, such change be not repugnant to the Constitution of the United States.

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[66] *See, e.g.*, Alabama 16:269; Connecticut 11:1; Illinois 3:30; Maine 9:1; Texas 7:1; *see also* U.S. CONST. art. VI, cl. 3 (requiring all state officers to take such an oath).

[67] Arizona 2:3; California 3:1; Colorado 2:2; Georgia 1:1, ¶ 33; Idaho 1:3; Maryland Decl. of Rts., art. 2; Mississippi 3:7; Missouri 1:3; Nevada 1:2; New Mexico 2:1; North Carolina 1:5; North Dakota 1:23; Oklahoma 1:1; South Dakota 6:26; Texas 1:1; Utah 1:3; Washington 1:2; West Virginia 1:1; Wyoming 1:37.

[68] California 3:1; Georgia 1:1, ¶ 33; Idaho 1:3; Mississippi 3:7; Nevada 1:2; New Mexico 2:1; North Carolina 1:4; North Dakota 1:23; Oklahoma 1:1; South Dakota 6:26; Utah 1:3; West Virginia 1:1; Wyoming 1:37.

It is true that such limitations began to appear only after the issue of federal supremacy reached a critical phase in the period during and after the Civil War. But they continue to reflect the prevailing understanding of the limits of popular power to alter state governments.[69]

33. The same limitations are suggested by another feature of the enactment of state constitutions. With the exception of the thirteen original states, every state was admitted to the Union pursuant to the power granted to Congress by Article IV, section 3 of the federal Constitution. Once admitted to the Union, every state stands on an "equal footing" and (within the limits of the Constitution) may alter its law as it sees fit.[70] But the achievement of statehood in the first place is subject to such conditions as Congress may choose to impose at the time. In some cases, Congress has specified particular requirements for the initial constitution of the new state or has insisted on approval of the constitutional text itself.[71] According to the Supreme Court "Congress may require, under penalty of denying admission, that the organic

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[69] In three constitutions the power of the people to control their state governments is expressly limited to the "internal" government of the state. Mississippi 3:6; Missouri 1:3; North Carolina 1:3.

[70] *Coyle v. Smith*, 221 U.S. 559, 573 (1911).

[71] *See, e.g.*, Act of March 3, 1821, 16 Stat. 645 (1821):

> That Missouri shall be admitted . . . upon the fundamental condition, that the fourth clause of the twenty-sixth section of the third article of the constitution submitted on the part of said state to Congress, shall never be construed to authorize the passage of any law, and that no law shall be passed in conformity thereto, by which any citizen, of either of the states in this Union, shall be excluded from the enjoyment of any of the privileged and immunities to which such citizen is entitled under the constitution of the United States: *Provided*, That the legislature of the said state, by a solemn public act, shall declare the assent of the said state to the said fundamental condition, and shall transmit to the President of the United States, on or before the fourth Monday in November next, an authentic copy of the said act . . .

Similarly, Congress admitted Nebraska to the union on the condition that it change its constitution to permit black suffrage. Eric Biber, *The Price of Admission: Causes, Effects, and Patterns of Conditions Imposed on States Entering the Union*, 46 AM. J. LEGAL HIST. 119, 119-20 (2004); *see also id.* at 129-31 (compiling admission conditions). And Louisiana's enabling act required the territory to submit its constitution to Congress for review. *See* Act of Feb. 20, 1811, 21 Stat. 641, 642-43. Once a state is admitted, however, Congress can enforce any such admission conditions only if it could validly pass a new law to the same effect. *See Coyle*, 221 U.S. at 573.

laws of a new State at the time of admission shall be such as to meet its approval."[72] Congress has regularly admitted new states with constitutions containing the kind of provision under discussion. Its acquiescence to that constitutional language is strong evidence that Congress does not regard these clauses as authorizing the states to modify their relationship to the United States.

34. Judicial readings of the popular sovereignty clauses have taken this limited interpretation to be a matter of course. The Supreme Court of Tennessee, for example, acknowledged that, under Section 1 of the state Bill of Rights—a provision that made no explicit reference to the federal Constitution—the "people are possessed with ultimate sovereignty and are the source of all State authority. The people have the ultimate power to control and alter their Constitution, subject only to such limitations and restraints as may be imposed by the Constitution of the United States."[73]

V. Conclusions

35. To summarize, my conclusions based on the research reflected in this memorandum are:

A. "Popular sovereignty" clauses of varying degrees of assertiveness are present in most state constitutions. They express the prevailing political philosophy of the founding era reflected in the Declaration of Independence. They have persisted in later constitutions through a process of retention and borrowing.

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[72] *Coyle*, 221 U.S. at 568; *see also id.* at 569 (quoting *Permoli v. First Municipality*, 44 U.S. (3 How.) 589, 609 (1845)).

[73] *Cummings v. Beeler*, 223 S.W.2d 913, 923 (Tenn. 1949).

B. The popular sovereignty clauses have had a limited impact on state decision-making. Judicial decisions applying them or taking note of them have largely been confined to questions concerning the process of constitutional amendment and the relative powers of state legislatures and state constitutional conventions. Most, although not all, judicial interpretations have subjected that process to existing positive law.

C. However they may have been regarded in the first eighty years of American independence, since the Civil War these clauses have been understood as referring only to the power of the people to alter the internal structure of state government subject to the requirements of the United States Constitution and, therefore, they exclude explicitly or implicitly, any power to alter the state's relationship to the United States. So interpreted they are entirely consistent with the United States Constitution.

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The Law As A Symbol, **Boston Globe** (July 27, 1981).

Constitution-Making in Canada, **Worldview** (May, 1981)

Benched by Seniority, **New York Times** (May 1, 1977) (Connecticut Weekly).

Memberships, etc.

University of Connecticut Senate, 2005-2006

Past Chair, Past member of Executive Committee, Constitutional Law Section, American Association of Law Schools

International Academy of Comparative Law

Board of Directors, American Society of Comparative Law, Treasurer, 2005- ,Member Executive Committee, 2003-2005

Board of Editors, American Journal of Comparative Law, Member Executive Editorial Committee, 2003-2005

American Society for Political and Legal Philosophy

Association for the Study of Canada in the United States

International Association of Constitutional Law

Contributor, New Dictionary of National Biography (Oxford University Press)

Occasional consultant to various state agencies, private companies and law firms

Invited panelist or speaker at numerous academic programs and conferences

Recipient of grants and fellowships from the University of Connecticut Research Foundation, National Endowment for the Humanities, American Philosophical Association, Folger Shakespeare Library, The Huntington Library, Government of Canada, Canada-United States Law Institute and United States Information Agency

N° : 500-05-065031-013

SUPERIOR COURT

KEITH OWEN HENDERSON

Petitioner

ATTORNEY GENERAL OF QUEBEC

Respondent

ATTORNEY GENERAL OF CANADA

Mis en cause

et als

NOTICE OF PRODUCTION OF AN EXPERT REPORT (DR KAY)
(art. 402.1 *C.C.P.*, art. 2809 *C.C.Q*)

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