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Semi-Federalism, Multi-Stage Constituent Process, and Diffused Popular Sovereignty:  
The Principles and Implications of the Making of 1780 Constitution in Massachusetts

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## 1. Introduction

Harry A. Cushing described the 1780 Constitution of the Commonwealth of Massachusetts as the last of the revolutionary constitutions produced in the wake of the American Independence War (save the one of New Hampshire which was imitated after Massachusetts) and the first of the modern constitutions.<sup>1</sup> Its distinct modern character consisted in its coherent and thought-through structure (and not a mere collection of more or less coherent provisions), preamble which spelled out the principles of the government of the Commonwealth of Massachusetts (and not the justification of the Revolution, as many other preambles of the newly independent American states did), and the bill of rights.<sup>2</sup> Because of its content – introduction of the bicameral legislature, strengthening of the executive, and establishing the Bill of Rights<sup>3</sup> – it is considered a model for the US Constitution. It prompted Paul C. Reardon, a member of Massachusetts Supreme Judicial Court, to proclaim that the Massachusetts Constitution “marks a milestone” in the American constitutional thought.<sup>4</sup> Additionally, a particular method of the drafting and the adoption of the Massachusetts Constitution – the constitutional convention – gave a rise to a constitution making model which culminated in the convention resulting in the adoption of the US Constitution.<sup>5</sup>

While there are good reasons to accept this reading of the Massachusetts Constitution, in this

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1 Harry Alonzo Cushing, *History of the Transition from Provincial to Commonwealth Government in Massachusetts.*, vol. VII, Studies in History, Economics and Public Law (New York, 1896), 245, <http://catalog.hathitrust.org/Record/007917764>.

2 Ibid., VII:246–247.

3 See: S. B. Benjamin, “The Significance of the Massachusetts Constitution of 1780,” *Temple Law Review* 70 (1997): 883–905; Paul C. Reardon, “The Massachusetts Constitution Marks a Milestone,” *Publius: The Journal of Federalism* 12, no. 1 (January 1, 1982): 45–55.

4 Reardon, “The Massachusetts Constitution Marks a Milestone.”

5 See: Andrew Arato, “Conventions, Constituent Assemblies, and Round Tables: Models, Principles and Elements of Democratic Constitution-Making,” *Global Constitutionalism* 1, no. 1 (2012): 173–200.

paper I would like to suggest an alternative interpretation: Massachusetts Constitution confronts us with a route not taken, that is, with a democratic constitution making process characterized by elements and principles which should challenge our understanding of popular sovereignty and the will of the people, the concepts fundamental for democratic theory and constitutionalism.

More specifically, traditionally understood, the people is a unitary macrosubject and its sovereign will is manifested instantaneously as a decision: the people is sovereign because it imposes its will.<sup>6</sup> Many have pointed out that this understanding either logically implies the necessity of unanimity or requires acceptance of a fact that it is always a part that imposes its will on the whole.<sup>7</sup> For this reasons, such understanding of popular sovereignty has been frequently judged as unrealistic and dismissed entirely and considered a fallacy,<sup>8</sup> or treated as a fiction which, nonetheless, can be used as a tool in the process of democratization<sup>9</sup>. Yet, the Massachusetts Constitution was a product of an extraordinary constitution making process – extraordinary to the extent that even Edmund Morgan, highly skeptical of the sovereignty of the people, stated that “the Massachusetts constitution could be said, with more plausibility than any other, to be an act of the sovereign people.”<sup>10</sup> Given the centrality of the concepts of popular sovereignty and

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6 This position is held, among others, by three great political thinkers, Jean-Jacques Rousseau, Emmanuel-Joseph Sieyès, and Carl Schmitt (different as they are). See: Jean-Jacques Rousseau, “Of the Social Contract,” in *Of The Social Contract and Other Political Writings* (London, New York: Penguin Books Limited, 2012), 1–133; Emmanuel Sieyès, “What Is the Third Estate?,” in *Sieyès: Political Writings: Including the Debate Between Sieyès and Tom Paine in 1791*, ed. Michael Sonenscher (Indianapolis: Hackett Publishing, 2003), 92–162; Carl Schmitt, *Constitutional Theory* (Duke University Press, 2008).

7 Rousseau is a well known example of this problem: he is able to solve it by stating that the general will is not the will of the majority but a will that each individual posses as citizen, but which can be obscured by their private desires. As a result, those who do not vote in accordance with the general will are simply wrong (in empistemic sense) about the content of the general will. Jean-Jacques Rousseau, “On the Social Contract,” in *Rousseau: The Basic Political Writings*, trans. Donald A. Cress, Second Edition, 2 edition (Indianapolis, IN ; Cambridge: Hackett Publishing Company, Inc., 2012).

8 See, for example: Adam Przeworski, “Self-Government in Our Times,” *Annual Review of Political Science* 12, no. 1 (2009): 71–92, doi:10.1146/annurev.polisci.062408.120543.

9 See, for example: Edmund S. Morgan, *Inventing the People: The Rise of Popular Sovereignty in England and America* (New York: W. W. Norton & Company, 1989).

10 *Ibid.*, 258.

the will of the people to democratic theory,<sup>11</sup> they are worth saving. In such a situation, I believe, instead of solving logical paradoxes on solely conceptual level, it is useful to reflect on the empirical case to revise and refine the concepts.

1780 Constitution of Massachusetts was a product of the convention which took place in very specific circumstances of virtually non-existent legitimacy of the old regime and difficult times of the revolutionary war against the British. A Convention as a type of constitution making is a peculiarly American invention. It is characterized, among other things, by double differentiation between constitution making and normal legislation, multiplicity of stages of the process, and lack of an organ which can make claims to embody popular sovereignty.<sup>12</sup> The process of constitution making in Massachusetts conformed to this ideal-typical characterization, however, it departed from the characteristic of the passivity of the last stage of constitution making:<sup>13</sup> the last stage involved not only simple ratification of the whole draft but, albeit largely ignored, suggestions for changes. Also, its crucial part was the existence of the multiplicity of actors involved in the process of constitution making. In this paper I argue that this departure from the ideal-typical characterization is not accidental historical contingency but rather internal to the logic of the Massachusetts constitution, making the process distinct from ideal-typical Convention. Therefore, I argue that Massachusetts constitution making process is not an “imperfect” Convention, but rather a Convention governed by slightly different principles – a Convention in the quasi-federal setting. I argue that this process and principles governing it have implications for our thinking about popular sovereignty and the will of the people.

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11 On the intimate relation between democracy and popular sovereignty, see: Andreas Kalyvas, “Popular Sovereignty, Democracy, and the Constituent Power,” *Constellations* 12, no. 2 (2005): 223–44.

12 See: Arato, “Conventions, Constituent Assemblies, and Round Tables,” 185.

13 *Ibid.*, 184–185.

Theorization of the empirical case of the 1780 Massachusetts constitution making in 1779-1780 requires breaking down of the case into its elements and principles. This, in turn, requires separation, on the one hand, between historical contingencies and necessary preconditions of this particular instantiation of the constitution making process, and, on the other, between, contingent events and the elements of the process. In order to complete my task I proceed from the description and analysis of the empirical case to draw theoretical implications. I analyze the historical process of the creation of the 1780 Constitution of the Commonwealth of Massachusetts, and by abstracting from historical contingencies, I elaborate on the particular model of constitution making that was enacted in Massachusetts. Reflecting on it further, I analyze its preconditions and separate the elements of the model from its principles. Lastly, I draw conclusions and theoretical implications from 1780 Massachusetts Constitution making for our thinking about popular sovereignty and the Will of the People.

## **2. Historical background**

Before, however, I analyze the process itself, it is necessary to provide some historical contextualization. 1779-1780 constitution making process in Massachusetts followed an earlier, 1777-1778 failed attempt to draft a constitution for the state by the General Court, a regular legislative body established by the colonial charter. This in turn was an effect of a longer process in which colonial system of government lost legitimacy entirely.

Delegitimation of the colonial system of government was an effect of a longer conflict between the Crown represented by the governor and his council on the one hand, and the provincial legislative representing the citizens of the colony of Massachusetts on the other. The towns of

Massachusetts, and especially Boston town meeting, the cradle of anti-Crown radicalism, supported the assembly against the Crown.<sup>14</sup> During the conflict, the spirit of defiance and resistance spread to other towns. Already 17 years before the outbreak of the Independence War, in 1768 the governor of the colony of the Massachusetts Bay, Sir Francis Bernard, dissolved the General Court and later refused to call for new one. Nonetheless, the towns took matters in their hands and after the Boston town meeting's call for convention, they sent their representatives. "The convention's legitimacy was based on the understanding that the towns behind it were themselves sovereign political units."<sup>15</sup> Towns continued cooperation through the committees of correspondence, which were pursuing local policies and were responsible only to the town meetings.<sup>16</sup>

In 1774, the British Parliament passed Intolerable Acts in order to control and punish the rebellious colony after the Boston Tea Party; among others, those acts changed the constitution of Massachusetts, and disempowered the town meetings in particular.<sup>17</sup> This move contradicted the common sense of the citizens of Massachusetts, who believed that constitution is not a grant from the Crown but a contract between the ruler and the ruled. This popular belief was inspired by theories of Whigs, like Harrington and Locke, who advocated republican form of government and civic independence.<sup>18</sup> Contrary to the expectations of the metropole, the punitive measures did not strengthen the British control over the colony, but almost completely delegitimized the

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14 Allan Nevins, *The American States During and After the Revolution 1775-1789* (New York: The Macmillan Company, 1924), 31.

15 Willi Paul Adams, *The First American Constitutions: Republican Ideology and the Making of the State Constitutions in the Revolutionary Era* (Chapel Hill, NC: University of North Carolina Press, 1980), 33.

16 *Ibid.*, 34.

17 Nevins, *The American States During and After the Revolution 1775-1789*, 34.

18 For the influence of Harrington's theory on the American common sense at the time, see: Aziz Rana, *The Two Faces of American Freedom* (Cambridge, Mass.: Harvard University Press, 2010). Influence of the theory of John Locke is a common knowledge.

authority of the office of governor and contributed to transfer of authority to town meetings.<sup>19</sup> Newly appointed military governor of the colony, General Thomas Gage, attempted to dissolve the lower chamber of the General Court, but the House openly disobeyed the order. Despite the prohibition, town meetings were held, even in the vicinity of the royal troops; the actions of the British Parliament also strengthened the solidarity among towns of the colony.<sup>20</sup> A call for extralegal provincial convention appeared.<sup>21</sup> In another counterproductive attempt to assert control over Massachusetts, Governor Gage canceled the call for elections to the General Court, but the Court was elected nonetheless and transformed itself into a Provincial Congress.<sup>22</sup> The animosities between the Crown and the colonists in Massachusetts culminated in September 1774 in the so-called Suffolk Resolves, a declaration of the leaders of the town of Suffolk calling for abolition of the “unconstitutional” administration of the Governor Gage.<sup>23</sup> The Resolve was endorsed by the First Continental Congress the same month. Essentially, as a result of this struggle, the colony of Massachusetts had a dual power structure and contested authority: the governor's administration on the one hand, and the quasi-federal structure bottom-up consisting of towns. The towns were associated in county-level bodies which organized consumer boycotts and assumed policing powers.<sup>24</sup>

In 1775, after the breakout of the American Revolutionary War, Massachusetts resumed the 1691 colonial Charter, considering the punitive changes introduced by the British Parliament null and void. The Provincial Congress was considered a legal continuation of the Court while the seat of

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19 Nevins, *The American States During and After the Revolution 1775-1789*, 35.

20 *Ibid.*, 35–36.

21 *Ibid.*, 37.

22 *Ibid.*, 38.

23 Adams, *The First American Constitutions*, 35.

24 *Ibid.*, 35–36.

the Governor was considered vacant.<sup>25</sup> In 1776 the Continental Congress advised the rebellious colonies to adopt constitutions based on the authority of the people.<sup>26</sup> Initially, the General Court of Massachusetts wanted to preserve the existing Charter arguing that it satisfies the suggestions of the Congress.<sup>27</sup> However, some of the towns demanded a completely new document. In particular, the town of Pittsfield argued in the Lockean vein, that constitution is necessary for legitimate legislation, but the abrogation of the constitution the British Crown resulted in the breaking of the constitutional contract. In effect the old document was null and void and all the power and authority returned to civil society. First demands for a special convention that would draft a new constitution were made already in 1776. This idea of double differentiation “originated in the mistrust the towns and counties felt toward the house of representatives and the council sitting in Boston.”<sup>28</sup> There were two main arguments in favor of double differentiation. The first one stemmed from the idea that the constitution is not an ordinary law and its task is to protect individuals from the abuses of power by the government: the creation of the constitution by the ordinary legislature would result in a document that is not a higher law and can be altered by any subsequent legislature.<sup>29</sup> This fear of parliamentary sovereignty Westminster style was well justified given punitive changes in the colonial Charter introduced by the British Parliament only two years earlier. The second argument was based on the fear of factionalism and the vested interests of the drafters: if the drafting body is to remain in power after the constitution is adopted, the drafters can either introduce provisions benefitting their interests or grant themselves excessive powers.<sup>30</sup> Poor Berkshire county in the western part of Massachusetts, fearing conservative tendencies among the the richer inhabitants of the easter part

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25 Nevins, *The American States During and After the Revolution 1775-1789*, 89.

26 Adams, *The First American Constitutions*, 63.

27 Ibid., 86.

28 Ibid., 64–65.

29 Ibid., 89; see also: Nevins, *The American States During and After the Revolution 1775-1789*, 176.

30 Nevins, *The American States During and After the Revolution 1775-1789*, 176.



of the colony, demanded also popular ratification of the draft.<sup>31</sup>

The second demand was honored but the first one was disregarded and after extraordinarily inclusive elections in 1777,<sup>32</sup> the lower chamber of the General Court proceeded with the drafting process of the new constitution. In 1778 the new constitution was submitted for ratification by towns, but it was rejected by the overwhelming majority of the freemen of Massachusetts – 2,083 votes were casted in favor of the draft, whereas 9,972 were against it.<sup>33</sup> Allan Nevins argues that the new constitution was not able to secure support neither among “conservatives” who demanded, among other things, inclusion of the bill of rights, nor the “radicals” who vehemently opposed the process of the creation of the document.<sup>34</sup> Willie Paul Adams adds that objections included also too exclusionary electoral rules, unequal distribution of the seats, and disagreement over the powers of the governor.<sup>35</sup> Anyway, the devastating defeat of the constitution is hardly surprising given the opposition of the towns to the idea of drafting of the constitution by the governing body.<sup>36</sup>

### **3. Drafting the 1780 Constitution**

The process of drafting of the 1780 Constitution of the Commonwealth of Massachusetts grew out of this failure. Nevins writes, that 1778 document “was so poor a Constitution that the chaplain of the House expressed the opinion that it had been drafted with the deliberate purpose

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31 Ibid., 175.

32 The property qualifications for the right to vote were suspended this time: Adams, *The First American Constitutions*, 91.

33 Nevins, *The American States During and After the Revolution 1775-1789*, 177.

34 Ibid.

35 Adams, *The First American Constitutions*, 91.

36 Morgan, *Inventing the People*, 258.

of having it rejected, so that the Charter authorities might continue in power.”<sup>37</sup> Indeed, the missing bill of rights and the unacceptable process of its drafting were quite offensive for prevailing sensibilities of the rebellious colonists. Nonetheless, in February of the next year, the General Court proclaimed a resolve, supported later by more than two thirds of towns, asking if they desired a constitutional convention charged with the task of drafting the constitution. Given the positive answer of the majority, the Court called for elections to the convention. The property qualifications were suspended as all free male residents of towns of the age of 21 and over were allowed to vote.<sup>38</sup> The same resolve established rules for ratification of the new constitution – all free males of age 21 and over acting in town meetings were supposed to vote on every provision of the constitution; the resolve considered the provision accepted if the two thirds of them accepted it.<sup>39</sup> As Samuel Eliot Morrison described it in 1917, the convention “was elected by, and submitted its work to, the People, in the widest contemporary political sense of that word.”<sup>40</sup>

The convention met on September 1, in “the darkest” period of the Revolution.<sup>41</sup> British General Henry Clinton was triumphant in the south while General Washington was stranded by sickness and desertion at the banks of Hudson river. Massachusetts troops were just defeated by the British, leaving under control of the Crown the territory of Maine east of Penobscot river. Public funds were virtually depleted.<sup>42</sup>

The constitution making process, that occurred in these quite non-favorable conditions, had four

37 Nevins, *The American States During and After the Revolution 1775-1789*, 177.

38 Cushing, *History of the Transition from Provincial to Commonwealth Government in Massachusetts.*, VII:228.

39 Ibid., VII:229.

40 Samuel Elliot Morrison, “The Struggle over the Adoption of the Constitution of Massachusetts, 1780,” in *Proceedings of the Massachusetts Historical Society, Vol. L, 1916-1917* (Massachusetts Historical Society, 1917), 392.

41 Nevins, *The American States During and After the Revolution 1775-1789*, 179.

42 Morrison, “The Struggle over the Adoption of the Constitution of Massachusetts, 1780,” 363; Nevins, *The American States During and After the Revolution 1775-1789*, 179.

stages.<sup>43</sup> The first stage consisted of the preparation of the first draft of the document by the convention specifically elected for this task. Before embarking on its task of drafting the constitution, the convention made two important moves. First, it formally recognized that it received its authorization from the people of Massachusetts.<sup>44</sup> “[I]t is the opinion of this Convention, that they have sufficient authority from the people of the Massachusetts Bay to proceed to the framing a new Constitution of Government, to be laid before them agreeably to their instructions.”<sup>45</sup> In other words, the convention recognized the conditionality of its legitimacy, implying that the source of authority rests with the people of the Massachusetts. Second, before proceeding to the part of the draft concerning the form of government, convention decided to focus on the Bill of Rights.<sup>46</sup> The task of drafting was delegated to the committee of thirty, which later delegated it to James Bowdoin, Samuel Adams, and John Adams. The last of them proved to be the most influential drafter and *the* author of the Bill of Rights.<sup>47</sup> The second stage was the debate over the first draft in the convention. One of the main points of contention in these debates considered the electoral rules and representation in the legislative. Given the lack of agreement on the issue, the convention decided to submit it to the people, during the stage of ratification.<sup>48</sup>

The ratification of the constitution was the third stage. Eighteen hundred copies of the draft were distributed to towns and put up for debate clause by clause during the fourteen weeks between

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43 Willi Paul Adams enumerates three: Adams, *The First American Constitutions*, 92 I consider the final step of ratification of the constitution as a separate, fourth stage.

44 Cushing, *History of the Transition from Provincial to Commonwealth Government in Massachusetts.*, VII:231.

45 Massachusetts Constitutional Convention, *Journal of the Convention for Framing a Constitution of Government for the State of Massachusetts Bay: From the Commencement of Their First Session, September 1, 1779, to the Close of Their Last Session, June 16, 1780* (Dutton and Wentworth, Printers to the State, 1832), 22.

46 Ibid.

47 Cushing, *History of the Transition from Provincial to Commonwealth Government in Massachusetts.*, VII:234–235.

48 Ibid., VII:244.

March 2 and June 7, 1780. Together with the copies of the draft, the towns were provided with the address of the president of the convention, James Bowdoin, which stated that they have “undoubted *Right*”<sup>49</sup> to accept, reject, and introduce revisions and alterations to the draft. The draft also gave rationale for the provisions of the draft. Although printed press does not give much evidence for public around the draft, at least nothing comparable to the debates surrounding the Federal Constitution,<sup>50</sup> the returns, differing greatly in length and substance, prove otherwise.<sup>51</sup> The town meeting of Boston, one of the most engaged in the debates over the draft,<sup>52</sup> issued even a recommendation to close all shops to improve attendance.<sup>53</sup> During the last meetings of the convention before sending out the draft, it was resolved that the final session of the convention charged with the task of tabulation of the votes was also allowed to introduce changes into the draft to conform it to the opinion of the two thirds.<sup>54</sup> More importantly, however, the final session was in principle a new body: its legitimacy was renewed because the towns could send different representatives to this session.<sup>55</sup> Thus, although it was generally recognized that the convention had the final say in the process of ratification,<sup>56</sup> the convention for the second time recognized the conditionality of its legitimacy.

The final step of ratification, and at the same time the final stage of the constitution making process proved to be difficult. As mentioned, returns from towns differed greatly. Some of them stated clear yay or nay concerning either the whole document or a provision and number of

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49 Massachusetts Constitutional Convention, *Journal of the Convention for Framing a Constitution of Government for the State of Massachusetts Bay*, 216.

50 Cushing, *History of the Transition from Provincial to Commonwealth Government in Massachusetts.*, VII:268.

51 Morrison, “The Struggle over the Adoption of the Constitution of Massachusetts, 1780,” 364.

52 *Ibid.*, 366.

53 Nevins, *The American States During and After the Revolution 1775-1789*, 181.

54 Massachusetts Constitutional Convention, *Journal of the Convention for Framing a Constitution of Government for the State of Massachusetts Bay*, 155.

55 *Ibid.*, 164.

56 Morrison, “The Struggle over the Adoption of the Constitution of Massachusetts, 1780,” 367.

casted votes, other included conditional yays with specific instructions concerning amending the contested provisions. In such a situation, altering the draft “in such a manner as may be agreeable to the sentiments of two thirds of the voters throughout the State”<sup>57</sup> was an extremely difficult task. Moreover, the difficult historical circumstances – the reality of revolutionary war and terrible financial situation of the state of Massachusetts – prompted the feelings of urgency. In the words of Samuel Adams: “Never was a good constitution more needed than at this juncture.”<sup>58</sup> The convention delegated the task of tabulation of the votes to a special committee, which found it difficult to reconcile differences in returns.<sup>59</sup> In the end, the convention resorted to a procedure which Edmund Morgan euphemistically calls “dubious.”<sup>60</sup> Yay votes and yav votes conditional upon specific changes were counted as votes in favor of the constitution, and this is how the required two thirds majority was secured. However, as Nevins notes, “At least two articles, by strictly fair count, would not have had a two-thirds vote, though they probably had more than half; but the committee reported all as having the necessary two-thirds majority, and the convention accepted the statement.”<sup>61</sup> On June 15<sup>th</sup>, at the one to the last meeting of the convention, the draft was read article by article and after each clause the representatives were asked whether they agree that the people accepted the article. Unsurprisingly, each article was passed.<sup>62</sup> It should be noted, that although disregarded, the returns with suggestions for changes anticipated most of the amendments to the Constitution of Massachusetts introduced before the Civil War.<sup>63</sup> Also, one of the causes of Shays' Rebellion in western Massachusetts was precisely

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57 Massachusetts Constitutional Convention, *Journal of the Convention for Framing a Constitution of Government for the State of Massachusetts Bay*, 155.

58 Samuel Adams, quoted in: Cushing, *History of the Transition from Provincial to Commonwealth Government in Massachusetts.*, VII:273.

59 Ibid., VII:274.

60 Morgan, *Inventing the People*, 258.

61 Nevins, *The American States During and After the Revolution 1775-1789*, 181.

62 Massachusetts Constitutional Convention, *Journal of the Convention for Framing a Constitution of Government for the State of Massachusetts Bay*, 180.

63 Morrison, “The Struggle over the Adoption of the Constitution of Massachusetts, 1780,” 365; Nevins, *The American States During and After the Revolution 1775-1789*, 181.

not revising the articles concerning the legislature in accordance with the returns from towns.<sup>64</sup>

#### **4. Preconditions, elements, principles**

Two previous sections provide factual material necessary to reconstruct the preconditions, elements, and principles of the constitution making process. Since, as mentioned, this process differs from the ideal-typical characterization of the model of the Convention, I elaborate on the preconditions, elements, and principles of the Massachusetts constitution making process by comparing and contrasting it at times with the ideal type. Most important differences are the active role of the last stage of constitution making, that is the possibility to introduce changes into the draft, and quasi-federal setting in which the process of constitution making took place.

*Preconditions.* As mentioned, constitution making process in Massachusetts took place in difficult historical circumstances of military conflict and delegitimation of the central authorities of the state. There are long-term and short-term preconditions of the Massachusetts constitution making. Three long-term preconditions are rooted in the colonial past of Massachusetts. The first one is the existence of the institutionalized vibrant independent civic life in the colony. Town meetings, inspired by the radical democratic and republican ideology of the Whigs were the center of local civic and political life and local self-government. They actively participated in provincial politics as places of deliberation and elections; they were cradles of democratic sentiments stemming from their internal pluralism;<sup>65</sup> they were places of civic education in public matters and public opinion formation. Second precondition is devolution of authority.

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64 Morrison, "The Struggle over the Adoption of the Constitution of Massachusetts, 1780," 388.

65 For example the town meeting of Boston included workers and shopkeepers, not only the elite. See: Nevins, *The American States During and After the Revolution 1775-1789*, 30.

Counterproductive repressive and punitive measures introduced by the colonial administration representing the British Crown and by the British Parliament resulted in delegitimization of the colonial institutions. The authority was transferred to already existing lower-level institution of local self-government, the towns, which acted self-governing units. The actions of the Governor and the Parliament against the colonists galvanized the opposition and created strong networks of cooperation and communication among the towns through the committees of correspondence, the third precondition. I call this combination of three long-term preconditions “quasi-federalism.” This situation resembles federal setting because of the multiplicity of self-governing units independent from the central institutions; at the same time, however, the people of Massachusetts felt as members of a larger polity bound together, legally, institutionally, and affectively. Essentially, it is a setting of the primacy of the local, bottom-up self-government over the supra-local institutions, without legal pluralism implied by federalism.

The quasi-federalist setting contributed also to one of the preconditions of the ideal-typical Convention, i.e. the continuity of legitimacy. The constitution making process began after the war started. Granted, Suffolk Resolves called for what amounts to revolution, and some considered punitive actions of the British not only illegal but also resulting in the dissolution of the colonial Charter as a constitution. Yet, the basic institutions of the republican form of government were functioning, and, more importantly, the towns retained their legitimacy. The second characteristic of a ideal-typical Convention is also a short-term precondition of the Massachusetts constitution making process: rupture of legality.<sup>66</sup> The Convention as a kind of “revolutionary reform” presumes the failure of attempts to reform of an existing form of

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66 Arato, “Conventions, Constituent Assemblies, and Round Tables,” 175–176.

government resulting in the necessity to break existing legal rules.<sup>67</sup> In the case of Massachusetts, the General Court was not able to preserve the colonial form of government, and later failed to secure majority for its draft of the constitution because, among other things, it disregarded the demands for constitutional convention. Crucially, the calls for constitutional convention came not from delegates-turned-self-selected drafters, as in the case of the Federal Constitution, but from the towns.

*Elements.* Some of the towns insisted that the convention be charged only with the task of drafting the constitution. Double differentiation is the first element of the Massachusetts constitution making process, characteristic also of a ideal-typical Convention. The body in Massachusetts was elected in inclusive elections solely for the purpose of drafting and dissolved after the constitution was adopted. The constitution making process consisted of the multiplicity of stages (second element): (1) the explicit authorization of the representatives to the convention by the sovereign people in inclusive elections; (2) drafting of and the debate over the constitution; (3) ratification of the constitution which consisted of submission of the draft to towns with the possibility to change each and every clause of the draft, followed by the final adjustments of the draft and (4) acceptance of the constitution by the convention with a renewed mandate. Throughout the process, the people of Massachusetts were considered a source of authority and legitimacy of the convention. In contrast, however, to ideal-typical Convention, and the constitution making process of the Federal Constitution, during two last stages, actors were allowed to introduce changes into the draft. The third element is the multiplicity of actors: the impetus for the process came partially from below, but the process itself was initiated by the institution of the *ancien regime*, the General Court. Later, constitution making involved the

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<sup>67</sup> Ibid., 178.



drafting convention, the towns, and the final convention which, because of the renewed mandate, was in principle (and in fact, given minor changes among delegates) a new body, and special committees selected by those bodies. The second and third elements combine into the “division of constitution making labor”, charging the first convention with the task of drafting, towns with debating and suggesting revisions, and the final convention with introduction of changes (at least in principle) and adoption of the constitution. The fourth element is the multiplicity of levels. The draft was prepared by the constitutional convention elected in national elections, but the towns, units of local self-government, to whom the draft was submitted for ratification, were given active role in the process of drafting.

*Principles.* The citizenry did not play a passive role in Massachusetts constitution making process. Their task was not only to select the representatives who would draft the constitution for them, but also to debate it in direct democratic bodies and in informal settings. The suspension of the property qualifications for voting and participation in the ratification process suggest an understanding that the constitution making process should be more inclusive than so-called normal politics. Citizens had the opportunity to contribute to the process indirectly, through their representatives and informal debates (including a limited debate in the press), and directly, in town meetings discussing the draft, and in voting on the draft. Thus, the first principle of the Massachusetts constitution making process is its inclusiveness and participatory character.

Unlike ratifying conventions in the process of creation of the Federal Constitution, the towns were allowed to suggest changes to the draft of the Constitution of Massachusetts. One of the intentions behind such a solution was to avoid the fate of the draft prepared by the General court: it was believed (and, as it turned out, correctly so) that voting clause by clause and possibility to

introduce changes would have prevented the outright rejection of the draft.<sup>68</sup> In the end, these suggestions were not taken into account; also, before even the draft was submitted to the towns, the convention decided not to resubmitted the changed draft. Nonetheless, these decisions, and the one to disregard the returns, seem to be contingent, i.e. resulting from particular historical circumstances during which the whole process took place: the circumstances of crisis and war.<sup>69</sup> As mentioned, members of the convention felt extraordinary pressure to adopt the constitution quickly,<sup>70</sup> also, in principle nothing ruled out the option of resubmission of the changed draft to the people. Whatever the intentions behind the rules, the process embodied (and imperfectly enacted) the principle of constitutional learning: the “division of constitutional labor” provided space for plurality of voices and perspectives to be included in the discussion and alteration of the draft.

Even if the space for constitutional learning was provided for purely pragmatic reasons, it suggests that those who convened the convention, and later the convention itself, recognized their legitimacy problems. These problems resulted partly from the legacy of the (mis)management of the colony and political conflict with the Crown. To the legitimacy problems contributed generally dominant at that time mistrust in delegated powers, motivated by (Lockean in fashion) conviction that the people should delegate only as much power as they deem necessary for the government to perform its functions. Consequently, the convention was popularly authorized twice, and explicitly recognized the conditionality of its mandate. These

68 Morrison, “The Struggle over the Adoption of the Constitution of Massachusetts, 1780,” 362.

69 Ibid., 400.

70 Another possible explanation for the manipulation during the last session of the convention was lack of technological means for ensuring transparency of actions of the representatives to the convention: without mass media, the proper oversight of the works of the convention was significantly more difficult. It is also possible, that as an elected body, regarded popular authorization through voting as only means for authorizing its mandate. Consequently, unlike non-elected bodies, the convention did not have to look for substitute means for ensuring its democratic legitimacy, transparency of being one of them. Obviously, better realization of the principle of popular sovereignty as constituent power would require better transparency of the constitution making process.

moves served to soothe this principal legitimacy problem. In other words, the Massachusetts constitution making process embodied the principle of popular sovereignty *qua* constituent power. According to this principle, legitimacy of every delegated power is conditional upon consent of those who delegated it, or, in other words, the legitimacy of the constituted is depends on the consent of the constituent. The authority rests with the collective and is never fully alienated. In other words, popular sovereignty is in this case enacted not as a power of the unitary macrosubject to impose commands, but as a power to create a political form. Again, imperfect enactment of this principle, especially by disregarding the suggestions for changes in the draft provided by towns in returns, does not invalidate the principle itself, which as every principle provides a normative ideal against which the actual process can be judged, rather than an literal description of the actual process.

Morrison states that in fact two-thirds majority for each article was manufactured and from this he concludes that “it is not far from the truth to state that the constitution was referred to the people for their consideration and detailed vote, the consent of two-thirds being a prerequisite; but ratified by an adjourned session of the Convention, with a fresh popular mandate.”<sup>71</sup> This interpretation, if correct, undermines the my argument concerning the principle of popular sovereignty and suggests that the “dubious” procedure of vote tabulation amounted to manifestation of organ sovereignty latent in the Convention form of constitution making. Although this interpretation rightly points the imperfections and enactment of the principles of constitutional learning and popular sovereignty *qua* constituent power, it underplays the importance of the popular authorization. Without submitting it to towns for deliberations, voting clause by clause, and alterations, the draft would most probably have been rejected.

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71 Morrison, “The Struggle over the Adoption of the Constitution of Massachusetts, 1780,” 354.

A word of explanation is needed why the circumstances of war, referred to in the subsections dedicated to the elements and principles of the constitution making process in Massachusetts, were not considered in the subsections on preconditions. The war undoubtedly contributed to strengthening towns against the central administration. The necessity to maintain unity during the military struggle, feeling of urgency in implementation of a new instrument as soon as possible, combined with the lack of capacities to impose a constitution using a threat of coercion, gave the central administration no other choice but to defer to the demands of towns. Yet, the revolutionary war is not so much a precondition of the particular way in which the constitution making process in Massachusetts developed, but, as a moment of profound crisis and strife, it should be seen as a condition of possibility of the manifestation of constituent power and by extension of constitution making process. In other words, revolutionary war is not important for the constitution making process in Massachusetts as a war, but as a moment of crisis. The particular form of military struggle is a historical contingency, not a precondition, which, however, influenced certain already mentioned developments during the constitution making process, as well as the product of the process – Massachusetts 1780 Constitution had the strongest executive in America at the time.<sup>72</sup>

## **5. Diffused popular sovereignty and the processual Will of the People**

Ideal-typical Convention does not have an organ which embodies popular sovereignty. In the case of the constitution making process of the Federal Constitution, popular sovereignty was

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<sup>72</sup> Ibid., 384.

antinomic, understood alternately in national and federal terms.<sup>73</sup> In this sense it resembled Carl Schmitt's idea of “undecided seat of sovereignty.”<sup>74</sup> Yet, as I argued, Massachusetts constitution making process enacted the principle of popular sovereignty as constituent power. This, however, does not mean that popular sovereignty was embodied in an organ. Rather, I claim, Massachusetts constitution making process requires rethinking of popular sovereignty as diffused popular sovereignty.

Diffused popular sovereignty has to do with the spatial aspect of the process and the topology of it. The spatial aspect refers to quasi-federalism. To recapitulate, at the eve of the Massachusetts constitution making, “The towns were, in fact, the several sovereigns of Massachusetts-Bay; their relation to the General Court closely approximated that of the states to the Congress of the Confederation, with the important difference that there were not thirteen, but almost three hundred of them.”<sup>75</sup> Yet, the difference lies in the bonds of pre-existing unity among the towns of Massachusetts. For example, “A number of objecting towns, apparently regarding themselves distinct bodies politic in their relation to the state, passed a vote to the effect that they would accept the constitution without their favorite amendments if two-thirds of the people voted so.”<sup>76</sup> Morrison dubbed these resolutions superfluous since the convention had not have any intention to leave the dissenting towns out of the state. Yet, he misjudges the action of the towns, since its meaning is not so much separatist as unitarian: these resolutions express precisely the pre-existing unity of these towns with the rest of the state. Another example is the action of the dissenting town of Middleborough, which, outraged by the short period of time given to towns for debates over the draft, small number of copies distributed of the draft distributed to towns,

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73 Arato, “Conventions, Constituent Assemblies, and Round Tables,” 180–181.

74 Schmitt, *Constitutional Theory*.

75 Morrison, “The Struggle over the Adoption of the Constitution of Massachusetts, 1780,” 360.

76 *Ibid.*, 397.

and alleged vagueness of the provisions of the draft, called for other towns to join them in civil disobedience in case the constitution is adopted.<sup>77</sup> There was no separatist call. Thus, in spatial terms, Massachusetts was considered a unity with multiplicity of seats of local authority which only together and simultaneously were the bearers of undivided sovereignty. Such a situation (which is only apparently paradoxical) relates to the topology of the constitution making process which involved both local centers of authority and a “national” representative body (elected by individuals, not towns). The circulation of initiative between these levels of political participation prevented concentration of authority in one place, enabling at the same time supra-local cooperation. The peculiar mode of Massachusetts constitution making did not require banishing the sovereign in order to prevent organ sovereignty and related to it dangers of dictatorship. Rather, the sovereignty remained but spatially diffused, vested at the bottom of the institutional pyramid. Unlike traditional understanding of popular sovereignty, constituent power allows does not require such degree of unity: spatial diffusion and multiplicity of levels allows for internal plurality of the sovereign collectivity. Thus, diffused sovereignty means not only institutional separation of power but also, and predominantly, spatial its disaggregation into multiplicity of sites of participation.

It is worthwhile to take a brief glance at the two distinctive features of the product of the Massachusetts constitution making process, namely the preamble and the bill of rights,<sup>78</sup> and how the relation between the people and the constitution is formulated. The preamble to the Constitution was drafted last, on June 16<sup>th</sup>, 1780. It states that if the institutions governing a body politic fail “to furnish the individuals who compose it, with the power of enjoying, in safety and

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77 Arthur Lord, “Some Objections Made to the State Constitution, 1780,” in *Proceedings of the Massachusetts Historical Society, Vol. L, 1916-1917* (Massachusetts Historical Society, 1917), 54–60.

78 See Introduction.

tranquility, their natural rights, and the blessings of life ... the people have the right to alter the government.”<sup>79</sup> The body politic is described as a “voluntary association of individuals” and a “social compact, by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good.”<sup>80</sup> Moreover, the people is named as the author of the constitution.<sup>81</sup>

The bill of rights recognized that (Article I) “All men are born free and equal, and have certain natural, essential, and unalienable rights”, including the right to life and liberty and to protect them, the right to property, in short, the right “of seeking and obtaining their safety and happiness.”<sup>82</sup> It also recognized rights to justice (Article XI),<sup>83</sup> fair trial (Articles XII and XIII)<sup>84</sup>, the right to bear arms (Article XVII)<sup>85</sup>, and to protection from arbitrary taxation (Article XXIII)<sup>86</sup>, as derivative and implied by those of the Article I. Other articles, however, expressed the principle of popular sovereignty in the language of rights. Article IV states that “The people of this Commonwealth have the sole and exclusive right of governing themselves as a free,

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79 Massachusetts Constitutional Convention, *Journal of the Convention for Framing a Constitution of Government for the State of Massachusetts Bay*, 222; Massachusetts Constitutional Convention, *The Constitution of the State, Adopted 1780, with the Amendments Annexed* (Boston: Richard and Lord, 1826), 3.

80 Massachusetts Constitutional Convention, *The Constitution of the State, Adopted 1780, with the Amendments Annexed*, 3.

81 *Ibid.*, 4.

82 Massachusetts Constitutional Convention, *Journal of the Convention for Framing a Constitution of Government for the State of Massachusetts Bay*, 223; for the formulation in accepted constitution, see: Massachusetts Constitutional Convention, *The Constitution of the State, Adopted 1780, with the Amendments Annexed*, 5.

83 Massachusetts Constitutional Convention, *Journal of the Convention for Framing a Constitution of Government for the State of Massachusetts Bay*, 225; Massachusetts Constitutional Convention, *The Constitution of the State, Adopted 1780, with the Amendments Annexed*, 8.

84 Massachusetts Constitutional Convention, *Journal of the Convention for Framing a Constitution of Government for the State of Massachusetts Bay*, 225; Massachusetts Constitutional Convention, *The Constitution of the State, Adopted 1780, with the Amendments Annexed*, 8.

85 Massachusetts Constitutional Convention, *Journal of the Convention for Framing a Constitution of Government for the State of Massachusetts Bay*, 226; Massachusetts Constitutional Convention, *The Constitution of the State, Adopted 1780, with the Amendments Annexed*, 9.

86 Massachusetts Constitutional Convention, *Journal of the Convention for Framing a Constitution of Government for the State of Massachusetts Bay*, 196; Massachusetts Constitutional Convention, *The Constitution of the State, Adopted 1780, with the Amendments Annexed*, 10.

sovereign, and independent state”<sup>87</sup>. As Willi Paul Adams notes, the common sense in America at the time distinguished between popular sovereignty as constituent power that belonged to the people, and the “supreme delegated power”, i.e. the power of representatives.<sup>88</sup> Accordingly, Article V introduces distinction between the original power that resides “in the people”, and the derived powers, i.e. magistrates and officers of government, who are vested with authority by the people and act as their “substitutes and agents, and are at all times accountable to them.”<sup>89</sup> In Article VII, it is stated that “the people alone have an incontestible, unalienable, and inalienable right, to institute government; and to reform it, alter, or totally change the same, when their protection, safety, prosperity and happiness, require it.”<sup>90</sup> The last Article of the bill of Rights provides for separation of powers between the judiciary, legislative, and executive powers as safeguards against tyranny (Article XXX).<sup>91</sup> In short, the preamble and the bill of rights recognized the people, the collectivity, as the bearer of sovereignty, but translated it into the language of individual rights guarded by separation of powers. Sovereignty, in other words, is undivided, yet it is collective and does not consume the individual as in, for example, Rousseau.

This redefinition of popular sovereignty questions the traditional conception of the Will of the People as unitary and coherent. Yet, the Massachusetts constitution making process, and its temporal aspect in particular, provides inspiration. 1780 Constitution of Massachusetts was

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87 Massachusetts Constitutional Convention, *Journal of the Convention for Framing a Constitution of Government for the State of Massachusetts Bay*, 224; Massachusetts Constitutional Convention, *The Constitution of the State, Adopted 1780, with the Amendments Annexed*, 6.

88 Adams, *The First American Constitutions*, 65.

89 Massachusetts Constitutional Convention, *Journal of the Convention for Framing a Constitution of Government for the State of Massachusetts Bay*, 224; Massachusetts Constitutional Convention, *The Constitution of the State, Adopted 1780, with the Amendments Annexed*, 7.

90 Massachusetts Constitutional Convention, *Journal of the Convention for Framing a Constitution of Government for the State of Massachusetts Bay*, 224; Massachusetts Constitutional Convention, *The Constitution of the State, Adopted 1780, with the Amendments Annexed*, 7.

91 Massachusetts Constitutional Convention, *Journal of the Convention for Framing a Constitution of Government for the State of Massachusetts Bay*, 227; Massachusetts Constitutional Convention, *The Constitution of the State, Adopted 1780, with the Amendments Annexed*, 11.



created in the multistage process which involved also many actors. The constitution was drafted by a responsible committee and debated in the convention; subsequently it was submitted to towns for debates. The most popular way of dealing with this task was a delegation of assessment of the draft to the special committee, and deliberation and voting on its report. Although imperfectly, it enacted the principle of constitutional learning: the draft was subject to the debates in direct-democratic and elected-representative bodies, and in principle subject to change before submitted for final acceptance in the convention. If democratic constitution represents the Will of the People, then this Will is not instantaneous but processual. Constitution making, is a deliberative process of the popular will formation, involving contracts, conflicts, and compromises. The constitution itself, is not, as Carl Schmitt wanted, a decision of the will of the constituent subject, but the product of the *process* of formation of the Will of the People. Processual Will of the People involves negotiation between opinions coming from the multiplicity of loci of public opinion formation, and merging them if possible into one in the temporally extended process of public deliberation. Importantly, the deliberative process in the processual will formation has mainly a transformative character – it is supposed to transform individual opinions in light of the assumed general interest. Obviously, such a process will produce dissenters and those, whose position could not be incorporated in the dominant opinion, but Will's legitimacy stems not from it being the opinion of all or the will of the true People, but from the process of its formation. At the same time, it does not have the sanctity of the instantaneous Will of the People, as the general will in Rousseau has, but is open to contention and further deliberation.

In this paper I analyzed the 1779-1780 constitution making process in Massachusetts in terms of its preconditions, elements, and principles. I argued that its preconditions involved preexisting

institutionalized form of political and civic life, devolution of authority from “national” institutions to those local institutions, and strong ties of cooperation and solidarity between localities – together named “quasi-federalism” – and characteristic of ideal-typical Convention rupture in legality. The elements of the constitution making process itself are double differentiation between legislation and constitution making, multiplicity of stages (including drafting, deliberation, popular input, and in principle redrafting), multiplicity of actors, and multiplicity of levels. The process consisting of these elements enacts principles of participatory inclusiveness, constitutional learning, and popular sovereignty *qua* constituent power. It largely conforms to ideal-typical Convention, but differs from it in the possibility of popular input, constitutional learning, and – most importantly – by non-embodied yet non-antinomic popular sovereignty. I inferred from this that Massachusetts constitution making process implied peculiar understandings of popular sovereignty and the Will of the People. Popular sovereignty is diffused, because it jointly lays with the multiplicity of local centers of authority; therefore it is as sovereignty it is undivided yet collective and impersonal. The Will of the People that corresponds to this conception of popular sovereignty has to be conceptualized as process of deliberative public opinion formation, outcome of which is neither unanimous nor sanctified but open for revisions and contestation.

Nonetheless, my interpretation of the constitution making process in Massachusetts points to the alternative route of constitution making through conventions, the one not taken by the Federal Convention. Federal Convention did not allow for popular input during the process and therefore did not enact the principle of constitutional learning. Hence, it was less democratic and participatory. Historical circumstances partially explain this choice: including popular input requires extending the constitution making process in time and proliferation of deliberation

which might lead to conflicts and strifes – neither of these requirements was desirable in time when the new polity barely secured its independence, struggled with the aftermath of the war, and was afraid of invasion by the revengeful British. This does not mean, however, that this more democratic way of constitution making should be forgotten, because it allows us to construct a critical ideal against which other constitution-making processes might be judged.

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