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*Alternative Visions of American Constitutionalism: Popular Sovereignty and the
Early American Constitutional Debate*

Christian G. Fritz



ARTICLES

Alternative Visions of American Constitutionalism: Popular Sovereignty and the Early American Constitutional Debate

By CHRISTIAN G. FRITZ*

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Overview

American constitutional interpretation and theory remain prisoners of an excessively narrow perspective of the Constitution. Such perspective is limited by entrenched assumptions about constitutional history and a blinding fixation on the federal document. These

* Henry Weihofen Professor of Law, University of New Mexico, and visiting Professor of Law, University of California, Hastings College of the Law. The author gratefully acknowledges the critical readings of earlier versions of this Article by James W. Ellis, Joseph Franaszek, Marlene Keller, James H. Kettner, and Robert F. Williams.

preconceptions suggest the inevitability of the received wisdom about American constitutionalism, constraining the debate and delimiting the range of constitutional ideas. Expanding the arena in which the contemporary play of ideas occurs is conceptually difficult and has met with considerable resistance. A more complete account of the American experience with written constitutions reveals much complexity and forces us to re-evaluate many of our most cherished constitutional beliefs.

This Article explores the revolutionary period and the early national period of American constitutionalism, examining popular sovereignty as the foundation of American governance and political power. It intends to challenge standard perspectives on American constitutionalism, in particular the notion that the United States Constitution was the model constitution and reflected the mature, complete understanding of how to translate revolutionary theory into republican practice. The Federal Constitution was not the culmination of the "correct" understanding of popular sovereignty, but merely one version that ultimately produced a distinct constitutional tradition. An alternative vision, however, existed, survived, and gave coherence to a rather different tradition of constitution-making and revision. The validity and vitality of that tradition has largely been muted by two hundred years of Federal Constitution worship.¹

This Article discusses the tensions between broader and narrower visions of constitutional possibilities and how those two visions formed and re-formed in the early constitutional experience of the states. This early, developmental period of constitutional formation is viewed through the lens of a series of questions that Americans continued to struggle with in constitutional conventions and as they thought about constitutional revision. These questions sprang from popular sovereignty and concerned the role of legislatures in framing constitutions, the necessity of popular ratification, the people who could create constitutions, and the limits, if any, to constitutional change.

Popular sovereignty was the dynamic concept that underlay the American Revolution. By examining rarely utilized sources, one can

1. Joyce Appleby has made a similar point about the Anti-Federalists and the constitutional possibilities they anticipated. See Joyce Appleby, *The American Heritage: The Heirs and the Disinherited*, 74 J. AM. HIST. 806 (1987); see also Richard E. Ellis, *The Persistence of Anti-Federalism After 1789*, in BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY 295, 297 (Richard Beeman et al. eds., 1987); Pauline Maier, *The Road Not Taken: Nullification, John C. Calhoun, and the Revolutionary Tradition in South Carolina*, 82 S.C. HIST. MAG. 1 (1981).

see that the development of American constitutionalism was intertwined with deliberations and perceptions about popular sovereignty.² Indeed, popular sovereignty became the central challenge to Americans in establishing republican governments. Americans were both united in accepting popular sovereignty as the foundational principle of their governments and divided over how to implement the principle. As Americans framed and reframed answers to popular sovereignty, a complex and conflicted American constitutional tradition emerged that departed in many important respects from the conception of constitutionalism embodied in the Federal Constitution.

Moreover, that divergent tradition continued to enjoy a vibrant life long after 1787. State constitutions and state constitution-makers embraced a far more expansive view of popular sovereignty, while the Federal Constitution and its Framers reflected a constrained view of the people's right to alter or abolish their government. The coexistence of these competing perceptions of popular sovereignty hinged

2. This Article emerges from a broader study of the American debate over the implications of popular sovereignty from the Revolution until the end of the nineteenth century. That study analyzes all the extant debates of state constitutional conventions of that period as well as contemporary and scholarly accounts of such conventions. Well over 200 state constitutional conventions have been held since the eighteenth century. See Albert L. Sturm, *The Development of American State Constitutions*, 12 *PUBLIUS* 57, 57-84 (1982).

Because the first published debates appeared only in the 1820s, the work and understandings of prior state constitution-makers must largely be gleaned from sources other than published debates, such as newspaper accounts, private papers, and the often cryptic proceedings and minutes of those conventions. Ironically, state constitution-making during the 1820s and 1830s has received disproportionate attention, given the fact that the best evidence of the thought of delegates—the published debates of the conventions—proliferated at that time. See, e.g., *DEMOCRACY, LIBERTY, AND PROPERTY: THE STATE CONSTITUTIONAL CONVENTIONS OF THE 1820s* (Merrill D. Peterson ed., 1966) [hereinafter *DEMOCRACY, LIBERTY, AND PROPERTY*]. In fact, only 7 of 59 published debates of nineteenth century constitutional conventions were for conventions that took place in the 1820s and 1830s, including Massachusetts (1820), New York (1821), Virginia (1829-1830), Delaware (1831), Michigan (1835), North Carolina (1835), and Pennsylvania (1837).

From the 1840s through the 1860s the debates for 35 conventions were published, usually increasing in sophistication of stenographic accuracy. Seventeen debates were published for conventions that met during the 1870s until the end of the nineteenth century, but what they lacked in numbers they gained in length, as, for example the 12 volumes of Missouri's 1875 convention and the 5 volumes of Delaware's 1896-1897 convention.

The focus on state constitution-makers offers a unique means of tracing not only the results of American constitution-making, but attitudes towards the process of constitutional revision. In most conventions, delegates engaged in a wide range of substantive debates that reflected political partisanship. Nonetheless, the process of drafting or revising constitutions inevitably raised questions about the philosophical dimensions and meaning of American constitutionalism. Although not entirely free from various political agendas, delegates frequently discussed how and why constitutions should be framed and revised in terms that reflected divergent constitutional persuasions shaped by differing perceptions and understandings of popular sovereignty.

on differences over how the people could create and change their written constitutions. The groundwork for distinctive, competing traditions of constitutionalism was well established by the early national period. Branded as revolutionists after the Dorr Rebellion and as secessionists after the Civil War, a significant number of delegates kept alive a constitutional tradition that had emerged with the American Revolution. They maintained the inherent right of the people to revise, insisted on the existence of a constitutional middle ground between revolution and procedurally driven constitutional revision, and persisted in trying to enshrine such guarantees in the constitutions they drafted or revised.

I. Popular Sovereignty as the Basis of Constitutional Law

With the Declaration of Independence, Americans took an irrevocable step in embracing popular sovereignty. The principle that all political power derived from the people became indispensable to the creation of republican governments through written constitutions.³ The centrality of popular sovereignty was the acknowledgement that the people provided the source of authority that made constitutions fundamental. Constitutions could limit and control government because they expressed the will of the people in their sovereign, primary capacity. As such, constitutional law took clear precedence over statutes passed by legislatures functioning in their ordinary capacity as representatives of the people. This distinction between constitutional and ordinary law formed the basis of American constitutionalism. The hallmarks of that constitutionalism were identifying the people as the only legitimate basis of government and translating that theory into a practice of constitution-making.

The procedures and mechanisms used to create and revise constitutions, however, are often confused with popular sovereignty as the basis of constitutional law. The source of constitutions—the will of the sovereign people—and not the manner in which they were created endowed them with their fundamental authority. Eventually, specially elected conventions were routinely used to frame constitutions, accompanied by an increased reliance on popular ratification. A mod-

3. The creation of American "states" implicated the notion of sovereignty in two different senses. The process entailed both a territorial dimension, that is, the state's jurisdiction over a particular region, and a political dimension, that is, the creation of a legitimate government. However, "[t]he revolutionary right to create new governments was a political right. It could not, without totally upsetting property relations, bring with it a right to land or territory. Territorial jurisdiction, like property itself, rested on a title." PETER S. ONUF, *THE ORIGINS OF THE FEDERAL REPUBLIC* 40 (1983).

ern assumption that orthodox constitution-making exclusively entails constitutional conventions followed by ratification has led to a mischaracterization of early American constitutions. Moreover, it has overlooked the vitality of the principle of popular sovereignty in constitutional discourse.

In the midst of struggling to define their republican government and societies, Americans easily agreed on the underlying premise of popular sovereignty. Accepting popular sovereignty, however, did not insure agreement on a series of questions having profound consequences for constitution-making and revision. Indeed, the American Revolution initiated a debate over the implications of popular sovereignty that continued throughout the nineteenth century. That debate proved persistent because popular sovereignty easily lent itself to a variety of interpretations. It could be seen as a principle inviting practical invocation and expansively giving the people an active and direct role in their governments. On the other hand, it could be regarded as merely the theory underlying American governments that envisioned a more constrained and passive role for the people. These conflicting views reflected a struggle over what claims the people had on their constitutions and what power they had to shape a constitutional tradition that ultimately rested on their authority. Beneath these differences lay the relative faith one placed in the capacity of the people to pursue their best interests. The tensions between these opposing views were not resolved when the Federal Constitution incorporated a more passive understanding of popular sovereignty. Beyond the role of popular sovereignty in constitutional theory, various approaches to popular sovereignty proved useful in the political debates over substantive issues in state constitutional conventions. Thus, both theoretical malleability and practical politics helped keep the debate over the implications of popular sovereignty alive throughout the nineteenth century.

The Federal Constitution did not epitomize the natural evolution and mature understanding of American constitution-making since the Revolution. Rather, it only represented an important eighteenth century victory for those who adhered to a narrower view of popular sovereignty that sought to minimize the people's role by channeling their impact through procedures and the legislative process. Likewise, judicial review was not inevitable, but consistent with an effort to narrow the implications of popular sovereignty. The context and process of constitution-making both before and after 1787 reveals the continuing development of more expansive views of the principle of popular sov-

ereignty, including the rejection of a judicial monopoly on constitutional interpretation. The ongoing debate over popular sovereignty compels us to reconsider the inevitability and orthodoxy of what the Federal Framers produced.

An alternative constitutional view of popular sovereignty has also been obscured by the tendency to consider the principle primarily as it relates to the Federal Constitution. The great struggle over the shape of the national government and its relationship to the states was but one important battle over the meaning of popular sovereignty. In successfully asserting that the theoretical basis of the Federal Constitution rested on an "unmediated relationship" between the national government and all American citizens, the authors of *The Federalist* advanced an understanding of popular sovereignty that held enormous consequences.⁴ Not only did their version of popular sovereignty render the sovereign people an arguably impotent "ghostly body politic,"⁵ it also justified the suppression of secession.⁶

The predominant focus on popular sovereignty as it has shaped the federal government has largely overlooked the principle as it has been regarded within the context of state constitution-making. Irrespective of the arguments of Federalists and Anti-Federalists, and the outcome of their struggle, popular sovereignty had a related, but ultimately independent meaning at the state level. Both the outcomes and arguments over what role the people played in constitution-making and revision varied from the better known debates captured at the national level. In the end, both the federal and state constitutions realized the necessity of implementing popular sovereignty.

What revolutionaries said and did reflected their widespread belief that a sovereign people formed the only legitimate basis for governments. Subsequent generations of Americans, not to mention constitutional theorists, have continued to endorse this belief almost without exception.⁷ This consensus, however, naturally raised such

4. See Joshua Miller, *The Ghostly Body Politic: The Federalist Papers and Popular Sovereignty*, 16 POL. THEORY 99, 113 (1988).

5. *Id.*

6. See Kenneth M. Stampp, *The Concept of a Perpetual Union*, 65 J. AM. HIST. 5 (1978). Alternative views of popular sovereignty as the basis of the Federal Constitution suffered by their connection with states' rights arguments in defense of slavery.

7. Despite the debate over the origins and nature of the American Revolution and the Federal Constitution, revisionism has "not undermined in any important way the orthodox view that the United States government derives its legitimacy, in the Lockean sense, from the consent of the governed." James A. Gardner, *Consent, Legitimacy and Elections: Implementing Popular Sovereignty Under the Lockean Constitution*, 52 U. PITT. L. REV. 189, 193 (1990); see also MARSHALL L. DEROSA, *THE CONFEDERATE CONSTITU-*

questions as: How do we make a constitution based on popular sovereignty? Who were *the people*? How could constitutional change occur? And, are there limits to constitutional revision? The implications of popular sovereignty in terms of how constitutions should be created and the people's role in that process were initially addressed by the revolutionary generation. The issues of future revision and constitutional change began to receive attention soon thereafter, when the first constitutions were created in 1776 and 1777.

In basing their governments on the people, the American revolutionaries embraced ideas which necessarily rejected the authority of the King and the British Parliament. Invoking these ideas to effect revolution proved easier than restraining them after revolutionary success. Popular sovereignty, according to the Declaration of Independence, entitled the people to make their own governments and "to alter or to abolish" them whenever governments become destructive of their rightful ends.⁸ This right would endanger the stability of new governments established under the authority of popular sovereignty if

TION OF 1861: AN INQUIRY INTO AMERICAN CONSTITUTIONALISM 7 (1991); DON E. FEHRENBACHER, CONSTITUTIONS AND CONSTITUTIONALISM IN THE SLAVEHOLDING SOUTH 1 (1989); DONALD S. LUTZ, POPULAR CONSENT AND POPULAR CONTROL: WHIG POLITICAL THEORY IN THE EARLY STATE CONSTITUTIONS 38 (1980); Akhil Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043, 1054-55 (1988); Sanford Levinson, "Veneration" and Constitutional Change: James Madison Confronts the Possibility of Constitutional Amendment, 21 TEX. TECH. L. REV. 2443, 2444 (1990). Even a critic who repudiates Amar's theory and calls popular sovereignty an "esoteric notion that is irrelevant to constitutional interpretation" ultimately concedes it to be "a premise of our beliefs" and "an idea that underlies the constitution." David R. Dow, *When Words Mean What We Believe They Say: The Case of Article V*, 76 IOWA L. REV. 1, 26, 35 (1990).

The exception to this consensus occurred late in the nineteenth century and accompanied the Progressive era. One of the few repudiations of popular sovereignty and the necessity of the people's consent comes from the late nineteenth century commentator Christopher Tiedeman at a time when opponents of an expansive view of popular sovereignty were fixated on the dangers of anarchy and socialism. See CHRISTOPHER G. TIEDEMAN, *THE UNWRITTEN CONSTITUTION OF THE UNITED STATES: A PHILOSOPHICAL INQUIRY INTO THE FUNDAMENTALS OF AMERICAN CONSTITUTIONAL LAW* 115-24 (New York, G.P. Putnam's Sons 1890). Bruce N. Ong argues that while popular sovereignty clearly formed the basis of American constitutions framed in the eighteenth century, in the late nineteenth century and early twentieth century it came under attack by Progressives as the true theory of government. Woodrow Wilson, one of the leading Progressives, "attacked the idea of popular sovereignty as it applied to the constituent act of establishing a fundamental law" and "sought to replace that notion of sovereignty with one which emphasized the sovereignty of those who led the state, not those who ratified its charter of power and limitations." Bruce N. Ong, *Constitutionalism and Political Change: James Madison, Thomas Jefferson, and Progressive Reinterpretations* 333, 339 (1985) (unpublished Ph.D. dissertation, University of Virginia).

8. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).