

WESTERN LEGAL HISTORY

THE JOURNAL OF THE
NINTH JUDICIAL CIRCUIT HISTORICAL SOCIETY

VOLUME 21, NUMBER 2 2008

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2008

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Cover photo: Pictured is Laguna Pueblo, where tribal members, dissatisfied with BIA actions, hired attorney Felix Cohen, who was outside the Indian Bureau and was responsible only to the tribe. Indian-attorney contracts are the subject of Jill Martin's article. (Courtesy of Denver Public Library, Western History Collection, Ben Wittick, X-30260)

BOOK REVIEWS

American Sovereigns: The People and America's Constitutional Tradition Before the Civil War, by Christian G. Fritz. New York: Cambridge University Press, 2008; 427 pp.; notes, index; \$80.00 cloth.

Traditionally, constitutional history has traced a path from the 1787 Constitutional Convention through a panoply of Supreme Court decisions and formal amendments to arrive at our modern regime. The antebellum era is, more often than not, marked by heroic monuments: *Marbury v. Madison* (1803); *McCulloch v. Maryland* (1817); *Gibbins v. Ogden* (1824); and—somewhat less heroically—*Dred Scott v. Sandford* (1857). This court-centered history enjoys a wide popular following from a generation raised on the belief that constitutional law is, after all, law. It belongs to the courts and, in the last resort, to the Supreme Court. Any proper constitutional history, or so the belief goes, ought principally to tell the Court's story.

So it might surprise some that Christian Fritz's marvelous new book, *American Sovereigns*, deals seriously with only one court case—*Luther v. Borden* (1849)—and even that one fails to make an impression. In Fritz's formulation, the contours of American constitutionalism were worked out by the people-at-large in a variety of settings, both formal and informal. The primary constitutional question of the antebellum era, Fritz contends, was how the people could act as a collective sovereign.

Practically, this could manifest itself in several ways. The people might revise or amend their constitutions. They might bypass established amendment procedures and call constitutional conventions, effectively nullifying old arrangements. Or they might express their sovereign will by more benign means—for example, by sending instructions to legislators to redress specific grievances or to repeal obnoxious laws. Precisely how the sovereign will could be expressed appropriately was a matter of serious debate in antebellum America. Fritz's choice of constitutional landmarks to plot his narrative demonstrates his sensitivity to this fact. Beginning with Shays' Rebellion (1786), he moves through the Constitutional Convention to a detailed history of the Whiskey Rebellion (1791–94), to the Virginia and Kentucky Resolutions (1798–99), to the Hartford Convention (1814), to the Nullification Crisis (1833), and finally closes with the Dorr Rebellion (1841–42) in Rhode Island.

These disputes, Fritz contends, are appropriate sites for exploration because contending parties were forced to articulate precisely how the people could act in their sovereign capacity. A fundamental belief in the people as sovereign undergirded all parties in these conflicts, but the proper role of the people almost never occasioned agreement. Revolutionary lights (and federal framers) like Alexander Hamilton and George Washington argued strenuously against people coming together in "certain self-created societies" to discuss political matters, and they denounced as illegal the citizens' assemblies in western Pennsylvania that had called for the repeal of the whiskey excise tax. Thomas Jefferson and James Madison, on the other hand, sympathized with such dissent and encouraged the robust exercise of the sovereign will of the people.

Jefferson's victory in the election of 1800 vindicated the people as active participants in democracy, but it did not end the debate. In the 1830s it resurfaced as South Carolina contemplated nullification of a federal statute. Committed Jeffersonians (like President Andrew Jackson) now found themselves arguing that the Union was sacred and perpetual, thus prohibiting certain actions by the people acting as collective sovereigns (such as, for instance, South Carolinians nullifying a congressional tariff). However, the belief in the right of the people to act as sovereigns persisted, and by mid-century something of a constitutional middle-ground had been staked out. Between the poles of strict obedience to established procedure and outright revolution, the people retained the right to alter or abolish unjust governments and to watch vigilantly over their operations. This, Fritz argues convincingly, rather than reverence for procedural amendments, dominated the American constitutional tradition.

Somewhat troubling is the absence in Fritz's book of any mention of slavery. Slavery was central to the antebellum constitutional order, as scholars of the last generation have labored tirelessly to prove. Slavery's absence in *American Sovereigns* disappoints most because its inclusion might well have strengthened Fritz's argument. The territorial disputes over slavery in Missouri (1819–20) and Kansas (1854–60) raised constitutional issues about the people's role as collective sovereign. State authorities in Wisconsin, Ohio, and Massachusetts justified interposition to obstruct the Fugitive Slave Act of 1850 on the grounds that they were expressing the sovereign will of the people.

Such criticism serves only to highlight the richness of the history Fritz seeks to illuminate. This book succeeds in its task of bringing to light a central constitutional issue too often neglected today. It does so in lively style, peppered with compel-

ling stories and incisive analysis. It should be read and enjoyed by academics, judges, lawyers, and anyone else interested in our constitutional history.

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Making Indian Law: The Hualapai Land Case and the Birth of Ethnohistory, by Christian W. McMillen. New Haven and London: Yale University Press, 2007; 284 pp.; maps, notes, index; \$38.00 cloth.

In 1941, when the Supreme Court issued its fifteen-page opinion on *United States v. Santa Fe Pacific Railroad Company*, it not only set the stage for the massive cases presented to the Indian Claims Commission, but it helped mold the discipline of ethnohistory. Felix Cohen and Nathan Margold spent two days in November 1941 arguing the case for the United States, in behalf of the Hualapai Indian Tribe. Just three weeks later Justice William O. Douglas, writing for a unanimous court, included a short statement that would have a far-reaching impact on tribal litigation in the twentieth century. He said the court had concluded that "occupancy necessary to establish aboriginal possession is a question of fact to be determined as any other question of fact." That opinion not only made the Indian Claims Commission possible; it probably made it necessary. The determination of tribal exclusive use and occupancy of aboriginal territory led directly to the development of ethnohistory as a new discipline, combining elements of ethnographic fieldwork and historical research.

The history of this very complicated case has been laid out excellently by historian Christian W. McMillen. In 1866 Congress passed an act granting lands to the Atlantic and Pacific Railroad Company to encourage the construction of a rail line. The railroad was granted alternate sections within forty miles on either side of the railroad's tracks. When the tracks were finally laid through western Arizona by the Santa Fe Pacific Railroad Company, successor to the Atlantic and Pacific, they passed near the southern boundary of the recently established Hualapai Indian Reservation. The Hualapai Reservation had been made permanent by a presidential executive order, issued in 1883, and the Santa Fe Pacific Railroad Company claimed ownership of alternate sections within the forty-mile limit and inside the Hualapai Reservation.

The battle over ownership of those tens of thousands of acres went on for decades, until it was finally settled in the