

AMERICAN SOVEREIGNS: THE PEOPLE AND AMERICA'S CONSTITUTIONAL TRADITION BEFORE THE CIVIL WAR, by Christian G. Fritz. New York: Cambridge University Press, 2008. 440pp. Hardback. \$80.00/£50.00. ISBN: 9780521881883.

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The last decade has witnessed an increasing and sustained analysis of “popular constitutionalism” as a historical and normative object of study in constitutional law and theory. Among legal academics, Larry Kramer’s, “THE PEOPLE THEMSELVES,” and Mark Tushnet’s, TAKING THE CONSTITUTION AWAY FROM THE COURTS, are perhaps the most recent and well-known attempts to give new life to the important role that non-judicial political actors – and even citizens more generally – have played in giving meaning to the constitution. Among political scientists, Keith Whittington’s CONSTITUTIONAL CONSTRUCTION is still the most thorough account of the important role that other American institutions (including Congress, the Executive, and state legislatures) have played in constructing constitutional meaning. More generally, the “regime politics” literature, situated mostly in political science, has amassed an impressive account of constitutional change more broadly in American politics, as it has resurrected and modified Robert Dahl’s singularly influential account of the Supreme Court during the height of the behavioral revolution (Keck 2007; Dahl 1957). These accounts of Constitutional theory, change, and development, though, are not new. Starting with Walter F. Murphy, there has been a small, but nevertheless influential, cadre of scholars like William F. Harris II, James Fleming, Sotirios Barber, and Wayne Moore, who have zeroed in on issues of departmentalism, judicial supremacy/judicial review, and the imperfect relationship between limited government and democracy that characterizes the entire enterprise of written constitutionalism in the United States. All of these accounts and approaches have led to a much greater understanding of the role that a more robust understanding of constitutionalism – as the full panoply of governmental institutions – has played in accounting for political change and development.

In AMERICAN SOVEREIGNS: THE PEOPLE AND AMERICA'S CONSTITUTIONAL TRADITION BEFORE THE CIVIL WAR, Christian G Fritz (Law, University of New Mexico) has contributed a smart and very useful volume that further seeks to delve into the original understandings and subsequent development of how a sovereign American people understood their new political identity during the antebellum period. What is particularly useful is the developmental emphasis of his account that assumes neither a stasis in this understanding of the people’s sovereignty nor a singular explanation of its development. [*247]

Fritz contends that modern scholarship on questions of the “people’s sovereignty” (as opposed to the more infamous moniker of ‘popular sovereignty’) suffers from two distinct and potentially fatal premises that he seeks to correct in AMERICAN

SOVEREIGNS. First is the notion that the people's sovereignty is a fictional construction (Morgan 1989). And second, is the idea of the people's sovereignty that assumes a fixed or "background notion" definition and understanding, mostly attributed to Larry Kramer (2005). These two reigning theories are effectively set aside in Fritz's volume.

Fritz first introduces two related, but distinct, notions of the people's sovereignty that the Founders – and subsequent political generations up to the Civil War – employed in their understanding of what it meant in theory and practice for "the people as the sovereign whose written constitution grants and guides the legitimate exercise of government authority" (p.1) to rule themselves. The first of these two "lost" ideas is an understanding of the people's sovereignty as an "expansive" notion of one that "adhe[re]s to procedures specifying constitutional change" for "determining the will of the sovereign" but is not necessarily bound by those procedures in creating constitutional change or legitimizing it. This perspective is "expansive" because it seems to operate with little to no boundaries that the sovereign people respect in terms of governing themselves under written constitutions (p.3). The second is a "constrained" view that made "procedure" the test of legitimacy. The "people" certainly gave their consent and authority to create written constitutions that would bind themselves at some original point, but the subsequent role of the people was to be a "passive" one in which they authorized only their duly elected representatives to rule in their name. The "constrained" view of sovereignty, however, was not as plastic as we would assume, for this view also condoned change outside of formal procedures (p.4).

Thus, aside from the Founding generation's general agreement that the people were sovereign, these two distinct and often times contentious approaches characterized the antebellum period's approach to sovereignty. Moreover, because these two approaches were contending approaches, Fritz is able to suggest – and show – that there was a considerable, but by no means settled, conception of the people's sovereignty.

The book is divided into three substantive sections with more substantive chapters explaining each section. In Part One, Fritz details the Revolutionary and early state understandings of the people's sovereignty. Initially confronted with the gravity and importance of having the ability to be their own sovereigns, Americans moved from British theory to American practice in accepting and implementing their newly won role as the author of their own political world. However, the only real agreement during this period was the more general notion that the people *were* sovereign, not *how* or *what* that sovereignty looked like. Fritz demonstrates the remarkable degree of diverse understandings of just how this idea was put into practice. In this section he also shows how this new idea of sovereignty, when claimed and asserted by the people, contains within [*248] itself the seeds for controversy and tension. The fact that the people now had the power to create governments by which they would be bound, also implied that they could destroy them as well. As a nascent "people" began to grapple with an equally nascent idea, they soon realized that contending conceptions would have to be reckoned with.

In Part Two, Fritz continues this theme as he argues that, during and immediately after ratification, the Constitutional consensus was still not achieved on the meaning of the people's sovereignty, through a detailed examination of these competing understandings as they played out during the Whiskey Rebellion, the Nullification Crisis, and the Virginia and Kentucky Resolutions. It is in this section, moreover, that Fritz begins to account for the beginning of the end of the two initial perspectives on sovereignty: the "constrained" and "expansive" views. Increasingly during the 1830's and 1840's, sustained discussions of the expansive and constrained views of sovereignty that characterized the Founding of the national and state governments became partly eclipsed by a more general notion that the key constitutional issue in American constitutional thought was the perpetuity of the "Union." This shift, consciously or not, militated against both of the two original conceptions of sovereignty, for if the Union of the states was the key problem (and the key normative goal), then the people's sovereignty was weakened because this more pressing idea became more necessary to resolve.

In Part Three, Fritz shows that even after seventy years of constitutional development, there were still competing and unresolved tensions within the more general notion of sovereignty. He does this through a detailed account of the Dorr Rebellion in Rhode Island in 1842. This section is particularly useful, not only for its consistency with Fritz's overall argument in *AMERICAN SOVEREIGNS*, but also because the Dorr Rebellion is one of the most understudied events in American Constitutional history and development. Fritz clearly shows this, but Chief Justice Roger Taney's subsequent opinion in *LUTHER v. BORDEN* is also important because it became the precedent for the doctrine of "political questions" in American constitutional law, a question that is more than relevant to ideas of popular constitutionalism. This doctrine was not only immensely important for the debates concerning the theoretical foundations of "states" during Congressional Reconstruction, but it also has tremendous import for current debates surrounding political questions, particularly involving voting rights (see, e.g., *BAKER v. CARR*). These debates make it clear that we still have not come to an agreed upon notion of the definition and the contours of the people's sovereignty even as we enter into the twenty-first century.

In the Epilogue, Fritz sets out to distinguish his conception of the multiple understandings of the people's collective sovereignty from other scholars and from the more general current understanding of sovereignty on the modern Court. As stated earlier, Fritz's conception of the people's collective sovereignty differs significantly from that posited by Kramer, because Kramer assumes an almost singular notion of sovereignty. [*249] Fritz smartly argues that competing conceptions of sovereignty did not emerge from one unified set of assumptions but instead grew piecemeal during the antebellum period. Thus, "the constitutionalism that holds sway today is not a natural inheritance but the product of choices Americans made between shifting understandings about a collective sovereign" (p.280).

This argument about the piecemeal development of notions of the people's sovereignty is perhaps the book's greatest strength, as it ties together constitutional theory, law, and larger developmental issues in American politics. However, this argument is potentially the book's greatest weakness, as well. Fritz convincingly articulates the serpentine development of notions of sovereignty in the antebellum period, but we are still left in the dark, as it were, in understanding exactly *how* and *why* these multiple ideas fade away. For example, Fritz intersperses broadly interesting assertions throughout the book, such as "Contrasting eighteenth-century constitutionalism with today's understandings suggests our current theory of what makes government legitimate was not inevitable." It would be nice, though, for Fritz to tell us how he sees subsequent understandings of sovereignty developing, and what they actually were and are now. Moreover, he seems to suggest that the Civil War (and Reconstruction, too?) provides a marker of sorts between an older understanding and our modern one without explaining *what* exactly changed. To be fair, Fritz does begin to acknowledge these issues, but only in a footnote and belatedly at the end of the volume. He seems to suggest that antebellum ideas did in fact remain part of constitutional discourse after the Civil War but only in muted form, and that significant changes in conceptions of sovereignty occurred only after the Progressive movement (p.280, n.9). While these criticisms do not serve a fatal blow to Fritz's overall thesis, they should be addressed.

AMERICAN SOVEREIGNS is a welcome addition to the literature on constitutional theory, legal history, and American political development. While the book is dense, it is nevertheless readable and presents unique criticisms and corrections, specifically concerning the literatures on popular constitutionalism and extra-judicial constitutionalism.

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