



DEFIANT VISIONS OF POWER AND COMMUNITY

America's Forgotten Constitutions

ROBERT L. TSAI

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Preface

This book was conceived on the day I stumbled upon a copy of John Brown's Provisional Constitution and Ordinances for the People of the United States. Eagerly, I pored over its contents, wondering why the abolitionist's imagined community had not gained the same amount of attention as his armed assault on Harpers Ferry. The deeper I delved, the more I realized that the instrument represented the latest in the man's body of writings having political and legal significance: letters, op-eds, organizational bylaws, a declaration of independence, and then, finally, a proposal for a republican form of government. That discovery led me to wonder what other groups of Americans authored constitutions to rule themselves. The documents I collected revealed a great deal about not only substantive disagreements over law and policy but also ordinary people's divergent perceptions of political community and the constitutional process. After investigation and culling, I was left with eight experiments from generative periods in American history. What they tell us about the political tradition—its tensions, competing forms, and suppressed ideas—became the driving inquiry for this book.

Special thanks to librarians and archivists at the Center for Icarian Studies at Western Illinois University, Moorland-Spingarn Research Center Manuscript Division at Howard University, New Hampshire Historical Society, University of Chicago, and University of Nebraska.

Billie Jo Kaufman, William Ryan, and the library staff at American University provided invaluable assistance in tracking down primary and secondary materials. The *Boston College Law Review* offered an early venue to explore John Brown's constitutional theories.

A number of colleagues and friends read one or more chapters closely. Among them: Bruce Ackerman, Michael Barkun, Bethany Berger, Susan Carle, Janie Chuang, Joshua Cohen, Garrett Epps, Christian Fritz, Robert Gordon, James Henretta, Joe Lowndes, Fernanda Nicola, Jeff Powell, Kim Lane Scheppele, Howard Schweber, Mark Weiner, and Steven Wilf. Vanessa Careiro, Chris Datskos, Arija Flowers, Christine Miranda, Brian O'Connell, Brett Shields, and Gillian Thompson provided invaluable research assistance. Three anonymous reviewers for Harvard University Press pushed me to deepen the manuscript's insights, and I am grateful for their suggestions. Faculty workshops at Loyola-Los Angeles School of Law, Rutgers University Law School-Camden, Stanford Law School, University of Connecticut Law School, and University of Washington proved invaluable at crucial junctures. Other productive opportunities to sound out the book's themes took place at the D.C. Area Legal History Roundtable, University of Wisconsin Constitutional Law Discussion Group, the American Democracy Forum's Inaugural Conference on *Popular Sovereignty and American Democracy*, the Workshop on Race, Gender, and Sexuality in Law and Political Development at Ohio University, and the Charles R. Clason Lecture at Western New England School of Law. Dean Claudio Grossman's financial support of research was indispensable. Most of all, Joyce Seltzer's keen eye and commitment to the project made it possible for these American constitutions to reach a wider audience.

In America, the principle of the sovereignty of the people is not either barren or concealed, as it is with some other nations; it is recognized by the customs and proclaimed by the laws; it spreads freely, and arrives without impediment at its most remote consequences.

Alexis de Tocqueville
Democracy in America
1835–1840

America's Forgotten Constitutions

Contents

	Preface	<i>vii</i>
	Prologue	<i>1</i>
1	The Republic of Indian Stream, 1832–1835	<i>18</i>
2	The Icarian Nation, 1848–1895	<i>49</i>
3	John Brown’s America, 1856–1859	<i>83</i>
4	Confederate Anxieties, 1860–1865	<i>118</i>
5	The Sequoyah Convention, 1905	<i>152</i>
6	A Charter for the World, 1947	<i>185</i>
7	The Republic of New Afrika, 1968	<i>218</i>
8	The Pacific Northwest Homeland, 2006	<i>254</i>
	Epilogue	<i>292</i>
	Notes	<i>303</i>
	Index	<i>341</i>

Prologue

At the close of the constitutional convention in September 1787, the men who framed the U.S. Constitution returned home believing they had designed the best possible government under trying circumstances. They were not foolish enough to think that all of a young nation's problems could be solved with the stroke of a pen, yet they pronounced themselves "satisfied that any thing nearer to perfection could not have been accomplished." First among the statesmen's objectives was the fusion of "free and independent" states into a federal republic. Unhappy with the inefficient Articles of Confederation, delegates proposed an energetic government capable of solving national problems. Perhaps most daunting, they dreamed of a single "people of America," bound by one fundamental law and a common destiny.¹

There are many outstanding books that assess the contributions of the towering figures involved in the writing process or tell the story of ratification. More plentiful still are projects that weigh the soundness of the Constitution's original design. Instead of revisiting such questions, this study wrestles with the puzzle of ideological domination over time: how America's constitutional culture developed after the founding. Instilling a sense of self-empowerment and a belief in political possibility through the rewriting of legal texts proved essential to the experiment in self-governance. What happened next was that enough individuals took these ideas seriously and put them into

practice. Multiple groups claimed the right to rule, proposing an array of legal visions. Instead of a single legal text standing intact for all time, citizens subsequently found themselves awash in competing constitutions.

Building a national legal order in the world outside the Philadelphia statehouse could never be as simple as envisioning an ideal government on paper. To the contrary, it proved infinitely challenging to bring together communities with different conceptions of the good life and understandings of their own authority. Not everyone accepted the relentless drive to create one people, the claim of national supremacy, or the prospect of sharing political power with individuals of different experiences and beliefs. Many were displeased to have their fortunes dictated by bureaucrats and judges who did not share their values. They feared the “annihilation” of not only existing governments but also distinctive ways of life. When unrest reached a perfect pitch, a group of Americans expressed their displeasure by authoring a new constitution.

If creating one people out of many was an audacious idea from the start, then the Framers' revolutionary rhetoric created as many fresh problems as it solved. Delegates to the Federal Convention invoked the people's natural right of sovereignty to justify exceeding their mandate in proposing an entirely new constitution instead of recommending modest changes. Supporters called upon the will of the people once again in defending their choice to ignore established protocols for altering the Articles of Confederation. Americans could break the rules, James Wilson explained, because “the supreme, absolute, and uncontrollable power remains in the people,” with the natural consequence “that the people may change the[ir] constitutions, whenever and however they please.” That argument echoed throughout the ratifying debates and eventually carried the day.²

In establishing the American republic, the Framers unleashed a pair of seductive ideas: popular sovereignty and written constitutionalism. One is treated as a God-given right; the other, a cherished means of ordering society. More than the brute fact of shared territory, these ideas became central to American identity and legal practice. The two principles, yoked together during a time of “great national discussion,” would present a conundrum, proving to be both generative and destabilizing over time. According to their logic, the people have

the right to withhold their consent to be governed. Moreover, if all share equally in that most basic right to rule, then anyone can propose a return to the drafting table. But beyond specifying a protocol for amending the 1787 Constitution, the Framers themselves left unresolved precisely when and how the twin ideas can be activated again to overthrow, transform, or subvert the legal order. Successive generations would have to determine the legitimacy of popular methods and concepts. Through trial and error, the people themselves had to decide how a new constitution could be popularly authorized and when, instead, a democratic experiment transgressed the limits of legality.

After the heady days of ratification had passed, the principles of popular sovereignty and written constitutionalism mutated in the hands of ordinary people. Americans found themselves simultaneously enchanted and repelled by what they had wrought. The prospect of starting over at any time was exhilarating, no matter how bleak one's circumstances. Indeed, the pair of ideas inspired an explosion of democratization throughout the United States and later around the world. Even so, citizens who became invested in the 1787 Constitution increasingly believed that popular sovereignty and written constitutionalism were dangerous ideas that themselves had to be reformed. The possibility that a healthy legal order could be eroded through the tools of its creation seemed positively nefarious. If the authors of new constitutions in each generation represented the imaginative, lawbreaking strain of the political tradition, then defenders of the kind of sovereignty articulated in the federal Constitution represented its order-preserving antithesis, carried out through the enforcement of ordinary law and superior force of arms.

To fully appreciate the cultural contest that characterizes the legal process in action, one must investigate the struggles of dissidents who wrote and defended their own constitutions. It requires analysis of the ideas and belief systems of groups that disagreed vehemently with the emerging national constitutional order but whose members, in their own way, remained committed to the rule of law. Many of their experiences have been neglected by academics interested in recounting the triumph of mainstream constitutionalism. But to gain an accurate sense of the tradition, it is crucial to develop a feel for the ideological periphery—or more precisely, the points of friction between conventional ideas about the American Constitution and insurgent theories

of law. These points of contact, redundancy, or contradiction reveal a wealth of information about the nation's legal belief system. The primary task, then, is to chart the development of these popular legal theories and the relationships among them—whether antagonistic or complementary. These conflicts offer evidence that democratic constitutionalism ultimately entails an intellectual and spiritual struggle over ideas, values, and worldviews. Despite the common expectation that a written text can end such battles, in fact a constitution can do little more than shape how conflict unfolds.

The entire process of creating and sustaining a constitution is ideological and social in nature. To be successful, a constitution must shift allegiances, realign sources of authority, and cultivate new identities, mind-sets, and habits consistent with good citizenship. Evidence of such transformations is not found in law books alone. Differing points of view can be heard within institutions carrying the imprimatur of the 1787 Constitution, but far more antagonistic legal perspectives typically are nourished elsewhere. The sources of law can lie far beyond the control and supervision of the authorities, fostered in alternative constitutions and legal materials, popular writings, underground organizations, and the Internet. Creating an oppositional legal culture requires not only the reframing of older ideas and historical experiences but also the development of coherent and responsive theories of law, power, and community. Cogent theories of law, in turn, depend upon brave and resourceful thinkers willing to challenge legal orthodoxy.

Throughout history, a host of colorful characters—squatters and native peoples, slaveholders and abolitionists, black nationalists and white supremacists, socialists and world federalists—have felt left out of the larger project to build a single nation. Recreating life on the margins of society, popular legal theorists within these communities railed against the defects of the legal order. Convinced they would be better off under their own designs, they proposed state governments, breakaway republics, and miniature or worldwide republics not confined by physical boundaries. As resourceful Americans dreamed of the good life, they developed novel theories of community and power through a process of adaptive design, legal writing, and social resistance.

Their constitutions are forgotten in two senses. First, we have left them behind because their proponents lost crucial battles in their own

time. Some ran away; others were driven underground, defeated on the battlefield, jailed, or executed. Those who did not meet a violent fate watched the implosion of their legal visions or lost the public relations war. We tend to discount the possibility that these Americans had compelling ideas, because in their own era they made a bid to rule but ultimately failed. Second, their legal theories have been for the most part rejected and suppressed by mainstream constitutionalism as perilous or wrongheaded. These rule-of-law communities have either been crushed or absorbed. In fact, the survival of the 1787 Constitution—wounded, repaired, reread, but never altogether abandoned—has diminished political possibility along the way. Its remarkable endurance has induced forgetfulness of much that has passed: failed democratic experiments, the ingenuity of alternative designs, certain tactics of direct action—even the inner workings of the ideological aspects of constitutionalism itself.

Despite our collective amnesia about these episodes, the constitutions are worth remembering, analyzed and situated within the American political tradition. Doing so tells us something about the substantive ideas, but even more it reveals the recurring forms that constitutional struggle can take. The usual approach is to study the history of American constitutional law as the creation of a single coherent tradition. From this vantage point, the law is a system of well-settled rules to be applied authoritatively, and thus it is sensible to study only a tiny set of documents. The losers in legal conflicts are relegated to the dustbin of history, their ideas presumed to be defeated for all time. But this is a mistake; defining what is suitable for study based strictly upon major legal achievements glorifies insiders at the expense of outsiders, ignores ideological rifts, and privileges technical authority over living practice. The awkward truth is that the American legal tradition is an untidy phenomenon and constitutional defeats are rarely permanent. Insurgent ideas of law can easily be nurtured in underground settings, only to reemerge in more favorable climates. By studying the U.S. Constitution's ascendance through the eyes of the discontented, it becomes possible to observe the American constitutional tradition at war with itself.³

There are many ways to make sense of a political tradition—one could just as easily study electoral politics, social movements, or litigation. Constitution-writing experiences are valuable because they provide windows into raging ideological battles engaged by ordinary

citizens. Though discontent can surely find other outlets, Americans who dared to resist the tide of history by drafting a constitution rendered some of the most coherent and vibrant theories of sovereignty around. Unlike the typical political movement or party, whose vision might be rendered bland by an appeal to the lowest common denominator or a failure of nerve, proponents of new constitutions presented a holistic diagnosis of the American condition. These dreamers came up with comprehensive plans for a more hopeful future. And wanting desperately to be taken seriously, the people labored to integrate their critiques, experiences, and proposals with the nation's founding narrative, even as they drew sharp differences with a legal regime in place. While successful politics of all sorts must make such appeals, the founders in this volume distinguished themselves through ideological intensity, the integrity of their constitutional vision, and the intricacy of the institutions designed. Each legal experiment is explored on its own terms as a collective intellectual exercise in order to preserve what is unique about a group's behavior while emphasizing the commonalities and departures among experiences.⁴

If Americans wrote so many constitutions, why take a closer look at these eight texts? The constitutions selected for this volume appeared at historically important moments: westward expansion, industrialization and urbanization, America's reckoning with slavery, the forced integration of Indian tribes, the end of the Second World War, the ascendance of civil and human rights. Because these proved to be catalyzing experiences during America's transition from a fledgling republic to a liberal democratic nation, they generated an enormous amount of discord over fundamental values. As snapshots of ideological ferment, the constitutions that emerged from these periods expose major fault lines in our political belief system. The documents present opportunities to excavate ideas and proposals that have been defeated but remain with us, nurtured in underground settings and pockets of discontent. A number of the constitutions—such as the Icarian Constitution of 1850, the Sequoyah Constitution, or the World Constitution of 1947—allow us to contemplate moments of legal transformation often ignored by leading scholars. Significant attention has been paid to the Founding, Reconstruction, and New Deal at the expense of other generative periods, including a burst of nineteenth-century utopianism, the peak of Progressivism, and the

impact of wars on a global scale. The additional episodes explored herein suggest that our constitutional past is best understood not as an explosive founding moment followed by general stability but rather as an ongoing, tumultuous social process punctuated by a succession of ideologically significant events. Other constitutions, like those of Malcolm X's followers or Aryan separatists from the Pacific Northwest, allow a different entry point into already identified moments of legal creativity, such as the black civil rights movement of the 1960s and the conservative countermobilization that took place in the aftermath of civil rights successes. In these stories, one encounters not only the breadth of societal disagreement over theories about the U.S. Constitution but also the intensity of popular defiance.

These crises yield insights about when and how disagreement boils over into concerted action. Each constitution exemplifies defiance of the substantive values of the emerging legal order, permitting investigation of the many points of friction rather than harmony. A constitution-writing event worthy of study must be motivated by the kind of outrage that would prompt vigorous reevaluation of ideas about community and power. That way, the collection of texts sheds light upon the historical development of popular sovereignty as a living practice. For this reason, though Americans wrote countless constitutions for local governments, territories, and civic organizations, most ordinary civic constitutions have been excluded from the discussion. In the main, such texts are used for private ordering and civic participation without composing an alternative theory of peoplehood or repudiating the basic precepts of the national legal order. There are always exceptions, of course, and where routine legal forms were used in transformational ways, such instances merit extended treatment.

The eight constitutions also represent legal instruments at different stages of usage and assimilation. Some, like the Icarian Constitution, were embraced by the people and fully implemented. More numerous were constitutions rejected by officials or put into practice incompletely by followers. Compiling a cross section of constitutions at different stages of legitimacy makes it possible to reach some tentative conclusions about the variety of functions that alternative legal texts might serve in a community. Doing so helps us to understand why dissidents might turn to written constitutionalism even when the odds of long-term success are infinitesimal.

Finally, the episodes illustrate a range of popular tactics in defense of a legal vision. Many subscribe to the ideal of peaceful, orderly legal change embodied in the 1787 Constitution. Yet there are always historical figures who insist upon the right to employ extralegal tactics in the defense of higher law. Revolutionaries from Robert Barnwell Rhett, a slave owner, to Imari Abubakari Obadele, a descendant of slaves, claimed that some level of force was necessary for routine resistance to unconstitutional acts as well as for order-smashing projects. In the name of the people, advocates might nullify unjust laws, organize citizen defense leagues, or forcibly liberate individuals and property. When all else failed, their theories of popular sovereignty might justify more extreme steps, such as secession or warfare.

A few caveats are in order. Not every dissident group wrote a constitution; some chose to express their unhappiness through other means. This study focuses only on transformative constitutions of the discontented. It does not try to systematically test the oft-made claim that Americans have a unique propensity to write constitutions. We would need a larger sample before it could be demonstrated, empirically, that Americans are comparatively more likely to write constitutions than the citizens of other countries. The modest goal here is to trace the contour of legal ideas and the social process by which fundamental law takes hold rather than to predict the probability of choices and outcomes. Americans have authored a variety of constitutions to resist cultural and political developments. The central lines of inquiry consist of why people wrote alternative legal texts in the face of enormous odds, how their theories diverged from the ascendant interpretation of the U.S. Constitution, and what functions these texts served for dissident communities. This is not a quantitative study of all available American constitutions but rather a case study of representative models of American constitutionalism. The chapters reveal the divergent forms of popular sovereignty as ordinary people actually practiced them and the inherent challenges faced by those theories.

Even as they present alternative readings of law, the constitutions in this volume shed light on the ideological triumph of the American Constitution. Taken together, they illustrate the broader intergenerational dynamic by which dissident legal ideas and their constituencies are created, sustained, and either integrated or marginalized. This is part and parcel of the larger process by which the U.S. Constitution