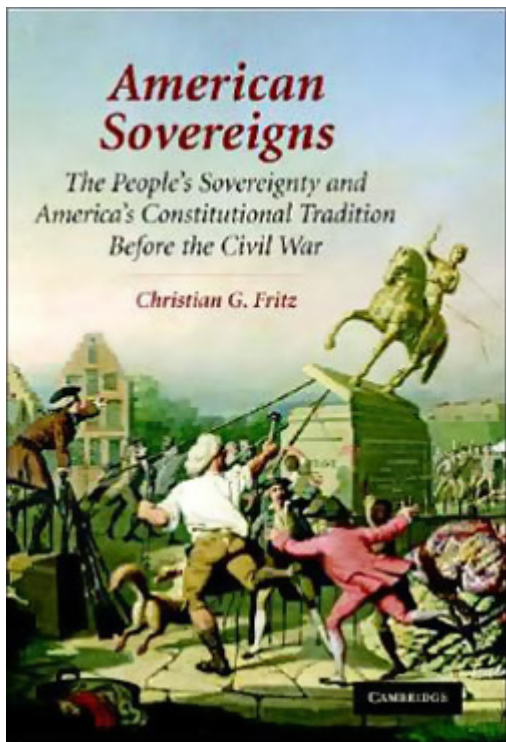
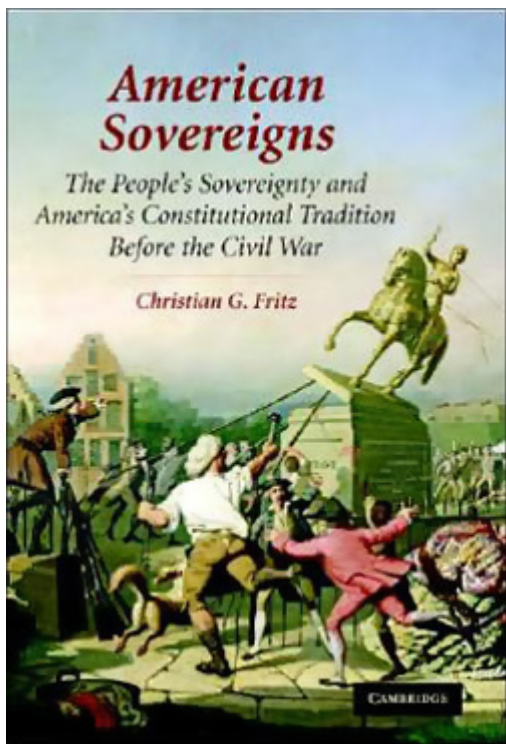


Collective Sovereignty? The Contested Early History of U.S. Constitutionalism



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Christian G. Fritz's *American Sovereigns: The People and America's Constitutional Tradition Before the Civil War* poses a series of challenges for

historians. Its claims are sweeping and it includes just about every major constitutional controversy in the 150 years from the Glorious Revolution in England to the American Civil War (save one, about which more shortly). It incorporates literature from history, political theory, and law. It is bold, creative, and cannot be ignored, yet its overall methodology is problematic. How can historians trained to analyze texts in their actual historical context and to find the contemporary meanings of terms make sense of an essay filled with such free-floating concepts as "the people" or "American constitutionalism"? How can historians, even those willing to engage such an essay on its own terms, appreciate the leaps and bounds in Fritz's book?

American Sovereigns is divided into three parts. In the first part, which covers the Revolutionary period, Fritz says that he wants to see the American philosophy of governance in a new light. Fair enough. Historians are not fazed by revisionism. To accomplish his aim, he borrows liberally from more recent law professors' forays into constitutional history, coming away with a handful of neo-populist and proto-democratic interpretations. If the framers were conservative by our lights (or so the conventional history tells us), one nevertheless can read their words and see in them the seeds of robust democratic egalitarianism. Fritz calls this "American constitutionalism." Prior studies tie that term to the very scholarship he wants to jettison, but Fritz is undaunted by the conventional accounts of the framers and their work in 1787. His answer to conventional accounts is bold: coin terminology. Dump moldy old language like federalism and concurrent powers and replace it with a shiny new one, "collective sovereignty."

In a regime of collective sovereignty, power lies with the people, not with officers or royalty. The people rule because they are, together as a group, the sole source for power. New coinage, however, no matter how bravely and insistently introduced, cannot conceal the debates that raged from 1787 to 1860 over the meaning of a sovereign people. Fritz thus finds himself attempting to argue two mutually opposing theses: the triumph of the principle of the people's collective sovereignty and the persistence of confusion on what those terms meant. If he is right, if he has found the underlying principle in the political thought of the new nation's leaders, he should also have found evidence of consensus. If there was no consensus, then there were competing principles abroad. It is possible to argue, contrariwise, that pre-Civil War constitutionalism was both more fluid and open, especially considering how easily the sovereign people could change their basic laws; and at the same time more restrictive (than Fritz concedes) regarding who "the people" were and what role they were to play in self-government.

For collective sovereignty is not what Americans sought. They wanted a rule of law that was consistent and fair. That is, they wanted their rulers to play by the rules. Because he insists that collective sovereignty was always democratic in its instincts, Fritz gets basic historical facts wrong. For example, he argues that the American Revolution replaced the idea of the sovereignty of the crown with the sovereignty of the people. Both counts are controversial. Many

historians have contended that English constitutionalism had arrived at this conclusion four generations before the Patriots. The settlement of William and Mary in the Glorious Revolution of 1688-1689 in England was accompanied by the notion that parliament was sovereign and that the people's rights were the bedrock of all government. While the Revolutionaries cast off imperial rule, they did not throw off the sovereignty of the crown; they rejected a corrupt parliament and an insensitive king. Even the most liberal of the new state constitutions limited the franchise and protected the property of the better sort. Law remained the real measure of collective sovereignty.

Fritz is having none of this. He raises protests, mob action, and contrary-to-law jury findings to the level of law; the more popular the protest, the more it fits his version of the constitutional law canon. Even the people observing these activities at the time did not describe them as altering the fundamental law. They knew better.

But Fritz's work is not without value. In the second part of the book on the early national period, he does a fine job of problematizing the consensus narrative of constitutional history that dominates law school libraries and curricula. Considered as expressions of American constitutionalism, extra-legal movements like the Regulators in North Carolina and Shays' rebellion in Massachusetts show how rural folks contested the constitutional arrangements of eastern propertied elites. Experiments with constitutionalism in the trans-Appalachian region and in Vermont pre-figured the democratic constitutional reforms of the pre-Civil War era. Though one may quibble with Fritz's use of Jefferson's tolerance for a little revolution now and again as a representative thought when it was a minority view, the portrayal of a contentious early national period is evocative of a more open time in American political life.

In subsequent chapters on the Whiskey Rebellion, the contest between the Federalists and the Republicans in the 1790s, and other key passages on conflicts in the story of American constitutional thought, Fritz makes clear that early national Americans advanced two very different, if not quite evenly matched understandings of collective sovereignty. On the one side were those whom we might label as republicans. They believed that the people were sovereign, but had delegated their powers to state and federal elected representatives. On the other side were the democrats who subscribed to a more open form of politics with more opportunities for popular participation. While the democrats eventually predominated, a triumph registered in the rise of the Jacksonian Democratic Party, both sides adopted the language of American constitutionalism.

In this manner Fritz ties the story of American constitutionalism to the nation's political history. It is good to remember that law and politics then, as now, were bedfellows. Yet even here, one vital aspect of American constitutional life is absent from Fritz's republican/democrat contest. Slavery does not appear in the book's index, and that with good reason. Slavery plays no role in his discussion of the debates over the Constitution (either in the

Constitutional Convention or during ratification) or over the Bill of Rights in the first Congresses. How can one explain these controversies without ever mentioning slavery? A book aimed at placing "the people" at the center of constitutionalism should come to terms with slavery, not least because African-American slaves constituted approximately nineteen percent of the overall population of the United States according to the first census in 1790.

In the next chapters in part two, Fritz explains the differences and similarities between the Virginia and Kentucky Resolutions, the Hartford Convention, and the Nullification Crisis in terms of the doctrine of American constitutionalism known as "interposition," namely that the people as sovereigns within their states could interpose themselves between their government and themselves. Thus, the Virginia and Kentucky legislatures and the Hartford Convention were not acts of rebellion, but constitutional expression of the people's sovereignty. In contrast, people like James Madison argued that South Carolina's reaction to the tariffs of 1828 and 1832 were an improper exercise of this authority.

In his final substantive chapter, which constitutes the whole of part three of the book, Fritz examines how the sovereign people exercised their authority over state, and by implication federal, constitutions. Specifically, he reinterprets the Dorr War that fractured Rhode Island during the 1840s and led to the U.S. Supreme Court case of *Luther v. Borden* (1848). Although the original dispute over representation in the state legislature and the extent of the franchise was nothing new, the People's Convention that formed a constitution for Rhode Island and elected Thomas Dorr to the governorship without the state legislature's permission was. The dispute turned violent and sparked a national debate over whether or not unauthorized individuals could meet and form a new government or alter the provisions of a currently existing one. Though Chief Justice Roger B. Taney upheld the governor's imposition of martial law, and the convictions of Dorr and others, both he and the sole dissenter argued for the doctrine of the people's sovereignty. But even this apparent triumph of his argument presents a dilemma for Fritz: Everyone may have agreed on the principle of collective sovereignty, but there was no consensus on its enactment or enforcement.

In the epilogue, Fritz reminds the reader of his overall purpose: rewriting the history of Americans' understanding of their constitutional law into a story that prefigures modern constitutionalism. Here he joins Akhil Reed Amar, Larry Kramer, and other advocates (for this is advocacy as well as analysis) of a "people's constitution." This perspective contrasts sharply with a court-centered view, an institutional perspective, and what we may term a more conservative approach, a law and order rendering. From the perspective of Fritz and his allies, Daniel Shays and Thomas Dorr were not rebels, but seers, insofar as they stood for a robust understanding that the people had taken the place of the king after the American Revolution. This reworking of American constitutional history has much to teach us even if its narrow focus misses such substantial issues as the effect of the Glorious Revolution and slavery on

American constitutional discourse.