

# America's Unknown Constitutional World



"We the People" once had many ways of exercising their sovereignty besides those ordained and established in the Federal Constitution.



"The Looking Glass for 1787" (click image for explanation)

## Citizen Protests

Indebted farmers in Western Massachusetts had little to show after years of petitioning the legislature for relief from the state's post-revolution fiscal policies. With their appeals unanswered and their economic plight deepening, they began organizing countywide meetings as they had during the Revolution. This time those efforts produced little relief. Finally, on August 29, 1786, some 1,500 farmers crowded the Court of Common Pleas at Northampton, preventing the court from meeting. They did not challenge the court's legitimacy. Rather, the farmers sought a temporary suspension of debt collections to give the legislature time to redress "their grievances."

The Northampton court closing, along with later actions of the farmers, raised the specter of revolution not just in Massachusetts, but across America. The Massachusetts events acquired the name "Shays' Rebellion." They have been cited ever since as one reason for replacing the Articles of Confederation with a new federal Constitution that supposedly saved the country from spiraling into rebellion and discord. Most historical accounts have followed suit, depicting the farmers as the losers in their confrontation with state government and in a larger struggle to determine if "tumultuous meetings" and armed resistance could be legitimate ways for the sovereign people to express their will.



Yet at the time, the political leaders we now call the Founders differed sharply over what the Massachusetts incidents really signified.

John Adams considered the farmers' actions "seditious," even their peaceful conventions and petitions, and referred to the Massachusetts events as an "insurrection." Others, like James Madison, were clearly worried about the "turbulent scenes" in Massachusetts, but did not see them as rising to the level of revolution. Madison came to wonder if the government's reaction to the farmers—including their violent suppression by a state-sanctioned private army—was a harmful overreaction. A few leaders, like Thomas Jefferson, considered the Massachusetts "commotions" a minor inconvenience of rule by a people who had won the Revolution. The Massachusetts incidents reflected the "liberty" Americans now possessed to rock the boat of government on occasion, and a little "turbulence" would not sink it.

In essence, historical and popular understandings of the American constitutional tradition have adopted the contentions of only one side of this debate and its role in bringing about the 1787 constitution. In doing so, these accounts miss much of that tradition's actual history. The Massachusetts farmers were largely vindicated in the aftermath of their so-called rebellion. In the next state election following the "suppression" of the alleged rebels, those supporting forceful measures against the farmers lost control of the governorship and the lower house of the legislature. In this respect, the views of "defeated rebels" turned out to more closely mirror the attitudes of the populace and eventually exercised a strong influence on the direction of policy. That the farmers were as comfortable about expressing the will of the people through direct action as they were in going to the polls was a source of considerable consternation to their opponents.

Understanding why the meaning of the Massachusetts events divided Americans at the time, as well as its significance to America's constitutional development today, requires understanding the constitutional mindset of the Massachusetts farmers and their opponents. It was not only what the Massachusetts farmers were doing, but how they defended themselves that alarmed their opponents. The fact that the farmers justified their actions in constitutional terms galvanized the Americans who framed and later supported the federal Constitution to move in a very different direction. Despite their different views of constitutionalism, the two sides in the 1787 debate both reflected ideas unleashed by the American Revolution.

### **American Constitutionalism's Revolutionary Heritage**

After declaring independence, Americans saw themselves as revolutionaries, but not as rebels. They maintained this distinction because they had exercised a people's collective right to cast off an arbitrary king, as they had George III. Both natural law and English constitutional doctrine gave the colonists a

right to revolt against a monarch's oppression. But in rejecting George III, Americans had no ready replacement with a traditional claim on their loyalty. Few American revolutionaries worried about this. They assumed that the people themselves were the new and rightful sovereign, rather than a monarch. They established new state governments based on written constitutions. In thus implementing the theory of the people as the sovereign, Americans created a new and distinct revolutionary constitutionalism that would prove extraordinarily powerful and difficult to control.

While the theory of the people exercising power as the sovereign was not original to Americans, actually building governments on that foundation was new to world history. Most governments at the time were monarchies or expressions of raw power. Few examples existed of a people deliberately creating their own government. Thus, Americans found themselves in a unique position. As a South Carolina pamphleteer observed, Americans could fashion their own governments because they had freed themselves from "the control of hereditary rulers and arbitrary force."

Written state constitutions adopted in the 1770s expressed Americans' belief that they could, as Thomas Paine explained in *Common Sense*, exercise their "power to begin the world over again." A congressional delegate from Connecticut, Oliver Wolcott, described America's constitution-making in 1776 as a "Real" and not a theoretical expression of the people's will. In a Fourth of July oration in 1778, historian David Ramsay captured the novelty of America's constitutions: "We are the first people in the world who have had it in their power to choose their own form of government." Before the American Revolution, constitutions were "forced on all other nations" or "formed by accident, caprice," or "prevailing practices."

In the setting of the Old World, constitutions often represented a grant of specific rights or liberties to the people by the sovereign. In contrast, as Madison described, the American constitutions were "charters" by the people as the sovereign, granting to government specific powers. Achieving independence confirmed for most Americans the truth of their revolutionary aspirations. The deficiencies that hampered their war effort were overshadowed by the vindication that victory gave to their idealism. Their revolution ushered in governments that made it possible for the people to be the sovereign.

As Colonel Benjamin Hichborn, a Boston lawyer, expressed it in 1777, this sovereignty was expansive. It entailed "a power existing in the people at large, at any time, for any cause, or for no cause, but their own sovereign pleasure, to alter or annihilate . . . any former government and adopt a new one in its stead." There were doubters, of course. In that same year Pennsylvania revolutionary Dr. Benjamin Rush qualified claims "that 'all power is derived from the People.'" This was undoubtedly true, believed Rush, but it did not mean "that all power is seated in the people." They might be the source of power, but the actual exertion of that power on a day-to-day basis should be vested in the government and office-holders the people selected.

Independence intensified the struggle over what it meant that the people were the sovereign. Americans grappled with how they as the collective sovereign could, like a king, speak clearly in one voice on local as well as on national concerns in their large and diverse country. For some, a natural solution to discerning the voice of the sovereign was found in what we might call "proceduralism." One would know the true will of the people only with their use of specified procedures established by the constitution.

But even this commitment to formal legal procedures by its most emphatic advocates was not absolute. The belief that a constitution's requirements for changing the constitution should be observed gave way to the recognition that the government was still the servant of the people as the sovereign. Thus, as the sovereign, a majority of the people could dispense with the procedures required by the constitution for change. As a practical matter, to those believing in this proceduralism, the principle worked in two ways. If the servant of the people—the government—recognized a change the people made without using the established procedures, the legitimacy of the change went unquestioned. But if government refused to validate an alleged change made outside the constitutionally established procedures, the use of those procedures was necessary to legitimize the change and validate the fact that the sovereign had spoken.

One instance of the supple utility of the authority of the people to overcome supposedly mandatory procedures came with the revision of Pennsylvania's 1776 Constitution. Critics of that "radical" constitution were stymied in their efforts for constitutional change. They had been unable to muster the constitutional requirement of a two-thirds vote by a Council of Censors that only met every seven years to consider whether or not to hold a new constitutional convention. By 1790 those critics controlled the legislature and they bypassed the 1776 constitution's requirements for constitutional change by initiating a convention themselves. They argued that "the people" as the sovereign could replace the existing constitution without following its procedures, and called for elections of delegates to a constitutional convention that created a new constitution for the state. This was the same tactic used to replace the Articles of Confederation with the federal Constitution.

### **The Proceduralist Vision of Rule by the People**

Today the idea that we know the will of the sovereign *only* through the exclusive use of specific formal procedures—such as elections and constitutional amendment—seems self-evident. For the revolutionary generation this was not immediately apparent. The recent experience of their successful revolution clearly taught them that proceduralism was not the *only* way to recognize when the sovereign had spoken. Often during the Revolution there was no way that traditionally accepted procedures could lend legitimacy to their

struggle. Proceduralism provided one way, but not the only way, to confirm that the people had expressed their will. But with military victory, applying the principle of the collective sovereign's ability to act directly, without the aid of procedural verification, became a growing source of dispute among America's leaders, and between those leaders and some of their constituents.

To understand this dispute, the modern reader must resist assuming that our ordered world was anticipated by members of the revolutionary generation. Many of their ideas about rule through a constitution—ideas they seriously discussed, considered, and acted upon—are foreign to our present constitutional understandings and near-absolute commitment to proceduralism. Yet, the historical record offers abundant evidence that our constitutional tradition has evolved from many different and earlier constitutional understandings. Appreciating how these ideas gave rise to our present constitutional world requires that we take the past on its own terms to recover a constitutional world that once existed in America.

Today, it is widely assumed that following established procedures and processes is the only basis for legitimate change. From this perspective it seems as if the farmers who closed Northampton's court lacked any legal or constitutional justification. This conclusion erroneously assumes that the proceduralism we take for granted now was the touchstone of constitutional legitimacy in America then. As my book *American Sovereigns* suggests, the exclusive use of specific procedures was not so obvious to earlier generations of Americans.

### **Proceduralism in the Context of Revolutionary Constitutionalism**

Americans of the revolutionary generation had a concept of proceduralism, but one significantly different from the one we accept today. Americans then and for quite some time after the Revolution often followed procedures, such as those specifying how a constitution could be changed. But even when those procedural steps were followed, many Americans regarded them as simply useful, not indispensable. The people might well follow specifically mandated procedures to effect change, but utilizing those procedures was not the only way a collective sovereign could legitimately articulate its will.

Indeed, the farmers participating in court-closings during the summer of 1786 saw themselves as the "body of the people" entitled to exercise their sovereignty. They followed the well-known and widely accepted practice employed during the Revolution when crowds, committees of correspondence, and legally unsanctioned gatherings expressed the will of the people. That such a view was vigorously disputed by Massachusetts authorities and their allies underscores the growing difficulty of recognizing when "the people" acted as the collective sovereign. Colonel Hichborn's 1777 celebration of the power of "the people at large" was consistent with the views of the Massachusetts farmers engaged in the court-closings. Untroubled by his earlier statement, however, Hichborn took

a leading role in suppressing the farmers' movement.

Since the time of the Revolution, ideas drawing upon the authority of the people—frequently reiterated in the constitutions of the 1770s (and in the Massachusetts Constitution of 1780)—were used in increasingly expansive ways. The events in Massachusetts frightened many leaders in post-revolutionary America. For those scandalized by citizens presuming to act as the people in closing courts, the “rebellion” in Massachusetts showed how important it was to rein in misguided constitutional understandings and constrain the meaning of American constitutionalism. The legitimacy of direct action was particularly serious because the events in Massachusetts formed part of a broader pattern of popular protests experienced in post-revolutionary America.

### **The Federal Framers and the People**

Not surprisingly, those events influenced the federal Framers in 1787. Among the principles not expressed in the federal Constitution when it was drafted were statements of the rights of the collective sovereign—their primacy over government, their right to scrutinize governors and their government, and their right to alter or abolish government at will. A general concession that governors were the servants of the people and that the collective sovereign had the right to abolish government was one thing, but it was quite another to place words to that effect in the Constitution where it might be invoked willy-nilly. During the convention, James Madison acknowledged that the collective sovereign could “alter constitutions as they pleased.” It was, after all, “a principle in the [state] Bills of rights,” he noted. Still, popular attempts to exercise that right under state constitutions caused difficulties, as the events in Massachusetts demonstrated. Why tempt fate by including similar language in the federal Constitution?

In fact, while “the people” appeared prominently in the Preamble to “ordain and establish” the federal Constitution and later surfaced to elect members of the House of Representatives, they then disappeared from the text of the Constitution. Their absence formed a striking contrast to their presence in many state constitutions in which the people and their collective existence as the sovereign was repeatedly acknowledged. “The people” reappeared in the federal Bill of Rights added by the first Congress, but without any statements comparable to the wide-ranging expressions of the authority and rights of the collective sovereign that were found in the state constitutions. Instead, James Madison drafted the amendments as narrowly worded prohibitions on certain types of legislation. This focus had the effect of deemphasizing the people's collective rights.

This silence about the people in the federal Constitution did not mean that the federal Framers disputed the idea that the people were the sovereign. In fact, they explicitly invoked the people's authority in submitting the new federal

Constitution for an up-or-down vote even though their convention had only been authorized to revise the Articles of Confederation. The Framers brought about a new federal Constitution in defiance of the procedures that the Articles stipulated for altering its structure by citing the legitimacy that came with the people acting as the sovereign. As Madison put it, the people could “breathe life” into the proposed new Constitution, overcoming any procedural irregularities in its creation.

In this respect, the framing of the federal Constitution was not a singular constitutional event. It was another example of the doctrine of rule by the people. Yet despite their willingness to deploy this doctrine as a political tactic, the Constitution’s supporters were reluctant to acknowledge, much less encourage, the direct authority of the people. The Federalist position simply underscored the tension inherent in the American commitment to the sovereignty of the people. That tension would resurface repeatedly over the next half-century.

### **The Persistence of Revolutionary Constitutionalism**

Many federal Framers—including George Washington—expected the people to assume only a passive role as the sovereign after the adoption of the federal Constitution. These expectations were soon disappointed. Stiff resistance met the attempt to collect the national government’s first tax on a domestic product: an excise on whiskey. Those tax protests illustrate a wider and persistent debate over the people’s relationship to government that the Revolution had not resolved.

That relationship had been at the center of emerging understandings of constitutionalism from the moment Americans acted as the collective sovereign to declare independence and create new governments. Under that conception, government in America was subordinate to the people, and representatives were the people’s agents. As with any principal-agent relationship, the people retained the right to monitor their agents through the constitutional order established under their authority as the collective sovereign. For example, the practice of drafting instructions to guide the actions of legislators—familiar to Americans long before the Revolution—developed a particularly important constitutional significance after independence.

The western farmers who protested the excise tax in the early 1790s embraced a constitutionalism that considered the people entitled—as individual citizens and groups of citizens—to scrutinize the conduct of government. They believed that citizens had the right to petition, instruct, and assemble to criticize government officials as well as to establish groups to question government policies. Yet all these steps—unexceptional from today’s perspective—were at the time branded by supporters of Washington’s administration as “seditious” and constitutionally illegitimate. These later Federalists neutered the



collective sovereign to point of flirting with a transfer of sovereignty from the people to government— and came close to turning America’s revolutionary constitutionalism on its head. These constitutional arguments by opponents of the excise tax protestors are usually overlooked because of a tendency to focus on the later, violent stage of the farmers’ protests and their supposed intent to foment a “Whiskey Rebellion.” In fact, the controversy illustrates a disputed constitutionalism even after the federal Constitution supposedly “settled” the proper relationship of the people to their government.

This disputed constitutionalism persisted at both the state and national level well into the 1840s. For example, in 1842, Rhode Island witnessed another so-called rebellion involving whether a constitution enacted under the people’s authority—but without the consent of the existing state government—had constitutional legitimacy. This “Dorr Rebellion” crystallized America’s competing perceptions of the implications of written constitutions. That struggle pitted those who acknowledged the practical manifestation of the people’s sovereignty against those who increasingly located sovereignty in government itself. Proponents of government sovereignty insisted that the people needed to act with the consent of the existing government and only according to constitutional provisions for change. Anything different would be a revolution based on raw power. Their opponents, on the other hand, insisted that the people’s sovereignty gave constitutional legitimacy to revisions that bypassed existing provisions for constitutional revision and that occurred without the government’s consent.

Contrasting our constitutionalism with that of earlier generations of Americans suggests our current theory of what makes government legitimate was not inevitable. It did not develop in a straight-line from the Revolution to today, as is often depicted in constitutional histories. Controversies over the people as the sovereign and how they would rule were not resolved in 1776, or in 1787, or in the 1790s, or for that matter in the 1840s.

### **America’s Post-Civil War Constitutional Framework**

The Civil War clearly influenced the development of ideas about the authority of the collective sovereign to act independent of government. It seems that many of those earlier constitutional ideas—described in *American Sovereigns*—survived the Civil War. This demonstrates that American constitutionalism—of both the federal and state variety—did not emerge from one defining moment or event. Rather, it grew incrementally over the course of political controversies within the states and at the national level. The constitutionalism that holds sway today is not a natural inheritance but the product of choices Americans made between shifting understandings about the people as a collective sovereign.

As a preliminary study of the post-Civil War period suggests, the legitimacy of

direct action by the people eventually came to be displaced. Ironically, those ideas were rendered beyond the constitutional pale only during the Progressive Era—the period of progressive reform associated with Theodore Roosevelt and persisting into the early 20th century. The Progressives suggested that direct action by the people could be achieved through the device of the initiative and referendum. The image of “the people” making law directly for themselves suggests—at first glance—the exercise of their sovereign authority. Yet, such law-making by the people required strict compliance with legal procedures. This effectively reversed the position taken by farmers closing courts in Massachusetts in 1786 that the sovereign could act independent of legal procedures.

Our adherence to proceduralism today often makes it difficult to understand our forebears’ constitutionalism. Yet we both ground the legitimacy of American government on the consent of the people and their sovereign authority. And we—just as they—continue to struggle with the vitally important question: what does it mean that in America “the people” rule?

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### **Further Reading:**

A highly influential study of early American constitution-making is Gordon S. Wood’s *The Creation of the American Republic, 1776-1787* (1969). In extending Wood’s findings beyond the time frame of his work, scholars have assumed that today’s constitutionalism is directly linked to the Federal constitution. For a critique of that assumption by historians, political scientists, and lawyers, see Christian G. Fritz, “Fallacies of American Constitutionalism,” 35 *Rutgers Law Journal* (2004), 1327-69. Fritz, *American Sovereigns*, examines how Americans struggled over the idea that a collectivity—the people—would rule as the sovereign. Terry Bouton, *Taming Democracy: “The People,” the Founders, and the Troubled Ending of the American Revolution* (2007) and Ronald P. Formisano, *For the People: American Populist Movements from the Revolution to the 1850s* (2008) demonstrate how Americans both before and after the federal Constitution continued to invoke the sovereignty of the people. Larry Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (2004), advances a theory of “popular constitutionalism” that gives the people the responsibility “for interpreting and enforcing their constitution.” The classic study tracing the emergence of the concept of the sovereignty of the people is Edmund S. Morgan, *Inventing the People: The Rise of Popular Sovereignty in England and America* (1988).

**BLOGITORIAL NOTE: Presenting an article that I commissioned a little too late to go through the full Common-Place production process, but still wanted to be part of the extended Politics Issue here on the blog. I think readers will find it one of the most original and illuminating pieces in the whole issue, and I am grateful to Prof. Chris Fritz for turning this out in record time and in such fine fashion. For another aspect of “popular constitutionalism,” see Ray Raphael’s article on the doctrine of instruction elsewhere in the issue and my essay on freedom of the press posted here a few weeks ago, a longer variant of one published in Pennsylvania Legacies. – JLP**

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