

The Constitutional Legacy of the American Revolution

Prof. Christian G. Fritz

Interdisciplinary Summer Workshop for College Instructors

August 3-7, 2009

Santa Barbara, California

*Workshop participants received a reader of course materials containing selected documents and portions of Prof. Fritz's *American Sovereigns: The People and America's Constitutional Tradition Before the Civil War*.

Mon. Aug. 3

Introduction (Course Materials pp. 1-3)

The Conventional Historiography of American Constitutionalism (CM pp. 4-85):

Christian G. Fritz, "America's Unknown Constitutional World," 9 *Common-Place* (Oct. 2008).

Willi Paul Adams, *The First State Constitutions: Republican Ideology and the Making of the State Constitutions in the Revolutionary Era* (1980), 63-66.

Jack Rakove, "Thinking Like a Constitution," 24 *Journal of the Early Republic* (2005), 1-26 (excerpt pp. 16-19).

Gordon S. Wood, *The Creation of the American Republic, 1776-1787* (1969), 273-82.

Pennsylvania 1776 Bill of Rights

Virginia 1776 Bill of Rights

[Thomas Tudor Tucker] Philodemus, *Conciliatory Hints: Attempting, by a Fair State of Matters, to Remove Party Prejudice* (Charleston, 1784), 616-18, 626-30.

Christian G. Fritz, "Fallacies of American Constitutionalism," 35 *Rutgers Law Journal* (2004), 1327-1369.

Before exploring the revolutionary constitutionalism unleashed by the American Revolution, it is necessary to step back and appreciate the conventional story of American constitutionalism. Part of that story entails the preeminence of the Federal Constitution (and what helps account for an equation of that Constitution and "America's" constitutional tradition). Another part of that story entails implicit but widespread assumptions about proceduralism, the nature of constitution-making, and the natural logic of judicial review.

Pennsylvania's and Virginia's 1776 constitutions and Tucker's *Conciliatory Hints* are three contemporary documents that take on new meaning and significance if examined *without* those modern assumptions.

Tues. Aug. 4

The collective sovereign and American Constitutionalism (CM pp. 86-185):

Christian G. Fritz, *American Sovereigns: The People and America's Constitutional Tradition Before the Civil War* (2008), 1-79.

Massachusetts 1780 Bill of Rights

Provisional Constitution of Frankland (1785), 1 *American Historical Magazine* (1896), 51.

Pennsylvania 1790 Bill of Rights

How does the collective sovereign act: as the sovereign, the ruler, and the ruled? (CM pp. 186-242):

Fritz, *American Sovereigns*, 80-116.

William Whiting, *Some Remarks on the Conduct of the Inhabitants of the Commonwealth of Massachusetts in Interrupting the Siting of the Judicial Courts in Several Counties in that State: To Which is Added an Appendix Extracted from the Antient Romas History* [December 1786] 140-159 in Stephen T. Riley, 66 *Proceedings of the American Antiquarian Society* (1957), 140-59.

This material sets out the case for the existence of an understanding of revolutionary constitutionalism that suggests a different assessment of the period of constitution-making *before* the Federal Constitution.

The material on pages 99-134 lays out this constitutionalism in a general way and pages 186-222 explore the application of these ideas during the so-called Shays Rebellion in Massachusetts in 1786 and 1787 when that constitutionalism was invoked and disputed. The text of Massachusetts' 1780 constitution (pp. 168-172) and Dr. Whiting's tract (pp. 223-242) are again contemporary documents that yield a meaning and significance at odds with our modern assumptions about constitutionalism.

The chapter on the early determinist movements (pp135-167) suggests the widespread presence and utilization of the ideas and implications of a revolutionary constitutionalism even at the grassroots level and on remote frontiers.

Wed. Aug. 5

Overlapping collective sovereigns: the people of a state and the people of the United States (CM pp. 243-284):

Fritz, *American Sovereigns*, 117-152.

Amendments to the Draft Federal Constitution from the Virginia and New York Ratifying Conventions

How does the national collective sovereign act: the relationship between the people and the national government? (CM pp. 285-323):

Fritz, *American Sovereigns*, 153-189.

George Washington's Proclamation, Sept. 15, 1792.

Washington's *Farewell Address*, Sept. 19, 1796 (paragraphs 16-17).

Handout:

David Thomas Konig, "Why the Second Amendment Has a Preamble: Original Public Meaning and the Political Culture of Written Constitutions in Revolutionary America," 56 *UCLA Law Rev.* (2009), 1295-1342.

In our morning session Professor Konig will offer a presentation drawn from his recent work seeking to provide a historical context for the debate generated over the U.S. Supreme Court's recent opinion in *District of Columbia v. Heller* and the meaning of the 2nd Amendment. His article takes seriously the interpretative significance of the concept of "original public meaning" that figures prominently in that decision. However, by examining new scholarship on the Founding and the early Republic, particularly on the role of the public in constitutional politics, Professor Konig finds a rather different common meaning shared by the public than that advanced by the majority opinion.

The afternoon session will allow us to explore the "fit" and interplay between Professor Konig's findings in the historical context of *Heller* and the course materials that focus on the similar time period, namely the framing of the Federal Constitution and the exploration of the relationship between "the people" and their national government in the 1790s as illustrated by the events surrounding the so-called Whiskey Rebellion.

Thurs. Aug. 6

A national collective sovereign in tension with the value of the Union (CM pp. 324-391):

Fritz, *American Sovereigns*, 190-234.

Kentucky Resolutions, Jefferson's Draft, pre-Oct. 4, 1798 [Jefferson, *Papers*,

XXX:536-43].

Kentucky Resolutions, (Adopted by Kentucky General Assembly), Nov. 10, 1798 [Jefferson, *Papers*, XXX:550-56].

Virginia Resolution, Dec. 21, 1798 [Madison, *Papers*, XVII:188-91].

Madison's "Report of 1800," Jan. 7, 1800 [Madison, *Papers*, XXX:307-12, 347-50].

Handout:

Harry Scheiber, "The Transportation Revolution and American Law: Constitutionalism and Public Policy," in *Transportation and the Early Nation* (Indiana Historical Society, 1982), 1-29.

Harry Scheiber joins us for a conversation about questions of constitutionalism in the context of the Federal Constitution—including what light the episodes of the Virginia and Kentucky Resolutions, the Hartford Convention, and Nullification shed on such questions. Those episodes clearly also involved constitutional questions implicating the nature and understanding of federalism—a topic that Professor Scheiber has extensively studied, including his chapter in *Transportation and the Early Nation*.

Fri. Aug. 7

Is there an American consensus on the collective sovereign before the Civil War? (CM pp. 392-437):

Fritz, *American Sovereigns*, 235-276.

The "People's Constitution" of Rhode Island (Bill of Rights) (1841).

What happened to the collective sovereign after the Civil War? (CM pp. 438-462):

Fritz, *American Sovereigns*, 277-301.

Handout:

Edited version of *Marbury v. Madison* in Gerald Gunther and Kathleen M. Sullivan, eds., *Constitutional Law* (13th ed., Foundation Press, 1997), 3-11.

In our morning session Dean Larry Kramer will offer a presentation and exegesis of one of the most famous cases in American constitutional history: John Marshall's U.S. Supreme Court opinion in *Marbury v. Madison* (1803). Without giving too much away, let's just say that he will suggest that there is more to the case than the place it normally takes in the canon of American constitutionalism.

The issue of judicial review, of course, raises the question of who is entitled to monitor the constitutional order and how the constitutional authority of the people might be invoked. That these questions were still open for many Americans in the period before the Civil War is demonstrated in the events surrounding the so-called Dorr Rebellion and the aftermath of *Luther v. Borden* (1849), the U.S. Supreme Court's response to that episode.

The afternoon session allows us, along with Dean Kramer, to assess the implications of the sovereignty of the people, as part of a wrap-up of the course. If there is some reason to believe that the concept of "the people" had practical meaning for earlier generations of Americans and was not (as we tend today) understood to be mere rhetoric or a fictional construct, then two important questions need to be addressed. First, how does that reality alter the manner in which we tell or understand the history of American constitutionalism. And second, what implication does that history have for the theory of constitutionalism today, the manner in which that history is used by the Supreme Court in its constitutional interpretation, and most broadly the role of judicial review.