The Vitality of the American Sovereign

Todd E. Pettys
University of Iowa College of Law

Follow this and additional works at: https://repository.law.umich.edu/mlr

Part of the Constitutional Law Commons, Law and Society Commons, Legal History Commons, and the Legal Writing and Research Commons

Recommended Citation
Available at: https://repository.law.umich.edu/mlr/vol108/iss6/7

This Review is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.
THE VITALITY OF THE AMERICAN SOVEREIGN

Todd E. Pettys*


The proposition that “the people” are the preeminent sovereign in the United States has long been a tenet of American public life. The authors of the Declaration of Independence characterized the American people’s sovereignty as a “self-evident” truth when announcing the colonies’ decision to sever their ties with Great Britain,¹ the delegates to the Philadelphia Convention in 1787 invoked the people’s sovereignty when framing the nation’s Constitution,² and Americans today exercise their sovereignty each time they cast their ballots on Election Day. Yet what prerogatives, precisely, does the people’s sovereignty entail? In modern America, where neither a bloody revolution nor an entirely new constitution is in the offing, can the people’s sovereignty manifest itself in ways other than through participation in the nation’s elections?

In American Sovereigns: The People and America’s Constitutional Tradition Before the Civil War, Christian Fritz³ aims to recover for his readers a conception of the people’s sovereignty that is far broader than the conception he believes prevails today. Focusing on the period between the Revolutionary and Civil Wars, Fritz argues that numerous events—events that historians often mistakenly regard as unrelated—can be fully appreciated only if one sees them as battles in the larger war between two competing understandings of the people’s sovereignty. The narrow understanding, which Fritz believes ultimately triumphed, holds that the people may influence day-to-day governmental affairs only through elections and other limited mechanisms that elected officials might authorize, and that Article V of the Constitution describes the exclusive methods by which the Constitution may be changed. The broad understanding permits the sovereign people to intervene directly in day-to-day governmental affairs with or

* Professor of Law and Bouma Fellow in Trial Law, University of Iowa College of Law.

1. See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (“We hold these truths to be self-evident, that . . . it is the Right of the People to . . . institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.”).

2. See U.S. CONST. pmbl. (“We the People of the United States . . . do ordain and establish this Constitution for the United States of America.”).

3. Professor of Law, University of New Mexico School of Law.
without elected officials’ consent, and to alter their constitutional arrangements by any means they deem appropriate. With few exceptions, Fritz argues, the broad understanding of the people’s sovereignty has been “lost . . . as a viable principle” (p. 280) and, for all practical purposes, sovereignty today rests in the hands of government officials (p. 298). This, Fritz argues, is regrettable. “The belief in a powerful and direct role for the people as the sovereign is part of America’s historical experience with written constitutions,” he writes, “and should not be ignored” (p. 283).

In Part I, I recount Fritz’s central arguments, elaborating on the two sovereignty models that Fritz identifies and the ways in which he finds those models manifested in historical events. In Part II, I dispute Fritz’s claim that Americans today have essentially ceded their sovereign prerogatives to government officials. Contrary to Fritz’s suggestion, ordinary Americans do still sometimes intervene directly in day-to-day governmental affairs in ways that are unauthorized by their elected leaders, and they do alter their constitutional landscape by means other than those formally authorized by Article V. Even more fundamentally, the American people today reject the more extreme strains of the two models that Fritz describes. Rather, Americans have determined that their long-term interests are often best served by manifesting their sovereign desires through extended interactions with government officials and institutions—interactions that permit the sovereign people to retain ultimate control over their government and their Constitution, but that permit government institutions to retain the credibility and power they need in order to do the people’s work.

I. THE BOOK’S ACCOUNT OF THE SOVEREIGNTY DEBATE

A. Two Competing Models

Fritz contends that two fundamentally different conceptions of the people’s sovereignty competed for Americans’ attachment prior to the Civil War. The first was the narrow view that many Founding-era Federalists favored. This view holds that, having legitimized the Constitution with their consent, the American people now can express their sovereign wishes only through elections and other “government-sanctioned procedures” (p. 3). After voting on Election Day, citizens must limit their involvement in government to activities that can be performed from the sidelines—such as lobbying elected officials and praising or criticizing their conduct—unless the people’s elected leaders invite the people onto the playing field for some brief and limited purpose.

Under this narrow understanding of the people’s sovereignty, moreover, the Constitution remains unchanged until the country alters its constitutional bearings using the amendment mechanisms specified in Article V of the Constitution itself (pp. 4, 135–38, 146–47). The people cannot legitimately amend their fundamental law by any other means. Even here, the country’s

elected leaders play the leading role, because it is only those leaders—either in Congress or in state legislatures—who have the power under Article V to initiate the amendment process.\(^5\) Apart from the task of periodically choosing the people’s representatives, therefore, sovereignty functionally rests entirely in the hands of government officials, and the citizenry at large “has no practical role to play in the operation of government” (p. 298).

Based on his analysis of numerous historical events (ranging, as I describe below, from the battle over debt relief in Massachusetts in the 1780s to the debate over the People’s Constitution in Rhode Island in the 1840s), Fritz contends that many early Americans had a much broader understanding of the people’s sovereign powers. Seen from the vantage point of this second model, the sovereign people are entitled to direct the country’s day-to-day governmental affairs, as well as to alter or abolish—by any means they find appropriate—the constitutional arrangements under which those affairs are conducted (pp. 3–4). “Drafting constitutions during the Revolution . . . led many to expect that as the sovereign they would have an ongoing right and obligation to act,” Fritz writes (p. 22). “Creating written constitutions expressed but did not exhaust the people’s role as the sovereign” (p. 22). On this view, “voting during periodic elections expressed the people’s will in an initial way that did not foreclose other, more direct expressions of the people’s sovereignty” (p. 98). Moreover, although Article V describes ways in which elected leaders may initiate constitutional change, the sovereign citizenry cannot be limited to those formally articulated alternatives (pp. 3–4, 30–31).

Those holding this expansive view in the nation’s first half century found vindication in the manner in which the Constitution itself had been adopted. Although the Articles of Confederation required the unanimous consent of all thirteen state legislatures to approve any change in the Articles’ provisions,\(^6\) the Framers concluded that they were not bound by that procedural requirement (pp. 31, 138–40). Instead, they determined that ratification by nine states’ conventions would be sufficient to install a new constitutional regime.\(^7\) For many, that experience demonstrated that constitutional legitimacy does not invariably require compliance with the lawmaking procedures laid down by one’s predecessors (pp. 146–47). All that the country needs to know is that, by one means or another, the sovereign people have spoken.

Early Americans holding this broad view of the people’s sovereignty faced difficult questions. If the formal ratification of constitutional texts and the choice of elected leaders are not the sole manifestations of the sovereign people’s will, by what other means can the people’s will be expressed? How does the country know when the people have spoken in

---

5. U.S. CONST. art. V (stating that the amendment process begins either when Congress proposes amendments or when Congress, “on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments”).

6. ARTICLES OF CONFEDERATION art. XIII.

7. U.S. CONST. art. VII.
their sovereign capacity, and how can the content of those sovereign expressions be discerned? Fritz finds that many early Americans did not believe it was necessary to answer those questions with absolute clarity. "During their Revolution and for a half-century thereafter," Fritz writes, "Americans were more open to the idea than we are today that a collective sovereign could rule without insisting on institutions or procedures to verify and discern the sovereign's will" (p. 277).

Although he does not develop the argument, Fritz suggests that it was not until the aftermath of the Civil War—when the nation coalesced around the conviction that the Union was beyond the people's power to dissolve—that many Americans finally loosened their attachment to the belief that the sovereign people are always free to determine their own governmental arrangements (pp. 233–34). While even the book's title signals Fritz's belief that the Civil War was indeed the crucial turning point, there is reason to believe he entertained doubts as he brought the manuscript to completion. In the book's closing pages, Fritz drops a footnote suggesting that the broad conception of the people's sovereignty persisted for another half century. Timing questions aside, however, Fritz contends that the narrow view of the people's sovereignty did indeed ultimately triumph and that the broad understanding has long ceased to play a meaningful role in American politics and constitutional scholarship.

B. The Models at Work

In numerous historical events, Fritz finds Americans embracing the broad view of the people's sovereignty by doing far more than merely exercising their power as "the ruled" to express their views about government through petitions, protests, editorials, and the like (p. 7). He sees them invoking powers that he believes modern Americans would find quite foreign: either the power of "the ruler" to intervene in day-to-day governmental affairs when elected officials behave in undesirable ways, or the power of "the sovereign" to fashion entirely new constitutional frameworks by any means the people deem appropriate (pp. 6–7).

Fritz begins his historical narrative with states' constitution-making activities in the years between the Revolution and the adoption of the federal Constitution. Although written constitutions quickly emerged as a way in which the sovereign people could issue "explicit and unilateral orders" (p. 15), ratifying those constitutions "did not exhaust the people's role as the

8. Fritz writes that questions of how and when the broad view died will be "the subject of a future book," but that "[p]reliminary research . . . suggests that . . . many of the constitutional understandings traced in this book appear to have been displaced and rendered beyond the constitutional pale only in the course of the Progressive movement of the early twentieth century." P. 280 n.9.

9. The terms "ruler" and "sovereign" are, of course, closely linked. As Fritz acknowledges, "[t]he different dimensions of the people's authority ha[ve] a natural tendency to blend into one another." P. 8. Fritz uses the term "ruler" to describe occasions when the people attempt to involve themselves in governance matters within the prevailing constitutional framework, and the term "sovereign" to describe occasions when the people attempt to alter the constitutional framework itself.
sovereign” (p. 22). Numerous early state constitutions, for example, acknowledged citizens’ inherent right to “alter or abolish” their constitutional arrangements whenever they wished and by any means they found efficacious (pp. 24–25). It was in that spirit that the Framers of the federal Constitution concluded they were free to disregard the amendment procedures specified in the Articles of Confederation (pp. 30–31).

This belief in the people’s unbounded powers soon came into conflict with the desires of those who were eager to invoke the coercive powers of government institutions. When Massachusetts debtors found themselves heavily burdened by their government-enforced debts and by Massachusetts’s monetary policies in the 1780s, for example, they and their champions (who together styled themselves as “Regulators”) formed county conventions aimed at expressing the sovereign people’s desires on the matters at issue—a step that their opponents, the self-styled “Friends of Government,” regarded as an illegitimate attempt to bypass the people’s elected leaders (pp. 92–94). When relief for the debtors was not forthcoming from the state legislature, crowds of Regulators appeared at the state’s courthouses, hoping to shut down those courts’ debt-collection proceedings and thereby place even greater pressure on state legislators to respond to the debtors’ complaints (p. 100). While the Regulators saw themselves as a legitimate voice of the sovereign people, the Friends of Government saw them as constitutionally illegitimate mobs (p. 101).

Although Massachusetts officials ultimately subdued the Regulators by force, many American leaders concluded that those events demonstrated the need “to temper and constrain the more wide-ranging invocations of the people’s sovereignty” (p. 116). The federal Constitution produced in Philadelphia the following summer reflected that sentiment in numerous ways. The electoral college, the selection of Senators by state legislatures, and the amendment provisions of Article V, for example, all were aimed at forcing commoners to leave the task of governance to political and economic elites (pp. 133–35). “In the end,” Fritz writes, “the federal Constitution, and especially Article V, reflected an expectation that after the sovereign people ratified the new constitution, they would thereafter largely disappear” (p. 138).

Yet the broad conception of the people’s sovereign prerogatives was not easily extinguished. Fritz argues that numerous events over the next half century reflected the continuing tension between the competing ways of understanding the sovereignty of the American people:

*The Whiskey Rebellion:* In the early 1790s, citizens in Pennsylvania and elsewhere resisted a newly-imposed federal excise tax on whiskey (pp. 161–65). When several state legislatures failed in their attempt to instruct their representatives in Congress to oppose the tax, protestors harassed the tax’s
collectors (by tarring and feathering them, for example) in an effort to prevent them from doing their work, and held meetings and conventions throughout the country aimed at expressing the sovereign people's desire that the tax be repealed (pp. 166–70). The tax's opponents believed they were acting as a legitimate voice of the people (pp. 172–73), while the tax's defenders believed that "the people should leave representation to their betters and not second-guess them" (p. 178).

The Virginia and Kentucky Resolutions: Acting as "interposers" between the people and their elected federal leaders, the Virginia and Kentucky legislatures in 1798 sought to alert the sovereign citizenry that the Alien and Sedition Acts were an unconstitutional abuse of the federal government's power, and that the people needed to press hard for those statutes' repeal (pp. 197–201). The statutes' Federalist champions insisted that "the legislatures of Virginia and Kentucky had no business assessing the constitutionality of the acts" and that the task of constitutional interpretation ought to be left entirely to the judiciary (p. 202).

The Hartford Convention: In 1814, legislatures and counties throughout New England sent delegates to a convention aimed at (among other things) resisting federal efforts to gain control of state militias during the War of 1812 (pp. 211–13). While the delegates to the Hartford Convention claimed a right to make their own judgments about the constitutionality and wisdom of the federal government's actions (pp. 213–14), critics sought to affix to the delegates "the enduring stigma of disloyalty and disunion" (p. 217).

The Nullification Crisis: In the early 1830s, leaders in South Carolina claimed that the people of each state had a right to nullify federal laws that they believed were unconstitutional—such as, in this case, a federal law imposing tariffs (pp. 219–22). Critics of South Carolina's position argued that the people of a single state could never claim to be the voice of the nation's sovereign, and that those who wished to redirect the federal government's actions were limited to the lawmaking and Constitution-amending procedures specified in the Constitution (p. 224). James Madison unavailingly tried to strike a middle ground, arguing that the sovereign people had the power to act "outside the 'forms' of the constitution," but could do so only when the people of one state acted collectively with the people of other states (pp. 225–31).

The People's Constitution in Rhode Island: Dismayed by the Rhode Island legislature's repeated refusal to repair defects in the State's 1663 charter, critics of the charter government held a constitutional convention in 1841 (pp. 246–53). The delegates to that convention produced the "People's Constitution," which was quickly ratified in accordance with its own terms, and elections under that constitution were promptly held (p. 254). Those who defended the charter government insisted that the 1841 convention was illegitimate because it had been held without the consent of the existing government and had bypassed the charter's amendment provisions (pp. 245, 254). While awaiting the U.S. Supreme Court ruling that would declare the
battle between the two governments a nonjusticiable political question,"\textsuperscript{11} Thomas Dorr—who had led the effort to adopt the People's Constitution—issued a warning that Fritz likely finds prescient and that brings his historical narrative to a close. Without continual reminders of the sovereign powers they possess, Dorr cautioned, the American people are likely to grow accustomed to the notion that their law-shaping activities must always occur within the narrow confines of established, government-approved procedures, and they thus are likely to forget that they, not their elected leaders, are the nation's true sovereign (p. 275).

II. THE AMERICAN SOVEREIGN TODAY

For a variety of reasons, Fritz's claim that the broad view of the people's sovereignty has perished might initially ring true for many readers. One does not find direct modern counterparts to the formal conventions that early Americans formed, for example, when displeased with the federal excise tax on whiskey, with the federal attempt to take control of state militias, and with the perpetuation of Rhode Island's original charter government. Efforts in the early twentieth century to amend Article V so that citizens could have a direct voice in proposing or ratifying federal constitutional amendments went nowhere, thus ostensibly leaving control of the amendment process entirely in government officials' hands.\textsuperscript{12} With respect to judicial supremacy, it has become commonplace for constitutional scholars to insist upon the need for life-tenured federal judges to protect political minorities from the rights-trampling impulses of hotheaded political majorities and their representatives in the nation's legislative and executive branches.\textsuperscript{13} One thus is not surprised when Fritz contends that the narrow view of the people's sovereignty has triumphed, just as one was not surprised when Larry Kramer observed in 2004 that "skepticism about people and about democracy is a pervasive feature of contemporary intellectual culture,"\textsuperscript{14} or when Roberto Unger wrote in 1996 that "discomfort with democracy" is so prevalent in today's political, judicial, and academic circles that "[f]ear and loathing of the people always threaten to become the ruling passions of this legal culture."\textsuperscript{15}

Yet the American people's perception of their own sovereignty, and their capacity to wield control over the nation's governmental affairs, are remarkably resilient—a point one can miss only if one mistakenly insists that, if the American people do not manifest their sovereignty in one particular

\textsuperscript{11} Luther v. Borden, 48 U.S. 1, 47 (1849).
\textsuperscript{12} See Lester Bernhardt Orfield, The Amending of the Federal Constitution 177–78, 192 (1942) (noting such efforts).
\textsuperscript{14} Id. at 243.
form or fashion, then they have essentially ceded their sovereign powers to government officials. As Fritz acknowledges, the broad view of the people's sovereignty does not demand that the people express their sovereign desires in any particular form (pp. 3–4, 30–31, 98–99). The American people's willingness to allow the practice of assembling in popular conventions to fall into relative desuetude, for example, should not be seen as tantamount to a decision to embrace the cramped view of the people's sovereignty that Fritz believes now prevails. In the eighteenth and nineteenth centuries, many believed that the sovereign people's will could be manifested in ways as informal as the appearance of "public crowds, gatherings, and mobs"—an expression of the people's will was simply "something you knew, recognized, and accorded legitimacy when you saw it" (p. 293). There are very real ways in which that remains true today. To conclude otherwise is to mistake a change of tactics for a change of convictions.

I argue in Section II.A that, at times, modern Americans' claim to sovereignty expresses itself in conduct comparable to that of the Massachusetts Regulators who shut down state courthouses in order to thwart the collection of debts and that of the critics of the federal whiskey tax who physically resisted the federal government's tax-collection efforts. Fritz is simply mistaken when he asserts that "the modern observer" would invariably regard those as "illegitimate acts" (p. 300). I argue in Section II.B that, more frequently, one finds the American people expressing their sovereignty in ways that permit government institutions to retain the credibility and relevance they need in order to help accomplish the sovereign people's objectives, but that permit the sovereign people's will to prevail in the end.

A. Direct Interventions in Governmental Affairs

On February 1, 1960, four African American freshmen from North Carolina A&T College entered a Woolworth's store in Greensboro, North Carolina, seated themselves at the store's whites-only lunch counter, and—when told that the store would stand by its racially discriminatory service policies—politely reported that they intended to stay and to return daily until they had received the same service that white customers received.\(^\text{16}\) By ignoring management's demand that they leave, the four young men knew they were violating the state's trespass laws, but concluded "that not until blacks trespassed would their right to equal service be established."\(^\text{17}\) As the freshmen's supporters rapidly grew in number in the following days, North Carolina's attorney general urged the store's management to have all of them arrested on trespassing charges,\(^\text{18}\) but Woolworth's ultimately chose to desegregate instead.\(^\text{19}\) That incident and others like it across the South

---

17. Id. at 141.
18. Id. at 120–21.
19. Id. at 136.
The Vitality of the American Sovereign helped fuel a civil-rights movement that culminated in sweeping legislative and social changes—changes that, while certainly not curing all of the nation's racial evils, carried the cause of progress a very long way indeed.20

What are we to make of the Greensboro sit-ins and of comparable acts of direct civil disobedience more generally?21 In one respect, of course, they are a form of protest aimed at pressuring lawmakers, business owners, or other actors to adopt the protestors' preferred course of action.22 By breaking the law and agreeing to suffer the consequences, the protestors hope to draw attention to their cause and provoke their leaders to respond.23 Yet the students who participated in the Greensboro sit-ins were doing much more than merely protesting. By engaging in the very conduct that they believed society's laws and norms ought to permit and protect, they were claiming not merely the power to express their views about the legal and social order they desired, but the greater power to play a direct role in constructing it.24 The students and their supporters, in other words, began to live the regime they preferred. As William Chafe puts it, the students and other like-minded law reformers in the 1960s demonstrated that they would not "allow anyone else to define their rights."25 By forging ahead with the construction of a new regime, rather than waiting until they had won the support of those who had been formally elected to positions of governmental power, the Greensboro students and others like them served "as the catalyst that triggered a decade of revolt—one of the greatest movements in history toward self-determination and human dignity."26

In the Greensboro students, one can easily spot the genealogical residue of the Regulators who shut down Massachusetts' debt-collecting courthouses in the 1780s and of the citizens who disrupted the efforts of federal

---


21. By "direct" civil disobedience, I mean to refer to instances in which activists violate one or more of the very same laws to which they object. The Greensboro students objected to a cluster of racially discriminatory laws and social norms, including the state trespass laws that permitted a white store owner to demand that black would-be customers leave the premises because of their race. Such acts of civil disobedience may be distinguished from "indirect" disobedient acts, in which activists violate one law in order to convey a message about some unrelated law or policy (such as when individuals illegally climb a bridge in order to hang a banner protesting nuclear proliferation). See generally CARL COHEN, CIVIL DISOBEDIENCE: CONSCIENCE, TACTICS, AND THE LAW 52 (1971) (distinguishing between direct and indirect acts of disobedience).

22. See, e.g., ELLIOT M. ZASHIN, CIVIL DISOBEDIENCE AND DEMOCRACY 118 (1972) (defining civil disobedience as a "form[] of protest" that involves "a knowing violation of a public norm" and "is nonrevolutionary, public, and nonviolent").

23. See COHEN, supra note 21, at 16 (discussing this aspect of civil disobedience).

24. See Daria Roithmayr, Left(Over) Rights, 5 L. TEXT CULTURE 407, 439 (2000) (stating that the Greensboro sit-ins and other comparable acts were "a transgressive performance of unimaginary proportions, momentarily disrupting the web of social rules and customs and replacing them with evocative glimpses of what formal equality and integration might look and feel like").


26. Id. at 137; see also BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 108 (1991) ("The civil rights movement of the 1950's and 1960's was the most successful act of popular transformation in recent history.").
whiskey-tax collectors in the 1790s. Like their early-American predecessors, the students and their supporters were seeking to accomplish "what voting, coalition-formation, bargaining, and observation of the rules of the game could not." Rather than engage in traditional forms of political persuasion and then defer to the ultimate judgment of elected officials, these activists took matters into their own hands, such that "elections, court decisions, and even legislative victories were the events that punctuated the real ongoing political process." They embraced, in other words, an expansive view of the American people's sovereignty.

The relationship between such acts of civil disobedience and the broad view of the people's sovereignty becomes even clearer when one considers one of the leading arguments against civil disobedience's legitimacy. Opponents of such disobedience commonly contend that, although one might have the right to engage in civil disobedience in repressive regimes, one has no such right in a democracy, where one can make one's preferences known to government officials in numerous lawful ways. "To hold otherwise," those holding this view argue, "would not only undercut legality; it would allow each citizen the right to pick and choose which laws he will obey and thus invite anarchy or chaos." In that argument, one hears unmistakable echoes of the claim made by eighteenth- and nineteenth-century advocates of the narrow view of the people's sovereignty: after choosing leaders on Election Day and engaging in government-approved forms of political advocacy, citizens must defer to their elected leaders' ultimate decisions. The rebuttal to that argument rests squarely on the conviction that sovereignty-claiming citizens in the eighteenth and nineteenth centuries shared: when government leaders are unresponsive, the sovereign people need not restrict their law-shaping activities to government-approved channels.

Of course, no matter what their goals, activists who choose to circumvent unresponsive government leaders usually do not entirely reject those leaders' claims to power and relevance. To the contrary, those activists almost always wish to have their preferences embraced by the appropriate government bodies. The Greensboro freshmen and their supporters across the country, for example, were eager to advance a broad civil-rights agenda in the nation's legislatures and courts. Many of Fritz's activists in the eighteenth and nineteenth centuries desired government officials' embrace, too—the Regulators wanted the Massachusetts legislature to respond to...

27. Burton Zwiebach, Civility and Disobedience 168 (1975) (analogizing such acts of civil disobedience to "the plotting of the American revolutionists").
29. See Zashin, supra note 22, at 229–31 (elaborating upon this argument).
30. Zwiebach, supra note 27, at 148; see also id. at 166–68 (rejecting this argument).
31. See, e.g., Geoffrey C. Hazard, Jr., The Legal and Ethical Position of the Code of Professional Ethics, in 5 Social Responsibility: Journalism, Law, Medicine 5 (Louis W. Hodges ed., 1979) ("[A]ll persons who are seriously concerned with law must entertain the notion of civil disobedience. . . . The law wishes us to accept its imperialism, its claim to the total and preemptive. But we must resist that claim. We must stand outside the law and deny it complete normative sovereignty.").
The Vitality of the American Sovereign

debtors' needs, the activists in Pennsylvania and elsewhere wanted Congress to repeal the whiskey tax, the proponents of the Kentucky and Virginia Resolutions wanted Congress to repeal the Alien and Sedition Acts, and the delegates to the Hartford Convention wanted federal leaders to end their effort to gain control of the states' militias. That desire for legislative, executive, or judicial validation need not be taken as a concession that sovereignty rests in the hands of government officials. Rather, it can be seen simply as an acknowledgment that the most practical way to try to cement one's victories in the battle to articulate and implement the sovereign people's will is to enlist the support of the people's government and its elaborate structures and resources. Once the activists' desires have been satisfactorily embodied in legislation, executive policies, or judicial rulings, those activists can return to their own daily lives, leaving to judges and elected leaders the task of day-to-day governance until activists who style themselves as the voice of the sovereign people again perceive the need to intervene.32

Sovereignty-claiming citizens' interventions in day-to-day governmental affairs are not limited to Greensboro-style acts of direct civil disobedience. For example, although the Supreme Court has insisted that "it is the duty of juries in criminal cases to take the law from the court and apply that law to the facts as they find them to be," jurors nevertheless sometimes exercise their power to acquit criminal defendants whose guilt they believe has been established beyond a reasonable doubt.33 When jurors refuse to apply the law as it has been explained to them by the presiding judge, they are taking the law squarely into their own hands and rendering judgments based on their own uncodified conceptions of justice. Although juror nullification was deemed legitimate by some of the nation's early leaders, political and judicial elites eventually concluded "that under a republic the protection of citizens [lies] not in recognizing the right of each jury to make its own law, but in following democratic processes for changing the law."34 Yet despite the modern charge that jury nullification constitutes an illegitimate form of lawmaking, the practice persists. When jurors do engage in nullification, they plainly are acting upon a broad conception of the people's sovereignty.

Just as in eighteenth- and nineteenth-century America, citizens today can disagree sharply about whether those who take matters into their own hands are legitimately expressing the will of the sovereign people or are illegitimately thwarting the actions of the people's elected representatives.

32. Cf. ACKERMAN, supra note 26, at 40–49 (describing occasions when the sovereign people have cemented constitutional victories by winning the support of elected and judicial officials).
Consider, for example, events in Florida during the controversial presidential election of 2000. When Florida officials began to recount ballots by hand using varying criteria, a number of George W. Bush's supporters (some of them staffers from Capitol Hill, some of them citizens from Florida and elsewhere) appeared at sites where the ballots were being recounted, hoping to disrupt the recount and thereby preserve Bush's apparent victory. If one asks a politically diverse group of people today how they perceived those disruption efforts, one is likely to hear two very different stories. In the eyes of many Al Gore supporters, the interventionists were bullying thugs who were illegitimately thwarting Florida officials' attempt to do their jobs. In the eyes of many Bush supporters, the interventionists were heroically attempting to thwart an illegitimate recount. Where would the interventionists and those who applauded them get the idea that they were entitled to step in when they objected to decisions made by Florida's election officials? Rightly or wrongly, they would get it from the broad view of the people's sovereignty that Fritz mistakenly believes no longer plays a meaningful role in American public life.

B. The Sovereignty Dance

On most occasions, however, citizens choose to operate within the constraints of the nation's officially approved lawmaking procedures. They make that choice for at least two different reasons. The first reason concerns citizens' perception of their individual self-interest, while the second concerns what I describe as the "sovereignty dance," a dance that pairs the people with their chosen leaders in ways that transcend the differences between the broad and narrow conceptions of the people's sovereignty.

First, citizens ordinarily comply with the nation's approved lawmaking procedures because they intuitively recognize that it would be against their interests to strip the nation's legislative, executive, and judicial bodies of the aura of respect and power they need in order to remain effective instruments of the people's will. Each time unhappy citizens circumvent the nation's ordinary lawmaking mechanisms, they risk discrediting the institutions in which those mechanisms are housed and thus risk undercutting their ability to rely upon the power of those institutions in the future. Similarly, if citizens play outside the nation's ordinary lawmaking rules today because they are unhappy with the outcomes that compliance with those rules would like-


37. See, e.g., Paul Krugman, Tea Parties Forever, N.Y. TIMES, Apr. 13, 2009, at A21 (describing those "riots" as "fake grass roots" events that were "actually orchestrated by G.O.P. strategists"); see also Masterson, supra note 36 (reporting some Democrats' charge that "the activists, flown in from around the country, were guilty of intimidation, a violation of the Voting Rights Act").

38. See Masterson, supra note 36 (reporting some Republicans' belief that the activists were exercising "a fundamental American right").
ly yield, they weaken their ability to insist that their opponents play by those same rules when the tables are turned tomorrow.39

Second, and even more fundamentally, the American people have learned that, when they wish to change the status quo, they generally need not choose between either trying to take the reins of government entirely into their own hands or passively hoping that the next round of elections and judicial appointments will produce like-minded leaders. By patiently joining with government officials in the sovereignty dance, the American people can permit those officials to retain the power and relevance they need in order to do the people’s work, but can ensure that the sovereign people’s desires will ultimately prevail.40

The most striking examples of the sovereignty dance may be found in the area of federal constitutional change—the area in which one might initially think citizens are most at the mercy of their elected leaders. On the constrained view of the people’s sovereignty (the view Fritz believes has long prevailed), the nation’s constitutional commitments may be altered only when the people’s elected leaders take the country through the formal amendment process specified in Article V. If that were an accurate description of the American constitutional system, one would expect to find no significant changes in the nation’s constitutional bearings—no changes that are widely, even if not universally, embraced as legitimate—other than those springing from alterations of the nation’s formally ratified constitutional texts. As a description of how constitutional change actually occurs in modern America, however, that account is patently false.41

As Bruce Ackerman recently observed, “Every American intuitively recognizes that the modern [formal] amendments tell a very, very small part of the big constitutional story of the twentieth century—and that we have to look elsewhere to understand the rest.”42 In areas ranging from the dramatic increase in the scope of the federal government’s regulatory power, to the increased power of the president, to the recognition of a right to privacy and other civil rights, to dramatic reforms of the criminal justice system, vast changes have been made in America’s constitutional landscape over the past

39. See Frank H. Easterbrook, Textualism and the Dead Hand, 66 Geo. Wash. L. Rev. 1119, 1122 (1998) (“Someone who loses a legislative battle today accepts that loss in exchange for certainty that next year’s victory on some other subject will be accepted by other losers in their turn.”); Jack Goldsmith & Daryl Levinson, Law for States: International Law, Constitutional Law, Public Law, 122 Harv. L. Rev. 1791, 1836 (2009) (“Political actors and their constituents might not find it in their interests to violate particular constitutional rules if the result will be a breakdown of the larger constitutional game.”).

40. Fritz’s historical narrative actually offers some of the early case studies from which that lesson was ultimately learned: activists who lost their short-term battle to seize governmental power often got what they wanted in the long run. The Friends of Government in Massachusetts were swept out of power in the election following the Regulators’ ostensible defeat, for example, and the Rhode Island government eventually adopted “a new constitutional order that looked very much like the one embraced by the popular ratification of the People’s Constitution.” P. 286.

41. David A. Strauss, Common Law Constitutional Interpretation, 63 U. Chi. L. Rev. 877, 884 (1996) (“Most of the great revolutions in American constitutionalism have taken place without any authorizing or triggering constitutional amendment.”).

century without any provocation from newly ratified constitutional texts.\textsuperscript{43} Although scholars have not yet agreed upon a comprehensive account of how non-Article V amendments are proposed, debated, and ultimately accepted as part of the nation’s constitutional canon,\textsuperscript{44} any credible account will acknowledge that ordinary citizens often play leading roles in the process.

In the modern era, for example, it is often through citizen-led social movements that the status quo is publicly called into question and the possibility of constitutional change is placed—and kept—on the nation’s agenda.\textsuperscript{45} Reva Siegel’s examination of what she calls the “de facto Equal Rights Amendment” provides an illustration.\textsuperscript{46} In the mid-1900s, the National Organization for Women (“N.O.W.”) and affiliated grassroots leaders launched a movement seeking broad-ranging constitutional equality for the sexes.\textsuperscript{47} That movement engaged citizens and government officials in a period of sustained debate, a debate that ultimately prompted the Supreme Court to revamp its equal protection analysis for sex-based classifications.\textsuperscript{48} Article V’s nonexclusivity was underscored by the fact that the N.O.W.’s movement achieved its successes even as the effort to secure formal ratification of the Equal Rights Amendment was ending in failure.

The heart of the sovereignty dance may be found in the period between the placement of an item on the nation’s constitutional agenda (whether by citizens, politicians, or the courts) and the eventual perception of actual constitutional change. During that time, the citizenry, elected leaders, and judges engage in an extended conversation both at the state and national levels, a conversation marked by proposals and counterproposals, actions

\textsuperscript{43} Strauss, supra note 41, at 884 (listing these and other examples).


\textsuperscript{45} See Ackerman, supra note 42, at 1759–60 (stating that constitutional change begins when there emerge “activists, a large body of citizens who are willing to invest enormous time and energy in the pursuit of a new constitutional agenda”); Jack M. Balkin & Reva B. Siegel, Principles, Practices, and Social Movements, 154 U. Pa. L. Rev. 927, 949 (2006) (“Social movements ... can change the meaning of constitutional norms, and thus alter the constitutional legitimacy or illegitimacy of particular social practices.”); Larry D. Kramer, “The Interest of the Man”: James Madison, Popular Constitutionalism, and the Theory of Deliberative Democracy, 41 Val. U. L. Rev. 697, 751 (2006) (“Social movements, different parts of civil society, even individuals may equally launch a campaign based on a novel reading of the Constitution, with the test of validity being only whether they can persuade enough others to embrace or adopt their position.”).

\textsuperscript{46} See Reva B. Siegel, Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA, 94 Cal. L. Rev. 1323, 1366–418 (2006).

\textsuperscript{47} Id. at 1367–68.

and reactions, as citizens and officials signal their desires and intentions and then wait for others to respond. Through their participation in political parties and other organizations, citizens work to install their allies in positions of governmental power and respond to officeholders' behavior, while those same officeholders seek to mobilize like-minded citizens and respond to the behavior of the citizenry. The goal shared by all participants in that ongoing exchange is to propose the synthesis of the nation's constitutional values that ultimately wins the acceptance of the sovereign citizenry.

Citizens also play a powerful role in shaping the culture in which voters', politicians', and judges' values are formed. Women who acted upon reconceived career and family objectives in the 1960s and 1970s, for example, offered new models of womanhood and helped to shape the social norms that ultimately were manifested in the Court's equal protection and privacy rulings. Similarly, by taking their relationships public and winning for themselves an ever-increasing public perception of normalcy, same-sex couples have shaped the culture in ways without which rulings such as Lawrence v. Texas would be difficult to imagine.

The people's control over their government is thus indirect, but nevertheless very real. It ultimately is up to the sovereign people to decide whether to accept any given constitutional synthesis and permit it to "sink deeply into [their] normative consciousness.

---

49. See Alexander M. Bickel, The Supreme Court and the Idea of Progress 91 (Yale Univ. Press 1978) (1970) ("Virtually all important decisions of the Supreme Court are the beginnings of conversations between the Court and the people and their representatives."); Robert C. Post & Reva B. Siegel, Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act, 112 Yale L.J. 1943, 2029 (2003) ("The plain historical fact is that judicial and nonjudicial interpretations of the Constitution frequently coexist and contend for the allegiance of the country."); cf. Balkin & Siegel, supra note 45, at 947 ("Courts arrive in medias res, absorbing the shocks caused by social movements and assisting in the reconstitution of social understandings in the wake of movement struggle.").

50. See Balkin & Levinson, supra note 44, at 1068 ("A key function of political parties is to negotiate and interpret political meanings and assimilate the demands of constituents and social movements; as such, parties are the major source of constitutional transformations.").

51. Robert Post & Reva Siegel, Originalism as a Political Practice: The Right's Living Constitution, 75 Fordham L. Rev. 545, 567 (2006) (describing conservative justices' efforts to "excite the anger, fears, and resentments of conservative constituencies, and thus to fan the fires of political mobilization"). Liberal justices engage in the same practice. See, e.g., Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 923 (1992) (Blackmun, J., dissenting) ("I remain steadfast in my belief that the right to reproductive choice is entitled to ... full protection . . . . And I fear for the darkness as four Justices anxiously await the single vote necessary to extinguish the light.").


55. William N. Eskridge, Jr. & John Ferejohn, Super-Statutes, 50 Duke L.J. 1215, 1217 (2001) (discussing the way in which certain statutes acquire constitution-like status); cf. 2 Bruce Ackerman, We the People: Transformations 29 (1998) (arguing that rigid adherence to Article V would "stifle the expression of constitutional movements that have won the continuing support of
who engages in a series of exchanges with an architect about the design of a new home, with the owner and the architect repeatedly reacting to one another’s contributions to the process, but with the owner holding the ultimate power to choose the final design. It is much the same in the realm of constitutional politics. Politicians and judges are responsible for drafting most of the operative texts in their repeated interactions with the citizenry, but it ultimately is the sovereign American people who decide when an acceptable constitutional settlement has been reached.\footnote{56} This untidy, patience-demanding process is marked by the very same kinds of uncertainties that champions of the broad view of the people’s sovereignty confronted in the eighteenth and nineteenth centuries. Once one moves beyond the confines of Article V, it can be extraordinarily difficult to ascertain at any given moment whether the sovereign people have spoken and, if so, precisely what it is they have said.\footnote{57} In the area of same-sex marriage, for example, the nation’s constitutional conversation is plainly still in progress; in the area of abortion, where it has been more than thirty-five years since the Court decided \textit{Roe v. Wade},\footnote{58} there are many conservatives who insist that a firm constitutional settlement has not yet been reached. As Fritz acknowledges when discussing some of America’s early experiences (p. 277), those uncertainties are simply the price a nation pays when its citizenry rules as the collective sovereign.

Those uncertainties are not mere side effects of the sovereignty dance—they are part of what makes that dance so attractive to the American people. The very fact that one often cannot know with certainty whether the sovereign people have rendered their final judgment on a given matter—and that much about the Constitution’s meaning thus remains both contestable and contested—helps to ensure that a diverse citizenry will remain bound together by the project of interpreting their shared constitutional traditions, and by the hope that the national community might yet turn in the direction that one prefers.\footnote{59} Relatedly, the dance’s polycentrism ensures that the sovereign people will get the benefit of numerous voices and perspectives before settling upon any particular constitutional arrangement. Ronald Dworkin points out, for example, that the courts bring to the nation’s consti-

\footnote{56} \textit{Cf.} ADRIAN VERMEULE, \textit{JUDGING UNDER UNCERTAINTY} 241 (2006) (arguing that courts’ unpopular rulings are rarely “able to withstand sustained majoritarian pressure for more than a generation or so”).

\footnote{57} See Kramer, \textit{supra} note 45, at 751 (stating that the process of amending the Constitution outside Article V “is as undefined and unspecified as anything else that gets decided in the hurly burly of politics and public debate”).

\footnote{58} 410 U.S. 113 (1973).

\footnote{59} See H. JEFFERSON POWELL, \textit{A COMMUNITY BUILT ON WORDS} 213 (2002) ("American constitutionalism can be read as an ongoing proposal to maintain political community in the teeth of, and indeed through means of, robust disagreement.").
tutional debates a valuable focus "on matters of principle" that other governmental actors are unlikely to provide. 60

Perhaps most important of all, engaging in the sovereignty dance with government officials ensures that while government institutions will ultimately yield to sustained manifestations of the sovereign people's will, those institutions are not so susceptible to pressure that they lose their capacity to enforce the people's will against outliers once a constitutional settlement has been at least temporarily achieved. 61 We permit ourselves to be bound by the Supreme Court's unfavorable rulings in the short run, for example, because we believe that, in future constitutional battles, the Court may be a powerful ally. A government institution cannot be trusted to offer our opponents meaningful resistance tomorrow if we do not permit it to provide us with meaningful resistance today. Short-term setbacks at the hands of government officials thus are not incompatible with the people's sovereignty. Those setbacks are simply part and parcel with the people's desire to enjoy the benefits of having robust government institutions over the long run. We don't shove our government institutions to the side when they make a misstep; we take a patient breath and continue to dance.

CONCLUSION

Fritz mistakes the value of his rich historical narrative. His account does not, as he believes, illustrate a lost conception of the people's sovereignty. Rather, it provides readers with a valuable perspective on the challenges that Americans have always faced in trying to rule a vast nation as its collective sovereign. It can be as difficult today as it ever has been to determine whether the sovereign people have spoken and, if so, what it is they have said. Those difficulties are simply inherent in the American constitutional system. The American people's tactics may have changed over the past two centuries, but their overarching objective remains the same. The sovereign people will get what they want in the end.

60. RONALD DWORKIN, FREEDOM'S LAW 345 (1996); cf. LAWRENCE G. SAGER, JUSTICE IN PLAINCLOTHES 202–05 (2004) (arguing that life-tenured judges are more open than elected officials to the claims of individuals who lack money or a powerful political voice).

61. Cf. Goldsmith & Levinson, supra note 39, at 1833 ("Most of the Court's major interventions have been to impose an emerging or consolidated national consensus on local outliers."); Robert Post & Reva Siegel, Roe Rage: Democratic Constitutionalism and Backlash, 42 Harv. C.R.-C.L. Rev. 373, 385 (2007) ("Those who wish to change the content of constitutional law . . . face a dilemma: they must sway courts to their own constitutional values and yet they must also preserve the authority of courts to speak for the Constitution in the name of an independent rule of law.").