

The Vitality of The American Sovereign

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In *American Sovereigns: The People and America's Constitutional Tradition Before the Civil War* (Cambridge University Press, 2008), Christian Fritz argues that there was an ongoing battle in the eighteenth and nineteenth centuries between two competing understandings of the American people's sovereignty. The narrow understanding held that the people may influence day-to-day governmental affairs only through elections and other limited mechanisms that elected officials authorize, and that Article V of the Constitution describes the exclusive methods by which the Constitution may be changed. The broad understanding held that the sovereign people may intervene directly in day-to-day governmental affairs with or without elected officials' consent, and may alter their constitutional arrangements by any means they deem appropriate. Fritz argues that the narrow understanding of the people's sovereignty ultimately triumphed. The broad understanding has been "lost . . . as a viable principle" (p. 280), he writes, and for all practical purposes sovereignty today rests in the hands of government officials.

In this paper, I dispute Fritz's conclusion. 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. Americans have determined that their long-term interests often are 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. DIRECT INTERVENTIONS IN GOVERNMENT AFFAIRS

For an example of citizens' direct intervention in government affairs, consider one of the key moments in the American civil-rights movement. 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

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reported that they intended to stay and to return daily until they had received the same service that white customers received.¹ 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."² 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, but Woolworth's ultimately chose to desegregate instead. That incident and others like it across the South 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.

By breaking the law and agreeing to suffer the consequences, the protestors hoped to draw attention to their cause and provoke their leaders to respond. Yet the students 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. 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."³ 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 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."⁴

In the Greensboro students, one can easily spot the genealogical residue of those whom Fritz cites as exemplars of the broad view of sovereignty, such as the citizens who shut down Massachusetts' debt-collecting courthouses in the 1780s and the citizens who disrupted the efforts of federal 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."⁵ 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

¹ See WILLIAM H. CHAFE, *CIVILITIES AND CIVIL RIGHTS* 112-20 (1980) (describing the encounter).

² *Id.* at 141.

³ *Id.* at 131.

⁴ *Id.* at 137.

⁵ BURTON ZWIEBACH, *CIVILITY AND DISOBEDIENCE* 168 (1975) (analogizing such acts of civil disobedience to "the plotting of the American revolutionists").

political process.”⁶ They embraced, in other words, an expansive view of the American people’s sovereignty.

Sovereignty-claiming citizens’ interventions in day-to-day governmental affairs are not limited to Greensboro-style acts of 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,”⁷ jurors nevertheless sometimes exercise their power to acquit criminal defendants whose guilt they believe has been established beyond a reasonable doubt. 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.

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. 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 reasons.

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

⁶ BARBARA RANSBY, ELLA BAKER AND THE BLACK FREEDOM MOVEMENT 370 (2003).

⁷ *Sparf v. United States*, 156 U.S. 51, 102 (1895).

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 likely yield, they weaken their ability to insist that their opponents play by those same rules when the tables are turned tomorrow.

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 what I call 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 ultimately will prevail.

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 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.

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."⁸ 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 century without any provocation from newly ratified constitutional texts. 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, any credible account will acknowledge that ordinary citizens often play leading roles in the process. In the modern era, for example, it often is 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.

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, politicians, and judges engage in an extended conversation, a conversation marked by proposals and counterproposals, actions and reactions, as citizens and officials signal their

⁸ Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1750 (2007).

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 '70s, 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*⁹ would be difficult to imagine.

The people's control over their government is thus indirect, but nevertheless very real. Consider the property owner 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.

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. Yet those uncertainties 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. 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 constitutional debates a valuable focus “on matters of principle” that other governmental actors are unlikely to provide.¹⁰

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

⁹ 539 U.S. 558, 578-79 (2003) (holding that the states cannot criminalize private, consensual sexual activity between adults of the same sex).

¹⁰ RONALD DWORKIN, FREEDOM'S LAW 345 (1996).

pressure that they lose their capacity to enforce the people's will against outliers once a constitutional settlement has been at least temporarily achieved. 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. We don't shove our government institutions to the side when we believe they have made a misstep; we take a patient breath and continue to dance.

The American people's tactics may have changed over the past two centuries, but their objective remains the same. The sovereign people will get what they want in the end.