

# Texas Law Review

## *See Also*

Volume 94

### Response

#### A Tradition at War with Itself: A Reply to Professor Rana's Review of *America's Forgotten Constitutions: Defiant Visions of Power and Community*

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##### I. Introduction

Let me begin by thanking the *Texas Law Review* for commissioning a review of *America's Forgotten Constitutions* and Professor Aziz Rana for his close and generous reading of my book.<sup>1</sup> Professor Rana delightfully captures what I set out to accomplish in this volume, which is first to recover a set of constitution-writing projects that usually elude the canon of constitutional studies, and second, by virtue of their inclusion, to challenge the dominant view of American constitutional law. Obviously, there are too many such events to tackle in a single book, so difficult selection choices had to be made. In the end, I settled upon eight relatively unknown constitutions that reveal something about the broader political culture found in the United States: some of the ideas, processes, and events that continue to shape legal battles today. In that sense, while the book's order is chronological (in the sense that I deal with each event in the order in which it occurred in historical time), the book's main goal is to explore the alternative constitutional theories developed by American citizens. In particular, I tried to focus the

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1. Aziz Rana, *The Many American Constitutions*, 93 TEXAS L. REV. 1163 (2015) (reviewing ROBERT L. TSAI, *AMERICA'S FORGOTTEN CONSTITUTIONS: DEFIANT VISIONS OF POWER AND COMMUNITY* (2014)).

reader's attention on the multiple forms of sovereignty that a constitution might represent, as well as the different functions such a text might serve a dissident community.<sup>2</sup>

I am gratified that rather than being overwhelmed by the diversity of legal ideas and experiences portrayed in the book, Professor Rana finds himself exhilarated by the messiness that characterizes the views of these citizen theorists. In his words, the constitutional theories of the average citizens "are richly textured and internally complex."<sup>3</sup> These works of angst-filled dreaming offer evidence of recurring grievances of neglected subnational populations and clues as to possible weaknesses in our constitutional system.

Rather than perpetuate the impression that mainstream constitutional law is stable, as if citizens merely internalize the views of public officials like automatons, my account questions whether the expectation of obedience on the part of insiders is warranted by inverting the standard narrative. The protagonists in my book enthusiastically adapt founding ideas and precedents to the problems of the day. They are not always powerless,<sup>4</sup> but many do find themselves lacking political power. But whether these citizens may be counted among the elite or not, their exasperation with the direction of mainstream constitutional law (which I refer to in largely institutional terms as the emergence of a theory of "conventional sovereignty")<sup>5</sup> leads them to conjure ancient origin stories and to invoke first principles to guide an act of political self-creation.<sup>6</sup> If their social standing does not always put them on the periphery, their unorthodox ideological views certainly hold them up for opprobrium and, more important, resistance from the powers that be.

Professor Rana's review beautifully grounds my work in the extant scholarly literature. I allowed myself a broad smile when Professor Rana invoked Richard Hofstadter's work as evidence of the Consensus School. Though Professor Rana would have no reason to know this, I actually had Hofstadter's scholarship in mind as I developed the book, both as a model and a foil. I found worthy of emulation Hofstadter's unparalleled ability to

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2. See ROBERT L. TSAI, *AMERICA'S FORGOTTEN CONSTITUTIONS: DEFIANT VISIONS OF POWER AND COMMUNITY* 5–17 (2014) (laying out the book's chronological organization and its primary goals of inquiry into the multiple forms of popular sovereignty and functions of an alternative constitution).

3. Rana, *supra* note 1, at 1175.

4. For instance, it would be difficult to deny the high social and political status enjoyed by Confederate slaveholders who sought to preserve their cultural heritage or the academics who dreamed of a single constitution that might save the world from nuclear destruction. See TSAI, *supra* note 2, at 135–41, 188–95.

5. See *id.* at 9–10.

6. These twin founding principles are twofold: (1) the natural right to self-governance, which has never been divested to any particular government; and (2) the centrality of a written constitution, which supersedes conflicting law, norms, and practices.

locate broad themes across historical time and to convey his discoveries in plain language.<sup>7</sup> At the same time, his assertion that a consensus existed over American values has always seemed too pat to ring true. I wanted to present an account of the political tradition that would be at once more colorful, inclusive, and rancorous than the one he envisioned.

## II. More On Conventional Sovereignty

In his review, Professor Rana raises two points about the book's approach to which I shall respond briefly. His first concern is that *America's Forgotten Constitutions* might not go far enough in attacking the consensus approach—that it might actually contain a “hidden” teleological understanding of the development of constitutional law.<sup>8</sup>

I want to reject that criticism. Nowhere in the book do I claim that American constitutional law, understood as an ideological and social practice, evolved in a way that was inevitable or predictable. Nor has the original ethical nature of the U.S. Constitution simply been revealed over time. To steal from King, I do not think that the moral arc of constitutional law “bends toward justice.”<sup>9</sup>

I *do* find it important to acknowledge there can be a set of ideas that are active rather than latent, enforced through institutions, and may be said to dominate political and legal discourse at certain historical moments. To me, this is simply accounting for the fact that ideas have consequences and that, within the realm of public life, some legal ideas have had more influence than others. A contest over foundational ideas is never a fair fight; it is always about control, and some ideas will be in a position to dictate destinies, while other, perhaps innovative, ideas must dislodge those prevailing ideas for a legal vision to have sustained success.

Perhaps the confusion arises from my use of the term “conventional sovereignty” to capture a narrow range of mainstream constitutionalism,<sup>10</sup> a concept that is more plastic than the other popular theories of power and

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7. See, e.g., RICHARD HOFSTADTER, *THE AGE OF REFORM: FROM BRYAN TO F.D.R.* (1955); RICHARD HOFSTADTER, *THE AMERICAN POLITICAL TRADITION: AND THE MEN WHO MADE IT* (1948). Hofstadter would have rejected the label of “Consensus School” practitioner just as surely as he avoided disciplinary jargon. And no doubt he would point to the complexities in his own accounts. But the fault lines in the American belief systems are deeper than Hofstadter allows and, at least in my view, frequently in different places than Hofstadter saw them. I do agree with Foner that Hofstadter's work was not as unabashedly celebratory as other consensus-based works. See, e.g., Eric Foner, *Richard Hofstadter: Columbia's Evolutionary Historian*, in *LIVING LEGACIES AT COLUMBIA* 405, 407–08 (Wm. Theodore de Bary ed., 2006).

8. Rana, *supra* note 1, at 1171–72.

9. Martin Luther King Jr., *Our God is Marching On!* (Mar. 25, 1965), STANFORD: THE MARTIN LUTHER KING, JR. RES. & EDUC. INST., <https://kinginstitute.stanford.edu/our-god-marching> [<https://perma.cc/NCE8-YZMN>].

10. See, e.g., TSAI, *supra* note 2, at 10–13.

community discussed in the book. Because every constitutional theory arises in response to some existing set of ideas and practices of power, I needed a way to frame the prevailing weight of institutional interpretations, preferences, and expectations of the U.S. Constitution at any given moment in time. This is the body of official rulings, statutes, interpretations, and expectations that appear to govern at any moment in time. I believe that status quo views of the law have their own force, even if they are not ideologically consistent. The status quo will always have its defenders, sometimes out of substantive agreement with a governing regime but other times simply for broader rule-of-law reasons, or even out of inertia. So in using the phrase “conventional sovereignty” I wish to direct the reader to key features of mainstream constitutionalism—accepted by many Americans but certainly not all—that might be said to have potency in any particular era.

I always intended the concept to change over time, but I see more clearly now that it is also different in kind from the other theories of power and community discussed in the book: thinner, “prefer[ring] . . . order, integrity, and gradualism,”<sup>11</sup> but not necessarily committed to any substantive values as rich as those found in the legal theories developed by pioneers, revivalists, preservationists, or internationalists. I think it is safe to say that defenders of conventional sovereignty will not be revolutionaries (or at least they will be *retired* revolutionaries), but instead are likely to favor a strict reading of Article V of the Constitution, endorse *stare decisis*, and otherwise adopt a Burkean outlook to legal change. Beyond that, it is hard to pin them down either in terms of ideological commitments or even the forms of constitutional argumentation that might be preferred.<sup>12</sup>

Even so, it is possible for a conventional account of the Constitution to contain features of other theories of popular sovereignty—which is why I stressed that these models of constitutionalism are really exemplars rather than hermetically sealed from one another.<sup>13</sup> I certainly do not intend to “keep mainstream constitutionalism isolated from and uncontaminated by practices of illiberalism,” as Professor Rana warns.<sup>14</sup> When I discuss John Brown’s Constitution and the Confederate Constitution, I point out the various ways that the Supreme Court or Congress endorsed slavery, along with the particular theories of property and federalism that assisted in this

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11. *Id.* at 11.

12. Here I have in mind the various ways in which Americans, whether lawyers or laypersons, tend to speak of the Constitution: referring to the text, invoking history, contemplating its structure, relying on precedents, resorting to broader values at stake, or cautioning decision makers about the costs entailed in one interpretation or another. These forms of argumentation are not the same as theories of popular sovereignty, though it may be the case that a particular theory of power and community will draw on certain kinds of arguments but not others.

13. TSAI, *supra* note 2, at 9.

14. Rana, *supra* note 1, at 1174.

nefarious work.<sup>15</sup> Similarly, in the chapter on the so-called Five Civilized Tribes' efforts to establish the State of Sequoyah, I show how the growing idea of liberal individualism is deemed crucial to twentieth-century ways of securing freedom and autonomy in a rapidly industrializing society, but how it is also seen as a threat to theories of tribal sovereignty.<sup>16</sup>

More complicated still is the relationship of the Republic of New Afrika's constitutional theory vis-à-vis conventional sovereignty as its members found it.<sup>17</sup> In their devastating critique of the law, political freedom of the sort promised by antidiscrimination laws and social integration is a bitter illusion. It offers the appearance of fairness instead of actual compensation for generations of violence and lost opportunities; more importantly, it leaves in place political arrangements that continue to deny the ability of black Americans to decide their own destinies. In each of these episodes, as well as in others not mentioned here, there is a sense that dominant approaches to liberalism as a broad value or equality as a specific value are manifestly unjust.

Professor Rana points to my use of conventional sovereignty as sometimes being "content-free" and sometimes appearing "interlinked with liberal egalitarianism."<sup>18</sup> As I indicated before, I do not think that conventional sovereignty is content free and never made such a claim. I do plead guilty to the second charge as I wish to allow the conventional to change in substance, which I believe it has over time. The actual content of what the law "is" at any moment in time is not a seamless and coherent body of work, but rather an eclectic accumulation of ideas, outcomes, and precedents.

If by "liberal egalitarianism" Professor Rana means the claim that equality of political and economic status is central to governance, I do believe that a sketch of that idea existed at the founding in classical terms adapted by transplanted Europeans to the perceived needs of a nation-state. The founding project in 1787 took for granted the civic equality of white landholding as a background fact, and extending the parameters of citizenship simply was not on the agenda. As a dominant principle or national reform project to embrace a heterogeneous polity, egalitarianism took hold of the public imagination only in later generations as social groups struggled for recognition and influence.<sup>19</sup>

This is why I consider the Union's battlefield victory a defeat of a cultural theory of power and community by the forces of conventional

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15. See TSAI, *supra* note 2, at 83–151.

16. See *id.* at 152–84.

17. See *id.* at 218–53.

18. Rana, *supra* note 1, at 1172.

19. See TSAI, *supra* note 2, at 13–14.

sovereignty, which had come to endorse egalitarianism as a reason for fighting the war.<sup>20</sup> Now, it is important to note that an ideological defeat is rarely permanent; there are far too many entry and exit points in our system of government for illiberal ideas to reemerge.

Liberal triumphalism is not only a bad look, it is also bad history. Professor Rana's explication of the post-Civil War period as a resurgence of cultural theories of law is well taken.<sup>21</sup> My chapter on the Confederate Constitution does not delve into Reconstruction, instead focusing on South Carolina statesman Robert Barnwell Rhett's journey from agitator to founder, back to a marginalized figure from the standpoint of conventional law after the war.<sup>22</sup> I end that chapter with Rhett's vocal efforts to keep alive the ideas that founded a slaveholding republic.<sup>23</sup> One war is over, but another is just beginning. Rhett calls on Southerners to resist the Reconstruction Amendments, to bear their "persecutions" as "blessings" until the time is right to throw off their chains.<sup>24</sup> His words are not only a shameless play on antislavery rhetoric, but they are also evocative of an older conception of a constitution in social terms.

Aristotle wrote that a constitution is the "way of life of a people."<sup>25</sup> Rhett seemingly appeals to this belief-and-practice based approach by denying the claim of authority that the U.S. Constitution, as amended, makes on him. That piece of paper will never be *his* constitution; instead, he remains constituted as a citizen by the beliefs and practices of a slaveholding society. Thus, he seeks to foster a continued sense of political community based on defiant ideals. Southerners may have to swallow the end of slavery, but they remain firmly in control of their territory and culture, and they can retain a legal consciousness based on whiteness and a shared struggle to maintain that heritage. The end of Reconstruction brings a horrifying return of racial sovereignty with a vengeance, enacted into state and local laws and often carried out through partnerships between private actors and local authorities. This is not the end of the story of American law, to be sure, but it is a brutal reminder that theories of power and community are constantly clashing, with potent visions of law continually sifted, co-opted, or repudiated by existing political institutions.

In short, *America's Forgotten Constitutions* should be read according to Professor Rana's first instinct: as a frontal assault on the heroic interpretation of the political tradition as a coherent set of ideas the enforcement of which

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20. *See id.* at 149–51.

21. *See* Rana, *supra* note 1, at 1172.

22. *See* TSAI, *supra* note 2, at 118–51.

23. *Id.* at 150–51.

24. *Id.*

25. JILL FRANK, *A DEMOCRACY OF DISTINCTION: ARISTOTLE AND THE WORK OF POLITICS* 136 (2005) (quoting ARISTOTLE, *POLITICS* 1295a).

has led to a widening circle of freedom and justice. Much has happened since 1787 and there are certainly significant achievements to be marked; yet it is also the case that illiberal or otherwise unjust practices remain very much a part of American life, either explicitly protected by the law or casually ignored by the authorities. A sense of relative progress but a measure of uncertainty is what I wished to stir in readers, especially since I choose to end the book with contemporary efforts by Aryans to establish a whites-only republic in the Pacific Northwest.<sup>26</sup> Far from being merely a white-supremacist fantasy, the maturation of this community's legal ideas confirms a shift in tactics, one where the ultimate survival of a racially conscious community increasingly depends on capitalizing on the dissatisfaction of mainstream citizens and, perhaps ironically, engaging more directly with constitutional law.

My point, in any event, is not to measure legal progress in absolute terms but rather to reveal the discrepancies in ideology and lived experience. For that reason, the constitutional history that we know all too well does not get the same kind of treatment in the book once less familiar figures take center stage.

### III. A Dialectical Role for Revolutionary Projects?

A second point raised by Professor Rana in his review flows from a concern about completeness—more precisely, what gets left out of a book about a handful of failed constitutions.<sup>27</sup> Obviously, there are some failed experiments that did not make the book, and it is possible that recovery of other projects will complicate our understanding of the legal tradition further.

There is also the matter of the mysterious relationship between constitutional successes and failures. With the exception of the Native American population's efforts to create the State of Sequoyah at the turn of the twentieth century, which aimed to create a text subordinate to the U.S. Constitution, the remaining episodes in the book are revolutionary in nature.<sup>28</sup> It is also noteworthy that many of the characters in the book find themselves disagreeing vociferously with other groups pushing for legal change.

Along this front, Professor Rana offers some thoughts about the complex relationship between reformist agendas and revolutionary movements. In particular, he finds unexplored a tacit claim in the book:

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26. *See* TSAI, *supra* note 2, at 254–91.

27. *See* Rana, *supra* note 1, at 1174–75 (arguing that leaving out some “far more complicated political history raises the worry that Tsai, by depicting American constitutionalism as marked by competing and distinct constitution-writing projects, inadvertently tends to compartmentalize the overall tradition”).

28. *See, e.g.*, TSAI, *supra* note 2, at 18–48, 49–82.

[A] potential implication of Tsai's work is that those reforms to the mainstream project—reforms that American citizens are most proud today—may well have been bound to the threat of fundamental institutional and ideological challenges. Indeed, a tacit feature of Tsai's historical narrative is that every high tide of meaningful social change *within* mainstream constitutionalism appears to have occurred during a period with a viable and oftentimes revolutionary radical base.<sup>29</sup>

Let me venture some rudimentary thoughts about Professor Rana's insight. To begin, there are at least two sources of irritation for revolutionaries. The first is the dominant political regime against which most legal rhetoric is pitched. This makes instrumental sense from the standpoint of harnessing the people's anger broadly by gathering as many likely constituencies as possible, as well as directing that discontent so as to undermine a regime's legitimacy. A second source of irritation can come from fellow proponents of legal change. Because the project of constitutionalism ultimately entails a war for control of the public imagination, even fellow critics of the status quo become competitors over scarce resources. Thus, to render her project distinctive and worthy of support, a revolutionary will often characterize a competitor as collaborating with a corrupt political regime. We saw this with Malcolm X, who accused Martin Luther King, Jr. of "keeping negroes defenseless" and "making them forget what whites have done to them,"<sup>30</sup> as well as with proponents of a World Constitution who criticized supporters of the United Nations for "perpetuat[ing]" the "competing anarchy of sovereign states," which led to war, human-rights abuses, and nuclear devastation.<sup>31</sup>

While they are competitors in an important sense, in truth radicals also need reformers. The success of moderates playing within the system creates an opportunity for radicals, who can behave parasitically on reformers' efforts by engaging an already energized electorate. Therefore, a certain degree of success by reformers reduces the costs of doing business for revolutionaries, especially since there is likely to be substantial overlap in the base of each community. The existence of experienced reformers also forces revolutionaries to hone their theories to render them distinctive and comprehensive. More worrisome is what happens to the means chosen by radicals, for the drive for differentiation can lead them to opt for more aggressive, even violent, methods of initiating legal change when it appears their message is not getting through.

From the perspective of reformers, revolutionary projects offer

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29. Rana, *supra* note 1, at 1177.

30. TSAI, *supra* note 2, at 219.

31. *See id.* at 199.



invaluable foils. In the book, I push back against the idea that every revolutionary project is necessarily lawless, violent, or hopeless. The World Constitution was a truly visionary project, with a pacific approach to persuasion.<sup>32</sup> The socialists known as the Icarians organized themselves into a law-based socialist community, preferring to model their legal vision for others rather than resort to the sword.<sup>33</sup> Had John Brown not attacked Harper's Ferry and saw everything spiral out of control,<sup>34</sup> his plan to establish a dissident legal community of militants and ex-slaves might have gotten further along. Nevertheless, the fear that revolutions can descend into worsening cycles of lawlessness and violence is a powerful one, kept alive in historical remnants of the French revolutionary experience but also amply demonstrated by foiled armed plots on American soil. That fear of revolutionary chaos is easily invoked by reformers, who contend that immediate legal changes will calm the electorate and minimize the need for more far-reaching political solutions. A reformer can play "Good Cop" to the revolutionary's "Bad Cop," and this dynamic might broaden a reform movement's appeal to include not only citizens who are ideologically committed to a cause but also those who prefer order, security, and gradual change. At moments of considerable debate, the dialectic between revolution and reform can also speed the timetable for legal changes within the system.

Toward the end of his review, Professor Rana raises the issue of whether "the disappearance of alternative constitutionalism as a real political force has removed, perhaps counterintuitively, a critical pillar of support for reformist agendas within the mainstream project."<sup>35</sup> I cannot pretend to do justice to this insight here but believe it is worth additional investigation. As my concluding chapters suggest, alternative constitutional visions do remain available but often must be constructed underground and disseminated in more resourceful ways. The 1787 Constitution's domination of the political imagination means that there is far less room for highly visible projects of legal experimentation and that opponents of radical projects are more easily characterized as hostile to the rule of law. Every so often, events align that might be exploited by radicals—e.g., the attacks of 9/11, the election of the first black president—but far more often what we see today is reformers acting within the system to accommodate those impulses and siphoning the energy away from more comprehensive changes. Even when significant legal changes occur within the system, one wonders whether those changes are actually supported by measurable popular support, such that they will be lasting ones.

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32. *See id.* at 185–217.

33. *See id.* at 49–82.

34. *See id.* at 102–03.

35. Rana, *supra* note 1, at 1177.

#### IV. Conclusion

In the end, I hope the book will unsettle reader's beliefs about the stability of constitutional ideas. As readers move through each episode, I would like them to continually ask themselves: what holds together our political tradition? Surely not the substance of the law, for citizen theorists vary widely in their beliefs about what powers, institutions, and rights should be contained in a constitution, even as they believe themselves to be laboring within the American tradition.<sup>36</sup> The most disturbing discovery of all might be that the claim to be the authentic heirs of the tradition is made even by those who advocate illiberal practices or institutions that subvert those created by the U.S. Constitution. That realization, too, suggests that the core of constitutional law—if there is one—is smaller and far more contested than previously thought.

A defender of the Consensus School might retort: there remains broad agreement over values such as equality and liberty even if citizens disagree on the application of these principles. But at times there are such divergent conceptions of equality and liberty (and justice and republicanism, more broadly) that it seems fair to ask whether they are even within the same family of ideas. At that point, one wonders if it is true agreement over substantive legal values that binds Americans, or instead simply an agreement to talk in a particular way about the nation's problems.

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36. It goes without saying that, as an empirical matter, few Americans know the content of the Constitution or the law in intimate detail, beyond certain broad abstractions.