

# America's Forgotten Constitutions: Defiant Visions of Power and Community

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## Review

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**Tsai, Robert L.** *America's Forgotten Constitutions: Defiant Visions of Power and Community*. Harvard University Press, \$35.00 ISBN 9780674059955

### Constitutional Visions of Ethics and Culture

Anyone who has lectured on written constitutions knows how hard it is to capture the magic of fundamental law. Specific clauses can be unlocked through historical examples, but it is very difficult to lecture on the clauses themselves. In *America's Forgotten Constitutions*, Robert Tsai, Professor of Law at American University and author of a variety of interdisciplinary explorations of popular constitutionalism, offers eight well-drawn historical studies that largely avoid clause-by-clause drudgery. With one important caveat, the result is a very impressive, thought-provoking study of divergent forms of popular sovereignty.

The grand, serious idea that is at the heart of the book is that the 1787 Constitution tried to create a single nation (4) and a single people (9). This assertion is repeated at least ten times throughout the text, supported with a single reference to a Founding era thinker. (I could not find the short quotation, cited in the first footnote, in James Wilson's speech of Oct. 6, 1787. Perhaps Wilson's Dec. 11, 1787 speech is meant, although there Wilson rejects consolidation.) Tsai's America moves from a parochial revolutionary republic to a liberal democracy with a "thin and inclusive civic culture" (255) and, through visionary dissenters' attempts to marry written constitutionalism and popular sovereignty, part of the way back again. He employs a loosely-explained framework of competing interpretations of popular sovereignty: conventional, pioneer, tribal, ethical, cultural, and global. These are descriptions of utopian experimentation rather than analytical categories, and, combined with further descriptions of deliberative, expressive, and disciplinary constitutional functions, help to explain the aims of these legal experiments.

The caveat is that Tsai's account of our Constitution invites a degree of confusion concerning the legal status of the Union, and thus about the aim and

meaning of the Constitution. Drafted on the backdrop of worries about governmental consolidation, the aim of the Constitution was a Union that was merely “more perfect” than the flawed Articles of Confederation. In contrast, Tsai’s Founding has the more demanding task of *creating* one people out of many. The source of confusion is twofold. By ascribing to the founding a goal of uniform national citizenship that was hatched, as Tsai acknowledges, much later, under pressure from the Confederacy, and reintroduced by Croly et al in the Progressive Era, Tsai makes 1787 an experiment in ethically thick constitutionalism. He then chooses to read the 1787 Constitution as an ideologically dominating, exclusionary document that “suppressed unorthodox ideas of self-rule” (15).

Granted, both republicanism and liberalism can have compressive effects, and Tsai’s book is mostly about constitutional culture *after* the founding. That culture is too pluralist and too liberal for Tsai’s visionary dissenters (298). For instance, American individualism is said to be part of a “plan” for political consolidation that put “enormous strain” on dissident communities (81). But isn’t this the same pluralism that allows constitutional experiments to unfold? Tsai would undoubtedly argue that not all communities were on an equal footing at the founding, and he is surely right, but his argument, which is largely contained in a short prologue and epilogue, would have been strengthened by a fuller account of the founding views of the strengths and weaknesses of the 1787 Constitution.

Any account of this book must judge it primarily by its historical case studies, and these are uniformly insightful and remarkably even-handed. The Republic of Indian Stream is an example of what Tsai calls pioneer sovereignty. It is pluralistic, and presupposes a radically individualistic theory of economic development. In contrast, the Icarian republic that was built by French socialist Etienne Cabet is both perfectionist and accommodationist. Unlike the Indian Stream republic, which was ultimately squeezed out of existence by existing powers (Canada and New Hampshire), the Icarians were allowed to incorporate under Illinois law and were outwardly obedient to state and federal authority. The contrast between Indian Stream’s pioneers, absorbed by powerful competitors, and Icaria, a perfectionist community that implodes through dissent, is rather beautifully drawn, and provides insight into centripetal and centrifugal pressures on constitutions.

Tsai's even-handedness is tested by his chapters on John Brown and the Confederacy. John Brown's Provisional Constitution is another ethically perfectionist attempt to create a single, national people in open competition with the 1787 Constitution. It is meant to operate in a counterfactual world where slaves and whites have joined together in a violent war against slavery. The attempt at armed insurrection fails, but Tsai admires the ethic. A "benevolent constitutional vision" relying on the targeted use of violence is, oddly, portrayed as a way of preserving "democratic dialogue." Tsai's inference is somewhat at odds with the subsequent discussion of a "more ambitious undertaking" of "educating and organizing slaves" (108-9), which *is* dialogic and liberty-preserving. In contrast, the Confederate vision of sovereignty is murkily cultural, based upon regional distinctiveness and white superiority. For Tsai, there is no ethically transformative content to the Confederate vision. This is perhaps a defensible interpretation, but Tsai quotes Southern leaders defending their order and slavery as natural and moral, and cites Fitzhugh's obnoxious argument that slavery improves Africans. This vision is ethical, even if it is ethically misguided.

Even less satisfying as an attempt at cultural or ethical sovereignty, the Sequoyah Constitution was developed after an earlier, unsuccessful attempt at constitution-building in Indian Territory (the Okmulgee Constitution of 1870) was rejected by the Indian population. Tsai portrays the Sequoyah Constitution, like the federal constitution, as an attempt to build upon individual rights (adding, in the case of Sequoyah, progressive economic commitments) and not upon tribal sovereignty or an inclusive, dissident challenge to racial hierarchies. It ended, like Indian Stream, in an act of political consolidation, but Sequoyah's institutional echoes remained in the Oklahoma Constitution.

The last three case studies are post-World War II, and illuminate the promises and perils of ethical sovereignty. First in order is Robert Maynard Hutchins's Committee to Frame a World Constitution, which is an academic experiment in taking conventional sovereignty to its logical conclusion: a regionally-grounded, global republic. Although some version of an improved UN had broad popular support in the US, it is formally rejected by Truman's State department and was a failure except in its deliberative and expressive functions. The last two experiments consist of attempts at founding black and white sovereign communities. The Republic of New Afrika is constituted by followers of Malcolm X, and aims at black sovereignty over five southern states. Tsai compares this republic to the Confederacy, but describes it as ethical rather

than cultural because its Code respected the rights of internal minorities and was committed to a communitarian ethical creed. Covington's Aryans harbor a comparable desire to establish a white-only homeland in three Northwestern states, but they eschew direct mobilization, preferring to hide in plain view in cities while deliberating and proselytizing online and through works of fiction. Like the Icarians, they want their laws to reflect the people's values, but, despite sophisticated attempts to draft a constitution, theirs is a document still seeking a people.

Some readers may be troubled to find that Tsai cannot or will not marshal his resources to criticize racial and cultural sovereignty. In defense of this book, *it is* about the big questions, even if Tsai's conclusion is overly modest. Tsai's insightful case studies suggest that good ideas and bad ideas are not easily separated into the categories of visionary theory and practical failure, and that both hope and reflection are needed for thoughtful constitutional dissent.

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