



AMERICAN CONSTITUTIONALISM
 VOLUME I: STRUCTURES OF GOVERNMENT
 Howard Gillman • Mark A. Graber • Keith E. Whittington

Supplementary Material

Chapter 6: The Civil War/Reconstruction Era - Federalism

OXFORD
 UNIVERSITY PRESS

John Alexander Jameson, A Treatise on Constitutional Conventions (1866)¹

The notion of popular sovereignty, of the power and authority of what the historian Gordon Wood has called “the people out of doors,” formed the basis for traditional theories of American constitutionalism and the supremacy of the fundamental law to the acts of government. But the prospect of a popular sovereign that might appear in practice was deeply unsettling to established governments. Episodes like the “Dorr War,” which gave rise to the case of Luther v. Borden, raised real difficulties for theories of republican government that wanted to make room for both the exceptional supremacy of the people themselves and the normal authority of government officials. The spectacle of the southern secession conventions of 1861 that claimed the right to reconstitute the state governments and declare independence from established constitutional relationships suggested to some in the North the need for a constitutional theory that could rein in the authority of popular constitutional conventions.

*John Jameson, a former Illinois judge, took on this task. His *A Treatise on Constitutional Conventions* sought to distinguish the “revolutionary conventions” of the founding period from true “constitutional conventions.” The latter were sharply constrained by legal limits and in important ways subordinate to existing state governments. The conventions were really a specialized legislative “committee,” rather than a representation of the political sovereign. Their job was not the revolutionary one of making up new constitutions, but the conservative one of bringing the existing written constitutions into line with organic political developments. Constitutional Conventions, the first of its kind, was very influential in the late nineteenth century and state constitutional conventions were domesticated and declined in importance over the next several decades.*

....
 . . . [W]hat is the place in our system, what are the relations to other governmental agencies, the normal functions and powers, of an institution, that, however hedged about by legal restraints, obviously exhibits more features that are menacing to republican liberty than any other in our whole political structure.

To the interest attaching to the Convention, thus, from abstract considerations, has been added a greater, resulting from the connection of that institution with recent political events. The desolating war of secession . . . could hardly have been inaugurated but for the use made by the revolting faction of that institution. . . . [I]t had come to be a maxim in the practical jurisprudence of the United States, at least in some of the States, that whatever had been done by a Constitutional Convention, had been done by the people, “in their primary and sovereign capacity,” and was therefore absolutely unquestionable, on legal and constitutional grounds When to this, which is deemed one of the most impudent heresies of our times, was added its fellow, the dogma of State sovereignty . . . the transformation of a loyal community into a band of parricides seeking to pull down the edifice of our liberties, need be but the work of a day. To effect it, there was needed but a vote of a few conspirators, sitting as a Constitutional Convention, pretending to utter the voice of the people. . . .

....
 We are to conceive of the Constitutional Convention, then, as an adaptation to the constitutional uses of an institution originally revolutionary; that is, whose methods and principles of action, as well as whose purposes, were alien and hostile to the established laws and Constitutions. And this is the real

¹ Excerpt taken from John Alexander Jameson, *A Treatise on Constitutional Conventions*, 4th ed. (Chicago: Callaghan and Company, 1887).



occasion of most of the misconceptions prevalent as to its true character. Thus, the notion has been common among even the well-informed, that the Constitutional Convention is above the law . . . that it is possessed, in short, of the powers of its revolutionary namesake.

....

By the Constitution of a commonwealth is meant, primarily, its make-up as a political organism; that special adjustment of instrumentalities, powers, and functions, by which its form and operation is determined.

This is a Constitution, *considered as the outcome of social and political forces in history, as an organic growth, or . . . as a fact.*

Besides, the term "Constitution" has a secondary meaning . . . a Constitution, in this secondary sense, is the result of an attempt to represent in technical language some particular constitution, existing as an organic growth. This is a constitution *considered as an instrument of evidence.*

A third variety of Constitutions, so-called, may be noted, but only to exclude them from the list of legitimate Constitutions, that is, *Constitutions "as they ought to be."* . . . They are Constitutions framed in the closet, according to abstract ideas of moral perfection, for imaginary commonwealths. . . .

...

To render a written Constitution safe . . . it must embrace efficient machinery for its own amendment, and that machinery must be so devised as neither to operate with too great facility, nor to require to set in motion an accumulation of force sufficient to explode the system. . . .

. . . . When great historical movements, like those which have lately convulsed the United States, have resulted in important political changes, that are so consummated and settled as to indicate a solid foundation in the actual Constitution, they should be immediately registered by the proper authority among the fundamental laws. Why embarrass the courts and fly in the face of destiny by refusing to recognize accomplished facts? . . .

....

. . . . [A] government, once established, represents the sovereign, and . . . while it lasts no body of men can assemble and assume more perfectly or more rightfully than that government to represent the sovereign; still more . . . while that government survives, no earthly power has a right to shape the policy of the State superior to that of its own legislature. . . . Whether . . . it is or is not politic to call a Convention, or, if called, to tie its hands by restrictions, or to leave it free to act at its own discretion, is a question for the legislature alone. . . . Under our system, it must be the legislature, else our Constitutions are no better than those of the first French republic, characterized by Burke as "digests of anarchy." . . . [I]n politics as in social life, there must be strait-jackets, because, in both, men sometimes go mad. The Convention system, as we know by bitter experience in 1861, at the South, went mad, and came near wrecking our ship of state. . . .