
The Constituent Power as a Remedy for the Administrative State

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The United States is built upon the idea of popular sovereignty. The people, rather than any one person or an artificial body, wields ultimate power. Only the people can form, alter, or abolish constitutions through the constituent power. Of course, government officials exercise power as the people’s agents. This delegated power is often called “governmental” or “legislative sovereignty” and is inferior to the people’s ultimate sovereignty.

Although an appreciation for popular sovereignty is indispensable to understanding American constitutionalism, one must also value the franchise as a limitation on the people’s agents who exercise governmental sovereignty. Elections and voting to check the rulers seem too basic to require further exposition, but very few have recognized that a shift in governmental sovereignty has occurred with the rise of the administrative state. The myriad rules and regulations that shape our lives are created not so much by elected officials in Congress but by “experts” in various federal agencies. This new sovereign and its technocratic leadership have given rise to recent populist outbursts.

Despite the people’s exalted place in American political theory, the word *populism*, with its claim to give a voice to the common citizen, has a negative connotation. Populism is typically characterized as a threat to minority rights, sound government,

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and legitimate political opposition. In reality, it is a natural reaction to the technocratic devaluation of the franchise and the ascendancy of a new class with interests counter to those of average Americans.

In this paper, I examine the implications of popular sovereignty, the federal system, and populism on the governmental system in the United States. I endeavor to show that although the U.S. Constitution has built-in restrictions that limit the power of majorities, the rise of the administrative state has compromised the potency of elections. As a consequence, the ultimate protection is not the veto power of the people wielded during normal elections but the constituent power possessed by the people acting in their several communities. This constituent power adopted the Constitution, has amended it, and may be used to challenge the rule of the technocrats. In this manner, the constituent power is constitutional populism and provides a real security to political communities that cannot be achieved by the conventional franchise in this era when the managers are ascendant.

Populism Defined

The definitions of populism are myriad. Some are simple. For example, Mark Tushnet of Harvard Law School defines populism as “the enactment into public policy of the people’s views, whatever they happen to be” (2000, 553). David Fontana of George Washington University Law School goes further: “Populism generally refers to arguments pitting a large number of average people unjustly disempowered relative to and against some power elite” (2018, 1486). The Dutch political scientist Cas Mudde, like Fontana, sees populism as dividing society into “two homogenous and antagonistic groups” consisting of “the pure people and the corrupt elite” (2015).

In his classic work *Liberalism against Populism* (1982), William H. Riker describes populism as having two propositions: “(1) What the people, as a corporate entity, want ought to be social policy,” and “(2) The people are free when their wishes are law” (238). Populism, for Riker, is the scion of Jean-Jacques Rousseau and his “general will.” Rousseau, of course, believed that men should rule themselves in “one legislative corps” inasmuch as civil society forms an artificial person with a general will (Cranston 1986, 83). The general will, according to Rousseau, writing in the mid-eighteenth century, “considers only the common interest” and is always “good” (Rousseau 2020, 22). Hence, a citizen who finds a law to be distasteful and oppressive has no real argument against the measure because he has been a part of the process in which the wisdom of the general will was discovered.

Riker focuses on the importance of the franchise and distinguishes populism from liberalism (in the classical or continental sense) by averring that in the former “the opinions of the majority must be right and must be respected because the will of the people is the liberty of the people,” whereas in the latter “there is no such magical identification. The outcome of voting is just a decision and has no special moral

character” (1982, 14). But voting is fundamental in a liberal democracy, according to Riker, because it acts as a veto by which governmental tyranny can be restrained. This check on tyranny, Riker asserts, is the chief end of elections.

Riker advocates a limited purpose for elections because different systems of voting can bring divergent outcomes from the same profile of an individual voter’s stated preference. Seldom, if ever, is there truly a binary alternative where the choices are only A or B. Further, he argues that the outcome of an election is easily manipulated (e.g., vote trading or proclaiming false values). Hence, democracy is a poor vehicle, in Riker’s thought, for determining the people’s policy preferences because it is inaccurate and transitory.

Popular Sovereignty and American Constitutionalism

But do Riker’s observations hold when dealing with a governmental system in which the people occupy a special place as the creator of constitutions? Is voting during normally scheduled elections the end of the people’s power? And how has the so-called managerial revolution altered Riker’s assumptions?

It is helpful to remember that the American Revolution was a rebellion against the idea of the sovereignty of Parliament. Under British constitutional theory, Parliament exercised an unlimited and uncontrollable authority. The American colonists contended that sovereignty resided in each colonial legislature, with the tie to empire being the monarchy. When George III did not come to the aid of the colonists, war ensued, and the Americans continued to reevaluate the locus of sovereignty. Americans questioned whether ultimate sovereignty could rest in an artificial body such as a state assembly.

The change in thinking is illustrated in a proclamation issued by the General Court of Massachusetts in 1776: “It is a maxim, that, in every government, there must exist, somewhere, a supreme, sovereign, absolute, and uncontrollable power; But this power resides always in the body of the people, and it never was, or can be delegated, to one man, or a few; the great Creator, having never given to men a right to vest others with authority over them, unlimited, either in duration or degree” (General Court [1776] 1966, 65).

Similarly, in June 1776 the Virginia Declaration of Rights stated that “all power is vested in, and consequently derived from, the People; that magistrates are their trustees and servants, and at all times amenable to them” (Mason [1776] 1987, 6).

Of course, it is one thing to embrace a new theory; it is another to implement it. Implementation is seen in the adoption of new state constitutions. Massachusetts was the first state to use a special convention to draft a constitution and then to submit this product to the people. In June 1779, the state House of Representatives passed two resolutions. In the first resolution, it “recommended to the several Inhabitants of the several towns in this State to form a Convention for the sole purpose of framing a new Constitution” (General Court [1776] 1966, 402). The second resolution provided that once the delegates finished

their work, the document would be circulated among the people for approval. In this manner, a new constitution was drafted and ultimately approved by the people.

In *Notes on the State of Virginia*, Thomas Jefferson praised Massachusetts for its chosen method of adopting a constitution and urged his state to follow this example: “[T]o render a form of government unalterable by ordinary acts of assembly, the people must delegate persons with special powers. They have accordingly chosen special conventions to form and fix their government” (Jefferson [1785] 1943, 652). Virginia’s failure in 1776 to use a popular convention to ratify its constitution was, to Jefferson, a critical defect.

With the Constitution of 1787, the Framers created a system in which the people of each state delegated power to two governmental sovereigns: the state government and the national government. “The Federal and State Governments are in fact but different agents and trustees of the people,” James Madison wrote in Federalist No. 46, “instituted with different powers, and designated for different purposes” ([1788] 1992, 237). To accomplish such an act, the Constitution had to be ratified in separate state conventions, so the people of each state—the true ultimate sovereigns—could take a portion of the powers originally delegated to their state governments (or retained among themselves) and transfer this power to the national government.

From the moment the Philadelphia convention began proceedings, the leading delegates urged ratification in state conventions. Edmund Randolph of Virginia, in a successful effort to frame the debate, presented fifteen resolutions for the delegates to consider. These resolutions are known to history as the “Virginia Plan.” The fifteenth resolution proposed that the new constitution be submitted to “assemblies . . . expressly chosen by the people, to consider & decide thereon” (in Madison [1840] 1987, 33). Madison praised this resolution and “thought it indispensable that the new Constitution should be ratified in the most unexceptionable form, and by the supreme authority of the people themselves” (in Madison [1840] 1987, 70). George Mason supported Madison: “The Legislatures have no power to ratify it. They are mere creatures of the State Constitutions, and cannot be greater than their creators” (in Madison [1840] 1987, 348). Oliver Ellsworth of Connecticut objected to the convention requirement but did concede that “a new sett [*sic*] of ideas seemed to have crept in since the articles of Confederation were established. Conventions of the people, or with power derived expressly from the people, were not thought of then” (in Madison [1840] 1987, 350–51). The delegates, following this “new sett of ideas,” opted for submission to the state conventions, and Article 7 of the Constitution eventually read: “The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.”

John C. Calhoun and Concurrent Constitutionalism

Riker’s emphasis on the importance of a veto through elections to defend liberal democracy is borne out by the political thought of a man whom most moderns consider

illiberal: John C. Calhoun. The “cast-iron” man from South Carolina served as representative in the U.S. House of Representatives, senator in the Senate, secretary of war, secretary of state, and vice president. Often considered one of the last of the Founding Fathers, not because he was a contemporary of the other Founding Fathers but because of his understanding and analysis of republican government, Calhoun understood the dangers of a mere numerical majority but also appreciated the powerful check provided by popular sovereignty in state conventions. Like most men of his time, Calhoun held repugnant views on race and slavery. Although we fortunately have difficulty comprehending Calhoun’s views on these topics, we should not let our presentism deprive us of useful insights from his theory of government.

In *A Disquisition on Government*, Calhoun began with the principle that man is inherently selfish and is ever ready to “to sacrifice the interests of others to his own” ([1851] 1992a, 7). For this reason, government is created for the peaceful existence of society. Because the people who administer government have fallen natures, like all of mankind, a constitution is necessary to counteract the state’s tendency to oppress and abuse. The primary weapon and the foundation of constitutional government, Calhoun believed, are the franchise. But voting itself brings dangers to the community because it leads to conflicts among different interests and the quest for power to advance particular positions. Hence, a struggle emerges to obtain a majority and therefore control of the government.

To protect the community from the evils of majority dominance, Calhoun suggested “dividing and distributing the powers of government” to “give each division or interest . . . either a concurrent voice in making and executing laws, or a veto on their execution” ([1851] 1992a, 21). Suffrage plus the concurrent majority, for Calhoun, yields constitutional government. The former checks the rulers from oppressing the people, and the latter prevents any one interest or combination of interests from oppressing a weaker interest. “It is this negative power—the power of preventing or arresting the action of government—be it called by what term it may—veto, interposition, nullification, check, or balance of power—which, in fact, forms the constitution” ([1851] 1992a, 28).

The concurrent majority is a conservative principle because it encourages the divisions within a community to work for compromise. This impetus toward compromise “tends to unite the opposite and conflicting interest, and to blend the whole in one common attachment to the country” (Calhoun [1851] 1992a, 37).

In the American context, Calhoun recognized that the U.S. Constitution contains many concurrent features. Bicameralism, equal state power in the Senate, the Electoral College, and presidential veto are examples. But these various mechanisms are often insufficient to protect the states as separate organic political communities. A fuller protection can be provided only by nullification, as articulated by Thomas Jefferson and James Madison during the crisis of the Alien and Sedition Acts in the late 1790s.

In opposing draconian federal laws making criticism of the national government a crime and giving President John Adams fulsome powers over aliens residing in the United States, Jefferson and Madison penned sets of resolutions outlining first principles of the Constitution and charging the states to interpose themselves between the

people and these unconstitutional federal laws. In the Kentucky and Virginia Resolutions, Jefferson and Madison initially anticipated the state legislatures taking action but soon reasoned that because the Constitution was ratified by the people of the several states as ultimate sovereigns, any nullification or veto should originate from state conventions and not from legislatures. Because Jefferson won the presidential election of 1800 and his party was swept into power, no actual nullification occurred. The franchise proved sufficient to check the actions of the Federalist Party.

In the 1820s and early 1830s, the issue for Calhoun was the tariff and its effect on states depending on free trade. The numerical majority of the northern states was decidedly in favor of protectionism and not inclined to compromise on tariff rates. Calhoun argued that the powers delegated to Congress were trust powers rather than plenary ones and were consequently limited to the nature and the object of the trust. Thus, the power to levy tariffs could be used only to raise revenue to meet the legitimate expenses of government.

Unable to secure a compromise from the North and denying that the Supreme Court—an agency of the national government—was the final arbiter of constitutional questions, Calhoun and South Carolina turned to nullification. The basis for the doctrine of nullification was the locus of sovereignty: “That the people of the States, as constituting separate communities, formed the Constitution, is as unquestionable as any historical fact whatever,” Calhoun asserted. It followed that ultimate “sovereignty, then, is in the people of the several States, united in this federal Union. It is not only in them, but in them unimpaired; not a particle resides in the Government; not one particle in the American people collectively” ([1833] 1992b, 287, 288). Thus, only the ultimate sovereigns have the right to serve as the final judges of infractions of the federal compact.

Of course, nullification really operated only as a suspension of the federal law. It was an invitation for the other states to meet in a constitutional convention and either confer the contested power upon the national government or reject that power. If a convention of the states ruled against the nullifying state, that state would have to obey and withdraw the ordinance of nullification or secede from the Union.

Through a special convention called to wield sovereign power, South Carolina declared the tariffs of 1828 and 1832 void and of no force. Tension rose as President Andrew Jackson threatened to invade the state to preserve the Union’s authority. Fortunately, a spirit of compromise developed, and Congress passed a bill lowering tariff duties. Although duties remained higher than South Carolina desired, the state convention accepted the measure’s conciliatory spirit and rescinded the ordinance of nullification. Hence, Calhoun’s concurrent theory worked as a conservative principle and resulted in a compromise between differing interests.

The Managerial Revolution and Populism

In *Liberalism against Populism*, Riker assumes a system of parliamentary sovereignty and places no special emphasis on the people of the several states as the ultimate

sovereigns. He also ignores a twentieth-century revolution that has to a large extent given rise to recent populist movements. Indeed, in this revolution, assumptions about the workings of liberal democracy have been turned on their head such that the franchise as a negative force on tyranny has been weakened.

Perhaps the first scholar to recognize the “managerial revolution” was James Burnham, a former Trotskyite who became a fixture in the conservative movement in the 1950s. Like Riker, Burnham assumed that parliamentary sovereignty was the norm in the United States, but he noticed a shift in the locus of power. Burnham believed that from the Great War on, power had “been slipping away from parliaments” ([1940] 1999, 50). He described this process as a shift of sovereignty from elected officials to what we today call the “administrative state.” “The new agencies and new kinds of agency are formed to handle the new activities and extension of activity,” Burnham observed. “As these activities overbalance the old, sovereignty swings, also, over to the new agencies” (54).

Key for Burnham was not just the transfer of power to administrative agencies but also the “new type of men” who ran the country: the managers. Modern technology and specialization, Burnham posited, called for technocrats to oversee the vast bureaucracies and corporate structures. Naturally, the managers use the power of the state to reward themselves and to favor pet causes and projects. Burnham also recognized that they would also punish enemies and reduce the options of those who do not share the viewpoints and goals of the managerial class.

More recently, Michael Lind, a scholar at the Lyndon B. Johnson School of Public Affairs at the University of Texas at Austin, has followed up on Burnham’s insights on the managerial class. In *The New Class War* (2020), Lind argues that democratic pluralism has been replaced by “technocratic neoliberalism” (xii). The university-educated and credentialed managerial class, Lind asserts, pulls the levers of power in the realm of culture, the economy, and government. He believes the distinction between left and right is obsolete and that now the main political categories are “credentialed insider” and “noncredentialed outsider.” The latter have flocked to populist causes in Europe and America. Lind fears that populist successes may cause the managerial elites to restrict “access to political activity and the media by all dissenters” from the neoliberal technocratic vision (xiv).

Scholars are not the only ones to recognize a revolution. Chief Justice John Roberts of the Supreme Court has noted that the administrative state “is a central feature of modern American government” and that the accumulation of power in multiple agencies approaches “the very definition of tyranny.” The agencies and their technocratic managers exercise vast authority “over our economic, social, and political activities” such that the Framers of the Constitution would be aghast at what has happened in the United States. Roberts sees the situation worsening as “the federal bureaucracy continues to grow; in the last 15 years, Congress has launched more than 50 new agencies. And more are on the way” (*City of Arlington v. F.C.C.*, 569 U.S. 290, 313 [2013], Roberts, C.J., dissenting).

When faced with the ascendancy of the administrative state and the managerial elites' power in the culture and economy, Riker's limited view of the franchise seems anachronistic. What good are elections as checks on power when the technocratic elite in government agencies who make the important decisions do not appear on any ballot? Moreover, with the elites in both political parties sharing assumptions on major issues such as trade policy, immigration, and foreign interventionism, millions of people are attracted to populist candidates in hopes of enacting ignored policy preferences into law. "Where populists have succeeded in Western countries," Lind avers, "they have done so because they have opportunistically championed legitimate positions that are shared by many voters but [are] excluded from the narrow neoliberal overclass spectrum" (2020, 75). Of course, "success" for populists must be more than getting a particular candidate elected. As evidenced by Donald Trump's victory in 2016, intransigence in the administrative state can slow and thwart any real change.

A Place for Nullification

Calhoun, like Riker, saw voting as an essential part of constitutional government, but he also emphasized the place of concurrent majorities to protect various interests. With the rise of managerialism, which Riker does not take into account and Calhoun could not have foreseen, nullification might be a useful tool today to check the power of the administrative state. Popular sovereignty is a cardinal principle of American constitutionalism, although it is often forgotten and confused with parliamentary or governmental sovereignty. The states, as distinct communities, are the parties to the constitutional compact. When the people exercise their constituent power in special conventions, they are exercising ultimate sovereignty.

Rather than on the Alien and Sedition Acts or tariff rates, a modern nullification would likely focus on the actions of administrative agencies. Normal elections, even the victory of a populist president, have shown themselves as ineffectual in restraining the administrative state. The nullification or suspension of an agency directive would start a national debate and perhaps force the technocratic elite to compromise with the denizens of flyover country. This could be a first step in scaling back the administrative state.

One must expect a chorus of protests that the Civil War settled the issue of state sovereignty; ultimate sovereignty is now lodged in the people of the United States as a whole. But force of arms cannot ultimately overcome reason. The fact that a bandit with a pistol persuades a person to hand over his wallet and jewelry does not vest the bandit with a good title. Similarly, the success of Union armies could not undo the constitutional process and ramifications surrounding the adoption of the U.S. Constitution.

Moreover, *secession* (the ultimate threat of nullification) is not such a dirty word anymore. In the past thirty years, multiple republics seceded from the Soviet Union; the people of Quebec in 1995 voted by only a slim majority of 50.6 percent to 49.4 percent

to remain within the federation of Canada; Scotland held an independence referendum in September 2014, with 55 percent of the voters deciding to remain in the United Kingdom; and more recently, in 2016, the United Kingdom voted to leave the European Union. In the United States, Californians have been discussing “Calexit,” with some polls showing upward of 32 percent of Californians favoring leaving the Union. Secessionist referendums and plans are simply not beyond the pale in modern political discourse.

The much-vilified populism has risen for good and obvious reasons associated with the administrative state and its managerial elite: the latter exercise significant power and never appear on any ballot. Because of the history of its formation and embrace of popular sovereignty, the United States is in a unique position to channel populist frustration into constituent conventions, where the reign of the technocrats can be checked. Only by checking and reducing the power of the administrative state will the franchise assume its former importance. John C. Calhoun has shown us the path; however, the question remains whether we will have the courage to follow it as the protestations from our managers intensify.

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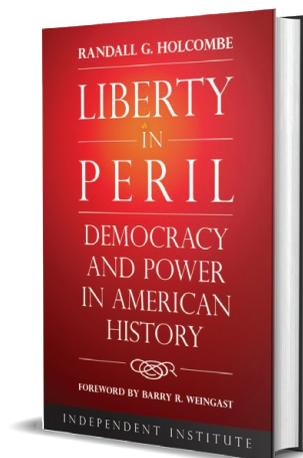
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