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LOST BUT NOT (YET) FORGOTTEN

Susan McWilliams*

ROBERT L. TSAI, *AMERICA'S FORGOTTEN CONSTITUTIONS* (HARVARD UNIVERSITY PRESS 2014). PP. 368. HARDCOVER \$35.00.

Regardless of where you are going, you have to go out of your way—way, way, way out of your way—to get to Ashtabula County, Ohio. However, if you add the extra hours or days to your trip that it takes to get there, you will be rewarded to find, almost hidden in the one-intersection town of Williamsfield, the nation's "One and Only Presidential Museum." What makes this a presidential museum that merits the moniker "one and only"—and it does—is that it focuses attention on the men who served as president under the Articles of Confederation. The founder of this "one and only" museum, Nick Pahys, built and now curates the museum with a dissident zeal. He proclaims to whomever will listen that John Hanson, the real first President of the United States, has been done a grave injustice by his almost total erasure from the history books. To his point, American presidents to this day still stand behind the Great Seal that was created during the Hanson Administration.¹

I have never agreed entirely with the adage that the winners write history. One only needs to think of Thucydides, the most famous of ancient Greek historians, to cast doubt upon that claim. An Athenian who chronicled Sparta's defeat of his home city, Thucydides suggests in *History of the Peloponnesian War* that it is actually proper for the losers of a battle to be the ones who write about it.² One who is on the losing end of a contest has, in its wake, more reason to reflect carefully about it. But although that old saying about winners doing the writing may be of dubious merit, it still may be true that history is written mostly about the winners.

In the United States, that does seem effectively true—so true, that in reality, it rises to the level of gospel. Americans pay scant attention to those people and ideas that we deem defeated. Thus, to the irritation of Nick Pahys, the mere taint of association with that "losing" document, the Articles of Confederation, consigned Hanson and seven other men who should be counted among the nation's founding fathers to the proverbial "trash heap" of American history. They have been consigned to a place of limited

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1. Harry V. Martin, *America's First President – John Hanson*, 1215.ORG (Nov. 14, 2015, 10:24 AM), <https://www.1215.org/lawnotes/work-in-progress/americas-first-president.htm>.

2. THUCYDIDES, *THE HISTORY OF THE PELOPONNESIAN WAR* (Richard Crawley trans., 2008) (1874).

recognition in what is essentially a money-losing storefront in northeastern Ohio. Although Pahys can come across like a character out of central casting, conspiracy division—he tells visitors that the government and the media are trying to hide the truth about Hanson from Americans so that the populace will be more easily controlled³—he cannot be dismissed as a crank.

In fact, I think it fair to say that Pahys's complaint applies to both popular and scholarly registers. Have students of American political thought paid enough attention to those Americans whose political thoughts were influential or important, albeit not triumphant? Have scholars of American constitutionalism paid enough attention to those Americans who have mounted serious if unsuccessful challenges to the standing constitutional order?

It is hard to imagine that the answer to these questions is "Yes." Thirty-something years ago, when Murray Dry published Herbert Storing's seven-volume collection of anti-Federalist writing, *The Complete Anti-Federalist*,⁴ there was a moment in which it seemed that scholars of American political thought were eager to correct the discipline's tendency to hand over the spoils and the spotlight to the victor. However, that eagerness has not amounted to much. In most courses on American political history and thought, *The Federalist Papers* still stands alone on the syllabus. Storing's decades-long dedication to the cause of giving anti-Federalists their due, while widely respected, has not translated into more sustained and serious reflection on the founding outside *The Federalist Papers*. As Gordon Wood recently and rather succinctly put it, "The Anti-Federalists seem forever doomed to be losers, bypassed by history."⁵ In recent public law scholarship, even works like Emily Zackin's noteworthy exploration of the alternative political visions in state constitutions (reviewed elsewhere in this issue), are the exception to the general rule that attention goes mostly to the usual suspects.⁶ While a number of thinkers have, especially in the last ten years, extended the attentions of the American political thought to previously neglected questions of race in particular, those works have not (or at least have not yet) shaken the dominant modes and methods of the discipline.

It is hard not to wonder why this is the case, beyond making recourse to generalizing claims like Toni Morrison's pronouncement that the United States is a pastless place (a claim that, while it may be true, is more a restatement of the problem than an explanation for it).⁷

Perhaps it is, as Robert Tsai suggests, that "the survival of the 1787 Constitution itself—wounded, repaired, reread, but never altogether abandoned"—has "induced forgetfulness of much that has passed: failed democratic experiments, the ingenuity of alternative designs, certain tactics of direct action—even the inner workings . . . of

3. One and Only Presidential Museum, *Roadside America*, <http://www.roadsideamerica.com/story/9785> (last visited Mar. 1, 2016).

4. Herbert J. Storing and Murray Dry, eds, *The Complete Anti-Federalist* (1981).

5. GORDON WOOD, *THE IDEA OF AMERICA: REFLECTIONS ON THE BIRTH OF THE UNITED STATES* 127 (2011).

6. EMILY ZACKIN, *LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA'S POSITIVE RIGHTS* (2013).

7. "We live in a land where the past is always erased," Morrison writes. "The past is absent, or it's romanticized." See Toni Morrison, *Living Memory*, *CITY LIMITS* (Mar. 31-Apr. 7, 1988), at 10-11.

constitutionalism itself.”⁸ Those words come early in his magisterial work on *America’s Forgotten Constitutions*, surely one of the most captivating works on American political thought and American constitutional history to be written in the last several years.

Tsai tells you right off, in no uncertain terms, that his is a book that is going to bring the losers to the fore and that there are great stakes involved in making that move:

The usual approach is to study the history of American constitutional law as the creation of a single coherent tradition. From this vantage point, the law is a system of well-settled rules to be applied authoritatively, and thus it is sensible to study only a tiny set of documents. The losers in legal conflicts are relegated to the dustbins of history, their ideas presumed to be defeated for all time. But this is a mistake; defining what is suitable for study based strictly upon major legal achievements glorifies insiders at the expense of outsiders, ignores ideological rifts, and privileges technical authority over living practice.⁹

Instead, Tsai suggests “[b]y studying the U.S. Constitution’s ascendance through the eyes of the discontented, it becomes possible to observe the American constitutional tradition at war with itself.”¹⁰ This exposes “[t]he awkward truth . . . that the American legal tradition is an untidy phenomenon and constitutional defeats are rarely permanent.”¹¹ American constitutional law, as Tsai describes it, is a herky-jerky struggle, a much less uniform and stable thing than “an ongoing, tumultuous social process punctuated by a succession of ideologically significant events.”¹²

Other scholars have argued along these general lines, of course. However, what distinguishes the argument in *America’s Forgotten Constitutions* is Tsai’s focus on a series of groups of Americans who, for one reason or another, dissented from the national constitutional order but remained committed enough to the rule of law in general and to the American tradition of written constitutionalism to craft their own constitutions. The attempts at alternative constitutional order discussed by Tsai include: the Republic of Indian Stream (1832-1835), the Icarian Nation (1848-1895), John Brown’s Provisional America (1856-1859), the Confederate Rule (1860-1865), the Sequoyah Convention (1905), A Charter for the World (1947), The Republic of New Afrika (1968), and The Pacific Northwest Homeland (2006).¹³

While none of these attempts at constitution-writing was successful in the most immediate or obvious ways, Tsai argues that what they have in common is they all “distinguished themselves through ideological intensity, the integrity of their constitutional vision, and the intricacy of the institutions designed.”¹⁴ That may be true, but it is also true that Tsai has a good eye for what makes for a good story, and he knows how to put that good story together.

Here, the story is trifold. First, in separate chapters Tsai examines each forgotten

8. ROBERT L. TSAI, *AMERICA’S FORGOTTEN CONSTITUTIONS* 5 (2014).

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* at 7.

13. TSAI, *supra* note 8.

14. Some will be obscure to even the most diligent student of American politics and range across a field of conflicting ideological commitments, spanning the nation’s entire history. *See id.* at 6.

constitution at length, exploring its historical context and reflecting on its origins, purposes, qualities, and effects. The case studies are captivating, each on its own merits. Tsai could have merely walked through the narration of some of these stories and written a memorable book. For weeks after reading *America's Forgotten Constitutions*, I badgered my friends and loved ones with accounts of Etienne Cabet's Icaria, an attempted agrarian socialist republic made up mostly of French immigrants in the late 1840s and early 1850s. Cabet and his followers founded Icaria in Texas.¹⁵ Later, when Texas proved inhospitable to their project, they moved to Nauvoo, Illinois. In Nauvoo, they were able to lease more than 1,500 acres from the Mormons, who had recently fled west in search of a more hospitable horizon of their own.¹⁶ The Icarians worked hard to make their political vision tolerable to the powers that be, and to an astonishing degree, they were successful. In 1851, the Illinois legislature passed an act of incorporation that declared Icaria to be "constituted a body politic" with the power to make its own laws, as long as those laws were not incompatible with the laws of the state.¹⁷ This nation-within-a-nation persisted, in one form or another, for almost half a century. Although Icaria did not last—I will refrain from spoiling Tsai's engaging account of things, although suffice it to say that both internal fighting and external pressures were brought to bear on the nation—its tenure on Midwestern soil cannot help but raise exciting questions about a number of subjects, not the least of which are questions about the respective places of localism, agrarianism, and socialism in the American tradition. I imagine that Tsai's chapter on Icaria alone would make a valuable contribution to many courses and conversations about American political thought. "Have you ever heard of the Icarian Nation?" I kept asking my colleagues. "How is it that none of us have ever heard of the Icarian Nation?"

What is remarkable is that in this sense, the Icaria chapter is not exceptional within the book; all the case studies here beg for further study. The Icarians were not alone, for example, in writing an alternative constitution that found some kind of temporary peace with the standing constitutional order. The Sequoyah Constitution of 1905 was so well constructed and so amenable to the general ideas of its time and place, Tsai tells us, that even though it was intended to promote the cause of an independent State of Sequoyah, the document actually became incorporated into the state of Oklahoma's original constitution.¹⁸ In that dynamic, one can see new ways to think about the movement from tribal sovereignty to a liberal democratic order.

Although Tsai's work would be successful if it merely brought some of these forgotten constitutions to the light of day, this book does more. Tsai does not merely recount and narrate these case studies. In a kind of second level of analysis, he also compares them to great effect. Nevertheless, his attempt to categorize his case studies by means of one-word appellations such as "conventional, pioneer, tribal, ethical, cultural, and global" falls flat by being too *flattening*;— when will we academics learn that not every book is enhanced by forcing into it an awkward set of categories "for analytical

15. *Id.* ch. 2.

16. *Id.* at 59.

17. *Id.* at 60.

18. TSAI, *supra* note 8, at 165-80.

purposes”¹⁹

Toward that end, much of what I found striking about *America's Forgotten Constitutions* was that, despite the ostensibly different aims of these documents, many of them circle a set of complaints about the United States Constitution that are of a single piece. More specifically, many of them circle a set of complaints that echo the concerns of the anti-Federalists. Almost without exception, for example, the authors of these alternative constitutions imply or state outright that the U.S. Constitution fails to promote civic virtue. As Tsai says, a significant number of these authors “worried that a liberal democracy lacks the moral aspirations of a good society.”²⁰ Many include specific guarantees of a right to education, especially in the context of virtue promotion. A number of these forgotten constitutions also lament the administrative and cultural centralization that the Constitution has authorized and engendered, articulating instead a vision of greater local, small-scale political authority. Across these alternative constitutions exist persistent attempts to restructure economic systems in the United States, born of suspicion that the standing Constitution sacrifices citizenship to commerce. Tsai, noting all this, suggests that policy makers would do well to recognize the commonness of these complaints and work to mitigate them, in order to discourage “the most destructive efforts to reshape the political order.”²¹

There is wisdom in that statement, and yet it seems to me that the persistent patterns of constitutional resistance Tsai identifies point to more profound conclusions. For one thing, the very persistence of the patterns here suggests some intractability in the present constitutional order that works against addressing such complaints in the way Tsai suggests. It is perhaps even likely that these complaints persist because of the Constitution's specific, inherent qualities—meaning that these complaints are not likely to go away without some “destructive efforts to reshape the political order.” These are values so deeply embedded in the Constitution that they must almost be the negative cases in Tsai's assertion that constitutional defeats are rarely permanent.

At the very least, such thematic resonance that can be found across such different attempts at alternative constitution formation suggests that important intellectual work that is yet to be done in thinking about alternative political traditions in America writ large.²² That is, rather than approaching the “losers” of American political history as the rightly vanquished parties in a series of individual and disconnected episodes (thus justifying their neglect), Tsai's book suggests the possibilities that might inhere in thinking about those “losers” as representing sustained themes of dissent and discord across a long series, thus necessitating their consideration, both individually and en masse. If dissent takes place in the United States on fairly predictable terms, looking at it allows us to see more clearly the nature and limits of the standing Constitution.

Tsai may be at his most intellectually provocative when he is operating at the level

19. *Id.* at 9.

20. *Id.* at 298.

21. *Id.*

22. Here, I am backing into the language of my father Wilson Carey McWilliams's paean to an alternative tradition in the United States, *The Idea of Fraternity in America*, a book, which in some but not all ways, captures the spirit of the kind of inquiry. See WILSON CAREY MCWILLIAMS, *THE IDEA OF FRATERNITY IN AMERICA* (1973).

of this kind of broad analysis, using his case studies and comparisons to venture some important thoughts about the traditions of American constitutional order in particular and the traditions of written constitutionalism and popular sovereignty more generally. That is what I take to be the third level of the story in *America's Forgotten Constitutions*. From the book's opening page, Tsai situates his book as one that explores "the puzzle of ideological domination over time,"²³ especially in the American constitutional tradition, and he argues that "[i]nstill[ing] a sense of self-empowerment and a belief in political possibility through the rewriting of legal texts proved essential to the experiment in self-governance."²⁴ The heady combination of popular sovereignty and written constitutionalism, he tells us, means that even serious dissidents to the constitutional order often maintain their commitment to the rule of law, so much so that they express their dissidence through an act of lawmaking. That there is a tradition of alternative constitution writing in the United States almost paradoxically demonstrates the strength of the standing constitutional order. This form of resistance to this Constitution is, oddly enough, also a form of reverence for its constitutionalism. It is subversion that should please the powers that be.

In part, Tsai concludes from this important observation "that democratic constitutionalism ultimately entails an intellectual and spiritual struggle over ideas, values, and worldviews."²⁵ That struggle is part of the standing order. While that will come as no news to anyone who has thought about the spirit has another sort of import. His portraits of various alternative constitutions remind us of the extent to which constitutions are less about the legal and political forms they might instantiate and more about the educative and moral vision they engender merely by taking written form. For example, it seems unlikely that John Brown imagined his Provisional Constitution would immediately be realized with a set of governmental institutions, but it seems certain that he imagined it would do other, more formative work: helping to educate slaves, helping to organize abolitionists, establishing a sense of community among an often hidden and dispersed group of believers, serving as a sense of guidance and inspiration to the disconnected and downtrodden, bringing about the conditions that would one day bring an end to racialized slavery, and even "manipulating political perceptions in the face of inadequate resources."²⁶ The fact that Brown clearly did not write his Provisional Constitution with the idea that it would become the imminent law of the land helps to remind us that written constitutionalism invariably entails a great deal more than establishing laws and institutions. To echo Tsai's language, constitutions have educative, expressive, deliberative, and legitimating dimensions, among many other aspects. I think this is part of what Tsai means when he says, "to gain an accurate sense of the tradition, it is crucial to develop a feel for the ideological periphery."²⁷

Even as he makes that statement, a statement which seems to push the periphery toward the center, Tsai toggles back to the argument—the argument with which he ends

23. TSAI, *supra* note 8, at 1.

24. *Id.*

25. *Id.* at 4.

26. *Id.* at 114.

27. *Id.* at 3.

America's Forgotten Constitutions—that in the United States the periphery has become ever more peripheral. He makes clear through example that would-be “folk statesmen found the task of moving fellow citizens to action harder over time.”²⁸ It was easy enough for a small group of pioneers, finding themselves and their land in the midst of a minor border dispute between the United States and Canada, to proclaim and organize themselves as the Republic of Indian Stream. Imbued with a frontier mindset and convinced that popular sovereignty was rooted in territorial control, their sense of political possibility was expansive. Their composition of a constitution seemed both necessary and natural to a large body of citizens. Closing in on two centuries later, by contrast, it was not so easy for the Aryan activist Harold Covington to stoke the fires of constitutional resistance for his Pacific Northwest Homeland. He knew from the beginning that he would run up against a foreshortened sense of political possibility and the likely objection that writing an alternative constitution was a waste of time. Some of this change over time has to do with the changing scale of the United States, to be sure. However, Tsai allows us to see that “[a]s conventional sovereignty became an entrenched and layered practice, ordinary law became an effective instrument to deprive radicals of their claim to speak for the people”²⁹ merely through “[t]he regular enforcement of the laws.”³⁰ In addition, “[t]he legal order’s means of protecting itself and its citizens became more sophisticated, as new agencies acquired expanded powers and deployed advanced technologies to monitor, infiltrate, and undermine radicals,” ultimately reducing “the chances that new visions of constitutional law might completely overtake the existing institutions of government.”³¹ The farther the historical distance from 1787, the less Americans have seen it as a model of and potential target for political rebellion and the more we have seen it as a fixed star in the sky. (Looked at in a certain way, then, Nick Pahys’s assertion that the neglect of John Hanson goes along with certain kinds of national ideological control is on or at least close to the point.)

Drawing attention to that which is lost and all but forgotten in the American tradition, then, does reaffirm the strength of the historical victors and to some degree turn our attention back to them. It does so in a multifaceted, often surprising way that opens rather than closes fields of inquiry. Thinking about what Tsai calls here the puzzle of ideological domination helps us to avoid the kind of concomitant intellectual domination that is perpetually a danger in political inquiry. As such, let this work on forgotten works be itself not forgotten.

28. TSAI, *supra* note 8, at 300-01.

29. *Id.* at 300.

30. *Id.*

31. *Id.*