

Winter 2020

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Recommended Citation

Emily Pears, *Popular Legitimacy: A Tenuous Proposition*, 55 *Tulsa L. Rev.* 277 (2020).

Available at: <https://digitalcommons.law.utulsa.edu/tlr/vol55/iss2/20>

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POPULAR LEGITIMACY: A TENUOUS PROPOSITION

Emily Pears*

HOWARD PASHMAN, *BUILDING A REVOLUTIONARY STATE: THE LEGAL TRANSFORMATION OF NEW YORK, 1776–1783* (UNIVERSITY OF CHICAGO PRESS 2018). PP. 192. HARDCOVER \$90.00. PAPERBACK \$30.00.

GEORGE VAN CLEVE, *WE HAVE NOT A GOVERNMENT: THE ARTICLES OF CONFEDERATION AND THE ROAD TO THE CONSTITUTION* (UNIVERSITY OF CHICAGO PRESS 2017). PP. 400. HARDCOVER \$30.00. PAPERBACK \$20.00.

The classic, popular story of the American Revolution and Founding goes something like this: in a decidedly upright and legalistic fashion, America declared its independence from England, and the colonies cooperated to ultimately defeat that great empire in the Revolutionary War. At the war's conclusion, the Articles of Confederation emerged like a phoenix from the ashes, fully formed. After a few years and Shays' Rebellion, it became obvious to all that the Articles required tweaking to ensure that less cooperative states would get on board. The Constitutional Convention in Philadelphia presented those tweaks in the form of a new Constitution whose genius, legitimacy, and popular support were obvious from the outset to all but a stodgy few.

Scholarly research obviously complicates that rudimentary textbook account substantially, but the basic sense still permeates that America's was a legalistic revolution and that institutional legitimacy was bestowed, at each stage, automatically. Two recent books, Howard Pashman's *Building a Revolutionary State* and George William Van Cleve's *We Have Not A Government* work to reconstruct our understanding of how legal and institutional structures in those tumultuous years between 1776 and 1787 were viewed on the ground, by ordinary American citizens. As a result, each work shows how chaos, politics, and the people's demands for change constructed America's early republican institutions. Rather than emerging complete from the minds of great legal scholars, America's institutional forms self-legitimize through an iterative process of public pushback and reform.

Reading *We Have Not A Government* and *Building a Revolutionary State* together makes clear that legal and political institutions cannot be created in vacuums. Institutions that are imposed on publics unwilling or unable to uphold their central tenants will

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ultimately collapse when tested. What is required, instead, is a public confidence, or attachment, to undergird institutional norms. When the people see the value of their institutional arrangements, when they have faith that their government will protect and serve them well, their support will prop up even those norms that seem to violate foundational principles. But institutions that attempt to exert power and authority without public support require, at the very least, vast military resources and leaders with strong stomachs for rebellion.

Howard Pashman's *Building a Revolutionary State* uses the example of a single state, New York, to investigate how the chaos and "popular upheaval" of the Revolutionary War transformed into a relatively stable legal system at the close of the revolutionary period.¹ The answer, he argues, lies in the popularity of property redistribution among a beleaguered and fearful wartime populace and New York's willingness to embrace such populist tools.² The start of the war saw the destruction of colonial legal systems with little in the way of institutions, courts, or stable tools of governance to replace them. The first wave of legal authority from the provisional government came in the form of the Committee for Detecting and Defeating Conspiracies. At first glance, such a committee appears to signal an erosion of the rule of law, or at least a violation of the individual rights at the core of the revolutionary movement. In fact, Pashman argues, the Committee replaced ad-hoc vigilante citizen groups who already sought to rid their towns of apparently disloyal enemies.³ "In this way, it generated popular support for revolutionary authority,"⁴ and as citizens came forward to help the committee identify Tories, "they saw that revolutionary institutions worked for them and that central authority would address their urgent desire to suppress Loyalism."⁵

The Committee's methods of jailing and deporting British sympathizers ultimately proved unsustainable as overcrowding and returning prisoners revealed holes in institutional capacity.⁶ In the spring of 1777, as the war began to take its toll on New York's population, the state's Convention appointed local "Commissioners of Sequestration" to confiscate and auction off any property abandoned by British loyalists.⁷ The material relief and real goods Commissioners provided to a struggling population did a great deal to connect citizens to their Provincial Congress and interest them in its institutional authority. As Pashman writes, redistribution "linked New Yorkers to the revolutionary project by giving them a vested interest in maintaining insurgent government."⁸ Ultimately, New Yorkers became frustrated by the Convention's restraint in redistributing material goods but not real property. In 1779, citizens began re-forming the lawless local committees that had allowed them to exact justice against Loyalists at the

1. HOWARD PASHMAN, *BUILDING A REVOLUTIONARY STATE: THE LEGAL TRANSFORMATION OF NEW YORK, 1776–1783*, at 3 (2018).

2. *Id.*

3. *Id.*

4. *Id.* at 42.

5. *Id.* at 45.

6. PASHMAN, *supra* note 1, at 54.

7. *Id.* at 65.

8. *Id.* at 78.

start of the war, effectively bypassing the state's nascent legal institutions.⁹

New York's legislature finally responded to erosions in popular trust by enacting a forfeiture law in 1779 which dramatically increased property redistribution. "[B]y 1783, the committee system had ceased, and New Yorkers accepted the legal authority of formal state structures, two changes that had seemed impossible only a few years before."¹⁰ The forfeiture law, Pashman argues, turned anger and resentment into trust in and support for brand new legal institutions across the state.¹¹ Ultimately, property redistribution helped to legitimize and fortify nascent political institutions in New York because it accomplished three distinct but equally necessary goals. First, property redistribution provided immediate relief to a suffering wartime population.¹² Citizens respond to institutions that provide tangible benefits in times of need and recognize the utility of legitimizing those institutions with their support. Second, redistribution established "moral authority."¹³ Citizens who supported the revolution and suffered during the war wanted desperately to see their Tory enemies punished, and forfeiture laws sent a clear message that opposition to the revolutionary cause warranted moral as well as legal action. Finally, redistribution tied citizens' interests to those of the newly formed state institutions.¹⁴ Citizens who purchased forfeited property immediately acquired a vested interest in the survival of the courts and committees that granted them that share. Those bonds, built on material interest, lasted far beyond the war years and helped significantly bolster the legitimacy of state legal institutions.

It is tempting to think of institutional legitimacy as dependent exclusively on legal validity or administrative efficiency, but such thinking belies the complexity of public trust and interest in times of great upheaval. Blunt tools, such as forfeiture laws and the establishment of committees to root out enemies of the state, look to legal scholars with the benefit of hindsight to be illegal, or at least to violate the principles and foundations of a Lockean republic. In reality, however, such actions can serve a valuable function for a regime that claims to rule by law and requires public support to do so. As my own work on political attachments has also suggested, legitimizing institutions requires a multifaceted approach to winning public sympathy and constructing deep and lasting connections between citizens and the institutions of government.¹⁵

Long standing public narratives about the legalistic nature of America's revolution might lead us to conclude that forfeiture laws were ultimately enforced in an orderly and just way, but Pashman makes clear that was not the case. New York State singled out absentee defendants in prosecuting forfeiture cases, nearly guaranteeing default judgements.¹⁶ Pashman writes that "as soon as the war ended, some of New York's leaders

9. *Id.* at 86.

10. *Id.* at 88.

11. PASHMAN, *supra* note 1, at 10.

12. *Id.*

13. *Id.*

14. *Id.* at 11.

15. See generally Emily Pears, *Chords of Affection: A Theory of National Political Attachments in the American Founding*, 6 AM. POL. THOUGHT 1 (2017).

16. PASHMAN, *supra* note 1, at 101–02.

tried to convince ordinary people that their revolution had been more fair, more just and rule bound, than it actually had been.”¹⁷ Hamilton, among others, suggested that it was a betrayal of the revolution itself to continue vengeful practices of confiscation and redistribution. But, as *Building a Revolutionary State* makes clear, those practices were at the core of what allowed revolutionary institutions to succeed.

Pashman’s narrative, of legitimate legal institutions emerging from revolutionary turmoil as a result of the people’s desire for material relief and vengeance, highlights the importance of public confidence in constructing stable, legitimate institutions. One of the book’s strongest contributions lies in Pashman’s extensive archival research that highlights how a wide array of New Yorkers reacted to wartime upheaval and pressed their political leaders to take action against traitors to the revolutionary cause. Public demands and preferences do not always adhere to political principles or legal formalities but ultimately dictate the fate of any institutional order.

George William Van Cleve highlights similar themes in *We Have Not a Government*. His analysis of the Articles of Confederation’s loss of public confidence and ultimate political collapse demands similar attention to the interplay between public faith, institutional forms, and legal foundations. Having read Pashman, we should not be at all surprised to find, in the aftermath of the Revolutionary War, an American public that is distrustful of institutions, seeks revenge against enemies, ignores established laws, and generally views the protection of private property as a principle of only secondary importance. This was far from the Lockean liberals we have come to expect among America’s founding generation. While New York managed to emerge from the Revolution with a surprisingly well-respected legal system, its institutions depended on the continued support of a fickle public. Van Cleve picks up where Pashman leaves off, providing a new and well-researched account of the policies and events that ultimately led to a loss of public confidence in the Articles of Confederation’s ability to govern a sectionally divided America.

Van Cleve takes on past historical narratives of the post-revolutionary period that describe the Articles and the subsequent push for constitutional reform as either the result of imminent economic collapse, or a conservative effort to stymie an increasingly democratic system. Van Cleve instead argues that “[t]he intractability of the Confederation’s problems stemmed principally . . . from growing sectional and interstate conflicts, often based on economic interest, as it confronted the massive challenges to America posed by the burdensome legacy of the Revolutionary War.”¹⁸ Political collapse, rather than imminent financial collapse, caused America’s leaders to lose faith in the Confederation’s ability to govern.

We Have Not A Government begins with an analysis of the impact of massive Revolutionary War debt on late eighteenth century governance. A wide array of political leaders agreed on the need to maintain public faith by properly dealing with war debts, both domestic and international. But it became clear that public opposition to state taxes,

17. *Id.* at 113.

18. GEORGE WILLIAM VAN CLEVE, *WE HAVE NOT A GOVERNMENT: THE ARTICLES OF CONFEDERATION AND THE ROAD TO THE CONSTITUTION* 9–10 (2017).

state refusal to comply with Confederation requisitions, and overwhelming Federalist opposition to a direct Confederation taxing power meant debts would not be paid. As Van Cleve writes, “in the final analysis . . . it was the self-interest of the states and their citizens that destroyed the 1783 proposals for Confederation taxation” and “the states would continue to hold the nation’s financial future hostage to their individual interests and desires as long as the confederation survived.”¹⁹ State efforts to combat commerce and trade restrictions imposed by Britain further exacerbated sectional disputes and a growing sense that state interests would always predominate in confederation politics. Van Cleve argues that states were by and large *able* to raise tax revenue and pay for imposed trade restrictions, but refused to, because taxes were unpopular.²⁰

The book’s second section highlights an additional arena of interstate conflict and Confederation political failure through a study of western settlement and emigration. The war’s peace treaty opened western lands to American settlement and emigrants, particularly from New England, flooded west. While the Confederation facilitated the sale of western lands and aimed to benefit from its profits, it failed to adequately protect or control settlers as clashes with Native American tribes and disputes over European-controlled borders became commonplace. The Confederation showed significant weakness in failing to meet the political and institutional challenges of western expansion that again pitted state and sectional interests against one another. Institutional weakness in the west was particularly worrisome, given that settlers lacked any patriotic attachment to a state or nation.²¹

The Confederation proved itself unable to broker political compromises across sectional and economic interests. This was particularly true, Van Cleve writes, when it came to the Spanish treaty negotiations over Mississippi River navigation, which proved to be “the most intractable political stalemate of the postwar period.”²² The Confederation Congress’ inability to negotiate a deal that would re-open the Mississippi to American interests “sharply increased interest in creating separate sectional Confederations to replace the United States” and “markedly increased opposition to strengthening the existing Confederation.”²³ Americans had not only lost confidence in the leaders and political arrangements tasked with their protection, but they had begun to lose faith in their union altogether.

We Have Not a Government also focuses on popular movements and revolts in response to declining economic conditions in the lead-up to the Constitutional Convention of 1787. Van Cleve traces popular movements in support of debt relief and paper-money across the Confederation, but ultimately concludes that they had limited effects on the Confederation reform movement because both Federalist and nationalist leaders tended to oppose radical relief measures.²⁴ Outside of states like South Carolina and Rhode Island,

19. *Id.* at 101.

20. *Id.*

21. *Id.* at 147.

22. *Id.* at 185.

23. VAN CLEVE, *supra* note 18, at 185.

24. *Id.* at 212–13.

where there was significant legislative support for relief measures, “state legislatures almost always responded to popular pressure for economic relief by balancing it against conflicting creditor and wealth-holder interests.”²⁵ Popular support for debt relief primarily highlighted the danger posed by state popular majorities united against minority rights. Leaders across the political spectrum began to think differently about the Confederation’s power to control such majority abuses of power. That concern came to a head with Shays’s Rebellion in 1786.

Van Cleve argues that like the Confederation’s lackluster response to conflict in western settlements, Shays’s Rebellion highlighted both the state and national governments’ powerlessness in defending political institutions and the rule of law.²⁶ Van Cleve highlights the opposing conclusions of Benjamin Lincoln and George Washington in the aftermath of the Rebellion. “Lincoln wanted the Confederation divided because it was unable to enforce its laws and could not protect his section’s interests. Washington wanted a nation powerful enough to enforce its laws in a way that could surmount sectional conflicts.”²⁷ In each case weak, illegitimate institutions that utterly lacked public confidence rendered any grand political bargain useless.

The book’s final section traces state views in the lead-up to the Constitutional Convention at Philadelphia and highlights the process by which leaders came to conclude that reform was necessary. Even as state leaders determined that impotent Confederation powers required reform, they turned to face a more daunting problem:

How could a central government obtain the support of its people to become an effective continental republic? On the eve of the convention, experienced political leaders still could not grasp how a national government could obtain obedience to its decisions by states (and their citizens) without using military force, the antithesis of republican government.²⁸

That question—of how best to ensure public confidence and uphold institutional legitimacy without violating republican norms—sits at the very center of Pashman and Van Cleve’s studies. While both provide answers grounded in specific crises, their coexistence provides evidence that public trust and attachment requires constant tending for any republican institutions to long survive. Ultimately, Van Cleve argues that the Constitutional Convention overcame the problems of sectionalism and public confidence by “provid[ing] for broad intersectional power sharing,”²⁹ a devil’s bargain that required the creation of “sectional distortions of politics before the Civil War caused by the three-fifths clause.”³⁰ That solution is not unlike New York’s recourse to requisition and redistribution to bolster weak state institutions during the war. Neither reflected pure legal theory or commitment to revolutionary principles, but both succeeded in maintaining the rule of law when political instability and a divided public threatened institutional forms.

Institutions can win the people’s support in a variety of ways. Pashman usefully

25. *Id.* at 212.

26. *Id.* at 216.

27. *Id.* at 218.

28. VAN CLEVE, *supra* note 18, at 278.

29. *Id.* at 286.

30. *Id.* at 289.

highlights the way that Revolutionary institutions in New York solved basic human problems, demonstrated their value to the public, and then economically tied the people's interests to the government's survival as a means of constructing deep and lasting attachments between citizens and their laws. Once convinced of the utility and legitimacy of their laws, the people voluntarily defended them, further reinforcing their public faith.

Reading these two books in tandem highlights, however, that legitimizing institutions through public faith requires constant upkeep and maintenance. Attachments between the public and their institutions, once established, cannot be left to wilt. They must instead be tended to, providing perpetual reminders to the public of the government's utility, legitimacy, and goodness. Too often, in both the study and creation of institutional forms, we lose sight of the role the public plays in granting their power. When we study laws and ideas without reference to how they will be received by the people they govern, we miss the majority of the story of their efficacy. These books take on the significant challenge, particularly in historical research, of understanding how laws and institutional actions affected people on the ground, how those actions altered public perceptions, and how public confidence ultimately legitimized or undermined those institutions moving forward.