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EAVESDROPPING ON THE VOX POPULI

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EAVESDROPPING ON THE VOX POPULI

Alison L. LaCroix*

PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, *1787-1788* (Simon & Schuster 2010). Pp. 608. Hardcover. $30.00.

JACK RAKOVE, REVOLUTIONARIES: A NEW HISTORY OF THE INVENTION OF AMERICA (Houghton Mifflin Harcourt 2010). Pp. 487. Hardcover. $30.00.

"Go on reading until you hear people talking. Then you will understand why things happened as they did," the Oxford historian G.M. Young exhorted his colleagues in 1948.[1] Young's message to his fellow scholars was simple, if daunting: one should immerse oneself in the primary sources and stay submerged until the sources disappear and the voices of the historical actors whisper unmediated.

The task of sifting through sources until one hears voices becomes even more overwhelming when the people surveilled happen to have inhabited British North America, and later the United States, between the years 1765 and 1800. The whispers are muffled, obscured, and yet strangely familiar. The voices' observations often turn into oracular koans; their efforts at grasping the vast political, social, and legal changes occurring around them seem either impossibly prescient or all-too-humanly banal. In the dark hours of the academic night, the historian of early American political and legal history might be forgiven for asking: will anyone ever be able to hear those people talking again? Is such espionage even possible anymore, or have the intervening generations of gloss, repetition, and revision forever stifled the dense and overlapping tones of the late eighteenth century?

Two recent books on the Revolutionary and founding periods by the distinguished historians Pauline Maier and Jack Rakove provide, in different ways, thoughtful and inspiring responses to this question. Maier and Rakove each undertake to amplify the long period of the Revolution and the founding by focusing their attention more on individual voices and the thread from one conversation to the next, than on sharply defined analytical frames that might muffle the talking. Both scholars largely adopt the form of narrative history, focusing on specific individuals in specific places and moments, in order to estrange their readers from the era and bring freshness to the events and debates, examining them as they happened. One striking similarity between these books is the success with which they place less-frequently studied participants in the

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1. G.M. YOUNG, TODAY AND YESTERDAY: COLLECTED ESSAYS AND ADDRESSES 112 (1948).

Electronic copy available at: http://ssrn.com/abstract=2177014

Revolutionary and founding moments at the center of the broadcast, providing new conversations for readers to listen in on without engaging in claims about the relative importance of specific actors. Thus, John Jay, Henry Laurens, George Mason, the ratification-era Patrick Henry, and Melancton Smith share the transcript with the more familiar figures of George Washington, Thomas Jefferson, and James Madison.

Rakove's story in *Revolutionaries: A New History of the Invention of America* begins more than a decade earlier than Maier's. Rakove examines the years between 1773, when colonists in Boston began to agitate against metropolitan rule and conventional Blackstonian theories of Parliament's sovereignty, and 1792, the first post-ratification presidential election year in which all branches of the federal government (including nascent political parties) were fully functioning. As the book's subtitle suggests, the aim is both to revise earlier accounts of the Revolution and the founding, and to investigate the political and intellectual origins of the nation. Rakove frames his central question as an inquiry into "how . . . we explain the appearance of the remarkable group of leaders who carried the American colonies from resistance to revolution, held their own against the premier imperial power of the day, and then capped their visionary experiment by framing a Constitution whose origins and interpretation still preoccupy us over two centuries later."[2]

Rakove seeks to answer this question by examining a series of dramatic incidents that place specific actors in particular moments of tension and transition. A chapter titled "The Revolt of the Moderates" discusses the slow and deliberate turn of Jay, John Dickinson, and Robert Morris toward advocating independence. The chapter "Vain Liberators" focuses on the complex attitudes toward slavery held by the Laurens family. The final two chapters, "The Greatest Lawgiver of Modernity" and "The State Builder," meanwhile, examine Madison's central role in the drafting of the Constitution and Hamilton's plans for developing federal institutions, respectively.

Maier's *Ratification: The People Debate the Constitution, 1787-1788* focuses on a narrower but deeper slice of the founding period: the single year, from September 1787 to September 1788, during which the Constitution was debated and ratified in the states. One of Maier's many contributions is to provide the first comprehensive history of how the ratification process unfolded — or didn't — in each of the original thirteen states. Maier's story is polyphonic, with chapters largely moving in chronological fashion through the states, while also acknowledging the importance of sequencing, momentum, and interconnectedness among the participants. These participants, of course, were paying eager attention to how the debates unfolded elsewhere, against the backdrop of each state's own deeply rooted political culture. The book thus emphasizes both the diverse and decentralized nature of the ratification debates and the debates' secondary role in building the centripetal force toward nationhood. Maier describes the ratification contest as "the first national election" insofar as "[o]ver and over observers tried to calculate how what happened in one state would affect what came later, which itself served to bind the nation together more tightly."[3] Maier's story is not one in which "[t]hirteen clocks were made to strike together," as John Adams retrospectively

2. JACK RAKOVE, REVOLUTIONARIES: A NEW HISTORY OF THE INVENTION OF AMERICA 17 (2010).
3. PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787-1788, at xi (2010).

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described independence, but rather a more remarkable one in which, by 1790, thirteen clocks decided of their own volition to strike in sequence, releasing a multilayered phrase of carillon music.[4]

The books develop several common themes, three of which are especially notable: commerce, constitutionalism, and the role of uncertainty. In addition, the authors' methodological approaches raise interesting and potentially provocative definitional questions, as well as provide an opportunity to consider the strengths and weaknesses of a primarily narrative approach to writing the history of this period.

Revolutionary and founding-era Americans' views on commerce play a central role in both Rakove's and Maier's stories. However, each author notes that the account he or she is offering should not be understood as an economics-focused approach to the founding period, of the kind made famous in the early twentieth century by Charles Beard.[5] Rakove's moderates — Morris, Dickinson, Jay, and others, the majority of whom hailed from the middle colonies — turned toward independence in late 1774 at least in part because they feared Parliament was infringing on their property rights, one of the vital "rights of Englishmen" that they believed had been enshrined by the Glorious Revolution. "The independence they sought was personal, not collective; economic, not political," Rakove notes.[6] "But their concept of security also had a profoundly political dimension," insofar as "they genuinely feared that the rights they treasured most would be rendered insecure in an empire that subjected their property to the legislative control of others."[7] Ten years later, one of the charges that critics aimed at the Articles of Confederation was that they failed to offer meaningful protection for property and economic rights, because they gave the states plenary authority over commerce, which in turn enabled parochial legislation and hobbled the confederation's efforts to build the public credit abroad. Efforts to reform the Articles to give Congress some power to regulate commerce, spearheaded by Madison in the Virginia legislature in 1785, led to the Annapolis Convention of 1786, and eventually the Philadelphia convention of 1787.

In setting the scene for the ratification debates, Maier delves extensively into both the mechanics of commercial regulation under the Articles and the ideological connections between commerce and emerging notions of federalism. In the 1780s, the issue of duties on imports, or imposts, and the relative power of the state and general governments to levy such duties, echoed the previous two decades' debates about the relative powers of Parliament and the colonial assemblies to regulate trade within the empire and to use taxation as an explicit means of raising revenue. (Indeed, as Maier notes, both supporters and opponents of congressional trade regulation frequently referred to such legislation as "navigation acts").[8] The Articles of Confederation did not grant Congress the power to tax individuals or the states for fear of creating an *imperium*

4. Letter from John Adams to Hezekiah Niles (Feb. 13, 1818), *in* X THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES 282, 283 (Charles Francis Adams, ed., Boston: Little, Brown & Co. 1856).

5. *See* CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (1913).

6. RAKOVE, *supra* note 2, at 85.

7. *Id.* at 85-86.

8. MAIER, *supra* note 3, at 46.

in imperio – a sovereign within a sovereign. To many state-builders of the late 1770s and early 1780s, allocating the taxing power concurrently between the states and the general government appeared to violate the subject-matter separation of governmental authority that underpinned the initial theoretical separation between colonial and metropolitan visions of sovereignty.[9] Instead, the Articles confined Congress to receiving annual payments, or requisitions, from the states, which Congress then used to retire war debt and to fund the general government.

Yet the conventional story of the weak Confederation, a story that builds whiggish momentum toward the eventual adoption of the Constitution, fails to capture the many levels on which the conflict over taxation was being fought in the 1780s. The familiar narrative contained in some history textbooks and constitutional law casebooks conceals much of what is interesting about the taxation issue. As Maier teases apart the tangle of early national views regarding the taxing power, she makes an enormous contribution to the historiography, as well as providing useful and provocative grist for scholars of constitutional law. In the early 1780s, while the Confederation Congress was imploring the states to allow it to collect an impost to cover the war debts, individual states were collecting import duties from other states, as when New York collected duties from Connecticut for goods that entered the country through the former but were ultimately sold in the latter.[10]

Both these imperatives could be seen as largely consistent with the standard, largely ahistorical story of the weak Confederation as a mistaken rough draft that ultimately gave way to the triumphant Constitution. But Maier also points out an important and less well-known aspect of this story, one that potentially subverts many received understandings of the founding period, including some held by recent and current justices of the U.S. Supreme Court. Maier notes that New York actually ratified the 1783 amendment giving Congress the power to lay an impost. However, the New York delegation to the Confederation Congress "insisted that the duties levied by Congress be paid in New York's paper money and collected by state officials."[11] In other words, New York leaders of the 1780s were arguing for a version of what would now be termed "cooperative federalism." As a matter of history rather than doctrine, the weak-Articles story must be reconciled with a scenario in which "commandeering," as the Supreme Court has characterized the improper use by Congress of state legislative and executive officials, was accepted and even advocated by some of the states, despite modern caselaw's suggestion that such use constitutes — and *has always constituted* — a violation of the states' reserved powers under the 10th Amendment.[12] Maier's insights suggest that the Articles should be seen neither as a false start that had no bearing on the subsequent constitutional regime, nor as a type of malign doppelgänger of the

9. *See* ALISON L. LACROIX, THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM 60-65 (2010).

10. MAIER, *supra* note 3, at 129.

11. *Id.* at 12.

12. *See, e.g.*, Printz v. United States, 521 U.S. 898, 919 (1997) (Scalia, J.) ("The Framers' experience under the Articles of Confederation had persuaded them that using the States as the instruments of federal governance was both ineffectual and provocative of federal-state conflict."); *accord* New York v. United States, 505 U.S. 144, 188 (1992) (O'Connor, J.) (invalidating certain types of congressional control of state legislative officials).

Constitution, but as an alternative vision of constitutional order so powerful and complex that it could not simply have disappeared in 1787. Maier thus fruitfully challenges many of the assumptions of originalist constitutional interpretation. Without writing a book that describes itself as legal history or engaging in awkward presentism, Maier implicitly engages with some of the most pressing current debates in constitutional law scholarship.

Moreover, both Rakove's and Maier's books are in conversation, albeit without explicitly engaging in much historiographical discussion, with some of the dominant scholarly accounts of constitutionalism and popular sovereignty. Perhaps most important, Rakove and Maier both suggest that the related ideas of constitutions as a normative governmental framework (rather than simply a description of institutional arrangements) and the sovereignty of the people were still works in progress relatively late in the chronology of the founding period. Rakove argues that Americans became constitutionalists in 1776, pointing to the Virginia constitution and declaration of rights that year.[13] But, in Rakove's view, it was not until the drafting of the Massachusetts constitution in 1780 that Americans were able to "perfect a workable concept of popular sovereignty."[14]

Maier describes her project as telling "the story of how 'We the People' decided whether or not to ordain and establish the Constitution of the United States."[15] She therefore emphasizes a somewhat later chronology than Rakove's, pointing out that as late as 1787-1788, the talismanic phrase "the people" sometimes referred to the people of a particular town meeting rather than the people of the United States or even the people of the state as represented in the state legislature.[16] Indeed, Maier notes, during the Virginia ratification convention in June 1788, Patrick Henry attacked "'that poor little thing – the expression, *We, the people*,' with which the Constitution began, instead of 'we the States'" as part of his broader argument against ratification.[17] Henry insisted that "[t]he people in their collective capacity were not the proper agents for entering leagues, alliances, or confederations; that was the work of 'states and sovereign powers.'"[18] Statements such as Henry's suggest the degree to which the meaning and import of the Revolutionary idea of popular sovereignty remained unsettled well into the early national period. Indeed, participants in the ratification debates devoted significant attention to considering arrangements based on multiple or divided sovereignty among different governments and institutions. They did not simply assume that the emergence of popular sovereignty, in either thought or practice, solved the old *imperium in imperio* problem by offering a single new source of sovereign power.

Despite the importance of ideas of constitutionalism and popular sovereignty to both books' accounts, the concepts remain in the background. Their content and significance is assumed but not fully explored. Given both authors' stature and body of scholarly work, this deemphasis on situating the narrative in the relevant historiography must proceed from a deliberate choice to tell a story rather than to spend time quibbling

13. RAKOVE, *supra* note 2, at 159.
14. *Id.* at 195.
15. MAIER, *supra* note 3, at ix.
16. *Id.* at 134-35.
17. *Id.* at 264.
18. *Id.*

in the faculty lounge. As a result, however, each book suffers at times from a lack of sharp analysis. Rakove's analysis appears particularly reluctant to delve deeply into the question of what constitutionalism and popular sovereignty actually *meant* to the Revolutionaries and founders, or how these radical ideas unfolded in practice. Instead, Rakove offers tautological definitions that ultimately obscure the political and legal changes that he clearly wants to emphasize. By 1776, he argues, Americans had "become a people who defined themselves by the constitutions they framed and who saw their opportunity 'to alter and abolish' constitutions as the great achievement their own struggle for independence should bequeath to the wider world."[19] Later in the book, he locates the importance of the Massachusetts constitution of 1780 in the fact that it "helped seal a defining aspect of American nationhood and citizenship. Americans were a people who wrote constitutions, and the constitutions they wrote defined their character as a people."[20] How might seventeenth-century colonists' efforts to write down a foundational frame of government, as in the Mayflower Compact (1620) or the Fundamental Orders of Connecticut (1639), fit into this vision of the 1770s as the moment of American constitutional origins? What does it mean to say that the identity of the American people – and thus the central power of popular sovereignty – consisted in their sense of themselves as constitution-writers? Did popular sovereignty come first or constitution drafting? Rakove's account does not provide answers to these questions.

Both books are most compelling when highlighting the uncertainty and chaotic contingency of many of the developments in American politics and law in the 1770s and 1780s – the very developments that many legal scholars, as well as general readers, tend to think of as relatively certain and consensual. Indeed, both Rakove and Maier deftly single out several decisive moments in the chronology of the Revolution and the founding and demonstrate that those moments became dispositive only after the fact. The processes of declaring independence, winning the war, and drafting the Articles of Confederation and the Constitution were loaded with ambiguous and contested implications as they happened.

Rakove gives an especially evocative account of the utter missing of the minds between British and American officials regarding just what had been established by the battle of Yorktown. Some metropolitan officials, such as the secretary of state for the American Department, Lord George Germain, as well as George III himself, doubted that Cornwallis's defeat dictated even a cessation of military action in America, much less British recognition of American victory or independence. Others, such as the prime minister, Lord North, took the news with more tremble in the upper lip; North is said to have cried out, "Oh God! It is all over!"[21] North's successor, the Earl of Shelburne, for his part, inquired of American commissioner Henry Laurens "why Americans would want to cut all ties with Britain, when that would lose them the benefit of habeas corpus, the Great Writ of English liberty." The query enraged Laurens, a lawyer who had been imprisoned in the Tower of London on treason charges for much of the war.[22]

19. RAKOVE, *supra* note 2, at 159.
20. *Id.* at 196.
21. *Id.* at 272.
22. *Id.* at 276.

Similarly, Maier limns a vivid picture of participants' uncertainty regarding the options open to them at various points during the ratification debates, as well the importance of temporal sequencing to the debates' outcome. The specter of a second convention (to consider amendments proposed by the state ratifying conventions) recurred throughout much of the process. So also did the question whether local assemblies and town meetings were limited to appointing delegates to the state conventions, or were instead permitted to debate the merits of the Constitution. The bindingness of those debates on the state conventions was also an open question.[23] On the congressional side, was Congress's role confined to transmitting the text of the Constitution from the Philadelphia Convention to the states, or were the members of Congress (many of whom were also delegates to the state ratifying conventions) permitted to offer comments or even suggest amendments? These procedural questions stood for larger uncertainties about the legitimacy and legality of the Philadelphia Convention's plan of reform. They also dovetailed with the spectrum of possible substantive votes: for ratification, against it, or somewhere in the middle (most commonly, ratification with some form of guarantee of amendments by the new Congress). Absorbing the confusion and ambiguity surrounding these ostensibly pivotal moments in the American founding is vital to a genuinely and richly historical understanding of the period. In these depictions of a lack of consensus among contemporaries regarding the meaning of specific events, Rakove and Maier give readers a visceral appreciation for the founders' lurching journey.

At the level of interpretive methodology, however, the books diverge. Maier's book does an outstanding job of following the injunction from Barbara Tuchman that Maier quotes in the introduction: "A writer can build suspense in telling a story . . . even if the reader knows how the story turned out, so long as the writer never mentions the outcome until it happens at the proper place in the story."[24] In its focus on telling the story, however, the book occasionally seems reluctant to engage with some of the important intellectual history questions, especially the question why specific actors argued and wanted to argue as they did. For example, in the section on the Connecticut debates, Maier describes Federalists such as Oliver Ellsworth and Roger Sherman as "explaining away or denying what fundamental changes the Constitution would bring" and as either not grasping or refusing to accept their fellow Nutmeggers' understanding of popular sovereignty.[25] But Maier does not explain why she adopts this account of the Federalists' mindset or goals, or indeed what "real" beliefs lay behind these apparent strategies. Given Maier's admirable determination to avoid reading outcomes backward into what came before, the book would have benefited from a crisper account of why particular individuals' positions mattered and why she appears to ascribe specific rhetorical motives to commentators such as Ellsworth and Sherman.

Despite Rakove's stated concern with uncertainty and contingency, his account repeatedly adopts a jarringly triumphalist tone. The book at times appears to adopt a "great man" theory of historical causation, a beat-the-odds story in which the

23. MAIER, *supra* note 3, at 44-45, 134, 145.
24. *Id.* at xvi.
25. *Id.* at 131, 136.

revolutionaries of the title "carried the American colonies from resistance to revolution, held their own against the premier imperial power of the day, and then capped their visionary experiment by framing a Constitution whose origins and interpretation still preoccupy us over two centuries later."[26] Elsewhere, Rakove emphasizes "historical destiny,"[27] points to a "political vortex" into which "the moderates found themselves sucked . . . by the sheer magnitude of the crisis" of the 1770s,[28] and distinguishes between "history" and "History."[29] For example, he writes that "History had other plans" besides a career in the Virginia legislature for Thomas Jefferson.[30] Rakove also likens the "utopian" Jefferson to Thomas More, although he notes that Jefferson lacked "the religious faith that sent More to the stake."[31] (More was executed by beheading in 1535.) Rakove's repeated analogies between the revolutionaries and the "greatest generation" of the World War II era feel forced, but, more distressingly, they raise concerns that an over-awareness of outcomes and some background assumptions of heroism underpin Rakove's story. Moreover, Rakove never gives a satisfying definition of what he means by the term "revolutionary," other than to suggest that each of the founders he focuses on was an unlikely one, and that "none was a revolutionary in the modern sense of the term."[32] But this "unlikely . . . revolutionaries" story ends up lending itself to a heroic narrative that belies Rakove's apparent aim of challenging modern filiopietism toward the founders.[33] In the end, were the founders ordinary men or extraordinary patriots? Rakove's book seems to want to argue the former, but the repeated refrain of their ordinariness and their sudden transformation into revolutionaries ("the Revolution made them as much as they made the Revolution"[34]) ultimately serves to hide them even more from our understanding.

Rakove's account seems less interested in the "why" questions than in explaining the origins of a known set of happenings. Maier's dedication to not mentioning the outcome to which her story has often been treated as mere prelude, and her openness with the reader about that interpretive challenge, has allowed her to produce what may be one of the clearest possible recordings of late eighteenth-century voices. Perhaps what is most encouraging about these books is their promise that we can, if we try, still hear the voices, and that there will always be something more to understand about why things happened as they did.

Can we hear the founders talking through these books? Or, to put the question slightly differently, is there reason to think that the authors heard the founders talking as they read and reread the writings their subjects produced? In different ways for each book, the answer to both questions is yes. The books' adherence to the second part of Young's dictum — "Then you will understand why things happened as they did" — is

26. RAKOVE, *supra* note 2, at 17.
27. *Id.*
28. *Id.* at 79.
29. *Id.* at 30.
30. *Id.* at 172.
31. RAKOVE, *supra* note 2, at 441.
32. *Id.* at 14-15.
33. *Id.* at 17.
34. *Id.*

more difficult to evaluate.[35] But both Rakove and Maier have clearly gone on reading until they heard people talking, and twenty-first century readers are fortunate to have these listening posts available to them.

35. YOUNG, *supra* note 1, at 112.

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