

2015

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Corey Brettschneider

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Recommended Citation

Brettschneider, Corey, "Popular Constitutionalism Contra Populism" (2015). *Constitutional Commentary*. 147.
<https://scholarship.law.umn.edu/concomm/147>

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POPULAR CONSTITUTIONALISM CONTRA POPULISM

THE CIVIC CONSTITUTION: CIVIC VISIONS AND STRUGGLES IN THE PATH TOWARD CONSTITUTIONAL DEMOCRACY. By Elizabeth Beaumont.¹ Oxford University Press, 2014. Pp. xvi + 343. \$49.95.

PEOPLING THE CONSTITUTION. John E. Finn.² University Press of Kansas, 2014. Pp. xv + 350. \$39.95.

*Corey Brettschneider*³

Theorists of “popular constitutionalism” seek to ground constitutional interpretation in the democratic value of self-government. They claim that the “people themselves,” and not judges, should have the democratic authority to interpret the Constitution. These theorists regard judicial review by elite, unelected judges as being “counter-majoritarian” or undemocratic.

In attempting to synthesize democratic and constitutional theory, however, popular constitutionalism faces some challenges. Specifically, I have argued previously that one of the leading popular constitutionalists, Larry Kramer, leaves two fundamental questions unanswered in his book, *The People Themselves*.⁴ First, it is unclear who the “people” are. Kramer alternates between discussions of state legislators, Congress, and social movement leaders, implying that any entity but the Court could count as the people.

1. Associate Professor of Political Science, University of Minnesota.

2. Professor of Government, Wesleyan University.

3. Professor of Political Science, Brown University.

4. LARRY KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004); see also Corey Brettschneider, *Popular Constitutionalism and the Argument for Judicial Review*, 34 *POL. THEORY* 516 (2006).

Second, Kramer's account leaves open why popular constitutionalism is constitutionalist, as opposed to being only populist. At points in his book, it seems that a policy counts as constitutionally legitimate solely because it comes from the decisions or voices of a majority of non-judicial actors. But this overlooks the possibility that majorities may support unconstitutional positions. On my view, therefore, Kramer's popular constitutionalism lacks a set of independent standards that could be used to determine whether or not the majority position is consistent with the principles and requirements of the Constitution. Kramer compounds this difficulty with a final chapter that appeals to relativism, or the notion that constitutional meaning is merely what various political actors say that it means.

Liz Beaumont in her book, *The People Themselves*, offers a clear answer to these two challenges to popular constitutionalism that improves on Kramer's approach. Beaumont forcefully argues that the people interpreting the Constitution are defined by the rhetoric of social movements. She persuasively shows how participants in social movements expanded the language of constitutional rights through everyday deliberations, their correspondence, and in their participation in protests and other politics "out of doors." The terms they used to advance their arguments ultimately influenced the doctrines of the most important precedents of the Supreme Court. The great cases expanding rights protections drew their content and power from the language of social movements.

Beaumont thus offers a unique account of how to reconcile democracy with constitutional rights that limit majoritarian decision-making. These rights do not originate with elite and undemocratic judges. Although judges articulate constitutional rights in the rulings of the Supreme Court, they base their understanding of these rights in the discourse of the wider democratic culture. Equal protection of the law and civil rights for African-Americans and women have their roots in the popular discourse of citizens involved in social movements. Although eventually codified as doctrine, these rights are grounded in the protests of ordinary citizens involved in the Women's Movement and the Civil Rights Movement. Even substantive due process rights, often thought to be the most contentious counter-majoritarian doctrine of the Court, have a popular constitutionalist basis, according to Beaumont. These rights were

advocated by the Anti-Slavery Movement to protect the liberties of African-Americans.

Beaumont's grounding of civil rights and due process rights in social movements gives these areas of constitutional law a deep kind of democratic authority. This point, made through rich and detailed history, is a distinctive contribution to the literature of constitutional theory. Her vision of the "people" is not a vague appeal to legislative enactments. It is a well-documented description of how the rhetoric of social movements influenced constitutional interpretation and eventually became law.

Two central examples illustrate the importance of her view. The first concerns the role of free speech and the revolutionary spirit of "positive liberty." In the twentieth century, deliberative democrats such as Alexander Meiklejohn argued that the First Amendment should be understood as enabling democratic discourse and discussion.⁵ Without the ability to freely hear and make all arguments, citizens would be unable to give their informed consent to laws, and democracy would be impossible. Although free speech often involves "negative rights" against state coercion, it is rooted in a democratic concern for "positive liberty" that enables participation in government. This is often thought to be a recent argument, but Beaumont demonstrates that it arose in early discussions of free speech. In the debates leading to the ratification of the Constitution, citizens supported the First Amendment to protect the ability to participate in political discussion free from tyranny. Beaumont persuasively demonstrates that the revolutionary context made the First Amendment a product of popular constitutionalism. This argument is a major contribution to our thinking about the First Amendment's free speech protection.

A second example of Beaumont's use of history to provide important insights into constitutional theory is her chapter on the introduction of women's suffrage to the Constitution. Beaumont notes American constitutional scholars have largely ignored this topic because women's suffrage has been thought to be a consequence of expanding the franchise to African Americans. Beaumont persuasively demonstrates that the Amendment was instead the product of a deeper debate about whether the Constitution regarded women as occupying a non-public domestic sphere. The victory for women's suffrage not only added another

5. ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948).

right, but more fundamentally, it gave women a public role and entitled them to be treated as free and equal citizens.

So far I have elaborated on Beaumont's notion of the "people." I turn now to the way she answers the question of how we might distinguish popular constitutionalism from populism. Beaumont does this by considering what might be said about popular movements that oppose rights protections. At different points in American history, citizens have used the language of constitutionalism to attack rights, though they have often failed. For example, how should popular constitutionalism regard a popular movement that advocated a "separate spheres" constitution that would leave women solely as domestic agents with no public role?

Unlike Kramer, Beaumont is clear that the Constitution is not defined by the most popular social movements. In Beaumont's account, the Constitution is defined by inclusive rights, and these rights provide an independent standard to judge the changes to the Constitution that particular social movements advocate. These changes should be judged by whether they are advancing constitutional rights, not by the sheer number of people who have joined the social movement. Since Beaumont provides an independent standard, in the form of constitutional rights, for judging the changes proposed by social movements, she avoids collapsing constitutionalism into pure populism.

John Finn's important book, *Peopling the Constitution*, shares Beaumont's commitment to the notion that non-judicial actors have a role in interpretation. But despite the points of agreement in their projects, there is a fundamental difference. While Beaumont stresses the continuity of popular constitutional interpretation and the courts, where important cases often draw their arguments from the discourse of social movements, Finn stresses more of a dissonance between the "civic" and the "juridical" constitution. The civic constitution is defined by the interpretation of non-judicial actors in civil society, such as social movements. Here the content of the constitutional text is realized by popular deliberation and interpretation. In contrast, the "juridical" constitution is defined by courts and lawyers. Finn regards the juridical constitution as lacking in life and tending to be mistaken in its content compared to the civic constitution. He characterizes the contemporary juridical constitution as a "rot" that has strayed from its constitutional ideals. While Finn defines the civic constitution as being shaped by mass participation and fidelity to high ideals, he views the juridical constitution as

depriving rights and excessively deferring to presidential authority.

Finn draws his inspiration from civic republican theory, particularly the work of Jürgen Habermas, who emphasizes the public sphere as the ground for constitutional rights.⁶ Drawing from Habermas, Finn explains that if constitutional interpretation were merely left to courts, the result would be a constitution that lacked the vigor of democratic life. It would only reflect the views of a homogenous group of lawyers and judges. By contrast, a constitution shaped by civil participation would embody the cultural and religious diversity of the wider society. It is the public sphere of constitutional interpretation, more than courts and judges, that give the Constitution meaning and authority.

Finn's claim is not only Habermas' idea that the people have democratic authority in virtue of their mass participation, although that is part of his argument. Finn's argument is that the people interpreting the civic constitution tend to be better at making constitutional decisions than the elite group of lawyers that sit on the nation's courts. The Constitution itself protects rights of diversity in speech, religion, and politics. It should not be surprising that a homogeneous Supreme Court tends often to rob that document of its pluralistic quality. Finn criticizes, as an example of the disconnect between constitutional meaning and lawyerly interpretation, a noted constitutional law professor who encouraged students not to read the constitutional text. In contrast to this often incorrectly interpreted "juridical constitution," the civic constitution, as understood by many citizens participating in civil society, is truer to the meaning of the Constitution and its protection of pluralism. Like Beaumont, Finn offers a way to distinguish popular constitutionalism from populism. The people should be deferred to because they are better at constitutional interpretation than the courts.

Part of Finn's argument turns to the text of the Constitution to make its point. The constitutional ideals of equal protection of the law and freedom of speech are accessible to many citizens, and are not limited to being understood by lawyers. These provisions are best discussed widely and affirmed by citizens.

The last third of Finn's book is a criticism of recent constitutional history. In *City of Boerne v. Flores*⁷ he argues the

6. JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY (1998).

7. 521 U.S. 507 (1997).

Supreme Court declared itself the sole interpreter of the Constitution, suggesting the demise of the role of the people in constitutional interpretation. What has followed, not unrelatedly in his view, is a demise as well of the constitutional ideal of limited government. In particular, he is critical of how much the Supreme Court's modern separation of powers doctrine has deferred to the executive. This "rot," as he describes it, is directly the result of an exclusive emphasis on the Court as an interpreter of the Constitution. The decline in citizens' involvement in interpreting the constitution has been followed by an erosion of constitutional liberty.

I admire much in Finn's insightful book. His discussion of the Court's deference to executive power and his critique of *Boerne* are very well done. His criticisms of the juridical constitution should motivate scholars to pay greater attention to the role of the civic constitution. I think his point about the plain meaning of much of the Constitution's text is especially important. He convincingly demonstrates that there is nothing about law school that would give special insight into this document. The text is indeed accessible and understandable to the people as a whole.

But ultimately, I think Finn's view is too dismissive of the ways that the juridical and civic constitutions might interact and inform one another. Finn does recognize that there are moments where juridical and civic constitutions merge. But I think he places too little emphasis on these affinities. Although he would be skeptical of Beaumont's view of how the Supreme Court's constitutional interpretation is informed by social movements, I share her vision that judicial interpretation and civic demands for rights can work in tandem. Reflecting this influence, the language of the Court has often been aspirational, and not just legalistic, at crucial moments in American history. The Court has powerfully articulated Constitutional ideals during the end of legalized segregation, in the rise of privacy rights, and in the recognition of equal protection for women.

I also disagree with Finn's dismissal of the potential educative effects of the Supreme Court. He looks upon the civic constitution as a corrective to the legalistic interpretation of the document by courts. In this account, the Supreme Court should not inform the public, but the influence should only run from the public to the Court. The public, in Finn's view, corrects the court's decisions and its legalistic tendencies.

But I would argue that not all constitutional developments are “bottom up” in the way Finn describes. Sometimes the Court can inform the public in a way that opens up possibilities in advancing constitutional rights. For example, when the Court struck down a discriminatory referendum in *Romer v. Evans*,⁸ it did anything but shut down discussion about gay rights. It challenged the actions of the majority of Colorado’s citizens and reignited civic debate about gay rights that eventually culminated in the marriage protections passed by several states. The case is a recent reminder that the people do not always uphold constitutional rights, but there is a role for courts as well in defending rights.

I do not want to suggest, however, that Finn completely separates the civic and juridical constitutions. Finn does think that the civic and judicial constitutions do sometimes support one another, despite his skepticism of recent constitutional history. But I would differ in at least one of the moments where he sees a merger of these two constitutions. Finn thinks the decision in *Wisconsin v. Yoder*⁹ is one of the points in which the juridical constitution affirms the civic constitution. On his view, the Amish way of life serves as a symbol of the vast diversity of the civic constitution. In claiming their rights, the Amish defended and exemplified the pluralism of the civic constitution. He concludes that this was a rare moment when the Supreme Court deferred to and learned from the civic constitution.

I found Finn’s use of this case helpful in elaborating his vision of how the civic constitution can correct the juridical constitution. But I think the case also raises potential objections to his approach to the Constitution. First, Finn often characterizes the juridical constitution as being the creation of distant and elite judges. But court cases have an important participatory component, in that they are started when ordinary citizens file suit to protect their rights. For example, Amish parents filed suit in *Yoder*. More generally, all constitutional cases start with individual litigants seeking to defend their rights. As Alon Harel puts it, judicial review is not merely an act of judges, but it is often about ordinary citizens having a “right to a hearing.”¹⁰ Finn’s framing of the juridical constitution as being the creature of

8. 517 U.S. 620 (1996).

9. 406 U.S. 205 (1972).

10. See Alon Harel, *Judicial Review and the Value Theory of Democracy*, 47 REPRESENTATION 63 (2011); Yuval Eylon & Alon Harel, *The Right to Judicial Review*, 92 VA. L. REV. 991 (2006).

judges obscures the way that individuals can use the judicial system to protect their rights. Even when there is not mass participation, individual litigants can actively claim their individual rights through law and the juridical constitution.

Second, *Yoder* brings out a potential problem with Finn's emphasis on diversity as the basis for the civic constitution. The content of the Constitution is about the rights of individuals. While for Finn, the First Amendment's Free Exercise Clause stands as an example of deference to the diversity of groups, most constitutional clauses respect rights of individuals, often as against the interest of groups. On this point, Finn does note Justice Douglas' dissenting argument in *Yoder*. Douglas writes that allowing the Amish to withdraw their children from school might deprive the individual children of the education they need to become full citizens. Indeed, Finn admits that it may have been right for Wisconsin to make civic education classes mandatory for all children, including Amish children. But I think this obscures the real choice between a commitment to civic education and religious pluralism present in the case. Finn wants to defend both these values and admirably seeks ways of doing so. But courts can face real conflicts between pluralism and civic diversity. The Amish resistance to teaching abstract notions of the kind essential for civic education suggests that there is no easy way to avoid this conflict. Indeed, at a deeper level the case suggests how the rights of individuals, such as the Amish children, might be at odds with the views of a group. In that case, individuals need courts to protect their rights from groups in civil society.