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# The Civic Dimensions of American Constitutionalism

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## Book Reviews

### THE CIVIC DIMENSIONS OF AMERICAN CONSTITUTIONALISM\*

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

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

*George Thomas*<sup>3</sup>

The American Constitution begins by pronouncing itself an act of “We the People” and derives its legitimacy from its ratification by the people. And yet the people rarely appear in the body of the Constitution and citizenship goes largely unmentioned. The perplexing place of the people within the constitutional scheme is reflected in its closing article. For while the Preamble begins as an act of the people, Article VII closes by stating that the Constitution will be “established” once the conventions of nine states have ratified it. Whether this would be an act of the people directly, or whether it would occur by way of the existing state legislatures, was left for the states to decide (and, perhaps, to the people within them). The fact that the people themselves are largely unmentioned in the Constitution does not necessarily mean they were neglected. The same cannot be said about constitutional scholarship, where citizens have long been

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neglected. Even in studies that putatively focus on the people, such as Larry Kramer's *The People Themselves* and Bruce Ackerman's three volume *We the People*, the people are not, in fact, the central focus.<sup>4</sup>

Elizabeth Beaumont's *The Civic Constitution* and John Finn's *Peopling the Constitution*, coincidentally but happily coming out at the same time, speak to the central importance of citizens in creating and maintaining the American Constitution. Yet far more than simply filling in the gaps and seeking to illuminate the place of the people in the constitutional order, these works give us a deeper understanding of American constitutionalism and speak to the very nature of the constitutional enterprise. Both Beaumont and Finn argue for a civic understanding of the Constitution. As Finn describes it, the Civic Constitution's primary ambition "is to constitute a political community in which citizens shoulder a significant part of the responsibility for achieving and maintaining a constitutional way of life" (p. 1). This is in contrast to what Finn describes as the Juridic Constitution, which he prefers to "legal," as "juridic" better captures the fact that judges and lawyers not only bear the primary responsibility for maintaining the Constitution, but that such an understanding comes at the expense of a more robust civic sense of the Constitution. Beaumont's book complements this understanding by illuminating how "civic founders" have played an important role in shaping constitutional meaning and understandings, including constitutional text and membership in the civic community, which has been an important part of building constitutional democracy in America (p. 7). I treat these works together as offering us an understanding of The Civic Constitution from both a theoretical and historical perspective, but I should be clear that they are not always in agreement; indeed, at times they are in marked tension with one another.

In this essay, I first take up what it means to view the Constitution in civic terms. I then focus on questions of constitutional foundations, change, and development from a civic perspective. I conclude by briefly speaking to the importance of civic education that both of these works point to as an essential,

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4. LARRY KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004); BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991); BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998); *WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION* (2014). Ackerman's third volume does focus more on the people than the first two. *But see* WAYNE MOORE, *CONSTITUTIONAL RIGHTS AND POWERS OF THE PEOPLE* (1996).

and deeply neglected, feature of maintaining the American Constitution.

### THE CIVIC CONSTITUTION

To apprehend the Constitution in civic terms is an attempt to understand the Constitution as a whole, or from a synoptic point of view; it is an effort to understand the kind of polity the Constitution brings into being, which includes things that are part of the Constitution—civil society and political culture, for example—but are not always clearly associated with it. Such an understanding places the text of the Constitution within the whole of the American constitutional order. This is not to neglect the text. On the contrary, the text itself begins as an act of the people, but this act of the people is an attempt to constitute a particular polity, which includes a particular kind of people. The Civic Constitution thus includes the text, but it also includes the practices the text attempts to bring into being. As Finn argues, “constituting embraces four interrelated projects—the creation of texts, institutions, citizens, and cultures” (p. 28). For Finn this is not unique to the Civic Constitution. All constitutions attempt to do these things. What is unique about Finn’s approach is the bringing to light of a more capacious understanding of the act of “constitution,” which includes the configuration of citizens and culture to sustain a commitment to constitutional norms, principles, and values.

The text itself adumbrates some of these principles and values: the Fourteenth Amendment’s commitment to equality, or the First Amendment’s commitment to liberty of conscience, for example. Read through the lens of the Civic Constitution, parts of the constitutional text might be seen more lucidly and fully. Pieces of the text, in fact, should strike us as odd when understood in Juridic terms. The guarantee of a republican form of government to every state in the Union is not legally enforceable by way of courts; it thus stands out as a non-enforceable part of the Constitution. Yet when understood from a civic lens, this provision speaks to an important marker of civic identity: we define ourselves as a republican people and guarantee that as a civic practice to all states within the Union. Viewed through a civic lens this is also a reminder that the people are responsible for guaranteeing this promise. One of the great virtues of Beaumont’s historical investigation is to illustrate how even judicially enforceable textual clauses are more fully understood by way of the Civic Constitution. Beaumont illustrates this with

regard to the Bill of Rights, the Civil War Amendments, and the Nineteenth Amendment, demonstrating how antifederalists, abolitionists, and suffragists, nurtured and shaped constitutional understandings that would come to be reflected in textual amendments. The Nineteenth Amendment is of particular interest because it is often seen as of little constitutional significance—it gave women the vote, and enforced that by way of courts, but otherwise left the Constitution more or less intact. And, from a Juridic perspective, we might say this is just so. Yet this would miss the larger civic implications of the amendment—a textual marker of what Beaumont calls a “civic refounding”: “suffragists also initiated a broader new beginning for the political community through their struggle to reinvent the basic terms of American constitutionalism—what the Constitution is and for whom and for what it was made” (p. 213). In rejecting the “separate spheres” status quo—in which women were understood to find their place in the republican scheme in private life—suffragists profoundly altered the makeup of civil society, included altering how the “private” and “public” spheres were understood. This was, Beaumont argues, a much more profound transformation of American life (civic and private) than simply giving women the vote.

In this manner, the Civic Constitution speaks not only to “who” we are, but what “we” believe, and what “we” aspire to. Of course, who “we” are and what “we” aspire to is a much-disputed question, but understanding such disputes historically can help us understand who we have been, which is also part of thinking about who we are and who we wish to become (civic education, as I will discuss below, is central to constitutional maintenance in this regard). For Finn, this requires an active “tending” on the part of the people; it also, at times, seems to suggest a uniformity of understanding that Beaumont, I suspect, would be hesitant to embrace. Yet I am not sure that Finn and Beaumont are as far apart as they might seem at first glance. Finn’s insistence that the Civic Constitution does speak to who “we” are and what “we believe” allows for vigorous dispute; indeed, we might even say it requires it. It also allows for serious differences, but not differences on everything. While Beaumont’s focus is on civic struggles, she also takes certain commitments—“free and equal” citizenship, which she draws from Aristotle—as essential to American constitutional democracy. The historical disputes that Beaumont canvases illuminate the struggle to achieve “free and equal citizenship,” something “we” aspire to in

Finn's language, and reveal a more robust civic life than is usually associated with the Constitution; yet such disputes have been central to maintaining the Constitution and building constitutional democracy in America. Reformers from the revolutionary generation onward, the "middling people" and figures often at the margins of civic life, or in the case of blacks and women, excluded from much of it, took up the tasks of citizenship: they helped expand and solidify many of the rights we take for granted, reframed who and what a citizen was, and forged "common sense" constitutional ideals that reflected their vision.

In the case of abolitionists and suffragists this might be readily apparent, but Beaumont reveals how "civic founders" were essential in framing the Constitution itself and the Bill of Rights that soon followed. Yet the Civic Constitution is not revealed at the moment of "founding." Indeed, it is difficult to conceive of a single "moment" of founding, or even "refounding," as the Constitution is in a state of becoming, which raises fundamental questions regarding constitutional foundations, change, and development.

#### CONSTITUTIONAL FOUNDATIONS, CHANGE, AND DEVELOPMENT

A central characteristic of the Civic Constitution is dialectic. Even if we begin by saying the people are committed to constitutional principles, it is clear that there is no easy agreement on just what this commitment entails. And, in fact, Finn insists the precise meaning of these commitments cannot be fully described (p. 6). This could be a set of "first principles" that define the essence of America's constitutional identity that the people strive to live in accord with even while disagreeing about its particular contours and application. Certainly, as Beaumont notes, civic reformers have often "claimed only to be upholding or reinforcing the fundamental principles of an existing Constitution," and thus were committed to its "core principles" (pp. 219, 221). As Finn describes it, we are committed to a shared civic life "defined by our fidelity to certain norms, principles, and values" (p. 92). The commitment to "free and equal citizenship" is central in this regard for both Finn and Beaumont.

Yet the Civic Constitution does not simply unfold—even if in a conflicted manner—from foundational constitutional commitments and principles. Nor are such principles necessarily in tact from the founding moment. Rather, the founding of the

Constitution set a larger process in motion. Yet there is nothing inevitable about bringing a polity into line with its best understanding of itself; it is not the inexorable unfolding of History, but the hard labor of building a constitution.<sup>5</sup> Beaumont captures this civic work, “different visions of free and equal citizenship can appear inevitable or fully derivable from ‘first principles’ of American constitutionalism now because of the extent to which reformers’ civic ideals inescapably shape our present constitutional life and worldviews” (p. 24).<sup>6</sup> What appears obvious now was once deeply contested. As a people, Americans have struggled over what it means to be committed to the Constitution and these conflicts have themselves shaped the Constitution and modified, often profoundly, how we think of ourselves and how we think of the Constitution that both shapes us and comes to reflect, however partially, who we strive to be as a people.

This is not to say that the Constitution becomes whatever the people want it to be, defined by how the people come to define themselves. Finn suggests that while constitutional maintenance is an ongoing activity vested in the people—and thus not defined and configured at the moment of founding—he nonetheless argues that commitments made by “We the People” at the founding “remain in some way our commitments now and in the future” (p. 91). Such commitments determine the national character of a people who “assum[e] responsibility for honoring constitutional values” (p. 93). Some of these commitments, Finn argues, are “foundational” insofar as they reside within our commitment to constitutionalism itself. But does this suggest an abstract commitment to, say, limited government, human equality, and reason and deliberation, so that our constitutional commitments do not necessarily run to the particulars of the American polity? For both Beaumont and Finn, I think the Civic Constitution operates at a somewhat more grounded level. The constitutional past is inextricably bound up in the constitutional future. How we have understood constitutional ideals and constitutional commitments is an essential part of “constitut[ing] our constitutional identity” (Finn, p. 112–13).

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5. Though as Louis Hartz says, a problem with this rendering is that America never really sins, “only its inferior self” does. LOUIS HARTZ, *THE LIBERAL TRADITION IN AMERICA* 31 (1955).

6. As Jack Balkin notes, constitutional arguments can move from “off-the-wall” to “on-the-wall,” but this turns on constitutional faith and a hope of persuading your fellow citizens. JACK BALKIN, *CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD* 47 (2011).

In giving this historical life, Beaumont refines what has been dubbed “popular constitutionalism,” particularly in the work of Ackerman and Kramer. Curiously, as both Beaumont and Finn note, there is actually very little about the people in these scholarly accounts. Moreover, in describing American constitutional history, both Ackerman and Kramer’s analyses lean more toward populism than constitutionalism: the people can seemingly engage in unconstrained rule, remaking the Constitution as they see fit, so long as it is authentically the “people” who engages in such an act. For Ackerman, America is identified as a “dualist democracy” where “popular sovereignty” is foundational; when the people act as *the people* they can remake the polity in a manner that dissolves distinctions between conceptual issues such as constitutional maintenance, amendment, transformation, and revolution (Finn, pp. 150–51). Beaumont offers a more refined account of “popular constitutionalism,” which first illustrates how civic reformers have engaged the public and official institutions in constitutional dialogue and, second, shows how these reformers “embraced constitutionalism as governance by fundamental law” even while rejecting “official interpretations” of the Constitution (p. 15).

Gary Jacobsohn’s examination of “constitutional identity” might be helpful in understanding how the civic dimensions of the Constitution can be reshaped and altered even while keeping the essentials of the constitutional order intact. As Jacobsohn argues, constitutional identity emerges dialogically—it is not fully formed at the moment of “founding” but emerges over time.<sup>7</sup> I think this understanding is somewhat different from Ronald Dworkin’s famous insistence that we come to apprehend the full meaning of constitutional principles by way of moral reasoning.<sup>8</sup> In civic terms, constitutional ideals and principles are partly constructed overtime as “We the People” determine our understandings and commitments. The result—in part captured by Jacobsohn’s notion of constitutional disharmony—is a continual back and forth between past and present, between foundational commitments and civic understandings.<sup>9</sup> Defining “who” we are is in part a task of understanding “who” we have been, which makes the

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7. GARY JEFFREY JACOBSON, *CONSTITUTIONAL IDENTITY* 7 (2010).

8. RONALD DWORIN, *JUSTICE IN ROBES* 122 (2006).

9. Finn’s civic understanding at times seems an over-correction to the “Juridic Constitution.” In contrast, I think the Court plays a healthy role within this dynamic so long as we keep in mind that it is one feature of the whole constitutional order. See GEORGE THOMAS, *THE MADISONIAN CONSTITUTION* (2008), where I defend a robust role for the judiciary within a departmentalist scheme.



constitutional past a deeply important part of our constitutional presence, and speaks to the importance of civic education as a form of constitutional maintenance.

#### CIVIC EDUCATION AND CONSTITUTIONAL MAINTENANCE

The Civic Constitution thus calls for a more robust form of civic education than is usually associated with the Constitution. As James Fleming and Linda McClain argue in *Ordered Liberty*, “the realization of the Constitution’s ends and the very maintenance of the constitutional order requires a formative project of cultivating civic virtues in responsible citizens.”<sup>10</sup> The precise nature of these qualities, and how they can legitimately be cultivated, is the source of much argument. Yet this can be done, as Beaumont suggests in another work, in an “investigative” rather than “inculcative” manner.<sup>11</sup> Civic knowledge is essential to thoughtful civic participation. If the Constitution is what holds Americans together, how we understand “the nature and history of our constitutional past will, in turn, shape the meanings we are prepared to give to our country’s present and future.”<sup>12</sup>

Facing the past—including its ugly side—might actually help civic cohesion and belonging. If we consider the interaction between the specifics of history and more universal principles, attachment to principles may well help citizens engage the particulars of the polity: citizens should not simply accept their inherited traditions or history. Moreover, the past is central to the present and the future of the polity: “the future of constitutional identity is inscribed in its past.”<sup>13</sup> How we understand our Constitution is part of how we understand and define ourselves. This includes knowledge of the past, which is essential knowledge in wrestling with how we understand and apply the Constitution in our current circumstances: there is no escaping constitutional judgment, which is a necessary feature of constitutional self-government (Beaumont, p. 231). We cannot look backward for all of our answers and each generation cannot escape the demands of maintaining the Constitution, which requires more than asking what those of the founding generation thought; it requires current

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10. JAMES E. FLEMING & LINDA C. MCCLAIN, *ORDERED LIBERTY* 114–15 (2013).

11. See ANNE COLBY, ELIZABETH BEAUMONT, THOMAS EHRLICH & JOSH CORNGOLD, *EDUCATING FOR DEMOCRACY: PREPARING UNDERGRADUATES FOR RESPONSIBLE POLITICAL ENGAGEMENT* (2007).

12. ACKERMAN, *WE THE PEOPLE: FOUNDATIONS*, *supra* note 4, at 37.

13. JACOBSON, *supra* note 7, at 349.

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citizens to think through contested constitutional principles and contested civic understandings in light of our fundamental constitutional commitments.

The Constitution is incomplete in this regard. Not necessarily through profound failures of constitutional design, but because every constitution that seeks to “endure for ages to come” is necessarily incomplete: it will always depend on later generations to carry it forward, to embrace and preserve its constitutional identity and political creed.