

## THE STRUCTURE OF THE AMERICAN CIVIC SPHERE

**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.

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Do citizens alter, transform, remake, and authorize their fundamental law only outside of a particular regime, or from within it as well? What forms of political agency have citizens in the U.S. constitutional polity used in the past to achieve these ends, and which offer themselves today? What is the role of radical critique and radical action in the development of certain hegemonic binaries like “public” and “private,” “free” and “slave,” the “social” and the “political”? Beyond winning electoral victories or suing for their rights, how else can and do movements transform political structures, ideas, and outcomes in the U.S.?

In a polity whose foundational referent is a text—the U.S. Constitution—these questions about public mobilization and political life are also questions about the links between civic life and the ongoing authority of a constitutional project. Civic life is so important because, in John Finn’s words, the “main principles of constitutional architecture, such as the principle of checks and balances, [are] mere parchment barriers but for their grounding in a civic culture that regards them as valuable and insists upon some measure of fidelity to them by political actors and citizens” (p. 85). Both of these works—*The Civic Constitution* and *Peopling*

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*the Constitution*—interrogate the civic conditions that rest behind the ongoing authority of a constitutional order.

The contribution of both works should be understood from within a paradigm set by two field-defining theoretic propositions: Bruce Ackerman’s notion of constitutional dualism and Larry Kramer’s constitutional populism.<sup>4</sup> Bruce Ackerman’s idea of constitutional “dualism” describes constitutional authority as a creation of citizens who use legal tools—most especially voting, petitioning, and assembling—to periodically influence elite representatives to transform the Constitution’s practical meaning.<sup>5</sup> For Kramer, constitutional publics have, in an ongoing way—as voters, jurors, mobs, legislatures, and town halls—been able to mobilize to seize authority over constitutional meaning and especially to seize it away from judges.<sup>6</sup> Both of these approaches are useful, but both have limits. Many have challenged the periodicity of Ackerman’s account, as well as the implication that, in John Finn’s words, “[i]n most moments . . . citizens have little obligation to tend to the Constitution or even to public life” (p. 99). Kramer’s work obscures the organizational features of the public’s collective action because Kramer never defines who “the people” are, how they may be recognized, or the processes and structures through which they exercise political agency.

Beaumont and Finn have written substantial books that begin to address these problems. For Finn, citizens make the Constitution authoritative by using its text in their deliberations; reasoning about the public good; tending to civic life; arguing and resisting; and voting and petitioning too. Finn’s ideal constitutional citizens are highly mobilized, highly educated extraverts, not content to register their preferences in a voting booth or sue for their rights, but instead demanding that the public spaces around them engage constitutionalist values almost relentlessly. His key category is “tending”: citizens tend to a constitutional order when they are committed in an active, ongoing way centered on everyday “practices of care” which are grounded in “a specific kind of knowledge, one grounded in the practice of politics and practical experience” (p. 26). For Beaumont, practices of civic deliberation themselves *create* citizens. In *The Civic Constitution*, deliberation is the work that unauthorized subjects (colonists, women, slaves)

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4. BRUCE ACKERMAN, 1 *WE THE PEOPLE: FOUNDATIONS* (1993); LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004).

5. ACKERMAN, *supra* note 4, at 10–16.

6. KRAMER, *supra* note 4, at 208–13.

do to transform themselves into recognized constitutional agents. Beaumont calls this a power of “civic founding” (pp. 5–8). Arguing that the Constitution contains no “self-correcting” mechanism (p. 22), Beaumont shows that scholars seeking to understand the ongoing meaning of constitutional text over time should study the citizens whose ideas and actions have transformed public meanings of the text and the structures and the forms of agency through which citizens have claimed and exercised this civic power (pp. 11, 14). Their practices of self-authorization led them to speak in contexts that they were barred from, to sit in areas of exclusion, to use bazaars, fairs, newspaper publications, petitions and assemblies, and most essentially peaceful confrontation to argue for and perform their visions of politics to others. From her discussions of the use of free speech by “common men” (p. 31), to her exposure of the early uses of boycotts and non-importation agreements for revolutionary politics (p. 53), her excavation of “debtors’ constitutionalism” (p. 77) and the radical practice of suffragists (chapter 5), Beaumont brings attention to how citizen advocates have been driven to “self-authorized” themselves (p. 150) to address problems that their fellows were only too ready to suppress.

For both authors, this “founding” or “tending” can happen almost anywhere: pie-baking circles and the PTA, workplaces and jury boxes, as well as “letters to the editor, farmers’ markets, coffee houses, barbershops, supermarkets, and a nearly endless variety of so-called third spaces” (Finn, p. 14). When citizens use constitutional language, institutions, and values for advocacy, contestation, and deliberation, then according to these authors, they are sustaining constitutional authority.

The works have a number of important similarities that will, I hope, become ordinary in this field. Both authors move past accounts of political authority rooted in ideological, cultural, or reasoned unanimity. They instead are careful to insist that the Constitution can be authoritative even when, or perhaps especially when, its meaning and even value are contested. Indeed contestation is one of the major processes through which a constitution becomes relevant in public life. For Finn, a faithful civic constitutional practice involves being willing to expose disagreement and pluralism as well as reasoned responsiveness in a context of conflict. In *The Civic Constitution*, Beaumont explores instances of civic founding in which a minority (sometimes a very tiny minority indeed) was able, through dedicated advocacy, to challenge majority conceptions of constitutional meaning and ultimately prevail. Neither scholar sees unanimity as an especially important

category for understanding public authority. I would have enjoyed reading more about how each scholar relates this patient attitude towards conflict to the highly-developed conceptions of political authority that are currently pervasive, almost all of which identify consensus (either ideological consensus or consensus in terms of being willing to submit to certain practices of reason-giving) as a foundation for political authority.

Both scholars also embrace, rather than resist, the tension between empirical and evaluative work at the heart of constitutional studies. The citizens they study are ones who are self-consciously disciplining themselves with constitutional language and values (Beaumont's civic founders are sophisticated constitutional agents who are not simply bending constitutional language to their own preferences but rather self-police with an explicit eye towards the "constitutional mode" (p. 58)). At the same time, these scholars are not exploring *empirical social movements* that engage the Constitution's text so much as *worthwhile political practices*. While relatively positivist inquiry has its place in social science, the aspiration towards value-neutrality also often may obscure the straightforward (and frequently defensible) value judgments behind scholarly research. These authors are refreshingly forthright about the value judgments resting behind the scope of their inquiry. In Beaumont's words, "[n]otions of founding and refounding are not purely historical, factual, or empirical designations; they are interpretive or hermeneutic frameworks that involve attempts to understand and explain the origins and foundational values of our modern political community" (Beaumont, pp. 217–18). For Finn, "[e]very constitution rests upon . . . a boundary between the spheres of public and private life, or between state and society. These categories are not just empirical political facts . . . They are themselves *objects* of constitutional design," and as such, subject to ongoing evaluation (p. 85). Both assert that, as a point of historical fact, citizens have launched political projects in the Constitution's name—creating Jim Crow or resisting women's equality, for example—that the best scholarly accounts of constitutional "tending" or "founding" should either marginalize or outright ignore (*e.g.*, Beaumont, p. 233; Finn, p. 165). Beaumont explicitly rejects treating movements for racial hierarchy as "foundational" because, while they have obviously been important, they did not help to found the "type of political community we are and should be" (p. 224). At the same time, the emphasis on understanding authorization *practices* and not just

*ideas* means that each author is willing to defend forms of engagement that often leave something to be desired (as when Beaumont cautiously traces the tensions between women suffragists and abolitionists in the context of Reconstruction Politics) (ch. 4). This is an important departure from Kramer and Ackerman's value-neutral or proceduralist conceptions of public authority.

The question at stake is whether highly mobilized citizens can be "wrong" about what the Constitution means, whether their moments of seizing public power should always be described in terms of tending or founding, and if not, what distinguishes subversive political action from sustaining political action. This is especially important insofar as conflict is itself part of the project of constitutional maintenance. The moderation which Beaumont, especially, demonstrates in her selection criteria is consistent with Rogers Smith's appeal for scholars and citizens to self-consciously center, in their research and advocacy, inclusive versions of the many American civic traditions.<sup>7</sup>

The two works have important differences. While Beaumont explores key moments of refounding, Finn resists periodicity. For Finn, constitutional authority derives not from key moments but more pervasively from a "way of life" that involves citizens' beliefs, aspirations, and importantly, practices (pp. 4, 6, 13, 175). Finn sketches a portrait of a deliberative, active and engaged citizenry and admits that the burdens of this form of citizenship are "weighty" (p. 97), for "the Civic Constitution seeks an active transformation of persons into citizens," with no "sharp, impregnable distinction" between the public and private, refusing that liberal "liberty to be bad" (p. 97). In a series of careful essays Finn spells out the relationship between civic constitutionalism and deliberation, justice, and "civility," and then interrogates how a public can create, maintain, or destroy a constitutional polity. I found civility to be one of his most interesting concepts. Finn emphasizes that to be "civil" is not the same as to behave democratically, because "civility" includes the limitations on political life that are part of "bonds of fellowship" and "constraints upon the democracy authority" (p. 158). Civility involves a willingness to take up the burdens of a constitutionalist politics that is explicitly concerned with ends and outcomes (Finn references Sotirios Barber's work on constitutional welfarism<sup>8</sup> in this context (p. 168)). Any

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7. ROGERS M. SMITH, *STORIES OF PEOPLEHOOD: THE POLITICS AND MORALS OF POLITICAL MEMBERSHIP* (2003).

8. SOTIRIOS A. BARBER, *WELFARE AND THE CONSTITUTION* (2003).

differences between cultural tendencies in a democratic or constitutionalist polity obviously depend on how one defines these terms in the first place, and I had some disagreement with Finn's understanding of democracy as majoritarianism, but in his hands the concept of "civility" is recurrently helpful, especially in his willingness to characterize dissident, rule-breaking, or unmannerly behavior as "civil" if it nevertheless seeks cultural accountability to constitutional commitments (p. 185).

Running throughout *Peopling the Constitution* is an ongoing contrast between the Civic Constitution and the Juridical one, and here I disagreed with the author. The "Juridical Constitution" is, for Finn, associated with private liberal individualism (p. 80), with Constitution "worship" (p. 116), with judicial supremacy (p. 133), with constitutional settlement rather than dialogue (p. 133), and in general with an atrophy of public debate (p. 133). Finn acknowledges that the Juridical Constitution is equally rooted in the Constitution's text (p. 88), but rejects Juridical constitutionalism because the responsibilities it delineates for citizens are "sharply limited—paying taxes, reporting for jury service, and voting"—such that "citizenship is an occasional, part-time practice," and an exercise of power always only mediated by representation (p. 96). He worries that the public's felt responsibility for constitutional deliberation might be merely "ceremonious" (p. 157) if publics imagine that deliberation is only the Court's work—a phenomenon Mark Tushnet names judicial "overhang" (p. 133).

Analytically this seems to me not quite right. The boldest statements of judicial supremacy—*Cooper v. Aaron*,<sup>9</sup> *Planned Parenthood v. Casey*,<sup>10</sup> *City of Boerne v. Flores*<sup>11</sup>—involve a Court struggling to make itself heard in a thicket of political opposition. It is hard to claim that the Court's statements of supremacy in these cases were politically decisive. If these cases represent the Court's preferred outcome, then it is worth noticing that in no area has that outcome actually prevailed (desegregated schools, reasonable and pervasive access to abortion rights, or the immunity of generally applicable federal legislation to special challenge by religious groups)—to say nothing of being "settled." Are the Court's cries of supremacy really the last word or are they the shout of a political institution that believes it is losing its grip?

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9. 358 U.S. 1 (1958).

10. 505 U.S. 833 (1992).

11. 521 U.S. 507 (1997).

Consider that Louis Seidman, a legal theorist of unsettlement, celebrates strong statements of judicial authority precisely for the backlash that they can create.<sup>12</sup>

One might also respond that most citizens easily shrug off weighty constitutional responsibilities with a much easier excuse than judicial overhang. Most citizens, even very active ones, have so many other valuable things to do. Raising families, earning a wage, playing sports, creating community, appreciating the sacred, and being sociable can be wonderful activities even if not disciplined by the project of maintaining a particular constitutional order. Where does this fit into Finn's demanding republicanism? Are citizens who would rather pursue hobbies, make art, work hard, invest money, and raise children forever destined to be governed by predators? Finn offers little confidence that almost any of this work can be safely delegated to representatives or to legal professionals and I wonder if, given the centrality of representation and legal structures to the constitutional text, Finn hasn't painted a portrait of a Constitution at war with itself (p. 169).

The next question that both works raise for me is about the structure of the public spheres that have transformed constitutional meaning. I think each author has made a serious contribution here and I hope other scholars will take up the agenda that these books set. Beaumont is clear that she is studying how a disciplined, structured associational life has enabled subjects to claim power and create textual meaning that includes them in the burdens and privileges of governing (pp. 11, 14). She is persuasive that subjects have had to creatively re-imagine social and political structures to re-found an order that will generate outcomes inclusive of them. At the same time, in a social movement, not every citizen participates in the same way (p. 152). And, while constitutional language may prompt the formation of responsive public constituencies, some language has been less generative than other language. Consider the difference between mobilization around the Second Amendment and mobilization around the guarantee of a "republican form of government" for the states (p. 208). If "the public" (p. 41) really is a diverse and disciplined array of associations rather than a mass—then what is the relationship between the structure of that sphere, and constitutional outcomes? Can we note any general tendencies or systematic relationships?

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12. LOUIS MICHAEL SEIDMAN, *OUR UNSETTLED CONSTITUTION: A NEW DEFENSE OF CONSTITUTIONALISM AND JUDICIAL REVIEW* 144–216 (2001).

Vast literatures in law and political science interrogate the systematic relationships between the membership, behavior, and rules of institutions to the outcomes they generate. If the public is more like an institution than a mass, then constitutional scholars should interrogate its characteristic features and behavior as we do for other institutions.

I would be especially interested to learn more about the effects of class and economic hierarchy on the structure of the public sphere and on constitutional outcomes. In fact, on the basis of Beaumont's work (which highlights the incredibly high burdens placed on would-be constitutional founders) and from Finn's demanding republicanism, the books lead me to wonder whether the very notion of civic constitutionalism might be at odds with the constitutional text insofar as that text entrenches an elitist commercial republic.

The political effects of class hierarchy are vast. And class hierarchy may well be grounded in the Constitution itself: Stephen Elkin's work on the "commercial republic" make it clear that the Constitution's commitment to the blessings of liberty, free trade, and a national legislature empowered to enable commerce will generate some kind of economic elite.<sup>13</sup> These values are reinforced by a complex, highly mediated representational structure that privileges the wealthy in terms of influence, access, and office-holding.<sup>14</sup> This complex system filters out many potentially successful political movements, but arguably has its strongest effect on class politics. A constitutional commitment to generating *wealth* without a corresponding textual concern for wealth distribution generates pressing problems of inclusion. Neither Beaumont nor Finn interrogates the expectation of some of the framers that the Constitution will generate an economic elite which would then disproportionately hold the reigns of social and political power. Neither work interrogates the way constitutional structures generate hierarchy or the relative impermeability of constitutional institutions to class-based politics. Finn even transforms Madison's class anxiety (the famous logic of demobilization in the *Federalist Papers*) into an anxiety about judicial supremacy (p. 73). In general, I found myself wanting to hear more details about

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13. STEPHEN L. ELKIN, *RECONSTRUCTING THE COMMERCIAL REPUBLIC: CONSTITUTIONAL DESIGN AFTER MADISON 19-73* (2006).

14. See LARRY M. BARTELS, *UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE* (2008).



the structure of the public spheres that, according to these authors, hold so much constitutional authority and in particular I wanted to hear about economic hierarchy within that structure.

Reading these two books together also raises some interesting questions about intellectual or ideological divisions of labor in public mobilizations. Beaumont is clear that in a social movement, many citizens will participate, but not every citizen participates in the same way. When assessing the constitutional authority of a movement, she turns to its most highly developed constitutional articulations, not to whether each individual within that movement could offer a cogent, rational, developed justification for their politics. This is in sharp contrast to Finn's account of civic authority, which seems to demand that, to make a real contribution to constitutional culture, a movement must be constituted entirely of individuals who are not only active and present, but also each and every one of them familiar with the precise constitutional vocabularies that are a part of the movements they support. In general, for Finn, representation and delegation (either from publics to institutions, or from one public to other publics) appear as dead-end streets. I find Beaumont's approach more appropriately political. Isn't there room in an "ideal" movement for folks to help bake pies, walk door-to-door, or circulate newspapers without needing to think through the precise ins-and-outs of, say, the extent to which the Fugitive Persons Clause mandates national rather than state authority over the meaning of due process? Is it enough for some, indeed many participants to know, to feel, that slavery is wrong and to want to do something about it, without concerning themselves too much about the extent of executive power in the states? Should scholars really claim that the abolitionist movement—which pulled off perhaps the single most successful constitutional transformation, by any terms, of any movement—was less than ideal if not every participant had thought through the Lysander Spooner—Frederick Douglass—William Lloyd Garrison—John Brown debate? The civic founders and tenders of our nation's history haven't necessarily all been participants in all of the many diverse forms of labor demanded by their movements. To the extent that there is division of labor, and to the extent that that division is acceptable, I wonder about its terms. To what extent did these movements feature separation between their material work—baking pies, printing newspapers, and the like—and the ideological labor of developing arguments, generating new ideas and new language? How did economic class

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and gender structure these divisions? How deeply did constitutional language and ideation saturate the discourse of these movements?