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THE CREATION OF A CONSTITUTIONAL CULTURE

Jason Mazzone*

I. INTRODUCTION

In *A History of American Law*, Lawrence Friedman calls his chapter introducing changes that occurred with independence “The Republic of Bees.”¹ The chapter title derives from Jesse Root of Connecticut, who in 1798 wrote of the need for the American legal system to end its reliance on foreign law so that Americans—the bees—could make their own sweet legal honey using nectar gathered from the flowers growing at home.² One of the things these newly liberated bees did in their republic was to make and remake constitutions. Between 1776 and 1780, all but two of the thirteen former British colonies wrote and adopted their own state constitutions.³ In 1788, the thirteen states became governed by the United States Constitution, which replaced the Articles of Confederation. By the time Andrew Jackson was elected the seventh President in 1828, the Constitution had been amended twelve times, and the twenty-four states that then comprised the Union had produced thirty-three individual state constitutions.⁴ The Americans who produced all of these constitutions were, in apiarian terms, more the elite queen bees (and perhaps the drones) than the thousands of regular worker bees that keep

* Assistant Professor of Law, Brooklyn Law School. This essay relates to a larger national study of civic associations and American constitutionalism. See Jason Mazzone, *Organizing the Republic: Civic Associations and American Constitutionalism, 1780-1830* (unpublished J.S.D. dissertation, Yale L. Sch. 2004) (copy on file with Yale L. Sch.).

1. Lawrence M. Friedman, *A History of American Law* pt. 2, ch. 1 (2d ed., Simon & Schuster 1985).

2. *Id.* at 111.

3. The two exceptions were Connecticut and Rhode Island. Connecticut retained its Royal Charter of 1662 (after removing the references to the King) until the state adopted a constitution in 1818. Willi Paul Adams, *The First American Constitutions: Republican Ideology and the Making of the State Constitutions in the Revolutionary Era* 4 (Rita & Robert Kimber trans., UNC Press 1980). Rhode Island replaced its Royal Charter of 1663 with a constitution in 1842. *Id.* Incidentally, Vermont, which in 1764 King George III had ruled was properly part of New York, adopted state constitutions in 1777 and 1786 before becoming the fourteenth state in 1791. *Id.*

4. The dates of the state constitutions before 1828 are: Alabama (1819); Connecticut (1818); Delaware (1776, 1792); Georgia (1777); Illinois (1818); Indiana (1816); Kentucky (1792, 1799); Louisiana (1812); Maine (1819); Maryland (1776); Massachusetts (1780); Mississippi (1817); Missouri (1820); New Hampshire (1776, 1784, 1792); New Jersey (1776); New York (1777, 1821); North Carolina (1776); Ohio (1802); Pennsylvania (1776, 1790); Rhode Island (none); South Carolina (1776, 1778, 1790); Tennessee (1796); Vermont (1777, 1786, 1793); Virginia (1776). On the process of forming state constitutions, see generally Adams, *supra* n. 3; Friedman, *supra* n. 1, at 117-24; Marc W. Kruman, *Between Authority and Liberty: State Constitution Making in Revolutionary America* (UNC Press 1997); Allan Nevins, *The American States During and After the Revolution: 1775-1789* ch. 4 (Macmillan 1924).

a hive running. Drafting and ratifying constitutions in the new Republic was the work of educated, well-heeled gentlemen, rather than the labor of the People whose authority they invoked.⁵ Yet, what about the ordinary Americans, the worker bees? What was their place in all of this constitution making?

This essay suggests how, just as a hive will perish without the efforts and cooperation of its thousands of unnamed worker bees, the creation and prosperity of an American constitutional republic depended upon ordinary Americans, whose contributions are rarely featured in history books. By way of preview, ordinary Americans mattered because the success of constitutional government required the existence of a broader constitutional culture. By constitutional culture, I do not mean anything very complicated. Professor Friedman, in his important 1975 book on the legal system, identifies the “legal culture” to encompass “public knowledge of and attitudes and behavior patterns toward the legal system”; whether “people feel and act as if courts are fair” and their willingness to rely on the judicial system; and the general population’s knowledge about the law and perceptions of its legitimacy.⁶

Constitutional culture, then, can be said to include such things as the disposition of regular citizens to recognize and accept that they are governed by a written document, one that creates institutions of government and sets limits on what the government may do; the accepted belief that the governing charter is created by the citizenry; the knowledge that the charter is not timeless, but rather that the citizens may change it or revoke it under certain circumstances; and the understanding that until the charter is changed we are bound by it and required to go along with its ultimate results even though we are free to disagree with them. Constitutional culture also includes the understanding that a constitution unifies a population beyond those in one’s immediate sphere of acquaintance such that other people in other places are likewise governed by this written document and that, whatever our other differences, this is something we have in common. Constitutional historians have never provided a very satisfying account of how it was that *after* the drafting and ratification of the federal and state constitutions, the population at large came to understand what these constitutions meant, accepted them as law, and went along with the arrangements that had been put in place and the consequences that followed. The failure to appreciate the creation of a constitutional culture is a serious oversight. The ratifying generation, the very Americans who put in place these written charters, understood that it was not enough simply to write and adopt a constitution: if a constitution was going to last and thrive, it was crucial to have in place a constitutional culture—otherwise, the principles and institutions of constitutional government would be little more than words on paper.

The particular piece of the story this essay presents is how civic associations emerged in the early decades of the Republic as an important, perhaps the most important, mechanism for creating the American constitutional culture. By civic association, I mean a group of private individuals who came together voluntarily to

5. U.S. Const. preamble (“We the People . . .”).

6. Lawrence M. Friedman, *The Legal System: A Social Science Perspective* 193-94 (Russell Sage Found. 1975).

pursue some kind of shared purpose.⁷ Although some authors have emphasized the civic qualities of the colonies,⁸ before the Revolutionary War, civic associations per se were rare. By the mid-eighteenth century, there existed a small number of localized civic associations mostly confined to the largest towns: organizations like immigrant-aid societies, a smattering of Masonic lodges, mutual-aid societies functioning like insurance funds, literary organizations and subscription-based library associations, and early fire societies (two dozen of which existed in Philadelphia by 1770).⁹ After the United States's independence in 1776, the number and variety of civic associations increased dramatically, such that by the 1830s, Alexis de Tocqueville identified associating as the most distinctive element of American life.¹⁰ There emerged, during the early decades of the Republic, vast numbers of charitable associations; reformist organizations devoted to temperance, moral reform, prison reform, and other goals; missionary and Bible societies; fraternal orders; maternal associations, cent societies¹¹ and other women's groups; and agricultural societies. Civic associations had become a new and distinctive feature of American society.¹² It is this early period, up to 1830, just before de Tocqueville arrives, that is my concern. The period represents one full generation after the Philadelphia Convention—the first generation of Americans living in the age of constitutional government.

During these early decades, civic associations were a powerful means for instilling in ordinary people the values and habits of constitutional government. Civic associations were also a nationalizing, unifying force, bringing together Americans from disparate states into a shared, common constitutional experience. Perhaps more than anywhere else, it was in civic associations that ordinary Americans, the people who were neither delegates to the 1787 Constitutional Convention in Philadelphia nor the draftsmen of state constitutions, learned the principles of constitutional government, developed and nurtured republican values, and came to understand themselves as American citizens who shared interests and a destiny with the inhabitants of distant towns and other states. In this sense, civic associations helped to make work the constitutions that were ratified

7. In this essay, I do not consider churches (although some of the civic associations I do consider have a religious origin or orientation). The discussion also excludes militia companies.

8. For example, Stephen Innes argues that the economic success of the Massachusetts Bay Colony was a result of its strong civil society and its rich stock of social capital, but his description is limited to how within the colony the "family, church, town, and commonwealth were bound together by a series of . . . covenants." Stephen Innes, *Creating the Commonwealth: The Economic Culture of Puritan New England* 6 (W.W. Norton 1995).

9. See generally Stanley Elkins & Eric McKittrick, *The Age of Federalism: The Early American Republic, 1788-1800*, at 451-61 (Oxford U. Press 1993). On Philadelphia fire societies, see Carol Wojtowicz Smith, *Volunteer Fire Companies, in Invisible Philadelphia: Community through Voluntary Organizations 571-73* (Jean Barth Toll & Mildred S. Gillman eds., Atwater Kent Museum 1995).

10. Alexis de Tocqueville, *Democracy in America* 513 (J.P. Mayer ed., George Lawrence trans., Harper & Row 1988).

11. Cent societies, typically formed by women, were church-based groups that solicited pledges from members of their congregation of one cent each week to aid a designated cause, such as missionary efforts, the education of ministers, or anti-slavery activities.

12. As Richard Brown observes, "Tocqueville's observation regarding the incidence and importance of voluntary associations in the 1830's would have been drastically out of place in the decade preceding the Revolution." Richard D. Brown, *The Emergence of Voluntary Associations in Massachusetts, 1760-1830*, 2 J. Voluntary Action Research 64, 65 (1973).

in the early years of American independence. To be sure, the men who wrote the federal Constitution—the queen bees—often feared the disruptive effects of citizen organizations, and they did not foresee that civic associations would play these kinds of roles.¹³ Nonetheless, civic associations put into place the very culture that the statesmen, who are normally the subjects of constitutional history, knew was required in order for the Republic to succeed.

The creation, after a revolution, of a republic governed by constitutional law seems far removed from the formation of lodges, charities, literary societies, and other kinds of civic associations. Yet these two developments in the early decades following independence—one at the pinnacles of governmental structure, the other in the mundane arrangements of everyday life—were closely and critically related. Civic associations created and embodied the constitutional culture that contributed in significant and lasting ways to the success of constitutional government.

Part II of this essay explores these themes by focusing on a single representative case study: the town of Utica, New York, from the town's origins in 1788 until about 1830. Examination of the emergence and role of civic associations in Utica during these years demonstrates how civic associations instilled in local residents the knowledge and habits of constitutional government, and made them a part of a broad national cultural experience. Part III discusses some implications of the Utica experience for constitutional history and theory. Part IV concludes by suggesting an alternate perspective on constitutional law.

II. THE CASE OF UTICA, NEW YORK

To explore the relationship between civic associations and constitutional government, this essay focuses on a single town: Utica, New York. Located in the fertile Mohawk Valley in the geographical center of New York State, Utica began as Old Fort Schuyler¹⁴ with Palatine Germans from the lower Mohawk arriving shortly after independence. In 1788, an inn was built, and several New England families arrived to create the first permanent settlement.¹⁵ In 1797, Oneida County was formed, and the village of Utica was incorporated with fifty houses. With the creation of a railroad link and the opening of the Erie Canal in 1825, Utica's population steadily grew, rising from 2,000 residents in 1817 to 8,323 in 1829. By 1829, the town had seven weekly newspapers, thirty-three schools,¹⁶ a bank, several insurance companies, a town library, five fire companies, and a lyceum. In 1832, Utica was chartered as a city and within a few decades became an important manufacturing center.¹⁷

Like other towns in the early decades of the Republic, Utica experienced a boom in civic associations. While it is impossible to know just how many organizations formed

13. See e.g. James Madison, *No. 10: The Union A Check on Faction*, in *The Federalist* (Paul Leicester Ford ed., Henry Holt & Co. 1898) (discussing the dangers of factions).

14. Old Fort Schuyler was named after the fort used there during the Seven Years' War.

15. See generally M.M. Bagg, *Memorial History of Utica, N.Y.: From Its Settlement to the Present Time* (D. Mason 1892); David Maldwyn Ellis, *The Upper Mohawk Country: An Illustrated History of Greater Utica* (Windsor Publications 1982); Elisha Harrington, *The Utica Directory for 1829* (Dauby & Maynard 1829).

16. Many of these schools were operated by single women.

17. *Supra* n. 15.

in Utica in these first decades, information contained in town directories and newspapers, reports from town parades and other public events, and other documents show clearly the growing significance of civic associations in the lives of Utica residents. The town directory, published sporadically by a local printer, did not report every organization in existence, but did include an ever-growing roster of civic associations. The 1817 directory listed just four organizations,¹⁸ while the 1829 version included fifty-two.¹⁹ Among the civic associations that formed in Utica in this period were Sunday School societies. Three were in place by 1817: the Utica Sunday School Society, the Utica Female Sunday School, and the Sunday Evening School for People of Color.²⁰ Several missionary societies began in Utica in the 1820s. The Utica Lyceum began in 1823. Immigrant-aid organizations in Utica included the Ancient Britons' Benefit Society (formed in 1814) "[for] the support of its members in time of affliction" with eighty-six members in 1818, and the Utica Hibernian Benevolent Society (1822), which had forty members holding an annual meeting on St. Patrick's Day in 1828.²¹ Trade-based organizations included the Utica Beneficial Society of Journeymen Cordwainers begun in 1821.²² Its members contributed fifty cents to join and \$1.25 monthly thereafter to receive \$2 per week in case of sickness and a guarantee that the other members would attend a deceased member's funeral services and pay for the burial.²³ A horticultural society formed in Utica in 1826, and a musical society began the following year.²⁴ The town had three Masonic lodges by the 1820s.²⁵ By 1829, there was also a string of Bible societies, temperance organizations, and tract societies.²⁶ Women in Utica formed and operated their own civic associations in this early period. The Female Society of Industry for Charitable Purposes began in October 1819; by 1828 its seventy members had raised \$200 for charitable work and had begun a separate fund to build an Orphan Asylum in the town. Other women's organizations included the Female Missionary Association of Trinity Church (1822), the Female Missionary Association (1824), the Maternal Association (1824), the Female Auxiliary Tract Society of Utica (1825), and the Infant School Society of Utica (1828).²⁷

The first step in creating a civic association in the early Republic was to call an organizing meeting (often announced in advance in the local paper), and write and ratify an associational constitution. These associational constitutions, typically printed up in pocket books for members to carry, mimicked the provisions of governmental constitutions and engaged the association's members in the processes of drafting, debating, and interpreting constitutional provisions. Members wrote preambles setting

18. See *The Utica Directory for the Year 1817* (William Williams 1817).

19. See Elisha Harrington, *The Utica Directory, No. 3* (Elisha A. Maynard 1832).

20. See *supra* n. 18.

21. See Harrington, *supra* n. 19.

22. See Elisha Harrington, *The Utica Directory: To Which is Added a Brief Historical, Topographical and Statistical Account of the Village and Its Neighborhood* 68 (Augustine G. Dauby & Elisha A. Maynard 1828).

23. *Id.*

24. See *id.* at 71-72.

25. Harrington, *supra* n. 19.

26. See Harrington, *supra* n. 15 (listing, among others, the Welsh Bible Society, the Utica Society, for the Promotion of Temperance, and the Female Auxiliary Tract Society).

27. See Elisha Harrington, *The Utica Directory, No. 5* (Elisha A. Maynard 1834).

out the purposes of their organizations—often substituting “We the Subscribers” or a related reference in place of the “We the People” in the federal Constitution. The articles of the association’s constitution specified the bases for admitting new members and the obligations of membership. Articles also provided for the election of a president and other organizational officers and set out their duties, which often included elaborate record keeping and reporting requirements. Associational constitutions also established requirements for adopting bylaws that were inferior to the association’s constitution—understood to be supreme law. Some constitutions contained procedural protections for members who became subject to fines, expulsion, or other penalties for violating associational rules. Associations also provided for the future amendment of their own constitutions—amendment often required the approval of two-thirds or three-fourths of the members. In civic associations, members engaged in interpreting what their constitutions meant and required; decisions were sometimes collected in digests for ready consultation. Through these practices, civic associations taught a generation of Americans the meaning of constitutional self-government. As a result of their own hands-on experiences, members of civic associations learned what it meant to come together with other individuals and adopt a written constitution that then governed their collective activities.²⁸

Two examples from early Utica exemplify these practices: the Washington Benevolent Society and the Western Education Society. The Washington Benevolent Society began in Utica in 1812. Like the dozens of other Washington societies forming around the nation during this same period, the Society distributed a leather-bound book containing its own constitution—together with a copy of the Constitution of the United States, the state constitution, and George Washington’s farewell address.²⁹ The Society’s Constitution, reproduced as Appendix A to this essay, starts with a preamble stating, “We, the Subscribers . . . have formed ourselves into . . . an association, and adopted the following Articles as the Constitution of our Society.”³⁰ The twelve articles that follow specify such things as the officers of the Society and their duties,³¹ that meetings are held “on the Tuesday preceding each full moon”³² and are presided over by the President,³³ and the election of members and their obligations.³⁴ The members

28. See e.g. Oneida Bible Society, *The Constitution of the Oneida Bible Society* (Seward & Williams 1812); Protestant Episcopal Society, New York, *The Constitution of the Protestant Episcopal Society for Promoting Christian Knowledge in the Western District of the State of New York* (William Williams 1821) (copy on file with author); Utica Female Missionary Association, *Constitution of the Utica Female Missionary Association* (1822) (archival material, copy on file with author); Washington Benevolent Society, County of Oneida, *The Constitution of the Washington Benevolent Society of the County of Oneida* (Websters & Skinners 1812); Welsh Bible Society of Steuben and Utica, *Constitution of the Welsh Bible Society of Steuben and Utica, and Their Vicinities* (1828) (archival material, copy on file with author); Western Domestic Missionary Society, New York, *Constitution of the Western Domestic Missionary Society of the State of New York* (1826) (archival material, copy on file with author); Western Education Society, New York, *The Constitution of the Western Education Society of the State of New York* (William Williams 1818).

29. Washington Benevolent Society, County of Oneida, *supra* n. 28.

30. *Id.* at preamble.

31. *Id.* at arts. 2, 4-7.

32. *Id.* at art. 3.

33. *Id.*

34. Washington Benevolent Society, County of Oneida, *supra* n. 28, at arts. 8-11.

could make bylaws to govern the Society's business.³⁵ The Constitution could be altered with the consent of the majority of the members.³⁶

The Western Education Society began in Utica on December 31, 1817 when town residents, responding to a public notice, gathered at the Presbyterian Church to "[form] a Society for the purpose of educating pious and indigent Young Men of talents for the Gospel Ministry."³⁷ The Society's Constitution, ratified that same day, began with the following preamble:

Being deeply impressed with the importance of increasing the number of pious and learned Ministers of the Gospel, we whose names are underwritten, do hereby form ourselves into a Society, for the purpose of aiding indigent Young Men of talents and piety, in acquiring a competent education for the Gospel Ministry.³⁸

The Society's Constitution contains seventeen articles, specifying such things as the requirement that members contribute \$1 annually,³⁹ that the officers of the Society consist of a President, Vice Presidents, "a Recording Clerk, a Corresponding Secretary, a Treasurer and Auditor," and "such assistant Officers and Agents as experience may prove necessary";⁴⁰ and that there is to be an annual election of a nine-person Board of Directors.⁴¹ According to the final article of the Constitution, it could be "altered, or amended by the votes of two thirds of the members present at any annual meeting"⁴² so long as the amendment was "recommended by a majority of the Directors,"⁴³ and with the substantive limitation that "the funds of the Society shall never be diverted from the education of pious indigent youth for the ministry."⁴⁴

Importantly, the people writing and interpreting these associational constitutions neither attended the Philadelphia Convention or the state conventions ratifying the federal Constitution, nor were they participants in the creation of state constitutions. For example, on February 7, 1826, black residents in Utica drafted and ratified a constitution for a Mutual Relief Society. The members of the Society contributed seventy-five cents initially and then twenty-five cents per month to a fund to assist each other in times of sickness or a death in the family. The Constitution of the Society limited membership to "such as are known to be persons of good reputation."⁴⁵ There were seventeen members of the Society in 1828.⁴⁶ Women also actively engaged in constitution making in their civic associations. One of the most extraordinary organizations that formed in Utica was the Female Missionary Society of the Western District, begun in 1816. It operated as an umbrella organization for women's organizations supporting the missionary cause in the

35. *Id.* at art. 12.

36. *Id.*

37. Western Education Society, New York, *supra* n. 28, at 2.

38. *Id.* at preamble.

39. *Id.* at art. 2.

40. *Id.* at art. 5.

41. *Id.* at art. 6.

42. Western Education Society, New York, *supra* n. 28, at art. 17.

43. *Id.*

44. *Id.*

45. Harrington, *supra* n. 22, at 69.

46. *Id.* at 68-69.

surrounding area. The Society's Constitution, ratified in 1816, provided for an annual meeting for the election of fifteen trustees, who in turn chose a President, Treasurer, and Secretary; members of the Society were required to contribute \$1 annually.⁴⁷

In an age when the promise of democratic government was still unfulfilled, civic associations provided many thousands of Americans with an experience in self-government. In addition to engaging members in writing constitutions, civic associations taught members how to run meetings, recruit other members, elect officers, draft and vote for resolutions, oversee a budget, and maintain financial records. In civic associations, Americans who were excluded from the offices and activities of formal politics—including women and blacks—acquired and practiced these kinds of political and administrative skills, often for the first time. Charles Ingersoll in a speech before the American Philosophical Society in 1823, observing the growing number of civic associations, pointed to these practices as the associations' most significant characteristic:

I am within bounds in asserting, that several hundred thousand persons assemble in this country every year, in various spontaneous convocations, to discuss and determine measures according to parliamentary routine. From bible societies to the lowest handicraft there is no impediment, but every facility, by law, to their organisation. And we find not only harmless but beneficial, those various self-created associations, which in other countries give so much trouble and alarm. It is not my purpose to consider the political influences of these assemblies, nor even their political character. But their philosophical effect on the individuals composing them, is to sharpen their wits, temper their passions, and cultivate their elocution. While this almost universal practice of political or voluntary legislation, could hardly fail to familiarise a great number of persons with its proprieties. The mode of transacting business is nearly the same in them all, from the humblest debating club to Congress in the capitol.⁴⁸

A few months after its inception in 1816, the Female Missionary Society of the Western District hired David R. Dixon as a missionary. He traveled to neighboring towns to deliver sermons and help organize auxiliary societies. Within a year of its founding, the Society had twenty-nine auxiliary societies in neighboring towns, each with its own women officers, and together totaling more than 1,400 members. These auxiliaries contributed funds to the parent Society, with contributions from each auxiliary tabulated in the Society's annual reports. After a year of operations, the Trustees reported that they found "the Society increasing in importance far exceeding their highest expectations."⁴⁹

Civic associations expanded the opportunities to hold positions of responsibility. In early Utica, no woman, however well educated or prominent her family, could aspire to be the town trustee, a local judge, or the county representative in the New York

47. Female Missionary Society of the Western District, *Constitution of the Female Missionary Society of the Western District*, in *The First Annual Report of the Trustees of the Female Missionary Society of the Western District* 47 (William Williams 1817).

48. C.J. Ingersoll, Annual Oration, *A Discourse Concerning the Influence of America on the Mind* (The Am. Philosophical Socy., U. Phila., Oct. 18, 1823) (A. Small 1823).

49. Female Missionary Society of the Western District, *The First Annual Report of the Trustees of the Female Missionary Society of the Western District* 15 (William Williams 1817).

legislature. Women could, however, hold important positions in civic associations. In 1828, of Utica's 7,446 inhabitants, 138 residents—all men—served in public office in positions that included justice of the peace, assessor, town clerk, constable, and fence viewer.⁵⁰ In addition to these public offices, the 1828 town directory lists 129 offices in civic associations, filled by 112 residents.⁵¹ These associational positions included such things as superintendent of a Sunday school, president of the horticultural society, secretary of the fire society, and treasurer of the tract society. There was little overlap between holding public office and holding associational office: just seven individuals held both.⁵² There was also a large dispersal of the associational positions, with the majority of associational officers (ninety of them) holding just one position.⁵³ Among the male associational officers, a wide range of occupations are represented, including attorney, merchant, auctioneer, cordwainer, tavern keeper, carpenter and joiner, and morocco manufacturer.

While no woman held public office in Utica in 1828, women did fill positions in civic associations. Fifteen women, five of whom were single women, are listed in the directory as holding office in that year.⁵⁴ Miss Hannah Alvord, for example, was Director of the Female Society of Industry in 1828, while Miss Betsey Barker was Superintendent of Sunday School No. 1.⁵⁵ The Reverend's wife, identified as Reverend Mrs. Brace, was Vice President of the Female Missionary Association and Treasurer of the Female Society of Industry.⁵⁶ Perhaps not surprisingly, though, when a civic association was open *both* to men and women, men filled the association's offices. The records of the Oneida Bible Society, for example, show men and women as members and paying their dues, but all the elected positions filled by men.⁵⁷ Nonetheless, civic associations increased the number of elected offices in Utica and allowed a wide range of individuals who were not serving in public office to hold a position of responsibility.

Civic associations also served to connect the residents of Utica with the wider nation. Some civic associations in Utica were part of a broader organizational network that transcended the town. During the early decades of the American Republic, a group of reform-oriented entrepreneurial individuals created national networks of associations, first by unifying existing associations in various towns, and then by expanding the

50. Harrington, *supra* n. 22, at 3-56.

51. *Id.*

52. The seven were: Thomas Colling, Secretary of the Utica Horticultural Society and Town Trustee; Charles Coventry, Corresponding Secretary of the Utica Lyceum and Town Health Officer; Ezra S. Cozier, Masonic leader, Justice of the Peace, and Town Supervisor; T.H. Hubbard, Director of the Utica Library and Clerk of the Supreme Court; Richard R. Lansing, Director of the Utica Library, Clerk of the United States District Court, and Town Trustee; J.H. Rathbone, Secretary, Treasurer, and Librarian of the Utica Library and Court Commissioner; and Nathan Williams, President of the Utica Horticultural Society and Judge of the Fifth Circuit Court. *Id.*

53. These included: Frederick Ayer, Manager of Sunday School No. 6; Ezekiel Bacon, Director of the Utica Library; Moses Bagg, Treasurer of the Missionary Association of Utica; Charles Carter, Treasurer of the Utica Hibernian Benevolent Society; and A.R. Knox, Treasurer of the Tract Society.

54. Since only a few positions are mentioned in the directory, the actual number of women office-holders was certainly much higher.

55. Harrington, *supra* n. 22, at 76, 78.

56. *Id.* at 74, 76.

57. See e.g. Directors of the Oneida Bible Society, *The Report of the Directors of the Oneida Bible Society at the Annual Meeting of the Society in the Presbyterian Church* (J. Dix. & J.H. Carpenter 1812).

network to create additional auxiliaries across the nation. Sunday schools, temperance organizations, moral reform associations, abolitionist organizations, and others grew rapidly around the nation as a result of this strategy. Hired agents, armed with model constitutions and other organizational literature, traveled from town to town to set up local groups. Periodicals shared news about similar associations in other towns. Delegates from individual associations came together in regional and national conventions. In addition to embodying and promoting the values and purposes of the national organization at the local level and carrying on its work there, the local units often raised funds to transmit to the national body. Importantly, civic associations that were part of a national organizational structure operated with a very large degree of autonomy. They were not subordinate branches of a national organization: they created their own constitutions, passed their own bylaws, elected their own officers, ran their own meetings, and conducted their affairs mostly free from central oversight.

In Utica, associations that were part of a broader national organizing pattern included the town's Bible societies, tract societies, missionary societies, Sunday schools, and the temperance organizations in place by the 1820s. Two examples show this phenomenon: the town's tract societies and its temperance societies. The American Tract Society ("ATS") began in 1825 when the New York Religious Tract Society (1812) and the New England Tract Society (1814) joined to create a national umbrella organization.⁵⁸ At the time of the merger, Utica had a local tract society operating as an auxiliary branch of the New York Religious Tract Society.⁵⁹ The ATS disseminated non-denominational religious tracts through a network of male and female auxiliaries that purchased the tracts at subsidized rates and distributed them locally to individuals. These tracts, which averaged twelve-pages each, provided general religious and moral instruction to their readers, often through a story with an underlying lesson. According to Article 10 of the ATS Constitution, a local tract society could become an auxiliary so long as it was "formed on the principles of this Society, and annually contributing a donation to its treasury";⁶⁰ the President and Secretary of auxiliaries became *ex officio* members of the ATS.⁶¹ Delegates from the ATS traveled throughout the nation to encourage the formation of auxiliary societies and to persuade pre-existing organizations to affiliate with the parent body. By 1829, the number of ATS auxiliary societies was 630.⁶² Utica had two auxiliary societies, the Utica Branch of the American Tract Society and the Female Auxiliary Tract Society of Utica.⁶³ Through the publications of the ATS, the Utica residents who were members of these auxiliary societies saw how their contributions were part of a larger national movement and how their efforts compared to

58. See generally American Tract Society, *A Brief History of the Organization and Work of the American Tract Society* (Am. Tract Socy. 1855); American Tract Society, *Proceedings of the First Ten Years of the American Tract Society* (Flagg & Gould 1824); Mark S. Schantz, *Religious Tracts, Evangelical Reform, and the Market Revolution in Antebellum America*, 17 *J. Early Republic* 425 (1997).

59. *Brief History of the American Tract Society, Instituted at Boston, 1814, and Its Relations to the American Tract Society at New York, Instituted 1825*, at 7 (T.R. Marvin 1857) [hereinafter *Brief History of the American Tract Society*].

60. New England Tract Society, *Constitution of the American Tract Society* (Flagg & Gould 1825).

61. *Id.*

62. *Brief History of the American Tract Society*, *supra* n. 59, at 47.

63. See Harrington, *supra* n. 15, at 20-21, 119; Harrington, *supra* n. 22, at 75-76.

those of auxiliaries in other parts of the nation. Annual Reports of the ATS carefully tabulated information on each auxiliary, including the date of formation, the name of the secretary or treasurer, the remittances from the auxiliary for tracts, and the donations it had made in the preceding year. Auxiliaries that were especially generous, successful, or had experienced unusual growth in membership received special mention.⁶⁴

Temperance societies represent a second example of Utica's civic associations existing as part of a national organizational structure. In 1826, Lyman Beecher and his associates formed the American Society for the Promotion of Temperance (known as the American Temperance Society), the first national temperance organization.⁶⁵ Overseen by Massachusetts Congregational minister Justin Edwards, and drawing inspiration from the successes of the ATS, the American Temperance Society aimed for national influence. It disseminated publications and sent representatives to address citizens in their towns and organize local groups. Echoing Beecher's own themes, evangelical ministers like Albert Barnes, the pastor of the First Presbyterian Church of Philadelphia and a prominent theologian, preached that the success of the United States Constitution and the future of the nation depended on abstinence from drink. An important tool of the American Temperance Society was to persuade people to sign a pledge to abstain from distilled spirits.⁶⁶

The temperance movement touched Americans everywhere, both in the North and the South. Between 1831 and 1833, the number of temperance organizations rose from 2,200 groups with a membership of 170,000, to 6,000 groups with more than a million members. By 1835, there were 1.5 million members—one out of ten Americans—in 8,000 auxiliaries. In Utica, seven temperance societies formed between 1828 and 1833, each designed to attract a different kind of person: the Young Men's Temperance Society, the Utica Hibernian Temperance Society, the Third Ward Temperance Society, the Young Men's Temperance Society of the County of Oneida, the Welsh Temperance Society of Utica and Its Vicinity, the Second School District Temperance Society, and the Utica Mechanics and Laboring Men's Temperance Society.⁶⁷ In 1833, the American Temperance Society organized a national convention attended by some 400 representatives of temperance organizations in twenty-one states. The convention renamed the national organization the United States Temperance Union.⁶⁸ By 1835, the Union had 1.5 million members in eight thousand local societies, making it at that time the largest organization ever established in the United States.⁶⁹ Although they began and operated at the local level, Utica's temperance societies were very much part of a

64. See American Tract Society, *Annual Report of the American Tract Society* (Society's House 1826).

65. See generally Ronald G. Walters, *American Reformers, 1815-1860*, at 125-32 (Hill & Wang 1997).

66. Ian R. Tyrell, *Drink and Temperance in the Antebellum South: An Overview and Interpretation*, 48 J. S. Hist. 485, 486 (1982). Brewed liquor was considered less troublesome. *Id.*

67. See Harrington, *supra* n. 27, at 43-44.

68. The Temperance Union became the American Temperance Society in 1836. Tyrell, *supra* n. 66, at 487 n. 9.

69. See American Temperance Society, *Annual Reports of the Executive Committee of the American Society for the Promotion of Temperance* (Flagg & Gould 1831); American Temperance Society, *Report of the Executive Committee: of the American Temperance Union* (S.W. Benedict 1842); *Proceedings of the National Temperance Convention* (1841) (archival material, copy on file with author); Tyrell, *supra* n. 66, at 486.

national movement, giving the members from Utica a shared experience and linkages with inhabitants of other towns.

Other civic associations that formed in Utica were purely local creations. Rather than existing as part of a national organizational structure, these associations formed from the efforts of a group of like-minded residents. The activities of these associations were limited to the town and there was no formal relationship with organizations in other places. Utica's Maternal Association, for instance, began in 1824 and was:

[F]ormed . . . for the purpose of improvement in the religious education of the children of the members. They seek information from works on education, and hold semi-monthly meetings for colloquial intercourse touching the object of the association. And at the quarterly meetings they assemble their children with them, and hear recitations, essays, &c.; and also make a liberal contribution to a literary institution. Present number of members, 45.⁷⁰

Other examples of purely local associations in Utica included the women's charitable organizations, the musical association, the horticultural society, and the town's immigrant aid groups.

Yet even purely local organizations in the early Republic brought Americans together. While organized and operated in a single community like Utica, local associations immersed their members in practices and values that were replicated to an astonishing degree in organizations across the country. The expanding postal system disseminated news on the formation and activities of local civic associations. Newspaper editors, thanks to a congressional subsidy in the 1792 Post Office Act, received newspapers from around the country,⁷¹ and frequently reprinted in their own papers reports on associational activities occurring in other towns. For example, on January 13, 1818, the *Dedham Gazette* in Massachusetts republished from a Utica paper an account of donations the town's residents had made to the local education society.⁷² Borrowing and copying led to a remarkable degree of similarity in the types and activities of associations from one town to the next. Utica organizations adopted procedures and practices, including constitutions and bylaws, that were adopted by other associations in towns around the nation. As a result, even without any central coordinating efforts, the roster of local civic associations in Utica during this early period was very similar to the list of organizations that were found in other towns. Therefore, even local civic associations brought the inhabitants of Utica into a common national experience.

To summarize, civic associations created a constitutional culture in Utica. In their civic associations, the residents of Utica wrote constitutions and practiced the art of self-government. They shared this experience with inhabitants of other towns around the nation, in some instances through formal organizational linkages. Ordinary townsmen, including women and blacks, experienced first-hand constitutional government through their associational memberships.

70. Harrington, *supra* n. 22, at 73.

71. 1 Stat. 232 (1792). See Richard R. John, *Spreading the News: The American Postal System from Franklin to Morse* (Harvard U. Press 1995).

72. *Dedham Gazette* (Jan. 13, 1818) (copy on file with author).

III. THE CONSTITUTION'S CULTURE

The Utica experience in the early decades of the Republic was very typical. In towns across the nation, civic associations immersed Americans in a common, hands-on experience of constitutional self-government. This part explores some implications of this experience for constitutional history and theory.

A. *The History of Constitutional Government*

The creation of a constitutional culture that occurred in Utica, New York and in towns throughout the nation suggests that existing accounts of constitutional history are woefully inadequate and that more attention is needed to the role ordinary Americans played in the early development of our system of constitutional government. "We the People," begins the United States Constitution, but the history of constitutional government in the United States has never had much of a place for regular Americans. Most of the scholarly history of the Revolutionary era and of the Constitution is limited to the acts and words of elite political figures.⁷³ As historian Simon Newman complains, students of the early national era tend to "writ[e] as if poor, lower, and even middling sort Americans had no political existence or none worthy of mention," and they view ordinary citizens as "essentially powerless spectators . . . outside of and thus in some sense apart from the political process."⁷⁴

Modern constitutional scholarship itself is centered on the courts, particularly on the United States Supreme Court, whose decisions are painstakingly scrutinized. As Robert McCloskey observes, "American constitutional history has been in large part a spasmodic running debate over the behavior of the Supreme Court."⁷⁵ Law professor Bruce Ackerman, for example, puts the Constitution in the hands of judges save for revolution, civil war, and other rare episodes of extraordinary citizen engagement.⁷⁶ Ronald Dworkin understands the Constitution as a judicial weapon to protect the interests of minority citizens against a misguided general public.⁷⁷ Robert Justin Lipkin presents judges as permanent revolutionaries, ever updating the Constitution to suit the

73. There are, of course, exceptions. For histories that look beyond political elites, see e.g. Susan Branson, *These Fiery Frenchified Dames: Women and Political Culture in Early National Philadelphia* (U. Penn. Press 2001); Paul A. Gilje, *The Common People and the Constitution: Popular Culture in New York City in the Late Eighteenth Century*, in *New York in the Age of the Constitution, 1775-1800*, at 48 (Paul A. Gilje & William Pencak eds., Assoc. U. Press 1992); Karen V. Hansen, *A Very Social Time: Crafting Community in Antebellum New England* (U. Cal. Press 1994); Gary B. Nash, *Forging Freedom: The Formation of Philadelphia's Black Community, 1720-1840* (Harv. U. Press 1988); Alfred F. Young, *The Women of Boston: "Persons of Consequence" in the Making of the American Revolution*, in *Women and Politics in the Age of Democratic Revolution* 181 (Harriet B. Applewhite & Darline G. Levy eds., U. Mich. Press 1990).

74. Simon P. Newman, *Parades and the Politics of the Street: Festive Culture in the Early Republic* xi (U. Penn. Press 1997).

75. Robert G. McCloskey, *The Modern Supreme Court* 290 (Harv. U. Press 1972). The decisions of lower federal courts, state courts, and other constitutionally significant actors receive less attention; Michael Kammen rightly criticizes the tendency to "conflate the [Supreme] Court and the Constitution," and to "describe our constitutional history as predominantly the [Supreme] Court's history." Michael Kammen, *A Machine That Would Go of Itself: The Constitution in American Culture* 9, 10 (Alfred A. Knopf 1987).

76. See Bruce Ackerman, *We the People I: Foundations* (Harv. U. Press 1991).

77. See Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* 7 (Harv. U. Press 1996).

demands of modern life.⁷⁸ Kathleen Sullivan considers the People's desire to *change* their Constitution an illness or disease that she diagnoses as "amendmentitis," and she warns sternly of the consequences if the public tinkers with constitutional text.⁷⁹ Judges, too, have often denied the significance of the general public. The words of former United States Supreme Court Chief Justice Charles Evans Hughes support this point: "We are under a Constitution, but the Constitution is what the judges say it is."⁸⁰

In one sense, this lack of attention to ordinary Americans is unsurprising. The delegates to the Philadelphia Convention were themselves an elite and secretive bunch. They put in place a constitution that purposely constrained the role of the masses, and George Washington and others famously abhorred popular participation through political parties.⁸¹ Therefore, it may be unremarkable that, looking backwards, constitutional history focuses on the roles of the elite. With the masses of the population purposely confined to watching how the story unfolds, rather than playing starring roles themselves, the creation of the Republic is the tale of a few central protagonists who occupy the limelight from start to finish. Accordingly, history reports the efforts and innovations, the successes and failures, of these elite actors.

Yet, the very statesmen who created the United States Constitution also understood that a constitutional republic required much more than designing appropriate political institutions. They cared deeply about the general public because they were obsessed with the question of just what kinds of broader *social* arrangements were necessary to sustain the political system they envisaged, and they fretted over whether eighteenth-century American society was up to the task. In 1786, Benjamin Rush wrote to Richard Price,

The American war is over; but this is far from being the case with the American revolution. On the contrary, nothing but the first act of the great drama is closed. It remains yet to establish and perfect our new forms of government, and to prepare the principles, morals, and manners of our citizens for these forms of government after they are established and brought to perfection.⁸²

In particular, the leaders of the founding generation understood that the masses of citizens had to be united together—that there needed to be some level of social cohesion if constitutional government were to succeed. As Gordon Wood observed,

In building . . . an integrated national state, the Federalist leaders saw their principal political problem as one of *adhesion*: how to keep people in such a large sprawling republic from flying apart in pursuit of their partial local interests. . . . Tying people together, creating social cohesiveness, making a single nation out of disparate sections and

78. See Robert Justin Lipkin, *Constitutional Revolutions: Pragmatism and the Role of Judicial Review in American Constitutionalism* x (Duke U. Press 2000).

79. Kathleen M. Sullivan, *Constitutional Amendmentitis*, 23 Am. Prospect 20 (Fall 1995).

80. Charles Evans Hughes, *Addresses of Charles Evans Hughes: 1906-1916*, at 185-86 (2d ed., G. P. Putnam's Sons 1916).

81. See e.g. George Washington, *Farewell Address* in *The Writings of George Washington: from the Original Manuscript Sources* vol. 35, 214, 224-25 (John C. Fitzpatrick ed., U.S. Govt. Prtg. Off. 1940) ("[A]ll combinations and Associations, under whatever plausible character, with the real design to direct, controul counteract, or awe the regular deliberation and action of the Constituted authorities are . . . of fatal tendency.").

82. David Freeman Hawke, *Benjamin Rush: Revolutionary Gadfly* 341 (Bobbs-Merrill 1971).

communities . . . was the preoccupation of the Federalists, and it explains much of what they did.⁸³

In an important sense, therefore, “the Constitution . . . was no more than a promissory note. The nation was far from united even as to the wisdom of national federation.”⁸⁴ Reflecting on the achievement of the founders, Michael Zuckerman observes that modern perspectives do not yet fully account for how a “congeries of colonies which had displayed no previous gift for cooperation ever acted together so effectively in 1776 or stayed together afterward.”⁸⁵ Our modern approaches, focused as they are on statesmen and the elite, neglect an issue prominent in our constitutional past.

Civic associations are an important part of that larger history (although likely but one component). They made their contributions to the Republic’s success in meetings that took place in town halls, churches, private residences, and inns; in parades along a waterfront and gatherings in village squares; in public lectures on winter evenings; and in houses of refuge for the poor. Most of the participants in associational life were not important enough to have streets named after them or statues erected in their honor. Many, including women and blacks, were entirely excluded from the formal operations of government. As the Utica experience shows, some participants in civic associations held public offices, but most were far from the centers of political power. With so many more tantalizing individuals and events to uncover in our constitutional history, it is easy to forget or overlook the roles of *these* people and the thousands more like them. But to understand the experience of American constitutional government, it is vital to recognize the roles of Americans working far from Independence Hall, Congress, and the chambers of state government.

The creation of the constitutional culture in the early Republic also suggests the need for more attention to the ongoing and changing circumstances in which the United States Constitution and the state constitutions operate. Despite massive interest, prolonged attention, and zealous efforts, we still know remarkably little about how constitutions actually work. Scholars delve into the historical circumstances leading to ratification of the Constitution and its twenty-seven amendments.⁸⁶ There are numerous biographical accounts of the individuals who created the federal Constitution, and debates rage on their motivations, philosophies, and personal quirks. Today, understanding the federal Constitution as a body of supreme law is a professional occupation. Legal scholars have produced vast research and argument about what individual constitutional clauses meant or should be interpreted to mean, and build careers on explicating a single constitutional provision—the Speech Clause of the First Amendment, for instance, or the meaning of due process. These efforts are certainly valuable, and this work collectively represents an astonishing depth of knowledge. To

83. Gordon S. Wood, *Launching the “Extended Republic”: The Federalist Era*, in *Launching the Extended Republic: The Federalist Era 6-7* (Ronald Hoffman & Peter J. Albert eds., 1996) (emphasis added).

84. Peter Dobkin Hall, *The Organization of American Culture, 1700-1900: Private Institutions, Elites, and the Origins of American Nationality* 19 (NYU Press 1982).

85. Michael Zuckerman, *A Different Thermidor: The Revolution Beyond the American Revolution*, in *The Transformation of Early American History: Society, Authority, and Ideology* 170 (James A. Henretta, et al. eds., Alfred A. Knopf 1991).

86. Scholars tend to put less emphasis on state constitutions.

achieve depth, however, we have sacrificed breadth. In looking with such careful diligence at all of these features of constitutional government, we have overlooked others that are more basic and may be more revealing.

Some observers complain that constitutional scholars range too far. Richard Posner, for instance, contends it “absurd that constitutional law should be considered a single specialty,” in which scholars seek to understand anything more than a “mere corner” of the discipline.⁸⁷ This view should be squarely rejected. Constitutional scholarship is not too broad, rather, it is not broad enough. The omission of the cultural context from constitutional scholarship has produced a very incomplete understanding of how the federal Constitution and its state counterparts actually function in the real world. We need better tools to understand how, in Professor Friedman’s terms, the “living law, observed in cross section at any point in time, reveals the imprint of those social forces which have actually pressed against the legal system,”⁸⁸ and a better account of the “social forces” that, as he puts it, “‘make’ the law” what it is.⁸⁹

Attention to the Constitution’s cultural context suggests several fruitful lines of inquiry. A first is to understand how various kinds of social relationships have helped or hindered the development and operations of constitutional government. For example, as a historical matter, how did Americans’ strong *local* connections in the early Republic help or hinder federalism? Federalism deals only with government at the level of the nation and the states; the United States Constitution gives no specific authority to localities. How, then, did it matter for purposes of implementing the federalist system, that the towns and villages, most significant in the lives and hearts of Americans, were excluded from the constitutional design? In a similar mode, one might ask how various kinds of social relationships have shaped constitutional protections for individual rights. The Eighth Amendment, for instance, prohibits excessive bail and the infliction of cruel and unusual punishments. It is not hard to see that what is excessive, or cruel and unusual, might depend on the practices and perceptions of citizens in particular places at a particular time, and that these practices and perceptions themselves might depend on social conditions like crime rates, economic prosperity, or a community’s experiences with the judicial system. Rather than examine constitutional provisions only in the abstract, there is value to looking at how structures and protections have operated on the ground.

A second line of inquiry asks what changes over time in our social arrangements have meant for constitutional governance. For instance, one might examine the implications, for creating a national constitutional government, of the predominately local communities that existed in the era immediately after the Revolutionary War, and see how national government developed once social connections spanned greater distances. Alternatively, one might look at how a shift away from localism has affected the contours of constitutional rights. The Fourth Amendment, for example, protects against unreasonable searches and seizures. What is an unreasonable search or seizure

87. Richard A. Posner, *Overcoming Law* 207, 209 (Harv. U. Press 1995).

88. Friedman, *supra* n. 6, at 148.

89. *Id.* at 154.

surely meant something quite different to inward-looking locals of the late eighteenth century than what it meant to more cosmopolitan Americans of the late nineteenth century. The significance and meaning of constitutional provisions that regulate relationships among the states have also likely varied as social relationships have changed. Article IV of the Constitution requires the states to accord the same privileges and immunities to citizens of other states as they do their own citizens.⁹⁰ If there is little geographic mobility or other kinds of inter-state activity, the provision has little significance. As people cross state lines more frequently, it takes on greater importance.

Third, scholars should examine how the Constitution itself draws upon and makes use of particular kinds of social and cultural arrangements. For example, Article III requires that, except for impeachment, trials of crimes be jury trials; the right to a jury trial is also protected in the Bill of Rights.⁹¹ One might, therefore, investigate how the Constitution's jury provisions depend upon citizens having existing networks and habits of collaboration that can be employed in jury service.

Fourth, scholars could usefully examine how the Constitution depends on other, broader cultural conditions. For instance, to what extent is it important to constitutional government that people trust each other, respect rights, and exhibit a willingness to obey laws? Moreover, why does the Constitution matter to citizens: why do people accept it, abide by it, support it, and cherish it? This line of inquiry may be particularly important in considering whether and how American constitutionalism may be exported to and adopted in foreign nations: as Professor Friedman has written, it is naive to think of legal culture as containing "neutral artifacts that a society can pick or buy."⁹²

The issue is also of domestic importance. What happens, we might ask, to constitutional government if citizens do not care about, or are too busy to play a role *as citizens* in political life? The 1788 Constitution formally assigns to ordinary citizens three interconnected political roles: as *voters*, members of the *militia*, and as *jurors*.⁹³ These three roles correspond to the tripartite governmental scheme of the legislative, executive, and judicial branches respectively. Citizens ensure representatives act in accordance with the public's interests, rather than their own, by holding elected representatives accountable at the polls. Juries, as one early commentator put it, represent "the democratic branch of the judiciary power."⁹⁴ In criminal cases, juries serve as a check on the government because they can refuse to convict a defendant where they believe the government has abused its power.⁹⁵ By serving on juries, citizens also learn and practice the art of self-government.⁹⁶ Alexis de Tocqueville had in mind this value of juries when he observed that "[t]he jury is both the most effective way of

90. U.S. Const. art. IV, § 2.

91. U.S. Const. art. III, § 2; U.S. Const. amend. VI.

92. Friedman, *supra* n. 6, at 194-95.

93. See Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* (Yale U. Press 1998).

94. *Essays by a Farmer*, in *The Complete Anti-Federalist* vol. 5, 36, 38 (Herbert J. Storing & Murray Dry eds., U. Chi. Press 1981).

95. See Amar, *supra* n. 93, at 84-85. At the Founding, there were dramatic examples of colonial juries having resisted British authority in trials such as that of John Peter Zenger on charges of seditious libel. See Shannon C. Stimson, *The American Revolution in the Law: Anglo-American Jurisprudence before John Marshall* 52-55 (Princeton U. Press 1990).

96. See Amar, *supra* n. 93, at 94-96.

establishing the people's rule and the most efficient way of teaching them how to rule."⁹⁷ According to de Tocqueville, "[J]uries . . . instill some of the habits of the judicial mind into every citizen, and just those habits are the very best way of preparing people to be free."⁹⁸ In the early years of the Republic, jurors looked more like judges than they do today. Instead of simply deciding well-defined issues of fact, early juries also interpreted and applied the law.⁹⁹ The militia, in its 1788 form, provided armed protection against a potentially abusive government. On a day-to-day basis, the militia's importance in the early Republic lay in enforcing the law. Without the cooperation of the local militia units, governmental programs could not get very far.¹⁰⁰ If modern citizens are too busy to vote, if today's criminal (and civil) cases proceed and conclude without the oversight of juries, and if the only contemporary militia units are cranks in Montana—what becomes of constitutional government?

Incorporating the cultural context into constitutional study also invites a focus on how the Constitution itself has structured that context. Legal structures, as Richard Pildes demonstrates, frequently affect the nature and composition of social arrangements, often in unexpected ways.¹⁰¹ A further line of inquiry, therefore, is how constitutional provisions have altered or reinforced particular cultural elements. For instance, how does federalism encourage or undermine certain types of social networks? Does free speech help or harm social cohesiveness? What are the social effects of according constitutional protections to certain groups? Like the framers themselves, we should recognize and seek to understand the relationships between formal government and our broader social institutions.

B. *Theories of Constitutional Government*

In addition to enhancing historical accounts, an understanding of constitutional culture also informs modern theories of constitutional government. Today, constitutional scholarship contains a striking tension between a commitment to the Constitution's profound and revolutionary democratic vision, and the insignificance it assigns to ordinary people. A central preoccupation of modern constitutional theory is what Alexander Bickel identified in 1962 as the "Counter-Majoritarian Difficulty."¹⁰² The "difficulty" is how to explain the role of judges in reviewing and invalidating laws validly enacted by elected representatives in a democracy. Or, as Bickel puts it in one of

97. de Tocqueville, *supra* n. 10, at 254.

98. *Id.* at 252.

99. See Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. Chi. L. Rev. 867, 903-21 (1994); Amar, *supra* n. 93, at 100-01; John D. Gordan, III, *Juries as Judges of the Law: The American Experience*, 108 Law Q. Rev. 272 (1992); Mark DeWolfe Howe, *Juries as Judges of Criminal Law*, 52 Harv. L. Rev. 582 (1939); Douglas G. Smith, *The Historical and Constitutional Contexts of Jury Reform*, 25 Hofstra L. Rev. 377, 446-54 (1996); *The Changing Role of the Jury in the Nineteenth Century*, 74 Yale L.J. 170 (1964).

100. See generally Lawrence Delbert Cress, *Citizens in Arms: The Army and the Militia in American Society to the War of 1812* (UNC Press 1982); John K. Mahon, *History of the Militia and the National Guard* (Louis Morton ed., Macmillan 1983).

101. See Richard H. Pildes, *The Destruction of Social Capital through Law*, 144 U. Pa. L. Rev. 2055 (1996).

102. See Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 16 (2d ed., Yale U. Press 1962).

the most frequently quoted phrases in all of constitutional scholarship, “when the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it.”¹⁰³ In other words, if we believe (as the Constitution tells us) that the People are the source of political authority, what business does a judge have deciding that the People’s representatives in Congress cannot enact this or that law? Nearly everybody agrees that, at times, the courts (the principal interest being the Supreme Court) have overstepped their roles, although there is profound disagreement as to precisely when this has occurred.¹⁰⁴ Importantly, the stated difficulty judicial review presents is only *counter-majoritarian*. Like things that at first seem counterintuitive, there is, impliedly, a solution to the puzzle. Therefore, the modern jurist’s task is to figure out how judicial review is, or can be made, consistent with the People’s rule. As a result, it is impossible to exaggerate the degree to which modern constitutional scholarship has been concerned with solving, resolving, or otherwise dealing with the counter-majoritarian difficulty.¹⁰⁵ (Tellingly, this clumsy term is meaningless outside of the legal academy.)¹⁰⁶

The potential contributions of a cultural approach to the Constitution are made clear by considering briefly two prominent theoretical schools that each confront Bickel’s puzzle: dualism and constitutional populism. Bruce Ackerman’s dualist account posits that American constitutionalism consists of two tracks: a track of normal politics, in which citizens are relatively disengaged and decisions are left to elected representatives; and a track of constitutional politics, occasional moments of intense citizen mobilization, resulting in higher law-making, the creation of new principles of fundamental law with constitutional status, equivalent to formal constitutional amendments under Article V.¹⁰⁷ Ackerman argues that there have been three moments of constitutional politics in our nation’s history: the Founding, Reconstruction, and the New Deal.¹⁰⁸ According to Ackerman, during periods of normal politics, the Supreme Court is “preservationist.”¹⁰⁹ It keeps the legislature in check by interpreting and applying the Constitution in line with the will of the People expressed in the prior

103. *Id.* at 16-17.

104. Legal academics have invented the verb “Lochnerize,” after *Lochner v. New York*, 198 U.S. 45 (1905), to describe illegitimate judicial activity.

105. For a sampling of recent writings dealing with the issue, see Robert W. Bennett, *Counter-Conversationalism and the Sense of Difficulty*, 95 Nw. U. L. Rev. 845 (2001); Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* (Free Press 1990); Rebecca L. Brown, *Accountability, Liberty, and the Constitution*, 98 Colum. L. Rev. 531 (1998); Robert A. Burt, *The Constitution in Conflict* (Belknap Press 1992); Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. Chi. L. Rev. 689 (1995); Anthony T. Kronman, *Alexander Bickel’s Philosophy of Prudence*, 94 Yale L.J. 1567 (1985); Mark Tushnet, *Red, White, and Blue: A Critical Analysis of Constitutional Law* (Harv. U. Press 1988); Mark Tushnet, “*Shut Up He Explained*,” 95 Nw. U. L. Rev. 907 (2001); Steven L. Winter, *An Upside/Down View of the Countermajoritarian Difficulty*, 69 Tex. L. Rev. 1881 (1991).

106. Robert Dahl therefore urges, “if we were ever to undertake a discussion about the adequacy of our [C]onstitution when we assess it against democratic standards, this problem, which [has] so far been discussed mainly among legal scholars, would have to be opened up to public debate and discussion.” Robert A. Dahl, *How Democratic is the American Constitution?* 153 (Yale U. Press 2001).

107. See generally Ackerman, *supra* n. 76.

108. *Id.* at 58.

109. *Id.* at 10.

episodes of constitutional politics. Judicial review is, therefore, not anti-democratic. Rather, it protects the interests of the People until “We the People” mobilize again in constitutional politics.

Ackerman’s dualism purports to “dissolve” the counter-majoritarian difficulty: by preventing elected representatives from legislating beyond the scope of their mandate, the Court properly safeguards the interests of the People expressed in prior moments of constitutional politics.¹¹⁰ Yet, the upshot of Ackerman’s approach is to exclude the vast majority of citizens from our constitutional experience. According to dualism, *no* citizen who was born or came of age after 1936 (the most recent moment of constitutional politics) has played *any* role in American constitutionalism. No citizen born after the Founding who died before the Civil War played any role either; neither did any citizen who was born after the Civil War and died before 1936. The only citizens who can claim to have acted as part of the People are those who participated with sufficient zeal in the three moments of constitutional politics. Judges, however, are quite different. According to dualism, judges constantly engage in the constitutional project. They are the ones charged with understanding and applying the constitutional values that emerge from the People’s episodes of higher lawmaking. Ever evaluating and synthesizing the outputs of constitutional politics, judges determine whether and how “a constitutional revolution will be codified in Article Five terms.”¹¹¹ Indeed, one scholar has taken Ackerman’s approach to its logical extreme, arguing that judges, not citizens, are the true revolutionaries; the judiciary is properly and uniquely charged with the task of expanding and upgrading the Constitution to fit our evolving circumstances.¹¹²

The experience of civic associations brings dualism’s central error into sharp focus. The creation of a constitutional Republic did not end with the Constitution’s ratification, leaving work to be taken up again only when the nation erupted into Civil War. Rather, the written Constitution was merely the starting point, necessary to be sure, but by no means conclusive. American constitutionalism has been an ongoing project, not the few data points that register on dualism’s under-sensitive radar. Once the written Constitution was in place, the task became to put its words into action. Americans had to understand, accept, and respect constitutional government. They had to see themselves as part of a nation, sharing interests and a common fate with residents of disparate towns and states. It is appropriate to celebrate the genius and importance of the moment of the written Constitution. What dualism forgets, however, is that it was not at all certain in 1788 that constitutional government would succeed. Through many moments of activity and work over the course of the ensuing decades—less noticed but nonetheless constitutionally significant—civic associations put the written Constitution firmly in place.

Constitutional populism emphasizes ongoing citizen participation in constitutional decision-making. Understanding our recent constitutional history as an erosion of the

110. *See id.* at 261-62.

111. Bruce Ackerman, *We the People: Transformations* vol. 2, 315 (Harv. U. Press 1998) (emphasis omitted).

112. *See* Robert Justin Lipkin, *Constitutional Revolutions: Pragmatism and the Role of Judicial Review in American Constitutionalism* (Duke U. Press 2000).

People's authority by judges and distant officials,¹¹³ populist commentators look for ways to regenerate the input of ordinary Americans. Akhil Amar points to the modern shift in the "center of gravity,"¹¹⁴ as judges, especially federal judges, have displaced citizens acting in juries and other settings as the principle guardians of the Constitution. Writing with Alan Hirsch, Amar argues that the goal, therefore, should be to renew and protect various forms of popular participation that are increasingly neglected: the power of jurors to interpret the Constitution and invalidate statutes; the rights of all citizens to serve on juries and in the military; the ability of citizens to sue abusive government; and the power of voters to make law by plebiscite and to amend the Constitution through national referenda.¹¹⁵ Richard Parker also calls for an infusion, in constitutional practices, of the political energy of ordinary Americans through their regular participation in determining what the Constitution means, disobedience to unpopular judicial decisions, and reaffirmation of majority rule.¹¹⁶ In the tradition of older proposals to limit judicial review,¹¹⁷ some versions of the participatory solution focus specifically on replacing judges as the sole or even principal interpreters and guardians of the Constitution—taking the Constitution "Away from the Courts," in the words of Mark Tushnet.¹¹⁸

Other commentators, writing from a different political perspective, have also advocated a stronger role for individuals and institutions, besides courts, in constitutional interpretation and decision-making.¹¹⁹ Robert Bork argues that Congress should have the power, by majority vote, to reverse Supreme Court decisions.¹²⁰ Michael Stokes Paulsen writes that the President has equal authority to interpret the Constitution's requirements with respect to executive powers, and is therefore not required to abide by

113. See e.g. Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (Oxford U. Press 2004).

114. Amar, *supra* n. 93, at 24.

115. Akhil Reed Amar & Alan Hirsch, *For the People: What the Constitution Really Says About Your Rights* 3-19, 34-47, 59-78, 93-104, 120-26, 135-39 (Free Press 1998).

116. See Richard D. Parker, "Here, the People Rule": *A Constitutional Populist Manifesto* 96-99, 111-12 (Harv. U. Press 1994).

117. Proposals to limit judicial review are not new. Debates over the appropriate scope of judicial review preceded *Marbury v. Madison*. See generally Larry D. Kramer, *The Supreme Court, 2000 Term, Foreword: We the Court*, 115 Harv. L. Rev. 5, 13 (2001); James M. O'Fallon, *Marbury*, 44 Stan. L. Rev. 219 (1992). In the late nineteenth century, James Bradley Thayer proposed limiting judicial invalidation of congressional legislation to laws that are so clearly unconstitutional "that it is not open to rational question." James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 Harv. L. Rev. 129, 144 (1893).

118. Mark Tushnet, *Taking the Constitution Away from the Courts* (Princeton U. Press 1999). Much of Tushnet's proposal, though, is about giving the Constitution to Congress rather than to ordinary citizens. See *id.* at 54-71.

119. For surveys of this literature, see Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 Harv. L. Rev. 1359 (1997); Susan R. Burgess, *Contest for Constitutional Authority: The Abortion and War Powers Debate* (U. Press Kan. 1992); Frank H. Easterbrook, *Presidential Review*, 40 Case W. Res. L. Rev. 905 (1989-90); Louis Fisher, *Constitutional Dialogues Interpretation as Political Process* (Princeton U. Press 1988); Louis Fisher, *Constitutional Interpretation by Members of Congress*, 63 N.C. L. Rev. 707 (1985).

120. See Robert H. Bork, *Slouching Towards Gomorrah: Modern Liberalism and American Decline* 117 (Regan Bks. 1996).

contrary Supreme Court rulings.¹²¹ Jesse Choper argues that the Court should not decide constitutional questions involving the division of power between the federal and state governments or between the Executive and the Congress.¹²² Keith Whittington advocates “constitutional construction” by the legislature, existing alongside constitutional interpretation by the courts.¹²³ Larry Kramer notes in this regard that even if the judiciary has the last word on constitutional matters, it should not have the only word.¹²⁴

Like dualism, constitutional populism falls short as an account of constitutional history because it focuses on and treats as significant only activities in the realm of formal politics. As a prescription, populism also confronts an important difficulty. While the channels of political participation are more open today, many Americans do not seem to know very much about their Constitution and are not inclined to play a role in their government. Surveys demonstrate that while Americans consistently hold their Constitution (and the Supreme Court) in high regard, they are largely uninformed—or worse, misinformed—about many of the Constitution’s specific provisions.¹²⁵ Michael Kammen concludes that there is indeed a long tradition of blissful ignorance: “Americans have taken too much pride and proportionately too little interest in their frame of government.”¹²⁶ According to Kammen, “the Constitution occupies an anomalous role in American cultural history. . . . [I]t has been swathed in pride yet obscured by indifference: a fulsome rhetoric of reverence more than offset by the reality of ignorance.”¹²⁷

Lack of knowledge is also not confined to the Constitution itself. Despite rising access to education, there has been little overall advance in citizens’ political knowledge in the modern era.¹²⁸ Americans do not fare much better as doers. About half of voting-age Americans do not vote, giving the United States one of the lowest voting rates among all democracies.¹²⁹ Other forms of political participation, including attending

121. See Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 *Geo. L.J.* 217 (1994).

122. See Jesse H. Choper, *Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court* 175-76, 263 (U. Chi. Press 1980).

123. Keith E. Whittington, *Constitutional Construction: Divided Powers and Constitutional Meaning* (Harv. U. Press 1999).

124. See Kramer, *supra* n. 117, at 13.

125. For example, The National Constitution Center reports from a recent survey that while the vast majority of respondents take pride in the Constitution (89% of the respondents) and consider it relevant to modern life (91%), only a minority know such things as when the Constitution was drafted (19%) and the number of amendments (19%). National Constitution Center, *Startling Lack of Constitutional Knowledge Revealed in First-Ever National Poll* (Sept. 15, 1997). A majority of respondents (84%) also mistakenly thought the Constitution states, “all men are created equal.” *Id.* These results, the surveyors conclude, show a “stark contrast between our knowledge of the Constitution and our reverence for the Constitution.” *Id.*

126. Michael Kammen, *A Machine That Would Go of Itself: The Constitution in American Culture* xx (Alfred A. Knopf 1986).

127. *Id.* at 3.

128. See Robert D. Putnam, *Bowling Alone: The Collapse and Revival of American Community* 35-36 (Simon & Schuster 2000).

129. Voting trends are not entirely a result of sheer apathy: vast segments of the population, particularly black men, have been disenfranchised as a result of laws denying political rights to felons and others. See Christopher Uggen & Jeff Manza, *Democratic Contraction? Political Consequences of Felon*

town meetings, petitioning, rallying, and campaigning, have also declined in the modern era. Americans also identify less strongly with a political party than they did a generation ago. In addition to staying away from the polls, Americans are increasingly uninterested in political issues and are distrustful of government.¹³⁰ We have, in short, become angry Americans who hate and avoid politics.¹³¹ Among young Americans, these trends are especially pronounced.¹³²

Widening the lens to take account of the broader culture in the early Republic that supported the new federal Constitution brings into focus the role of ordinary Americans in constitutional history without resorting to a characterization of the Constitution's

Disenfranchisement in the United States, 63 Am. Sociological Rev. 777, 797 (2002) (estimating that 4.7 million Americans were disenfranchised in the 2000 election).

130. For overviews, see Barry C. Burden, *Voter Turnout and the National Election Studies*, 8 Pol. Analysis 389 (2000); Jack C. Doppelt & Ellen Shearer, *Nonvoters: America's No-Shows* (Sage Publ. 1999); Schley R. Lyons & Theodore S. Arrington, *Who Votes and Why?* (Taft Inst. for Two-Party Govt. 1988); Warren E. Miller & J. Merrill Shanks, *The New American Voter* (Harvard U. Press 1996); Peter F. Nardulli, Jon K. Dalager & Donald E. Greco, *Voter Turnout in U.S. Presidential Elections: An Historical View and Some Speculation*, 29 PS: Political Science & Politics 480 (1996); Stephen M. Nichols & Paul Allen Beck, *Reversing the Decline: Voter Turnout in the 1992 Election*, in *Democracy's Feast: Elections in America* (Herbert F. Weisberg ed., Chatham House 1995); *Parties without Partisans: Political Change in Advanced Industrial Democracies* (Russell J. Dalton & Martin P. Wattenberg eds., Oxford U. Press 2000); Putnam, *supra* n. 128, at 31-35; Steven J. Rosenstone & John Mark Hansen, *Mobilization, Participation, and Democracy in America* (Macmillan 1993); Ruy Teixeira, *The Disappearing American Voter* (Brookings Instn. Press 1992).

131. See generally *Congress and the Decline of Public Trust* (Joseph Cooper ed., Westview 1999); Stephen C. Craig, *The Malevolent Leaders: Popular Discontent in America* (Westview Press 1993); E.J. Dionne, Jr., *Why Americans Hate Politics* (Simon & Schuster 1991); John R. Hibbing & Elizabeth Theiss-Moore, *Congress as Public Enemy: Public Attitudes Toward American Political Institutions* (Cambridge U. Press 1995); Susan J. Tolchin, *The Angry American: How Voter Rage is Changing the Nation* (Westview Press 1996); *Why People Don't Trust Government* (Joseph S. Nye, Jr., Philip D. Zelikow & David C. King eds., Harv. U. Press 1997). According to the most recent figures from the Federal Election Commission (based in turn on statistics from the state election offices and the Congressional Research Service), in the 1996 presidential election, 49.08% of the voting age population of the United States voted. Federal Election Commission, *Voter Registration and Turnout - 1996*, <http://www.fec.gov/pages/96to.htm> (accessed Jun. 29, 2005). In the 1992 presidential election, the figure was 55.23%. Federal Election Commission, *Voter Turnout in the 1992 Presidential Election by State*, <http://www.fec.gov/pages/rat92.htm> (accessed Jun. 29, 2005). However, these numbers are based on a denominator that includes all individuals of voting age in the United States, even people who are ineligible to vote (e.g. because they are not United States citizens or because of a felony conviction). Calculations using estimates of the number of eligible voters as the denominator yield higher voting rates for these same years. See Michael P. McDonald & Samuel L. Popkin, *The Myth of the Vanishing Voter*, 95 Am. Pol. Sci. Rev. 963, 966 tbl. 1 (2001) (reporting, using an estimate of eligible voters that excludes non-citizens and ineligible citizens, turnout rates of 52.6% in 1996 and 60.6% in 1992); Press Release, Committee for the Study of the American Electorate, *President Bush, Mobilization Drives Propel Turnout to Post-1968 High, Kerry, Democratic Weakness Shown* 12, <http://www.fairvote.org/reports/CSAE2004/electionreport.pdf> (Nov. 2, 2004) (reporting, based on an estimate of eligible voters that excludes non-citizens, turnout rates of 51.5% in 1996 and 58.1% in 1992). Similar calculations show increasing voting rates during the two most recent presidential elections. See McDonald, *supra*, at 966 tbl. 1 (reporting a turnout of 55.6% in 2000); Press Release, Committee for the Study of the American Electorate, *supra*, at 19 (reporting a turnout of 59.6% in 2004 and 54.3% in 2000).

The longer history of voting rates is one of peaks and dips. From 1840 to 1900, the turnout of eligible voters averaged 77.7%. See Teixeira, *supra* n. 130, at 9 tbl. 1.3 (author's calculation based on table data). After the Nineteenth Amendment was ratified in 1920, turnout dropped: just 49.3% of eligible voters (now including women) voted in the 1920 presidential election; 48.9% voted in 1924. See *id.* Even in the years after the passage of the 1965 Voting Rights Act, which extended the franchise to millions of Americans, turnout reached a high (in 1964) of only 63.3% of eligible voters. See *id.*

132. See generally Alexander Astin et al., *The American Freshman: Thirty Year Trends, 1966-1996* (Higher Educ. Research Inst. 1997); Stephen Earl Bennett, *Political Apathy and Avoidance of News Media Among Generations X and Y: America's Continuing Problem*, in *Education for Civic Engagement in Democracy: Service Learning and Other Promising Practices* 9 (Sheilah Mann & John Patrick eds., ERIC 2000).

framers as populists. Rather than try to cast ordinary Americans into starring roles in the Constitution's production, it is far better to recognize the importance of the work that occurred behind the scenes.

Moreover, populism's goal of enhancing the roles ordinary citizens play today would also be better served by understanding the ongoing significance of constitutional culture. Surveys showing that the general public lacks knowledge about the Constitution's specific provisions obscure other kinds of constitutional knowledge that may in the long run be more significant to constitutional government. In the early Republic, when members of civic associations in Utica and other places prepared their own constitutions, they mimicked the structure and form of the federal Constitution, but did not copy it jot for jot. Rather, the federal Constitution provided a template for arranging and governing the civic associations. The reason is obvious. It made no sense for a charitable association or a maternal society to use a governmental constitution without modifying it to conform to the organization's purposes. Civic associations did not, therefore, impart to their members all of the intricacies of the Constitution. It is unlikely, for instance, that residents of Utica who joined civic associations thereby gained detailed knowledge about the President's Article II war powers or of the full faith and credit mandate of Article IV. Since civic associations did not need these things, there would have been no occasion for members to write parallel provisions into their own constitutions or engage in debate over the meaning of such provisions. Nonetheless, civic associations taught their members more fundamental features of constitutional governance: the solemnity of drafting and ratifying a written constitution, a constitution's binding authority, divisions of power and responsibility among officers, the importance of adhering to proper procedures, the need to safeguard individuals from arbitrary action, the distinction between ordinary laws and supreme constitutional law, the role of notice, the possibility of review, and the seriousness of amendment. The significance of this kind of constitutional knowledge can hardly be overstated. A constitution's specific details are meaningless if nobody knows or cares about these fundamental features of a constitutional government.

Americans today are better educated than they were in the early Republic and they likely know more about their government. In an important respect, however, today's citizens are less suited to constitutional government than were the residents of Utica and other towns in the early Republic. Americans today may *know* constitutional government better, but they are less equipped to *do* constitutional government. Knowledge about the Constitution today comes through passive activity: reading textbooks, listening to lectures, and watching television. By contrast, Americans in the early Republic learned about constitutional government through hands-on activity. They understood what it meant to adopt and be governed by a constitution because they did this themselves within their civic associations. They interpreted and debated constitutions, not as distant observers, but to resolve questions their organizations faced. Rather than just reading about the powers of this or that official, Americans in the early Republic ran for office and performed constitutionally specified duties themselves. Members of civic associations kept detailed records and delivered reports on the organization's past achievements and goals going forward. Doing is a more effective

way to learn than watching. Americans in Utica and in other towns in the early Republic learned about constitutional government as they grappled with their own constitutions, and they developed skills for working with others to pursue goals within a governing framework and for resolving difficulties when they arose.

Our predecessors were perfectly confident in carrying out constitutional government. To them, “constitution” signified not a mysterious and lofty document that should be left to specialists, but something that belonged to the people. What early Americans may have lacked in specific knowledge about the United States Constitution or state constitutions, and about the operations of government, was made up for with a practical appreciation for, and skills in, constitutional governance. When it came time to serve on juries, to evaluate the record of an elected representative, to argue a constitutional point, or to debate a petition, Americans in the early Republic could draw upon their prior experiences in democratic practices. In this regard, it is useful to remember that what impressed de Tocqueville in the 1830s was that “Americans of all ages, all stations in life, and all types of disposition are forever *forming* associations.”¹³³ Modern references to the United States as a “Nation of Joiners”¹³⁴ obscure the importance of like-minded individuals in Utica and other towns who convened to *create* their own organizations.

Constitutional populists seek to bring citizens back into constitutional decision making through service on juries, in public office, and in other governmental capacities. The goal is admirable, but it should not lose sight of the broader conditions the Constitution needs to prosper. A lack of more general civic skills in the population may be more serious to American constitutionalism than poor public knowledge about the Constitution itself. That is to say, opportunities for hands-on participation in some modern equivalent to early civic associations may be more vital than getting people to serve on juries or to sign petitions. The quiet, private undertakings of a dozen neighbors may hold more promise than rallying around a figurehead on the national public stage.

To summarize, there is a pressing need to investigate and take account of constitutional culture. Historians who seek to understand the origins and development of American constitutional government must examine more closely the cultural conditions in which that government emerged and has operated. Theorists who look deeply at the contours and possibilities of constitutional government must also look broadly at the ways in which it shapes and is shaped by culture.

IV. CONCLUSION

“What gives life and reality to the legal system,” Lawrence Friedman wrote in 1975, “is the outside, social world.”¹³⁵ “Social forces,” he explained, “are constantly at work on the law—destroying here, renewing there; invigorating here, deadening there; choosing what parts of ‘law’ will operate, which parts will not; what substitutes, detours,

133. de Tocqueville, *supra* n. 10, at 485 (emphasis added).

134. Arthur M. Schlesinger, *Biography of a Nation of Joiners*, 50 *Am. Hist. Rev.* 1, 13 (1944).

135. Friedman, *supra* n. 6, at 15.

and bypasses will spring up; what changes will take place.”¹³⁶ The law, he said, is therefore “a product of culture and society,”¹³⁷ and “one must accept the ultimate dependence of law on society”¹³⁸ because “[n]o other point of view makes sense.”¹³⁹ Thirty years later, constitutional history and theories of constitutional government have not, unfortunately, come to fully share this perspective.¹⁴⁰ Understanding the origins of constitutional government in the United States, how it has operated and developed over time, and the possibilities it holds for the future, requires much greater attention to our constitutional culture. To overlook this constitutional culture is to miss the law’s life and its reality.

136. *Id.*

137. *Id.* at 142.

138. *Id.* at 143.

139. *Id.*

140. See generally Paul W. Kahn, *The Cultural Study of Law* (U. Chi. Press 1999).

APPENDIX A

Constitution of the Washington Benevolent Society of Oneida County (1812).

CONSTITUTION, &C,

WE, the Subscribers, believing that every association, founded on the basis of humanity and benevolence, is conducive to public happiness;—Deeply impressed with the necessity of inculcating and diffusing as widely as possible the principles of morality, charity, and brotherly love, without which no people can prosper, no nation long exist;—Taught by the experience of ages and the observation of every day, that the permanent welfare of a community depends upon the preservation of public morals and the progress of information, and that a people to be happy, should be virtuous;—And convinced that those important objects can in no way be more readily obtained than by the formation of those associations in which there is a free interchange of sentiment and opinion, where the afflicted may apply for relief, where virtue may be inculcated by precept and enforced by example—have formed ourselves into such an association, and adopted the following Articles as the Constitution of our Society:

First.—This society shall be known and distinguished by the name of the WASHINGTON BENEVOLENT SOCIETY OF THE COUNTY OF ONEIDA.

Second.—The officers of this society shall consist of a President, first, second and third Vice-Presidents, a Secretary and Deputy Secretary, a Treasurer, two Stewards, a Standing Committee of seven persons, and a Door-keeper. All which officers shall hold their offices for one year from the twenty-second day of February; on which day, in each year, a new election shall be held by ballot. And if a vacancy shall happen in any of the said offices, a new election shall be held in the society at the next regular meeting; provided such twenty-second day shall come on Sunday, then the annual meeting shall be held on the Monday following;—And in case the officers are not elected, the society shall have power to make such laws or regulations respecting the election of the officers as the exigency of the case may require.

Third.—The society shall hold a regular meeting on the Tuesday preceding each full moon, and may adjourn from time to time. At every meeting the President, or in his absence the eldest Vice-President who is present, or in their absence, a President elected for the purpose, shall preside.

Fourth.—The Secretary shall keep the books and minutes, and record such of the proceedings as the society shall direct.

Fifth.—The Stewards shall provide a place of meeting for the society, procure necessary accommodations, distribute and collect ballots, on electing members, assist in preserving order, and be the acting officers in the society under the direction of the acting President; and their accounts for disbursements shall be audited and paid by the Treasurer.

Sixth.—The Standing Committee shall distribute the benevolent donations of the society, and attend to such other duties as the society shall direct: But no benevolent donation shall exceed the sum of Two Dollars to any one person, in one month, without the consent of the society first obtained; and report shall be made to the society, every three months, what

donations they have made, and to what persons; and they shall have power to draw on the treasurer for such sums as they shall expend. The President, Vice-Presidents, Secretary and Treasurer, shall be *ex officio* members of this committee, in addition to the seven persons elected for that purpose.

Seventh.—The Treasurer shall hold the funds of the society, collect the initiation fees, and report every three months to the society the state of the funds.

Eighth.—Every member of this society shall pay on his being initiated the sum of Two Dollars; which payment shall entitle him to a copy of a book containing the Constitution of the Society, Washington's Farewell Address to the People of the United States, the Constitution of the United States, and the Constitution of the state of New-York, and a Certificate of his admission.

Ninth.—Persons who have been duly initiated into any other society of a similar denomination, on producing their certificates of admission, and signing this constitution, and the by-laws of the society, shall, at the discretion of the society, be entitled to all the rights and privileges of a member of this society, and shall be liable to pay the sum of fifty cents.

Tenth.—Persons proposed as members must be recommended by some one of the Standing Committee, at a meeting of the society, and balloted for by black and white balls; the balloting may be postponed to any subsequent meeting, at the request of one third of the members present. The President shall examine the ballots and declare whether the member is admitted. Five black balls shall be sufficient, to prevent the admission of a member; and no person shall be balloted for, or any other business transacted, unless ten members are present.

Eleventh.—The form of initiation and the manner of receiving members into the society who have been duly elected, shall be regulated by the by-laws of the society.

Twelfth.—The Society shall have power to make such by-laws as may be deemed necessary; but no part of this constitution shall be altered, without the consent of a majority of all the members belonging to the society.