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## The Civic Constitution

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## THE CIVIC CONSTITUTION

Kathleen S. Sullivan\*

ELIZABETH BEAUMONT, *THE CIVIC CONSTITUTION: CIVIC VISIONS AND STRUGGLES IN THE PATH TOWARD AMERICAN DEMOCRACY* (2014). Pp. 368. Hardcover \$ 49.95.

KRISTIN A. GOSS, *THE PARADOX OF GENDER EQUALITY: HOW AMERICAN WOMEN'S GROUPS GAINED AND LOST THEIR PUBLIC VOICE* (2012). Pp. 256. Hardcover \$ 70.00.

JOHN E. FINN, *PEOPLING THE CONSTITUTION* (2014). Pp. 384. Hardcover \$ 39.95.

When New York celebrated its ratification of the United States Constitution on July 23, 1788, it threw a parade that proceeded by profession—farmers, butchers, coopers, cabinet makers, shipwrights, cartmen, gentlemen of the bar, public officials, and other occupations all had a place.<sup>1</sup> It is a colorful illustration of constitutionalism outside the courts. Various approaches in law and courts literature have enabled us to recognize this parade as such. The studies of constitutional moments, departmentalism, and popular constitutionalism have all invited us to consider the dynamics of constitutional change and legitimation, the presence of power and politics, the importance of structure to the framing of constitutional discourse, unconventional processes, alternatives or complements to the legal constitution, and the democratic features of the constitutional order.<sup>2</sup>

Despite all of that literature, there has remained one vague actor—the popular sovereign. We the People have a critical role to play in constitutional dynamics, and phenomena, such as critical elections, have served as the mechanism for The People to confer legitimacy. But the invocation of The People raises as many questions as it answers—Are these people The People? Are these paraders representative? Are their decisions, truly, the wishes of The People? Were those occupations in the 1788 ratification parade representative of The People? Was the list of occupations aspirational? A simple nod to mollify the public?

Elizabeth Beaumont's *The Civic Constitution*, Kristin Goss's *The Paradox of Gender Equality*, and John Finn's *Peopling the Constitution* are poised to answer or redirect

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1. Richard Platt, *Order of Procession, in Honor of the Constitution of the United States*, in *FORGING A FEDERAL GOVERNMENT - CREATING THE UNITED STATES - LIBRARY OF CONGRESS* (George Washington et al., 1788), available at <http://www.loc.gov/exhibits/creating-the-united-states/forging-a-federal-government.html#obj2> (accessed Sept. 1, 2014).

2. See LARRY KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004); BRUCE ACKERMAN, *WE THE PEOPLE, VOLUME II: TRANSFORMATIONS* (2000); WALTER F. MURPHY, *CONGRESS AND THE COURT* (1962).

such questions by attending to the Civic Constitution.<sup>3</sup> Finn coined the phrase, defining the Civic Constitution as “an approach to the Constitution of the United States that emphasizes its status as a constitutive political act.”<sup>4</sup> Drawing from constitutional theory, political theory, feminist theory, public policy, and historical analysis, these studies emphasize the intrinsic importance of civic life in constitutionalism. They invite us to place citizenship at the center of our study of constitutionalism and, furthermore, to consider constitutionalism in terms of foundational values. They can explain why it is significant that the New York ratification parade proceeded by occupation, and what that tells us about The People whom the Constitution serves and constructs.

The actors in the civic constitutionalism are who you might think—civic groups or ordinary citizens in civil society. As an alternative to (but a necessary companion to) the legalistic language and legally-focused framing of problems in the Juridic Constitution,<sup>5</sup> the Civic Constitution also includes “noncanonical” texts. As President Lincoln asserted (and is now generally accepted), The Declaration of Independence is a Founding document whose commitments guide the interpretation of the formal Constitution.<sup>6</sup> Beaumont draws from petitions, newspapers, and pamphlets of activists that can be used to contest questions of justice and consider incorporating new principles.<sup>7</sup> Goss focuses on the congressional testimony of women’s groups that reflect women’s “civic place.”<sup>8</sup>

Beaumont places civic groups as key actors in a series of “Refoundings”—the dawning revolutionary period, the ratification period, the abolitionist movement, and the woman suffragist movement.<sup>9</sup> This sequence is a departure from Bruce Ackerman’s Foundings, and, indeed, Beaumont’s and Ackerman’s studies have different purposes. Where Ackerman identifies the dynamic process that led to the expansion of federal power,<sup>10</sup> Beaumont is concerned about the changing composition of the popular sovereign. In each of her Refoundings, civic groups developed innovative constitutional views, contested the status quo, wrought changes to the texts, ideals, and norms of the U.S. Constitution, and expanded membership of the popular sovereign.<sup>11</sup>

The groups that Beaumont studies are not unfamiliar, but she places them in a position not usually granted to them. In Beaumont’s work, these are not merely enthusiastic citizens, not merely agitators. They are Founders. It is commonplace to see these groups as expanding the capacity of terms such as liberty, equality, or justice, but for Beaumont, there is more to this enterprise. In each case, these civic groups contributed to a casting of a new community and the foundational commitments of that community.<sup>12</sup> It is not just that rights were extended to white farmers, or to blacks, or to women, but that in each case

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3. ELIZABETH BEAUMONT, *THE CIVIC CONSTITUTION: CIVIC VISIONS AND STRUGGLES IN THE PATH TOWARD AMERICAN DEMOCRACY* (2014); KRISTIN A. GOSS, *THE PARADOX OF GENDER EQUALITY: HOW AMERICAN WOMEN’S GROUPS GAINED AND LOST THEIR PUBLIC VOICE* (2012); JOHN E. FINN, *PEOPLING THE CONSTITUTION* (2014).

4. FINN, *supra* note 3, at 1.

5. *See* FINN, *supra* note 3.

6. *Id.* at 50-52.

7. BEAUMONT, *supra* note 3, at 4.

8. *See* GOSS, *supra* note 3, at 9-10.

9. *See* BEAUMONT, *supra* note 3, at 5.

10. *See* ACKERMAN, *supra* note 2.

11. BEAUMONT, *supra* note 3, at 2.

12. *Id.* at 6.

the popular sovereign—We the People who cast legitimacy on the constitutional order—was reconfigured.<sup>13</sup> When new groups were recognized as members of the popular sovereign, The People fundamentally altered their national identity and recommitted to their newly shared commitments.<sup>14</sup>

Groups in the late colonial period—organizing by trade, by church, in taverns, on waterfronts, and in public squares—boycotted, petitioned, and mobbed.<sup>15</sup> They propagated new perspectives on the rule of law and civil disobedience.<sup>16</sup> In doing so, they reconstituted the notion of self-rule.<sup>17</sup> The contribution of such groups becomes quite clear in Beaumont’s study of the Reconstruction Amendments, which are typically attributed to Radical Republicans. In her analysis, the prior decades of abolitionism set these amendments into motion.<sup>18</sup> The abolitionists are the ones who invited new ways of thinking about fundamental law.<sup>19</sup> The civic actors in Beaumont’s Refoundings play the long game: They might not even be around to see their ideas become incorporated as fundamental principles.

Beaumont’s account of the woman suffrage movement drives that point home. The ratification of the Nineteenth Amendment was followed by a “postsuffrage crash” in women’s political efficacy.<sup>20</sup> For Beaumont, this story of decline detracts from the contribution. Woman suffragists contested fundamental public-private relationships of the constitutional order.<sup>21</sup> They redrew the boundaries of citizenship.<sup>22</sup> From this perspective, the ultimate constitutional contribution of the woman suffrage movement is not suffrage but the transformation in the civic membership of women and the shared principles that the entire polity committed to when it included women.<sup>23</sup>

Goss likewise takes on the story of decline by challenging the “wave” metaphor and the corresponding “crash” that purportedly followed both the first and second wave women’s movements.<sup>24</sup> She gauges the strength of women’s participation by following the congressional testimony of women’s groups from 1870 to 2000.<sup>25</sup> She draws different conclusions about each crash, capturing the distinction in her opening anecdote. In 1948, women’s groups gave testimony before Congress in support of the Marshall Plan.<sup>26</sup> This may come across as a surprising fact, and it should be—Goss finds that, by the 1990s, women’s groups were rarely present at foreign policy hearings.<sup>27</sup> The difference tells us much about the periods after the peak of the first and second wave feminist movements.

Goss explains that the women’s movement did not dismantle after the Nineteenth

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13. *Id.*

14. *Id.* at 7.

15. *Id.* at 4.

16. *Id.*

17. *Id.* at 62.

18. *Id.* at 120.

19. *Id.*

20. GOSS, *supra* note 3, at 28.

21. See GRETCHEN RITTER, *THE CONSTITUTION AS SOCIAL DESIGN: GENDER AND CIVIC MEMBERSHIP IN THE AMERICAN CONSTITUTIONAL ORDER* (2006).

22. BEAUMONT, *supra* note 3, at 168.

23. *Id.* at 186.

24. GOSS, *supra* note 3, at 7.

25. *Id.*

26. *Id.* at 1.

27. *Id.* at 2.

Amendment.<sup>28</sup> Replacing the “wave” metaphor with that of a river,<sup>29</sup> Goss follows the tributaries, where she finds plenty of civic activity after 1920. There was a multiplicity of groups working for both women’s issues and staking claim to broader national issues, such as war and democracy.<sup>30</sup> Furthermore, these groups were membership-based, with local chapters and active participation, working their way up to a national presence that testified on Capitol Hill.<sup>31</sup> Goss thus identifies ongoing, vibrant civic engagement after 1920. In contrast, the period after the peak of the second wave women’s movement shows women’s groups that tend to be professional organizations focused more narrowly on specific women’s issues.<sup>32</sup> Testimony before Congress dropped, and the scope of women’s groups’ claims narrowed as well.<sup>33</sup> Goss identifies this as a loss of women’s civic place, which “encompasses the civic identity on which groups draw to construct their interests and justify their political authority, the modes of collective action that groups deploy to press those interests, and the policy niche that groups legitimately occupy.”<sup>34</sup>

Women’s inclusion invited women’s participation, but that inclusion and participation also allowed the state to shape women’s civic membership. Policies of the 1960s (The Presidential Commission on the Status of Women, the Equal Pay Act, and the Civil Rights Act of 1964) made liberal feminism dominant and reshaped women’s civic place with more professionalized groups focused on women’s rights.<sup>35</sup> Goss is quite careful to parse out what is problematic about the change in and decline of women’s collective engagement. She is not railing against special interests or identity politics. While she uses the sameness/difference debate to analyze how women’s groups became narrowed, she does not stop there.<sup>36</sup> Goss is pinpointing the decline of civic place, shift in civic membership, and change of voice.<sup>37</sup> For Goss, this is about citizenship. Once women were included as members of the popular sovereign (in Beaumont’s account), they participated and were, in turn, shaped by the process.<sup>38</sup> The rumored decline did *not* occur after 1920, but a certain sort of decline did occur in the 1980s.<sup>39</sup> Parsing out the distinction between the afterlife of the two waves of feminism, through a civic lens, allows the reader to see a vibrant—if diversified—women’s movement after 1920 and a breakdown of its strengths in the late twentieth century. The problem, then, is a civic one.

As all three of these studies suggest, civic problems are constitutional problems. John Finn presents his ideas on the Civic Constitution with a set of essays: “Constituting,” “Maintaining,” and “Failing.”<sup>40</sup> The essay form of the book is innovative and reflective of its subject, inviting a less formal (but not informal) tone that raises questions and opens up the mind to consideration of civic possibilities and all of the work that it does to sustain a

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28. *Id.* at 29.

29. *Id.* at 40.

30. *Id.* at 40-41.

31. *Id.* at 26.

32. *Id.* at 99.

33. *Id.* at 71-72.

34. *Id.*, at 10.

35. *Id.* at 79-80.

36. *Id.* at 128.

37. *Id.*

38. BEAUMONT, *supra* note 3, at 212.

39. GOSS, *supra* note 3, at 133-34.

40. See FINN, *supra* note 3.

civic constitutional order.<sup>41</sup> The Civic Constitution is distinct from the Juridic Constitution, but Finn is not promoting it as an alternative.<sup>42</sup> Sustaining the Princeton School's appreciation for law as well as politics, Finn makes it clear that the Juridic Constitution is necessary, but insufficient on its own, to constitute and maintain a constitutional order.<sup>43</sup>

Like the other authors, Finn is keen on civic engagement as the avenue for participation in constitutional interpretation, although he goes further to emphasize civic responsibility. As Finn sees it, civic constitutionalism places a burden on the citizenry to "shoulder a significant part of the responsibility for achieving and maintaining a constitutional way of life."<sup>44</sup> Lest we mistake this point for thick constitutionalism or robust democracy, the civic activity is likely to have been part of civil society, anyway. Civic constitutionalism finds citizens where they are. The constitutional order, in turn, has the responsibility to cultivate the structures and environment that will maintain a culture that fosters that activity.<sup>45</sup> The constitutional order must provide a civic education that prepares citizens to engage in critical reflection<sup>46</sup> and to understand the role of contestation in political life to prepare them for "dissident citizenship."<sup>47</sup> Citizens must be given "opportunities and incentives to participate in public life,"<sup>48</sup> particularly through local associations.<sup>49</sup> Such educational and associational institutions need to be maintained in order to foster civic participation and inquiry into constitutional questions.<sup>50</sup> The localized rule of self is built up to rule by the people.<sup>51</sup>

Like the other authors, Finn is concerned about the identity produced by constitutive acts. As we see in Beaumont, in particular, inclusion of one group affects the identity of the whole community. For Finn, constitutional questions "do not reduce to questions of legality, technicality, or judicial interpretation, but are instead questions about who we are and to what we are committed."<sup>52</sup> Like Beaumont, these questions of identity are arrived at through contestation. That is why it is so important to provide a civic education that does not teach mere facts but poises citizens to deal with difference and to reflect on their shared commitments.

Beaumont and Finn depart on the timing of this contestation. Beaumont is concerned with Refoundings, a framework that insists that we take inclusion seriously and as a collective enterprise. The granting of woman suffrage, for example, was not just a victory for women; it affected everyone. Extending the franchise or civic membership changes those in the privileged position. They now agree to the values that come with the act of inclusion. They are now part of The People who broke down the public-private distinction and let go of the old social ordering that gendered status had accomplished. Identifying that agreement as a Refounding makes sense and makes us take notice of the shared consequences

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41. *Id.* at 28.

42. *Id.* at 3-4.

43. *Id.*

44. *Id.* at 1.

45. *Id.* at 107.

46. *Id.*

47. *Id.* at 118, 121.

48. *Id.* at 117.

49. *Id.* at 119.

50. *Id.* at 121.

51. *Id.* at 79.

52. *Id.* at 123.

of inclusion.

On the other hand, the Founding trope invites us to reserve such constitutive moments for Foundings. What about periodic constitutional politics? What about ongoing questions and controversies? Finn's attention to maintenance is able to account for ordinary affairs and the fostering of structures and thinking that produce the civic contestation that Beaumont describes.<sup>53</sup> Where do civic groups such as Beaumont's come from? Finn can lead us toward sources, both in the training of citizens and in maintaining a disposition of questioning and engagement.<sup>54</sup> As for the period after inclusion, constitutional maintenance invites citizens to remain in the game of constitutional interpretation, not abdicating that responsibility to the courts.<sup>55</sup> An attitude of belonging to the interpretative community and a willingness to challenge others can raise attention to those shared commitments, again and again.<sup>56</sup> The People may reaffirm them or reconsider those shared commitments.<sup>57</sup> Finn is just as concerned with shared identity as Beaumont is, but he finds the spaces to the make issues of identity part of a constitutional way of life.

Both Finn and Goss provide guides to maintenance. Goss's study cautions against being satisfied with the act of inclusion, for increased participation invites the state to shape, and possibly reduce, citizens' civic capacities and political strengths. Finn looks for "both opportunities and incentives to engage in public life."<sup>58</sup> The cautionary tales in his chapter on constitutional failure<sup>59</sup> make it clear that strict formalism, civility that avoids disagreement, and abdication of interpretive responsibility are all liabilities of a constitutional order.<sup>60</sup>

When we recognize that civic life is intrinsic to the constitutional order, then the tools of political science become useful in constitutional theory in new ways. Goss's use of policy feedback is able to capture the reshaping of women's participation in congressional testimony and offer a nuanced account of the civic and political health of women's groups. A civic perspective allows us to see privatization not in terms of economic theory or ideologically but as a constitutional issue: the professional, staff-led organizations of the late twentieth century may have plenty of expertise, but women's groups lost the merits of membership-based federations, which imparted self-rule into political participation.<sup>61</sup> Finn, too, values local associations.<sup>62</sup> The associations themselves provide a structure in constitutional architecture.<sup>63</sup> Localism contributes to a civic culture.<sup>64</sup> The Civic Constitution happens on the ground, finding The People where they are, and engagement starts there. In short, from the perspective of these authors, "bowling alone"<sup>65</sup> would be not just

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53. *Id.* at 53-54.

54. *Id.* at 91.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* at 117.

59. *See id.* at 191-215 (discussing what he terms "constitutional rot" in relation to the antiterrorism efforts after September 11, 2001).

60. *See id.* at 218-19.

61. GOSS, *supra* note 3, at 78-79.

62. FINN, *supra* note 3, at 117, 125.

63. *Id.* at 54.

64. *Id.* at 85.

65. *See* ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000).

a political problem, but a constitutional problem, what Finn calls “constitutional rot” in his account of constitutional failure.<sup>66</sup> Finn’s attention to failure raises the stakes, but the resources for recovery are all at hand—in civic life and in the tools of the discipline, if only they would be directed toward constitutional questions.

These studies go a long way to explaining why status issues, such as race and gender, are not peripheral issues in studies of constitutionalism. Inclusion is more than the extension of rights and recognition, once we recognize that the entire community is reshaped. The focus on identity and civic place in all of these works makes it clear that changes in status for one group matter for everyone. Such work could be continued by attending to the connection between ideas and institutions.<sup>67</sup> If women’s inclusion broke down the separate spheres doctrine, then where did that emerge, institutionally? Such questions would help us to reconcile Beaumont’s Refoundings with Ackerman’s Foundings, connecting issues of identity with issues of constitutional authority.

These studies are a welcome addition to the law-and-politics approach to constitutionalism. If law and politics has suggested that we reduce our reverence for a legalistic constitution as well as any romantic attachment to the Founding Fathers,<sup>68</sup> then civic constitutionalism replaces any romantic notions we might have about popular constitutionalism. Rather than feel the need to identify The People with precision, or ratchet up their political participation, civic constitutionalism starts with citizens’ lived experience. It finds citizens where they are—in their associations at work, in church, in civil society. The imperatives of a civic constitution require civic engagement, but it does not rest on any ideal theory of citizenship. It is about citizens engaging in their own lives. A constitutional order need not impel citizens to participate at critical junctures, but, rather, maintain the conditions so that they dig a little deeper into their own affairs—participating in their own self-rule—and extend that until they are engaged with others and with constitutional questions. This is the elemental stuff of citizenship. Health is gauged not by output but by moments along the way—the richness of education, the dynamics of participation, and the ability to give voice.

Returning to New York’s 1788 ratification parade, we see the contributions of each of these authors. Beaumont’s work draws our attention to the particular actors—white men, common folk, and elite—together, celebrating their long-fought victory over the redefinition of rule of law and liberties. Goss’s work invites us to look at the parade as a civic place, with the various occupations demarcating location in civil society and in political recognition. By having a place in the parade, each occupation asserted political authority. Finn impels us to look both backward and forward, to recognize this as a constitutive moment and as the foot on which the community would step forward. He may also make us wonder why the idea of a ratification parade is so foreign to our constitutional culture today and worry about our civic and constitutional health.

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66. FINN, *supra* note 3, at 165.

67. See ROBERT LIEBERMAN, IDEAS, INSTITUTIONS, AND POLITICAL ORDER: EXPLAINING POLITICAL CHANGE (2002).

68. See SUSAN BURGESS, THE FOUNDING FATHERS, POP CULTURE, AND CONSTITUTIONAL LAW: WHO’S YOUR DADDY? (2009).