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FOREWORD

“There is hardly a political question in the United States which does not sooner or later turn into a judicial one.” This famous observation is one of the most profound insights in *Democracy in America*, and it allowed Alexis de Tocqueville to show the world that modern democracies could overcome their natural tendency to succumb to majority tyranny. Democracies, he argued, tend to neglect forms and formalities and thereby gave free rein to the brute preferences of overbearing majorities. Majority tyranny could be precluded or ameliorated by democratic practices and institutions modeled on admirable aspects of aristocracy. A well-designed democracy could learn from aristocracy without becoming an actual aristocracy based on inherited social classes. These lessons from aristocracy could enable democracies to avoid their worst tendencies while enhancing the best attributes of democratic rule. The American institution he held in highest esteem—his surrogate for an aristocracy within a democracy—was the legal system, lawyers and judges.

Tocqueville’s prediction that political reasoning would be supplanted by legal discourse and practice in American historical development could not have been more right. His prescience was truly stunning. Lawyers dominate the American political world today, and constitutional thinking is understood to be legal reasoning by nearly all citizens in the United States. However, Tocqueville’s argument that this development would mark the maturation of a healthy democracy could not have been more wrong.

In the wide-ranging and probing book that you have before you, John Finn shows that the reliance on law, on the specialized language of lawyers, and on the assumption that constitutional questions require legal answers—which Finn labels the “Juridic Constitution”—is the very source of America’s most serious political pathologies. Because the Juridic Constitution supplanted “the Civic Constitution”—an idea Finn first wrote about and a term he coined in an article published in 2001—American citizens are now distanced from, and often ignorant about, politics, and American politicians are incapable of even discussing and identifying, let alone solving, the nation’s most serious political challenges. Features of legal reasoning that Tocqueville found so attractive, such as its reliance on specialized experts

and on a technical language, depoliticized the American regime. Ordinary citizens retreated into their private worlds and left the practice of politics to lawyers or to politicians who deferred to lawyers and judges.

Ironically, the Juridic Constitution destroyed the constitutional vitality of another feature of American political life that both Tocqueville and John Finn agree is essential to the health of any well-designed democracy—voluntary associations and local political practices. Finn shows that these Tocquevillian practices are better understood as necessary features of the Constitution itself than as the cultural conditions for a Constitution understood as a “legal” instrument above and outside of society and the private sphere. It is in the associative life that Tocqueville so admired that constitutional thinking is best taught, learned, and practiced. Tocqueville failed to see how his ersatz aristocracy would sap democratic vitality and diminish the meaning and practice of citizenship.

John Finn makes the case for a civic understanding of constitutional theory and for a constitutional understanding of civic education. He returns constitutional theory to its political roots, and he develops a constitutional capacity for civic education. Although the Juridic Constitution has been very harmful to American political health, Finn does not argue that it should be eliminated. Rather he offers a capacious view of the Constitution and of constitutional theory in which both the Civic and Juridic Constitutions have their rightful places. Because the Juridic Constitution looms so large in contemporary America, Finn devotes most of his attention in this book to developing the civic alternative.

In developing a systematic account of the Civic Constitution, Finn draws upon much work by others who share a view of the Constitution as a political design containing a legal order within it. Some have labeled this political orientation the “Princeton School” of constitutional theory because many scholars working in this tradition were colleagues or students of Walter Murphy, a very influential Princeton professor with whom Finn himself studied. The Princeton School sought to develop an extrajudicial constitutional point of view, and it drew upon work in political science, political theory, and other disciplines. In addition to his own clear and original argument, one of the wonderful merits of John Finn’s book is that it offers the best synthesis of this larger ambit of work and it brings the fruits of the Princeton School into conversation with leading “juridical” constitutional theorists in the legal academy. Finn prosecutes his thesis in a way that serves as a superb introduction to the entire field of constitutional theory and to the writings of political and social theorists of education and civic life.

The book is divided into three large sections that would reflect the prin-

cial concerns of a political architect: the founding, maintenance, and potential failure of political regimes. One could describe this orientation as Aristotelian because Finn looks at American politics as a whole, as a regime. Modern liberal democracies, and the scholars within them, tend to view and interpret politics from some part of the whole—such as the economy, legal system, or culture—because one of the hallmarks of modern politics is the separation of the private sphere from public life. Even though we rightly value privacy and individual liberty, Finn shows that the Constitution and public life necessarily superintend or configure the so-called private sphere. Thus, a perspective on the whole regime is as necessary in modern America as it was in ancient Athens. John Finn’s articulation of the “Civic Constitution” offers a cogent regime perspective for our time.

Jeffrey Tulis
Coeditor





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PEOPLING THE CONSTITUTION



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INTRODUCTION

In this book, I develop an understanding of the constitutional enterprise that illumines the Civic Constitution. The Civic Constitution, I have argued previously, is an approach to the Constitution of the United States that emphasizes its status as a constitutive political act.¹ It constitutes, literally, we the people, and in so doing transforms us into a singular political entity, We the People; it makes persons, citizens. The chief purpose of the Civic Constitution is to ordain a particular kind of community,² first by calling into being the collective We and second by articulating what We believe and that to which We aspire; it is, put another way, a public affirmation of the shared principles of national self-identity.³ The Civic Constitution commits us to a constitutional order dedicated to a way of life defined and lived by our fidelity to the fundamental norms and precepts that make up liberal constitutionalism, as well as a vital and robust civic life informed by an ethos and practice of civility, in which citizens assume responsibility for tending to the constitutional project.

I call it the Civic Constitution for two reasons. First, it is the Civic Constitution because its principal ambition is to constitute a political community in which citizens shoulder a significant part of the responsibility for achieving and maintaining a constitutional way of life,⁴ in which the most important questions of political life, concerning the meaning and application of constitutional principles to public life, are a shared public responsibility.⁵ The Civic Constitution locates its *essentia* in the common life of the community.

Second, I call it the Civic Constitution to highlight how this understanding differs from another, more commonly held approach to the Constitution, which I have called the Juridic Constitution.⁶ The main outlines of the Juridic Constitution are immediately familiar to most scholars. In contrast to the Civic Constitution, the Juridic Constitution finds its identity in law. I call it the Juridic Constitution, and not the legal constitution (as have some others),⁷ because the word “juridic” highlights issues of ownership and exclusivity. The Juridic Constitution begins but is not coextensive with the proposition that the Constitution is fundamental (and fundamentally) law,⁸ a claim voiced most prominently in the supremacy clause of Article 6. The Juridic Constitution did not emerge fully developed from Article 6, however,

or even from the more familiar claims of law advanced in *Federalist* #78 or in *Marbury v. Madison* (1803). Instead, judicialization of the Constitution took place over a long time and is intricately bound up with the development of law itself as a profession.⁹ It continues to wax and wane.¹⁰ Nevertheless, the basic logic of the Juridic Constitution traces to *Marbury*, where Marshall referenced the Constitution's status as a legal instrument in several places and then used that characterization to license judicial review.¹¹

The Juridic Constitution is not just law; it is the property of judges and lawyers, who have assumed primary institutional responsibility for maintaining the constitution and for protecting it (us) from failure. Its relationship to the people is correspondingly remote. The Juridic Constitution constitutes the people in a legal sense and invests them with formal sovereignty, but it does not charge them with responsibility for attending to the Constitution. Part of my argument here will rest upon the (once common) proposition that nothing about the Constitution makes its meaning inaccessible except to the few schooled in the mysteries of law and legal logic. In contrast to the Juridic Constitution, whose meaning is private in the sense that it is restricted to legal and professional elites, the Civic Constitution is public, its meaning accessible, and knowledge of it broadly democratic. Indeed, to discharge its function, to work as a creed or as a statement of national identity, the Civic Constitution must not reduce to a private knowledge, for "knowledge cannot be at one and the same time accessible to the few and yet serve as the vital bond holding the entire community together."¹²

The Civic Constitution anticipates a community in which constitutional questions are not only questions of law, but are also publicly debatable civic aspirations. Its purposes are to establish a community, a civic culture, that prizes questions about the fundamental principles and purposes of constitutional life, principles that include, among others, the meaning of liberty, equality, and justice. The Civic Constitution thus offers a different understanding about what kind of an activity the constitutional enterprise is and, no less important, about whether and how citizens should take part in that enterprise. It assigns a broader, more expansive purpose to the text than simply subjecting the state to higher law, and consequently asks more of citizens in realizing that purpose. It requires that we rethink the proposition that the Constitution should be understood chiefly as a legal instrument as incomplete¹³ or insufficient to the achievement of an authentically constitutional way of life.

The Juridic Constitution is synecdochic; it is a profound mistake to think that because the Constitution is the supreme law, it is *only* law, or that lawyers and judges alone can discern its meaning or have any special re-

sponsibility for maintaining it.¹⁴ It is, moreover, a mistake to think that all or even the most significant problems in constitutional theory are questions about constitutional interpretation or require judicial exegesis of the text.¹⁵ (Constitutional interpretation is only a small part of the constitutional enterprise.¹⁶) Part of my effort in this book will be to show how the Juridic Constitution impoverishes our understanding of the constitutional enterprise by neglecting other objects of constitutional concern, such as citizenship, civic education, and fidelity,¹⁷ which are central to the creation, maintenance, and failure of constitutional orders writ large.

A conclusion that the Constitution is both Juridic and Civic, although at odds with many academic and most popular understandings of the Constitution, does not take us very far along to understanding precisely where and how it is one or the other, or to whether the two can be reconciled. My claim that it is both opens up significant questions about whether and how the Juridic and Civic Constitutions can coexist. In the three essays that follow, we will see that although there are areas where the Juridic and Civic conceptions are complementary, there are also areas of constitutional life where they pull in different directions. This has two important implications. First, it means that our constitutional identity, precisely because it must navigate the most fundamental sorts of political (constituting) questions, is never fixed but is instead continually contested and renegotiated.¹⁸ As Gary Jacobsohn has observed, the disparate strands of constitutional identities may be harmonic or disharmonic, and are likely to be both: “to apprehend constitutional identity is to see its dynamic quality.”¹⁹ The relationship between the Juridic and Civic Constitutions is necessarily protean. Second, and related, my call for renewed attention to the Civic Constitution is not a quixotic quest to change who We are, or to remake (or reconstitute) our collective identity anew. It is, instead, a work of recollection and restoration. I might describe it as a work of constitutional imagination: “Imagination,” writes Kahn, “constructs the political identity of the citizen.”²⁰

The disharmonic elements of the Juridic and Civic Constitutions reach at least as far back as the founding, and likely find their origins in political and philosophical conflicts that predate 1789. An intellectual genealogy of the two constitutions, which I do not pursue here, would certainly find elements of the Juridic Constitution in the political thought of the Federalists, and of the Civic Constitution in some anti-Federalist thinking. Even so, it is a mistake simply to equate Juridic with Federalist, or Civic with anti-Federalist, because neither denomination is intellectually homogenous, and because neither leads inexorably to a single preferred constitutional vision or design. We can find evidence for this in some of the important new scholarship that

addresses Madison's understanding of constitutional design, especially in the work of George Thomas,²¹ Colleen Sheehan,²² and Stephen Elkin,²³ all of whom argue that much of the received scholarship on Madison's constitutional design substantially understates the role he envisioned for public engagement. The more complicated picture of Madison they proffer "invites struggle over constitutional meaning and identity"²⁴ and leaves room for finding elements of both the Juridic and the Civic Constitutions both at the founding and in the present; who we were informs who we are.

The Juridic and Civic Constitutions thus exist in a state of uneasy interdependence; a full account of the American Constitution must accommodate both. If a complete understanding of the American constitutional order must incorporate both the Juridic and the Civic constitutions, however, then it must also admit the important differences between them. Each conception implies a characteristic way of understanding what kind of a people we are and of the community in which we claim citizenship. Selecting between them, or, better, choosing to embrace elements of both, means making fundamental choices about the distribution of political power and self-rule and is itself an act invested with constitutional meaning.²⁵

CIVIC ASPIRATIONS AS CONSTITUTIONAL COMMITMENTS

Following Pitkin, a constitution "is a characteristic way of life" for a community, "the national character of a people, their ethos or fundamental nature as a people. . . . In this sense, a constitution is less something we have than something we are."²⁶ The Civic Constitution anticipates a constitutional way of life in this richer historical, if not Aristotelian, sense,²⁷ as invoking a kind of political community that is both broadly deliberative and committed to the pursuit and development of virtue.²⁸ But it is not enough simply to declare that the Civic Constitution commits us to a way of life. We must further describe what a constitutional way of life looks like. Implicit in the Civic Constitution is a claim about the identity of the Constitution as well as what it means to say we know or have knowledge of it. To know the Civic Constitution, we must know the beliefs and aspirations around which we constitute and to which we commit ourselves, or, as Pitkin might put it—we must know who we are.²⁹ What are these aspirations and beliefs?

By a constitutional way of life, I mean the Civic Constitution envisions constitutional maintenance as embracing and preserving a particular kind of constitutional culture and a particular kind of constitutional citizenship,

both of which differ in important ways from their juridic analogues. The Juridic Constitution establishes a thin conception of civic life, marked by occasional and small contributions on the part of citizens, and then usually only in their capacity as individuals (i.e., the citizen votes as an individual, whether in elections or on juries, and pays taxes as an individual). In a civic constitutional order, the Constitution seeks to create and sustain the kind of community in which the people can carry forward the constitutional project, by giving meaning to and assuming responsibility for honoring constitutional values. The Civic Constitution seeks a vibrant, thick conception of civic life, in which the activity of citizens as citizens extends to daily life and comprehends both rights and obligations, chief of which is the responsibility to tend to our constitutional ideals.³⁰

A principal trait of the Civic Constitution, therefore, is its commitment to self-governance realized through civic participation. This requirement of robust civic engagement derives without difficulty from several of our aspirations and constitutional principles, some of which inhere in our commitment to constitutionalism itself, and some of which are particular to the Civic Constitution. The former include aspirations to self-governance, limited government, liberty, human dignity and equal moral worth, and public reason. The latter, as summarized only partly and imperfectly by the Preamble (the Preamble calls us to a *more* perfect union),³¹ include establishing justice, insuring domestic tranquility, providing for the common defense, promoting the general welfare, and securing the blessings of liberty to ourselves and our posterity.³² (I further discuss the provenance of civic commitments in the essays to follow.) The Preamble “sets forth in ‘majestic generalities’ what we believe in as a political community and what we hope to secure for ourselves and our posterity.”³³ Our commitment to self-governance also follows from a belief in the equal moral worth and dignity of all persons. Self-governance is an expression of the equality principle because it presumes that all persons are equally capable of participating in public affairs (and possess an equal right to do so), and concomitantly that legitimate public authority must be predicated upon their free, informed, and voluntary consent.

CIVIC AND CONSTITUTIONAL

Maintaining a constitutional way of life requires us to think about the nature of the Constitution, and in particular about the character of its authority. The Constitution I have sketched so far is an admixture of constitutional and civic components. At the core of the Civic Constitution reside two irreduc-

ible commitments. The first is a commitment to constitutional norms, principles, and values—or a commitment to the commitments that inhere in the Constitution itself.³⁴ A constitutional way of life therefore includes fidelity to the fundamental norms and broad normative precepts historically associated with Western constitutionalism, as well as to those that are particular to our own constitutional identity.³⁵ How do we know what these precepts are? They are adumbrated, among other places, in the Preamble to the constitutional text and in other parts of the constitutional document, whether explicitly, in the Fourteenth Amendment’s commitment to equality and the First Amendment’s commitment to freedom of expression, or implicitly, in the Thirteenth Amendment’s concern for equality and human dignity, or in the commitment to reason and deliberation that undergirds the due process clauses.³⁶ They find expression also in other constitutive documents, including the Declaration of Independence, the Gettysburg Address, “Letter from a Birmingham Jail,” and others.³⁷

The precise meaning and import of our constitutional commitments cannot be fully described, for a principal feature of the Civic Constitution is precisely that contests about its meaning and application in the political life of the community are the essence of what it means to live a constitutional way of life. The identity and the meaning of the Civic Constitution is in large measure found in these contests, in which citizens consider the purport and application of fundamental constitutional norms and concepts, such as equality, liberty, citizenship, and rights. Those arguments, about the meaning of constitutional principles and their application in the life of the community, are the word-stock of the Civic Constitution.

Hence, the second component of the Civic Constitution is a commitment to a vital and vibrant civic life, or to *civilis*. The Civic Constitution envisions a community that aspires to live by constitutional ideals and to realize those ideals in the life of the community. It envisions a *deliberative* community knowledgeable of its constitutional commitments, and an *engaged* community, alive with civic concern and actively occupied in the work of self-government. The Civic Constitution places a high value on the concept of participation in the public and deliberative life of the polity. It thus requires a political order with a robust conception of civic space, in which citizens tend to constitutional concerns and act with an ethic of civility (I discuss tending and the ethic of civility below and in Essays One and Two).

Like some recent interpretations of American constitutional practice that reconsider the role of citizens in making constitutional meaning, among them Larry Kramer’s work on popular constitutionalism³⁸ and Bruce Ackerman’s *We the People*,³⁹ the Civic Constitution takes the people seriously. I discuss

both Kramer and Ackerman as we proceed, but for now I note simply that neither the literature on popular constitutionalism nor that on constitutional moments provides a satisfactory account of our civic responsibility for maintaining the Constitution.⁴⁰ Kramer, for example, has argued that civic attention to the Constitution is an essential element of our constitutional past, evident in periodic conflict and challenges to the judicialization of the Constitution.⁴¹ For most popular constitutionalists, such histories become inquiries into the nature, possibilities, and limits of the people's interpretive capabilities and responsibilities.⁴² (I speak at a very high level of generality here. There is no canonical understanding of what popular constitutionalism is or what it requires regarding the allocation of interpretive authority.⁴³ Some versions, such as those by Jeremy Waldron and Mark Tushnet, allocate little or no authority to judges to interpret the Constitution.⁴⁴ Sager rejects judicial supremacy, but not judicial review.⁴⁵) For Ackerman, civic contributions to constitutional meaning are exceptional moments, not ordinary practice, and consequently do not provide a weighty account of civic responsibility for realizing our constitutional ideals. Instead, in the course of normal politics, the Court "speaks for" citizens in a "preservationist" function. Neither approach peoples the Constitution fully.

The Civic Constitution, in contrast, envisages citizens engaged in constitutional practice on a regular, recurrent basis and in a wide variety of civic spaces. Engaged citizens are citizens who practice their commitment to constitutional ideals. This is a conception of citizenship as work, or as practice⁴⁶ (and not simply as deliberation),⁴⁷ and it occurs as an ordinary and routine part of public life.⁴⁸ The Civic Constitution envisions a constitutional order in which responsibility for determining the meaning and the requirements of our constitutional obligations, although shared with other actors, is a civic no less than a judicial undertaking; the meaning of the Civic Constitution is the people's responsibility. The Civic Constitution thus combines a commitment to the values and principles of constitutionalism with a commitment to civic life in which citizens are the chief custodians of those constitutional values.

For some readers this conjunction of "civic" and "constitutional" might seem odd. As I will explain later, some of this unease is a consequence of the rise of the Juridic Constitution itself, and the resultant sense, prominent among many academics and citizens alike, that constitutional matters are well beyond the understanding of most citizens as well as unsafe in their hands.⁴⁹ Another reason the conjunction of civic and constitutional may appear incongruous relates to potential differences in the conception of authority that rests behind them. The constitutional component of the Civic Constitution references a conception of authority superior in rank to, or

which trumps decisions made by, the democratic process. It thus seems ill suited to a conception of the Constitution that stresses the civic dimensions of political life, which seems by way of contrast to assign a very high measure of authority to decisions made by the democratic process. It is a mistake to overstate the tension between our commitments to constitutional ideals and to self-governance, but neither should we deny the tension between them—each invokes a somewhat different understanding of the constitutional order. We should also resist the sense that we must find a way to reconcile our constitutionalist commitments with our civic ones completely. Such an effort neglects the ways in which all healthy identities include diverse and often disharmonious elements.⁵⁰

Is the Civic Constitution a Justice-Seeking Constitution?

Justice-seeking accounts of the Constitution stress the Constitution's centrality to an overarching theory of justice. A justice-seeking account of the Constitution sees it as "a document that takes establishing justice as a goal for legislation and as a guide to the document's own interpretation. Their position makes the Constitution and justice coincident, so that an inquiry into the Constitution's meaning is simultaneously, and indistinguishably, an inquiry into justice."⁵¹ Prominent among justice-seeking accounts of the Constitution are the works of Christopher Eisgruber⁵² and Lawrence Sager, both of whom have argued that our best understanding of the Constitution is to regard it as a commitment to securing fundamental principles of political justice. Thus, as Sager notes, "To make sense of our constitutional practice, we have to see it as justice-seeking—that is, as serving the end of making our political community more just."⁵³

At first appearances it is difficult to imagine how the Civic Constitution could be a justice-seeking constitution, chiefly because most of us incline to the view that whatever its other virtues, self-government is an unreliable mechanism for securing justice. Indeed, Sager concludes, "the justice-seeking view of our constitutional institutions depends upon the belief that the judiciary—guided only broadly by the text of the Constitution—is a reasonably good guide to the most critical requirements of political justice."⁵⁴ As is well known, Sager treats judges as active partners in the enterprise of securing the fundamentals of political justice. What is perhaps less clear is that such a partnership is demanded, in part, because we harbor some doubt about the prospect of achieving justice without the assistance of judges as partners.

However, Sager also acknowledges that the domain of constitutional jus-

tice is more limited than the pursuit of political justice broadly. As a consequence, “justice-seeking theorists have the burden of explaining why the Constitution seems to fall so short of its target.”⁵⁵ Without fully recounting the argument here, part of Sager’s explanation for why constitutional justice stops so far short of political justice hinges on the distinction “between the Constitution proper and the adjudicated Constitution.”⁵⁶ Sager’s under-enforcement thesis holds that some principles of political justice, to which the Constitution is committed in abstract, “are wrapped in complex choices of strategy and responsibility that are properly the responsibility of popular political institutions.”⁵⁷ Our commitment “to popular political institutions and our durable understanding [means] that these institutions have broad leeway in managing our political affairs.”⁵⁸ Note too that these principles of justice “may impose affirmative obligations outside the courts on legislatures, executives, and citizens generally to realize them more fully.”⁵⁹

Consequently, a justice-seeking account of the Constitution is not necessarily incompatible with the Civic Constitution, insofar as it appears to commit the enforcement of some principles of constitutional justice to legislatures and executives, and to the people (this is what Sager calls the “partnership model,” in contrast to the “agency model”). If we take the liberty of conflating “justice-seeking” with “moral readings” of the text (there are good reasons to distinguish between “justice-seeking” and “moral,” especially in institutional terms, but at a higher level of abstraction the differences are not so important), then there is little reason not to conclude that the Civic Constitution is also a justice-seeking Constitution.⁶⁰

On the other hand, some readings of Sager detect suspicion on his part that the people will take up that responsibility. As Fleming has noted, for example, “Sager’s account is too court-loving and too skeptical about legislatures, executives, and the people themselves for its own good.”⁶¹ For somewhat more generous and sunnier accounts of the capacity of other institutions to address constitutional questions, consider the work of Tushnet, who writes of an “incentive-compatible” or self-enforcing Constitution,⁶² and Sunstein, who argues that legislatures no less than courts can be forums of principle.⁶³

Is the Civic Constitution a Deliberative Constitution?

In contrast to justice-seeking interpretations of the Constitution, deliberative accounts of the Constitution stress its centrality to creating a political order that facilitates authentic and extensive public deliberation.⁶⁴ In these narratives, “constitutions [are] mainly . . . instruments for facilitating a mode of

political discourse in which the good is sought in collective decision-making and political association.”⁶⁵ Deliberative theorists, as represented by Jürgen Habermas, Cass Sunstein, and others, emphasize a public sphere that is communicative and deliberative in character, and in which citizens exercise a significant measure of political responsibility.⁶⁶

Democratic deliberation is a constitutive part of all constitutional orders because constitutional orders are committed to the necessity of reason in public affairs.⁶⁷ In Kahn’s words, “Politics begins with deliberation.”⁶⁸ The requirement of reason in public affairs inheres in the twin concepts of respect and justification. To put it simply, public deliberation on the basis of giving reasons is required by the principle of respect for others because democratic self-governance, to the extent it embraces a principle of majoritarian decision making, must justify results that necessarily produce winners and losers. The process of deliberation teaches citizens that they have a role in public decision making and are not simply the objects of it. Deliberation, in other words, is a process we use to distinguish citizens from subjects; citizens are entitled to deliberate with others, to be included in the process of decision making; subjects are not. The alternative to governing based on reason, as Madison foresaw, is rule by passion and irrationality⁶⁹—an affront to efforts to govern wisely and well, but just as importantly an affront to the conception of human dignity that constitutional government invokes.⁷⁰

I have argued elsewhere that the deliberative function of reason in a constitutional democracy also goes some way to telling us what kinds of reasons properly count as public reasons and what kinds of reasons should not.⁷¹ Public reasons must advance arguments that invite exchange and deliberation instead of closing it down. Public reasons “should be accepted by free and equal persons seeking fair terms of cooperation.”⁷² In addition, public reasons must be framed as accounts of the public good or as arguments about the public good, as Rawls concludes.⁷³ Reasons that appeal to claims of faith, or that end ultimately in appeals to authority, must be rejected as claims of reason because they deny the utility and necessity of reason itself. In other words, constitutional reasons must be reasons that every and all citizens of the polity could recognize as a claim of reason, thus disqualifying claims grounded in my religious faith (God commands it)⁷⁴ or in my superior authority (Because I say so). A reason that depends for its ability to persuade solely on the authority of the speaker falls outside the pale of good reasons, because in such cases the speaker’s position amounts to a claim that no justification is necessary.⁷⁵ Such claims are fundamentally undemocratic and uncivil in character because a failure to explain frustrates political dialogue.⁷⁶ Moreover, if reasons are to justify and not merely to rationalize or

explain an exercise of power, they must be reasons that admit of and invite a response from others. Good reasons, in other words, make possible genuine exchange and deliberation. Reasons advanced on claims of superior expertise or exclusive knowledge shutter deliberation and exchange. The former reason is a private reason, not a public one, and the latter is no reason at all, or one that denies the democratic practice of reason giving as a preferred way of organizing political life.

My arguments for the Civic Constitution bear a deep similarity to these deliberative accounts of the constitutional order, especially insofar as both identify public deliberation as a critical component of constitutional governance. Indeed, the two cardinal elements of the Civic Constitution—its commitment to a robust civic life and its constitutionalist commitments, which include reason and deliberation in public affairs—tell us that it is partly deliberative in character. A full account of the Civic Constitution thus dictates some consideration not only of how the constitutional order can be designed to promote public deliberation (and some discussion about what deliberation means, or what it means to deliberate), but also of the mechanisms necessary to carry the burden forward.

We should be cautious, however, about concluding that the Civic Constitution establishes a deliberative constitutional order. Deliberation is an ambition of the Civic Constitution, but it is not our only aspiration. A constitutional way of life requires significant deliberative capacity in citizens, but just as importantly, it supplies the object of our deliberation and constrains it as well. To the extent citizens are responsible for maintaining the constitutional order, then, we are committed to more than just deliberation as a constitutional ideal. We are committed additionally to certain constitutional norms and precepts that we cannot, consistently with our aspiration to be a constitutional people, forswear or abjure. To put it another way, there are places where the public's deliberation cannot go without sacrificing other constitutional ideals. Deliberation is therefore a core element of the Civic Constitution, but it is subject to certain constitutional (or justice-seeking) restraints. This does not mean that deliberative and justice-seeking accounts of the constitution are incompatible in toto. Recently some scholars have sought to combine “constitutional and deliberative principles by developing an account of deliberative democracy within the context of a liberal constitutional framework. On first consideration the deliberative constitutionalist project would not appear to be a promising one, for the theoretical commitments of constitutionalism and of deliberative democracy seem to be in tension, if not utterly incompatible, with one another.”⁷⁷ The incompatibility, if it is one, results from the suspicion that the deliberative, or civic, elements

of deliberative constitutionalism will undermine (or rather, overwhelm) its constitutionalist restraints.⁷⁸

These constraints matter because considerations of power and position will necessarily play a role in the process of deliberation, as will bargaining, negotiation, and even compromise. It is important not to romanticize or idealize what civic deliberation looks like in practice, or to imagine that it will always reflect our best constitutional selves. Nor will civic deliberation always reflect the considered judgment of an authentically “public” voice that incorporates or respects the voices of minorities, women, and other liminal groups. As Mary Ryan and other critics have noted of Habermas, for example, his deliberative sphere ignores the extent to which there is not one public, but several smaller ones, and how the terms and occasions of their interaction are grounded in struggle and power.⁷⁹ Conceptions of deliberative democracy, unadorned, may sentimentalize citizenship by referencing an idealized world of deliberation and reasoned exchange, divorced from the messy and raucous realities of public discussion.⁸⁰ Under the Civic Constitution, the justice-seeking, or constitutionalist, elements of the civic constitutional order seek to inhibit the excesses and inequalities that otherwise inhere in unconstrained public deliberation. Moreover, the virtues of civility and tending that the Civic Constitution cultivates will also work to mitigate incivilities in the public sphere. But we should not pretend that public deliberation will always elicit our best constitutional selves.⁸¹

Constitutional Maintenance and Civic Work

The Civic Constitution includes elements of both justice-seeking and deliberative constitutional designs, but even together, these two components yield an account of civic life unequal to the Civic Constitution. Constitutional maintenance, or the burden of carrying the Constitution forward, requires more than simply a revitalized public sphere in which citizens can talk about, or find their voice, on constitutional matters. Voice *is* important “because it empowers citizens.”⁸² But restoring “[D]eliberative democracy is not enough. . . . By uprooting citizenship from the everyday world of power, interests, and work, deliberative democracy sentimentalizes citizenship. To bring back a fuller account of public life it is useful to recall a third version of citizenship, aimed at developing the capacities of citizens for public work.”⁸³

As Boyte notes, we must distinguish between deliberation and civic work.⁸⁴ What the Civic Constitution requires are not citizen-philosophers,

well tutored in the practices of deliberation, but rather citizens schooled in practical citizenship, “focused on the development of people’s capacities for work together through civic-problem solving.”⁸⁵ The Civic Constitution demands a conception of citizenship as work, and not simply as deliberation, because it is through civic work that citizens learn to act civically. And it is through civic work that citizens learn to (at)tend to concrete differences in power, resources, and status that may be masked by or papered over in purely deliberative accounts of the constitutional order.⁸⁶

The project of civic maintenance therefore, cannot be immured to debates over the meanings of inspirational texts.⁸⁷ Maintaining the Civic Constitution means translating constitutional concerns and ideals into a way of life. A way of life requires that we commit to the performance of constitutional precepts and not simply pledge an allegiance to them. To paraphrase Hadot, a constitutional way of life is not only a way of seeing the world, it is a way of being in the world.⁸⁸ Civic maintenance thus finds expression wherever citizens take up matters that address the lives we lead in common. It occurs in those activities and places where citizens consider the meaning and application of constitutional norms and ideals. If “life in the polis is an education,” as Dahl insisted,⁸⁹ then life in the Civic Constitution manifests in public conversation and controversies over matters that go to the centrality of the Constitution’s vision for public life.

For this reason, when we look for the Civic Constitution, we must look beyond deliberation to engagement, and beyond seminal texts to lived practices. Our experience of these practices is not confined to the earliest period of our constitutional history or to such obvious examples as popular agitation concerning the Alien and Sedition Acts and abolitionism.⁹⁰ As Kramer and other have noted, they persisted through the Jacksonian era and later.⁹¹ The populists of the 1880s and 1890s were centrally concerned with defending “a positive constitutional order,”⁹² and the Progressives were likewise engaged in a self-conscious program of constitutional critique and reform.⁹³ The suffrage campaigns of the nineteenth and twentieth centuries, and civil rights struggles of the 1940s, ’50s, and ’60s,⁹⁴ are all instances of civic engagement with matters that define what it means to practice a constitutional way of life.⁹⁵ Recent examples of the Civic Constitution in practice include citizen campaigns surrounding the issues of same-sex marriage and health care, both of which involve disagreements about the meaning and import of first principles, over the commitments that comprise our identity.⁹⁶ (In Essay Two I shall argue that civic education must extend not only to teaching first principles, but also to teaching when and where citizens have participated in disputes about their meaning and application.⁹⁷)