

# "Constitutions as Ways of Life; Rights as Political Practices: Using Theory and History to Reframe American Constitutional Politics"

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## Introduction

This paper is a work-in-progress stemming from a larger project examining the role of civic participation in constitutional theory and politics, with particular attention to the ways in which citizens have understood, argued about, practiced, and helped transform constitutional rights and liberty during critical historical periods. The broader project challenges dominant accounts of constitutional theory and seeks to excavate and reinvigorate the notion of a civic constitution in which engaged citizens play a pivotal role in defining and transforming constitutional principles. I call this distinctive form of civic engagement *public guardianship of liberty*, the beliefs and activities that treat the Constitution and rights as *res publicae* – public things and matters of public concern and shared responsibility. I argue that this form of constitutional politics is not only a recurring mechanism for constitutional interpretation and change, but it bears witness to a more powerful -- and more empowering -- view of constitutional rights and liberty. My goal, in part, is to reorient the way we think and talk about constitutions and the relationship between people and constitutions, encouraging us to recognize the ways in which constitutions are defined by the “ways of life” of the people, as Aristotle urged, and the ways in which rights are defined by political practices, including the beliefs and actions of ordinary people.

At first glance, these ideas that citizens participate actively and creatively in shaping Constitutional rights and commitments -- the meaning and institutionalization of the fundamental principles of the political community -- may seem indisputable. Some may even wonder how anyone could reasonably think otherwise. Yet the vast body of modern constitutional theory gives little attention to popular constitutional debates, judgments, and activities. As a result, Aristotle’s classical notion of a *civic constitution*, or the perception that constitutions and citizens are interdependent and that constitutions are as much shaped by citizens as citizens are shaped by constitutions, seems all but lost. Citizens are rarely recognized as creative and influential constitutional thinkers and actors. Instead, people remain ghostly figures, appearing as passive spectators to constitutional politics and rights developments spearheaded by judges and presidents (Wolin, *Fugitive Democracy* 1996). Ironically, even the handful of scholars who have taken up the mantle of popular constitutionalism give surprisingly little attention to the constitutional ideas and actions of engaged citizens and civic groups (Ackerman 1993, 1998; Kramer 2004). These failings leave us with a constitutional system whose legitimating principles of popular sovereignty and participation in self-rule seem to have been rendered empty or fictional. Moreover, it prevents us from recognizing the multiple stages on which rights play out, and appreciating the extent to which public involvement in constitutional politics helps define and reform our constitutional rights and commitments.

To demonstrate how the concept of public guardianship improves our understanding of the United States Constitution, and of constitutional democracy, the book project revisits several historical periods of constitutional conflict and development, illuminating the ways in which citizens’ constitutional arguments and activities have contributed to revolutionary reinterpretations – even re-foundings – of the constitutional order. Drawing on a range of primary and secondary literature, particularly the letters, petitions, publications, and accounts of the political activities of a range of activists and groups, I show that popular constitutional judgments and actions have played a dramatic and creative role in five revolutionary shifts -- constitutional founding, adoption of the Bill of Rights, abolition of slavery, women’s suffrage, and passage of civil rights. I advance a combination of conceptual, normative, analytic, and descriptive claims to make a case for conceiving of the American constitutional project as a story of changing constitutional understandings and rights arguments and activities spun as much from the minds of ordinary citizens as from political elites.

Along the way, I challenge some mainstream currents in constitutional theory, arguing that failure to recognize the role of the public in shaping the constitutional order is not merely an empirical flaw that can be addressed by including a wider range of voices. The deeper problem is theoretical and normative. It has as much to do with how we conceive of the American constitutional project today as it has to do with how we view the Constitution in history. If constitutional democracy is to be more than a mirage that flickers and disappears on approach, we need a thicker account of the role of people and groups in defining the core public commitments the Constitution. And if constitutional liberty and rights are to exist as something more than parchment promises, we need to appreciate of the ways in which many relatively ordinary people have worked toward reimagining and realizing these ideals.

I am not arguing that public participation in shaping the meaning of fundamental Constitutional rights and principles always leads to wiser or more just constitutional settlements. Indeed, the competing constitutional visions asserted by engaged citizens during historical periods can be disheartening as well as inspirational. Civic participation in American constitutionalism has sometimes contributed to fairer, freer, and more egalitarian constitutional commitments and practices, but it can also contribute to inhumane, unfair, and inegalitarian permutations of the constitutional order.

But even if public involvement in defining public constitutional commitments cannot guarantee outcomes with which wise moral philosophers would agree, I argue that this involvement, it is valuable because it upholds and embodies crucial elements of constitutional liberty: participation in meaningful self-government. This liberty includes the creative power of the people to participate in defining our public commitments, directing our public purposes, and influencing our shared life and identity as a national political community. Constitutional scholarship has not recognized or appreciated these aspects of constitutional liberty, or our ability to share in power over and responsibility for what we jointly, as a political community, express as our fundamental public commitments, and the ways in which we define and apply these public commitments in practice.

A project of this size and scope is not without its challenges. Tracing origin, specifying processes of social and political change, conceptualizing emergent phenomena, are all difficult tasks. I try to bypass some of these difficulties by avoiding the temptation of trying to offer a complete explanation or general theory of constitutional development. Rather, I seek to identify broad patterns of popular participation in important constitutional changes for which there is much compelling empirical evidence, and argue that this expanded vantage opens important windows on constitutional theory. The strength of this approach lies less in its causal claims than in its conceptual and normative contributions -- the important notion of popular constitutionalism will not bear fruit until what I call public guardianship of liberty receives careful conceptual treatment and empirical support.

Below, I turn to a well-known period of constitutional crisis -- the abolition movement, Civil War, and Reconstruction -- as a case study of the public face of constitutional rights (1800-1880). The draft is rough, preliminary. And I have large collection of examples of popular constitutional argument from primary sources that I have not yet been able to explore or incorporate. But the paper begins to trace a set of general arguments about the role of anti-slavery activists in reshaping fundamental constitutional commitments we now take for granted.