

CONSTITUTIONAL EDUCATION FOR *THE PEOPLE THEMSELVES*

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## INTRODUCTION

It was an intellectual pleasure for me to read Dean Larry Kramer's *The People Themselves*.<sup>1</sup> Having taught and written in the area of constitutional law for over two decades, I very much appreciated the opportunity to revisit yet again the great (and not so great) decisions of the Supreme Court as well as the different Justices, political leaders, and commentators whose views of the respective roles of Congress, the President, and the Court regarding constitutional interpretation and meaning have brought us to where we are today. If Dean Kramer is correct in his historical description, there existed, at least until relatively recently, an ongoing political and legal battle between judicial supremacy (constitutional interpretation and meaning from the *top down*) and popular constitutionalism (constitutional interpretation and meaning from the *bottom up*).<sup>2</sup>

Specifically, Dean Kramer explores the question of how we arrived at the point where the United States Supreme Court, for the first time in our history and with relatively little public outcry (including from the Democratic Presidential candidate himself), directly chose the President of the United States.<sup>3</sup> According to Dean Kramer, this convincingly demonstrates—although *Cooper v. Aaron*<sup>4</sup> had previously delivered the same message explicitly—that from his perspective the war unfortunately appears to have been won by judicial supremacy. He accurately characterizes

1. LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004).

2. “[E]ach of the three departments has equally the right to decide for itself what is its duty under the constitution, without regard to what the others may have decided for themselves under a similar question.” Letter from Thomas Jefferson to Spencer Roane (Sept. 16, 1819), *quoted in* KRAMER, *supra* note 1, at 106 (cited in *The People Themselves* as a “succinct” expression of departmentalism). Dean Kramer goes on to quote a senator in 1832 who describes the related role of the people as follows: “If different interpretations are put upon the Constitution by the different departments, the people is the tribunal to settle the dispute. . . . [W]here there is a disagreement as to the extent of these powers, the people themselves, through the ballot-boxes, must settle it.” KRAMER, *supra* note 1, at 201.

3. *Bush v. Gore*, 531 U.S. 98 (2000).

4. 358 U.S. 1, 18 (1958) (declaring that “the federal judiciary is supreme in the exposition of the Constitution” and “the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land”).

the *Bush v. Gore* decision as triumphalist, a description typically reserved for religions that claim to have exclusive access to salvation and Heaven.

Despite the so-called settlement function of Supreme Court supremacy,<sup>5</sup> I was, and still am, profoundly disturbed by *Bush v. Gore* and the majority's intellectual dishonesty in ignoring Article III's constraints, rejecting federalism, making up new equal protection doctrine for that specific case, and demonstrating a kind of contempt for the people's ultimate ability to sort things out through the political process. However, I do not go as far as Dean Kramer does in arguing normatively for a return to his kind of popular constitutionalism. Dean Kramer advocates a direct interpretive role for the people when the three branches have different and inconsistent constitutional positions, and thus he promotes a rejection of judicial supremacy.<sup>6</sup> My position is more modest and builds less on Dean Kramer's criticism of judicial supremacy than on the self-government rationale of our constitutional structure and the First Amendment.<sup>7</sup>

Self-government demands that the American people, through Congress, the President, or independently, evaluate and criticize Supreme Court decisions not only on their merits, but also for the interpretive approaches they use. The people must regularly participate in constitutional conversations in order to be engaged as citizens who govern themselves. Such participation should not be limited to so-called "constitutional moments" such as the Founding, the Civil War era, and the New Deal.<sup>8</sup> Further, in order for the people to participate meaningfully, the people must be educated constitutionally. Before elaborating on this position, I comment briefly on several of Dean Kramer's points.

### I. COMMENTS ON *THE PEOPLE THEMSELVES*

Dean Kramer identifies (he doesn't claim to be the first) what many of us in constitutional law have struggled with for years: how to reconcile the Court's extremely deferential approach to congressional power (at least prior to *New York, Lopez, Printz*, and *City of Boerne*<sup>9</sup>) and to economic

5. See KRAMER, *supra* note 1, at 234–35.

6. Or even for Congress, except in certain circumstances such as legislation enacted pursuant to section 5 of the 14th Amendment. Compare, e.g., *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (narrowing the Section 5 power), with *Katzenbach v. Morgan*, 384 U.S. 641, 646–47 (1966) (broadening the Section 5 power).

7. I rely on both the self-government rationale of the First Amendment as articulated by Alexander Meiklejohn and others, and on a fine but apparently overlooked book, JOSEPH GOLDSTEIN, *THE INTELLIGIBLE CONSTITUTION* (1992), to make this argument.

8. See I BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991).

9. See *New York v. United States*, 505 U.S. 144 (1992); *United States v. Lopez*, 514 U.S. 549 (1995); *Printz v. United States*, 521 U.S. 898 (1997); *Boerne*, 521 U.S. 507.

regulation with its non-deferential—dare I say supremacist—approach to individual rights under the Fourteenth Amendment and the Bill of Rights. For my money, the process, or representation-reinforcement, approach that originated in the second part of *McCulloch v. Maryland*,<sup>10</sup> and gained jurisprudential heft in the twentieth century in reaction to legal realism,<sup>11</sup> has always done the best job—but not a perfect one—of explaining this bifurcated approach to constitutional interpretation.<sup>12</sup> As Dean Kramer observes, what the Court has done recently in the name of federalism to the Commerce Clause and to Section 5 of the 14th Amendment can be seen as the gradual elimination of this bifurcated approach and the reinstatement of the pre-New Deal regime of non-deference, at least with respect to congressional power.<sup>13</sup> In a sense, this move rationalizes judicial supremacy.

Even after this move by the Court, however, there still remain several doctrines of substantive constitutional law that expressly remit certain issues entirely to the political process. The political question doctrine, for example, does so explicitly.<sup>14</sup> Similarly, the view that the political process and not the Court enforces federalism in certain circumstances appears in the *Garcia* decision,<sup>15</sup> even if that decision's practical impact has been eviscerated by the Court's post-1995 federalism decisions. So, too, does that view of separation of powers which might be termed functionalist,<sup>16</sup> as does the use in economic regulation cases of the extremely deferential ra-

10. 17 U.S. (4 Wheat.) 316, 339–43 (1819).

11. This approach was perhaps most eloquently articulated by John Ely. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980). The process approach is also grounded on Justice Stone's famous footnote 4 in *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938) (suggesting that searching review could apply to statutes "directed at particular religious, or national or racial minorities" because "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operations of those political processes ordinarily to be relied upon to protect minorities" (citations omitted)).

12. However the process approach poses difficulties in explaining unenumerated rights in general and *Roe v. Wade*, 410 U.S. 113 (1973), in particular.

13. KRAMER, *supra* note 1, at 225.

14. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 166 (1803) (stating that where "the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that [its] acts are only politically examinable"). A more recent example of the doctrine is *Nixon v. United States*, 506 U.S. 224 (1993).

15. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550–52 (1984) ("[T]he principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself. . . . State sovereign interests, then, are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power.").

16. As opposed to formalism. Compare, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (formalist; Justice Black's opinion for the Court), with *Dames & Moore v. Regan*, 453 U.S. 654 (1981) (functionalist), and *United States v. Curtiss-Wright Corp.*, 299 U.S. 304 (1936) (functionalist).

tional basis standard of review in equal protection and substantive due process analyses.

The Court's move to reduce significantly judicial deference to the exercise of congressional power also demonstrates the connection between one's view of the political process and one's view of the proper role of the federal judiciary. Perhaps it is because I find the process approach to constitutional interpretation to be the most persuasive that I have long thought that there is indeed such an intimate connection. If one thinks (believes? hopes?) that the national political process should work, and in fact works, the way that Madisonian Republicanism envisions it as working—that national political outcomes are the result of deliberation refracted through separation of powers, bicameralism, and presentment<sup>17</sup>—then one is likely to think that the Supreme Court's role should be deferential to Congress (and the states) except where the Court is convinced that the deliberative political process has in fact not worked, or cannot work. Examples of such instances include the racial discrimination cases or where a specific constitutional provision counsels otherwise irrespective of the political process, as in First Amendment free speech cases.

However, if one thinks that the national political process in fact works primarily not through extensive deliberation but rather through interest group politics, then several possible positions as to the Court's role emerge. One is that this is the way in which the political process should work as a normative matter; thus, the Court's role should generally be deferential in the absence of proof that even interest group politics is not "working" properly.<sup>18</sup> A very different position is a posture of skepticism about most legislative outcomes of the national political process precisely because they are the result of interest group politics. Justice Powell's critical description of the political process in his *Garcia* dissent regarding federalism and the states is an example of the influence of this view of the political process on the role of the Court.<sup>19</sup> Dean Kramer himself makes this connection ex-

17. See, e.g., *INS v. Chadha*, 462 U.S. 919 (1983).

18. Again, racial discrimination by government is a good example. Another is the Court's actual purpose in the equal protection decision in *Romer v. Evans*, 517 U.S. 620 (1996).

19. Arguing that the Supreme Court should enforce federalism, and not the national political process, Justice Powell spoke of the recent rise of numerous special interest groups that engage in sophisticated lobbying and make substantial campaign contributions to some members of Congress. These groups are thought to have significant influence in the shaping and enactment of certain types of legislation. Contrary to the Court's view, a "political process" that functions in this way is unlikely to safeguard the sovereign rights of States and localities:

Federal legislation is drafted primarily by the staffs of congressional committees. . . . These [staff and civil service] employees may have little or no knowledge of the States and localities that will be affected by the statutes and regulations for which they are responsible. In any case, they hardly are as accessible and responsive as those who occupy analogous positions in State and local governments.

PLICIT in several places when he discusses the relation between the ways in which the political process is thought to work and the rise of judicial supremacy.<sup>20</sup>

Finally, I wonder whether, even in the face of the current dominance of judicial supremacy, the people themselves still continue to play an important role in bottom up constitutional interpretation. Consider the Religion Clauses of the First Amendment. According to Philip Hamburger's persuasive account, the people's historical understanding of separation of church and state, and thus of those clauses, began to shift in the middle of the 19th century from one of disestablishment to one of strict separation.<sup>21</sup> This shift culminated in those third-quarter 20th century Supreme Court decisions that, relying on strict separation, struck down school prayer<sup>22</sup> and much private school funding legislation.<sup>23</sup> Similarly, the Due Process Clause and the Eighth Amendment are provisions whose interpretations are directly affected by the changing traditions and understandings of the people.<sup>24</sup>

## II. SELF-GOVERNMENT, THE FIRST AMENDMENT, AND CONSTITUTIONAL MEANING

The structure of the Constitution and the First Amendment clearly indicate that the people have a duty as citizens to be regularly engaged in

*Garcia*, 469 U.S. at 576–77 (Powell, J., dissenting).

20. For example, he connects the rise of judicial supremacy to the thought of Robert Dahl and Joseph Schumpeter who “denigrated democratic politics as a site for developing substantive values and replaced it instead with a self-interested competition among interest groups.” KRAMER, *supra* note 1, at 222. Dean Kramer further observes that

[a]ll the anxiety about Congress is ultimately not so much about legislative institutions or legislators as it is anxiety about *us*, about what we will permit or encourage politically accountable actors to do. The modern Anti-Populist sensibility presumes that ordinary people are emotional, ignorant, fuzzy-headed, and simple-minded, in contrast to a thoughtful, informed, and clear-headed elite.

*Id.* at 242 (emphasis in original).

21. PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE (2002).

22. *See, e.g.*, *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 205 (1963) (striking down devotional Bible-reading in public schools).

23. *See, e.g.*, *Lemon v. Kurtzman*, 403 U.S. 602, 607 (1971) (striking down private school funding statute).

24. The Due Process Clause (at least for substantive due process-liberty purposes) and the Eighth Amendment come immediately to mind as provisions in which the Court consciously looks to the people and their developing, and thus changing, traditions and standards in order to determine constitutional meaning. *See, e.g.*, *Lawrence v. Texas*, 539 U.S. 558, 562 (2003) (declaring that “[l]iberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct[.]” and holding that states may not criminalize homosexual sodomy); *Roper v. Simmons*, 125 S. Ct. 1183, 1190 (2005) (holding the death penalty for juveniles unconstitutional and using as its criterion the “evolving standards of decency that mark the progress of a maturing society” and looking to objective evidence of society’s consensus on the issue).

constitutional conversations among themselves and with the three branches of the federal government. To discharge this duty of self-government, it is essential that the American people are educated to understand, evaluate, and criticize Supreme Court decisions.

The Court has a corresponding responsibility to be a constitutional educator. An important aspect of being an educator is opening yourself to questions and explaining your conclusions and reasoning. These explanations should be provided not only to the other branches of government and to lawyers, but also to the people. And it is not only the Supreme Court that has this structural and First Amendment-based educational responsibility: Congress, the President, the bar, and the media bear it as well. If the people were better educated about the Constitution and constitutional interpretation and meaning—recently, I was asked the following somewhat unnerving question by a thirty-ish college-educated adult: “Doesn’t the Supreme Court just follow the law?”—this would go a long way toward demystifying the Supreme Court as the sole legitimate interpreter of the Constitution.

#### A. *On Re-Reading McCulloch v. Maryland*<sup>25</sup>

While I will emphasize the First Amendment’s self-government rationale as articulated by Alexander Meiklejohn,<sup>26</sup> the need for the people to understand the Constitution in order to govern themselves goes back, not surprisingly, to the Founding. Indeed, Chief Justice Marshall explicitly made this point in *McCulloch* just before he wrote the following famous statement: “In considering this question [the scope of Congressional power regarding choice of means], then, we must never forget, that it is *a constitution* we are expounding.”<sup>27</sup> That statement, which in isolation appears to emphasize an exclusive judicial role—indeed, that seems to be how Dean Kramer uses it<sup>28</sup>—is preceded by an important, sometimes overlooked discussion of why and how a constitution is different from ordinary legislation:

A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. *It would probably never be understood by the public.* Its nature, therefore, re-

25. 17 U.S. (4 Wheat.) 316 (1819).

26. ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948) [hereinafter MEIKLEJOHN, *FREE SPEECH*]; Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245 (1961) [hereinafter Meiklejohn, *First Amendment*].

27. *McCulloch*, 17 U.S.(4 Wheat.) at 407 (emphasis in original).

28. KRAMER, *supra* note 1, at 148–50.

quires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves.<sup>29</sup>

Chief Justice Marshall argued that while the people need not necessarily understand the complexities of statutes, they must have some basic understanding of the Constitution because the national government receives its powers not from the states, but directly from the people. I interpret Chief Justice Marshall as referring not only to the role of the people when they were confronted at the Founding with the question whether to ratify the Constitution.<sup>30</sup> Rather, I understand him as also insisting that the people have a *continuing* need to understand the Constitution's meaning, and therefore Supreme Court decisions interpreting the Constitution, in order to govern themselves knowledgeably.<sup>31</sup>

### B. *The First Amendment's Self-Government Rationale and Constitutional Education*

Alexander Meiklejohn obviously did not originate the First Amendment rationale of self-government, namely, that we need freedom of speech and of the press in order to govern ourselves. Self-government is embedded in the very structure of our Constitution, which, as a product of the Enlightenment, is intended to constitute a unique, republican form of representative self-government. And two decades before Meiklejohn, Justice Brandeis gave this First Amendment self-government rationale particularly eloquent expression in his concurrence in *Whitney v. California*:

Those who won our independence . . . believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public

29. *McCulloch*, 17 U.S. (4 Wheat.) at 407 (emphasis added).

30. What were the Federalist Papers if not an educational project directed at the people and their representatives at the time of the Founding?

31. See, e.g., President Franklin D. Roosevelt's assertion:

[L]ay rank and file can take cheer from the historic fact that every effort to construe the Constitution as a lawyer's contract rather than a layman's charter has ultimately failed. Whenever legalistic interpretation has clashed with contemporary sense on great questions of broad national policy, ultimately the people and the Congress have had their way.

Franklin D. Roosevelt, Address on Constitution Day (Sept. 17, 1937), in 6 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 359, 362-63, 365 (Samuel I. Rosenman ed., 1941), *quoted, cited, and discussed in* KRAMER, *supra* note 1, at 217.

discussion is a political duty; and that this should be a fundamental principle of the American government.<sup>32</sup>

Alexander Meiklejohn subsequently went well beyond this position and, rejecting the application in First Amendment cases of the Holmes-Brandeis “clear and present danger” test, argued forcefully for an absolutist position with regard to speech of political concern.<sup>33</sup> In his view, “We the People” are constrained to engage in self-government, with the town meeting as the model forum. Everything worth saying must be said so that the people are made as wise as possible. The First Amendment is thus intended to prevent the mutilation of the thinking process of the political community.

Two aspects of Meiklejohn’s argument are of particular interest here. First, he criticized the Court for adopting the Holmes-Brandeis clear and present danger test, which he believed was grounded on intellectual license, as incompatible with the role of the individual as *citizen*.<sup>34</sup> Second, he asserted that the Court “has struck a disastrous blow at our national education . . . . [I]t has denied the belief that men can, by processes of free public discussion, govern themselves.”<sup>35</sup> For Meiklejohn, this was especially distressing because “the Supreme Court has a large part to play in our national teaching [because it] is commissioned to interpret to us our own purposes, our own meanings.”<sup>36</sup> Moreover,

[I]ts teaching has peculiar importance because it interprets principles of fact and of value, not merely in the abstract, but also in their bearing upon the concrete, immediate problems which are, at any given moment, puzzling and dividing us. . . . [F]or this reason the court holds a unique place in the cultivating of our national intelligence.<sup>37</sup>

Meiklejohn’s criticisms of the Court help in formulating answers to the question why the people need to be educated in particular about the Supreme Court and constitutional interpretation and meaning. One answer is that the Constitution is the supreme law of the land, and thus, when interpreted, it often affects us all directly. This is true not only for individual rights, but also for Congressional powers, separation of powers, and federalism to the extent that these issues are taken out of the political process because they’ve been constitutionalized. A second answer is that the Senate and the President have important roles in the federal judicial appointments

32. *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis & Holmes, JJ., concurring) (emphasis added).

33. MEIKLEJOHN, *FREE SPEECH*, *supra* note 26; Meiklejohn, *First Amendment*, *supra* note 26.

34. MEIKLEJOHN, *FREE SPEECH*, *supra* note 26, at 89–90.

35. *Id.* at 90.

36. *Id.* at 32.

37. *Id.*



process and that the people's constitutional education is an important consideration in their deciding for which candidates to vote.

But there is perhaps a deeper answer, suggested by both Brandeis and Meiklejohn, that combines elements of the foregoing but is nevertheless different. The people themselves should be educated because it is an obligation of American citizenship grounded in the structure of the Constitution, as well as in the First Amendment, to participate in democratic decision-making—not just voting, but discussion, criticism, and running for office.<sup>38</sup> This almost sacred obligation of citizenship<sup>39</sup> demands an understanding by the people themselves of the Constitution, the role of the Supreme Court, and constitutional interpretation and meaning so that the ensuing constitutional conversation is meaningful.

### III. THE PEOPLE'S CONSTITUTIONAL EDUCATION

How and by whom are the people to be educated constitutionally? At the outset (and obviously), basic reading, writing, and thinking skills are required for this purpose, as well as a desire to learn. These skills and desire are, it is hoped, developed at the elementary and secondary levels of education.<sup>40</sup> In addition, most schools at these levels provide some sort of education about the United States Constitution in civics and American history classes. Furthermore, while not every citizen attends college, those who do are occasionally exposed at a somewhat deeper level to constitutional history and important Supreme Court decisions. All of this—including Senator Robert Byrd's newly minted Constitution Day, September 17<sup>41</sup>—surely helps to provide some basis for citizenship and participa-

38. Recall that the Speech and Press Clauses, which protect communications among citizens, is followed by the Petition Clause, which protects communications directed by citizens to government. U.S. CONST. amend I.

39. *Cf. Deuteronomy 6:6-7*:

And these words, which I command thee this day, shall be upon thy heart; and thou shalt teach them diligently unto thy children, and shalt talk of them when thou sittest in thy house, and when thou walkest by the way, and when thou liest down, and when thou risest up.

THE PENTATEUCH AND HAFTORAHS 771 (J. H. Hertz ed. & trans., 2d ed. 1965).

40. As the Court famously declared in *Brown v. Board of Education*,

[Education] is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.

347 U.S. 483, 493 (1954).

41. See Sam Dillon, *From Yale to Cosmetology School: Americans Brush Up on History and Government*, N.Y. TIMES, Sept. 16, 2005, at A14 (describing Senator Byrd's insertion of a requirement that "every American school receiving federal money teach about the Constitution on Sept. 17, the date it was signed in 1787").

tion in democratic decision-making. But I want to go beyond this and address other, perhaps less obvious and less formal ways of promoting the people's constitutional education.

### A. *The Supreme Court*

As noted earlier, Meiklejohn suggested that the Supreme Court plays an important educational role because it "is commissioned to interpret to us our own purposes, our own meanings."<sup>42</sup> In order for the Court to perform this educational role effectively, its opinions addressing important, nationally significant issues of constitutional law should be understood by the people. The people's understanding of significant constitutional decisions is additionally vital because those of the Court's decisions striking down federal or state legislation on constitutional grounds effectively take such legislation out of the political process in a counter-majoritarian manner.<sup>43</sup> It follows that the Court should not write its constitutional opinions exclusively for a judicial and lawyerly elite.

Elaborating at considerable length on this view, Joseph Goldstein maintains that the Court should adhere to certain canons of comprehensibility. The Court should use simple and precise language that all can understand;<sup>44</sup> write with candor and clarity and confront opposing arguments;<sup>45</sup> "acknowledge and explain deliberate ambiguity";<sup>46</sup> be fair and accurate "in making attributions to another opinion in the case";<sup>47</sup> and use text rather than footnotes for important material relevant to the decision and its breadth.<sup>48</sup> In short, the Court's opinions should, to the greatest extent possible, be well-written and understood by the people. Perhaps one of the best examples of such a judicial opinion is *Brown v. Board of Education*, which, while perhaps necessarily short on legal analysis, was (and remains) eminently understandable by the people.<sup>49</sup>

42. See MEIKLEJOHN, *FREE SPEECH*, supra note 26, at 32.

43. See GOLDSTEIN, supra, note 7, at 115 (stating that the Court's obligation to explain itself stems in large part from the countermajoritarian difficulty).

44. *Id.* at 112.

45. *Id.* at 114–15.

46. *Id.* at 116.

47. *Id.* at 119.

48. *Id.* at 121. Moreover, Goldstein even suggests that the Court adopt final review of all opinions for compliance with these canons before release. *Id.* at 125.

49. This characteristic may also be explainable on other grounds, such as the need for a unanimous opinion, the desire to obscure the equal protection standard used so that the Court's decision would appear to be limited to de jure public school segregation, and the rhetorical purpose of portraying black school children as innocent victims harmed forever by such segregation.

As part of the Court's educational role, individual Justices should also not be reluctant to speak to lay groups about the Constitution and the Court's role in constitutional interpretation and meaning. An illuminating and recent example, reported in *The New York Times*,<sup>50</sup> is a speech by Justice Stevens at a bar association meeting in Las Vegas at which he distinguished between constitutionality and wisdom, that is, between binding constitutional precedent and a Justice's policy preferences.<sup>51</sup> Similarly, individual Justices should also be comfortable writing books about constitutional law for the people, as, for example, Justice Scalia and Justice Breyer have recently done.<sup>52</sup>

### B. Congress and the President

However, educating the people about the Constitution and its interpretation and meaning is not solely for the Supreme Court and individual Justices. The politically accountable branches of the federal government—Congress and the President—have independent obligations to interpret the Constitution when it is appropriate for them to do so. Congress may decide not to enact certain proposed legislation because, in its view and regardless of any Supreme Court precedent to the contrary, such legislation would be unconstitutional. Or the President may decide to veto legislation that would probably be found constitutional by the Supreme Court on the ground that, in the President's opinion, the legislation is unconstitutional. This is not to say that Congress and the President will not frequently defer to the Supreme Court on such matters for various reasons, including political ones, but only that Congress and the President have no constitutional obligation

50. Linda Greenhouse, *Justice Weighs Desire v. Duty (Duty Prevails)*, N.Y. TIMES, Aug. 25, 2005, at A1.

51. See also THE FEDERALIST NO. 78 (Alexander Hamilton), in which Hamilton, in the course of arguing that the federal judiciary will represent the people when it declares federal legislation unconstitutional, states, "The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body." THE FEDERALIST NO. 78, at 405 (Alexander Hamilton) (Gideon Ed., George W. Carey & James McClellan eds., 2001). I explain to my law students that a constitutional statute may be very unwise or immoral, while an unconstitutional statute may be very wise and moral. That is, there is no necessary relationship between wisdom and morality on the one hand and (un)constitutionality on the other. Of course, there is not always a bright line between the two: a Justice's view of the wisdom of legislation often affects his or her view of its constitutionality. Consider, for example, the decision to use strict scrutiny and the related determination of what constitutes a compelling governmental interest. The latter surely is a value-driven decision.

52. See ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997); STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION (2005). Although I refer to the Supreme Court and its Justices, surely federal and state judges should also be encouraged to educate the people about the Constitution. Of course, they must be careful not to be too specific about concrete cases that might come before them, but explaining why such caution is required is part of their audience's constitutional education as well.

to do so. Judicial supremacy and departmentalism or popular constitutionalism conflict primarily when the Supreme Court has found legislation unconstitutional but Congress and the President, or the people, wish it enforced nonetheless.

The independent constitutional obligations of a politically accountable Congress and President to interpret the Constitution, even where the Court has upheld legislation as constitutional, give rise to their corresponding obligation to educate the people constitutionally. Such an education includes evaluation and, often, criticism of Supreme Court decisions. This obligation of Congress and the President is more than a normative one; it also stems from the judicial appointments process set out in the Constitution. The President nominates persons to the Supreme Court, and the Senate must either confirm or reject them. As a result, not only do the President and the Senate necessarily engage in conversation about the nature of constitutional interpretation and meaning, but this conversation includes the people as well. Thus, despite a bit too much speech-making and grandstanding by some Senators, the recent televised and much reported-on Senate hearings on the nomination of John Roberts to replace Chief Justice Rehnquist provided an excellent opportunity to further the people's constitutional education, including the role of precedent, approaches to constitutional interpretation, and the like.

Perhaps as significant, the Roberts hearings, the debates among Senators and others, and the resulting discussions in the media about the appointment demonstrated the importance of political ideology in Supreme Court decision-making. Although this is nothing new—think back to the Robert Bork confirmation hearings, the New Deal, and FDR's attack on the Court, and even to John Adams's appointment of Federalist John Marshall to the Court—the lesson that political ideology matters is nevertheless an important part of the people's constitutional education.<sup>53</sup> The more recent nomination and confirmation of Judge Samuel Alito to replace Justice O'Connor promises to further the people's constitutional education even more along these lines, particularly because Justice O'Connor often cast the deciding vote in important cases involving not only abortion but congressional power, federalism, and the Religion Clauses.

53. In this regard, it is unfortunate that more political and media attention was given, and continues to be given, to abortion than to Congressional power, federalism and the Religion Clauses.

### C. *The Bar and the Media*

I frequently speak to lay groups—typically college-educated adults—about the Constitution and constitutional interpretation and meaning. Even when I address specific topics such as freedom of speech, separation of church and state, racial discrimination, and affirmative action and abortion, I always include some discussion, as concrete as possible, of the history and underlying theories of the Constitution, including separation of powers, federalism, and different approaches to constitutional interpretation. In the course of attempting to educate people in my audience, I am often dismayed by their ignorance about the Supreme Court and the Constitution, but I am at the same time encouraged by the excellent questions they ask. They are hungry for useful and relevant information about the Constitution and the role of the Supreme Court, especially when the Court hands down a major constitutional decision or, as has been the case recently, when vacancies occur on the Court. I also find that having to answer an audience's down-to-earth questions sometimes helps me to appreciate better the impact that Supreme Court decisions have (or do not have) on the people. Furthermore, it is educational for an academic, even one with some practice and consulting experience, to be forced to answer laymen's questions in non-technical terms. I recommend the experience highly for these reasons and also because speaking to lay groups promotes the people's constitutional education.

In part because of my experience, I firmly believe that lawyers as a group must take on greater responsibility to educate the people about the Constitution. Although there is no expressly enforceable professional ethical obligation to do so, lawyers, both as direct participants in the justice system and as citizens interested in the rule of law and in the Constitution, nevertheless have a special obligation to engage in such conversations with non-lawyers and thereby to educate them.<sup>54</sup>

54. The Preamble to the American Bar Association's Model Rules of Professional Conduct speaks of the lawyer's obligation as a public citizen to further the public's understanding of the rule of law and of constitutional democracy. *See* AM. BAR ASS'N, CTR. FOR PROF'L RESPONSIBILITY, MODEL RULES OF PROFESSIONAL CONDUCT, PREAMBLE (2004) available at <http://www.abanet.org/cpr/mrpc/preamble.html>. Also, the ABA House of Delegates passed a resolution in February 2000 that encouraged "every lawyer to consider it part of his or her fundamental professional responsibility to further the public's understanding of and confidence in the rule of law and the American system of justice." DIV. FOR PUB. EDUC., AM. BAR ASS'N, HOUSE OF DELEGATES RESOLUTION (2000), <http://www.abanet.org/publiced/resolution00.html>. I thank Howard Kaplan of the ABA for calling my attention to the latter.

It is with some trepidation that I now turn to the mass media, including both the print and electronic media.<sup>55</sup> Those of us who carefully follow the Supreme Court and its opinions know that there are all too few print media that do a competent job of reporting accurately and knowledgeably on the Supreme Court and its decisions. Perhaps because of the background and education of the particular reporters assigned, *The New York Times* and *The Chicago Tribune* do a good to excellent job at this (there may be others as well). In fact, *The New York Times* occasionally includes lengthy excerpts from the Court's opinions, hearkening back to a long-ago era in which Supreme Court decisions were occasionally printed, in whole or in part, in newspapers.<sup>56</sup>

At least the print media, whatever their shortcomings, ordinarily have some time to attempt to get things right. In contrast, I know from personal experience as an interviewee and from watching and hearing the electronic media, that these media are all too often looking only for pithy comments—video and sound bites—from lawyers and other commentators immediately after an important Supreme Court decision is handed down. The result is that these commentators have frequently not had the chance to assimilate the decision (or even to read it) and to make it understandable, and the audience is thus not given a thoughtful, or even accurate, assessment of the decision. It goes without saying that any subtleties in the decision are ignored. The electronic media then move on to something else because of what is presumed to be the short attention span of the audience. The predominance of entertainment and the importance of revenue generation to these media in particular are likely factors in the electronic media's own short attention span.<sup>57</sup>

55. The Internet is relatively new and its potential educational impact on the people's constitutional education is only now becoming clear. It is worth noting that the Court, Congress, the President, the bar, and the print and electronic media are already using the Internet for various purposes. For example, many courts, including the Supreme Court and the lower federal courts, regularly make their opinions available on the Internet. Indeed, the Court has recently even made several of its oral arguments available in downloadable audio format shortly after the arguments themselves have concluded. In addition, there are websites and blogs for lawyers, legal academics and the public that discuss legal matters, including the Constitution and constitutional interpretation.

56. See, e.g., 1 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 511–25 (1926), for a discussion of press coverage and publication of the decision in *McCulloch v. Maryland*. See also Craig Joyce, *Wheaton v. Peters—The Untold Story of the Early Reporters*, in *SUPREME COURT HISTORICAL SOCIETY 1985 YEARBOOK* (1985), available at [http://www.supremecourthistory.org/04\\_library/subs\\_volumes/04\\_c19\\_g.html](http://www.supremecourthistory.org/04_library/subs_volumes/04_c19_g.html).

57. Interestingly, Meiklejohn, writing in 1948, criticizes radio for not living up to its potential as a medium for the public's education and self-government. In his view, radio is primarily about making money and promoting excessive individualism. MEIKLEJOHN, *FREE SPEECH*, *supra* note 26, at 104. This sounds familiar, does it not, even fifty-eight years later?

Obviously, the role of the media in the people's constitutional education is an appropriate topic not just for one book but for many. Still, I would like to suggest modestly, first, that the print and electronic media assign reporters with some legal background (there must be a few out there) to report on the Supreme Court, the Constitution, and law in general. Second, broadcasting appellate arguments in the circuits and perhaps, in special circumstances, even in the Supreme Court<sup>58</sup> is an idea worth seriously pursuing. Audio alone could be tried, or perhaps video as well. Broadcast delays could be part of this experiment in the people's constitutional education.

I fully appreciate some of the problems with the electronic media: the likelihood that excerpts (both questions and answers) will be taken and used out of context so as to create a misleading impression of the advocates, the judges, and the issues; the possibility that advocates or judges could play to the audience; and the danger that the judicial decision-making process will be coarsened by a kind of leveling process, that commercializes or renders as entertainment almost everything communicated in the electronic media.<sup>59</sup> Perhaps the C-Span model is the best one. But whatever the methods used, the electronic media are so pervasive that the people's constitutional education, to be truly national in scope, must involve them.

#### CONCLUSION: THE NATURE AND EXTENT OF LIMITS ON CRITICISM OF THE COURT

To be true to the self-government rationale of the Constitution and freedom of speech, there must be no constraints on the people's criticism of the Court's decisions and of the Justices who write them. As a *constitutional* matter, of course, and except for true threats, the First Amendment protects virtually all such speech: it is high-value political speech.<sup>60</sup> But

58. This was done in *Bush v. Gore* in December 2000, in *Ayotte v. Planned Parenthood* (abortions for minors) on November 30, 2005, and in *Rumsfeld v. Fair* (Solomon Amendment) on December 6, 2005. See *Bush v. Gore* (2000) [00-949], <http://www.oyez.org/oyez/resource/case/766/> (last visited Feb. 28, 2006); *Ayotte v. Planned Parenthood of Northern New England* [04-1144], <http://www.oyez.org/oyez/resource/case/1869/> (last visited Feb. 28, 2006); *Rumsfeld v. Forum for Academic and Institutional Rights* [04-1152], <http://www.oyez.org/oyez/resource/case/1872/> (last visited Feb. 28, 2006).

59. Some might be concerned that as the mystique of constitutional interpretation by the Supreme Court was gradually stripped away, so too would the Court's political capital. However, my major point is that the people's constitutional education is essential for self-government. And if the Court's mystique were in fact reduced as a result of constitutional education, that would be a healthy result for democracy.

60. The Court has held that even vehement criticism of judges conducting trials in pending cases, including the threat of a strike if the judge ruled in a particular way, has a large measure of First Amendment protection. In *Bridges v. California*, the Court declared,

there should be no objection as a *normative* matter to vehement criticism, from any source, of any and all Supreme Court decisions. Even calls for the impeachment of particular Supreme Court Justices, whether Earl Warren or William Rehnquist, for example, are normatively appropriate as part of the people's constitutional education. It is out of the clash of different constitutional arguments and ideas that the people's constitutional understanding will be furthered.

Does such criticism of the Court increase the likelihood of non-compliance with Supreme Court decisions? The answer is "probably yes," as the historical experiences with *Brown v. Board of Education*<sup>61</sup> on the one hand and *Roe v. Wade*<sup>62</sup> on the other demonstrate.<sup>63</sup> But even though the Court's political capital is thereby reduced, I agree with Dean Kramer that the Court is a strong enough institution to weather such criticism<sup>64</sup> and perhaps, in appropriate circumstances, even to be guided by it.<sup>65</sup>

There is another possible danger of such criticism: the conflation of the judicial and the political in the people's eyes, thereby undermining rule of law values. That is, the people will see the Court as just another political institution, albeit one that is not directly political accountable, just as certain legal realists and critical legal scholars have maintained. I have never accepted this extreme position, although I recognize that the distinction between constitutional law and politics is sometimes difficult to defend.<sup>66</sup> Nevertheless, the people's constitutional education is sufficiently important

The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. . . . [E]nforced silence . . . solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect.

314 U.S. 252, 270–71 (1941). The Court also pointed that the judge was already aware of the possibility of a strike and that he would therefore not be intimidated by the threat of one. *Id.* at 278. On the other hand, serious personal threats—true threats—against Justices are not, and should not be, protected by the First Amendment. Compare *Watts v. United States*, 394 U.S. 705, 708 (1969) (remark that defendant would shoot President if he were drafted and forced to carry a rifle considered hyperbole and not a threat), with *Virginia v. Black*, 538 U.S. 343, 347 (2003) (cross burning carried out with intent to intimidate blacks can be a true threat unprotected by the First Amendment).

61. 347 U.S. 483 (1954).

62. 410 U.S. 113 (1973).

63. On the other hand, it has been suggested that, in any event, the extent of compliance with controversial Supreme Court decisions and the effect of those decisions on behavior has been greatly exaggerated. See GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991).

64. KRAMER, *supra* note 1, at 251 ("For experience shows the Court to be anything but fragile.").

65. As, for example, in the New Deal era when the Court retreated from its use of heightened scrutiny in Commerce Clause and economic regulation/liberty of contract cases. Of course, the subsequent appointment in the middle and late 1930's and early 1940's of a majority of new Justices with a political ideology similar to that of FDR also made a real difference.

66. The best recent example of such a breakdown is—surprise—*Bush v. Gore!*



for self-government that the risk that the rule of law values promoted by this distinction may be eroded should be accepted.

Discussing constitutional review over a century ago, Thayer cautioned,

[I]t should be remembered that the exercise of [judicial review], even when unavoidable, is always attended with a serious evil, namely, that the correction of legislative mistakes comes from the outside, and the people thus lose the political experience, and the moral education and stimulus that come from fighting the question out in the ordinary way, and correcting their own errors. . . . The tendency of a common and easy resort to this great function . . . is to dwarf the political capacity of the people, and to deaden its sense of moral responsibility. It is no light thing to do that.<sup>67</sup>

The people's constitutional education is a first step in the direction of reversing this tendency.

67. JAMES BRADLEY THAYER, JOHN MARSHALL 106-07 (1901).