

THE TECHNICOLOR CONSTITUTION: POPULAR CONSTITUTIONALISM, ETHICAL NORMS, AND LEGAL PEDAGOGY

By: Shannon D. Gilreath*

“Constitutional rights should not be frittered away by arguments so technical and unsubstantial. The Constitution deals with substance, not shadows.”¹

“We must never forget that it is a constitution we are expounding.”²

I. INTRODUCTION: THE LAWYER AND THE POPULAR CONSTITUTION

While a law student, one of my biggest criticisms of law school teaching in general was that students were too seldom asked what the law “should be” as opposed to what the law “is.” This lack of inquiry is in part a practical concern. Law schools are in the business of preparing students to practice law, and to do that, it is necessary that students learn what the law “is.” Another explanation is that there is a student ethic against this sort of teaching. Many students object to the more esoteric questions and prefer to stick with the “practical.” This, in turn, spills over into the practice of law, with lawyers being more concerned with the people immediately affected by the law than with the law that affects the people. And lawyers are only a small fraction of the public. The general public, presumably, is even less concerned about what the state of the law should be, unless, of course, the law directly affects them in some meaningful way.

In the areas of constitutional law and civil liberties, the idea of approaching the law in a black and white fashion, thereby deeming the court’s decisions on constitutional law as the beginning and end of the discussion, is acutely problematic. Law students are reduced to learning about constitutional law by studying court opinions, memorizing end analyses, and regurgitating these analyses on law school exams. Seldom are students asked to evaluate the law in meaningful ways. The law is a “black and white” exercise: “this” is protected speech, and “that” is not.

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1. *Milwaukee Soc. Democratic Publ’g Co. v. Burleson*, 255 U.S. 40, 431 (1921) (Brandeis, J., dissenting).

2. *McCulloch v. Maryland*, 17 U.S. 316, 415 (1819).

Or, so the classroom study goes. But constitutional law, with its nuances and implications not always thoroughly analyzed by the United States Supreme Court and certainly not by the average law school textbook, is not “black and white.” To use a familiar buzzword of our media age, the Constitution is Technicolor.

Too often, however, students are not asked to examine the variant shades of the Constitution; they are not asked to question the efficacy of the Court’s decisions. The ordinary citizen has even less impetus for searching constitutional query. A lack of meaningful popular concern, or popular constitutionalism if you will, is a sad affair for all. David Hoffman, a one-time leader of the American bar, once told his students that the American lawyer should be “the asserter of right, the accuser of wrong, the protector of innocence, and the terror of crime.”³ Sadly, this more philosophical role of the lawyer has been largely eschewed by modern legal education. The social impact of the law has become merely peripheral to the study of judicial decision.

In order to educate lawyers effectively, legal education must orient legal principles within the greater purpose of the law—to serve as the vehicle for a society striving to realize democratic ideals. Accordingly, Professor Lawrence Sager wrote of the fallacy of treating “the legal scope of a constitutional norm as inevitably coterminous with the scope of its . . . judicial enforcement.”⁴ Instead, Professor Sager argued that constitutional norms are “valid to their conceptual limits.”⁵ Indeed, some of the significant legal and social advances in our nation’s history have not come from the pen of the Court in its interpretation of the Constitution but from the people’s own conception of the content of constitutional norms, sometimes even in the face of contradictory proclamations by the Supreme Court.⁶

This criticism notwithstanding, many lawyers have been taught that a large portion of what is worth knowing about the Constitution can be learned through survey and analysis of the decisions of the United States Supreme Court. In this light, constitutional law appears as nothing more than the product of judicial fiat. As Professor Sager pointed out, however, presuming that the Supreme Court is the only interpreter of the law worth concentrating on is an approach that gives only a partial

3. Michael Les Benedict, *Victorian Moralism and Civil Liberty in the Nineteenth-Century United States*, in *THE CONSTITUTION, LAW, AND AMERICAN LIFE: CRITICAL ASPECTS OF THE NINETEENTH-CENTURY EXPERIENCE* (Donald G. Nieman ed., 1992) (quoting David Hoffman, *A Lecture Introductory to a Course of Lectures, Now Delivering in the University of Maryland, reprinted in THE LEGAL MIND IN AMERICA: FROM INDEPENDENCE TO THE CIVIL WAR* (Perry Miller ed., 1962)).

4. Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1213 (1978).

5. *Id.*

6. I am thinking specifically of the Constitution-referencing anti-slavery clamor that vigorously persisted even after the Court’s “final” word in *Dred Scott* and is discussed below. See discussion *infra* Part II.A.

picture of what the law is really about. The Supreme Court as an institution may be the guarantor of constitutional longevity, but the Court has not necessarily been the cause of many significant constitutional changes that we learn about only in terms of the opinions the Court has seen fit to render regarding those changes. Moreover, concentrating only on Supreme Court opinions ignores the evolutionary process of fundamental law that is primarily a social undertaking, a construct of concerned, knowledgeable women and men who recognize a legal failure and seek to right it. An inquiry into what the law "should be" and the attendant striving to bend the law in that direction bring to bear the popular genesis of the Constitution and result in "We the People," not the courts, being the most significant contributors to American constitutional law. When we add to constitutional study the popular aspiration behind the Court's decisions, we return from judicial fiat to the realm of reason. Constitutional adjudication is, after all, both means and ends oriented—course and conclusion. Judicial decision is often merely a memorial of a shift in popular thought.

The Constitution's popular genesis cannot be denied. Its very Preamble proclaims this fact: "We the People." Even the die-hard textualist cannot disagree that the people are given a place of paramount importance in the very language of the Constitution. The Constitution is above all an instrument by and for the populace. The law of the Constitution did not come to us via some Sinai or Olympus; it was the construct of a revolutionary group of men, the greatest statesmen of their age—perhaps of any age. I am of the view that these Framers intended this great charter not as the exclusive property of justices in marble temples, but for the common citizen as a vehicle by which each individual's potential and humanity could be recognized to the fullest. Why, then, in the academic study of the Constitution do we so often ignore the constitutional ideals, aspirations, and contributions of "We the People?" Why do we ignore the importance of the lawyer as policymaker and as guardian of democratic values?

The aim of this essay is to support my opinion, with particular reference to law school pedagogy, that popular consideration of the Constitution as a tool for social betterment should be more highly valued and encouraged. In many instances the courts are less protective of individual rights than "We the People" are disposed to be. In these cases, crucial activists from the ranks of the people have defined the content of what we now consider bedrock constitutional liberty. They were not satisfied to rest on the courts' interpretations of the Constitution, but rather recognized that the courts do not possess a monopoly on constitutional wisdom.⁷ They engaged in a crucial

7. As Justice Robert Jackson once admitted of the Supreme Court, "We are not final because we are infallible, but we are infallible only because we are final." *Brown v. Allen*, 344 U.S. 443, 540 (1953).

discourse, inquiring not only as to the courts' decisions, but also whether those decisions were ethically legitimate when measured against the democratic constitutional ideal. Their contributions were indispensable to the liberty we now enjoy. This is the sort of inquiry that should engage prospective lawyers and be the concern of the responsible citizen, especially lawyers by virtue of their training and status in the community as legal professionals.

II. OUR HISTORY OF POPULAR CONSTITUTIONALISM

To illustrate the importance of this sort of critical analysis, I will briefly (briefly because this is a critique of legal pedagogy and not a historical exposition *per se*) recount paradigmatic episodes in which the people's view of the Constitution squarely faced and triumphed over a more restrictive interpretation by the courts. Inquiry and challenge proved in these instances what law schools often fail to assert with authority: The Constitution is a document of the popular conscience.

A. SLAVERY AND POPULAR CONSTITUTIONALISM

Slavery certainly marks one of the darkest and most tragic periods in American history. But it also was the precipitating factor of one of the greatest and most far-reaching popular constitutional movements in United States' history. The controversy surrounding slavery, from the moment it was arguably sanctioned by the Constitution, ultimately led to the Civil War. Even the most ill-versed student of American history can tell you that the Civil War ended slavery in the United States. But what is not as readily well-known is the popular constitutionalism at work behind the scenes. The war, or more precisely, the Thirteenth Amendment, ended slavery; but, the immeasurable contributions by countless citizen "abolitionists" that preceded ultimate emancipation and citizenship for blacks should not be discounted. These contributions challenged a juridical conception of the Constitution that belied its overarching aspiration of human dignity; and, eventually, they redefined the constitutional norm of equality.

As assuredly as slavery bred popular unrest, it also bred bad law. The Supreme Court, for the better part of the Nineteenth Century, interpreted the Constitution totally to disenfranchise blacks. *Scott v. Sanford*,⁸ the infamous *Dred Scott* decision, marked one of the most pathetic moments in American constitutional history. The Supreme Court effectively decided that slaves could not be citizens of the United

8. 60 U.S. 393 (1856).

States and invalidated the Missouri Compromise,⁹ which checked the progression of slavery, in one sweep. Students are obviously knowledgeable of the changes in American constitutional jurisprudence from *Dred Scott* to the Fourteenth Amendment, to *Plessy*,¹⁰ to *Brown*,¹¹ to the Civil Rights Act of 1964, but they have been taught to conceptualize those changes in ways that trivialize their nature and import. Too much focus on the text of various opinions overlooks the activism that brought about these monumental changes. Before and after *Dred Scott*, abolitionists campaigned against the ills of slavery and the debasement of constitutional morality that the courts too often embraced and fostered.¹² The abolitionists understood that slavery did not comport with the Constitution's paramount precepts of human dignity and that any effort to legitimate the institution by constitutional reference would inevitably prove fruitless.

In the face of a contrary "final" word from the United States Supreme Court, it was the abolitionists' attack on the social ills of slavery and, more pointedly, their focus on the Constitution's mandates for humanity as a weapon against suppression of discourse, and ultimately against slavery itself, that led to the institution's undoing in America and paved the way for the Fourteenth Amendment—arguably the most populist portion of our populist Constitution.¹³ The abolitionists engaged in an analysis of American constitutionalism that went far beyond the Supreme Court's interpretation of what the Constitution had to say about slavery; they insisted that the Constitution demanded something entirely different. What they achieved is astonishing. Most importantly, the abolitionists connected slavery to the greater ideals of the Constitution. The early abolitionist argument focused on a belief that all people have inalienable rights, among which include control of their own bodies and persons, the right to free speech, and the right to acquire knowledge.¹⁴ In this way the abolitionists reconnected America with the revolutionary root of its constitutional reality. The abolitionists resorted to the fundamental tenet that the aim of the Constitution was to reserve these rights from the ebb of political power. The aim of the abolitionists, as voiced by radical disunionists like William Lloyd Garrison and Wendell Phillips, was that "the public mind" be "thoroughly revolutionized."¹⁵ Their criticisms of the prevailing constitutional

9. *Id.* at 427.

10. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

11. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

12. DAVID A. J. RICHARDS, *CONSCIENCE AND THE CONSTITUTION: HISTORY, THEORY AND LAW OF THE RECONSTRUCTION AMENDMENTS 78-79* (1993).

13. By this I mean that the Fourteenth Amendment enfranchised a segment of the populace that had formerly been excluded from the American constitutional scheme. Its very existence can be credited in large measure to the popular constitutionalism of the abolitionists.

14. See RICHARDS, *supra* note 12, at 75.

15. *Id.* at 93 (quoting Wendell Phillips, *Can Abolitionists Vote or Take Office Under the United States Constitution?* (New York, American Anti-Slavery Society, 1845)).

interpretation, and indeed of the Constitution itself, were strategically aimed to stir the slavery controversy beyond constraint.

1. FREDERICK DOUGLASS

A prime exemplar of the contentious abolitionist mind in action is Frederick Douglass. Douglass thought and wrote about slavery and campaigned for reform at a time when the constitutional law of the day unequivocally denied that slaves could be citizens and held that they were not part of “We the People.” Douglass repeatedly challenged the “official law” as it was handed down by the courts and enforced under their auspices. He escaped from slavery in Maryland in 1838 and made his way north to Massachusetts, where he lived as a free person—though his freedom was not made official until his manumission was purchased by friends and supporters in 1847.¹⁶ Douglass claimed citizenship as a right for himself and others, voted in state and federal elections, owned property, edited a newspaper (when it was illegal for blacks to even learn to read), engaged in interstate and foreign travel, and became an advisor to Abraham Lincoln.¹⁷ Douglass challenged the interpretation of the Constitution in his day—that slavery was contemplated and endorsed by the Constitution, and that slaves, consequently, were inferior and could not claim the benefits of citizenship. Rather than accepting the “final” say of the courts on this issue, Douglass championed a radical re-interpretation of the Constitution in which the whole document was read in moral harmony with the dictated goals of its Preamble and the aspirations of its precursor, the Declaration of Independence.¹⁸

While, ultimately, slavery ended with the Civil War and the Reconstruction Amendments and not by way of Douglass’ interpretation of the Constitution without amendment, Douglass’ contribution should not be overlooked. He formulated and publicized a theory whereby the Constitution could encompass radical, harmonizing change without the necessity of official amendment. Douglass proclaimed: “I hold that every American citizen has a right to form an opinion of the [C]onstitution, and to propagate that opinion, and to use all honorable means to make his opinion the prevailing one.”¹⁹ By refusing to consider himself intellectually bound by past interpretation or by the “final” decisions of the courts, Douglass realized and promoted the everyday

16. See Wayne D. Moore, *Constitutional Citizenship*, in CONSTITUTIONAL POLITICS: ESSAYS ON CONSTITUTION MAKING, MAINTENANCE 238 (Sotirios A. Barber & Robert P. George eds., 2001).

17. *Id.*

18. FREDERICK DOUGLASS, *The Present and Future of the Colored Race in America*, in 3 THE LIFE AND WRITINGS OF FREDERICK DOUGLASS, THE CIVIL WAR 354 (Philip S. Foner ed., 1952).

19. FREDERICK DOUGLASS, THE FREDERICK DOUGLASS PAPERS VOL. 2 1847-54 385 (John W. Blassingame, ed., Yale Univ. Press 1982).

role of the people in creating and redefining the content of constitutional norms.

2. THE CONTROVERSY OVER FUGITIVE SLAVES

Without question, the conflagration in public opinion and discourse caused by the abolitionists precipitated the eradication of slavery in the United States. Their success is also undeniably in large part a result of what was, for them, a fortuitous resolution of the Civil War. But even their presence in this conflict cannot be denied. When brother clashed with brother in America's bloodiest conflict, he did so doubtlessly under the banner of disagreement about states' rights and the moral and ethical position of slavery, but he did so also nurturing a schismatic disagreement about the fundamental principles of the Constitution and the revolutionary ideals of the founding on which it was based. Under the weight of abolitionist bombardment, the United States erupted in civil war or, as Lincoln coined it, "a war for preservation of the union."²⁰ But to many abolitionists, it was a revolution for constitutional vindication.²¹ Partly because of the abolitionists' influence, at the resolution of the Civil War, concern turned almost immediately to the relationship of blacks to white America and to the framing of the Fourteenth Amendment.²²

Chief Justice Roger Taney's Court presented a supposedly authoritative interpretation of the Constitution that was undeniably racist and judicially unsound.²³ The Court effectively ruled that blacks were inferior and the words of the Declaration, that all men are created equal, were not meant to apply to the African race.²⁴ The abolitionists sought to give constitutional equality a different definition, and their challenge to the status quo resulted in a redefining of equality in the United States. Frederick Douglass is merely a famous example. Abolitionist fervor was felt at all levels, from the national celebrity to the common man. Slavery provided ample opportunity for the popular mind to wrangle with the greater meanings of liberty and democracy. The fugitive slave controversy provided one such opportunity.

The Fugitive Slave Act of 1793²⁵ was enacted to ensure that slaves escaping to the North would not be lost to their owners. Abolitionists in the North were naturally hostile to the Act, and increasing anti-slavery sentiment resulted in the "personal liberty laws" aimed at weakening the Act's effects. The most significant challenge came in 1837 in the *Prigg*

20. RICHARDS, *supra* note 12, at 110.

21. *Id.*

22. *Id.* at 110, 114.

23. *Id.* at 113.

24. *Id.* (discussing *Scott v. Sanford*, 60 U.S. 393 (1856)).

25. 1 Stat. 302, sec. 4 (1793).

case.²⁶ Edward Prigg, a professional slave catcher, was hired by a Maryland woman to go to York County, Pennsylvania, to recover her escaped slave Margaret Morgan and Morgan's two children.²⁷ Pennsylvania had passed a fugitive slave act "supplementing" the federal act of 1793 whereby anyone entering Pennsylvania to reclaim a fugitive slave had first to resort to a magistrate for a warrant.²⁸ This requirement directly violated the federal act, which provided that the fugitive could first be captured and then presented to a judge.²⁹ Prigg complied with the law to the extent that he obtained a warrant, but he spirited Morgan and her children back to Maryland without the judicial finding that he was authorized to do so.³⁰ Prigg was indicted under Pennsylvania law for kidnapping and was extradited to Pennsylvania to stand trial.³¹ But the case at this point in the slave conundrum was about far more than Prigg's future. Pennsylvania, in fact, agreed that the case would only proceed if it proceeded to the United States Supreme Court.³²

Ultimately, the Court declared Pennsylvania's law to be in impermissible conflict with the federal Constitution.³³ Abolitionists, however, were not convinced by the Court's pronouncement. They would test Prigg's solidity in less than a year. This challenge came by way of the *Latimer* case.³⁴ George Latimer was an escaped slave from Virginia living in Massachusetts. Though it appeared that the claims of Latimer's owner would prevail, the proceedings were abruptly terminated when Latimer's owner agreed to sell him to Boston abolitionists.³⁵

The abolitionists, however, were not deterred, and the passage of "personal liberty laws" in direct defiance to the Prigg precedent multiplied in the North.³⁶ The South reacted by forcing the passage of the Fugitive Slave Act of 1850, which more stringently protected Southern property interests in runaway slaves,³⁷ but defiant legislation continued to increase. Eventually, every state in New England and most other Northern states had passed laws that served to retard the effectiveness of the fugitive slave acts.³⁸

The fervor over slavery continued to build until the nation's endurance cracked. Civil War ended in Union victory at a heavy price in

26. Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842).

27. *Id.* at 608.

28. *Id.* at 608-09.

29. *Id.* at 617.

30. *Id.* at 609.

31. Prigg, 41 U.S. at 609.

32. *Id.* at 609-10.

33. *Id.* at 625-26.

34. See generally ROBERT B. SHAW, A LEGAL HISTORY OF SLAVERY 239 (1991).

35. *Id.* See also Leonard W. Levy, *The Law of the Commonwealth and Chief Justice Shaw*, reprinted in THE SPIRIT OF AMERICAN LAW 141 (George S. Grossman, ed. 2000).

36. SHAW, *supra* note 34, at 243.

37. *Id.*

38. *Id.*

life and liberty. But, the Reconstruction Congress saw the enactment of many of the abolitionists' constitutional ideals into positive law with the Thirteenth, Fourteenth, and Fifteenth Amendments.³⁹ Indeed, the primary drafter of the Fourteenth Amendment, arguably the most popularly oriented of all constitutional measures, was himself an ardent anti-slavery advocate.⁴⁰ The construction of the Fourteenth Amendment, therefore, marked the legitimization of the abolitionists' popular ideals about the content of our constitutional liberty. Even though it would be long before the ideals embodied there were treated seriously, their efforts stand as the purest example of a popular shaping of constitutional reality.

B. THE EVOLUTION OF FREE SPEECH

The issue of slavery also provided another paradigmatic example of popular constitutionalism shaping constitutional norms: the evolution of freedom of speech. "Free speech," of course, has numerous implications. Most germane to the points here is free speech as it relates to our democratic form of government. For many of us, the idea that we can speak out about, or even against, our government is a given. The fundamental premise of a democracy is that individual citizens will contribute to the shaping of the collective good. In order to do so, it is imperative that there be free access to information and that issues be debated and alternatives analyzed in the public forum. It will come as no surprise to anyone with even the most cursory knowledge of American history that the free speech rights of freed slaves and successive generations of African-Americans were not robustly protected. It might, however, come as a surprise that the norm in connection with other groups and causes in American history was a system of protection only in theory, or flatly no protection at all. In fact, American history is more wont than glorious in this regard. For instance, it was not until 1925 that the Supreme Court suggested that freedom of speech and press, as we have come to know them, were protected ideals under the First and Fourteenth Amendments.⁴¹

Early American history resonates with the Blackstonian theory of free speech, i.e., "the liberty of the press . . . consists in laying no previous restraints upon publications and not in freedom from censure for criminal matter when published."⁴² Consequently, under that theory, free speech is merely a matter of chronology, which is to say that while

39. These amendments, at least as I believe they were intended by their framers if not so interpreted by the courts, brought blacks into the constitutional fold in line with the abolitionist vision. The Thirteenth Amendment ended slavery, the Fourteenth Amendment secured the rights of citizenship for blacks, and the Fifteenth Amendment gave voting rights.

40. The reference is to John Bingham of Ohio. *See generally* MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* (1986).

41. *See* *Gitlow v. New York*, 268 U.S. 652 (1925).

42. 4 WILLIAM BLACKSTONE, *COMMENTARIES* *151.

government may not enjoin the publication of material, it may punish publication after the fact, all it wants.⁴³ The Federalist administration of President John Adams took this view to heart in enacting the Sedition Act of 1798.⁴⁴

The year 1798 was not unlike present times. The United States, because of impending war, feared for its safety and political stability and sought to protect itself from the type of revolutionary idealism then wreaking havoc in Europe. Insulation from the perceived threat of political instability, however, came at a price, a price exacted by the Sedition Act. The Sedition Act criminalized false, scandalous, and malicious writings against the government, either house of Congress, or the President, if such publication was made with defamatory intent, or with the intent to stir up popular discontent with the government.⁴⁵ Not surprisingly, the Adams Administration had exempted “false and malicious” criticisms of Vice President Thomas Jefferson, President Adams’ Republican opponent in the upcoming election.⁴⁶

The Federalists declared, “Whatever American is a friend to the present Administration of the American Government, is . . . a true Patriot: For the Administration is, of necessity, elected by a majority of the people . . . It is Patriotism to write in favor of our Government—it is Sedition to write against it.”⁴⁷ Thus, by reducing the First Amendment’s protections of free speech and press to a prohibition of prior restraint only, the Federalists fashioned a formidable weapon against dissent.

The courts enforced the Sedition Act, even against constitutional challenge. Take, for example, the case of Matthew Lyon, a Republican congressman from Vermont, who became the first person convicted under the Sedition Act.⁴⁸ As a critic of Adams’ military policy, Lyon wrote:

Whenever I shall, on the part of the Executive, see every consideration of public welfare swallowed up in a continual grasp for power, in an unbounded thirst for ridiculous pomp, foolish adulation, and selfish avarice . . . when I shall see the sacred name of religion employed as a state engine to make mankind hate and persecute one another, I shall not be their humble advocate.⁴⁹

43. ZECHARIAH CHAFEE JR., *FREE SPEECH IN THE UNITED STATES* 9 (1941).

44. 1 Stat. 596 (1798).

45. *Id.*

46. Michael Kent Curtis, *Judicial Review: Blessing or Curse? Or Both? A Symposium in Commemoration of the Bicentennial of Marbury v. Madison: Judicial Review and Populism*, 38 WAKE FOREST L. REV. 313, 357 (2003) [hereinafter Curtis, *Judicial Review*].

47. *Id.* at 358.

48. The following facts about the *Lyon* case are taken from MICHAEL KENT CURTIS, *FREE SPEECH*, “THE PEOPLE’S DARLING PRIVILEGE”: STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY 83-84 (2000) [hereinafter CURTIS, *FREE SPEECH*].

49. *Id.* at 81.

For his criticisms, Lyon was indicted under the Sedition Act, and he unsuccessfully challenged its constitutionality.⁵⁰

The Jeffersonian Republicans assiduously challenged this conception of free speech.⁵¹ They rejected the Blackstonian view of free speech as merely freedom from prior restraint, proclaiming, “to speak, write, and censure freely are privileges of which freemen cannot divest themselves.”⁵² Eventually, the Jeffersonian Republicans won the debate. Internal conflict within the Federalist Party over President Adams’ handling of the potential war with France divided the party, and the Republicans carried the 1800 election.⁵³ Newly elected President Jefferson pardoned those convicted under the Sedition Act, and the act quietly expired.⁵⁴ The Jeffersonian Republicans’ refusal to passively accept the prevailing, restrictive view of freedom of speech eventually ushered in an era of more expansive federal protection of speech and press. By 1840, the view that the Sedition Act was unconstitutional evidently carried the day.⁵⁵ In 1840, the House of Representatives considered and passed a bill to repay Matthew Lyon’s fine; the report in favor of the bill noted that the Sedition Act was a “mistaken exercise of undelegated power.”⁵⁶

C. THE WOMAN’S MOVEMENT

This essay has extolled the popular movement that eventually ended slavery and redefined the constitutional norm of equality by virtue of the Fourteenth Amendment. Unfortunately, the trilogy of post-Civil War amendments that ostensibly brought equality to blacks preserved prejudices along gender lines. The Court apparently had no regrets about perpetuating those biases. In the 1879 decision of *Strauder v. West Virginia*,⁵⁷ the Court struck down a challenge by blacks to a West Virginia statute restricting jury service to whites only. The Court then added, for good measure, that it perceived no problem where the law restricted jury service to males only.⁵⁸ In the early 1870s, the Court upheld laws that barred women from voting⁵⁹ and from law practice.⁶⁰ In fact, it was not until the 1971 case of *Reed v. Reed* that the United States

50. *Id.* at 82.

51. See Curtis, *Judicial Review*, *supra* note 46, at 359.

52. *Id.*

53. Curtis, *FREE SPEECH*, *supra* note 48, at 94.

54. Curtis, *Judicial Review*, *supra* note 46, at 359.

55. Curtis, *FREE SPEECH*, *supra* note 48, at 84.

56. *Id.*

57. 100 U.S. 303 (1879).

58. *Id.* at 310.

59. *Minor v. Happersett*, 88 U.S. 162 (1874).

60. *Bradwell v. State*, 83 U.S. 130 (1872).

Supreme Court found a discriminatory gender-based classification unconstitutional.⁶¹ This case was the beginning of successful constitutional litigation of women's rights claims. Popular constitutionalism was, however, at work well in advance of the first positive stirrings in the Court. The National Organization of Women was formed in 1966, and the National Association for the Repeal of Abortion Laws was formed in 1969. Two groups, the National Women's Political Caucus and the Women's Rights Project—which brought *Reed* to the Court—were formed in 1971.⁶²

The beginning of feminist organization, of course, far predates these groups. The earliest real surge in feminist social development dates to sisters Sarah and Angelina Grimké, who rose to the challenge of gender inequality while laboring in the fight against slavery. The Grimké sisters, the children of a slaveholder from South Carolina, migrated to Philadelphia, where they began to write and lecture for the abolitionist cause.⁶³ By the late 1830s, the sisters were holding meetings in numerous New England towns. While history will today hail them as outspoken and successful advocates of both causes, they were, in their own day, met with overwhelming Nineteenth Century convention that nearly silenced their efforts. As religion was, at least in the North, often a powerful weapon in the abolitionist arsenal, it is surprising to find that religious convention was one of the greatest enemies of the Grimké sisters' abolitionist efforts. The bigoted dicta of St. Paul, which the South used to validate slavery,⁶⁴ were used in the North to invalidate the impassioned voices of the Grimké sisters.⁶⁵ The sisters' campaigning and foray into public life offended the prevailing religious sentiment of the day. The Council of Congregationalist Ministers of Massachusetts issued a staunch condemnation:

61. *Reed v. Reed*, 404 U.S. 71 (1971) (holding unconstitutional a state statute that mandated preference of a male executor of an estate over a female executor of the estate, even when familial ties were equal between the two).

62. GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE* 241-42 (1991).

63. Charleston officials had actually exiled Angelina, and her work, *Appeal to the Women of the South*, was publicly burned by South Carolina postmasters.

64. St. Paul's admonitions in his epistle to Timothy (below) and others of his New Testament writings were widely used in the South to justify the legality of slavery from a religious, moral standpoint:

Let as many servants as are under the yoke count their own masters worthy of all honor, that the name of God and his doctrine be not blasphemed. And they that have believing masters, let them not despise them, because they are brethren; but rather do them service, because they are faithful and beloved, partakers of the benefit. These things teach and exhort. If any man teach otherwise, and consent not to wholesome words, even the words of our Lord Jesus Christ, and to the doctrine which is according to godliness.

1 *Timothy* 6:1-3 (King James).

65. "Let the women learn in silence with all subjection. But I suffer not a woman to teach, nor to usurp authority over the men, but to be in silence." 1 *Timothy* 2:11-12 (King James).

We invite your attention to the dangers which at present seem to threaten the female character with widespread and permanent injury. The appropriate duties and influence of women are clearly stated in the New Testament. Those duties, and that influence are unobtrusive and private, but the sources of mighty power. When the mild, dependent, softening influence upon the sternness of man's opinions is fully exercised, society feels the effect of it in a thousand forms. The power of woman is her dependence, flowing from the consciousness of that weakness which God has given her for protection.⁶⁶

Thus, in seeking to contribute to the abolitionist cause, the sisters found that they were forced to fight a new battle. They wasted no time in answering their critics. Sarah Grimké wrote:

Adam's ready acquiescence with his wife's proposal does not savor much of that superiority in *strength of mind* which is arrogated by man. Even admitting that Eve was the greater sinner, it seems to me that man might be satisfied with the dominion he has claimed and exercised for nearly 6000 years, and that more true nobility would be manifested by endeavoring to raise the fallen and invigorate the weak than by keeping women in subjection.⁶⁷

But purely religious condemnation was not the only problem challenging the Grimkés and their allies. American law and religion were very much intertwined in the Nineteenth Century. Perceived biblical biases against women had made their way into the American legal structure. The abolitionist cause was in full swing and the increasingly anxious South looked for every way to quell the mounting chorus of anti-slavery sentiment. As abolitionist petitions from women's anti-slavery organizations poured into Congress, the House of Representatives passed the Pinckney Gag Rule⁶⁸ to forbid their presentation. As Congressman Howard of Maryland declared, women, largely the petition gatherers, had no legal right to petition Congress as they had no legal right to vote.⁶⁹ This prompted former president John Quincy Adams, now serving as a representative of Massachusetts to retort, "Is it so clear that they have no such right as this last?"⁷⁰

66. ELEANOR FLEXNER, *CENTURY OF STRUGGLE: THE WOMAN'S RIGHTS MOVEMENT IN THE UNITED STATES* (rev. ed. 1975) (1959) (quoting a Pastoral letter).

67. *Id.* at 47.

68. WILLIAM LEE MILLER, *ARGUING ABOUT SLAVERY* 508 (1996); see CONG. GLOBE, 24th Cong., 1st Sess. 40, 75-77 (1836).

69. FLEXNER, *supra* note 66, at 50-51.

70. *Id.* at 51.

Thus, when in 1848 Elizabeth Cady Stanton, Lucretia Mott and others met at Seneca Falls, New York, to draw up the first petition for the redress of women's rights, a right to suffrage was inserted. Mrs. Stanton quoted the Declaration of Independence and was supported by such notable popular constitutionalists as Frederick Douglass.⁷¹ Indeed, in 1894, Mrs. Stanton boldly declared suffrage a natural right.⁷² The women argued that inequality for women challenged American revolutionary principles in the same way that slavery challenged them, and so needed to be abolished.⁷³ The natural rights argument for the vote and the idea of the universality of the Declaration's principles, as they inform the Constitution, were arguments the women's rights movement cultivated and utilized until the constitutional norm of equality again changed in 1920, and women were allowed to vote.⁷⁴

D. PRINCIPLED DISSENT AND MARTIAL LAW IN HAWAII⁷⁵

World War II provides a more contemporary example of the popular shaping of constitutional values. Take, for instance, the civil liberties crisis that gripped Hawaii after the Japanese attacks in December 1941. Only hours after the Japanese attacked, the Governor of Hawaii and the military agreed that martial law would be imposed and *habeas corpus* suspended.⁷⁶ The extent to which martial "law" gripped Hawaii, however, cannot be overstated. The edict meant the closing of all civilian courts, including the federal district court for Hawaii, and military censorship of mail and press. Living in our own wartime era, we can easily see how "security" can be the wholesale justification for a host of questionable civil liberties positions. This episode in civil liberties is different from the above accounts, because popular constitutionalism operated, not in spite of what the courts were saying, but in a void created by an utter absence of judicial scrutiny of military action. When the courts were allowed to open a few months after the initial kibosh, they were marginalized and few cases were pressed.⁷⁷ Indeed, when federal district judge Delbert Metzger clashed with the

71. AILEEN S. KRADITOR, *IDEAS OF THE WOMAN SUFFRAGE MOVEMENT 1890-1920* 1 (1965).

72. *Id.* at 45.

73. Interestingly enough, it was an organization led by Mrs. Stanton and Susan B. Anthony that first petitioned Congress to make emancipation permanent by virtue of a thirteenth amendment to the Constitution. See Nell Irvin Painter, *Voices of Suffrage: Sojourner Truth, Frances Watkins Harper and the Struggle for Woman Suffrage*, in *VOTES FOR WOMEN: THE STRUGGLE FOR SUFFRAGE REVISITED* 42 (Jean H. Baker ed. 2002).

74. U.S. CONST. amend. XIX, § 1.

75. Harry N. Scheiber & Jane L. Scheiber, *The Roles of Lawyers in a Civil Liberties Crisis: Hawaii During World War II*, in *CONSTITUTIONALISM AND AMERICAN CULTURE: WRITING THE NEW CONSTITUTIONAL HISTORY* 123-73 (Sandra F. Van Burkleo et al. eds. 2002).

76. *Id.* at 125.

77. *Id.* at 127.

military commander in Hawaii, General Robert Richardson, the general threatened to try Metzger militarily, with a sentence of five years hard labor.⁷⁸ When *habeas corpus* was pressed, for instance in the Ninth Circuit in 1942, the appeals court upheld the military action as a necessity.⁷⁹ The Supreme Court conveniently denied certiorari. In fact, it was not until four years after the Pearl Harbor attack that the Court heard the first appeals challenging the military regime in Hawaii.⁸⁰ Even then, the majority based its repudiation of the military position on statutory rather than purely constitutional grounds.⁸¹ Moreover, the Court's decision came too late to aid those who had been injured by unconstitutional military usurpation of their liberty.

Blackouts and curfews were imposed, as well as total regulation of labor relations.⁸² Job changing and absenteeism were made criminal offenses under the army code, and violators were tried in military courts with perfunctory trials, no jury, and without counsel.⁸³

As it is today, speaking out against military action in a time of war was unpopular in occupied Hawaii. But there were courageous individuals who recognized the incompatibility of the military's action with our constitutional ideals. One such individual was attorney J. Garner Anthony.⁸⁴ As a prominent member of the bar and Hawaii's social elite, Anthony was approached, along with other prominent lawyers, to serve in the military tribunals which General Green, then commander in Hawaii, had intended to staff partially with civilians.⁸⁵ Anthony refused in protest, and his refusal prompted many other bar members to refuse as well, thwarting the military's effort to give an air of legitimacy to an otherwise illegitimate exercise of power.⁸⁶ In May, 1942, Anthony published an article in the *California Law Review*, which was extensively covered in the *New York Times* and Hawaiian newspapers, challenging the military's rule in Hawaii as unconstitutional.⁸⁷ The article sparked a firestorm of criticism in the legal community and led the military to respond with its own article, also in the *California Law Review*.⁸⁸ Though its instant accomplishments

78. *Id.* at 126.

79. *Zimmerman v. Walker*, 132 F.2d 442, 446 (9th Cir. 1942), *cert. denied*, 319 U.S. 744 (1943).

80. *Duncan v. Kahanamoku*, 327 U.S. 304 (1946) (finding that the supplanting of civilians by military tribunals in Hawaii was unlawful).

81. *Id.*

82. *Scheiber & Scheiber*, *supra* note 75, at 123, 128.

83. *Id.*

84. *Id.* at 136.

85. *Id.*

86. *Id.* at 137.

87. Anthony is also another example, having been a corporate lawyer, that one does not need to be a constitutional lawyer *per se* or a member of the scholarly community to contribute meaningfully to academic analysis of the Constitution. J. Garner Anthony, *Martial Law in Hawaii*, 30 CAL. L. REV. 371 (1942).

88. Archibald King, *The Legality of Marital Law in Hawaii*, 30 CAL. L. REV. 599 (1942).

were negligible, Anthony's tactic of bringing the issue into the academic forum at least made certain that the progression of martial law would receive the much needed scrutiny of the legal community, particularly the community outside Hawaii.

E. SOME CURRENT EXAMPLES

1. CHAPEL OF CONTENTION

Consider for a moment a private university where there is a chapel. The chapel is utilized by a congregation independent of the university. When a same-sex couple wishes to be married in the chapel with the blessing of the congregation, the university trustees issue an order prohibiting the ceremony, and then proceed to censor the school press's coverage of their actions. Of course, private schools may proscribe speech in ways that the government would not be able to do.⁸⁹ Certainly there is no articulated constitutional right to same-sex marriage.⁹⁰ Yet, the outcry of university faculty and students leads to a repeal of the university imposed censorship, and the marriage ultimately goes forward. In this example, the people's ideas about what free speech and equality require, as opposed to what the courts have delineated, triumphed.

2. CROSSGATES CONTROVERSY

Consider also a recent example of popular constitutionalism in action. A sixty-year-old attorney, Steve Downs, was arrested at the Crossgates Mall in New York for refusing to remove a "Give Peace a Chance" t-shirt (which he had purchased at the mall), and then refusing to leave the mall when asked to do so by mall officials. The Supreme Court (and New York's highest court) has found that shopping malls, even the common areas, are not public fora in which constitutional free speech norms apply.⁹¹ The law was on the mall's side. But a hundred or so protestors—members of "We the People"—showed up at the mall to protest its shortsighted policy; as a result, the mall sought to drop the prosecution.⁹² The popular conception of the content of the free

89. Since the relationship between a private college and its students is based upon contract, private colleges may make necessary rules to insure orderly management and may make obedience to those rules a condition of matriculation at the school.

90. While Vermont, and most recently Massachusetts, have legalized gay unions in one form or another, the Supreme Court has not addressed the issue of a constitutional right to marry that would reach gays and lesbians.

91. *See Amalgamated Food Emp. Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 300 (1968).

92. *Protestors gather at Crossgates Mall* (NBC News Channel 13, Albany, N.Y., Mar. 5, 2003), available at <http://www.msnbc.com/local/WNYT/M276307.asp>.

expression norm triumphed in direct contrast to the norm as defined by the courts.

These situations could easily have had unhappy endings had concerned citizens not refused to merely accept the law for what it “is.” The legitimacy of any governing law is in part a measure of the governed people’s commitment to it. It would therefore be a mistake not to see the sort of commitments exemplified in the preceding paragraphs as constitutionally significant, quite apart from whether those commitments constitute the law as it “is” or even whether they reflect the overall views of society. Our Constitution, after all, is a reflection of the rights inherent in the people for whom it was written. In this way, a most important purpose of reasoning, responsible citizens—in particular for lawyers because of their special training and skill—is to protect and enhance the ideals of the Constitution through active popular constitutionalism.

III. LEGAL EDUCATION AND POPULAR CONSTITUTIONALISM

With the exception of militarized Hawaii, these examples of popular constitutionalism were not undertaken by lawyers. Yet, I began this essay with a rather pessimistic point about public participation in government. It is common knowledge that voter turnout is low and public apathy is high. If the Constitution is now to be left to lawyers, with constitutional vitality ultimately dependent upon popular commitment, it stands to reason that lawyers will be left with the increasingly important duty of relating the law to the public. As the gap between citizen and government grows, lawyers must stand in the gap. If lawyers and policymakers turned out by law schools are to effectively relate and explain the law to the “unschooled” public, they cannot afford to overlook the sociology of the law, what Benjamin Cardozo called sociological jurisprudence.⁹³ Cardozo wrote, “The final cause of law is the welfare of society.”⁹⁴ In a lecture at the University of Akron Law School, Steven Gottlieb referred to the problem as the passing of the Cardozo generations.⁹⁵ Justice Cardozo has very obviously had an enormous impact on the law and the study of law. But as Professor Gottlieb notes, the era of sociological jurisprudence and the generations of “Cardozo lawyers” has passed.⁹⁶ Many young lawyers can identify the negative implications of the Constitution in terms of what it forbids,

93. See generally BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921); see also RICHARD POLLENBURG, *THE WORLD OF BENJAMIN CARDOZO: PERSONAL VALUES AND THE JUDICIAL PROCESS* (1997).

94. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (6TH ED. 1928).

95. Stephen E. Gottlieb, *The Passing of the Cardozo Generations*, 34 *AKRON L. REV.* 283 (2000).

96. *Id.*

but they can do little in the way of explicating its substance. Constitutional dialogue has suffered, and the lawyer trained as policymaker and society-builder is virtually extinct.

I share Professor Gottlieb's concern about how we, as lawyers, relate the Constitution to nonlawyers.⁹⁷ Indeed, I would have grave reservations about challenging a posting of the Ten Commandments or a religious monument on public property in rural North Carolina in only the vocabulary of the courts. Why? The answer is simple: the people have their own ideas about the Constitution. Surely their Constitution permits them their "thou shalt not(s)" and their manger scenes on public property. As lawyers, we rattle off what the Court has said about purely religious displays or mandatory prayer. But this accomplishes little in the way of changing attitudes. I have a very colorful friend who has a way of summing up what he hears when people he is not fond of speak. "Background noise," he calls it.⁹⁸ And were I to attack the people of rural North Carolina with the *Lemon* test, that is exactly what they would hear—background noise.⁹⁹

In so far as it is possible to affect those who are bent on having their manger scenes, they are not likely to be affected by my recitation of precedent. They will only be affected by an understanding of the risks they face and the potential consequences of not giving up their manger. In short, they are likely to be swayed only when they are convinced of the overarching moral imperative of the Constitution and why we must impose the First Amendment's nonestablishment norm. They will not be swayed, by my relating to them that in *Lynch v. Donnelly* or *Allegheny County v. A.C.L.U.*, the Supreme Court decided that purely religious displays violated the Constitution.¹⁰⁰ If my hypothesis that lawyers are now necessary to fill the gap between citizen and Constitution is correct, it follows that the people in rural North Carolina will only be swayed if their lawyers and policymakers understand the moral imperatives that necessitate the implementation of constitutional safeguards and can argue them convincingly.

Our Constitution is a marvelous vehicle through which we can actualize our democratic ideals. But in order for the Constitution to be utilized to its utmost, it must continue to be vital and important to the people for whom it was written. The people responsible for the constitutional revolutions I recounted earlier in this essay saw the

97. *Id.* at 291.

98. *See also id.* at 288 (discussing a similar argument against overly technical discourse as a means for informing the public).

99. The Court in *Lemon* held that the Establishment Clause forbids government sponsorship of religion. In order for a statute to survive it must have a secular legislative purpose; its principal or primary effect must be one that neither advances nor inhibits religion; and it must not foster an excessive government entanglement with religion. To the extent that they would be inclined to entertain the Supreme Court's argument in this regard, many people would be left nonplused by its complications. *Lemon*, and its practical application, stupefies many lawyers.

100. 465 U.S. 668 (1984).

Constitution as vital, and it was important to them. They concerned themselves with the Constitution not only in terms of what the Constitution said they could not be or do, but also with what they believed the Constitution meant and what it potentially allowed them to be and do.

Lest constitutionalists everywhere cry foul, the purpose of the Constitution is, as Justice Jackson put it in *Barnette*, to “withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.”¹⁰¹ I know it perfectly well, and I believe it. However, the idea that popular understanding of the Constitution matters has been around since the framing. In the Declaration, Jefferson addressed the “Opinions of Mankind.”¹⁰² Even Madison, the principal architect of the Constitution, respected popular constitutionalism. Like Jefferson, Madison viewed the people as presumptively liberating.¹⁰³ Madison, however, drew lines along the duality of human nature. Popular reason, he believed, should control and regulate government.¹⁰⁴ Public passion, however, should be controlled by the government.¹⁰⁵ Perhaps Justice Jackson’s statement in *Barnette* should be read in this light. Lawyers charged with implementing public policy, then, must learn to appeal to popular reason by cultivating their own. They must cease to see the Constitution only in terms of what the courts have said and come to see it for what it means for themselves and for the American people generally. Mere recitation of appellate opinion will not accomplish this goal.

The key to all this discordance is, of course, education. As the dramatist Terence once said, “[N]othing is said that has not been said before.”¹⁰⁶ Professors Lasswell and McDougal pointed out the problem as early as 1943, writing, “[d]espite all the talk of ‘teleological jurisprudence’ and of the necessity of evaluating legal structures, doctrines, and procedures in terms of basic policy, there is little conscious systematic effort to relate them clearly and consistently to the major problems of a society struggling to achieve democratic values.”¹⁰⁷ But while nothing is said that has not been said before, as Andre Gide clarified, “Everything has been said before, but since nobody listens we have to keep going back and beginning all over again.”¹⁰⁸ Therefore, I reiterate that in their approach to teaching the Constitution and indeed

101. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943).

102. James G. Wilson, *The Role of Public Opinion in Constitutional Interpretation*, 1993 BYUL REV. 1037, 1054 (1993).

103. *Id.* at 1057.

104. *Id.*

105. *Id.*

106. EUNUCHUS, Prologue (1629).

107. Howard D. Lasswell & Myres S. McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 YALE L. J. 203, 205 (1943).

108. LE TRAITE DU NARCISSE (1891).

the law generally,¹⁰⁹ law schools must broaden their notions of what it means to be a professional school.¹¹⁰ The Constitution will be better explicated, not in terms of technicality or judicial fiat, but of value and social objective. In their article, now some sixty-years-old but still efficacious, Professors Lasswell and McDougal offer an involved plan to accomplish beneficial change in legal education.¹¹¹ I offer no such involved solution. I simply point out that law schools fail students when they do not challenge them to question what the law should be as often as they inform them of what the law is.

Of course, to believe that this discussion is even necessary, one must accept what must be my obvious opinion from this essay: that the primary purpose of legal education is to teach the lawyer, at every possible juncture, a consciousness and commitment to our democratic ideals and constitutional morality. As Lasswell and McDougal adroitly put it, "to contribute to the training of policymakers for the evermore complete achievement of the democratic values that constitute the professed ends of American polity."¹¹² For me, legal education is inescapably value laden. It is the duty of every professional law teacher to deal with this sociology. Even today, however, I have had colleagues express to me their professional preference for a completely dispassionate classroom approach, with concern merely for method. Like my predecessors sixty years ago, I can only confess my inability to identify.¹¹³ Considering the modern progress of liberty, I pray that is not the opinion to carry the day. As the gap between the people and their government continues to widen, the influence of lawyers as mediators, policymakers, and deliverers of explanation is increasingly important. Consequently, it is imperative that the law school teach the lawyer to make not only a study of the current status of the law, but also an inquiry into its long-term effects on his fellow citizen. The study of law is an endeavor of the past, present, and future, and it is above all a study of people.

IV. CONCLUSION

The Constitution has explicitly granted law-making power in various capacities to the various branches of government. By doing so, however, the Constitution has not removed the people from the process entirely. Our rights, after all, are antecedent to government and are

109. Lasswell & McDougal, *supra* note 107, at 291. Professors Lasswell and McDougal did not limit their discussion to one area of the law.

110. By this I mean they must teach that the law is a true calling, a vocation, not merely a "profession."

111. Lasswell & McDougal, *supra* note 107, at 204-05. Some of their suggestions, like clinical programs, have become staples of modern legal education.

112. *Id.* at 206.

113. *Id.* at 207.

inherent, indeed inseparable, from the individual—so promises the Declaration. There are some very good reasons to recognize and to encourage the recognition of legal norms that reach beyond what the law “is.” The only permanent aspect of American constitutional history is change, but this change is not unilinear, i.e., merely the product of the courts. The preceding examples demonstrate how individuals can, by exercising their rights of speech, voting, assembly and others, create unofficial constitutional norms that beneficially contribute to our democratic liberty. This sort of change is most often not a sweeping deluge, but a ceaseless trickle, and it quite often does not begin in the legislature or the courts. It begins instead with a much more circumspect questioning and popular unrest with the status quo. As the role of lawyers becomes increasingly vital to the understanding and development of constitutional law, commitments to popular constitutionalism and social welfare become imperative.

Engendering a commitment to popular constitutionalism admittedly requires a difficult balance. When I first taught legal research at Wake Forest Law School, I created a research scenario based on a civil liberties issue, specifically race relations, that I hoped would help not only to teach the students legal method but also to make them think critically about the issues themselves. The extent of contention over the underlying issues was more than I expected. Courses in legal method cannot be dominated by substantive law. Likewise, substantive courses like constitutional law must teach students the current status of the law; of this there is little basis for dispute. But law schools have a further obligation to engender in students the truth that lawyers, as citizens, are charged with contributing to and enhancing the Constitution’s meaning and vitality through intellectual contemplation and challenge.

The abolitionists, free speech advocates, and equal rights activists mentioned above defined constitutional norms by voting, writing, speaking, and participating in constitutional dialogue in other meaningful ways. Law schools should strive to motivate their students to become this sort of participating member of “We the People” by challenging them not only to learn the law, but also to dissect and evaluate it. The law, and constitutional interpretation in particular, is not insulated from social striving and intellectual criticism; the meaning of the Constitution is dramatically different in the Twentieth and Twenty-first centuries than it was even in the Nineteenth Century. Hopefully, we can say that the law has changed for the better. If we strive for continual advancement, future members of the legal community must be taught not just a mastery of the law as it “is,” but a commitment to critical analysis and to creating and changing constitutional norms for the better. As liberty is ultimately a possession not of the courts but of the people, a deeper commitment, especially among lawyers, to the dynamic nature of American law, beyond mere static application, is paramount to the survival of our

democratic ideals. Liberty, after all, receives both its definition and its strength from the committed members of the society that enjoy its blessings. Accordingly, legal education must strive to instill and strengthen that commitment.