

Denver Law Review

Volume 90
Issue 4 *Twentieth Annual Ira C. Rothgerber Jr.*
Conference: Public Constitutional Literacy

Article 2

January 2013

Public Constitutional Literacy: A Conversation

Melissa Hart

Follow this and additional works at: <https://digitalcommons.du.edu/dlr>

Recommended Citation

Melissa Hart, Public Constitutional Literacy: A Conversation, 90 Denv. U. L. Rev. 825 (2013).

This Front Matter is brought to you for free and open access by the Denver Law Review at Digital Commons @ DU. It has been accepted for inclusion in Denver Law Review by an authorized editor of Digital Commons @ DU. For more information, please contact jennifer.cox@du.edu, dig-commons@du.edu.

Public Constitutional Literacy: A Conversation

FOREWORD: PUBLIC CONSTITUTIONAL LITERACY; A CONVERSATION

MELISSA HART[†]

What is constitutional literacy and how is it different from civic literacy? Is constitutional literacy a neutral concept? If it is not, does that matter? What role does constitutional literacy serve in preparing young people to participate as citizens in our democracy? Can and should law schools participate in efforts to advance constitutional literacy among younger students? The Twentieth Annual Ira C. Rothgerber Jr. Conference, “Public Constitutional Literacy,” brought scholars, judges, lawyers, and teachers together at the University of Colorado Law School to consider these and other questions.

The event was prompted in large part by three interactions I had during the 2011–2012 school year:

First, when Colorado Law launched its first “Constitution Day Project,” sending law students into high school classrooms all over Colorado to teach a lesson in recognition of Constitution Day, an online comment to a news story about the event caught my attention. The commenter queried: “Taught Constitutional law by CU law students? Depends which Constitution they choose. Obama’s taught by liberal professors in Boulder or the original signed by Patriots.”¹ The remark was a reminder that the concept of constitutional literacy is not uncontroversial.

The second was a conversation I had with American University Washington College of Law (WCL) Professors Jamin Raskin and Maryam Ahranjani at a meeting of chapter directors for the Marshall–Brennan Constitutional Literacy Project (Marshall–Brennan), which Professor Raskin had founded in 1999. We were discussing the resistance that programs like Marshall–Brennan often face from law school faculties because there is a concern about whether these programs are sufficiently rigorous or worthwhile to be part of the law school curriculum.

Finally, on September 19, 2011, a group of lawyers, judges, and educators met in Denver to explore how the Colorado legal community might best partner with our state’s education community to enhance teaching and learning about the Constitution, the judiciary, and the rule

[†] Associate Professor of Law and Director of the Byron R. White Center for the Study of American Constitutional Law at the University of Colorado Law School.

1. LessGovtsBetter, Comment to Brittany Anas, *Longmont High Celebrates Constitution Day with Moot Court Led by CU-Boulder Students*, DAILYCAMERA.COM (Sept. 15, 2011, 9:12 AM), http://www.dailycamera.com/boulder-county-schools/ci_18906946.

of law. Many of us involved in that conversation have continued to collaborate, given our mutual strong conviction that the bench and bar should take an active role in public education about the law (for both children and adults) as part of our public service obligation.

From these three very unconnected interactions grew the conviction that a conference focused on the meaning and value of constitutional literacy and what role law schools can appropriately play in constitutional literacy efforts was much needed. Many of the participants in the conference were chapter directors of Marshall–Brennan. Others were leaders in civic and constitutional literacy efforts through national programs, such as *We the People*² or the American Bar Association’s Teaching the Constitution Committee,³ and more local programs like Colorado’s Judicially Speaking⁴ or Massachusetts’s Discovering Justice.⁵

The conference began with a keynote talk given by Harvard Law School Professor Mark Tushnet, a well-known proponent of popular constitutionalism, who spoke about “Constitutional Literacy Outside the Courts.”⁶ Among other points, Professor Tushnet argued that efforts at civic or constitutional education should focus less on “factual knowledge” and more on “civic capacity.”⁷ He observed that popular constitutionalism is often criticized for suggesting that people outside of the judiciary should actively participate in constitutional interpretation and enforcement. These criticisms point to the myriad evidence demonstrating a widespread lack of public knowledge about the Constitution and the legal system.⁸ Professor Tushnet argued that these critics tend to focus on factual knowledge about the particular contents of the Constitution, rather than explore whether people have an understanding of the larger principles that motivate our constitutional system. This focus should be flipped, he concluded, because understanding constitutional principles is more important to civic participation than knowing the details of constitutional facts. The greatest potential of effective civic and constitutional education is to develop students’ understanding of the Constitution’s broad principles and activate their civic capacity.

2. *The We the People Program*, CENTER FOR CIVIC EDUC., <http://new.civiced.org/wtp-the-program> (last visited Apr. 16, 2013).

3. See *Lawyers Conference*, A.B.A., http://www.americanbar.org/groups/judicial/conferences/lawyers_conference.html (last visited Apr. 16, 2013) (noting the “Teaching the Constitution: 2013 Civic Learning Initiative”).

4. Margaret Haywood, *A Civics Education, Judicially Speaking*, DOCKET, Jan. 2012, at 18, 18.

5. DISCOVERING JUST., <http://www.discoveringjustice.org/> (last visited Apr. 16, 2013).

6. Mark Tushnet, William Nelson Cromwell Professor of Law, Harvard Law Sch., Keynote Address at the University of Colorado Law School Ira C. Rothgerber, Jr. Conference: Constitutional Literacy Outside the Courts (Nov. 29, 2012), available at <http://www.colorado.edu/law/research/byron-white-center/rothgerber>.

7. *Id.*

8. *Id.*

The distinction Professor Tushnet draws between knowledge of specific facts and understanding of broader principles is one that those involved in constitutional and civic education efforts know well. As the articles in this symposium issue demonstrate, the crisis in civics *knowledge* has been a starting point for many efforts to get lawyers, judges, and law students involved in increasing public civic and constitutional literacy. The statistics demonstrating a lack of factual knowledge are one of the most effective tools to garner funding for the kinds of programs conference participants are involved in. At the same time, the goal of these programs is not simply to provide factual content. Instead, as is apparent in each of the articles included here, public constitutional and civic education is fundamentally focused on increasing civic capacity.

Certainly, this focus on civic capacity and engagement was one of the founding goals of Marshall–Brennan. Indeed, Professor Raskin makes a strong case that Marshall–Brennan is “democratic constitutionalism in action.”⁹ It puts constitutional knowledge and the skills to deploy that knowledge effectively and responsibly into the hands of people who are among the most excluded from our political processes. At the same time, it reminds traditional students of the Constitution that you cannot understand that document simply by reading books.

In addition to detailing the ways that Marshall–Brennan empowers students to be more civically engaged, Raskin offers a powerful theoretical explanation of the value to law schools and legal education of the hands-on and engaged experience that Marshall–Brennan offers those who participate. He describes the creation of the first Marshall–Brennan chapter at WCL and sets out the core values and commitments that he and others involved in that program’s creation established for the project. This history, not only of the WCL chapter’s founding, but also of the expansion of the project nationally, is invaluable for students and teachers interested in joining Marshall–Brennan, and for those engaged in other community outreach programs. Raskin perfectly captures the relationship between legal education and civic engagement, and the way that Marshall–Brennan synergizes the two. Raskin’s article addresses head on some of the increasingly vocal criticisms being leveled at legal education today and considers how Marshall–Brennan offers a counterpoint or antidote to these criticisms. Raskin effectively demonstrates the ways in which students who engage in the active learning and community outreach that Marshall–Brennan offers are likely to become the effective lawyers and community leaders of the future.

One of the challenges facing Marshall–Brennan and programs like it is sustainability, both financially and institutionally. Continuing success

9. Jamin B. Raskin, *The Marshall–Brennan Constitutional Literacy Project: American Legal Education’s Ambitious Experiment in Democratic Constitutionalism*, 90 DENV. U. L. REV. 833, 842 (2013).

within law schools requires these programs to develop a convincing explanation for the value they add; Raskin's article does that extremely well. In order to get necessary funding, civic education programs, whether run through law schools or through other organizations, must demonstrate measurable outcomes to potential donors. As Laura McNabb argues in her article, *Civic Outreach Programs: Common Models, Shared Challenges, and Strategic Recommendations*, developing the tools to measure outcomes is one the most significant challenges facing civic education programs.¹⁰ McNabb's article is the product of detailed research, including dozens of interviews and a careful analysis of online resources for civics education. As she observes, civics education programs can be divided into two broad categories: those that focus on enhancing opportunities through the K–12 and post-secondary education systems and those that focus their attention outside of the school system. McNabb argues that programs focused on K–12 education have more potential to effect change because of the mandatory and universal nature of K–12 education and the historic obligation of schools to provide this type of education. However, McNabb observes, even programs focused on schools face significant sustainability challenges. She urges those involved in civic outreach efforts to increase inter-program coordination and to collaborate so that we are not competing for scarce resources or duplicating research as we work to develop tools that will capture evidence of the measurable outcomes that are essential to programmatic success.

Two of the articles presented in this symposium offer examples of efforts to measure outcomes. These articles focus specifically on Marshall–Brennan's effectiveness at achieving its twin goals of educating law students and high school students. American University Professors Jessica Waters and Lynn Addington present the results of a study they conducted to assess the impact of participation in Marshall–Brennan on law student career choices in *The Marshall–Brennan Effect*.¹¹ Their study focuses particularly on whether law students who teach through Marshall–Brennan are more likely to enter public interest or government civil service careers than they might have been had they not participated in the program. The article fits within a broader discussion about the phenomenon of “public interest drift”: many students who come to law school stating they plan to pursue public interest careers drift away from that commitment. Waters and Addington found that just the opposite was true for Marshall–Brennan Fellows; participating in Marshall–Brennan tended to strengthen student commitment to public interest work and that commitment carried through to post-graduate career choices.

10. Laura McNabb, *Civic Outreach Programs: Common Models, Shared Challenges, and Strategic Recommendations*, 90 DENV. U. L. REV. 871, 891–92 (2013).

11. Jessica L. Waters & Lynn A. Addington, *The Marshall–Brennan Effect: The Benefits of Teaching Constitutional Literacy for Law Students*, 90 DENV. U. L. REV. 901, 912–15 (2013).

Conference participants Maryam Ahranjani, Caleb Medearis, and Jeff Shook focus their research on Marshall–Brennan’s impact on high school students participating in the program. In *Evaluating High School Students’ Constitutional and Civic Literacy*, these authors present the results of a study they conducted during the 2010–2011 academic year in Washington, D.C. public high schools.¹² The study found that the high school students who participated in Marshall–Brennan for the school year ended the year with greater knowledge of their constitutional rights and responsibilities and an increased interest in civic participation.

Whereas Laura McNabb argues that the *recipients* of civics education efforts should be actors in K–12 institutions, Jill Friedman, Conrad Haber, and Eve Biskind Klothen make a powerful case that law schools at public universities in particular have an obligation to serve as *providers* of this education.¹³ Friedman, Haber, and Klothen begin by detailing the extraordinary range of civics education public interest programs in place at Rutgers University School of Law–Camden, explaining how the school developed its interlocking network of civics education programs, and discussing the wide cross-section of community members served by these programs. The article considers some of the benefits the programs have had for community members and for law students. The authors then go on to argue that all law schools, but particularly public law schools, should offer these programs because of the important role of service to the community in a public law school’s mission.

While several of the articles presented here focus on specific programs designed to offer civics education and consider what those programs should look like, what their outcomes have been, and what challenges they face, another group of articles focuses on the benefits that might flow from civics education. In *Impaneled and Ineffective*, for example, K Royal and Darra Hofman tackle the question of how civics education might be a tool in jury reform.¹⁴ Royal and Hofman first detail some of the ways that our jury system today is broken, and some promising efforts that have been made to improve that system. They go on to argue that service on a jury is one of the most important moments of civic participation for any citizen and that effective juries must include jurors with a strong understanding of our system of government and the rule of law. Royal and Hofman ultimately recommend not only increasing focus on civics education in schools but also including a short, basic

12. Maryam Ahranjani, Caleb Medearis & Jeff Shook, *Evaluating High School Students’ Constitutional and Civic Literacy: A Case Study of the Washington, D.C. Chapter of the Marshall–Brennan Constitutional Literacy Project*, 90 DENV. U. L. REV. 917, 924–29 (2013).

13. Jill Friedman, Conrad Haber & Eve Biskind Klothen, *Educating Young People About Law in a Disadvantaged City: Rutgers University School of Law and the City of Camden, New Jersey*, 90 DENV. U. L. REV. 937, 955–56 (2013).

14. K Royal & Darra L. Hofman, *Impaneled and Ineffective: The Role of Law Schools and Constitutional Literacy Programs in Effective Jury Reform*, 90 DENV. U. L. REV. 959, 971–74 (2013).

civics class as part of any jury service. However civics education is delivered to jurors or potential jurors, Royal and Hofman conclude, the jury system will work better if jurors are better educated about the legal system.

University of New Mexico School of Law Professor Dawinder Sidhu's contribution to the symposium asks this thought-provoking question—Can civic education serve as a tool for upward social mobility for the poor?¹⁵ Having posed that question, Sidhu interviews a number of prominent scholars and educators who are actively involved in efforts to understand and eradicate entrenched poverty. Although respondents generally recognized the value of civic and constitutional education for increasing civic engagement, they questioned its utility as a tool for addressing the structural causes of urban poverty.

In exploring this alternative potential goal for civic education, the article offers some important insights for how civics education programs—particularly those run by law schools that employ law students as instructors—might be structured to maximize their impact. In particular, Professor Sidhu notes that those he interviewed focused on the need for law students to model professional behavior, to serve in mentoring roles beyond the classroom experience, to offer high school students access to people and opportunities they might otherwise not have, and to discuss current and local events in their discussion of constitutional issues. All of these elements of a constitutional literacy program would benefit high school students and would be equally beneficial as training opportunities for law students. Professor Sidhu closes his article with another thought-provoking question—Do law schools have a responsibility to participate in civics education in poor communities? Those he interviewed were reluctant to place that responsibility on law schools. Sidhu himself, however, concludes that the enormous benefits that come with legal education and the privilege of legal knowledge bring with them responsibilities to those without such benefits, and that participation in constitutional literacy programs in poor communities is an effective and appropriate way to fulfill these responsibilities.

In the final article of the symposium, *Teaching the Constitution: An American Tradition*, Charles Crimmins explores the perspectives of two of America's Founders: George Wythe and Thomas Jefferson.¹⁶ These two men, Crimmins explains, "believed constitutional literacy was the responsibility of every citizen and essential to a self-governing society."¹⁷ Using a wealth of historical documentation, Crimmins explores the

15. Dawinder S. Sidhu, *Civic Education as an Instrument of Social Mobility*, 90 DENV. U. L. REV. 977, 984–92 (2013).

16. Charles J. Crimmins, *Teaching the Constitution: An American Tradition*, 90 DENV. U. L. REV. 1003, 1006–12 (2013).

17. *Id.* at 1003.

relationship between Wythe and Jefferson and examines their shared view that legal education should train lawyers to be public leaders. The citizen lawyer envisioned by these Founders is a central piece of today's constitutional literacy efforts. Crimmins explores how participating in constitutional literacy programs helps both law students and law schools fulfill their obligations in an expanded effort to educate an engaged citizenry.

In all of these articles, echoing Professor Tushnet's remarks in the keynote address of the Rothgerber Conference, the themes of engagement and capacity are central. Whether the focus is on engaging law students in active learning, engaging jurors in their civic responsibilities, or engaging young people in an exploration of the Constitution, the legal system, and their potential for democratic participation, civics education efforts operate with the understanding that factual knowledge is only one piece (and perhaps not the largest piece) of a larger commitment to effective democracy. This understanding brings me back to the interactions that prompted the organization of Twentieth Annual Ira C. Rothgerber Jr. Conference around the theme of public constitutional literacy.

I do not believe we will ever reach a national consensus about the meaning of the Constitution. Although there is in fact only one U.S. Constitution (and not, as my online critic suggests, Obama's Constitution and the "original" Constitution), it is an intentionally open-ended document, designed to survive and evolve with a future the Framers couldn't have predicted. With the strengths of this design come inevitable conflicts about the scope and meaning of the Constitution. Teaching young people about the Constitution and their role in a constitutional democracy does not mean teaching them only the plain language of the document. Instead, it means teaching them about the principles on which our country was founded and giving them the tools to be part of the conversation about what those principles mean today. For law students to participate in that educational process as teachers is both a tremendous public service and an opportunity to learn in an entirely different, deeper, and more complex way. Teaching develops skills—organization and management, communication, and creative problem solving—that are essential for effective lawyering and leadership. And the work that law schools and law students do to facilitate constitutional education is only one piece of the larger project of civics education. Law students who develop a commitment to helping kids develop civic capacity will go on to join a substantial community of lawyers and judges who share the same ideals.

