

CONSTITUTIONAL ILLITERACY

REVIEW ESSAY OF LOUIS MICHAEL SEIDMAN & MARK V. TUSHNET, *REMNANTS OF BELIEF: CONTEMPORARY CONSTITUTIONAL ISSUES*

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INTRODUCTION

In my constitutional law class, we begin the semester, appropriately enough, at the beginning of the Constitution: the Preamble. The opening words of the Preamble are a fruitful area for discussion: “We the People.”¹ At first, these words seem both majestic and all-inclusive. Next, however, discussion turns to the question whether the words, historically understood, mean what they say. The Constitution itself shows that slaves—though the word slavery appears nowhere in the document—are not part of this “We.” Also, knowledge of history shows that women were not part of this “We.” Similarly, not all white men were meant to be a part of “We.” Rather, “We the People” really meant “We the Adult White Male Property Owners.”²

Does the disjunction between the apparent and actual meaning of “We the People” really make a difference? Probably. The Constitution, ratified by “the People” assembled in state conventions, created a representative democracy. Also, Articles I (legislative branch) and II (executive branch) of the Constitution created a democratic republic that assumed individual participation in government. Thus, the Constitution reveals that both the consent and the participation of the governed were important aspects of the new government. To the extent that groups subject to the Constitution and its regime were not asked for their consent or participation, we should be troubled by the narrow definition of “We the People.”

Professors Louis Michael Seidman and Mark V. Tushnet make a similar definitional move in their new book *Remnants of Belief: Contemporary Constitutional Issues*.³ According to Professors Seidman and Tushnet, we are in the midst of a constitutional crisis: “Americans are preoccupied with constitutional argument even though they know that very few people are actually

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1. U.S. CONST. preamble.

2. See RICHARD B. MORRIS, *THE FORGING OF THE UNION: 1781-1789*, at 173 (1987) (“The original Constitution we now recognize to have been basically a document of governance for free white propertied adult males.”).

3. LOUIS MICHAEL SEIDMAN & MARK V. TUSHNET, *REMNANTS OF BELIEF: CONTEMPORARY CONSTITUTIONAL ISSUES* (1996).

persuaded by the arguments they make.”⁴ Their claim begs a very important question—who are these “Americans” preoccupied by constitutional argument. As argued later, Seidman and Tushnet’s “Americans” encompass a very narrow group.⁵ The “Americans” they speak of are a group I call “constitutional professionals,” which include academic commentators, judges, and public figures who engage in discussion of constitutional issues for a living.⁶

But, so what? Who cares if another book by legal academics talks about and to their own kind? We should care because Seidman and Tushnet define the “Americans” who are “preoccupied” by constitutional issues in a narrow and elitist manner. By defining “Americans” too narrowly, Seidman and Tushnet miss a problem with the constitutional arguments among “Americans.” The problem is that the Constitution is missing from these public constitutional arguments. Many people feel free to speak about what the Constitution requires without making any effort to link their arguments to the Constitution itself. This complaint is not an appeal for a strict textual reading of the Constitution.⁷ Rather, it is a plea for these arguments to have the Constitution’s text as a common starting point; if people do not know the language of the Constitution, it is difficult to formulate a successful argument.⁸

This Essay has two missions. First, to plead for a more universal view of who matters when we speak about the relevant community for constitutional argument. Second, to suggest some lessons we might learn from taking a more universal view of this community. These points are developed in five parts. Part I discusses Seidman and Tushnet’s thesis that a constitutional crisis is on the horizon. Part II analyzes Seidman and Tushnet’s definition of “Americans” whom they say are heading toward a constitutional crisis. This discussion suggests that some academic writing makes generalizations about society based on observations about a narrow slice—and, as it turns out, a rather elitist slice—of the population. Part III identifies the constitutional crisis that afflicts America generally, constitutional illiteracy, and Part IV asks why we should care about this problem. Part V concludes with a suggested cure for the constitutional illiteracy that ails

4. *Id.* at v. (emphasis added).

5. *See infra* notes 37-43 and accompanying text.

6. Professor Michael Kammen has made a similar classification in his study of the Constitution in American popular culture. *See* MICHAEL KAMMEN, *A MACHINE THAT WOULD GO OF ITSELF* at xi (1986). Professor Kammen analyzed how the Constitution was viewed by “ordinary Americans.” *Id.* “‘Ordinary’ does not refer to their social status or degree of education, but rather to the fact that they are nonprofessionals: not lawyers, nor judges, nor professors of constitutional law.” *Id.*

7. Constitutional arguments may take many forms including: text, history, structure, precedent, political theory, and all the other arguments that flow from these sources. *See generally* PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* (1982) (describing six basic methods of constitutional argument: historical argument, textual argument, doctrinal argument, prudential argument, structural argument, and ethical argument).

8. Later, this Essay discusses examples of constitutional arguments that suffer from a failure to consider the Constitution’s text. *See infra* notes 68-78 and accompanying text.

America—the America we *all* inhabit.

I. THE COMING CONSTITUTIONAL CRISIS

According to Professors Seidman and Tushnet, American debate over constitutional issues is in crisis. In part, the crisis is that no one has irrefutable answers to constitutional issues. There is always another side to the argument. For example, if one judge or commentator argues that state action is present under certain circumstances, another can make an equally plausible argument to the contrary. We cannot agree.

The inability to answer constitutional questions is only the beginning of our constitutional crisis. Judges and commentators compound the problem by *acting as if* they know the answers, even though—as Seidman and Tushnet show throughout their book—these judges and commentators *cannot* prove that they are right.⁹ Under this view, current constitutional discourse is merely an act of self-deception and, thus, is doomed.¹⁰

The main culprit in dooming constitutional discourse is the disemboweling effect of legal realism and the partial endorsement of that theory by the architects of the New Deal. Several realizations arise from this aspect of the New Deal. First, action versus inaction is a false distinction. Government inaction is really a *choice to perpetuate* the status quo. Seidman and Tushnet use the case of *Miller v. Schoene*¹¹ as a running example of this concept.¹² In *Miller*, Virginia faced an unfortunate choice. At that time, the state had a large apple industry threatened by a form of tree disease known as cedar rust. The disease grew on cedar trees and then spread to apple trees. The disease was harmless to the cedar trees, but destroyed apple trees. To eradicate the cedar rust and protect the apple trees, Virginia decided to destroy the cedar trees.

The owners of the cedar trees sued Virginia for compensation; they claimed that the state had “taken” their cedar trees within the meaning of the Takings Clause.¹³ The Court dismissed this challenge in a passage highlighted and relied on extensively by Seidman and Tushnet: “[T]he state was under the necessity of making a choice between the preservation of one class of property and that of the other. . . . It would have been *none the less a choice* if, instead of enacting the present statute, the state, by doing nothing, had permitted serious injury to the apple orchards . . . to go on unchecked.”¹⁴ If Virginia had chosen to do nothing, it would have decided to destroy the apple orchards. Either way, the state acted

9. SEIDMAN & TUSHNET, *supra* note 3, at 5. (“Our aim is to explain why so many constitutional questions are hard and why so many commentators pretend that they are easy.”).

10. *See id.* at 193-94.

11. 276 U.S. 272 (1928).

12. SEIDMAN & TUSHNET, *supra* note 3, at 26-27.

13. U.S. CONST. amend. V (“nor shall private property be taken for public use, without just compensation”).

14. *Miller*, 276 U.S. at 279 (emphasis added). *See also* SEIDMAN & TUSHNET, *supra* note 3, at 26-27 (discussing *Miller*).

to favor one property interest over another. Inaction is a *choice*, and that choice is action. Seidman and Tushnet emphasize this point by repeatedly citing *Miller* or quoting the phrase “none the less a choice.”¹⁵

By discrediting the action versus inaction distinction, legal realism shows that all of society is somehow constructed by government action. Nothing in society can be the result of a neutral baseline unaffected by political preferences. Rather, “everything in social life results from a choice by government. . . .”¹⁶ This insight has important consequences for how we view social institutions. For example, the notion of a “free” marketplace where individuals act autonomously in “private” transactions is based on an erroneous assumption. The marketplace has a set of initial property rights as a starting point for so-called “private transactions,” and the initial allocation of property rights is a political act of government.¹⁷

The realist insight about the marketplace shows why the demise of the economic due process doctrine associated with *Lochner v. New York*¹⁸ was inevitable. In *Lochner*, the Supreme Court held that a New York law limiting the number of hours that bakers could work violated the Fourteenth Amendment’s due process protection of “liberty.”¹⁹ According to the Court, the then-existing common law rules of contract—under which the law left the employer and the bakers free to set work hours—was a natural condition of liberty, free from government action.²⁰ Any act by the state legislature to change that common law was deemed an infringement of the parties’ liberty rights.²¹ *Miller*, however, teaches that a legislative decision *not* to change the common law is “none the less a choice.” Consequently, a state’s choice to “do nothing” was a decision to “permit” the consequences of the common law rules.²² Because a state’s courts stood ready to enforce those rules, the state’s choice not to change the rules was an endorsement of them.

As Seidman and Tushnet amply demonstrate in their book, the implications of *Miller*’s “none the less a choice” argument go far beyond economic due process. Most obviously, the argument has a devastating effect on the concept of

15. SEIDMAN & TUSHNET, *supra* note 3, at 27, 30, 68 (examples of where that phrase can be found).

16. *Id.* at 27.

17. Further, legal realism has taught us that there is no objective way to set these initial starting points. Eric Blumenson, *Mapping the Limits of Skepticism in Law and Morals*, 74 TEX. L. REV. 523, 529 (1996); Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 820-21 (1935); Mark V. Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1402 (1984).

18. 198 U.S. 45 (1905).

19. *Id.* at 53, 64; *see* U.S. CONST. amend. XIV, § 1 (“No State shall . . . deprive any person of life, liberty, or property, without due process of law.”).

20. *See Lochner*, 198 U.S. at 64.

21. *See id.*

22. *See Miller v. Schoene*, 276 U.S. 272, 280 (1928). *See* SEIDMAN & TUSHNET, *supra* note 3, at 30.

state action in constitutional law.²³ If state action is *everywhere*, a state action requirement is meaningless.²⁴ For example, the Equal Protection Clause prohibits only state discrimination, not private discrimination. A decision by the legislature not to prohibit private discrimination is a government “choice” to permit private discrimination and, thus, is government discrimination.²⁵ Indeed, under this view, the states could be under a *duty* to enact anti-discrimination laws, lest their inaction be judged state action permitting private discrimination.²⁶

But, *Miller*’s “none the less a choice” argument—that *all* action is government action—cannot be true. “[S]ome conception of individual action not attributable to the state is necessary to the existence of rights.”²⁷ If *Miller* is right, individuals become wholly vulnerable to the government because “[w]ithout a private sphere in which individual decisions are not attributable to the government, the very concept of individual right loses its meaning.”²⁸ The problem is trying to determine how far short of *Miller* we should stop and how to define a sphere of individual action not attributable to the state and therefore protected from state intervention. Seidman and Tushnet argue that there is no principled way to draw this line and, thus, no one can claim to have drawn it correctly.²⁹

The bulk of *Remnants of Belief* applies *Miller*’s “none the less a choice” insight to constitutional issues such as unconstitutional conditions, racial equality, pornography,³⁰ campaign financing, and the death penalty. In each case, they persuasively demonstrate how this insight prevents convincing resolution of the issue.

Herein lies the constitutional crisis: although no one can legitimately claim to have the “right” answers to constitutional questions, many commentators *act as if* they have the answers. Also, according to Seidman and Tushnet, each author’s resolution of constitutional questions *just happens* to coincide with that author’s

23. See SEIDMAN & TUSHNET, *supra* note 3, at 63-68.

24. See *id.* at 68.

25. See *id.* at 30.

26. See *id.* at 111.

27. *Id.* at 63.

28. *Id.* at 51. If all private action is government action, such action cannot be private and as a result, individual action would not be protected against government intervention. See Ronald J. Krotosynski, Jr., *Back to the Briarpatch: An Argument in Favor of Constitutional Meta-Analysis in State Action Determinations*, 94 MICH. L. REV. 302, 323 n.109 (1995).

29. See SEIDMAN & TUSHNET, *supra* note 3, at 70-71.

30. The “none the less a choice” argument is particularly effective in the free speech area. Obviously, if government passes a law that limits certain speech it has restricted speech under the First Amendment guarantee of free speech. Yet, under *Miller*, the opposite choice may have the same effect. Certain speech, it is argued, has the effect of silencing or devaluing the speech of others. This is one of the arguments against pornography—it silences or devalues speech by women. By refusing to regulate such “silencing” speech, the government has made a choice to permit such speech, and this government choice or government action devalues or silences speech by women. Thus, it is false to say that government regulation of pornography would restrict speech and failure to regulate would not restrict speech. *Id.*

political preferences.³¹ Seidman and Tushnet suggest that this correlation between scholarly conclusion and political disposition is no accident.³² Rather, because the post-New Deal “none the less a choice” insight makes constitutional argument inherently malleable, authors can manipulate constitutional arguments to further their political agendas. Yet, authors still write as if they are correct and their opponents are wrong. “There has been a persistent tendency to treat constitutional questions as if they were easy and the answers as if they were obvious. It naturally follows from this belief that one’s opponents are foolish, or evil, or dangerous extremists bent on fundamentally transforming bedrock constitutional principles.”³³ The result is “the politics of polarization—the demonization of opponents and the oversimplification of complex problems that are hallmarks of constitutional argument.”³⁴

Seidman and Tushnet offer a solution to that constitutional crisis: self-awareness and tolerance. We should become *aware* of the weaknesses in our arguments, and with this awareness, be *tolerant* of the arguments made by others.³⁵ Only then can we move away from the “politics of polarization,” and move toward a dialogue in which we can “at last . . . talk directly to each other without the necessity of filtering our disagreements through overblown constitutional rhetoric.”³⁶

II. WHO ARE “WE”?

In diagnosing our constitutional crisis, Seidman and Tushnet claim to identify an ailment that afflicts constitutional debate among “Americans” generally.³⁷ In setting to their task, they state, “Some representative examples of the sort of constitutional argument we are talking about—drawn from the popular press, public discussions, and the law reviews—will help frame our argument.”³⁸ After reading the book, however, one realizes that Seidman and Tushnet are discussing a problem in a rather narrow slice of America. As noted above, “Americans” means “constitutional professionals,” those who think and write about the Constitution for a living. Indeed, a perusal of the “Bibliographic Essay” included at the end of the book shows that their “representative examples” are drawn from

31. See *id.* at 20-21. For example, Seidman and Tushnet point specifically to Professor Michael McConnell’s treatment of selective abortion funding and funding of religious activities. *Id.* at 16-18. See Michael W. McConnell, *The Selective Funding Problem: Abortions and Religious Schools*, 104 HARV. L. REV. 989 (1991). They note that McConnell’s conclusion on the constitutionality of each practice coincides with his substantive commitments on each issue. See SEIDMAN & TUSHNET, *supra* note 3, at 16-18.

32. See SEIDMAN & TUSHNET, *supra* note 3, at 21.

33. *Id.* at 4.

34. *Id.* at 193.

35. *Id.* at 198, 200.

36. *Id.* at 193.

37. *Id.* at v.

38. *Id.* at 5.

legal academics,³⁹ academics from other disciplines,⁴⁰ professional public commentators,⁴¹ and judges⁴²—all constitutional professionals. Also, almost all of the sources cited appear in law reviews, law books, and case reports. Only two citations to publications of general circulation are included—two newspapers—and only for factual background, not as examples of constitutional argument.⁴³

Seidman and Tushnet, then, base their critique of American constitutional debate on a narrow definition of America—constitutional professionals. These individuals are likely an elite group.⁴⁴ Consequently, Seidman and Tushnet's critique and proposed solution apply to a problem with constitutional debate in a narrow slice of "America," not Americans generally. Like "We the People," Seidman and Tushnet's "America" is narrowly defined.

A book that Seidman and Tushnet cite favorably commits the same sin of

39. Just a smattering of the academic works cited are: BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991); ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990); CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* (1993); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* (2d ed. 1988); John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 *YALE L.J.* 920 (1973); Michael W. McConnell, *The Selective Funding Problem: Abortion and Religious Schools*, 104 *HARV. L. REV.* 989 (1991); David A. Strauss & Cass R. Sunstein, *The Senate, the Constitution, and the Confirmation Process*, 101 *YALE L.J.* 1491 (1992). The Bibliographic Essay continues in this vein, with citations predominantly to law review articles and books by constitutional professionals. SEIDMAN & TUSHNET, *supra* note 3, at 203-16.

40. Nat Hentoff, *Is Congress Going to Bring Back George III*, *WASH. POST*, Nov. 9, 1991, at A27. See SEIDMAN & TUSHNET, *supra* note 3, at 203-16.

41. George Will, *The Flag Dispute: Individualism Redux*, *NEWSDAY*, July 3, 1989, at 43; George Will, *The Flag Isn't the Only Thing Burned Up*, *NEWSDAY*, June 26, 1989, at 51; George Will, *Affirmative Action Gets a Good Knock*, *NEWSDAY*, Jan. 30, 1989, at 50; George Will, *How Can a Judge Impose Birth Control?*, *NEWSDAY*, June 26, 1988, at 10 [hereinafter Will, *How Can a Judge Impose Birth Control?*].

42. See, e.g., *DeShaney v. Winnebago County Dept. of Soc. Servs.*, 489 U.S. 189 (1989); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973); *Miller v. Schoene*, 276 U.S. 272 (1928). See SEIDMAN & TUSHNET, *supra* note 3, at 203-16.

43. See Ruth Marcus, *Court Runners-up Drew President's Warmest Praise; Clinton Settled on Breyer as Less Risky Choice*, *WASH. POST*, May 15, 1994, at A6 (cited for factual background of President Clinton's nomination of Stephen Breyer to the Supreme Court); Kathy Fair, *'Every Woman and Child' Faces Rape, Judge Says; McSpadden Says Castration Should Be Sex Case Option*, *HOUSTON CHRON.*, Oct. 13, 1992, at 17A. Of course, Seidman and Tushnet also cite to the newspapers that carry Nat Hentoff and George Will's columns. See *supra* notes 40-41.

44. Cf. *Romer v. Evans*, 116 S. Ct. 1620, 1637 (1996) (Scalia, J., dissenting) ("When the Court takes sides in the culture wars, it tends to be with the knights rather than the villeins — and more specifically with the Templars, reflecting the views and values of the lawyer class from which the Court's Members are drawn."); CASS R. SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* 177 (1996).

defining America in elitist terms. Dean Anthony Kronman's *The Lost Lawyer: Failing Ideals of the Legal Profession*⁴⁵ argues that the American legal profession currently suffers from a malaise—a loss of purpose.⁴⁶ In an earlier time, lawyers were motivated by an ideal of the lawyer as statesman.⁴⁷ This ideal of the lawyer-statesman derived from “the belief that the outstanding lawyer—the one who serves as a model for the rest—is not simply an accomplished technician but a person of prudence or practical wisdom as well.”⁴⁸ Today, however, the bottom line has displaced this ideal as the profession's prime motivating force.⁴⁹

In making his diagnosis, Kronman focuses on the influence of American law schools, law firms, and courts on the legal profession. Kronman, however, takes a narrow view of what counts as American law schools and law firms. By law schools, he means the elite, national law schools that center their curricula around the law-and-subject of the moment.⁵⁰ Legal scholarship is the product of the professors at these same schools.⁵¹ Wholly ignored are the legions of “other” law schools that have not done so. Also, he ignores the scholarship in non-elite law reviews, where doctrinal analysis is often sophisticated and prevalent.

Kronman suffers from the same myopia when he critiques the American legal profession. On this score, however, Kronman acknowledges his narrow focus and offers a justification:

Today, as in the past, only a small percentage of lawyers practice in large corporate firms (those, let us say, with one hundred or more attorneys and a predominantly business clientele). Indeed, data collected in 1980 indicate that roughly three-quarters of all the lawyers in private practice “either practice alone or in firms having ten members or less.” But the large corporate firm continues to exercise an influence, both within the profession and outside it, that far exceeds its numerical strength. However influence and power are measured—whether in raw economic terms or in subtler political ones—these firms remain the leaders of the bar. In that respect, their position is little different from what it was a generation ago, or even earlier.⁵²

This is Kronman's only attempt to make his observations about large firms

45. ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1993).

46. *Id.* at 3.

47. *See id.* at 2-3.

48. *Id.* at 2.

49. *See id.* at 4 (“[T]he explosive growth of the country's leading law firms . . . has changed forever the practice of the lawyers in them and created a new, more openly commercial culture in which the lawyer-statesman ideal has only a marginal place. . .”).

50. *Id.* at 6 (addressing the “scholarly culture . . . in the country's leading law schools”). Kronman focuses primarily on the effects of the law and economics and critical legal studies movements. *See id.* at 166-68, 225-64.

51. *See id.* at 266-70.

52. *Id.* at 273-74 (footnotes omitted).

relevant to the *entire* practicing bar.⁵³ The passage makes clear that his book is written about and for a narrow slice of the American legal profession.⁵⁴ Like “We the People” and Seidman and Tushnet’s “Americans,” the “Lawyer” in Kronman’s “The Lost Lawyer” is not as inclusive as it first sounds. “The Lost Lawyer” is really “The Lost Lawyer Who Graduated from an Elite Law School and Practices in a Large Firm in a Large City.”

So why should we care that authors like Seidman, Tushnet, and Kronman write about and to a narrow audience? Simply put, their narrow focus ignores problems in America at large. How one defines the set of relevant people determines *whose problem* one ultimately diagnoses. Our next task, then, is to diagnose the crisis in constitutional debate among Americans generally.

III. CONSTITUTIONAL ARGUMENT?

A. *Open Up and Say “Ahhh . . .”*: Diagnosing Our Constitutional Ailment

Seidman and Tushnet are correct to worry about what passes as constitutional argument in today’s popular culture. When the Supreme Court upheld the Pennsylvania abortion statute at issue in *Webster v. Reproductive Health Services*,⁵⁵ the local television news in my city reported that the Supreme Court had held that abortion was illegal. This must have frightened or falsely encouraged many people who took the reporter’s word on the issue. Unfortunately, our constitutional literacy is so poor that even the media can misunderstand that the Constitution does not restrict abortions, but rather addresses the government’s ability to do so. In other words, the Constitution largely addresses state action,⁵⁶ rarely imposing requirements directly on private

53. Others have attempted to address the malaise that affects particular areas of practice. Professor Charles Ogletree has offered one such effort for lawyers in public defender offices. See Charles J. Ogletree, Jr., *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, 106 HARV. L. REV. 1239 (1993).

54. In speaking with Texas lawyers who practice in smaller communities, the current President of the Texas Bar has learned that these practitioners have different needs and views than their large firm counterparts. See Colleen McHugh, *A Commitment to Texas Lawyers*, 59 TEX. B.J. 512, 512 (1996) (Lawyers in small towns “talked about life in a small town, imploring us to remember the ‘country lawyers’ and the particular needs of small-firm practitioners.”).

55. 492 U.S. 490 (1989).

56. This is not to say that the state action requirement is easy to understand or apply. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 18-1, at 1688-91 (2d ed. 1988); Charles L. Black, *The Supreme Court, 1966 Term—Foreword: “State Action,” Equal Protection, and California’s Proposition 14*, 81 HARV. L. REV. 69, 95 (1967) (describing the Court’s state action cases as “a conceptual disaster area”). Indeed, at times an otherwise private enterprise may be treated as a government actor if the private and government conduct are sufficiently intertwined. See *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 726 (1961) (holding that private coffee shop in public parking garage was a state actor restricted by the Constitution). Yet, the core intuition—which can get lost in public constitutional argument—is that government action is the

individuals.⁵⁷ Ignorance of the state action requirement is ignorance of what the Constitution does—what it is fundamentally about.

The problem of constitutional illiteracy goes well beyond the state action doctrine. Seidman and Tushnet correctly note that many people appeal to the Constitution on a hotly-debated issue to signal the importance of the issue or the strength of their views. Such actions parallel de Toqueville's observation that most political issues in America inevitably become judicial issues.⁵⁸ Similarly, today most every important political issue in America, sooner or later, is made into a constitutional issue.

If political issues are converted into legal issues (as de Toqueville suggests) or constitutional issues (as Seidman and Tushnet suggest), Americans will need to know something about legal argument or constitutional argument to continue the debate. Indeed, de Toqueville observed that Americans of his time were prepared to follow political issues into the courts:

There is hardly a political question in the United States which does not sooner or later turn into a judicial one. Consequently the language of everyday party-political controversy has to be borrowed from legal phraseology and conceptions. As most public men are or have been lawyers, they apply their legal habits and turn of mind to the conduct of affairs. Juries make all classes familiar with this. *So legal language is pretty well adopted into common speech; the spirit of the law, born within schools and courts, spreads little by little beyond them; it infiltrates through society right down to the lowest ranks, till finally the whole people have contracted some of the ways and tastes of a magistrate.*⁵⁹

According to de Toqueville, as political discussion became entwined with the law, law-talk was assimilated into popular political discourse. If this assimilation did not happen, the public at large would be left out of political discourse.

Unfortunately, modern Americans have not assimilated the Constitution into their political arguments as readily as de Toqueville's Americans assimilated legal language into their political arguments. To do so, modern Americans would need a working knowledge of how the game of constitutional interpretation is played.⁶⁰

focus of the Constitution.

57. Indeed, the only provision of the Constitution that may apply directly to individual action is the Thirteenth Amendment's prohibition of slavery. U.S. CONST. amend. XIII; *see Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968) (Congress' power to legislate under the Thirteenth Amendment extends to regulation of private conduct.). Conversely, the Court has held that Congress' power under the Fourteenth Amendment extends only to regulation of state action. *See The Civil Rights Cases*, 109 U.S. 3 (1883). Of course, this is not to suggest that the line between "state" and "private" action is an easy one to draw. *See supra* note 56.

58. de Toqueville wrote: "There is hardly a political question in the United States that does not sooner or later turn into a judicial one." ALEXIS DE TOQUEVILLE, *DEMOCRACY IN AMERICA* 248 (J.P. Mayer & Max Lerner eds., George Lawrence trans., 1966) (1835).

59. *Id.* (emphasis added).

60. *See* SEIDMAN & TUSHNET, *supra* note 3, at 3-4.

Yet, when we redirect our focus to the American public generally, we see that popular constitutional arguments often are not *constitutional*. Instead, the Constitution is played as a trump card that is meant to end discussion. The speaker makes little, if any, effort to explain why her argument derives from the Constitution. In sum, what is missing most from American constitutional argument is the Constitution itself.

B. *Looking at American Constitutional Argument*

In looking at constitutional argument among Americans generally, we start with how Americans use—or misuse—the *text* of the Constitution. Because all constitutional arguments flow from the text,⁶¹ either directly or indirectly, the text must form a common ground, otherwise we cannot recognize what the speaker is saying as constitutional argument; we may as well be speaking different languages.⁶²

An example discussed by Seidman and Tushnet, drawn from the work of popular political commentator George Will, illustrates the failure to appeal to text. In one article, Will criticized the decision of an Arizona trial court judge to condition the probation of a mother convicted of child abuse on the mother's continuing use of birth control. Will opined: "When government tampers, surgically or chemically, with sexuality, it is touching personal identity. In light of the recent elaboration of a woman's privacy rights, as defined in constitutional law concerning abortion, it is hard to imagine [the judge's] sentence withstanding the scrutiny in an appeals court."⁶³ Will makes a common form of argument in public debate. The argument goes like this: "If the Constitution protects right X, then it *certainly* must protect right Y." The author hopes that the reader will have the same visceral reaction to the situation that the author did. Seidman and Tushnet criticize Will for offering an unpersuasive constitutional argument. They

61. One such argument is history or original intent. The ignorance of constitutional text is compounded by a popular ignorance of basic American history. See Lewis H. Lapham, *The Importance of Studying U.S. History*, HARPER'S MAG., Jan. 1, 1996, at 7. ("Assume that the existence of the American democracy requires the existence of an electorate that knows something about American history, and [a recent] . . . press release from the U.S. Department of Education can be read as a coroner's report."). Another such argument relies on the structures of government created by different parts of the text. See generally CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIPS IN CONSTITUTIONAL LAW* (1983).

62. Recently, Professor Laurence Tribe has argued that constitutional argument must obey certain rules to be recognized as such. See Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221 (1995) (Professor Tribe criticizes the arguments in recent articles by professors Akhil Amar and Bruce Ackerman as outside the bounds of proper constitutional argument.); see Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799 (1995); Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457 (1994).

63. Will, *How Can a Judge Impose Birth Control?*, *supra* note 41, at 10. See SEIDMAN & TUSHNET, *supra* note 3, at 7.

note several counterarguments that Will did not address, as well as some of the faulty assumptions that underlie his argument.

The problem with Will's argument is that it does not count as *constitutional* argument.⁶⁴ Will's lesser-must-be-included-in-the-greater argument—that protection of a broad right (right X) clearly requires, as a matter of inexorable logic, the protection of a second, supposedly lesser included right (right Y)—relieves the author of the burden of articulating the precise basis for protecting the lesser included right. At the most basic level, Will does not identify the constitutional text he relies on. The reference to the abortion cases suggests that the Due Process Clause may be doing the work.⁶⁵ But, why does the Due Process Clause protect abortion? Why is abortion analogous to imposition of birth control as a condition of probation? How has due process changed since *Roe v. Wade*⁶⁶ articulated its vision of the right to privacy? Why not include *Griswold v. Connecticut*'s⁶⁷ contraception decision? Will is one of the more thoughtful lay commentators on constitutional issues, and yet, he leaves all of these questions unanswered. This example does not bode well for popular constitutional argument.

Another error seen in popular constitutional argument is misquoting the Constitution's text. The popular discussion of gun control laws is replete with examples of this type of misargument. Opponents of gun control argue that gun control laws are unconstitutional because the Second Amendment protects a largely unfettered right of individuals to purchase and possess firearms. This right

64. Will's discussion of the term limits issue in his book contains the same flaw. GEORGE WILL, *RESTORATION: CONGRESS, TERM LIMITS AND THE RECOVERY OF DELIBERATIVE DEMOCRACY* (1992). At one point, Will discusses the States' constitutional authority to place term limits on federal representatives. Will's only reference to the Constitution is to the Times, Places and Manner Clause in Article I, Section 4. *Id.* at 223. Will's discussion fails to explain why a term limit is a time, place or manner restriction (a viewpoint the Supreme Court rejected in *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995)), and wholly ignores the Qualifications Clauses in Article I, Sections 2 and 3. Also, although Will refers to Supreme Court cases dealing with a tangential issue, he wholly ignores the most relevant case, *Powell v. McCormack*, 395 U.S. 486, 548 (1969), in which the Court held that Congress cannot add to the Constitution's list of qualifications for federal representatives. WILL, *supra*, at 223-24.

65. In *Roe v. Wade*, 410 U.S. 113, 153 (1973), Justice Blackmun was deliberately vague about what constitutional text supported a woman's right to terminate a pregnancy:

This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty . . . , as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.

Subsequent cases have made clear that the Court sees the right as an aspect of due process "liberty." See *Planned Parenthood v. Casey*, 505 U.S. 833, 846 (1992) ("Constitutional protection of the woman's decision to terminate her pregnancy derives from the Due Process Clause of the Fourteenth Amendment.").

66. 410 U.S. 113 (1973).

67. 381 U.S. 479 (1965).

arguably derives from the Second Amendment's command that "the right of the people to keep and bear Arms, shall not be infringed."⁶⁸ For example, during his unsuccessful bid for the 1996 Republican presidential nomination, Pat Buchanan said, "That Second Amendment right *to keep and bear arms* is a right that . . . comes before the Constitution."⁶⁹ Similar statements appear in letters-to-the-editor in newspapers around the country:

- "The Second Amendment to the U.S. Constitution . . . protects the right to bear arms. . . ." ⁷⁰
- "Our founding fathers meant for Congress, the President and all governmental authorities never to infringe on the rights of the people to keep and bear arms." ⁷¹
- "[T]he Second Amendment right to keep and bear arms" ⁷²
- "The people's right to keep and bear arms shall not be infringed period." ⁷³
- "[M]y Second Amendment right to bear arms" ⁷⁴

On their face, the above quotes appear persuasive — the Constitution's command seems clear. Indeed, Buchanan and others should be applauded for appealing to the Constitution's text. Each speaker, however, omits an entire qualifying clause that the Framers tacked onto the beginning of the Second Amendment: "*A well regulated Militia, being necessary to the security of a free state, the right of the People to keep and bear Arms, shall not be infringed.*"⁷⁵ Whether this additional text is fatal to the above claims is beside the point of this Essay.⁷⁶ Rather, the important point is that advocates of a prominent constitutional issue do not feel the need to read or cite the full text of a constitutional provision. Some writers probably paraphrased the text based on what they heard others say. Indeed, a number of the above quotes refer to a "right to bear arms"—a misquote itself. So much for constitutional text.

Of course, proponents of gun control commit similar errors. Consider the

68. U.S. CONST. amend. II.

69. Michael Rezendes, *In Arizona, Buchanan Lashes Gun Control*, BOSTON GLOBE, Feb. 26, 1996, at 7 (emphasis added).

70. David Callender, *Gun Rights Wording Worries Prosser*, WIS. ST. J., Feb. 17, 1996, at 4A (reporting on a proposed amendment to the Wisconsin state constitution that would protect "the right to keep and bear arms for any lawful purpose including for security or defense, for hunting and for recreational use.").

71. Jeanne Sexton, *Letters From the People*, ANCHORAGE DAILY NEWS, June 11, 1995, at M3.

72. G.C. Hammond, *Metropolitan Voices: News Media on the Mark on Gun-Permit Application*, WASH. TIMES, Jan. 25, 1996, at C2.

73. Jim Dore, *Letters From the People*, ANCHORAGE DAILY NEWS, Jan. 26, 1996, at B10.

74. David J. Giurintano, *Readers' Views*, BATON ROUGE ADVOC., Jan. 24, 1996, at 6B.

75. U.S. CONST. amend. II (emphasis added).

76. This question is subtle and complex and has been addressed by several thoughtful commentators. See, e.g., Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1162-73 (1991); Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989).

following letter-to-the-editor in the *St. Petersburg Times*:

I don't believe how people who claim to believe in God can look the other way when so many of God's innocent children are being killed by people who *hide behind a few sentences in our Constitution*, which was written more than 200 years ago. In those days, our people needed guns because our country was a mixture of frontier towns and vast wilderness. Today, the proliferation of guns has turned our cities into jungles and our suburbs into killing fields.⁷⁷

What text is the writer referring to? The writer makes no effort to locate his argument within the Constitution. Given that the issue is gun control, the text is likely the Second Amendment. But, even a glance at the text of the Constitution would show that the Second Amendment is *one* sentence, not a "few." So much for familiarity with the text.⁷⁸

Other examples from popular commentary show that knowledge of text does not necessarily ensure logical argument based on that text. Consider the following writer's argument:

I am neither a constitutional scholar nor a lawyer. But I am a concerned citizen who feels that the main clause of the Second Amendment—"the right of the people to keep and bear arms, shall not be infringed"—stands independent of its subordinate clause and says exactly what the founders our [sic] great nation wanted it to say.⁷⁹

Again, one must ask "why"? Other than the author's undefined "feeling," he offers no constitutional principle which supports severing one clause from another? The author offers no explanation of any history supporting such a reading.

Poor constitutional argument is not limited to Second Amendment commentators. A writer questioning the constitutionality of President Clinton's actions in sending American troops to Bosnia argued: "The bottom line is that our Constitution does not authorize [military deployments for humanitarian purposes]. We either have a Constitution or we don't."⁸⁰ I guess we will just have to take the writer's word for it; he offers no text or other explanation in support of this bald

77. Arthur McIntyre, *Officials, Back Gun Control and 'Stop the Slaughter' Series: Letters*, ST. PETERSBURG TIMES, Feb. 22, 1996, at 2 (emphasis added).

78. The writer also expresses an attitude that is perhaps more disturbing than mere ignorance of the text. The writer suggests that the Constitution is a mere technicality which those opposing gun control try to "hide behind." The writer further suggests the irrelevance of the Constitution by referring to its age and, presumably, its obsolescence. In doing so, the author relegates the Constitution to irrelevance on the issue—it's ok to not know anything about the Constitution because it is an irrelevant technicality.

79. Lawrence F. Pace, *In Second Amendment, 'People' Are the Core*, BUFFALO NEWS, Jan. 13, 1995, at B2.

80. George Schmall, *Letters to the Editor: Support of Deployment Shows Ignorance of the Constitution*, DAYTON DAILY NEWS, Jan. 8, 1996, at 7A.

assertion about the President's power. This gap also exists on the side of those supporting the President: "I am appalled to read . . . [a letter to the editor] calling for Congress to impeach and remove the commander in chief for carrying out his constitutional right and duty of directing his troops to join their European counterparts in an effort to make [the] Balkan peace last."⁸¹

The above quotes on gun control and presidential power may reveal an additional problem with popular constitutional argument: Laypersons have an attitude that one need not shoulder the burden of explaining *why* their argument derives from the Constitution. If constitutional debate follows this road, it will quickly resemble the old beer commercials where warring camps alternately yelled "less filling" and "tastes great." Constitutional debate could become a shouting match in which slogans substitute for argument.

Even when people take on the burden of offering an explanation, ignorance of the Constitution's text can still be fatal to their argument. Consider the following letter-to-the-editor that attacks a proposed bill to limit welfare payments to unwed mothers:

It is my understanding that a child born in the United States is a citizen of the United States. The marital status of the mother has nothing to do with that child being a citizen. Its rights are the same as those of any other child, whether born to a married or unmarried mother.

It therefore would appear that it would be unconstitutional to deny welfare benefits to one child based upon the marital status of the mother.⁸²

The writer fails to explain what "right" in the Constitution forbids discrimination against unwed mothers and their children. The mere fact of citizenship cannot be enough because virtually all laws discriminate between citizens on some basis. Also, what provision of the Constitution supposedly prevents this discrimination? The Equal Protection Clause? The Citizenship Clause? Perhaps the writer is claiming that some Americans have a constitutional right to welfare. This claim, however, would beg even more questions than an antidiscrimination argument (such as from where does such a right derive and what are the limits of such a right).

The problem of public ignorance of text is compounded by public ignorance of the historical setting and meaning of the Constitution.⁸³ Regardless of whether

81. Denis Huang, *Keeping Peace in Bosnia*, SALT LAKE TRIB., Jan. 4, 1996, at A10.

82. James B. Nash Jr., *Letters From the People*, ST. LOUIS POST-DISPATCH, Oct. 7, 1995, at 14B.

83. Many commentators have observed that Americans have poor knowledge of their own history. See KAMMEN, *supra* note 6, at 23-29, 230; Michael Kammen, *Refuting Some Common Myths: Constitution 1787-1987*, ST. PETERSBURG TIMES, May 31, 1987, at 1D (describing a survey that found Americans' knowledge of the Constitution to be "downright embarrassing."); Lewis H. Lapham, *The Importance of Studying U.S. History*, HARPER'S MAG., Jan. 1, 1996, at 7; Alan Miller, *Sad Truth of Rampant Ignorance Among Teens*, SAN DIEGO UNION TRIB., Feb. 21, 1988, at Books-4 ("In short, many 17-year-olds are woefully ignorant of their cultural heritage."); Barbara Vobejda, *Humanities Education: 'Startling Gaps'; Schools Emphasize Skills Over Knowledge, Study Says*,

one ultimately adopts history or drafter's intent as the method of constitutional interpretation,⁸⁴ history must accompany text as the starting point of interpretation. One must first understand the Constitution *as written* before moving to other theories of constitutional interpretation. Only by gaining such an understanding can one evaluate whether contemporary society is different *in a way that is relevant to the meaning of the Constitution*. Thus, without a knowledge of history, Americans are not armed to take the first step beyond text in interpreting the Constitution.⁸⁵

In sum, many Americans suffer from constitutional illiteracy at a most basic level—ignorance of text and history. Our constitutional crisis is that the Constitution itself is missing from American constitutional debate. Only by addressing constitutional illiteracy can we begin to resolve this crisis.

IV. WHO CARES?

Before moving to solutions, we must ask a relatively simple question: Should we care that the American public is constitutionally illiterate? Why not be content that *some* people are minding the constitutional store? In fact, should not those with the most interest be left to carry on constitutional debate—academics who bring a genuine and enthusiastic commitment to the debate, litigants who bring their personal causes, judges who bring their craft,⁸⁶ and public interest groups who bring their ideological commitment. Indeed, that is one argument behind the requirement of standing—issues will be best aired by those with a stake in their

WASH. POST, Aug. 31, 1987, at A1 (“American schools are producing students with ‘startling gaps in knowledge’ of history and literature. . .”).

84. Indeed, the theory of original intent is fraught with difficulties. First, whose views does one count as the definitive statement on original intent? GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 41-42 (3d ed. 1996). The drafters? The ratifiers? Second, what does one do when several of the supporters or drafters of a constitutional provision had different views of the provision's meaning? *Id.* Third, at what level of generality should we look for an original intent: broad concepts (e.g., equality) or specific outcomes (e.g., separate public schools are inherently unequal)? *Id.* at 42; Ronald Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469, 490-91 (1981). Supporters of original intent theory have responses to these challenges. See EARL M. MALTZ, RETHINKING CONSTITUTIONAL LAW: ORIGINALISM, INTERVENTIONISM, AND THE POLITICS OF JUDICIAL REVIEW 20-36 (1994); Earl M. Maltz, *A Minimalist Approach to the Fourteenth Amendment*, 19 HARV. J.L. & PUB. POL'Y 451, 454 (1996); Earl M. Maltz, *The Failure of Attacks on Constitutional Originalism*, 4 CONST. COMMENTARY 43 (1987); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862-65 (1989). However, those problems are not easily solved.

85. For the importance of history in constitutional interpretation, even to those who reject original intent as a method of interpretation, see *infra* notes 127-32 and accompanying text.

86. On the topic of judicial craft, see Sidney A. Shapiro & Richard E. Levy, *Judicial Incentives and Indeterminacy in Substantive Review of Administrative Decisions*, 44 DUKE L.J. 1051, 1053-54 (1995).

outcome.⁸⁷ So, why should we care?

Although I hope that the last question is read by most as rhetorical, I offer three answers. First, to do otherwise is to disrespect the abilities of others. Ignoring constitutional illiteracy would send a message that only the few, the proud who engage in constitutional debate for a living are *able* to do so. This is not to say that all people ought to be constitutional professionals. Only that constitutional professionals ought not exclude laypersons from the conversation. We ought to embrace Thomas Jefferson's declaration, made in support of his proposal that the Constitution be re-written each generation, that "I am not among those who fear the people."⁸⁸

Second, to do otherwise is to disrespect the autonomy of others. Constitutional illiteracy should not be an excuse for cutting the bulk of America out of constitutional argument, but rather a call to greater constitutional literacy. As Thomas Jefferson has also written, "no safe depository of the ultimate powers of the society [exists] but the people themselves: and if we think them not enlightened enough to exercise their control with a wholesome discretion, the remedy is not to take it away from them, but to inform their discretion."⁸⁹ Professor Joseph Goldstein has made a similar point in explaining why the Supreme Court ought to write opinions that are intelligible to the average American:

If Ours is to be an "intelligent democracy," if Our revolutions are to be peaceful, We the People . . . must be able to learn, from Our own reading of the Constitution and the Supreme Court's construction of it, what rights We have and do not have, what values are and are not protected, and what limits are and are not imposed on those who govern on Our behalf. For then We can meet Our responsibility as informed citizens to respond to what the Court did and why it did it.⁹⁰

By choosing to ignore the problem of constitutional illiteracy—and, as *Miller v. Schoene*⁹¹ should teach, our decision is "none the less a choice"—we have decided

87. See *Flast v. Cohen*, 392 U.S. 83, 99 (1968) (requirement of standing "assure[s] that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962))). Of course, many commentators have noted that a standing requirement is not necessarily the best way to ensure such adverseness. See *STONE ET AL.*, *supra* note 84, at 100; Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 *SUFF. U.L. REV.* 881, 891 (1983).

88. Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), in *THOMAS JEFFERSON, THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON* 615 (Adrienne Koch & William Peden eds., 1993).

89. Letter from Thomas Jefferson to William Charles Jarvis (Sept. 28, 1820), in *JOSEPH GOLDSTEIN, THE INTELLIGIBLE CONSTITUTION: THE SUPREME COURT'S OBLIGATION TO MAINTAIN THE CONSTITUTION AS SOMETHING WE THE PEOPLE CAN UNDERSTAND* 5 (1992).

90. *GOLDSTEIN*, *supra* note 89, at 6.

91. 276 U.S. 272 (1928).

that the intelligent participation of many in our government is not worth the cost of constitutional literacy.⁹² In effect, we have devalued the voice of many Americans in our government, and robbed them of an important means of autonomy.⁹³

Third, constitutional illiteracy will make the Constitution irrelevant to public decisionmaking and, in turn, threaten constitutional protections. As Solicitor General Drew Days has observed, ignorance of the Constitution has led to an “attitude that suggests we have lost confidence in our ability to deal with our problems *while remaining faithful to the Constitution*.”⁹⁴ Consequently, public debate and government decisionmaking increasingly occur without consideration of the constitutionality of government action; that issue will be determined by the

92. This choice may also be in tension with the principle of “equal citizenship” that underlies the Constitution. U.S. CONST. amend. XIV, § 1. Professor Kenneth Karst defines the principle of “equal citizenship” as follows:

While respect for each individual’s basic humanity is the primary value in the principle of equal citizenship, the principle also encompasses two related and overlapping values: participation and responsibility. A citizen is a participant, a member of a moral community who counts for something in the community’s decisionmaking processes. No less importantly, a citizen is a responsible member of society, one who owes obligations to his fellow members. Both these values contribute to self-respect, but they also have independent significance.

Kenneth L. Karst, *The Supreme Court 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 8 (1977). On this view, when we ignore the problem of constitutional illiteracy, we deny people the background they need both to exercise their right to participate intelligently in government and to fulfill their responsibility to do so.

93. This is a point that Justice Antonin Scalia and other members of the Supreme Court have made, that the “remedy” for many wrongs should be found in the political process, not the courts. *See Romer v. Evans*, 116 S. Ct. 1620, 1637 (1996) (Scalia, J., dissenting) (“I think it no business of the courts (as opposed to the political branches) to take sides in th[e] culture war” over sexual orientation); *Planned Parenthood v. Casey*, 505 U.S. 833, 1002 (1992) (Scalia, J., dissenting) (“[B]y foreclosing all democratic outlet for the deep passions this issue arouses, by banishing the issue from the political forum that gives all participants, even the losers, the satisfaction of a fair hearing and an honest fight, by continuing the imposition of a rigid national rule instead of allowing regional differences, the Court merely prolongs and intensifies the anguish.”); *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 465 (1983) (O’Connor, J., dissenting) (“[W]hen we are concerned with extremely sensitive issues, such as [abortion], ‘the appropriate forum’ for their resolution in a democracy is the legislature.”); *Ferguson v. Skrupa*, 372 U.S. 726, 731 (1963) (arguments about the wisdom of a law “are properly addressed to the legislature, not to” the courts); *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) (“It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious.”).

94. Abe Zaidan, *Young People Urged to Stand by Constitution*, PLAIN DEALER, Dec. 2, 1994, at 2B (emphasis added) (U.S. Solicitor General Drew S. Days noted that “America knows very little about the Constitution. People are not aware of what the Constitution provides in terms of protection.”).

courts at a later date. Yet, to best safeguard constitutional values, each branch of government should determine for itself whether proposed government action violates the Constitution.⁹⁵ Although a court might ultimately halt unconstitutional government action *after* some harm has been done, the legislature or executive can prevent unconstitutional government action by *preventing the government from acting in the first place*. By removing the Constitution from public debate, we also allow Congress and the President to abdicate their roles as guardians of our constitutional protections.⁹⁶

If the public and their representatives do not consider the Constitution, we should expect a greater incidence of constitutionally suspect government action, with a corresponding burden on constitutional rights. The effect will last at least until someone with the money and the time is able to persuade a court to halt the government action. The current political scene holds examples of the political branches abdicating their role as constitutional guardians.

U.S. Solicitor General Drew S. Day has suggested that the Chicago police's "sweep searches" of public housing projects were the result of such an abdication.⁹⁷ Without reason to suspect individual residents of wrongdoing, the police randomly searched apartments for evidence of drug dealing or other crime.⁹⁸ Unsurprisingly, a federal court quickly halted the sweep searches because they violated the Fourth Amendment.⁹⁹ However, the court's action came too late for those already subjected to the searches. As the federal court stated in enjoining the police sweeps, such disregard for the Constitution by public officials in one area of one city "will ultimately undermine the rights of each of us."¹⁰⁰

95. Thomas Jefferson expressed this view in a letter to Abigail Adams:

[N]othing in the Constitution has given [the courts] a right to decide [constitutional issues] for the Executive, any more than [for] the Executive to decide for them. . . . The judges, believing the law constitutional, had a right to pass a sentence of fine and imprisonment, because that power was placed in their hands by the Constitution. But the Executive, believing the law to be unconstitutional, was bound to remit the execution of it

Letter from Thomas Jefferson to Abigail Adams (Sept. 11, 1804), in STONE ET AL., *supra* note 84, at 55.

96. See Richard Dooling, *Most of These Guys Are Lawyers, Right?*, N.Y. TIMES, June 15, 1996, at A2 (arguing that lawmakers knowingly pass unconstitutional laws to score political points with their constituents). Dooling suggests: "Maybe we should have a separate session of Congress every so often so politicians can pass popular bills while pretending that the Constitution doesn't exist." *Id.*

97. See Zaidan, *supra* note 94, at 2B.

98. See Stephen Braun, *Chicago Police Seek Warrantless Sweeps to Seize Guns*, L.A. TIMES, Apr. 7, 1994, at A16.

99. Pratt v. Chicago Hous. Auth., 848 F. Supp. 792, 796 (N.D. Ill. 1994) (A preliminary injunction was appropriate because "an overwhelming body of law demonstrates a substantial likelihood that the [Chicago Police's] Search Policy violates the Fourth Amendment.") (emphasis added).

100. *Id.* at 797.

The Communications Decency Act of 1996 (CDA)¹⁰¹ contains another example of constitutional abdication. A section of the CDA prohibits Internet distribution of information about abortion.¹⁰² The section is a patently unconstitutional restriction of free speech. Most obviously, the section conflicts with the Supreme Court's precedent protecting abortion advertising.¹⁰³ Also, the law is presumptively unconstitutional because it regulates speech based on its content.¹⁰⁴ President Clinton recognized these obvious points in signing the Act into law when he stated that the Justice Department will "decline to enforce that provision of current law."¹⁰⁵ Yet, when Congress considered and passed the CDA, the Constitution was missing in action.

Another provision of the CDA further demonstrates that the Constitution may be irrelevant to the political branches of the federal government. One section effectively bans dissemination of any "indecent" material on the Internet.¹⁰⁶ Generally, government can only ban dissemination of "obscene" material and is limited to narrower regulations of indecent material.¹⁰⁷ At the time of the enactment, this part of the CDA was arguably unconstitutional. Although the Justice Department later announced that it would delay enforcement of the prohibition of indecent material,¹⁰⁸ and an ultimately successful legal challenge was in the works,¹⁰⁹ some universities and an Internet access provider began

101. Pub. L. No. 104-104, §§ 501-561, 110 Stat. 56, 133-43 (1996) (codified in scattered sections of 18 U.S.C. and 47 U.S.C.).

102. 18 U.S.C.A. § 1462 (West Supp. 1997). Prior to the CDA, federal law prohibited distribution of abortion material by an "express company or common carrier." 18 U.S.C. § 1462 (1994). The CDA extended the prohibition to the Internet.

103. See *Bigelow v. Virginia*, 421 U.S. 809 (1975).

104. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) ("Content-based regulations are presumptively invalid."). To overcome this presumption, the government must show that the law is necessary to achieve a compelling government interest. *Id.* at 382-83.

105. President's Statement on Signing the Telecommunications Act of 1996 (Feb. 12, 1996), in 11 WEEKLY COMP. PRES. DOC. 218, 219 (1996). See also *Davis v. United States*, 512 U.S. 452, 463-65 (Scalia, J., concurring) (noting Justice Department's failure to enforce 18 U.S.C. § 3501 (1994)).

106. 47 U.S.C.A. § 223(d) (West Supp. 1997).

107. See *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 116 S. Ct. 2374 (1996); *FCC v. Pacifica Found.*, 438 U.S. 726 (1978); *Miller v. California*, 413 U.S. 15 (1973).

108. See *Federal Judge Blocks Internet Indecency Law*, DALLAS MORNING NEWS, Feb. 16, 1996, at 1D ("A Justice Department spokesman said it was the agency's policy not to begin prosecutions under a law while it was being challenged in court."); Peter H. Lewis, *Judge Blocks Law Intended to Regulate On-Line Smut*, N.Y. TIMES, Feb. 16, 1996, at D5 (It is the Justice Department's "policy not to begin prosecutions under a law while it was being challenged in court.").

109. A provision of the CDA was challenged in the District Court for the Eastern District of Pennsylvania. After a hearing, the district court judge entered an order enjoining enforcement of the law. *ACLU v. Reno*, 929 F. Supp. 824, 827 (E.D. Pa. 1996), *aff'd*, 65 U.S.L.W. 4715 (U.S. June 26, 1997). Next, pursuant to the expedited review provision in the CDA, the Chief Judge of

censoring their Internet services to avoid legal problems.¹¹⁰ In other words, the CDA, though dormant and on the road to judicial interment, chilled speech. Under these circumstances, one would have hoped for careful consideration of the provision's constitutionality. Yet, Vice President Al Gore, Clinton Administration cheerleader for the Information Superhighway, indicated that the Administration was leaving the constitutionality of the indecency provision to the courts.¹¹¹ The Constitution, then, was irrelevant to Executive Branch consideration of that provision.

By removing the Constitution from public debate and lawmaking, constitutional illiteracy threatens the vitality of the Constitution itself. If the public and its representatives feel free to ignore the Constitution—abdicate their responsibility to safeguard that document¹¹²—law professors and other ivory-tower-dwellers can do little in their academic journals and books to recapture the spirit. Also, with the Supreme Court trimming its caseload to the bone,¹¹³ we cannot expect that Court to settle all of our constitutional disputes. And, just because judicial redress may be in the offing does not mean that ill-advised, unconstitutional laws will not cause significant harm *before* a court can stop the bleeding.

In sum, respect for others as well as the Constitution itself demands that we

the Third Circuit convened a three-judge panel to consider the constitutionality of the law. Communications Decency Act of 1996, Pub. L. No. 104-104, § 561, 110 Stat. 56, 142-43. That panel ultimately determined that the CDA's restriction of indecent material on the Internet violated the First Amendment's guarantee of the freedom of speech. *ACLU v. Reno*, 929 F. Supp. at 883. The Supreme Court affirmed the three-judge panel's decision.

110. See Lewis, *supra* note 108, at D1 (an Internet access provider commented that "the law is very vague in some areas, so what is required of me to be in compliance is in question."); Thomas R. O'Donnell, *Universities Worry Over Internet Content*, DES MOINES REG., Mar. 6, 1996, at 1 ("Professors, students and administrators at Iowa universities say the law could force them to remove some material from Internet sites used by students and scholars. . . .").

111. See Peter H. Lewis, *Protest, Cyberspace-Style, for New Law*, N.Y. TIMES, Feb. 8, 1996, at A14 ("Vice President Gore had said this week that he continued to support the telecommunications bill, but he said the courts were the proper place to decide the constitutionality of the Communications Decency Act.").

112. This responsibility could be seen as part of the "equal citizenship" that Professor Karst has articulated. See *supra* note 92.

113. See Linda Greenhouse, *Case of the Shrinking Docket: Justices Spurn New Appeals*, N.Y. TIMES, Nov. 28, 1989, at A1 ("Since the middle of its last term, the Court appears to have cut back sharply on the number of cases it is granting."); Al Kamen, *Fewer Clerks Has No Appeal*, WASH. POST, June 8, 1994, at A21 ("this term's 84 rulings will be the fewest since 1961 . . ."); David G. Savage, *Docket Reflects Ideological Shifts: Shrinking Caseload, Cert. Denials Suggest an Unfolding Agenda*, A.B.A. J., Dec. 1995, at 40, 40 (1995) (during the October 1995 term, the Court was on pace to "issue written decisions in roughly 75 cases, about half the workload of a typical term during the 1980's."); David G. Savage, *With a Lighter Caseload, Supreme Court Moving Toward End of Term*, L.A. TIMES, June 5, 1993, at A16 ("This term, the court is expected to issue written decisions in 116 cases, down from a norm of more than 150 per term in the mid-1980's.").

solve the problem of constitutional illiteracy. To respect our fellow citizens, we must treat them as actors who are capable of understanding and acting on constitutional principles. To respect the Constitution, we must ensure that the Constitution's protections are a part of political decisionmaking, both by the public and its representatives.

V. WHAT NOW?

Seidman and Tushnet offer a solution to a narrow problem—how to revitalize constitutional argument among constitutional professionals. Unfortunately, as noted above,¹¹⁴ this solution does not address the problem of constitutional illiteracy that afflicts constitutional argument in the general public. Before the general public can participate in the type of debate that Seidman and Tushnet address, they must learn the building blocks of such argument. The following are some initial suggestions for providing the building blocks for constitutional literacy.

A. *What Should Americans Know?*

1. *Text.*—First, there must be more popular attention to text. The text of the Constitution should be the foundation for all types of constitutional argument. Even if later arguments are based on the Constitution's history, structure, or purpose, such arguments assume the existence of *text* that *has* a history, *creates* structures, or *has* a purpose.

Take the example of whether the Constitution protects a woman's decision to seek an abortion. Popular proponents of constitutional protection often appeal to the right to privacy. For the argument to work as constitutional argument, however, the right to privacy must be located within the Constitution's text. As to the proper text, a person has several choices. First, as some have suggested, the woman's right to choose to end her pregnancy may be linked to the Equal Protection Clause.¹¹⁵ Second, some may adopt the privacy approach taken by Justice William Douglas in *Griswold v. Connecticut*.¹¹⁶ Justice Douglas argued that several amendments create overlapping zones of privacy.¹¹⁷ Third, as the Court has held since *Roe v. Wade*,¹¹⁸ the right is a component of the "liberty"

114. See *supra* note 44 and accompanying text.

115. U.S. CONST. amend. XIV. See CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 272-85 (1993) ("We might . . . explore another argument on behalf of the abortion right, one that is grounded in principles of equal protection. This argument sees a prohibition on abortion as invalid because it involves an impermissibly selective co-optation of women's bodies."); Guido Calabresi, *Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores)*, 105 HARV. L. REV. 80, 95-96 (1991).

116. 381 U.S. 479 (1965).

117. See *id.* at 484 ("The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy.") (citations omitted).

118. 410 U.S. 113 (1973).

protected by the Due Process Clauses of the Fifth and Fourteenth Amendments.¹¹⁹

2. *Beyond Text*.¹²⁰—Even after selecting a text, one may find that the answer is not clear because the chosen text is susceptible to more than one interpretation. On abortion, the Due Process Clause will pose particular difficulties. How does the speaker overcome the fact that the clause speaks only of procedure? On its face, the clause *allows* infringements of liberty when “due process” procedures are followed. Once that obstacle is surmounted, the speaker must determine what activities or choices count as “liberty”? Also, can government *never* restrict liberty? Or, only under certain circumstances? What circumstances and how do these circumstances relate to abortion?

Text alone cannot answer all our questions.¹²¹ Professors Jordan Steiker, Sanford Levinson, and J.M. Balkin illustrate this point with the example of the Presidential Qualifications Clause.¹²² The Clause reads in pertinent part: “No person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the office of President”¹²³ As the authors demonstrate, under one literal reading of this text, all Presidents since Zachary Taylor were *not* qualified to hold that office.¹²⁴ They point out that the phrase “at the time of the Adoption of this Constitution” can be read to modify *both* “Citizen of the United States” and “natural born Citizen.”¹²⁵ Thus, to be qualified for the Presidency, one must have been a citizen of the United States—natural born or otherwise—at the “time of the Adoption of the Constitution.” No President since Zachary Taylor could meet these requirements.

Although as a matter of text this interpretation must be counted as “reasonable,” few if any people—either constitutional professionals or laypersons—would likely accept this interpretation. “It’s silly,” or “That’s just plain stupid,” might be some of the reactions. But why? If the answer is, “Because the Constitution set up a government that was supposed to endure over time,” the speaker has gone outside the text to rely on the *purpose* of the document

119. See *id.* at 153; see also *Planned Parenthood v. Casey*, 505 U.S. 833, 846 (1992).

120. Justice Antonin Scalia is one of the few commentators to self-consciously acknowledge the difficulty of making the choice of which source(s) to consult besides the text of the Constitution itself. Scalia, *supra* note 84, at 862-65; see also PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* (1991).

121. See BOBBITT, *supra* note 7, at 38.

122. Jordan Steiker et al., *Taking Text and Structure Really Seriously: Constitutional Interpretation and the Crisis of Presidential Eligibility*, 74 TEX. L. REV. 237 (1995). The article was spurred by a contest published in *Contest: Was George Washington Constitutional?*, 12 CONST. COMMENTARY (1995).

123. U.S. CONST. art. II, § 1, cl. 5.

124. Steiker et al., *supra* note 122, at 239-40.

125. They argue that the placement of the comma after “United States” requires this interpretation on a strictly textual basis. “Indeed, it seems clear enough that our reading of the text is absolutely required under a plain meaning approach that pays due attention to the Constitution’s words and its punctuation.” *Id.* at 245.

or the *intent* of those who drafted it. Either way, a source outside of the four corners of the text comes into play.¹²⁶

Thus, constitutional literacy requires some constitutional knowledge beyond the text alone. As suggested above, history ought to be a primary source beyond text.¹²⁷ History shows that many provisions of the Constitution were written to address problems existing *at the time of the founding*. Any constitutional theory must take account of that fact and explain whether and, if so, how changed circumstances affect the current application of these provisions.¹²⁸ For example, one might take a modified Jeffersonian view of constitutional argument. Just as Jefferson believed that each generation should be allowed to enact its own constitution,¹²⁹ a modified Jeffersonian view might allow each generation to interpret the existing Constitution *as if* it had been adopted by that generation, in a way that meets the needs of their time. This view recognizes that any law, including a Constitution, responds to the felt needs and exigencies *of that time*. A modified Jeffersonian argument, then, rests on an understanding of the way the Constitution functioned for the founding generation. Thus, even an argument that rejects history as a method of constitutional interpretation must at least address history in justifying that theory.

To the extent that the public is becoming historically illiterate, a primary source for understanding the Constitution *as written* has been eroded.¹³⁰ To have any hope of generating a meaningful constitutional dialogue, we must enhance the general awareness of the Constitution's text and our Nation's history. Yet, what should be included as the essentials of the "Nation's history" is not an uncontested issue. Although we may not fear willful ignorance or deception regarding the nation's official history à la the former Soviet Union,¹³¹ choices about emphasis

126. Professors Steiker, Levinson, and Balkin undertake such inquiries in their Article. *Id.* at 243-52.

127. See *supra* notes 83-85 and accompanying text.

128. Professor Lawrence Lessig has called this the problem of "translation" of past meaning to present circumstances. Lawrence Lessig, *Understanding Changed Reading: Fidelity and Theory*, 47 STAN. L. REV. 395 (1995); Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993).

129. Letter from Thomas Jefferson to James Madison (Sept. 6, 1739), in 1 THE REPUBLIC OF LETTERS: THE CORRESPONDENCE BETWEEN JEFFERSON AND MADISON, 1776-1826, at 631-36 (Norton 1995); Letter from Thomas Jefferson to Samuel Kerchval (July 12, 1816), in THOMAS JEFFERSON, THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 615 (A. Koch & W. Peden eds., 1993).

130. On the public's poor knowledge of U.S. history, see *supra* note 83.

131. See DAVID REMNICK, LENIN'S TOMB: THE LAST DAYS OF THE SOVIET EMPIRE 31-40 (1993); *Soviet History Books to Fill "Blank Spots" for the High Schools*, N.Y. TIMES, Sept. 4, 1988, § 1, at 9 ("Soviet high school students will be given supplements to their history books by the start of next year to fill in the 'blank spots' in the knowledge of their country's past . . ."). That is not to say that textbooks on American history have not been criticized for omitting or distorting aspects of U.S. history. See JAMES W. LOEWEN, LIES MY TEACHER TOLD ME: EVERYTHING YOUR AMERICAN HISTORY TEXTBOOK GOT WRONG 13-17 (1995).

and inclusion will be contentious.¹³² No one said it would be easy.

B. What Can Lawyers Do?

At first, an obvious place to find a solution for the crisis in popular constitutional debate would seem to be the popular media. Yet, the quality of constitutional analysis in these sources is not guaranteed. Consider the following quote in *Newsweek* magazine summarizing the Supreme Court's decision in *Adarand Constructors, Inc. v. Pena*:¹³³

Last week the U.S. Supreme Court seemed to scale back the federal government's own affirmative action. By a vote of 5-to-4, the justices fashioned a legal test that will make it very difficult, if not impossible, to preserve government programs that give an edge to minorities and women. The decision in *Adarand Constructors v. Pena* was written in a murky legalese. But the point was articulated by the plaintiff, Randy Pech, whose *Adarand* construction outfit in Colorado had lost out to a Hispanic-owned company under a program that earmarked highway contracts for minorities. The burly Pech asked why he should be discriminated against to make up for discrimination that occurred more than a century ago.¹³⁴

Regardless of whether one agrees with the Court's decision in *Adarand*, this quote is rife with misstatements about the case.

First, and perhaps most basic, *Adarand* addressed affirmative action programs based only on race and not gender.¹³⁵ Second, the Court did not "fashion" a legal test in *Adarand*. Rather, the Court merely held that the *pre-existing test* that applied to state affirmative action programs should apply to federal government affirmative action programs.¹³⁶ Third, the affirmative action program challenged in *Adarand* was not intended to remedy "discrimination that occurred more than

132. See, e.g., Dan Quayle, *A Case of Political Correctness Gone Wild*, ARIZ. REPUBLIC, Nov. 12, 1995, at G5 (criticizing the National Standards for United States History that the federal government commissioned from the UCLA National Center for History in the Schools as "a case of political correctness gone wild."). Also, the task of formulating a curriculum cannot be value-neutral. See Suzanna Sherry, *Responsible Republicanism: Educating for Citizenship*, 62 U. CHI. L. REV. 131, 158 (1995) ("It is simply not possible to eliminate values from education.").

133. 115 S. Ct. 2097 (1995).

134. Evan Thomas et al., *Rethinking the Dream*, NEWSWEEK, June 26, 1995, at 18, 18.

135. Indeed, gender classifications are governed by a separate legal test. See *Craig v. Boren*, 429 U.S. 190, 197 (1976) ("[C]lassifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."); accord *United States v. Virginia*, 116 S. Ct. 2264 (1996).

136. The Court had previously held in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), that state affirmative action programs are subject to strict scrutiny under the Equal Protection Clause.

a century ago”—presumably a reference to slavery.¹³⁷ Rather, the law was intended to correct for *current* racial disadvantages in the construction industry.¹³⁸ In sum, anyone who relied on *Newsweek* to explain the Court’s decision in *Adarand* would have come away sorely misinformed. So, one source that holds hope for educating the public about the Constitution—the popular media—may not always be a reliable source of information.

Perhaps, then, we need writing by constitutional professionals that is aimed at the constitutional layperson. On this point, constitutional professionals should take a lesson from Stephen Jay Gould, Professor of Zoology and Geology at Harvard University. Professor Gould has written several books that make the complexity of science accessible to the layperson. In the Prologue to his book *Bully for Brontosaurus: Reflections in Natural History*, Professor Gould explains why such writing is one of the highest callings in any discipline:

In France, they call this genre *vulgarisation*—but the implications are entirely positive. In America, we call it “popular (or pop) writing” and its practitioners are dubbed “science writers” even if, like me, they are working scientists who love to share the power and beauty of their field with people in other professions.

In France (and throughout Europe), *vulgarisation* ranks within the highest traditions of humanism, and also enjoys an ancient pedigree—from St. Francis communing with animals to Galileo choosing to write his two great works in Italian, as dialogues between professor and students, and not in the formal Latin of churches and universities. In America, for reasons that I do not understand (and that are truly perverse), such writing for nonscientists lies immured in deprecations—“adulteration,” “simplification,” “distortion for effect,” “grandstanding,” “whizbang.” I do not deny that many American works deserve these designations—but poor and self-serving items, even in vast majority, do not invalidate a genre. “Romance” fiction has not banished love as a subject for great novelists.¹³⁹

Professor Gould also offers his view of why this bias against popular writing is harmful.

I deeply deplore the equation of popular writing with pap and distortion for two main reasons. First, such a designation imposes a crushing professional burden on scientists (particularly young scientists without tenure) who might like to try their hand at this expansive style. Second, *it denigrates the intelligence of millions of Americans eager for intellectual stimulation without patronization*. If we writers assume a crushing mean of mediocrity and incomprehension, then not only do we

137. Thomas et al., *supra* note 134, at 18.

138. See *Adarand*, 115 S. Ct. at 2102-04.

139. STEPHEN JAY GOULD, *BULLY FOR BRONTOSAURUS: REFLECTIONS IN NATURAL HISTORY* 11 (1991).

have contempt for our neighbors, but we also extinguish the light of excellence. The "perceptive and intelligent lay person" is no myth. . . .¹⁴⁰

Last, Professor Gould says that accessible, popular writing should not require compromise in intellectual integrity. "The rules are simple: no compromises with conceptual richness; no bypassing of ambiguity or ignorance; removal of jargon, of course, but no dumbing down of ideas (*any conceptual complexity can be conveyed in ordinary English*)."¹⁴¹

By substituting the words "law" and "lawyer" for "science" and "scientist" in the above quotations, we can see how Professor Gould's words hold true for the legal profession. Specifically, constitutional professionals can aid the cause in two ways. First, legal writing can target general, lay audiences. Books by Professors Robert Bork, Stephen Carter, Lawrence Tribe, and Harry Wellington, to name a few, have made recent efforts along these lines.¹⁴² Also, articles, op-ed pieces, or letters-to-the-editor in newspapers or other periodicals of general circulation serve the same function.¹⁴³ These authors do the remarkable service of making constitutional issues accessible to a wide audience while not dumbing down the material.

Unfortunately, the works by the above authors are remarkable because of their rarity. As Professor Gould noted in other fields, popular writing also is not valued in the legal profession. For the practitioner, such writing is not "billable." For the academic, such writing is not of sufficient "scholarly" or "academic" depth to qualify the author for tenure.¹⁴⁴

For legal academics, their bias against popular legal writing can be traced to the elitism inherent in academia. Professor J.M. Balkin has noted:

140. *Id.* at 11-12 (emphasis added).

141. *Id.* at 12 (emphasis added).

142. *See, e.g.*, ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990); STEPHEN L. CARTER, *THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENTS PROCESS* (1994); STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION* (1993); LAURENCE H. TRIBE, *ABORTION: THE CLASH OF ABSOLUTES* (1990); HARRY H. WELLINGTON, *INTERPRETING THE CONSTITUTION: THE SUPREME COURT AND THE PROCESS OF ADJUDICATION* (1990).

143. *See* Linda S. Eads, *The Abortion Debate: Waiting for Imminent Supreme Court Decision*, DALLAS MORNING NEWS, June 28, 1992, at 1J; Paul Gewirtz, *Who Is Stephen Breyer?*, HARTFORD COURANT, July 24, 1994, at D1; Paul Gewirtz, *Litmus Test for Justices? Legal Views Do Matter*, BALTIMORE EVENING SUN, Apr. 29, 1993, at 19A; Laurence H. Tribe, *Rule of the 27th Amendment Joins the Constitution*, WALL ST. J., May 13, 1992, at A15.

144. Judges Harry Edwards and Richard Posner have argued that such an attitude exists within the academy also toward doctrinal scholarship. *See* Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession: A Postscript*, 91 MICH. L. REV. 2191, 2194-95 (1992); Richard A. Posner, *The Present Situation in Legal Scholarship*, 90 YALE L.J. 1113, 1117-19 (1981); *see also* KRONMAN, *supra* note 45, at 265 ("Every law teacher belongs to the community of university scholars, and it is to this community that his or her research and writing are primarily addressed.").

Despite their often egalitarian views, legal academics are socialized into a culture that privileges elite values. After all, like everyone else, academics hope to succeed in their chosen calling; and they need to distinguish themselves by being smarter, by being more learned, and by possessing greater expertise. Thus, saying that legal academics have tendencies towards elitism is like saying that they have tendencies towards breathing oxygen.¹⁴⁵

And, Professor Balkin suggests that an “encounter with populist values”—values shared by the public at large—“may help [law faculties] balance their natural proclivities.”¹⁴⁶ Writing popular legal material could provide just such an opportunity. Unfortunately, however, little incentive currently exists for the writing of popular legal works, such as newspaper and magazine articles, because they are not valued in the promotion and tenure system that most legal academics work within.¹⁴⁷

And, even the distinguished examples cited above can be inaccessible because of the problem of constitutional illiteracy. For example, none of the above authors, except for Wellington,¹⁴⁸ included a copy of the Constitution in their work for the reader’s reference. The reader has no sense of the document as a whole, only of the selected words that the author chooses to quote. The reader is encouraged to take it on faith that the text means what the author says it says—not a good way to encourage independent thinking.

Last, legal scholarship aimed at the layperson must make the case that constitutional literacy is relevant—why it is worth the reader’s attention. It is a mark of elitism and extreme arrogance to expect a wide audience to heed your words, rather than persuading the listener why one’s words are worth attention. Unlike legal academics—professionals at contemplating their own navels—who tend to find these discussions interesting in themselves, the non-academic must be persuaded to devote scarce time to the author’s material. In the language of the litigator, we must make our case. And, if the people ultimately ignore the message, we may have done all we can. For, it is at best unclear whether government—and certainly academics—should prescribe what the general public finds important or worthwhile.¹⁴⁹ We must be good advocates, not cultural czars.

145. J.M. Balkin, *Populism and Progressivism as Constitutional Categories*, 104 YALE L.J. 1935, 1950 (1995) (reviewing CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* (1993)).

146. *Id.*

147. Most tenure writing requirements are stated in terms of scholarly articles published in professional journals and reviews. See JULIUS GETMAN, *IN THE COMPANY OF SCHOLARS: THE STRUGGLE FOR THE SOUL OF HIGHER EDUCATION* 43-49, 109-10 (1992); Gordan Fellman, *On the Fetishism of Publications and the Secrets Thereof*, *ACADEME*, Jan.-Feb. 1995, at 26, 26-27.

148. See WELLINGTON, *supra* note 142, at 159-80.

149. Professor J.M. Balkin has recently addressed this point in the context of the First Amendment’s free speech guarantee. Balkin, *supra* note 145. Stated very simply (perhaps too simply), two currents—populism and progressivism—are prevalent in free speech as well as other

In the end, members of the legal profession—specifically, constitutional professionals—must play a role in improving constitutional literacy. We are the ones with knowledge of the Constitution and training in its interpretation and application; after all, it's our job! And, part of that job should be making our work and its object (the Constitution) accessible to the general public. This will not happen, however, until we recognize that obligation and offer incentives for our fellow constitutional professionals to do so. We must give practicing lawyers a reason to devote time to this cause. For example, states that have a Continuing Legal Education requirement might give CLE credit for legal writing in the popular media, or doing civics presentations for school children. And law schools might consider rewarding faculty who take the time and effort to write non-technical pieces that attempt to educate the public. As the pro bono arena has shown, unless lawyers are enticed with a carrot or threatened with a stick, they are unlikely to alter their behavior in an unselfish direction.

CONCLUSION

Seidman and Tushnet's *Remnants of Belief* has served as a jumping-off-point for this Essay's discussion of constitutional illiteracy. This Essay is more of a call to arms than a set of ready-to-go solutions. Such solutions will only come when the bar and academia recognize the problem and commit themselves to its solution. In the meantime, Seidman and Tushnet's advice—self-awareness and tolerance—will have limited application. Among constitutional professionals, this advice holds promise. In the larger America, however, we first need to put the Constitution back into constitutional argument.

areas of constitutional law. *See id.* at 1943-44. A central value of populism is the value of and confidence in the opinions of the average American. *See id.* at 1945-47. Progressivism, on the other hand, looks at the unalloyed popular will with suspicion, preferring some form of removed deliberation as a filter for raw public preferences. *See id.* at 1947-48. Balkin points out that academics tend to fall into the progressive mindset, which has a tendency to prescribe what the public *should know* or how the public *should act*. *Id.* at 1951. This Essay does not attempt to resolve the tension between populist and progressive tendencies, and ultimately lies somewhere between them. In a progressive vein, this Essay argues that we *should* value constitutional literacy. In a populist vein, however, this Essay argues that constitutional literacy should not be force-fed, but rather that legal writers should persuade the public to consider their work.

