

## CITIZEN AS LAWYER, LAWYER AS CITIZEN

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### I. ORDINARY PEOPLE AND CONSTITUTIONAL INTERPRETATION

Ordinary people engage in constitutional analysis.<sup>1</sup> How do they do so? How should they do so? What can lawyers contribute to their engagement? In this brief Essay I offer some anecdote-based speculations on the first question, which lead to some reflections on the second and third.<sup>2</sup>

Most lawyers have some experience with popular constitutional interpretation. Most of us have read something about extreme constitutional interpretations, of the sort associated with tax protesters who believe that the income tax is unconstitutional.<sup>3</sup> But, popular constitutional interpretation is more widespread and, by a large margin, much more sensible. Ordinary people think about the Constitution when they discuss antigay protests at military funerals, considering whether such protests are forms of political expression protected by the First Amendment or are instead forms of hate speech that governments can permissibly regulate.<sup>4</sup> They think about the Constitution when they discuss abortion rights,

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1. Throughout this Essay I refer to “ordinary people,” although sometimes I shift to the term “citizens” despite its implications—not always misplaced—for the identity of the class of people that is my primary concern.

2. I am not aware of substantial studies on popular constitutional interpretation, although I suspect that scholars of communications and political science have produced some. I put aside in this discussion constitutional interpretation by executive officials and legislators, which raises issues different from the ones I am interested in exploring here.

3. *See, e.g.,* *Crain v. Comm’r*, 737 F.2d 1417, 1418 (5th Cir. 1984) (dismissing an argument that the U.S. income tax is unconstitutional as without “colorable merit”).

4. *See, e.g.,* *NBC Today Show* (NBC television broadcast Nov. 1, 2007), transcript available at 2007 WL 21546556 (documenting an interview with Albert Snyder, who successfully won a lawsuit against groups who protested his son’s military funeral, in which Mr. Snyder stated, “Well, my son fought [in Iraq] for freedom of speech. My son did not fight for freedom of hate speech. And that’s basically what it is.”).

with prochoice people defending their positions by referring to a woman's liberty and equality interests, and prolife people arguing that fetuses (or unborn children, as they see it) are "persons" within the meaning of the Fourteenth Amendment and therefore entitled to the state's protection.<sup>5</sup>

My own experience with popular constitutional interpretation comes from two areas. I recently published a book on the Second Amendment, which is perhaps the constitutional provision about which the largest number of nonlawyers have reasonably firm interpretive positions.<sup>6</sup> In writing the book and in discussions with ordinary people—that is, nonlawyers—about the Second Amendment after the book was published, I found that firmly held positions split sharply on what the Second Amendment means, but were basically united in interpretive approach: ordinary people are straightforward textualists.<sup>7</sup> Gun-rights proponents observe that the Amendment's second clause, sometimes in lawyers' discourse called the "operative" clause, uses the phrase "right to keep and bear arms," and assert that the phrase must refer to the same kind of right that other Bill of Rights provisions create.<sup>8</sup> Gun-control proponents, in contrast, focus on the Amendment's first clause, its "preamble," which refers to "a well-regulated militia," and assert that whatever right the Amendment creates has to have something to do with membership in a militia, an organized and collective body, and that the right is not a purely individual right like the others in the Bill of Rights.<sup>9</sup>

A second example of popular textualism comes from my study of African American civil rights lawyers in the first half of the twentieth century. When one reads biographies of those lawyers, or their autobiographies, one finds a striking number of occasions in

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5. See, e.g., Catherine Verna, Letter to the Editor, *Technology Proves Fetus in Womb Alive*, PRESS OF ATLANTIC CITY, July 10, 2008, at A8 (arguing that "[a]n unborn baby has the same right to life and protection of the 14th Amendment ... as [we all] have").

6. MARK V. TUSHNET, *OUT OF RANGE: WHY THE CONSTITUTION CAN'T END THE BATTLE OVER GUNS* (2007) [hereinafter TUSHNET, *OUT OF RANGE*]. For my earlier observation about the prevalence of popular constitutionalism with respect to the Second Amendment, see MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 124 (1999).

7. TUSHNET, *OUT OF RANGE*, *supra* note 6, at 2.

8. *Id.* at 4.

9. *Id.* Of course, the Supreme Court rejected this view in *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008).

which textualism is said to have propelled the subject toward becoming a civil rights lawyer.<sup>10</sup> The structure of the events is similar: the young person obtains a copy of the Constitution—sometimes from a favorite relative, sometimes while sitting in a school room—and reads it. On reaching the Fourteenth Amendment, the subject reads the phrase “[n]o state shall ... deny to any person ... the equal protection of the laws,”<sup>11</sup> and is struck by the fact that “equal protection of the laws” would be an extremely desirable state of affairs, but is at odds with the subject’s experience in a segregated society.<sup>12</sup> Reading the Constitution’s text leads the subject to become a lawyer who will eventually take it as his or her duty to make reality reflect the text.<sup>13</sup>

Textualism is the nonlawyer’s first interpretive principle, but it is not the only one. Nonlawyers are also purposivists in interpretation. They supplement their textualism with explanations to the effect that the text read as they would read it makes good policy sense.<sup>14</sup> So, for example, limiting the Second Amendment right to persons and weapons with some connection to a state-organized militia makes sense because it allows the people acting through their representatives to respond to outbreaks of gun-based violence.<sup>15</sup> Or, on the other side, the individual-rights interpretation makes sense because it allows people to defend themselves against criminal predators when the government has not been able to provide an adequate collective defense.<sup>16</sup> It also serves as an essential check on the possibility that the government will become tyrannical, not so much because an armed people will be able to resist a modern army (although such a people operating as a guerilla force can make a soldier’s life miserable), but more because a people confident in its ability to defend itself against an oppressive

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10. *See, e.g.*, MICHAEL D. DAVIS & HUNTER R. CLARK, THURGOOD MARSHALL: WARRIOR AT THE BAR, REBEL ON THE BENCH 37-38 (1992).

11. U.S. CONST. amend. XIV, § 1.

12. *See, e.g.*, DAVIS & CLARK, *supra* note 10, at 37-38.

13. *See, e.g., id.*

14. For an overview of this interpretive theory, see TUSHNET, OUT OF RANGE, *supra* note 6, at 71-72.

15. *Id.* at 4.

16. *Id.*

government will be alert to incursions on their rights and will not elect representatives who might become tyrants.<sup>17</sup>

In addition, nonlawyers are weak traditionalists. In popular culture the fact that a practice has been regulated extensively for a long time counts against a claim that people have a constitutional right to engage in the practice, and the fact that a practice has gone on without regulation for a long time counts in favor of a claim that people have a constitutional right to engage the practice. The traditionalist interpretive principle is weak, though. Traditions are only occasionally robust enough to support any conclusions. More important, as against a tradition of regulation, people can say that we have only recently become alert to the ways in which regulation impinges on our rights, and, as against a tradition of non-regulation, people can say that the practice has only recently become widespread enough to justify regulatory intervention.

Nonlawyers almost never rely on precedents to explain their preferred interpretations. That is hardly surprising, of course, because nonlawyers are rarely familiar with the precedents, particularly when the precedents are thick on the ground. The exceptions are cases like *Brown v. Board of Education*<sup>18</sup> and *Roe v. Wade*,<sup>19</sup> which enter into popular understanding not so much as precedents in the lawyer's sense of the term, but rather as references that capture some deeper principle to which people are committed or opposed.<sup>20</sup>

Finally, ordinary people are not really originalists in constitutional interpretation. Sometimes people will refer to something like original understandings, but such references are almost always ways of referring to text or tradition. Originalism comes into popular discussions largely because originalism has been widely disseminated as *the* preferred interpretive method, and people think that they should somehow be originalists even if they are not quite sure what originalism really is, or, perhaps more important, even

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17. *Id.*

18. 347 U.S. 686 (1954).

19. 410 U.S. 113 (1973).

20. I suspect that this phenomenon is what politicians and scholars are attempting to capture when they refer to some decisions as "superprecedents." That is, that term may refer to cases as symbols of deeper commitments rather than as generators of legal meaning. See generally Michael J. Gerhardt, *Super Precedent*, 90 MINN. L. REV. 1204 (2006).

if they lack a good handle on what a constitutional provision's adopters understood the provision to mean.<sup>21</sup>

In some sense, of course, no one should be surprised that textualism and purposivism are the people's interpretive methods. Text and purpose are the only things to which ordinary people have ready—and unmediated—access. Everything else—legal doctrine and precedents most obviously, but even original understandings—are the province of legal specialists. At the same time, though, lawyers know that textualism, purposivism, and weak traditionalism cannot adequately support constitutional interpretation. And indeed, if ordinary people were able to reflect on the role of textualism and purposivism in the Second Amendment context, they would come to the same understanding: the text speaks in one way to gun-rights proponents, in another to gun-control proponents.<sup>22</sup>

The inadequacy<sup>23</sup> of the interpretive theories ordinary people use when they think about the Constitution means that lawyers can make a valuable contribution to popular constitutionalism. I confine my attention to a specific but important phenomenon: popular understanding of particular constitutional *rights* in ordinary political discussions.<sup>24</sup> Questions of public policy often implicate

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21. For good accounts of originalism's dissemination, see JOHNATHAN O'NEILL, *ORIGINALISM IN AMERICAN LAW AND POLITICS: A CONSTITUTIONAL HISTORY* (2005) (sympathetic to originalism), and Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 *FORDHAM L. REV.* 545, 545-48 (2006) (unsympathetic to originalism).

22. TUSHNET, *OUT OF RANGE*, *supra* note 6, argues that participants in popular discussions of the Second Amendment are actually unlikely to achieve this reflective state because each participant's position derives from a cultural predisposition prior to the participant's views on the Second Amendment's meaning. *Id.* at 127-36.

23. I write "inadequacy" to indicate that textualism, purposivism, and traditionalism have some place in both a well-informed popular constitutionalism and professional constitutionalism.

24. Bruce Ackerman argues that ordinary people do not—and properly do not—pay much attention to constitutional issues in what he calls times of ordinary politics; instead, they leave policymaking to the processes of interest group bargaining. BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 245-48 (1991). Perhaps so, if we are considering the large-scale structure of our constitutional order. But Ackerman's account is clearly wrong with respect to some important questions, such as gun rights and abortion. Similarly, LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004), focuses primarily on how ordinary people historically contributed to large-scale constitutional transformations, but have ceased to do so today. Lawyers may well play or have played a different role in such large-scale processes than they do in ordinary times, and I do not speculate here on those roles.

constitutional questions as well, and sometimes popular discussions of the policy issues include some explicit attention to the constitutional questions. What can lawyers contribute to such discussions?

Perhaps relatively little. Consider here an argument derived from one made by James Madison.<sup>25</sup> Addressing the concern that legislators motivated by desire for re-election and for their private interests would not adopt laws that advanced the public interest, Madison offered an ingenious argument. True, he conceded, individual legislators might be badly motivated.<sup>26</sup> But, he continued, laws result from the aggregation of individual votes.<sup>27</sup> What happens when we aggregate the (badly motivated) votes of individual legislators from a republic with a large territory and wildly diverse local interests? Madison suggested two outcomes. One was that no legislation would result, which was from his point of view not an obviously bad thing.<sup>28</sup> The other, more interesting in the present context, is that the bad motivations would cancel each other out.<sup>29</sup> The legislation that resulted would rest solely on the core of public interest embedded within each legislator's selfish position.<sup>30</sup>

Perhaps something similar might occur in popular discussions of policies that implicate constitutional rights. Each participant puts forward a position that combines a view about good public policy and a view about the Constitution's meaning. The discussions themselves might involve sharply divergent positions on both parts, particularly because of the previously noted convergence between views about good public policy and views about the Constitution's meaning. So, for example, letters to newspaper editors might be completely polarized on both dimensions: policy and constitutional meaning. Yet, when we move from abstract discussions to policymaking, the polarization might disappear. Perhaps the compromises ordinarily required to enact public policies will rest on accepting to some degree the constitutional views offered by both

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25. THE FEDERALIST NO. 10 (James Madison).

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

sides. And the constitutional position implicit in the policy as adopted might be “correct” from a lawyer’s point of view.<sup>31</sup>

According to this argument, lawyers need do nothing to influence the course of public discussion, because professionally acceptable interpretations will result from the operation of ordinary politics. Yet, this adaptation of Madison’s argument has an obvious defect. Both versions of the argument rely on the aggregation of partisan views to produce, in one, policy that advances the public interest, and in the other, good constitutional interpretations. Why, though, should we think that the aggregation of partisan views will actually occur? The argument Madison made also included another proposition: representatives have an incentive to get something done, so that they can go to their constituents and run on their records.<sup>32</sup> Gridlock, that is, is not an attractive outcome for representatives. So, when their purely private and partisan interests are cancelled by others’ opposing private and partisan interests, representatives nonetheless want to get something done, and all that is left is the public interest. As far as I can tell, ordinary people have no similar incentives to get something done, and so there is no reason to think that anything like an aggregation of conflicting views among the public will actually occur.

This implies that lawyers might actually have something to contribute to public discussions. And the contribution is obvious: information to which ordinary people do not have ready access. Earlier I referred to this as “precedent,”<sup>33</sup> but here the term has to take on a distinctive meaning. Of course we can inform people about what the Supreme Court has done on a disputed question of constitutional interpretation or on questions related to those under public discussion. I am unsure, however, if providing that sort of information is useful. If ordinary people accept judicial supremacy—that is, if they believe with Charles Evans Hughes that “the

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31. This possibility is supported by the proposition, which I have defended elsewhere, that constitutional interpretation in the United States is eclectic, drawing in almost every case on a range of interpretive approaches. Mark Tushnet, *The United States: Eclecticism in the Service of Pragmatism*, in *INTERPRETING CONSTITUTIONS: A COMPARATIVE STUDY* 7 (Jeffrey Goldsworthy ed., 2006).

32. THE FEDERALIST NO. 10 (James Madison).

33. See *supra* notes 18-20 and accompanying text.

Constitution is what the judges say it is”<sup>34</sup>—the information might be useful, even dispositive. Rarely, though, will the Court’s decisions be so clear that telling people, even those who accept judicial supremacy, what the Court has said will be more than a modestly relevant datum.<sup>35</sup>

And, after all, not all ordinary people are judicial supremacists, at least with respect to the constitutional questions they most care about. Indeed, my sense—again, based on anecdote rather than systematic evidence—is that many ordinary people (I would guess most, in fact) reject judicial supremacy in favor of an alternative. One alternative is departmentalist: here people agree that the courts have the final word on matters that come before them, but that until the courts resolve particular questions everyone has the right to develop his or her own constitutional interpretation. The other somewhat stronger alternative is that everyone has the right and perhaps the duty to develop his or her own constitutional interpretation independent of what the courts have said or will say. Courts have only the authority their decisions rationally gain from their expertise and the like, but the mere fact that the courts have spoken carries no weight as ordinary people think about what the Constitution means.<sup>36</sup> For ordinary people who are departmentalists or adhere to the “independent judgment” view, precedent carries little weight as such, and lawyers who use precedents in public discussions with such people as they would in their presentations to courts are not accomplishing much.

Yet, “precedent” can be helpful in public discussions in another way. For lawyers imbued with a common law sensibility, precedents matter because they let us think about real-world problems with a range of characteristics. They allow us to test our interpretations against our intuitions about problems that might not be immedi-

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34. Charles Evans Hughes, Speech Before the Elmira Chamber of Commerce (1907), in *ADDRESSES OF CHARLES EVANS HUGHES, 1906-1916*, at 179, 185 (2d ed. 1916).

35. In the Second Amendment discussions, for example, the most a lawyer could fairly say is that prior to 2008, the Court’s most recent discussion of the Amendment came in 1939, in *United States v. Miller*, 307 U.S. 174 (1939), and that the Court’s treatment of the Second Amendment can be read to support both a “militia-related” and an “individual right” interpretation of the Amendment. See generally *Miller*, 307 U.S. 174.

36. For advocacy of this approach, see KRAMER, *supra* note 24, at 247-48.

ately in front of us.<sup>37</sup> Ordinary people tend reasonably enough to focus on the problem at hand—a specific legislative proposal, for example—that they assess in policy terms. They then try to make constitutional sense of the policy position they have taken with respect to that proposal. Constitutional interpretations, though, might reach beyond the problem, at least in the view of the policy’s supporters or opponents.<sup>38</sup> Good lawyers are adept at generating examples that they can use to test whether a constitutional interpretation that makes intuitive sense for the policy at issue makes equally good sense for some other policies.<sup>39</sup> Our comparative advantage as lawyers, that is, may lie in our ability to look somewhat farther beyond the problems immediately before us than ordinary people do.<sup>40</sup>

## II. LAWYERS AS CIVIC EDUCATORS

Those of us who teach constitutional law regularly face a modest “crisis” of pedagogy. Why exactly are we teaching our students constitutional law? It cannot be that we are preparing them for the practice of law. Few of our students will deal with serious federal constitutional issues in practice.<sup>41</sup> Perhaps every student will run up against a federal constitutional issue occasionally, and some may end up practicing in areas in which specific topics—the constitu-

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37. For an elaboration (perhaps a bit too fancy for what is basically a discussion of common law reasoning), see Eugene Volokh, *Intermediate Questions of Religious Exemptions—A Research Agenda with Test Suites*, 21 *CARDOZO L. REV.* 595, 620-21 (1999).

38. Lurking within this formulation is a deep question about how strong a lawyer’s commitment to legal realism is. I discuss some aspects of this question below. *See infra* text accompanying notes 48-50.

39. Consider, for example, the proposition that the Second Amendment protects an individual right to keep and bear arms so that an aroused citizenry can fight off the military forces of an overreaching government. In light of modern conditions, does this mean that people have a right to keep and bear anti-tank weapons? (Maybe so, actually.)

40. As Ackerman’s analysis suggests, this is not a criticism of ordinary people, who have better things to do than think much beyond the policies immediately at issue in politics. *See ACKERMAN, supra* note 24, at 245-48. Lawyers’ professional training means that we can look a bit farther with a smaller investment of time and energy, diverting fewer intellectual resources to the task than ordinary people might. *See id.*

41. This is particularly true now that constitutional criminal procedure has been completely hived off from the basic course in constitutional law. Even if that topic remained in the syllabus, however, it would be relevant to the legal practice of only a handful of our graduates.

tional limitations on state taxation of interstate commerce, for example—matter a great deal. But, in the general constitutional law course we can do almost nothing to prepare these students for their later specializations. My sense is that the only topic in the basic constitutional law course that will come up in the practices of a fair number of our graduates is the preemption of state law by federal statutes, but a student who happens to be shopping on the Internet during the few minutes we devote to this topic might miss it entirely.<sup>42</sup>

We teach students constitutional law because knowing something about the Constitution is an important part of a lawyer's professional life even though it is not an important part of a lawyer's professional practice. Among other things, lawyers are important participants in their communities' civic life, and people expect them to know something about constitutional law. Even more, people expect lawyers to be able to tell them something they do not already know about constitutional law. That is, part of a lawyer's professional life is the job of civic educator.

Specifying civic education's content is a bit tricky. We might try to educate people about the content of constitutional law, offering answers to questions like, "What is the best interpretation of the Second Amendment?" Although I believe that lawyers should resist the temptation to answer such questions, I defer offering my reasons for a few paragraphs so that I can outline what I think is the better approach.

As civic educators, lawyers should try to get across to ordinary people that thinking through questions of constitutional interpretation is a complicated matter. As I have suggested, ordinary people work out their constitutional views after they have come to some

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42. Nor can we say that we are teaching them to "think like lawyers" in any distinctive way. Indeed, one of the pedagogic challenges in teaching constitutional law is to get students even to try to deploy the skills of legal thinking that they have learned in their other courses. That is, the challenge is to get students to think of constitutional law as law at all. They are inclined to think that constitutional law is a simple reflection of politics, and frankly, as a general matter, teachers of constitutional law do little to discourage them in so thinking. We want them to understand that constitutional law is deeply bound up with politics, and at most we want to ensure that they see that the connections between constitutional law and politics are deep, interesting, and not always easy to discern, rather than superficial, boring, and obvious.

resolution of the questions of public policy in which they are interested.<sup>43</sup> As some psychologists might put it, they are motivated reasoners: given their prior conclusions about good public policy, they are likely to find constitutional interpretations that support those conclusions more congenial than interpretations that do not.<sup>44</sup> Lawyers as civic educators can point out complications that motivated reasoning might have led ordinary people to overlook, by posing hypothetical and not-so-hypothetical cases that let their interlocutors think more deeply about the interpretation they favor.<sup>45</sup>

Consider, for example, a conversation about the individual-rights interpretation of the Second Amendment.<sup>46</sup> As far as I know, every adherent to that interpretation agrees that the individual's right to keep and bear arms is subject to reasonable regulation. What, though, counts as a reasonable regulation? Should it be as difficult to justify a regulation of the individual's right to keep and bear arms as it is to justify regulation of the individual's right to speak on political matters? A lawyer can ask, "Why is it alright to prohibit people convicted of felonies, who have served their sentences, from possessing handguns? Do you think that the justification you have just offered applies to people convicted of nonviolent felonies such as embezzlement? What about a ban on gun possession by people under a domestic protection order, who have not been convicted of anything?" If the job is done well, the lawyer as civic educator will be able to deepen the ordinary person's understanding of the individual-rights view by exploring what sorts of justifications are good enough—and the lawyer can do this all without using lawyers' jargon about "strict scrutiny," "intermediate scrutiny," and "rational basis review."<sup>47</sup>

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43. See *supra* text accompanying notes 14-17.

44. For an overview of the theory of motivated reasoning, see generally Ziva Kunda, *The Case for Motivated Reasoning*, 108 PSYCHOL. BULL. 480 (1990).

45. It is important to emphasize that adding complexity need not induce a change in position, but might help the person better understand exactly what is at stake in adopting that interpretation.

46. See TUSHNET, *OUT OF RANGE*, *supra* note 6, at 4.

47. Except perhaps at the conclusion of the conversation, when the lawyer might tell participants that they may run across that jargon if they start reading the legal literature on the problem, but that they should not be put off by it, because they have already worked through the ideas that the jargon simply summarizes.

Note that my approach avoids some problems that might arise for those who, like me, are strong legal realists. For strong legal realists, constitutional interpretations are case- or problem-specific.<sup>48</sup> It is not clear to me that a strong legal realist lawyer could in good faith use “precedent” or hypothetical cases in the way I suggest. Perhaps such a lawyer could properly do so in dealing with people who are not strong legal realists, and who therefore think that the constitutional interpretation they adopt in the case or problem at hand has implications for other cases or problems.<sup>49</sup> Or, perhaps more plausibly, the legal realist lawyer could assert that his or her efforts at civic education are directed at helping ordinary people think about *whether* the positions they take on specific questions of public policy and constitutional interpretation have any implications for other questions.<sup>50</sup>

As other participants in this Symposium point out, lawyers do face real constraints on their ability to act as civic educators.<sup>51</sup> The time available for that activity is limited, as is the time available to learn about the relevant constitutional law on the range of issues that ordinary people want help in thinking through. Specialization impairs the lawyer’s ability as well. Someone who has a superb grasp of the constitutional and nonconstitutional law of bank regulation, and who can explain its details in ways that ordinary people can understand, might well know almost nothing about the

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48. For what is in my view the best presentation of this point, see generally Jan G. Deutsch, *Precedent and Adjudication*, 83 YALE L.J. 1553 (1974).

49. Even here there is a problem, and I am unsure about its proper resolution. The non-legal-realist’s belief is, to the strong legal realist, mistaken. May the strong legal realist nonetheless work within the listener’s erroneous framework, or must he or she attempt to educate the listener about legal realist theory? (I am inclined to think the latter.)

50. On this view, the civic education provided by the legal realist lawyer bolsters listeners’ convictions by providing them with the language for resisting arguments that have the form, “The interpretation you adopt for the case at hand seems to you intuitively correct, but that very same interpretation applied to a different case leads to conclusions that even you think are unacceptable; you therefore ought to modify the interpretation you have developed for this case, and perhaps you will then see that under a more acceptable interpretation, you would have to abandon your support for the policy.”

51. See, e.g., Robert W. Gordon, *The Citizen Lawyer—A Brief Informal History of a Myth with Some Basis in Reality*, 50 WM. & MARY L. REV. 1169 (2009); James E. Moliterno, *A Golden Age of Civic Involvement: The Client Centered Disadvantage for Lawyers Acting as Public Officials*, 50 WM. & MARY L. REV. 1261 (2009).

Second Amendment.<sup>52</sup> Here lawyers have a professional obligation to devote some time to learning about current issues of constitutional law; not as deeply as a specialist would, but to an extent appropriate for their role as civic educators.<sup>53</sup>

Another constraint discussed by other Symposium participants—duties to clients and the need to avoid taking a public position that conflicts with a client's interests—may be less important when the lawyer acts as civic educator than as, for example, legislative lobbyist.<sup>54</sup> We might be concerned about a lawyer's lobbying efforts because lobbying sometimes occurs behind closed doors or because lobbying resources might be unbalanced.<sup>55</sup> In contrast, civic education takes place in the open air.<sup>56</sup> Further, as I have noted, the constitutional issues that concern ordinary people rarely arise in the lawyer's practice, which suggests that an imbalance in resources might be rare, or if it occurs, might arise because the client's position actually already enjoys widespread support. Finally, client-motivated "civic education" is unlikely to do more than reinforce views already held.<sup>57</sup> Lawyers representing clients have a distinctive mode of discourse, in which all relevant considerations point in the same direction—the client's interest—and nuance is lacking. That is precisely where ordinary people start from, and client-motivated "civic education" is not likely to do much good—or harm. In any event, disclosure to the public about

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52. My sense is that ordinary people understand when a lawyer says that she does not know anything useful about the law relating to subprime mortgages, to take a recent example, but are less forgiving if a lawyer says that she does not know anything about the Constitution. Ordinary people likely understand that the legal topics that come and go are properly the subjects of true specialists, but do not regard constitutional law as similarly specialized.

53. I have sometimes presented my students with the image of their conversations at a family Thanksgiving dinner: they should, I suggest, be able to sustain a brief conversation on pretty much any constitutional issue of current interest. That is the level of knowledge that I think all lawyers have an obligation to attain.

54. See generally Moliterno, *supra* note 51.

55. I should note that I personally do not find either of these concerns terribly worrisome, but I know that others do.

56. Cf. generally Jonathan R. Macey, *Civic Education and Interest Group Formation in the American Law School*, 45 STAN. L. REV. 1937 (1993) (discussing the role of civic education provided to lawyers in law school).

57. This is the so-called "echo chamber effect" in which people hear messages they already agree with. See KATHLEEN HALL JAMIESON & JOSEPH N. CAPPELLA, *ECHO CHAMBER: RUSH LIMBAUGH AND THE CONSERVATIVE MEDIA ESTABLISHMENT* 75-78 (2008).

the lawyer's relation to a client with an interest in the subject should be sufficient to alleviate any concerns.

A different problem might pose more severe difficulties. Lawyers are citizens as well as professionals. As citizens we have views on matters of public policy: we are prochoice or prolife, favor or oppose gun control, and the like. And because we do, we too run the risk of the same kind of motivated reasoning that ordinary people use—motivated not by a client's interests but by our own commitments to public policy positions.<sup>58</sup> So, when we purport merely to present the competing arguments to deepen our audience's understanding of the constitutional question it is interested in, we will inevitably shape our presentation in light of our policy commitments. And worse, we will do so subtly, and with respect to the professional matters as to which we have some comparative advantage.<sup>59</sup> Our listeners may mistakenly think that because we have no client interests at stake, we are offering a dispassionate professional view of the matter.

I see two ways of avoiding this difficulty, although neither of them is completely attractive. First, we could take care to perform our task as civic educators by performing that task only with respect to policy issues and constitutional questions as to which we are largely indifferent.<sup>60</sup> Yet, doing so has peculiar implications. By hypothesis, we are not much interested in the subject and, for reasons I have already sketched, we will not know much about it.<sup>61</sup> To perform as civic educators, then, we would have to take time to learn about something in which we have little interest. As dedicated

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

59. Of course, if our audience knew about motivated reasoning, listeners could ask what our views on the policy at issue were and then discount appropriately what we have to say. I believe this to be unlikely.

60. This suggestion draws on my experience in writing and thinking about the Second Amendment, a topic in which I had only a passing interest, at most, before writing my book. The book had its origins in an inquiry from the editor of a proposed series on "inalienable rights" who asked whether I would be interested in writing a book in the series, and if so, on which rights. I replied that I would be happy to do something on the First Amendment's religion clauses, but that to accommodate him I would consider writing on some other topic. He responded that he had already lined someone up for the religion clauses, but needed someone to write on the Second Amendment. I agreed to do so, again mostly out of friendship and some minor interest in the subject.

61. *See supra* text accompanying notes 51-53.

professionals, some of us might actually do that, but I would not think it likely that many of us will.

The other possibility might seem even more paradoxical. We could take an interest in various matters of public policy and constitutional interpretation, but assiduously work to avoid having any substantive views about them.<sup>62</sup> Then, when we work as civic educators, we will genuinely not have any basis for motivated reasoning. The seeming paradox, though, is that our ability to perform our duty as civic educators requires that we disengage ourselves from the very policy and interpretive controversies that constitute our civic life. Or, more forcefully, to be good civic educators perhaps we must be bad citizens.

Perhaps not, though. After all, lawyers in an adversary system are familiar with the stance I have described. It is the stance they are allowed to take with respect to their clients' positions.<sup>63</sup> A lawyer may represent a client when accomplishing the client's goals in something the lawyer as a citizen opposes.<sup>64</sup> Perhaps the lawyer as civic educator should take a similar stance with respect to public policy, treating it as a matter of indifference.

Here too the problem of incentives arises. Lawyers represent clients when they disagree with the clients' positions basically because they are paid to do so. Money provides the incentive to be indifferent about the client's goals.<sup>65</sup> Nothing but a sense of professional duty can do so with respect to civic education. I am

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62. Perhaps it is an advantage of the strong legal realist position mentioned above, *see supra* text accompanying notes 48-50, that legal realists know that, although they have arguments to which they are committed, those arguments are no better, as legal arguments, than those of adherents to positions they oppose.

63. "Allowed," not "required," because as a general matter lawyers have no professional obligation to represent clients with whose positions they disagree (with some important exceptions, such as the famous "last lawyer in town" problem of providing representation to a despised client who is unable to obtain other representation). *See* MODEL RULES OF PROF'L CONDUCT R. 1.16(b) (2008).

64. The Model Rules of Professional Conduct state that a lawyer should represent a client even if the lawyer opposes the client's cause. *Id.* at R. 1.3 cmt.; *see also* Robert P. George, *Reflections on the Ethics of Representing Clients Whose Aims Are Unjust*, 40 S. TEX. L. REV. 55, 55-56 (1999) (stating that it is possible to represent clients whose objectives are unjust).

65. For an important exchange on the implications of this observation, see Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1074-76 (1976), and Edward A. Dauer & Arthur Allen Leff, *Correspondence: The Lawyer as Friend*, 86 YALE L.J. 573, 578-79, 582 (1976).

afraid that relative to all the other constraints and incentives a lawyer faces, that might not be enough.

#### CONCLUSION

I became increasingly discouraged as I worked out the thoughts I have expressed here. I began with a reasonably firm conviction, based on my reflections on teaching constitutional law, that lawyers had an important role to play as civic educators. I also thought that that role was rarely described in an analytic way, beyond the cheerleading of Law Day speeches. I may have found out why that is so. Lawyers may have a professional duty to act as civic educators, but I fear that we are unlikely to perform that duty well.<sup>66</sup>

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66. Although perhaps no worse than we perform our other professional duties, I suppose.