

THE MARSHALL–BRENNAN CONSTITUTIONAL LITERACY PROJECT: AMERICAN LEGAL EDUCATION’S AMBITIOUS EXPERIMENT IN DEMOCRATIC CONSTITUTIONALISM

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ABSTRACT

The Marshall–Brennan Constitutional Literacy Project is the leading effort in American legal education to mobilize law students to teach high school students about the Constitution and Bill of Rights. This Article traces the development of the project from its beginnings in the 1990s at American University Washington College of Law to its unexpected but dramatic expansion across the country to eighteen law schools today. The Article explains the Marshall–Brennan curriculum, which focuses on Supreme Court decisions addressing the rights of America’s student population in school and in the criminal justice process, and canvasses the essential operational ingredients of Marshall–Brennan chapters thriving all over America. It argues that this project provides functional meaning to the intellectual movement in constitutional law to define a democratic or popular constitutionalism, offering law schools and their students and professors an excellent, practical way to promote constitutional values in their local communities. It further posits that the project offers one compelling answer to the growing cynicism about law schools, which are being vilified for being internally exploitative, socially useless, intellectually self-referential, and indifferent to the community. Finally, the Article contends that, in the post-*Fisher v. University of Texas* age of sharply controlled affirmative action, the project is the most effective pipeline strategy in the land for making a law school education a tangible choice and viable prospect for talented and disadvantaged high school students from all backgrounds.

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INTRODUCTION

I remembered a reply Bob Moses once made to a reporter when he was asked, "How do you organize?" "By bouncing a ball," he replied. "What?" asked the puzzled reporter. "You bounce a ball," Bob explained quietly. "You stand on a street and bounce a ball. Soon all the children come around. You keep on bouncing the ball. Before long it runs under someone's porch and then you meet the adults."

—David Dennis, Foreword to *Radical Equations: Math Literacy and Civil Rights*¹

Apart from concerns about school speech doctrine, constitutional scholars rarely enter the high school classroom. This is a mistake.

—Tom Donnelly, *A Popular Approach to Popular Constitutionalism: The First Amendment, Civic Education, and Constitutional Change*²

The French have an amusing expression that came to mind when I set out to write this Article. "Well, yes, we know it works in *practice*," they say. "But does it work in *theory*?"

This ironic question nicely captures the challenge of describing the Marshall–Brennan Constitutional Literacy Project (Marshall–Brennan), which has been working in practice for nearly fifteen years, bouncing a ball across America. The project has a dynamic presence in eighteen law schools where Marshall–Brennan chapters have organized to teach thousands of students in dozens of high schools from New Jersey to California, from Louisiana to Minnesota. It has produced impressive results for these lucky high school students who have studied with the Marshall–

1. David Dennis, *Foreword* to ROBERT P. MOSES & CHARLES E. COBB, JR., *RADICAL EQUATIONS: MATH LITERACY AND CIVIL RIGHTS*, at xiv (2001).

2. Tom Donnelly, *A Popular Approach to Popular Constitutionalism: The First Amendment, Civic Education, and Constitutional Change*, 28 QUINNIPIAC L. REV. 321, 327 (2010).

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Brennan Fellows (Fellows), the law students whose own educations have been enriched and transformed by their commitment to teach younger contemporaries about the Constitution and the Bill of Rights.

Yet the project has never received an extended academic presentation or defense. Even more surprisingly, although its champions and supporters are legion across America, significant numbers of legal scholars, deans, and students still have not even heard of it. This Article seeks to open a broader discussion about this surging movement for constitutional literacy that has, in short order, brought law schools and high schools together in positive ways in communities all over America.

It is an especially valuable moment to explain the project because law schools are under attack everywhere for being selfish, greedy, deceptive, exploitative, parochial, self-referential, and indifferent.³ Ask any dean and you will be told: these are dark days for legal education in America, and many people who work in it are simply hunkering down and praying that the storm of criticism passes over.⁴

But this Article offers an expansive margin of hope amid all the gloom about the future of legal education. While many law schools are huddled in a defensive cocoon, the law schools investing energy in the Marshall–Brennan project are propelling a national movement for constitutional literacy that is doing remarkable public service by transforming the endlessly lamented but never seriously confronted civic and constitutional ignorance of the American public. The project harnesses the idealism, energy, and knowledge of law students to improve in systematic ways the constitutional intelligence of the high school students involved. Law school chapters send the Fellows into nearby public high schools to teach their students a detailed course about the Constitution and Bill of Rights. The course focuses on how constitutional values and rules apply to conflicts that take place in the public school setting or within the juvenile justice system, familiar and paradigmatic contexts that open up the world of constitutional thought in immediately understandable ways. The results of this targeted curriculum have been startling and, if replicated and expanded, could become the basis for vastly improved constitutional literacy in hundreds of communities across America.

3. Law schools are being characterized on the Internet as greedy and corrupt rackets focused on the goal of raking in bucks. *See, e.g.*, David Segal, *Law School Economics: Ka-Ching!*, N.Y. TIMES, July 17, 2011, at B1; *Greed*, INSIDE L. SCH. SCAM (Aug. 10, 2012, 2:34 PM), <http://insidethelawchoolscam.blogspot.com/2012/08/greed.html>; Elizabeth G. Olson, *Law School Fuzzy Grad Jobs Stats: A Federal Offense?*, CNNMONEY (Mar. 16, 2012, 10:20 AM), <http://management.fortune.cnn.com/2012/03/16/law-school-fuzzy-grad-jobs-stats-a-federal-offense>. *See generally* THIRD TIER REALITY, <http://thirdtierreality.blogspot.com> (last visited Apr. 23, 2013).

4. *See* Ethan Bronner, *Law Schools' Applications Fall as Costs Rise and Jobs Are Cut*, N.Y. TIMES, Jan. 31, 2013, at A1; Lincoln Caplan, *An Existential Crisis for Law Schools*, N.Y. TIMES, July 14, 2012, at SR10.

High school students served by Marshall–Brennan not only master essential constitutional concepts relating to the Bill of Rights and constitutional structure but also learn a key rhetorical skill for participating in American life: how to think, argue, persuade, and reason with one’s fellow citizens in ways that draw on core constitutional values. Moreover, the high school students served by the project enter into extended contact with law students, legal thought, and judicial process. Many make the intellectual and social connections that convince them—and help them—go to college; some will even end up on the path to law school, which we insist is not an ignoble trajectory even though it is obviously not going to be for most young people.

Meantime, the Fellows achieve life-changing benefits of their own in the contested terrain of the public school classroom. Teaching young people the processes of constitutional reasoning, they deepen in impressive ways their own understanding of constitutional law. Moreover, they learn about the complex institutional life of American public schools, where much of American constitutional law has been worked out and continues to develop. In the course of the experience, many of the Fellows will encounter judges who they will come to clerk for, school system lawyers or private education law attorneys who they will be recruited to join, or public school communities they will continue to assist. Similarly, the law professors involved in teaching the Fellows not only send out but also receive back big waves of constitutional learning. The project offers a paradigm of *democratic constitutionalism in action* because the locus of the project’s constitutional discourse moves back and forth from the courts and the law schools to the high schools and the greater community, allowing for a much richer process of legal training for the Fellows and “constitutional absorption” for the high school students.⁵

In Part I, I describe the history of the Marshall–Brennan Constitutional Literacy Project, both in Washington, D.C., and in its unfolding national expansion. I also describe the essential operating principles of local chapters and the basic dynamics of study and action that occur in the course of the school year. In Part II, I argue that the project is potentially the most significant institutional projection of the movement among constitutional scholars to define and strengthen democratic and popular constitutionalism in American life. This is a movement that includes both scholars, like Robert Post and Reva Siegel, who seek to “protect constitutional ideals under conditions of constitutional conflict” by

5. The model of “constitutional absorption” is suggested by Tom Donnelly, who argues that the textbooks and lessons offered to high school students about constitutional law and process are key avenues for both the transmission and “absorption” of constitutional values and ideals. See Donnelly, *supra* note 2, at 357.

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securing the people's role in the cultural process of "norm contestation,"⁶ and those, like Mark Tushnet, who seek more radically to "take the Constitution away from the Courts."⁷ I argue that the constitutional literacy movement propelled by Marshall–Brennan speaks comprehensively to the call for a democratic and popular constitutionalism and has already begun to benefit American democracy by uplifting public understanding of the Constitution in targeted areas. When law students work with high school students in the project, the high school students (and often their families) not only gain a sense of greater civic knowledge and capacity in their school environment but also learn to participate over the course of their lifetimes in realizing constitutional values. Because Marshall–Brennan awakens passionate civic interest in many young people who are accustomed to being the objects and victims of law rather than its authors and agents, the project is also the model pipeline strategy for identifying and nurturing poor, working-class, African-American, and Hispanic high school students who may want to explore legal education as a professional pathway.⁸ In the course of this exciting educational process, the project links law schools to the daily life of the communities that surround them. Overall, the Marshall–Brennan project offers the chance to make the high-minded and abstract promise of popular constitutionalism not a passing academic theory but an enduring pragmatic commitment and continuing project for thousands of people in different social and institutional situations.

In Part III, I explain how the project offers a strong counter-narrative to the toxic assumptions about what legal education has become and what it must be today. The Fellows are providing a lively, pragmatic, and experimentalist answer to the acid cynicism being poured down on legal education, debunking the claims that law schools are categorically insular, selfish, exploitative, and interested only in preparing students for corporate law firm jobs that no longer exist.

6. Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. REV. 373, 377, 381 (2007).

7. See e.g., MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999).

8. See Sarah E. Redfield, *The Education Pipeline to Law School—Too Broken and Too Narrow to Provide Diversity*, 8 PIERCE L. REV. 347 *passim* (2010) (providing analysis of diversity statistics of both the U.S. and law school populations).

I. "IF WE CAN DO IT"⁹:
THE HISTORY OF THE CONSTITUTIONAL LITERACY PROJECT

A. "Very Heated and Controversial": *Suppression of Student Speech About Same-Sex Marriage in 1996*

Every Marshall–Brennan Constitutional Literacy Project at each of the eighteen law schools involved has its own story to tell, each one intricate and suspenseful in its own way. But the one that I know best relates to the original project at American University's Washington College of Law (WCL), which launched in 1999 and became the working model for all the others. The WCL chapter has also become the organizing home for the national Marshall–Brennan Constitutional Literacy Project, which has worked to nourish the other law school chapters, to promote constitutional literacy as a cause within the law schools and the country, and to provide leadership for the national Marshall–Brennan moot court competition and other cooperative endeavors.¹⁰

The origins of the project lie with the outbreak of a highly charged public conflict in a suburban school system over the meaning of freedom of speech in the school setting. It began for me with a phone call that I received in 1996 from Jake Milstein, who was a senior at Montgomery Blair High School in Silver Spring, Maryland, and the son of my colleague Elliott Milstein, then the dean of WCL. Jake was a student in Blair's Communication Arts Program (CAP) and participated in the production of a monthly television talk show for Montgomery County Public Schools' cable channel called *Shades of Grey*, which featured debates on public policy issues. The show had been running on the county's Channel 60 for many years according to a signed agreement between CAP and the channel managers.¹¹

Jake called because the managers were refusing to run the October episode that featured a debate between two prominent liberals and two prominent conservatives over whether gays and lesbians should have the right to marry. The discussion, clearly ahead of its time, was civil, lively, and fascinating; the CAP teacher, Christopher Lloyd, praised the show's general excellence (if not its primitive lighting techniques).¹² But the Montgomery County Public Schools authorities insisted on previewing a tape of the show—although this was not their ordinary practice—and, having seen it, concluded that it was "inappropriate" and too "hot" for

9. See *The Principles and Structure*, ALGEBRA PROJECT, <http://www.learn2question.com/seevak/groups/2001/sites/moses/ap/principles-page2.htm> (emphasis added) (last visited Apr. 23, 2013).

10. See *The Marshall–Brennan Constitutional Literacy Project*, AM. U. WASH. C.L., <http://www.wcl.american.edu/marshallbrennan/> (last visited Mar. 22, 2013).

11. JAMIN B. RASKIN, *WE THE STUDENTS: SUPREME COURT CASES FOR AND ABOUT STUDENTS* 64 (2d ed. 2008).

12. *Id.*

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the audience.¹³ They particularly disfavored the parts of the debate that involved guests voicing their perspectives on God and the religious implications of same-sex marriage.¹⁴

On October 23, 1996, Barbara Wood, the program director for Channel 60, sent an e-mail to Mr. Lloyd and the students explaining the decision not to run the show: “We felt that the gentleman who was a guest on the show [Dr. Frank Kameny] brought up the issue of religion and God in a very heated and controversial manner. . . . We both felt it would be inappropriate to air the program for that reason alone.”¹⁵

School authorities had apparently reacted negatively to a colloquy that took place when the student host asked a question about the basis of the guests’ views on same-sex marriage. One of the conservative guests, Paula Govers, press secretary for Concerned Women for America, introduced religious faith to the discussion:

GOVERS: The Concerned Women for America believes that marriage is an institution sanctioned by God, licensed by the state, specifically between one man and one woman, and specifically for the purpose of procreation and should be a covenant between two people that should be a lifetime commitment.

This comment prompted the liberal guests, Dr. Frank Kameny of the Washington, D.C. Gay and Lesbian Activists Alliance and Judith Schaeffer of People for the American Way, to respond:

KAMENY: Paula, you said that the First Amendment guarantees us freedom of religion, and we all have our own views of God. My God gave us homosexuality as a blessing given to us by our creator God to be enjoyed to its fullest—exultantly, exuberantly, joyously. My God sanctifies same-sex marriage even if your God does not, and we are both American citizens and both Gods deserve equal recognition from our—not your—our government.

SCHAEFFER: That’s exactly what the First Amendment requires. The government cannot legislate religious beliefs.

KAMENY: If you don’t want to enter into a same-sex marriage, don’t. But don’t tell us just because your God doesn’t sanctify it, my God is to be ignored.

GOVERS: Dr. Kameny, you said that your God does sanctify these unions. So your religious beliefs would say it’s a good thing and our religious beliefs would say it’s not. Why does your view get to trump ours?

13. *Id.*

14. *Id.* at 65.

15. *Id.*

KAMENY: It does not. If you believe that, you have an absolute right not to enter into a same-sex marriage.

KRIS ARDIZONNE (the other conservative guest and legal director of the Eagle Forum): But my taxpayer dollars go to pay for the institution of marriage. And we don't believe in it.

KAMENY: And so do the tax dollars of gay people go to pay for marriage as well.¹⁶

Although Mr. Lloyd and Dr. Philip Gainous, the Blair High School principal, considered this spirited exchange of views enlightening, the Montgomery County Public Schools' cable managers, who reported to Superintendent Jerry Weast, deemed it "inappropriate" for the mostly adult audience of the cable channel.¹⁷ As did the principal in *Tinker v. Des Moines School District*,¹⁸ the nervous cable managers saw the threat of "disruption" breaking out everywhere. In both cases, education authorities who could not handle the idea of minors expressing themselves on a profound national problem—the Vietnam War or whether gay people should be permitted to marry—tried to erase all signs of the offending speech and ideas.

Jake and his classmates Andrea Merriam and Andrea Stuart asked whether I would be willing to represent the class (on a pro bono basis) to defend their right to have the show run pursuant to the letter agreement they had with the school system. I readily agreed to help.

My representation began by explaining to the students what the Supreme Court had decided about how the First Amendment affects their rights at school: the seminal *Tinker* case, the restrictive and regressive decisions in *Hazelwood School District v. Kuhlmeier*¹⁹ and *Bethel School District No. 403 v. Fraser*,²⁰ and finally, the promising *Rosenberger v. Rectors and Visitors of the University of Virginia*,²¹ an especially important case for us because it established that public institutions cannot discriminate against student speakers on the basis of the religious content and viewpoint of their speech.²² We also read a few relevant Fourth Circuit decisions that were somewhat less favorable to our case. It was an intensive First Amendment workshop.

Despite the fact that these were bright honors students who had been selected for a competitive language and communications program, they had never heard of any of these decisions and indeed were uncertain

16. *Id.*

17. *Id.* at 64.

18. 393 U.S. 503 (1969).

19. 484 U.S. 260 (1988).

20. 478 U.S. 675 (1986).

21. 515 U.S. 819 (1995).

22. *Id.* at 845–46.

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as to whether high school students, as one of them put it to me, “have any rights at all. I mean, we’re in school, right?”

The students were galvanized by our review of Supreme Court authority explaining that students assuredly do have constitutional rights. They were especially moved by the doctrines of content and viewpoint discrimination, which gave them a language to describe their frustration. They were convinced that they were being censored because of what the guests on the show were saying and because the school system believed that the public could not handle an honest discussion in which articulate people advocated same-sex marriage.

The students quickly turned our impromptu seminar into strategy sessions for some old-fashioned community organizing. Although I had wanted to go straight to court, they wanted to appeal the school superintendent’s censorship decision through school system channels, and this proved to be a wise decision indeed. They proceeded to make dozens of videotaped copies of the censored show and gave it to their principal, their parents, parent–teacher association (PTA) leaders, journalists from the *Washington Post* and *Washington Times*, National Public Radio, and the school board members who would render a decision on the superintendent’s actions. They then lobbied and collected statements of support not just from their teacher, who had always backed them, but also from their principal, Dr. Gainous, who became a strong ally. They soon won resolutions of support from the Blair PTA and student council, other local high school PTAs and student councils, and local officials and prominent Blair alumni, like journalist Carl Bernstein. By the time we submitted formal arguments to the Montgomery County Board of Education, the political context had been transformed by the educational campaign that the students had undertaken with their peers, their teachers, and the community.

Before the Montgomery County Board of Education, we argued that the decision to censor the show violated both county policy and the First Amendment by discriminating against a speaker because of his religious views. We quoted the Supreme Court’s decision in *Rosenberger*, which struck down the University of Virginia’s practice of subsidizing student journals that had secular points of view but withholding funds from those that had a religious point of view.²³ The Court there found: “The government must abstain from regulating speech when the specific motivating ideology, or the opinion or perspective of the speaker, is the rationale for the restriction.”²⁴ The students argued that the school system’s cable managers objected to “the gentleman who was a guest on the show” who

23. *Id.*

24. *Id.* at 829.

“brought up the issue of religion and God in a very heated and controversial manner,” which of course he had every right to do.²⁵

When the school system responded that *Hazelwood* gave it the right to edit and censor student speech, the students had an answer. Because the actual educators in this case—the CAP media teacher and the Blair principal—both favored broadcast of the show, the school system could not claim under *Hazelwood* that its actions were “reasonably related to legitimate *pedagogical* concerns.”²⁶ The *teachers* in this case were strongly opposed to the school system’s censorship, which had nothing to do with *student learning* and everything to do with a predicted adverse *audience reaction*.

At a boisterous public meeting, the Montgomery County school board voted 4–3 to reverse the superintendent’s decision to stand by his cable channel managers. The board also voted to air the show more than a dozen times, and to broadly advertise the broadcast.²⁷ It was a sweet win for the students and their teacher, all of whom had been demoralized by the original squelching of the broadcast. The icing on the cake for the students was that their work on the show was given an A by Mr. Lloyd as a superior piece of broadcast journalism. Their principal, Dr. Gainous, soon thereafter won an award from the Freedom Forum for standing up for the First Amendment rights of his students.²⁸

After these events, I was besieged by high school students raising serious in-school constitutional issues: random stop-and-frisks in the classroom, orders from a principal to cover up a tattoo, prayers on the loudspeaker at basketball games, unequal access to Advanced Placement courses, and so on. It suddenly became clear to me that our public schools are a terrain of continuing disputation about the rights and responsibilities of young people and the meanings of democratic citizenship. Only a small fraction of school-based conflicts ever go to court, and the tiniest fraction of those that do will reach the Supreme Court. In the main, the profoundly interesting controversies that take place at school are worked out by teachers, students, parents, principals, school boards, city councils, and state legislatures in arenas that are galaxies away from the Supreme Court. Conscious or not, this is the vaunted popular and democratic constitutionalism in action.²⁹

There was no practical way that I could respond to these entreaties and wade into all these controversies, but one source of the problem had

25. RASKIN, *supra* note 11, at 66.

26. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) (emphasis added).

27. RASKIN, *supra* note 11, at 66.

28. See *Newseum Presents 1st Annual Courage in Student Journalism Awards*, FREEDOM FORUM (Apr. 14, 1998), <http://www.freedomforum.org/templates/document.asp?documentID=6424>.

29. For the most fully developed theory of popular constitutionalism, see TUSHNET, *supra* note 7, at 177–94.

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become disturbingly clear: the high schools that should be *teaching* students about their rights were instead too often *trampling* their rights. Neither teachers nor students had been even casually informed, much less seriously educated, about the thick body of Supreme Court precedent interpreting the constitutional balance of rights and responsibilities in the school community. This educational failure meant that neither students nor teachers nor administrators nor parents nor the broader community had even the most elementary conceptual framework for addressing the conflicts that are a recurring and unavoidable part of the educational process. This failure to prepare members of the school community for predictable conflict over rights and responsibilities represented not just a self-inflicted wound in terms of school management, but also a missed, glorious teaching opportunity and, therefore, a kind of deep educational malpractice and social failure.

B. "We the Students": A Curriculum and Strategy Are Born

I resolved in the aftermath of the *Shades of Grey* victory to undertake two related projects: (1) to write a book that would compile and explain the major Supreme Court decisions and public controversies involving students in public school; and (2) to create what I hoped to call a "constitutional literacy" project at American University Washington College of Law, my home school, that would deploy the magnificent energy and creativity of our law students to educate area high school students about the Bill of Rights and our constitutional system and values.

The idea behind the book *We the Students*—which was sponsored by the Supreme Court Historical Society and first published by Congressional Quarterly Press in 2000—was to provide a clear and scrupulously evenhanded casebook that could become the basis of a new curriculum for high school students to learn about the Constitution and the Supreme Court through the cases that affect them most directly.³⁰ "[H]igh school teachers still rely heavily upon textbooks for both homework assignments and the content of their classroom instruction,"³¹ and any effort to infuse the curriculum with serious constitutional ideas would require a new foundational text, not simply a textbook with answers but a casebook with theoretical texture and hard questions. Such a casebook would also be a resource for students, teachers, parents, and others to consult about the controversies that recurrently arise in the school context.

The even more ambitious idea of a constitutional literacy project—to have law students teaching high school students about constitutional values, process and rules, and to engage them constantly on issues of constitutional moment in their own lives—reflected the fact that most

30. See RASKIN, *supra* note 11, at ix.

31. Tom Donnelly, Note, *Popular Constitutionalism, Civic Education, and the Stories We Tell Our Children*, 118 YALE L.J. 948, 972 (2009).

school systems are neither taking constitutional education seriously nor equipped with the personnel or resources to make it happen if they were. The idea of taking direct action—using a surplus of constitutional consciousness among law students to correct a deficit of constitutional understanding among high school students—was inspired by the remarkably nimble work of the great civil rights organizer and mathematician Bob Moses.

Moses's career has involved cutting across and through existing institutional forms in society by mobilizing the idealistic energy of the young to produce intellectual and moral progress for disadvantaged and disempowered people. His career has taken him from being a math teacher to a Harvard philosophy Ph.D. student to the visionary organizer of the Student Nonviolent Coordinating Committee and Freedom Summer in Mississippi to initiating the Algebra Project in the 1990s.³² He has made the best ideals of the Enlightenment come alive for millions of Americans stuck at the bottom of entrenched hierarchies of power, wealth, and knowledge. His death-defying voter registration work in Mississippi in the early 1960s developed the aspirational political language of “one person one vote,” which became the “radical equation” that came to redefine American politics and social life after the civil rights movement.³³ Moses's current project building a grassroots social movement to teach algebra to elementary and middle school students in Mississippi and other parts of the South is giving countless Americans a new foundation for personal success, saving them from the demoralizing and disabling experience of being mathematically ignorant in the new century.

In his indispensable book *Radical Equations*, Moses explained the need for community organizers to find principles that establish a “minimum of common conceptual cohesion”³⁴ in the community of the dispossessed and then to identify what he called the “crawl space”³⁵ for progress within existing institutional channels to advance those principles in society. In the early civil rights movement, the organizing idea was one person—one vote, and the crawl space was the tiny window of opportunity opened up by the 1957 Civil Rights Act creating the Civil Rights Division in the U.S. Department of Justice. The movement found expression in the personal courage of young people active in the movement in Mississippi, as well as in the grassroots encouragement they drew from the community.³⁶ In the Algebra Project, the central idea is advanced math

32. See MOSES & COBB, *supra* note 1, at 91–92.

33. See *Reynolds v. Sims*, 377 U.S. 533, 586–87 (1964); see also *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) (proclaiming as formal equal protection doctrine the civil rights movement's principle of “one person one vote,” over the vehement protests in dissent of conservative Justices that the Constitution guaranteed no such thing).

34. See MOSES & COBB, *supra* note 1, at 91.

35. *Id.* at 92.

36. See *id.* at 91–92; see also BIANCA DUMAS, ROBERT PARRIS MOSES 25–39 (2003).

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literacy for all; the crawl space comes from relationships to schools that permit the project—made up originally of “outsiders”—to enter, teach, and recruit new generations of algebra teachers and experts.

The Marshall–Brennan project was inspired by Moses’s conceptual model of community organizing as a form of participatory and inclusive public education. The project’s core principle is simple: in a democracy, the Constitution belongs to everyone. The corollary was invoked long ago by both Justice Thurgood Marshall and Justice William Brennan, the namesakes of the project: to become capable and effective democratic citizens, young people need to study and understand the Constitution and Bill of Rights.³⁷ Meantime, to become the kind of lawyers that America needs—public citizens who teach, lead, and seek justice—law students should help even younger people come to terms with their place in our constitutional life.

Our crawl space was found originally in our law school’s partnership with the Washington, D.C. area’s public schools, which proved to be in great need of the energy of law students. Our inspiration was anchored in the instinctive solidarity between law students and high school students—young people at different stages of adolescence navigating the twists and turns of a very competitive and complex society.

Several colleagues at WCL immediately took to the idea and helped bring it to life. The first was Steve Wermiel, a constitutional law professor and Justice William Brennan’s authorized biographer.³⁸ Professor Wermiel recovered old speeches and articles by Justices Brennan and Marshall (discussed below) that had emphasized the importance of educating young people on constitutional basics to promote constant renewal of our civic culture. He arranged for meetings between us and Mrs. Thurgood Marshall and Mrs. William Brennan, the widows of the two great liberal Supreme Court Justices, both of whom pledged their gracious help in creating this living memorial to their late husbands and warmly endorsed the idea of calling it the Marshall–Brennan Constitutional Literacy Project. Later, Professor Wermiel would become the associate director of our Program on Law and Government assigned to run the Marshall–Brennan project. He came to innovate many of the most attractive features of the project, including partnerships with law firms and visits to Supreme Court oral arguments for the high school students in our classes, something that had never taken place before, as far as we can tell, in the history of Washington, D.C.

Another key force in the project was Maryam Ahranjani, a brilliant WCL student who—to our everlasting shame—was rejected for the pro-

37. *Faculty: Stephen Wermiel*, AM. U. WASH. C.L., <http://www.wcl.american.edu/faculty/wermiel/> (last visited Apr. 23, 2013).

38. *See generally* SETH STERN & STEPHEN WERMIEL, *JUSTICE BRENNAN: LIBERAL CHAMPION* (2010).

ject when she applied to be part of the first class (we have taken our own selection processes with a grain of salt ever since). Fortunately, she did not allow this to deter her; she reapplied, was accepted, and proceeded to become a clever teacher who lit up every classroom she entered and showed how the Marshall–Brennan experience could be the catalyst for revitalizing the high school experience in desultory school environments. When we convinced Maryam to stay on at WCL to work with Marshall–Brennan, she upgraded the curriculum, built strong ties with the high schools, and created a fierce *esprit de corps* among the Fellows. She began teaching the law school seminar in 2003 and continues to refine its utility in training and supporting the Fellows. In 2009, she joined WCL full time as the new associate director of the Marshall–Brennan project and an adjunct professor teaching the Fellows’ seminar. Over the years, she has built a strong programmatic infrastructure and managed the rapid national expansion of the program.

A final significant supporter who deserves mention is Mary Beth Tinker, the subject of the Supreme Court’s decision in *Tinker*, which was the zenith of the Court’s commitment to political free speech in school. Mary Beth, who is today a professional nurse, union organizer, and champion of young people’s rights, has lost none of the incandescent passion for justice and peace that made her a symbol of defiant free speech when she was barely a teenager in the 1960s. When we contacted her, she offered to help immediately and has been a staunch ally and participant in the work of the Marshall–Brennan project ever since, not just in Washington, D.C., but all over the country.

The WCL chapter launched formally in September of 1999, with Mrs. Marshall and Mrs. Brennan on hand to cheer on the first class of Fellows. That fall semester we sent twenty-five law students who had excelled in constitutional law into District of Columbia public high schools to teach the first course in constitutional literacy to whatever schools and classes were willing to take a gamble on the program. Several of the principals we first spoke with were skeptical. As one of them said, “Wait a second, you want to send law students into my high school to teach them about their rights? I don’t think that’s a very good idea.” But we insisted that all rights imply responsibilities—if I have a right, that means that *you* have the same right, and I have a responsibility to respect it. On this theory, teaching young people about the system of rights and responsibilities can only lead them to become effective citizens of the community. A sufficient number of principals and social studies coordinators were convinced for us to gain a foothold. As the years have passed, many more schools have realized the wisdom of teaching students about rights and responsibilities together—and as soon as possible. Today, Washington, D.C.-area schools clamor to get aboard the program, which is never able to fully meet demand. In our class-

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rooms, the union of rights and responsibilities continues as a mantra and guiding philosophy.

The second- and third-year law students we named as the original Fellows were selected through a competitive application process. Although they had no real textbook yet, no seminar to back them up, and little of the support and resources that we would come to provide their successors, they were thrilled to be part of this ambitious experiment. Teaching constitutional law made them masters of the field: as they quickly discovered, the best way to learn material is to teach it to someone else, and the intellectual clarity and creativity that teaching forced upon them benefitted them as law students. Teaching a mostly working-class and impoverished population also gave Fellows a powerful sense of commitment to the local community, and to using their education for broader purposes of social reconstruction.

Over the years, the essential component parts of the project came into place as we built on our strengths, filled in gaps, learned from the Fellows and their students, and replaced weak features of the program. When I finished writing *We the Students*, the Fellows finally had a common curriculum from which to teach and build upon. The book covers the waterfront in a doctrinal sense but zeroes in on the Supreme Court decisions affecting public school students directly: drug testing of student athletes, censorship of student newspapers and yearbooks, segregation and desegregation, corporal punishment, affirmative action, the rights of students with disabilities, prayer in the classroom and on the football field, sexual harassment, and Title IX and girls' sports. The excerpted opinions in these decisions lead to questions, hypotheticals, role plays, and the kinds of constitutional brainteasers that fill up law school lecture halls but now ricochet off the walls of high schools, too.

In addition, Maryam Ahranjani and I soon collaborated with a gifted public defender named Andrew Ferguson, now a professor at the University of the District of Columbia David A. Clarke School of Law, on another book that is being used with great success in the project, *Youth Justice in America*, which explores the rights of young people caught up in the criminal justice system.³⁹ High school students are fascinated by criminal justice, and many of them, alas, have already interacted in uncomfortable ways with the police or even been arrested and found responsible for a juvenile offense and committed to a juvenile facility. This book and its attached curriculum shift the object of study from the constitutional framework governing young people in high schools to the constitutional framework governing young people in police-suspect interactions, criminal courtrooms, and juvenile detention facilities. And so, just as we teach the conflicts that occur in the schoolhouse, we teach the con-

39. JAMIN B. RASKIN ET AL., *YOUTH JUSTICE IN AMERICA passim* (2005).

flicts that occur on the street and in the jailhouse. On this pathway we are hardly trailblazers because the pioneering Street Law program has been working since 1972 to educate young people about the criminal justice system and street interactions between police and citizens.⁴⁰

At WCL, we now choose between forty and sixty Fellows each year in what remains an intensely competitive and selective process. At our school, serving as a Marshall–Brennan Fellow carries the prestige of being a member of the law review. Indeed, many students engage in both of these activities at once (and, to be sure, not much else).

The Fellows teach mostly in pairs, with a returning Fellow being joined by a new Fellow whenever possible. This arrangement permits Fellows to help each other develop their skills and authority in the classroom, divide up lesson plans, and spell one another when it gets close to law school exam period. The Fellows generally teach twice or three times per week and have the classroom and the class to themselves; only rarely do they have a teacher-observer in the room. They are responsible for all lesson planning, class management, and grading. They meet with parents on back-to-school night. They are, in every practical sense, and certainly in the eyes of their students, real teachers. One of my colleagues at WCL, Professor Robert Vaughn, once said to me, “I always know when I’ve called on one of your Marshall–Brennan Fellows in class because they start off by saying, ‘there are three essential things you need to understand about this decision.’ These law students sound like law professors.” In a certain sense, of course, that is what they become over the course of their fellowships.

The Fellows are enrolled in a weekly advanced constitutional law seminar with one or two constitutional law professors who lead them through the analysis of the cases that they themselves will be teaching. Professor Wermiel and I taught together for the first several years, combining relevant doctrinal coverage of the First, Fourth, Eighth, and Fourteenth Amendments and theoretical analysis of trends on the Court with detailed discussion of what was happening in the Fellows’ high school classes. Today, Maryam Ahranjani teaches the class. In the part of class devoted to rounds, a practice borrowed from our colleagues in the WCL clinics, we canvass how things are going in the classes and discuss teach-

40. The original and still dynamic Street Law program is headquartered at Georgetown University Law Center, and the general curriculum for the program now extends far beyond criminal law and procedure to landlord–tenant law, consumer law, other fields of domestic law, and international human rights law. The Marshall–Brennan project differs in its overriding focus on American constitutional law and the decisions within it that affect the lives of students and young people. Also, the Marshall–Brennan project only proceeds by sending law students as part of a formal curricular program to teach complete and recognized courses in public schools; some of the Street Law programs are just like that, but in many law schools Street Law is a volunteer student project in which law students may visit high schools once a month for a lecture or exercise. The Marshall–Brennan project has enjoyed a friendly and exciting collegial relationship with Street Law ever since we launched, and in many communities the two projects work hand in hand as partners.

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ing methods, syllabi, class planning, homework, memory devices, testing, grading, discipline, disabilities, the dynamics of race and gender in the classroom, how to interact with school bureaucracy, and what to do with students facing extracurricular problems, such as pregnancy or family dysfunction. In my experience, the doctrinal and rounds portions of the class reinforce each other and often bleed together once students get comfortable integrating their teaching experience with the substance of the class and their understanding of the cases with the experience of teaching.

Marshall–Brennan seminars continue to have this dual character, canvassing both the “formal curriculum” of the classes we teach and the “informal curriculum” of everything else that happens in school.⁴¹ This double vision is fitting, of course, because the standard Marshall–Brennan curriculum, as found in *We the Students*, is a study of Supreme Court cases that focus on the non-curricular life or perhaps the near-curricular life of the school—subjects like segregation, desegregation, and affirmative action, the suppression of student political speech, prayer in the football huddle, and the censorship of student newspapers. In this sense, the Marshall–Brennan project is making the lived experience of students and teachers in school itself the object of reflective academic study and debate. They are learning not only about what is being deliberately taught but also about the social and context of their education.

As an exercise in constitutional inquiry, the Marshall–Brennan curricula, by definition, “teach[] the conflicts”—the sharp intellectual controversies in the Court and in the country over competing interpretations of constitutional law and democracy.⁴² At the same time, the Fellows are teaching the constant tension between the law-on-paper as embodied in Supreme Court decisions and the law-on-the-ground as experienced by young people. Thus, a recurring theme in our Equal Protection instruction in Washington, D.C., is how to teach the normally triumphal narrative surrounding *Brown v. Board of Education*⁴³ and its local companion case of *Bolling v. Sharpe*⁴⁴ in a city where the vast majority of African-American students go to public schools with no white students. One of the Fellows reported to our seminar that, after teaching *Brown* in the conventionally heroic fashion to his class, one of his high school students

41. I am borrowing this distinction from John Dewey, who distinguished between the “formal curriculum” of schools, which is what we set out to teach students in class, and the “informal curriculum,” which is what students learn from everything else that takes place in school, including how teachers treat students, how the school treats the teachers, the janitors and other personnel, and how students experience the school day. MYRA POLLACK SADKER & DAVID MILLER SADKER, *TEACHERS, SCHOOLS, AND SOCIETY* 190–95 (10th ed. 2013).

42. See generally GERALD GRAFF, *BEYOND THE CULTURE WARS: HOW TEACHING THE CONFLICTS CAN REVITALIZE AMERICAN EDUCATION* 144–70 (1992) (describing the pedagogical method of “teaching the conflicts” with regard to controversial subject matter and competing approaches to contested academic disciplines and values).

43. 347 U.S. 483 (1954).

44. 347 U.S. 497 (1954).

deflated all of his grandiose rhetoric by saying, “But that’s not the law, Mr. Lerum, because we have ‘separate but equal’ schools in D.C., don’t we?” Similarly, Fellows often encounter cognitive dissonance when telling students what their Fourth Amendment stop-and-frisk rights are in theory but advising them, in practice, how to respond safely to sharp police orders in the street.

In the development of the project’s curriculum, the fall and spring moot court competitions, which focus on cutting-edge school-related problems like the exclusion of gay couples from the senior prom or the punishment of students for off-campus Internet speech vilifying administrators, have steadily taken center stage.⁴⁵ The local moot court competitions that take place across the country now flow into a springtime national moot court competition, where local chapters send their finest teams to compete. The national competition has rotated between Washington—where students are able to take in visits to the Supreme Court, the Capitol, and the monuments—and Philadelphia, where we have been hosted by the thriving chapter at Drexel University Earle Mack School of Law, and feted at the National Constitution Center, and taken to Constitution Hall. The students have impressed and dazzled judges on the U.S. Court of Appeals for the Third Circuit and local Pennsylvania state court judges. Mary Beth Tinker has been an exuberantly received presence at these events. Over the years, the level of performance by high school students has been outstanding and often astounding to the judges.⁴⁶

The moot court competition has become a key learning device and a central part of the rhythm of most Marshall–Brennan classes. Fellows report that many students who were passive before moot court training become energized and engaged after putting themselves in the role of

45. Fellows and faculty from around the country develop a moot court problem for the high school students based on significant topical developments in schools. High school students learn the moot problem and its underlying precedents and then compete in their classes, with Fellows bringing in other law students to judge the competition. At the next level, the highest performers come to WCL on a Saturday to do their oral arguments before lawyers, law students, Marshall–Brennan alumni, and law professors; and, in the final rounds, the top performers argue before federal district and appellate court judges at the United States District Court for the District of Columbia. Federal judges participating in the past have included Federal Circuit Judge Sharon Prost, whose son was in a Marshall–Brennan class at Woodrow Wilson High School in Washington, D.C., and U.S. district court Judges John Facciola, William Royal Furgeson Jr., Juan Sanchez, Joel Schneider, Emmett Sullivan, Reginald Walton, and many others.

46. One 2009 high school winner, a junior on the Arizona State University chapter’s team, appeared with teammates all over the Philadelphia press after she startled the judges and audience with her poise, eloquence, and brainpower. See Valerie Russ, *71 Students From 7 Cities Get Taste of Law in Moot Court Here*, PHILA. DAILY NEWS, Mar. 23, 2009, at 12. There is something thrilling about watching high school sophomores and juniors answering questions about the appropriate level of scrutiny to be applied under equal protection, whether a school can justifiably promote heterosexuality over homosexuality, or whether a student council election constitutes a limited public forum or a nonpublic forum under the First Amendment. The experience reminds us that constitutional concepts and terms do not comprise a foreign language inaccessible to young people or non-lawyers generally. Law follows the general rules of logic, rhetoric, and common sense, and bright young people can quickly assimilate its structure and terminology.

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appellate lawyers and being treated as serious public actors with something original and important to say in their own voices. We know that many of our high school students have been transformed by the experience, which calls on speaking and thinking skills normally untapped in high school. We often hear from parents and families that the complex challenge of doing moot court has turned their sons and daughters into confident and self-possessed speakers.

At the same time, the intellectual excitement and high hopes raised by this intense experience can leave some students disappointed if they lose in the final rounds or fail to advance. Thus, we emphasize that community and competition in our program go hand in hand. There will be academic and personal disappointments aplenty in the average high school student's career, and the last thing we want to do is add more negative stress. We take pains not to exalt competition over community, and we insist that the competitive dimension of the project is there only to spur hard work, group study, and intellectual achievement. Competition without community can be destructive, just as community without competition can be stagnant. The moot court has proven to be an enormously effective teaching tool for many students, but we are acutely aware of its perils.

Thus, we see to it that the moot court project is just one, albeit prominent, part of a robust extracurricular culture, which has included, in Washington, D.C., class trips to the Supreme Court and the superior court, essay competitions where there are winners in each school and in every class, creative arts competitions on constitutional themes, a competition to design our annual Project T-shirt, and a raucous poetry slam often judged by Mrs. Thurgood Marshall. The trick is that we multiply the occasions and contexts in which students can improve their talents, shine, win something, and be recognized for it. We are trying hard not to reproduce the dominant "winner take all" culture that often ends up quietly humiliating and demoralizing students who do not habitually take home top academic honors.⁴⁷

C. "If You Build It, They Will Come": The Project Goes National

From the very start of the project, faculty and students at other law schools expressed interest in joining us. This development was unex-

47. Many Marshall-Brennan classes in Washington, D.C., have also tried to undertake group social action projects in the spring, like youth voter registration drives, lobbying the D.C. Council or Board of Education on education issues, fighting for voting rights in Congress for the District of Columbia, and environmental activism, such as Potomac River cleanups. These endeavors build further group cohesion, teach concrete civic skills, and permit students with different special talents to emerge. The project has developed working partnerships with the National Archives, law firms like Arnold & Porter, democracy advocacy groups like the League of Women Voters, DC Vote and FairVote, Teach For America, and environmental groups seeking to engage young people in direct action. In general, most participants agree that this is a component of the project that should be elaborated and strengthened.

pected. After all, law schools are famously insular and competitive places, divided ever more deeply by commercial rankings. Yet, we had people at schools across America reaching out to ask if they could work with us in this constitutional literacy mission and share our ideas and materials, our name, our expertise, and our ambitions for revitalized constitutional culture. We were open to such overtures because the pragmatic spirit and ambitious goals of the program invites proliferating experimentation and inter-law school cooperation. But we did not quite know how to integrate other institutions in our work at first, and it took many years and false starts for us to develop an effective model for national collaboration while maintaining our local work.⁴⁸

Howard University School of Law formed a Marshall–Brennan chapter and teamed up with WCL almost immediately, sending law students to participate in our weekly seminar and to become Fellows teaching with us. We soon received inquiries from a dynamo organizer and teacher named Gwen Stern at the University of Pennsylvania Law School. She was convinced that students in the Philadelphia public schools desperately needed a program like Marshall–Brennan and that the local law schools in Philadelphia could benefit by sending their law students to teach them. Her work quickly made the local Marshall–Brennan chapter a major force in Philadelphia public schools, the host of several national moot court competitions, and the subject of numerous media profiles.⁴⁹ Stern later became a trial practice professor and director of the Marshall–Brennan Constitutional Literacy Project at Drexel University Earle Mack School of Law, deepening the influence of the project in Philadelphia.

Although it began on the East Coast, this pattern has been replicated across America. We have generally seen one or two public-spirited people—a law professor, a dean, a public interest coordinator, a law school alum, a former Marshall–Brennan Fellow living in a new city, or a law

48. Today, there are bylaws, a national advisory board and regular meetings around our national moot court competition and Association of American Law School conferences. There are seven requirements for becoming and maintaining a Marshall–Brennan chapter: (1) that the chapter has formed a partnership between the host law school and an underserved local public school system; (2) that both law students and high school students in the program earn academic credit for participating in the Marshall–Brennan project; (3) that the Fellows focus on constitutional literacy, using *We the Students*, *Youth Justice in America*, or both as the foundation for what they teach high school students, and that they teach the annual moot court materials; (4) that the chapter share the goals of improving high school students' oral advocacy skills, cultivating critical-thinking skills, and instilling understanding of constitutional cases and concepts; (5) that the chapter have faculty or staff supervision and support at the host law school; (6) that the chapter maintain regular communication with the national office at WCL; and (7) that the chapter send representation to the annual directors' meetings and National Marshall–Brennan High School Moot Court Competition whenever possible.

49. See Valerie Russ, *Don't Argue with Them!: High Honors for City Students in Nationwide Test of Courtroom Skills; They Made Their Case*, PHILA. DAILY NEWS, Apr. 4, 2007, at 3; see also *Students Make Their Case During Court Competition*, TIMES LEADER, http://archives.timesleader.com/2007_54/2007_04_22_Students_make_their_case_during_court_competition_nocat.html (last visited Apr. 23, 2013).

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student—grow determined to bring the brainpower and constitutional passion of law students into high school classrooms. They have contacted us, and we have shared with them the requirements for becoming a Marshall–Brennan chapter and offered to do whatever we can to help propel them in their work. We have offered strategic coalition-building and fundraising advice; model budgets, syllabi, and planning documents; contacts with helpful people around the country; and oftentimes the presence of a national Marshall–Brennan figure—like Mary Beth Tinker or Mrs. Thurgood Marshall or participating faculty—at their kickoffs or before their faculties. We have acted with them to brainstorm about how to build an organization with deep academic and institutional roots and many branches of inquiry and service.

The project has spread to eighteen law schools, with chapters in different phases of development, all of them owing their vibrant strength to individual faculty or student visionaries who have, through their conviction and passion, brought the idea into reality.⁵⁰ There are some successful chapters led by luminous constitutional law scholars like the University of Colorado Law School chapter headed up by Professor Melissa Hart or the Suffolk Law School chapter spearheaded by Professor Michael Avery; there are others, like the Rutgers–Camden chapter, led by Director of Pro Bono and Public Interest Programs Jill Friedman, where senior law school administrators take the lead; and there are others still in transition where law students shoulder most of the administrative and academic burden, such as the spirited and promising chapter at Yale Law School. The following is a list of active chapters along with the key organizers of each local project:

- American University Washington College of Law (Professors Jamin Raskin and Maryam Ahranjani)
- Arizona State University Sandra Day O’Connor School of Law (Michelle Roddy)

50. There are three law schools where vibrant Marshall–Brennan chapters essentially ended when the key figures behind their success left: Howard University School of Law, where a strong project ended soon after Carmia Caesar left the school; University of California Berkeley School of Law, where the project ended with the departure of Professor Jennifer Elrod; and Northeastern University School of Law, where an excellent program collapsed when the adjunct professor spearheading it, the passionate Roy Karp, chose to go work in civic education in other venues. Marshall–Brennan has reemerged in Boston under the extraordinary leadership of Professor Michael Avery and Kim McLaurin at Suffolk University Law School, a school that has made a substantial and enduring investment in the project. See *Marshall–Brennan Constitutional Literacy Project*, SUFFOLK U. L. SCH., http://www.rappaportcenter.org/probono/marshall_brennan/ (last visited Apr. 23, 2013). But the most interesting case of disaffiliation occurred in 2012 when the University of Pennsylvania Law School Marshall–Brennan chapter ended. Despite the fact that Marshall–Brennan there involved dozens of students and was routinely chosen as one of the top pro bono projects among students, the law school was unable to commit to meeting the formal requirements of participation. The project had no academic seminar component for the student Fellows and no faculty involvement to speak of, received limited institutional funding and administrative assistance, and proved unable to participate in support of the national project and sister chapters around the country. We were sad to see them go and wish them well as the students there seek to work to pursue similar goals under a different name and auspice.

- Capital University Law School (Professor Dan Kobil)
- University of Colorado Law School (Professor Melissa Hart)
- University of Connecticut School of Law (Professor Justin Taylor)
- Drexel University Earle Mack School of Law (Professor Gwen Stern, Associate Dean Susan Brooks, and Dean Roger Dennis)
- University of Louisville Louis D. Brandeis School of Law (Professors Laura Rothstein and Sam Marcossan)
- University of New Mexico School of Law (Professor Dave Sidhu and Preston Sanchez)
- Phoenix School of Law (Professor Kristine Reich)
- University of Pittsburgh School of Law (Professor Jeffrey Shook and Associate Dean Kevin Deasy)
- Rutgers University School of Law–Camden (Professor Jill Friedman)
- Santa Clara Law School (Lecturer Deborah Moss-West)
- Southern University Law Center (Professor Russell Jones and Donna Glasper)
- Suffolk University Law School (Professors Michael Avery and Kim McLaurin, and Bob Smith, and Director of Public Interest and Pro Bono Programs)
- Washington University School of Law (Dave Collier)
- William & Mary Law School (Professor Charles Crimmins)
- William Mitchell College of Law (Dean Mary Patricia Byrn)
- Yale Law School (Andres Idaragga, Nic Riley, Jamil Jivani, Michelle Mangan, and Director for Student Affairs Sachi Sugimoto Rodgers)

There is no mystery to the success of these ventures. If you build it, they will come—“they” being the waves of law students who want to serve as Fellows and the high schools that want to give their students the chance to participate in this special intellectual experience.

The key to programmatic success has been modest but consistent institutional support by law schools to bolster the efforts of professors and students. The home law school must be willing to invest in the program, specifically with academic credits and teaching time for an advanced seminar for Fellows, academic or pro bono credits for Fellows teaching in high schools, and sufficient financial and administrative resources to sustain an operation that has a continuing relationship with what is typically a large and semi-dysfunctional educational bureaucracy. The law schools that have made these investments have produced thriving Marshall–Brennan projects that are also able to raise significant amounts of money from local bar associations, law firms, educational foundations, local governments, and private philanthropy. One of the chapters—at Southern Law School in Baton Rouge, Louisiana—has raised, under the inspired leadership of Russell Jones, prodigious amounts of money and won wide-ranging praise in the area for its impressive outreach to the high schools and the community.⁵¹ It has shown

51. For examples of the program’s outreach and success, see *Winners Announced in SU Moot Court Regional Competition; Six Students Now Go on to National Contest*, E. BATON ROUGE

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that a project does not have to be in a wealthy city or belong to a university with a huge endowment to raise all the money it needs. The average Marshall–Brennan project budget, outside of salaries for the professors and staff involved, is less than \$20,000 a year. If you compare that to what schools spend on publicity and marketing simply to influence their Association of American Law Schools (AALS) ratings, it is a trifle. Even in hard times, the chapters have been able to raise what they need and to help one another.

II. DEMOCRATIC CONSTITUTIONALISM IN ACTION

The Marshall–Brennan project can have a major influence on the future of legal education because it responds to both fresh stirrings and old yearnings within the field of constitutional law, which has offered the central frame to American legal education since the civil rights and due process revolution of the 1960s. The project addresses the traditional interest in trying to uplift public constitutional understanding but also provides a powerfully concrete and practical answer to the theoretical call for a new “popular” or “democratic” constitutionalism by linking law schools with the communities they inhabit through crosscutting waves of constitutional learning and dialogue. Moreover, by maintaining a natural pipeline of students from disadvantaged backgrounds into legal education, Marshall–Brennan promotes diversity at a time when affirmative action has been placed in a straitjacket by the Supreme Court.

Within the field of constitutional law today, numerous scholars argue passionately for what Professor Tushnet calls “populist constitutional law,” the spirit that “takes . . . to heart” the sentiment of President Abraham Lincoln’s statement in his First Inaugural Address that “[t]his country, with its institutions, belongs to the people who inhabit it.”⁵² In his book *Taking the Constitution Away from the Courts*, Tushnet defines “populist constitutional law” as “a law oriented to realizing the principles of the Declaration of Independence and the Constitution’s Preamble,” which he calls the “thin Constitution.”⁵³ It is a law that is “committed to the principle of universal human rights justifiable by reason in the service of self-government.”⁵⁴ Tushnet wants to decenter and sideline the Supreme Court as the focus of constitutional aspiration and elaboration, pulling in other branches of government and the people themselves as

PARISH SCH. SYS. (Dec. 1, 2010), <http://news.ebrschools.org/explore.cfm/ebprssnews/shsmootcourt>, and *Area Moot Court Student Winners Going to Nationals this Spring*, E. BATON ROUGE PARISH SCH. SYS. (Feb. 29, 2012), <http://news.ebrschools.org/explore.cfm/ebprssnews/mootcourt2012winners>.

52. TUSHNET, *supra* note 7, at 181 (quoting Abraham Lincoln, First Inaugural Address, Mar. 4, 1861, in JAMES D. RICHARDSON, MESSAGES AND PAPERS OF PRESIDENTS 10 (1899)) (internal quotation marks omitted).

53. *Id.* at 181–82.

54. *Id.* at 181.

agents of constitutional progress.⁵⁵ Similar sentiments surface in Jack Balkin's recent work, *Living Originalism*, which promotes a "constitutional project" that involves "an intergenerational project of politics,"⁵⁶ and in which "popular mobilizations play a crucial role."⁵⁷ Alexander Tsesis also invokes the democratic spirit in his work on the historical centrality of liberty and equality, arguing that while

both equality and liberty have often been mere abstractions used as catchwords for political gain, real progress has come when these principles inspired action for the sake of fairness and national improvement. The most effective changes have arrived through the efforts of coalitions capable of winning popular and political support.⁵⁸

As attractive as the academic interest in popular constitutionalism is, an important refinement to the normative calls to "take the Constitution away from the Court" comes from Robert Post and Reva Siegel. In their article *Roe Rage: Democratic Constitutionalism and Backlash*, Post and Siegel depart from some of the popular constitutionalists by embracing "the essential role of judicially enforced rights in the American polity" and therefore disclaiming any interest in "tak[ing] the Constitution away from courts."⁵⁹ However, they believe strongly in the idea that "[c]onstitutional judgments based on professional legal reason can acquire democratic legitimacy only if professional reason is rooted in popular values and ideals."⁶⁰ Their theory of a "democratic constitutionalism" observes continuous dialogue among political branches and between the government and the people, leading them to conclude that "adjudication is embedded in a constitutional order that regularly invites exchange between officials and citizens over questions of constitutional meaning."⁶¹ The point of normative democratic constitutionalism is not to strip the Constitution from the Court but rather to empower other branches of government, social movements, and the people themselves to engage effectively in the critical process of "norm contestation," the process "which seeks to transform the values that underlie judicial interpretations of the Constitution."⁶²

55. *Id.* at 182–87.

56. JACK M. BALKIN, *LIVING ORIGINALISM* 75 (2011).

57. *Id.* at 81. Some actors in this scholarly movement for popular constitutionalism actually question or oppose the institution of judicial review, a dubious step neither necessary for nor implied by the rest of the project. *See, e.g.*, Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 *YALE L.J.* 1346, 1348–49 (2006); Louis Michael Seidman, *Let's Give Up on the Constitution*, *N.Y. TIMES*, Dec. 31, 2012, at A19.

58. ALEXANDER TSEISIS, *WE SHALL OVERCOME: A HISTORY OF CIVIL RIGHTS AND THE LAW* 3 (2008).

59. Post & Siegel, *supra* note 6, at 379.

60. *Id.*

61. *Id.*

62. *Id.* at 381.

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Marshall–Brennan takes the core idea of democratic and popular constitutionalism seriously by aggressively expanding the circle of conversation about constitutional values to include many thousands of new high school students each year, who become conscious participants in the process of democratic constitutionalism. The project arms these students with the means of intellectual self-defense in the process of social norm contestation by giving them the language and concepts they need to assert themselves effectively in school and in other public contexts. The project is thus a reverberating experiment in democratic constitutionalism, with law professors teaching law students how to teach the Constitution, law students teaching high school students how to think about and understand the Constitution, and high school students teaching law students and professors about the practical realities of translating constitutional law in public schools and in community life.

Inevitably, the constitutional communities formed in the project come to address in informed ways the relevant crises of the day. The impeachment of President Clinton, the contested presidential election of 2000, the military invasion of Iraq, the revelation of torture at Abu Ghraib, the nomination of new Justices, the use of drones in the War on Terror, the lack of representation of residents of Washington, D.C., in Congress, and the debate over same-sex marriage have all been carefully processed and ventilated in real time in our classrooms. Furthermore, the Marshall–Brennan classes are able to address the localized conflicts that so often roil school communities. Fellows have been leading figures in explaining, resolving, and transcending conflicts over issues like the revocation of a place in an honor society to a pregnant high school junior, the use of metal detectors in school buildings, random locker searches, the rights of religious students to pray in a cafeteria, sexual harassment scandals, and even, most terribly, the epidemic of gun violence nationwide that leaves many public school students injured or dead.

The Marshall–Brennan project is democratic constitutionalism in action. It responds nicely to Tom Donnelly’s argument that “[i]f legal scholars are serious about popular constitutionalism, they must move beyond . . . studies of elite discourse and examine how popular constitutional meaning is shaped ‘on the ground,’” specifically “on an important pathway that has been largely ignored by legal scholars—civic education.”⁶³

The project makes the Constitution come alive outside of the courts and in the hallways and classrooms of public schools—our central public

63. Donnelly, *supra* note 2, at 323. Donnelly’s impressive focus on civic education and specifically on the textbooks and surrounding lessons studied by high school students mirrors the public philosophy of the Marshall–Brennan project. The only piece missing from this excellent article is the role that law schools, law professors, and law students themselves can play directly in the process of entrenching constitutional values in young America.

institution. In reality, of course, the Constitution never belonged exclusively or even primarily to the courts, and the vast majority of conflicts that shake public schools (or private schools for that matter) never see the inside of a courtroom, much less the Supreme Court. Thus, there is plainly no need to “take the Constitution away from the courts.” Rather, our task is to inject into the cultural setting of the American public high school the complex of constitutional values and conflicts that have evolved over the centuries and that pervade a good legal education. We should not feel so beleaguered by the current attack on law schools as to forget that we have something essential and irreplaceable to offer to the rest of society.

The fundamental importance of constitutional education is a point that one of our liberal namesakes, Justice William Brennan, championed. In a remarkable speech forty-five years ago before principals of girls’ schools, Justice Brennan insisted upon the “interdependence of our legal and educational systems.”⁶⁴ He observed:

If there is one central responsibility of the American secondary school’s curriculum, it would seem to be to transmit an appreciation of those individual rights and liberties, and reciprocal responsibilities, which form the spine of our constitutional heritage. That heritage, particularly the Bill of Rights, assures our precious liberties, but it also creates a duty of responsible citizenship.⁶⁵

Justice Brennan was emphatic that constitutional law and discourse be taught critically and with democratic purposes in mind. He said that constitutional education does not consist “simply in having students carefully memorize the first ten amendments and recite them unflinchingly”⁶⁶ (although it is amazing that this was apparently the practice!). A rote method like that “teaches students nothing of these precious guarantees in real life. It gives them no sense of their relevance to current social, political and economic problems.”⁶⁷ He cautioned against the view that constitutional law is “a brooding omnipresence in the sky”—something which is fixed and certain if only we could capture it and put down precisely what it means.”⁶⁸ He argued that “every citizen must understand that constitutional principles are not absolute self-enforcing truths from the museum of our political history.”⁶⁹ Rather, they are “a set of principles which must be understood, grappled with, fought for and constantly

64. William J. Brennan, Remarks at the National Association of Principals for Schools of Girls: Education in Constitutional Liberties and Responsibilities (Mar. 1, 1967), at 1–2 (unpublished transcript) (on file with author).

65. *Id.* at 2.

66. *Id.* at 7.

67. *Id.*

68. *Id.* at 7–8 (quoting *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting)).

69. *Id.* at 8.

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reassessed and applied under fire. That task is not one for judges and lawyers only.”⁷⁰

In his speech, Justice Brennan identified the urban riots that had taken place in the summer of 1964 as a crucible for the rule of law. He rejected the view that “if only we could find out who instigated certain acts,” punishment could follow and “that would end the matter.”⁷¹ This would be to “neglect the role of law as an instrument of social justice,” for “[s]ociety’s function does not stop with the punishment of the man who transgressed, but only begins there.”⁷² He continued: “If the rule of law is to survive and flourish in our society, then I would suggest we bear a heavy responsibility to look beneath the surface when the rule of law breaks down.”⁷³ Underneath a lot of social disintegration, he argued, is “some failure to inculcate an early and deep respect for the principles of the Bill of Rights.”⁷⁴ It is the job of both educators and lawyers, who are part of “overlapping” disciplines, to “teach something about the conflicts in values that make the Bill of Rights so much harder to apply than to recite.”⁷⁵ Justice Brennan argued that we should teach about civil rights and liberties from “case studies” that are “realistic, concrete, graphic, so as to keep the optimum interest on the students’ part,” and the cases “should be presented in terms of fact situations which are closest to the concerns and interests of secondary school students.”⁷⁶ He observed that “[i]f the principles can be first applied and tested this close to home, their transfer to more abstract contexts in which they are more likely to affect adults should be far easier.”⁷⁷ He advised, finally, that “[i]t would be well to focus each case upon a conflict of values—for the difficult cases in the civil rights area present such a clash.”⁷⁸

Justice Brennan’s speech reads like a manifesto for the Marshall–Brennan Constitutional Literacy Project. To be sure, he was hoping that public and private school teachers themselves would undertake the task of constitutional education. Yet they did not do so for many complex reasons, which probably include a lack of proper resources, a fear of teaching young people about their rights, and the new nonstop testing regimes. So the critical task of constitutional education falls to law schools. As Bob Moses says in his radical axiom, “If *we* can do *it*, then *we* should.”⁷⁹ If not us, then who else?

70. *Id.*

71. *Id.* at 10–11.

72. *Id.* at 11.

73. *Id.*

74. *Id.* at 12.

75. *Id.*

76. *Id.* at 19–20.

77. *Id.* at 20.

78. *Id.*

79. See *The Principles and Structure*, *supra* note 9 (emphasis added).

Basic civic and constitutional understanding for the young is a commonly expressed aspiration heard over the decades, and yet every year, at Constitution Day, the media delights in pointing out that more American high school students can name one of the Three Stooges or the characters on *Jersey Shore* than a Supreme Court Justice or a Founder of the country.⁸⁰ The Fellows typically roll their eyes at these perennial and superficial complaints, which seem to suggest that popular culture and constitutional knowledge are opposite ways of understanding society. In fact, as every Marshall–Brennan Fellow knows, cultural knowledge and constitutional knowledge are complementary. In any event, it is easy to bemoan young people’s ignorance, but the challenge for adults is to educate the young, not smugly rail against them. All of the foundation money pouring into studies to document the civic illiteracy of the young should be redirected to programs directly uplifting the constitutional and civic capacity of America’s teens. Constitutional education is hard and mostly invisible work, but it is exhilarating and important, and the funds to do it should be channeled into direct action.

By taking at least partial responsibility for constitutional literacy in society, professors of constitutional law can heighten the importance and relevance of their own work. If constitutional law does not belong exclusively or primarily to the Supreme Court or to the judiciary, then constitutional scholarship should be directed as much to the people as to the judges, and as much to younger people in high school as to older people on the High Court.

The recent work of Professor Lessig promoting a constitutional convention for democratic reform related to money in politics provides a good example. Lessig argues that the *Citizens United v. Federal Election Commission*⁸¹ and *Buckley v. Valeo*⁸² decisions have created an urgent need to amend the Constitution to confine money power in our campaigns.⁸³ On this matter, most Americans, including myself, agree.⁸⁴ He

80. See, e.g., Liz Halloran, *What Supreme Court? Many Americans Lack Basic Supreme Court Knowledge*, U.S. NEWS & WORLD REP. (Sept. 29, 2006), <http://www.usnews.com/usnews/news/articles/060929/29annenbergestudy.htm>; *More Teens Can Name Three Stooges than Can Name Three Branches of Government*, NAT’L CONST. CENTER (Sept. 2, 1998), <http://constitutioncenter.org/media/files/survey-1999-stooges.pdf>; Amanda Paulson, *A Third of High School Seniors Lack Basic Grasp of Civics, US Government*, CHRISTIAN SCI. MONITOR (May 4, 2011), <http://www.csmonitor.com/USA/Education/2011/0504/A-third-of-high-school-seniors-lack-basic-grasp-of-civics-US-government>.

81. 558 U.S. 310 (2010).

82. 424 U.S. 1 (1976).

83. LAWRENCE LESSIG, *REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT* 290–93 (2011).

84. See *National Survey: Super PACs, Corruption, and Democracy*, BRENNAN CENTER FOR JUST. (Apr. 24, 2012), http://www.brennancenter.org/content/resource/national_survey_super_pacs_corruption_and_democracy; Jamie Raskin, ‘*Citizens United*’ and the Corporate Court: Giving Corporations the Inalienable Right to Buy Elections, NATION (Oct. 8, 2012), <http://www.thenation.com/article/169915/citizens-united-and-corporate-court#>; Jamie Raskin, *Take Back the Constitution from the Corporate Court*,

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argues, more controversially, that the constitutional convention should be called by the states, for the first time in our history.⁸⁵ The Internet provides a technology of effective communication for this idea, but how might one seriously put it into action? The Fellows and the thousands of high school students they are teaching across America would be a natural first audience to consider and debate this unorthodox idea and proposed experiment. Why not draft a constitutional convention roadmap and then invite high school students across America, under the tutelage of the Fellows, to meet and brainstorm in mini-constitutional conventions on how to deal with the money politics problem? Let us see what might come of the exercise and invite the public and media to respond to the moot constitutional conventions. The Fellows can report back their insights about the project, which would indeed be a novel and challenging one.

This is obviously a simple sketch of one idea, but it suggests how the often vague concept of popular constitutionalism can gain traction in the work of Fellows and high school students across the country. The young are hungry to participate in what Professor Balkin calls the “inter-generational project of politics”⁸⁶ in which “popular mobilizations play a crucial role.”⁸⁷ There is plainly no shortage of abstract ideas and concepts introduced by law professors (I do not exempt myself from this faint praise), but there is a shortage of meaningful and practical popular dialogue about such ideas in which professors themselves interact substantively with non-lawyers. This project provides a forum for serious constitutional experimentation and civic capacity building.

Law schools themselves are shaped by the constitutional and legal practices we study. In the sweep of American history, law schools have traditionally had few non-white students, a reality produced by both segregation and the historical effects of racism and poverty.⁸⁸ Affirmative action programs over the last several decades have improved the picture substantially,⁸⁹ but the Supreme Court declared in the *Grutter v. Bollinger*⁹⁰ decision that the clock is ticking on affirmative action and the Court’s indulgence of the practice will likely expire no later than 2028

PEOPLE FOR AM. WAY (July 23, 2012), <http://www.pfaw.org/issues/government-people/edit-memo-take-back-constitution-corporate-court>.

85. See Lawrence Lessig & David Segal, *Report from the Conference on the Constitutional Convention*, HUFFINGTON POST (Sept. 30, 2011, 12:25 PM), http://www.huffingtonpost.com/lawrence-lessig/report-from-the-conferenc_b_988902.html.

86. BALKIN, *supra* note 56.

87. *Id.* at 81.

88. See *generally* DISTURBING TREND L. SCH. DIVERSITY, <http://blogs.law.columbia.edu/salt/> (last visited Apr. 23, 2013) (describing diversity statistics in law schools); see also Paula C. Johnson, *The Grutter Decision*, DISTURBING TREND L. SCH. DIVERSITY, <http://blogs.law.columbia.edu/salt/the-grutter-decision/> (last visited Apr. 23, 2013).

89. Brief for the American Ass’n for Affirmative Action as Amicus Curiae in Support of Respondents at 32–35, *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013) (No. 11-345), 2012 WL 3308290, at *32–35.

90. 539 U.S. 306 (2003).

and perhaps much sooner.⁹¹ Indeed, in its 2013 decision remanding for further findings in *Fisher v. University of Texas at Austin*,⁹² the Court insisted that strict scrutiny of racially conscious affirmative action in public universities means that these institutions must show that there are no “workable race-neutral alternatives” to achieve the acknowledged benefits of educational diversity.⁹³

Whatever the exact fallout of the *Fisher* decision, the race is on to figure out organic ways to get minority and poorer students into the pipeline for America’s law schools, which are already seeing declining numbers admitted and enrolled from both groups.⁹⁴ Even with affirmative action, the pool of African-American and Hispanic students is shrinking.⁹⁵ The question is how to replenish and solidify the numbers, especially in an environment where financial aid is painfully scarce and the *U.S. News & World Report* rankings exert constant downward pressure on schools’ willingness to take students with weaker LSAT scores. In the current harsh economic environment, it is all too likely that, without effective and concerted action by law schools, the diversity commitment will simply fade away. This is a shocking possibility for those who believe, with the AALS, that racial and ethnic “[d]iversity is critical for *all* law schools because they all can serve as a pathway to the exercise of state power and to public office.”⁹⁶

Based on our experience in the project, I would venture to say that the wrong way to build and sustain the pipeline is simply to visit classes of African-American, Hispanic, and at-risk students annually on Constitution Day and tell them that they should think about going to law school. This advice seems premature and blithely indifferent because there is little chance that the students can profit from it. What high school students need is not conclusory career advice—“Go to law school!”—but rather sustained educational interaction and a profound experimental immersion in law as a field of study. Almost all will learn from the experience, many will toy with the idea of going to law school, and some who otherwise never would have will actually end up going to college and studying law. We have countless examples of students who tell us that they never even would have gone to college but for the experience of their Marshall–Brennan class and the concrete help of their Fellows. One of the great thrills law school chapters have experienced is to have high

91. *Id.* at 377.

92. 133 S. Ct. 2411, 2421–22 (2013), *vacating and remanding* 631 F.3d 213 (5th Cir. 2011).

93. *Id.* at 2420.

94. Leigh Jones, *Minority Enrollment Is Faltering*, 30 NAT’L L. J. 4, 4 (2008); James O’Neill, *Web Site Shows Drop in Minority Enrollment in US Law Schools*, COLUMBIA L. SCH. (Dec. 28, 2007), https://www.law.columbia.edu/media_inquiries/news_events/2007/December07/law_enroll.

95. See sources cited *supra* note 94.

96. Brief for the Ass’n of American Law Schools as Amicus Curiae in Support of Respondents at 19, *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013) (No. 11-345), 2012 WL 3527822, at *19.

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school students who we taught in our project come back to our schools as law students themselves. It is satisfying beyond measure when they decide to apply and become Marshall–Brennan Fellows.⁹⁷

The project provides a natural and constructive educational pathway. We treat the high school students as individuals who have both a lot to learn and a lot to contribute. Although it is not in their job description, the Fellows often help the high school students on their college searches and on their applications. They coach them closely through the admissions process, a form of assistance that many of the high school students would otherwise not receive. The Fellows cultivate their students' intellectual strengths and help steer them in the right direction. We do not want anyone to go to law school just to fill out the numbers for this group or that; the Fellows know these young people personally and want what is best for them. They only suggest an academic path leading to law school for a student if they think a student is suited for the rigors of legal education and has the makings to succeed at it.

III. UNFAILING LAW SCHOOLS: THE MARSHALL–BRENNAN ANSWER TO CYNICISM AND DESPAIR ABOUT LEGAL EDUCATION

Law schools are under ferocious attack today, both from within and outside academia. It is hard to keep up with all of the criticisms leveled at them on the Internet: they are fundamentally selfish and greedy, deceptive in their recruiting and marketing tactics, exploitative of students, hopelessly self-referential and self-indulgent in the scholarship they produce, fundamentally indifferent to the communities they inhabit and even their own students, and complacent or complicit with injustice in the world.⁹⁸ This critique, which lights up the Internet on a daily basis, crystallized in Brian Tamanaha's book *Failing Law Schools*, perhaps the most thoughtful entry in this genre, which focuses on the harsh economics of legal education and the grim prospects for legal employment facing graduates.⁹⁹

97. For example, Chanell Autrey graduated from George Washington University Law School in 2012 after taking Maryam Ahranjani's Constitutional Law class at School Without Walls in Washington, D.C., in 2003–2004. Maryam and Chanell stayed in touch when Chanell went on to college at Penn State, and Maryam helped her secure law-related internships and wrote her recommendations for law school. During the 2011–2012 academic year, the WCL chapter had two Fellows—Gabrielle Lewis-White and Angela King—who had taken Marshall–Brennan classes as high school students in Washington, D.C. public schools. These successes have nothing to do with race consciousness in the admissions process and everything to do with effective and “affirmative action” in the lives of students.

98. For a sampling of some of the gentler criticism, see Charles Lane, *How Law School Became a Bad Deal*, WASH. POST, Aug. 5, 2012, at B01; David Segal, *Is Law School a Losing Game?*, N.Y. TIMES, Jan. 9, 2011, at B1; Paul Campos, *Goodbye Is Too Good a Word*, INSIDE L. SCH. SCAM (Feb. 27, 2013, 2:43 AM), <http://insidethelawschoolscam.blogspot.com/2013/02/goodbye-is-too-good-word.html>; Steven Davidoff, *The Economics of Law School*, N.Y. TIMES DEALBOOK (Sept. 24, 2012, 3:01 PM), <http://dealbook.nytimes.com/2012/09/24/the-economics-of-law-school/>.

99. See BRIAN Z. TAMANAHA, *FAILING LAW SCHOOLS* (2012).

Tamanaha argues compellingly that law student tuition is too high—inflated across the board as schools follow the example of the most elite law schools, which have set tuition at \$50,000 a year or more.¹⁰⁰ Similarly, law professor salaries are too high, with the most elite schools paying salaries of more than \$300,000 and pulling everyone else along.¹⁰¹ Law professors are engaged in ever more esoteric, abstract, and decadent scholarship that is scorned as useless by the bar and the bench.¹⁰² The market for hiring young lawyers into the big corporate law firms—never robust enough to absorb the large surplus population of hopeful young law graduates churned out by the nation's law schools—has turned dramatically worse in the Great Recession, especially for graduates of law schools not in the first tier of the *U.S. News & World Report's* law school rankings.¹⁰³ Moreover, the growing ranks of unemployed or underemployed young lawyers are staggering under a giant debt burden that many of these demoralized graduates will never be able to repay.¹⁰⁴

Meantime, many law schools, locked in savage competition for a shrinking supply of students and operating under the all-important gaze of the *U.S. News & World Report*, have been caught up in scandal and controversy over alleged deceptive consumer practices like fudging their employment statistics and sugarcoating the job prospects of their students.¹⁰⁵

This is a grim portrait painted by Tamanaha, all of its essential features all too recognizable within the law schools. Tamanaha is right to blow the whistle on deceptive consumer practices by which law school operatives try to sell a legal education like a used car. There is simply no excuse for doctoring figures about job placement or misleading students about questions of debt. On this basic question of professional and institutional ethics, there can be no dispute. Furthermore, legal education, like other parts of higher education, is clearly undergoing an adjustment in the wake of the Great Recession, and the changes we are adopting should clearly put the needs of students and graduates first.

But when it comes to the broadside indictment of law schools, there is more to this picture than meets the eye. Every type of higher educational institution in America—if not every institution in America, period—is experiencing financial upheaval brought on by the Great Recession. The student loan debt burden facing many law students is part of a

100. *Id.* at 132–34.

101. *Id.* at 48–51.

102. *Id.* at 55–61.

103. *Id.* at 167.

104. See Catherine Rampell, *The Lawyer Surplus, State by State*, N.Y. TIMES (June 27, 2011, 11:35 AM), <http://economix.blogs.nytimes.com/2011/06/27/the-lawyer-surplus-state-by-state/>; sources cited *supra* note 98.

105. TAMANAHA, *supra* note 99, at 145–54.

general crisis that has shaken the expectations and career plans of millions of graduate and college students who never set foot in a law school and hold degrees *less* marketable than a J.D. Indeed, student loan debt overall now exceeds credit card debt in America.¹⁰⁶ The stubborn unemployment encountered by many young lawyers continues to be a mass phenomenon that affects nearly every profession in the country. The problem is not that people are seeking graduate education; the problem is that the economy is not producing sufficient and relevant jobs on the other side of it.

In fact, what is most compelling about Tamanaha's book—his criticism of the radical disparity between wealthy institutions with comfortable professors and their debt-burdened students facing bleak employment prospects—is actually a disturbingly familiar feature of higher education generally. Indeed, this disparity is not even confined to the domain of education: the contrast between rich universities and poor students mirrors the general divide between the magnificent wealth of corporate America and the steadily sinking economic fortunes of America's middle and working classes.¹⁰⁷

Although he may not have intended it this way, Tamanaha's profile of law schools at the start of the new century seems to fit well within the political narrative of the Occupy Wall Street movement, which arose in 2011 and targeted public policies that favor profound economic inequality and defend the political injustices that follow from it.¹⁰⁸ Tamanaha's critique is actually better understood as the story of how American legal education, following the most Wall Street-focused schools in their ranks, tied itself closely to the elite economy, reproduced the corporate culture by inflating faculty salaries and using deceptive public relations strategies to enlist students, and reinforced the sharp inequalities that gave rise to the devastating political frame of the 1% versus the 99%. The law schools that should have been standing up for the common good and

106. Dennis Cauchon, *Student Loan Debt Surpasses \$1 Trillion: Burden Could Drag Economy in Future*, USA TODAY, Oct. 19, 2011, at A1; Daniel de Vise, *Student Loans Surpass Auto, Credit Card Debt*, WASH. POST (Mar. 6, 2012, 10:54 AM), http://www.washingtonpost.com/blogs/college-inc/post/student-loans-surpass-auto-credit-card-debt/2012/03/06/gIQARFQnuR_blog.html.

107. See Conference, *Third Panel: How Law Constructs Wealth Patterns*, 15 GEO. J. ON POVERTY L. & POL'Y 509, 521 (2008) (“[A] CEO earns more in one day than what the average worker earns in 52 weeks. The median CEO saw his total compensation increase 186 percent between 1992 and 2005, while the median worker saw wages rise by only 7 percent.” (quoting Kent Greenfield, Professor of Law and Law Fund Research Scholar, Boston College) (internal quotation marks omitted)); Sarah E. Waldeck, *Coming Showdown over University Endowments: Enlisting the Donors*, 77 FORDHAM L. REV. 1795, 1798 (2009) (“Some scholars have even suggested that universities directly capture the benefit of these demand-generating tax expenditures by raising their tuition to account for the subsidy available to the prospective student.”); *id.* at 1811 (“In a large study of almost 9,000 nonprofits, including more than 2,000 educational institutions, researchers found a positive correlation between executive compensation and an excess endowment, with the amount of compensation increasing as the amount of excess endowment increased.” (footnote omitted)).

108. Sarah Kunstler, *The Right to Occupy—Occupy Wall Street and the First Amendment*, 39 FORDHAM URB. L.J. 989, 990–91 (2012).

exposing an epidemic of corporate crime over the last several decades instead organized themselves around the legal needs of the 1% and went along for this most dangerous ride.¹⁰⁹

Although many law school critics seem to think that eliminating a large bloc of America's law schools would cure the ills of legal education, a different conclusion emerges if we focus on how the dominant culture of our law schools got caught up in the economic bubble, the deification of Wall Street, and the acquiescence to shocking inequality in society. After the Wall Street subprime mortgage crisis destroyed trillions of dollars of private wealth in America and millions of jobs, the consequences for lawyers were predictably brutal, leaving many attorneys out of work and in debt. The loss of junior associate positions at the top law firms caused graduates of the more prestigious schools to take a few steps down the money-based professional hierarchy to seek jobs at mid-size law firms and in government and public interest settings, forcing them into competition with the mass of lawyers who were never going to end up at Cravath, Swain & Moore or White & Case in the first place. In this context, it seems only too convenient, if predictable enough in historical terms, to deplore the proliferation of lower-prestige law schools, law students, and lawyers who occupy the places these graduates of elite law schools now want.¹¹⁰

This broader perspective on the political economy that structures American legal education is missing from Tamanaha's account. Therefore, his critique of the dynamics of legal education—trenchant as far as it goes—seems both too narrow and too pessimistic. It is too narrow because it describes the financial dynamics of the law school crisis in isolation from the broader economy and because it fails to capture the full sweep of the intellectual disarray and competitive neuroses affecting law schools. By organizing themselves around the confining and conservative metrics of the *U.S. News & World Report*, a reality that Tamanaha records well,¹¹¹ the schools have distorted not only the finances of legal education and the career expectations of their students but also the character of their intellectual and ethical missions.

Yet, paradoxically, Tamanaha is still far too pessimistic about the future of American legal education. He sees only a dog-eat-dog race to the bottom among the law schools in which the ethically questionable

109. See Segal, *supra* note 98 (describing the “[n]umber-fudging games” involved in law school rankings and the “Enron-type accounting standards” that have become the norm in the legal academic community with regard to salaries).

110. For a fascinating analysis of prior periods when contraction in the legal labor market led to an attack on the presence of immigrant students in law schools, see Bryant Garth, *Crises, Crisis Rhetoric, and Competition in Legal Education: A Sociological Perspective on the (Latest) Crisis in the Legal Profession and Legal Education*, 24 STANFORD L. & POL'Y REV. 503 (2013).

111. See TAMANAHA, *supra* note 99, at 71–84.

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practices of administrators undermine our educational mission.¹¹² But this gloomy assessment ignores the deep currents of intellectual and programmatic reconstruction taking place at many schools. Elitist economics and its failures do not chart the limits of our collective destiny, and law schools everywhere are in the process of reinventing and reinvigorating themselves to serve the real needs of the society, economy, and polity.¹¹³

I will not try to speak for any of the other healthy institutional tendencies that are percolating throughout the law schools, but the Marshall–Brennan project has been promoting a completely different set of values from the ones that Tamanaha perceives in legal education. By interacting with students in their high schools and taking responsibility for a crucial part of their education, the project’s work negates the dominant and false corporatist assumptions about legal education today.

These still-dominant assumptions, held both within the law schools and outside, specifically invite us to believe that

a. over the course of three years, law students will learn an esoteric language that will, of necessity and by definition, distance them from people in the broader community;

b. each law school must be locked in a ferocious institutional competition with all the others, precluding any prospect of engaging in common work and programmatic collaboration (apart from the kind of collusive and illegal financial practices that have been denounced by the Department of Justice and brought to an end by a consent decree with the American Bar Association);¹¹⁴

c. law school classes must be brutally competitive and student life cutthroat, nasty, and unhealthy;

d. law schools as elite institutions divert young people from paths of direct service in the community—especially that of teaching, which is to today’s college graduates what the Peace Corps was to graduates a few generations ago—and offer little or nothing to the public, with the possible exception of a small number of individual pro bono representations in clinics;

e. law students, not being lawyers yet and having no free time, have little or nothing to offer the public during their time in school; and

112. *Id.* at 83–84.

113. See Ethan Bronner, *To Place Graduates, Law Schools Are Opening Firms*, N.Y. TIMES, Mar. 8, 2013, at A14 (describing new ways in which law schools are creatively addressing the heavy indebtedness of their graduates and the growing number of Americans unable to pay for legal services, including universities opening nonprofit law firms for some of their graduates, the launch of Lawyers for America—“a conscious echo” of Teach For America for lawyers—and university-sponsored community law practices).

114. TAMANAHA, *supra* note 99, at 11–14.

f. law students are all grasping for the golden ring of jobs at corporate law firms and are fundamentally frustrated by the inadequate supply of such jobs, and thus come to regret their decision to go to law school.

In contrast, the Marshall–Brennan project insists that

a. over the course of three years, law students can master constitutional law by constantly translating and explaining the relevant concepts and terms to young people, bringing them closer to people in the broader community;

b. students, faculty, and staff at law schools across America are open to seeing themselves as participants in a common, socially valuable enterprise and not as warring competitors for money and power tied to different institutional hierarchies;

c. law school classes can bring out the best in each law student through cooperative hard work and study while helping to sustain a healthy and supportive law student culture;

d. law schools as places of learning and civilization can promote direct service in the community, especially teaching the law to non-lawyers, which is an obligation of professional social responsibility;¹¹⁵

e. law students, as energetic people whose minds are on fire with legal ideas and questions, are the perfect couriers of constitutional thought and inquiry throughout young America;

f. not all law students want to be corporate finance lawyers on Wall Street or anywhere else, and there are ample and fascinating opportunities for young lawyers committed to constitutional thought and practice to find employment as judicial clerks with judges who value the importance of constitutional literacy, and as attorneys in school districts, with school boards, in educational reform activities, in the representation of students having problems with individual disabilities or discrimination, in the myriad civil rights and civil liberties groups working on school issues, and in federal, state, and local government working on educational public policy; and

g. Fellows generally express tremendous satisfaction and pride in their work, do not hate law school, do not think that the culture is cannibalistic and suffocating, and find that there is no antidote to cynicism like creative service to others.

The “crisis” of legal education is only a crisis if we see the purpose of legal education as recruiting law students to train in a cutthroat environment to become high-paid private corporate lawyers working on or

115. AM. BAR ASS'N COMM'N ON PROFESSIONALISM, ‘. . . IN THE SPIRIT OF PUBLIC SERVICE’: A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM 50 (1986), *reprinted in* 112 F.R.D. 243, 302–03 (1986).

around Wall Street. That is a fundamentally narrow and distorted view of what lawyers do and of how their talents and services are needed in America today. In Marshall–Brennan, we do not see any of our Fellows as superfluous; each one is essential to the project, indispensable to his or her students, and part of an important movement for constitutional literacy and civic activism in our country. Similarly, we see the high school students we serve not as part of a surplus population with no future in a declining economy but rather as important actors in the great, exciting story of unfolding democracy in America.

CONCLUSION

Political philosopher Michael Walzer has observed that “[d]emocracy puts a premium on speech, persuasion, [and] rhetorical skill.”¹¹⁶ These skills are at the heart of the constitutional literacy training offered by the Fellows to America’s high school students. The project teaches students how to argue about the proper interpretation of constitutional provisions, as good lawyers do, and how to argue about questions of political and ethical value, as good citizens do. It also teaches that the Constitution and its meanings belong to everyone and can truly become our own if we are only willing to take responsibility for them.

In its first dozen years, the Marshall–Brennan project has built a lean organizational infrastructure underneath a public philosophy that champions the central importance of constitutional education to healthy political democracy. The project involves partnerships with local school systems, a curriculum geared to the interests and skill levels of high school students, a moot court culture that works wonders in the motivation of teenagers, a complete menu of teaching methods and strategies, and an organizational model rooted in tight budgets and expansive use of the precious natural resources that are universally available in law schools: the raw intelligence and magnificent energy of law students and their idealism about law as an instrument of justice, enlightenment, and successful citizenship.

This infrastructure now offers a platform for law schools across the country to help renew their sense of purpose and, indeed, their image in the new century. What human rights is to American law schools in the international law field, constitutional literacy should be to law schools in the domestic program: a moral touchstone for scholarship and an organizing principle for teaching and service. The open question is whether the constitutional literacy movement will remain a kind of underground sensation among those in the know or whether it will connect with clearly relevant streams of scholarship, most notably democratic and popular constitutionalism, and the urgent institutional imperative of fashioning a

116. MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* 304 (1983).

durable pathway for students from impoverished communities to find their way into legal education. For the sake of both a strong constitutional democracy and a relevant and pluralistic legal academy, one can only hope that the Marshall–Brennan Constitutional Literacy Project continues to flourish and take hold in the new century.