

## **Towards a Better State: Fostering Dialogue Between the Supreme Court and the Public Through a Public Comment Period**

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### **Introduction**

Since *Marbury v. Madison* in 1803,<sup>1</sup> the case that “invented” judicial review, the Supreme Court has exercised this power sparingly; that is, until recently. In the 1860s the Supreme Court, exercising its power of judicial review, struck down four laws, seven in the 1870s, four in the 1880s, and five in the 1890s. Between 1990 and 2000, the Court struck down thirty laws.<sup>2</sup>

In 1962, Professor Alexander Bickel criticized judicial review most famously for its counter-majoritarian difficulty, but also because he argued it leads to a decline in public debate.<sup>3</sup> Following the lead of James Bradley Thayer and Judge Learned Hand, Bickel argued that “judicial review may, in a larger sense, have a tendency over time seriously to weaken the democratic process.”<sup>4</sup> According to Bickel and Thayer, judicial review gives the legislature leave to “shed all considerations of constitutional restraint” because the courts will step in. In turn, the people will be less conscientious in who they send to Congress. The end result, according to Thayer, is that judicial review “dwarf[s] the political capability of the people, and [] deaden[s] its sense of moral responsibility.”<sup>5</sup> The people lose their political capabilities because the Supreme Court, an outsider, swoops in to remedy legislative mistakes, robbing the people of the political experience of debating the issue in public and correcting their own mistakes.

### **Benefits of an Active Public Sphere**

Not only does judicial review make Supreme Court decisions the “law of the land,” it also short-cuts public debate on politically controversial issues. Judge Learned Hand identified one reason why public debate wanes as a result of judicial review: the people no longer have any part in the “direction of public affairs.”<sup>6</sup> Without this sense of having a valued and powerful voice, Thayer warns that the people will be deprived a “moral education.”<sup>7</sup>

The idea that public debate is an important part of the political process dates back to Immanuel Kant.<sup>8</sup> According to Kant, the public sphere has three main benefits: it prevents revolution by providing the people with a non-violent mechanism of pursuing political and social change; it helps people develop their own reason; and it teaches people to think for themselves. Kant thought that by encouraging people to think freely, public debate would also encourage

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<sup>1</sup> 5 U.S. 137 (1803).

<sup>2</sup> LARRY D. KRAMER, *THE PEOPLE THEMSELVES* 213 (2004).

<sup>3</sup> ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 26 (1986)

<sup>4</sup> *Id.* at 21.

<sup>5</sup> *Id.* at 21–22.

<sup>6</sup> *Id.* at 20.

<sup>7</sup> *Id.* at 22.

<sup>8</sup> IMMANUEL KANT, *AN ANSWER TO THE QUESTION: ‘WHAT IS ENLIGHTENMENT?’* (1784), *reprinted in* KANT: POLITICAL WRITINGS 59 (H.S. Reiss, ed., H.B. Nisbet, trans., Cambridge University Press 1991) (1970).

them to act freely. He also believed the public sphere serves as an intellectual resource for government officials who can draw upon the debate and consensus to implement better policies.<sup>9</sup> A fourth reason public debate is important, as identified in the public administration literature, is that deliberative democracy helps to generate the political will necessary to take action.<sup>10</sup>

Kant's ideal public sphere has been picked up by philosophers and reframed as deliberative democracy. Samuel Freeman notes that deliberative democracy encourages "conciliation, fairness, and taking up others' points of view, because grievances are aired and proposals are debated in the hopes of convincing others of their soundness or desirability."<sup>11</sup> He goes on explain that the value of deliberative democracy is that it recognizes and respects people as free and equal citizens, which is a condition of individual political autonomy; further deliberative democracy matters because it is a "requirement of political legitimacy that the exercise of political power be justifiable according to considerations all can reasonably accept as democratic citizens."<sup>12</sup>

### **The Supreme Court as an Educator**

Rather than writing off the Supreme Court as completely contrary to the democratic process, Bickel offers a way out of the contradiction presented by the problem of judicial supremacy and the resulting disengagement of the public sphere: "Hence it is that the courts, although they may somewhat dampen the people's and the legislature's efforts to educate themselves, are also a great and highly effective educational institution."<sup>13</sup> Bickel, following the lead of Dean Eugene Rostow, sees the Supreme Court's relationship to the people and the elected branches as that of teacher to student: "The Supreme Court is, among other things, an educational body, and the Justices are inevitably teachers in a vital national seminar."<sup>14</sup>

What does it mean for the Supreme Court to be a teacher in a vital national seminar? Like a teacher, the Supreme Court can define the terms of the discussion and correct the behavior of misguided students—in this case, the Congress or President. While the Supreme Court is not an omniscient teacher, having nine of the nation's best lawyers guide the discussion and serve as resources for their students (i.e., the public) would be invaluable.

### **Integrating the Public**

Thus far, I have argued that there are powerful reasons to engage the public in the conversation around the interpretation of the Constitution. In addition, the public can serve as a resource for government officials in identifying the best solution and can provide the political will to take action. Integrating the public fully is a way to improve civic culture, educate citizens, and harness the collective wisdom of the public.

Currently individuals or groups who want to submit comments for consideration by the Supreme Court may submit an amicus brief. An amicus brief, literally a "friend of the court" brief, "that brings to the attention of the Court relevant matter not already brought to its attention

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<sup>9</sup> *Id.*

<sup>10</sup> Edward C. Weeks, *The Practice of Deliberative Democracy: Results from Four Large-Scale Trials*, 60 PUB. ADMIN. REV. 360-72 (July, 2000).

<sup>11</sup> Samuel Freeman, *Deliberative Democracy: A Sympathetic Comment*, 29 PHIL. & PUB. AFF. 393 (2000).

<sup>12</sup> *Id.* at 394.

<sup>13</sup> BICKEL, *supra* note 3, at 26.

<sup>14</sup> Eugene Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 2 (1952).

by the parties may be of considerable help to the Court.”<sup>15</sup> While certainly a pre-existing avenue for lawyers and interested persons with means, an amicus brief does not provide an accessible avenue for most people. A more accessible way to integrate the public into the Supreme Court’s process would be through a public comment period. While novel to the Supreme Court, public comment periods are sometimes used at the state court level regarding procedural or administrative rule changes.<sup>16</sup> The Arizona state courts also use public comment periods for judicial performance reviews.<sup>17</sup>

A public comment period would work similarly to the process used by Executive Branch agencies. After granting certiorari and receiving the petitioner, respondent, and amicus briefs, the Court would publish these materials along with a summary of the lower courts’ decisions through a notice on its Web site and through the *Federal Register*.<sup>18</sup> The public would then be allowed to submit comments until a week before oral arguments. All submissions would be posted on the appropriate page of the Supreme Court Web site. All submissions, except submissions with obviously offensive language, would be available for public viewing. In addition to directly responding to the case at hand, I would expect that some submitters would engage in a dialogue with each other.

At the end of the comment period, law clerks would read and compile the submitted comments. The law clerks would provide a summary memo of the submissions and ensuing dialogue for the justices including the original submissions in an appendix. The Chief Justice would assign one of the justices to be responsible for crafting the Court’s reply to the comments. The Court’s official reply would have to be approved by a majority of the Court and would be consistent with the majority opinion. Similar to federal agencies, the Court’s official reply would organize its response around the key questions and themes raised by the comments. Despite needing a consensus of the Court, the reply would not be binding on lower courts.

By allowing the public to submit comments on a case through a formal mechanism and by requiring the Court to take those comments seriously in its reply, the justices would be demonstrating respect for the contribution of the public. In its reply, the Supreme Court would be engaging in a direct, though limited, dialogue with “the people.” This response document would give the Supreme Court the opportunity to explain the case not for lawyers and judges, but in language accessible to the larger public. In addition, the reply would give the Court the opportunity to serve as an educator, correcting misperceptions and misunderstandings, and guiding the public debate. While serving as educator, this process would also provide a mechanism for the Court to better understand the context of its decisions and other considerations that the justices may not have entertained. This dialogue would serve as a foundation for progressive improvements in the autonomy and freedom of the polity as well as

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<sup>15</sup> SUP. CT. R. 37.

<sup>16</sup> For example, Montana and Arizona use public comment periods when making changes in rules. See *Court Issues Major Rule Change on Civil Procedure and Court Records*, 32 MONT. LAW. 12 (Mar. 2007); see also Jimmie D. Smith, *President’s Message: Discipline Changes in the Works*, 43 ARIZ. ATT’Y 6 (Dec. 2006).

<sup>17</sup> A. John Pelander, *Judicial Performance Review in Arizona: Goals, Practical Effects and Concerns*, 30 ARIZ. ST. L.J. 643 (1998).

<sup>18</sup> Currently, some of this information is available on the American Bar Association website through a link on the U.S. Supreme Court website. See Am. Bar Ass’n, *Supreme Court Preview*, <http://www.abanet.org/publiced/preview/briefs/home.html> (last visited Mar. 30, 2008).

better governance by the elected branches, because politicians would better understand the Constitution, and this dialogue would create an informed and deliberative public.<sup>19</sup>

An obvious challenge to a public comment period is that it is inherently self-selecting and would therefore only attract participation from the active public—many of whom could enter the public sphere through newspaper opinion editorials, blogs, and protests. However, on matters as important as the fundamental laws of the United States, it is important for all interested members of the public to have the opportunity to participate. Newspapers are vital sources of information, but the back page is controlled by an editor or editorial board, which could unfairly limit the presentation of other points of view. In regards to other forums such as blogs and protests, these activities are important aspects of the public debate; however, these activities are not in and of themselves sufficient to qualify as a national public dialogue. Blogs in particular, while gaining in popularity, are not formal avenues of discussion.

The public comment period model would encourage a national dialogue between citizens themselves and between the Supreme Court and citizens. It is a model used in other contexts to foster public discussion and lend credibility to federal rulemaking. In the context of the Supreme Court, the public comment period would serve a dual educational function. The public would benefit from guidance provided by the Supreme Court in the reply document, and the Court would benefit from the context, experience, and ideas generated in the public comment period dialogue. In addition, participants and observers would learn from each other creating a more informed and deliberative public.

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<sup>19</sup> In his widely-read book *We The People*, Bruce Ackerman suggests having regular constitutional amendment referendums on important constitutional questions. Ackerman suggests that presidents should be able to offer constitutional amendments for consideration by Congress that, if approved, are placed on the ballot during the next two presidential elections. If three-fifths of the voters approve the amendment during each election, then the constitutional amendment is ratified. The advantage of this proposal is to force political leaders to go around the country to “gain public acceptance of their constitutional proposals.” Ackerman’s point, and my own, is that we need a mechanism to create an open dialogue both for times of normal politics and higher lawmaking. BRUCE ACKERMAN, *WE THE PEOPLE* 54–55 (1991).