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The Pedagogy of “Equality”†

SANFORD LEVINSON*

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I. INTRODUCTION

I was very grateful to receive an invitation to participate in the San Diego symposium on equality. The gratitude was tempered, however, by my realization that I had nothing of true value to contribute in terms of the deep theoretical problems surrounding the use (or critique) of the term “equality.” After all, “equality” has been the topic of systematic examination for roughly 2,500 years. More to the point, perhaps, is that I am scarcely an expert myself in the vast, and ever-growing, literature on the subject. As true of many other law professors, that has not kept me from writing several essays that touch on the subject and opining on particular controversies.¹ But I am always aware that others, including fellow participants in the San

† © 2022 Sanford Levinson. Prepared for presentation at the San Diego symposium on equality. I am very grateful to Steve Smith and Larry Alexander for inviting me. And, as always, I am immensely grateful to Jack Balkin and Mark Graber for their comments on an earlier draft of this essay. More than ever, they should certainly be held harmless for any problems in my argument or possible “crankiness” in its tone, though they certainly deserve great credit in forcing me to try to become more clear and nuanced in setting out my positions.

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1. See, e.g., SANFORD LEVINSON, *WRESTLING WITH DIVERSITY* (2003).

Diego gathering, are vastly more aware of the formidable academic literature than I am.

So perhaps this essay is best viewed as a “meta-essay” consisting of reflections generated by almost four decades of teaching various facets of the subject of “equality” within the particular context of the legal academy. For reasons that should become obvious, I am not at all sure that my remarks would be equally relevant had I continued to be only a member of a political science department as a political theorist or were I a professional philosopher teaching either undergraduates or graduate students themselves hoping to spend their lives as philosophers. But it is a fundamental reality of the legal professoriate that they are *not* teaching graduate students in any conventional sense, beginning with the obvious fact that fewer and fewer law students are likely to have any significant background in the relevant literature on the subject of equality.

II. WHY IT IS DIFFICULT TO TEACH STUDENTS ABOUT “EQUALITY”

I organize my remarks around three propositions: First, as already noted, “equality” is an enormously rich and complex issue, having challenged the best philosophers and political theorists—and theologians—over more than two millennia. Second, the task of “modern” professors of constitutional law, dating back to the triumph of the “case method” in American legal education, is to use their inevitably limited time to concentrate, almost obsessively, on the work product of the United States Supreme Court. This necessarily means emphasizing the opinions written by the judges who happen, for whatever contingent reasons, to inhabit the bench at a particular time. If a standard philosophy course might be titled “what important philosophers have written about the subject of equality,” the law school analogue is “what Supreme Court justices have opined as to the meaning of equality, with an emphasis on the most recent justices and their work products.” Third is the obvious truth that the writings of justices are extremely different from what one might expect from philosophers or political theorists—or, for that matter, theologians, for one of the few things that most of us might agree on, whatever our profound differences, is that justices are not selected for their position because of having demonstrated the kind of philosophical acumen that explains the granting of tenure in the academic world.

What lawyers think and say about equality is quite different from the thought and writings of members of other parts of the modern university. As Justice Kagan made clear in an opinion turning on the notion of “sovereignty,” lawyers—or, at least the Supreme Court—address that complex concept in a way quite different from academics, even if, it is worth noting, a particular justice, like former Harvard Law School Dean Kagan herself, has had an

unusually distinguished career within the legal academy.² As she forthrightly wrote, “Truth be told . . . ‘sovereignty,’” when used by the Supreme Court to discuss “whether two governments are distinct for double jeopardy purposes . . . does not bear its ordinary meaning.” Instead, “for whatever reason, the test we have devised . . . overtly disregards common indicia of sovereignty.”³ One might admire her candor—and the implications of the words “for whatever reason”—while at the same time lamenting this almost cavalier disregard of “common indicia of sovereignty.” Or, even more to the point, one might strongly agree, as I do, with Don Herzog’s argument in his recent book *Sovereignty R.I.P.*, that the term has almost no value in the modern world, which is very different, both intellectually and empirically, from the 16th and 17th century European circumstances that generated the rich discourses about “sovereignty” in such philosophers as Bodin and Hobbes. He therefore argues that it should be dropped from academic—and, one presumes, all other forms of—discourse trying to understand our own world rather than the circumstances some four centuries ago that generated the initial discourses. Yet no academic lawyer believes that Herzog’s advice is even remotely likely with regard to the discourse of law, and we must continue teaching about “sovereignty” even if our own private opinion is that it is no more useful than phlogiston or “the ether” as a way of understanding reality.

All of this raises a somewhat painful question. If application of the standards of other intellectually rigorous disciplines like political theory or philosophy might lead to the realization that emanations from the Supreme Court are strikingly deficient, then why should students—and, necessarily, their professors—spend so much time carefully parsing opinions that could in fact not pass muster if presented in other parts of the university? Is it sufficient simply to say that legal education is its own specialized area, with its own internal standards of discourse as a means for grasping the world? We need not believe that legal understandings—“thinking like a lawyer”—provide *the* way of understanding the world in order to believe that they are important roadways that are ignored by other valuable modes of comprehension. From this perspective, then, perhaps it is a feature, and not a bug, that the Court has created its own special understandings of such concepts as “sovereignty” or “equality”—and, of course, there is a certain connection between these once one begins talking about the “equal

2. See *Puerto Rico v. Sanchez Valle*, 579 U.S. __ (2016), 136 S. Ct. 1863 (2016).

3. *Id.* at 1870.

sovereignty” of states in an international system or even of American subnational “states” within our particular federal system.⁴

I will not take the space fully to “prove” these assertions. I hope the following will suffice. As to the first, that is, the plentitude of rich materials examining the concept of “equality,” I offer the results of a perfunctory tour through my own library, which produced a number of scholarly books with “equality” in their title. (I am obviously not including any references to the works of the great philosophers themselves whose writings are the foundation of most academic scholarship.). These include Sanford Lakoff, *Equality in Political Philosophy*; Doug Rae et al. *Equalities*; Peter Westen, *Speaking of Equality: An Analysis of the Rhetorical Force of ‘Equality’ in Moral and Legal Discourse*; Charles Beitz, *Political Equality*; and Sidney Verba and Gary R. Orren, *Equality in America: The View from the Top*. There is also an edited collection of essays, *Equality and Preferential Treatment*. I shudder to think how many books might in fact be added through a search of any university library, not to mention every book that in fact contains serious discussion of “equality” whatever its title, such as, say, John Rawls’s *A Theory of Justice*, Michael Walzer’s *Spheres of Justice*, or Michael Sandel’s recent attack on *The Tyranny of Meritocracy*.

There are also books that contain “inequality” in their title, such as Christopher Jenck’s *Inequality: A Reassessment of the Effect of Family and Schooling in America* or a more recent book *Framing Inequality: News Media, Public Opinion, and the Neoliberal Turn in U.S. Public Policy*, touching on the way that members of a very different profession, i.e., journalists, structure much of the public discussion of equality and inequality in contemporary American society. Whatever their significant differences, all manifest the practical reality that “equality” or its structural complement, “inequality,” is what philosophers call an “essentially contested concept.” This means not only that there are important variations among the authors of even these relatively few books; there simply is not an agreed upon meaning for the word. But it is also the case that the word itself—“equality”—at least in the modern world has a positive valence, just as “inequality” for many, has a negative tilt.⁵ That is, after all, one of the reasons why so much

4. See, e.g., Chief Justice Roberts’s opinion in *Shelby County v. Holder*, 570 U.S. 529 (2013), which ultimately rests on what many regard as the judicially-manufactured and ultimately incoherent doctrine of “equal state sovereignty.”

5. Thomas J. Main, in his *The Rise of Illiberalism*, shows that illiberal movements in the United States and presumably throughout the world include a “rejection of the proposition that all people are created equal,” in the specific sense of an entitlement to what Main calls “political equality.” THOMAS J. MAIN, *THE RISE OF ILLIBERALISM* 16 (2022). Main obviously recognizes what might be called the empirical problems attached to assertions of radical equality, though even the emphasis on “political equality” is vitiated to some extent by the fact that *all* political systems do in fact differentiate with regard to the opportunity

energy is put into assertions about what constitutes the “correct” theory of the concept. Something more than mere academic point scoring is thought to ride on the answer.

Consider that Thomas Piketty became an international academic superstar with his book on *The Economics of Inequality*, which for many triggered an agreement that he had identified a genuine problem to which politicians must respond. Ganesh Sitaraman’s contribution to a collection of essays, *Constitutional Democracy in Crisis?*, would have removed the question mark. He wrote on “Economic Inequality and Constitutional Democracy” and concluded that “[e]conomic inequality is a problem for constitutional democracy” inasmuch as it “require[s] a relative degree of economic equality to persist.”⁶ Generally speaking, it is regarded as a good thing in the United States to be an egalitarian of some sort, especially if one wishes to be considered a “progressive.” Abraham Lincoln is only the most noteworthy American politician who emphasized the Declaration of Independence’s assertion that “all [humans] are created equal,” which he used to criticize the ideology behind slavery. But, of course, he never truly asserted that Blacks and whites were truly equal across the legal board or, more ominously, that they could necessarily live together in peace were slavery eliminated.

I almost always mentioned to students the importance of *Equalities*—and the importance of its plural title—immediately after the Fourteenth Amendment arrived in the course and served to initiate discussion of as the explicit topic of equality. Rae and his colleagues demonstrate that there are 108 logically defensible notions of “equality”; I go on to assert that the text of the Constitution provides not a clue as to which is the “correct” meaning and that we as Americans have never truly agreed on the “correct,” or “best,” meaning. It is this fundamental reality that makes “originalism,” whatever particular permutation of that doctrine one accepts, including

to participate in political decisionmaking., beginning most obviously with age. Consider that the United States Constitution itself distinguishes between those citizens who are eligible to become president on the basis of their status as “natural born citizens”; it also requires naturalized citizens to wait seven and nine years, respectively, before they are eligible to serve as representatives or senators, not to mention the reading by the United States Supreme Court that Section 2 of the Fourteenth Amendment in effect acknowledges the legitimacy of denying felons the right to vote. See the wooden textual opinion by then-Justice Rehnquist in *Richardson v. Ramirez*, 418 U.S. 24 (1974).

6. Ganesh Sitaraman, *Economic Inequality and Constitutional Democracy*, in *CONSTITUTIONAL DEMOCRACY IN CRISIS?* 533, 548 (Mark A. Graber, Sanford Levinson, and Mark Tushnet eds., 2018).

“original public meaning,” basically useless as a means of resolving the disputes generated by the term.

Perhaps the first meaning that might occur to someone, including our students, is simply “treat everyone alike.” After all, as St. Paul tells us in Galatians 3:28, an essential text in Christianity, “all human beings are equal in the eyes of God,” which to some might suggest that God does not discriminate.⁷ But, to put it mildly, that view of a completely egalitarian God seems to violate the beliefs of those Christians who believe that John 3:16 serves as the basic rationale for separating the sheep who will be saved from the goats who will be subjected to eternal torments in hell that await non-believers in Jesus as the Messiah. More to the point, such Olympian detachment about what might differentiate human beings is certainly not true of us mortals.

As an empirical matter, we are constantly seeking out differences among us. Almost all of us readily agree that it would truly be senseless to adopt “equality as identity” as a way to organize our complex social reality. To treat everyone as if there were truly no differences would be a recipe for social chaos. One of the first things we teach students is that there is a difference between “legitimate” discrimination and its “invidious” counterpart. We often use “discriminating taste” as a term of praise when referring to selecting wines, restaurants, movies, and perhaps even friends and future mates. Our students were, after all, admitted on the basis of a number of differentiations, including grade point averages, LSAT scores, and I suspect in all state universities, residence, to take three obvious—and relatively uncontroversial—bases of what is, after all, discrimination. But all of us are aware of the difficulties that ensue if we add race or ethnicity into the mix, though not, apparently, athletic prowess or the fact that an applicant’s parents or relatives might have attended the university in question. And, of course, ability to pay is a key variable in terms of determining who actually attends law school, even given the scholarship programs present in many law schools. In any event, we are off and running into trying to discern the difference between allowable distinctions and ones that arguably should be condemned as unacceptable and therefore forbidden in a just society.

One of the difficulties, as Rae and his colleagues in effect point out, is that debates about equality often break down into the equivalent of shouting matches between proponents of theories #24, 37, and 73 among the 108 logically possible candidates. It is not only the case, as is often suggested, that there is a tension between equality and liberty. *That* simply invites argument as to the comparative weight of two important conflicting values. Rather, the shouting match is caused by the sincere belief of all of the

7. See PETER WESTEN, *SPEAKING OF EQUALITY* (2016).

proponents that their particular favorite among the 108 is *the* correct theory and, therefore, that their adversaries must either be stupid or simply engaging in motivated reasoning in order to achieve their own crass interests. After all, Sitaraman's call for greater *economic* equality may leave untouched other forms of inequality, as suggested years ago in Michael Walzer's *Spheres of Justice*. Equality of access to medical care, say, implies nothing at all about similar access to skiing vacations in Switzerland or the ability to purchase delicious delicacies instead of being confined to a less expensive diet—or, perhaps, the ability to purchase graduate education in non-obviously utilitarian pursuits like classical languages or medieval art.

As to the second of my three assertions, about the felt necessity to focus on Supreme Court opinions, I call simply on the "lessons of experience," as the Framers might have—and indeed *did*—put it. I am assuming that many of my readers have been called upon to teach within a law school setting those aspects of constitutional law that include the Fourteenth Amendment and the presumptive meaning of "equal protection of the laws." That obviously requires constructing a syllabus and deciding what materials on which to spend very scarce and precious class time. Each syllabus, in its own way, constructs its own "canon" as to what we believe well-educated students ought to know. As we all know, every item that we in fact assign requires the ruthless rejection of many other worthy competitors. To what degree can we—or *should* we—more-or-less ignore so-called "leading cases" of the Supreme Court, particularly if they are quite recent and the subject, say, of newspaper editorials, political debate, and maybe even symposia at law schools? As the co-editor of what is said to be one of the "leading" casebooks in the field, which I would like to believe is interestingly different from most of its competitors by being more self-consciously "theoretical," I can speak to the pressures to focus not only on the general handiwork of the United States Supreme Court, but also its more recent cases. This is registered in the reality of the importance of the annual "supplements" that are issued by most casebook editors.

Many contemporary cases often have as their ostensible subject "equality," and we therefore dutifully include them in the Casebook, including, say, the tandem cases involving affirmative action at the University of Michigan, *Gratz*⁸ and *Grutter*.⁹ It would, presumably, be scandalous to omit *Brown*

8. *Gratz v. Bollinger*, 539 U.S. 244 (2003).

9. *Grutter v. Bollinger*, 539 U.S. 306 (2003).

*v. Board of Education*¹⁰ from a casebook—or from most course syllabi. It is, after all, what Jack Balkin and I identified some years ago as part of the “cultural canon” of constitutional law cases that we seem obligated to transmit to our students if they are not to embarrass themselves at dinner parties, or perhaps job interviews, by admitting to ignorance of the case.¹¹ The point of our essay, which is relevant to this one as well, is that there are in fact multiple canons. We focused particularly on three: the “pedagogical canon” that demands being taught to students as fledgling lawyers; the “cultural literacy” canon that Americans might be expected to have at least minimal familiarity with, especially, but not limited to, lawyers; and then the “constitutional theory” canon that identifies the materials that legal academics make the subjects of their own professional reflections. This last might well interest few students, judges, or professional lawyers, even though proficiency in this particular canon may dictate whether someone is hired or receives tenure in the academy. Needless to say, we did *not* argue that there is necessary agreement on the content of the three, only that it is important to realize that there are significant differences among the materials that we might assign to the three boxes.

But, as a segue to my third assertion, the principal thing anyone teaching the two Michigan cases or *Brown* itself realizes is they make relatively little sense if one expects a truly coherent argument that, among other things, allows one to offer fairly confident assertions either as to what exactly explains the opinions written to justify the Court’s decision or about what might follow from accepting them as authoritative. With regard to *Gratz-Grutter*, the central reality is that seven of the nine justices clearly believed that it made no sense to decide them differently in terms of accepting or rejecting the programs being litigated. The problem is that they split 4-3 in how they would have decided the two cases, but they all agreed that the two plans involving undergraduate admissions and applicants to the Law School should have survived or died together. Justices O’Connor and Breyer, of course, begged to disagree. This meant that the Law School prevailed by a 5-4 vote, while the undergraduate college was chastised by a 6-3 vote.

How many of us, I can only wonder, take the distinctions discerned by O’Connor and Breyer seriously? Perhaps we can “teach” those distinctions in the same way that grammarians can teach students learning English as a second language how to conjugate the irregular verbs. It may make no sense not simply to add “ed” to the present tense of the verb in question, but that is the way we do things when speaking or writing English. One must commit the practices—they are not really “rules,” of course—to

10. *Brown v. Board of Ed. of Topeka, Shawnee Country, Kan.*, 347 U.S. 483 (1954).

11. J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963 (1998).

memory, and perhaps that is simply what we ask students to do with regard to distinguishing between *Gratz* and *Grutter* in their application of purported notions of “equal protection under law.” In any event, we should ask ourselves what, exactly we think our students are supposed to learn from the careful study of both of the cases, beyond the importance of judicial idiosyncrasy in multi-member decision-making bodies. And, of course, we can then add to their frustration by assigning the two later cases involving Abigail Fisher and her anguished attempts to achieve her dream of attending my home institution, the University of Texas Law School. Perhaps the main thing we must teach our students is that deviations from a relentlessly—and itself dubious—process of “meritocracy” can be justified only by reference to a magic word, “diversity,” which itself requires that one recognize that we are in fact *not* all alike. Many years ago, I compared lawyers to participants in the childhood game of “Simon says,” where sometimes inane instructions must be followed on pain of losing the game. So it is with clothing policies almost always decided on for a complex set of reasons in the singular garment of “diversity,” whether one believes that genuinely makes good sense or not.¹²

Nicholas Lemann recently wrote an illuminating essay in *The New Yorker* on the Court’s treatment of affirmative action, in which, among other things, he interviewed Justice Lewis Powell’s law clerk, Robert Comfort, on the process of decision and opinion writing in *Bakke*.¹³ What Comfort made absolutely clear is that Powell was after a workable “compromise” rather than a necessarily intellectually elegant answer. That compromise was found in the idea of “diversity,” emphasized in a brief submitted by Harvard and, apparently, encouraged by a slim book about the travails of two relatively “liberal” universities in apartheid South Africa.¹⁴ Reflecting on the Powell opinion that he helped to draft, Comfort conceded, “It was not the most elegant piece of legal reasoning, but it was the right result. . . . We had saved the country from another civil war. The academic reactions, on both sides, were very harshly critical. Sometimes the right answer is not the intellectually defensible answer. It’s not the lawyerly answer. It’s a compromise. *A lawyer* [including, presumably, a lawyer serving on the Supreme Court] *isn’t interested in producing the clearest opinion. He*

12. See Sanford Levinson, *Diversity*, in *WRESTLING WITH DIVERSITY* 11 (2003).

13. *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

14. See Nicholas Lemann, *The Diversity Verdict*, *NEW YORKER* 34–45 (Aug. 2, 2021).

wants to produce the best result.”¹⁵ I shall return to this defense of Powell’s opinion in *Bakke* below.

With regard to *Brown*, it is important, presumably, to realize that the politically sagacious Chief Justice Earl Warren, who had been a wildly popular bipartisan governor of California, knew exactly what he was doing. He very consciously penned a “non-accusatory” opinion that he hoped (wrongly) might be relatively well-accepted by the white Southerners who had been complicit for decades in creating and maintaining a ruthless system based on white supremacy. But it was also crucial to gain not only majority assent, but, rather, *unanimous approval*, including the vote of the Kentuckian Stanley Reed, who basically appears to have believed that *Plessy v. Ferguson* should still be accepted as binding precedent.¹⁶

Warren was not submitting his opinion to a law school seminar. He would also presumably be indifferent to the fact that, for me at least, the opinion is a nightmare to teach decades later. Students who brief the case may ascertain the fact that schools were segregated by race in seventeen states, including Delaware, South Carolina, Virginia, and Kansas, and the accompanying case of *Bolling v. Sharpe* provides the additional information that schools were also segregated in our nation’s capital. However, there is no useful information that allows students ignorant of American history to understand *why* the schools were segregated in these localities. Nothing is said about slavery, the failed attempt at genuine “reconstruction” of the defeated Confederacy, or even Jim Crow, even if we are told, with reference to some controversial social psychology experiments, that separating children on the grounds of race is likely to inflict psychological harm. Doctrinally, the opinion is a mess, sending conflicting messages first that “separate schools are inherently unequal” and then, only a paragraph later, informing us that the key question is really whether the separate schools are the result of intentional decisions to distinguish among the children *solely* because of their race. Readers may feel legitimately confused as to what counts as unconstitutional “segregation” or even exactly why we should care about “racially separate schools,” which are apparently tolerable so long as they are not *intended* by the school board in question.

It is, therefore, not surprising that the Supreme Court itself basically engaged in a shouting match on the “true meaning” of *Brown* over fifty years later in a case involving the voluntary desegregation of schools in Seattle, Washington, and Louisville, Kentucky, both of which involved taking the

15. *Id.* at 42 (emphasis added).

16. See Sanford Levinson, *The Rhetoric of the Judicial Opinion*, in *LAW’S STORIES* 187–205 (Paul Gewirtz and Peter Brook, eds., 1996).

race of the students into account.¹⁷ Chief Justice Roberts and Justice Breyer appeared to accuse each other of lawyerly incompetence in understanding the basics of that truly canonical, albeit incoherent, case. What should our students think of such a display? I can report that a group of New Zealand judges to whom I gave a talk about *Parents Involved* in the summer of 2007 were dismayed by the unedifying spectacle of the dueling opinions and their tone. They commented that the American experience following the constitutionalization of "equality" was a contributing reason to the fact that the New Zealand Bill of Rights, a quasi-constitution for that country, avoids using that word. From their perspective, the United States presents a chastening, rather than inspiring, example of constitutional drafting—and judicial interpretation. Better to avoid the de facto constitutionalization of "equality" than to risk going down the American rabbit hole of apparently endless disputation and acrimony.

These are not isolated examples of what faces any law professor charged with teaching about "equal protection of the law." I am even more perturbed about another line of cases that interest me as a citizen as well as a law professor, involving the distribution of political power in the United States through legislative districting. Prior to 1962, we might have taught our students that the issue was nonjusticiable.¹⁸ But 1962 saw the great sea change, with *Baker v. Carr*, which overruled *Colegrove* and held that the citizens of Memphis, Tennessee, who claimed they were subjected to unequal voting power stated a claim under the Equal Protection Clause.¹⁹ As with *Brown*, the Court provided no particular guidance in *Baker* as to what exactly courts should do. That would presumably come later. My own mentor in graduate school, Robert McCloskey, became the only non-lawyer to contribute a "Foreword" to the *Harvard Law Review's* annual issue on the previous term of the Court, and he pleaded with the Court to craft a basically modest and restrained path into what Felix Frankfurter had warned was the "political thicket" of reapportionment.²⁰ It obviously did not do so. A 1963 case, arising out of Georgia, was the occasion of the Court's

17. *Parents Involved in Community Schools v. Seattle School District*, 551 U.S. 701 (2007).

18. *See Colegrove v. Green*, 328 U.S. 549 (1946). Interestingly enough, the vote was only 4–3, so perhaps that offers professors an opportunity to discuss whether such a decision should be treated as in some way weaker or less binding than a 5–4 decision, assuming, of course, that precedents should be treated as binding at all.

19. 369 U.S. 186 (1962).

20. *See* Robert G. McCloskey, *The Supreme Court 1961 Term: Foreword: The Reapportionment Case*, 76 HARV. L. REV. 54 (1962).

thundering pronouncement that “[t]he concept of political equality from the Declaration of Independence, to Lincoln’s Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can only mean one thing—one person, one vote.”²¹ And the following year *Reynolds v. Sims* invalidated the legislative systems of almost all of the states, many of which replicated the national constitution inasmuch as the “upper house” awarded equal numbers of senators to each country regardless of population.²² Thus the small North Carolina county in which I grew up had the same single senator as did the county in which Charlotte, at least six times larger, was located. The United States Senate was saved, as it were, only because the Framers, in their unwisdom, specified in the text that each state received two (and presumably only two) senators.

In 2002, I published a somewhat cranky article submitted as part of a symposium at the University of North Carolina on the 40th anniversary of *Baker v. Carr*.²³ I in fact applauded *Reynolds* and agreed that the United States Senate is illegitimate under any proper 21st century theory of equality,²⁴ a view to which I am ever more committed. But I also indicated in 2002 that the Court’s slogan was simply a “mantra in search of meaning”; in no serious sense had the justices conveyed to any intelligent reader an articulation of what might count as a deep theory of political equality and its connection with the all-important subject of political representation. I cited one of my favorite articles, Jonathan Still’s essay in *Ethics*, in which he demonstrated, at least to my satisfaction, that the most defensible meaning of a truly “equal vote” entailed adoption of proportional representation.²⁵ We have, though, repeatedly been told by all members of the Court, most recently in an otherwise bitterly divided 5-4 decision on gerrymandering,²⁶ that proportional representation is most definitely *not* required by the mantra, though without a scintilla of genuine explanation. Perhaps it is appropriate to quote one of my favorite sentences in all of literature, Ring Lardner’s “‘Shut up,’ he explained.”²⁷

Similarly, *Evenwel v. Abbott*,²⁸ another contribution of my home state of Texas to the U.S. Reports, required the Court to address whether the

21. *Gray v. Sanders*, 372 U.S. 368, 381 (1963).

22. 377 U.S. 533 (1964).

23. Sanford Levinson, *One Person, One Vote: A Mantra in Need of Meaning*, 80 N.C. L. Rev. 1269 (2002).

24. See, e.g., Sanford Levinson, *OUR UNDEMOCRATIC CONSTITUTION* (2006).

25. Jonathan W. Still, *Political Equality and Election Systems*, 91 *ETHICS* 375 (1981). See also Sanford Levinson, *Gerrymandering and the Brooding Omnipresence of Proportional Representation: Why Won't It Go Away?*, 33 *UCLA L. REV.* 257 (1985).

26. See *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019).

27. See RING LARDNER, *SHUT UP HE EXPLAINED: A RING LARDNER SELECTION* (1962).

28. *Evenwel v. Abbott*, 578 U.S. 54 (2016).

basis of representation should be citizens—and perhaps only those citizens actually entitled to vote—or, rather, the population in general, including many thousands who are ineligible to vote because of age, status as felons, or, most prominently, lack of citizenship (including residents who are also at the same time undocumented aliens). Not at all coincidentally, the same zealot who has financed attacks on affirmative action, including that at the University of Texas, was behind *Evenwel*. The plaintiffs were arguing, in effect, that Houston, the nation's third-largest city, should not be rewarded with extra representation in the Texas legislature because of its significant cohort of non-citizens, whether resident aliens or undocumented aliens. Whatever one thinks of the argument, it can scarcely be dismissed as "frivolous" inasmuch as it goes to the root of what one means by "representation."

Justice Ginsburg in a quite wooden opinion for the Court declared that since we had always assigned *all* persons to the denominator for representation, Texas was certainly not required to accept the plaintiff's argument to change the basis. This seems clearly correct, especially if one is a devotee of relative judicial modesty, even if, needless to say, the reapportionment decisions themselves scarcely comport with any such modesty. Justice Alito, while concurring in the result, wrote an opinion accurately noting that the issue was in fact quite an interesting one, at least if one linked "representation" to the electorate, as one might believe was the message of *Reynolds* and other cases. It was, therefore, unclear to him why a state could not use as its "denominator" in crafting state legislative districts only citizens or even citizens eligible to vote. (He apparently agreed that congressional districting did require the counting of *all* "residents," whether or not citizens. But this can be interpreted simply as the submission to what I am sometimes tempted to describe as "mindless textualism.") That being said, though, his opinion was more successful in spotting the issue, which Justice Ginsburg basically ignored, than in attempting to provide any way of resolving one of the most fundamental questions in all of political theory.

Ironically or not, Mark Graber, in a comprehensive forthcoming study of the congressional debate over Reconstruction, notes that some Radical Republicans were quite insistent on linking the number of representatives a state would receive to the actual voting population. This followed from the reality that by losing the War, Southern states might in fact gain significant power in the House (and the electoral college) inasmuch as the three-fifths clause became a nullity and the formerly enslaved persons were now counted as whole persons. The key issue, of course, was whether or not these persons, or, at least, the males among them, would be allowed to vote, and the answer

was all too unclear at the time the Fourteenth Amendment was being debated. “Proponents of congressional reconstruction were adamant,” Graber writes, “that former confederate states not be allocated representatives (and votes in the Electoral College) on the basis of disenfranchised persons of color.”²⁹ As Republican Representative Baker put it, “Who can stand before the people of the North and tell them that the late rebel communities in Congress ought, as a matter of right, to have between thirty and forty Representatives in Congress upon no better basis than the unvoting and therefore unrepresented colored people of the South?”³⁰ As another Representative put it, “Representation and the ballot must go hand in hand.”³¹

Today, of course, this position is thought to be decidedly illiberal, but that may only be yet another illustration of what Jack Balkin has called “ideological drift.” That is, positions that at one time were proffered by people on one side of the political spectrum are now espoused by those on the other and denounced by their original supporters. But this may also illustrate the even more basic truth that *all* political reasoning is *motivated* reasoning, so that any given argument, as proponents of the “Cambridge School” identified with Quentin Skinner, has to be understood in the context of the particular issues and political realities generating the text being studied. This suggests, among other things, that the quest for a truly transhistorical, universal theory of “equality” is a fool’s errand. The decision to embrace any one of the 108 contenders will inevitably be a function of one’s response to contingent “facts of the ground,” even if a specific argument will adopt a purportedly universalist rhetoric. Even if one might want to challenge this with regard to “pure philosophy,” it surely captures a fundamental reality about legal argument, which must always take note of the actualities generating any given case and of the consequences of any proffered solution.

In any event, we have entered the third decade of the 21st century with the Court’s still having failed to produce anything that could possibly count as a genuine elucidation of what it—or, for that matter, any individual justice—has in mind when invoking a presumptively hallowed concept of equality of the suffrage as a defining condition of the American political system. One might ascribe this failure to the fact, however much we sometimes wish to ignore it, that the Court, like all genuine institutions, is not an “it,” but, rather, a “they.” So perhaps the real question is why we—or anyone else—should expect genuine intellectual coherence from even a nine-member body charged with reaching at least enough consensus to issue “opinions

29. MARK A. GRABER, *PUNISH TREASON, REWARD LOYALTY: THE FORGOTTEN FOURTEENTH AMENDMENT I* (U. Press of Kansas: Lawrence) (forthcoming 2023), at 297 (on file with author).

30. CONG. GLOBE, 39th Cong., 1st Sess. 463 (1866).

31. CONG. GLOBE, 39th Cong., 1st Sess. 1319 (1866).

of the Court" that, at least in theory, provide bureaucratic orders to those the Constitution defines as "inferior" courts.

But one can also ask why anyone would expect even very smart judges, educated at our finest law schools—such as the nine who now inhabit the bench in Washington, eight of whom attended either Harvard or Yale law schools—to be able to offer truly convincing resolutions of debates that have challenged the best minds of the past 2,500 years. And this might be especially true if legal education, including that delivered at our very best law schools, makes no serious attempt to introduce its students, who might later become even Supreme Court justices, to what Matthew Arnold might have defined as the "best which has been thought and said" by the truly eminent writers and thinkers in what we sometimes call "our tradition."

There is, incidentally, nothing innocent about this last observation. No doubt an observer of my home library would take note of the fact that it is basically lacking in any systematic examination of what anyone outside of "Western political thought" might have said about equality. Is it really the case that no one writing out of, say, Islamic, Indian, or Chinese political thought, has had nothing of interest to say about this topic? One might respond that *American* constitutional law should be based exclusively on homegrown thinkers and ideas, which suggests, among other things, that the "American idea of equality" might be interestingly different from that found in, say, France, Germany, or Kenya.³² Indeed, federalism buffs might go on to suggest that there is a distinctly "Texan theory of equality" that is importantly different from the variety one finds in, say, Massachusetts or California. There is nothing stupid about such suggestions, but it only underscores the difference between "thinking like a lawyer" and "like a philosopher" who, for better or worse, generally seeks more universal answers to important philosophical questions.

One might view most occupants of high office in the United States as "gifted amateurs" with regard to the issues they are called upon to resolve. For those in elective positions, their legitimacy is derived from the sheer fact of election. It is, of course, more difficult to figure out exactly what legitimizes judicial decisionmaking by nonelected jurists. This is especially true in a post-realist world that is skeptical of the existence of a teachable "legal science" instantiated in the decisions of judges. At the very least, that might require adopting a more European

32. See, e.g., DONALD LUTZ, A PREFACE TO AMERICAN POLITICAL THEORY (1992).

mode of organizing the judiciary so that judges are truly “professional” insofar as they are trained for that role even from their basic legal education. That, obviously, is in no way true of American judges, whether appointed or elected. Interestingly enough, Elena Kagan is the only one of the current members of the Supreme Court who is certifiably “learned in the law.” And that is not because she was Dean of the Harvard Law School; rather, it is because, in order to become Solicitor General of the United States, she had to assure both the appointing President and the confirming Senate that she indeed had that status! I have no idea if that required anything more than possession of a law degree and, perhaps, membership in a Bar. But such certification is irrelevant, at least as a legal matter, to becoming a judge in the United States.

One’s qualifications for appointment have little or nothing to do with the power one has as a judge after taking the oath of office, however. Appointment to the office itself entitles the occupants to engage in what philosophers call “performative speech,” i.e., the power to *create* new legal realities simply by virtue of their uttering certain words. And this is also the *de facto* power to force law professors to spend significant time on their opinions whatever the professoriate might in fact think of their quality. Nick Lemann captures this reality perfectly with regard to the need of lawyers—and law professors—to concentrate on the rhetorical use of “diversity” as another mantra; the sole reason is that Justice Powell in 1978 found it an acceptable path toward a compromise and then, twenty-five years later, Justice O’Connor, casting her own idiosyncratic votes in *Gratz-Grutter*, proclaimed Powell’s view as continuing to be the law of the land. We might on occasion indicate that students should do a far better job if they wish to get an A on a seminar paper, but that is irrelevant so far as determining the legal status of a given Supreme Court pronouncement. Our students are far better advised to obey Supreme Court opinions than any eviscerating critiques their professors, who are distinctly *not* charged with, say, keeping the country from falling into civil war, might in fact offer in our classrooms.

I am not a devotee of law and economics, but I am completely aware that all of us, as actual teachers, operate under the duress of scarce resources, the most important of which is time. Even law schools that require courses in constitutional law generally require only one such course. The University of Texas Law School is unusual inasmuch as we require seven hours in two courses. However, there is no attempt genuinely to standardize either of those courses. The first one is an “introduction” to the subject for first-year students; the second is any course drawn from a menu of options. What this means, in fact, is that it is perfectly possible to graduate from the Law School without ever engaging in any truly extended discussion of “the equal protection of the law,” if, for example, one has

decided to take one's second course on "freedom of speech," "constitutional criminal procedure," or the topic that I increasingly focus on, "comparative constitutional design." Whether this is a feature or a bug of the triumph of student choice regarding which courses they wish to take—and the "academic freedom" of the professoriate to organize courses around their own interests rather than conform to some set curriculum even with an ostensibly single subject matter area—might itself be open to interesting discussion, but there is no doubt that it is now a pervasive reality. Students and faculty would, I suspect, join together in a common uprising against any true uniformity in the curriculum!

So each and every one of us charged with teaching American constitutional law, including whatever the Supreme Court might have to say about "equality," must necessarily decide exactly what to assign our students and spend precious time discussing. It is hard to escape the zero-sum aspects of designing a curriculum. More time spent on X will necessarily mean less time on Y. I have become very critical of the fact that our collective obsession with interpreting the Fourteenth Amendment has meant, practically speaking, the diminished attention we are likely to give to the structural features of the Constitution that may illustrate manifest inequalities in our political system. The most obvious example is the United States Senate, the patent inequalities of which I have come to believe are far more important in explaining the possible collapse of the United States as an operating political system than is anything the Court says about the Fourteenth Amendment. But, of course, almost no courses genuinely address why James Madison was completely correct in describing equal voting power in the Senate as an "evil"³³ because not even Ronald Dworkin's Hercules could present a plausible argument that this evil is at the same time "unconstitutional." One does not have to be a committed textualist to believe that "What part of two do you not understand" is a dispositive rejoinder to anyone who claims that Wyoming's enjoying equal voting power with California is unconstitutional rather than "merely" an indefensible feature of the unamended 1787 Constitution. That is the teaching of *Reynolds v. Sims*³⁴ itself inasmuch as the Court completely backed off from addressing the illegitimacy of the Senate under its own thundering standard of "one person/one vote." American legal education is simply uninterested in what is not subject

33. See THE FEDERALIST NO. 62 (James Madison).

34. 377 U.S. 533 (1964).

to litigation, including basic institutional structures that violate any plausible notion of equality in the 21st century.

Perhaps I should add a fourth assertion to my possibly sclerotic set of assumptions about the challenge of being a legal academic charged with the task of teaching about “equality.” That would be that our students, with some welcome, but too infrequent, exceptions, do not bring with them to law school the kind of educational background that might hold us harmless, so to speak, in choosing to teach only the remarkably limited material found in almost all law school courses. This, of course, has nothing to do with their raw intelligence, which is often extremely impressive, or even their dedication to “mastering the law” as defined by diligence in performing their assignments. It does, however, relate to the areas in which they majored prior to entering law school. Perhaps there are a few schools where most of the admitted students have majored in what we used to think were “traditional liberal arts,” including, say, history, political science, or philosophy, but I dare say that that is an ever-lessening group. Perhaps we get a good cohort of economics majors, though that only invites discussion (and bickering) about the nature of so-called “economic reasoning” either empirically or normatively. But today students at “non-elite” schools are likely to major in business or communication arts, not to mention those students who major in engineering or other hard sciences that do not require any grappling with traditional liberal arts subjects in order to get a degree. (Many of our students also have extraordinarily little experience in writing serious papers that depend on amassing relevant evidence and then developing a coherent and well-developed argument about the implications of the evidence.)

In my now almost half-century of teaching, I have found the single most difficult problem to be that of allusions: i.e., what can one expect one’s students to be tolerably familiar with, whether from “high” or “popular” culture, and what, instead, comes across to the student audience as a sign simply of old age—who today really knows of Jefferson Airplane or Richie Havens?—or a form of intimidation practiced by the self-professed well educated upon those with less education. Why should we expect a student today to be able to identify Plato and Aristotle, Hobbes, Locke, Rousseau, and Bentham, or even John Rawls, Ronald Dworkin, and Robert Nozick, and to know the important differences among them? Can we any longer presume that students will be able to identify Biblical references or understand why Nelson Rockefeller included in his stock campaign speech a reference to what political reporters reduced to BOMFOG—the “Brotherhood of Man and the Fatherhood of God”?

Many of us have become sympathetic to concerns about “cultural blindness” predicated on the often stunning lack of “our” own knowledge about figures well-known to at least some of our students. Are we really

entitled to be surprised by a student's ignorance about John Locke? Perhaps the reality of contemporary intellectual life, particularly in the United States, is a "long melancholy roar" of not so much "ignorant armies" clashing by night, but rather differentially educated armies who are angry at what they view as the parochialism of those they are also perhaps increasingly inclined to view as Schmittian enemies rather than members of a common community united by a good faith desire to achieve the perhaps utopian ends of the Constitution with regard, say, to "establishing Justice" or achieving what some might define as the *true* "equal protection of the laws."

III. WHAT IS TO BE DONE?

Although there are moments when I am tempted to call for the radical reconceptualization of the legal academy, I recognize not only that that is completely unrealistic. More importantly, it also misses the fact that there are good reasons why the study of law within that academy might be interestingly different from the same study in other parts of the university that, among other things, are not concerned with producing graduates who are capable of practicing law. That being conceded, though, one can still ask exactly why we approach the teaching of constitutional law the way we do within the legal academy and whether significant changes—I would call them "reforms"—are thinkable.

The first, and most important, question we must ask ourselves is exactly what we think the purpose of the basic constitutional law course is. One way of answering this is to ask further why it is that many, though certainly not all, law schools *require* at least one course in constitutional law while forgoing any such requirement with regard, say, to family law, evidence, corporate law, taxation, or employment law. The answer is surely not that these latter areas of law are less important to the practicing lawyer than is constitutional law. As a matter of empirical fact, one can predict that relatively few graduates of most law schools will find themselves litigating the subjects covered in most constitutional law courses. To the extent the typical graduate *is* likely to have a "constitutional law" case, it is far more likely to involve the dormant commerce clause, a topic rapidly fading as a central focus of most courses, constitutional criminal procedure, or, of course, the kinds of constitutional law issues that might come up if one is pursuing a career in state or local government, e.g., zoning. Ironically or not, criminal procedure, including capital punishment, has, generally speaking, been hived off to its own course, and many students

graduate without ever confronting the issues raised, say, by the Fourth, Fifth, Sixth, or Eighth Amendments. For some lawyers, the First Amendment will become implicated in cases involving intellectual property or the regulation of social media, again topics that are rarely raised in the introductory courses that are my primary interest. It is my experience as well that most of “us” assume that our colleagues teaching property will convey to students the morass of legal doctrine that is “land use planning” and, especially, “takings.”

So let me turn to some quite specific suggestions, based on my own experience. At the very least, I hope this might provoke a discussion among legal academics about the single most important piece of legal writing they do, which is to prepare a syllabus of the materials that they then impose on students. For many years now I have refrained from teaching *Marbury v. Madison*, which I regard as a vastly overrated case that contributes surprisingly little to one’s legal education other than, probably, a certain amount of cultural literacy.³⁵ It *would* be embarrassing if presumably well-trained lawyer said they never heard of the case. But that can be accomplished in roughly ten minutes of comments. One certainly need not take the time necessary to explain the specifics of the Election of 1800, the “midnight judges,” and Marshall’s altogether questionable hermeneutics when “interpreting” Section 13 of the Judiciary Act of 1789 and then Article III of the Constitution. As it happens, I use the time saved from spending the three days necessary to teach *Marbury* adequately to students who are unlikely to know any of the relevant history (or, for that matter, to be familiar with hermeneutics) in order to teach far more important cases involving the Constitution’s treatment of enslaved persons. And, of course, it is slavery that is the historical predicate for the so-called Reconstruction Amendments, including the Fourteenth Amendment and the Equal Protection Clause.

So “equality” arrived as a central topic of discussion midway in the courses I used to teach. What, indeed, does the concept mean, particularly with regard to the issues of race and white supremacy that were the foundation stone of the American form of chattel slavery? Several years ago I proclaimed in the pages of a symposium devoted to teaching the Fourteenth Amendment³⁶ that one could do an adequate job of teaching everything students needed to know, in order to be “introduced” to the conundra of the Fourteenth Amendment’s equal protection clause, by

35. Sanford V. Levinson, *Why I Don’t Teach Marbury (Except to Eastern Europeans) and Why You Shouldn’t Either*, 38 WAKE FOREST L. REV. 553 (2003).

36. Sanford Levinson, *Why Strauder v. West Virginia Is the Most Important Single Source of Insight on the Tensions Contained Within the Equal Protection Clause of the Fourteenth Amendment*, 62 ST. LOUIS U. L.J. 603 (2018).

concentrating exclusively on *Strauder v. West Virginia*,³⁷ perhaps supplemented by *Plessy v. Ferguson*.³⁸ I will not rehearse my entire argument. But I do believe that the relatively short opinion authored by Justice Strong, together with the dissent of Justice Stephen J. Field, present a student with the basic issues presented by the Equal Protection Clause, and that almost literally none of the many cases decided since then do anything really to clarify the difficulties set out in that case. It is *not* that Strong’s opinion is truly coherent in the sense that it adopts only one theory of equality. Indeed, what makes it so valuable pedagogically—and, I must say, very much worth reading aloud and discussing each paragraph, and sometimes even each sentence seriatim—is that it captures so well the essential tension in approaching the Constitution’s meanings with regard to using race as a predicate for public policy.

I have on occasion taken up to four days to work through the opinions in *Strauder*, so valuable do I think the opinion is. But for now let me focus only on one key paragraph, in which Strong elaborates what he believes to be the “spirit and meaning” of the Fourteenth Amendment and declares that

It ordains that no State shall deprive any person of life, liberty, or property, without due process of law, or deny to any person within its jurisdiction the equal protection of the laws. *What is this but declaring that the law in the States shall be the same for the black as for the white*; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color? The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race, — *the right to exemption from unfriendly legislation against them distinctively as colored, — exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race.*³⁹

So one finds in this slender paragraph the two key theories of the Equal Protection Clause that to this day are the subject of unending, and bitter, contention. Does it prescribe that “the law in the States shall be the same for the black as for the white,” which obviously sounds a lot like the “color-blindness” test that John Marshall Harlan would contribute in

37. 100 U.S. 303 (1879).

38. 163 U.S. 537 (1896).

39. *Strauder*, 100 U.S. at 307–08 (emphasis added).

his *Plessy* dissent. Or, very much on the other hand, does it distinctly proscribe only “the right to exemption *from unfriendly legislation*”? The former quite clearly would prohibit “affirmative action” which rejects “sameness” as the overarching criterion for assessing the law regarding race. The latter just as clearly can support affirmative action inasmuch as it is distinctly “friendly” to the Blacks (and other groups) who have formerly been excluded from the basically herrenvolk democracy established in 1787 and fully operative until at least 1865.

Plessy is interesting in this regard inasmuch as the majority opinion, which a modern reader is thoroughly justified in regarding as exemplifying an obtuse racism, nonetheless was careful to state, in response to an argument that their operative doctrine would allow all sorts of discriminations beyond segregated railway cars, “The reply to all this is that every exercise of the police power must be reasonable, and extend only to such laws as are enacted in good faith for the promotion for the public good, *and not for the annoyance or oppression of a particular class*.”⁴⁰ Perhaps it is the very obtuseness of the Court in failing to realize the degree to which Louisiana’s policy was in fact designed “for the annoyance or oppression of a particular class” that leads us to sympathize with Justice Harlan’s mantra about the Constitution being “color-blind,” but what *Strauder* teaches is that the Constitution simply does not offer a clear solution to the conundrum illustrated in Strong’s paragraph. “Color-blindness” may be defensible as a prophylactic measure based on the mistrust of federal judges or any other public officials (particularly in the late 19th century?) to make nuanced judgment about the social meanings of various classifications, racial and otherwise, but no one should pretend that it is a compelled meaning of the “majestic generality” of “equal protection of the laws.”

So why teach any of the further cases, especially, of course, if one agrees that they are stunningly unilluminating save for revealing only the fissures within the Court (and American society) themselves? The answer, presumably, is that our students should know the legal languages (or jargon) that contemporary judges use in approaching such problems. But I think we should ask ourselves exactly why that is so important, especially if I’m correct that very few of our students will actually have to write briefs or make oral arguments that turn on decoding the mysteries found in *Brown*, *Gratz-Grutter*, and the other cases that truly practicing lawyers do indeed have to be aware of. But it might be independently valuable for students to learn about the history of “diversity” as a mantra within the Supreme Court as recollected by Justice Powell’s law clerk. How sensitive *should* the Court be to the social ramifications of its decisions? Does it matter if

40. *Plessy*, 163 U.S. at 550 (emphasis added).

Justice Powell was correct in his belief that America was moving toward a de facto civil war over the issue of affirmative action and that he might contribute to some soothing of tensions by creating the decidedly "inelegant" notion of "diversity"? A similar question can be asked, of course, about the Court's actions in *Bush v. Gore*, another controversial, shall we say, exercise in interpreting the Equal Protection Clause. By far the best defense of that egregious decision was offered by former Judge Richard Posner, who based his argument on the premise that the country was faced with a genuine political-constitutional crisis that the Court, by its *coup de main*, resolved. If one disagrees with Posner—or with Powell—is that because one disagrees with them on the empirical assertions about the situation being faced by the United States or, instead, because one believes that such considerations ought to be irrelevant to justices whose oath is to be loyal to the Constitution and not to adopt the role of basically political decisionmakers? *That* is certainly a question that law students might find worthy of debate, though not necessarily because it will make them better lawyers as such.

Quite frankly, I think the only real defense of continuing to *require* courses in constitutional law, given all of the courses and subject matters that we do *not* require, is that an exposure to the history of American constitutional development—itsself profoundly different from a focus on recent cases of the Supreme Court—helps to create better *citizens*. If it is true, as Tocqueville and others have emphasized, that American society looks to legal elites for guidance regarding fundamental social controversies, then it is certainly important that these elites have at least some of the relevant knowledge required to engage in their role as what some have called "republican schoolmasters." It is a further pathology of American legal education that it provides no serious examination of what the document might mean by requiring a "Republican Form of Government" of the various states, thanks in part to the 1849 decision in *Luther v. Borden* that, practically speaking, read the clause out of the Constitution by making it non-justiciable. Ironically, Michael McConnell and others have argued that the Reappointment Cases would make far more sense, theoretically, were they based on the Republican Form of Government Clause, but that plea has fallen on completely deaf ears.

In the "old days," whether they were necessarily good or not, law schools were far more authoritarian than they are now with regard to design of the curriculum. But we have moved, with some exceptions, far closer to the modern model of the university as cafeteria, with both the professoriate

and the students allowed to pursue their own interests quite independent of any institutional impositions. I have certainly benefitted from the freedom accorded me; I would certainly object to being “forced” to waste my and the students’ time with an extensive foray into *Marbury* or, just as importantly, most of the contemporary handiwork of the Court. But perhaps we should recognize that the freedoms we enjoy come with the price of a certain incoherence in the very idea of “legal education,” especially with regard to such a central—and often mysterious—concept as “equality.”