CONSTITUTIONAL HERESY?

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Every year, every one of us who teaches an introductory course in constitutional law is forced to make extraordinarily difficult decisions about what to include and what to leave out of the syllabus. In particular, after settling on which aspects of the subject we will teach, we confront the reality that we simply cannot ask our students to read all the cases that really matter. Borrowing

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More to the point, virtually none of our students will on graduation, or throughout their subsequent careers, "practice" constitutional law. The Constitution will structure and direct virtually every aspect of their professional lives. But actual, living breathing constitutional law clients and claims will by and large not occupy their time.[5] Moreover, few, if any, will ever participate in a case posing the issues that most people associate with the construct, constitutional law. And so, I ask myself, repeatedly, why am I wasting my time teaching *Brown v. Board of Education*?[6]

Don't get me wrong. *Brown* is a great case. The Court's opinion triggered a series of defining moments in American legal, political, and social history. Nevertheless, what exactly does it contribute in a course that supposedly prepares our students for the actual practice of law? As I will note and argue, the honest answer is practically nothing. Especially when the students learn that the "rules" ylyla91 (l3 (i)5.3 ((our)3.s3 (i).

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celebration of a land in which there is "liberty and justice for all."[9] If, as Justice Wiley Rutledge declared in the wake of World War II, the difference between the United States and the Axis powers was that we lived in a land where the Constitution establishes a regime of "[l]aw, freedom, and justice,"[10] then surely those portions of the Constitution most directly associated with those precepts matter the most. Which makes it arguably appropriate to reduce it to a document that bars "depriv[ations] of life, liberty, or property without due process of law" and forbids "den[ials of] . . . the equal protection of the laws."[11]

Law students enter their first constitutional law course with visions of affirmative action, abortion, flag burning, same-sex marriage, and the like dancing in their heads. They are then understandably shocked and appalled when they learn that the constitutional provisions that will actually matter in their future practice are far removed from these hot button issues. Standing? Yuck. The Commerce Clause? Double yuck, since it has both positive and negative dimensions.[12] Egad! Where is the Constitution we envisioned?

This due process/equal protection fixation is understandable. These are the constitutional provisions that best articulate American notions of justice and fair play. They are also constitutional provisions at issue in a minuscule portion of the cases litigated before the Supreme Court, albeit the ones that feature in a majority of those that actually command public attention. Very few people understand that the Court's docket is dominated by issues and controversies far removed from the sexy parts of the Constitution. As I write, thirty-two cases have been accepted for argument and decision in October Term, 2017.[13] Only four of them involve the sorts of issues most people think of as "constitutional."[14] The remainder are relatively obscure matters of statutory and

9. For a general discussion of the Pledge and the constitutional issues it poses, see Mark Strasser, *Establishing the Pledge: On Coercion, Endorsement, and the* Marsh *Wild Card*, 40 IND. L. REV. 529, 530 (2007).

10. WILEY RUTLEDGE, A DECLARATION OF LEGAL FAITH 10–11, 18 (1947).

11. I insert here the obligatory footnote making it clear that the quoted language may be found in U.S. CONST. amend. XIV, § 1, and add the observation that anyone who needs a proper Bluebook citation to find the source of that language probably won't understand it or much of what follows in this Article.

12. For a dose of reality in such matters, see Mark R. Killenbeck, *A Prudent Regard to Our Own Good? The Commerce Clause, in Nation and States*, 38 J.S. CT. HIST. 281 (2013) (noting the central place of the Commerce Clause in matters constitutional).

13. *October Term 2017*, SCOTUSBLOG, http://www.scotusblog.com/case-files/terms/ot2017 [https://perma.cc/6Q4D-R786]. The numbers will have changed by the time this article is in print. The pattern of high-profile core constitutional issues as the exception rather than the rule will remain.

14. Two of the four grow out of the Trump administration's executive orders on immigration. Int'l Refugee Assistance Project v. Trump, 241 F. Supp. 3d 539, 551 (D. Md. 2017), *aff'd* in part, *vacated* in part, 857 F.3d 554, 606 (4th Cir. 2017), *cert. granted*, 137 S. Ct. 2080 (2017); Hawai'i v. Trump, 245 F. Supp. 3d 1227, 1231 (D. Haw. 2017), *vacated* in part, *rDt2] Tw -2.493 0 Td [(.)- -0.01 -2.493 0 Td [(.)- -0.01 -2.493 0*

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regulatory interpretation, often mired in the constitutional equivalent of President Bill Clinton's ruminations on "what the meaning of *is* is."[15]

This does not mean that constitutional issues and concerns do not lie deep within virtually every case that comes before the Court. No actor in the federal system can undertake anything without constitutional authority. Many areas of practice invoke constitutional rules and norms, if only in passing.[16] That said, the vast majority of the cases litigated in our system are not the sort of matters that long detain those who wax eloquent abouho w9-5 (rfpc0.0)]TJ (.8 (l)5.2 (n)5.w 23 Tw 0.61

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groups of people.[32] Then there is Section 2, which some of us have worried about in the past, largely to no avail.[33] Sections 3 and 4? Well, with the possible exception of someone writing for this issue, who cares?

I now take this process one step further, concentrating my attention on the Equal Protection Clause and, more narrowly, equal protection litigation where the claim is that a given government action initiates or perpetuates discrimination in the structure and delivery of K-12 public education. And I ask, why teach *Brown*?

II. *BROWN* IN THEORY AND *BROWN* IN FACT

Very few cases decided by the Supreme Court achieve iconic status, and very few constitutional principles are regarded as central to our identity as a nation. *Brown* is an iconic case.[34] In his Childress Lecture providing the introduction to a symposium marking *Brown*'s fiftieth anniversary, William E. Nelson declared that *Brown* is "surely the most important case decided in the Twentieth Century by the Supreme Court of the United States."[35] The constitutional principles for which *Brown* stands, in turn, are viewed as indisputable and indispensable. The Court has emphasized repeatedly that "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality."[36] In particular, "racial discriminations are in most circumstances

32. *Compare* Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 66– [illegible]

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irrelevant and therefore prohibited."[37] This reflects the reality that a racial classification "demeans the dignity and worth of a person [who is] judged by ancestry instead of by his or her own merit and essential qualities."[38]

The "rules" are clear. Race is a "suspect" classification, a primary exemplar of a "discrete and insular minority" whose protection requires "more searching judicial inquiry."[39] This means "that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect" and are "subject . . . to the most rigid scrutiny."[40] In its current formulation, we describe this as "strict scrutiny," which means that "such classifications are constitutional only if they are narrowly tailored to further compelling governmental interests."[41]

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classification which a State makes in a sterilization law is essential, lest unwittingly, or otherwise, invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws."[46] This was followed quite soon by *Korematsu*'s use of what is in effect the current formulation, when the Court (mistakenly, we now know) credited the government's claims of true national security threats and accepted the contention that

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Post-*Brown* cases provide a way for individuals concerned about such matters to assert a claim that school choice programs that are not predicated on

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originalism and their application to the question the Court asked, and avoided, in 1954: "What evidence is there that" the individuals who drafted, debated, and ratified the Fourteenth Amendment "contemplated, or did not contemplate,

It remains to be seen if the individual currently occupying the office of the President will be able to nominate and secure confirmation of additional members of the Court in the originalist mode he seems to champion. Just as it remains to be seen if Justice Gorsuch's originalist creed takes him down a road that not even Robert Bork was willing to travel.[71] Be that as it may, the original understanding/intent problem provides one final note of caution regarding the place for *Brown* in the teaching canon.

III. *BROWN* IS DEAD! LONG LIVE *BROWN*!!

So why teach *Brown*? Why teach a case that doesn't provide much help in terms of the governing law? The simple answer is almost certainly the same one that impelled the Court to do what it did in *Brown*: there is law, and then there is justice. In some very key instances, they are just not the same. *Brown* may or may not be "emblematic of the Court's position as a defender of minority rights and as the avant-garde in social justice struggles generally."[72] Regardless, it is important for our students to consider *Brown* in the light cast by a fuller sense of what are, and are not, exemplars of justice in our political, legal, and social systems.

As I noted at the outset of this Essay, appeals to Thomas Jefferson as an adherent to the American ideal of liberty and justice for all are fraught with risk.[73] This is not simply a matter of did he or didn't he, Sally Hemmings division. It is, rather, a complex mix of what Jefferson actually thought about "all men" and what the Constitution actually created in 1787. Jefferson's musings on the nature of "blacks" in his *Notes of the State of Virginia* place his general views on equality in a far different light than is the norm. In a similar vein, Chief Justice Roger Brooke Taney's statements about race and slavery in *Dred Scott* bear closer examination. The received wisdom is that we must reject out of hand, with vigor, both Taney and *Dred Scott*.[74] Except, what exactly is it that Taney said in that case? The key passages, properly understood, are not simple paeans to the glories of slavery and denunciations of slaves as mere chattel. Rather, they are unfortunately accurate descriptions of the manner in which the individuals who crafted the Constitution approached the question of

with the statute authorizing the classification in question, nor the decisions heretofore made touching the point in controversy in this case." *Garnes*, 21 Ohio St. at 209.

71. *See* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 74–84 (Simon & Schuster Inc. 1991) (1990) (arguing the *Brown* Court properly articulated a "presumption .451 00.7 (i)-10t6 ( )]TJ 0 Tc 0 Tc -0.00fo-12.1 mc 0 Tw -28.155 47.R C(he)]TJ /(t)-10.7 (20)-14.1-10.7 (he)0.5 (p)-14.1

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slavery, given the need to fashion a compromise that would keep the southern states in the federal fold.

The question, Taney says, "is, whether the class of persons described in the plea . . . compose a portion of this people, and are constituent members of this sovereignty?"[75] His answer was not that slaves are inherently inferior as a matter of law and fact, although he almost certainly believed that such was the case. It was, rather, that the individuals who drafted and ratified gave us an instrument

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challenged school segregation in South Carolina,[80] Virginia,[81] and Delaware.[82] There are also the many that followed in its wake, both to enforce the *Brown* principles,[83] and extend them far beyond the limited confines of separate but equal in public education.[84] We may or may not teach these cases, or even mention them. They are nevertheless key elements in the full story of *Brown*.

There are also the practical dimensions and realities of "landmark" litigation. There is a tendency on the part of students and the body politic alike to think that a lawsuit is a quick and easy solution to pressing problems. The classic civil rights chant captures this nicely. What do we want? Justice! When do we want it? Now! That's not the real world of civil rights and civil liberties litigation. It was certainly not the world or reality that produced that decision. *Brown* was the culmination of a protracted and painstakingly crafted strategy t

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thing in one sense. More than once, the Court mentioned the fact that the statute in question "den[ied] [a white the ability] to dispose of his property" only because he wished to sell it to a "person of color."[87] The Court also rejected an attempt to question *Plessy* and separate but equal, stating that "[t]he most that was done was to require him as a member of a class to conform with reasonable rules in regard to the separation of the races."[88]

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Brown had now vanished, told one of his former clerks "[t]his is the first indication I have ever had that there is a God."[96]

Vinson's death led to a decision that would have a profound impact on *Brown* and on constitutional law and the Supreme Court in general. When the Court reconvened for the second set of arguments in *Brown* the center seat on the bench was occupied by Earl Warren, the new Chief Justice of the United States. Warren may, or may not, have owed his nomination by President Dwight Eisenhower to his decision to eschew his favorite son status and place the California delegation behind Eisenhower's candidacy at the Republican National Convention in 1952.[97] He certainly was someone whose deep involvement in the "resettlement" of California's Japanese-American citizens during the early years of World War II gave him profound insights into a principle articulated by the Court in 1943, albeit not honored in the case in which it was pronounced: "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality."[98]

Warren's leadership of the Court in the wake of the reargument proved decisive. He was able to bring the Justices together behind a single, unanimous opinion. That unanimity was critical. It did little to assuage the citizens of the South, who were appalled that they were now confronted with the prospect of sending their sons and daughters to school with children that many of them deemed inferior. It also, for that matter, was a less than thrilling result for many individuals in the North, who harbored racist sentiments no less pronounced than their southern brethren that they hid behind a veneer of tolerance.[99]

Neither Vinson's death nor Warren's nomination and confirmation were

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that typify a true graduate school, where extensive and deep reading are the norm.

We cannot accordingly make the sorts of reading assignments that are the norm in advanced courses in history or political science. Richard Kluger's *Simple Justice* is 778 pages long and everyone who purports to care about the Constitution and racial justice should read it. Which is to say, every law student. I wish I could assign it and expect each of my students to read it with care. I can't. Not, that is, if I am expected to cover in any sort of depth all of the myriad constitutional provisions and cases that are essential parts of a four-credit hour