IF IT'S TUESDAY, THIS MUST BE PROCREATION: METHODOLOGY AND SUBJECT-MATTER IN FOURTEENTH AMENDMENT PEDAGOGY

WILLIAM D. ARAIZA*

In the 1969 movie, *If It's Tuesday, This Must Be Belgium*, a busload of American tourists is whisked through Europe on a nine-country, eighteen-day tour of the continent that leaves them more confused than enlightened. The title is based on a 1957 *New Yorker* cartoon, in which two women standing next to a tour bus in the shadow of an Italian campanile consult an itinerary, one of them insisting: "But if it's Tuesday, it *has* to be Siena." The movie and the cartoon make the same joke: first-time visitors to Europe are thrown onto a bus and driven across a countryside that appears only as a blur, and they receive only the shallowest of information from their tour guide and itinerary.

Constitutional law classes in American law schools can feel the same way. The sheer number of topics to be covered (nine countries) in a relatively small number of units (eighteen days) imposes enormous pressure on the professor/tour guide to move quickly, pointing out landmarks along the way while barely slowing down. Of course, alternatives to such tours exist. Most notably, a professor can provide a curated tour, sharply limiting coverage in a way that allows students more time to focus on the topics and cases the professor chooses to retain on the itinerary. But just like curated tours of Europe, this approach to teaching constitutional law in general (and the Fourteenth Amendment in particular) deprives the first-time student/tourist of a comprehensive introduction to the subject. Such truncated coverage may impact students' future understanding, by failing to introduce them to topics and thus narrowing the foundation upon which they ultimately build that understanding.

But there is an alternative. My casebook[1] focuses on methodologies of constitutional decision-making, rather than using topics or subject-matter as its primary organizing tools. As this Essay explains, the Fourteenth Amendment is particularly well-suited for this pedagogical approach. Fourteenth Amendment

* Professor of Law, Brooklyn Law School. Professor Araiza's most recent book is ANIMUS: A SHORT INTRODUCTION TO BIAS IN THE LAW (2017). Professor Araiza wishes to thank the *Saint Louis University Law Journal* for inviting him to contribute to *Teaching the Fourteenth Amendment*.

1. WILLIAM D. ARAIZA, CONSTITUTIONAL LAW: CASES, APPROACHES, AND APPLICATIONS (2016).

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

doctrine is marked by fundamental disagreements among the Justices on how to analyze and decide cases. Organizing the material around the methodological grounds the Justices debate allows professors to provide coverage that is both comprehensive and comprehensible—akin to organizing a tour of Europe according to architectural periods rather than the happenstance of simply being in Siena on Tuesday.

I. THE BENEFITS—AND DRAWBACKS—OF A TOPICAL APPROACH

In most American law schools, Fourteenth Amendment pedagogy in an introductory constitutional law class takes a familiar path, in that any given class will focus on a topic—for example, the due process right to sexual intimacy or the equal protection right against discrimination based on alienage. This topic-by-topic approach has real benefits. It organizes the material in a way that students will intuitively grasp. It allows the professor to provide the black-letter rule governing that topic. It also provides a template for easy assessment on the final exam, as the professor can test the student on a fact pattern involving a topic, which in turn allows the student to demonstrate her mastery of both the content and the standard IRAC (Issue/Rule/Application/Conclusion) template. And, of course, the Justices' opinions themselves employ this topical focus—for example, Justices speak of the Court's "abortion jurisprudence."[2]

Nevertheless, something important is lost when instruction, and instructional materials, are organized by topic. Most importantly, this approach isolates cases, treating each topic as its own self-contained unit. (Hence, the comparison to the confused tourist who knows nothing about Siena except that she happens to be there at that moment.) It thus discourages students from seeking connections between different topics, or from contextualizing the Court's doctrine on a topic within its broader jurisprudence. As a result, it also discourages students from learning about the evolution of the Court's thinking on Fourteenth Amendment issues.

Consider substantive due process. Materials that simply walk the student through the various topics addressed by the canonical modern substantive due process cases—contraception,[3] abortion,[4] family structure,[5] sexual intimacy,[6]

2. *E.g.*, Gonzalez v. Carhart, 550 U.S. 124, 169 (2007) (Thomas, J., concurring).

3. Griswold v. Connecticut, 381 U.S. 479, 485 (1965).

4. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 844 (1992); Roe v. Wade, 410 U.S. 113, 116 (1973).

5. Michael H. v. Gerald D., 491 U.S. 110, 113 (1989); Moore v. City of East Cleveland, 431 U.S. 494, 495 (1977).

6. Lawrence v. Texas, 539 U.S. 558, 562 (2003); Bowers v. Hardwick, 478 U.S. 186, 190 (1986).

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

assisted suicide,[7] and marriage[8]—risk siloing those cases unless the instructor, essentially fighting the casebook, makes a conscious effort to encourage the student to think more broadly. Teaching materials can encourage that siloing in several ways. Most explicitly, materials that subdivide the chapter by topic encourage the idea that each topic is separate and distinct. While it may seem trivial, signaling to the student that, for example, family structure and sexual intimacy are two separate topics likely impacts how the student perceives those topics and their relationship to each other.

This signaling can have deleterious effects. Most importantly, presenting the cases in a topical, and thus possibly non-chronological order[9] sends the message that the cases do not build on each other, but rather stand independently. It thus discourages students from considering how a decision flows or deviates from precedent. More generally, it makes it impossible—or at least much harder—for students to perceive the Court's doctrinal evolution. Consider, for example, a tour through substantive due process that considers *Lawrence v. Texas*[10] before *Washington v. Glucksberg*,[11] as several leading casebooks do. A student encountering the cases in that order would find it much harder to appreciate both the current state of substantive due process law and, more particularly, how *Lawrence*'s methodology deviated so markedly from the Burger and early-mid Rehnquist Courts' insistence on precise identification of the due process interest at stake, as exemplified in cases such as *Bowers v. Hardwick*,[12] *Michael H. v. Gerald D.*,[13] and *Glucksberg*[14] itself.

To be sure, some topic-based grouping is appropriate. For example, discussing *Roe v. Wade*[15] but then waiting several classes before following up with *Planned Parenthood of Southeastern Pennsylvania v. Casey*[16] might well confuse students, who won't have the benefit of immediate recall when they analyze and evaluate *Casey*'s engagement with *Roe*. Moreover, abortion is arguably *sui generis*, given both the unique burdens pregnancy and childbirth impose on women and the uniquely compelling interests that states assert in

7. Washington v. Glucksberg, 521 U.S. 702, 705–06 (1997).

8. Obergefell v. Hodges, 135 S. Ct. 2584, 2593 (2015); Zablocki v. Redhail, 434 U.S. 374, 375 (1978).

9. Of course, a book might intentionally or simply accidentally order the topics chronologically. But this structure risks disruption by the happenstance of the Court deciding a new case on a topic that appears earlier in the book. *See infra* text accompanying note 34.

10. 539 U.S. 558.

11. 521 U.S. 702.

12. 478 U.S. 186, 191 (1986).

13. 491 U.S. 110, 120–21 (1989).

14. 521 U.S. at 720–21.

15. 410 U.S. 113 (1973).

16. 505 U.S. 833 (1992).

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

protecting potential life.[17] More generally, some topic-based categorizing is probably quite helpful for most students. Approaches that eschew such categorization—for example, those that present a purely historical, period-based approach to constitutional law—may well reveal fascinating insights to scholars and others who already understand the basic doctrine. However, for all but the most insightful neophytes, such an advanced tour will likely lack the needed intuitive, accessible, topic-grounded doctrinal context.

II. A METHODOLOGICAL APPROACH TO TEACHING THE FOURTEENTH AMENDMENT

Another approach to teaching constitutional law in general, and the Fourteenth Amendment in particular, is to focus on the methodologies the Court has employed to address these issues.[18] The Fourteenth Amendment is a particularly hospitable field for such an approach: in writing opinions in substantive due process and equal protection cases the Court has often been quite explicit about the approaches it is adopting (or rejecting), and the debates among the Justices often center on exactly those decisions.[19] Thus, focusing pedagogy on those methodologies allows students to observe the Court's decisional process, in a context in which choices about that process are central to the Court's resolution of the case. In short, method matters in Fourteenth Amendment adjudication, and the cases often allow students to experience

17. *See, e.g.*, LAURENCE H. TRIBE, ABORTION: THE CLASH OF ABSOLUTES 96–99 (1st ed. 1990); *see also Casey*, 505 U.S. at 852.

18. An important caveat that should be raised at the start of this discussion is that this Essay does not engage the merits of presenting an originalist or non-originalist approach to constitutional interpretation. To be sure, debates over such methodologies occupy a great deal of scholarly attention, attention that presumably seeps into decisions about how and what to teach. However, this Essay takes as a given the imperative to teach the Constitution largely as the Court has interpreted it. Indeed, the very idea of a "casebook" implies that the law is generally what the cases say it is. Of course, books and instructors may still wish to recognize both disputes about originalist versus non-originalist interpretive methodology as well as the components of the Constitution that, by being textually unambiguous, are unlitigated. For a brief discussion about teaching the unlitigated portions of the Constitution, see Michael Dimino, *Should Constitutional Law Teach the Constitution?*, PRAWFSBLAWG (Dec. 26, 2007, 4:55 PM), http://prawfsblawg.blogs.com/prawfsblawg/2007/12/should-constitu.html [https://perma.cc/4XUM-QZRV]. But because the vast majority of most instructional materials in constitutional law classes do focus on the cases, this Essay does so as well, as opposed to, say, historical material suggesting the original meaning of a given constitutional provision.

19. *Compare* Michael H. v. Gerald D., 491 U.S. 110, 137–41 (Brennan, J., dissenting) (criticizing Justice Scalia's reliance on history and tradition to determine due process liberty interests), *with id.* at 128 n.6 (plurality opinion) (responding to Justice Brennan's criticism). *See, e.g.*, Obergefell v. Hodges, 135 S. Ct. 2584, 2602 (2015) (explaining, in a majority opinion written by Justice Kennedy, why the Court's method of identifying the due process interest at issue in that case legitimately differed from the Court's method in *Glucksberg*, a majority opinion that Justice Kennedy joined).

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

methodological choices in action—but only if the presentation of those cases reveals those choices.

A. Defining and Defending This Approach

Simply put, a methodological approach is one that focuses on the methodologies the Court employs to decide a particular type of constitutional claim. In the context of the Fourteenth Amendment, this approach would, for example, group equal protection cases and topics by whether the Court analyzed them through the lens of *Carolene Products*[20]-style political process reasoning.[21] In turn, within such a grouping it would present those topics chronologically, to the extent possible.

This method provides several pedagogical benefits. It gives students an opportunity to examine how the same methodology—e.g., political process reasoning—guided the Court's thinking across otherwise distinct types of discrimination claims. To the extent the cases employing that methodology can be presented chronologically, they also provide students with a chance to consider how the Court used precedent from one area (e.g., sex discrimination) to analyze cases in another (e.g., legitimacy discrimination).[22] The chronological presentation of these topics (and of the cases within the topics) also allows the student to observe when an approach encountered resistance or obstacles, or otherwise started to decay.[23]

Consider these benefits. In addition to learning "the rule" about, say, legitimacy discrimination, a student learning from a methodologically-organized set of materials is exposed to the process by which the Court confronts

20. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

21. *See* ARAIZA, *supra* note 1, at 699–768. Of course, the Court has at times employed approaches other than political process reasoning. But because many types of discrimination were recognized by the Court as raising substantial equal protection questions during the 1970s, the period when this reasoning was quite influential, political process reasoning can helpfully serve as a reference point for thinking about modern equal protection law, even when the Court has not employed it, for example, in the context of race discrimination in general and affirmative action in particular. *See infra* text accompanying notes 44, 55, 56.

22. *See, e.g.*, Mathews v. Lucas, 427 U.S. 495, 506 (1976) (declining to accord explicitly heightened scrutiny to legitimacy classifications based on a comparison of "the severity or pervasiveness of the historic legal and political discrimination" faced by persons born to an unmarried couple, as compared with the discrimination historically imposed on women and African Americans (citing Frontiero v. Richardson, 411 U.S. 677, 684–86 (1973) (plurality opinion))); *see also* ARAIZA, *supra* note 1, at 741 (presenting this excerpt from *Lucas*).

23. *See, e.g.*, City of Cleburne v. Cleburne Living Ctr. Inc., 473 U.S. 432, 442–46 (1985) (expressing reluctance to grant the intellectually disabled suspect or quasi-suspect class status in part because of concerns about judicial competence to apply such scrutiny to medical and scientific issues such as intellectual disability). For an example of how a chronological approach makes these insights possible in the due process context, see *supra* text accompanying note 19 (recounting how the Court in *Obergefell* explained its decision not to employ the due process methodology employed in an earlier majority opinion which *Obergefell*'s author joined).

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

an entire area of law at a given point in time, for example, equal protection at a time when social movements were beginning seriously to press equality claims that extended beyond race. That exposure in turn allows them to witness the more granular process by which the Court applies that general approach to the particular facts of the case, or, in the equal protection context, the type of discrimination at issue.[24] In addition, it reveals that process in a way that gives students a chance to experience and critique the Court's use of precedent—a basic legal reasoning skill.[25] Finally, this type of presentation allows students to experience the Court working through the implications of a particular methodology and, if those implications prove to be problematic, to witness the Court's (or individual Justices') critiques and retreats.[26]

By contrast, a student studying equal protection through a strict topic-by-topic approach receives the message that different types of discrimination are distinct and have no relationship to each other. For example, such a casebook might lead off its equal protection materials with extended discussions of the Court's treatment of race and sex, and perhaps move from there to ancillary (though important) issues such as the intent requirement, before presenting other types of discrimination in a catch-all section that walls them off from any doctrinal connection to the Court's race and sex jurisprudence. In such a case, the student may learn "the rule" for a given type of discrimination, and they may even learn how that rule has evolved over time. But any larger learning opportunity is lost.[27]

24. *See, e.g.*, *Lucas*, 427 U.S. at 504–05, 510–11.

25. *See, e.g.*, ARAIZA, *supra* note 1, at 748–49 (prompting students to consider this question in the context of the legitimacy cases' application of *Frontiero*).

26. *See, e.g.*, United States v. Virginia, 518 U.S. 515, 574–75 (1996) (Scalia, J., dissenting) (suggesting that standard political process-based criteria would counsel downgrading judicial review of sex discrimination claims to review for mere rationality); *Cleburne*, 473 U.S. at 445 (expressing the Court's reluctance to apply political process reasoning to grant heightened scrutiny to intellectual disability discrimination); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 290 (1978) (rejecting a *Carolene Products*-based political process approach to determining whether affirmative action policies should be subjected to strict scrutiny); s*ee also* ARAIZA, *supra* note 1, at 733–34 (excerpting the portion of Justice Scalia's dissent from *Virginia* cited above); *id.* at 918 (excerpting the discussion from *Cleburne* cited above); *id.* at 810–11 (excerpting the discussion from *Bakke* cited above).

27. To be sure, the imperative to keep reading assignments (and thus casebooks) to a manageable length often prevents books from providing a detailed recounting of the evolution of a particular doctrine. For example, it is not unusual for casebooks to limit their presentation of alienage or legitimacy classifications to one excerpted case, supplemented by a note. A methodological approach allows the student to witness that evolution in the broader context of the Court's thinking about political process reasoning. For example, a student could encounter an early, enthusiastic example of such reasoning in *Frontiero*, 411 U.S. at 690–91 (plurality opinion), and then be able to compare it with the Court's reluctance to embrace such reasoning a dozen years later in *Cleburne*, 473 U.S. at 432, 445–46 ("[I]f the large and amorphous class of the mentally retarded were deemed quasi-suspect for the reasons given by the Court of Appeals, it would be

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

Due process is another doctrinal area where this approach could be useful. It is commonplace for constitutional law casebooks to organize the canonical due process cases by the right at issue: for example, procreation, abortion, family structure, sexual intimacy, assisted suicide, and marriage. As innocuous as it may sound, that categorization sends an unhelpful message to students—a message, in effect, that "if this is Tuesday, we must be studying the due process law of family structure."[28] In a sense, of course, that would be an accurate statement of a class session that focused on *Moore v. City of East Cleveland*.[29] But to so describe that session is unhelpful on several levels.

First, it sends a message that, regardless of whatever else happened in due process jurisprudence since *Moore* in 1977, "the due process law of family structure" is still that stated by *Moore* (perhaps as modified by *Michael H.*). That message is simply wrong-headed. To ignore post-*Moore* and *Michael H.* cases that considered different topics—*Casey*, *Glucksberg*, *Lawrence*, and *Obergefell*—on the theory that those later cases are "not about" family structure suggests to students that those later cases add nothing to the law of family structure handed down in *Moore* and *Michael H*. That is surely incorrect. Unfortunately, this type of structure, and the resulting muddled messaging, is common.

Second, and closely related to the first point, this approach has only a random relationship to the evolution of the Court's thinking about due process rights. Unless the topics themselves are organized in a way that reflects the chronology of the Court's cases, a topic-by-topic approach gives students no sense of how the Court has thought about,[30] built on,[31] modified,[32] and even

difficult to find a principled way to distinguish a variety of other groups who have perhaps immutable disabilities setting them off from others, who cannot themselves mandate the desired legislative responses, and who can claim some degree of prejudice from at least part of the public at large. One need mention in this respect only the aging, the disabled, the mentally ill, and the infirm. We are reluctant to set out on that course, and we decline to do so."). A book that isn't aware of this comparison may not present those topics chronologically, or may do so simply by accident. By contrast, a book that is organized along methodological (and, within methodology, along chronological) lines allows the student to make this comparison. Indeed, the very organization of the book prompts the student to do exactly that.

28. Compare to *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 501 (1981), a First Amendment case that states: "We deal here with the law of billboards."

29. 431 U.S. 494, 495 (1977).

30. *See, e.g.*, Washington v. Glucksberg, 521 U.S. 702, 752, 762–63 (Souter, J., concurring) (providing a lengthy analysis of Justice Harlan's due process approach in his dissent in *Poe v. Ullman*, 367 U.S. 497, 543 (1961)).

31. *See, e.g.*, Michael H. v. Gerald D., 491 U.S. 110, 121–24 (1989) (plurality opinion) (relying on Justice Powell's opinion in *Moore* to justify its narrow definition of the due process right at issue).

32. *See, e.g.*, Obergefell v. Hodges, 135 S. Ct. 2584, 2602 (2015) (explaining why *Glucksberg*'s methodology for identifying due process rights may not always be the appropriate one).

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

repudiated[33] its prior thinking about due process. For example, it is not uncommon for casebooks to present *Glucksberg* (1997) after *Lawrence* (2003). Any student whose final encounter of the semester with substantive due process is with *Glucksberg* is not being well-positioned to think about the current status and future trajectory of substantive due process.

But even books that do manage to organize their topics in a way that reflects the chronology of their decision risk finding that structure compromised when the Court decides a new due process case. For example, books already in print when *Obergefell* was decided in 2015 face an unpleasant choice. Either they have to tack that case onto the end of the substantive due process chapter, even if the relevant topic (the right to marriage) came much earlier in the chapter, or they need to direct users to read *Obergefell* as part of the marriage rights material that came earlier in the chapter, even if that results in the Court's most recent statement on due process being presented early in the chapter, and not, as is more appropriate, as the chapter's coda.[34]

Concededly, a pure methodological/chronological approach[35] is not perfect. If the Court decides a case about a particular due process right and then returns to that exact same issue after deciding intervening due process cases on other topics, it may be appropriate to pair those two cases to allow students to compare the Court's two analyses of that identical issue. In addition to abortion, as noted earlier,[36] this issue arises when one considers *Bowers v. Hardwick*, decided in 1986, and *Lawrence v. Texas*, decided in 2003. Because *Michael H. v. Gerald D.*, decided in 1989, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, decided in 1992, and *Washington v. Glucksberg*, decided in 1997, intervene chronologically between these two cases, a strict chronological approach would direct students to read *Bowers*, then *Michael H.*, *Casey*, *Glucksberg*, and, finally, *Lawrence*.

To be sure, there is something to be said for such an uncompromisingly chronological approach. After all, Justice Scalia's plurality opinion in *Michael H.* and Chief Justice Rehnquist's majority opinion in *Glucksberg* follow *Bowers* in their narrow approach to defining the right at issue; indeed, in *Michael H.*

33. *Compare, e.g.*, Lawrence v. Texas, 539 U.S. 558, 571–72 (2003) (asserting that the laws and traditions of the past half century are most relevant in determining the constitutionally-protected status of a claimed liberty interest), *with id.* at 598 (Scalia, J., dissenting) ("[A]n 'emerging awareness' is by definition not 'deeply rooted in this Nation's history and tradition[s],' as we have said 'fundamental right' status requires.").

34. *Compare* ARAIZA, *supra* note 1, at 642–65 (presenting *Obergefell* as the last excerpted case in the chronological order of the due process cases the book presents), *with id.* at 665–66 (providing final thoughts and questions for students to consider in light of those cases, culminating in *Obergefell*).

35. In the case of unenumerated substantive due process rights, a methodological approach—here, an approach that focuses on the Court's decisional method for identifying the right and scrutinizing its infringement—melds into a chronological approach.

36. *See supra* text accompanying notes 15–17.

Justice Scalia defends that approach by expressly invoking *Bowers* (among other cases) in his famous footnote 6.[37] Similarly, the Chief Justice's opinion in *Glucksberg* attempts to explain why the lower court erred in relying on *Casey* as authority for construing the claimed "right to die" broadly rather than narrowly.[38] These examples reveal the potential utility of insisting on a strict chronological reading that allows students to follow the doctrinal progression as it occurs. Nevertheless, sometimes that approach should give way. For example, given the closely-related subjects addressed in *Bowers* and *Lawrence*—indeed, given that the latter overruled the former—it may be appropriate to relax this insistence in that case.[39] But the *Bowers*-*Lawrence* exception itself serves the purpose of the general chronological rule, as it allows students to consider how the latter case deals with, and decides to reject, the *Bowers* precedent.

In sum, a methodological approach, supplemented by subsidiary organization along chronological and/or subject-matter lines when appropriate,[40] allows students to see "the big picture" of constitutional law, while still learning how the Court decides particular cases and treats particular subject-matter.

B. The Challenge of Race

To repeat, none of this is to suggest that the methodological approach is perfect. If one compares that approach to one that focuses on subject-matter, it becomes clear that race looms as the primary challenge for the methodological approach. The topic of racial discrimination stands apart as one that, in and of itself, should matter for Fourteenth Amendment pedagogy. As a historical matter, racial equality was the primary focus of the drafters and ratifiers of the Fourteenth Amendment.[41] From a contemporary perspective, race remains the primary challenge to Americans' aspirations to "the equal protection of the

37. *See* Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989) (Scalia, J., joined by Rehnquist, C.J.).

38. *See* Washington v. Glucksberg, 521 U.S. 702, 726–28 (1997).

39. *See* ARAIZA, *supra* note 1, at 624–26 (presenting a note on *Bowers* after a sequence of due process cases ending with *Glucksberg*, and immediately before presenting an excerpt from *Lawrence*).

40. A subject-matter approach would not make sense when the Court's modern jurisprudence does not include more than one, or perhaps two, cases on that subject. In such a case, as, for example, with substantive due process, it makes more sense simply to focus on the chronological evolution of the Court's thinking about due process methodology without artificially creating subject-matter categories consisting of only one or two cases. By contrast, when the Court has decided multiple cases involving particular subject-matter, subject-matter may function as an appropriate second order categorization tool. For example, the fact that the Court has decided multiple cases on sex, alienage, and legitimacy discrimination justifies use of those categories as second order categorizations.

41. *See* Paul Finkelman, *Original Intent and the Fourteenth Amendment: Into the Blackhole of Constitutional Law*, 89 CHI.-KENT L. REV. 1019, 1029, 1037, 1040 (2014).

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

laws." If any "mere" subject-matter merits pedagogical treatment as its own category, surely race does.

Yes—but with a caveat. For all the reasons just stated, race does merit standalone treatment as a subject-matter category. But at the same time, it disserves students to divorce that topic entirely from the methodological approach. After all, during the police power era of Fourteenth Amendment jurisprudence, the Court considered race issues through the lens of the legitimate police power of the state.[42] It's also been established that Justice Stone had race—and, in particular, the status of African Americans—in mind when he drafted Footnote 4 of *Carolene Products*.[43] The key affirmative action cases of the 1970s and 1980s engaged, at least in passing, John Hart Ely's argument that *Carolene Products*-style political process reasoning favored more deferential judicial review of this type of race consciousness.[44] These examples suggest that even a question as important as racial equality *cannot* be examined in isolation from the underlying methodological currents that influenced Supreme Court doctrine at any given point in the Court's history.

This is not common pedagogical wisdom. Casebooks often lump together the Court's canonical race cases—among them the *Civil Rights Cases*,[45] *Plessy*,[46] *Brown v. Board of Education*,[47] *Loving v. Virginia*,[48] *Bakke*,[49] *J.A. Croson Co.*,[50] and *Grutter v. Bollinger*[51]—without so much as a nod toward the vastly different methodological contexts from which they arose. While unfortunate, this phenomenon is understandable. Because race is the central concern of the Fourteenth Amendment (or at least of the Equal Protection Clause), it's not surprising that the race cases are presented together. But students presented with these vastly different opinions without also being provided with any sense of those underlying contexts will likely find themselves lost. At the least, the lack of methodological context may lead them to apply

42. *See* Plessy v. Ferguson, 163 U.S. 537, 544 (1896); *see also* Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 229–30 (1991). For an example of how a contemporary of the *Plessy* Court used police power reasoning to explain a state court decision upholding an ordinance requiring residential segregation, see Recent Case, Harris v. City of Louisville, 177 S.W. (Ky.) 142, 25 YALE L.J. 81, 81–82 (1915).

43. *See, e.g.*, Klarman, *supra* note 42, at 226–27.

44. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493–97 (1989); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 290 (1978); *see also* John Hart Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723, 726–27 (1974) (offering a political process-grounded justification for race-based affirmative action).

45. 109 U.S. 3 (1883).

46. 163 U.S. 537.

47. 347 U.S. 483 (1954).

48. 388 U.S. 1 (1967).

49. 438 U.S. 265.

50. 488 U.S. 469.

51. 539 U.S. 306 (2003).

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

their presentist doctrinal preconceptions to what must be partly understood as historical documents reflecting those Justices' methodological and jurisprudential commitments. For example, the lack of such context may prompt students to ask why the Court failed to apply strict scrutiny to the Louisiana segregation ordinance in *Plessy*, ignoring the fact that that concept—and indeed the entire enterprise of tiered scrutiny—lay decades in the future.[52] This is not to suggest that students should be dissuaded from passing moral judgment on earlier cases. *Plessy* can (and should) be understood as being "wrong the day it was decided."[53] But as part of that act of moral judgment, students should be made to understand and appreciate the jurisprudential world of the *Plessy* Court, just as students reading *Bakke* should understand why the Court in that case declined to embrace the political process reasoning that was then at its zenith.

How can a book (and an instructor) do this, consistent with the imperative to treat race as distinct topic? The solution requires a compromise. The Court's race jurisprudence *should* permeate a book's presentation of the Court's Fourteenth Amendment doctrine—in particular, its equal protection doctrine. But that jurisprudence should be understood as a reflection of the Court's larger worldview at that time. Thus, students exposed to *Plessy* should have a sense of the Court's more general police power-based jurisprudence as it then existed.[54] Similarly, students reading *Brown* should have already been exposed to Footnote 4, so they can consider why the Court did not use political process reasoning to conclude that the political exclusion and social oppression of African Americans in 1954 justified the strictest review of separate-but-equal.[55] Conversely, students studying affirmative action should also have been exposed to Footnote 4, so they can ask the reverse question: why that same political process tool did not justify more lenient review of the University of California's or the City of Richmond's race-based set-asides in *Bakke* or *Croson*, respectively.[56] In other words, a presentation of methodology should accompany the race cases, in order to allow students to both understand and critique them.

52. *See* William D. Araiza, *The Section 5 Power and the Rational Basis Standard of Equal Protection*, 79 TUL. L. REV. 519, 531, 583–84 (2005).

53. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 863 (1992).

54. *See, e.g.*, ARAIZA, *supra* note 1, at 671–81 (presenting the Court's police power jurisprudence before the race cases); *id.* at 681–82 (discussing the Court's use of police power reasoning in *Plessy* before presenting *Plessy* in detail).

55. *See, e.g.*, ARAIZA, *supra* note 1, at 699–701 (presenting Footnote 4 before the race cases); *id.* at 701–04 (discussing the Court's failure to employ Footnote 4-type reasoning to the race cases it decided up to and including *Brown*, before presenting *Brown* in detail); Klarman, *supra* note 42, at 226–40 (discussing the Court's failure to use political process reasoning to decide *Brown* and other race cases during the 1940s and 1950s).

56. *See, e.g.*, ARAIZA, *supra* note 1, at 699–701 (presenting Footnote 4 before the race cases); *id.* at 701–04 (noting the failure of the majority coalitions in the foundational affirmative action cases to do serious Footnote 4 analyses when evaluating affirmative action plans, before presenting those cases in detail).

This solution thus weaves the Court's discussion of race into that methodological approach. For example, its presentation of the police power approach to the Fourteenth Amendment should explain how the *Plessy* Court decided that streetcar segregation was a legitimate police power regulation.[57] Similarly, its explanation of political process theory should note the Court's failure to use such reasoning either to strike down segregation or, conversely, to review race-conscious affirmative action more leniently.[58]

But by itself this approach is insufficient. Given the centrality of race, it behooves instructors *also* to present the race cases together. But students can appreciate the sweep of the Court's race jurisprudence only after they've come to understand the interpretive methodologies the Court has employed over the course of its history. Thus, as counter-intuitive as it sounds, this unified presentation of the race cases should occur only later in the discussion of equal protection.[59] But far from demoting race from its central position in Fourteenth Amendment jurisprudence, this move reflects its importance—in particular, the importance of appreciating how the Court understood its interpretive task at the moments it confronted what eventually became the canonical race cases.

C. Why Not Only History?

The argument thus far inevitably raises a follow-up question: If the Court's methodology is all, or almost all, that should matter, then why not go all in? In other words, why shouldn't a book—or a survey course in constitutional law—simply focus on historical periodization and the methodologies the Court employed to decide cases during particular periods? Such a purely historical approach risks confusing students—most of whom are seriously encountering the Constitution for the first time—by embedding doctrinal study within historical periods before they have learned the doctrinal basics. Just like a first-time visitor to Europe who is shown an eighteenth-century palace and then whisked to a performance of a Hadyn symphony and is expected to appreciate the parallels, so too most first-year law students encountering the Constitution for the first time can't fairly be expected to see, for example, the parallels between the *Lochner*-era Court's Commerce Clause and Fourteenth Amendment jurisprudence. Eventually, as the tourist/student gains expertise, we can expect her to develop an appreciation for the artistic or jurisprudential parallels within a period. But, for all but the most talented neophytes, it takes work before that can happen.

Moreover, and happily, grouping cases by the highest, most general, or theoretical levels of methodology is unnecessary for students to obtain the advantages of a methodological approach. This is because the Court's

57. *Id.* at 681–82.

58. *Id.* at 701–04.

59. *See, e.g.*, *id.* at 769 (first page of the chapter devoted to race).

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

methodologies for deciding different types of constitutional cases have diverged to the point that an instructor can still get the benefits of a methodological approach while respecting doctrinal boundaries. For example, while at a high level of theory one can draw parallels between the modern Court's Commerce Clause and equal protection jurisprudence, those two doctrinal areas have become sufficiently methodologically distinct[60] that a student can study and learn about equal protection decisional methodologies while remaining within the boundaries of cases that will strike the student as intuitively related, because they all deal with discrimination. In short, the methodological approach provides pedagogical benefits within the parameters of subject-matter delineated (and thus intuitively-accessible) doctrines, broadly construed.

D. Looking Forward: Animus as a Methodology

A methodological approach can look forward as well as backward—it can give students an opportunity to think about doctrinal evolution as it is happening. By presenting cases according to their methodology, books and instructors can highlight the Court's evolving direction.

Consider animus.[61] The extraordinary string of victories won by gay rights plaintiffs over the course of the last two decades[62] has largely been based on the Court's conclusion that the challenged government actions were based on unconstitutional animus.[63] Presenting those cases together, and linking them to earlier cases that had reached similar conclusions in the contexts of other types of discrimination,[64] allows students to experience the trajectory of equal protection law over the last three decades.[65] It also encourages them to speculate about its future, in a way that would be far more difficult if, for example, *Romer*

60. Aziz Z. Huq, *Tiers of Scrutiny in Enumerated Powers Jurisprudence*, 80 U. CHI. L. REV. 575, 576–77 (2013).

61. *See, e.g.*, WILLIAM D. ARAIZA, ANIMUS: A SHORT INTRODUCTION TO BIAS IN THE LAW 3 (2017). For a more skeptical view of the usefulness of that concept, see Stephen D. Smith, *The Jurisprudence of Denigration*, 48 U.C. DAVIS L. REV. 675, 698–99 (2014).

62. United States v. Windsor, 133 S. Ct. 2675, 2682 (2013); Lawrence v. Texas, 539 U.S. 558, 579 (2003) (O'Connor, J., concurring); Romer v. Evans, 517 U.S. 620, 635–36 (1996); *see also also* Obergefell v. Hodges, 135 S. Ct. 2584, 2608 (2015).

63. *See Windsor*, 133 S. Ct. at 2693–95; *Lawrence*, 539 U.S. at 583–84 (O'Connor, J., concurring); *Romer*, 517 U.S. at 632. Even *Obergefell*, in some ways, can be understood as an animus case. *See* ARAIZA, *supra* note 61, at 163–72.

64. *See, e.g.*, ARAIZA, *supra* note 1, at 911–51 (presenting the animus cases in a separate chapter).

65. *See* City of Cleburne v. Cleburne Living Ctr. Inc., 473 U.S. 432, 450 (1985) ("The short of it is that requiring the permit in this case appears to us to rest on an irrational prejudice against the mentally retarded . . . ."); U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973) ("[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.").

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

v. Evans[66] and *City of Cleburne v. Cleburne Living Center*[67] were siloed in separate sub-chapters entitled, respectively, "sexual orientation discrimination" and "intellectual disability discrimination."

Indeed, the rise of animus can be seen as a response to the decline of suspect class analysis (at least at the Supreme Court).[68] Presenting the animus cases after the cases in which the Court employed suspect class/tiered scrutiny analysis, and in some ways as a response to the decline of suspect class analysis at the Court, allows students to witness the ongoing evolution of Supreme Court doctrine.[69] By contrast, the type of siloing critiqued here has the effect of discouraging students from discovering both the commonalities and the evolving doctrinal pathways that actually do much of the Court's real work, both historically and today.

III. BACK TO SIENA

Return to the tourism analogy that opened this Essay and inspired its title. What would be the shape of a European tour that followed the methodological approach this Essay has sketched out? Just as with a survey course in constitutional law, the challenge of a whirlwind tour of Europe includes not just deciding what material to omit from the itinerary, but also organizing the remainder for maximum appreciation and comprehension. This Essay has argued for organizational principles that go beyond mere locations or subject-matter.

At this point, the analogy between touring and studying becomes less precise. Touring requires a physical presence at the sight. This reality necessarily limits the thematic quality of a given itinerary, at least if the tour guide aspires to provide a reasonably comprehensive overview of the continent. Thus, while the closest tourism analogy to the methodological approach might be a tour that, for example, spent one week focusing on Baroque architecture across the continent, subdivided into days that focused on religious, civic, and royal

66. 517 U.S. 620.

67. 473 U.S. 432.

68. *See generally* ARAIZA, *supra* note 61. To be sure, lower federal courts and state courts have continued to consider if particular groups should be considered suspect classes. *See, e.g.*, SmithKline Beecham v. Abbott Labs., 740 F.3d 471, 474 (9th Cir. 2014); Varnum v. Brien, 763 N.W.2d 862, 880 (Iowa 2009).

69. *See* ARAIZA, *supra* note 1, at 911–51. *Cleburne* in particular presents a wonderful opportunity to present this transition, given its tentative, skeptical application of suspect class analysis followed by its application of rationality review which culminated in its conclusion that animus infected the government's decision. This is not, however, to suggest that the Justices intended to create a logical connection between these two parts of the opinion. *See* William D. Araiza, *Was* Cleburne *an Accident?*, 19 U. PA. J. CON. L. 621, 668–69 (2017) (tracing the history of the Justices' deliberations in *Cleburne* and concluding that they did not intend the Court's rejection of heightened scrutiny for the intellectually disabled to logically segue into its heightened rationality review of the challenged discrimination).

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

structures, the travel required to sort tour stops along those lines makes such an itinerary impracticable. Legal study does not suffer from such constraints. Thus, for example, grouping equal protection law according to decisional methodology, and within each methodology sub-grouping by topic area, is feasible in a way that organizing tour days by architectural period is not.

Nevertheless, a survey course in constitutional law confronts a somewhat analogous practicability challenge. Both first-time European tourists and first-time students of the Fourteenth Amendment operate under severe knowledge constraints. For that reason, methodological approaches—whether to architecture or legal doctrine—must be combined with approaches that provide information in a more intuitive, accessible way. For a first-time European tourist, this might require opening the bus doors at the main piazza in Siena, and pointing out different architectural styles within the context of categories the tourist might find more intuitive—first, the city hall and the monastery down the street, both Romanesque, then the cathedral, constructed in High Gothic, and finally the market building and later additions to the cathedral, both done in the Renaissance style.

Similarly, for first-time students of the Fourteenth Amendment, the bus doors might open onto the Equal Protection Clause, and the tour guide/professor might wish to point out the Court's police power analysis in *Plessy*, its political process reasoning in cases from the 1970s and rejection of such reasoning in *Bakke* and *Croson*, and, finally, its animus reasoning in *Cleburne* and the gay rights cases. In such tours, the tourist/student is told more than "Here we are in Siena" or "Here we are in sex discrimination." Instead, she is given a deeper context beyond that mere place-name or subject-matter. With luck, that methodological context will allow her to remember more than the day of the week she visited Siena or read *Frontiero*.