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

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

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 s (m)16.cn

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 *Michael1.6 (io7d( )Tj -0bw 0.4310 1)Tj -6 (e [((*

Justice Scalia defends that approach by expressly invoking *Bowers* (among other

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]

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* smitme bee mTJ 0 Tw (unde)0essy

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 exer:

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