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Reflections on Teaching Constitutional Law in the Midst of Constitutional Crisis

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REFLECTIONS ON TEACHING CONSTITUTIONAL LAW IN THE MIDST OF CONSTITUTIONAL CRISIS

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The events of January 6, 2021, at the Capitol Building in Washington, D.C., brought the U.S. Constitution to the forefront of the minds of citizens across the nation. For law students beginning a Spring 2021 Constitutional Law course on this very day, the typical "first day" abstract hypothetical was supplanted by the very real and imminent crisis, and the term was sent on an unforeseen trajectory. This essay reflects upon the experience of teaching Constitutional Law in an era of compelling challenges to the American legal order. The teaching of Constitutional Law in today's climate, the author concludes, must foster a discussion beyond the text of the Constitution and letter of the case law, including frank conversations about the government branches' and individual actors' roles in enforcing constitutional principles and ideals, as well as an understanding of the social context and political landscape in which what we refer to as "Constitutional Law" lives and breathes.

Early in the morning of January 6, 2021, I sat at my computer, cup of coffee in hand, to make final preparations to teach my first constitutional class later that morning. I had been selected to teach the course weeks earlier after the unexpected retirement of one of my esteemed colleagues. I felt a mix of fear and excitement—mostly fear. At the time, like many, I was also keeping an eye on developments in the national capital. As I reviewed my notes for the last time, I saw that President Donald J. Trump used his Twitter account to publicly encourage Vice President Michael R. Pence to show "extreme courage" and to send peoples' votes "back to the States" so that "WE WIN."[1] I also knew that some of Trump's most avid supporters were already crowding into an area near the White House for a midday speech and rally. This is what I knew as class began.

Beyond introducing students to the basic structure of the course and my general expectations, my goal for the first class was to get students thinking about what power the Constitution possesses. We began our discussion by using the text of the Constitution to explore how it might be applied to resolve a question I thought highly relevant to the day's proceedings in the national capital. That question was the extent of Congress's powers to scrutinize the legitimacy of

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1. Shelly Tan, Youjin Shin & Danielle Rindler, *How One of America's Ugliest Days Unraveled Inside and Outside the Capitol*, WASH. POST (Jan. 9, 2021), https://www.washingtonpost.com/nation/interactive/2021/capitol-insurrection-visual-timeline/ (quoting @realDonaldTrump, TWITTER (Jan. 6, 2021, 8:17 AM), https://twitter.com/realDonaldTrump (account suspended)).

certified votes it receives and ultimately not to count them if it determines the votes (or their certification) are in some way flawed. To answer that question required us to consider an additional question of what it means for votes to "be counted," as the Twelfth Amendment provides.[2] Students rightfully surmised that this seemingly simple question was a trap.

Using apples as an analogy, I then asked the class what it would mean if they worked for an orchard and were asked to count the number of apples they had placed in a basket so that they may be paid on a per-apple basis. Silence. I followed up with a more specific question of whether the act of counting apples required them, as either employees or independent contractors, to determine whether each thing in the basket was, in fact, an "apple." They seemingly agreed that it did. I then asked whether they should properly exclude from their count things that were admittedly "apples" but were also, in their judgment, rotten or otherwise inedible. In other words, is it presumed in the directive to count "apples" that said "apples" be edible? As students pondered this question, I made the link to the Twelfth Amendment and the counting of electoral votes more explicit by asking a related question: inasmuch as Congress has the power to reject certified votes from their "count," must Congress have to make at least some evidentiary showing regarding the "rottenness" of the certified votes it chooses to reject? We pondered that question for a bit before I closed with one more question. Beyond the substantive question of what it means to "count" votes, there lingers the perhaps more important question of who gets to decide what it means for votes to "be counted." Is that question to be answered by each individual legislator? By the courts? By each of us individually?

As might be obvious by now, the point of the above class discussion was not to come to any definitive answers but rather to introduce students to the idea of uncertainty and contingency in constitutional law. It was to introduce them to the reality of how little the text of the Constitution itself answers. It was to have a conversation with them that in some admittedly imperfect way reflected the recursive process that ultimately constructs—and continually reconstructs—the body of rhetoric we call "constitutional law." This body of law, after all, is primarily various opinions and arguments—by judges, attorneys, scholars, politicians, and laypeople—about what the Constitution means. It is a recursive process in that our very talking about what the Constitution means comes to determine what it means, and the process repeats ad infinitum. It is ongoing. The students were already creators of the very thing they were here to study.[3] How fun!

For most everyone, January 6, 2021, will long be remembered for reasons other than it being this professor's first time teaching Constitutional Law. It will be remembered as a day the process envisioned by the Twelfth Amendment—and

2. U.S. CONST. amend. XII.

3. Now, of course, I also cautioned students that not all arguments are equal in terms of their influence on the fabric of constitutional law. For example, the arguments (or "opinions") of members of the Supreme Court are highly influential and indeed form the bulk of what we will be studying as "constitutional law."

indeed the peaceful transfer of power so essential to republican self-government—was put to the test. Shortly after we ended class, Trump began his speech to as many as 30,000 eager supporters, most maskless, who had gathered on the Ellipse outside the White House to help him "stop the steal" and "save America."[4] In his speech, Trump repeated his debunked claims that the election had been "rigged" and stolen from him by an assortment of actors, including "big tech," "fake news," and "emboldened radical-left Democrats."[5] He insisted that Pence, if he were to refuse Trump's demands for him to send the certified votes back to the states, would be failing in his duty to "protect our country, support our country, support our Constitution, and protect our Constitution."[6] He implored the audience that "if you don't fight like hell, you're not going to have a country anymore," and encouraged them to march to the Capitol so that they might give Republicans "the kind of pride and boldness that they need to take back our country."[7]

Fight like hell, they did. Shortly before Trump finished his speech, just after 1:00 p.m. Eastern Standard Time, Congress convened to count the electoral votes and presumably to confirm former Vice President Joseph R. Biden Jr.'s victory. At that time, Acting Secretary of Defense Christopher C. Miller received reports of demonstrators moving on the Capitol. Within a half-hour, the Capitol Police had ordered the evacuation of two Capitol buildings, and officers outside the Capitol had been forced to retreat up the Capitol's steps. Shortly after 2:00 p.m., insurrectionists broke a window on the exterior of the Capitol and began entering through the broken window, some chanting to hang the vice president, causing the Senate to recess and Senators to evacuate. Not long after, the House of Representatives followed suit. As this was happening, Trump supporters continued their assault on law enforcement outside the Capitol. One insurrectionist sprayed Officer Brian Sicknick with a chemical substance. He died the following day from a stroke. Another officer, D.C. Police Officer Michael Fanone later recalled being "grabbed, beaten, Tased, all while being called a traitor . . . ."[8] Fanone felt "at risk of being stripped of and killed with [his] own

4. Trump claimed "hundreds of thousands" of people were in attendance. While estimates are difficult, it is notable that the permit for the "Save America Rally" was for 30,000 people, having been amended from an original projected crowd size of 10,000. Rebecca Shabad & Monica Alba, *Trump to Address D.C. Rally Where as Many as 30,000 People are Expected*, NBC NEWS (Jan. 6, 2021, 6:02 AM), https://www.nbcnews.com/politics/congress/blog/electoral-college-certification-updates-n1252864/ncrd1252964#blogHeader.

5. Bryan Naylor, *Read Trump's Jan. 6 Speech, A Key Part Of Impeachment Trial*, NPR (Feb. 10, 2021, 2:54 PM), https://www.npr.org/2021/02/10/966396848/read-trumps-jan-6-speech-a-key-part-of-impeachment-trial.

6. *Id.*

7. *Id.* Previously, Rudolph "Rudy" W.L. Giuliani called for "trial by combat." Aaron Blake, *'Let's Have Trial by Combat': How Trump and Allies Egged on the Violent Scenes Wednesday*, WASH. POST (Jan. 6, 2021, 8:09 PM), https://www.washingtonpost.com/politics/2021/01/06/lets-have-trial-by-combat-how-trump-allies-egged-violent-scenes-wednesday/.

8. Kevin Breuninger, *'I Was Just Trying to Survive That Day': Cops in Jan. 6 Hearing Describe Beatings, Slurs from Pro-Trump Mob*, CNBC (Jul. 27, 2021, 9:53 AM), https://www.cnbc.com/2021/07/27/capitol-riot-probe-must-uncover-everything-that-happened-at-white-house-cheney-says.html.

firearm . . . " as the crowd chanted "'[k]ill him with his own gun.'"[9] Capitol Police Private First Class Harry Dunn reported that the crowd chanted racial slurs at him.[10] Capitol Police Sergeant Aquilino Gonell described being crushed by a stampede of rioters: "I could feel myself losing oxygen and recall thinking to myself, 'This is how I'm going to die, defending this entrance . . . .'"[11] Hours passed before order was restored, and the insurrectionists were removed from the Capitol and its surroundings.

For whatever else these events accomplished, revealed, caused, or meant, they also exemplified some key themes I hoped to develop throughout the semester. To start, they exemplified the degree to which the meanings of even the seemingly straightforward constitutional provisions (such as the counting of votes) can still be contested. As a class, we read Professor Mark V. Tushnet's *The U.S. Constitution and the Intent of the Framers* to help with our first week's discussions.[12] While this piece is ostensibly a critique of 'originalism' as an interpretive philosophy, my goal in assigning it had nothing to do with originalism.[13] It was rather to get students to think critically (at the meta-interpretive level) about all fundamentalist approaches to the Constitution.[14]

With the events of January 6th as a backdrop, we had the opportunity as a class to consider one of the fundamental problems with originalism, according to Tushnet, namely the impossibility of finding a single operative original understanding or intent that can determine the answer to questions raised today. First, people of the founding generation likely had divergent understandings of the constitutional text, if they were even asked. That people in the United States can hold such divergent views of what the Constitution means was indeed on full display on January 6th. Why would we presume the past was so radically different from the present? As it came to the founding generation, there were substantial divisions and disagreements among "the people" as a whole, as well as among those whose views were most influential. This requires an originalist to decide whose views count. Additionally, we face issues today that those who ratified the Constitution never even contemplated, much less expressed any clear intent or understanding as to their proper resolution. They thought about particular issues that were relevant to them. Thus, to determine what those people thought (or would have thought) regarding different issues requires inferences to be drawn, and any inference is inherently tentative and debatable. For this last point, Tushnet showed two radically different interpretations of the same evidence regarding an

9. *Id.*

10. *Id.*

11. *Id.*

12. Mark Tushnet, *The U.S. Constitution and the Intent of the Framers*, 36 BUFF. L. REV. 217 (1987).

13. *Id.*

14. By "fundamentalist," I mean any methodology that claims to remove the necessity of choice in constitutional interpretation—that claims to dictate results in most if not all cases, such that judges need merely to be astute observers (or "umpires," to use Chief Justice Roberts' metaphor from his nomination proceedings) and to call the correct result, importantly without inserting their own subjectivities.

"original" intent or understanding regarding the Fourteenth Amendment's application to public education, both entirely plausible and defensible.[15]

Again, the purpose here was not to criticize originalism as a judicial methodology but rather to think critically about all fundamentalist claims regarding constitutional interpretation.[16] In his piece, Tushnet also, for example, criticized Justice William J. Brennan Jr.'s "living Constitution" judicial philosophy for failing to constrain judges in any meaningful way, just as originalism also fails.[17] The task before us then is to understand why we are attracted to such fundamentalist claims. Tushnet, for his part, posited that it is rooted in a fundamental and unresolvable dilemma, namely that we want a government strong enough to help but not powerful enough to hurt. We want a judiciary to be a check on government, but that only works if one ignores the fact that judges too are part of government and that they too can (or must) impose their will in carrying out their duties.

As much as it might be a comforting thought, judges are not fully constrained by originalism or any other interpretive model. As much as they might try (or perhaps pretend) to be bound, there is, in fact, no way for judges to escape having to make choices as to how to exercise their power, perhaps especially as it comes to constitutional questions that are, to some degree, novel. Indeed, no method can reconcile grants of power and limitations on the exercise of power, as any limitation on one's power is an allocation of power to another. The Constitution entrusts certain officials to make certain decisions and to take certain actions. In fact, there can be no other way.[18]

That brings us to another theme January 6th came to exemplify for me as I pondered the meaning of constitutional law. That is the fact that the Constitution depends upon the actions of officials (legal and non-legal) for its force.[19] The Constitution itself does not *do* anything. It neither liberates us nor imprisons us. It neither protects us nor endangers us. It neither promotes our activities nor

15. *Id.* at 223. Of course, not all scholars agree with Tushnet's emphasis on indeterminacy. However, even Ronald Dworkin, whose "right answer" thesis is seen as a primary competitor to the indeterminacy thesis, acknowledged that there would be the rare case for which the law failed to provide a correct answer. Even more importantly, he acknowledged it would not be rare for lawyers to disagree as to what that correct answer is. Ronald Dworkin, *No Right Answer?*, 53 N.Y.U. L. REV. 1, 30 (1978). Thus, even under Dworkin's view, the actual evolution of legal doctrines depends in part upon *who* is entrusted with interpreting and applying the law. *See also* Ken Kress, *Legal Indeterminacy*, 77 CAL. L. REV. 283, 283 (1989) (arguing that indeterminacy is "no more than moderate" and "does not undermine law's legitimacy").

16. On this point, originalism was appealing to me as an introductory piece because it is one with which students are most likely to be familiar and to which, perhaps, they are likely to be intuitively attracted.

17. Tushnet, *supra* note 12, at 225-26.

18. In this, I may have been influenced by legal scholar Professor Scott J. Shapiro's notion of trust as being central to interpreting the Constitution at the meta-level. According to his Planning Theory of law, "the more trustworthy a person is judged to be, the more interpretive discretion he or she is accorded; conversely, the less trusted one is in other parts of legal life, the less discretion one is allowed." SCOTT J. SHAPIRO, LEGALITY 331 (2011).

19. This claim does not depend upon one endorsing Professor H.L.A. Hart's acceptance theory of law, though his theory likely informed my thinking here. H.L.A. HART, THE CONCEPT OF LAW 116 (2d ed. 1994).

impedes them. The Constitution lacks any will or agency. It is a passive object—a tool—to be used by persons to achieve certain purposes.[20] Like any tool, it can be used for good or ill. It can be applied consistently or inconsistently, in good faith or in bad. In any event, its implementation—its use—requires persons to act. Thus, the operative question is never really "does the Constitution prohibit A," but rather, "will persons whom the community (including, but not limited to, legal officials) generally entrusts to resolve constitutional issues raised by A prevent A or otherwise provide remedies to those harmed by A." With such a formulation, what we lose in concision we gain in accuracy.

Importantly, those persons with the authority to interpret and enforce the Constitution do not all wear black robes. In the case of January 6th, we saw many people act in defense of the Constitution. These included the ten living former secretaries of the Defense Department, who penned a letter in the Washington Post days before the insurrection renewing their "oath to support and defend the Constitution against all enemies, foreign and domestic" and proclaiming their oath was neither to any individual nor political party.[21] In the letter, they warned "civilian and military officials" who "involve the U.S. armed forces in resolving election disputes would take us into dangerous, unlawful and unconstitutional territory" and "would be accountable, including potentially facing criminal penalties, for the grave consequences of their actions on our republic."[22] The letter was apparently motivated by at least some concern that Trump had been replacing civilian and military leaders with loyalists who may have been willing to involve the military in backing Trump's claims regarding the illegitimacy of Biden's electoral victory. Behind the scenes, active members also sounded alarm bells. For example, Chairman of the Joint Chiefs of Staff General Mark A. Milley reportedly made informal plans with other top military leaders in the event of an attempted coup.[23] In one instance, Milley reportedly told his officers, "[t]hey may

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20. As Shapiro has argued, "[t]he purpose of constitutional law is to guide the behavior of legislators, judges, ministers, and police officers so that they may know how to create, apply, and enforce legal rules." SHAPIRO, *supra* note 18, at 68. It is they who make the rules, they who apply them, and they who enforce them.

21. Ashton Carter et al., *Opinion: All 10 Living Former Defense Secretaries: Involving the Military in Election Disputes Would Cross into Dangerous Territory*, WASH. POST (Jan. 3, 2021, 5:00 PM), https://www.washingtonpost.com/opinions/10-former-defense-secretaries-military-peaceful-transfer-of-power/2021/01/03/2a23d52e-4c4d-11eb-a9f4-0e668b9772ba_story.html. As just one example of the reaction to the letter, see Bryan Bender & David Cohen, *Ex-Defense Secretaries Say Military Must Stay Out of Election Battles*, POLITICO (Jan. 3, 2021, 6:13 PM), https://www.politico.com/news/2021/01/03/defense-secretaries-military-trump-election-454334, which quotes Mick Mulroy as stating:

> The op-ed today by all living former secretaries of Defense is exceptional in its scope and directness. It needed to be. I volunteered to assist with the transition as soon as I was asked. I am not a partisan person, but this is beyond partisanship. It is the duty of any American, especially those that gave an oath to serve the Constitution, to ensure the peaceful transfer of power to the duly elected President. There should be no further delay in that process, especially from the Department of Defense.

Id.

22. Carter et al., *supra* note 21.

23. CAROL LEONNIG & PHILIP RUCKER, I ALONE CAN FIX IT: DONALD J. TRUMP'S CATASTROPHIC FINAL YEAR 366 (2021).

try, but they're not going to f[***]ing succeed . . . You can't do this without the military. You can't do this without the CIA and the FBI. We're the guys with the guns."[24]

Even some politicians showed courage in defending the Constitution on January 6th. Pence, for one, refused to comply with Trump's edict to act unilaterally in rejecting the certified election results from the states, even as his own life was threatened.[25] According to one report, Pence refused to evacuate the Capitol despite his security detail's urging, at one point telling them, "[w]e can't let the world see that our process of confirming the next president can be delayed."[26] Once Congress returned to session, many members of Congress, including some who had previously flirted with, if not outright embraced, Trump's conspiratorial rhetoric regarding the election having been stolen, embraced their constitutional role. Perhaps most notably, Senator Addison Mitchell McConnell gave a floor speech in which he condemned the insurrectionists—and the lies that inspired their actions[27]—and vowed to fulfill what he saw as his constitutional duty:

> I believe protecting our constitutional order requires respecting the limits of our own power. It would be unfair and wrong to disenfranchise American voters and overrule the courts and the States on this extraordinarily thin basis. And I will not pretend such a vote would be a harmless protest gesture while relying on others to do the right thing. I will vote to respect the people's decision and defend our system of government as we know it.[28]

The people who chose to "stop the steal" by barging into the halls of Congress, threatening the lives of members of Congress, and stopping the counting of the votes were also defending the Constitution, at least in their view. The same is true of those members of Congress who, even after all the violence of the day, chose to reject the certified votes from some of the states that Biden won. Now, the actions of those who broke into the Capitol or committed acts of violence there were clearly unlawful.[29] But were their underlying motivations justifiable,

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24. *Id.*

25. PBS NewsHour, *WATCH: Video Shows Capitol 'Mob Calling for the Death of the Vice President,' Plaskett Says*, ASSOCIATED PRESS: POL. (Feb. 10, 2021, 6:20 PM), https://www.pbs.org/newshour/politics/watch-video-shows-capitol-mob-calling-for-the-death-of-the-vice-president-plaskett-says.

26. Oma Seddiq, *Pence Refused to Leave the Capitol During the January 6 Riot Despite Secret Service Agents Urging Him to Evacuate, Saying, 'I'm not getting in the car': Book*, BUSINESS INSIDER: POL. (July 15, 2021, 3:59 PM), https://www.businessinsider.com/mike-pence-refused-to-leave-capitol-during-riot-book-2021-7.

27. Alan Feuer, *Trump Campaign Knew Lawyers' Voting Machine Claims Were Baseless, Memo Shows*, N.Y. TIMES: POL. (Nov. 6, 2021), https://www.nytimes.com/2021/09/21/us/politics/trump-dominion-voting.html.

28. Senator Mitch McConnell, *McConnell Remarks on the Electoral College Count* (Jan. 6, 2021), https://www.republicanleader.senate.gov/newsroom/remarks/mcconnell-remarks-on-the-electoral-college-count-.

29. Clare Hymes, Cassidy McDonald & Eleanor Watson, *What We Know about the "Unprecedented" Capital Riot Arrests*, CBS NEWS (Aug. 11, 2021, 6:36 PM), https://www.cbsnews.com/news/us-capitol-riot-arrests-latest/; NPR Staff, *The Capitol Siege: The Cases*

if not in the strictly legal sense, then with reference to deeper notions of political morality that underlie the constitutional order? If not, *why* not? These are the questions I asked myself on the evening of January 6th as I contemplated how to handle the events of that day in class. Ultimately, what I really wanted to know was whether I could come into class the following morning and say, with absolute conviction, that one side was acting in defense of the Constitution while the other was acting against it.

Ultimately, I decided that I could—and indeed *should*—do precisely that. To say constitutional law is contingent rather than absolute, that it is shaped by persons making choices or judgments, or that there is no *one* objectively correct interpretation as to many issues we face is not to say that all possible constitutional analyses are equally valid. It is not to say that there are no "obligations and constraints to which good-faith participants in constitutional arguments are subject," to use the words of legal theorist Richard H. Fallon, or that there are no standards by which such arguments can be judged.[30] It is not to say that "there are no rules!" as my students frustratedly proclaimed on multiple occasions throughout the semester. The Constitution and case law provide sets of rules that serve to structure debates even if they do not resolve them. Arguments outside of that structure can therefore be said to be bad, or even invalid, constitutional arguments.

One possible ground for concluding that the efforts to get Congress to reject the certified votes or otherwise to stop the count from taking place were constitutionally invalid is the procedures they sought to invoke were not the proper constitutional procedures for contesting presidential votes. McConnell made precisely this argument on the floor of the Senate on the evening of January 6th, as he proclaimed his intention to vote to certify the election results:

> I supported the President's right to use the legal system. Dozens of lawsuits received hearings in courtrooms all across our country. But over and over the courts rejected these claims, including all star judges, whom the President himself has nominated. . . . The Constitution gives us here in Congress a limited role. We cannot simply declare ourselves a National Board of Elections on steroids. The voters, the courts, and the stage have all spoken. They've all spoken. If we overrule them, it would damage our Republic forever.[31]

This argument is indeed a persuasive one.

However, it also misses on a key point. It is not just that election officials, state legislatures, and judges had all rejected Trump's claims of systematic election fraud that made the insurrectionists' arguments, as well as the arguments of their enablers on Capitol Hill, invalid. One can envision a scenario where, in

Behind the Biggest Criminal Investigation in US History, NPR (Jan. 7, 2022), https://www.npr.org/2021/02/09/965472049/the-capitol-siege-the-arrested-and-their-stories.

30. Richard H. Fallon, *Author's Response: Further Reflections on Law and Legitimacy in the Supreme Court*, 18 GEO. J.L. & PUB. POL'Y 383, 385 (2020).

31. McConnell, *supra* note 28.

the days leading up to Congress meeting to count the votes, reliable information came to light showing a far-reaching conspiracy among state election officials, state legislators, and state and federal judges to ignore evidence of systematic voting irregularities and to certify slates of electors who had not been legally elected. In such a case, would it not then be appropriate for members of Congress to refuse to accept the electors? Perhaps. Would it not be at least arguable that those members of Congress were acting in defense of the Constitution? After all, the Constitution provides a role not just for state officials and judges in the selection of the president, but also for members of Congress. That would be a different scenario, however, from what we had on January 6th. What separates the two is that, in our real-life case, all of the election officials, legislators, and judges who rejected Trump's claims of election irregularities were *right* to do so. They were right to do so because the claims were wholly unsupported and, in many cases, demonstrably disproven.[32] Thus, the key reason that we can say the insurrectionists were threatening to undermine the constitutional order rather than saving it is that their constitutional claims were built on unsupported factual premises.

I also imagined an alternative scenario, one in which everything played out exactly as it had, except those in Congress who objected to the counting of votes of certain states that Biden won had in fact succeeded in gaining a majority in each chamber; they had succeeded in overruling the will of the people. What would happen in that case? Would the Supreme Court step in? *Should* the Supreme Court step in in such a scenario? These are important questions that go to the heart of what it means to have—and be bound by—a Constitution. They also do not have clear answers, though our readings on the "political question" doctrine in the coming weeks would provide some guidance as to how the Supreme Court has viewed this issue. These questions led me to my concluding thoughts for the first week of classes, one shaped by the events of January 6th. The important takeaway, for me, was not just that the Constitution can be interpreted in multiple ways. Rather, it is that the Constitution, if it is to work, depends upon the wisdom and self-restraint of all those who hold power in enforcing or upholding it. It requires them to see that the long-term survival of the constitutional order is more important than getting their way as to any particular issue. That, in turn, requires them to see that the constitutional order is both vulnerable and worth saving.

As we moved past the introductory portion of the course and began exploring the substance of constitutional law, students had their own questions. Namely, if there is no one objectively *right* answer to at least the most difficult constitutional questions (which they quickly gleaned occupy the bulk of what is discussed, debated, and litigated), then what separates a good answer from a bad one? What

32. This has been borne out as some of the lawyers who brought claims on behalf of Trump, including Rudy Giuliani, have faced sanctions for having lied in official court filings and proceedings. Chris Dolmetsch & Greg Farrell, *Giuliani's Law License Suspended by N.Y. Over Election Lies*, BLOOMBERG: POL. (June 24, 2021, 10:34 AM), https://www.bloomberg.com/news/articles/2021-06-24/rudy-giuliani-suspended-from-law-practice-in-new-york-state-kqb2gxd8; Katelyn Polantz, *Lawyers Sanctioned for 'Conspiracy Theory' Election Fraud Lawsuit*, CNN (Aug. 4, 2021, 2:12 PM), https://www.cnn.com/2021/08/04/politics/lawyers-colorado-2020-election/index.html.

distinguishes between the potentially many *right* answers and those that are *wrong*? Implicit in those questions, of course, was the related one of how they were going to be graded.

The events of January 6th continued to weigh on me as I struggled to articulate an answer that would satisfy students, as well as myself. It is one thing to say that constitutional arguments using unsupported or fabricated factual claims to overturn an election are bad or invalid. It is another to define, in concrete terms, what it means to be a good student of constitutional law. Using Bloom's taxonomy or hierarchy of learning, as Professor Michael Josephson interpreted and applied to legal education, I did my best.[33] First, there are bits of information that students need to know, be able to explain, and apply (the first two levels of intellectual development). These bits of information are principally the constitutional text itself as well as the tests the Supreme Court has developed—and not yet explicitly or implicitly overruled—in interpreting said text. Second, they need to be able to analyze the different cases, identify where there are issues left unresolved, and advance arguments as to how those issues should be resolved. These can be situations where the text and the case law are silent as to how they are to be resolved, they can be situations where different tests seemingly conflict, or they can involve areas of law where the Supreme Court seems to be in the midst of a paradigm shift. (This requires some understanding of deeper principles underlying the Constitution and case law and thus implicates the third and fourth levels of intellectual development.) Third, they should strive to recognize the social aspects of a legal issue and incorporate them into their constitutional analyses while also thinking critically about how those aspects have factored into the judicial decision-making process. Doing so is essential not only for understanding constitutional law as it exists now, but also for advocating how it should develop or change into the future. Finally, they should try to synthesize the material that comprises constitutional law in a way that makes sense to them. On this point, I sought to clarify that there are potentially many ways to synthesize constitutional law. The key to their syntheses is that they incorporate all relevant material (even if as an exception or something to be distinguished), that they do not misstate any of said material, and that they adequately support any controversial truth claims external to the law. I wanted them to embrace the creative—*artistic* even—aspects of this endeavor. I wanted them to recognize that their perspective as lawyers, as citizens, and as human beings mattered.[34]

Through this exercise, I realized that a thorough understanding of constitutional law thus requires students to have some literacy in disciplines outside of the law. Students must be able to engage meaningfully with historians, sociologists, political scientists, and psychiatrists, among other academics.

33. 1 MICHAEL JOSEPHSON, LEARNING AND EVALUATION IN LAW SCHOOL 53-58 (1984).

34. As an example of one attempt at a synthesis, I provided students with my outline of the interstate commerce power after we had finished that unit. I emphasized that this was just one way they might make sense of the seemingly disparate and contradictory cases we had read over the past couple of weeks. I pointed out that my synthesis differed in some respects from the synthesis included in the majority opinion in *United States v. Lopez*, which we had read. United States v. Lopez, 514 U.S. 549, 552-61 (1995).

Students must learn to do this not just as a way of understanding the impacts of various judicial decisions on society, or even as a way of identifying unspoken influences on judges and the broader legal system, but also as a necessary step in understanding the explicit legal reasoning contained in judicial decisions and in developing persuasive arguments to influence judicial decision making in the future.[35] That is because constitutional arguments themselves depend upon truth claims regarding matters entirely external to the law. The only question, therefore, is whether these claims are informed by the work of professionals whose training and expertise make them specially equipped to test the veracity of said claims. To me, a properly functioning legal system is one in which practitioners advance arguments whose premises about the world's many systems represent the best understanding of experts. Given my responsibility of training students to be leaders within the profession and their communities, it is essential to my job, therefore, to ensure students have the requisite skills to do so.

One frustration I encountered throughout the semester is that the Supreme Court too often fails to represent a role model for students. In this regard, I have written in the past how the Supreme Court misuses history, which is my discipline (in addition to law).[36] In a 2018 article titled *"Whether or Not Special Expertise is Needed": Anti-Intellectualism, The Supreme Court, and the Legitimacy of Law*,

35. Perhaps most obviously, engaging in the practice of constitutional law requires familiarity with history. As constitutional scholar Professor Akhil Reed Amar has written, the Constitution and "the history of its implementation furnish a common vocabulary for our common deliberations—a shared national narrative that can facilitate social cooperation and coordination for a diverse and highly opinionated populace." AKHIL REED AMAR, THE CONSTITUTION TODAY 405-06 (2016). Also, Amar noted that "many of the difficult issues faced by modern constitutional decision-makers are in fact surprisingly similar to those faced by their predecessors, because today's constitutional institutions lineally descend from the Founders' institutions," such that "[m]odern interpreters should . . . learn from our constitutional predecessors." *Id.* at 406. *But see* Richard A. Posner, *Law School Professors Need More Practical Experience*, SLATE (June 24, 2016, 5:49 PM), https://slate.com/news-and-politics/2016/06/law-school-professors-need-more-practical-experience.html ("I see absolutely no value to a judge of spending decades, years, months, weeks, day, hours, minutes, or seconds studying the Constitution, the history of its enactment, its amendments, and its implementation (across the centuries—well, just a little more than two centuries, and of course less for many of the amendments). Eighteenth-century guys, however smart, could not foresee the culture, technology, etc., of the 21st century. Which means that the original Constitution, the Bill of Rights, and the post–Civil War amendments (including the 14th), do not speak to today."). Others have written on the relevance of psychology and other disciplines to the practice of law. Avani Mehta Sood, *Applying Empirical Psychology to Inform Courtroom Adjudication—Potential Contributions and Challenges*, 130 HARV. L. REV. F. 301, 301 (2017) ("Empirical psychology studies can offer insights into law and legal decisionmaking, while testing legal assumptions to improve the accuracy and fairness of the legal system."); Amy Rublin, *The Role of Social Science in Judicial Decision Making: How Gay Rights Advocates Can Learn From Integration and Capital Punishment Case Law*, 19 DUKE J. GENDER L. & POL'Y 179, 180 (2011) (quoting Bryant G. Garth, *Observations on an Uncomfortable Relationship: Civil Procedure and Empirical Research*, 49 ALA. L. REV. 103, 118 (1997)) ("[J]udges do not decide a case only on the facts in front of them but instead take into account larger societal issues and 'facts' from the world outside of law. Judges 'must constantly import from disciplines around the law in order to stay up-to-date' because the social context in which the law is applied is not static and evolves over time. Because a given case can have repercussions beyond its particular facts, it is important for judges to consider how the rule they adopt may influence society."); Rachel F. Moran, *What Counts As Knowledge? A Reflection on Race, Social Science & the Law*, 44 L. & SOC'Y. REV. 515 (2010) (examining the role of social science in the jurisprudence of race).

36. Sean M. Kammer, *"Whether or Not Special Expertise is Needed": Anti-Intellectualism, The Supreme Court, and the Legitimacy of Law*, 63 S.D. L. REV. 287 (2018).

I focus on Justice Antonin G. Scalia's opinion in *District of Columbia v. Heller*[37] and how Scalia manufactured a historical account that flatly contradicts the consensus understanding of professional historians.[38] One of Scalia's colleagues on the bench, Justice Stephen G. Breyer, criticized Scalia for ignoring professional historians. "If history, and history alone, is what matters," Breyer asked rhetorically in a follow-up case to *Heller*, then "why would the Court not now reconsider *Heller* in light of these more recently published historical views?"[39] Scalia's apparent answer was to question the entire notion of one possessing a "special expertise" in history.[40]

Still, in approaching constitutional law in the wake of January 6th and the fraudulent constitutional claims used to advance Trump's claims, I was struck by how often justices have engaged in wild speculation as to physical or social reality. In one case involving abortion, for example, Justice Anthony M. Kennedy speculated that women patients would want to be shielded from certain information, that physicians would indeed shield them from said information, and that many women would later regret their decision once learning of all the details from which they were ostensibly protected.[41] In another case, this one involving sexual orientation, Scalia and Justice Clarence Thomas based their constitutional arguments in part on notions that sexual orientation is a choice, despite it already having been well settled that sexual orientation is determined by some combination of genetics, hormones, and environmental factors.[42] These opinions

37. 554 U.S. 570 (2008).

38. Kammer, *supra* note 36, at 295-304; *Heller*, 554 U.S. at 581-92.

39. McDonald v. City of Chicago, 561 U.S. 742, 916 (2010) (Breyer, J., dissenting) (internal citations omitted).

40. *Id.* at 804-05 (Scalia, J., concurring).

41. Gonzalez v. Carhart (*Carhart II*), 550 U.S. 124, 129, 159 (2007). As Justice Ginsburg argued in a scathing dissent, "the Court invokes an antiabortion shibboleth for which it concededly has no reliable evidence: Women who have abortions come to regret their choices, and consequently suffer from 'severe depression and loss of esteem.'" *Id.* at 183 (Ginsburg, J., dissenting). Ginsburg rightly pointed out how Kennedy's "way of thinking reflects ancient notions about women's place in the family and under the Constitution—ideas that have long been discredited." *Id.* at 185.

42. Lawrence v. Texas, 539 U.S. 558, 599 (2003) (Scalia, J., dissenting); *id.* at 605 (Thomas, J., dissenting). *See generally* Richard Green, *The immutability of (homo)sexual orientation: behavioral science implications for a constitutional (legal) analysis*, 16 J. PSYCHIATRY & L. 537 (1988) (describing how sexual orientation is innate); Brian S. Mustanski, Meredith L. Chivers & J. Michael Bailey, *A Critical Review of Recent Biological Research on Human Sexual Orientation*, 13 ANN. R. SEX RSCH. 89 (2002) (explaining biological influences of sexual orientation). Scalia has also repeated homophobic tropes and even explicitly defended animus towards the LGBTQIA+ community as a legitimate state interest. In a 1996 opinion, for example, he wrote, "I had thought that one could consider certain conduct reprehensible—murder, for example, or polygamy, or cruelty to animals—and could exhibit even 'animus' toward such conduct. Surely that is the only sort of 'animus' at issue here: moral disapproval of homosexual conduct . . . ." Romer v. Evans, 517 U.S. 620, 644 (1996) (Scalia, J., dissenting). Then, in his 2003 dissent in *Lawrence v. Texas*, he asserted that Texas's interest in banning homosexual conduct was the same as in banning bigamy, adultery, incest, bestiality, and obscenity. *Lawrence*, 539 U.S. at 599 (Scalia, J., dissenting) (citing Bowers v. Hardwick, 478 U.S. 186 (1986)). More recently, in a talk at Princeton University, Scalia responded to a question from a gay student with a rhetorical question: "[i]f we cannot have moral feelings against homosexuality, can we have it against murder? Can we have it against other things?" Amanda Marcotte, *Justice Scalia Compares Sodomy to Murder*, SLATE (Dec. 11, 2012, 10:49 AM), https://slate.com/human-interest/2012/12/scalia-compares-sodomy-to-murder-why-because-he-says-so.html.

presented me with yet another dilemma: if I can say the arguments of insurrectionists and those who enabled them were invalid because they lacked any factual basis, can I really say the same thing about Supreme Court opinions, including those that constitute "good law"?

I especially struggled with this question as we worked our way through the materials on race and racism. It was there I could see the Court's myopic rejection of social science most vividly. Near the beginning of our materials on racial discrimination, the authors of our casebook noted a poll showing that white Americans tended to view racism solely as a matter of ill intent or prejudice, whereas Black Americans tended to define racism in terms of the disparate effects of institutional practices, regardless of the intent or motives of individual actors.[43] Our book noted how "discussions of racial issues sometimes fail to bridge this gap."[44] It is important we attempt to bridge that gap. In doing so, however, we must not fall into the trap of treating both views as equally valid. This is not about finding a "middle ground." Rather, we must first recognize that one group's views are backed by social scientists and humanities scholars, the other's are not. Scholars understand racism to consist of more than just individual actions whose conscious purpose is the oppression or subjugation of minoritized racial groups—more than just individual beliefs in the inferiority of minoritized racial groups. They understand it to also include unconscious biases that cause individuals to act in ways that perpetuate racial discrimination. They understand it to be something that operates at the systemic level through its embeddedness in a society's culture, namely in its normalizing and valuing of features associated with the dominant racial group, while devaluing, marginalizing, or rendering invisible racially minoritized groups, as well as through the practices and policies of social institutions that create and sustain advantages for the dominant racial group at the expense of minoritized groups.[45]

To leave it at that, however, would miss a crucial point, one I had not fully realized prior to teaching this course. That is, the debate as to what social phenomena the term "racism" applies is not just a semantic one about what certain social phenomena should be called. Rather, because "racism," as a term, seemingly purports to depict all the ways in which "race" comes to influence social hierarchies, the act of asserting "racism" is solely a matter of personal animus or prejudice has the effect, if not the purpose, of *denying* the more systemic levels at which race operates.[46] Teaching this class helped me to understand this, however imperfectly still.

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43. DAVID CRUMP, DAVID S. DAY, & EUGENE GRESSMAN, CASES & MATERIALS ON CONSTITUTIONAL LAW 744 (6th ed. 2014).

44. *Id.*

45. For a recent overview of sociological definitions of racism, see generally Jiannbin Shiao & Ashley Woody, *The Meaning of 'Racism*,*'* 64 SOCIOLOGICAL PERSPS. 495 (2020).

46. As social psychologist Brian Lowery recently summarized the research into the psychology of racism denial, finding "the idea that being white has conferred unfair advantages can be incredibly uncomfortable" to white people. AM. PSYCH. ASS'N, *Speaking of Psychology: The Invisibility of White Privilege with Brian Lowery, PhD* (July 2020), https://www.apa.org/research/action/speaking-of-psychology/white-privilege. This leads to a cognitive dissonance. *Id.*

The Supreme Court has, for the most part, refused to see racism and racial inequality except in its most individualized and overt forms. In one of the first cases we read regarding racial discrimination and the Equal Protection Clause, *Korematsu v. United States*,[47] the Court explicitly linked its decision to uphold the internment of Japanese-Americans to a discomfort with recognizing the policy for what it was, namely "the imprisonment of [] loyal citizen[s] in a concentration camp because of racial prejudice."[48] Justice Hugo L. Black refused to recognize the internment centers as "concentration camps" not based on their not meeting the definition of concentration camps, but rather merely because of "the ugly connotations that term implies."[49] Racism is indeed ugly. That makes it all the more important to face it.

As a class, we observed how the Court's denial of implicit and systemic racism continued in the wake of the Court's overturning of formal racial segregation in *Brown v. Board of Education*.[50] We could see it in the Court's requirement that actions have a discriminatory *purpose*—not just a disparate impact—to run afoul of the equal protection mandate.[51] We could see it in the distinction it assumes exists between *de jure* and *de facto* segregation, even as scholars have shown the extent of the governments' extensive involvement in maintaining and even exacerbating racial segregation.[52] We could see it perhaps most clearly, however, in the context of affirmative action and other programs designed to promote racial diversity, where the Court has embraced the concept of "color blindness" as the constitutional ideal.

This notion of color blindness as being foundational to the equal protection clause dates to *Plessy v. Ferguson*,[53] in which Justice John Marshall Harlan wrote, in dissent, that "[t]here is no caste here. Our Constitution is color-blind."[54] In *Brown*, future Justice Thurgood Marshall and his team of attorneys, arguing for the litigants challenging formal segregation in public schools, declared, "[t]hat the Constitution is color blind is our dedicated belief."[55] In each of these cases, the color blindness ideal was used to counter one allowing for color-conscious

47. 323 U.S. 214 (1944).

48. *Id.* at 223.

49. *Id.*

50. 347 U.S. 483 (1954).

51. Washington v. Davis, 426 U.S. 229, 239 (1976) (quoting Akins v. Texas, 325 U.S. 398, 403-04 (1945)) (holding that "[a] purpose to discriminate must be present" to prove an equal protection violation); Vill. of Arlington Hts. v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265-66 (1977) (clarifying that the discriminatory purpose must be "a motivating factor" in the action); Batson v. Kentucky, 476 U.S. 79, 96 (1986) (defining the prima facie case for showing purposeful discrimination in the context of prosecutorial peremptory challenges); Shaw v. Hunt, 517 U.S. 899, 905 (1996) (citing Miller v. Johnson, 515 U.S. 900, 911, 915-16 (1995)) (requiring the racist purpose to be the "dominant and controlling" consideration in the context of legislative redistricting).

52. *See generally* RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA (2017) (showing how the government and its courts have maintained systems of racial segregation).

53. 163 U.S. 537 (1896).

54. *Id.* at 559 (Harlan, J., dissenting).

55. Brief for Appellants at 65, *Brown*, 347 U.S. 483 (Nos. 1, 2 and 4 and for the Respondents in No. 10 of Reargument).

policies and actions that sustained racial oppression and subjugation; it was used as a sword to attack racism. In the context of affirmative action, however, the concept of color blindness has been used as a shield to protect the less obvious—and more insidious—forms of racism from being redressed. This can be seen in *Parents Involved in Community Schools v. Seattle School District No. 1*,[56] in which Chief Justice John G. Roberts Jr., writing for the Court, argued against race-conscious policies in striking down the school district's program designed to counter racial re-segregation in public education.[57] For Roberts, "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[58]

The problem is that social scientists have found that the concept of color blindness, as it has been used in recent decades, primarily perpetuates racial inequalities. The way to stop discrimination on the basis of race is to recognize the myriad of ways in which racism operates within society. Sociologist Professor Eduardo Bonilla-Silva, among other social scientists, has written on the ways in which color blindness as an ideology operates to validate social practices that sustain racial inequalities in housing, education, voting access, criminal justice, and other areas.[59] Furthermore, sociologists have shown that race consciousness enhances support for racial equality. As sociologist Professor Adia Harvey Wingfield summarized this research, "moving away from color blindness can actually serve as a pathway toward anti-racism."[60] "In many of these studies," Wingfield noted, "as whites came to understand themselves as members of a racial group that enjoyed unearned privileges and benefits, this compelled them to forge a different sense of white identity built on anti-racism rather than simply supporting the status quo."[61] Thus, "[m]oving away from the color-blind ideology that sociologists critique—the idea that it's admirable to profess not to see color, that it's problematic to see oneself as a member of a racial group—is, according to the research in this area, actually an important step to anti-racist activism."[62]

The Court, as an institution, has largely failed to see that even as it purportedly strives to ensure *equal* protection. In *Parents Involved in Community Schools*, for example, Roberts not only ignored the consensus of social scientists regarding color blindness, but also made claims that directly contradicted it. In support of his arguments in favor of color blindness, Roberts pointed to the social costs of race-conscious policies, including that the use of racial classifications

56. 551 U.S. 701 (2007).

57. *Id.* at 718-48.

58. *Id.* at 748.

59. His most widely known and influential work is EDUARDO BONILLA-SILVA, RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN AMERICA (5th ed. 2018). Other prominent social scientists who have studied color blindness as an ideology include Professor Lawrence D. Bobo, Professor Meghan A. Burke, Dr. Tyrone A. Forman, Professor Donald R. Kinder, Professor Amanda E. Lewis, and Professor Uma M. Jayakumar.

60. Adia Harvey Wingfield, *Color Blindness is Counterproductive*, ATLANTIC: POL. (Sept. 13, 2015), https://www.theatlantic.com/politics/archive/2015/09/color-blindness-is-counterproductive/405037/.

61. *Id.*

62. *Id.*

promotes notions of racial inferiority, and leads to racial hostility, despite the available social science showing the opposite to be the case.[63] For each contention, Roberts failed to engage with the science, instead citing only to other judicial opinions, none of which themselves cited to any social scientific research either.[64] It seems the Court argued for a constitutional ideal in part based on speculations about the workings of society, then repeatedly cited to itself as proof. What the Court presented as a window onto the world is actually just a mirror.

It is important to emphasize the distinction between challenging the premises of an argument, as I have done above (and as I did in class), and rejecting the ultimate position being advanced by said argument.[65] A position, in short, can be valid even if a particular argument supporting it contains faulty premises. We must recognize that one's position on any particular issue is formulated with a mix of descriptive claims (of what *is*, of what *has been*, or of what *will or could be*

63. *Parents Involved in Cmty. Schs.*, 551 U.S. at 746.

64. First, he contended that "government action dividing us by race is inherently suspect because such classifications promote 'notions of racial inferiority and lead to a politics of racial hostility.'" *Id.* (quoting City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989)). For that contention, he cited to a passage from a prior Supreme Court plurality opinion, which itself relied upon a passage from the Court's 1978 opinion in *Regents of University of California v. Bakke*, which in turn relied on a dissenting opinion from three years earlier. *Croson*, 488 U.S. at 493; Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 298 (1978); DeFunis v. Odegaard, 416 U.S. 312, 343 (1974) (Douglas, J., dissenting). That opinion stated, without any support, that "[a] segregated admissions process creates suggestions of stigma and caste . . . " and "is a stamp of inferiority . . . ." *Odegaard*, 416 U.S. at 343. Second, Roberts asserted that these programs "reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin." *Parents Involved in Cmty. Schs.*, 551 U.S. at 746 (quoting Shaw v. Reno, 509 U.S. 630, 657 (1993)). For that, Roberts cited to another unsupported contention from a prior opinion. *Shaw*, 509 U.S. at 657 ("Racial classifications of any sort pose the risk of lasting harm to our society. They reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin."). Finally, Roberts stated these programs "'endorse race-based reasoning and the conception of a Nation divided into racial blocs, thus contributing to an escalation of racial hostility and conflict.'" *Parents Involved in Cmty. Schs.*, 551 U.S. at 746 (quoting Metro Broad., Inc. v. FCC, 497 U.S. 547, 603 (1990) (O'Connor, J., dissenting)). The Supreme Court, in *Metro Broadcasting*, also cited to Justice Murphy's dissent in *Korematsu*. *Metro Broad., Inc.*, 497 U.S. at 603 (O'Connor, J., dissenting) (citing Korematsu v. United States, 323 U.S. 214, 240 (1944) (Murphy, J., dissenting)). That citation stretches the meaning of the passage in *Korematsu*, which again dealt with not just any racial classification, and certainly not a "benign" one, but rather one characterizing a minoritized group as the enemy in the midst of wartime. *Korematsu*, 323 U.S. at 240 (Murphy, J., dissenting). Further, Roberts' notion that affirmative action programs in the context of admissions or hiring lead to notions of inferiority is rooted in misunderstandings of what these programs actually do. It assumes that these programs give Black applicants (or other applicants of color) an advantage over white applicants, thereby allowing for less deserving Black applicants to take the spots of equally or more deserving white applicants. As evidence, some critics point to studies showing that members of certain minoritized groups are more likely to be admitted to institutions of higher learning than their white counterparts with the same or even higher scores on college entrance exams. One influential study was set forth by Professor Thomas J. Espenshade and Dr. Alexandria Walton Radford. THOMAS J. ESPENSHADE & ALEXANDRIA WALTON RADFORD, NO LONGER SEPARATE, NOT YET EQUAL: RACE AND CLASS IN ELITE COLLEGE ADMISSION AND CAMPUS LIFE (2010). However, the argument that these results show certain minoritized groups receive an advantage in the admissions process is premised on the notion that these tests accurately reflect each applicant's quality or deservedness for admissions. Given the racial disparities in test scores, this is simply a subtler way of saying that the average white applicant is more qualified or deserving than the average Black, Latinx, or Indigenous applicant. For information on SAT scores, broken down by race or ethnicity, see Scott Jaschik, *SAT Scores Are Up, Especially for Asians*, INSIDE HIGHER ED (Oct. 29, 2018), https://www.insidehighered.com/admissions/article/2018/10/29/sat-scores-are-gaps-remain-significant-among-racial-and-ethnic-groups.

65. Philosophers refer to the failure to recognize this fact as "the fallacy fallacy."

given certain preconditions) and normative claims (about what is *good* or what *should* be). These claims can be explicit or implicit, conscious or unconscious. To challenge someone's descriptive claims about objective reality is to say nothing of their normative claims; it is to say nothing of the moral principles they hold. I tried to emphasize in my teaching that our goal should not be to persuade one another that their moral views on, say, abortion are wrong. Rather, our goal is to understand the different arguments, to understand their moral and factual premises, and to understand how they comport, or fail to comport, with the broader framework of constitutional law, inasmuch as there is one.

One irony in teaching constitutional law at this historical moment is that some students appeared to resist what were purely descriptive discussions (such as discussions about what professional historians tell us about the United States' founding or how social scientists describe systemic racism) because they deemed them to be too political, whereas many of these same students also desired me to provide more definitive answers as to how the Constitution resolves many of the unanswered questions we currently face, even though my doing so would be inherently political. They deemed the former to be my taking certain normative positions, even though such discussions were descriptive in nature, and they seemingly deemed the latter to be merely descriptive of objective constitutional reality, even though it necessarily would have required me to advance certain positions as to the relevant underlying normative debates.[66] Part of the explanation for this seems to be the degree to which our current political environment has been shaped not by open discussions about what we value as a society, and which values take precedence over others when they conflict, but rather by disputes about what even constitutes a fact. Another part could be that the form of constitutional discourse (and legal discourse more generally) is to present normative claims (about how a court should rule) as descriptive claims (about what the Constitution means). Students are right to be confused.

Ultimately, perhaps more than anything else, teaching this course forced me to ponder the concept of *justice* and how it relates to what I do as a law professor. After all, as members of a legal community, we professors have an obligation to serve the cause of justice, and part of what we teach our students is how to do the same. Part of teaching law, therefore, is acculturating students to the values of the profession, including a commitment to justice. Now, of course, *justice* is a broad concept capable of many different *valid* interpretations. In short, *justice* means different things to different people. That is indeed a good thing—a *necessary* thing—in a pluralist society, which our Constitution and our legal profession also value. Our goal is certainly not to tell our students what to think, particularly as it comes to moral issues, but it is also important that we not let our students get away without the skills to ask themselves important questions about *why* they

66. This is based in part on my sense from class discussions, but it was also somewhat confirmed by course evaluations, though it is of course difficult to put a precise number on how many students felt this way.

think the way they do and *how* they might better serve the cause of justice as they define it. I, for one, cannot justify doing anything less.