

BRINGING CASES TO LIFE: *EDUCATION LAW STORIES*

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Law professors regularly teach through the use of appellate-court opinions. This device provides a kind of legal laboratory that efficiently exposes students to hundreds of enlightening “experiments” that have the priceless characteristic of depicting real-world situations. But the appellate process largely rinses out of these cases their humanity, grittiness, legal technique, and culture. This aspect creates a daunting dilemma for legal education. On the one hand, our students cannot (and should not) fully identify with all the human emotions, concerns, and interests implicated in those hundreds of cases, even if there were time to provide all the relevant factual details. This emotional overload would foster technical dysfunction, if not psychological breakdown. (Similarly, I don’t want doctors who perform surgery on me to care so much that they sob into my incision.) In addition, especially in light of the constant expansion of the law, we do not have the time (or even the ability) to put every appellate-court case into its procedural and historical context or provide all the developments and refinements flowing in the wake of that case.

On the other hand, we do not want our students to see cases so clinically that the people involved become nothing more than faceless, bloodless robots who merely provide the setting for our legal magic, manipulation, or mistakes. Nor do we want them to assume that the distilled factual account and the summarized lower-court holdings set out in the appellate-court opinion mark the beginning of the case rather than the (current) culmination of countless factors—human hurt or disappointment, legal tactics good and bad, evidentiary rules, historical coincidence, and the like. At least to the partial rescue, for us teachers of the Law of Education, comes this marvelous little book, *Education Law Stories*,¹ which provides context—human, cultural, and legal—for a select number of highly important cases.

This book of “stories” is one of a series of about two dozen such books that Foundation Press has produced addressing discrete areas of the law from Antitrust to Torts.² Underlying the series is the intent to “tell the

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1. EDUCATION LAW STORIES (Michael A. Olivas & Ronna Greff Schneider eds., 2008).

2. Besides Education Law, subjects include Administrative Law, Antitrust, Bankruptcy, Business Law, Civil Procedure, Civil Rights, Constitutional Law,

stories behind the leading cases in important areas of law—the parties to the dispute, the legal and historical context, the immediate impact of the case as well as the continuing importance of the case in shaping the law.”³ This particular collection comprises thirteen chapters, one dedicated to the editors’ introduction and each of the others addressing a specific and important case⁴ from the history of the Law of Education.

The lineup of authors is impressive.⁵ For example, Professor Leland Ware, co-author of *Brown v. Board of Education: Caste, Culture and the Constitution*,⁶ wrote the book’s fine chapter on *Brown v. Board of Education*;⁷ Professor Laura Rothstein, perhaps the foremost American scholar dealing with Disability Law, contributed the chapter on *Southeastern Community College v. Davis*;⁸ Robert M. O’Neil, former President of the University of Virginia and Director of the Thomas Jefferson Center for the Protection of Free Expression, provided the account of *Keyishian v. Board of Regents*,⁹ a landmark case involving a loyalty-oath law that unexpectedly intersected his own employment situation and his participation in the legal challenge;¹⁰ and Erwin Chemerinsky, a Constitutional Law icon who has written four books and more than 100 law review articles, supplied the account of the Establishment Clause challenge to religious invocations at Texas public-school football games.¹¹ Both editors are themselves distinguished scholars in the field of Education Law.¹²

Contracts, Criminal Procedure, Employment Discrimination, Employment Law, Environmental Law, Evidence, Family Law, Immigration, Intellectual Property, International Law, Labor Law, Property, Tax, and Torts. See *id.* at back cover.

3. *Id.*

4. In the order in which they appear, those cases are *Brown v. Board of Education*, 347 U.S. 483 (1954); *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Lau v. Nichols*, 414 U.S. 563 (1974); *United States v. Virginia*, 518 U.S. 515 (1996); *Southeastern Community College v. Davis*, 442 U.S. 397 (1979); *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988); *Board of Regents v. Southworth*, 529 U.S. 217 (2000); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Edwards v. Aguillard*, 482 U.S. 578 (1987); *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000); and *Board of Education v. Earls*, 536 U.S. 822 (2002).

5. For a list of authors and their honors and accomplishments, see EDUCATION LAW STORIES, *supra* note 1, at 371–76.

6. ROBERT COTTROLL, LELAND WARE & RAYMOND DIAMOND, *BROWN V. BOARD OF EDUCATION: CASTE, CULTURE, AND THE CONSTITUTION* (2003).

7. 347 U.S. 483 (1954).

8. 442 U.S. 397 (1979).

9. 385 U.S. 589 (1967).

10. See *infra* text accompanying note 48.

11. EDUCATION LAW STORIES, *supra* note 1, at 319–36.

12. Professor Michael A. Olivas holds the William B. Bates Distinguished Chair in Law at the University of Houston Law Center and serves as Director of the Institute for Higher Education Law and Governance there. Among accomplishments and honors too numerous to mention here, Professor Olivas has authored or co-authored eight

Surely the selection of cases presents to the editors of such collections a fascinating challenge. Interestingly, despite an otherwise thorough introduction, the editors say almost nothing about why particular cases were selected,¹³ and nothing at all about their selection over particular others. (Indeed, perhaps the authors commissioned to write individual chapters were themselves given a choice among several cases.)

In any event, the intent underlying the *Stories* series, set out above, surely provides the principal criterion: “leading cases.”¹⁴ But each area of the law presumably offers many more such cases than a volume of this size can accommodate. In plans for the book under review here, then, which twelve “leading cases” should make the cut? One might consider, plain and simple, how famous the case is—either to the general public or, more likely, to those involved in that area of the law. *Brown v. Board of Education*,¹⁵ which made the cut, easily meets this standard. So too, among others in the book, do *San Antonio Independent School District v. Rodriguez* (school finance),¹⁶ *Lau v. Nichols* (discrimination relating to language),¹⁷ and *Edwards v. Aguillard* (creation science).¹⁸ One might consider a case’s original impact or perhaps its continuing day-to-day relevance. *Brown* easily would pass the former screen, but less likely the latter; its basic principle now so clearly established, its actual use today in providing legal guidance has significantly dissipated. On the other hand, though much less important historically and morally than *Brown*, *Hazelwood v. Kuhlmeier* (involving student journalism under the First Amendment),¹⁹ which is included, does daily service in constitutional assessments not only of student newspapers, but also of student plays and concerts and other forms of student (and even teacher) speech. The editors cite this factor as crucial to the case’s selection for the anthology: “For this reason [*Hazelwood*’s importance] and because of the large number of speech cases that inevitably involve school-sponsored speech, we chose to

books. He has served on the editorial boards of more than twenty scholarly journals. *See id.* at 371.

Professor Ronna Greff Schneider is Professor of Law at the University of Cincinnati College of Law, where she teaches the Law of Education. She has twice served as Chair of the Association of American Law Schools Section on Law and Education. Among her writings: *EDUCATION LAW: FIRST AMENDMENT, DUE PROCESS, AND DISCRIMINATION LITIGATION* (Thomson West 2004). *Id.* at 371–72.

13. For one minor exception, see *infra* text accompanying note 20.

14. *See* *EDUCATION LAW STORIES*, *supra* note 1, at back cover.

15. 347 U.S. 483 (1954). Indeed, in their Introduction, the editors refer to *Brown* as “[p]erhaps the most famous case involving education.” *EDUCATION LAW STORIES*, *supra* note 1, at 2.

16. 411 U.S. 1 (1973).

17. 414 U.S. 563 (1974).

18. 482 U.S. 578 (1987).

19. 484 U.S. 260 (1988).

tell the tale of *Hazelwood*.”²⁰ And although *Tinker v. Des Moines Independent Community School District* (the black armband case)²¹ provided the arguably seminal ruling in this area and looms historically superior, both *Tinker* and *Bethel School District No. 403 v. Fraser* (involving a sexually themed school assembly speech)²² predate *Hazelwood*, allowing the chapter’s author to consider the fuller contours of *Tinker*. (Of course, *Fraser* and *Hazelwood* could have been discussed as important sequels to *Tinker*, a methodology used in many chapters of the book.)

With regard to current applicability, several cases not chosen might have been included in the book. *Goss v. Lopez*,²³ the basic definer of what student interests warrant a hearing under the Due Process Clause, continues to exert decisional muscle in countless situations. So too do *Board of Regents v. Roth*²⁴ and *Perry v. Sindermann*,²⁵ setting out the fundamental parameters of due-process rights in educational employment contexts. And all three of these meet any historical or seminal requirements one might attach to the term “leading cases.”

One guesses too that the quest for subject variety played a significant role in the selection process.²⁶ At least six of the cases deal with various areas of discrimination: race (*Brown* and *Grutter v. Bollinger*),²⁷ national origin (*Lau*), gender (*United States v. Virginia*),²⁸ disability (*Davis*) and wealth (*Rodriguez*). Still, important areas remain uncovered. As indicated earlier, no case in the book deals directly with the important question of procedure in assessing academic or disciplinary penalties regarding teachers or students—a huge area, indeed.²⁹ While the appropriate role for religion in public schools finds expression in two cases (*Aguillard* and *Santa Fe Independent School District v. Doe*),³⁰ no case treats the important and somewhat converse question of state support of religious schools,³¹ an area that has garnered dramatic attention over the years.

20. EDUCATION LAW STORIES, *supra* note 1, at 9.

21. 393 U.S. 503 (1969).

22. 478 U.S. 675 (1986).

23. 419 U.S. 565 (1975).

24. 408 U.S. 564 (1972).

25. 408 U.S. 593 (1972).

26. “The dozen cases selected for inclusion in this book . . . address most of the significant social topics of our time.” EDUCATION LAW STORIES, *supra* note 1, at 1.

27. 539 U.S. 306 (2003).

28. 518 U.S. 515 (1996).

29. With regard to this area, the editors might have considered including *Board of Curators v. Horowitz*, 435 U.S. 78 (1978), or *Regents v. Ewing*, 474 U.S. 214 (1985), both setting out important distinctions between academic and disciplinary interests under the Due Process Clause.

30. 530 U.S. 290 (2000).

31. Among the themes around which the volume is centered, the editors cite “the constitutionally permissible scope of religion in the public sphere,” but not the

Would *Everson v. Board of Education* (upholding the provision of transportation to private-school students),³² which scores too on the seminal-case scale, or *Lemon v. Kurtzman* (parent to the iconic “Lemon Test”)³³ have been a better choice than, say, the second race case (*Grutter*) or *Board of Regents v. Southworth*,³⁴ an important but relatively narrow case (and one not even mentioned in the casebook from which I currently teach)?³⁵ In light of these gaps, one might question filling nine of the twelve slots with six discrimination cases and three speech cases (*Hazelwood*, *Southworth*, and *Keyishian*), despite the undeniable importance of the cases selected.

Two other worthy cases not included come readily to mind. The first, *Widmar v. Vincent*, although at bottom a speech case,³⁶ delivered huge religious significance: with regard to the state providing an otherwise generally available speech-related benefit to religious institutions, *Widmar* largely changed the question from “May?” to “Must?”³⁷ *Widmar* powerfully influenced other significant cases.³⁸ *Widmar* also breathed its spirit into its secondary-school parallel, the Equal Access Act of 1984.³⁹ The second, *Pierce v. Society of Sisters*,⁴⁰ has over time come to be the all-purpose citation for any assertion of parents’ right to control some aspect or other of the education of their children.

Although other factors might account for the variance, the editors chose seminal (or near-seminal)⁴¹ cases with regard to race (*Brown*), language (*Lau*), wealth (*Rodriguez*), gender (*Virginia*), disability (*Davis*), and teacher speech (*Keyishian*). Arguably, they eschewed the seminal in choosing *Hazelwood* over *Tinker*,⁴² *Aguillard* over *Epperson v. Arkansas*,⁴³

permissible scope of public involvement in the religious sphere. See EDUCATION LAW STORIES, *supra* note 1, at 1.

32. 330 U.S. 1 (1947).

33. 403 U.S. 602 (1971).

34. 529 U.S. 217 (2000).

35. See MICHAEL J. KAUFMAN & SHERELYN R. KAUFMAN, EDUCATION LAW, POLICY, AND PRACTICE: CASES AND MATERIALS (2005).

36. The fact that three other speech cases (*Hazelwood*, *Southworth*, and *Keyishian*) garner chapters in the book may have doomed *Widmar*. But *Widmar* has organizational and religious implications well beyond the typical speech case.

37. 454 U.S. 263 (1981).

38. The editors of this volume tell us that *Southworth*, selected for inclusion, “seems to be a natural outgrowth of the Supreme Court’s decision in *Widmar*” EDUCATION LAW STORIES, *supra* note 1, at 10.

39. See 20 U.S.C. §§ 4071–4074 (2006).

40. 268 U.S. 510 (1935).

41. What is seminal can itself become a matter of contention. Is *Brown* itself truly seminal in light of the several higher-education race cases setting its stage?

42. Interestingly, the editors refer to *Hazelwood* as “one of the most important school speech cases of the twentieth century.” EDUCATION LAW STORIES, *supra* note 1, at 8 (emphasis added). The author of the chapter on *Hazelwood* herself quotes an expert who calls *Hazelwood* “probably the most significant free speech case involving

*Santa Fe Independent School District over Lee v. Weisman*⁴⁴ (or even *Engel v. Vitale*)⁴⁵ and *Board of Education v. Earls*⁴⁶ over *New Jersey v. T.L.O.*⁴⁷

Of course, some choices might reflect the availability of potential authors. Securing Robert O’Neil, one of the nation’s foremost experts on speech, to discuss *Keyishian* could almost alone justify choosing that case over other speech cases. That O’Neil also filed an *amicus curiae* brief in that case and apparently became “the last applicant for New York State employment ever to encounter the Feinberg Law” (requiring a loyalty oath) surely made the inclusion of *Keyishian* irresistible.⁴⁸ Even when the cases themselves cried for inclusion, especially apt authors have been deployed. For example, to discuss *Brown*, the editors called on Leland Ware, “co-author of a behind-the-scenes book on the decision.”⁴⁹

Unsurprisingly, the twelve selected cases have in common their United States Supreme Court provenance. (Indeed, an amusing game could be made of suggesting cases from other courts that might have warranted inclusion.)⁵⁰

Whether plaintiff or defendant ultimately won obviously played no role: plaintiffs won in seven⁵¹ of the twelve decisions, a virtual split. But readers of the book learn that even the concept of “winning” is multifaceted. Kinney Kinmon Lau and his mother, though having “made civil rights history” in *Lau*, remain “ambivalent about—indeed, even estranged from—their role in the case.”⁵²

public school students since . . . *Tinker* . . .” *Id.* at 221 (quoting Bruce C. Hafen, *Hazelwood School District and the Role of First Amendment Institutions*, 1988 DUKE L.J. 685, 685 (1988)).

43. 393 U.S. 97 (1968).

44. 505 U.S. 577 (1992).

45. 370 U.S. 421 (1962).

46. 536 U.S. 822 (2002).

47. 469 U.S. 325 (1985). Interestingly, the author of the chapter on *Earls* himself, in two separate allusions, refers to *T.L.O.* as a “landmark” and as a “seminal” case. EDUCATION LAW STORIES, *supra* note 1, at 342, 344.

48. EDUCATION LAW STORIES, *supra* note 1, at 301.

49. *Id.* at 2 (citing ROBERT J. COTTRILL, RAYMOND T. DIAMOND & LELAND B. WARE, *BROWN V. BOARD OF EDUCATION: CASTE, CULTURE, AND THE CONSTITUTION* (2003)).

50. Two candidates come readily to mind: *Pennsylvania Association for Retarded Children v. Commonwealth*, 334 F. Supp. 1257 (E.D. Pa. 1971), *aff’d* 343 F. Supp. 279 (E.D. Pa. 1972), the first significant judicial foray into the rights of the disabled, and *Dixon v. Board of Education*, 294 F.2d 150 (5th Cir. 1961), a seminal holding requiring a hearing as a precondition to dismissal from college.

51. *Brown, Lau, Virginia, Southworth, Keyishian, Aguillard, and Santa Fe Independent School District.*

52. EDUCATION LAW STORIES, *supra* note 1, at 111. Much of their disenchantment understandably flows from the fact that delays in the case deprived Kinney of much of the benefit from the victory. *Id.* at 140. Even “winning” lawyers find disappointment

Finally, a problem familiar to most editors of collections: appropriate authors might not have been available for certain cases or, once commissioned, might not have submitted timely (or acceptable) manuscripts.⁵³

These observations regarding case selection remain quibbles, not quarrels. Recognizing the limited number of slots for the book, one should not overly second-guess the editors; after all, every case included is undeniably important.

The editors “have structured this book so that it may serve as a supplemental text for law school classes addressing issues involving K-12, higher education or both.”⁵⁴ It could also, they add, serve as either the primary or the supplemental text in a school of education or of public policy.⁵⁵ The decision to target both supplemental and primary uses has important implications. Were the book aimed only at a law school class already assigned to read the opinions in the course casebook, much less space in the book under review might have been devoted to rehearsing the Court’s holding, reasoning, concurrences, and dissents. (A few succinct “as you know . . .” paragraphs would have sufficed.) Of course, such discussions in fact included become crucial for students using the book as the primary tool in a course. Still, reading both an assigned casebook and this text as a supplement will surely do law students no harm and perhaps provide a helpful synthesis. This said, the book should enkindle interest well beyond academe—indeed, among all interested in the Law of Education or the law in general.

To this reviewer, who teaches the Law of Education, the question of how to use such an enriching and interesting book in connection with that course immediately arose. At my institution (far from alone on this score), there is but one course on the Law of Education. Because so many worthy matters already must be left out or glossed over, adding the entire book as a reading requirement might not work. (Put aside here the additional problem presented by requiring students to purchase a second course-book at a time when book costs have so justifiably captured the imagination!) But I am toying with the idea of having the law library put several copies on reserve, dividing the class into twelve groups, and assigning each group to report to the class on a separate chapter. One alternative might be to assign all students to read the two, three, or four chapters the instructor

in “victory.” In *Lau*, attorney Edward Steinman “was eager for a dramatic constitutional victory but instead prevailed on narrow statutory grounds.” *Id.* at 111.

53. In an “Acknowledgments” section, the editors, thanking “the dozen authors whose work we highlight here,” remark that “everyone came through with his or her promised best work, in timely fashion.” *Id.* at 377. This leaves open the possibility that authors could not be found for some targeted cases or that some authors who agreed to write ultimately failed to submit adequate manuscripts.

54. *Id.* at 12.

55. *Id.* at 12–13.

finds most enlightening. Still another might be to require all students to read two or three chapters of their choice. (A brief report to the instructor might be required, or the course examination might include a question—applicable, of course, to all chapters—*e.g.*, “What legal techniques seemed most effective?” or “What background aspects most surprised you?”) on those readings.

The ideal law school use would be as the principal assigned treatise for a seminar; even a one-credit course could spend at least one class period on every chapter, allowing students to explore the various aspects of each case. Alas, very few law schools have the luxury of offering such a course, which would perhaps have to be at least the third course dealing with the Law of Education. (Even if a second course on the Law of Education appears in the curriculum, splitting out K-12 from higher education likely consumes the two entries.) At institutions that allow directed readings for credit, however, using the book as the core would work marvelously.

The Introduction by the editors provides further texture for the cases discussed in the book, including subsequent judicial, legislative, or other action related to the principal case. For example, the editors provide us with the text of the state constitutional amendment⁵⁶ enacted in the wake of *Grutter* to preclude the State of Michigan’s use of race in, among other things, admissions to public education. The editors discuss the interesting questions raised by the amendment’s language, assess the high school affirmative action case decided by the U.S. Supreme Court in the wake of *Grutter*,⁵⁷ and insightfully address the pivotal role that Justice Anthony Kennedy plays as this intractable issue further sorts itself out.⁵⁸ The Introduction also relates the treated cases to one another. Indeed, one could make a case for reading this Introduction only after reading the rest of the book, that is, as effective synthesizer rather than as prelude.

As already intimated, the chapters make especially important and interesting contributions with regard to two aspects of the judicial proceedings described: the factual “backstory” of the case—what the editors call the “human drama”⁵⁹—and the legal techniques attending the judicial procedures. Concerning the former, often developed through newspaper accounts or interviews with lawyers and parties, certain chapters stand out. Robert M. Bloom’s account of *Earls*, an ultimately unsuccessful attack on the drug-testing of all students involved in competitive extracurricular activities in public schools of the district, often reads like a good novel.⁶⁰ He writes that sixteen-year-old Lindsay Earls, a sophomore

56. MICH. CONST. art. I, § 26.

57. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 127 S.Ct. 2738 (2007).

58. EDUCATION LAW STORIES, *supra* note 1, at 5.

59. *Id.* at 1.

60. *See id.* at 337–69.

at Tecumseh High School, “was sitting in choir, her first class of the day, when the Choir Director distributed the form describing a new drug testing policy Lindsay was shocked. She thought the teacher was joking. . . . This outrage started a four-year journey for Lindsay that ended . . . after her freshman year in college.”⁶¹ The author knows that the reader cannot appreciate the courage of this young lady (because of her challenge, false rumors of drug use and even attacks on her Christianity spread through the community) without understanding more about her:

Lindsay not only knew all of the students in her own class, but also those in the classes above and below her. Lindsay is a fifth-generation Tecumseh graduate. She knew all the members of the School Board, and even called one of them “Grandma” due to connections with a childhood friend. Lindsay enjoyed high school and describes herself as pretty popular. She had a lot of friends and did well in school. She was a member of the show choir, the marching band, the Academic Team, and the National Honor Society. Until the suit was filed, Lindsay had never had a negative experience in Tecumseh schools.⁶²

The author’s description of the site of the challenge (this isn’t Manhattan, he’s telling us!) adds to the texture of the story:

Tecumseh, Oklahoma, is a small, conservative, mainly Protestant town about forty minutes from Oklahoma City. With a population just over 6,000, Tecumseh is the kind of town where everyone knows everybody’s business and news spreads quickly. . . . [T]he town is approximately 80% white; the next largest racial group is American Indian at 13%. The median household income in 2000 was \$27,202. Ten percent of the town population has a college degree. There is some farming, but most residents work in Oklahoma City.⁶³

The author follows Lindsay to Dartmouth College, where she receives strong support from the community and ultimately learns that the U.S. Supreme Court turned down her challenge to the drug-testing law.⁶⁴ The author reports Lindsay’s disappointment in some detail.⁶⁵

61. *Id.* at 337–38 (footnotes omitted).

62. *Id.* at 338. Many other parties are well described, for example the plaintiff in *Grutter*, *id.* at 89.

63. *Id.* at 338. See also the excellent descriptions of: Virginia Military Institute, *id.* at 165–68, the University of Wisconsin–Madison, *id.* at 260–62, and Santa Fe, Texas, *id.* at 320.

64. *Id.* at 341.

65. *Id.* Lindsay was especially upset that Justice Thomas wrote the opinion for the Court: “[S]he didn’t think he was paying attention at the oral arguments and he didn’t ask any questions. Lindsay said it looked like he was doing a crossword puzzle” *Id.*

It should be noted, however, that Justice Thomas asks questions from the

Other backstories spice this volume. We learn that Lloyd Gaines, a Black man who sought admission to the law school at the University of Missouri, never profited from his significant U.S. Supreme Court victory;⁶⁶ by the time the case got remanded to the district court, he had totally disappeared and “was never heard from again.”⁶⁷ Apparently and ironically, *Brown*, the most well known racial-discrimination case in history, owes its name to gender discrimination: the group aligning the plaintiffs “felt that a male should be the lead plaintiff.”⁶⁸ Oliver Brown thus became famous. (A more amusing reason underlies the lead name in *Keyishian*; explained the lawyer: “I just knew it would mean more to Harry than to any of the others.”)⁶⁹ Barbara Grutter, who lost her challenge to the affirmative-action policy at the University of Michigan Law School, never attended law school there or anywhere else.⁷⁰ The young lady who filed the complaint that generated *Virginia*, “now presumably in her mid-thirties, has remained nameless and faceless without any details of her aspirations, the sincerity of her interest, or her qualifications.”⁷¹

With regard to legal tactics and strategies, Leland Ware, in his excellent chapter on *Brown*, informs us that the plaintiff in *Plessy v. Ferguson*⁷² was selected to attack legally segregated railroad cars in New Orleans because he was “white enough to gain access to the train and black enough to be arrested for doing so.”⁷³ Mr. Ware states in dramatic detail that *Brown* was not a freestanding blockbuster case but rather the (relative) culmination of a long and deliberate fight against legal segregation.⁷⁴ In the 1930s, in order to avoid a reaffirmation of *Plessy*’s “separate but equal” pronouncement, the NAACP turned to a strategy of attacking the “equal” rather than the “separate.”⁷⁵ Southern states, the strategy theorized, could not bear the costs and other burdens of actual equalization.⁷⁶ This litigation, so heavily targeting graduate and professional schools, reflected the fact that Southern states provided virtually no post-graduate or professional education,

bench only very rarely. See Editorial, *Notable Numbers*, THE NEWS & OBSERVER (Raleigh, NC), Mar. 1, 2008, at A20 (noting that over a span of two years Justice Thomas had not asked a single question of lawyers before the Court).

66. *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938), *rehearing denied*, 305 U.S. 676 (1939).

67. EDUCATION LAW STORIES, *supra* note 1, at 30.

68. *Id.* at 39.

69. *Id.* at 289.

70. *Id.* at 104.

71. *Id.* at 163.

72. 163 U.S. 537 (1896).

73. EDUCATION LAW STORIES, *supra* note 1, at 19 (quoting KEITH WELDON MEDLEY, WE AS FREEMEN: PLESSY V. FERGUSON (2003)).

74. *Id.* at 19–20.

75. *Id.* at 20.

76. *Id.*

segregated or otherwise, for African-Americans.⁷⁷ Post-World War II cases in turn argued that even equalization “could not remedy the deprivations caused by racial segregation.”⁷⁸ These cases laid important groundwork for the successful attack on “separate” in *Brown* itself. Unsung heroes of great courage—parties, lawyers, witnesses, and judges—pepper the long, bumpy story.

Some readers will be surprised to learn of arguments advanced by scholars against the *Brown* result, arguments that Ware rehearses (and with which he disagrees), including Professor Michael Klarman’s view that without *Brown* segregation would have ended “in a more gradual manner,” one that would have engendered wider support from Southern whites—and therefore less violence,⁷⁹ and Professor Derrick Bell’s assertion not only that *Brown* was wrongly decided, but that Black students would have fared better had the Court required equalization rather than desegregation.⁸⁰ Ware might have added Judge Richard Posner’s (unsurprisingly) contrarian view that, “[f]rom a longer perspective,” *Brown* “seems much less important, even marginal.”⁸¹

The book sets out many other enlightening observations on legal aspects of the discussed cases. Michael Heise, in his chapter on *Rodriguez*, discusses the deliberate decision to base the attack not on race or ethnicity but on wealth.⁸² Wendy Parker, in her chapter on *Grutter*, notes the important role that intervention can play in broadening the issues.⁸³ Although lawyers might not think of themselves as media people, these chapters reflect the legal importance of public relations. *Grutter* involved a widespread media campaign, including an op-ed piece in the *New York Times* written by former President (and University of Michigan alumnus) Gerald R. Ford.⁸⁴ Lawyers in *Lau* and *Virginia* also thought it important to

77. *Id.*

78. *Id.* at 32.

79. *Id.* at 44 (citing MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004)).

80. *Id.* at 44–45 (citing DERRICK BELL, SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM (2004)).

81. Richard Posner, *Appeal and Consent*, THE NEW REPUBLIC, Aug. 16, 1999, at 36, 39. Judge Posner elaborates: “[V]ery little actual enforcement of minority rights occurred until the enactment of anti-discrimination legislation in the 1960s, and that legislation appears to have owed much more to the non-legalistic civil rights movement led by Martin Luther King Jr. than to anything the Supreme Court had done or said.” *Id.* Ware argues that *Brown* itself inspired that civil rights movement, and asserts that “[n]o other Supreme Court decision has had such lasting significance.” EDUCATION LAW STORIES, *supra* note 1, at 20–21, 46.

82. EDUCATION LAW STORIES, *supra* note 1, at 55, 64. Heise points out the complexity of arguing that money matters with regard to student academic achievement. *Id.* at 57. He also notes that “conventional litigation wisdom today is to conflate—and not separate—school finance and race and ethnicity.” *Id.* at 64.

83. *Id.* at 90–91.

84. *Id.* at 95. Defendant Lee Bollinger, President of the University of Michigan,

reach the public.⁸⁵ We learn that *Lau* presents “the rare equity case where . . . the plaintiffs urged no specific remedy, and appeared to want the issue remanded . . . to the offending Board of Education.”⁸⁶ Anne Proffit Dupre uses large doses of the Supreme Court transcript to illustrate the legal jostling between Court and lawyer surrounding the difficult governance issue presented in *Hazelwood*.⁸⁷

Readers get reminded that lawsuits do not necessarily result from a potential plaintiff seeking out a lawyer; often lawyers, working for organized groups, seek out plaintiffs. In *Grutter*, for example, the founder of the Center for Individual Rights and a Minneapolis attorney interviewed potential plaintiffs, intent on including women as named plaintiffs so that the case would not center about “angry white men.”⁸⁸ Leslie Griffin, in recounting the story of *Aguillard*, assesses the procedural importance in some cases of moving for summary judgment rather than facing a jury trial.⁸⁹ Robert O’Neil offers a nice discussion of how the role of the *amicus curiae* brief differs from that of the party’s brief.⁹⁰ Even the relatively trivial can be revealing: O’Neil points out that the plaintiffs’ lawyers get to choose the case’s caption and thus sometimes decide whom (among a plurality of plaintiffs) to immortalize and whom (among a plurality of defendants) to make notorious.⁹¹

Principles learned in law school, for example “Never ask on cross-examination a question to which you don’t know the answer,” get reinforced. In *Virginia*, a lawyer for the all-male defendant institution, which used the rigorous “adversative method,” asked an expert whether she knew of any educational authorities supporting the use of that method for women. “No,” the expert replied, “nor for men.”⁹² Reinforced also are the financial cost of litigation (the defendants in the VMI litigation apparently spent \$14 million)⁹³ and the difficulties and ambiguities involved in implementing judicial pronouncements, even those from the U.S. Supreme Court.⁹⁴ Law’s connection to popular culture receives attention: by

persuaded Mr. Ford to write the piece. *Id.*

85. *See id.* at 117 (pointing out that the lawyer for the plaintiff in *Lau* “thought it imperative to generate support in the Chinese community”); *id.* at 169–70 (“The VMI forces . . . looked to the North, hiring a Manhattan public relations firm . . .”).

86. *Id.* at 6.

87. *Id.* at 231–34.

88. *Id.* at 89 (citation omitted). *See also id.* at 117 (stating that in *Lau* the lawyer “enlisted a lead plaintiff” and “recruited other parents to allow their children to join the lawsuit”). The lawyer in *Lau* even recruited ten *amici curiae*. *Id.* at 131.

89. *Id.* at 309.

90. *Id.* at 293–96.

91. *Id.* at 289.

92. *Id.* at 173.

93. *Id.* at 183.

94. *See, e.g.,* the chapters on *Brown*, *Lau*, *Grutter*, *Virginia*, *Southworth*, and *Aguillard*.

stressing the number and diversity of individuals with disabilities now represented on television shows like “ER,”⁹⁵ Laura Rothstein, discussing *Davis*, cleverly points out “how disability discrimination law changed the way society views [such] individuals”⁹⁶

The book’s need of more rigorous editing is easily overcome by its excellent substance. Rachel Moran’s piece on *Lau* warrants special mention and, although not without competition from other offerings in the book, may well represent the exemplar for such discussions.⁹⁷ Her account of the historical context, litigation, and long-term effects of the case is deep, nuanced, and brilliant.⁹⁸ (Even her endnotes—numbering 298 and extending beyond fourteen pages—add much to the chapter.)⁹⁹ It is a joy to read. Rosemary Salomone’s discussion of the VMI case is also stunningly good.¹⁰⁰ Anne Proffitt Dupre wonderfully analyzes the impact, actual and potential, of *Hazelwood*.¹⁰¹

This book will make clear to law students (and others) just how complex the trial of a case can become, ranging from the choice of plaintiffs, intervenors, experts, and venue, to the marshaling of evidence and legal arguments. Every fork in the road creates the occasion for victory or defeat, however defined. Those exposed to this book will realize more deeply than ever that the appellate opinion often constitutes but a large-scale distillation, a mere literary narrative of what in fact is a very human story of hurt, effort, emotion, vision, competence, devotion, courage, luck, and, ultimately, liberating exhilaration, deep disappointment, or something in between. Not a bad achievement for one relatively short book!

95. EDUCATION LAW STORIES, *supra* note 1, at 197, 213.

96. *Id.* at 197.

97. *See id.* at 111–58.

98. *See id.*

99. *See id.* at 143–57.

100. *Id.* at 159–96.

101. *Id.* at 221–58.