TEACHING THE FORGOTTEN FOURTEENTH AMENDMENT AND THE CONSTITUTION OF MEMORY

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The Congress shall have power to enforce, by appropriate legislation, [the Due Process Clause and Equal Protection Clause].

Occasionally, the taught Fourteenth Amendment is slightly more expansive. While, students who read the *Slaughter-House Cases*

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Republicans in 1866 did not answer the questions contemporary originalists ask about the meaning of Section 1. When questions arose about the meaning of Section 2 and 3, the Joint Committee on Reconstruction produced a new draft

claim they are motivated entirely by originalist or textualist arguments.[55] Constitutional law classes need to teach students how to make originalist arguments, while recognizing what they are doing is not history. Legal originalism may be little more than finding one's friends in history and quoting them out of context.[56] Nevertheless, if such history is what Justices expect from advocates and influences the path of constitutional law, then students must learn the proper techniques. Students who through the forgotten Fourteenth Amendment learn that Fourteenth Amendment originalism is not history may, freed from the shackles of authentic historical analysis, produce better "originalist" arguments.

IV. HISTORICIZING *MARBURY* AND JUDICIAL POWER

The forgotten Fourteenth Amendment sheds light on the place of constitutional litigation in the United States. Conventional legal analysis treats constitutional litigation as the primary engine of American constitutional development. The constitutional politics of the Fourteenth Amendment suggests that political parties are the primary engine of constitutional development. Thaddeus Stevens's fight for Sections 2 and 3 was rooted in his understanding that the structure of partisan competition drives the official law of the land. If a professor shifts students' focus from constitutional litigation to the structure of partisan competition as the driver of constitutional change they will understand why *Marbury v. Madison*[57] had no impact on the constitutional politics of the nineteenth century, was central to the constitutional politics of the twentieth century, and has a status not yet determined in the constitutional politics of the twenty-first century.

Chief Justice Earl Warren's claim in *Cooper v. Aaron* that *Marbury v. Madison* established "the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and Country as a permanent and indispensable feature of our constitutional system"[58] is the single most important passage in a judicial opinion that law students read during the late twentieth century. *Cooper*, law students learned, correctly asserted that *Marbury* established the Supreme Court as having the final say on constitutional matters, that the United States had been committed to judicial supremacy since early adolescence, and that such a commitment was the mark of a mature constitutional democracy. Constitutional

55. *See, e.g.*, ANTONIN SCALIA, A M

His discussion of partisan supremacy continued: "My own opinion is, that the new *Dred Scott* decision, deciding against the right of the people of the States to exclude slavery, will never be made, if that party is not sustained by the elections."[63] Unlike Jefferson who spoke of independent presidential authority to interpret the Constitution,[64] Lincoln never claimed constitutional authority to challenge the Supreme Court on the basis of office. His first inaugural insisted that Republicans were authorized to reverse the result in *Dred Scott* because the people by election had vested that party with the power to determine the constitutional status of slavery in the territories. Lincoln said:

> [T]he candid citizen must confess that if the policy of the government, upon vital questions, affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made, in ordinary litigation between parties, in personal actions, the people will have ceased, to be their own rulers, having, to that extent, practically resigned their government, into the hands of that eminent tribunal.[65]

The Fourteenth Amendment was rooted in this commitment to partisan supremacy. Republicans were not interested in creating new rights. Rather, party members sought to guarantee that the Republican Party would determine the proper interpretation of the Amendment for the foreseeable future.[66] Doing so required that party members ensure that southern states did not enjoy a representative boon from being allocated ext2.5 (r)7 (ur)3.5 (e)0.8 (6w)0.8 (6w)0.8 (6wot)59-0 0 10.56

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Judicial supremacy became the official law of the land only with the rise of non-ideological or divided ideological parties during the late nineteenth century.[70] As both the Democratic and Republican parties acquired liberal and conservative wings, both coalitions became poor engines for constitutional maintenance or change.[71] Early twentieth-century political parties could not be engines for constitutional maintenance or change on such matters as the Commerce Clause, the freedom of contract, racial equality, and the freedom of speech because both parties housed strong proponents of judicial activism and strong proponents of judicial restraint on each of these issues. Moreover, crucial

than nineteenth-century Jacksonians, Whigs, and Republicans.[76] The second foundation of nineteenth-century partisan supremacy, a majority party, is being erected. Republicans are very close to becoming the dominant national party in the United States, if they have not achieved that status already. These conditions may generate renewed commitments to partisan supremacy or a novel allocation of constitutional authority in the United States. Students familiar with the forgotten Fourteenth Amendment will at least be aware that, as the dominant understanding of constitutional authority transformed after the structure of partisan competition transformed in the past, changes in the structure of partisan competition in the present may again transform the dominant understanding of constitutional authority.

IV. TOWARD THE CONSTITUTION OF MEMORY

Professor Sanford Levinson, in a pathbreaking work on America's constitutions, coined the phrases "Constitution of Settlement" and "Constitution of Conversation" for thinking about how the Constitution of the United States is taught and functions.[77] The Constitution of Conversation is the litigated constitution. That Constitution consists of those provisions, such as the Equal

as engaged in constitutional law or even as having anything interesting to say to constitutional lawyers.

Sections 2, 3, and 4 of the Fourteenth Amendment belong to a different Constitution, the Constitution of Memory. This Constitution consists of those provisions that once played or were intended to play vital roles in American constitutionalism, but do not play any role in present constitutional politics. Some provisions in the Constitution of Memory are anachronisms. The congressional power to issue letters of marque and reprisal permitting private shipowners to attack the enemy or the Third Amendment are two examples. Other provisions have been interpreted away over time. The Privileges and Immunities Clause of the Fourteenth Amendment falls into this category.[79] Still other provisions in the Constitution of Memory have been repealed. Copies of the Constitution of the United States include the Fugitive Slave Clause, even though the Thirteenth Amendment nullified that provision. Finally, the Constitution of Memory includes the forgotten Fourteenth Amendment, provisions designed to play crucial roles in structuring a constitutional regime that no longer exists. The present American commitment to judicial supremacy and the institutional practices that make judicial supremacy seem natural make unnecessary, if not unintelligible, constitutional provisions rooted in partisan supremacy and the long gone institutional practices that made that understanding of constitutional authority seem natural in Martin Van Buren and Abraham Lincoln.

The Constitution of Memory might be folded into the Constitution of Settlement. No serious conversations exist about the meaning of provisions in either Constitution. Still, unlike the Constitution of Settlement, provisions in the Constitution of Memory may not be clear and they do not have substantial impact on contemporary politics. They seem relics from a constitutional past.

This Essay is a 2 (egr i)2 argument for including the Constitution of Memory in the pedagogy of constitutional law. Most constitutional law courses pay some attention to the constitutional past, even when that past is not part of the

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