TEACHING THE FORGOTTEN FOURTEENTH AMENDMENT AND THE CONSTITUTION OF MEMORY

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Most constitutional law professors teach a highly edited version of the Fourteenth Amendment.[1] The pedagogical version of the received text in most classes consists of the Due Process Clause, the Equal Protection Clause, and the Enforcement Clause so that the taught Fourteenth Amendment for all practical purposes reads:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> . . . .
>
> 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*[2] learn that the Privileges and Immunities Clause[3] has been largely moribund for almost a century and a half, those who read Justice Clarence Thomas's concurrence in *McDonald v. City of Chicago* realize that resurrection is possible.[4] Some constitutional law professors note that the Citizenship Clause[5] overturns the holding of *Dred Scott v. Sandford*[6] and has implications for birthright citizenship.[7] But no one teaches

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1. The evidence for this paragraph is highly anecdotal. Skeptics should consult the other essays in this issue and all the constitutional law textbooks on their bookshelves.

2. 83 U.S. 36 (1872).

3. U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States.")

4. 561 U.S. 742, 806, 813–50 (2010).

5. U.S. CONST. amend. XIV, § 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.")

6. 60 U.S. 393, 454 (1857).

7. *See* Benjamin Wallace Mendelson, Note, *Courts Have Gone off the Map: The Geographic Scope of the Citizenship Clause*, 95 TEX. L. REV. 873, 873 (2017).

anything about Sections 2,[8] 3,[9] and 4[10] of the Fourteenth Amendment. Students who do not at some point read the entire Constitution in the appendix of their text are unlikely to know those provisions exist. Whether most constitutional law professors know their contents is doubtful.

The taught Fourteenth Amendment inverts the original Fourteenth Amendment.[11] The first draft of the Fourteenth Amendment was a standalone version of what eventually became Section 2 of the final text.[12] The Reconstruction Congress debated that text for a month before that provision went down to defeat in the Senate.[13] After the Joint Committee on Reconstruction came back with what became the five-section text, members of Congress spent most of their energy debating Sections 2 and 3, some energy discussing Section 4, and hardly any energy considering Section 1 or 5.[14] John Bingham, the only member of Congress who displayed serious interest in Section 1, devoted his attention almost entirely to the Privileges and Immunities Clause.[15]

8. U.S. CONST. amend. XIV, § 2 ("Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such a State, being twenty-one years of age, and citizens of the United States, or in any way abridged, exception for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.")

9. U.S. CONST. amend. XIV, § 3 ("No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or give aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.")

10. U.S. CONST. amend. XIV, § 4 ("The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States, nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.")

11. The arguments in this paragraph will be elaborated in MARK A. GRABER, CONSTRUCTING CONSTITUTIONAL POLITICS: THADDEUS STEVENS, JOHN BINGHAM, AND THE FORGOTTEN FOURTEENTH AMENDMENT (forthcoming 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2483355 [https://perma.cc/5ZWQ-PGWW].

12. *Id.* (manuscript at 33).

13. *Id.* (manuscript at 42).

14. *Id.* & n.123.

15. *See id.* (manuscript at 46, 53 n.170).

This brief Essay explores why professors might teach the forgotten Fourteenth Amendment. Some reasons are obvious. Professors who take a historical approach to constitutional pedagogy should teach the correct history of the Fourteenth Amendment. Some reasons are rooted in traditional legal pedagogy. Several scholars provide good reasons why the forgotten Fourteenth Amendment should again become part of the litigated constitution, the subject of most constitutional law classes. The forgotten Fourteenth Amendment is an excellent vehicle for teaching students the difference between originalism as practiced by historians and originalism as practiced by advocates. Still other reasons focus on questions of constitutional authority. By teaching the Constitution of Memory, professors may contrast the twentieth-century commitment to judicial supremacy with the nineteenth-century commitment to partisan supremacy. Students who understand that how the Constitution works today is not how the Constitution worked in the past are prepared to explore how contemporary constitutional politics may resurrect older approaches to constitutional authority or generate new means for settling constitutional controversies.[16]

I. LET'S TEACH HISTORY (OR CONSTITUTIONAL DEVELOPMENT)

Many constitutional law classes take historical perspectives or the political science perspectives associated with the study of American political and constitutional development. Undergraduate programs and many graduate programs in history and political science routinely offer classes in constitutional law. Some classes focus on legal doctrine. Others, recognizing that PhD faculty are far better able to teach distinctive disciplinary concerns than legal doctrine and that students who go to law school will get all the doctrine they need, treat constitutional law as an opportunity to explore the American constitutional regime more generally.[17] Many law professors, in part because of taste and in part out of recognition that their students are unlikely to practice constitutional law, similarly emphasize facets of American constitutionalism other than constitutional litigation. Their constitutional law classes provide vital civic education for lawyers who are likely to play important roles in American civil society, even if they never litigate a Fourteenth Amendment claim.[18]

16. One should not underestimate the contribution the forgotten Fourteenth Amendment makes to professorial showing off. Professors who wish to demonstrate that they have mastered the most obscure constitutional provisions can impress students by expounding at great length on Sections 2, 3, and 4.

17. *See* Mark A. Graber, *Constitutionalism and Political Science: Imaginative Scholarship, Unimaginative Teaching*, 3 PERSP. ON POL. 135, 141 (2005), http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1312&context=fac_pubs.

18. *See* Sanford Levinson, *Reconsidering the Syllabus in "Constitutional Law,"* 117 YALE L.J. F., http://yalelawjournal.org/forum/reconsidering-the-syllabus-in-constitutional-law [https://perma.cc/22BF-VSU3].

The forgotten Fourteenth Amendment belongs in the teaching canon for American constitutionalism taught as history. Historians emphasize the "strangeness" of past practice.[19] By teaching students the concerns that motivated the persons responsible for the Fourteenth Amendment, professors highlight the gap between mid-nineteenth-century constitutionalism and contemporary constitutional practice. Contemporary Americans regard John Bingham as the "founding son" of the Fourteenth Amendment and put Section 1 at the heart of that text.[20] Republicans in 1866 followed Thaddeus Stevens and regarded Sections 2 and 3 as the core of that text. Stevens gave the most important speech for understanding the Fourteenth Amendment when he declared that a constitutional amendment was needed "to secure perpetual ascendancy to the party of the Union; and so as to render our republican Government firm and stable forever."[21] This assertion explains the importance of Section 2, 3, and 4 to Republicans during Reconstruction. These provisions, prominent Republicans repeatedly claimed, simultaneously made the United States more democratic and prevented rule by a revived Democratic/Slave Power alliance. Republicans other than John Bingham paid little attention to Section 1 because they believed constitutional protections for persons of color were parchment barriers in the absence of a dominant party committed to implementing those constitutional protections.[22]

The historical perspective on the forgotten Fourteenth Amendment slides easily into the political science perspective, or at least the perspective of those political scientists interested in American political and constitutional development. Political scientists who study American political and constitutional development document and explain continuity and change in American politics over time.[23] From this political science perspective, Stevens was articulating a core element of Jacksonian democracy. Parties during the mid-nineteenth century were the primary agents of constitutional meaning, not courts.[24] This understanding of constitutional authority helps students understand why, in the entire congressional debate over drafting the Fourteenth Amendment, only a few minor participants suggested that courts might independently implement Section 1.[25] Classroom conversation may then turn to the breakdown of the movement parties underlying the partisan constitution of

19. *See* Linda K. Kerber, *Making Republicanism Useful*, 97 YALE L.J. 1663, 1664–65 (1988).

20. GERALD N. MAGLIOCCA, AMERICAN FOUNDING SON: JOHN BINGHAM AND THE INVENTION OF THE FOURTEENTH AMENDMENT (2013).

21. CONG. GLOBE, 39th Cong., 1st Sess. 74 (1865).

22. GRABER, *supra* note 11 (manuscript at 35–49).

23. *See* KAREN ORREN & STEPHEN SKOWRONEK, THE SEARCH FOR AMERICAN POLITICAL DEVELOPMENT (2004).

24. Mark A. Graber, *Separation of Powers*, *in* THE CAMBRIDGE COMPANION TO THE UNITED STATES CONSTITUTION (Karen Orren & John Compton eds., 2018).

25. GRABER, *supra* note 11 (manuscript at 50, 54).

the nineteenth century, the replacement of movement parties by non-ideological parties, and how non-ideological parties fueled the rise of litigation and courts as the central means for constitutional development.[26]

II. THE FORGOTTEN FOURTEENTH AMENDMENT AND THE LITIGATED CONSTITUTION

The forgotten Fourteenth Amendment plays two important roles in the litigated constitution. Professors may use Sections 2, 3, and 4 when demonstrating how successful litigators avoid constitutional barriers by shifting the terrain of constitutional conversation. Courts reluctant to overrule precedents decided under one constitutional clause may become more receptive when the same result is based on a different constitutional provision. The forgotten Fourteenth Amendment is an excellent vehicle for thinking about originalism. The near exclusive framing concern with Sections 2, 3, and 4 suggests the probability that no original understanding of Section 1 existed, at least from an historical perspective. This insight might highlight problems with originalism or merely how historians seek original understanding differs from how constitutional lawyers seek original understandings.

A. Litigating the Forgotten Fourteenth Amendment

Successful constitutional litigators know how to "jump[] tracks."[27] Professor Gordon Silverstein, who introduced the metaphor with respect to constitutional practice, points out how courts are often receptive to arguments changing the course of constitutional law that substitute new constitutional foundations for claims previously rejected on other constitutional foundations. He notes how the Supreme Court in *Heart of Atlanta Motel v. United States*[28] and Congress when passing the Civil Rights Act of 1964 successfully reversed the result in the *Civil Rights Cases*[29] by deriving the power to ban racial discrimination in places of public accommodation from the Commerce Clause rather than from Section 5 of the Fourteenth Amendment.[30] *Baker v. Carr* is another well-known instance of track jumping.[31] The Justices in that case ruled that constitutional attacks on malapportionment that the Court had previously ruled non-justiciable under the Guarantee Clause of Article IV[32] were justiciable

26. Mark A. Graber, *Judicial Supremacy and the Structure of Partisan Conflict*, 50 IND. L. REV. 141, 160–61, 166 (2016).

27. GORDON SILVERSTEIN, LAW'S ALLURE: HOW LAW SHAPES, CONSTRAINS, SAVES, AND KILLS POLITICS 73 (2009).

28. 379 U.S. 241, 261–62 (1964).

29. 109 U.S. 3, 25–26 (1883).

30. SILVERSTEIN, *supra* note 27, at 77, 80.

31. 369 U.S. 186, 237 (1962).

32. Colegrove v. Green, 328 U.S. 549, 556 (1946).

when made under the Equal Protection Clause of the Fourteenth Amendment.[33] The Court in both cases might have reached the same conclusion if absolutely forced to reconsider the grounds of the earlier decision. Given the general receptivity of the Warren Court to civil rights claims, the Justices in *Heart of Atlanta Motel* probably would have overruled the *Civil Rights Cases* had no constitutional alternative existed.[34] Nevertheless, constitutional litigators generally attempt to make as easy as possible a judicial decision in favor of their client or cause. Given that jumping the track is a standard way for overcoming judicial reluctance to overrule precedents, constitutional law classes focused on constitutional litigation should teach students how to employ that jurisprudential technique.

Professor Franita Tolson is presently completing an important work demonstrating how legal advocates may use the forgotten Fourteenth Amendment to jump the track in voting rights cases.[35] Her concern is congressional power to abrogate state sovereignty when enforcing the right to vote. The majority opinion, concurrence, and dissent in *Shelby County v. Holder* limit their discussions to whether Congress under Section 1 of the remembered Fifteenth Amendment could impinge on state sovereignty when retaining the preclearance formula used in previous voting rights acts.[36] Tolson begins her discussion by noting that Section 2 of the Fourteenth Amendment authorizes Congress to deprive a state of representation whenever the national legislature finds that the state in question has withheld the ballot from persons of color.[37] This is a severe impingement on state sovereignty. Therefore, Tolson concludes, interpreted in light of Section 2, Section 5 permits Congress to impose lesser penalties than a reduction of representation after Congress concludes that a state's voting laws and practices unconstitutionally discriminate against persons of color.[38]

Inspired by Professor Tolson's example, constitutional law classes might explore other uses of the forgotten Fourteenth Amendment to achieve constitutional goals by jumping the track. Akhil Amar's claim that Section 2 protects the right to vote is one example,[39] as is Jack Balkin's claim that Section

33. SILVERSTEIN, *supra* note 27, at 85.

34. RICHARD C. CORTNER, CIVIL RIGHTS AND PUBLIC ACCOMMODATIONS: THE HEART OF ATLANTA MOTEL AND MCCLUNG CASES 145 (2001).

35. FRANITA TOLSON, A PROMISE UNFULFILLED: SECTION 2 OF THE FOURTEENTH AMENDMENT AND THE FUTURE OF THE RIGHT TO VOTE (forthcoming 2018).

36. 133 S. Ct. 2612, 2618–2631 (2013); *Id.* at 2631–32 (Thomas, J., concurring); *Id.* at 2632–52 (Ginsburg, J., dissenting).

37. Franita Tolson, *What is Abridgment: A Critique of Two Section Twos*, 67 ALA. L. REV. 433, 438 (2015).

38. *Id.* at 457.

39. Akhil Reed Amar, *The Lawfulness of Section 5—and Thus of Section 5*, 126 HARV. L. REV. F. 109, 117 (2013).

4, by forbidding the United States to default on the federal debt, permits the President to raise the debt ceiling unilaterally.[40] Students might put Section 3 to creative use in debates over whether to maintain monuments to Confederate notables. Prominent Confederates, that text suggests, were traitors in need of pardons, not heroes who merited statutes. Other claims are obviously possible. The important point is that the jumping the tracks exercise highlights that effective constitutional litigators are creative. They do not simply parrot the standardized answers that professors expect on constitutional law finals. Rather, they refashion constitutional material, often forgotten constitutional material, in ways that make their constitutional claims and principles appear to make the Constitution "the best it can be."[41]

III. THE FORGOTTEN FOURTEENTH AMENDMENT AND CONSTITUTIONAL INTERPRETATION

The forgotten Fourteenth Amendment is an excellent vehicle for teaching students the differences between historical and legal originalism. The emphasis of the Fourteenth Amendment's framers on Sections 2, 3, and 4 requires contemporary originalists to ask questions that the framers neither asked nor answered. John Bingham aside, no Republican in 1866 expounded at length and repeatedly on the meaning of Section 1. Bingham, in his more frequent speeches, said almost nothing about the Equal Protection Clause and the Due Process Clause.[42] Republicans were unconcerned with the substantial meaning of Section 1 because they were seeking to ensure their coalition would retain the power necessary to implement the Thirteenth Amendment. They did not think of themselves as establishing fixed legal rules restricting state power. To complicate matters further, Republican understandings of the post-Civil War Amendments changed in response to changing circumstances, making constitutionally arbitrary any effort to privilege the dominant understanding at any particular time or in any particular place. The changing emphases and politics underlying the forgotten Fourteenth Amendment belie Section 1 originalism as history, but do not undermine the more fundamental project of originalism, which is to reconstruct American history in ways that privilege contemporary projects.[43] The forgotten Fourteenth Amendment reminds law students that advocates interpret history as lawyers, not as historians.

40. Jack M. Balkin, *The Not-So-Happy Anniversary of the Debt-Ceiling Crisis*, THE ATLANTIC (July 31, 2012), https://www.theatlantic.com/politics/archive/2012/07/the-not-so-happy-anniversary-of-the-debt-ceiling-crisis/260458/ [https://perma.cc/LR74-SEHK].

41. Ronald Dworkin, *Law's Ambitions for Itself*, 71 VA. L. REV. 173, 177 (1985).

42. GRABER, *supra* note 11 (manuscript at 45, 51, 54).

43. JACK M. BALKIN, LIVING ORIGINALISM (2011); Eric J. Segall, Commentary, *The Constitution According to Justices Scalia and Thomas: Alive and Kickin'*, 91 WASH. U. L. REV. 1663, 1666–67 (2014).

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 that clarified any ambiguity.[44] The Joint Committee ignored Democrats who claimed Section 1 was hopelessly ambiguous.[45] The few Republicans who attempted to interpret Section 1 offered inconsistent comments.[46] Most Republicans simply stated that Section 1 was a nice statement of broad principles already inherent in the Constitution.[47] No historian looking at the debates in Congress over the Fourteenth Amendment could conclude with good conscience that the framers of the Section 1 had anything clear to say about any contemporary Fourteenth Amendment issue.

Contemporary originalists seek answers to the questions that Republicans did not ask. The important provisions of Sections 2 and 3 of the Fourteenth Amendment were designed to secure the Republican Party as the main vehicle for implementing the Thirteenth Amendment.[48] Republicans did not intend the Fourteenth Amendment to resolve disputes among themselves, such as whether the Constitution, before or after 1865, guaranteed persons of color the right to vote or whether segregation was consistent with equality. Those matters were for Republicans to determine in the future.[49] They were constructing constitutional politics, not making constitutional law. They were asking nineteenth-century questions such as "what democratic rules will best secure a Republican majority for the foreseeable future," rather than twenty-first century questions such as "does racial bias render capital punishment unconstitutional," or "is partisan gerrymandering unconstitutional?"

The forgotten Fourteenth Amendment raises important timing questions for determining the substantive rights protected by the post-Civil War Amendments. By the fall of 1865, most Republicans had concluded that Congress possessed broad power under Section 2 of the Thirteenth Amendment to transform African Americans from slaves to full citizens.[50] These powers included the power to abolish slavery, the power to prohibit race discrimination, and the power to provide persons of color and other destitute persons with basic necessities. John Bingham was the only Republican who disputed this interpretation. His dispute was limited to the Civil Rights Act of 1866.[51] Nevertheless, many Republicans

44. *See* GRABER, *supra* note 11 (manuscript at 43).

45. *Id.* (manuscript at 7).

46. *Id.* (manuscript at 45–46).

47. *See* CONG. GLOBE, 39th Cong., 1st Sess. 2464, 2471, 2498, 2502, 2504, 2506, 2509, 2510–2511, 2532, 2534, 2539, 2540–41 (1866).

48. GRABER, *supra* note 11 (manuscript at 35–36, 39–40).

49. *Id.* (manuscript at 67–68).

50. *Id.* (manuscript at 22).

51. Mark A. Graber, *The Second Freedmen's Bureau Bill's Constitution*, 94 TEX. L. REV. 1361, 1369–70 (2016).

suggested narrower interpretations of the Thirteenth Amendment during the drafting process in Congress.[52] Many Republicans also narrowed their interpretation of the post-Civil War Amendments after the election of 1867, in which Democrats gained considerable ground in the north by claiming that Republicans were too friendly to persons of color.[53] This history further confounds efforts to determine the original meaning of the post-Civil War Amendments. Republicans had a narrower understanding of the rights protected by the post-Civil War Constitution when they drafted the Thirteenth Amendment then when they ratified the Thirteenth Amendment. Republicans had a broader understanding of the rights protected by the post-Civil War Constitution when they drafted the Fourteenth Amendment then when they ratified the Fourteenth Amendment.

The questions Republicans asked when considering the forgotten Fourteenth Amendment and the different answers they gave at different times highlights how the search for the original understanding of the post-Civil War Amendments makes no sense as an historical matter. Their focus on ensuring that the Republican Party implemented the Thirteenth Amendment left too few materials on the scope of the rights protected by Section 1 of the Fourteenth Amendment for future generations to reach any clear conclusions on the meaning of such phrases as "privileges and immunities," "equal protection," and "due process." The search for original meaning is also confounded by disagreements among Republicans over the rights protected and, outside of vague commitments to equality under law, the mid-level principles underlying the Fourteenth Amendment. The dynamics of Reconstruction constitutional politics further destabilized the original meaning of the post-Civil War Constitution. Republican commitments to broader or narrower readings of the Thirteenth and Fourteenth Amendments changed dramatically during the process of drafting and ratification. Teaching the forgotten Fourteenth Amendment, thus, highlights how framers draft and ratify constitutions during times of dynamic political change in which crucial concepts do not have stable meanings and the constitutional enterprise is as often a means for creating desirable structures for fighting things out in the future as for imposing stable legal rules on the present.[54]

The perspective the forgotten Fourteenth Amendment provides on originalism hardly obviates the need to teach originalism in a class oriented to constitutional litigation. Almost all Justices like originalist arguments. Some

52. *See* MICHAEL VORENBERG, FINAL FREEDOM: THE CIVIL WAR, THE ABOLITION OF SLAVERY, AND THE THIRTEENTH AMENDMENT 131–33 (2001).

53. Michael Les Benedict, *The Rout of Radicalism: Republicans and the Elections of 1867*, 18 CIV. WAR HIST. 334, 334–36, 341, 343 (1972).

54. For a similar point, see JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 12–17 (Vintage Books 1997) (1996).

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 MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997).

56. *See* Town of Hallie v. City of Eau Claire, 501 N.W.2d 49, 51 (Wisc. Ct. App. 1993); Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 COLUM. L. REV. 523, 524–25 (1995).

57. 5 U.S. 137 (1803).

58. 358 U.S. 1, 18 (1958).

law classes taught that departmentalism, the view that each department has the right to interpret the Constitution for itself, is the only alternative to judicial supremacy and that the departmentalist alternative only flares up sporadically.[59]

The forgotten Fourteenth Amendment offers an alternative history with an alternative moral. Sections 2, 3, and 4 were drafted by persons who thought constitutional questions are best settled by the dominant political party of an era. Thaddeus Stevens and his political allies championed partisan supremacy, which reigned throughout much of the nineteenth century, as the most important alternative to judicial supremacy. Martin Van Buren expressed the dominant view of constitutional authority in Jacksonian America when he declared:

> If different interpretations are put upon the Constitution by the different departments, the people is the tribunal to settle the dispute. Each of the departments is the agent of the people, doing their business according to the powers conferred; and where there is a disagreement as to the extent of these powers, the people themselves, through the ballot-boxes, must settle it.[60]

Lincoln and his fellow Republicans were Van Burenites on partisan supremacy. Lincoln's most famous assertion on constitutional authority claimed:

> We oppose the Dred Scott decision in a certain way, upon which I ought perhaps to address you a few words. We do not propose that when Dred Scott has been decided to be a slave by the court, we, as a mob will decide him to be free. We do not propose that, when any other one, or one thousand, shall be decided by that court to be slaves, we will in any violent way disturb the rights of property thus settled; but we nevertheless do oppose that decision as a political rule which shall be binding on the voter, to vote for nobody who thinks it wrong, which shall be binding on the members of Congress or the President to favor no measure that does not actually concur with the principles of that decision. We do not propose to be bound by it as a political rule in that way, because we think it lays the foundation not merely of enlarging and spreading out what we consider an evil, but it lays the foundation for spreading that evil into the States themselves. We propose so resisting it as to have it reversed if we can, and a new judicial rule established upon this subject.[61]

"We" referred to the Republican Party. "The *Dred Scott* decision," Lincoln asserted in a separate speech, "never would have been made in its present form if the party that made it had not been sustained previously by the elections."[62]

59. This was the gospel according to Gerald Gunther, whose constitutional law casebook was the most widely assigned during the 1970s and 1980s. *See* GERALD GUNTHER, CONSTITUTIONAL LAW 1–29 (12th ed. 1991).

60. MARTIN VAN BUREN, INQUIRY INTO THE ORIGIN AND COURSE OF POLITICAL PARTIES IN THE UNITED STATES 330 (photo. reprint 1967) (1867).

61. Mr. Lincoln's Speech, Sixth Debate with Stephen A. Douglas, at Quincy, Illinois (Oct. 13, 1858), *in* 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN 245, 255 (Roy P. Basler ed., 1953).

62. Mr. Lincoln's Speech, Fifth Debate with Stephen A. Douglas, at Galesburg, Illinois (Oct. 7, 1858), *in* THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 61, at 232.

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 extra representation in Congress because the Thirteenth Amendment, by repealing the Three-Fifths Clause in Article I, Section 2, apparently compelled Congress when allocated seats in the House of Representations to count as full persons former slaves likely to be denied the right to vote in the South. That was the point of various versions of Section 2.[67] Republicans also moved to limit sharply the power of former Confederate elites by proposing that they be banned from voting or holding office. That was the point of various versions of Section 3.[68] Nobody bothered spelling out the rights protected by Section 1 because the persons responsible for the Fourteenth Amendment believed they were empowering Congress rather than the federal courts. Republicans in 3,000 pages of the *Congressional Globe* rarely if ever indicated whether the Supreme Court could independently enforce Thirteenth or Fourteenth Amendment rights in absence of a federal statute.[69]

63. *Id.*

64. Letter from Thomas Jefferson to James Madison (May 13, 1793), *in* 9 THE WRITINGS OF THOMAS JEFFERSON 88 (Andrew A. Lipscomb ed., 1905).

65. First Inaugural Address−Final Text (Mar. 4, 1861), *in* 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 268 (Roy P. Basler ed., 1953).

66. GRABER, *supra* note 11 (manuscript at 48–49).

67. *Id.* (manuscript at 43).

68. *Id.* (manuscript at 44).

69. *Id.* (manuscript at 50).

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 party elites did not want to have their coalition take responsibility for being the engine of constitutional change or maintenance on the leading constitutional controversies that arose in the early twentieth century. A contemporary cottage industry has developed demonstrating how divided parties empowered courts to resolve such hotly contested issues as race and abortion.[72] The Roosevelt Administration, unwilling to antagonize southerners in Congress by pushing for legislation mandating racial equality, appointed racial liberals to the Court. The Republican Eisenhower Administration continued the same policy.[73] The result was *Brown v. Board of Education*[74] and a judicial decision four years later in *Cooper v. Aaron* that confused the political commitment to judicial supremacy in the twentieth century as a "permanent" feature of American constitutionalism.[75]

The United States may be returning to the constitutional universe of the forgotten Fourteenth Amendment. The first foundation of nineteenth-century partisan supremacy, polarized parties, is firmly in place. Twenty-first century Democrats and Republicans are, if anything, far more ideologically homogenous

70. Mark A. Graber, *Belling the Partisan Cats: Preliminary Thoughts on Identifying and Mending a Dysfunctional Constitutional Order*, 94 B.U. L. REV. 611, 639 (2014); *see also* Graber, *supra* note 26, at 164, 166.

71. Graber, *supra* note 70, at 641–44.

72. For reviews of this literature, see Mark A. Graber, *The Countermajoritarian Difficulty: From Courts to Congress to Constitutional Order*, 4 ANN. REV. L. & SOC. SCI. 361, 369, 381 (2008); Mark A. Graber, *Constructing Judicial Review*, 8 ANN. REV. POL. SCI. 425, 431, 436, 443 (2005); Mark A. Graber, *The Non-Majoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. AM. POL. DEV. 35, 36, 45, 53–54 (1993).

73. KEVIN J. MCMAHON, RECONSIDERING ROOSEVELT ON RACE: HOW THE PRESIDENCY PAVED THE ROAD TO BROWN 97–143, 197–99 (2003).

74. 347 U.S. 483 (1954).

75. For discussions of the political foundations of Warren Court judicial liberalism, see LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 485–501 (2002); Howard Gillman, *Party Politics and Constitutional Change: The Political Origins of Liberal Judicial Activism*, *in* THE SUPREME COURT AND AMERICAN POLITICAL DEVELOPMENT 138, 138–160 (Ronald Kahn & Ken I. Kersch eds., 2006).

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 Protection Clause of the Fourteenth Amendment, whose interpretation is debated in our society. Constitutional pedagogy focuses on the Constitution of Conversation, teaching students the various techniques for making disputed constitutional questions come out right. The Constitution of Settlement is the unlitigated constitution. That Constitution consists of those provisions, such as Article I, Section 3, which requires state equality in the Senate, whose meaning is clear and uncontroversial. Constitutional law classes rarely teach the unlitigated provisions of the Constitution, even though such plainly stated rules of constitutional structure as state equality in the Senate arguably have more impact on American politics than the litigated provisions of the Constitution.[78] The provisions that constitute the Constitution of Settlement are studied, if studied at all, by students of American politics who do not think of themselves

76. A legion of works could be cited for this proposition. For two examples, see SARAH A. BINDER, STALEMATE: CAUSES AND CONSEQUENCES OF LEGISLATIVE GRIDLOCK 24–25 (2003) (describing the impact of party and preference polarization on political stalemate and explaining the ideological polarization in Congress along these lines); THOMAS E. MANN & NORMAN J. ORNSTEIN, THE BROKEN BRANCH: HOW CONGRESS IS FAILING AMERICA AND HOW TO GET IT BACK ON TRACK, at x (2006) ("The growing ideological polarization of the parties, the transformation of intense partisanship into virtually tribal politics . . . contributed to a climate on Capitol Hill that we found unsettling and destructive.").

77. SANFORD LEVINSON, FRAMED: AMERICA'S 51 CONSTITUTIONS AND THE CRISIS OF GOVERNANCE 19 (2012).

78. *See* FRANCES E. LEE & BRUCE I. OPPENHEIMER, SIZING UP THE SENATE: THE UNEQUAL CONSEQUENCES OF EQUAL REPRESENTATION (1999).

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 brief 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 constitutional present. If we teach such cases as *Schenck v. United States* in part to highlight the cribbed interpretation past generations gave to First Amendment freedoms,[80] then we should teach the forgotten Fourteenth Amendment to highlight how past generations understood constitutional authority. Students should recognize that the Constitution of Memory may become the Constitution

79. *See* Slaughter-House Cases, 83 U.S. 36, 96 (1872) (Field, J., dissenting) ("[If the Clause] refers . . . to such privileges and immunities as were before its adoption specially designated in the Constitution or necessarily implied as belonging to citizens of the United States, it was a vain and idle enactment which accomplished nothing, and most unnecessarily excited Congress and the people on its passage.").

80. 249 U.S. 47, 52 (1919).

of the Living Dead.[81] One enduring feature of American constitutionalism is that provisions and decisions long thought buried sometimes come back to life in ways that fundamentally alter the official constitutional law of the land. *Bush v. Gore* resurrected *McPherson v. Blacker*.[82] Future litigators may revive Section 2. The Constitution of Memory enables students to distinguish between historical originalism and legal originalism by pointing to the different purposes constitutional language served in the past and in the present. The persons responsible for the Fourteenth Amendment, operating in a constitutional universe structured by partisan supremacy, were doing something different when adding constitutional text than contemporary Americans, raised on judicial supremacy, do when they consider constitutional amendments.

The Constitution of Memory belies the tendency to think of contemporary constitutional practice as the inevitable outcome of 1787, of 1868, or as essential to democratic constitutionalism. The persons responsible for the Fourteenth Amendment had a distinctive notion of how constitutions work. Sections 2, 3, and 4 are the core of their working constitution. By returning to the forgotten Fourteenth Amendment, we may better understand how our Constitution worked in the past, how our Constitution works in the present, whether our Constitution works in the present, how our Constitution might work in the future and how our Constitution might work better in the future.

81. Keith E. Whittington & John Maclean, *It's Alive! The Persistence of the Constitution,* 11 GOOD SOC'Y 8, 8 (2002).

82. 531 U.S. 98, 104 (2000).