NAVIGATING CONTROVERSIAL FOURTEENTH AMENDMENT TOPICS

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INTRODUCTION

Teaching the Fourteenth Amendment brings its own unique challenges, particularly when it comes to hot-button topics like abortion and same-sex marriage. Like many others, my institution is home to students who differ from one another in almost every way imaginable. It is no surprise that class discussions of the Fourteenth Amendment produce more disagreement than consensus.

Political diversity is nothing new, but this generation of students has lived through an increasingly partisan political climate.[1] Consensus about the scope of free speech on campus has broken down.[2] This makes it harder for students to speak out in class, particularly when they are uncertain of their classmates' opinions. Saying the wrong thing about a Fourteenth Amendment topic seems embarrassing at best and at worst, damaging to a student's social standing.

Increasingly, my students also have trouble separating law from politics. Unlike their predecessors, this generation of students has never known a world before the Supreme Court nomination of Robert Bork.[3] Many take for granted

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1. On growing political polarization, see, for example, Russell Berman, *What's the Solution to Political Polarization in the U.S.*?, ATLANTIC (Mar. 8, 2016), https://www.theatlantic.com/politics/archive/2016/03/whats-the-answer-to-political-polarization/470163 [https://perma.cc/6BX6-HLFN]; Jonathon Haidt & Marc Hetherington, *Look How Far We Have Come Apart*

that presidential candidates will vow to nominate judges with specific views of Fourteenth Amendment issues.[4]

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protection and due process cases.[11] Others wrestle with how doctrinal outliers like the undue burden standard fit into the larger Fourteenth Amendment framework.[12] It is hard to explain that rational basis review may not always be as deferential as the hornbooks suggest.[13] Fourteenth Amendment doctrine is deceptively complex. Fear of embarrassment makes it harder for students to dive into the doctrinal details that they will have to master.

To help students overcome their reluctance to speak on controversial topics, I go out of my way to dignify every political and doctrinal position on the topics we discuss. As importantly, I encourage students to expose the weaknesses of every claim, even ones that I find instinctually compelling. Some of these conversations focus on how to make effective Fourteenth Amendment arguments rather than on who is "right" politically. Focusing on strong advocacy rather than substance makes it easier to jump-start deeper conversations about the topics we tackle.

I also use historicals

Pennsylvania v. Casey.[16]

talk about Title VII of the Civil Rights Act, exploring the relationship between the two and the elaboration of constitutional law outside the courts.[27] We talk about popular reinterpretations of *Roe*.[28] When we study *Casey*, we spend time on the Justices' views of both popular abortion politics and their influence on abortion doctrine.[29] This kind of class allows students to see both the relevance of public discussion of the Fourteenth Amendment and the difference between popular views and formal doctrine.

Applying case law to real-world cases can also bring students back to the legal side of the Fourteenth Amendment. Recently, I have had students discuss

students of the limits of what the law, including the much-lauded Fourteenth Amendment, can deliver when it comes to social change.

III. REINTRODUCING HISTORY

As a legal historian, I tend to see the Fourteenth Amendment as a foundational part of the nation's political and legal evolution. When I was a 2L and first fell in love with legal history, my professor spent what was probably an inordinate amount of time on the Fourteenth Amendment. That approach made sense to me at the time, and nothing has changed since then.

But with a few exceptions, students are not history nerds like me, and they often have little sense of how interpretations of the Fourteenth Amendment have changed. Some of this is generational. My students generally were born when the civil rights movement was treated more as something that occurred in the past rather than a present-

reproduction as an opportunity to ditch much-criticized doctrinal approaches and try something new.[40]

It can be hard for students to understand what is going on in these cases when they treat current case law as a given. A better sense of the history shows how many familiar Fourteenth Amendment topics were once open-ended and easily could be once again.

Without a good historical grounding, students have an oversimplified sense of the distinction between Fourteenth Amendment decisions that have been overruled and those that have not. Indeed, the Court has reinterpreted decisions to the point of transforming an original holding. Such was the case with *Brown* and *Roe*, just to name a few. To have a real grasp of Fourteenth Amendment doctrine, students should understand how the Court modifies its precedents as well as rejects them.

And missing the historical narrative can lead students to ignore the many paths not taken in the law of the Fourteenth Amendment. It is easy to think that the evolution of doctrine was natural in some ways, either the result of the meaning of the Constitution or the views of political leaders. The problem, of course, is that this view is as discouraging as it is wrong. Contemplating the lost possibilities of Fourteenth Amendment doctrine can remind students how different the law could have been and could be once again. Teaching these lost

Court opinions for evidence of the founders' intent.[43] And on other occasions, the influence of others' views of the Fourteenth Amendment may be as subtle as a fleeting reference to a lower court opinion or an influence that will only be clear later to those combing through a Justice's papers at an archive. An understanding of the broader historical context of an opinion allows students to see the actors that can influence the Supreme Court. At times, these outside actors have had the final word on what the Fourteenth Amendment means.

I try to introduce historical context in several ways. First, before we tackle the cases assigned for class, I give students historical background on the subject we are studying. I try to make this discussion easily digestible and relatable. Rather than assigning a lot of additional reading, I try to introduce ideas in class, so that students are less inclined to see history as an annoyance that expands their workload.

I also introduce brief excerpts of briefs, statutes, lower court opinions, and other unconventional material that deals with the constitutional subjects we study. I ask students to think about where different ideas about the Fourteenth Amendment originate. I also invite students to identify how the opinions in the casebook differ in their ideas about the purpose, scope, and history of the Fourteenth Amendment.

When we encounter a discussion of history in a Supreme Court opinion, I also pause to ask students what difference it would make if the Justices got it wrong. Should we understand the history connected to the incorporation of the Second Amendment the way that the Justices did in *McDonald v. City of Chicago*?[44] How different might debates about the Fourteenth Amendment look if the Court in the *Slaughterhouse-Cases* had taken a different position on the Privileges and Immunities Clause?[45] Is the problem with *Roe v. Wade* Justice

Carrie's illegitimate child.[50]

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