

## 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.<sup>1</sup> Consensus about the scope of free speech on campus has broken down.<sup>2</sup> 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.<sup>3</sup> 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*, N.Y. TIMES (Sept. 17, 2012, 9:48 PM), <https://campaignstops.blogs.nytimes.com/2012/09/17/look-how-far-weve-come-apart> [https://perma.cc/7VMJ-DNE6].

2. See Matt Saincome, *Berkley Riots: How Free Speech Debate Launched Violent Campus Showdown*, ROLLING STONE (Feb. 6, 2017), <http://www.rollingstone.com/culture/features/berkeley-riots-inside-the-campus-showdown-over-free-speech-w465151> [https://perma.cc/Q66Q-HM57]; Paige St. John & Shelby Grad, *Ann Coulter, Free Speech, and UC Berkeley: How a Talk Became a Political Bombshell*, L.A. TIMES (Apr. 25, 2017, 7:45 AM), <http://www.latimes.com/local/lanow/la-me-coulter-speech-berkeley-20170425-story.html>.

3. On the transformational impact of Bork's failed nomination, see, for example, LAUREN COHEN BELL, *WARRING FACTIONS: INTEREST GROUPS, MONEY, AND THE NEW POLITICS OF SENATE CONFIRMATION* 101 (2002); CHRISTINE L. NEMACHEK, *STRATEGIC SELECTION:*

that presidential candidates will vow to nominate judges with specific views of Fourteenth Amendment issues.<sup>4</sup> Accusations that judges engage in judicial activism—in politics, rather than law—are commonplace.<sup>5</sup>

When a law school class takes on a divisive political issue, it is hard for students to stay away from the political claims on a specific subject—or even to know when they have crossed the line between constitutional law and popular debate. This matters for several reasons. Students have trouble mastering the ins and outs of constitutional law when they focus too much on entrenched political debate about a subject. And when students mix up law and popular politics, it can be hard to explain the relationship between legal and ideological arguments. Political arguments can and have reshaped formal constitutional law,<sup>6</sup> but understanding this requires students to differentiate popular from formal constitutionalism in the first place.

The blurring of law and politics happens partly because for this generation of students, the dominant constitutional conflicts of the day seem oddly removed from historical context. Some subjects, like abortion rights (and the validity of *Roe v. Wade*),<sup>7</sup> seem to be a subject of permanent and bitter contestation.<sup>8</sup> Other battles, like the struggle for same-sex marriage, might appear to be completely resolved.<sup>9</sup> Because students do not always have a sense of the longer story

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PRESIDENTIAL NOMINATION OF SUPREME COURT JUSTICES FROM HERBERT HOOVER THROUGH GEORGE W. BUSH 47 (2007).

4. On the relevance of Supreme Court nominations in recent presidential elections, see Nina Totenberg, *The Supreme Court: A Winning Issue in the Presidential Campaign?*, NPR (Sept. 29, 2016, 4:53 PM), <http://www.npr.org/2016/09/29/495960902/the-supreme-court-a-winning-issue-in-the-presidential-campaign>.

5. See, e.g., Jay Skoning, *Gay Rights and Judicial Activism: Brazen End Run Around Congress*, AM. SPECTATOR (Apr. 12, 2017, 12:04 AM), <https://spectator.org/gay-rights-and-judicial-activism-brazen-end-run-on-congress> [https://perma.cc/93MZ-SYTF] (characterizing a Seventh Circuit ruling as “judicial legislation”); Ed Whelan, *This Day in Liberal Judicial Activism*, NAT’L REV. (Sept. 17, 2017, 8:00 AM), <http://www.nationalreview.com/bench-memos/446819/liberal-judicial-activism> [https://perma.cc/YJ6Y-P88V] (asserting that Justice Souter implemented the Left’s agenda on a broad range of issues).

6. For discussion of the impact of popular arguments on constitutional law, see, for example, LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 7 (2004); Christopher W. Schmidt, *Popular Constitutionalism on the Right: Lessons from the Tea Party*, 88 DENV. U. L. REV. 523, 550–52 (2011); Reva Siegel & Robert Post, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 373–77 (2007).

7. 410 U.S. 113 (1973).

8. See, e.g., LINDA GORDON, *THE MORAL PROPERTY OF WOMEN: A HISTORY OF BIRTH CONTROL POLITICS IN AMERICA* 295–320 (Univ. Ill. Press 3d ed. 2002) (1976); LAURENCE H. TRIBE, *ABORTION: THE CLASH OF ABSOLUTES* 7 (1990).

9. See, e.g., Kathleen E. Hull, *The Past and Future of (Same-Sex) Marriage*, HUFFINGTON POST (June 28, 2015, 5:44 PM), [http://www.huffingtonpost.com/kathleen-e-hull/the-past-and-future-of-same-sex-marriage\\_b\\_7681478.html](http://www.huffingtonpost.com/kathleen-e-hull/the-past-and-future-of-same-sex-marriage_b_7681478.html) [https://perma.cc/9TAA-ZR2H].

behind some of the issues we study, any understanding of the Fourteenth Amendment issues we survey can be quite shallow.

In this Essay, I explore ideas for navigating the hardest parts of teaching the Fourteenth Amendment at a time when partisanship and polarization have become so pronounced. Specifically, I discuss ways to overcome the following challenges: 1) student discomfort with staking out a position on controversial subjects; 2) students' tendency to blur the law and politics surrounding Fourteenth Amendment topics; and 3) students' blindness to the legal and political history shaping the doctrine we study. I consider ways to deal with these stumbling blocks in three separate parts.

### I. OVERCOMING SILENCE

I have often experienced uncomfortable silences when teaching the Fourteenth Amendment. I teach the Fourteenth Amendment as part of my courses in constitutional law and family law, and both classes tend to generate passionate conversations. In family law, students argue about who got the raw end of a divorce and how to fairly value the contributions of homemaking spouses. In constitutional law, students clash about what the Establishment Clause says about holiday displays. Yet when it comes time to discuss divisive topics, students become oddly silent.

Or maybe the silence is not so strange. At a large public university, students are certain to disagree deeply with friends and classmates about big Fourteenth Amendment topics. Professors may have profound convictions that do not line up with their students'. Saying the wrong thing can, quite literally, make a student an object of ridicule. Students have confided in me that they did not want to say something off-putting in front of classmates making decisions about law review or moot court or student government. Others have worried that holding the wrong opinion would put that grade in jeopardy.

A willingness to engage is certainly important to any law school class, but students' silence is particularly counterproductive when they are learning about the Fourteenth Amendment. In this area, with many Supreme Court decisions that are familiar to lay people, students are far more likely to have preconceptions about what a particular opinion says. It is easy to think that *Roe* discusses a right to choose or that *Obergefell v. Hodges*<sup>10</sup> mentions marriage equality. When students are afraid to say something stupid or offensive, they tend to pay less attention to the material altogether, and the misconceptions carried into the course are often carried back out of it.

Additionally, some Fourteenth Amendment doctrine is quite complex. Students often struggle with the tiers of scrutiny governing some equal

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10. 135 S. Ct. 2584 (2015).

protection and due process cases.<sup>11</sup> Others wrestle with how doctrinal outliers like the undue burden standard fit into the larger Fourteenth Amendment framework.<sup>12</sup> It is hard to explain that rational basis review may not always be as deferential as the hornbooks suggest.<sup>13</sup> 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 historical context to show students how often people on either side of a Fourteenth Amendment topic have changed their minds. When it comes to abortion, for example, pro-life constitutionalists once favored a substantive due process method that would lead to the recognition of a fundamental right to life.<sup>14</sup> Now, many of the same theorists call for an originalist method of interpretation.<sup>15</sup> Seeing that people with whom a student agrees have changed makes it easier to invite open-mindedness from everyone in class.

Finally, I use humor to break the ice. Students often approach certain topics with trepidation. In office hours, students have asked me whether I am nervous about an upcoming class on *Roe* or *Planned Parenthood of Southeastern*

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11. See Eric Berger, *In Search of a Theory of Deference: The Eighth Amendment, Democratic Pedigree, and Constitutional Decision Making*, 88 WASH. U. L. REV. 1, 4 (2010) (asserting the Court’s tiers of scrutiny are inconsistently applied and stating there is “little guidance” on when to defer to legislative facts); McClean Crichton, *A Fool’s Errand: Why Congress Should Amend the Voting Rights Act but Not Section Four’s Coverage Formula*, 80 BROOK. L. REV. 223, 230 (2014) (explaining that the Court oscillates between a rational basis test and heightened scrutiny); Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481, 482–85 (2004) (discussing the Court’s lack of uniform application of its three-tiered equal protection framework and the problems with the three-tiered approach).

12. See, e.g., Caroline Mala Corbin, *Abortion Distortion*, 71 WASH. & LEE L. REV. 1175, 1176, 1190–92 (2014) (describing abortion exceptionalism as courts’ failure to apply “normal doctrine” when abortion is at issue); Ian Vandelwalker, *Abortion and Informed Consent: How Biased Counseling Laws Mandate Violations of Medical Ethics*, 19 MICH. J. GENDER & L. 1, 2–3 (2012).

13. See, e.g., Katie R. Eyer, *Constitutional Crossroads and the Canon of Rational Basis Review*, 48 U.C. DAVIS L. REV. 527, 529–30 (2014).

14. See, e.g., MARY ZIEGLER, *AFTER ROE: THE LOST HISTORY OF THE ABORTION DEBATE* 42–54 (2015).

15. See, e.g., Mary Ziegler, *Originalism Talk: A Legal History*, 2014 BYU L. REV. 869, 869–75 (2014).

*Pennsylvania v. Casey*.<sup>16</sup> Abortion, like many Fourteenth Amendment subjects, is serious business, and I always try to treat students' positions with respect and care. But occasionally, when class turns to a sensitive subject, I make fun of myself. I try to illuminate what might be funny about a particularly juicy sentence in a majority or dissenting opinion. When students can laugh, the stakes of saying something in class seem lower, and more students seem willing to share their thoughts.

In smaller classes, I have also asked students to write response papers on the readings assigned on a controversial subject. This way, I have at least a sense of what students think before class starts. I can spark a conversation by asking members of the class about what they wrote. I can ask people to pinpoint the shortcomings of their own arguments and to take seriously the claims made by people who disagree. When it is feasible to do so, I try to get students to stake out a position before class to encourage more dialogue in class.

What I have found, perhaps ironically, is that the more students talk about the Fourteenth Amendment, the more they are comfortable talking about the Fourteenth Amendment. Seminars tend to get the most deeply into touchy issues, and students have taken radically different positions on every subject we discuss. But generally, the more we dig into tough issues, the more at ease students tend to feel. Most students defy straightforward stereotypes. "Conservative" students do not take consistently "conservative" positions. Something similar is true of "progressive" students.

If you know and speak extensively with someone who disagrees with you, you can dispel the myths surrounding what "that kind of person" is like. And while students may never change their minds, they always get a richer sense of how complex an issue is.

## II. SEPARATING LAW FROM POLITICS

The Fourteenth Amendment has given rise to some of the most politicized debates in constitutional law. Some historians believe that *Dred Scott v. Sanford*<sup>17</sup> set off the Civil War.<sup>18</sup> The abortion rights recognized in *Roe* and *Casey* might have made the difference in some presidential elections.<sup>19</sup> Fourteenth Amendment issues spark protests, boycotts, marches, and television advertisements.

Because of all of this, it is easy for students to mix up familiar political claims with what I teach about the Fourteenth Amendment. When we cover *Roe*,

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16. 505 U.S. 833 (1992) (plurality decision).

17. 60 U.S. 393 (1857).

18. See, e.g., ROBERT K. CARR, *THE SUPREME COURT AND JUDICIAL REVIEW* 208 (1942); Louise Weinberg, *Dred Scott and The Crisis of 1860*, 82 CHI.-KENT L. REV. 97, 98 (2007).

19. See, e.g., Alan I. Abramowitz, *It's Abortion, Stupid: Policy Voting in the 1992 Election*, 57 J. POL. 176, 176-86 (1995).

students often continue to attribute ideas to the decision that the Supreme Court did not articulate in 1973. Something similar happens when we talk about *Brown v. Board of Education*.<sup>20</sup> Other students have trouble staying on topic, treating constitutional arguments almost like a distraction from the political arguments that they find persuasive.

Failing to separate law from politics can create headaches for students as well as for me. First, students sometimes miss the practical side of learning constitutional law. Fourteenth Amendment issues can come up in a surprising variety of cases—in contexts from zoning<sup>21</sup> to child support<sup>22</sup> to small-business regulations.<sup>23</sup> If students continue to view these issues through the lens of politics, they may leave my class without any of the practical tools that I hope to give them.

When students get swept away by political arguments, they also miss the impact that arguments made outside of court have had on the doctrine we study. In recent years, legal scholars and historians have created a valuable literature on how constitutional law is not always shaped by the usual suspects.<sup>24</sup> Clients, rather than lawyers, can dictate claims made before courts.<sup>25</sup> Social movement activists, regulators, legislators, and other actors articulate ideas about the Fourteenth Amendment that influence what the courts say and do.<sup>26</sup> It is hard to teach about popular constitutionalism when students fail to grasp the differences between legal doctrine and political ideas.

I use several techniques to help students see the difference between familiar political arguments and potentially unfamiliar Fourteenth Amendment doctrinal approaches. First, in giving students historical background on the subjects we discuss, I explicitly discuss political conflicts about the Fourteenth Amendment. This discussion helps students to see the evolution of independent but intertwined debates about the Fourteenth Amendment in politics. These conversations also help students to feel that their political convictions are not being dismissed.

I also take opportunities to incorporate popular constitutionalism into our discussion of case law. When we discuss the Equal Protection Clause, we also

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20. 347 U.S. 483 (1954).

21. *See, e.g.*, Moore v. City of East Cleveland, 431 U.S. 494, 495–96 (1977).

22. *See, e.g.*, Zablocki v. Redhail, 434 U.S. 374, 375–77 (1978).

23. *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469, 477–78 (1989).

24. *See, e.g.*, Risa Goluboff, *Lawyers, Law, and the New Civil Rights History*, 126 HARV. L. REV. 2312, 2319–24 (2012).

25. *See, e.g.*, RISA L. GOLUBOFF, *THE LOST PROMISE OF CIVIL RIGHTS* (2007); GEORGE I. LOVELL, *THIS IS NOT CIVIL RIGHTS* (2012).

26. *See, e.g.*, TOMIKO BROWN-NAGIN, *COURAGE TO DISSENT: ATLANTA AND THE LONG HISTORY OF THE CIVIL RIGHTS MOVEMENT* 213–15 (2011); SOPHIA Z. LEE, *THE WORKPLACE CONSTITUTION FROM THE NEW DEAL TO THE NEW RIGHT* 2–5 (2014); Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191, 191–215 (2008).

talk about Title VII of the Civil Rights Act, exploring the relationship between the two and the elaboration of constitutional law outside the courts.<sup>27</sup> We talk about popular reinterpretations of *Roe*.<sup>28</sup> When we study *Casey*, we spend time on the Justices' views of both popular abortion politics and their influence on abortion doctrine.<sup>29</sup> 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 the constitutionality of President Trump's travel ban.<sup>30</sup> After reading *Casey*, we analyzed the constitutionality of laws banning abortion after twenty weeks<sup>31</sup> or requiring women to receive information about the possibility of reversing the effects of medical abortion.<sup>32</sup> When students see how Fourteenth Amendment doctrine can apply to subjects they see in the news, they have more reason to tease out the differences between law and politics.

When possible, I also tell the stories of specific litigants in Fourteenth Amendment cases. These individual narratives remind students that we are studying specific cases and controversies, not abstract political fights. These stories remind students of the real-world consequences faced by plaintiffs like Jim Obergefell<sup>33</sup> or Abigail Fisher.<sup>34</sup> Additionally, these narratives remind

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27. See, e.g., WILLIAM N. ESKRIDGE JR. & JOHN FERREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* 32–74 (2010).

28. See ZIEGLER, *supra* note 14, at 159–86.

29. On the popular constitutionalism evident in the *Casey* decision, see Siegel & Post, *supra* note 6, at 426–29.

30. For analysis of the travel ban, see *Int'l Refugees Ass'n v. Trump*, 241 F. Supp. 3d 539 (D. Md. 2017); *Aziz v. Trump*, 234 F. Supp. 3d 724 (E.D. Va. 2017).

31. For an overview of these laws, see *State Policies on Later Abortions*, GUTTMACHER INST. (Jan. 1, 2018), <https://www.guttmacher.org/state-policy/explore/state-policies-later-abortions> [https://perma.cc/WCZ3-ETFD].

32. See, e.g., Americans United for Life, *Abortion Pill Reversal Information Act*, MODEL LEGISLATION & POLICY GUIDE, Fall 2016, at 3, [http://aul.org/downloads/2016-Legislative-Guides/WPP/Abortion\\_Pill\\_Reversal\\_Information\\_Act\\_-\\_LG\\_2016.pdf](http://aul.org/downloads/2016-Legislative-Guides/WPP/Abortion_Pill_Reversal_Information_Act_-_LG_2016.pdf) [https://perma.cc/973D-VYUY].

33. See, e.g., Steven Petrow, *Jim Obergefell: The 'Accidental Activist' One Year Later*, WASH. POST (June 9, 2016), [https://www.washingtonpost.com/lifestyle/style/jim-obergefell-the-accidental-activist-one-year-later/2016/06/09/59d20992-2daa-11e6-9b37-42985f6a265c\\_story.html?utm\\_term=.5fe8a6d3f4ce](https://www.washingtonpost.com/lifestyle/style/jim-obergefell-the-accidental-activist-one-year-later/2016/06/09/59d20992-2daa-11e6-9b37-42985f6a265c_story.html?utm_term=.5fe8a6d3f4ce); Michael S. Rosenwald, *How Jim Obergefell Became the Face of the Supreme Court Gay Marriage Case*, WASH. POST (Apr. 6, 2015), [https://www.washingtonpost.com/local/how-jim-obergefell-became-the-face-of-the-supreme-court-gay-marriage-case/2015/04/06/3740433c-d958-11e4-b3f2-607bd612aeac\\_story.html?utm\\_term=.a77924bd4778](https://www.washingtonpost.com/local/how-jim-obergefell-became-the-face-of-the-supreme-court-gay-marriage-case/2015/04/06/3740433c-d958-11e4-b3f2-607bd612aeac_story.html?utm_term=.a77924bd4778) [https://perma.cc/4WQJ-PUDV].

34. See, e.g., Mollie Reilly, *5 Things to Know about the Woman Whose Case Could End Affirmative Action as We Know It*, HUFFINGTON POST (Dec. 16, 2015, 4:46 PM), [http://www.huffingtonpost.com/entry/abigail-fisher-5-things-to-know\\_us\\_56719717e4b0dfd4bcc026a4](http://www.huffingtonpost.com/entry/abigail-fisher-5-things-to-know_us_56719717e4b0dfd4bcc026a4) [https://perma.cc/8WX8-MGR2].

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-day struggle.<sup>35</sup> Many of my classes have roughly equal numbers of men and women, reinforcing students' views that we have largely eliminated discrimination on the basis of sex.<sup>36</sup> Students may have the sense that the Fourteenth Amendment targets types of discrimination that occurred in the past and are no longer a concern.

An obliviousness to history can make Fourteenth Amendment doctrine seem far more resistant to change than is really the case. Students will often ask if they "have to know" cases that no longer have precedential weight, like *Plessy v. Ferguson*,<sup>37</sup> *Lochner v. New York*,<sup>38</sup> or even *Roe*. Some assume that these decisions were obviously wrong at the time they were decided. Others conclude that a decision is irrelevant if the Court has overruled it in whole or in part. Dismissing this history makes it harder for students to see the ways in which lawyers and activists challenge and dislodge established precedent.

Understanding the contingency of Fourteenth Amendment doctrine is important because so much of what I teach is still changing. In family law and constitutional law, for example, we discuss the rules governing assisted reproduction. To say that this area of Fourteenth Amendment doctrine is up in the air would be an understatement. Courts disagree about what body of law should apply to assisted reproduction cases and about how to apply it. Some judges apply a relatively familiar framework, like Fourteenth Amendment doctrine governing abortion or parental rights.<sup>39</sup> Other courts take assisted

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35. See, e.g., Angela Onwuachi-Willig, *Teaching Employment Discrimination*, 54 ST. LOUIS U. L.J. 755, 755–56 (2010).

36. See, e.g., *id.* at 757.

37. 163 U.S. 537 (1896).

38. 198 U.S. 45 (1905).

39. See, e.g., *DMT v. TMH*, 129 So. 3d 320 (Fla. 2013); *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992); *L.F. v. Breit*, 736 S.E.2d 711 (Va. 2013).

reproduction as an opportunity to ditch much-criticized doctrinal approaches and try something new.<sup>40</sup>

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 possibilities can also open students' eyes to interpretations of the Fourteenth Amendment that differ considerably from the ones in the casebook.

Finally, students' lack of awareness about history can send an inaccurate message about where Fourteenth Amendment law is made. Casebooks often emphasize the decisions of the U.S. Supreme Court, and with some reason. But Fourteenth Amendment doctrine is shaped in many other places. The Supreme Court hears only a small fraction of the cases decided on Fourteenth Amendment issues,<sup>41</sup> and for an extended time, crucial matters will be decided only by lower courts.

Furthermore, the Court pays at least some attention to others' ideas about the Fourteenth Amendment. Sometimes, this is obvious. When Justice Anthony Kennedy describes evolving ideas about the Fourteenth Amendment, for example, he looks to state laws, local ordinances, and lower court decisions.<sup>42</sup> Originalist Justices, like the late Justice Antonin Scalia, look beyond Supreme

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40. See, e.g., *In re Marriage of Witten*, 672 N.W.2d 768 (Iowa 2003); *Kass v. Kass*, 696 N.E.2d 174 (N.Y. 1998).

41. See, e.g., Adam Liptak, *The Case of the Plummeting Supreme Court Docket*, N.Y. TIMES (Sept. 28, 2009), <http://www.nytimes.com/2009/09/29/us/29bar.html>.

42. For discussion of Kennedy's attention to state norms and evolving standards, see Lisa K. Parshall, *Embracing the Living Constitution: Justice Anthony M. Kennedy's Move Away from a Conservative Methodology of Constitutional Interpretation*, 30 N.C. CENT. L. REV. 25, 47, 55 (2007).

Court opinions for evidence of the founders' intent.<sup>43</sup> 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*?<sup>44</sup> 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?<sup>45</sup> Is the problem with *Roe v. Wade* Justice Harry Blackmun's reading to the popular or medical history of abortion?<sup>46</sup>

By asking these questions, I help students get a better sense of how we got where we are today when it comes to the Fourteenth Amendment. Some of my best professors taught me the same thing. When I was in law school learning about the Fourteenth Amendment, I ran into *Buck v. Bell*<sup>47</sup> for the first time. *Buck* involved a compulsory sterilization law then on the books in Virginia.<sup>48</sup> Virginia wanted to sterilize Carrie Buck because state officials believed that she was "feeble-minded" and "promiscuous."<sup>49</sup> The basis for this ruling was

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43. On Scalia's approach to originalism, see ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1997).

44. 561 U.S. 742, 767–78 (2010).

45. 83 U.S. 36, 74–80 (1873).

46. 410 U.S. 113, 130–48 (1973).

47. 274 U.S. 200 (1927).

48. *Id.* at 205–06.

49. PAUL LOMBARDO, *THREE GENERATIONS, NO IMBECILES: EUGENICS, THE SUPREME COURT, AND BUCK V. BELL* 127 (2008).

Carrie's illegitimate child.<sup>50</sup> Buck argued, among other things, that the law violated the Equal Protection Clause because it ordered the compulsory sterilization only for the inmates of certain state institutions.<sup>51</sup>

The story got more depressing from there. Only one Justice dissented from Justice Oliver Wendell Holmes' decision rejecting Carrie Buck's claim.<sup>52</sup> It is horrific to justify sterilization because of a woman's sexual history or disability, but Carrie Buck did not even resemble the description offered by the State of Virginia. Contemporaneous records have established that Carrie Buck did not have a low IQ.<sup>53</sup> Nor was she promiscuous; her pregnancy resulted from rape.<sup>54</sup>

My professor used history to bring Carrie Buck to life. He told us about the eugenic legal reform movement. We heard about compulsory sterilization laws and rules about who could marry. I was shocked that I had never heard of eugenic laws before. All of the things the professor discussed seemed so bizarre and awful, and yet all of them happened so recently.

Constitutional case law on eugenics also made me less certain that I understood either the law or politics of reproduction. I found myself thinking about the relationship between the right to procreate and the right to avoid procreation, about the role of control in reproduction, and much more.

I want my students to have similar experiences. I hope they can see how disturbingly or delightfully different the law of the Fourteenth Amendment has been and could be in the future. I hope they remember how real people are affected by our ideas about the Fourteenth Amendment all the time. If done correctly, incorporating history into the teaching of the Fourteenth Amendment allows me to do what T.S. Elliott described—to bring the class back to the place where we started and know it for the first time.<sup>55</sup>

#### CONCLUSION

Teaching the Fourteenth Amendment is one of the most fulfilling experiences that I have as a professor. Although teaching a divisive subject can be stressful, it can also be moving, thought-provoking, and fun. It is thought-provoking when students offer me and each other ideas about the Constitution that we would never have encountered otherwise. It is fun to see students become committed to weaving the Fourteenth Amendment into the careers that they will pursue when law school is done. It is more than fun to see students encounter the possibilities and alien conclusions of constitutional doctrine in this area. And it is moving to see how much students can change their minds when they really

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50. *Id.* at 134–37.

51. *Buck*, 274 U.S. at 205, 207–08.

52. *Id.* at 208 (Butler, J., dissenting).

53. *See* LOMBARDO, *supra* note 49, at 139.

54. *Id.* at 139–40.

55. T.S. ELLIOTT, *FOUR QUARTETS* 49–55 (1971).

understand another's points of view. These are the reasons that teaching the Fourteenth Amendment makes me a better scholar and a better teacher—the same reasons why I would not give up teaching the subject for anything in the world.