Where Constitutional History and Civil Rights History Intersect

By Charles DeCicco '67

Harvard Law School Professor Kenneth W. Mack, who delivered the Skadden, Arps Lecture on Constitutional Law, is an authority on American legal and constitutional history and one of the leading scholars in the civil rights field. A classmate of President Barack Obama at Harvard Law School and a former Executive Editor of *The Harvard Law Review*, his talk was entitled "A Constitutional History for the Age of Obama." It focused on constitutional history as it intersects with civil rights history. Dr. Mack spoke in the Amsterdam Room of the North Academic Center.

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Dr. Mack focused on two constitutional questions that have recently become part of a public debate: Title II of the 1964 Civil Rights Act, which outlawed discrimination in public accommodations, and which Rand Paul, the recently elected Republican Senator from Kentucky, said he might not have voted for on constitutional grounds (although Mr. Paul later backtracked and stated that he would have voted for the Civil Rights Act of 1964); and the announcement by a group of Republican politicians in August 2010 that they are opposed to granting citizenship status to American born children of illegal immigrants.

The second issue involves what Dr. Mack called "the Magna Carta" of Civil Rights law, the 14th Amendment, which, in addition to guaranteeing equal protection "has been thought to also guarantee birthright citizenship."

Professor Mack maintained that we have entered a period of "large and raucous debate" about constitutional history and the history of the civil rights movement "mostly in response to Barack Obama's election." Perhaps because the President is African-American and possesses family connections to three different continents, said Dr. Mack, he seems to provoke intense reactions, both positive and negative.

Rand Paul's original position is a simple application of the libertarian view of property rights: each individual has the liberty to use her property as she pleases so long as no harm comes to others, Professor Mack said. How would a constitutional historian react to this position? "The short answer," he said, "is that Rand Paul had a point. At the time it was enacted, Title II was perhaps the most controversial part of the Civil Rights Act of 1964 in terms of its constitutionality."

Title II, he noted, was a direct response to the sit-in movement that began in Greensboro, North Carolina in February 1960, when a group of black college students went to a local lunch counter and refused to leave when they were denied service. The movement spread quickly and became a matter of national debate. In defending their actions, the owners of public accommodations did not invoke segregation statutes, they invoked trespass law. "Just as I have the power to eject any person who comes on my property without my consent," they maintained, "I have the same power to eject people based on their race." State laws outlawing discrimination in public accommodations were quite controversial at the time, Dr. Mack said, even in the North. For example, when Martin Luther King, Jr. was a student at a theological seminary in Delaware in the 1950s he crossed over to New Jersey to go to a restaurant and was denied service on the basis of his race.

The basic libertarian claim, therefore, was that the private property owner's liberty cannot be constrained unless he or she is harming others. But the sit-in protestors' contention was that to deny them service on the basis of race was causing harm by denying them access to services and resources that other Americans could depend on as a matter of course. The U.S. Supreme Court eventually sided with that position and upheld the constitutionality of the public accommodations section of the Civil Rights Act of 1964.

The second recent controversy concerns the movement to deny birthright citizenship to American born children of illegal

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Harvard Law School Professor Kenneth W. Mack and CCNY's Joseph H. Flom Professor Lynda Dodd.

immigrants. Its proponents have two basic claims, said Professor Mack: first, that members of Congress who framed the 14th Amendment, and Americans who participated in its ratification, simply wanted to overturn the Dred Scott decision that maintained that African-Americans could not be U.S. citizens. And, second, that 19th Century Americans simply didn't understand that illegal immigration existed, which means the original understanding of the 14th Amendment doesn't cover illegal immigrants.

Dr. Mack noted that Section I of the 14th Amendment says: "All persons born or naturalized in the United States and subject to the jurisdictions thereof are citizens of the United States and of the state where they reside." The key question, he said, is how to interpret the words "subject to the jurisdiction thereof." To answer that question Professor Mack focused on how 19th Century Americans would have interpreted those words. He noted that in the aftermath of the Union's victory in the Civil War, Congress enacted the Civil Rights Act of 1866 which, among other things, overturned Dred Scott and contained a definition of birthright citizenship similar to that in the 14th Amendment, which was adopted in 1868. He said the Constitution does not supply a definition of what it means to be a natural born citizen because "the drafters assumed that everybody knew what it meant." That is because the common law of England, as described in William Blackstone's treatise *Commentaries on the Law of England*, published on the eve of the American Revolution, essentially became the common law of the U.S. "If you wanted to become a lawyer in the U.S. you read Blackstone," said Professor Mack. This included Abraham Lincoln and many members of Congress who drafted and passed the 14th Amendment. On the subject of natural born citizens, Blackstone says: "Natural born subjects are such as are born within the dominions of the crown of England." Blackstone adds: "The children of aliens born here in England are generally natural born citizens."

"Those are the basic American rules that are very familiar to us today," said Dr. Mack, "and they would have been just as familiar to people in the 19th Century."

As to the second claim, that 19th Century Americans did not understand illegal immigration, Dr. Mack noted that many immigrants arrived illegally at that time. And there was enormous controversy about illegal Chinese immigration that sparked race riots. In the 30 years after the 14th Amendment was ratified, he noted, illegal immigration was an issue that drove national policy. Politicians "acted over and over again to do something about it." Indeed, attempts were made to restrict Chinese immigration almost immediately after the ratification of the 14th Amendment, but illegal immigration continued virtually unabated. Then, in 1882, Congress enacted the Chinese Exclusion Act which prohibited Chinese from immigrating to America for 10 years. When that did not work, he said, Congress finally made Chinese exclusion permanent in 1902. Nevertheless, said Dr. Mack, nothing was done to change the birthright citizenship rule that made the children of illegal Chinese immigrants American citizens. This history demonstrates that 19th Century Americans understood that illegal immigration existed, he said, because they took many steps to try to eliminate it. But in taking these many actions Congress left birthright citizenship untouched as the "default rule that covers American citizenship." That refutes the second claim of those who would eliminate birthright citizenship for children of illegal immigrants, he maintained.

Dr. Mack concluded his presentation with words of caution for those who would revise our rules concerning birthright citizenship: "The caution," he said, "should be lodged in the idea that we should protect those settled understandings because of our 100 years of reliance on them." ■

Skadden Scholars, left to right, Shereece Blake, Felix Navarro and Jeremy Wilson.