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THE SUPREME COURT AND THE FOURTEENTH AMENDMENT: THE UNFULFILLED PROMISE

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I. INTRODUCTION

Conventional wisdom maintains that the Fourteenth Amendment has been a major success. After all, the Equal Protection Clause was the basis for the constitutional revolution that ended racial segregation and began the movements for equal rights for African Americans and women. Application of the Bill of Rights to the states—undoubtedly one of the most important constitutional changes—occurred through judicial interpretation of the Due Process Clause. Fundamental freedoms, such as the rights to marry, procreate, purchase and use contraceptives, obtain abortions and raise children, are protected as part of the liberty safeguarded by the Due Process Clause.

Although each of these developments warrants applause, focusing solely on these successes paints a misleading picture of the Fourteenth Amendment's history. This Essay contends that since its first interpretations of the amendment, the United States Supreme Court consistently has made tragic mistakes. Over and over again the Court has adopted positions that are undesirable as a matter of constitutional interpretation and social policy.

Section 1 of the Fourteenth Amendment is written in direct and majestic language as a constitutional provision should be. The first sentence was designed to overrule the infamous *Dred Scott* decision[1] by establishing that former slaves are citizens of the United States and the states where they reside.[2] The second sentence—perhaps the single most important sentence found anywhere in the Constitution—states:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor

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1. Scott v. Sandford, 60 U.S. (19 How.) 393 (1857) (declaring Missouri Compromise unconstitutional and holding in part that slaves are property, not citizens).

2. The first sentence of Section 1 states: "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." U.S. CONST. amend. XIV, § 1.

> shall any State 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.[3]

This Essay's thesis is that the promise of these words has gone largely unfulfilled. Through judicial interpretation, the Court has rendered the Privileges or Immunities Clause a nullity. The Due Process Clause often has failed to provide procedural protection against arbitrary government action. Initially, this clause was limited because the Court said that due process was required only when a right, rather than a privilege, was deprived. More recently, the scope of procedural due process has been greatly diminished by the embracing of positivism. Under this view, individuals have liberty and property interests only when the government grants them and are entitled to only the due process that the government chooses to provide. The use of the Due Process Clause to protect substantive rights appears forever limited because it has been tarred with the negative implications of the *Lochner* era. The Equal Protection Clause was almost totally unused for the first four score of the amendment's history. Since then it has been terribly restricted by analysis based on rigid levels of scrutiny that provide no meaningful protection outside of discrimination based on a few suspect classifications.

Viewed in this way, the Fourteenth Amendment's notable successes pale in comparison to the promise it originally offered. Indeed, the amendment's marred record raises questions about the ability of constitutionalism and judicial review to succeed. The first part of this Essay describes six tragic errors that the Supreme Court has made in interpreting the Fourteenth Amendment. The second part looks to the future in light of this history. After 114 years of judicial destruction, and in view of the ideological composition of the current Court, is there any reason to be hopeful for the future of the Fourteenth Amendment?

II. THE PAST

The vantage point of the present allows a view of the paths not taken in the past. Hindsight reveals six major mistakes that the Supreme Court has made in interpreting the Fourteenth Amendment. Constitutional law, and in fact all of American history, would be quite different if the Supreme Court had not made these rulings.

The mistakes described below are familiar to students of constitutional law. Some of these would be regarded unanimously as grievous constitutional errors. The reason for recounting them is to gain insight

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3. *Id.* § 2.

by focusing on them together. This Essay suggests that when viewed cumulatively these errors show both the untapped potential of the Fourteenth Amendment as well as the grounds for doubting whether the Court will ever use the Fourteenth Amendment as a vehicle for protecting the privileges or immunities of citizenship, guaranteeing due process of law or assuring equal protection of the law.

A. The Burial of the Privileges or Immunities Clause

After the Civil War and the passage of the Thirteenth Amendment's prohibition of slavery, African Americans were persecuted and oppressed in the South. The Fourteenth Amendment was adopted, in large part, to limit state power by imposing on state governments constitutional obligations to protect the privileges and immunities of their citizens, to provide due process and to assure equal protection.[4] The original Constitution, which served almost exclusively to create a national government and limit its powers, was expressly changed to restrict state governments.

Although claims about framers' intent are always suspect, strong reasons support the belief that the Privileges or Immunities Clause was meant to protect basic rights from state infringement. The words "privileges" and "immunities" were already a part of the Constitution in Article IV, Section 2, which prevents a state from denying citizens of other states the privileges and immunities it accords its own citizens. More than forty years before the adoption of the Fourteenth Amendment, Justice Washington stated that the Privileges and Immunities Clause in Article IV protected rights "which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments."[5]

During the congressional debate over the Fourteenth Amendment, representatives and senators said that the Fourteenth Amendment Privileges or Immunities Clause was meant to protect basic rights from state interference. Senator Howard, for example, quoted Justice Washington's earlier statement as to the meaning of privileges and immunities and declared: "Such is the character of the privileges and immunities spoken of in the second section of the fourth article of the Constitution. To these privileges and immunities . . . should be added the rights guarantied and secured by the first eight amendments of the Constitution."[6]

4. *See* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877, at 256-57 (1988).

5. Corfield v. Coryell, 6 Fed. Cas. 546, 551 (C.C.E.D. Pa. 1823) (No. 3230).

6. CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866).

While commentators dispute whether two-thirds of Congress and three-quarters of the states shared this view,[7] undoubtedly the very text of the Privileges or Immunities Clause expresses a desire to protect *some* rights from state interference. Nevertheless, in the first case interpreting the clause, the Supreme Court construed it so narrowly that the Court effectively read the provision out of the Constitution.[8] Indeed, never in the entire history of the Fourteenth Amendment has a majority of the Supreme Court used the Privileges or Immunities Clause as a basis for declaring a government action unconstitutional.[9]

In the *Slaughter-House Cases*,[10] decided in 1873, the Supreme Court held that the Fourteenth Amendment Privileges or Immunities Clause was not meant to change the relationship between the federal and state governments or protect rights from state interference.[11] By rejecting a challenge brought by New Orleans butchers to a grant of an exclusive monopoly to one slaughterhouse, the Court broadly rejected the view that the clause "was intended as protection to a citizen of a State against the legislative power of his own State."[12]

Thus the Court made its first tragic mistake in interpreting the Fourteenth Amendment in its initial decision construing this provision. Such a broad opinion was completely unnecessary: the Court easily could have ruled that the practice of a trade, such as butchering, is not a "privilege or immunity" and refrained from deciding the larger question of the overall meaning of the Privileges or Immunities Clause. By overreaching, the Court denied the Fourteenth Amendment's main purpose, which is to limit state power, and read a clause out of the Constitution.

What difference would it have made if the Privileges or Immunities Clause had remained an available part of the Constitution? At a minimum, the Court could have used the Privileges or Immunities Clause to protect fundamental rights, thereby making the concept of substantive

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7. For example, Raoul Berger argues against this interpretation of the Privileges or Immunities Clause. *See* RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 20-36 (1977). For a powerful criticism of Berger's historical account, see 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 334 n.21 (1991).

8. Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873).

9. The closest the Court came to a majority opinion was in Edwards v. California, 314 U.S. 160 (1941), where four Justices used the Privileges or Immunities Clause to invalidate a California law limiting migration of indigent persons into the state. *Id.* at 177.

10. 83 U.S. (16 Wall.) 36 (1873).

11. *Id.* at 78. For an excellent criticism of the *Slaughter-House* decision, see Michael J. Gerhardt, *The Ripple Effects of* Slaughterhouse: *A Critique of a Negative Rights View of the Constitution*, 43 VAND. L. REV. 409 (1990).

12. *Slaughter-House Cases*, 83 U.S. at 74.

due process unnecessary. Perhaps the Court would have been more comfortable and therefore more likely to protect unenumerated rights under the language of the Privileges or Immunities Clause, as opposed to the more difficult analytical process of justifying implied rights under the Due Process Clause. Indeed, many, including some conservatives, have suggested resurrecting the Privileges or Immunities Clause as a basis for protecting basic liberties in the future.[13]

B. The Requirement of State Action

The Supreme Court made its second major error when it strictly limited the Fourteenth Amendment to government action. In the *Civil Rights Cases*,[14] decided in 1883, the Court declared unconstitutional the Civil Rights Act of 1875, which prohibited private racially motivated interference with the use of "the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, [and] theatres."[15] The Court ruled that Congress, acting under Section 5 of the Fourteenth Amendment, was limited to controlling government action and that the entire amendment applied only to government conduct.[16]

This conclusion was not commanded by the text nor the intent behind the Fourteenth Amendment. Section 5 broadly authorizes Congress to adopt legislation to implement the amendment. The language of Section 1 prohibits a "state" from denying equal protection or depriving life, liberty or property without due process. However, states might deny equality or deprive rights by inaction in the face of private wrongs.[17] A state government that tolerated private racial discrimination easily could be deemed to deny equal protection to African Americans. In fact, a state that used its police and its trespass laws to enforce private discrimination easily could be found to have acted within the language of the Fourteenth Amendment. More generally, all private violations of liberties occur because the state has chosen to tolerate and not forbid them.

Private power certainly can interfere with fundamental values such as freedom of speech or equality every bit as much as government action. Yet, the *Civil Rights Cases* narrowly construed the power of both Congress and the judiciary to use the Fourteenth Amendment to remedy pri-

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13. *See* Philip B. Kurland, *The Privileges or Immunities Clause: "Its Hour Come Round At Last?"*, 1972 WASH. U. L.Q. 405, 418-20; Clarence Thomas, *The Higher Law Background of the Privileges or Immunities Clause*, 12 HARV. J.L. & PUB. POL'Y 63, 68 (1989).

14. 109 U.S. 3 (1883).

15. *Id.* at 9-10.

16. *Id.* at 13.

17. For a development of this argument and a criticism of the state action doctrine, see Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503 (1985).

vate wrongs. Although some judicial decisions have attempted to broaden the definition of state action and the scope of constitutional protections,[18] the legacy of the *Civil Rights Cases* has remained firm: the Constitution applies almost exclusively to government actions.[19] The promise and potential of the Fourteenth Amendment as a tool for social justice and equality is thus greatly limited.

The Court need not have been limited to a choice between a rigid requirement for state action in all Fourteenth Amendment cases or a complete application of the Constitution to private conduct. Rather, the Court could have embarked on a more careful analysis by examining the types of state involvement with private action and state tolerance of private wrongs that would justify a conclusion of state action. But the *Civil Rights Cases* largely foreclosed this analysis by articulating a blanket rule that the Fourteenth Amendment applies only to government actions.

C. *Separate But Equal*

The Supreme Court's holding in *Plessy v. Ferguson*,[20] that laws separating the races are constitutional, may be the greatest tragedy in its interpretation of the Fourteenth Amendment. The Court upheld a Louisiana law requiring segregation of the races on railroad cars, declaring that separate-but-equal accommodations are permissible.[21] The ruling in *Plessy* legitimized Jim Crow laws, which segregated virtually every aspect of Southern life. In reality, of course, facilities were separate, but definitely not equal. Schools for black children, for example, were not equal by any measure to those attended by white children. The cost of *Plessy* in untapped human potential is incalculable.

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18. *See, e.g.*, Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968) (extending First Amendment protections to corridors of private shopping malls), *overruled by* Hudgens v. NLRB, 424 U.S. 507 (1976); Evans v. Newton, 382 U.S. 296 (1966) (refusing to allow testator to racially restrict access to land donated for public park); Terry v. Adams, 345 U.S. 461 (1953) (prohibiting political parties from excluding racial minorities from voting in primary elections); Shelley v. Kraemer, 334 U.S. 1 (1948) (refusing to enforce racially restrictive private real estate covenants); Marsh v. Alabama, 326 U.S. 501 (1946) (forbidding private company town from restricting speech on streets and sidewalks).

19. More restrictive recent decisions include NCAA v. Tarkanian, 488 U.S. 179 (1988) (concluding that actions by NCAA are not state action); Blum v. Yaretsky, 457 U.S. 991 (1982) (finding no state action when private hospital transfers patients in part because of federal regulations); Rendell-Baker v. Kohn, 457 U.S. 830 (1982) (declaring no state action when private school receiving at least 90% of operating funds from government fires teacher because of her speech); Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974) (finding no state action where private utility terminates service).

20. 163 U.S. 537 (1896), *overruled by* Brown v. Board of Educ., 347 U.S. 483 (1954).

21. *Id.* at 540, 548.

Nor have the effects of government-mandated segregation been eliminated in the years since *Brown v. Board of Education*.[22] Segregated schools remain in most American cities, and overall much less is spent on the average black child's education than on the average white child's schooling.[23] More than a half-century of apartheid in this country—and apartheid is what it was—left a legacy that will take decades to erase.

The Court in *Plessy* dismissed the reality that segregation conveys a powerful and harmful message of racial inferiority. Amazingly, the Court stated that if African Americans felt stigmatized by laws requiring segregation, "it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it."[24]

Imagine how different America would be today if *Plessy* had been decided differently and the Supreme Court had enforced the Equal Protection Clause throughout the twentieth century and not just in its latter half. Undoubtedly, racist attitudes would have made the Court's task difficult. Yet, the institutionalization of segregation and its entrenchment in the half century after *Plessy* surely compounded the difficulties associated with desegregation and contributed to the racial problems our society continues to face.

D. The Due Process Clause

Section 1 of the Fourteenth Amendment has three substantive clauses: the Privileges or Immunities Clause, the Equal Protection Clause and the Due Process Clause.[25] Thus far, this Essay has suggested that the Supreme Court's interpretation gutted the Privileges or Immunities Clause throughout American history and crippled the Equal Protection Clause until at least the mid-1950s. This section focuses on the Due Process Clause.

The Due Process Clause has two different uses, termed respectively "substantive" and "procedural" due process. Substantive due process focuses on whether the government has an adequate justification—a sufficient substantive reason—for infringing upon a right that the Court has deemed protected under the Due Process Clause. Procedural due process centers on whether the government has followed adequate procedures in taking away a person's life, liberty or property. The first subsection argues that the Court erred in its use of substantive due pro-

22. 347 U.S. 483 (1954).

23. *Cf.* JONATHAN KOZOL, SAVAGE INEQUALITIES (1991).

24. *Plessy*, 163 U.S. at 551.

25. U.S. CONST. amend. XIV, § 1.

cess to protect economic liberties. The second subsection examines judicial mistakes concerning procedural due process.

1. Substantive economic due process

From the late nineteenth century until 1937, the Supreme Court used the Fourteenth Amendment Due Process Clause to greatly limit the ability of the government to protect workers and consumers. During a period of constitutional history known as "the *Lochner* era," the Supreme Court declared that the term "liberty" in the Due Process Clause protected freedom of contract as a fundamental right.[26] State laws infringing freedom of contract, such as minimum wage and maximum hour laws for workers, were invalidated as interfering with freedom of contract. During this time more than two hundred laws were declared unconstitutional on the grounds of economic substantive due process.[27]

This series of Supreme Court decisions has been thoroughly discredited and repudiated in subsequent cases as well as by commentators on both the left and the right.[28] Freedom of contract, as the Court protected it, never existed. The market limits freedom of contract as much as, if not more than, any government regulation. Bakers, for example, hardly had the ability to bargain to limit their work day to ten hours. The Court's decisions did not protect neutral rights as the judiciary assumed, but rather represented political choices to favor some classes over others. The economic harshness of the depression made judicial change imperative and inevitable.[29]

The Court's interpretation of the Due Process Clause during the *Lochner* era was a mistake with many adverse consequences. In human terms, countless people were hurt—many were maimed or died—because for decades the government was denied the ability to adopt protective laws.

Moreover, the total discrediting of Lochnerism caused the Court to disavow any judicial review of economic regulations and legislation. For

26. The phrase "*Lochner* era" is based on the paradigm case of Lochner v. New York, 198 U.S. 45 (1905), in which the Supreme Court declared unconstitutional a law imposing maximum hours for bakers. *Id.* at 64.

27. GERALD GUNTHER, CONSTITUTIONAL LAW 444-45 (12th ed. 1991).

28. *See, e.g.*, Ferguson v. Skrupa, 372 U.S. 726, 729-31 (1963) (citing post-*Lochner* decisions that repudiate liberty of contract argument); Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 423 (1952) (noting that *Lochner* doctrine was discarded). For a summary of the criticisms of Lochnerism, see LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 574-81 (2d ed. 1988).

29. For an excellent recent account of this change and its importance in constitutional history, see 1 ACKERMAN, *supra* note 7, at 105-30.

example, because of the overreaction to Lochnerism there has been no judicial protection of a right to practice a trade or regulation. Even irrational protectionist laws have been upheld regularly. For instance, in *Williamson v. Lee Optical Co.*,[30] the Court upheld an Oklahoma law restricting the ability of optometrists to make eyeglasses which served no purpose other than to increase business for opticians and opthamologists.[31] Another illustration is *New Orleans v. Dukes*,[32] where the Court allowed a limitation on pushcart food vending to those vendors who had operated for eight years.[33] In each instance, and many others, the Court proclaimed it was following post-*Lochner* deference to the legislature in economic matters. Thus, the error of Lochnerism triggered a complete judicial abdication.

In addition, the negative connotations of Lochnerism greatly limited the use of substantive due process to protect non-economic rights. As recently as 1965 in *Griswold v. Connecticut*,[34] the Court refused to use the Due Process Clause to safeguard the right to privacy because of its association with the discredited approach of the *Lochner* era.[35] Writing for the majority, Justice William Douglas expressly rejected substantive due process, choosing instead to find privacy in the "penumbra" of the Bill of Rights.[36] Furthermore, when the Court has used substantive due process to protect basic rights, it has been criticized for using the same approach followed during the *Lochner* era.[37]

Simply put, because of the negative connotations of Lochnerism the Court probably has refrained from using substantive due process to protect rights. In light of the earlier burial of the Privileges or Immunities Clause, the tarring of substantive due process further limits the Court's ability to safeguard fundamental liberties.

2. Procedural due process

The simplest, and perhaps most elegant, way of understanding the Fourteenth Amendment is to view the Privileges or Immunities Clause as protecting rights from government interference, the Equal Protection Clause as assuring equal treatment, and the Due Process Clause as pre-

30. 348 U.S. 483 (1955).
31. *Id.* at 487.
32. 427 U.S. 297 (1976).
33. *Id.* at 305.
34. 381 U.S. 479 (1965).
35. *Id.* at 481-82.
36. *Id.* at 485-86.
37. *See, e.g.*, John H. Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 937-43 (1973).

scribing the procedures that government must follow when it takes away life, liberty or property. At a minimum, the Due Process Clause seems to define how government must act when it deprives people of their rights. Yet because of restrictive Supreme Court interpretations, procedural due process has been greatly limited throughout most of the Fourteenth Amendment's history.

Initially, the Court restricted procedural due process by making a distinction between rights and privileges. Under this interpretation, the Constitution required government to provide due process only when a right was denied, not when a privilege was removed.[38] For example, due process was not required when an individual was fired from a government job or welfare benefits were taken away because the Court regarded employment and welfare as privileges rather than rights.[39]

In *Goldberg v. Kelly*[40] the Supreme Court appeared to reject the rights-privileges distinction and to expand the government's obligation to provide due process.[41] The Court wisely recognized that people depend on what previously had been termed "privileges" and in order to limit arbitrary government power, an expansion in the application of the Due Process Clause was required.[42]

Yet, the promise of greatly expanded procedural due process was almost immediately limited by the Court's retreat to positivism. For example, the Court has held that the existence of liberty and property interests under the Due Process Clause are both based almost entirely on the rights and expectations created by government laws. In *Paul v. Davis*,[43] for instance, the Supreme Court held that reputation, by itself, was not a liberty or property interest because state law did not create such a right.[44] Similarly in *Board of Regents v. Roth*,[45] the Court held that property interests under the Due Process Clause are created by the posi-

38. Lynch v. United States, 292 U.S. 571, 577 (1934) (holding that right to sue government is privilege that can be withdrawn at will); *see also* Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1717-18 (1975) (examining extension of due process rights to protect advantageous relations with government); TRIBE, *supra* note 28, at 680-81 (summarizing development of procedural due process doctrine).

39. *See* Bailey v. Richardson, 182 F.2d 46, 63 (D.C. Cir. 1950), *aff'd*, 341 U.S. 918 (1951) (holding that government employment is privilege that can be withdrawn at will); TRIBE, *supra* note 28, at 681 (explaining distinction between "rights" and "privileges").

40. 397 U.S. 254 (1970) (due process required before termination of welfare benefits).

41. *Id.* at 261-62.

42. *Id.*

43. 424 U.S. 693 (1976).

44. *Id.* at 712 (finding no denial of liberty without due process when person wrongly accused of shoplifting had picture posted by government in department stores).

45. 408 U.S. 564 (1972).

tive laws of a state.[46] The Court applied the same principle in *Bishop v. Wood*[47] and held that a police officer could be fired without due process because the state's laws did not create an enforceable expectation to continued employment.[48]

The foregoing description of procedural due process is sketchy and omits the protections that have developed under the doctrine. Yet it makes the point that the Court has underutilized procedural due process because of its errors in refusing to apply it in cases where so-called privileges were deprived and more recently because of the Court's positivistic approach to the clause.

E. The Rigid Levels of Scrutiny

Thus far, this Essay suggests that each of the clauses in the Fourteenth Amendment has been unduly narrowed by the Supreme Court. Admittedly, it has omitted the important and laudable uses of the amendment. Some of these positive examples—the desegregation of the South, the incorporation of the Bill of Rights, the protection of fundamental rights such as reproductive freedom—were mentioned in the introduction. Historically, most of these positive developments did not occur until the Warren Court era beginning in the mid-1950s.[49]

The problem with this history is that it paints the Warren Court as the paragon that saved the Fourteenth Amendment. Although the Warren Court undoubtedly did more than any Court in any other constitutional era to realize the promise of the amendment, unfortunately, it also did damage. Specifically, the Warren Court institutionalized rigid levels of scrutiny into constitutional jurisprudence, and as a result, limited effective judicial oversight to a few areas.

The levels of scrutiny can be traced back to the famous footnote four in *United States v. Carolene Products*[50] in which the Court explained that the judiciary would defer to the legislature except in cases involving fundamental rights or "discrete and insular" minorities.[51] But it was the

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46. *Id.* at 577.

47. 426 U.S. 341 (1976).

48. *Id.* at 347.

49. Some examples of these developments include the Court's decision in Brown v. Board of Education, 347 U.S. 483 (1954) (holding "separate-but-equal" doctrine has no place in public education); the incorporation of most of the Bill of Rights during the 1950s and 1960s, Duncan v. Louisiana, 391 U.S. 145 (1968) (noting that many rights guaranteed by first eight amendments were selectively incorporated into Fourteenth Amendment); and the decision in Griswold v. Connecticut, 381 U.S. 479 (1965) (protecting privacy right of married couples to use contraception).

50. 304 U.S. 144, 152 n.4 (1938).

51. *Id.*

Warren Court that made clear the radical difference between cases receiving strict scrutiny, where the government usually lost, and the rational basis test, where the government almost always won.[52] Although the Court has added intermediate scrutiny as a middle tier of review, it has maintained its rigid application of the levels of scrutiny.

Relatively few types of discrimination receive heightened scrutiny. Under current law only discrimination based on race, gender, alienage and legitimacy receive more than the rational basis test.[53] As a result, almost all other types of government discrimination are deemed acceptable. For example, the Court repeatedly has used rational basis review to uphold discrimination based on age[54] or wealth.[55] Government may be arbitrary and discriminatory so long as it is not acting in the few areas that have received heightened scrutiny.

The Constitution does not require that judicial review be defined in this manner. Nothing in the Fourteenth Amendment or the Equal Protection Clause prescribes these rigid levels of scrutiny. The Court could have adopted a more flexible, contextual approach based on evaluating the importance of the interest and the nature of the classification.[56] Moreover, even if one accepts the rigid levels of scrutiny, the rational basis standard need not lack virtually any teeth nor produce such complete deference to the government.

The rigid levels of scrutiny will continue to limit the scope and effect of the Fourteenth Amendment far into the future. A conservative Supreme Court can justify deference to the government simply by refusing to expand the categories receiving heightened scrutiny and then, fol-

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52. This analytical framework was powerfully described in Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court*, 86 HARV. L. REV. 1, 8-10 (1972).

53. Mills v. Habluetzel, 456 U.S. 91 (1982) (applying strict scrutiny to classification based on illegitimacy); Craig v. Boren, 429 U.S. 190 (1976) (applying intermediate scrutiny to classification based on gender); Graham v. Richardson, 403 U.S. 365 (1971) (applying strict scrutiny to classification based on alienage); Korematsu v. United States, 323 U.S. 214 (1944) (applying strict scrutiny to classification based on race).

54. *See, e.g.*, Vance v. Bradley, 440 U.S. 93 (1979) (holding that lower retirement age for federal employees covered by foreign service retirement system does not violate equal protection); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976) (holding that state law mandating retirement of police officer at age 50 does not violate equal protection).

55. *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) (holding that aid to schools through local property tax that favored wealthier districts does not violate equal protection); Dandridge v. Williams, 397 U.S. 471 (1970) (holding that welfare regulation limiting total amount of aid regardless of family size or actual need does not violate equal protection).

56. Jeffrey M. Shaman, *Cracks in the Structure: The Coming Breakdown of the Levels of Scrutiny*, 45 OHIO ST. L.J. 161, 177-82 (1984).

lowing the established approach, rule in favor of the government under the rational basis test.

III. The Future

Viewed together these six mistakes account for much of the Supreme Court's decision-making under the Fourteenth Amendment. For those who care about individual rights and social equality, this legacy leaves a sense of lost opportunities. Constitutional history would be far different if the Court always had used the Privileges or Immunities Clause to protect fundamental rights; if it always had used the Equal Protection Clause to prevent discrimination; if procedural due process always had been a judicially enforced norm.

Overall the Supreme Court regularly has ruled in favor of popular prejudices, as in *Plessy v. Ferguson*;[57] wealthy economic interests, as in the *Slaughter-House Cases*,[58] the *Civil Rights Cases*[59] and the *Lochner* doctrine; and government power, as in procedural due process decisions and under the restrictive levels of scrutiny. Even if one considers all of the positive developments under the Fourteenth Amendment, it has had a very mixed record of success.

It must be emphasized that the failures of the Fourteenth Amendment are not a product of conceptual errors in drafting the provisions or mistakes in writing their language. Nothing in the amendment commanded any of the judicial errors described above. The decisions are a product of the ideology of the Justices and the context of their times. Thus the experience of the Fourteenth Amendment reflects the potential and the limits of constitutionalism. The Supreme Court can act as a tremendously positive vehicle for social change, as in *Brown v. Board of Education*,[60] or the Court can be terribly destructive, as in *Plessy v. Ferguson*.[61] The outcome is all a matter of who is on the Court, what they believe and how they are influenced by current events.

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57. 163 U.S. 537 (1896), *overruled by* Brown v. Board of Educ., 347 U.S. 483 (1954); *see also* Bowers v. Hardwick, 478 U.S. 186, 192-93 (1986) (relying on history and tradition of state sodomy laws to hold that right to privacy does not encompass consensual homosexual conduct).

58. 83 U.S. (16 Wall.) 36 (1873).

59. 109 U.S. 3 (1883) (holding that denial of admission to inn or other public accommodation because of race did not constitute badge or incident of slavery), *overruled by* 42 U.S.C. § 2000a (1988) (all persons entitled to public accommodations without discrimination on racial grounds).

60. 347 U.S. 483 (1954).

61. 163 U.S. 537 (1896), *overruled by* Brown v. Board of Educ., 347 U.S. 483 (1954).

In light of this history, what might the future bring? With seven solid conservative Justices on the Court—Chief Justice William Rehnquist, and Justices Byron White, Sandra Day O'Connor, Antonin Scalia, Anthony Kennedy, David Souter and Clarence Thomas—this Court is not likely to resurrect the Privileges or Immunities Clause as a basis for protecting new rights or expand the coverage of equal protection to safeguard additional groups from discrimination. On the contrary, this Court seems deeply committed to deferring to government and restricting the Constitution's protections.[62]

In view of history and the composition of the current Court, progressive constitutional commentators have several possible choices. One option is essentially to give up; perhaps to change fields or to retreat solely to highly abstract scholarship that is completely removed from actual Supreme Court decisions. Another choice is to shift attention away from the Court and toward legislative action. After all, as a practical reality, for the foreseeable future the protection of rights and the achievement of equality will have to come from the legislatures and not the federal judiciary. A third option is to keep trying to encourage the Court to use the Fourteenth Amendment to protect basic rights and advance social equality. On the one hand, this seems a terribly futile effort perhaps for decades to come. Four of the conservative Justices on the current Court are under age fifty-five and likely will be the core of a conservative majority for decades to come.

Yet, for the same reason, this judicial era is an especially important time to keep trying. With the departure of Justices William Brennan and Thurgood Marshall, passionate dissents and well-reasoned attacks on the Court's reasoning from within will be increasingly rare. It is not impossible to imagine a Court with eight or even nine conservative Justices. Scholars will be the only critics of judicial opinions and the only source for inspiring constitutional change in the future. Competing visions to the Rehnquist Court's conservative orientation must come from scholars.

Although it is difficult to offer any reason to believe that such alternative visions will triumph, history shows occasional crucial advancements under the Fourteenth Amendment, such as *Brown v. Board of*

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62. For a more developed presentation of this argument, see Erwin Chemerinsky, *Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43 (1989).

Education,[63] *Reynolds v. Sims*[64] and *Roe v. Wade*.[65] Those with more expansive visions of the amendment's reach must have hope and faith that similar victories may be attained in the future.

Despite all the tragic errors in interpretation, many, including this author, believe that society is better off with the Fourteenth Amendment than it would have been without it. Empirically, it cannot be proven that on balance the amendment has made society better. Ultimately, all we have is faith in the Constitution and a hope of achieving the promise of the Fourteenth Amendment in the future. These beliefs are not much, but especially during the current era of judicial conservatism, they are about all we have as we think about the future of the Fourteenth Amendment and constitutional law.

63. 347 U.S. 483 (1954).

64. 377 U.S. 533 (1964) (holding that equal protection requires that equal numbers of voters should elect equal numbers of representatives and invalidating Alabama apportionment scheme).

65. 410 U.S. 113 (1973) (holding that Due Process Clause right to privacy broad enough to encompass woman's decision whether to terminate pregnancy).