

DOES THE FOURTEENTH AMENDMENT GUARANTEE EQUAL JUSTICE FOR ALL?

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Does the Fourteenth Amendment¹ guarantee equal justice for all? Implicitly, this question asks whether the Supreme Court may transformatively interpret the Amendment to ban practices that were commonplace in 1868 or to create new constitutional rights that were unknown at that time.² To answer this question, I need to address both the way in which the Fourteenth Amendment guarantees equality and the way in which it protects individual rights. My conclusion is that the Fourteenth Amendment is *not* a license to the Supreme Court to engage in transformative change.

I begin with the equality guarantee in the Fourteenth Amendment. On this point, I agree with John Harrison that the Amendment bans all forms of caste-like discrimination.³ No State is allowed either to make or enforce *any* law that abridges the privileges or immunities of one citizen of the United States as compared to another.⁴ This command accomplishes the cen-

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1. U.S. CONST. amend. XIV.

2. Bruce Ackerman and Ronald Dworkin offer comprehensive reviews of this subject, beyond the scope of this Essay. 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991) (reviewing the Supreme Court's advancement of Reconstruction values); 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998) (explaining the process of entrenching the validity of the Fourteenth Amendment); RONALD DWORKIN, *LAW'S EMPIRE* (1986) (considering the role that the Supreme Court has in determining which powers it may enforce and to what extent it should); RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (2nd prtg. 1977) (analyzing the position of the Supreme Court to make determinations outside of the democratic process).

3. John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 *YALE L.J.* 1385, 1413 (1992).

4. U.S. CONST. amend. XIV, § 1. Although the Due Process Clause has enjoyed greater traction as a protection of individual rights, I renew my assertion that the Framers intended the Privileges or Immunities Clause to be the most important.

tral purposes of the Amendment, which were to constitutionalize the Civil Rights Act of 1866 and to ban the Black Codes.⁵ The evil of the Black Codes was that they abridged, shortened, or lessened the fundamental rights of a class of people—freed African Americans—by creating a system of racial castes. The Fourteenth Amendment banned all caste systems, including the racial caste system of the South. The Amendment was not limited, however, to banning racial caste systems; it would also have been understood to ban the Hindu caste system or the reimposition of European feudalism with its division of society into hereditary nobles and serfs. At a very high level of generality, then, one may accurately say that the Fourteenth Amendment was originally meant to guarantee equal justice to all. But what does that mean for the role of the Supreme Court in applying the Fourteenth Amendment? How was the Supreme Court supposed to apply a constitutional ban on caste systems?

The easiest starting point is a racial caste system like the ones the Supreme Court held unconstitutional in *Brown v. Board of Education*.⁶ At the time the Fourteenth Amendment was enacted, thirty-six of the thirty-seven states required in their state constitutions that public schools be provided.⁷ The right to a public school education was, for all practical purposes, a privilege or immunity of state citizenship. Congress at the time almost passed—as Michael McConnell has shown—legislation outlawing segregated schools pursuant to Congress's Section 5 power to enforce the Fourteenth Amendment.⁸ Such legislation

Steven G. Calabresi, *Substantive Due Process After Gonzales v. Carhart*, 106 MICH. L. REV. 1517, 1532 (2008).

5. See RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 32–36 (2d ed. 1997) (analyzing the historical relationship between the Civil Rights Act of 1866 and the Fourteenth Amendment); Harrison, *supra* note 3, at 1413 (“[T]he immediate target of the Civil Rights Act of 1866 and Section 1 of the Fourteen Amendment [was] the Black Codes.”).

6. 347 U.S. 483 (1954).

7. Steven G. Calabresi and Sarah E. Agudo, *Individual Rights Under State Constitutions when the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 TEX. L. REV. 7, 109–10 (2008).

8. See Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 1092–93 (1995) (analyzing the congressional attempts to enact desegregation laws in the late nineteenth century). *But see* Michael J. Klarman, *Brown, Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881 (1995); Michael W. McConnell, *The Original Justification for Brown: A Reply to Professor Klarman*, 81 VA. L. REV. 1937 (1995).

could only be constitutional in the 1870s if public school education was thought to be a privilege or immunity.

In 1954, the Supreme Court held that segregation in schools led to an “abridgement” of the rights, privileges, and immunities of African Americans with respect to public schools as compared to all other Americans.⁹ The fact that such segregation had been practiced in 1868 and had been around for a very long time did not change the fact that it was and always had been unconstitutional. For this reason, the Supreme Court was on solid originalist ground when it struck down segregation in public schools.¹⁰

In 1967, the Supreme Court in *Loving v. Virginia*¹¹ struck down laws forbidding racial intermarriage that had been around since 1868 and that were widely supported in the 1860s and 1870s. Was *Loving* correctly decided? The answer again is yes because the Fourteenth Amendment had constitutionalized the Civil Rights Act of 1866, which said that African Americans had the “same” right to make contracts as was enjoyed by a white citizen.¹² A white citizen had the right to marry another white citizen so the Fourteenth Amendment plainly commanded that African Americans had that “same” right.¹³ Again, the fact the Framers of the Amendment did not understand this means nothing. Members of Congress rarely read

9. *Brown*, 347 U.S. 483.

10. Steven G. Calabresi & Livia Fine, *Two Cheers for Professor Balkin’s Originalism*, 103 NW. U. L. REV. 663, 672 (2009).

11. 388 U.S. 1 (1967).

12. Act of April 9, 1866, ch. 31, 14 Stat. 27 (reenacted by Enforcement Act of 1870 ch. 114 § 18, 16 Stat. 140 (1870) (codified as amended at 42 U.S.C. 1981–82 (2006)) (declaring that “all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United State; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States to make and enforce contracts; to sue, be parties and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding”).

13. See *Loving*, 388 U.S. at 11–12 (“There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.”).

much less understand the laws they make, but that does not make those laws any less binding on all of us. The Supreme Court's use of the Fourteenth Amendment to constrain racial castes in the 1950s and 1960s was right and is easily justifiable.

What then about the extension of the no-caste principle to sex discrimination beginning in the 1970s? Is that equally justifiable? Is sexual-orientation discrimination also unconstitutional? What about laws that lead to inequalities of wealth or income?

The Constitution explicitly addresses the subject of sex discrimination in the Nineteenth Amendment,¹⁴ which was adopted in 1920 and gave women the right to vote. The right to vote is a political right, unlike the civil rights addressed by the Fourteenth Amendment. The Framers of the Fourteenth Amendment distinguished between civil rights, which were possessed by all citizens, including women and children, and political rights, which were exercised only by the male subset of the population.¹⁵ For this reason, the Fifteenth Amendment¹⁶ was necessary to give African-American men the right to vote.¹⁷

Once the Constitution had been amended to bar sex discrimination as to political rights it became utterly implausible that the no-caste command of the Fourteenth Amendment did not also ban most, if not all, sex discrimination as to civil rights. Political rights are rarer and more jealously guarded than civil rights. It would make no sense to say that women could vote for President and Congress, but they were legally incapable of making a simple contract without their husband's permission. The Supreme Court recognized as much in 1923 in *Adkins v. Children's Hospital of DC*.¹⁸ The fifty years it took for the Court to act fully on its wise intuition as to sex discrimination in *Adkins* says more about the sorry intellectual state of New Deal constitutionalism than it does about the correct application of the Fourteenth Amendment.

14. U.S. CONST. amend. XIX.

15. See Calabresi & Fine, *supra* note 10, at 693.

16. U.S. CONST. amend. XV.

17. See WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* (1988).

18. 261 U.S. 525, 553 (1923).

Does the Fourteenth Amendment's ban on castes bar all forms of sexual-orientation discrimination? Is there a constitutional right to gay marriage? I think the answer is no. No constitutional amendment like the Nineteenth Amendment has been adopted that recognizes sexual orientation as being a suspect classification. The reason sex discrimination is appropriately subjected to almost strict scrutiny is because in 1920 two-thirds of both Houses of Congress and three-quarters of the States made a conscious, knowing social decision that sex ought to be irrelevant in voting. The Article V¹⁹ rule of recognition²⁰ for constitutional change was thus met by women in 1920. Before that time sex discrimination was not constitutionally a form of caste. After that time, it was. No Article V consensus for gay marriage has been demonstrated. In fact, in almost every state where the matter has been voted on, gay marriage has lost. Most Americans today seemingly would permit same-sex civil unions but not affirmatively endorse them with the word "marriage."²¹ This view may be right or wrong, but it undeniably speaks to how Americans today understand the Fourteenth Amendment's command of equal justice.

I mentioned at the start of this Essay that in addition to protecting equality I also believe the Fourteenth Amendment protects individual rights. The Amendment forbids *any* law which abridges the privileges or immunities of citizens of the United States—not only discriminatory laws. The word "abridge" can be used as a synonym for "discriminate," as it is in the Fif-

19. U.S. CONST. art. V.

20. The "rule of recognition," as coined by H.L.A. Hart, designates valid law as the rules accepted by the legal system. H.L.A. HART, *THE CONCEPT OF LAW* (1961). Amendments, properly adopted under the system set forth in Article V, meet this threshold for legitimacy.

21. Press Release, Pew Forum on Religious & Pub. Life & Pew Research Ctr. For the People & the Press, *Gay Marriage Gains More Acceptance: Majority Continues to Favor Gays Serving Openly in Military* (Oct. 6, 2010), *available at* <http://pewresearch.org/pubs/1755/poll-gay-marriage-gains-acceptance-gays-in-the-military> (noting that forty-two percent of Americans favor gay marriage, while forty-eight percent are opposed); Press Release, Pew Forum on Religious & Pub. Life & Pew Research Ctr. For the People & the Press, *Most Still Oppose Same-Sex Marriage: Majority Continues to Support Civil Unions* (Oct. 9, 2009), *available at* <http://people-press.org/report/553/same-sex-marriage> (noting that fifty-seven percent of Americans favor civil unions).

teenth Amendment,²² but it can also be used to denote a violation of individual rights, as is the case in the First Amendment.²³ Rights can be abridged one person at a time as well as one class of people at a time. Either form of abridgement is plainly forbidden by the text of the Fourteenth Amendment, and the use of that text to protect individual rights stretches well back into the nineteenth century.

How do we know which individual rights the Amendment protects? A good place to start would be to ask what individual rights of out-of-staters the Privileges and Immunities Clause of Article IV protects. A publicly interested citizen in 1868 would quite reasonably have thought that the “privileges or immunities” language in the Fourteenth Amendment tracked the “privileges and immunities” language in Article IV.²⁴ So how ought the Article IV Clause be construed? I think the Article IV Privileges and Immunities Clause is best seen as guaranteeing out-of-staters equal civil rights with in-staters,²⁵ but not equal political rights or rights to equal levels of benefits from state government or lands. If a state gives its in-state citizens the right to assisted suicide or gay marriage or to covenant marriage with no possibility of divorce, then out-of-staters should get the same right while they are residing in that particular state. The phrase “privileges and immunities” in Article IV thus does take on new meaning over time. When states expand the rights of their in-state citizens they expand the corpus of privileges and immunities.

What this means for the Fourteenth Amendment is that the guarantee of the Privileges or Immunities Clause could be argued to change very slowly over time so that if an Article V consensus of three-quarters of the states come to think that something is unconstitutional that was allowed in 1868 it may in fact become unconstitutional. Individual rights must be

22. U.S. CONST. amend. XV, § 1 (“The right of citizens of the United States to vote shall not be denied or abridged on account of race, color, or previous condition of servitude.”).

23. U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech, or of the press . . .”).

24. U.S. CONST. art. IV, § 2, cl. 1 (“The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”).

25. See Calabresi, *supra* note 4, at 1535 (“[T]he Privileges and Immunities Clause of Article IV . . . protects out-of-staters from being treated differently than are in-state citizens.”).

deeply rooted in history and tradition, as Justice Scalia said in *Michael H. v. Gerald D.*,²⁶ but it is also true, as Justice Harlan said in *Griswold v. Connecticut*,²⁷ that tradition is a living thing. The Framers of the Fourteenth Amendment understood the text to embody the rule of *Corfield v. Coryell*,²⁸ which certainly does require that unenumerated privileges and immunities be deeply rooted in history and tradition. But what Justice Harlan never said in *Griswold*, when he claimed that tradition was a living thing,²⁹ was that the Supreme Court acting on its own could update our traditions without an Article V consensus of three-quarters of the states. Striking down an unenforced, anti-contraceptive law in one out of fifty states is totally different from striking down the anti-abortion laws of all fifty states. It is arguable that in 1965 there was an Article V consensus for the result and the right recognized in *Griswold*, but no such argument can be made in defense of *Roe v. Wade*.³⁰ There was not an Article V consensus of three-quarters of the States to support abortion on demand in 1973, nor has there ever been such a consensus since.³¹ *Roe v. Wade* is not deeply rooted in history and tradition. It is not even deeply rooted in the contemporary society in which we live. It exists solely as a result of Supreme Court judicial fiat.

I close with the question we started with: Does the Fourteenth Amendment empower the Supreme Court to make transformative social changes at the behest of mobilized social-interest groups? I think the answer is no. The text of the Fourteenth Amendment is addressed to the Congress, the President, the Governors, and the State Legislatures, as well as to the Supreme Court. The Amendment mentions no special role for the

26. 491 U.S. 110, 125–26 (1989).

27. 381 U.S. 479 (1965).

28. 6 F. Cas. 546, 551–52 (C.C.E.D. Pa. 1823) (No. 3230).

29. See *Griswold*, 381 U.S. at 500 (Harlan, J., concurring in judgment) (relying on similar analysis by Justice Harlan in dissent in *Poe v. Ullman*, 367 U.S. 497, 522 et seq. (1961)).

30. 410 U.S. 113 (1973) (holding unconstitutional the majority of states' laws restricting abortion).

31. See Press Release, Pew Forum on Religious & Pub. Life & Pew Research Ctr. For the People & the Press, Support for Abortion Slips: Issue Ranks Lower on the Agenda (Oct. 1, 2009), available at <http://pewforum.org/Abortion/Support-for-Abortion-Slips.aspx> (forty-seven percent of Americans believe abortion should be legal in all or most cases).

courts.³² Nor would one expect the Framers of an amendment designed to overturn the *Dred Scott*³³ decision to be big fans of substantive due process. The only mention in the Fourteenth Amendment of an enforcement mechanism is the language of Section Five, which contemplates congressional and not judicial enforcement of the Amendment.³⁴ Legitimate transformative social change only happens, as it did in 1868 or in 1920, when two-thirds of both houses of Congress and three-quarters of the states agree on a textual change. Successful and mobilized social interests like the Jim Crow movement may win transient doctrinal victories, but those victories are illegitimate and can thus always be overturned. There is no guarantee, however, that an Article V majority of the American people or any majority will always act justly and fairly. Thus, I must agree that the Fourteenth Amendment does not necessarily guarantee justice and fairness to all.

32. See Calabresi & Fine, *supra* note 10 at 698–700.

33. *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857).

34. U.S. CONST. amend. XIV, § 5 (“The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”).