

INSIGHT AND ANALYSIS OF THE FOURTEENTH AMENDMENT:

A FOREWORD

by THE HONORABLE PHYLLIS W. BECK* AND PATRICIA A. DALY**

On a fall weekend in 2003 in Philadelphia, dozens of lawyers, law professors, legal scholars and students gathered at Temple University's Beasley School of Law for "Vision and Revision: The Fourteenth Amendment" (the Symposium). They met to discuss the history, purpose, treatment and future of the Fourteenth Amendment. It was a formidable task.

The result was a lively and spirited program highlighted by four eloquent keynote speakers: Akhil Reed Amar,¹ Erwin Chemerinsky,² Sylvia Law³ and Theodore Shaw.⁴ These four professors of law captured the attention of those assembled by providing insight into one of the broadest and most complex areas of the law. Their papers were interesting and provocative. However, the ability to seize upon and dissect an issue within this expansive topic belonged not only to these prestigious legal scholars; it also was the domain of the many panel commentators who spoke throughout the weekend on a variety of themes. Fortunately, the *Temple Political & Civil Rights Law Review* has insured that the knowledge shared by the Symposium panelists is available not just to those who attended the Symposium, but to anyone wishing to learn more. In this volume you will find the panelists' articles on thought-provoking topics, all of them centered on

* Judge of the Pennsylvania Superior Court.

** Deputy Judicial Clerk to Judge Beck.

1. Professor Amar's speech, *Forgotten Clauses of the Fourteenth Amendment*, opened the Symposium. Akhil Amar, *Forgotten Clauses of the Fourteenth Amendment*, Address Before the Temple Political & Civil Rights Law Review Symposium (Nov. 14-15, 2003).

2. Professor Chemerinsky began the second day of discourse with a speech entitled *Politics, Not History, Explains the Rehnquist Court*. Erwin Chemerinsky, *Politics, Not History, Explains the Rehnquist Court*, Address Before the Temple Political & Civil Rights Law Review Symposium (Nov. 14-15, 2003), in 13 TEMP. POL. & CIV. RTS. L. REV. 647 (2004).

3. Professor Law, whose excellent article appears in this volume, spoke on gender and the Fourteenth Amendment. Sylvia Law, *Where Do We Go From Here? The Fourteenth Amendment, Original Intent, and Present Realities*, Address Before the Temple Political & Civil Rights Law Review Symposium (Nov. 14-15, 2003), in 13 TEMP. POL. & CIV. RTS. L. REV. 691 (2004).

4. Professor Shaw enlightened attendees on a topic with which he has extensive, first-hand experience; he spoke about the United States Supreme Court's recent decision on the admissions policy at the University of Michigan. His presentation, *Turning Fourteenth Amendment Jurisprudence on its Head: The Practical Effects of Michigan v. Grutter for the Future*, offered wise commentary on this complex issue. Ted Shaw, *Turning Fourteenth Amendment Jurisprudence on its Head: The Practical Effects of Michigan v. Grutter for the Future*, Address Before the Temple Political & Civil Rights Law Review Symposium (Nov. 14-15, 2003), in 13 TEMP. POL. & CIV. RTS. L. REV. 963 (2004). Professor Shaw has spent this year at Temple as The Phyllis W. Beck Chair in Law. His presence has made a tremendous contribution to the law school community.

the Fourteenth Amendment.

When one thinks of in-depth constitutional analysis and discussion, Laurence Tribe and his book, *American Constitutional Law*,⁵ often spring to mind. Tribe's premier treatise is one of the first places to turn to get acquainted—or reacquainted—with a constitutional principle. Tribe, through the book, has performed an invaluable service. He has presented a blueprint for academic discourse on the Constitution. The Symposium has continued in that same vein and the articles contained in these pages do justice to Tribe's example of scholarly commentary.

In the preface of *American Constitutional Law*, Tribe cautions his readers that he offers “forthright opinions” throughout the book.⁶ He does so, he explains, because taking a position on a topic, while at the same time fairly considering contrary views, defines the “morality of responsible scholarship.”⁷ In reviewing the Symposium articles that make up this volume, it is clear that what has taken place here is indeed “responsible scholarship.”

The Symposium offered hours of insight and debate on the Fourteenth Amendment's history, and on the standards and rules that have emerged since its passage. The panelists explained the evolution of the Amendment through analysis of benchmark opinions and assessments of our Supreme Court under various Chief Justices. Their articles expand those analyses, by urging us to consider that the history of the Fourteenth Amendment began much earlier than the congressional debates on its passage;⁸ by reminding us of the origin of Equal Protection's strict scrutiny test,⁹ and by pointing out the manner in which the Supreme Court has limited the scope and effect of the Amendment.¹⁰

The panelists discussed the primary issue that triggered passage of the Fourteenth Amendment, race, and offered glimpses of what the future may hold. As authors, they offer criticism of Fourteenth Amendment jurisprudence. Sylvia Law recommends the Court pay attention to discriminatory effects, not just

5. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* (2d ed., Foundation Press 1988).

6. *Id.* at viii.

7. *Id.*

8. Paul Finkelman, *The Historical Context of the Fourteenth Amendment*, Address Before the Temple Political & Civil Rights Law Review Symposium (Nov. 14-15, 2003), in 13 *TEMP. POL. & CIV. RTS. L. REV.* 389 (2004). Garrett Epps, *The Undiscovered Country: Northern Views of the Defeated South and the Political Background of the Fourteenth Amendment*, Address Before the Temple Political & Civil Rights Law Review Symposium (Nov. 14-15, 2003), in 13 *TEMP. POL. & CIV. RTS. L. REV.* 411 (2004). Both Finkelman and Epps encourage the reader to consider the state of the law and the political views of the citizenry prior to the passage of the Amendment. Finkelman, *The Historical Context*, at 389; Epps, *The Undiscovered Country*, at 412-13.

9. Neil T. Gotanda, *Reflections on Korematsu, Brown and White Innocence*, Address Before the Temple Political & Civil Rights Law Review Symposium (Nov. 14-15, 2003), in 13 *TEMP. POL. & CIV. RTS. L. REV.* 663 (2004). Professor Gotanda discusses *Korematsu*, 323 U.S. 214, a war powers matter that upheld government racial classifications, as the case that defined strict scrutiny. *Id.*

10. Mark C. Rahdert, *Obstacles on the Road from Brown: Milliken v. Bradley and the Quest for Racial Diversity in Education*, Address Before the Temple Political & Civil Rights Law Review Symposium (Nov. 14-15, 2003), in 13 *TEMP. POL. & CIV. RTS. L. REV.* 785 (2004). In this piece, Professor Rahdert laments the limitations *Milliken* placed on *Brown*'s vision of education desegregation. *Id.* at 795-800.

discriminatory intent, in order to move forward with equality.¹¹ Other authors add to that assessment by calling for a change in the intent requirement,¹² and by characterizing the current state of Equal Protection law as doing too little¹³ and serving to “weaken” the Fourteenth Amendment’s effect.¹⁴

The authors also move beyond race, addressing gender¹⁵ and sexual orientation,¹⁶ as well as encouraging us to consider the language we use¹⁷ and the definitions we attach to terms¹⁸ in the context of equality.

The exercise of discussing and writing about a constitutional principle is not simply an academic one. The fundamental rights of citizenship, carrying with them certain privileges and immunities, as well as protections under Due Process and Equal Protection, are essential to American democracy. Whether we are citizens, lawyers, public decisionmakers, or judges, the Fourteenth Amendment has a significant impact on our everyday lives and in our work. The insights to be gleaned from the articles in this volume expand one’s perspective about this important topic.

On the website of Philadelphia’s National Constitution Center, you will find Scholar Essays written in advance of the Center’s opening. One of them, a piece called *Understanding Our Constitution*,¹⁹ was co-written by Professor Amar, a

11. See Law, *supra* note 3. Professor Law incorporates the defeat of the Equal Rights Amendment into her analysis of Fourteenth Amendment jurisprudence. She also offers a “utopian” proposal for a new amendment. *Id.* at 704.

12. Henry L. Chambers, Jr., *Retooling the Intent Requirement Under the Fourteenth Amendment*, Address Before the Temple Political & Civil Rights Law Review Symposium (Nov. 14-15, 2003), in 13 TEMP. POL. & CIV. RTS. L. REV. 611 (2004). Professor Chambers suggests replacing the intent requirement with the doctrine of natural and probable consequences. *Id.* at 621-27.

13. Barbara Stark, *The Future of the Fourteenth Amendment and International Human Rights Law: The Black Heritage Trail*, Address Before the Temple Political & Civil Rights Law Review Symposium (Nov. 14-15, 2003), in 13 TEMP. POL. & CIV. RTS. L. REV. 557 (2004). Cheryl Harris, *Resuscitating Plessy, Reinventing Whiteness*, Address Before the Temple Political & Civil Rights Law Review Symposium (Nov. 14-15, 2003).

14. Carlos A. Singer, *The Statist Drift and the Stultification of the Fourteenth Amendment*, Address Before the Temple Political & Civil Rights Law Review Symposium (Nov. 14-15, 2003), in 13 TEMP. POL. & CIV. RTS. L. REV. 875 (2004). Mr. Singer suggests that current, “neutral” laws serve to sustain past discrimination. *Id.* at 880.

15. Stephanie Wildman, *Privilege, Gender and the Fourteenth Amendment: Reclaiming Equal Protection of the Laws*, Address Before the Temple Political & Civil Rights Law Review Symposium (Nov. 14-15, 2003), in 13 TEMP. POL. & CIV. RTS. L. REV. 707 (2004).

16. Peggy Cooper Davis, *Neglected Stories and the Sweet Mystery of Liberty*, Address Before the Temple Political & Civil Rights Law Review Symposium (Nov. 14-15, 2003), in 13 TEMP. POL. & CIV. RTS. L. REV. 769 (2004). Professor Cooper Davis’s article discusses unrecognized relationships of slaves in the 1800s and the current debate surrounding homosexual marriage. *Id.* at 770-76.

17. Reginald C. Oh, *A Critical Linguistic Analysis of Equal Protection Doctrine: Are Whites a Suspect Class?*, Address Before the Temple Political & Civil Rights Law Review Symposium (Nov. 14-15, 2003), in 13 TEMP. POL. & CIV. RTS. L. REV. 583 (2004).

18. Wendy B. Scott, *CSI After Grutter v. Bollinger: Searching for Evidence to Construct the Accumulation of Wealth and Economic Diversity as Compelling State Interests*, Address Before the Temple Political & Civil Rights Law Review Symposium (Nov. 14-15, 2003), in 13 TEMP. POL. & CIV. RTS. L. REV. 927 (2004). Professor Scott attempts, through case law analysis, to define a compelling interest of the state. *Id.* at 949-53.

19. Akhil Reed Amar & Douglas W. Kmiec, *Understanding Our Constitution*, at <http://www.constitutioncenter.org/explore/NCCScholarEssays/UnderstandingOurConstitution.shtml>

keynote speaker at the Symposium. Professor Amar's piece characterizes the Fourteenth Amendment as "redefining" the Bill of Rights, and notes that today, "the concept of equality—for all persons, regardless of race, sex, or religion—animates everything in the Constitution."²⁰ The Symposium, and this publication, surely bears that out.

(last visited November 30, 2004). Professor Amar served as one of the National Constitution Center's 2000-2001 Senior Visiting Scholars.

20. *Id.*