The Privileges or Immunities Clause: A Potential Cure for the Trump Phenomenon

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ABSTRACT

The xenophobic authoritarianism of Donald J. Trump's highly successful Presidential candidacy as well as the popularity of far-right nationalists in other mature democracies traces its origins to the problem of middle class wage stagnation and how this relates to income and wealth inequality, which have both grown dramatically since the 1970s with the advent of free market neoliberalism as the developed world's prevailing economic ideology. Although this problem has manifested itself in all first-world nations, the bleakest example of this problem is found in the United States, where inequality and socio-economic immobility inform much of the impetus behind Mr. Trump's popularity. "The Privileges or Immunities Clause: A Potential Cure for the Trump Phenomenon?" argues that the problem of inequality and its problematic political consequences is attributable not only to economic globalization, but policy choices undertaken by all levels of government, including the Supreme Court of the United States, which has taken a crabbed and excessively deferential approach to discriminatory and regressive socio-economic legislation, while intrusively subjecting progressive legislation aimed at remediating poverty to a more searching standard of review. The article's thesis is that the Court should end its regressive approach to socio-economic legislation and fulfill its institutional obligation to "bridge" the nation's socio-economic and political divides by finally effectuating the promise of the long mistakenly disregarded Privileges or Immunities Clauses of Article IV, Section 2 and the Fourteenth

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Amendment, Section 1, to require all Americans be provided Court-protected socio-economic and political rights consistent with living in a first-world mature democracy. Taking such a jurisprudential approach would provide Americans with the necessary socio-economic and political rights to effectuate the obligations of citizenship and help them regain the cohesion, hopefulness, idealism, and energy of the post-World War II era, such that America can once again take its rightful place as the world's leading nation and authoritarian demagogues like Trump can be effectively delegitimized and consigned to the "ash-heap" of history.

Table of Contents

I. INTRODUCTION 62
II. THE U.S. TODAY: A COUNTRY OF PRONOUNCED INEQUALITY 66
A. U.S. Governmental Dysfunction 68
III. EVALUATING THE COURT'S JURISPRUDENCE 71
IV. PRIVILEGES AND/OR IMMUNITIES OF CITIZENSHIP – THE COURT'S HISTORIC MISTAKE AND A POTENTIAL SOLUTION 75
V. THE NEED FOR A REVITALIZATION OF THE CLAUSES 83
VI. COURT COMPLICITY IN MARGINALIZATION OF THE POOR 84
A. The Former Approach – Socio-Economic Protection 86
B. The Current Approach—Blatant Disregard of Socio-Economic Isolation and Discrimination 89
VII. THE PRIVILEGES AND/OR IMMUNITIES OF CITIZENSHIP—A POTENTIAL REMEDY TO SOCIO-ECONOMIC IMMOBILITY AND POLARIZATION 92
A. Updating the Nation's Political System via the Clauses 93
B. Racially Balanced Quality Public Schools and Affordable Higher Education 95
VIII. CONCLUSION 98

I. INTRODUCTION

The French economist Thomas Piketty's *Capital in the Twenty-First Century*[1] successfully refocused the political culture's attention to the problem of income and wealth inequality, and how this problem has grown dramatically since the 1970s with the advent of free market neoliberalism as the developed world's prevailing ideology.[2] Although this problem has manifested itself worldwide, Piketty's analysis paints perhaps the bleakest picture of the United States, which, in this period,

1. THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY (Arthur Goldhammer trans., Belknap Press of Harvard Univ. Press 2014), http://dowbor.org/blog/wp-content/uploads/2014/06/14Thomas-Piketty.pdf.

2. *See generally id.*

has seen both a marked uptick in inequality and a pronounced drop in socio-economic mobility.[3] A positive manifestation of this phenomenon was the relative success of the presidential candidacy of U.S. Senator Bernard Sanders, who has argued for free nationwide college education and the enactment of a national single-payer health care system.[4] An obvious negative one is the success of Republican Presidential candidate Donald J. Trump, whose xenophobic populism speaks to the authoritarian inclinations of socio-economically downscale white voters and their sense of marginalization in an increasingly heterogeneous country. Much of this anger and anxiety is attributable to stagnant wages and weak job security, together with the ever increasing cost of housing, health care, and higher education. Obviously this is not a phenomenon relegated to poor whites. As the African American public intellectual Ta-Nehisi Coates has written, this income and wealth inequality has superimposed itself upon the country's history of racial oppression, and is evidenced by pathologies that disproportionately affect African Americans, such as mass incarceration[5] and the increase in police shootings of African American men and boys by police officers nationwide.[6] It is also evidenced by the fact that White mean household wealth is 13 and 10 times greater than it is for African American and Hispanic households, respectively, and the unemployment and labor non-participation rates for under-represented racial minorities is consistently higher than it is for Whites and Asians.[7]

3. Joe Pinsker, *America is Even Less Socially Mobile Than Most Economists Thought: And as a Result, the Policies That Would Address the Situation are Even More Extreme—and More Politically Unfeasible*, ATLANTIC (July 23, 2015), http://www.theatlantic.com/business/archive/2015/07/america-social-mobility-parents-income/399311/.

4. BERNIE 2016, https://berniesanders.com/issues/ (last visited June 3, 2016).

5. African Americans are incarcerated at a rate six to seven times that of White Americans. Leah Sakala, *Breaking Down Mass Incarceration in the 2010 Census: State-by-State Incarceration Rates by Race/Ethnicity*, PRISON POLICY INITIATIVE (May 28, 2014), http://www.prisonpolicy.org/reports/rates.html.

6. Ta-Nehisi Coates, *Moynihan, Mass Incarceration, and Responsibility*, ATLANTIC (Sept. 24, 2015), http://www.theatlantic.com/politics/archive/2015/09/moynihan-mass-incarceration-and-responsibility/407131/; *see also Arrests by Offense and Race/Ethnicity: 2014*, FED. BUREAU OF INVESTIGATION, http://statabs.proquest.com/sa/docview.html?table-no=356&accno=C70951.5&year=2016&z=A731663FB575D29CE8DA5182F5E22EF923824001 (last visited Jul. 20, 2016).

7. Rakesh Kochhar & Richard Fry, *Wealth Inequality has Widened Along Racial, Ethnic Lines Since End of Great Recession*, PEW RESEARCH CENTER (Dec. 12, 2014), http://www.pewresearch.org/fact-tank/2014/12/12/racial-wealth-gaps-great-recession/; *see also Table 741: Family Net Worth Median and Mean Net Worth in Constant (2013) Dollars By Selected Family Characteristics: 2004 to 2013*, Bd. of Governors of the Fed. Reserve Sys., http://statabs.proquest.com/sa/docview.html?table-no=741&acc-no=C7095-1.13&year=2016&z=817597B74AEE99922C03CA4704BB8570C2ED399B (last visited Jul. 20, 2016).

Notwithstanding noises about this issue by the Obama Administration,[8] it has, until the recent Trump and Sanders phenomena, been disregarded and indeed been propitiated by the nation's hyper individualistic political culture and aided by the federal judiciary. The federal courts have been complicit in the problem by applying a very deferential standard of review to adjudicate the constitutionality of discriminatory socio-economic legislation,[9] while improvidently using heightened scrutiny to invalidate legitimate attempts to equalize the socio-economic "playing field." This has resulted in federal court jurisprudence under the Fourteenth Amendment's Equal Protection Clause that has reinforced the nation's historic cleavages to create a country that is uniquely unequal among developed nations. This paradoxically deferential and activist approach, together with the Court's mistaken disregard of what constitutes the Privileges or Immunities of U.S. citizenship, has worsened the problem of mass socio-economic inequality and, problematically for the U.S. and its governing elites, engendered dangerous levels of social distrust, xenophobia, and racist populism. For example, notwithstanding significant job creation since the nadir of the financial crisis, wage levels remain stagnant, the official poverty rate remains at an alarmingly high level of 15.1%,[10] and the wealth and income gaps between the top one percent and the rest of the population are at an historic high, such that the top one percent of the nation's income earners have seen their income grow by 200 percent in the last generation as compared to a mere 40 percent for the bottom 60 percent of the nation's income earners.[11] The most comprehensive

8. Jason Furman, Maurice Obstfeld & Betsey Stevenson, *The 2015 Economic Report of the President*, THE WHITE HOUSE: BLOG (Feb. 19, 2015, 6:00 AM), https://www.whitehouse.gov/blog/2015/02/19/2015-economic-report-president.

9. Discriminatory socio-economic legislation refers to federal, state or local legislation that has the effect of economic inequality. Examples include how most school districts are funded by local tax assessments, how many state governments deny health insurance coverage to their working poor and voter suppression techniques that have the effect of marginalizing the political power of poorer voters. *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) (concluding unequal public school funding is consistent with the Fourteenth Amendment's Equal Protection Clause); Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012) (concluding that requiring states to enact a federally paid-for Medicaid expansion violates the Tenth Amendment's guarantee of state sovereignty).

10. *Population Below Poverty Line*, THE WORLD FACTBOOK, https://www.cia.gov/library/publications/the-world-factbook/fields/2046.html#us (last visited June 21, 2016); s*ee also Individuals and Families Below Poverty Level–Number and Rate by State: 2004 and 2014*, U.S. CENSUS BUREAU, http://statabs.proquest.com/sa/docview.html?table-no=729&acc-no=C7095-1.13&year=2016&z=FDF0F698DF26F2E0E32920F99A85CFD6CD6FADA1 (last visited Jul. 20, 2016).

11. Chad Stone, Danilo Trisi, Arloc Sherman & Brandon Debot, *A Guide to Statistics on Historical Trends in Income Inequality*, CENTER ON BUDGET & POLICY PRIORITIES (Oct. 26, 2015), http://www.cbpp.org/cms/?fa=view&id=3629.

measure of a society's income inequality, the Gini Coefficient, evidences that the U.S. has, by far, the highest level of income and wealth inequality among mature democracies.[12]

This article will briefly analyze the Court's socio-economic jurisprudence under the Equal Protection Clause and conclude that this jurisprudence has unfortunately exacerbated the political, socio-economic, and racial polarization that renders the U.S. incapable of addressing its citizens' needs in an increasingly globalized, competitive, and resource-scarce twenty-first century. It will further argue that the federal courts' historic use of heightened equal protection scrutiny to protect racial minorities and women is rendered worthless by the Court's current institutional refusal to use heightened scrutiny to protect the poor in view of the very strong correlation between U.S. poverty rates and both race and sex.[13] This failure is magnified by the Court's willingness to apply heightened judicial scrutiny to strike down laws meant at equalizing U.S. society in areas that include racial polarization in public education, campaign financing, and voting rights. The article will conclude by arguing for a jurisprudential resuscitation of the Privileges and Immunities Clause of the U.S. Constitution's Article IV, Section 2 ("Article IV Clause"), and the Privileges or Immunities Clause of the Fourteenth Amendment, Section 1 ("Fourteenth Amendment Clause") (collectively "the Clauses"),[14] to revitalize American federalism and ensure that all Americans are given full and effective political rights as well as access to high quality and integrated public schooling and higher

12. The Gini Coefficient, named after the Fascist-era Italian economist Corrado Gini, measures the level of income inequality within a society. The Gini Coefficient lies between 0 and 1. A measure of 1 would be complete inequality, whereby all income would go to one person, whereas a measure of 0 would be complete equality, whereby all income was equally divided. By way of example, according to the CIA World Factbook, the United States has a Gini Coefficient of .451, Canada's Gini Coefficient is .321 and Sweden's is .23. "The Gini coefficient is the most commonly used measure of inequality. It measures the average or expected difference between pairs of incomes in the distribution, relative to the distribution size . . . ." JAMES FOSTER, SUMAN SETH, MICHAEIL LOKSHIN & ZURAB SAJAIA, A UNIFIED APPROACH TO MEASURING POVERTY AND INEQUALITY: THEORY AND PRACTICE 93 (2013), http://elibrary.worldbank.org.proxy.lib.utk.edu:90/doi/pdf/10.1596/978-0-8213-8461-9. "When every household in a region has the same per capita expenditure, then the Gini coefficient is 0." *Id.* at 279.

13. Alexandra Cawthorne, *The Straight Facts on Women in Poverty*, CENTER FOR AMERICAN PROGRESS, https://www.americanprogress.org/issues/women/report/2008/10/08/5103/the-straight-facts-on-women-in-poverty/ (last visited June 20, 2016) (demonstrating the poverty rate for African American women and men is 26.5% and 22.3%, respectively, whereas for White women and men it is 11.6% and 9.4%, respectively).

14. U.S. CONST. art. IV, § 2. ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."); U.S. CONST. amend. XIV, § 1. ("No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.")

education. The provision of these basic requirements for full and effective citizenship will, in turn, encourage the political branches to have the proper incentives to provide Americans with socio-economic rights consistent with being citizens of a mature first-world democracy, the lack of which, as manifested by the Trump and Sanders campaigns, explains much of the nation's current discontent.[15]

II. THE U.S. TODAY: A COUNTRY OF PRONOUNCED INEQUALITY

The U.S. is the leading country in the developed world, with a gross domestic product ("GDP") estimated at $18 trillion and a per capita income of approximately $57,000.[16] The U.S. also retains, by far, the most powerful military in the world, as it is unique among industrialized countries in spending nearly five percent of its GDP on military expenditures.[17] In addition, the U.S. retains the world's reserve currency, attracts highly skilled immigrants, and is home to many of the world's leading universities and companies.[18] The U.S., however, has many unique problems compared to other industrialized and emerging nations. First, it has pronounced socio-economic and racial cleavages that are aggravated by historical grievances and the dynamics of the country's political culture. The spate of recent police shootings[19] of African American males nationwide has highlighted not only the fact they are

15. Tom Kertscher, *For 70 Years, Most Americans Have Supported Single-Payer Government-Run Health Insurance?*, POLITIFACT WISCONSIN (May 14, 2014, 5:00 AM), http://www.politifact.com/wisconsin/statements/2014/may/14/ralph-nader/70-years-most-americans-have-supported-single-paye/; s*ee also* Ariel Edwards-Levy, *Most Americans Support Paid Sick Days, Parental Leave*, HUFFPOST POLITICS (Feb. 4, 2015, 6:02 PM), http://www.huffingtonpost.com/2015/02/04/sick-leave-poll_n_6616566.html (providing polling evidence that demonstrates that Americans of all political persuasions increasingly expect the government to provide not only basic social services, such as health insurance and pensions, but additional benefits, such as paid parental leave, that are more in-line with other mature democracies).

16. *Table 699: Selected Per Capita Income and Product Measures in Current and Chained (2009) Dollars: 1980 to 2014 [GDP, GNP, Personal and Disposable Income and Consumption Expenditures, Selected Years]*, BUREAU OF ECON. ANALYSIS (Dec. 2015), http://statabs.proquest.com/sa/docview.html?table-no=699&acc-no=C7095-1.13&year=2016&z=9CAF46473F505C70C1A9F00125BA26EF1A86AE54.

17. *Military Expenditures as a Percent of GDP, Selected Years 2006 to 2015, and Manpower, 2010, by Country*, CENT. INTELLIGENCE AGENCY (Dec. 2015), http://statabs.proquest.com/sa/docview.html?table-no=1405&acc-no=C7095-1.30&year=2016&z=86DAE507DADED68CCF94AC623EC8A06D83441666.

18. Uri Dadush & Zaahira Wyne, *What Does the U.S. Election Mean for the World Economy?*, CARNEGIE EUROPE (Aug. 2, 2012), http://carnegieeurope.eu/publications/?fa=48970.

19. Michael Wines & Sarah Cohen, *Police Killings Rise Slightly, Though Increased Focus May Suggest Otherwise*, N.Y. TIMES (Apr. 30, 2015), http://www.nytimes.com/2015/05/01/us/no-sharp-rise-seen-in-police-killings-though-increased-focus-may-suggest-otherwise.html.

subjected to far harsher policing techniques, and are incarcerated at a rate six to seven times higher than Whites,[20] but the fact of their relative economic powerlessness.[21] The deep dissatisfaction with the nation's trajectory among less affluent Whites, who feel the pressures of socio-economic immobility together with a sense of political powerlessness, is problematic for all Americans as this socio-economic backlash is manifesting itself in irrational ways, as exemplified not only by Trump's relative popularity, but increasing evidence that Americans, concerned about their own economic security, have lost the generosity of spirit to support continued international engagement and collective security. The American desire to disengage from international commitments, as manifest by the Obama Administration's rapid withdrawal of U.S. troops from Iraq and Afghanistan, its failure to adequately support its intervention in Libya with ground troops, and its refusal to intervene to stop what is arguably genocide in Syria,[22] portends poorly for international security in a world that will be increasingly Hobbesian without American leadership and engagement. American citizens, however, need to feel sufficiently secure in their own political and economic rights before acquiescing in further military endeavors. This is problematic for American credibility because public dissatisfaction with the nation's trajectory has, inhumanely, pushed our leaders to abjure stopping atrocities committed by the Assad regime in Syria, while, at the same time, denying asylum to war-displaced Syrian refugees.[23]

The failure of U.S. institutions to remediate high levels of socio-economic inequality has tilted the nation's political culture further to the right by effectively depressing democratic participation by poorer Americans and racial minorities. This poses great problems for a country that has historically been the world's largest marketplace and guarantor of international stability. In fact, the U.S. is no longer the world's largest economy, as it has been overtaken by the People's Republic of China in terms of aggregate GDP.[24] When asked about the U.S's long-term

20. *See* Sakala, *supra* note 5.

21. Rakesh Kochhar, Richard Fry & Paul Taylor, *Hispanic Household Wealth Fell by 66% From 2005 to 2009: The Toll of the Great Recession*, PEW RESEARCH CENTER (July 26, 2011), http://www.pewhispanic.org/2011/07/26/the-toll-of-the-great-recession/.

22. *See generally* Priyanka Boghani, *A Staggering New Death Toll for Syria's War—470,000*, PBS FRONTLINE (Feb. 11, 2016), http://www.pbs.org/wgbh/frontline/article/a-staggering-new-death-toll-for-syrias-war-470000/.

23. Amanda Sakuma, *The U.S. is Way Behind its Goal of Accepting 10,000 Syrian Refugees*, NBC NEWS (Apr. 7, 2016, 4:38 PM), http://www.nbcnews.com/storyline/syrias-suffering-families/u-s-way-behind-its-goal-accepting-10-000-syrian-n552521.

24. Simon Rabinovitch, *China Forecast to Overtake US by 2016*, FINANCIAL TIMES (Mar. 22, 2013, 7:26 AM), http://www.ft.com/cms/s/0/0a3f5794-92b3-11e2-9593-00144feabdc0.html#axzz4CG4TJtpj (measuring, not at official exchange rates. but at purchasing power parity levels); *see also Country Comparison: GDP (Purchasing Power*

unemployment crisis and low labor force participation rate, Pacific Investment Management Company, Inc., LLC's founder and former Chief Investment Officer, Bill Gross, stated that "[o]ur labor force is too expensive and poorly educated for today's marketplace."[25]

This was not always the case. Historically, the U.S. was the envy of the world in both political and economic rights. For example, at the Founding, U.S. living standards were very high and relatively equal compared with those of the United Kingdom, France, or the rest of continental Europe.[26] The Framers intentionally created an "Empire of Liberty" that would be the envy of the world in terms of both first and second generation freedoms, namely, individual freedom from state coercion and the ability to earn sufficient livelihoods to assure full participation in U.S. economic life and democracy.[27] This unfortunately is no longer the case, as increasing numbers of Americans live in either economic insecurity or poverty, which, in turn, manifests itself in the trend toward illiberal authoritarianism. Recognizing that the Court has neither anticipated nor acted to remedy the problem, a brief evaluation of U.S. government dysfunction and the Court's jurisprudence follows.

A. U.S. Governmental Dysfunction

The U.S. is beset by a perceived dysfunction such that the U.S. government's political branches seem either incapable of or unwilling to address the nation's problems. In their book, *It's Even Worse Than it Looks*, the highly regarded scholars Thomas Mann and Norman Ornstein document how the U.S. Congressional system has broken down across partisan lines to make a bipartisan approach to legislation almost impossible.[28] Evidence of this breakdown is the debt ceiling debacle that led the Standard and Poor's credit rating agency to downgrade the creditworthiness of U.S. government debt from AAA to AA+ in August

Parity), THE WORLD FACTBOOK, https://www.cia.gov/library/publications/the-world-factbook/rankorder/2001rank.html#ch (last visited June 21, 2016).

25. *The 'Skills Gap' Myth*, THE PROGRESSIVE (Mar. 25, 2013), http://progressive.org/skills-gap-myth.

26. *See generally*, CHARLES C. HERRING, FROM COLONY TO SUPERPOWER: U.S. FOREIGN RELATIONS SINCE 1776 (David M. Kennedy ed., Oxford Univ. Press 2008).

27. Michael J. Gerhardt, *The Ripple Effects of* Slaughter-House*: A Critique of a Negative Rights View of the Constitution*, 43 VAND. L. REV. 409, 428–29 (1990) (citing the late Chief Justice Rehquist and Judge Richard Posner to conclude they mistakenly interpret the Fourteenth Amendment based on their own laissez-faire economic thinking when its Framers intended to use it as a means of imposing affirmative duties on state governments).

28. *See* NORMAN J. ORNSTEIN & THOMAS A. MANN, IT'S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM (2012).

2011.[29] The U.S. government's weakness is further evidenced by the fact it taxes its citizens at rates comparable to a developing nation as compared to a mature democracy. To illustrate, tax revenues account for a mere 15.7% of U.S. GDP (compared to 44.9% for Germany, 40.9% for the United Kingdom, and 38.4% for Canada) and the U.S. has, accordingly, fewer resources to remediate poverty and income inequality rates that are the highest in the developed world.[30]

Although all socio-economic benefits could be legislatively enacted by Congress under its Spending Clause power, the fact that neither Congress nor the several States has done so evidences an institutional failure borne of an individualistic political culture that is skewed in favor of the wealthy and against the poor and racial minorities, and a political system that reinforces this trend by empowering moneyed interests at the expense of the poor. Examples of this institutional sclerosis include an excessively open and cash-dependent political system that enables large donors and organized interest groups to undermine needed legislation; a single member plurality legislative districting system that blatantly undervalues political participation by racial minorities and the poor by allowing state legislatures to gerrymander districts to dilute voting efficacy; an arcane electoral system that forces equal representation by state, regardless of population, in the U.S. Senate, which depresses the political power of larger states, urban residents, and racial minorities; a system of federalism that discourages needed public investments by encouraging a "race to the bottom" regarding tax rate; arcane legislative rules such as the Hastert Rule[31] and Senate filibuster[32] that excessively empower interest groups; and a Congressional committee system that rewards seniority over competence. The list is potentially endless and is perhaps best exemplified by the Republican-controlled U.S. Senate's

29. John Detrixhe, *U.S. Loses AAA Rating at S&P on Concern Debt Cuts Deficient*, BLOOMBERG (Aug. 6, 2011, 1:17 PM), http://www.bloomberg.com/news/articles/2011-08-06/u-s-credit-rating-cut-by-s-p-for-first-time-on-deficit-reduction-accord.

30. *Table 693: Relation of GDP, GNP, Net National Product, National Income, Personal Income, Disposable Personal Income, and Personal Saving: 2000 to 2014*, U.S. BUREAU OF ECON. ANALYSIS, http://statabs.proquest.com/sa/docview.html?table-no=693&acc-no=C70951.13&year=2016&z=C5121AE5792DDE3718A29A3F9FE1093EF3E747CE (last visited June 21, 2016).

31. Molly Ball, *Even the Aide Who Coined the Hastert Rule Says the Hastert Rule Isn't Working*, ATLANTIC (July 21, 2013), http://www.theatlantic.com/politics/archive/2013/07/even-the-aide-who-coined-the-hastert-rule-says-the-hastert-rule-isnt-working/277961/. Under the doctrine, the Speaker will not allow a floor vote on a bill unless a majority of the controlling party supports the bill. *Id*.

32. Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181, 188 (1997). The filibuster is a dilatory tactic that enables an individual senator to prevent debate on a measure by speaking for as long as she wishes unless a supermajority of 60 senators can vote to end debate by invoking cloture. *See id*.

reluctance to schedule confirmation hearings for U.S. Court of Appeals Chief Judge Merrick Garland, who is President Obama's nominee to succeed the late Antonin Scalia as an associate justice on the U.S. Supreme Court. The Court should fulfill its obligation to protect the most vulnerable by revivifying the Clauses to ensure that all Americans be provided the foundation to participate as free citizens in all aspects of American life.

It is evident the U.S. government is incapable of addressing the country's challenges that include weak public education,[33] low private savings,[34] excessive and disproportionate entitlement spending,[35] high long-term unemployment,[36] low labor force participation,[37] lowering productivity growth,[38] stagnant wages,[39] government debt accumulation,[40] excessive income inequality,[41] the current backlash against illegal immigration,[42] unhealthy levels of racial polarization[43],

33. *See Education at a Glance: OECD Indicators 2012*, OECD, https://www.oecd.org/unitedstates/CN%20-%20United%20States.pdf (last visited June 21, 2016).

34. Milton Marquis, *What's Behind the Low U.S. Personal Saving Rate?*, FED. RESERVE BANK OF SAN FRANCISCO ECON. LETTER (Mar. 29, 2002), http://www.frbsf.org/economic-research/publications/economic-letter/2002/march/what-is-behind-the-low-us-personal-saving-rate/#subhead1.

35. Romina Boccia, *Federal Spending by the Numbers, 2014: Government Spending Trends in Graphics, Tables, and Key Points (Including 51 Examples of Government Waste)*, THE HERITAGE FOUNDATION (Dec. 8, 2014), http://www.heritage.org/research/reports/2014/12/federal-spending-by-the-numbers-2014.

36. Nancy Cook, *What the Great Recession Taught Us About Long-Term Unemployment*, ATLANTIC (Mar. 31, 2015), http://www.theatlantic.com/business/archive/2015/03/what-the-great-recession-taught-us-about-long-term-unemployment/425310/.

37. *Databases, Tables & Calculators by Subject: Labor Force Statistics from the Current Population Survey*, BUREAU OF LABOR STATISTICS (Jun. 3, 2016), http://data.bls.gov/timeseries/LNS11300000.

38. Scott Andes & Jessica A. Lee, *Why is Labor Productivity So Low? Consider Investments in Skills*, BROOKINGS (May 8, 2015, 10:12 AM), http://www.brookings.edu/blogs/the-avenue/posts/2015/05/08-labor-productivity-low-skills-andes-lee.

39. *Nominal Wage Tracker*, ECONOMIC POLICY INSTITUTE (June 3, 2006), http://www.epi.org/nominal-wage-tracker/.

40. Mike Patton, *National Debt Tops $18 Trillion: Guess How Much You Owe?*, FORBES (Apr. 24, 2015, 2:19 PM), http://www.forbes.com/sites/mikepatton/2015/04/24/national-debt-tops-18-trillion-guess-how-much-you-owe/#3747373c5ebd.

41. *See generally* PIKETTY, *supra* note 1.

42. Jens Manuel Krogstad & Jeffrey S. Passel, *5 Facts About Illegal Immigration in the U.S.*, PEW RESEARCH CENTER (Nov. 19, 2015), http://www.pewresearch.org/fact-tank/2015/11/19/5-facts-about-illegal-immigration-in-the-u-s/.

43. *See* Jamelle Bouie, *Could America Become Mississippi?*, SLATE (Apr. 9, 2014, 11:24 PM), http://www.slate.com/articles/news_and_politics/politics/2014/04/demographics_conservatism_and_racial_polarization_could_america_become_mississippi.html.

and staggering student indebtedness.[44] This dysfunction breeds cynicism by the broader American public and informs the authoritarian nationalism that explains both Trump's popularity and the growth of cynicism, anger, and apathy in the American public.[45] How should the Court's jurisprudence be evaluated in this environment? It is to this subject that this paper turns.

III. EVALUATING THE COURT'S JURISPRUDENCE

The Supreme Court's jurisprudence should be evaluated not only by the desirability of its decisions and institutional legitimacy, but as to how its jurisprudence deals and interacts with the problems confronting U.S. society. The Court's jurisprudence should ultimately be evaluated based on whether it remedies, rather than reinforces, the nation's problems. By this standard, the Court's jurisprudence reinforces rather than remedies the historical racial and socio-economic cleavages that harm U.S. society, and is contributing to what the writer and public intellectual George Packer has called the "unwinding" of the American institutions and society.[46]

To go back in time, it is useful to recall Justice Brandeis's concurring opinion in *Ashwander v. Tennessee Valley Authority*,[47] which promulgated what have since become known as the *Ashwander* Rules that remain the standard for evaluating the legitimacy of federal court oversight.[48] The most important of these is that the Court should abjure

44. *See* Jillian Berman, *America's Growing Student-Loan-Debt Crisis*, MARKETWATCH (Jan. 19, 2016, 2:11 PM), http://www.marketwatch.com/story/americas-growing-student-loan-debt-crisis-2016-01-15.

45. *See* Kenneth T. Walsh, *Anxiety and Anger in America*, U.S. NEWS (Sept. 11, 2015), http://www.usnews.com/news/the-report/articles/2015/09/11/trumps-rise-illust rat es-anger-and-anxiety-in-america.

46. GEORGE PACKER, THE UNWINDING: AN INNER HISTORY OF THE NEW AMERICA 3–4 (Farrar, Straus and Giroux eds., 2013).

47. Ashwander v. Tennessee Valley Auth., 297 U.S. 288 (1936).

48. *See id*. at 346–48. The *Ashwander* Rules are as follows:

1. "The Court will not pass upon the constitutionality of legislation in a friendly, non-adversary, proceeding, declining because to decide such questions 'is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy between individuals. It never was the thought that, by means of a friendly suit, a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act.'"
2. "The Court will not 'anticipate a question of constitutional law in advance of the necessity of deciding it.' It is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case."
3. "The Court will not 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'"
4. "The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. This rule has found most varied application.

from adjudicating the constitutionality of an issue unless it is an absolutely necessary matter of last resort.[49] This is to minimize the footprint of the appointed federal judiciary and allow for the Framers' laboratories of democracy to flourish. Justice Brandeis's admonition remains highly relevant as the Court has refused to protect socio-economic rights, notwithstanding the manifest need for it to do so, and has improvidently used judicial review under the Due Process and Equal Protection Clauses in a manner that has created a backlash against vulnerable groups and harmfully misaligned the political culture. An obvious example is reproductive rights, where federal judicial review has resulted in pronounced and unbridgeable political polarization on abortion and pathologically politicized the nomination and confirmation of federal judges. Justice Ginsburg, no less, has argued that the Court's creation of national abortion rights has had the parlous consequence of creating sharp divisions on the issue at the very moment when states were liberalizing their abortion laws.[50] A similar argument can be made of the Court's forays into capital punishment;[51] the 2000 presidential election;[52] Lesbian, Gay, Bisexual, and Transgender ("LGBT") rights;[53] homosexual sodomy;[54] and, most recently, same-sex marriage.[55] The spectacle of Alabama Chief Justice Roy Moore's refusal to recognize the Supremacy Clause and allow the issuance of marriage licenses to LGBT

Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter. Appeals from the highest court of a state challenging its decision of a question under the Federal Constitution are frequently dismissed because the judgment can be sustained on an independent state ground."

5. "The Court will not pass upon the validity of a statute upon complaint of one who fails to show that he is injured by its operation. Among the many applications of this rule, none is more striking than the denial of the right to challenge to one who lacks a personal or property right."
6. "The Court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits."
7. "When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided."

49. *See id*. at 346–47.

50. *See* Jonathan Bullington, *Justice Ginsburg: Roe v. Wade Not 'Woman-Centered'*, CHICAGO TRIBUNE (May 11, 2013), http://articles.chicagotribune.com/2013-05-11/news/chi-justice-ginsburg-roe-v-wade-not-womancentered-20130511_1_roe-v-abortion-related-cases-wade-case.

51. *See* Furman v. Georgia, 408 U.S. 238, 240–41 (1972).

52. *See* Bush v. Gore, 531 U.S. 98, 100–103 (2000).

53. *See* Romer v. Evans, 517 U.S. 620, 624 (1996).

54. *See* Lawrence v. Texas, 539 U.S. 558, 562 (2003).

55. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2593 (2015); *see also* United States v. Windsor, 133 S. Ct. 2675, 2682 (2013).

Alabamians is a reminder that federal judicial review always comes at a political price at the state and local levels.[56] Indeed, to the degree judicial review has been a tool used to advance historically marginalized groups and perspectives, it has, at times, misaligned the political culture away from other pressing concerns. The country's political trajectory might have been different if the Court had never intervened to create federal abortion rights because political exploitation of this issue has realigned the politics toward social issues at the expense of socio-economic issues. It also most likely reinforced the nation's red/blue state divide to the detriment of the nation's overall cohesion and socio-economic rights by aligning socially conservative and authoritarian voters with the Republican Party. It was Republican President Richard Nixon who advocated a federal guaranteed minimal income for the poor during his first term as President, but shifted tack to focus on social issues to win re-election in 1972.[57] To the degree a potential consensus on these matters might have been feasible, it was preempted by the backlash brought about by the Court's decision in *Roe*. Linda Greenhouse and Reva Siegel, who dispute the claim that *Roe* is responsible for the politics of abortion, write:

> Accounts of abortion backlash differ in the particular failings that they ascribe to the Supreme Court, but the assumption that binds them together is that it was the Court's decision in *Roe* that began conflict over abortion. As Ken I. Kersch, director of the Clough Center for the Study of Constitutional Democracy at Boston College, explains, "Politically, the Court's decision to declare abortion to be a national right served as a catalyst for the Right to Life movement. That movement, in turn, played a major role in realigning the party loyalties of millions of Americans."
>
> Not only is it commonly assumed that *Roe* started the conflict over abortion but the common assumption, both outside and within the legal academy, is that *Roe* has driven the realignment of Republican and Democratic voters around abortion. According to Benjamin Wittes, "One effect of *Roe* was to mobilize a permanent constituency for criminalizing abortion—a constituency that has driven much of the southern realignment toward conservatism." As Cass Sunstein put it, "[T]he decision may well have created the Moral Majority,

56. *See* Emily Bazelon, *In Sort-of-Defense of Roy Moore*, N.Y. TIMES MAGAZINE (Feb. 11, 2015), http://www.nytimes.com/2015/02/11/magazine/in-sort-of-defense-of-roy-moore.html.

57. *See* DANIEL P. MOYNIHAN, THE POLITICS OF A GUARANTEED INCOME: THE NIXON ADMINISTRATION AND THE FAMILY ASSISTANCE PLAN 220–26 (Random House 1973); s*ee also* Noah Gordon, *The Conservative Case for a Guaranteed Basic Income*, ATLANTIC (Aug. 6, 2014), http://www.theatlantic.com/politics/archive/2014/08/why-arent-reformic ons-pushing-a-guaranteed-basic-income/375600/.

> helped defeat the equal rights amendment, and undermined the women's movement by spurring opposition and demobilizing potential adherents." Or as Sandford Levinson explains, "I have often referred to *Roe* as 'the gift that keeps on giving' inasmuch as it has served to send many, good, decent, committed largely (though certainly not exclusively) working-class voters into the arms of a party that works systematically against their material interests but is willing to pander to their serious value commitment to a 'right to life.'" David Brooks charges yet more harshly: "Justice Harry Blackmun did more inadvertent damage to our democracy than any other 20th-century American. When he and his Supreme Court colleagues issued the *Roe v. Wade* decision, they set off a cycle of political viciousness and counter-viciousness that has poisoned public life ever since." Robert P. George invokes *Roe* in warning the Supreme Court not to accept the constitutional claim for same-sex marriage: "By short-circuiting the democratic process, *Roe* inflamed the culture war that has divided our nation and polarized our politics."[58]

It is entirely plausible that, but for the Court-induced abortion politics, the country might have enacted a guaranteed minimum income for poorer Americans, protected high-paying union-jobs by forcing both parties to protect the nation's industrial base, and minimized racial political polarization by preventing the Republican Party from "peeling away" ethnic and rural Whites from the Democratic Party's New Deal coalition. It is impossible to identify *Roe'*s full consequence, but it is plausible that poorer women might have better access to full reproductive freedom in many "red" states if the ensuing backlash had been avoided.

The same undoubtedly holds true for other Court interventions that have taken the Democratic Party, the center-left party in American democracy, away from its traditional role as a protector of the socio-economically disadvantaged and made it an identity politics party that is little more than an umbrella organization for historically marginalized groups. This is because the Court has violated the *Ashwander* Rules by adjudicating the constitutionality of many issues that should have been legislatively resolved, while at the same time, notwithstanding the demonstrable need and legislative inaction, abjuring judicial protection for the poor to the detriment of both the Court's legitimacy and, as manifest by the rise of political polarization and authoritarian populism, the nation's overall cohesion. As set forth more fully below, the Court should invoke the *Ashwande*r Rules and use the long-disregarded

58. Linda Greenhouse & Reva B. Siegel, *Before (and After) Roe v. Wade: New Questions About Backlash*, 120 YALE L.J. 2028, 2072–73 (2011).

Clauses to remedy the socio-economic divides that undermine our nation's cohesion–divides that the political branches refuse to address.

IV. PRIVILEGES AND/OR IMMUNITIES OF CITIZENSHIP – THE COURT'S HISTORIC MISTAKE AND A POTENTIAL SOLUTION

The Article IV Clause provides that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States,"[59] while the Fourteenth Amendment Clause provides that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."[60] The Clauses should be interpreted as their Framers' attempt to ensure that all citizens of the nascent and post-reconstruction republics, respectively, maintain citizenship rights and living standards at the forefront of international standards by rejecting the distinction between positive and negative rights, and requiring the federal government to protect the fundamental rights of all citizens against state or private action.[61] This is, in the case of the Article IV Clause, because the Framers sought to attract citizens of the former thirteen colonies that already had, by some measures, the highest material living standards in the world, to join a federal republic that would enhance and uniquely protect their civil, political, and material rights by ensuring national citizens against out-of-state discrimination.[62] In the case of the Fourteenth Amendment Clause, its Framers, seeking to protect former African American slaves from recalcitrant state and local governments, sought to ensure provision of substantive negative and positive freedoms to all Americans from all levels of government, including one's own state government.[63]

The Article IV Clause's promise was set forth as early as 1823 when, in *Corfield v. Coryell*,[64] Justice Bushrod Washington[65] adjudicated

59. U.S. CONST. art. IV, § 2, cl. 1.

60. U.S. CONST. amend. XIV, § 1.

61. *See* Akhil Reed Amar, *Substance and Method in the Year 2000*, 28 PEPP. L. REV. 601, 631–32 (2001); *see also* Gerhardt, *supra* note 27, at 437.

62. *See* RICHARD MIDDLETON & ANNE LOMBARD, COLONIAL AMERICA: A HISTORY TO 1763 255–59 (Wiley-Blackwell eds., 4th ed. 2011); s*ee also* Thomas Weiss, Joshua L. Rosenbloom & Peter C. Mancall, *The Standard of Living in the Colonies and States of the Middle Atlantic Region Before 1800: Evidence From a Sample of Widows' Allowances*, NAT'L SCIENCE FOUND. GRANT NO. 0317265 16–17 (Mar. 2010), http://www.iga.ucdavis.edu/Research/All-UC/conferences/spring2010/Rosenbloom%20paper.PDF; *see also* NIALL FERGUSON, EMPIRE: THE RISE AND DEMISE OF THE BRITISH WORLD ORDER AND THE LESSONS FOR GLOBAL POWER 70 (Basic Books 2008); AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 14–20 (Random House 2005).

63. *See* Gerhardt, *supra* note 27, at 437.

64. *See* Corfield v. Coryell, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230).

65. Justice Washington was the nephew of our greatest citizen, who advocated for ratification of the Constitution in Virginia before serving for several decades on the

a trespass action based on the seizing of a boat named *The Hiram* that had been captured after it was found to be oyster raking in a cove illegally. Although Justice Washington disagreed with the claim that oyster raking was a privilege and immunity of citizenship (state residency was a prerequisite for those engaged in the activity), he elaborated on the Article IV Clause's meaning, writing:

> The inquiry is, what are the privileges and immunities of citizens in the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state; may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental: to which may be added, the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised. These, and many others which might be mentioned, are, strictly speaking, privileges and immunities, and the enjoyment of them by the citizens of each state, in every other state, was manifestly calculated (to use the expressions of the preamble of the corresponding provision in the old articles of confederation) "the better to secure and perpetuate mutual friendship and intercourse among the people of the different states of the Union."[66]

Justice Washington's seminal elaboration of Article IV's Clause is consistent with the Declaration of Independence's recognition that "all

Supreme Court. *See* Brief of Constitutional Law Professors as Amici Curiae in Support of Petitioners, McDonald v. City of Chicago, No. 08-1521, 2009 WL 4099504, at *10–12 (U.S. 2009).

66. *Corfield*, 6 F. Cas. at 551–52.

men are created equal" and "endowed by their Creator with certain inalienable rights" that include "life, liberty and the pursuit of happiness."[67] Justice Washington concluded that it would be too tedious to enumerate the fundamental liberty principles protected by his Article IV Clause interpretation, but it may be comprehended under the following general heading, namely protection of the individual by the Government, "the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety . . . ."[68] This definition of the term "privileges and immunities" drew on the framing-era understanding that these terms were associated with broad protections of substantive liberty, as provided for in, among other places, the Declaration of Independence.[69]

Justice Washington's description was commonly understood as the proper understanding of the Article IV Clause and informed the public meaning of the Fourteenth Amendment's Privileges or Immunities Clause, which was enacted and ratified based on, among other things, revulsion at the institution of slavery and its consequences in the antebellum South.[70] This is because the Article IV Clause is premised on the liberating benefits of federalism and textually only protects out-of-staters and not in-state residents from abusive practices, the obvious examples being slavery and economic exploitation.

Accordingly, the Fourteenth Amendment's Framers included the Fourteenth Amendment Clause due to federalism's limits and because protection of civil, political and socio-economic rights from recalcitrant state and local governments had become an imperative concern in the years since the Article IV Clause's ratification.[71] Unlike the Article IV Clause, the Fourteenth Amendment Clause would provide all citizens with substantive rights against their own state and local governments by, for the first time, purporting to incorporate the first eight articles of the Bill of Rights against state governments and providing individual citizens with protection in federal court against state intrusions into these and other fundamental rights.[72] Although the Court did not adopt this methodology and instead used the Fourteenth Amendment's Due Process Clause to selectively incorporate the Bill of Rights over a more than one-hundred year time-frame that began a generation after the Fourteenth

67. Brief of Constitutional Law Professors, *supra* note 65, at 11–12.

68. *Corfield*, 6 F. Cas. at 551; *see also* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 62–65 (Princeton Univ. Press 2003) (describing the repeated reliance on *Corfield*).

69. *See* Brief of Constitutional Law Professors, *supra* note 65, at 11–12.

70. *See id.* at 14, 26–30.

71. *See id.* at 5–6.

72. *See id.* at 16, 20.

Amendment's ratification,[73] most legal scholars would agree this was a mistake that is belied by the Fourteenth Amendment's text and its Framers' intent.[74] As the Constitutional Accountability Center has written,

> [t]he most influential and knowledgeable members of the Reconstruction Congress went on record with their express belief that Section One of the Fourteenth Amendment—and, in most instances, the Privileges or Immunities Clause specifically—protected against state infringement of fundamental rights, including the liberties secured by the first eight articles of the Bill of Rights. Not a single senator or representative disputed this understanding of the privileges and immunities of citizenship or Section One . . . . To the contrary, whether in debates over the Fourteenth Amendment or its statutory analogue, the Civil Rights Act of 1866, Republicans in Congress affirmed two central points: the Privileges or Immunities Clause would safeguard substantive liberties set out in the Bill of Rights, and that, in line with *Corfield*, the Clause would give broad protection to substantive liberty, safeguarding all the fundamental rights of citizenship.[75]

The Fourteenth Amendment Clause prohibits the making or enforcing of any state law that "abridges the privileges or immunities" of any United States citizen and goes beyond mere antidiscrimination.[76] Because it concerns the substantive fundamental rights that all states must respect, a citizen need only show that government action has violated her fundamental rights to make out a violation of the Fourteenth Amendment Clause.[77] In support of this thesis, the Institute for Justice writes:

> There is ample historical evidence that the purpose of the Fourteenth Amendment, and particularly the Privileges or Immunities Clause, was not merely to provide for the mechanistic "incorporation" of the first eight amendments (it would have been easy enough to say so), but instead to redress a whole host of laws, practices, customs, and

73. The Court first applied the Due Process Clause to incorporate the Fifth Amendment's Takings Clause against the states via the Fourteenth Amendment's Due Process Clause in *Chicago, Burlington and Quincy Railroad Co. v. City of Chicago*, 166 U.S. 226 (1897) and it took another one hundred and thirteen years for the Court to conclude the Fourteenth Amendment's Due Process Clause required state and local governments to provide Second Amendment protections. *See* McDonald v. City of Chicago, 561 U.S. 742, 754 (2010).

74. *See* Brief of Amicus Curiae Institute for Justice in Support of Petitioners, McDonald v. City of Chicago, No. 08-1521, 2009 WL 4099506, at 8–10.

75. Brief of Constitutional Law Professors, *supra* note 65, at 20–21.

76. *Id. at* 21.

77. *See id.* at 20–21.

> mores whose common purpose was to destroy the ability of newly freed slaves to become self-sufficient members of society. History shows that it would have been impossible to identify, fix, and proscribe the entire host of state laws, local ordinances, and regulations that collectively made up the infamous "Black Codes" designed to keep freedmen in a state of penury and terror. Thus, for example, many states adopted laws that kept blacks from practicing trades or even leaving their employer's land without permission; others adopted vagrancy laws that, in practice, made it illegal to be unemployed, and therefore illegal to look for work . . . . The Fourteenth Amendment—particularly its Privileges or Immunities Clause—was a direct response to Southern tyranny and a very deliberate attempt to protect individual rights whose enjoyment is indispensable to personal security and autonomy.[78]

This requirement that the Clause protects more than equal treatment by states is logically consistent with the understanding that states have a separate obligation to assure their citizens personal security and autonomy because a requirement of equal treatment can easily be satisfied by states denying substantive rights to all citizens, as was the case when southern states systematically compelled silence on the issue of slavery during the antebellum period.[79] The Institute for Justice writes:

> This last point is best illustrated by the sheer variety of laws invented by Southern governments to prevent freed slaves from enjoying the personal autonomy that was to have been theirs upon ratification of the Thirteenth Amendment. To take just one example, starting with Virginia in 1870, Southern states began to pass increasingly restrictive regulations of "emigrant agents"—people who attempted to recruit freedmen to leave their plantations by promising higher wages and better working conditions on understaffed Western plantations, eventually making it illegal or practically illegal for people to even *offer* these economic opportunities to poor workers. Those and other laws had the express (though not always expressed) purpose of binding former slaves to the very same plantations they had worked during slavery, and upon essentially the same terms.[80]

This was anathema to the Fourteenth Amendment's Framers "and it [was] abundantly clear that they intended to confer upon the federal courts not only the power but *the duty to ensure the freedom, security,*

78. Brief of Amicus Curiae Institute for Justice, *supra* note 74, at 12–13.
79. *See id.* at 13–14.
80. *Id.* at 14.

and autonomy of all American citizens by protecting them from the tyranny of local governments."[81]

Professor Akhil Reed Amar also concludes that the Fourteenth Amendment Clause was intended to both incorporate the Bill of Rights against the several States and provides Americans with broader, more substantive rights.[82] He writes:

> There were indeed a core set of fundamental freedoms that the People aimed to affirm in the Fourteenth Amendment's Privileges or Immunities Clause—freedom of expression and of religion, protection against unreasonable searches, the safeguards of habeas corpus, and so on. These clear instances of inclusion—with less tainted origins—give us paradigm cases from which we can properly begin the doctrinal process of generalization, interpolation, and analogic reasoning. Moreover, the Privileges and Immunities Clause suggests a method for going about finding fundamental rights that is less Court-centered, and admirably so.
>
> The Fourteenth Amendment does not exhaustively list all of Americans' privileges and immunities, but it does rest upon a notion that such fundamental rights are catalogued elsewhere in documents that the American People have broadly ratified, formally or informally. In the eyes of those who drafted and ratified the Fourteenth Amendment, the federal Bill of Rights was one of these catalogues—a compilation of fundamental rights that the Amendment would henceforth guarantee ("incorporate") against states. But, the Bill of Rights was not the only epistemic source of guidance. (In other words, the Fourteenth Amendment aims to do more than "incorporate" the Bill of Rights.) The Magna Carta, the English Petition of Right, the Declaration of Independence, state bills of rights—all these, too, were proper sources of guidance for interpreters in search of fundamental rights and freedoms. Rather than a system where Justices simply look to what they or their predecessors have declared fundamental in self-absorbed opinions, a more attractive and document-supported approach to the Privileges or Immunities Clause would invite the Court to canvass nonjudicial legal sources—the above-listed documents, state laws and constitutions, federal legislation, and so on—as critical sources of epistemic guidance.[83]

This demonstrates that the Fourteenth Amendment Clause's Framers intended to fundamentally alter American federalism from one that protects individuals and states from an abusive federal government

81. *Id.* at 14–15 (emphasis added).
82. *Id.* at 13–15.
83. Amar, *supra* note 61, at 631–32.

into one that imposes positive duties on all levels of government to ensure Americans are provided with individual rights and living conditions consistent with a free and democratic society.[84]

Notwithstanding both clear text and evidence of this intent, the Court has narrowly interpreted the Clauses to mean little more than protection against foreign residents by state governments regarding the ability to earn a livelihood and the right to relocate to take up residency on equal terms.[85] This mistaken marginalization of the Clauses, attributable to the doctrine of judicial deference,[86] goes back to *The Slaughter-House Cases*,[87] which, a mere four years after the Fourteenth Amendment's ratification, concluded that the Fourteenth Amendment Clause provides no redress against one's own state government because a textual interpretation such as this would be too radical for Congressional intent purposes, and because it would redefine American federalism by permanently empowering the federal courts to police the several states, notwithstanding that this was precisely what the Reconstruction Amendments' Framers purported to do.[88]

The *Slaughter-House* decision was immediately condemned by former members of the 39th Congress as a "great mistake,"[89] which, according to U.S. Senator Timothy O. Howe, had perverted the Constitution by "assert[ing] a principle of constitutional law which [would never] be accepted by the [legal] profession or the people of the United States."[90] U.S. Senator George Franklin Edmunds said the *Slaughter House* view of the Fourteenth Amendment's Clause "radically differed" from the Framers' intent.[91] The Court's reluctance to revisit this conclusion, although it is based on an interpretation that is "contrary

84. Gerhardt, *supra* note 27, at 425–33.

85. Saenz v. Roe, 526 U.S. 489, 507–11 (1999) (concluding that California could not impose a durational residency requirement before new residents could be entitled to full welfare benefits).

86. The doctrine of judicial deference refers to courts being reluctant to invalidate the actions of the other branches of government for fear of institutionally undermining the judiciary and antagonizing the political culture. By way of example, Chief Justice Roberts was accused by conservatives of excessive judicial deference when he found an ingenious means of concluding that the Patient Protection and Affordable Care Act's individual mandate was not a prohibited penalty under the Commerce Clause, but a constitutional means of raising revenue under the Taxing and Spending Clause in Nat'l Fed. of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2650–55 (2012).

87. Slaughter-House Cases, 83 U.S. 36 (1873).

88. *Id*. at 78; s*ee also* Brief for Constitutional Law Professors, *supra* note 65, at 31; Gerhardt, *supra* note 27, at 425–33.

89. Brief for Constitutional Law Professors, *supra* note 65, at 32–33 (quoting former U.S. Senator and Fourteenth Amendment Framer George S. Boutwell).

90. 43 CONG. REC. 1, 4148 (1874).

91. *See id*. at 33; *see also* MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 177 (Duke Univ. Press 1986).

to an overwhelming consensus among leading constitutional scholars today[] who agree that the opinion is egregiously wrong,"[92] has distorted its jurisprudence by foreclosing the Fourteenth Amendment Clause as a means of reviewing unjust state laws and facilitated a process whereby the Court, being limited to the Due Process and Equal Protection Clauses, cannot protect Americans from the baneful effects of sclerotic, disconnected, and outdated government institutions, including outdated, underfunded, and inadequate criminal justice, social service, and education systems. This failure explains much of the public's anger and frustration.

Because the text, history, original public meaning, and promise of the Fourteenth Amendment Clause show that its purpose is to protect substantive fundamental rights against state infringement, I propose that it be revitalized by finally recognizing its true import and invoke the *Ashwander* Rules to require, in view of the political branches' hyper-partisan paralysis, the updating of government institutions at all levels to ensure that Americans be provided civil, political, and education rights that are at the forefront of international standards. This is a necessary endeavor because the nation's sclerotic institutions are at the root of the illiberalism that informs the electorate's authoritarian inclinations. For example, the nation's election procedure infirmities[93] explain not only the oligarchic levels of political and economic power held by the wealthiest Americans, but the low levels of social trust felt by the rest of the population, including skepticism toward all public institutions.[94]

Moreover, socio-economic and racial isolation in public schools,[95] together with inaccessibly expensive higher education,[96] explains the high levels of income and wealth inequality that undermine social cohesion and the notion of shared citizenship.[97] Although this is not a

92. CURTIS, *supra* note 91, at 177 (citing Amar, *supra* note 61, at 631).

93. *See, e.g.*, Akram Faizer, *Reinforced Polarization — How the Roberts Court's Decision to Invalidate the Voting Rights Act's Coverage Formula will Exacerbate the Divisions that Bedevil U.S. Society*, 45 CUMBERLAND L. REV. 303, 320–44 (2014–15). For a full description of second generation voting obstructions, see Justice Ginsburg's dissent in *Shelby County. v. Holder*, 133 S. Ct. 2612, 2632–39 (2013).

94. *See Beyond Distrust: How Americans View Their Government*, PEW RESEARCH CENTER (Nov. 23, 2015), http://www.people-press.org/2015/11/23/1-trust-in-government-1958-2015/.

95. *See* Parents Involved in Community Schools v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 803–69 (2007) (Breyer, J., dissenting) (demonstrating that racial imbalance in American public schooling is increasing).

96. *See* Tamar Lewin, *College May Become Unaffordable for Most in U.S.*, N.Y. TIMES (Dec. 3, 2008), http://www.nytimes.com/2008/12/03/education/03college.html?_r=0.

97. *See* Jon Marcus & Holly K. Hacker, *Poorer Families are Bearing the Brunt of College Price Hikes, Data Show*, HECHINGER REPORT (Mar. 9, 2014),

comprehensive list of problems that should be addressed by an updated approach to the Clauses, they are prerequisites to full and effective citizenship and are, per the *Ashwander* Rules, needed to ensure policymakers are legitimately elected to effectively govern in the national interest.

V. THE NEED FOR A REVITALIZATION OF THE CLAUSES

A revitalization of the Clauses is a needed jurisprudential endeavor because the provision of sufficient political and socio-economic rights has historically been a key component of the American democratic experiment. At the nation's founding, free White Americans had living standards and personal and political freedoms that were among the highest in the world, and the Article IV Clause was included within the Constitution to provide citizens a textual basis for seeking greater constitutional protections based on an evolving understanding of their needs.[98] Similarly, the Fourteenth Amendment Clause was enacted by its Framers, following the country's greatest trauma, to expand the Article IV Clause's promise to those tragically excluded by the country's initial civic compact.[99] The Court's current refusal to jurisprudentially undertake this approach has come at the expense of American living standards, which have regressed by international standards.[100] It has also undermined the nation's political cohesion, due to the extreme influence of money, electoral partisan gerrymandering, and vote-dilution. Compared to the Founding, when Americans were among the most politically participatory people in the world,[101] the U.S. today has among the lowest voter participation rates in the developed world with only 53.6 percent of the voting age population casting ballots for the 2012 general election.[102] This has enormous implications for political and socio-economic inequality because politicians cater to voters, and voting rates

http://hechingerreport.org/data-show-poorer-families-bearing-brunt-college-price-hikes; *see also* PIKETTY, *supra* note 1, at 169–328.

98. AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY 118–25 (Basic Books 2012). *See also* Gerhardt, *supra* note 27, at 429.

99. Gerhardt, *supra* note 27, at 429.

100. *See* HUMAN DEVELOPMENT INDEX, UNITED NATIONS DEVELOPMENT PROGRAMME, http://hdr.undp.org/en/content/table-1-human-development-index-and-its-components (last visited Apr. 15, 2016).

101. Stanley L. Engerman & Kenneth L. Sokoloff, *The Evolution of Suffrage Institutions in the New World*, Yale Econ. History Workshop 18 (Feb. 2005), http://economics.yale.edu/sites/default/files/files/Workshops-Seminars/Economic-History/sokoloff-050406.pdf.

102. Drew Desilver, *U.S. Voter Turnout Trails Most Developed Countries*, PEW RESEARCH CENTER (May 6, 2015), http://www.pewresearch.org/fact-tank/2015/05/06/u-s-voter-turnout-trails-most-developed-countries/.

correlate strongly with both income and education,[103] which, in turn, harms public policy by distorting election outcomes and misaligning the political culture.

My proposal is that the Clauses should guarantee not only the right to unencumbered domestic travel for both tourism and residency purposes, which is the Court's current parsimonious approach, but the right, as much as feasible, to political rights commensurate with living in a developed, mature democracy, such as the right to effectively vote in meaningfully competitive elections that are legitimized by reasonable campaign finance restrictions, and socio-economic rights in the form of the right to an equal, integrated, and high quality public education as well as access to affordable higher education based on merit. Although this leaves out many other potential socio-economic rights provided by social democracies worldwide, including universal health care, child care programs, and more generous income support, my approach to the Clauses would be less outcome determinative and ensure that fiscal policy be determined by the political branches and not an unelected judiciary. It will, however, ensure that all Americans be provided the foundational requirements to effectuate their full citizenship rights such that policymakers will be given the proper inputs to effectively govern in the national interest. Indeed, this approach is consistent with the American people's needs and will fulfill the Framers' intent that the U.S. be at the forefront of international standards regarding citizenship and its obligations.[104] This would be a marked shift from the current paradigm, whereby the Court has assisted the political branches in marginalizing the poor from all aspects of American life.

VI. COURT COMPLICITY IN MARGINALIZATION OF THE POOR

With the Clauses having been jurisprudentially marginalized, it is now paradigmatic in U.S. Constitutional jurisprudence that laws involving socio-economic issues are subject to only rational basis review under the Fourteenth Amendment's Equal Protection Clause.[105] This description is misleading because rational basis review means, in effect, that the Court takes an excessively deferential approach to discriminatory socio-economic legislation. This Court's reliance on rational basis review to evaluate socio-economic legislation stems from abuses of the

103. *See Voting and Registration in the Election of November 2012—Detailed Tables*, U.S. CENSUS BUREAU, http://www.census.gov/hhes/www/socdemo/voting/publications/ p20/2012/tables.html.

104. I write this recognizing the Founders tragically left the issue of slavery to the states and thereby furthered the Country's slide into an institutionalized racial hierarchy that still bedevils the U.S.

105. *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 40–44 (1973).

Lochner-era, when the Court used heightened review to invalidate social welfare legislation and impose a hyper-individualistic free market ideology on U.S. society under an ostensible substantive component to the Fourteenth Amendment's Due Process Clause.[106] Recognizing this line of jurisprudence was a historic mistake, the Court has improvidently disregarded poverty and socio-economic inequality in its recent jurisprudence, which problematically undermines the protections afforded racial minorities under the Equal Protection Clause because poverty correlates strongly with racial minority status, and the Court's failure to protect the poor has had the additional negative consequence of exacerbating racial polarization nationwide.[107] This, along with the Court's increasingly hostile approach to unions, campaign finance laws, voting rights, and employment discrimination legislation, has made it complicit in the country's pronounced income and wealth inequality.[108] To the degree the Court's institutional legitimacy requires it to be a brake on the abusive tergiversations of democratic power, its failure has

106. *See, e.g.*, Lochner v. New York, 198 U.S. 45, 64 (1905).

107. Parents Involved in Cmty. Schools v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 708–48 (2007) (concluding that federal courts lack jurisdiction to racially integrate public schools that are imbalanced due to socio-economic polarization); *Rodriquez*, 411 U.S. at 54–55 (concluding that unequal funding of public schools in a manner that reinforces socio-economic inequality is consistent with the Fourteenth Amendment's Equal Protection Clause); Harris v. McRae, 448 U.S. 297, 322–23 (1980) (concluding that poor women are not a suspect class such that the Hyde Amendment, which denies Medicaid funding for abortions, is consistent with equal protection); Nat'l Fed. of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2608 (2012) (concluding both that the individual mandate is disallowed under the Commerce Clause and that the federally paid for Medicaid expansion, which would provide greater subvention for the poor, violates the Tenth Amendment). For the proposition that race and socio-economic status correlate, see generally *Parents Involved*, 551 U.S. at 862; *Rodriguez*, 411 U.S. at 11–17 (1973) (suggesting that the discriminatory socio-economic funding paradigms corresponded with racial polarization in public schooling).

108. For example, in *Harris v. Quinn*, 134 S. Ct. 2618 (2014), the Supreme Court undermined collective bargaining by holding that the First Amendment precludes a state from requiring non-union members to pay for the proportionate cost of collective bargaining activities they benefit from. In *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), and *McCutcheon v. Federal Election Commission*, 134 S. Ct. 1434 (2014), the Supreme Court undermined campaign finance restrictions intended to ensure public trust in elections by concluding that restrictions on corporate political spending and aggregate campaign donations, respectively, violate First Amendment Speech rights. In *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), the Supreme Court invalidated the most important provision of what is arguably the nation's most important piece of civil rights legislation, namely the Voting Rights Act's preclearance formula. For more information, *see* Faizer, *supra* note 93, at 345–46. Finally, in *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009), the Supreme Court gutted a key provision of the Civil Rights Act of 1964, namely, the disparate impact provision, by concluding that New Haven city officials violated this provision by refusing to promote white applicants for firefighter promotions based on an examination system the municipality feared disproportionately harmed racial minority applicants.

furthered a tendency toward unsustainable socio-economic discrimination.

A. The Former Approach – Socio-Economic Protection

Although the Court's current disregard of socio-economic rights could be seen as consistent with the country's individualistic political culture, it is actually in marked contrast with the Court's approach during the New Deal and post-World War II eras, when the Court's repudiation of substantive due process in economics jurisprudence allowed for the enactment of progressive legislation by all levels of government.[109] This corresponded with a developed-world trend, known in France as "Les Trentes Glorieuses,"[110] that was noteworthy in its ability to deliver both high economic growth and a reduction in income and wealth inequality from the Depression-era until the mid to late 1970s.[111] As Professor Julie Nice has written:

> [T]he Court acknowledged in its unanimous 1941 decision in Edwards v. California that the Great Depression affected its constitutional interpretation, due in part to the growing recognition that providing relief for the needy in the transformed economy had become the concern of the whole nation and that poverty and immorality could no longer be considered synonymous. Also, following the second world war, the Court issued a well-known series of decisions affording various procedural protections to indigent defendants in the criminal justice system on the basis that, even if there is no fundamental right to additional procedure, once the government provides such procedure, there can be "no equal justice" when such procedure is denied to those who cannot afford the associated fees. One of these famous decisions,

109. The Court repudiated its substantive due process in economics jurisprudence as exemplified by *Lochner v. New York*, 198 U.S. 45 (1905), which concluded that New York's maximum hour statute for bakery workers violated the substance of the Fourteenth Amendment's Due Process Clause, and in *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937), which concluded that state minimum wage laws are constitutionally legitimate. The jurisprudential change enabled for the enactment of much of President Roosevelt's New Deal, including the National Labor Relations Act (49 Stat. 449), the Fair Labor Standards Act (52 Stat. 1060), the Works Progress Administration (52 Stat. 1428), and the Social Security Act (49 Stat. 620). It also corresponded with the enactment of progressive legislation at the state and local level and full employment, largely attributable to the nation's involvement in World War II.

110. Translated into English as "the glorious thirty." *See also* Jennifer A. Dyer, Note, *The Failure of France's First Employment Contract: Failing to Protect Jobs and Workers*, 17 TRANSNAT'L L. & CONTEMP. PROBS. 503, 505–06 (2008).

111. *See* Drew Desilver, *U.S. Income Inequality, on Rise For Decades, is Now Highest Since 1928*, PEW RESEARCH CENTER (Dec. 5, 2013), http://www.pewresearch.org/fact-tank/2013/12/05/u-s-income-inequality-on-rise-for-decades-is-now-highest-since-1928/.

> Griffin v. Illinois, involved a challenge to the denial of a criminal appeal to a defendant who could not afford to submit a trial transcript. In his eloquent concurrence in Griffin, Justice Frankfurter emphatically insisted that "[l]aw addresses itself to actualities." Then, considering how the fee requirement operated within the context of the criminal justice system, Justice Frankfurter reasoned that the "Court would have to be willfully blind" to ignore the scope of prejudice against indigent defendants and stated that courts could not "sanction such a ruthless consequence" and states could not produce such "squalid discrimination."
>
> Even more directly, during the battle over voting rights in the 1960s, but four years before Dandridge, the Court embraced heightened scrutiny for poverty or wealth classification when it invalidated a state poll tax in Harper v. Virginia Board of Elections. The Court held in Harper that, although the federal constitution contains no express protection of the right to vote in state elections, a voter's wealth, like his or her race, "is not germane to one's ability to participate intelligently in the electoral process. Lines drawn on the basis of wealth or property, like those of race, are traditionally disfavored." Considering how the burden on poor people operated in the context of voting, the Court "closely scrutinized" the classification and concluded that neither wealth nor fee payment had any relation to voting qualifications.
>
> In these examples, the Supreme Court interpreted equal protection as requiring heightened judicial scrutiny of regulations burdening poor people.[112]

The current mix of anger and apathy that characterizes many American voters' reaction to politics explains, in part, the low rate of U.S. voter participation.[113] This surely has to do with peculiar aspects of the nation's electoral system, which systematically dilutes and de-emphasizes the voice of poor and racial minority voters. The U.S. has historically denied franchise rights to racial minorities, women, and the poor, and the dynamics of U.S. politics and its polarized two-party system incentivizes today's political actors to revisit these historical injustices, albeit in a less obvious manner.[114] Although U.S. Constitution

112. Julie Nice, *Whither the Canaries: On the Exclusion of Poor People From Equal Constitutional Protection*, 60 DRAKE L. REV. 1023, 1042–44 (2012) (internal citations omitted).

113. *See* Desilver, *supra* note 102.

114. By this I mean suppression techniques that have ranged from outright bans on racial minority voting to suppression techniques that include voter intimidation, literacy tests, poll taxes, malapportionment, and property ownership qualifications.

Article I provides that elections are an area of traditional state concern,[115] this changed with passage of the Fourteenth and Fifteenth Amendments and the Court's Equal Protection jurisprudence, which, in *Baker v. Carr*[116] and *Reynolds v. Sims*,[117] required equally populated legislative districts. Similarly, with respect to elections, the Warren Court subjected voting restrictions to strict scrutiny because it deemed voting rights to be fundamental. For example, in *Harper v. Virginia State Board of Elections*,[118] the Court invalidated a $1.50 poll tax under the Equal Protection Clause because it had the effect of depressing voter turnout among poorer voters, and fixing qualifications based on wealth is invidious discrimination against the poor.[119]

Similarly, in *Kramer v. Union Free School District*,[120] the Court, once again applying strict scrutiny to a law burdening fundamental franchise rights, invalidated a New York law that disallowed renters without children enrolled in public schools from voting in local school district elections because it found the scheme to be unconstitutionally overbroad and underinclusive.[121] Tragically, the promise of full democratic participation under the Fourteenth and Fifteenth Amendments has stalled recently as the Court has, in effect, concluded that franchise rights are not fundamental and impediments to franchise rights need only satisfy rational basis review.[122] Given leeway to do so, state legislatures have craftily enacted measures to suppress the political power of both racial minorities and the poor by second-generation voting barriers that include partisan gerrymandering, vote dilution, felony disenfranchisement, and voter identification laws.[123] Indeed, the Roberts Court has gone even further and taken the highly regressive step of invalidating the Voting Rights Act's coverage formula for determining which states and voting jurisdictions must have their voting procedures approved, prior to implementation, by either the U.S. Attorney General

115. U.S. Constitution Article I, Section 2, Clause 1 provides, "[T]he House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." U.S. CONST. art. 1, § 2, cl. 1.

116. Baker v. Carr, 369 U.S. 186 (1962).

117. Reynolds v. Sims, 377 U.S. 533 (1964).

118. Harper v. Va. State Bd. of Elections, 383 U.S. 663 (1966).

119. *Id.* at 668.

120. Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621 (1969).

121. *Id.* at 627–33.

122. Crawford v. Marion Cty. Bd. of Election, 553 U.S. 181, 191 (2008) (concluding that voter identification laws need only satisfy rational basis review).

123. For a full description of second generation voting obstructions, see Justice Ginsburg's dissent in *Shelby Cty. v. Holder*. Shelby Cty. v. Holder, 133 S. Ct. 2612, 2632–39 (2013) (Ginsburg, J., dissenting).

or the United States District Court for the District of Columbia, which effectively guts the most significant piece of federal voting rights legislation enacted since the Fifteenth Amendment's ratification.[124]

B. The Current Approach—Blatant Disregard of Socio-Economic Isolation and Discrimination

The reversal away from welfare rights towards the socio-economic imbalances of today was adumbrated by the election of President Richard M. Nixon, notwithstanding his initial support for both universal health care and a guaranteed basic income for the poor.[125] Nixon, who won the 1968 presidential election against Vice-President Hubert Humphrey by only .7% of the popular vote,[126] appointed four justices to the Court whose jurisprudence changed the trajectory of socio-economic rights.[127] Marking the apogee of the Court's protection of the social welfare state, the Court concluded in *Goldberg v. Kelly*[128] that the Due Process Clause of the Fourteenth Amendment mandates the provision of pretermination hearings to welfare beneficiaries nationwide.[129] Three years after *Goldberg*, however, the Court, in *San Antonio Independent School District v. Rodriguez*,[130] in an opinion by business-friendly Nixon-appointee Justice Lewis Powell, refused to consider socio-economic inequality as a basis for either strict or intermediate scrutiny judicial scrutiny, and upheld Texas's highly unequal public school funding scheme against an Equal Protection challenge under the Fourteenth Amendment.[131] The Court's refusal to provide jurisprudential protection for the poor, which began under the Nixon Presidency, has continued to this very day.[132] This conservative revival on the Court reached its peak

124. *Id.*; s*ee also* Faizer, *supra* note 93, at 345–46.

125. Noah Gordon, *The Conservative Case for a Guaranteed Basic Income: Creating a Wage Floor is an Effective Way to Fight Poverty—and it Would Reduce Government Spending and Intrusion*, ATLANTIC (Aug. 6, 2014), http://www.theatlantic.com/politics/archive/2014/08/why-arent-reformicons-pushing-a-guaranteed-basic-income/375600/.

126. U.C. SANTA BARBARA, THE AMERICAN PRESIDENCY PROJECT: ELECTION 1968, http://www.presidency.ucsb.edu/showelection.php?year=1968.

127. President Nixon appointed four justices to the Court, namely Chief Justice Burger, Justice Rehnquist, Justice Blackmun, and Justice Powell, who were each economic conservatives.

128. Goldberg v. Kelly, 397 U.S. 254 (1970).

129. *Id.* at 261.

130. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

131. *Id.* at 24.

132. The conservative bias of the Court is most likely due to the fact that Republican presidents from the time of Nixon have appointed twelve justices to the Court, whereas Democratic presidents have appointed only four. This is partly due to a rightward shift in the nation's political culture, the fact that President Carter was never given an opportunity to appoint a Supreme Court Justice, and due to increased political

under Presidents Reagan, Clinton, and beyond, and has had profound consequences for the poor in America today. Professor Goodwin Liu writes:

> But it remains a fact of our legal culture that what counts as a constitutional right is deeply shaped by the courts, and for a generation, our courts have steered clear of social or economic rights, even as severe deprivation and inequality continue to pose serious challenges to our commitment to human dignity and equal citizenship.[133]

The country's tragic lack of generosity towards the poor undermines socio-economic advancement by reinforcing inequality. Liu writes:

> On our contemporary social landscape, it may be possible to identify some areas in which courts, playing the role I have described, can legitimately foster evolution of welfare rights. In public education, for example, the largest federal program supporting low-income children—Title I of the Elementary and Secondary Education Act of 1965—from its inception has distributed funding highly unequally across states. Because the statute makes federal allocations to each state proportional to the state's own per-pupil spending, high-spending states such as Massachusetts receive over fifty percent more money per low-income child than low-spending states such as Mississippi. As I have shown elsewhere, this method of allocation lacks a coherent policy rationale, and I have yet to find any purpose for it stated in the legislative history. In the context of an education system now expected to close achievement gaps by socioeconomic status and to prepare children for participation in the national and international economy, the interstate discrimination in federal funding seems overdue for legislative reconsideration.[134]

Other examples of irrational socio-economic discrimination include how the current safety net sets eligibility levels so low that the poor are effectively excluded from the nation's safety net. An example of this is state Medicaid programs that regressively limit eligibility to those whose incomes are no greater than 37% to 63% of federal poverty guidelines,[135]

polarization in the nominating process. *See* Adam Liptak, *The Polarized Court*, N.Y. TIMES, (May 10, 2014), http://www.nytimes.com/2014/05/11/upshot/the-polarized-court.html; *see also Supreme Court Nominations, 1789-Present*, UNITED STATES SENATE, http://www.senate.gov/pagelayout/reference/nominations/Nominations.htm (last visited Aug. 2, 2016).

133. Goodwin Liu, *Rethinking Constitutional Welfare Rights*, 61 STAN. L. REV. 203, 205 (2008).

134. *Id*. at 266–67.

135. See Chief Justice Roberts' majority opinion in *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566, 2601 (2012).

which effectively denies coverage to the working poor. Although the Court has never explicitly deemed poverty or lower socio-economic status to not be a suspect class, its failure to declare it a suspect class has effectively "deconstitutionalized [p]overty [l]aw"[136] such that the poor suffer the full vicissitudes and failures of American democracy. Professor Nice writes:

> The Supreme Court otherwise has deconstitutionalized Poverty Law by four departures from normal constitutional doctrine: first, by categorical immunization of "social or economic legislation" from any likelihood of invalidation; second, by circumvention of suspect class or classification analysis; third, by application of rationality review in a reflexive manner to uphold governmental regulation; and fourth, by reversal of heightened scrutiny normally used for protection of established fundamental rights.[137]

Included in this paradigm of deconstitutionalization are aspects of being a poor American that are almost unimaginable to other developed-world citizens. This failure to treat poverty as a suspect class has had extremely harmful consequences, including (a) historic high income and wealth inequality; (b) regressive reliance on local property tax assessment to fund public schools, which has exacerbated the problem of racial and socio-economic polarization; (c) the lack of a guaranteed minimum income[138] that relegates many Americans to uniquely low living standards by industrialized country standards;[139] (d) health care insecurity based on the lack of universal health care, which also makes the U.S. an outlier among industrialized nations;[140] (e) an electoral system that marginalizes the political power of poorer and racial minority voters by failing to treat voting as a constitutional right, such that state legislatures are given broad discretion to impose burdens on franchise rights; and (f) a campaign finance paradigm, brought about by the Court's judicial review powers, that inordinately empowers corporations

136. Julie A. Nice, *No Scrutiny Whatsoever: Deconstitutionalization of Poverty Law, Dual Rules of Law, & Dialogic Default*, 35 FORDHAM URB. L.J. 629, 670 (2008).

137. *Id.*

138. By this I mean a basic income that all Americans would be entitled to. It would operate like a negative income tax for those whose household incomes fall below a certain threshold. The idea was first mooted in the Nixon Administration and advocated by his domestic policy advisor (later U.S. Senator) Daniel P. Moynihan. *See* Moynihan, *supra* note 57, at 220–26.

139. Matt Bruenig, *When Is It Better Not to Be in America?*, DEMOS POLICYSHOP (Jan. 5, 2015), http://www.demos.org/blog/1/5/15/when-it-better-not-be-america.

140. Max Fisher, *Here's a Map of the Countries that Provide Universal Health Care (America's Still Not on It)*, ATLANTIC (June 28, 2012), http://www.theatlantic.com/international/archive/2012/06/heres-a-map-of-the-countries-that-provide-universal-health-care-americas-still-not-on-it/259153/.

and wealthy donors and distorts the political culture in their favor. Although a full discussion of each of these consequences is beyond this article's scope, one can see how a more forceful defense of socio-economic rights by all levels of government, including the Court, might have prevented these problems from materializing.

Recognizing the Court has refused to remedy these problems under the Fourteenth Amendment's Due Process and Equal Protection Clauses, and it has, in fact, worsened them, my thesis is that the Court should abide by the *Ashwander* Rules, recognize the baneful effects of poverty to national cohesion, take up its needed and proper role in American federalism, and resuscitate the Clauses to protect the poor from their current marginalized status. This will fulfill the Framers' promise by creating a true Empire of Liberty that will become a more perfect union, and enable the U.S. to once again fully engage with the international community as the world's leading exemplar of democracy and freedom.

VII. THE PRIVILEGES AND/OR IMMUNITIES OF CITIZENSHIP—A POTENTIAL REMEDY TO SOCIO-ECONOMIC IMMOBILITY AND POLARIZATION

In the face of the dislocation brought about by market capitalism and globalization, the federal courts have taken an altogether deferential approach when adjudicating cases dealing with socio-economic legislation and societal inequality. For example, the Supreme Court recently heard oral argument on the legality of the use of race by the University of Texas at Austin as a criterion in its admissions policy.[141] The Court, however, by signaling approval for the state's top ten percent law, did so in a manner that will further institutionalize racially imbalanced public schooling and strengthen vested interests[142] that favor continued inequality in public education. The Court disregarded the fact that both public and private universities systematically lack means of providing scholarships to poorer students and, for prestige purposes, charge poorer students full tuition based on their lower test score performance compared to their wealthier peers.[143] This is problematic

141. Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411 (2013).

142. By this I mean the interest groups who favor the current system of funding public schools, including real estate developers, brokers, mortgage lenders, homeowners and teacher unions.

143. Jon Marcus & Holly K. Hacker, *Poorer Families Are Bearing the Brunt of College Price Hikes, Data Show*, HECHINGER REPORT (Mar. 9, 2014), http://hechingerreport.org/data-show-poorer-families-bearing-brunt-college-price-hikes/. For example, two-thirds of families with incomes above $75,000 could name scholarships as a source of college financing, whereas only one-quarter of families with incomes below $25,000 could. *See* Jon Marcus, *Wealthier Students More Likely Than Poor to Get Private Scholarships; Federal Figures Also Show That Whites Have Better Odds of Getting*

because it undermines socio-economic mobility by denying poorer students affordable access to prestigious colleges and universities, and forces them to suffer the punishing burdens of non-dischargeable student loan debt.

This writer would like to see a reversal of the Court's mistaken prior precedent regarding the Clauses and the application of them in the fields of voting and education, in lieu of the current equal protection jurisprudence, as a means of insuring that American citizens are provided the political and education necessities to allow them to fully partake in American life. I hope that fully effectuating the Clauses' promise will enable the federal courts to act as a bridge between the apparently irreconcilable socio-economic and racial divides that currently undermine American cohesion.

A. Updating the Nation's Political System via the Clauses

The Roberts Court's current treatment of voting rights under rational basis review gives state and local governments excessive discretion to impose second-generation voting barriers that have the effect of excluding racial minorities and the poor from effective political power.[144] This risks undermining the legitimacy of American democracy by allowing, in effect, politicians to choose their voters.[145] Exacerbating this problem, in both *Citizens United*[146] and *McCutcheon*,[147] the Court invalidated corporate campaign spending and donation limits, respectively, by concluding that such limitations are an improper abridgement of First Amendment speech rights that corporations, as persons, share with individuals.[148] These cases should be reversed not because, as most liberals claim, corporate spending is unrelated to speech, but because voting is a fundamental right of citizenship—one which justifies campaign spending and donation restrictions—and,

Grants, HECHINGER REPORT (Apr. 27, 1015), http://hechingerreport.org/wealthier-students-more-likely-than-poor-to-get-private-scholarships/.

144. *See* Crawford v. Marion Cty. Bd. of Election, 553 U.S. 181 (2008) (concluding that franchise rights can be subjected to a balancing test to legitimize the State of Indiana's voter identification law, which imposes burdens racial minority voting rights).

145. Wayne Dawkins, *In America, Voters Don't Pick Their Politicians. Politicians Pick Their Voters*, GUARDIAN (Oct. 9, 2014), http://www.theguardian.com/commentisfree/2014/oct/09/virginia-gerrymandering-voting-rights-act-black-voters.

146. Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

147. McCutcheon v. Fed. Election Comm'n, 134 S. Ct. 1434 (2014).

148. *Citizens United*, 558 U.S. at 311 (concluding that limitations on corporate and union campaign spending on election campaigns violate First Amendment speech rights of non-natural persons); *McCutcheon*, 134 S. Ct. at 1462 (concluding that aggregate campaign donation limits are an unconstitutional abridgement of speech rights under the First Amendment).

therefore, legislatures should be given leeway under the First Amendment to enact spending and donation limits to ensure that each citizen's political voice is protected, and not overwhelmed by corporations.[149]

Judicial protection is needed in this environment to ensure all Americans have maximum political power because institutionally outdated U.S. elections and election procedures are exploited for parochial partisan reasons, undermine public trust, and fail to provide the nation's leaders with proper governing incentives. Because partisanship and political paralysis have prevented the elected branches from addressing the problem effectively, the Court should use the Clauses to remedy these problems and revivify the nation's democratic institutions. My proposal is for the Court to use the Clauses, in conjunction with the Fourteenth Amendment's Equal Protection Clause and the Fifteenth Amendment's prohibition on the denial of voting rights based on race or color, [150] to treat voting as a fundamental right of U.S. citizenship that requires all levels of government ensure maximum voter participation and enfranchisement. This requires states to (a) provide adequate time for voters to effectuate franchise rights by making voting day a holiday, allowing sufficient time for early voting, or requiring employers to provide their employees sufficient time off from work to cast ballots; (b) stop disenfranchising prisoners and felony convicts because felony disenfranchisement laws disproportionately affect racial minorities and the poor, are counterproductive, and fail strict scrutiny because they serve no compelling state interest and instead reflect mere animus;[151] (c)

149. What I mean here is that the Warren Court had treated voting as a fundamental right such that burdens imposed on voting rights had to survive strict scrutiny. The conservative Roberts Court, however, treats voting as not a right but an entitlement such that local governments can impose voting restrictions that merely need satisfy the very deferential rational basis review model. Moreover, because the Roberts Court treats corporate campaign spending as speech protected by the First Amendment, it has, at the same time, nullified laws intended to protect election legitimacy and engender public trust. My proposal would treat both the franchise and proper election procedures as a fundamental right of citizenship protected by the Clauses, and, therefore, legitimize corporate and other special interest campaign spending limitations, notwithstanding the fact corporate spending is currently treated as political speech.

150. The Fifteenth Amendment provides, in relevant part, "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. CONST. amend. XV, § 1.

151. Currently three states, Florida, Kentucky and Virginia permanently disenfranchise citizens who have been convicted of a felony. Virginia's Governor Terry McCauliffe has signed an executive order to reinstate felons' voting rights after they have served their time in prison. His authority to do so is being challenged by his Republican opponents. The majority of states deny franchise rights to parolees. Felony disenfranchisement laws have a disproportionate effect on African Americans as one out of thirteen African Americans are consequently barred from voting, compared to one out

reverse state laws requiring photo identification to vote because such laws fail strict scrutiny by serving no compelling interest, depress voter turnout, and undermine public trust in government;[152] (d) ensure all polling places are easily accessible to all potential voters; (e) subject single-member plurality districting to strict scrutiny so that the resulting districts no longer dilute franchise rights or, in the alternative, replace the current system with proportional representation districting as used in continental Europe and Ireland to encourage greater voter participation by preventing vote-dilution;[153] and (f) enact reasonable campaign finance restrictions to protect the legitimacy of election outcomes, encourage voter participation, and engender public trust in government.

Use of the Clauses to effectuate these changes would revitalize our democracy and provide lawmakers and government officials with proper electoral and governing incentives based on a comprehensive, thorough, and legitimate understanding of public opinion and need. By doing so, the Court would be invoking the *Ashwander* Rules' promise to bridge one of the nation's many divides.

B. Racially Balanced Quality Public Schools and Affordable Higher Education

The Fourteenth Amendment Clause should also be invoked to remediate racially imbalanced and unequal public schooling as well as the unaffordability of quality higher education. The racial and socio-economic imbalance in public schooling is perhaps the greatest injustice

of fifty-six white Americans. These laws are counterproductive because they provide a disincentive to elected officials to address issues of racial justice and the issue of recidivism and how this correlates with low labor force participation rates for convicted felons. The argument in favor of these laws, namely that those who transgress a state's laws permanently forfeit a right to have a say, has neither a compelling nor a rational basis. My proposal is for the Court to use the Fourteenth Amendment Clause to require all states to grant franchise rights to convicted felons as voting rights because franchise rights are fundamental and should not be taken away based on such irrational laws. *See Felony Disenfranchisement*, THE SENTENCING PROJECT, http://www.sentencingproject.org /issues/felonydisenfranchisement/ (last visited July 10, 2016).

152. The advocates of voter identification laws allege they are needed to combat voter fraud and engender public trust in election procedures and outcomes. These purposes are continuously restated notwithstanding the complete lack of any evidence of voter fraud nationwide and strong evidence that enactment of these laws will disproportionately disenfranchise poor racial minorities. Because these laws lack a rational basis and have a purely illegitimate partisan effect, my proposal would be to nullify them under the Fourteenth Amendment Clause because it would have the effect of burdening franchise rights without have any compelling purpose. *See* Crawford v. Marion Cty. Bd. of Elections, 553 U.S. 181, 209–38 (2008) (Souter, J., dissenting).

153. *The Voting System*, EUROPEAN PARLIAMENT INFO. OFFICE IN THE UNITED KINGDOM, http://www.europarl.org.uk/en/your-meps/european_elections/the_voting_system.html (last visited July 10, 2016).

imposed by the American government today.[154] This injustice has been assisted by the Court's Equal Protection jurisprudence. The Court, in *Parents Involved in Community Schools*,[155] applied strict scrutiny to preclude school districts from using race as one of many factors to integrate public schools that had become racially polarized due to living pattern racial imbalance. Although the Court should apply strict scrutiny to evaluate racial balancing schemes enacted to deny historically marginalized groups equal protection, it was a mistake for the Court to do so where the balancing schemes involved were intended to remediate for historically discriminatory practices and would have resulted in fairer and more inclusive learning environments.[156] If the Court revisited the issue and properly adjudicated it under the Fourteenth Amendment Clause (which was, after all, ratified to advance and not harm African Americans) with an understanding that a quality racially balanced education is a fundamental right of American citizenship, then similar integration plans would be sustained as legitimate and constitutional.

Regarding most states' practice of funding public schools based on local property assessments, which reinforces socio-economic inequality by, in effect, providing students from wealthier families with better public schooling, a proper reading of the Clause would require far greater state equalization funding to remediate this inequality because access to adequately funded education should be seen as a fundamental right of citizenship. My proposal would be to reverse *San Antonio Independent School District v. Rodriguez*,[157] which countenanced the current unequal funding paradigm under the Equal Protection Clause, and jurisprudentially invoke the Fourteenth Amendment Clause to end the charade that is not only unequal funding, but the use of school vouchers and magnet schools that have the effect of marginalizing the most vulnerable students.[158] The current paradigm should be replaced with

154. Richard Rothstein, Commentary, *The Racial Achievement Gap, Segregated Schools, and Segregated Neighborhoods—A Constitutional Insult*, ECON. POLICY INST. (Nov. 12, 2014), http://www.epi.org/publication/the-racial-achievement-gap-segregated-schools-and-segregated-neighborhoods-a-constitutional-insult/.

155. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007).

156. *Id*. at 784 (Kennedy, J., concurring).

157. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

158. Magnet schools are created by the local public school district to further integration. Magnet schools typically have a special focus such as science or the arts, and they are diverse because school officials are, because of the school's special focus, typically able to select from a large pool of applicants from all races. The problem with magnet schools, though, is that they create artificial diversity by, in effect, diverting students from other public schools. Charter schools, by contrast, are private entities that have separate sources of funding. The problem here is there are nowhere near sufficient funds to provide charter schooling to anything but a small number of students nationwide.

either a far more progressive state equalization formula or a statewide funding system that sets education spending on a per pupil basis at the state-level, as is the case in Hawaii and Vermont.[159] This will obviously not end education disparities based on socio-economic inequality because children from wealthier households and neighborhoods have many other advantages over their less fortunate peers, but it will, to paraphrase Winston Churchill, mark the "end of the beginning" in terms of inequality in public schooling.[160]

With respect to inaccessible and unaffordable higher education, evidence demonstrates that colleges and universities fail to make sufficient outreach to poor students. In fact, outside of limited affirmative action benefits, students from wealthier families with higher test scores[161] receive most of the scholarship subvention (likely for collegiate ranking and prestige purposes).[162] My proposal would be for the Court to highlight the fundamental importance of equal education access for effective citizenship and require colleges and universities that obtain federal and state funding to demonstrate their outreach efforts to the socio-economically disadvantaged based on objective metrics and limit them to using a largely need-based paradigm for providing scholarship assistance to incoming students. While this will limit their

See, e.g., *School Choices for Parents*, U.S. DEPT. OF EDUC., http://www2.ed.gov/parents/schools/choice/definitions.html (last visited July 10, 2016).

159. Traditionally, states and local communities are charged with delivering the majority of K–12 education revenue. Each state determines how much of its schools' budget it will contribute. A handful of states provide at least 50 percent of their schools' total budget (Alabama, Alaska, Arkansas, California, Delaware, Hawaii, Idaho, Kansas, Kentucky, Michigan, Minnesota, Nevada, New Mexico, North Carolina, Oklahoma, Oregon, Utah, Vermont, Washington, West Virginia, and Wisconsin). Hawaii and Vermont contribute the highest percentage, each supplying close to 90 percent of their schools' revenue. More than half of the 50 states provide less than 50 percent of their schools' budgets, with Illinois, South Dakota, and Texas providing the least amount, at around 32 percent (U.S. Census Bureau 2008). *See Money Matters: A Primer on K–12 School Funding*, CENTER FOR PUBLIC EDUCATION, http://www.centerforpubliceducation.org/Main-Menu/Policies/Money-matters-At-a-glance/Money-matters-A-primer-on-K12-school-funding.html.

160. Former British Prime Minister Churchill advised the House of Commons, after the British victory at El-Alamein during World War II, "[n]ow this is not the end. It is not even the beginning of the end. But it is, perhaps, the end of the beginning." *See* Winston S. Churchill, Speech at the Lord Mayor's Day Luncheon at the Mansion House, The Bright Gleam of Victory (Nov. 10, 1942), http://www.winstonchurchill.org/resources/speeches/1941-1945-war-leader/987-the-end-of-the-beginning.

161. Wealthier students receive higher test scores likely because they came from families with higher human capital levels, have attended better funded primary and secondary schools, and enrolled in costly standardized test preparation classes.

162. Lisa R. Pruitt, *The False Choice Between Race and Class and Other Affirmative Action Myths*, 63 BUFF. L. REV. 981, 983–84 (2015); Erin Oehler, Comment, *The Door to Higher Education: Accessible to All? Whether State-Funded Merit-Aid Programs Discriminate Against Minorities and the Poor*, 10 SCHOLAR 499, 533 (2008).

autonomy to recruit highly credentialed students in a competitive higher education marketplace, it will also, however, result in increased access to higher education which is a necessity in today's economy and ensure that the poorest students are no longer financially exploited via the federal student loan program to pay for their wealthier classmates' tuition.

Use of the Fourteenth Amendment Clause to require equal and integrated public schooling as well as affordable higher education is, per the *Ashwander* Rules, a necessary jurisprudential endeavor in view of the importance of quality education to equal and effective citizenship and the political branches' abject failure to address the issue adequately. Although it might seem an intrusive use of judicial review, it is institutionally legitimate in view of the close nexus between education and effective citizenship, which, in turn, is at the root of the American experiment in self-government.

VIII. CONCLUSION

Although it remains the world's sole superpower, the U.S. is beset by numerous problems that state and local elected officials are incapable of addressing due to the hyper-partisanship that characterizes the nation's politics, the parochial selfishness of the electorate, and the nation's sclerotic and outdated institutions. Perhaps the greatest unaddressed problem facing the country is excessive income and wealth inequality, which has grown pronouncedly since the Reagan Revolution of the 1980s and has worsened in recent years notwithstanding the Obama Administration's progressive agenda. The country's income and wealth inequality problem superimposes itself upon the country's other cleavages, including race, sex, socio-economic immobility, and geography to undermine social cohesion and worsen, as manifest by the popularity of Donald Trump's presidential candidacy, the divides that characterize nearly all aspects of American life.

The Court's role in American society is to remedy (in an institutionally legitimate manner), rather than reinforce, the divisions confronting U.S. society. By this standard, the Court's jurisprudence, which has taken a textual and narrow approach to hearing and adjudicating cases involving socio-economic rights, while actively nullifying legislation meant to address various manifestations of American inequality in areas such as public schooling, voting rights, and campaign finance restrictions, has, in view of the political branches' paralysis on the issue, fallen short of its institutional obligation to "bridge" the nation's divides.

I propose the Court take on its proper role by reversing the grave historical mistake that was the *Slaughter-House Cases*, and

reinvigorating Article IV's Privileges and Immunities Clause and the Fourteenth Amendment's Privileges or Immunities Clause, to require both the national and state governments to fulfill the intent of the Clause's Framers and ensure that all Americans be provided the basic political and socio-economic rights consistent with living in a mature democracy. While this is an ambitious agenda, use of the Clauses to ensure provision of adequate and effective voting rights, public schooling, and higher education is both necessary and jurisprudentially legitimate. Recognizing my political bias, it would be a jurisprudential overreach and would encroach into areas of fiscal policy better left to the elected branches, for the Court to use the Clauses to require universal health care and greater income support that is typical in Western European social democracies. The relative success of Bernie Sanders's presidential candidacy and how it has moved Hillary Clinton's campaign to the political left is evidence that economic redistribution can be an effective message. My hope is that a jurisprudentially ambitious approach to the Article IV and Fourteenth Amendment Clauses, in the form of updated political rights and better education, would provide Americans with the necessary prerequisites for effective citizenship which, in turn, would provide political candidates and policymakers with better governing incentives. This might result in the creation of a more economically successful and equal country that would help Americans regain the cohesion, hopefulness, idealism, and energy of a previous era while consigning today's demagogues to the ash-heap of history. It would also sustainably engage the rest of the world as both its leading nation and, to paraphrase Ronald Reagan, its shining city on a hill.[163]

163. President Reagan referred to the United States as a "shining city upon a hill" during his farewell address to the nation. The phrase has its origins in the parable of Salt and Light in Jesus's Sermon on the Mount. *See* Ronald Reagan, Farewell Address to the Nation (Jan. 11, 1989), http://www.pbs.org/wgbh/americanexperience/features/primary-resources/reagan-farewell/.