The Breakfast Club

Constitutional Minute for 31 May 2022

The 14th Amendment and Equal Protection

Let's see: we've covered the history of the 14th Amendment, its controversial ratification, the Incorporation Doctrine, the Citizenship Clause and the Due Process Clause. The end is in sight, but there are two more clauses I simply must cover with you: the Equal Protection Clause and the Insurrection Clause; the first because, like the Due Process Clause, it has been the focus of so many Supreme Court opinions; and the later because the Left has dragged it into recent headlines because of January 6th, 2021 (that will be next week).

As we learned last week, the predecessor to the 14th Amendment was the Civil Rights Act of 1866, one provision of which read:

> "Such citizens, of every race and color, and without regard to any previous condition of slavery or involuntary servitude, ... shall have the same right in every state and territory in the United States, … to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding."

This rather meandering paragraph was simplified in the 14th Amendment to read:

> "[N]or shall any State ... deny to any person within its jurisdiction the equal protection of the laws."

After the Court invented the Incorporation Doctrine, which was initially used to hold state governments responsible for extending the Bill of Rights protections to their citizens, the Equal Protection clause was "reverse incorporated" against the federal government in *Bolling v. Sharpe* (1954).

The infamous Supreme Court case of *Plessy v Ferguson* (1896) decided that there could be separate public facilities for blacks and whites, such as schools, restrooms, train cars, bus seating, etc, as long as those separate sets of facilities and accommodations were essentially "equal." This decision set the stage for the Jim Crow era, where, especially in the South, blacks were constrained to using separate facilities which were supposedly equal, but never really were. *Plessy* was the "law of the land" for nearly 60 years until overturned by *Brown v Board of Education* (1954), which ruled that segregated schools could never be equal. Both of these were "equal protection" cases which reached polar opposite results.

What is “equal protection of the laws.” In short it means that all laws and government actions should be applied fairly and uniformly to everyone, without exception. If there is to be an exception in the application of a law it must have at least a rational basis in a legitimate function of government, if race is a factor at issue, strict scrutiny will be applied.

The 1967 case of *Loving v. Virginia* was argued on equal protection grounds. By 1967 some states, such as Virginia, continued to prohibit interracial marriage. Mildred, a woman of black and native American heritage wanted to marry Richard Loving, a white man. They could not under Virginia law, so they traveled to Washington D.C. and were legally married there, only to be arrested upon returning to Virginia. Sentenced to spend a year in prison, the sentence was suspended on condition that they leave Virginia. On appeal, the Court of Appeals of Virginia ruled that the state had an interest in preserving the “racial integrity” of its constituents, which today may strike us as an absurd argument, but which apparently made sense in 1960s Virginia. The Supreme Court said, no, this was a blatant instance of racial discrimination and a violation of equal protection. Speaking of marriage, 2015’s *Obergefell v Hodges* found that the right to homosexual marriage was also based on equal protection.

Affirmative Action programs present an interesting challenge for the courts: one would think that affirmative action programs, which typically take race into account in administering college admission, would violate equal protection if similarly qualified white or Asian students are denied admission in favor of black applicants. One would be wrong.

In 2003’s *Grutter v. Bollinger*, a 5-4 majority ruled they would "take [colleges and universities] at [their] word" that they *need* to discriminate on the basis of skin color and ethnic heritage in order to create a racially diverse student body.

In regards to gender discrimination however, the situation is clearer: a California judge just this week struck down the state’s requirement that a certain number of women be appointed to every public company’s board of directors by the end of 2022, arguing that the mandate violated the equal protection clause of the state constitution.

Are illegal aliens entitled to equal protection of the laws? Texas had a law requiring out-of-state students pay higher tuition than illegal aliens residing in Texas. A federal judge used equal protection principles to strike down the state law!

Bottomline: You’d think after 150 years we’d have figured out what equal protection of the law means; apparently, we have not.

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