THE EQUAL PROTECTION CLAUSE: ITS FRAMERS’ INTENT AND THE CONTEMPORARY MIND

RALPH K. WINTER*

One should begin an analysis of the Equal Protection Clause by viewing it in the context of the political philosophy prevailing at the time of its enactment, a political philosophy that is very different from the one prevailing today. The Equal Protection Clause was controversial then, not because of its substantive terms, rights was the real issue. We thus may have fewer historical clues regarding the framers’ intent than what we might otherwise have had, in part because of the underlying nature of the federalism controversy.

In any event, the Equal Protection Clause seems to me to have been quite consistent with the prevailing political philosophy of that time. Central to that philosophy was a distinction between the governmental sector and the private sector. This separation was thought not only to maximize individual choice and economic efficiency, but also to check governmental power through the existence of a strong private sector. Also central to that philosophy was a fear of governmental monopoly of coercive power. One can view the Equal Protection Clause as embodying prevailing notions of equality before the law, which meant neutralizing in part government’s power to use invidious legislation to disadvantage individuals in their attempts to realize their potential in the private sector. This neutralizing effect seems as much a part of the laissez-faire philosophy as notions of freedom of contract, for example.

One difficulty that the contemporary mind finds with that kind of view of the general purpose of the Equal Protection Clause is that fostering competition among individuals in the private sector will inevitably lead to social and economic inequality. The framers recognized, however, that inequality is the natural result of competition. The rhetoric of the proponents of the Equal Protection Clause indicates that the framers did not expect it to lead to equality in social and economic status.

This view of the intentions and beliefs existing at that time

* Circuit Judge, United States Court of Appeals for the Second Circuit.
can be translated into law by looking first to the general philosophy, and second to the immediate problems, that caused the framers to include the Equal Protection Clause in the Fourteenth Amendment. Those familiar with post-Civil War history know something about the Black Codes. The Black Codes were state laws, not exclusively in the South by any means, that disadvantaged individuals because of their race, chiefly by hindering their ability to compete in the private sector. The Black Codes prevented blacks from doing many things that are central to private economic activity, such as owning property or making contracts. In taking the philosophy and the immediate occasion for the enactment of the Equal Protection Clause into account, and in deciding how to translate that into law, we face three central problems of interpretation.

The first problem has come to be known as the state action doctrine. Because the Equal Protection Clause embodies a fear of government, it is largely directed at the exercise of coercive power in which government has a monopoly. Requiring a restaurant to pass a health inspection by a government employee does not represent the kind of exercise of coercive power by the state as does, for example, prohibiting blacks from making contracts. However, it may sometimes be fair to analogize the exercise of collective private power to the exercise of state coercive power, so that we can say that exercise of private power is also a state action; examples of this include *Marsh v. Alabama* and *Shelly v. Kraemer*. The effect of the exclusionary covenants at issue in *Shelly v. Kraemer* was that any one person owning a small part of a large tract of land had a veto power over the sale of the rest of the land to any black person. This seems to me in every sense collective action so similar to exclusionary zoning by government that, in fact, the decision can be justified.

The second problem of interpretation is determining what kinds of legislative classifications are covered. This is done by looking at the one classification that we know was covered, namely race, and reasoning by analogy from it. Race is a classification that utilizes an individual characteristic as a stereotype. It has a history of systematic and invidious use, including use by government. It is a characteristic that is unalterable by the

---

individual, and it is not related to the individual’s merit or ability. It seems to me that one can legitimately expand the Clause to apply to other classifications with similar attributes without encountering a slippery slope or mudslide.

The third problem is whether this sort of classification may ever be used. I believe that a classification that is suspect probably may never be used. One of the key factors in determining suspectness is a history of invidious use, and there is great difficulty in knowing when a classification’s use has been invidious or not. It is difficult for courts to distinguish between bad motives-bad results, good motives-bad results, and good motives-good results. At most, only in the third case would the use of the classification be acceptable. I would think that one could also argue that quotas have no place in the Equal Protection Clause because, rather than enabling people to compete, they obviate the need to do so.

What, on the other hand, does the Equal Protection Clause not do? One illegitimate line of decisions under the Equal Protection Clause is that utilizing so-called fundamental interest analysis, such as Skinner v. Oklahoma, Griffin v. Illinois, and Harper v. Virginia State Board of Elections. These decisions, to be clear, are illegitimate only under the Equal Protection Clause; Griffin could clearly be a due process case, for example, and Harper could be a right-to-vote case. Skinner, for example, makes no sense in terms of equal protection. First, the Court was asked to pick out an interest based largely on personal values of the Justices. Second, the theory on which the decision is based is not that the state cannot sterilize people for certain crimes, but that the state can sterilize people for certain crimes only if it sterilizes people for a lot of other crimes as well. This is not exactly a sensible result.

As a separate matter, wealth may not be a suspect classification under the Equal Protection Clause. Most people who use it mean that wealth can be used as a legislative classification any time it is used to help those who are less wealthy, which itself indicates that it is a poorly designed classification. But more than that, being less wealthy in a private sector is totally dissim-

---

ilar, for example, to facing a barrier to access to a public facility because of one’s race. For most individuals, the lack of wealth is not at all unalterable. Moreover, I do not think there has been any history of systematic invidious use. Furthermore, using wealth as a suspect classification would result in the destruction of the private sector, which is the opposite of what the framers had intended.

What the Equal Protection Clause means and how it constrains the States—and, equally important, how it does not constrain the States—must be linked to the intentions and designs of its framers. What is critical is not the immediate applications of the Clause in 1868, but rather the philosophy embodied in it. An understanding of the fundamental political and economic principles behind the Clause ought to guide us in modern attempts to apply and enforce it.