Equal Protection: Judging Classifications by Law

A guarantee of equal protection of the laws was contained in every draft leading up to the final version of section 1 of the Fourteenth Amendment.[1373] The desire to provide a firm constitutional basis for already-enacted civil rights legislation[1374] and to place repeal beyond the accomplishment of a simple majority in a future Congress was important to its sponsors.[1375] No doubt there were conflicting interpretations of the phrase "equal protection" among sponsors and supporters and the legislative history does little to clarify whether any sort of consensus was accomplished and if so what it was.[1376] Although the Court early recognized that African-Americans were the primary intended beneficiaries of the protections thus adopted,[1377] the spare language was majestically unconfined to so limited a class or to so limited a purpose. Though efforts to argue for an expansive interpretation met with little initial success,[1378] the equal protection standard ultimately came to be applicable to all classifications by legislative and other official bodies. Now, the Equal Protection Clause looms large in the fields of civil rights and fundamental liberties as a constitutional text affording the federal and state courts extensive powers of review with regard to differential treatment of persons and classes.

The Traditional Standard: Restrained Review.—The traditional standard of review of equal protection challenges of classifications developed largely though not entirely in the context of economic regulation.[1379] It is still most often applied there, although it

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[1373] The story is recounted in J. James, The Framing of the Fourteenth Amendment (1956). *See also* Journal of the Joint Committee of Fifteen on Reconstruction (B. Kendrick, ed. 1914). The floor debates are collected in 1 Statutory History of the United States: Civil Rights 181 (B. Schwartz, ed. 1970).

[1374] Civil Rights Act of 1866, ch. 31, 14 Stat. 27, now in part 42 U.S.C. §§ 1981, 1982. *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 422–37 (1968).

[1375] As in fact much of the legislation which survived challenge in the courts was repealed in 1894 and 1909. 28 Stat. 36; 35 Stat. 1088. *See* R. Carr, Federal Protection of Civil Rights: Quest for a Sword 45–46 (1947).

[1376] TenBroek, Equal Under Law (rev. ed. 1965); Frank & Munro, *The Original Understanding of 'Equal Protection of the Laws'*, 50 Colum. L. Rev. 131 (1950); Bickel, *The Original Understanding and the Segregation Decision*, 69 Harv. L. Rev. 1 (1955); *see also* the essays collected in H. Graham, Everyman's Constitution: Historical Essays on the Fourteenth Amendment, the "Conspiracy Theory," and American Constitutionalism (1968). In calling for reargument in Brown v. Board of Education, 345 U.S. 972 (1952), the Court asked for and received extensive analysis of the legislative history of the Amendment with no conclusive results. Brown v. Board of Education, 347 U.S. 483, 489–90 (1954).

[1377] *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 81 (1873).

[1378] In Buck v. Bell, 274 U.S. 200, 208 (1927), Justice Holmes characterized the Equal Protection Clause as "the usual last resort of constitutional arguments."

[1379] *See* Yick Wo v. Hopkins, 118 U.S. 356 (1886) (discrimination against Chinese on the West Coast).