"Thoughts on Equality in the American Constitution"

by

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It's a joy to be here. I'm going to talk today more as a teacher than as a judge, perhaps. I'll be talking about the American Constitution. I want to talk about equality in the American Constitution. What it means. And I want to begin with a story because I tend to be a story teller. Most of the stories are about me, and this one is peripherally about me. Forty-six years ago this summer, I arrived as a law clerk at the Supreme Court. I had just gotten there when Cooper v. Aaron came up to the Court for an emergency decision during the summer. You'll recall that Cooper v. Aaron was a case which involved the desegregation of the schools in Little Rock. Governor Faubus had said it would not happen, and there was a moment when it was not clear whether the Court's order would be enforced. Herb Brownell and his Solicitor General, Rankin, believed strongly that it had to be enforced and they convinced President Eisenhower, who was not terribly keen on desegregation, to send troops to Little Rock in order to enforce the Court's order. The city of Little Rock said, “you can't send troop to do this.” The case came up in emergency session in the Court before school would begin in the fall and all the new law clerks were there watching. In the middle of the argument one of the Justices said to Rankin: “General Rankin, the city of Little Rock has said that education will suffer if troops are used to integrate the schools. Do you concede that, General Rankin?” And Rankin, who I don't think was probably much of a forensic great, stopped — he was a little man, about my height — stopped and he whirled around three times and then came back to the podium and said: “I concede that. I concede that. I concede more. I concede that if troops are
used to desegregate the schools, not only will education suffer but lives will be lost. And I want this Court to tell the nation and the world that there are values greater than life itself—and that equality is one.” And so the Court held unanimously in an opinion all the Justices signed.

I was very proud then, and I ask myself today: Do we still mean it? And what does it mean? What does it mean? And that's sort of the subject of this lecture. To understand the meaning of equality and its limitations I think we must return to the first constitutional moment, as my colleague Bruce Ackerman has termed it, and two bill of rights amendments, the First and the Fifth. Looking at these amendments, we can see the light they shed on the great egalitarian enactments of the second constitutional moment, the post-Civil War period. It's an interesting side note that the idea, the ideal of equality was a part of each of Ackerman's three constitutional moments. It was fundamental to the first moment, together with liberty, liberté, when fraternité… communitarianism we should say today, was not very much a part of it. And one can find it in the third constitutional moment, the New Deal, when Chief Justice Stone spoke about discrete and insular minorities in the *Carolene Products* case. There the Court, while retreating from the “old Court” view that generalized libert6 can be enforced by the courts in an increasingly communitarian social democratic society, affirmed, nonetheless, that égalité stood firm. But that's to the side.

We tend to think of one great egalitarian amendment — the 14th. But I believe that there are two — the 14th *and* the First. Each dealt with what were the principal inequalities of the time, religion and slavery. But they dealt with them in importantly different ways. At the federal level, and only at that level, as Amar has reminded us, the First Amendment said no establishment of religion. In a world in which religion was the primary difference among people (the 17th century had been a century of destruction on the basis of religion), the First Amendment proclaimed total
equality of religion. It said there are no we-religions and no they-religions. There are no outside religions and there are no inside religions. They are all the same. There is no establishment. And therefore there is also no affirmative action for any small, unpopular sect. All equal and symmetrical. All treated the same way. You don't favor the little one any more than you favor the big one.

But perhaps because this statement of equality is so broad and so fundamental it also contains another principle: You have a right to flaunt. That is, free exercise. We are all equal, there is no affirmative action, and you have a right to flaunt, you can be yourself openly and remain constitutionally protected. This at the federal level is the fullest of equality, all treated the same way and equally free to be themselves.

Now actually the First Amendment religion clauses may have accommodated a little bit of affirmative action, but of a different sort. (This, again, is to the side, though of course you know that I can't help always going slightly to the side.) It may be that the First Amendment did allow and indeed provide for affirmative action for secularism. That's much discussed today, but back then, one way of thinking about it was that secularists were the outsiders. And therefore if the question was whether you favored religion or favored secularism, you could favor secularism. And maybe the secularists weren't really allowed to flaunt all that much. But favoritism to the secular was probably countenanced. And if that is so — and as I said this is an aside, this isn't the topic of this talk — it suggests that perhaps those God-driven people, who are arguing that secularism currently gets unfair advantages in things, might have a better strategy. Instead of saying, “we have a right to put 'In God We Trust,' 'In God We This,' or 'In God We the Other,' because we are a Judeo-Christian-and-as-many-other-hyphens-as-you-want society,” they might say, “we have a
right to be treated equally for precisely the opposite reason: because this no longer is a Judeo-Christian, hyphen society, it is no longer a religiously based society in which the secularists are outsiders. Rather, today, the secularists are as much 'we' as anybody else. And, therefore, maybe affirmative action for secularism has lost its raison d'être.” I don't know if that would sell, or indeed if that would be right. But it would sure as heck be a better argument than: “we have a right to because we are the ‘we's.’” Okay, well that's to the side. You know they say that Mrs. Frankfurter said of Justice Frankfurter that he had two problems as a public speaker: one, that he always got off the track and two, that he always got back on.

So I'll get back on. In contradistinction to the First Amendment, the 14th amendment is profoundly remedial. It says “don't abridge,” “don't deprive,” as against the “there shall be no law concerning” formulation of the First. In context especially, the 14th amendment is there to bring people in who were outsiders, who weren't even citizens. The first part of the 14th amendment says who citizens are. Those who were not free, who were not even people — the 14th amendment says bring them in, treat them equally. It's a very different context/position from that of the First Amendment. And it isn't surprising that if you think in those terms you will also think as the 14th amendment Congress did in terms of affirmative action. In terms of doing what needed to be done to bring people in, to make equal those who before were not considered citizens or even people. It is not strange to think of it as treating people unequally in order to achieve equality, what the Italian constitutional court and some other European courts have called substantive equality as against formal equality.

We have always had trouble doing this ourselves. Every once in a while we do something along these lines. Thus, I have one opinion in which, sort of on the side, I ask whether it would be
equal to have the exact same reading test in order to be able to vote for somebody who is blind and for someone who can see. I did this to show that there are some situations where we take it for granted that formal equality doesn't mean equality. And that, therefore, was a significant part of the 14th amendment.

But there was a catch. Again it was a catch which could be found in the context, not in the words. And it was a catch that became most visible a few decades later when it was applied to new theys, to the immigrants. And that catch was, don't flaunt. No free exercise of your ethnicity. Be like us. We promise you equality — we don't always give it, but we promise it to you — if you become as much as you can white Anglo-Saxon male Protestants. The catch had a name: the melting pot. The melting pot. We forget how important the idea of the melting pot was, and how linked it was after all to the principle that we bring people in but they can't flaunt.

Still, the language of the 14th amendment, if you take it outside of context, and especially its “don't deprive” phrasing, can easily be assimilated to the ideal of the First Amendment, to that greater form of equality which is the First Amendment. And that has happened, of course; it is the counter-reading of the 14th amendment that so many people argue for, peddle today. Simply put, it's says no affirmative action; that's the ideal. As for flaunting, how interesting that many of the people who are so against affirmative action also say, “but for heaven's sakes don't flaunt,” and how interesting that many people who are for affirmative action say, “and of coursing flaunting is perfectly fine.” And this may be, because there is no logical reason why you can't have both. Psychologically and historically, however, it's much more of a problem.

The language of the 14th speaks to the First Amendment ideal. But when will we achieve it? Is it the 25 or 30 years that Justice O'Connor suggested in the Michigan cases? Well, it all depends
what 25 or 30 years means. The Bible keeps talking about 40, 40 days and 40 nights, 40 years in the wilderness, 40 this, 40 that. 40, I believe, meant an indefinite but large amount, whether it's of people, like Ali Baba and the 40 thieves, or of time, like 40 years in the wilderness. 40, in biblical terms, meant a long time, some time that will be. 25 or 30 years could mean the same. Disraeli said in 1832 that the Great Reform Act would last forever. When he introduced the new one in 1867, people responded, “but you said it would last forever.” He replied, in typical Disraelian form, “in politics, 35 years is more than forever.” So how long? Who knows.

At this point, I want to make a couple of reflections on these two different ideals. The first reflection focuses on gays; which equality should gays strive for? Should it be the equality of the First Amendment or the equality of the 14th? I think clearly the equality of the First. They should seek the equality that is more akin to the equality given to religion. Note on the similarity between sexual orientation and religion. The type of hatred aimed at that particular form of “they” is, in the language used, eerily akin to that aimed at “they” religions in the 17th century. “Immoral,” “whore of Babylon”: that is the way you spoke of the other religion, and that is the way people speak in terms of a different sexual orientation. There is also the argument about whether it's a matter of choice, whether you were born with it, whether it's the environment, whether it's God's choice. Am I struck by the grace of God and therefore a believer? Was it my choice, was it my parents, is it some combination of all these? Does it matter? Does it matter? Or is this something which is sufficiently a part of one's personality so that I have a right to express it even in terms of something like marriage, religious marriage? Do I have a right to it?

Well, when I speak of the similarities between sexual orientation and religion I drive people absolutely up the wall. I am religious, but those who are kind of defined by their religiosity tear
their tunics at the notion that sexual orientation could be the same thing. When I said this once at a little conference in New Haven, Barney Frank turned several shades of puce. He said, “don't ever say that, if you say that they will kill us in Congress.” From a political point of view, he knew perfectly well that one should stay very silent, but here in the temple of truth I can tell you that I think there is some similarity that merits consideration. And, of course, it is linked to an equality which says no affirmative action and the right to flaunt.

You might also think about the question of women and equality for women. Immigrants had very little choice but to melt in, and to accept equality on the terms of the previously dominant groups in society. It was too bad, because we lost many of the cultural values of those particular immigrant groups. When, three generations later, Italians try to find their roots, instead of finding that particular one-on-one relationship which is so typically Italian (we go to Italy and say, “isn't it nice the way people treat each other”), third-generation Italians tend to find pizza. Pizza is wonderful, but it is not the same thing. It's very difficult to find our roots after we have melted in, so we melt in some more. And the society loses something. But by and large it doesn't lose too much. Societies can survive without a Jewish mother, without an Italian mother, or even without an Italian Jewish mother. In England they survived very well without that for a long time, you know.

But it is very difficult to survive in a society without having some people do, and it certainly doesn't have to be women, those things which, as a matter of stereotype, women did. The bringing up of children is essential, and somebody has got to do it. And if women become stereotypical men in order to get equality instead of insisting on equality on their own terms, it's not clear who will. Of course, equality on women's own terms is much harder to get, because men are much less likely to give that sort of equality than simply to say, “you have to become like us.” But we can say, “no,
none of us needs to work 25 hours a day, neither male nor female.” Or, “the double standard in sexual matters is unequal and absurd, but it doesn't mean we all move into the gutter where men stereotypically went.” Of course, it also doesn't mean that we move into the Never-Never (sexual) Land where women supposedly lived. But we might find something in between, which is different, and harder to do. Harder to do. Again, that's the equality of the First Amendment rather than the equality of the 14th. Now, again, I'm not saying that this sort of equality for women excludes affirmative action. Logically, it doesn't, but psychologically, in terms of the two amendments, it makes it more difficult and therefore slower and therefore something to worry about. But that doesn't mean that one wants to opt for the lesser equality, that of a contextual 14th amendment.

Okay, but if understanding the First Amendment is crucial to understanding American constitutional egalitarianism, so too is understanding the importance of the Fifth Amendment. The Fifth Amendment — what am I talking about? Well, let's go back to *Cooper v. Aaron* and the fact that lives will be lost because equality is more important than life itself. It sounds wonderful. But whose lives will be lost? Is it the lives of the Justices or their children or grandchildren? Or is it the lives of some kids in the schools in Little Rock who will die, the concession, because troops are used to desegregate the schools? It's a problem.

Shortly after I met my wife, I was at her house and I saw a print of a rather ugly fellow standing with a book in his hand and a lighted taper. This was my wife's great, great grandfather, who was mayor of New Haven during the Civil War, and what he was doing was reading the Riot Act to the draft rioters who refused Father Abraham's call. And the family was very proud of that, and of their long tradition going way back to one Abraham Tyler, who had signed the first anti-slavery declaration in the 18th century and continuing through to today in their positions on
these things. And I said, “yes, that's wonderful, but who were the draft rioters?” They were poor Irish immigrants who had fled the potato famine and who couldn't buy substitutes to serve in the army. The cause was great — but on whom was the burden?

Through this we can see that the 14th amendment has another meaning, and that meaning is akin to the Fifth Amendment's Takings Clause. It's the functional equivalent of the Takings Clause. It requires compensation. You know that the Fifth Amendment says property will not be taken for a public purpose without compensation. Compensation has two purposes. First, to compensate the person from whom the property is taken, and second, and more important, to burden those who are taking so they will decide whether taking is worthwhile or not. Compensating sounds great, but Louis Kaplow got himself tenure at Harvard by writing an article saying, “hey, if we want to take the property for a park and we know that it's a good thing, why theheck should we compensate all the people we have taken the land from when some of them are rich and don't need compensation and we could better spend the money for the poor?” A wonderful article because the left at Harvard liked it, the economists at Harvard liked it, the bananas liked it, the perfect tenure piece for any law school. But there is something to compensation despite that.

The problem is that we often don't know whether the taking is worthwhile. The point is that the less we charge those who benefit from it, the easier it is to say that we want the park. We want the park. We want the park, but is it because we don't have to pay for it? Oddly enough, the best statement of this, after Justice Jackson first said it, was by none other than Nino Scalia. In *Cruzan*, he asked: “are there then no reasonable and humane limits that ought not be exceeded in requiring an individual to preserve his own life? There obviously are, but they are not set forth in the due process clause.” (That is to say, where libertarian interests are not that clear, don't look to the due
process clause to protect them.) “What assures us that those limits will not be exceeded is the same constitutional guarantee that is the source of most of our protection.” (And then he gives some sorts of horribles which are laughable that I'll spare you, they're about not driving and things.) “Our salvation,” he ends up saying, “is the Equal Protection Clause, which requires the democratic majority to accept for themselves and their loved ones that which they impose on you and me.” In other words, we must bear the burden, if we would put it on them.

Wonderful. And there are examples of this that the left would love: If you want to make sodomy a crime, make it a crime for straights and gays alike. If you are very troubled about drugs, you don't have a right to invade, without warrants, only public housing. You've got to do the same in McLean (I was going to say Woodbridge, where I live, but six of one, half a dozen of the other). If you want crime control, don't stereotype — stop us all. Stop us all when we go on planes — not just “them.” When you are going after prostitutes or controlling drugs, how about the buyer as well as the seller, hmm? If terrorism is so important that our civil liberties have to be restricted, let it be the liberties of “us” and not just “them.”

It's not that people want to discriminate against “them.” Some do, but not that many people. Most people don't want to discriminate against women in order to save fetuses. They want to save fetuses, and they don't worry about it too much because it is women who are bearing the burden. It is someone who is not themselves or those who are their constituents. And, of course, this was Ruth Bader Ginsburg's take on Roe v. Wade and very different from Roe v. Wade’s take on Roe v. Wade — and, in my view, distinctly correct.

Again, people do such things not because they want to discriminate but because they care for the value; they want the park so long as they don't need to pay for it. I gave you examples that
the left might like, but I can give you equal examples from the right. Go back to Cooper v. Aaron, go back to Father Abraham and Morris Tyler's story, how many Daggetts, Colbys, Hookers, and Tylers actually went and died in the Civil War? Well, thank God, when I asked that question of my in-laws, they said a lot of them. And if you go through the Grove Street cemetry you will find them there. And all of sudden you feel a lot better about the lighted taper.

Affirmative action: who pays? Is giving a poor black a job in the South something that a poor white steel worker in the South pays for? Or is it you and me? Very different. I think we have to give the poor black steel worker a job. But it's very easy to say that, if we are not the ones paying for it. And so it goes. I could go and on. The reaction to this tends to be, “fine, equality, but not in my back yard.” And that is achieved magnificently by none other than Nino Scalia, ironically, through a vision of formal equality which leads inevitably to neutral laws that affect only “them.” Abortion is forbidden to men and women alike. The law in its majesty forbids the rich and the poor alike from sleeping under bridges. It's been said a long time. And it is exemplified by Washington v. Davis, that opinion we can't live with and can't live without. (On this, I'll have something to say — if people want me to talk about it; we don't have time now, but perhaps in the discussion period — about what I might propose to do. It's technical, it's difficult, and it's a big problem.)

That's one way of doing it. The other way of course is just to say, “let's not do it.” Let's not have the park. Since the “haves” are not willing to bear the burden, we should do without it. And doing without the park is in fact the frequent result of the resentment of those who are asked, alone, to bear the burden. It is not surprising that they should say: “since you are not bearing the burden, you cannot tell us to bear it. And we won't do it.” I gave a little Law Day speech on this theme up in Boston, where anti-busing had been a very big issue, and any number of people who had been
anti-busers came up to me and hugged me. Their idea was, “yeah, it's all those limousine liberals.” But the limousine liberals were also hugging me, for other reasons, reasons linked to my next point.

The answer lies in substantive equality, under which the law binds all and requires us all to bear the burden. The 14th amendment provides for both control and equality. But to see what this means, we must realize that there are parks and there are parks, that not all parks are the same. If we really put the burden on all of us there would be some parks that we would opt not to have and some parks that we would opt to have. And often this is fine. Would we have capital punishment if those who were executed were people we know? Would we have the same drug and alcohol penalties if the President's daughters and our children were sent to jail for as long as those entrepreneurs from the inner city, whom we regularly sentence to 30- and 40-year terms? Would we have airplane searches? Maybe yes, maybe no, in an age of terrorism. Would we have laws against abortion if men became pregnant?

But the trouble with putting it this way is that it suggests that all parks are the same, all are optional. We can choose to have them, or we can choose to not have them. But that is not right either. Equality in the 14th amendment is not just a control; it is also a substantive requirement. Equality is itself a park that is constitutionally mandated.

In other words, there are some parks that our Constitution says we must have, and there is no choice about it. But in our constitution — for reasons which will come out in the discussion, and Kaplow to the contrary notwithstanding — even as to those parks that are mandatory, we all must share the burden. Thus, as to those parks we choose, and also as to those parks which we must have, everyone must pay, everyone must pay! The control function demands that we treat equally one park and another.
Nor can we get out of this obligation by hiding behind formal egalitarianism, by prohibiting men and women both from having abortions. We must, instead, be willing to say, “in my back yard,” “raise my taxes,” “on my back,” to achieve the substantive equality that the 14th amendment demands. Reneging on our 14th amendment promise of equality and avoiding paying the cost of achieving that equality ourselves: both of these are cursed in our Constitution. Are we willing? Are we willing to reject these practices, and bear the burden of paying for the parks our Constitution mandates? The answer to this question will tell us whether the promise of Cooper v. Aaron will be fulfilled. Thank you.