TRANSCRIPT: EQUAL PROTECTION: CRASH COURSE GOVERNMENT AND POLITICS #29

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Hi I'm Craig and this is Crash Course Government and Politics, and today we're going to finally get into why many people, including me, think that the Fourteenth Amendment is the most important part of the Constitution. At the same time, we will attempt – successfully, I hope – to unravel the difference between civil liberties and civil rights, and also try to figure out how the Supreme Court actually looks at civil rights and civil liberties cases. So that's a lot. Let's get this out of the way because we're not gonna have time later. Let's get started.

[Theme Music]

So we've been talking a lot in the past few episodes about civil liberties, the protections that citizens have against the government interfering in their lives. Civil rights are different in that they are primarily about the ways that citizens, often through laws, can treat other groups of citizens differently, which usually means unfairly. Civil Rights protections grow out of the "equal protection" clause of the Fourteenth Amendment, which reads: "No State shall make or enforce any law which shall … deny to any person within its jurisdiction the equal protection of the laws."

This may seem straightforward, and in some of the landmark cases that we'll get to like Brown v. Board of Education, it is, but when you think about it, unequal treatment of specific groups is usually done by private citizens or institutions – like your employer or your landlord, and most people, believe it or not, are NOT employed by the government, either federal or state and they don't live in government housing.

And initially the Supreme Court interpreted the clause to apply only to the state government, not to private discrimination. In the Civil Rights Cases, the Court ruled that the law, "could not have been intended to abolish distinctions based on color, or to enforce social, as distinguished from political equality," and they confirmed that as long as the state provided equal accommodations for people of different races, segregation was fine. This is the infamous "separate but equal" doctrine that was formulated in the case Plessey v. Ferguson.

The distinction between social and political equality is an important one, and it provides a principle for looking at discrimination that the courts still use. Unfortunately, it's pretty complicated and it means we have to look at something that's kind of confusing, levels of scrutiny and protected classes. And we'll start with protected classes because they are easier to understand. Let's go to the Thought Bubble.

So when state law or executive action mentions a protected class, the Supreme Court will almost automatically become suspicious. So what are protected classes? Broadly speaking they are what we might think of as "minorities" and this is an important way to conceptualize them. The Court defined protected classes in one of the most important footnotes in their jurisprudence. Here's the relevant passage: "Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious … or national, …, or racial minorities,… whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."

So here it lays out the categories where the Court is going to pay special attention: when a statute deals with “discrete and insular minorities,” such as religious, or national or racial minorities. It’s automatically suspect and the courts are going to look at it closely. Why? Well this is in the footnote too. It’s because minorities, by definition, are at a huge disadvantage in the democratic political process – their numbers are too small to pass laws that might favor them, and it is easy for groups in the majority to pass laws that will disadvantage groups that are not in the majority. And this gets at the heart of the distinction between civil liberties, which deal with government actions, and civil rights, which deal with majority groups making life hard for minority groups.
You may not like this distinction, but it does have the virtue of being based on a principle. Basically the courts will step in to protect groups that are unable to protect themselves in the legislative process because it will be too hard for them to pass laws in their favor. The way politics works in the U.S. will complicate this, as we’ll see, but as a principle it does make some sense. Thanks, Thought Bubble.
That footnote above talks about situations that call for a “more searching judicial inquiry.” This is known as the level of scrutiny that the courts will apply, and it’s not strictly limited to equal protection cases, but this is where I’m going to try to make sense of it.
So the highest level of scrutiny is called strict scrutiny. I'd call it super scrutiny or mega-monster scrutiny, but they didn't ask me today. And this means that the government will have a heavy burden to prove that the law or action in question is allowable. When government action concerns a protected class, strict scrutiny kicks in. There’s a five-step process that the courts go through in examining what the government has done.
First they look to see if there’s a protected liberty at stake. Sometimes this is easy, as with religious freedom, but other times it’s hard, as with certain property rights or privacy issues.
Second they look at whether the liberty is fundamental, which again can be complicated or not, depending on what the government is doing. Freedom from incarceration is a fundamental liberty, actually, it’s basically what we mean by liberty, so a law that specifically incarcerated one group based on nationality would get strict scrutiny. Unfortunately this did happen, during World War II when Japanese Americans were interned, but it’s a bad example of strict scrutiny since in that case the court, ruling in the case of Korematsu v. US let the government’s action stand.
Third, they look at whether the law or executive action places an undue burden on the person or group in question. Let's say a state requires literacy tests for voting which can be burdensome or not, depending on the test and how it is administered.
Fourth, assuming that the first three qualifications are met, the courts look to see if the law in question furthers a compelling government interest. In the literacy test example, the government interest might be seen as creating an educated pool of voters, although I’m not sure this would qualify as compelling.
Fifth, if the court finds that the law meets all the other criteria, it looks to see if the government action in question follows the least restrictive means of achieving the government’s interest. In other words, is there a less burdensome way that the government could accomplish what it says the law accomplishes? If the answer is yes, then the law is struck down.
So you can see, this five-part test is pretty, well, strict, and it’s hard for the government to pass it. In practice, this means that if the Court applies strict scrutiny, it means that the governmental action or law in question is probably going to be deemed unconstitutional.
So that’s strict scrutiny -- not mega-monster scrutiny -- but what about those cases where the government isn’t dealing with a protected class, which is much of the time? Usually the Court applies what is called the “rational basis” standard for review. This is the lowest level of court scrutiny, and what it means is that if the government can show that it has a rational basis for its actions, the courts will say they are ok. As you might expect, this gives the government a lot of leeway with its laws.
In between strict scrutiny and rational basis review is something called midzi scrutiny -- NOPE -- intermediate scrutiny. It’s a harder standard to meet than rational basis,

but it doesn't mean that the government usually loses, like with strict scrutiny.
Why doesn't the government consult me about naming things?
Ok, so now we have a sense of what civil rights are, and why the courts look at civil rights cases in the way that they do. It seems like a good time for an example to help make sense of all this. And there's no better example than the famous decision in Brown v. Board of Education of Topeka Kansas.
Although it was not the first case to take on the issue of discrimination in education, Brown v. Board is the most important, because it dealt with public schools. The issue was that Topeka had separate schools for black students and white students. Linda Brown was black and her parents wanted her to attend the white school because it was closer to where they lived and because it was better. The schools were supposed to be equal in quality under the "separate but equal" doctrine, but they weren't.
So after all I've told you about how the court decides cases where protected classes are involved – in this case black people who certainly qualify as a discrete and insular minority – the interesting thing about Brown v. Board of Education is that the Court pretty much ignored all of it. Their reasoning wasn't legal or historical, it was sociological, based on the idea that separate facilities are inherently unequal because they make the minority group feel inferior to the majority group.
Although the case didn't immediately bring about the end of segregated schools – many states engaged in what they called "massive resistance" to prevent school integration, Brown v. Board of Education is still a landmark Civil Rights case. It showed that the federal government could intervene in something as local as public education when racial discrimination was involved, and, more important, it showed that states couldn't use race as a criterion for setting up public schools. It was the legal basis of what we know as the American civil rights movement, and provided the foundation for the federal civil rights legislation of the 1960s.
So I got a little into the history there, sorry about that. I know this is Crash Course Government and not Crash Course History. But with civil rights it's kind of hard not to.
That's because, unlike with civil liberties which are pretty much defined by the bill of rights, the question of civil rights comes out of the Fourteenth Amendment equal protection clause, which itself came about because of the Civil War and from the very beginning was a contested concept, and one whose meaning has changed over time.
Because civil rights and equal protection almost by definition involve political activity and protection of minority rights, what constitutes civil rights changes over time. That's why, in 2015 people talk about same sex marriage as a defining civil rights issue when 30 years earlier it was hardly mentioned. What's really important is that we understand that civil rights, and their denial, have as much, if not more, to do with us and how we treat each other, as they have to do with how the government acts. Thanks for watching, I'll see you next time.
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