BROTHERS IN LAW

Skrmetti and birth equality (Part I)

By Akhil and Vikram Amar
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(Jimmy Woo via Unsplash)

Brothers in Law is a recurring series by Professors Akhil and Vikram Amar. For more content from Akhil and Vikram, please see Akhil's free weekly podcast, "Amarica's Constitution," and Vikram's regular columns on Justia.

Every justice takes an oath to support the Constitution itself as the supreme law of the land. Most members of the current court boast that they are faithful originalists – that is, jurists who generally prioritize the Constitution's text, history, and structure, as distinct from mere precedent or politics or practicality. Yet over the centuries, the justices have often failed to root their ruminations in the rich

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soil of the Constitution itself, even as they have claimed to be doing *constitutional* law. Last term was no exception.

Start with one of the term's highest-profile cases, ***United States v. Skrmetti*** – a case of first impression about what the Constitution says and does not say about transgender issues.

The case implicated one of the deepest questions of American constitutional law: What sorts of governmental discriminations/distinctions pass constitutional muster and what sorts are improper?

Logic alone does not get us very far. Imagine a law that says "All Alphas and only Alphas shall suffer penalty X." Or a law that says "All Betas and only Betas shall enjoy benefit Y." From one angle these laws plainly *discriminate* insofar as they treat Alphas worse than non-Alphas, Betas better than non-Betas. But from another angle, these laws apply universally, treating all Alphas *indiscriminately*, regardless of individual variation, and also treating all non-Alphas the same as all other non-Alphas. (Ditto for Betas and non-Betas, respectively.)

So which is it? Are these laws permissible or not?

Of course, it all depends. Surely it matters whether the law says, "all dark-skinned Americans shall suffer penalty X" or whether it instead says, "all arsonists shall suffer penalty X." A law giving benefit Y to whites *as such* seems entirely different from a race-blind law giving Y to inventors of useful gadgets.

But where, you ask, does the Constitution say that, or anything like that? Most judges, law students, and law professors begin with the 14th Amendment's equal protection clause, which bars a state from "deny[ing] to any person within its jurisdiction the equal protection of the laws." But where does this text clearly say, or even strongly imply, that laws penalizing arsonists are categorically different from laws penalizing dark-skinned persons? Also, where does this text prohibit improper discrimination by the *federal* government?

Reconstruction history – an indispensable tool in the originalist kitbag – moves the needle a bit, offering some answers but also raising many questions. Originalists know that the Reconstruction Republicans plainly meant to prohibit civil-rights discrimination against Black Americans. The amendment's sponsors repeatedly stressed that they aimed, among other things, to undo the infamous Black Codes then mushrooming in the Old South. Indeed (and with emphasis added), the amendment's companion **Civil Rights Act of 1866** explicitly promised "citizens, of every *race* and *color*, . . . the *same*" basic package of civil rights "as is enjoyed by *white* citizens."

But originalists should note that the 14th Amendment – unlike the 1866 Act and the later 15th Amendment – does not explicitly speak of race or color. Originalists should also note that much of the 14th Amendment – especially its language promising that "no state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States" – was strongly backed by women's rights' advocates led by **Elizabeth Cady Stanton**. With good reason,

Stanton and her allies read these general, non-race-specific words to prohibit invidious civil-rights discrimination against women as such.

Notably, Stanton in late 1865 famously urged Congress to enact the following language, which strongly foreshadowed the ultimate 14th Amendment text as proposed in mid-1866 and ratified soon thereafter: "the women as well as the men shall be secured in all the rights, privileges, and immunities of citizens." Stanton's **1865 proposal** built on her **1848 Seneca Falls Declaration** language, which demanded for women "all the rights and privileges which belong to them as citizens of these United States." And *that* language, in turn, built on other now-famous Seneca Falls language: "We hold these truths to be self-evident: that all men and women are created equal." **Every 19th-century reader** of course immediately recognized this 1848 meme as a riff on America's 1776 Declaration of Independence, proclaiming that "all men are created equal."

So far, so good: The best originalist scholarship thus suggests that the general language of the 14th Amendment was written at a level of generality to condemn *race-based* Black Codes **and also laws demeaning *women as such* in the exercise of their basic civil rights**.

But if the *only* sorts of improper discrimination condemned by the amendment were certain kinds of race laws and sex laws, why didn't the amendment just itemize these two categories explicitly? Because, we believe, the amendment swept more broadly, encompassing these two core categories but radiating beyond them.

Over the years, the Supreme Court has in fact treated a handful, but only a handful, of legal distinctions as particularly suspicious under the equal protection clause and closely related doctrines. Laws disadvantaging **Black Americans as such** raise alarm bells; so do laws disadvantaging **women as such**. Ditto for laws formally disadvantaging **"illegitimate" children** (that is, children born out of wedlock), and laws or government policies penalizing citizens because of their **religion** or **national origin**.

Although the point is much less well developed in Supreme Court doctrine, a long line of state statutes, state constitutions, and state court cases, beginning with Thomas Jefferson's reforms in Revolutionary Virginia, have also condemned primogeniture laws that privilege a given family's eldest child, like Akhil, at the expense of younger siblings, like middle-child Vik, and our youngest sibling, Arun. (With this observation, we offer data broadly in line with a history-and-tradition approach visible, with variations, in recent landmark cases such as ***Glucksberg***, ***Dobbs***, and ***Rahimi***.)

The vast mine-run of laws treating Alphas differently from non-Alphas, however, do not set off constitutional alarm bells merely because these laws draw distinctions among different categories of Americans. For example, laws punishing arsonists or tax cheats as such, and laws formally disadvantaging **artificial-milk producers** or **opticians**, are just fine.

Though the court has failed to connect the doctrinal dots in the most elegant and powerful originalist way, one strong thread tying together the myriad cases, statutes, and state constitutional provisions summarized above is that laws should not demean some Americans, or exalt other Americans, because of *the accidents of birth*.

Having taken a quick peek at originalist text and history, let's now consider the Constitution's overall structure. No one in America is legally *born* an American royal or an American noble. (Hence the Constitution's paired language in Article I, Sections 9 and 10, flatly banning first federal and then state titles of nobility and Article IV's requirement that every state have a republican form of government as distinct from a hereditary monarchy or hereditary aristocracy.) No one in America can be punished because of the crimes of their *birth parents*. (Hence Article III's special condemnation of "corruption of blood.") No one can be punished by any government, state or federal, because he was *born* with a given name. (This is a key component, but only one component, of the emphatic prohibitions on **bills of attainder** in Article I, Sections 9 and 10.)

For similar reasons, no Americans should be demeaned or treated as lesser beings simply because they were, for example, *born* female (like Elizabeth Cady Stanton), or *born* Black (like Frederick Douglass), or *born* low (like Abraham Lincoln) or *born* Jewish (like Ruth Bader Ginsburg), or *born* second in their family (like Vik), or *born* out of wedlock (like Alexander Hamilton), or *born* to non-citizen parents (like Akhil).

By contrast, no one is *born* an arsonist or a tax cheat or an optometrist or a synthetic-milk producer. Conduct-based penalties applicable to persons regardless of birth status ordinarily do not violate the birth-equality principle.

A deeply entrenched and horrific regime of birth-based chattel slavery at the Founding made it hard for earnest constitutionalists in the pre-Lincoln era to take all the above mentioned-clauses and state enactments seriously and at full value. But this interpretive embarrassment vanished when America abolished slavery in the 13th Amendment. And immediately thereafter, the nation ringingly proclaimed the birth-equality principle in the Constitution's very next words, proposed and ratified while the ink on the 13th was barely dry: "All persons *born* . . . in the United States, and subject to the jurisdiction thereof are citizens of the United States, and of the state wherein they reside."

Here, then, is the keystone of the constitutional arch, **the crown jewel of the text**: All those born under the flag are *born* citizens. All are born *free and equal citizens*. (Recall the **text of the 1866 Act**, which plainly tied birth-citizenship to "full and equal" civil rights.)

In a Lincolnian adaptation of the Declaration of Independence, all Americans are in crucial respects *created* equal. Early northern state constitutions said virtually the same thing, beginning with Benjamin Franklin's Pennsylvania Constitution of 1776 and John Adams' Massachusetts Constitution of 1780. All told, **15 of the 19 free-soil** state regimes in place when Lincoln took office proudly proclaimed, in

one way or another, that all men were "born" free and equal; or were "created" equal; or were "naturally" equal (from the French *naître* – to be born – and its Latin relatives *natura* and *naturalis*).

Over the years, America's greatest originalists both on and off the bench have wrung variations on this theme. Think of Lincoln's opening line at Gettysburg, echoed by Dr. King exactly 100 years later. (Yes, both were originalists, as Akhil takes pains to show in his **forthcoming book on birth equality**.) Or think of the famous line of the first Justice Harlan in his **iconic *Plessy* dissent**, phrasing embraced by both the Right and the Left today, though the two sides interpret it somewhat differently: "There is no caste here." (Caste laws are of course typically birth-based hierarchies, exalting some and demeaning others based on their birth status.)

One more crucial point: Unlike the equal protection clause, the 14th Amendment's born citizens clause omits the words "no state shall." Its command applies globally, against federal officialdom as well as against state and local governments. The **1866 Civil Rights Act** was unequivocal on this issue. It opened with language quite similar to the 14th Amendment's first sentence and then proceeded to declare that the equal-birth-citizenship principle applied "in every State *and Territory* in the United States."

The foregoing analysis is only the beginning of the hard work that needs to be done to understand the issues in *Skrmetti*. Thus far, we have merely identified the deep constitutional principles at issue, and their originalist roots in constitutional text, history, and structure.

In future columns in this opening series, we shall build on this originalist foundation and attempt to apply the deep constitutional principles sketched above to the facts of *Skrmetti*. Was the law at issue formally birth-based? Was it improperly demeaning or exalting? Should jurisprudence here go beyond formalism? If so, how far and why?

As we shall see in future posts, not all birth-based laws are unconstitutionally demeaning or exalting. For example, the Constitution itself repeatedly makes distinctions based on age, that is, on the ***date* when one is *born***. And surely nothing in the Constitution, rightly understood, prohibits government from trying to redress certain unfair accidents of birth – for example, by providing special health-care benefits to those born with genetic predispositions to nasty diseases. Also, even when sex discrimination is at issue, our law both on the books and in action is filled, and permissibly so, with distinctions between those born female and those born male. (Here, the reigning rule is essentially separate-but-equal in many quadrants: for example, **female gymnasts compete on uneven bars, while men compete with parallel bars**.)

After we conclude our series on *Skrmetti*, we hope to use the birth-equality principle to analyze the **constitutionally preposterous executive order** at the heart of one of the term's other blockbuster cases, ***Trump v. CASA***. On the merits, the issue is easy: All Americans born under the flag are born equal, regardless of the

status of their parents.

But the *remedy* questions in the Trump case are trickier. As we shall make clear in the weeks to come, the 14th Amendment's born citizen clause creates a framework **for horizontal relations between citizens themselves** – that is, equality between such actors. This horizontal-citizenship issue might well have decisive implications for any lower federal court currently considering how far it may go, remedially, given the court's strict instructions in ***Trump v. CASA***. In order to provide a truly full remedy to a single-plaintiff in a non-class-action lawsuit, every lower court will need to ponder the amendment's horizontal-citizenship component, above and beyond the individualistic, private-property-like rights that the amendment vests against state and federal officialdom.

So please stay tuned.

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WE CONCLUDE this maiden SCOTUSblog post with a few general words about our new relationship with this distinguished website, which we have long admired, and with you, the reader. Our running banner for this column, "Brothers in Law," is a pun – we are brothers by birth(!), not by marriage, but we both do law. Although we intend this column to be more serious than many other things out there (we won't name names), there is only so much that we do in a single blog post or even a series of related posts.

So if you want more – and we hope you do – please check out Akhil's FREE weekly podcast, "**Amarica's Constitution**" (another pun), which often features conversations with Vik and always features conversations with polymath **Andy Lipka**. All past podcast episodes are archived – four and a half years' worth, including a lively and informative interview with SCOTUSblog's very own Amy Howe back in **September 2022**. Podcast listeners can qualify for CLE credit in most states.

Please also check out Vik's regular columns on **Justia**. And if you want still more – we hope you do, especially on the crucial concept of birth equality – please, pretty please, preorder (and then please read!) Akhil's new book, due out in mid-September: ***Born Equal: Remaking America's Constitution, 1840-1920***. Some of the best stuff in this maiden column comes from this book, which features vastly more elaboration than is possible on this or any other website. Thanks for giving us a read, and we hope you will come back for more.

Posted in **Featured**, **Recurring Columns**
Cases: **United States v. Skrmetti**, **Trump v. CASA, Inc.**

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