THE IRRATIONAL INFIRMITY OF EQUAL PROTECTION JURISPRUDENCE - "SIMILAR" DOES NOT MEAN "IDENTICAL"

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It takes many years for sound political thought and an understanding of jurisprudence to develop fully within the mind of a person. I have read Judicial opinions on various legal topics for many years, biographies of great Americans, and great works of political philosophy. This has allowed me to narrow down the crux of the cognitive deficiency in Judicial opinions addressing the Equal Protection Clause (hereinafter "EPC") to one single factor. That factor is the inability of the Judiciary to understand that the term "Similar" does not mean
"Identical."

In Plyler v Doe, 457 U.S. 202 (1982) the U.S. Supreme Court described the basic test to be applied in determining whether the Equal Protection Clause is violated. It is actually a simple test and stated as follows:

> "The Equal Protection Clause directs that all persons **similarly** situated shall be treated alike." [178]

The operative term, which serves as the fulcrum for the analysis is the word "similarly." If the person asserting a violation of the EPC is not "similarly situated" to the person or group receiving preferential treatment then the EPC is not violated. If they are "similarly situated" then the biggest hurdle of the analysis is satisfied. The word "Similar" is defined in Webster's New Universal Unabridged Dictionary as follows:

> 1. having a likeness or resemblance 2. In Geometry of figures having the same shape 3. In Math, related by means of similarity transformation.
>
> **Synonyms** 1. like, resembling [179]

The word "Similarity" is defined in the same dictionary as follows:

> 1. the state of being similar, likeness, resemblance. 2. an aspect, trait or feature like or resembling another;
>
> **Synonyms** 1. similitude, correspondence, parallelism. See resemblance. [180]

Black's Law Dictionary defines the term "Similar" as follows (emphasis added):

> "Nearly corresponding; resembling in many respects; somewhat like; having a general likeness, **although allowing for some degree of difference**. . . Word "similar" is generally interpreted to mean that one thing has a resemblance in many respects, nearly corresponds, is somewhat like, or has a general likeness to some other thing but is not identical in form and substance, although in some cases "similar" may mean identical or exactly alike. It is a word with different meanings depending on context in which it is used." [181]

It is easy to see from the above that depending on which definition is selected the determination of whether one person is "Similar" to another depends on the proportion of characteristics between them, which are "Identical" to those, which are "Different." The more characteristics two people have in common which are Identical, the higher is the likelihood the two people will be determined to be "Similar." In contrast, the more characteristics two people have which are "Different," the higher is the likelihood the two people will be determined to not be "Similar."

As the importance and number of "Identical" characteristics increases, there is a corresponding reduction in the significance of the "Different" characteristics. However, whatever definition of "Similar" is selected, it is irrefutably established that the term "Similar" accounts for "Differences" and does not presume that the two people or groups being assessed are wholly "Identical." In contrast, to the word "Similar," the term "Identical" is, defined by New Webster's New Universal Unabridged Dictionary as follows (emphasis added):

> 1. similar or alike **in every way**. 2. being the **very same**, selfsame 3. **agreeing exactly** [182]

The best example of the meaning of the term "Identical" is the mathematical concept of "Identity." Most philosophers and mathematicians presents the classic example of "Identity" as being the logical truth that "A" = "A." Stated more simplistically, since 2 + 2 = 4; and since 4 = 4; it can be concluded that 2 + 2 is "Identical" to 4.

The distinction between the meaning of "Similar" and the meaning of "Identical" is the concept of "Difference." Where "Difference" exists, the two

people being assessed are not "Identical." However, they can still be "Similar." It can fairly be stated that there are differences between all people and no two people are exactly the same. Thus, it can be equally concluded with certainty, that no two people are "Identical." For purposes of EPC analysis, the issue is not whether two people are "Identical." EPC analysis focuses on whether two people are "Similar," and that allows for a degree of "Difference."

The concept of "Difference" in EPC analysis is embodied in laws, which focus on "Classifications" of people. The prime example is the fact that before the Civil War black people were "Classified" as slaves, whereas white people were "Classified" as free. Thus, the "Difference" of skin color gave rise to the "Classification" of the individual's status. A "Classification" depending on whether a person is Male or Female is another example.

The EPC does not preclude "Classifications" of people. Instead, what it does, is subject any "Classification" (i.e. the "Difference") to an analysis. The purpose of the analysis is to determine whether the "Difference" (i.e. the "Classification") is justifiable. The manner in which this determination is made is described in greater detail in the Chapter of this Supplement titled "The Irrational Nature of So-Called Rational Basis Scrutiny is Predicated Upon the Judiciary's Fear and Gang Mentality."

The major purpose of this short essay is simply to point out the importance of the incontestable fact that the term "Similar" does in fact account for a degree of "Difference." It does not require "Identity." From a logical perspective, this means that a person is entitled to constitutional protection when a "Classification" is not justifiable, even if they have certain "Differences" from the person who is advantaged by the "Classification." The reason is that the existence of "Differences" does not preclude "Similarity." The very essence of the notion of "Classifications," recognizes that there are "Differences" between two people. The moral principle intended to be furthered by the EPC is to properly determine whether the "Differences" justify the "Classification."

The problem with Judicial interpretation of the EPC is that Judges have used the concept of "Difference" in an irrational manner as a means to justify the total removal of cases from EPC analysis. They do this based upon a conclusion that the existence of "Differences" means the two groups of people are not "Similar." The impact of this is that they have substantively defined the term "Similar" as meaning "Identical," even though such is clearly not the case.

Competent EPC analysis recognizes the fact that "Differences" exist. It further mandates that the "Different" characteristics be compared to the nature and importance of the characteristics of the two groups which are alike (i.e. "Identical"), in order to determine if the two groups are "Similar."

Lastly, it should be noted that in regards to assessing the justification of "Classifications," the U.S. Supreme Court has regressed from its application of basic principles of "Fairness." It has done so at the expense of the general public, for the purpose of insulating and fortifying governmental power. A seminal case exemplifying this relatively recent retrenchment is FCC v Beach Communications, 508 U.S. 307 (1993). Justice Clarence Thomas, writing the Lead Opinion for the Court virtually demolished the EPC stating:

> "In areas of social and economic policy, a statutory classification . . . must be upheld against equal protection challenge if there is **any reasonably conceivable state of facts** that could provide a rational basis for the classification." [183]

Justice Stevens, protested vigorously against Justice Thomas' irrational test in Footnote 3 of his opinion, writing (emphasis added):

> "The court states that a legislative classification must be upheld "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification," . . . In my view, this formulation sweeps too broadly, for it is difficult to imagine a legislative classification that could not be supported by a "reasonably conceivable state of facts." **Judicial review under the "conceivable set of facts" test is tantamount to no review at all**.
>
> I continue to believe that, when Congress imposes a burden on one group, but leaves unaffected another that is **similarly, though not identically, situated**, "the **Constitution requires something more than merely a "conceivable**" or "plausible" **explanation for the unequal treatment**." [184]