READING 10
Equality: Foundations

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Constitutional Law for a Changing America

Rights, Liberties, and Justice

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CHAPTER NINETEEN

DISCRIMINATION

IN AN ADDRESS DELIVERED amid the planning for the bicentennial celebration of the Constitution, Justice Thurgood Marshall said that the document was "defective from the start." He claimed its first words—"We the People"—left out the majority of Americans because the phrase did not include women and blacks. He further alleged:

> These omissions were intentional. . . . The record of the Framers' debates on the slave question is especially clear: The Southern states acceded to the demands of the New England states for giving Congress broad power to regulate commerce in exchange for the right to continue the slave trade. The economic interests of the regions coalesced.

One does not have to agree with Marshall to believe that discrimination has been a difficult and persistent problem for the United States since its beginnings. Although the founders were considered the vanguard of enlightened politics, different treatment based on race, economic status, religious affiliation, and sex was the rule in the colonies, and issues of discrimination have persisted in the country's political agenda throughout the centuries. During the nineteenth century, slavery eroded national unity. Although officially abolished by the Civil War and the constitutional amendments that followed, racial inequity did not disappear. It continued through the Jim Crow era and the organized civil rights struggle, and it still exists today.

Recent years have seen the national spotlight turned on claims of unfair treatment based on sex, sexual orientation, and economic status, among other classifications. Attempts to force government to address these claims have engendered counterclaims by those who fear that a government overly sensitive to the needs of minorities will deprive the majority of its rights. With each new argument, the issues become more complex. This chapter explores the kinds of discrimination that have occurred (and continue to occur) in American society and how the Supreme Court has responded.

We begin with the Fourteenth Amendment's guarantee of equal protection and its historical relation to race discrimination. We then move forward to the framework the Court uses today to analyze claims under the equal protection clause. This discussion amounts to fleshing out the three levels of scrutiny that we introduced in the opener to this part of the book—rational basis, strict, and intermediate—and how the Court applies them to classifications based on race, gender, and sexual orientation.

RACE DISCRIMINATION AND THE FOUNDATIONS OF EQUAL PROTECTION

The institution of slavery is a blight on the record of a nation that otherwise has led the way in protecting individual rights. From 1619, when the first slaves were brought to Jamestown, to the ratification of the Civil War amendments 250 years later, people of African ancestry were considered an inferior race; they could be bought, sold, and used as personal property. Although some states extended various civil and political rights to emancipated slaves and their descendants, the national Constitution did not recognize Black Americans as full citizens. In ***Scott v. Sandford*** (1857) Chief Justice Roger Brooke Taney, delivering the opinion of the

Court, could have disavowed this view, the majority of justices did not. In *Scott* the majority interpreted the Constitution consistent with what they thought the framers intended: that an enslaved person could not become a full member of the political community and be entitled to the constitutional privileges of citizens. This interpretation not only undermined the legitimacy of the Court and damaged Taney's reputation forever but also set the stage for the Civil War. After Union victories on the battlefield reunited the country, the Thirteenth, Fourteenth, and Fifteenth Amendments were ratified. These amendments ended slavery, guaranteed equal protection of the laws, and conferred full national citizenship on Black Americans (thereby overruling *Scott*).

Congress moved with dispatch to give force to the new amendments, but the Supreme Court did not act with the same level of zeal. Although the justices supported the claims of the newly emancipated blacks in some cases, they did not construe the new amendments broadly, nor did they enthusiastically support new legislation designed to enforce them. In the ***Slaughterhouse Cases*** (1873), for example, the Court interpreted the Fourteenth Amendment's privileges or immunities clause quite narrowly. A broader view might have provided opportunities for women and blacks to bring cases based on this clause to the Court. In *United States v. Harris* and the ***Civil Rights Cases*****,** both decided in 1883, the justices nullified major provisions of the Ku Klux Klan Act of 1871 and the Civil Rights Act of 1875 for attempting to prevent discriminatory actions by private institutions. It was clear that the battle for legal equality of the races was far from over.

By the end of the nineteenth century, the Supreme Court still had not answered what was perhaps the most important question arising from the Fourteenth Amendment: What is equal protection? As the vitality of the Reconstruction Acts and federal efforts to enforce them gradually waned, the political forces of the old order began to reassert control in the South. From the 1880s to the 1950s, a period known as the Jim Crow era, what progress had been made toward achieving racial equality not only came to a halt but also began to be reversed. The South, where 90 percent of the Black population lived, began to enact laws that reimposed an inferior legal status on Black population lived, began to enact laws that reimposed an inferior legal status on Black Americans and required a strict separation of the races. Northern liberals were of little help. With the battle against slavery won, they turned their attention to other issues.

Although the Constitution made it clear that slavery was dead and the right to vote could not be denied on the basis of race, the validity of many other racially based state actions remained unresolved. With more conservative political forces gaining power in Congress, it was left to the Court, still smarting from the *Scott* debacle, to give meaning to the phrase *equal protection of the laws*.

The most important case of this period was *Plessy v. Ferguson* (1896), which forced the justices to confront directly the meaning of equality under the Constitution. At odds were the equal protection clause of the Fourteenth Amendment and a host of segregation statutes by then in force in the southern and border states. Specifically, in *Plessy* the Court considered the constitutionality of an 1890 Louisiana law ordering the separation of the races on all railroads.

Among other arguments, the law's challengers argued that "enforced separation of the two races stamps [Black Americans] with a badge of inferiority." But, using the reasonableness standard (rational basis test) to interpret the equal protection clause, the Court rejected that argument and upheld the Louisiana law.

The *Plessy* decision's "separate but equal" doctrine ushered in full-scale segregation in the southern and border states. According to the Court, separation did not constitute inequality under the Fourteenth Amendment; if the facilities and opportunities were somewhat similar, the equal protection clause permitted the separation of the races. Encouraged by the ruling, the legislatures of the South passed a wide variety of statutes to keep blacks segregated from the white population. The segregation laws affected transportation, schools, hospitals, parks, public restrooms and water fountains, libraries, cemeteries, recreational facilities, hotels, restaurants, and almost every other public and commercial facility. These laws, coupled with segregated private lives, inevitably resulted in two separate societies.

During the first half of the twentieth century, the separate but equal doctrine dominated race relations law. The southern states continued to pass and enforce segregationist laws, largely insulated from legal attack. Over the years, however, it became clear that the "equality" part of the separate but equal doctrine was being ignored.

As the inequality of segregated public facilities grew worse, the disadvantages of the black population increased. The disparities extended to almost every area of life, but they were felt most keenly in education. Whites and blacks were given access to public schools, but the black schools, at all levels, received support and funding far inferior to that of the white institutions.

These conditions spurred the growth of civil rights groups dedicated to eradicating segregation. None was more prominent than the National Association for the Advancement of Colored People (NAACP) and its affiliate, the Legal Defense and Educational Fund (com-monly referred to as the Legal Defense Fund, or LDF). Thurgood Marshall, who had been associated with the NAACP since he graduated first in his class at Howard University Law School, became the head of the LDF in 1940 and initiated a twenty-year campaign in the courts to win equal rights for black Americans. During those years, Marshall and his staff won substantial victories in the Supreme Court in civil rights cases concerning housing, voting rights, public education, employment, and public accommodations. Marshall also served as a judge on the court of appeals and as U.S. solicitor general before being appointed in 1967 to the Supreme Court. He was the first African American justice.

When Marshall took over leadership of the LDF, the rule set in Plessy was already on shaky ground. In 1938 the Court had handed segregationist forces a significant defeat in *Missouri ex rel. Gaines v. Canada*. Lloyd Gaines, a Missouri resident who had graduated from the all-black Lincoln University, applied for admis-sion to the University of Missouri's law school. He was denied admission because of his race. Missouri did not have a law school for its black citizens, so the state offered to finance the education of qualified black students who would attend law school in a neighboring state that did not have segregationist policies. The Supreme Court concluded, in a 7–2 vote, that the Missouri plan to pro-vide educational opportunities out of state did not meet the obligations imposed by the equal protection clause.

The Supreme Court's message was reinforced in 1950 in *Sweatt v. Painter*, in which the Court ruled that the University of Texas had violated the Constitution when its law school refused to admit a black applicant. The state had argued that its newly created law school for African Americans met the separate but equal requirement and allowed the state to continue to run the University of Texas law school on a whites-only basis. But the justices concluded that quality differences between the two schools were such that the black law school did not provide an education equal to that of the white law school.

The same day the Court decided *Sweatt*, it also issued a ruling in *McLaurin v. Oklahoma State Regents for Higher Education* (1950), which took another step toward racial equality in higher education. Oklahoma, to comply with court orders, admitted some African American students to graduate programs at the University of Oklahoma, but the university kept the minority students segregated in special areas of class-rooms, libraries, and dining halls. The Supreme Court unanimously found this segregated system in violation of the equal protection clause.

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By the early 1950s conditions were ripe for a final assault on the half-century-old separate but equal doctrine. Civil rights groups continued to marshal legal arguments and political support to eliminate segrega-tion. Legal challenges to a wide array of discriminatory laws were filed throughout the country, and the Justice Department under President Harry S. Truman sup-ported these efforts. The Supreme Court, through its unanimous rulings in favor of racial equality in higher education, appeared on the verge of seriously consider-ing an end to *Plessy*. In addition, an important leadership change had occurred on the Court. Chief Justice Fred Vinson died on September 8, 1953, and was replaced by Earl Warren, a former governor of California, who was much more comfortable with activist judicial policies than was his predecessor.

All these factors combined to produce *Brown v. Board of Education of Topeka* (1954), which many consider to be the Supreme Court's most significant decision of the twentieth century. Unlike earlier civil rights cases that involved relatively small professional and graduate education programs, the *Brown* case challenged official racial segregation in the nation's primary and secondary public schools. The decision affected thousands of school districts concentrated primarily in the southern and bor-der states. Moreover, it was apparent to all that the prec-edent to be set for public education would be extended to other areas as well.

As you read Warren's opinion for a unanimous Court, note how the concept of equality has changed. No longer does the Court examine only physical facilities and tangible items such as buildings, libraries, teacher qualifications, and funding levels; instead, it emphasizes the intangible negative impact of racial segregation on children. Warren's opinion includes a footnote listing social science references as authorities for his arguments. The opinion was criticized for citing sociological and psychological studies to support the Court's conclusions rather than confining the analysis exclusively to legal arguments. Are these criticisms valid? Should the Court take social science evidence into account in arriving at constitutional decisions? Note how similar Warren's opinion is to Justice Harlan's lone dissent in *Plessy*.

Brown starts on the next page.

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Brown v. Board of Education (I)

347 U.S. 483 (1954)
http://caselaw.findlaw.com/us-supreme-court/347/483.html
Vote: 9 (Black, Burton, Clark, Douglas, Frankfurter, Jackson, Minton, Reed, Warren)
0

OPINION OF THE COURT: ***Warren***

FACTS:

The Court consolidated five cases involving similar issues for consideration at the same time; *Brown v. Board of Education* was one of these cases. Part of the desegregation litigation strategy orchestrated by Marshall and funded by the NAACP, these cases challenged the segregated public schools of Delaware, Kansas, South Carolina, Virginia, and the District of Columbia. The most prominent lawyers in the civil rights movement, Spottswood Robinson III, Louis Redding, Jack Greenberg, Constance Baker Motley, Robert Carter, and James Nabrit Jr., prepared them. As Marshall had expected, the suits were unsuccessful at the trial level, with the lower courts relying on *Plessy* as precedent. The leading lawyer for the states was John W. Davis, a prominent constitutional attorney who had been a Democratic candidate for president in 1924. (Davis had reportedly once been offered a nomination to the Court by President Warren G. Harding.)

The plaintiff in the lead case, Oliver Brown, was an assistant pastor of a Topeka church and father of Linda Carol Brown, an eight-year-old Black girl. The Browns lived in a predominantly white neighborhood only a short distance from an elementary school. Under Kansas law, cities with populations of more than fifteen thousand were permitted to administer racially segregated schools, and the Topeka Board of Education required its elementary schools to be racially divided. The Browns did not want their daughter to be sent to the school reserved for Black students. It was far from home, and they considered the trip dangerous. In addition, their neighborhood school was a good one, and the Browns wanted their daughter to receive an integrated education. They filed suit challenging the segregated school system as violating their daughter's rights under the equal protection clause of the Fourteenth Amendment *(for more on the origins and aftermath of* Brown, *see Box 13-1)*.

The *Brown* appeal was joined by those from the other four suits, and the cases were argued in December 1952. The following June, the Court asked the cases to be reargued in December 1953, with special emphasis to be placed on a series of questions dealing with the history and meaning of the Fourteenth Amendment. This delay also allowed the newly appointed Earl Warren to participate fully in the decision. Six months later, on May 17, 1954, the Court issued its ruling.

ARGUMENTS:

For the appellants, Oliver Brown, et al.:

- When distinctions are imposed by the state based on race and color alone, the actions are patently arbitrary and capricious and in violation of the Fourteenth Amendment (*Yick Wo v. Hopkins* [1886], *Smith v. Allwright* [1944], *Sweatt v. Painter* [1950], etc.).
- The evolution of the Supreme Court's racial discrimination jurisprudence has rendered *Plessy v. Ferguson* no longer applicable.

AP Photo

Linda Brown at age nine. Her father joined the suit that led to the desegregation of the nation's public schools. Oliver Brown was upset that Linda had to travel two and a half miles to school even though the family lived close to Sumner, a white school. Despite their victory, Linda never went to Sumner School; by the time the decision was rendered, she was old enough for the junior high, a school that had been integrated since 1879.

- Social science evidence clearly establishes that official racial separation is detrimental to the segregated group no matter how equal the facilities. Among other adverse effects, segregation instills a sense of inferiority.

For the appellees, Board of Education of Topeka, Kansas, et al.:

- By any measure of the quality of physical facilities, curriculum, teacher training, and school transportation, the segregated schools in Topeka are equal.
- *Plessy v. Ferguson* remains good law and should control this case.
- There have been no findings that the specific children involved in this litigation have suffered any damages from attending segregated schools.

MR. CHIEF JUSTICE WARREN DELIVERED THE OPINION OF THE COURT.

In each of the cases, minors of the Negro race, through their legal representatives, seek the aid of the courts in obtaining admission to the public schools of their community on a nonsegregated basis. In each instance, they had been denied admission to schools attended by white children under laws requiring or permitting segregation according to race. This segregation was alleged to deprive the plaintiffs of the equal protection of the laws under the Fourteenth Amendment. . . .

The plaintiffs contend that segregated public schools are not "equal" and cannot be made "equal," and that hence they are deprived of the equal protection of the laws. Because of the obvious importance of the question presented, the Court took jurisdiction. Argument was heard in the 1952 Term, and reargument was heard this Term on certain questions propounded by the Court.

Reargument was largely devoted to the circumstances surrounding the adoption of the Fourteenth Amendment in 1868. It covered exhaustively consideration of the Amendment in Congress, ratification by the states, then existing practices in racial segregation, and the views of proponents and opponents of the Amendment. This discussion and our own investigation convince us that, although these sources cast some light, it is not enough to resolve the problem with which we are faced. At best, they are inconclusive. . . .

An additional reason for the inconclusive nature of the Amendment's history, with respect to segregated schools, is the status of public education at that time. In the South, the movement toward free common schools, supported by general taxation, had not yet taken hold. Education of white children was largely in the hands of private groups. Education of Negroes was almost nonexistent, and practically all of the race were illiterate. In fact, any education of Negroes was forbidden by law in some states. Today, in contrast, many Negroes have achieved outstanding success in the arts and sciences as well as in the business and professional world. It is true that public school education at the time of the Amendment had advanced further in the North, but the effect of the Amendment on Northern States was generally ignored in the congressional debates. Even in the North, the conditions of public education did not approximate those existing today. The curriculum was usually rudimentary; ungraded schools were common in rural areas; the school term was but three months a year in many states; and compulsory school attendance was virtually unknown. As a consequence, it is not surprising that there should be so little in the history of the Fourteenth Amendment relating to its intended effect on public education.

In the first cases in this Court construing the Fourteenth Amendment, decided shortly after its adoption, the Court interpreted it as proscribing all state-imposed discriminations against the Negro race. The doctrine of "separate but equal" did not make its appearance in this Court until 1896 in the case of *Plessy v. Ferguson,* involving not education but transportation. American courts have since labored with the doctrine for over half a century. . . .

Here, unlike *Sweatt v. Painter,* there are findings below that the Negro and white schools involved have been equalized, or are being equalized, with respect to buildings, curricula, qualifications and salaries of teachers, and other "tangible" factors. Our decision, therefore, cannot turn on merely a comparison of these tangible factors in the Negro and white schools involved in each of the cases. We must look instead to the effect of segregation itself on public education.

In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does.

In *Sweatt v. Painter,* in finding that a segregated law school of Negroes could not provide them equal educational opportunities, this Court relied in large part on "those qualities which are incapable of objective measurement but which make for greatness in a law school." In *McLaurin v. Oklahoma State Regents,* the Court, in requiring that a Negro admitted to a white graduate school be treated like all other students, again resorted to intangible considerations: ". . . his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession." Such considerations apply with added force to children in grade and high schools. To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. The effect of this separation on their educational opportunities was well stated by a finding in the Kansas case by a court which nevertheless felt compelled to rule against the Negro plaintiffs:

Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system.

Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson,* this finding is amply supported by modern authority.* Any language in *Plessy v. Ferguson* contrary to this finding is rejected.

We conclude that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment. . . .

Because these are class actions, because of the wide applicability of this decision, and because of the great variety of local conditions, the formulation of decrees in these cases presents problems of considerable complexity. On reargument, the consideration of appropriate relief was necessarily subordinated to the primary question—the constitutionality of segregation in public education. We have now announced that such segregation is a denial of the equal protection of the laws. In order that we may have the full assistance of the parties in formulating decrees, the

*K. B. Clark, *Effect of Prejudice and Discrimination On Personality Development* (Midcentury White House Conference on Children and Youth, 1950); Witmer and Kotinsky, *Personality in the Making* (1952), C. Vi; Deutscher and Chein, *The Psychological Effects of Enforced Segregation: A Survey of Social Science Opinion*, 26 J. Psychol. 259 (1948); Chein, *What are the Psychological Effects of Segregation Under Conditions Of Equal Facilities?* 3 Int. J. Opinion and Attitude Res. 229 (1949); Brameld, *Educational Costs*, *In Discrimination and National Welfare* (Maciver, Ed., 1949), 44–48; Frazier, *The Negro in the United States* (1949), 674–681. And see generally Myrdal, *An American Dilemma* (1944).

BOX 13-1

Brown v. Board of Education: Origins and Aftermath

Legal action to desegregate Topeka's schools began after numerous unsuccessful attempts by local NAACP leader McKinley Burnett to persuade the Topeka Board of Education to do so voluntarily. Topeka attorney Charles Scott and his family's law firm organized the initial lawsuit, working closely with the NAACP.

Scott recruited his childhood friend Oliver Brown, an assistant pastor at St. Mark's A.M.E. Church, to join the effort. The lawsuit was filed in 1951, after Brown's daughter Linda Carol was denied admission to the white Sumner Elementary School. Twelve other parents participated in the suit, but Brown was the only male. A decision was made to list his name first, in the belief that judges might take the suit more seriously with a man as the first party.

As the case moved to the U.S. Supreme Court, it was joined by NAACP-sponsored cases from South Carolina, Virginia, Delaware, and the District of Columbia. Unlike the other challenged districts, however, Topeka's segregated public schools were relatively equal in terms of measurable indicators of quality, requiring the justices to confront squarely the question of whether state-imposed racial separation alone was sufficient to constitute a violation of equal protection guarantees.

The Topeka litigants learned of the Supreme Court's decision over the radio and held a rally that evening at the previously Black Monroe Elementary School.

Oliver Brown passed away in 1961 at the young age of forty-two. Linda Carol Brown became a Head Start teacher. She and her sister Cheryl were active in efforts to promote the legacy of the case, including work with the nonprofit Brown Foundation for Educational Equity, Excellence, and Research. Linda died March 25, 2018, at the age of seventy-five. In 1992, the Monroe School became a National Historic Site.

Sources: "*Brown v. Board of Education*," Public Broadcasting System, May 12, 2004; The Brown Foundation (brownvboard.org), various dates; "One Child's Simple Justice," *U.S. News and World Report*, 1963; and *Washington Post*, March 26, 2018.

cases will be restored to the docket, and the parties are requested to present further argument on Questions 4 and 5 previously propounded by the Court for the reargument this Term.* The Attorney General of the United States is again invited to participate. The Attorneys General of the states requiring or permitting segregation in public education will also be permitted to appear as amici curiae upon request to do so by September 15, 1954, and submission of briefs by October 1, 1954.

It is so ordered.