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## HOW HAS THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT CHANGED THE CONSTITUTION?



### LESSON PURPOSE

The previous lesson explained how the Fourteenth Amendment prohibits state governments from depriving a person of life, liberty, or property without due process of law. This lesson examines how the equal protection clause prohibits state governments from denying people “equal protection of the laws.” Like the due process clause, the equal protection clause places limits on America’s governments, not private individuals.

When you have finished this lesson, you should be able to define equal protection of the laws. You should be able to explain why neither state governments nor the national government can deprive people of equal protection of the laws. You also should be able to explain the “separate but equal” doctrine of racial segregation and why the Supreme Court abandoned it in *Brown v. Board of Education*. You should be able to describe the categories that the Supreme Court now uses to decide cases challenging governmental actions that treat some people differently from others. Finally, you should be able to evaluate, take, and defend a position on how conflicts between or among rights should be resolved.

### TERMS AND CONCEPTS TO UNDERSTAND

equality of condition

separate but equal

equality of opportunity

strict scrutiny

intermediate scrutiny

rational basis



What rights are guaranteed by the equal protection clause of the Fourteenth Amendment?

### WHAT IS MEANT BY “EQUAL PROTECTION OF THE LAWS”?

The equal protection clause of the Fourteenth Amendment says that no state may “deny to any person within its jurisdiction the equal protection of the laws.” The amendment does not define “equal protection.” U.S. Senator Jacob Howard (1805–1871) of Michigan, one of the drafters, explained that the phrase

“ establishes equality before the law, and it gives, to the humblest, the poorest, the most despised...the same rights and the same protection before the law as it gives to the most powerful, the most wealthy, or those most haughty.

Equal protection of the laws, like due process, is a constitutional guarantee of fair treatment for all persons, regardless of sex, race, national origin, religion, or political views. It is rooted in the truth expressed in the Declaration of Independence that “all Men are created equal.”

Equal protection of the laws forbids arbitrary or irrelevant barriers to the full enjoyment of rights by all persons. Two early cases are illustrative of equal protection of the laws in matters of race. *Strauder v. West Virginia* (1880) concerned an African American who had been convicted by an all-white jury. West Virginia law expressly limited jury service to “all white male persons.”

On appeal, the Supreme Court declared that law unconstitutional because it violated the equal protection clause of the Fourteenth Amendment.

Six years later the Court ruled in *Yick Wo v. Hopkins* (1886) that a San Francisco city ordinance that discriminated against Chinese laundry businesses violated the equal protection clause. In a unanimous decision the Court held that the ordinance was discriminatory and constituted class legislation prohibited by the Fourteenth Amendment. It also ruled that the equal protection clause applies to all persons, citizens and aliens alike.

Equal protection of the laws means that government must treat all persons as equals without favoritism to any individual or group. It also means that every person is entitled to **equality of opportunity** so that everyone can try to achieve the goals they seek, or as the Declaration of Independence puts it, “the Pursuit of Happiness.” Equality of opportunity means that laws must not unfairly disadvantage anyone in his or her opportunity to seek a variety of social goods, such as education, employment, housing, and political rights. It does not mean, however, **equality of condition** or that the results or outcomes of life will be the same for all. Equality of condition means equality in all aspects of life, such as personal possessions, living standards, medical care, and working conditions.

### WHAT DO YOU THINK?

- 1 What are the differences between equality of condition and equal protection of the laws?
- 2 Does inequality of condition undermine the ideal of equality of rights? Explain your response.

### WHAT WAS THE “SEPARATE BUT EQUAL” DOCTRINE, AND WHAT WAS ITS EFFECT?

After the end of Reconstruction, when U.S. troops were removed from former Confederate states and white people reasserted control of those states’ governments, most Southern states adopted so-called Jim Crow laws. These laws were designed to limit the rights and freedoms of African Americans. By the end of the nineteenth century Jim Crow laws had imposed a system of racial segregation throughout the South and in many other parts of the country.

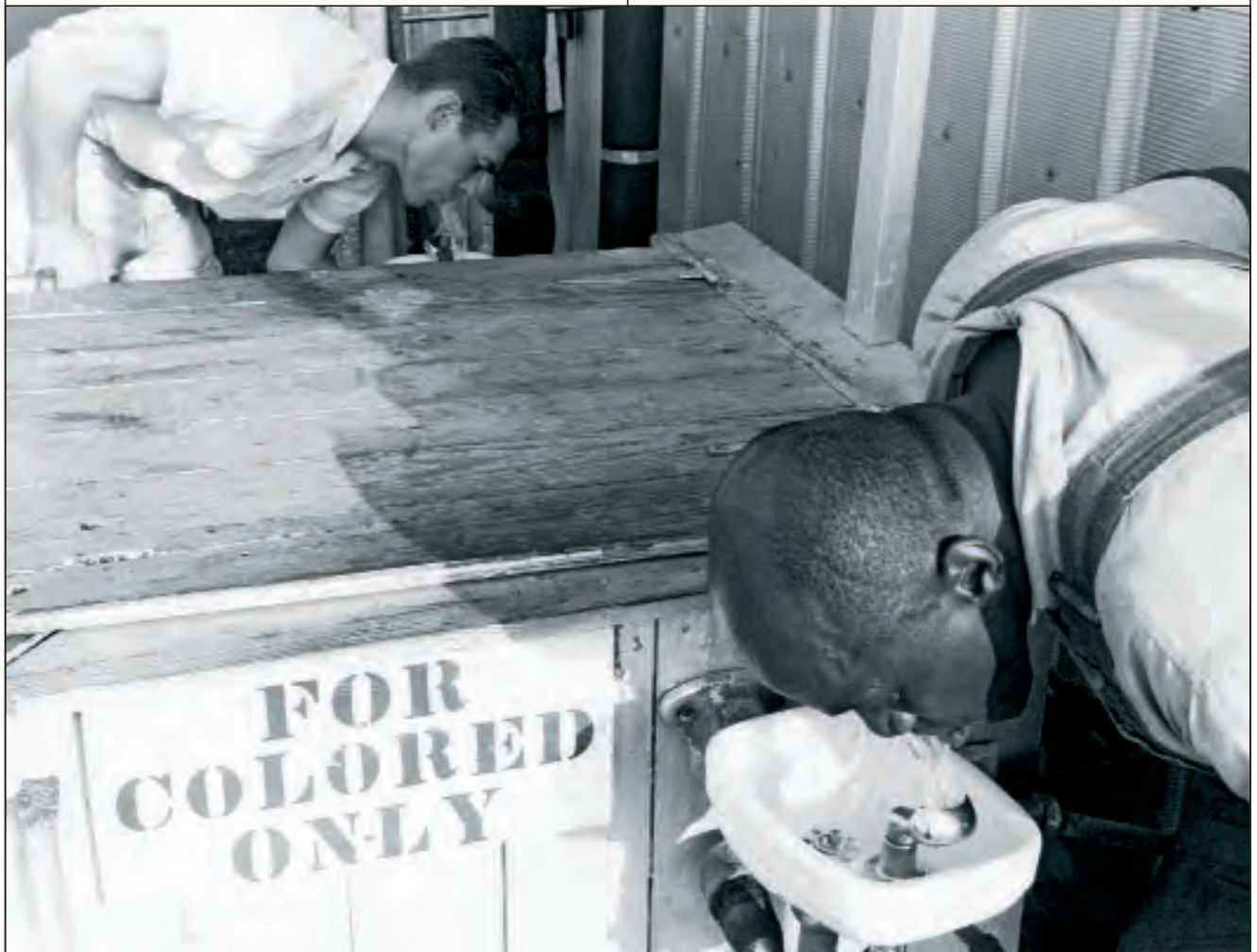
In the landmark case of *Plessy v. Ferguson* (1896) the U.S. Supreme Court rejected the argument that a

Louisiana law requiring blacks and whites to ride in different railroad cars violated the equal protection clause. The Court held that **separate but equal** facilities were constitutional. Justice Henry Billings Brown, writing for the majority in the 7-to-1 decision (one justice did not participate), wrote that if blacks interpreted the “separate but equal doctrine” as a “badge of inferiority,” it was “solely because the colored race chooses to put that construction upon it.”

Justice John Marshall Harlan, in a strong dissent, argued that allowing state-enforced segregation of the races violated the equal protection clause:

“ Our Constitution is color-blind.... In respect of civil rights, all citizens are equal before the law.... The judgment this day rendered will prove to be quite as pernicious as... the *Dred Scott* case.

In fact, state-sponsored segregation under *Plessy* lasted almost sixty years. Laws requiring racial separation affected Asian Americans as well as African Americans.



What were the effects of the “separate but equal” doctrine?



### WHY DID THE SUPREME COURT ABANDON “SEPARATE BUT EQUAL” IN *BROWN V. BOARD OF EDUCATION*?

The National Association for the Advancement of Colored People (NAACP) was founded in 1909. For its first twenty-five years it appealed to the conscience of all Americans to end racial mob violence and lynching, and it filed lawsuits seeking to end discrimination at the ballot box. The NAACP then turned to ending segregation in education. The association believed that improving educational opportunities and intermingling students of different races in schools would be the most effective way to end long-term patterns of racism in the United States. Under the direction of a legal team that included future Supreme Court Justice Thurgood Marshall, the NAACP argued and proved in case after case that medical, law, and other professional schools maintained for black students were not equal to those maintained for white students.

Those legal victories set the stage to challenge the separate but equal doctrine in segregated public elementary and secondary schools that were the legacy of *Plessy*. In 1952 the NAACP challenged state statutes that authorized “separate schools for the education of white and colored children.” The lead case was against the Board of Education of Topeka, Kansas. That school district maintained segregated schools, a situation that sometimes required students to be bused away from their neighborhoods to achieve segregation. Linda Brown, an African American third-grader, was one of the students who had to travel by bus to attend a segregated school. Her father, Oliver Brown, a railroad worker studying for the ministry, worked with the local Topeka NAACP to file a lawsuit seeking to remedy the situation. The trial court applied the separate but equal doctrine, and Brown lost.

On appeal to the U.S. Supreme Court the NAACP emphasized evidence demonstrating the severe and damaging effects of segregated schools on the psychological development of African American children. In *Brown v. Board of Education* (1954) the Supreme Court agreed with the NAACP and unanimously decided that separate education facilities are “inherently unequal.” In the field of public education, Chief Justice Earl Warren wrote, “the doctrine of ‘separate but equal’ has no place.” Justice Harlan’s dissent in *Plessy* was now the Court’s majority view. However, as will be discussed in Unit Six, *Brown* was more difficult to enforce than the Supreme Court anticipated.

### HOW HAS THE SUPREME COURT’S INTERPRETATION OF THE EQUAL PROTECTION CLAUSE CHANGED SINCE *BROWN*?

Many laws create classifications, or categories, of people. For example, a state law requiring a person to be at least sixteen years of age to qualify for a driver’s license creates two classifications of people—those sixteen and older and those under sixteen. People in one classification qualify to receive licenses or permits. People in the other classification do not. Therefore, the following is an important judicial question: Does a classification that results in different treatment violate the equal protection clause?

The Supreme Court uses at least three levels of analysis to decide whether laws that create classifications violate the guarantee of equal protection of the laws.

#### ● LEVEL 1: STRICT SCRUTINY

Laws that create classifications based on race, national origin, religion, or status as a legal alien are subject to the most rigorous judicial scrutiny, called **strict scrutiny**. Laws that deny or dilute the right to vote, impede interstate travel, or appear to restrict access to the courts also are subject to this level of analysis. Judges presume that such laws violate the equal protection clause. The government that adopted the classification can overcome the presumption if it can persuade the Court that there is an extremely strong reason, known as a “compelling state interest,” for the law and that the government has imposed the fewest possible restrictions on the disfavored group.

For example, during World War II the U.S. government persuaded the Supreme Court that there was a compelling state interest for racial classifications that resulted in the internment of Japanese Americans and others. All other laws classifying people on the basis of race have been struck down. For instance, in *Loving v. Virginia* (1967) the Court held that the state of Virginia had no compelling state interest for a law prohibiting interracial marriage.

#### ● LEVEL 2: INTERMEDIATE SCRUTINY

Classifications based on gender and illegitimacy (birth to an unmarried mother) are subject to **intermediate scrutiny**. Governments that distinguish between groups because of gender or illegitimacy must prove that the laws are “substantially related to an important government purpose.”

Using this standard, in *Craig v. Boren* (1976) the Court struck down an Oklahoma law that permitted women to buy 3.2-percent beer at age eighteen but required men to be age twenty-one. It held that the gender-based distinction was not substantially related to the state's interest in promoting traffic safety. However, in *Rostker v. Goldberg* (1981) the Court upheld a federal statute excluding women from the military draft on the ground that women were barred from combat.

### ● LEVEL 3: RATIONAL BASIS

All other laws that create classifications—including classifications based on wealth, disability, and age—are presumed to be constitutional. Courts presume that the deliberative process that legislatures use to enact laws ensures their “rationality”—that is, that such laws have a **rational basis**. The person or group challenging the law must show that the law is not rational, or reasonable.

Only rarely has the Court held that a law was not rational. In *Stanton v. Stanton* (1975), for example, the Supreme Court overturned a Utah statute that required divorced fathers to support their sons to age twenty-one but their daughters only to age eighteen. The state argued that it was rational for divorced fathers to support girls for a shorter time because girls tend

to mature and to marry earlier than boys do. The Supreme Court disagreed.

The Fourteenth Amendment's equal protection clause applies only to the states. The Court has held—in *Hirabayashi v. United States* (1943)—that the due process clause of the Fifth Amendment, which limits only the national government, contains an “equal protection component.” Both due process and equal protection standards require government to treat people fairly. Therefore individuals or groups who believe the national government has deprived them of equal protection of the laws may challenge their treatment under the Fifth Amendment.

### WHAT DO YOU THINK?

What level of judicial scrutiny do you think should apply in the following situations? Explain your reasoning in light of the criteria described regarding each level of scrutiny:

- Rejecting an eighty-five-pound woman from admission to the firefighters' academy.
- Requiring drivers over age seventy-five or male drivers under age twenty-five to take an annual driver's exam.
- Disqualifying a female student in a public high school from participating on the boys' wrestling team.
- Refusing to put elevators in a county courthouse.
- Incarcerating homeless persons with documented mental disabilities.
- Barring the children of illegal aliens from public schools.

### WHAT CONTROVERSIES REMAIN IN THE ARENA OF EQUAL PROTECTION OF THE LAWS?

Claims of equal protection raise many difficult issues, including the following:

- Whether laws that give preferences to certain groups that historically have been denied equal opportunities (a practice known as affirmative action) are impermissible “reverse discrimination.”
- Whether intermediate scrutiny is the appropriate level for analyzing classifications based on gender.



What evidence do you see in this picture of the results of the Supreme Court's decision in the *Brown* case?

- Whether groups such as the mentally handicapped, children of illegal aliens, and gays and lesbians should be treated as “discrete and insular minorities” for purposes of equal protection analysis because of prejudice against them.

### CRITICAL THINKING EXERCISE

#### Weighing Equal Protection Against Other Constitutional Rights

Consider the following real-life situation. James Dale was an assistant scoutmaster and an Eagle Scout in New Jersey. In 1990 Boy Scouts of America (BSA) revoked Dale’s membership because BSA’s standards “forbid membership to homosexuals.” Dale sued BSA, arguing among other things that revoking his membership violated his right to equal protection of the laws. BSA responded that the organization was merely exercising its right of association under the First Amendment. It pointed out that the Supreme Court has interpreted associational rights to include control over the political, religious, or cultural messages that an organization wishes to send.

Respond to the following questions:

- 1 How should the line be drawn between private organizations (which are not covered by the equal protection clause) and public action when

the private organization receives government financial support, as BSA does?

- 2 What level of judicial scrutiny should apply to claims of discrimination based on sexual orientation? Why? Compare your responses to the Supreme Court’s analysis in *Boy Scouts of America v. Dale* (2000).
- 3 What standards should courts apply in resolving conflicts between First Amendment rights and equal protection guarantees?
- 4 Identify other situations that also may raise conflicts between equal protection guarantees and other constitutional rights.

### REVIEWING AND USING THE LESSON

- 1 What was the “separate but equal” doctrine? How did the Supreme Court justify the doctrine in *Plessy v. Ferguson*?
- 2 What arguments did the Court use in *Brown v. Board of Education* to abandon the “separate but equal” doctrine it had endorsed in *Plessy v. Ferguson*?
- 3 How has the equal protection clause been interpreted since 1954?



Should private organizations be free to exclude people upon the basis of such factors as race, gender, ethnicity, or physical characteristics?