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ABSTRACT

The second in a special four-part series of law-school partnership handbooks on constitutional themes, this document focuses on equality. "Equality--the Forgotten Word" (J. A. Hughes) discusses what has been considered the U.S. Constitution's one flaw, its failure to abolish slavery, and the remedy to that flaw, the Fourteenth Amendment. The issue of equal protection as it exists today and how it bears on such things as age, gender, welfare rights, and aliens is also examined. "The Dilemmas of Equality" (M. Middleton) examines various court cases that have been significant in the battle against discrimination. James Giese and Barbara Miller provide two lesson plans: "Searching for Equality" (grades 7-12) provides a historical context for looking at current legal questions pertaining to equal rights; "Affirmative Action" (secondary grades) aims to help students understand the role that the federal government can take in clarifying how citizens will approach redressing past discrimination while protecting the rights of individuals whose opportunities may be limited by affirmative action programs. Dale Greenawald also provides two lesson plans including: "Sex Discrimination" (grades 7-12) which focuses on landmark sex discrimination cases in order to identify some of the legal principles concerning this topic. The second lesson, "Discrimination and the Law," (grades 9-12) examines discrimination in a variety of contexts. (JB)

BAR/SCHOOL
PARTNERSHIP
PROGRAMS



# Equality

## Constitutional Update



American Bar Association
Special Committee on Youth Education for Citizenship

# Equality—the Forgotten Word

## For generations, you needed a code book to decipher what the Constitution said—and didn't say—about equal rights in a diverse society

My focus is the equal protection clause of the Constitution and equality.

As we approach the bicentennial of the Constitution, it is important to recall its precursor: the Declaration of Independence. During the bicentennial of the Declaration of Independence, England lent to the American people one of the four signed copies of the Magna Carta. When it was put on display in the Capitol Rotunda, Britain's Lord Chancellor told the audience: "People not familiar with our ways have thought it a trifle paradoxical for the British to be joining in the celebration of the bicentenniary of what was, after all, the loss of the American colonies. They overlook our traditions of compromise. We in fact now regard the events of two centuries ago as a victory for the English-speaking world."

Similarly, the United States Constitution received great praise from the British Prime Minister, William Gladstone, who wrote in 1878 that "the American Constitution is the most wonderful work ever struck off at a given time by the brain and purpose of man."

### Compromises of Principle

While it is the oldest living written constitution in the world, and while we continue to live under a political structure that flows from its original clauses, as we approach the bicentennial of the Constitution it is important to note the compromises it contains. It has been called a timeless document with one grievous flaw--it did not abolish slavery. The forerunners of the compromises in the Constitution were in the Declaration itself.

The Declaration was a product of the

Third Continental Congress. A committee of five men were to be the drafters. Of those five, Thomas Jefferson was delegated the task of coming up with the first rough draft. In that original draft, he inveighed against the king of England for fomenting the slave trade, making the king the scapegoat for what has been called "that peculiar institution." One of his colleagues, John Adams, remarked that Jefferson's "flight of oratory" about slavery would never become part of the final document, and of course he was right.

The compromises continued into the drafting of the Constitution. Jefferson himself was away in France and so he did not have an opportunity to engage in flights of oratory about slavery, but in the Constitution of 1787, under the prodding of James Madison, the makers agreed that it would be wrong to admit in the Constitution that there could be property in man. One commentator noted "they were successful to the extent that they not only avoided use of the term slave or slavery but masked their references to the subject so skillfully that today laymen cannot identify the compromise clauses without the guidance of lawyers or historians." So let me be your guide.

The Constitution of 1787 created a governmental structure designed to solidify the Declaration's assertion that government derives its just power from the consent of the governed. Thus Article I, Section II, provides that the House of Representatives is to be composed of members chosen by the people and that those representatives are to be apportioned among the several states "according to their respective numbers which shall be determined by adding to the whole number of free persons three-fifths of all other persons." Translation: 'all other persons' means slaves.

At the time the Constitution was drafted there were about 50,000 free blacks in the United States but 700,000 slaves, most of whom were in the South. So this compromise led to the ironic fact that the slaves had no personhood but whites were entitled to representation in the legislature on the basis of the slaves' presence.

The second compromise is in Article I, Section 9, which prohibits Congress from interfering with the foreign slave trade before 1808. That section refers to the migration or importation of such persons. Translation: 'persons' is a euphemism for black slaves.

In another section of the Constitution, Congress is empowered to lay and collect taxes. A fear rose that a head tax on slaves might become so steep that slavery would be driven out of existence. Not to worry. There was a third compromise. Article I, Section 9 provides that "no capitation or other direct tax shall be laid unless in proportion to the census or enumeration herein before directed to be taken." (Of course, the amendment which gave us income taxes makes this section obsolete.)

Yet another fear arose. Perhaps these compromises would be eliminated by a constitutional amendment. Not to worry. Article V contains a proviso that no amendment could be made prior to the year 1808 which would undercut the second and third compromises.

Then we have the final compromise, which was fueled in part by a decision of

England's Lord Mansfield. He had held that a slave who set foot on free soil gained permanent freedom. Under the Northwest Ordinance, the Northwest Territory of the United States was free soil. So the Constitution drafters were worried about fugitive slaves setting foot on free soil and becoming free. Not to worry. The fourth compromise, in Article IV, Section 2, undermined the Northwest Ordinance by stating: "No person held to service or labor in one state, under the laws thereof, escaping into another, shall be discharged from such service or labor but shall be delivered up on claim of the party to whom such service or labor may be due." Translation: 'person' is a euphemism for black slaves.

## Dred Scott and the Court

Later, slaves and their abolitionist allies tried to infuse some life into the Constitution. They went to courts and went to the U.S. Congress and said: "But we are persons." Those attempts failed. William Lloyd Garrison, the abolitionist publisher, admonished "The compact which now exists...is a covenant with death and an agreement with hell."

The compromises clearly foreshadowed the failures of the Constitution as well as the necessity for a Fourteenth Amendment and its equal protection clause. No place in the 1787 document—nor in the Bill of Rights appended immediately thereafter—was there even any guarantee of equality or any mention of the concept.

It literally took an act of Congress to deal with the question of equality, particularly between blacks and whites. The Missouri Compromise of 1820 allowed Missouri admission to statehood provided that certain territories north of a line were to be free.

Then along came Dred Scott. Born a slave in Missouri, he was purchased for $500 by a Dr. Emerson, an Army surgeon. When Dr. Emerson was transferred from Missouri to Rock Island, Illinois (a free state), he took Dred Scott along. There Dred struck up an acquaintance with Harriet, who was a slave of another army officer, a Major Taliaferro. Dred's wife had been previously sold off to slavery to someone else. So he and Harriet got together and had a child, Lizzie. Fortunately, both Dr. Emerson and Major Taliaferro were transferred to Fort Snelling, which was then in the Northwest Territory in what is now Minnesota. So Dred, Harriet and Lizzie are then in free territory. Eventually, Dr. Emerson was transferred back to Missouri, and Dred, wife Harriet, child Lizzy go along. Back in Missouri, Dr. Emerson died. Scott then tried to buy his freedom, offering Emerson's widow his $300 savings, but she said "No." So he took his $300 and went to see a lawyer. He filed suit in a Missouri court seeking his freedom, saying, in effect, "I am free because I have been in free territory."

Scott lost, but filed a new suit when widow Emerson married Calvin Chafee, a Massachusetts antislavery congressman who did not want to be involved in slaveholding. So the widow transferred responsibility for her husband's estate, which included Dred Scott, to her brother John Sanford and went off to the North to live happily ever after with her antislavery husband.

The Supreme Court heard the case twice. In the meantime a presidential election intervened, and President-elect Buchanan became involved. In fact, he had private correspondence with a number of the justices so he knew which way the Court was going to rule before he gave his inaugural address, in which he asked the nation to be calm and to accede to whatever the Supreme Court said about Dred Scott.

The decision, what Chief Justice Taney said in *Dred Scott v. Sandford* [sic], 60 U.S. 393 (1857), was devastating to the proponents of equality. In sum, he stated that: (1) the Declaration's phrase "all men are created equal" does not include blacks; (2) the compromise clauses in the Constitution "point directly and specifically to the Negro race as a separate class of persons and show clearly that they were not to be regarded as a portion of the people or citizens"; (3) Free blacks were regarded the same as black slaves and were not even in the minds of Constitution's framers; (4) blacks were not citizens of the states in which they resided whether the state was on free soil or not, nor were they entitled to any protection from the federal government; (5) unlike native American Indians, blacks could not even be naturalized citizens of the United States and could not get a passport identifying them as such; and (6) finally, in the language that is usually quoted from *Dred Scott*, Justice Taney said that descendants of Africans who were imported into this country as slaves have "no rights which the white man was bound to respect; and that the Negro might justly and lawfully be reduced to slavery for his benefit."

Under Taney's decision, Dred Scott remained a slave because he had no national citizenship, and because the Missouri Compromise, making a portion of the United States free territory, was ruled invalid.

In the aftermath, Dred Scott might well have recalled the moral of the slave folk tale of the goose and the fox. One day, brother fox caught brother goose and tied him to a tree. "I am going to eat you brother goose," he said, "you have been stealing my meat." "But I don't even eat meat," brother goose said. "Tell that to the judge and jury," said brother fox. "Who is going to be the judge?" asked brother goose. "A fox," said brother fox. "Who is going to be the jury?" brother goose inquired. "They are all going to be foxes," said brother fox, grinning so that all his teeth showed. "Guess my goose is cooked," said brother goose. In other words, if you are a goose, you are in trouble if your citizenship is to be decided by a fox.

The Dred Scott decision created an uproar. The Supreme Court was lambasted on some sides, hailed on other sides. In the midst of all this, Dred Scott himself contracted consumption and died. But *Dred Scott*, the case, has been linked to the beginning of the Civil War and, in an indirect way, to the beginning of the Fourteenth Amendment.

## Changing the Constitution

After the Civil War, the radical Republicans launched a legislative program to rectify the centuries of slavery and to overturn *Dred Scott*. In addition, they promoted the Thirteenth, the Fourteenth and the Fifteenth amendments.

What is interesting about the Fourteenth Amendment, and particularly its equal protection and due process clauses, is that the radical Republicans believed that they were not needed. They operated under a political theory which said that men had natural rights and it was not the function of the federal government to interfere with those rights but rather to protect them, and thus, a Fourteenth Amendment would be unnecessary.

But, it was argued, you have to factor in a Supreme Court which might undo the legislative agenda represented by civil rights statutes passed after the Civil War. Remember that the Missouri Compromise, in which the Congress tried to make part of the nation free, was viewed as unconstitutional in *Dred Scott*. So the effort of the radical Republicans was to solidify in the Fourteenth Amendment their view of their legitimate rights as federal legislators.

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Three very important concepts come out of the Fourteenth Amendment, and particularly the equal protection clause. Although they were intended to benefit black slaves primarily, they have benefited every citizen of these United States.

First was the concept of national citizenship under Section One's declaration that "All persons born or naturalized in the United States...are citizens of the United States." Before this amendment, one was considered to be a citizen only of the state of residence. Second was the express constitutional guarantee of a right to equal protection. Nowhere in the original Constitution was that concept to be found. And third, the Fourteenth Amendment led to a federalization of civil rights. William Lloyd Garrison noted, "When I said I would not sustain the Constitution because it was a covenant with death and an agreement with hell, I had no idea that I would live to see death and hell secede."

What was the result of the Fourteenth Amendment? For blacks it meant slavery was abolished, and equal protection and due process were made available. But as one commentator has said, one of the ironies of legal history is that although the Fourteenth Amendment turned out to be an excellent shield for protecting expanding capital from government restraints, it proved of little practical help to the emancipated slaves. By the turn of the century, equal protection had been reduced to a mere slogan for blacks, because in *Plessy v. Ferguson*, 163 U.S. 537 (1896), the Court said separate but equal satisfied the Constitution.

## Unintended Benificiaries

Looking at what the Fourteenth Amendment and equal protection have meant to everybody else, it's a very different story.

At first, it was thought that the amendment applied only to blacks. *The Slaughterhouse Cases*, 83 U.S. 36 (1872), the first Fourteenth Amendment cases to come before the Supreme Court, held that granting a private slaughterhouse and stockyard monopoly by Louisiana did not violate the amendment. Justice Miller, writing for the majority, said, in effect, that it was doubtful whether the amendment could ever be held to apply to anyone but blacks.

The irony is that the original intention was to benefit blacks, to get blacks on a par with the rest of the country. But the amendment quickly was applied to other groups and *not* to blacks.

Even a corporate entity received the benefits at an early date. In 1886, the Court had before it *Santa Clara County v. Southern Pacific Railroad*, 118 U.S. 394, a case involving the distinction between taxing corporations and people. The lawyers had briefed the question of whether a corporation was a person within the Fourteenth Amendment. At the beginning of oral argument, the Chief Justice announced that the Court did not wish to hear argument on the question of whether the provision in the Fourteenth Amendment which forbids a state to deny to any person the equal protection of the laws applies to corporations. He said, "we have the opinion it does."

Other groups have also gained from the presence of the Fourteenth Amendment, particularly its equal protection clause. Let's look at the case of *Wick Yo v. Hopkins*, 118 U.S. 356, (1886). Wick Yo was a Chinese laundryman in San Francisco, who needed a license to operate. Almost any Caucasian who applied for a license in San Francisco got one. To be precise, seventy-nine of eighty Caucasians applying for a license were granted one, but none of the 200 Chinese applying for licenses were given them. The Supreme Court held that this inequity violated equal protection of the laws. So *Wick Yo v. Hopkins* was one of the first cases to apply the Fourteenth Amendment to non-black racial groups.

One racial group initially not protected (and most people believe the original decision was wrong) were the Japanese-Americans who were put in concentration camps during World War II.

*Korematsu v. U.S.*, 323 U.S. 214 (1944), upheld the constitutionality of the original relocation program, but recently claims for compensation by interned Japanese Americans have been honored.

How did the Fourteenth Amendment come to be applied to situations other than discrimination against blacks? One reason is that the radical Republicans had control of the Congress but they did not have control of the people's biases, nor could they direct the imagination of the country. Once the Fourteenth Amendment was there, the natural impulse was to co-opt the measure for the benefit of those with more leverage than blacks. At the same time, powerful social forces, in the South and elsewhere, created a climate for limiting the rights of blacks. After *Strauder v. West Virginia*, 100 U.S. 303 (1880), invalidating a state law excluding blacks from jury service, the amendment was rarely used to help blacks. The *Civil Rights Cases*, 109 U.S. 3 (1883), struck down the federal civil rights statutes of the reconstruction Congress, and *Plessy v. Ferguson*, 163 U.S. 537 (1896), instituted the notion that separate could be made to be equal.

Thus it is that a legal historian observed that if, at the mid point of the twentieth century one were to have tried to reconstruct American constitutional history by inspecting Supreme Court opinions, one could readily conclude that the Civil War and the amendments it spawned were concerned with freedom for the possessors of capital, perhaps the liberties of newspapers and periodicals and possibly the rights of criminal defendants. "Only in some kind of obscure way would the war be understood to have any bearing on the legal, political and social capacities of the forcibly expatriated African slaves."

Not until *Brown v. Board of Education*, 347 U.S. 483 (1954), was the promise of equality for blacks resurrected. However, as in the past, the Fourteenth Amendment and equal protection continued to expand to accomodate other interests.

## Equal Protection Today

The equal protection clause provides the basis for a person to go before a court and complain about unequal treatment. What groups and what causes rely upon the concept?

*Aliens.* Recently, in *Pyler v. Doe*, 457 U.S. 202 (1982), the Court held that Texas could not deny undocumented alien children the same free public education available to other children residing in the state. The issue in these cases has been whether the state could show some legitimate reason for treating aliens different from citizens. Since the Fourteenth Amendment protects persons—not just citizens—only with a substantial state purpose can there be a difference in treatment.

*Age.* In *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976), the Court considered an equal protection case involving age. Could a state regulation forcing state police officers to retire at 50 pass constitutional muster? The Court said yes. It held that the objective of assuring physical fitness of police officers is rationally furthered by a state regulation requiring uniformed state police officers to retire at age 50.

*Welfare rights.* A New Jersey program paid benefits to families in which the mother and father were married, but denied benefits when they were living in a common law relationship without a formal marriage. Although the state claimed an interest in promoting formal marriage relationships, the Court invalidated the distinction on equal protection grounds.

*Long-time residents v. newcomers.* A recent interesting case is from the state of Alaska, which has a permanent income fund from which it distributes monev to its citizens. But Alaska treated new arrivals to the state different from those with a longer residence. Because this distinction denies equal protection of the law and penalizes the exercise of a person's right to travel, the Alaska scheme was struck down in *Zobel v. Williams*, 102 S. Ct. 2309 (1982). Here again, equal protection was a key concept.

*Gender.* In most challenges to sex-based classifications, equal protection has been the major thrust. In Idaho, a minor child of estranged adoptive parents had died, leaving an estate of less than a thousand dollars. The mother, Sally Reed, petitioned the Idaho courts to allow her to administer the estate; but Cecil Reed, the father, was chosen under a state law that gave preference to men over women when other qualifications of eligibility were equal. In *Reed v. Reed*, 404 U.S. 71 (1971), the Court held that a state statute could not prefer men as administrators of estates over women.

*Orr v. Orr*, 440 U.S. 268 (1979), addressed the question of whether a statute could deal with alimony differently depending on whether the female was paying the male or the male paying the female. The Court struck down the Alabama statute in question, which imposed alimony obligations on husbands but not on wives, on the grounds that it violated the equal protection clause.

What these cases illustrate is that the equal protection clause has been the focal point in constitutional claims of inequality where persons allege they are being treated differently from someone else. But equal protection is not the same as "equality" because some differences in treatment are condoned by the law.

## Equal Protection Standards

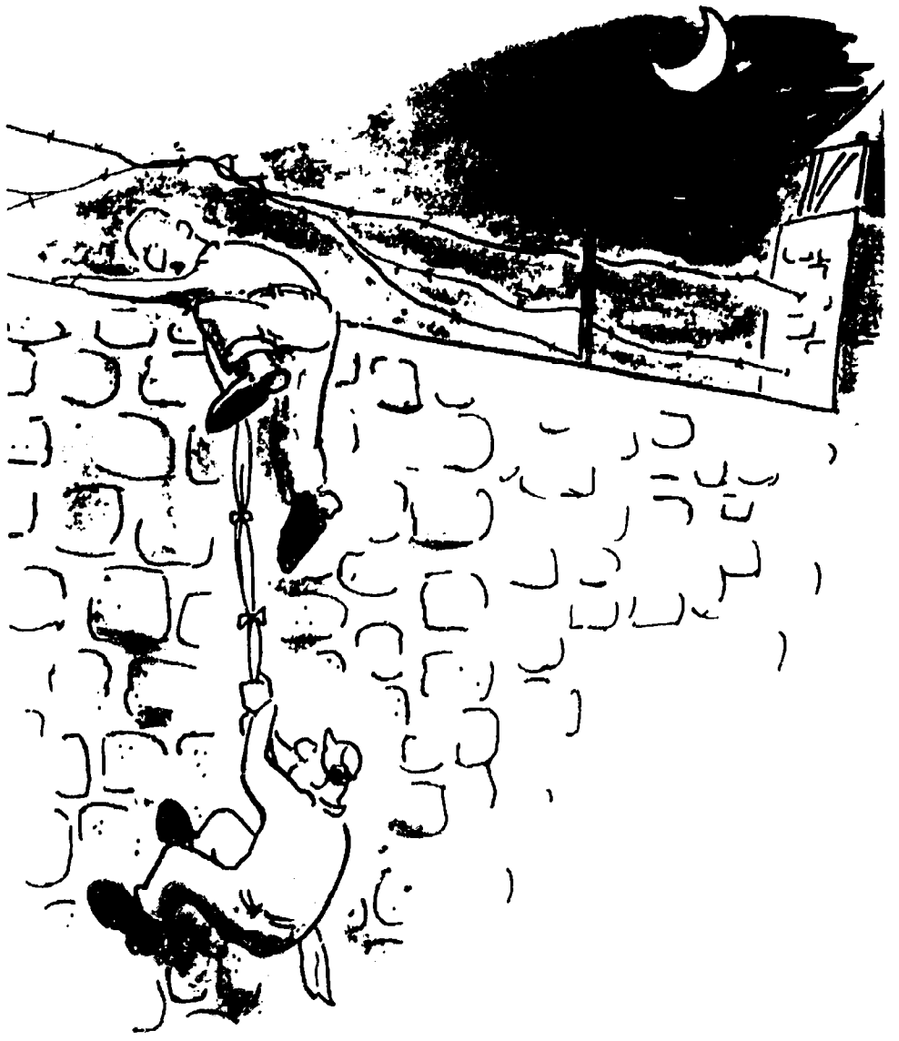
One of the current issues for the women's movement is how the law should deal with those differences between men and women that do in fact exist. Because of those differences can we treat them differently? For example: A statute permits you to sell 3.2% beer to girls at age 18, but not to boys until they reach age 21. The rationale for the difference is that girls are involved in fewer offenses relating to drinking. In *Craig v. Boren*, 429 U.S. 190 (1976), the Court held that the Oklahoma statute in question could not pass constitutional muster. The Court reasoned that the statistical evidence (that .18% of females and 2% of males in the 18-20-year-old age group were arrested for driving under the influence of liquor) "does not warrant the conclusion that sex represents an accurate proxy for the regulation of driving and drinking." The Court called such evidence "loosefitting generalities" that were insufficient under the equal protection clause to justify a gender-based classification.

Similarly, in *Arizona Governing Committee v. Norris*, 103 S.Ct. 3492 (1983), the Supreme Court required that retirement benefits be calculated without regard to the beneficiary's sex, despite the fact that women, on average, live longer than men. Thus mortality tables had to be done on composite gender-merged or "unisex" basis. No longer would it be permissible to provide women with lower benefits per month, on the assumption that they would live longer.

How does one determine whether equal protection has been violated by treating persons differently? There are three basic approaches that the Supreme Court uses.

One issue the Court has to determine is whether or not there is any rational connection between the classification and the result sought to be achieved. If there is any kind of *rational* connection, that classification or that difference or that distinction is permissible unless you are dealing with what has been referred to as "discreet and insular minorities." If that is the case, when a classification or difference in treatment burdens – not advantages but burdens – a discreet and insular minority, then the distinctions are subject to the second standard, known as "strict scrutiny," under which the government must show a *compelling* state interest in order for the classification to stand.

The compelling interest test to determine whether classifications discriminate views laws as "inherently suspect" if they are based upon characteristics determined "solely by the accident of birth." Here the Court requires more than a "substantial" relationship between the law and its purpose – a showing that the state had a "compelling interest" in drafting the law as it did. (This standard was advanced in the majority opinion in *Korematsu*, which found that the order excluding the Japa-



*"I just remembered – we're probably forfeiting our security deposit."*

nese did indeed meet the test.)

A third and intermediate standard between "rational basis" and "strict scrutiny" is that which effectively shifts the burden of proof to the law-making body, which must show that the classification is not only rational, but also a necessary element in achieving an important legislative objective. Using this standard, the Court struck down the Oklahoma law I mentioned before that allowed 18-to 20-year-old females to buy beer when males the same age could not, on the grounds that the law violated the equal protection clause of the Fourteenth Amendment.

Thus, a critical issue in equal protection cases is method of proving that one has been discriminated against—that is, that you have been treated differently from others similarly situated and thus denied equality.

When *Korematsu* and *Strauder v. West Virginia* were decided, discrimination was more blatant. The Black Codes and the Jim Crow laws were all very specific about race. But once you move away from a statute which on its face classifies by race or sex, then how do you prove that you are being treated differently?

One method is disproportionate impact. That is, a law impacts more heavily on one group, so it must be discriminating to their detriment. The disproportionate impact method of proof is on the wane. The Court is moving toward a position of saying you must now prove that the lawmakers were animated by a purpose, a motivation, a specific *intent* to discriminate. That makes it extraordinarily difficult, since in the 1980's inequality and discrimination have become more subtle.

Many people are saying that moving toward a proof of specific discriminatory intent is foolishness given that we are in the year 1986 and people have had more than 200 years to learn how not to discriminate on the face of an enactment. It is clear that the only way that you can move from equal protection to true equality is to look at what is real rather than what is assumed, and what is real is the disproportionate impact of statutes, decisions, practices on blacks, aliens, the poor, or other groups that do not have the political or economic ability to protect themselves from inequality.

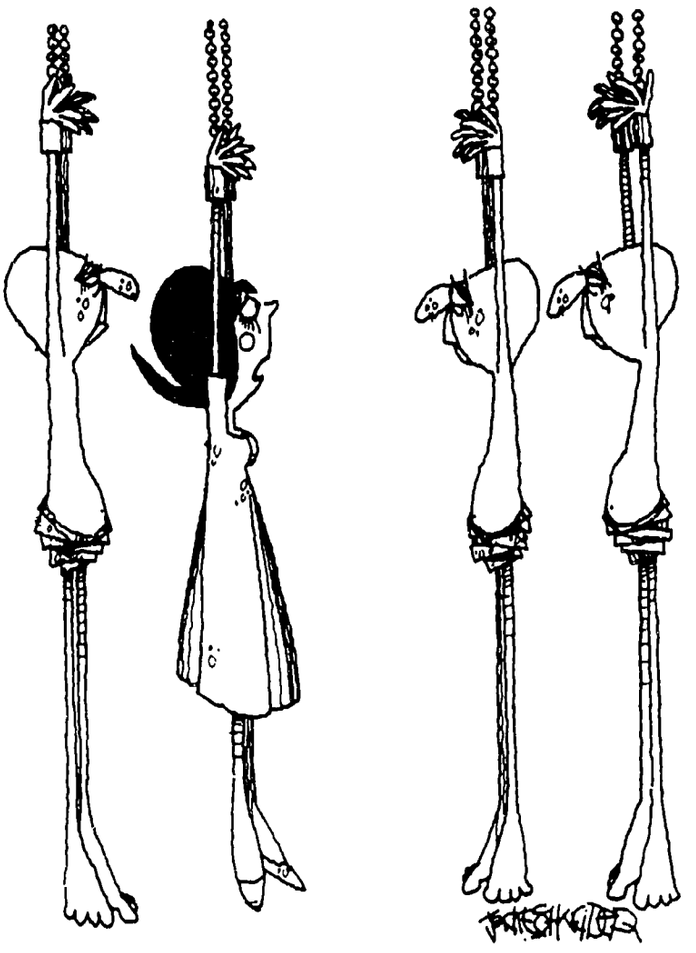
## The Future

The future of equal protection and equality is closely tied to the question of whether or not one can deal with people as a class rather than individually. What equal protection has meant throughout history is that people must be treated individually. And yet, if we go back to the origins of the Fourteenth Amendment, the major thrust of the amendment was to deal with class-based discrimination. So the argument now goes on between those who say that if the original discrimination was class-based, the remedy must be class-based, and those who argue that we deal only with individuals in this country.

The bottom line, of course, is that the equal protection clause is a legal doctrine that looks at whether or not a state has treated people who are similarly situated the same and which permits classifications—even burdensome ones—when a rational basis or a substantial state interest can be found. It says nothing about the ultimate results of the distribution of society's benefits and burdens. And while the amendment which houses it has been hailed far and wide as being a significant innovation of the American Constitution, it clearly does not automatically dictate a results-oriented equality, even though theories are available to permit benificent results under equal protection.

Current equal protection analysis often fails to look beyond the appearance of neutrality and therefore facial equality to get to the inequalities lurking behind the law's facade. To achieve actual equality of life results, the dispossessed are still at the mercy of legislative, political, and economic processes, and not the courts.

Notwithstanding these faults, I believe the equal protection clause is a the most significant part of the Constitution. Without the Fourteenth Amendment, according to *Dred Scott*, none of us would be citizens of these United States. Being national citizens, with some guarantee of equal protection, helps diverse people to come together as a society, and as a nation to work toward perfecting the vision embodied in the American Revolution and the Preamble to the United States Constitution. □



*"The hell of it is, I never even supported the ERA!"*

## Searching for Equality/Grades 7-12

James Giese and Barbara Miller

The evolution of equality is an important theme in U.S. history. This lesson provides an historical context for looking at current legal questions pertaining to equal rights. It is intended for the secondary grades, but if adapted by shortening the research, it would also be appropriate for middle school youngsters.

At the time the U.S. Constitution and the Bill of Rights were developed, equal rights was a limited concept that pertained primarily to white Christian males over the age of 21 who owned property. The story of the expansion of rights is contained in textbooks for U.S. history courses, but it is usually presented in segments rather than thematically. This lesson asks students to extract the story of the gains and setbacks of the civil rights movement from their textbooks and other resources and consider the search for equality as an historical theme that involves questions of morality and justice as well as law.

The historical perspective developed through this activity will illustrate the definition of equality (all humans have an equal right to status as citizens) in the following significant ways: (1) the definition of equality has been enlarged to address economic as well as political issues. Education, employment, health and housing have become the subject of "equal opportunity" in the 20th century; (2) numerous groups excluded from constitutional protections have, through hard work over long periods of time, gained rights and privileges that others have taken for granted.

Following a discussion of equal rights in the U.S. and a textbook search to gather information about the movement toward equal rights and opportunities, the students are asked to serve as an "editorial board" and select the 10 turning points that they feel were most critical in expanding constitutional protections and defining equality in American law and society.

## Procedures

### 1. INTRODUCING THE LESSON: PRODUCING A MAGAZINE ABOUT EQUALITY

Tell students that they are to assume the roles of editors for a special edition of a national news magazine. They will develop and design a publication entitled *The Promise of Equality* featuring 10 significant events or turning points in the movement toward equal rights in U.S. history. Their task will be to present these events in a way that shows the range of issues, people, goals, and strategies that have broadened the meaning of equal rights. Explain that constitutional principles have been the source of rights for disadvantaged Americans throughout our history. By utilizing and respecting the document, disenfranchised Americans have made significant strides toward equality.

### 2. DESIGNING THE PUBLICATION

Provide the students with an overview of the project. The class must decide on both the format and the content of the project. They may want each page of the magazine to be poster size so that it can be displayed in the school or they may wish to produce a reference book for the library or produce booklets that can be reproduced for each student.

Discuss what will be included in each feature story. Encourage students to include a title or headline, at least two or three paragraphs describing the event and illustrations. Special editions of news magazines (e.g., *Life's* 1976 "The 100 Event that Shaped America") provide a concrete model for the project.

### 3. PREPARING FOR RESEARCH

Ask students to list some of the groups who were excluded from the protections of the Constitution at various points in our history. Depending on what has been studied in class, the students should be able to list specific religious groups, racial minorities, women, criminals, poor people and immigrants.

### 4. IDENTIFYING THE ISSUES OF INEQUALITY

Ask students if they can describe some of the specific issues of inequality that each of these groups experienced. You may wish to provide some examples to get the class started. For example, you may wish to point out that although blacks were freed by the Emancipation Proclamation and granted rights and privileges through the Thirteenth, Fourteenth and Fifteenth Amendments, they did not immediately enjoy the same protections as whites.

### 5. WHAT IS A TURNING POINT: DEVELOPING CRITERIA

Discuss the meaning of the term "turning point" as a significant change. Explain that these significant changes involved the use of multiple strategies both before and after a particular important event. Illustrate how constitutional amendments (Twenty-sixth Amendment), legislation (Civil Rights Act of 1964), and court decisions (*Gideon v. Wainwright*, 1963) have been primary strategies for effecting a broader definition of equality. Ask students to think of other strategies that have been used (i.e., boycotts, marches, civil disobedience).

Ask students what criteria they will use in selecting turning points to be featured? Two that can be provided as a start include:

1. Does this event result in more rights for more people?
2. Does this event result in a broader definition of equality?

### 6. RESEARCHING THE TURNING POINTS

Distribute the handout "Historical Turning Points for Equality." (If you wish, you may shorten the list before giving it to the students.) Tell students that this list of turning points has been suggested by readers of the magazine. The list is representative but not inclusive. They can add other events if they wish.

Ask students to use their textbooks and other resources to research the events that have been nominated. Student groups can be assigned a particular disenfranchised group, a strategy for achieving equality, or a particular time period.

Show students how they can use a chart to research the topic.

*Time:* 1955

*Barriers/Problems:* separate facilities not equal/sit in back

*Goal*: equal access to facilities
*Strategies*: boycotts/law suits
*Outcome*: Supreme Court ruling

**7. ANALYSIS OF THE DATA**

Once the research has been completed and organized, the class should analyze the data and discuss which events seem to be significant turning points.

Teacher questions to focus the discussion can include:

1. Do all the items nominated meet the criteria for enlarging the definition of equality? If not, which ones should be eliminated?
2. Which events seem to have made the most significant differences in the lives of Americans? How would our society be different if the events had not taken place?
3. Which strategies seem to be the most effective for groups seeking equal rights?
4. What types of barriers and setbacks did various groups experience? In which time period was most of the progress made for political rights? for economic rights?
5. Are Americans satisfied with what has been accomplished? Does the progress that has been made indicate that we are firmly committed to equal rights? To live up to the ideals of our Constitution, do we need to continue enlarging the definition of equality?

**8. FINAL SELECTION**

The final selection of significant events can be made through a consensus process or through voting and debate. Students may wish to invite community resource people to comment on the final list or provide additional information that will help them with the decision-making process. Guest speakers could include spokespersons for such groups as the NAACP, NOW, AIM, and the ACLU.

**9. PRODUCTION OF *THE PROMISE OF EQUALITY***

The actual production can be completed as home work or as an in-class assignment. Students can divide responsibilities for such tasks as doing illustrations, writing the text, editing, and composition.

**10. CONNECTING WITH THE PRESENT**

Ask students: Do we need to be concerned about providing more equality for the present and the future? Who are the groups that are now requesting constitutional protections and what are their concerns? How are current issues of inequality similar to or different from those they have studied during this lesson? Provide students with a list of questions that the Supreme Court has been asked to consider about equal rights. Are the questions being raised by the same groups of people who asked for equality in the past or are there new groups who are seeking changes in laws?

1. Has capital punishment been imposed in a manner that is fair and appropriate?
2. Can states discriminate on the basis of economic status? Is education a fundamental right?
3. Do racial quotas limit the constitutional rights of individuals?

Students can search newspapers to find articles about current issues of equality.

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## Historical Turning Points for Equality

1. Declaration of Independence (1776)
2. Northwest Ordinance (1789)
3. Bill of Rights (1791)
4. Vermont Statehood (1792)
5. Alien and Sedition Acts (1798)
6. Impressment controversies (1790s-1810s)
7. Land Act (1800)
8. American Colonization Society (1817)
9. Missouri Compromise (1820)
10. "Democratizing" Politics in the 1820s
11. *Worcester v. Georgia* (1832)
12. Abolitionist Crusade (1840s)
13. Seneca Falls Convention (1848)
14. Common school movement (1830-1850)
15. Manifest Destiny
16. Fugitive Slave Act (1850)
17. *Uncle Tom's Cabin* (1852)
18. Kansas Nebraska Act (1854)
19. *Dred Scott v. Sanford* (1857)
20. Emancipation Proclamation (1863)
21. Homestead Act (1863)
22. Thirteenth Amendment (1865)
23. Fourteenth Amendment (1868)
24. Fifteenth Amendment (1870)
25. *Slaughter House* cases (1873)
26. *Minor v. Happersett* (1875)
27. "Trail of Broken Treaties"
28. Chinese Exclusion Act (1880)
29. Civil Rights cases (1883)
30. Dawes Severalty Act (1887)
31. Sherman Anti-trust Act (1890)
32. *Plessy v. Ferguson* (1896)
33. *Muller v. Oregon* (1903)
34. Sixteenth Amendment (1913)
35. Seventeenth Amendment (1913)
36. Nineteenth Amendment (1920)
37. *Ozawa v. United States* (1922)
38. National Origins Quota Act (1924)
39. Social Security Act (1935)
40. Frances Perkins becomes Secretary of Labor
41. Fair Employment Practices Committee (1941)
42. G. I. Bill of Rights (1944)
43. Desegregation of U.S. Armed Forces (1946)
44. *Brown v. Topeka Board of Education* (1954)
45. Montgomery Bus Boycott (1955)
46. Civil Rights Act (1957)
47. 1960 Presidential Election
48. Freedom Rides (1960-61)
49. *Gideon v. Wainwright* (1962)
50. Equal Pay Act (1963)
51. *Baker v. Carr, Reynolds v. Sims* (1964)
52. Civil Rights Act (1964)
53. Twenty-fourth Amendment (1964)
54. Voting Rights Act (1965)
55. *Miranda v. Arizona* (1966)
56. *In re Gault* (1967)
57. Equal Rights Amendment (1920-1981)
58. *Tinker v. Des Moines* (1969)
59. Twenty-sixth Amendment (1971)
60. *Bakke* case (1978)

Michael Middleton

# The Dilemmas of Equality

## The courts are the battleground for deciding how best to remedy a legacy of discrimination

Can affirmative action be squared with the Constitution? Is affirmative action constitutional? Does it have a place in the Constitution's philosophical ideal of equality?

This issue has been the subject of much debate over the past several years, and that debate is important and useful. Affirmative action, of course, is the one current question that truly tests the meaning of equality under the Constitution. In what circumstances may race be a factor in governmental decision making? When may a preference for a particular group comport with the notion of equality? The significance of this controversy is evident in the fact that despite several opportunities, the Supreme Court has still not rendered a decision that finally resolves it.

It's undisputable that the equal protection clause of the Fourteenth Amendment had as its central purpose the elimination of racial discrimination emanating from official sources. It was enacted to negate the effect of state laws treating the newly freed slaves as less than full citizens. Then came the case called *Plessy v. Ferguson*, 163 U.S. 537 (1896). Although recognizing the central purpose of the Fourteenth Amendment, *Plessy* found that the amendment permitted distinctions based on color if the distinction was made through the exercise of reasonable legislative judgment and for the promotion of the public good. In this case, a Louisiana statute requiring equal but separate railroad passenger coaches for black and white passengers was held to not violate the Fourteenth Amendment because this racial classification was reasonable in light of the customs and traditions of the time and because it was designed to preserve public peace and good order. Further, that racial classification did not deprive any group of any facilities. The burden of the classification was viewed as minimal and the purpose of that classification viewed as compelling.

Justice Harlan vigorously dissented, proclaiming that our "Constitution is color blind and neither knows nor tolerates classes among citizens." It is to be regretted, he said, "that this high tribunal, the final expositor of the fundamental law of the land, has reached the conclusion that a state can regulate civil rights solely on the basis of race."

The *Plessy* logic that racial segregation was constitutionally permissible lasted until 1954, when in *Brown v. Board of Education*, the U.S. Supreme Court found that even if the tangible aspects of the educational services provided to blacks and whites were equal, the fact that they were separated on the basis of race rendered them unequal. In light of the history of blacks in this country, separation on the basis of race alone denoted to the Court the inferior treatment of the black race and thus denied blacks equal protection of the law. The mere fact of the racial regulation here amounted to a violation of equal protection. Any language in *Plessy* that suggested otherwise was soundly rejected.

But the *Brown* Court did not adopt Harlan's dissent as the basis for its reversal of the *Plessy* decision. It was not that the racial classification *itself* was impermissible. It was that in the context of public education segregation was inherently unequal. The significance of *Brown* then, for the purpose of the affirmative action debate, is not in the analysis that established the violation but in the remedy for the violation that was developed in subsequent school desegregation cases.

### From Nondiscrimination to Race Consciousness

In *Brown*, the Court remanded the series of school desegregation cases before it to the lower courts for such orders as were necessary to admit black students to public schools on a racially non-discriminatory basis. The Supreme Court's order then required only that school systems bring to an end the practice of using race as the determining factor in school assignments and implement with all deliberate speed assignment practices that did not rely on race.

It was not until the late 60's, after years of resistance to that desegregation order, that the Supreme Court held that a federal court could require the assignment of students on a racial basis in order to remedy deliberate, unconstitutional school segregation and eliminate its vestiges.

Here then we have a dilemma. If the use of a racial classification by a governmental entity violates the equal protection

clause in the situation where its use infringes upon the constitutional rights of blacks, doesn't the use of a racial classification by that same entity also violate the equal protection clause when it infringes upon the constitutional rights of whites? The easy answer is, of course, that it does. Despite the fact that the Fourteenth Amendment was designed to ensure that the newly freed slaves were treated equally under the law, its language and logic apply to all citizens. Whites denied or provided inferior opportunities on the basis of race could claim protection under the Fourteenth Amendment.

Still, the Court held that remedial use of race was constitutionally permissible in order to remedy a constitutional violation. The Court, in reaching that result, engaged in a balancing process, balancing the governmental interest promoted by the racial classification against the harm done by that classification. In the words of Chief Justice Burger in *Swann v. Charlotte Mecklenburg Board of Education* in 1971, 402 U.S. 1, "a school desegregation case does not differ fundamentally from other cases involving the framing of equitable remedies to repair the denial of a constitutional right. The task is to correct by balancing the individual and collective interest the condition that offends the Constitution."

Racial classifications, then, though inherently suspect, serve the important governmental purpose—indeed in *Swann* a constitutionally required purpose—of eliminating unconstitutional segregation in public schools. The harm done by those classifications was the denial of local autonomy to school districts to operate their schools as they saw fit and the inconvenience to citizens who were accustomed to the status quo of segregated neighborhood schools. But in the balance, those interests lost out.

It is important to note, however, that this balancing of interest is the same balancing act that in 1896 prompted the Supreme Court in *Plessy* to find that racial segregation in public transportation did not violate the equal protection clause. The result is very different; the process is the same. It's apparent inconsistency is a natural consequence of our traditional approach to constitutional interpretation.

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## The Need to Interpret

Because the document is necessarily rather vague, somebody must decide what it means. Who can say with any precision what the framers meant by equal protection of the law, not to mention what they meant by unreasonable search and seizure in the Fourth Amendment or due process of law in the Fifth Amendment. Since 1803 when Chief Justice John Marshall, to the chagrin of Thomas Jefferson, in *Marberry v. Madison* assumed for the Court the position of final expositor of what the words in the Constitution mean, the Supreme Court has done that job. It has done so with a recognition that the framers designed the document as a living document, the overarching principals of which were to be applied to changing times to reflect the will of the people confined only by those fundamental rights and privileges necessary to freedom and dignity.

Others view the document as a fixed and written charter, its words meaning what they say and saying what they mean. Any ambiguity in those words should be resolved on the basis of our current understanding of what the framers intended them to mean, not what we view as an appropriate application of the words to contemporary circumstances.

The debate over the proper role of the Court in giving meaning to the Constitution has been placed in the forefront through recent attacks by the Department of Justice on the judiciary. The fact that the Supreme Court can determine what the words of the Constitution mean and interpret those words to mean different things in similar situations at different times raises a concern that the courts are taking liberties with the intent of the framers. Assistant Attorney General Brad Reynolds, in a recent speech at the University of Missouri Law School, argued that the Court was wrong in *Plessy* because, using the words of Justice Harlan, "the Constitution is color blind." The argument is that the Constitution is still color blind and that racial classifications are as impermissible now as they should have been in the *Plessy* days.

On its face and in a vacuum, this is a compelling argument. That argument, however, ignores the fact that the classification that should have been outlawed in *Plessy* operated to perpetuate vestiges of slavery that had recently been outlawed by the Thirteenth Amendment. The racial classification that today is being attacked, affirmative action, is designed to promote the Fourteenth Amendment goal of equality by eliminating the vestiges of unconstitutional discrimination.

This difference is significant, but the similarity between *Plessy* and today's affirmative action cases is also significant. The *Plessy* Court was reflecting what it viewed as the national will in circumstances that existed in 1896. Today's Court is reflecting what it views as the national will in circumstances that exist in the 1980s. I suggest that this is the genius of the Constitution, that it can be interpreted to apply to contemporary problems. The Supreme Court, in interpreting the equality that the Fourteenth Amendment, even with its ambiguities, apparently guarantees, has determined that consideration of race is permissible when used to remedy a race based constitutional violation.

Some might disagree, but it is not too difficult to accept the use of race as a remedy for a proven constitutional violation where the remedy is necessary to correct that violation for those who have been harmed. The difficulty arises when the beneficiary of the racial classification is not clearly found to have been a victim of discrimination and therefore personally entitled to relief. In these situations, the tension between the interest of those utilizing racial classifications and those adversely affected by those classifications is heightened, and the constitutional balance becomes significantly more difficult. This is the problem that has most recently been analyzed by the Supreme Court in the affirmative action area. I'd like, therefore, to go through some of the major Supreme Court decisions in the affirmative action area to let you see how the Court deals with that tension under the Fourteenth Amendment.

## Seeking a Standard

In *Board of Regents of California v. Bakke*, 438 U.S. 265 (1978), the Court first articulated its standard. There the University of California Medical School had a special admissions program which set aside 16 slots for minority applicants. Allan Bakke applied for admission to the school and was rejected. He showed that he had applied for admission, and had it not been for the set aside of those 16 slots, he would have been admitted based on his objective qualifications. He therefore claimed that the set aside violated his rights under the Fourteenth Amendment.

The Supreme Court rejected the University of California's special admissions pro-

gram, finding that an absolute preference for members of a minority group based solely on race was impermissible. The Court, obviously concerned about and divided over both the effect of the racial classifications on whites and the constitutional legitimacy of using such considerations to overcome a history of exclusion, rendered two separate majority opinions. In one, by Powell, Burger, Rehnquist, Stewart and Stevens, the Court held that race may not be the sole criterion for a preference, unless there is a judicial, legislative or administrative finding of past discrimination by the institution using the racial classification, tying the use of race considerations directly to the actual proven existence of a previous racial exclusion. The Court then found that the state's interest in helping victims of what it called societal discrimination, discrimination not tied to the institution, does not justify a classification which imposes disadvantages on persons who bear no responsibility for the harm the beneficiaries of the program were thought to have suffered.

In the second majority opinion, with Powell, Brennan, Marshall, Blackman and White concurring (Powell was on both sides), the Court held that even absent a finding of prior discrimination, race may be given some consideration in the admissions process in light of the school's interest in creating a diverse student body. This state interest need not be tied to any prior discrimination practiced by the state. This majority noted that there are a number of factors that go into a university's decision as to whom to admit, ranging from income level of the applicant's parents to the region of the country he or she comes from, to the alumni status of the applicant's relatives. The state's interest in creating a multi-racial educational setting is but another legitimate factor to be weighed in the balance, and it is a factor which could justify some consideration of race.

Both opinions seem to agree that race may not be the *exclusive* factor unless there is a finding of prior discrimination on the part of the institution and that the *exclusive* use of race is not a legitimate remedy for mere societal discrimination. The second majority, however, suggests that while race may not be appropriate as the exclusive factor in the absence of a finding, even without a finding race may be a factor among many in order to cure societal discrimination.

## Affirmative Action on the Job

In 1979, the Court rendered a decision in the case called *United Steel Workers of America v. Weber*, 443 U.S. 153. This was a case in which the constitutional question was not raised because there was no state action involved. It was a purely private affirmative action plan. But the Court set some standards for weighing the interests affected by affirmative action programs that would subsequently affect its constitutional analysis.

In *Weber*, Kaiser Aluminum and the steel workers' union entered into a collective bargaining agreement which established a new on-the-job training program for craft jobs at a Kaiser Aluminum plant in Louisiana. Recognizing the small number of blacks in such jobs and recognizing their history of exclusion, the parties agreed that they would admit to the program one black for every one white based on seniority, until the black percentage in craft jobs equaled the black percentage in the labor force.

Brian Weber sued under Title VII of the Civil Rights Act. He claimed that he applied for the training program but was passed over in favor of a less senior black. He was therefore excluded from the training program solely on the basis of his race.

The district court found in favor of Brian Weber. It found that the plan violated Title VII, which provides generally that no employer or labor organization shall discriminate against any individual in employment opportunities based on race. Here race was the only factor that excluded Weber. Therefore, there seemed to be a clear violation. The Supreme Court, however, found that the exclusion of Weber was not unlawfully discriminatory. The Court said that in light of the purpose and background of Title VII to open opportunities for blacks, it could not be construed to bar all private voluntary race conscious efforts to abolish traditional patterns of segregation. "It would be ironic," the Court said, "if a law triggered by a nation's concern over centuries of racial injustice and intended to improve the lot of those who had been excluded from the American dream for so long constituted the first legislative prohibition of all voluntary private race conscious efforts to abolish traditional patterns of racial segregation."

So the Court found that voluntary private affirmative action is permissible under Title VII to effectuate that compelling congressional purpose. The Court went on, however, to focus on the harm that could be done to innocent bystanders in the name of affirmative action. Recognizing that harm, it developed some guidelines for measuring the legitimacy of such programs. It found the harm done to Weber here permissible because it was the result of the operation of an affirmative action plan that was narrowly tailored to meet the congressional objective in enacting Title VII. Critical to the determination that the plan was acceptable were the facts that it was designed to overcome a conspicuous racial imbalance in a traditionally segregated job category and that it did not unnecessarily trammel upon the rights of whites. The plan did not exclude whites from the program and it did not require the discharge of any whites.

Here we see the Court, although not in the constitutional context, expressing strong concern for those whose opportunities are adversely affected by the affirmative action. Because Congress in enacting Title VII expressed its purpose, a finding of a violation was not required to justify the preference, but the amount of harm done to innocent bystanders was set out as a critical factor in determining whether the affirmative action went so far in denying the rights of whites as to render the preference illegally discriminatory under Title VII. The Court, in interpreting a statute that strictly prohibits denying individuals employment opportunities on the basis of race, looked to the purpose of the statute and the harm done by the consideration of race and by balancing those factors determined this race discrimination not to be illegal.

## Affirmative Action in Contracts

In 1980, one year later, in *Fullilove v. Klutznick*, 448 U.S. 448, the Court had to deal with legislation that required a 10% set aside for minority business enterprises in local public works projects funded by the federal government. Because this racial consideration was required by the federal government, the equal protection guarantees of the Constitution were implicated.

The Court, referring to the constitutional standard established in *Bakke* for the use of racial classifications, found that there was a compelling governmental interest here in remedying the effects of past discrimination. The Court found that Congress in enacting the set aside program had expressed its intent to redress the effects of discrimination against minority contractors and thus made a finding of past discrimination in the letting of federally supported public works contracts generally.

But what of the specific finding of prior discrimination by the agency using the classification that *Bakke* required? And what of the requirement that the racial classification be narrowly tailored as suggested in *Bakke* and as required by *Weber*?

The Court appeared to be relaxing its standard somewhat by allowing a general administrative finding of historical discrimination in the letting of public works contracts to justify a racial classification in the program. And the Court, while recognizing the need for the narrow tailoring of the remedy, noted that the effect of the remedy on innocent bystanders here – the denial of contracts to non-minority businesses on the basis of race – was only an incidental consequence of the program and not a part of its purpose.

This relaxed position provided little comfort to Justices Stewart and Rehnquist, who dissented strongly. Referring back to Harlan's dissent in *Plessy v. Ferguson*, they suggested that the Constitution is indeed color blind and that any legislation that accords a preference to citizens on the basis of race is unconstitutional.

So with *Fullilove* you saw the positions of the justices hardening somewhat on one side or the other.

## A Recent Case

It was not until 1986 that the Supreme Court was once again called upon to address the permissible scope and limits of affirmative action under the Fourteenth Amendment. In *Wygant v. Jackson Board of Education*, 106 S. Ct. 1842 (1986), the Court revisited the equal protection analysis that it formulated in *Bakke*. In 1972, the Jackson, Michigan, board of education and the teachers' union, because of racial tension in the school system, added to their collective bargaining agreement a layoff provision that protected black teachers from layoff to the extent necessary to maintain the percentage of black teachers employed at the time of the layoff. Otherwise straight seniority was to be used.

The board in the '76-'77 and '81-'82 school years conducted layoffs in compliance with the layoff provision of the contract. As a result, white teachers with greater seniority were laid off while minority teachers with lesser seniority were retained. One of the laid-off white teachers, Wendy Wygant, and other displaced non-minority teachers filed suit in federal court challenging the layoffs as violative of the equal protection clause.

The trial court dismissed their claims. Relying on the logic of the second majority in *Bakke*, the trial court found that under the equal protection clause racial preferences need not be grounded on a finding of prior discrimination but are permissible as an attempt to remedy societal discrimination by providing role models to minority school children. The court of appeals affirmed the district court judgment and the Supreme Court granted certiorari.

The question for the Court was the same as that raised in *Bakke*: What can constitutionally justify distinctions based on race under the equal protection clause of the Fourteenth Amendment? The majority opinion of Powell, Burger, Rehnquist and O'Connor, with White concurring, cited *Bakke's* first majority. The Court noted that racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination. This examination, they said, had two prongs: one, the racial classification must be justified by a compelling governmental interest; secondly, the means chosen to effectuate that purpose must be narrowly tailored to the achievement of that goal.

As to the first prong, the Court found that societal discrimination alone has never been held to justify a racial classification. Rather, the Court insisted upon "some showing" of prior discrimination by the governmental unit involved before allowing even a limited use of a racial classification to remedy the discrimination. The Court reasserted that remedying past discrimination by the employer in question is a compelling governmental interest, but that societal discrimination is too amorphous a basis for imposing a racially classified remedy.

Then the Court made a very interesting pronouncement. "A public employer, before it embarks on an affirmative action program, must have convincing evidence that remedial action is warranted." Well, what about the finding of particular discrimination required by *Bakke*? The Court went on to hold that the governmental unit must have "sufficient evidence to justify the conclusion that there has been prior discrimination." The Court did not decide how much evidence is sufficient to justify that conclusion of prior discrimination because of its finding on the second prong of the test. But it is clear that there is no need now for a judicial, administrative or legislative finding. That, I suggest, is consistent with the second majority in *Bakke*.

But as to the second prong, whether the means chosen to effectuate that compelling governmental purpose is narrowly tailored to the achievement of the goal, the Court found that in this case it was not. The court of appeals had found that because the method chosen to achieve the goal, the layoff plan, was reasonable, it was permissible. The Supreme Court stated that it had never adopted such a standard. Citing *Fullilove* and others, the Court noted that the means adopted to accomplish the goal must be specifically and narrowly framed to accomplish the legitimate government purpose. The Court recognized that in order to remedy the effects of prior discrimination it may be necessary to take race into account and that in so doing innocent persons may be called upon to bear some of the burden of the remedy. But the Court pointed out its serious concern over the burden imposed on innocent parties by a preferential layoff scheme. It noted that hiring goals are significantly less burdensome on innocent whites because their effect is diffused among many in society. Here the layoff scheme had a direct effect on Wendy Wygant in that it required her to lose her job. Layoff schemes imposed the entire burden of achieving racial equality on particular individuals. This burden the Court found too intrusive. So even if the governmental purpose had been determined to be so compelling as to justify the racial classification, the method chosen to accomplish that goal was constitutionally impermissible. With this decision, the burden imposed on innocent bystanders becomes critical to the determination of whether the racial classification is tailored sufficiently narrowly. The Court, therefore, here disapproved the layoff plan.

The Court, however, did not disapprove of affirmative action. In fact, it seemed to broaden the governmental interest that could justify consideration of race by removing the requirement of an official finding of discrimination, while narrowing the kinds of affirmative action permissible by increasing the importance of impact considerations in the balance.

## Looking to the Future

So there is still no clear picture of 1) what kinds of affirmative actions are permissible – hiring, layoff, promotion, training – or 2) the varying circumstances that might justify such action. It does seem clear, however, that the Court is embracing the position that to be legitimate an affirmative action plan need not be preceded by formal findings of past discrimination on the part of the agency implementing the plan. It is also clear that the impact of the plan on innocent others will have a significant impact on the decision about whether the plan is narrowly tailored.

The Court had before it this term two additional affirmative action cases. The decisions in these cases will further define the limits and scope of permissible affirmative action, with a focus on the extent to which the effect on innocent others should control the analysis. Both cases raise the issue of the legitimacy of affirmative action programs in the context of preferen-

tial treatment for blacks and women in promotions.

On February 25, 1987, the Supreme Court decided *United States v. Paradise*, 107 U.S. 1053 (1987). In this case, after a 1972 finding by the district court that the Alabama Department of Public Safety had systematically excluded blacks from employment in violation of the Fourteenth Amendment, that department was ordered to refrain from engaging in discrimination in its employment practices, including promotions. In 1979, in response to the fact that no blacks had been promoted, the district court approved a consent decree in which the department agreed to develop a promotion procedure that would have no adverse effect on blacks. By 1981, since that procedure had not been developed and since no blacks had been promoted, a second consent decree was approved by the court which provided that no promotions were to occur until the parties agreed upon a procedure or until the court ruled on a method to be used. In 1983, the court found that the promotional exam administered for promotion to corporal had an adverse impact on blacks, ruled that its results could not be used for determining promotion eligibility, and ordered that pending the development of a non-discriminatory selection procedure the department, subject to the availability of qualified applicants, was to promote one black for every one white until blacks constituted 25% of the upper ranks. The department then promoted eight blacks and eight whites and submitted a new promotion procedure to the court. The court approved the new procedure and suspended the one-for-one promotion requirement. The United States appealed the imposition of the one-for-one promotion requirement as violative of the Fourteenth Amendment, the court of appeals affirmed the requirement, and the Supreme Court granted certiorari.

In a majority opinion by Justice Brennan, joined by Justices Marshall, Blackmun and Powell with a separate concurrence in the judgment by Justice Stevens, the Supreme Court affirmed the one-for-one promotion requirement. The Court found that the race-conscious relief was justified by compelling governmental interests in eradicating the "pervasive, systematic, and obstinate" discrimination by the department, securing compliance with federal court judgments, and in eradicating the effects of the department's delay in implementing non-discriminatory procedures.

The one-for-one requirement was found to be narrowly tailored since it was necessary to achieve those compelling governmental interests; it was flexible in that it applied only when there was a need to make promotions and could be waived when there were no qualified blacks available for promotion; it was temporary in that its term was contingent upon the department's implementation of a non-discriminatory promotion procedure; it was properly related to the percentage of blacks in the relevant labor market; and it did not impose an unacceptable burden on innocent white promotion applicants since it did not bar, but only postponed, advancement by some whites, and did not require their layoff or dischage or require the promotion of unqualified blacks over qualified whites.

The dissent filed by Justice O'Connor, which was joined by Chief Justice Rehnquist and Justice Scalia and agreed to in substantial part by Justice White, reasserted the consensus reached in *Wygant* that race-conscious remedies are permissible under the equal protection clause of the Fourteenth Amendment, but challenged the majority's conclusion that the one-for-one requirement was sufficiently narrowly tailored to survive strict scrutiny. Noting that racial classifications are simply too pernicious to permit any but the most exact connection between the justification and the classification, the dissent proceeded to analyze the governmental interest served by the classification. The dissent concluded that the requirement was not narrowly tailored to the governmental interest in eliminating the effects of prior discrimination because it imposed a rigid quota rather than flexible goals. It was not designed to eradicate the effects of the delay in developing new procedures because it was to end not when those effects were eliminated, but when the new procedure was developed. The only governmental purpose which, in the view of the dissent, the one-for-one promotion requirement was arguably legitimately designed to accomplish was that of coercing compliance with the district court's earlier orders that the department develop a non-discriminatory procedure. For this purpose, the race-conscious remedy was inappropriate since the district court had not considered the effectiveness of alternatives to the requirement that would have had a lesser effect on the non-minority troopers and would have successfully achieved the legitimate purposes sought to be served by the district court order.

For purposes of the question of whether race-conscrious affirmative action is consistent with the constitutional ideal of equality, however, it is significant that the dissent here, as did he majority in *Wygant*, recognized that racial preferences are permissible under the Fourteenth Amendment. The dispute among the justices is not over the permissibility of racial preferences, but over the nature of the scrutiny under which such preferences will be put in determining their constitutional legitimacy. The minority of the Court, emphasizing the impact of such preferences on innocent others, would allow their use only where "manifestly necessary." The majority in this case, emphasizing the compelling governmental interests advanced by such preferences, struck the balance in their favor.

The second affirmative action case this term is still pending. In *Johnson v. Transportation Agency of Santa Clara*, the question is a preference for women in promotion in a California state agency.

It will be interesting to see how the justices align themselves in *Johnson* and other similar situations. We have seen that the burden imposed by hiring preferences is diffused among the general populace and the burden imposed by layoff protection is direct. How does one evaluate the burden of promotion preferences? Somewhere in between, I suspect. With the apparent consensus developed in *Wygant* and *Paradise*, however, I expect that while its limits are still somewhat unclear, it is highly unlikely that reasonable and legitimate considerations of race or gender in governmental decision making will be viewed by the Court as inconsistent with the notion of equality contained in the Fourteenth Amendment.

[Editor's Note: As this issue was going to press, the Court decided the *Johnson* case. In a 6-3 decision, the Court upheld the voluntary affirmative action plan adopted in 1979 by Santa Clara County. According to an article in the *Chicago Tribune*, the decision marked the first time the Court has upheld a voluntary affirmative action plan based on gender and on statistics demonstrating that women were underrepresented in certain job categories. Writing for the majority, Justice Brennan held that employers should be free to initiate voluntary plans to create a more balanced work force without being sued or forced to admit past discrimination. Brennan noted that the plan did not impose rigid quotas, ignore job qualifications, or exclude other employees from consideration for hiring or promotions. In a dissent joined by the Chief Justice, Justice Scalia wrote, "a statute designed to establish a color-blind and gender-blind workplace has...been converted into a

*(continued on page24)*

**Sex Discrimination/Grades 7-12** **Dale Greenawald**

By analyzing a series of situations based upon landmark sex discrimination cases, students will identify some of the legal principles concerning this topic. At the end of the 45-minute activity they should be able to explain legal reasoning in sexual discrimination cases; to support equality of opportunity; and to develop critical thinking skills.

## Procedures

Provide students with the readings in the box on page 20 (constitutional provisions and laws dealing with equality). Tell students to apply these guidelines as criteria for determining if illegal discrimination has occurred or not.

Have students form groups of four or five and assign each student a case to consider (divide the cases among the groups). After each person has come to a conclusion with regard to his/her case, share their answer and reasons with the group. Each group should discuss each of its cases and seek to reach a group consensus for each one.

After each small group has analyzed each of its cases and developed a response, discuss each case as an entire class. The teacher or resource person should explain the reasoning behind each case and respond to student questions. It is extremely important to explain each decision in sufficient detail for students to grasp the principles underlying that decision.

At the conclusion, the entire class should consider:

1. Are there ever any justifiable reasons to treat men and women differently?
2. Can different treatment be fair and just?

## Sex Discrimination Cases

Consider each of the following situations and decide if you think it is an example of illegal discrimination or not. Also consider for each situation some reasons for treating women differently from men and reasons for treating them the same.

1. Congress passes a resolution requiring all males—but not all females—to register for the draft.
2. Two sisters, one 5 foot 6 inches weighing 170 pounds and one 5 foot 9 inches weighing 212, decide to try out for their high school football team because there is no girls' team. The State Interscholastic Athletic Activity Association declares the girls ineligible.
3. Alice Keene is refused a job because the job description requires the employee to lift bags weighing about 30 pounds.
4. The Gravel Hill Glass Company pays an all-women day shift less than an all-male night shift which does the same work.
5. JoCarol Lafleur is a teacher in a junior high school. School board policies force her to take an unwanted leave without pay five months before she expects a child.
6. The Widget Manufacturing Company has 150 assembly-line employees, all of whom are men. The company doesn't hire women for its production jobs because it says its male workers would be distracted and productivity would decline.
7. Joyce finds out that her employer is requiring her to pay more per month for pension benefits than it requires male employees to pay. The company says this difference reflects the fact that women as a group live longer, so she will probably live longer than the males and, therefore, receive more benefits.
8. Nancy Oaks-Johnson applies for a credit card from the local department store. She uses her maiden name, Nancy Oaks. The store will not issue a card in that name, but it will issue one for Nancy Oaks-Johnson.
9. Harvey Miller works at Fred's Fast Foods. He is told to get a shorter haircut, although all of the women who do the same work have longer hair than Harvey. They wear hair nets.

## Teacher/Resource Person Background

1. The U.S. Supreme Court decided the case of the all-male draft. In *Rostker v. Goldberg,* 453 U.S. 57, the Court held that the male-only requirement did *not* violate the due process clause of the Fifth Amendment. (The Fifth Amendment is involved, rather than the Fourteenth, because the draft is a federal matter.) The Court reasoned that Congress was acting well within its constitutional authority to raise and regulate armies. The Court said that it customarily deferred to congressional judgments regarding military affairs, and should so defer in this case, since Congress had extensively considered the constitutional implications of its actions. The Court noted that the arguments pro and con were extensively aired in congressional hearings, and it is not for courts to reconsider this evidence and substitute their judgment for that of elected representitives.
2. In this hypothetical, the language of the controlling statute—Title IX of the Education Act Amendments of 1972—would require the school either to begin girls' football team or permit the girls to try ou the boys' team.
3. In *Weeks v. Southern Bell Telephone and Telegraph,* 408 F.2d 228 (1969), the Court considered the case of a woman who filed suit under Title VII of the Civil Rights Act of 1964 when she was denied the job of switchman because the company labelled the work "strenuous" and said that it was unsuitable for a woman. The Court held that the company had the burden of proof of showing that its gender-related classification was a "bona fide occupational qualification." The Court said this exemption from the normal rule was intended to be narrow, and that the company had not met the burden of proof.
4. The Equal Pay Act of 1963 requires employees doing equal work to be paid the same. Unless the employer could convince a court that workers on the night shift were facing different working conditions from those facing the day shift, the two shifts would have to be paid equally.

5. In *Cleveland Board of Education v. Lafleur*, 414 U.S. 632, the Supreme Court held that regulations such as this one are arbitrary and violate the due process clause of the Fourteenth Amendment. Such a rule creates a conclusive presumption that every teacher who is five-months pregnant is physically infirm, whereas in actuality the woman's health is an individual matter.
6. In this hypothetical, the company would clearly be required to hire women. The language of Title VII of the Civil Rights Act of 1964 is clear on this point.
7. In *City of Los Angeles Water and Power Department v. Manhart*, 435 U.S. 702 (1978), the Supreme Court decided a class-action suit brought by women employees under Title VII of the 1964 Civil Rights Act. The Court held that requiring them to pay more into the pension fund violated the law, since it resulted in "treatment of a person in a manner which but for the person's sex would be different." The statute focuses on fairness to individuals rather than classes, precluding a justification which rests on generalizations about one of the sexes.
8. In this hypothetical, the store's action seems clearly to contravene the Equal Credit Opportunity Act of 1974.
9. This seemingly simple hypothetical has several layers of interpretation. Much depends on why Fred wants Harvey to get a haircut. If long hair is a safety or health hazard, he would certainly be within his rights to require Harvey to do something about his hair. Indeed, he might have no choice but to insist that his hair be controlled in some way. However, if he requires a male to get a haircut while permitting females to wear hairnets, he could be in trouble with the law. An even-handed approach would be to establish gender-neutral standards for hair, which would meet the health and safety standards without imposing stereotyped solutions on either gender. Thus he might require all employees to have no unsecured hair longer than x inches, which would leave them the option of getting haircuts or wearing hairnets.

# Equality

## Discrimination and the Law/Grades 9-12

Dale Greenawald

Some types of discrimination are not only legal, but morally defensible. For example, four-year-olds cannot obtain a driver's license. This 45-minute activity examines discrimination in a variety of contexts. By analyzing cases students will recognize the standards used when deciding discrimination cases, interpret major sources of civil rights legislation, and support the extension of civil rights to all.

### Procedures

Ask students how many think that all discrimination is illegal. Discuss why. Then provide a definition of discrimination, "The classification of people into different groups according to some criteria."

Ask students to think of some legitimate examples of discrimination, e.g., driver's licenses only for those of a certain age who have passed a test; police officers able to carry arms while others may have to meet certain criteria; only those with special training permitted to be air traffic controllers. Ask students why these types of discrimination are acceptable. (The key response is that they are rationally defensible).

Explain that the courts use three primary tests to determine if an example of discrimination is legal. List these "tests" on the board and explain each:

1. *Rational Basis Test:* This is the most commonly used test to determine legal discrimination. It simply asks if there is a rational relationship between the classification and the law in question. For example, it is permissible for a law to deny a blind person a driver's license because it is rational to assume that a totally blind person cannot drive safely. There is a rational relationship between the law and the placing of blind persons in a special category with regard to driving.
2. *Substantial Relationship Test:* This test applies primarily to sex discrimination cases. It is more stringent than the "rational basis" test and effectively shifts the burden of proof on to the government, which must prove that the law in question serves important governmental objectives and that there is a close connection between the categories established by the law and the purpose of the law. For example, let's look at a law permitting the sale of alcoholic beverages to women at an earlier age than males because women are arrested less often for drunken driving. Does this example of discrimination (1) serve an important objective and (2) achieve the objective? In fact, in an actual Supreme Court case, *Craig v. Boren*, 429 U.S. 190 (1976), a similar law in Oklahoma was rejected under this test because it failed to achieve its objective. The Court reasoned that the statistical evidence was insufficient to justify establishing categories based on gender. Besides, the law might well not have achieved its objective anyhow. It wasn't against the law for boys 18 or 20 to *possess* beer, so women 18 to 20 could purchase beer and provide it to males, thereby undermining the intent of the law.
3. *Compelling Interest Test:* A law that discriminates on the basis of race, national origin, or alienage is viewed as "inherently suspect." That means that laws or practices discriminating on the basis of race, national origin, or alienage will be examined very critically by the courts, and that this test is the most stringent. These laws or practices will be declared unconstitutional unless the government can demonstrate that it has a *compelling* interest which demands such classification. Moreover, the government must show that there is no less offensive means to achieve its goal. For example, under this test the relocation of Japanese-Americans during World War II was upheld because of the extraordinary wartime need for national security. Very few other laws singling out a racial group for special treatment could pass constiutional muster. It is very hard to imagine, for example, sufficient justification

for a law prohibiting a particular national group from obtaining driver's licenses.

Divide the class into groups of four students and provide each group with one of the following cases and with the summary of the major civil rights laws on page 20. Several groups can independently analyze the same case. Ask students to analyze the cases according to the applicable laws and the three tests given above.

Each student should be primarily responsible for answering one of the four questions below. After each student gives his/her response to the question, the small group should discuss it and attempt to reach a consensus opinion. After each group has reached a conclusion regarding their case, debrief each and respond to the questions which they generate.

**Student Questions for Each Case**

1. Who is discriminating against whom?
2. What are the results or possible results of this discrimination?
3. What would be the effect upon individuals and society if this discrimination were prohibited?
4. Should this discrimination be prohibited? Why? Why not?

## Case Studies

**CASE 1**

Brian Weber is a white male employed by the Kaiser Aluminum Company in a plant in Louisiana. He applies for a training program to learn a skilled trade, but is rejected by Kaiser because the company and the union have agreed that 50% of the training positions will be for whites and 50% for blacks. The company and union instituted this policy because blacks were 40% of the workforce, but only 2% of the skilled employees. Weber feels that he is being discriminated against because of his race. He sues the company on the basis of Title VII of the Civil Rights Act of 1964.

**CASE 2**

K. Leroy Irvis, a prominent Pennsylvania politician, is refused admission to the Harrisburg Moose Club, a private club. Although he is the guest of a member, the club refuses to serve him because he is black. Irvis sues the club, reasoning that since the state licences the club to sell liquor, state action to discriminate is involved, in violation of the Fourteenth Amendment.

**CASE 3**

Diane Rawlinson recently completed a college program in correctional psychology. She passed all of the college courses and wants to work as a prison guard. She applies for a guard position but is rejected. The state rejects her because she does not qualify under height and weight requirements (she is less than 5'2" and under 120 lbs). Diane sues the state, claiming that she is being illegally denied the position. While her case is pending, the state promulgates a second regulation, this one explicitly stating that females are barred from being prison guards at maximum security prisons. This in effect limits severely the number of openings Diane can apply for. On the height and weight issue, she presents evidence that 42% of all women would be excluded from the job because of the height and weight requirements, but only 1% of males would be ineligible. She argues that neither regulation can meet the criteria established to determine whether discrimination is constitutionally permissible.

**CASE 4**

Officer Murgia is in excellent physical condition. He runs, lifts weights and maintains a strenuous program to keep his body in shape. For the last ten years he has passed every police department physical and been given an excellent bill of health. However, upon reaching his fiftieth birthday, the state forces him to retire because of a state law requiring all officers to retire at age 50. Murgia sues the police department, claiming that he is being denied equal protection of the law, as guaranteed by the Fourteenth Amendment, because of his age.

**CASE 5**

Francis Davis has a very serious hearing impairment. Although she has a hearing aid, she cannot understand speech unless she can lip read. She applies for a federally funded program in order to become a nurse. During her application interview, her hearing problem is obvious and the school rejects her, claiming that she cannot safely participate in the program or later care for patients in a safe manner. She sues the school, claiming discrimination against the handicapped.

## Lawyer/Teacher Background

**CASE 1**

In *United Steel Workers of America v. Weber,* 443 U.S. 193 (1979), Weber lost his case. The Supreme Court held that there was no constitutional issue here since the equal protection clause does not apply to hiring policies of private companies. The majority felt that an employer and union might jointly develop programs to eliminate the vestiges of past discrimination and segregation. In the plant, for example, blacks held a substantially smaller percentage of the skilled jobs than their percentage of the population in the surrounding community. Although the Court had earlier held that federal civil rights laws protected white as well as minority persons, neither did they prevent employer and union from entering into an agreement to expand opportunities for historically disadvantaged minorities. That was all the parties had done here, so the Court had no need to define the outer limits of these laws.

**CASE 2**

**Decision of the United States Supreme Court**

In *Moose Lodge No. 107 v. Irvis,* 92 S.Ct. 1965 (1972), the Court held that the state licensing of a private club does not significantly involve the state in the discriminatory practices of the club in order to establish a violation of the equal protection clause.

**Reasoning of the Court**

The equal protection clause states, "No State shall...deny to any person within its jurisdiction the equal protection of the laws." The equal protection clause applies to state actions only; that is, a state must in some way be involved in the denial of equal protection.

Justice Rehnquist stated in the opinion for the majority that discrimination by private bodies does not

violate the equal protection clause unless the state is significantly involved with the discrimination. He found no signifcant involvement by the state of Pennsylvania in the discriminatory practices of the private lodge. He stated that the mere licensing of the private lodge for the purpose of selling alcoholic beverages in no way involved the state in fostering or encouraging racial discrimination because the State Liquor Control Board played no part in establishing the club's guest policies nor was it a "joint partner" in the racial discrimination.

Justices Douglas, Marshall, and Brennan dissented, finding that since the availability of liquor licenses was restricted by the state, the ability of black people to obtain liquor was being restricted by the state. Therefore, there was sufficient state action in the pattern of regulations used by the state to control the sale of liquor.

(Used by permission from *A Resource Guide on Contemporary Legal Issues...For Use in Secondary Education,* a publication of Phi Alpha Delta Law Fraternity, International.)

**CASE 3**

**The Supreme Court's Reasoning**

The Supreme Court faced this sex discrimination problem in the case of *Dothard v. Rawlinson,* 97 S. Ct. 2720 (1977). Diane Rawlinson was denied a job as a prison guard because of her physical size and because of a regulation explicitly denying women the chance to be prison guards at maximum security installations. She sued the prison for illegal discrimination under Title VII of the Civil Rights Act of 1964 and asked that she be given the job.

Addressing the height and weight requirement first, a majority of justices said there had been improper discrimination because of the disproportionate impact of the height and weight regulations on women. The reasoning behind this conclusion was that height and weight requirements were not job related, and to the extent that they denied women the opportunity to compete for jobs as prison guards they established an improper pattern of discrimination. They felt that the only reason to require prison guards of a certain size was to guarantee that the guards be strong. This, they said, could be done without unevenly affecting females. They suggested giving strength tests: "Such a test," they concluded, "would be one that 'measures the person for the job' and not the person in the abstract." (If, however, "appearance of strength" was the requirement, two justices said that this would convince them to rule that the regulations were reasonable and necessary.)

As to the regulation explicitly denying women the opportunity to be prison guards, the majority cited the "rampant violence" and "jungle atmosphere" that prevails in Alabama's prisons. In view of the fact that 20% of the inmates were sex offenders, the Court concluded that this regulation was lawful, since it was a bona fide occupational qualification of that job.

The dissenters said that the regulation officially banning women was based on old myths. Women, they said, should not continue to be looked upon as "seductive sexual objects." It is their choice if they want to subject themselves to this potential danger. Furthermore, the dissenters said, what better way to train these sex offenders to live in society than to expose them to a more natural environment with guards of both sexes.

*Questions*

1. Which arguments would you accept as the most valid in this case?
2. How paternalistic should society be? In other words, do you feel it is right to tell women, or anyone, that they cannot do something because it is too dangerous? How would you balance this with freedom of choice? What about the balance this makes with equal protection under the Fourteenth Amendment?
3. The dissenters used this quote in their argument: "Once again 'the pedestal upon which women have been placed has...upon closer inspection, been revealed as a cage.' " What did they mean by this? Do you agree?
4. Reflect on the physiological differences between the sexes and ask yourself to what degree these affect equal treatment under the law.

(Used by permission of the Constitutional Rights Foundation and adapted from the *Bill of Rights in Action.*)

**CASE 4**

The Court ruled *Massachusetts v. Murgia,* 427 U.S. 307 (1976), that rationality, rather than strict strutiny, is the proper standard, since strict strutiny is required only where a legislative classification interferes with a fundamental right or works to disadvantage a suspect class. Since Murgia was not a number of such a class and working for the government is not a fundamental right, Massachusetts prevailed by showing that it had acted reasonably in assuming that there is a relationship between age and physical fitness. The Court went on to add that "drawing distinctions is...a legislative task and an unavoidable one. Perfection in making the classification is neither possible or necessary." Therefore, it was reasonable to draw the line at some age, and the Court upheld the retirement standard.

**CASE 5**

In *Southeast Community College v. Davis,* 442 U.S. 397 (1979), the Court decided in favor of the school. The case hinged on the definition of the phrase "otherwise qualified handicapped person" in the Rehabilitation Act of 1973. Did the lawmakers intend to protect persons who were qualified but happened to be handicapped, or did they intend to protect those whose handicap rendered them unqualified? Applying the first definition, the federal district court held that since Davis was unqualified for the program because of her handicap, the law didn't apply to her. Applying the second definition, the appeals court disagreed. It held that the words "otherwise qualified" meant that the school should have looked to her other qualifications, her "academic and technical qualifications." If she was qualified under these standards, then the school might be required to engage in "affirmative conduct" to accommodate her. A unanimous Supreme Court overruled the appeals court. It found that the Rehabilitation Act does not require educational institutions to use affirmative action policies to accommodate persons whose handicaps render them unqualified to meet the normal standards of the profession.

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## Major Federal Civil Rights Laws

AMENDMENT V: No person shall...be deprived of life, liberty, or property, without due process of law...(applies to the federal government; a similar provision in Amendment XIV applies to state governments)

AMENDMENT XIV: No state shall deny to any person within its jurisdiction the equal protection of the law.

EQUAL PAY ACT OF 1963
- Requires equal pay for equal work, regardless of sex
- Requires that equal work be determined by equal skill, effort, and responsibility under similar working conditions at the same place of employment
- Requires equal pay when equal work is involved even if different job titles are assigned

(Enforced by the Wage and Hour Division of the U.S. Department of Labor or by private lawsuit)

CIVIL RIGHTS ACT OF 1964 (amended in 1972)
- Prohibits discrimination based on race, color, religion, or national origin in public accommodations (e.g., hotels, restaurants, movie theaters, sports arenas). Does not apply to private clubs not open to the public.
- Prohibits discrimination because of race, color, sex, religion, or national origin by businesses with more than fifteen employees or by labor unions. This deals with hiring, recruitment, wages, and conditions of employment. (This section is commonly referred to as Title VII).
- Permits employment discrimination based on religion, sex, or national origin if it is a necessary qualification of the job (a "bona fide occupational qualification")
- Prohibits discrimination based on race, color, religion, sex, or national origin by state and local governments and public educational institutions
- Prohibits discrimination based on race, color, national origin, or sex in any program or activity receiving federal financial assistance, and authorizes termination of federal funding when this ban is violated

(Enforced by the Equal Employment Opportunity Commission or by private lawsuit)

AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967 (amended in 1978)
- Prohibits arbitrary age discrimination in employment by employers of twenty or more persons, employment agencies, labor organizations with twenty-five or more members, and federal, state, and local governments
- Protects persons between the ages of forty and seventy
- Permits discrimination where age is a necessary qualification for the job

(Enforced by the Equal Employment Opportunity Commission or similar state agency)

TITLE IX OF THE EDUCATION ACT AMENDMENTS OF 1972
- Prohibits discrimination against students and others on the basis of sex in educational institutions receiving federal funding
- Prohibits sex discrimination in a number of areas, including student and faculty recruitment, admissions, financial aid, facilities, and employment
- Requires that school athletic programs effectively accommodate the interests and abilities of members of both sexes. Equal total expenditure on men's and women's sports is not required.
- Does not cover sex-stereotyping in textbooks and other curricular materials

(Enforced by the Department of Education's Office of Civil Rights)

REHABILITATION ACT OF 1973
- Prohibits private and government employers from discriminating on the basis of physical handicap
- Requires companies that do business with the government to undertake affirmative action to provide jobs for the handicapped
- Prohibits activities and programs receiving federal funds from excluding otherwise qualified handicapped persons from participation or benefits

(Enforced by lawsuit in federal court or, in some cases, state or local human rights or fair employment practices commissions)

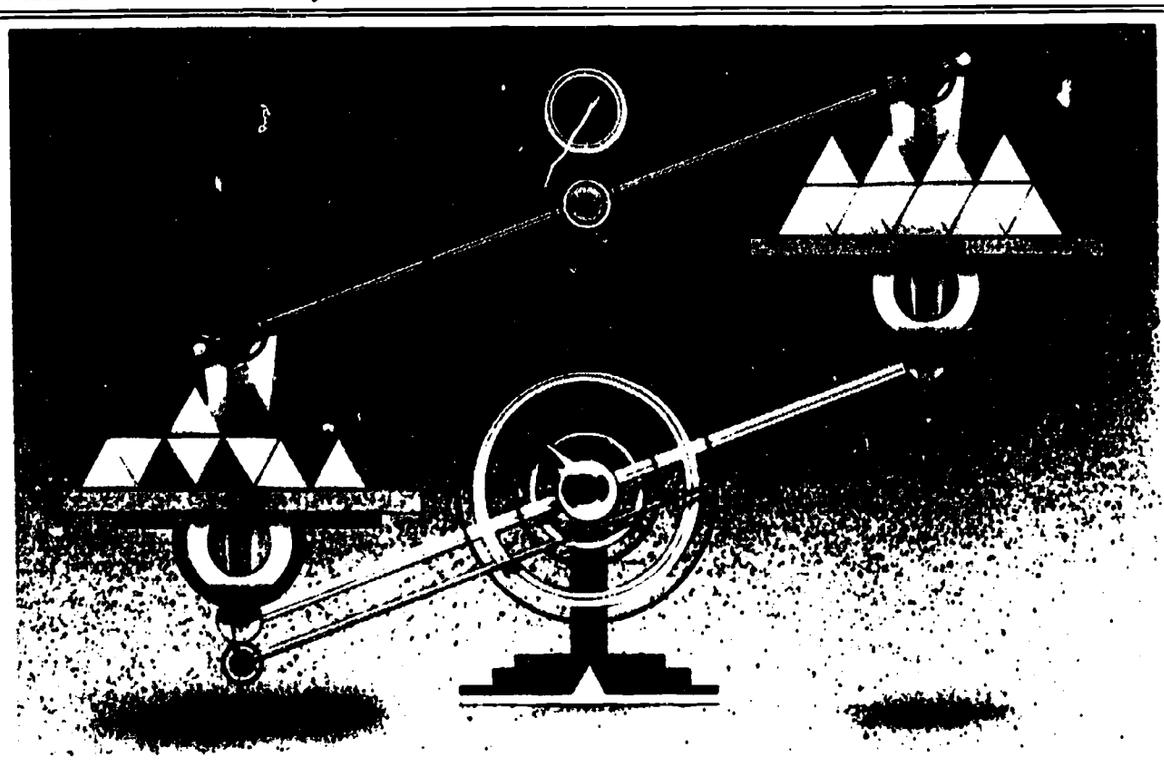
EQUAL CREDIT OPPORTUNITY ACT OF 1974
- Requires all financial institutions to make credit equally available to credit-worthy customers, regardless of sex and marital status
- Prohibits creditors from: asking the sex of the credit applicant; asking about the use of birth-control procedures or the applicant's child-bearing plans; differentiating between male and female heads of households; insisting a married woman's charge accounts be in her husband's name; terminating credit based on change of marital status; and requiring a credit cosigner of a woman when one would not be asked of a man

(Enforced by civil suit against the violator for as much as $10,000 in damages or by complaints filed with the Federal Reserve System (banks) or the Federal Trade Commission (all other institutions))

(Most of the above is used by permission from *Street Law: A Course in Practical Law*, Arbetman, McMahon, and O'Brien (St. Paul: West Publishing House, 1980) pp. 306-308.)

# Equality

**Affirmative Action/Secondary** **James Giese and Barbara Miller**



Tony Griff

Throughout our history, Americans have regarded the concept of equality as one of their fundamental values as expressed through the Constitution. Equality, however, has meant many things to many different people. Beginning in the 1960s, the federal government began to urge "affirmative action," action by both public and private sectors to help correct the problems of the past, particularly those associated with discrimination against racial minorities in educational and employment opportunities.

Since that time, affirmative action has been the focus of much of the discussion of the concept of equality in American society. The issue has been much discussed in election campaigns, debated in legislative bodies, and considered in several Supreme Court cases. Each of the three branches of government has been involved in the changing definition of equal opportunity in education and in the work place.

After much effort over the years, racial minorities (and women and the handicapped) were achieving some gains with regard to equal treatment in many areas of American life. But new problems arose as a result of this drive for racial equality. When special affirmative actions are taken to alleviate past discrimination and to improve equal opportunity of minorities, do white citizens then face "reverse discrimination?" To what extent are white citizens' rights violated when they are excluded from an educational program (as in the Bakke case), prevented from being hired for a job, or are not being promoted within the place of work? What formulas are proper for pursuing both goals at the same time? These and other important questions have been the focus of discussions on equality in the last decade.

**OBJECTIVE**

This lesson will help students understand the role that each branch of the federal government can take in clarifying how Americans will approach redressing past discrimination while protecting the rights of individuals whose opportunities may be limited by affirmative action programs.

**PROCEDURES**

1. What Types of Inequities Exist in Employment?

   Provide statistics to show that differences exist among various American social groups in terms of the types of jobs they typically hold and in terms of the incomes they receive for those jobs. Do students recognize any patterns in these differences? Do these differences show inequality? How do students feel about these social facts? Do students think the government should encourage affirmative action programs to eliminate inequality in employment?
2. Discussing a Hypothetical Case

   Tell students that they will have an opportunity to look at how each branch of the federal government can

**Data Card**

**EXECUTIVE GROUP**

When President Reagan was elected, he promised supporters that he would see that the law and the logic of the Fourteenth Amendment would apply to all citizens rather than special interest groups. He wants to fulfill his campaign promises to eliminate those aspects of affirmative action that he feels are harmful to individual citizens who may be unfairly punished for societal problems for which they are not responsible.

Prepare a brief as a "friend of the court" offering your opinion on what should be done in this case.

respond to concerns about equal opportunity in employment (and promotion). Give the class the following hypothetical situation to consider. (This case closely follows the recent Paradise case See pp. 14-15.)

**THE *TROOPER* CASE**

In the early 1970s, the National Association for the Advancement of Colored People (NAACP) brought suit against the Department of Public Safety of a southern state. The suit charged that the department had used discriminatory employment practices—it had deliberately maintained an all-white force of state troopers for 37 years. The court ordered (among other things) that one-half of all state trooper openings (new hires) be filled with black persons. This policy was to be effective until blacks became one-quarter of the trooper force, roughly equal to the general employment distribution of blacks in the state.

By 1975, the court found that the department had consistently delayed implementing the required policy. In 1977, it was charged with discriminating against blacks with regard to promotions from trooper to corporal (the next highest rank). In 1979 and again in 1981, the department agreed to implement a promotion program that would not discriminate against black troopers. But by 1983 the department had failed to establish such a promotion plan for even the lowest ranks. The newly created promotion exam produced a list of 79 whites and no blacks for promotion to corporal (the department wanted to fill 16 to 20 positions).

In addition, only white troopers were promoted to ranks above that of corporal throughout the whole period. The department required that troopers serve a specified period of time at a rank before they were eligible for the next highest rank. Furthermore, the department promoted only within its own ranks—that is, it made no new hires in higher ranks from outside the department.

Since the department was unable to establish an equitable promotion plan, the court established a temporary plan for it. The court ordered that half of all promotions to corporal and above be awarded to black troopers. The one-for-one quota was seen as temporary—until 25 percent of those in each rank were black or until a valid promotional plan could be established by the department.

Four white troopers who had scored well on the promotional exam for higher rank opposed the court order and brought suit. They argued that quotas were unconstitutional and therefore their rights had been violated.

**QUESTIONS FOR DISCUSSION**

1. Was there an apparent problem of past discrimination in the state trooper force?
2. Would the court-ordered program correct problems of past discrimination?
3. Would the program limit opportunity for some employees?
4. Should citizens be concerned about the composition of the state trooper force?

**SETTING UP THE ROLEPLAY**

Divide the class into two groups. Assign each group to look at the issue of affirmative action from the viewpoint of (1) the legislative branch (your congressional district) or (2) the judicial branch—the U.S. Supreme Court. (The simulation provides for the

## Data Card

**LEGISLATIVE GROUP**

In your congressional district, there is a large public agency that has a policy similar to that in the case of *Troopers*. Your want to know how your constituents feel about the issue of redressing past grievances through affirmative action.

If changes are needed to provide equality for all Americans, you feel that it is best done through the law-making branch of the government. Changes should reflect what the people want. Your job is to represent your constituents. Take a poll to find out if the people you represent want you to introduce a bill to give incentives to companies to undertake voluntary affirmative action programs, or if you should oppose such legislation.

Design a survey on affirmative action/reverse discrimination to administer to adults in your community. The questions below are provided to get you started. Administer the survey to a sample of adults and tally the findings to present to the class. Be sure you interview a broad cross-section of the population and get a wide diversity of views. [Note to teacher: if students are not able to secure opinions on both sides of the questions, be sure to see that arguments on both sides are adequately brought out.]

**SAMPLE QUESTIONS**

1. Do you feel that racial minority groups in this country have equal job opportunities?
   Yes No No opinion
2. Do you feel that women in this country have equal job opportunities?
   Yes No No opinion
3. What is your opinion of Equal Opportunities Laws? Do they go:
   Much too far A little too far Not quite far enough
4. The current administration wants to eliminate all affirmative action programs that involve quotas as a means for solving problems of past discrimination. Do you favor or oppose this effort?
   Favor Oppose
5. A recent study shows that discrimination in equal pay is a serious problem for women and minorities. What, if anything, do you think should be done to correct this problem?

Contact the local offices of your congressperson or senators. Find out how they have voted on affirmative action/reverse discrimination legislation. Ask about mail that they have received on this issue. They may also be able to provide the results of recent surveys and/or demographic information that students can use to compare with the survey they conduct in the community.

Based on information collected, report to the class on how you will vote on the issue of affirmative action if it comes up for a vote. If your constituents have strong feelings about the issue, you may wish to describe legislation you will introduce on the issue.

involvement of the executive branch if you prefer to add that dimension to the simulation.)

Ask the class: does the branch of government to which you have been assigned have any responsibility for affirmative action policies? Should the government take an active role in resolving questions of equality?

Explain that they are to consider the hypothetical situation from the viewpoint of their respective roles. Provide each group data cards with information about their roles or perspectives in looking at affirmative action. Review with the class what each group will be doing as follows:

a. The group representing the judicial branch will consider the precedents established in the case of Allen Bakke, a landmark case on affirmative action/reverse discrimination. Following a review of the Supreme Court rulings, the group will apply the law to the hypothetical situation of *Troopers.* (A number of other cases might also serve as a basis of discussion for this group. See especially pp. 13-15 of this handbook, which discuss cases on affirmative action in the workplace.)
b. The group representing the legislative branch will conduct a public opinion poll to find out about community attitudes toward problems of affirmative action/reverse discrimination. They will also contact the office of the their congressional representative to gather additional data. This group must decide what type of legislation their constituents would want to have passed on this issue.
c. (Optional) The group representing the executive branch will consider the Reagan administration policies on affirmative action/reverse discrimination. The group will also prepare an amicus curiae (friend of the court) brief to express the opinion of the administration on this issue.

**SMALL GROUP WORK/REPORTS**

Small groups will need time to complete research and discuss and compile their findings.

Each group should report to the class as follows:

The *legislative group* should report the results of their survey and describe any legislation that they plan to introduce.

The *judicial group*, (the Supreme Court) will deliberate in front of the class or offer the reasoning of the court through minority and majority opinions.

(Optional) Representatives of the *executive group* should distribute copies of their brief or give oral arguments about affirmative action before the Supreme Court.

**DEBRIEFING**

How do the executive and legislative branches of government view the problem differently? Describe the approaches of each one. What are the strengths and weakness of each branch of government in dealing with the problem? What happens when the court interprets the Constitution in a way that goes against public opinion? What should the president and Congress do when the public wants them to do something that goes against a court decision? Is the issue of affirmative action/reverse discrimination best resolved through court cases or through legislation?

**EXTENSION**

What do you think would be a fair way to help victims of past discrimination without hurting individuals who are also deserving of "equal opportunity?"

Try writing a fair affirmative action plan for the Department of Public Safety described in the case study.

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## Data Card

**SUPREME COURT GROUP**

In this simulation, you will be asked to determine whether or not racial quotas should be used to correct problems of racial discrimination. The white male who has brought the case presents arguments saying that the policy of one-black-for-one-white promotion should be set aside. Lawyers for black troopers will argue that the policy is fair and necessary to correct years of discrimination by the state highway patrol.

Your job is to interpret the Constitution. You are not to be swayed by public opinion. Rather you are to look at the Constitution and the law that has been developed through other cases. You have the final word on what the Constitution means.

Use the following rulings from the landmark case of *Board of Regents of California v. Bakke* as a basis for you ruling. (Allen Bakke asked the Supreme Court to set aside a policy that allowed minority students with lower grades to be admitted to medical school instead of him.) In this case the Court answered two questions: Is an affirmative action program that sets aside a limited number of slots for minority students lawful? Are considerations of race in admissions always lawful?

The Court decided that it is unlawful to have a strict quota system.

1. Race may not be the sole criterion for a preference unless there is a finding of past discrimination by the institution using the racial classification.
2. Helping victims of societal discrimination does not justify a classification which imposes disadvantages on persons who bear no responsibility for the harm the beneficiaries were to have suffered.

The Court also ruled that it is acceptable to consider race in affirmative action programs.

1. Race may be given some consideration in the admissions process in light of the school's interest in creating a diverse student body.
2. A number of factors may be considered in deciding who shall be admitted to a college, including income level of parents, special talents including athletic ability, geographical distribution of the student body, and alumni status.
3. The Court recognized the value of a multi-racial educational setting.

## Equality

*(continued from page 15)*

powerful engine of racism and sexism." Justice White filed a separate dissent.]

According to the Court, equality under the Constitution does not require the same treatment of each individual in all circumstances but allows for differences in treatment that are clearly focused on achieving a compelling governmental interest. The Court is allowing, in other words, short term, limited inequality of treatment to achieve long term equality.

### What Is "Equal"?

A strict reading of the words of the Constitution may suggest to you that the Court indeed has taken liberties with the document. Equal protection means equal protection, not preferences for particular groups. Reading the equal protection clause to allow for special treatment may be seen as a dangerous expansion on the meaning of the document.

The debate over the authority of the Court to interpret the Constitution has been alive since Chief Justice Marshall in 1803 assumed that authority. And the debate will be alive when we celebrate the 400th birthday of that great document. The debate over the legitimacy of the ends to be achieved and the extent to which those ends should influence one's view of the meaning of the constitutional provisions has also been alive and will live so long as there are differences of opinion and differences in self interest.

In my view, the current criticism of the Court for its radical egalitarianism, in the words of Brad Reynolds, reflects more a disagreement with the result of the Court's analysis than with the fact of the Court's analysis. The position of the critics is that the Court, for purposes of accomplishing a particular social agenda, has gone too far in broadening the meaning of the constitutional guarantee of equality. Resolving the question whether that criticism is well founded depends, I submit, on your own personal perspective, and for that reason I will not be so presumptuous as to suggest an answer. For me the fact that our Constitution leaves room for the debate reflects the genius of the framers and is the only guarantee of that document's continued vitality. □


# About This Handbook

This is one of four special bar-school partnership handbooks on great constitutional themes: Liberty, Equality, Justice, and Power. The articles and strategies in these handbooks are reprinted from *Update on Law-Related Education*, a magazine published by the American Bar Association Special Committee on Youth Education for Citizenship and appearing quarterly during the school year.

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