THE EQUAL PROTECTION CLAUSE

By Brian Fitzpatrick and Theodore M. Shaw[1]

Ratified as it was after the Civil War in 1868, there is little doubt what the Equal Protection Clause was intended to do: stop states from discriminating against blacks. But the text of the Clause is worded very broadly and it has come a long way from its original purpose. For example, despite its reference to "state[s]," the Clause has been read into the Fifth Amendment to prevent the federal government from discriminating as well.

Near the end of the nineteenth century, the Court considered whether racial segregation by the government violated the Constitution. If people were separated into different facilities by race, but those facilities were purportedly equally suitable, did that constitute discrimination? Historians have debated whether the Fourteenth Amendment was intended to end such segregation, but in *Plessy v. Ferguson* (1896), the Court ruled by a 7-1 vote that so-called "separate but equal" facilities (in that case, train cars) for blacks and whites did not violate the Equal Protection Clause. The decision cemented into place racist Jim Crow-era laws. In a famous dissent, Justice John Marshall Harlan disagreed, stating "[o]ur Constitution is color-blind . . . ." *Plessy* remained the law of the land until 1954, when it was overruled in *Brown v. Board of Education*. The Supreme Court unanimously overruled the reasoning of *Plessy* and held that separate schools for blacks and whites violated the Equal Protection Clause. Brown was a decisive turning point in a decades-long struggle to dismantle governmentally imposed segregation, not only in schools but throughout American society. Brown was a turning point, but it was not the end of the struggle. For example, it was not until 1967 in *Loving v. Virginia* that the Supreme Court held that laws prohibiting interracial marriages violated Equal Protection.

Although the original purpose was to protect blacks from discrimination, the broad wording has led the Supreme Court to hold that all racial discrimination (including against whites, Hispanics, Asians, and Native Americans) is constitutionally suspect. These holdings have led to an ongoing debate for the last several decades over whether it is unconstitutional for governments to consider the race of blacks, Hispanics, and Native Americans as a positive factor in university admissions, employment, and government contracting. We will address this question in our separate statements.

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The Supreme Court has also used the Equal Protection Clause to prohibit discrimination on other bases besides race. Most laws are assessed under so-called "rational basis scrutiny." Here, any plausible and legitimate reason for the discrimination is sufficient to render it constitutional. But laws that rely on so-called "suspect classifications" are assessed under "heightened scrutiny." Here, the government must have important or compelling reasons to justify the discrimination, and the discrimination must be carefully tailored to serve those reasons. What types of classifications are "suspect"? In light of the history of the Equal Protection Clause, it is no surprise that race and national origin are suspect classifications. But the Court has also held that gender, immigration status, and wedlock status at birth qualify as suspect classifications. The Court has rejected arguments that age and poverty should be elevated to suspect classifications.

One of the greatest controversies regarding the Equal Protection Clause today is whether the Court should find that sexual orientation is a suspect classification. In its recent same-sex marriage opinion, *Obergefell v. Hodges* (2015), the Court suggested that discrimination against gays and lesbians can violate the Equal Protection Clause. But the Court did not decide what level of scrutiny should apply, leaving this question for another day.

Like many constitutional provisions, the Equal Protection Clause continues to be in flux.