Chapter 10

The Right to Freedom from Racial Discrimination

In 1938, the Carnegie Corporation of New York asked Nobel Prize–winning Swedish economist Gunnar Myrdal and his wife, Alva, who later received the Nobel Peace Prize, to investigate the problems faced by African Americans. The result was a landmark study, An American Dilemma: The Negro Problem and Modern Democracy. The problem they described was a conflict between the high ideals of American society, as expressed in its founding documents, and the continuing reality of racial discrimination. It was a dilemma with a long history in America.

Slavery is the ultimate form of discrimination, and racial slavery had been part of the American landscape since the mid-seventeenth century. By the time of the Revolution, holding human beings as property was allowed in all thirteen states. It was also recognized in the Constitution in five places, including a clause that prevented Congress from abolishing the slave trade until twenty years after the document's ratification. Even though most delegates to the Constitutional Convention favored an immediate end to the traffic in slaves, slaveholders were confident that the Constitution did not grant the national government any power to emancipate slaves. They were correct in the short run. Because of these provisions, William Lloyd Garrison, a fiery abolitionist leader, later called the document "a covenant with death."

During the decades before the Civil War, cases involving slavery flooded federal courts. Many of the disputes involved the return of runaway slaves, slavery in the national territories, and the journeys of slaves through free states. All of these issues were highly inflammatory and contributed to the growing tension between increasingly antislavery northern states and southern states committed to the defense of the "peculiar institution." Hardly a year passed without an incident that called attention to a society that, in Abraham Lincoln's later characterization, was "half slave and half free."

By the 1850s, the antislavery crusade had resulted in a new Republican party determined to halt the spread of slavery, if not eliminate it altogether. An attempt by the pro-southern majority of the U.S. Supreme Court to resolve the controversy over slavery in favor of the South resulted in one of the Court's most inflammatory and controversial decisions. Led by Chief Justice Roger B. Taney, the Court ruled 7 to 2 that Dred Scott, a slave who sought his freedom after living in free territory and in Illinois, did not have access to the federal courts because he was black and therefore could not be a citizen of the United States. The Court claimed that, at the time of the Constitution's adoption, blacks were not citizens and universally were considered "beings of an inferior order, and altogether unfit to associate with the white race." It also held that the Fifth Amendment guaranteed the slaveholder's right to own another person. Taney had hoped to end the controversy over slavery and also destroy the Republican

"When the rights of even one human being are held in contempt the rights of all are in danger. . . . Our Government is founded on the equality of human rights—on the idea, the sacred truth that all are entitled to life, liberty and the pursuit of happiness. Our country is an asylum for the oppressed of all nations—of all races."

—Attorney Robert G. Ingersoll, "Should the Chinese Be Excluded?" *North American Review* (1893)

party, but *Scott v. Sandford* (1857) had the opposite effect. A hostile northern reaction to the decision strengthened both the antislavery and Republican causes. Three years later, Lincoln's election to the Presidency brought the impending crisis to its head and resulted in the attempted southern secession and civil war.

The aim of the war, in Lincoln's original view, was the preservation of the nation, not the elimination of slavery, but this understanding began to change after he issued the Emancipation Proclamation in 1863, which freed slaves in territories not under the control of Union forces. Ultimately, the Union's military victory made it possible to pass the Thirteenth Amendment, which formally ended slavery upon its ratification in 1866. When southern states then passed so-called Black Codes to deprive former slaves of any meaningful liberty—and when they blocked, in practice, the rights they had been required to extend to blacks formally—Congress followed with two more amendments. The Fourteenth Amendment (1868) conferred both national and state citizenship on blacks and forbade states from depriving "any person of life, liberty, or property, without due process of law" or denying to "any person. . . the equal protection of the laws." The Fifteenth Amendment (1870) prohibited the denial of the right to vote because of race. Congress also passed a series of civil rights acts intended to enforce the amendments and prevent racial discrimination.

Throughout the nineteenth century and much of the twentieth, the Supreme Court interpreted the amendments and civil rights acts narrowly. Lawmakers had clearly intended to prevent abuses, but the Court rejected a view that the amendments changed the historical relationship between the states and the central government. Federalism, or the division of power between state and national governments, was part of the original Constitution. States traditionally had responsibility for such things as criminal justice and the health and education of their citizens, whereas the central government had authority for those activities that affected the nation at large. Had the amendments changed this relationship? Until the mid-twentieth century, the Court generally thought not, at least for most individual rights. A series of cases in the 1870s and 1880s effectively curtailed the ability of Congress to improve the condition of former slaves. These matters, the justices decided, were for states to decide. Although the Court conceded that the object of the amendments, especially the Fourteenth Amendment, was to enforce the "absolute equality of races before the law," it also concluded in *Plessy v. Ferguson* (1896) that the amendments "could not have been intended to abolish distinctions based on color." "Separate but equal," or legal segregation, was acceptable under the Constitution, the Supreme Court decided.

Occasionally, however, the Court took a broader view of the amendments. One such case involved an unusually broad interpretation of racial discrimina-

tion. The decision, while advanced for its day, actually had little impact initially, although a century later, it became a powerful weapon in the modern civil rights revolution.What made the case unusual, however, was the plaintiff who pursued the issue to the Supreme Court. He was not African American but a member of another minority group that had suffered racial discrimination. He was Chinese.

Yick Wo went to San Francisco in 1861, lured, as were many Chinese immigrants before him, by the prospect of a better life. China was home to wars, unrest, natural disasters; California promised greater comfort and easy wealth, thanks to the gold rush that began in 1848 when prospectors struck pay dirt at Sutter's Mill.

Within three years, Yick Wo had established a laundry, a common occupation for Chinese immigrants who found themselves shut out of the more lucrative jobs in mining, manufacturing, or fishing. Racial discrimination, he had discovered quickly enough, was part of the culture of this American paradise. Chinese immigrants were prominent targets. In 1850, the state legislature taxed all foreign miners twenty dollars a month; in 1860, another bill required Chinese fishermen to buy a special license; two years later, legislators passed a law to discourage all Chinese immigration into the state. Chinese children could not attend public schools. As soon as a new opportunity arose, someone put forward a new measure to prevent Chinese from taking advantage of it. They could not even claim citizenship, the most basic American right. Legal documents usually described them as "subjects of the Empress of China." The Chinese were a people set apart, legally and culturally, from the promise of American life.

In response, the Chinese created a variety of self-help organizations. One of these groups represented the interests of Chinese laundries, including Yick Wo's. San Franciscans described it as a "wealthy and powerful association" that threatened the municipal government—and, of course, the hundred or so laundries in the city that were not owned by Chinese. They pressured the board of supervisors to require all laundries in the city to get the board's consent to stay in business, unless the laundry was "located in a building constructed either of brick or stone." Almost all of the Chinese laundries were made of wood, as were most of the city's homes and businesses. The board refused Yick Wo's application, as it did those of all the other Chinese owners. Eighty laundries in wooden buildings were allowed to remain open because, the board determined, they did not have drying scaffolds on their roofs and therefore posed no danger to their neighbors. None of the owners of these laundries was Chinese.

With the backing of the laundrymen's association, the Chinese continued to operate their businesses without the required permission. After he was arrested, Yick Wo refused to pay the fine and was sentenced to ten days in jail, which he appealed, unsuccessfully, to the California Supreme Court. Meanwhile, a second test case involving Wo Lee, a laundryman in another part of the city, was heard by a federal district court, with a different result. The judge agreed that the ordinance, while neutral on its face, was in fact applied arbitrarily by the supervisors and discriminated against the Chinese.

The Supreme Court decided to hear the two cases together, and in May 1886 the justices ruled in favor of Yick Wo and Wo Lee. In their order to discharge the petitioners from custody, the justices noted that the laundrymen had complied with every requirement of the law to protect against fire and guard the public health. The facts demonstrated "hostility to the race and the nationality." No one offered any reason "except the will of the supervisors" why the laundrymen

should not be allowed to practice "their harmless and useful occupation." Discrimination did not occur only in the text of statutes, the majority opinion concluded. Laws can be fair on their face, "yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances. . . the denial of equal justice is still within the prohibition of the constitution."

The ordinance and its enforcement were violations of the Fourteenth Amendment's guarantee of equal protection of the laws, which applied to all persons in the United States, not just citizens. The Constitution did not "leave room for the play and action of purely personal and arbitrary power. . . . For the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself."

Yick Wo v. Hopkins (1886) established an important principle that lay dormant for almost a century before becoming a central part of modern civil rights law. Even if a law is expressed in completely neutral terms—even if its language is not discriminatory—it will be judged unconstitutional if it results in discrimination. The Fourteenth Amendment protects individuals against a statistically significant unequal result and not simply intentional discrimination. Known as disparate impact, this standard was important in overturning statutes passed after *Brown v. Board of Education* (1954), the case that declared segregation of the races to be inherently unequal.

Civil rights are rights that belong to us by virtue of our citizenship. They include the fundamental rights guaranteed by the Constitution, as well as by congressional acts. Much of what we identify today as our right to be free from racial discrimination stems from a series of national laws passed since the 1950s. The Civil Rights Act of 1964 was the most comprehensive civil rights law in U.S. history. Two provisions—Title II and Title VII—were especially important because they prohibited racial discrimination in public accommodations, or any place open to the public, such as hotels, swimming pools, and public transportation, and in employment. Other acts, such as the Voting Rights Act of 1965, gave rights to individuals based on the concept of equal treatment.

The Court has interpreted these protections broadly, accepting, for example, that any employment practice that results in racial discrimination is unconstitutional, even if there is no intent to discriminate, which, of course, was the argument of Yick Wo and his fellow laundrymen. The Civil Rights Act of 1991 strengthened this principle even more by eliminating any claim by businesses that they needed to discriminate in order to remain competitive or viable. Significantly, these acts also allow individuals to collect damages from anyone who acts illegally to deny their rights. The Supreme Court generally has affirmed these laws, announcing in a 1989 case, for example, "Neither our words nor our decisions should be interpreted as signaling one inch of retreat from Congress's policy to forbid discrimination in the private, as well as the public, sphere."

One result of the various civil rights laws was affirmative action programs that required employers or labor unions to make a serious effort to hire members of racial minorities who had traditionally been excluded because of discrimination. Such programs were necessary, many people concluded, to erase old patterns of discrimination. But these attempts to remedy the ill effects of past practices were controversial, especially because they first appeared during a period of economic stagnation. Opponents claimed that affirmative action programs

"We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal."

—Chief Justice Earl Warren, *Brown v. Board of Education* (1954)

resulted in reverse discrimination, or bias against one group (whites) in order to make up for past discrimination against another group (blacks). They also argued that these programs, while not imposing racial quotas, violated American beliefs that merit, not race, should determine who is hired or wins a contract or is admitted to college.

The Supreme Court finally addressed this issue in 1978 in Regents of the *University of California v. Bakke*. The medical school at the University of California, Davis, with no history of racial discrimination, set aside sixteen of one hundred seats in its entering class for minorities, some of whom had lower grades and test scores than white applicants. One person denied admission was Allan Bakke, an aerospace engineer in his thirties. He sued, claiming that the program was a form of racial discrimination prohibited by the Fourteenth Amendment. By a narrow 5-to-4 vote that reflected the division in public opinion, the Court ruled in favor of Bakke and decided that although race could be one criterion for making decisions, specific racial quotas were illegal unless there was a history of racial discrimination. In 2003, in *Grutter v. Bollinger*, the justices upheld the use of race in making admission decisions if the purpose was to achieve "the educational benefits that flow from a diverse student body."

The Court has also upheld flexible affirmative action programs in other areas, such as a requirement that 10 percent of all the federal funds spent on public works projects go to minority contractors. Affirmative action opened opportunities for blacks in business, government, and the professions and helped spur the rapid growth of the black middle class in the late twentieth century. The same has been true for other racial and ethnic minorities who have experienced discrimination, as well as for women and people with disabilities.

Race remains an American dilemma, but it has never been expressed solely in terms of black and white. Most ethnic minorities have experienced discrimination. American Indians, Hispanics, Chinese, Japanese—the historical list is a long one, and the examples are too numerous to recount.We are not unique in this record of discrimination based on race, of course, but we are acutely aware of our shortcomings because our aspirations as a nation embrace the goal of equality of all people.

The Thirteenth, Fourteenth, and Fifteenth Amendments enshrined equality before the law for all citizens as a fundamental right, and the various civil rights acts have sought to redeem this promise for all Americans. The Constitution is color-blind, but regrettably we as citizens often are not. The issues we face in eliminating racial discrimination are complex, and proposed solutions at times appear to conflict with other important values, such as freedom of association or rewards based on individual merit.

We have not yet created a society where, as Martin Luther King, Jr., so eloquently stated in his 1963 "I Have a Dream" speech, people are judged not by the color of their skin but by the content of their character. Yet our history, troubled as it has been, affirms that Americans have taken seriously the promise of the Declaration of Independence that all people are created equal.What should be reassuring is how the quest to eliminate racial barriers has revitalized our sense of liberty and democracy. The concept of equal protection under the law, present at the creation of the American republic, now includes people who, by definition, did not enjoy this fundamental right in 1787.We as a nation have grown in our understanding of liberty, rights, and social responsibility, and it is the potential for an even fuller sense of human equality that keeps the Constitution a vital document more than two hundred years after its adoption.

Discrimination on Public Transportation

Racial discrimination has been a constant theme of American history. Free blacks in the North before the Civil War did not have to endure the bonds of slavery, but they still had to deal with a highly segregated society. In the following account published in the New York Tribune in 1854, Elizabeth Jennings, an African American schoolteacher in New York City recounts her forcible expulsion from a streetcar reserved for whites. This situation existed well into the twentieth century in a large part of the country. One hundred years after Elizabeth Jennings gave her account, Rosa Parks, a seamstress in Montgomery, Alabama, refused to give up her seat to a white passenger and move to the back of the bus.Her action began the bus boycott that propelled Martin Luther King, Jr., and the civil rights movement to national prominence and led to the end of legal segregation in public transportation, housing, education, and other areas of American life.

Sarah E. Adams and myself walked down to the corner of Pearl and Chatham Sts. to take the Third Ave. cars. I held up my hand to the driver and he stopped the cars, we got on the platform, when the conductor told us to wait for the next car: I told him I could not wait, as I was in a hurry to go to church (the other car was about a block off). He then told me that the other car had my people in it, that it was appropriated for that purpose. I then told him I had no people. It was no particular occasion; I wished to go to church, as I had been going for the last six months, and I did not wish to be detained. He insisted upon my getting off the car; I told him I would wait on the car until the other car came up; he again insisted on my waiting in the street, but I did not get off the car; by this time the other car came up, and I asked the driver if there was any room in his car. He told me very distinctly, "No, that there was more room in my car than there was in his." Yet this did not satisfy the conductor; he still kept driving me out or off of the car; said he had as much time as I had and could wait just as long. I replied, "Very well, we'll see." He waited some few minutes, when the drivers becoming impatient, he said to me, "Well, you may go in, but remember, if the passengers raise any objections you shall go out, whether or no, or I'll put you out." I answered again and told him I was a respectable person, born and raised in New York, did not know where he was born, that I had never been insulted before while going to church, and that he was a good for nothing impudent fellow for insulting decent persons while on their way to church. He then said I should come out or he would put me out. I told him not to lay his hands on me; he took hold of me and I took hold of the window sash and held on; he pulled me until he broke my grasp and I took hold of his coat and held on to that. . . . He then ordered the driver to fasten his horses, which he did, and come and help him put me out of the car; they then both seized hold of me by the arms and pulled and dragged me flat down on the bottom of the platform. . . . I went again in the car, and the conductor said you shall sweat for this; then told the driver to drive as fast as he could and not take another passenger in the car; to drive until he saw an officer or a Station House. They got an officer on the corner of Walker and Bowery, whom the conductor told that his orders from the agent were to admit colored persons if the passengers did not object, but if they did, not to let them ride.When the officer took me there were some eight or ten persons in the car. Then the officer, without listening to anything I had to say, thrust me out, and then pushed me, and tauntingly told me to get redress if I could; this the conductor also told me, and gave me some name and number of his car; he wrote his name Moss and the car No. 7, but I looked and saw No. 6 on the back of the car.

"Every Possible Protection against Espionage"

After the bombing of Pearl Harbor in Hawaii and the U.S. declaration of war against Japan in late 1941, concern arose about the loyalty of Japanese Americans. Many residents of the West Coast worried about an attack from Japanese bombers, and the military feared that citizens of Japanese ancestry might aid the enemy. President Franklin D. Roosevelt issued the following executive order in 1942 authorizing the removal of 120,000 Japanese Americans, more than two-thirds of them native-born U.S. citizens, and their placement into concentration camps. The Supreme Court upheld the executive order and subsequent federal legislation in Hirabayashi v. United States *(1943) and* Korematsu v. United States *(1944). Most scholars today consider the forced incarceration and the Supreme Court cases that approved it to have been America's worst wartime mistake concerning civil rights.*

Whereas, The successful prosecution of the war requires every possible protection against espionage and against sabotage to national defense material, national defense premises and national defense utilities. . . :

Now, therefore, by virtue of the authority vested in me as President of the United States, and Commander in Chief of the Army and Navy, l hereby authorized and direct the Secretary of War, and the Military Commanders whom he may from time to time designate, whenever he or any designated Commander deem such action necessary or desirable to prescribe military areas in such places and of such extent as he or the appropriate Military Commander may determine, from which any or all persons may be excluded, and with respect to which, the right of any person to enter, remain in, or leave shall be subject to whatever restriction the Secretary of War or the appropriate Military Commander may impose in his discretion. The Secretary of War is hereby authorized to provide for residents of any such area who are excluded there from such transportation, food, shelter, and other accommodations as may be necessary, in the judgment of the Secretary of War or the said Military Commander and until other arrangements are made, to accomplish the purpose of this order. The designation of military areas in any region or locality shall supersede designation of prohibited and restricted areas by the Attorney General under the Proclamation of December 7 and 8, 1941, and shall supersede the responsibility and authority of the Attorney General under the said Proclamation in respect of such prohibited and restricted areas.

I hereby further authorize and direct the Secretary of War and the said Military Commanders to take such other steps as he or the appropriate Military Commander may deem advisable to enforce compliance with the restrictions applicable to each Military area herein above authorized to be designated including the use of Federal troops and other Federal Agencies, with authority to accept assistance of state and local agencies.

I hereby further authorize and direct all Executive Department, independent establishments and other Federal Agencies, to assist the Secretary of War or the said Military Commanders in carrying out this Executive Order, including the furnishing of medical aid, hospitalization, food, clothing, transportation, use of land, shelter, and other supplies, equipment, utilities, facilities and service.

This order shall not be construed as modifying or limiting in any way the authority granted under Executive Order 8972, dated December 12, 1941, nor shall it be construed as limiting or modifying the duty and responsibility of the Federal Bureau of Investigation, with response to the investigation of alleged acts of sabotage or duty and responsibility of the Attorney General and the Department of Justice under the Proclamation of December 7 and 8, 1941, prescribing regulations for the conduct and control of alien enemies, except as such duty and responsibility is superseded by the designation of military areas thereunder.