Chapter 3

The Right to Equal Protection of the Laws

"All, too, will bear in mind this sacred principle, that though the will of the majority is in all cases to prevail, that will to be rightful must be reasonable; that the minority possess their equal rights, which equal law must protect, and to violate would be oppression."

—President Thomas Jefferson,
First Inaugural Address,
March 4, 1801

All men are created equal." This phrase has stirred hearts around the world for more than 200 years. It is one of the values most associated with the United States, but nowhere is the language of equality among individuals found in the Constitution. It comes instead from the Declaration of Independence, the document that signaled the intentions of the founding generation. Not until after the Civil War did the nation's governing charter include equality before the law as a constitutional guarantee, when the Fourteenth Amendment promised, "Nor shall any State. . . deny to any person within its jurisdiction the equal protection of the laws."

When Thomas Jefferson wrote the Declaration of Independence, few people believed in social or economic equality. The document's language did not mean the founders intended to level society. Like others of their day, they accepted upper and lower classes, or social hierarchy, as natural. What they desired was an equal opportunity for people to make the most of their abilities and to stand equal before the law. This idea was quite radical in the late eighteenth century, even though it is common today. It departed sharply from the world of privilege enjoyed by the men who led the Revolution. The declaration also pledged more than these men were willing to grant in fact; equal opportunity did not apply to women, slaves, the poor, native Americans, and many immigrants. Yet as limited as the ideal was in practice, all Americans ultimately were heirs to its promise.

The notion of equality as an essential part of democracy became deeply embedded in American society during the first half of the nineteenth century. Alexis de Tocqueville, the French visitor whose classic work, *Democracy in America* (1835), remains the best guide to the young nation's character, noted the popular insistence that "rights must be given to each citizen or to no one." The Civil War tested this principle, but the Union victory reaffirmed not only the nation's unity but also its commitment to equality before the law.When it became apparent that the defeated Confederate states were intent on severely restricting the legal and economic rights of former slaves, Congress passed the Fourteenth Amendment, which the states ratified in 1868. It made all persons born in the United States citizens of the nation and of the state where they lived. It also prohibited any state from "abridging the privileges and immunities of citizens of the United States," or denying its citizens "due process of law" or "equal protection of the laws." For the first time, the concept of equality became part of the Constitution.

The framers of the Fourteenth Amendment used open-ended phases—"due process of law" and "equal protection of the laws"—that had no clear or settled definition. Most scholars believe that they intended, at a minimum, to apply the protections of the Bill of Rights to the states, but this is not what happened. In a

series of cases during the late nineteenth century, the Supreme Court ruled that Americans had to turn to their states, rather than the federal government, for protection of their rights. The justices also voided most federal laws designed to protect blacks and decided that Congress did not have the power under the amendment to prohibit private acts of discrimination. The Court in fact supported state laws requiring discrimination, most famously in *Plessy v. Ferguson* (1896), when it interpreted the equal protection clause to allow racial segregation as long as separate facilities were equal. The Fourteenth Amendment, the Court decided, "could not have been intended to abolish distinctions based upon color." This "separate but equal" standard used to justify legal discrimination made the equal protection clause, in effect, a dead letter.

African Americans did not accept segregation willingly, however. Throughout the first half of the twentieth century, they resorted increasingly to the courts to win recognition of their rights. Led by the National Association for the Advancement of Colored People's (NAACP) Legal Defense Fund, blacks won significant victories on issues related to voting, police brutality, and rights of the accused.World War II played a big role in changing American attitudes. Segregation and the violence against blacks that accompanied it reminded many Americans of Nazi Germany's efforts to breed a pure race and to exterminate entire groups of people who failed to satisfy Adolf Hitler's notion of desirable human traits. After black soldiers demonstrated their courage on the battlefields, President Harry Truman acknowledged their contribution in 1947 by ending segregation in the U.S. Army. In 1950, the Supreme Court held in two cases that segregated law schools and graduate programs could never be equal to ones provided for whites. Four years later, in Brown v. Board of Education, the standard of "separate but equal" was discredited completely when the justices unanimously decided that segregated education was inherently unequal; it violated the Fourteenth Amendment's promise of equal protection of the law.

The *Brown* decision was one of the most momentous in Supreme Court history. It stimulated a revolution in civil rights and revitalized the Fourteenth Amendment's equal protection clause. The unavoidable logic of *Brown* was that if separating people in school on the basis of race violated the equal protection clause, then so did racial segregation in other parts of public life. In case after case, litigants used the *Brown* doctrine successfully to challenge statutory segregation, while the civil rights movement pushed the nation to open all of American public life to equality before the law.

Soon the Court was faced with questions about laws that regulated private conduct on the basis of race. One of the most volatile of these issues concerned interracial marriage. Southern states prohibited it, but how could law regulate matters of the heart? Were these laws a violation of the equal protection guarantee of the Fourteenth Amendment? In the 1960s, a young Virginia couple was determined to find out. Newlyweds Richard and Mildred Loving were asleep in their home in Caroline County, Virginia, in July 1958, when they were awakened by flashlights shining in their faces. The intruders demanded to know why they were in bed together, and the Lovings produced a marriage certificate from the District of Columbia. The leader of the group, the local sheriff, told them the certificate was not valid in Virginia and arrested them for violating the state's Racial Integrity Act of 1924, which prohibited a white from marrying anyone other than another white person. Richard was white; Mildred, black. Their crime was marrying each other. At their trial six months later, they waived a jury trial and accepted a deal from the judge. In exchange for a suspended sentence of

"I think that democratic peoples have a natural taste for liberty. Left to themselves, they seek it out, love it, and suffer if deprived of it. For equality, however, they feel an ardent, insatiable, eternal, invincible passion. They want equality in liberty."

—Alexis de Tocqueville, *Democracy in America* (1835)

one year in the state prison, they would leave Virginia for twenty-five years. "Almighty God created the races white, black, yellow, malay and red," the judge explained later when the case came back to him on appeal, "and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix." This view was by no means an isolated one. A public opinion poll in 1965 revealed that 42 percent of northern whites and 72 percent of southern whites supported laws banning interracial marriages.

The Lovings moved to Washington, D.C., but found it difficult to adjust to urban life. Mildred especially wanted to move back to the county where both she and Richard had family. In desperation, she wrote U.S. Attorney General Robert F. Kennedy, asking for his help. The Justice Department referred the letter to the American Civil Liberties Union (ACLU), which agreed to take the case. It offered the civil rights organization an opportunity to challenge the anti-mixing laws then on the books of sixteen states. The Lovings reluctantly accepted the ACLU's plan. They were private people who preferred to be left alone in their marriage. "We have thought about other people," Richard Loving told a reporter, "but we are doing it for us—because we want to live here."

After Virginia's highest court unanimously refused to overturn their convictions, the Lovings appealed to the U.S. Supreme Court. Their argument was straightforward: the statutes were "relics of slavery" and expressions of racism. "There are no laws more symbolic of the Negro's relegation to second-class citizenship. . . . [T]hey are legalized racial prejudice, unsupported by reason or morals, and should not exist in a good society," their petition argued. In the oral presentation, the Lovings' attorney advanced another, more poignant reason why the justices should void the marriage law. Richard had asked him to "tell the Court I love my wife, and it is just unfair that I cannot live with her in Virginia."

The justices agreed, 9 to 0. "The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States," Chief Justice Earl Warren wrote. "There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the equal protection clause." Racial classifications are "so directly subversive of the principle of equality at the heart of the Fourteenth Amendment," he concluded, that they also deprived citizens of

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"[I]n view of the constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guarantied by the supreme law of the land are involved."

—Justice John Marshall Harlan, dissenting opinion,
Plessy v. Ferguson (1896)

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liberty without due process of law.

Surprisingly, there was no public backlash to the decision in *Loving v. Virginia*, despite the social outrage that historically had attended intimate interracial relationships. Most Americans were sympathetic to the need to redeem the promise of equal protection made by the Fourteenth Amendment, at least when it came to racial classifications. For the Lovings, the result was more immediate and more personal. "I feel free now," Mildred said when she learned of the decision. Soon they returned to Virginia to live among family and friends without fear of going to prison. Their lives had changed, but they never understood why the public should be interested in their case. "All we ever wanted," they claimed, "was to get married, because we loved each other."

In the series of cases from *Brown* to *Loving*, the Supreme Court gave life to the equal protection clause and extended the promise of equality before the law to racial minorities who previously had been denied this right. But in some ways these cases were easy once the justices decided that laws requiring segregation by race violated the Fourteenth Amendment. What followed were issues far more difficult to resolve because they involved not legal discrimination but rather attempts to remedy past wrongs based on race and other suspect classifications such as gender.

Ending legal segregation did not end racial separation.Whether for economic opportunity or prejudice against minorities, many whites moved from cities into suburbs, leaving the inner cities poorer and less integrated. One response was to end segregation in fact and not simply in law. For example, schools were segregated in part because students lived in all-white or all-black neighborhoods, so courts required busing of blacks into white schools to ensure a racial balance approximately equal to the entire community's ratio of back and white citizens.

Another response was to allow affirmative action programs to guarantee minority access to higher education, civil service positions, labor unions, and government contracts. Under these programs, governments could take race into account as a way to increase minority participation. Although many people viewed these efforts as reverse discrimination, the Supreme Court upheld many affirmative action programs, especially in states where legal segregation had been strongest. The most important case was *Regents of the University of California v. Bakke* (1978). The Court allowed universities to consider race as a factor in admission decisions as a way of boosting the number of minority students, so long as they did not use strict racial quotas to reach a desirable mix, a result the justices reaffirmed in 2005 in two decisions involving the University of Michigan. The justices also struck down laws that resulted in discrimination, even if the result was unintentional and the law was fair otherwise. Finally, in 1987, in *St.Francis College v. Al-Khazraji*, they expanded the legal definition of race beyond its traditional meaning to include "identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics."

Equal protection of laws applied to any person, an Arab in this case, who was a member of one of these classes. The successful attack on racial discrimination was not lost on women, who looked to the equal protection clause as a way to remove inequalities based on gender. In the 1970s, the Court began to strike down gender classifications as a violation of the Fourteenth Amendment, just as they had done with racial classifications in earlier decades. The justices were responding in both instances to a broad national consensus brought about

in the first instance by the civil rights movement and in the second by the women's movement. By the mid-1990s, one of the last male-only bastions fell before the equal protection standard when the Court ruled, in *United States v. Virginia*, that Virginia could not deny admission to women at the state-supported Virginia Military Institute. The belief that women would falter under the rigors of military training was a stereotype that could not be used to deny an individual's right to equal protection. Even though an Equal Rights Amendment narrowly failed to win ratification, courts and legislatures at the federal and state level increasingly refused to accept discrimination based on gender.

Equal protection does not mean absolutely equal treatment. By its nature, law relies on classifications, and it treats people differently for good reason. We as a society do not provide driver's licenses, for example, to people who are blind, and we accept the idea that seniority confers different benefits, such as higher pay or greater privileges, on people who do the same job.What we do not accept is different treatment based solely on race, gender, or other classifications—age, sexual orientation, physical disability, among others—that have no reasonable relationship to the job, admission criteria, eligibility requirements, or the like. Also, equal protection does not apply equally to all groups. Distinctions based on race are more suspect than those based on gender, in part because the Fourteenth Amendment was designed specifically to eliminate the ill effects of racial classifications, even if the Court did not apply it in this fashion until the last half of the twentieth century. Not all our expectations for equal treatment before the law are based on the Fourteenth Amendment, however. The Americans with Disabilities Act (1990) is a federal statute, for instance, and not a constitutional requirement, but it and similar statutes reflect our constitutional commitment to equality.

The late-twentieth-century movement toward equality—the so-called egalitarian revolution—came from a variety of circumstances, but it could not have occurred without a Constitution capable of accommodating new meanings. John Marshall, a member of the founding generation and perhaps the nation's greatest chief justice, reminded his contemporaries that the document they had ratified in 1788 would always have "to be adopted to the various crises of human affairs." A second justice with the same surname but not the same heritage, Thurgood Marshall, the first African American on the Supreme Court, stated it more bluntly two centuries later:

> The men who gathered in Philadelphia in 1787 could not have imagined nor would they have accepted that the document they were drafting would one day be construed by a Supreme Court to which had been appointed a woman and a descendent of an African slave. "We the People" no longer enslaves, but the credit does not belong to the framers. It belongs to those who refused to acquiesce in outdated notions of "liberty," "justice," and "equality" and who strived to better them.

History presents new opportunities to apply—and extend—older concepts. The principle of equal protection of the law is one of the best examples of how our constitutional rights gain meaning from experience. Americans have always been committed to allowing individuals an equal opportunity to reach their full potential, to engage in the pursuit of happiness on equal terms with each other in the marketplace, in education, and in other parts of society. We have also understood that the ability to compete equally depends upon equality before the

law. The idea of equal protection of laws is a fundamental concept of democratic citizenship. With it, each of us can participate in decisions that affect us and our society, and we each bear responsibility for the choices we make. Without it, we would have categories of citizenship, with some members of society enjoying greater rights and power than others. We as a people have rejected this more restricted view of the role and responsibilities of citizenship by embracing, ultimately, a national goal of equality before the law. In doing so, we have acted to redeem the promise of 1776 that all men and women are created equal.

"A Broader Protest Is Made in Behalf of Woman"

Margaret Fuller was a writer, lecturer, early women's right advocate, and one of the most influential literary personalities in the nineteenth century. Daughter of a U.S. congressman and a close friend of Ralph Waldo Emerson, she organized a series of discussion groups in the 1840s around topics such as art, education, and equal rights for women. Many of the leading crusaders for equal rights for women attended these sessions. Fuller developed the ideas from these discussions more fully in a major work,Woman in the Nineteenth Century (1845), which argued for the independence of women. Fuller was America's first public intellectual woman of letters, and her work helped to shape the early women's rights movement.

It should be remarked that, as the principle of liberty is better understood, and more nobly interpreted, a broader protest is made in behalf of Woman. As men become aware that few men have had a fair chance, they are inclined to say that no women had a fair chance. . . .

We would have every arbitrary barrier thrown down. We would have every path laid open to Woman as freely as to Man. Were this done, and a slight temporary fermentation allowed to subside, we should see crystallizations more pure and of more various beauty. We believe the divine energy would pervade nature to a degree unknown in the history of former ages, and that no discordant collision, but a ravishing harmony of the spheres, would ensue.

Yet, then and only then will mankind be ripe for this, when inward and outward freedom for Woman as much as for Man shall be acknowledged as a right, not yielded as a concession. As the friend of the negro assumes that one man cannot by right hold another in bondage, so should the friend of Woman assume that Man cannot by right lay even well-meant restrictions on Woman. . . .

What Woman needs is not as a woman to act or rule, but as a nature to grow, as an intellect to discern, as a soul to live freely and unimpeded, to unfold such powers as were given her when we left our common home. . . .

It is therefore that I would have Woman lay aside all thought, such as she habitually cherishes, of being taught and led by men. I would have her, like the Indian girl, dedicate herself to the Sun, the Sun of Truth, and go nowhere if his beams did not make clear the path. I would have her free from compromise, from complaisance, from helplessness, because I would have her good enough and strong enough to love one and all beings, from the fullness, not the poverty of her being.

Arguments about an Opinion

After a Supreme Court case has been decided, the justice assigned to write the majority opinion circulates a draft for comment by the other justices. Chief Justice Earl Warren, who wrote the opinion in Loving v. Virginia *outlawing racial classifications, received the following memo from Justice Byron White, who expressed a reservation about Warren's draft. White told the chief justice that he prefers not to say that any legal classification by race is illegal because he thinks there might be an instance, "although perhaps rare," where it would be rational to do so. In the end, however, he agreed to support the opinion as the chief justice wrote it. The memo, dated May 31, 1967, reveals how the justices confer with each other to reach a decision, especially how they try to persuade other justices.*

Re: No. 395 - Loving v. Virginia
Dear Chief:
I may misunderstand your opinion, but it seems to me that we must meet the second contention made by the State which you mention on page 7 of your opinion—the so-called rationality of the statutory classification—and that you do meet it by saying either that there can be no rational racial classification, at least where criminal liability is concerned, or that the test is much more onerous than mere rationality where racial classification are involved and that this heavier burden has not been met here. I prefer the second approach since I think there are some racial classifications, although perhaps rare, which I would approve, although I see no reason for me or the Court to say so at this point.

Also, if the statute satisfied the Equal Protections Clause, I would not hold it a violation of due process as "arbitrary." On the other hand, since it does not meet equal protection standards, it may automatically be a violation of due process also. All in all, I see no reason to reach the due process question.

Perhaps in the interest of time, I should just concur in the result on the ground that the statute violates the Equal Protection Clause since the heavy burden of justifying the racial classification employed by the statue has not been met by the State in this case.

Sincerely,
Byron