

Brown

- Equal protection is a principle central to our nation's legal traditions and at the heart of our Constitution. Judicial interpretation and legislative action have enunciated and amplified these principles, most notably with passage of the Reconstruction Amendments and the Supreme Court's landmark decision *Brown v. Board of Education*.
- *Brown* made clear that the Constitution guarantees equality, not as an abstract principle, but as a lived experience in a social context. That is why the holding in *Brown* has been extended to invalidate segregation on public transportation, at places of recreation, and in other segregated spaces.

Brown cannot be reconciled with originalism

- *Brown* also demonstrates the failure of originalism, which cannot be reconciled with the opinion's vision of the equal protection guarantees of the Constitution. Indeed, the Court in *Brown* explicitly rejected an originalist analysis. To justify *Brown*, originalism must posit that the federal and state legislators who ratified the Fourteenth Amendment understood it to abolish segregated schools. Given the widespread practice of school segregation in the states and the paucity of evidence that the enacting Congress believed the Amendment would radically transform public schooling, it is no wonder that the unanimous Court in *Brown* found the original intent "[a]t best . . . inconclusive." Indeed, for over half a century, a scholarly consensus across the ideological spectrum has recognized that *Brown* cannot be explained on originalist grounds.

Brown and "colorblindness"

- Chief Justice John Roberts has asserted that the violation in *Brown* was that "schoolchildren were told where they could and could not go to school based on the color of their skin" and that the Constitution requires "'admission to the public schools on a nonracial basis.'" But the superficial neutrality of this phrasing paints a false portrait of history by implying that segregation imposed equal burdens on blacks and whites alike. As Justice Stevens observed, "it was only black schoolchildren who were so ordered; indeed, the history books do not tell stories of white children struggling to attend black schools." Neither history nor common sense supports Chief Justice Roberts's conclusion that "assign[ing] black and white students to *different* schools in order to *segregate* them" presents the same constitutional evil as "assign[ing] black and white students to the *same* school in order to *integrate* them." Moreover, in what sense is colorblindness "neutral" when its foreseeable result is, as it is in many communities, the assignment of schoolchildren to racially separate and unequal schools? The same criticism applies to another entailment of so-called neutral principles—the intent doctrine of *Washington v. Davis*—which provides a safe harbor for policies that, while not demonstrably motivated by race, show deliberate indifference to the racial inequalities they produce. The lesson of *Plessy*, revealed in *Brown*, is that "the seduction of 'neutral principles' must be tempered by an honest accounting of relevant social facts." In other words, the constitutional meaning of equality cannot be forged in a vacuum of legal formalism.

Gender Equality

- The constitutional protection of equality has also been determined to prohibit gender discrimination, an understanding that again demonstrates how contemporary social perceptions legitimately influence the task of interpreting Constitutional principles. Although suffragists during the nineteenth century actively fought for the abolition of slavery, their claim to equal citizenship was not part of the original understanding of the Fourteenth Amendment. It was in 1971, in *Reed v. Reed*, that the Supreme Court for the first time invalidated a gender classification under the Equal Protection Clause. Subsequently, the Court invalidated unequal housing and medical benefits for husbands and wives (*Frontiero v. Richardson*), limits on differing social security benefits for widows and widowers (*Weinberger v. Weisenfeld*), and disproportionate parental support for boys and girls (*Stanton v. Stanton*), among others.

Congressional Enforcement of Civil Rights

- Subsequently, through both Congressional legislation and Court interpretation, the provisions of the Constitution that guarantee equality have been held to embrace other minority groups. Clauses that authorize Congress "to enforce . . . by appropriate legislation" the guarantees of those amendments have allowed legislators to embrace protections against age (the Age Discrimination in Employment Act of 1967) and disability (the Americans with Disability Act in 1990). When judicial interpretation of Congress's enforcement powers has embraced the democratic implementation of constitutional rights, the nation has made progress toward greater liberty and equality, with the inverse being true as well. When this structural design has operated as intended, it has strengthened the core of civil rights protections that Americans enjoy.