

A Colorblind Constitution? A Historian Takes the Long View

Egalitarian rhetoric collides with segregation and racism.

by Patricia Hagler Minter

Revolutionary principles guided the development of the Constitution and the Bill of Rights. But irreconcilable differences on the question of slavery rendered the Constitution silent on the subject.

This article examines America's unsteady progress toward racial equality through the firestorms of the founding generation, the Civil War, Reconstruction, Jim Crow, and *Brown v. Board of Education*.

As American society grows more diverse, the question of colorblindness as a desirable goal for public policy has once again appeared. Proponents both for and against policies such as affirmative action and the continuation of school desegregation plans like to cite the "colorblind Constitution" as their guiding principle. In this article, I trace the idea of "colorblindness" from the founding generation to the post-*Brown* struggle to find a solution to the question of race in American legal culture.

A Specter Haunting the Convention: Slavery and the Founders

In 1775, the Continental Congress asserted in the *Declaration of Causes and Necessity of Taking Up Arms* that Americans "resolved to die freemen rather than live Slaves." The conception that the British Parliament desired to "enslave America" was a powerful rhetorical weapon as colonials developed a revolutionary consciousness. Yet these ideals of liberty and equality came into direct conflict with the realities of slavery and the existence of free blacks whose presence raised uncomfortable questions for the revolutionary generation. Patriots did not refer to the obvious contradiction of chattel slavery, but many recognized as long as they held half a million blacks in bondage that rhetoric about the defense of liberty would ring hollow. Enlightenment-era theories about natural rights provided a basis for abolitionist arguments.

When Americans rejected monarchy and embraced republicanism in 1776, the egalitarian promise of liberty for all was far from guaranteed. Conceptions of liberty

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and equality conflicted with the reality of racial subordination, not only of slaves but also of free blacks. Anti-slavery advocates enjoyed their greatest victories at the state level between 1776 and 1787, as several post-revolutionary state constitutions undermined the institution by incorporating abolition (Vermont, 1777), “free and equal” clauses (Massachusetts, 1780), and gradual emancipation of slavery (Pennsylvania, 1780; Connecticut and Rhode Island, 1784). When the framers of the Constitution convened in Philadelphia in 1787, slavery had morphed from a national issue into a sectional one.

Revolutionary principles sometimes triumphed over racist ideology and class interests, but this would not be the case at the Constitutional Convention. Although many delegates were concerned about the obvious contradictions between egalitarian rhetoric and the continued existence of slavery (and a few expressed overtly abolitionist sentiments), there was little chance that the Convention would adopt any meaningful anti-slavery language as they framed the new governing document. Simply stated, Southern delegates were unwilling to accept any provisions that might threaten the region’s economy and the status of the region’s powerful planter class; without the Southerners’ support, constitutional ratification and continued union were impossible. The price of the Constitution was concession by anti-slavery delegates on the slavery question.

The issue of representation was not only the biggest victory for Southern delegates, but it also became the most lasting consequence of this compromised document, sowing the seeds of regional antipathy that exploded later in civil war. The words *slave* and *slavery* appear nowhere in the Constitution, but their ghostly presence loomed over the language on representation. Although they

failed to win approval for counting of slaves as full persons, Southern delegates won the debate on whether or not slaves could count toward population for purposes of apportionment, mandating that apportioned representatives among the states “shall be determined by adding the Number of free Persons . . . and . . . three fifths of all other Persons.”

By wielding their human property for political power, Southerners increased their power in national government. Over the next seventy years, this became the means through which the Southern congressional delegations won political battles and shaped the Constitution into an overtly pro-slavery document. Although delegates eventually agreed to include a section gradually abolishing the odious trading of slaves by 1808 in Article IV, section 2 of the Constitution, the other significant pro-slavery victory for Southerners was the inclusion of the “fugitive slave clause” in the same section. This clause did not overtly address slavery, but its wording concerned interstate relations (comity) and suggested that states should not prevent

slaveowners from retrieving their property, should slaves flee to another state. Once ratified, the U.S. Constitution did represent “a new order for the ages,” but at the same time it contained several “poison pills” that, while colorblind on their face, would make race and personal status into political and cultural issues that would spark the Civil War. Ultimately, the question of whether or not the Union would continue would be determined on the field of battle, not in the halls of Congress or the nation’s courtrooms.

“A New Birth of Freedom”: Civil War and the “New” Constitution

When the guns fell silent at Appomattox Courthouse in 1865, the promise to recreate the nation represented “a new birth of freedom” for all Americans. For no group were the stakes higher than for newly freed African-American men and women. The end of the Civil War brought a nascent demand for equality from blacks. Legally transformed from property to persons by the ratification of the Thirteenth Amendment in 1865, freed people now needed



A small portrait of Lincoln is included at the bottom of an engraving celebrating the emancipation of slaves, probably around the time of the Emancipation Proclamation.

public policy to redefine the political and social landscape. For African Americans, a colorblind Constitution would have to be more than a “negative” that prevented whites from recreating a culture of enslavement. Instead, their vision of freedom encompassed guarantees of property rights, political rights, and the freedom to move freely within white society—to go into every arena where only recently they could not go. In 1865, Southern blacks organized state conventions (as their Northern counterparts had done before the war) and demanded that America finally deliver on the promises of the Declaration of Independence. Many members of the Republican Party (dubbed “Radicals”) shared this vision, and joined by their more moderate colleagues, they drafted the Fourteenth and Fifteenth Amendments to the Constitution. With the ratification of the three War Amendments, it appeared that the promise of a “colorblind Constitution” might be realized.

Battles over African-American voting during Reconstruction raged across the South, even as Southern states elected their first state-level black officeholders and Mississippi sent two African Americans to serve in Congress. Although the ratification of the Fifteenth Amendment in 1870 promised long-awaited political rights that could not be denied “on account of race, color, or previous condition of servitude,” the escalation of Ku Klux Klan violence in many

southern states forced the Republican-dominated Congress to enact bold new laws. The Enforcement Acts of 1870 and 1871 sought to deliver on the promises made by the War Amendments. When political opponents charged that these enforcement provisions overstepped the powers granted to Congress, the Republican framers argued that the federal government had an inherent right to protect its citizens, whether the threat came from state action or private acts of violence.

The U.S. Supreme Court, however, was reluctant to realize the full potential of the War Amendments to transform American legal and racial culture. In the *Slaughterhouse Cases* (1873), *U.S. v. Cruikshank* (1876), and *U.S. v. Reese* (1876), the Court interpreted the amendments in the narrowest possible fashion and struck down key portions of the Enforcement Acts as unconstitutional. Acts of individual violence or political discrimination were declared beyond the Constitution’s scope—only state action was subject to federal law. The Court’s decisions reflected a lack of commitment to pursuing aggressively the “equal protection of the laws.” But it also represented the Court’s reluctance to upset the long-established principle of federalism. As historian Donald Nieman put it, “Federalism was a principle that mattered . . . (but) this is not to say that race did not matter.” By 1883, however, race clearly mat-

tered much less to the Court than attempting to restrict the revolutionary transformation of federalism that the War Amendments seemed to herald. In the *Civil Rights Cases*, the Court struck down the Civil Rights Act of 1875, the last piece of Radical legislation that tried to deliver on the promise of equal access in public accommodations. With the last piece of Reconstruction era protection effectively gutted, the Court cleared the path for Southern state legislatures to reverse gradually the colorblind, egalitarian policies of Reconstruction.

The Triumph of Jim Crow: *Plessy* and the Era of “Separate but Equal”

From the end of federal occupation in 1877 until the turn of the century, white Southern Democrats slowly reversed the Reconstruction-era policies. One major watershed in their efforts came in 1896 when the Supreme Court handed down its infamous decision in *Plessy v. Ferguson*. By setting the legal fiction of “separate but equal” as precedent and by conflating this fiction with “colorblindness,” the Court cleared the way for an era of legalized racial separation.

Homer Plessy, who self-identified his race as “mixed,” agreed to serve as plaintiff for a test case initiated by black New Orleans citizens to test the 1890 Louisiana law requiring railroads to provide “separate but equal accommodations” for black and white passengers. Lower federal courts had already reached decisions in several cases in the 1880s (involving black middle-class female plaintiffs), in which they relied on a version of the “separate but equal” standard; however, these decisions usually turned on the “equal” portion of the equation, ordering remedies for black plaintiffs forced into second-class coaches solely on account of race. The Supreme Court took a different turn on

FOR DISCUSSION

Was the Constitution truly colorblind when it was ratified in 1787? What, if any, references did the Constitution make to “slavery” or to “blacks”?

Was the Civil War an inevitable result of the framers’ unwillingness to solve the “slavery controversies”?

Are “colorblind” and “separate but equal” similar concepts? How might they be different in their meaning or application?

the legal fiction of “separate but equal” in Plessy’s case. Reading colorblindness completely out of the Fourteenth Amendment, Justice Henry Brown’s majority opinion upheld the Louisiana statute by asserting that the amendment’s framers surely understood that there was a deep aversion in America to racial intermingling. Instead of a colorblind society, he argued that the framers merely intended to guarantee “the absolute equality of the races before the

The Age of Segregation: The Road to *Brown v. Board of Education*

If the end of the nineteenth century witnessed the creation of a “colorblind” legal fiction to justify segregation, the first fifty-four years of the twentieth century found African Americans crafting a new ideology of egalitarianism and a legal strategy to reverse the fiction of “separate but equal.” Segregation and disfranchisement shaped the lives of blacks, particularly in the South, by limiting their political and social power. The realities of segregated schools were particularly devastating for black children in the Jim Crow South, where they presented the most visible evidence of the untruth of “separate but equal.”

The National Association for the Advancement of Colored People (NAACP), founded in 1909, would lead the legal campaign to eliminate legalized racial separation. Fighting Jim Crow in the federal courts, NAACP lawyers won victories against the grandfather clause (1915) and segregated housing ordinances (1917), which revealed the power of targeted litigation as an instrument for social change. Building on their successes, the NAACP formed an in-house litigation organization, the Legal Defense Fund. Led from 1935 to 1938 by Charles Houston and then afterwards by Thurgood Marshall, the LDF developed a legal strategy to fight Jim Crow by systematically proving that “separate but equal” was a pernicious legal fiction that masked overtly racist public policy denying African Americans even the most basic equal protection rights.


The LDF’s strategy was to file lawsuits in federal court that first targeted segregated higher education, where fundamental inequality was fairly easy to prove, winning key cases in 1938 and 1944 in which white law school and

graduate school programs were ordered to admit black applicants, because the separate Jim Crow schools were inherently unequal. Once the NAACP’s legal team had established precedents that directly challenged the “separate but equal” doctrine, they then turned their attention to public primary and secondary schools.

By the early 1950s, when Marshall and his legal team launched their full offensive against segregated education, grass-roots support for civil rights had developed in black communities across the nation. Not only did many African Americans dream of equality in a colorblind society, but they also came to believe that it could happen in their lifetimes. The grass-roots support for this vision helped bring forward the five individual cases that would be argued and decided together as *Brown v. Board of Education*. Using social scientific evidence as well as precedents to argue that separate facilities based on race were inherently unequal and therefore unconstitutional, the NAACP’s lawyers attacked the *Plessy* decision at its very heart.

When Chief Justice Earl Warren announced the decision of a unanimous

continued on page 27



African-American men carry a coffin and a “Here Lies Jim Crow” sign down the middle of a street as a demonstration against “Jim Crow” segregation laws.

law,” but not social equality in public accommodations. If the legal fiction of “separate but equal” carried any “badge of inferiority” for African Americans, Brown continued, “it is . . . solely because the colored race chooses to put that construction upon it.” By placing its stamp of approval upon legalized racial separation, the Court cleared the way for the proliferation of segregation laws in the South, which not only compromised social rights such as public accommodations and schools, but also led to the systematic dismantling of black political rights through disfranchisement. Black Southerners entered the new century stripped of the egalitarian promises of Reconstruction, America’s “second revolution.”

For Further Reading

Klarman, Michael. *From Jim Crow to Civil Rights: The Supreme Court, Race, and the Constitution* (New York: Oxford University Press, 2004).

Lofgren, Charles. *The Plessy Case: A Legal-Historical Interpretation* (New York: Oxford University Press, 1988).

Nieman, Donald. *Promises to Keep: African-Americans and the Constitutional Order, 1776 to the Present* (New York: Oxford University Press, 1991).

Court in *Brown* on May 17, 1954, Warren addressed social scientific evidence that “separate but equal” was in fact a pernicious fiction. Instead of overruling *Plessy* directly, however, which would imply that Southerners had supported a blatantly unconstitutional white supremacist system for over fifty years, he held that recent events had made segregation incompatible with equal protection. Citing the damage done to African-American children by the racial caste system perpetrated by Jim Crow schools, Warren concluded,

“separate educational facilities are inherently unequal.” The following year, the Warren Court ordered federal judges to enforce the desegregation of Southern schools “with all deliberate speed.”

After *Brown*

First in the South and later in the rest of the country, whites mounted determined resistance campaigns against desegregation in the 1950s until the 1970s. They de-emphasized “speed” in favor of deliberate obfuscations of the inte-

grated schools promised by *Brown*. When the fight over school desegregation moved back into the lower federal courts for enforcement, it also raised questions about the viability of a “colorblind” interpretation of the Constitution’s equal protection clause and, indeed, questions about whether a colorblind legal culture was even the right model for a society in which equality under the laws was a reality. This debate still persists, as federal courts continue to wrestle with the ideologies and realities of a “colorblind” Constitution.

Did You Know? Some Quick Facts about *Brown v. Board of Education*

- *Brown* was actually two decisions — a 1954 decision (*Brown I*) declaring separate schools “inherently unequal” and a 1955 decision (*Brown II*) authorizing implementation of school desegregation “with all deliberate speed.”
- Both *Brown* decisions were unanimous (9-0). Chief Justice Earl Warren worked hard to secure the support of Justice Robert Jackson, who had planned to write a concurring opinion, and Justice Stanley Reed, who had intended to dissent.
- *Brown I* actually involved five separate cases—in South Carolina (*Briggs v. Elliott*), Delaware (*Gebhart v. Belton*), Virginia (*Davis v. School Board of Prince Edward County*), the District of Columbia (*Bolling v. Sharpe*), and Kansas (*Brown v. Board of Education of Topeka, Kansas*).
- The plaintiff in the Kansas case was Linda Brown, an 11-year-old schoolchild in Topeka, Kansas.
- Topeka, Kansas, had segregated public elementary schools for white children and for African-American children. Linda Brown lived four blocks from the nearest white school, but two miles from the nearest African-American school.
- The *Brown* opinion relied heavily upon studies by psychologist Kenneth B. Clark on the negative effects of prejudice and discrimination on young children.
- Several organizations filed *amicus curiae* briefs in *Brown* on behalf of the plaintiffs, including the American Jewish Congress, the American Civil Liberties Union, the American Federation of Teachers, the Congress of Industrial Organizations (CIO), and the American Veterans Committee.
- *Brown* was the logical culmination of previous Supreme Court decisions, including ones that outlawed “separate but equal” facilities in law schools (*Sweatt v. Painter*, 1950) and graduate schools (*McLaurin v. Oklahoma State Regents for Higher Education*, 1950).
- Thurgood Marshall, who later served as the first African-American justice on the U.S. Supreme Court, led the litigation efforts on behalf of the NAACP in *Brown*.
- The *Brown* decisions addressed only public schools segregated by law. Later decisions and orders of the Supreme Court would strike down segregation (“Jim Crow”) laws in such venues as public transportation, state parks, and more.