

Social Policy: Civil Rights

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Follow through debate over education

- **Recent controversy in higher education: Is affirmative action discrimination?**
- **If it is, is it acceptable?**
 - Are civil rights violated or affirmed?
 - Whose rights are we talking about?
 - What happens when rights conflict?
- **Both a policy issue and a Constitutional issue**
- **Use Courts to decide.**
- **Part of a historical debate.**

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Civil rights as a policy issue

- **Constitutionally protected rights**
 - Whose rights?
 - What happens when rights conflict?
- **Central role for courts.**
- **Education, voting, economic opportunity form the core.**
- **Historical move from negative to positive liberty implies policy change.**
- **Policy change is also social change.**
- **We're still debating these issues.**

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Understanding the history of civil rights and affirmative action

- What changed in policy terms?
- How was it changed?
 - By whom?
 - In what way?
- Why the courts?
- What is special about the courts as a policy actor?
- What is distinctive about civil rights??
- When is discrimination acceptable and when is it unacceptable?

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Historical basis of policy

- Amendment XIV Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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Plessy v. Ferguson

- Organized challenge to Jim Crow
- Invoked Equal Protection Clause of 14th Amendment
- Opens an interaction in courts that ties public policy to Constitution
- Establishes “separate but equal” as the law of the land

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Justifying separate but equal

- " The object of the [14th] Amendment was undoubtedly to enforce the absolute equality of the two races before the law, but *in the nature of things* it could not have been intended to abolish distinctions based upon color, or to enforce *social*, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either."

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- "We consider the fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. It is not by reason of anything found in the act, but solely because the colored race chooses (sic) to put that construction upon it."
- The argument also assumes that social prejudices may be overcome by legislation and that equal rights cannot be secured to the negro except by an enforced commingling of the races. We cannot accept this proposition. If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits and a voluntary consent of individuals."

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The pattern of action & decisions: Jim Crow

- Pattern of formal and informal segregation
- Began in the late 1890s
- Systematic effort to "codify (or strengthen) in law and state constitutional provisions subordinate position of African Americans in society:"
- separating the races in public spaces, and
- preventing adult black males from exercising the right to vote." R. F. Davis, "Creating Jim Crow"
<http://www.jimcrowshistory.org/history/creating2.htm>

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What did separate but equal mean?

- You could drive through Clarendon County, as I often did . . . and see these awful-looking little wooden shacks in the country that were the Negro schools. The white schools were nothing to be really enthusiastic about, but they were fairly respectable looking . . . The Negro schools were just tumbledown, dirty shacks with horrible outdoor toilet facilities. " *Waties Waring in Kluger (1975) pp. 301-302*

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Effort to change policy

- **Organized by NCAA**
- **End policy of moderating demands from Depression and WWII**
- **Provide opportunity for returning veterans who had sense of right and access to educational funds**

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NAACP strategy

- Separate but equal as practiced was a “false coin:”
- Focus on higher education
- Lawsuits will improve conditions;
- Raise costs of compliance (teachers’ salaries also raised);
- Chip away at *Plessy*.

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Using the courts to leverage policy change

- Focus on higher ed.
- Use courts to contest: separate is not equal
 - *Gaines*
 - *Sipuel*
 - *Sweatt v. Painter*
 - *McLaurin*
- Secure tangible benefits while raising costs of compliance.
- Gradually undermine *Plessy*.

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Searching for the right case

- *McLaurin Holding*: “Broader issues have been urged for our consideration, but we adhere to the principle of deciding constitutional questions only in the context of the particular case before the Court Because of the traditional reluctance to extend constitutional interpretations Much of the excellent research and detailed argument presented in these cases is unnecessary to their disposition.” (Vinson)

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Brown

- **Complex background**
- **Local conflicts**
- **Attempt at direct appeal for reform fail**
- **Local NAACP appeals for help**
- **Brown willing, but not eager; a strategic choice as plaintiff**

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Brown argued 3 times

- 1st round with Vinson
- Court split; Constitutional grounds to overturn *Plessy* uncertain
- Delayed for reargument
- Vinson dies; Warren a moderate Republican like Eisenhower appointed
- What is the basis for the appointment that swings the Court?

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Arguments in Brown

- Violates Equal Protection Clause of 14th Amendment: Defense is respect of precedent
- Foundation for separation eroded by prior decisions
- Court has to reaches to find harm that will allow to overturn *Plessy*.
- Uses social science to conclude that separate is inherently unequal.

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■ Today, *education is perhaps the most important function of state and local governments.* Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society.

■ We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does.

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■ The impact is greater when [segregation] has the sanction of the law, for the policy . . . is usually interpreted as denoting the inferiority of the negro group . . . Segregation . . . has a tendency to . . . deprive [negro children] of . . . the benefits they would receive in a racial[ly] integrated school system . . . Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson* , this finding is amply supported by modern authority.

■ We conclude that . . . the doctrine of "separate but equal" has no place. *Separate educational facilities are inherently unequal* . . . [W]e hold that the plaintiffs . . . are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.

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Brown I

- Unanimous
- Authored by Warren
- Short and accessible
- Reasoned discussion not an attack
- Limited: only public schools
- Compromise: segregation immediately illegal; remedy delayed

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Court decision acknowledges policy context

- “The genius of the Warren opinion was that it was so simple an unobtrusive. He had come from political life and had a keen sense of what you could say in this opinion without getting everybody’s back up. His opinion took the sting off the decision, it wasn’t accusatory, and it didn’t pretend that the 14th Amendment was more helpful than history suggested--he didn’t equivocate on that point.”
B.Prettyman, Clerk to Justice Jackson in Balkin(2001) 38

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Brown changed law but not policy as “pattern . . .”

- Court conflicted over what sort of opinion would help
- Desegregate “with all deliberate speed”
- Left discretion to regional district courts
- Limited relief to parties not classes
- “Deliberate speed” used to justify delay and intransigence

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Morgan v. Hennigan

- Address segregation in the North
- Part of effort to extend scope of Brown to “de facto” cases
- Previous cases had extended, but not all the way
- No definitive Supreme Court ruling

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Court decision sets policy and implementation

- Requires busing
- Policy provokes violence
- School committee defies
- "city is occupied"
- Court takes over the Boston schools

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Questions/issues raised

- Why reshape policy through the courts?
- Who played? Repeat [organizations, interest in precedent] vs. Single play [individuals, focus on case at hand]
- How were/are test cases constructed?
- What is the effect of the Constitutional tie?
- Are judges jurists or pragmatists? What is the basis of their legitimacy as policy actors?
- How active should courts be in shaping policy and promoting social change?
- What are the strengths and weaknesses of courts in shaping policy?

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Roots of affirmative action

- 1941: FDR Executive Order 8802 outlaws segregationist hiring by federal defense contractors.
- 1953: Truman Committee urges Bureau of Employment Security "to act positively and affirmatively to implement the policy of nondiscrimination"
- 1964 Civil Rights Act; 1965 Voting Rights Act extend equal protection.
- 1965: LBJ executive order "take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin."

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What happens when policies and actions to desegregate become affirmative?

- What is the alternative?
- Why and how do universities discriminate?
- What is the policy goal?
- Why is Univ. Michigan's policy controversial?
- Whose rights are at issue?
- How is the conflict/dilemma framed?
- Why? Is this framing helpful? Does it lead to good discussion? Good policy?

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What did the Court say?

- "diversity is a compelling interest in higher education, and that race is one of a number of factors that can be taken into account to achieve the educational benefits that flow from a diverse student body."
- Law School's "individualized, whole-file review" meets test of a "narrowly tailored" policy.
- LSA's "automatic distribution of twenty (20) points to students from underrepresented minority groups" does not.

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If you want to know more about the Michigan cases . . .

- <http://www.umich.edu/news/Releases/2003/Jun03/supremecourt.html>
- <http://www.umich.edu/~urel/admissions/>
- <http://www.umich.edu/~urel/admissions/faqs/chronology.html>
- <http://www.civilrightsproject.harvard.edu/>

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