

The Fourteenth Amendment and the Rights of Students

For 150 years, the Fourteenth Amendment has impacted a wide spectrum of student life. Through its Equal Protection Clause, Due Process Clause, and by incorporating the Bill of Rights, the Fourteenth Amendment has addressed issues such as which students share a classroom and whether students can be expelled without a hearing or made to recite prayers. Given its historical role in protecting the rights of students, it is likely that the Fourteenth Amendment will continue to protect students in the future.

Equal Protection

The Equal Protection Clause of the Fourteenth Amendment provides that “No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.”¹ The most famous case applying the Equal Protection Clause to schools is *Brown v. Board of Education*.² In *Brown*, African American children, through their parents, challenged their denial of admission to “white” segregated schools as violating the Equal Protection Clause.³ The Supreme Court unanimously decided that the doctrine of “separate but equal” is “inherently unequal.”⁴ In declaring segregation unconstitutional, the Supreme Court overturned a half century of legal precedent that had stood ever since *Plessy v. Ferguson*.⁵

¹ U.S. CONST. amend. XIV, § 1.

² *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

³ *Id.* at 487-88.

⁴ *Id.* at 495.

⁵ *Id.* at 494-95.

The impact of *Brown* cannot be overstated. The justices were correct that “school desegregation ‘would involve a social revolution.’”⁶ Violence⁷ and “white flight”⁸ were common reactions to *Brown*. While many schools integrated,⁹ others refused to do so.¹⁰ Even today, *de facto* segregation exists in some areas.¹¹ However, integration also narrowed racial achievement gaps¹² and increased opportunities for minorities. Linda Brown explained that the eponymous case “has made an impact in all facets of life for minorities[,] . . . taking away that feeling of second-class citizenship.”¹³

The Equal Protection Clause also protects students against discrimination due to sex,¹⁴ immigration status,¹⁵ and sexual orientation.¹⁶ These cases further diversity in schools, which

⁶ Michael J. Klarman, *BROWN V. BOARD OF EDUCATION AND THE CIVIL RIGHTS MOVEMENT* 45-46 (Oxford University Press 2007) [hereinafter Klarman].

⁷ *Id.* at 113-15 (describing violence against parents escorting children to school and NAACP lawyers responsible for school desegregation).

⁸ See Imani Perry, *Five Myths About Brown v. Board of Education*, WASH. POST, May 16, 2014, available at https://www.washingtonpost.com/opinions/five-myths-about-brown-v-board-of-education/2014/05/16/fd84b82cdc3b11e3800971de85b9c527_story.html?utm_term=.43859f205451 [hereinafter Perry].

⁹ Klarman at 105-6, 108.

¹⁰ *Id.* at 108, 111-12.

¹¹ See Perry.

¹² George Theoharis, ‘Forced Busing’ Didn’t Fail. Desegregation is the Best Way to Improve Our Schools, WASH. POST, Oct. 23, 2015, available at https://www.washingtonpost.com/posteverything/wp/2015/10/23/forced-busing-didnt-fail-desegregation-is-the-best-way-to-improve-our-schools/?utm_term=.28d5588f26f3 (“Racial achievement gaps were narrowest at the height of school integration.”).

¹³ Harrison Smith and Ellie Silverman, *Linda Brown Thompson, Girl at Center of Brown v. Board of Education Case, Dies*, WASH. POST, Mar. 26, 2018, available at https://www.washingtonpost.com/local/obituaries/linda-brown-young-girl-at-center-of-brown-v-board-segregation-case-dies-at-76/2018/03/26/2406d6d8-3138-11e8-8abc-22a366b72f2d_story.html?utm_term=.7450205622f8.

¹⁴ *United States v. Virginia*, 518 U.S. 515 (1996); *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982).

¹⁵ *Plyler v. Doe*, 457 U.S. 202 (1982).

¹⁶ See *Nabozny v. Podlesny*, 92 F.3d 446, 458 (7th Cir. 1996) (“We are unable to garner any rational basis for permitting one student to assault another based on the victim’s sexual orientation[.]”); *Flores v. Morgan Hill Unified Sch. Dist.*, 324 F.3d 1130, 1138 (9th Cir. 2003)

promotes creativity and diligence,¹⁷ and makes minorities feel more welcome and integrated into school. Overall, the Equal Protection Clause benefits schools as a whole.

Due Process

The Due Process Clause of the Fourteenth Amendment provides that states shall not “deprive any person of life, liberty, or property, without due process of law.”¹⁸ A major education case involving the Fourteenth Amendment Due Process Clause is *Goss v. Lopez*.¹⁹ In this case, ten Ohio students were suspended for alleged misconduct without a hearing.²⁰ The Supreme Court held that because Ohio “chose[] to extend the right to an education,” the students had an “entitlement to a public education as a property interest . . . protected by the Due Process Clause[.]”²¹ As a result of *Goss*, schools must provide notice and an opportunity to be heard before significantly disciplining students.²²

The impact of *Goss* is twofold. First, due process protects students from “erroneous” punishment.²³ Second, although education is not a constitutional right,²⁴ *Goss* recognized state-created rights to education. Accordingly, *Goss* bolsters students’ guarantees to education.

(there was sufficient evidence to conclude that “defendants intentionally discriminated against the plaintiffs [on the basis of sexual orientation] in violation of the Equal Protection Clause.”).

¹⁷ See Katherine W. Phillips, *How Diversity Makes Us Smarter*, SCIENTIFIC AMERICAN, Oct. 1 2014, www.scientificamerican.com/article/how-diversity-makes-us-smarter/.

¹⁸ U.S. CONST. amend. XIV, § 1.

¹⁹ *Goss v. Lopez*, 419 U.S. 565 (1975).

²⁰ *Id.* at 569-71.

²¹ *Id.* at 574.

²² *Id.* at 583-84.

²³ *Id.* at 583.

²⁴ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 30-35 (1973).

Incorporation of First and Fourth Amendments

The First and Fourth Amendments apply to the states—and therefore to schools—through the Due Process Clause of the Fourteenth Amendment.²⁵ Thus, students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”²⁶ Furthermore, schools cannot require students to recite the pledge of allegiance,²⁷ bible verses,²⁸ or prayers.²⁹ Students are also protected from unreasonable searches by the Fourth Amendment.³⁰

The impact of incorporation is significant. For example, after the Parkland, Florida school shooting, students are able to display messages regarding gun control on their backpacks.³¹ Student athletes are free to protest bigotry by kneeling during the National Anthem.³² And, teachers may not routinely strip search students.³³ In sum, incorporation of the First and Fourth Amendments allows students to participate in political discussions and secures their fundamental rights at school.

²⁵ Paul Rodgers, UNITED STATES CONSTITUTIONAL LAW: AN INTRODUCTION 206 (McFarland 2011).

²⁶ *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 506 (1969).

²⁷ *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

²⁸ *Sch. Dist. of Abington Township v. Schempp*, 374 U.S. 203 (1963).

²⁹ *Engel v. Vitale*, 370 U.S. 421 (1962).

³⁰ *New Jersey v. T.L.O.*, 469 U.S. 325 (1985).

³¹ See Dianne Gallagher, Emanuella Grinberg, and Paul P. Murphy, *How Parkland Students Feel About Their New Mandatory Clear Backpacks*, CNN, Apr. 2, 2018, <https://www.cnn.com/2018/04/02/us/marjory-stoneman-douglas-clear-backpacks/index.html>.

³² Valeriya Safronova and Joanna Nikas, *High School Students Explain Why They Protest Anthems and Pledges*, N.Y. TIMES, Oct. 21, 2017, available at <https://www.nytimes.com/2017/10/21/style/high-school-students-explain-why-they-protest-anthems-and-pledges.html>.

³³ See *Safford Unified Sch. Dist. #1 v. Redding*, 557 U.S. 364 (2009).

Future of Fourteenth Amendment

The Fourteenth Amendment will likely continue to protect students. Two areas which should be considered under the Fourteenth Amendment are the rights of transgender students and whether education should be considered a constitutional right that requires equal funding. First, the rights of transgender students to use bathrooms that correspond to their gender identity remains undecided by the Supreme Court.³⁴ Even after the Trump Administration rescinded guidance that directed schools to allow transgender students to use their preferred bathrooms,³⁵ some lower courts have nevertheless ruled in favor of transgender students citing the Equal Protection Clause.³⁶ The Supreme Court will likely decide this issue in the future and may well find that the Fourteenth Amendment protects transgender students from discrimination.

Second, the Supreme Court should reconsider whether education is a fundamental constitutional right that requires equal funding of schools. After the Civil War, states prohibited unequal school funding based on race.³⁷ “[W]hites complained about their taxes subsidizing black education,” and states then moved to allow school boards “discretion in allocating public funds.”³⁸ Currently, schools are funded by local property taxes, which results in affluent

³⁴ See *Gloucester County Sch. Bd. v. G.G. Ex Rel Grimm*, 137 S. Ct. 1239 (2017) (vacating judgement from Fourth Circuit Court of Appeals regarding transgender student for reconsideration in light of DOE and DOJ guidance document dated Feb. 22, 2017).

³⁵ Letter from Sandra Battle and T.E. Wheeler, *Dear Colleague Letter*, Feb. 22, 2017, <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf>.

³⁶ See *Whitaker v. Kenosha Unified Sch. Dist.*, 858 F.3d 1034, 1054 (7th Cir. 2017) (transgender student demonstrated “probability of success on his Equal Protection Claim.”); *M.A.B. v. Bd. of Educ. of Talbot County*, Case No. 1:16-cv-02622-GLR, Dkt. No. 53 at 24, 32, 37 (D. Md. Mar. 12, 2018) (denying motion to dismiss transgender student’s Equal Protection Claims).

³⁷ Klarman at 16-17.

³⁸ *Id.* at 17.

communities having well-funded schools and poorer communities having under-funded schools. This funding scheme results in educational inequality.

The plaintiffs in *San Antonio Independent School District v. Rodriguez* challenged school funding inequality. The Supreme Court found that education is not a fundamental right under the Equal Protection Clause, and therefore equal funding was not required.³⁹ However, the Supreme Court could reconsider its decision and find a right to education under the Privileges or Immunities Clause of the Fourteenth Amendment.⁴⁰ Though historically weak, the Privileges or Immunities Clause encompasses the right to travel.⁴¹ Therefore, it could also possibly be found to encompass a right to education. If the Supreme Court found a right to education, it could help create educational equality and reduce the effects of *de facto* segregation.⁴²

Conclusion

The *Brown* Court declared, “education is perhaps the most important function of state and local governments.”⁴³ It is therefore crucial that students attend school without discrimination and with the constitutional guarantees of due process and the Bill of Rights. By securing these rights for students, the Fourteenth Amendment has fundamentally shaped American education and will continue to do so.

³⁹ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 30-35 (1973).

⁴⁰ U.S. CONST. amend. XIV, § 1.

⁴¹ See Kara A. Millonzi, *Education as a Right of National Citizenship Under the Privileges or Immunities Clause of the Fourteenth Amendment*, 81 N.C.L. Rev. 1286, 1288, 1298-99 (2003).

⁴² *Id.*; see also Perry.

⁴³ *Brown*, 347 U.S. at 493.