

Voluntary Segregation: Gender and Race as Legitimate Grounds for Differential Treatment and Freedom of Association

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INTRODUCTION

Virtually all Americans agree that public education is in trouble. Virtually no one agrees what the problem is or just how to solve it. One particularly contentious issue centers around race. More than forty years after *Brown v. Board of Education*, America's schools remain segregated and inequitable. But reformers respond to this problem with very different solutions. In Hartford, Connecticut plaintiffs in a state suit are petitioning for a desegregation plan based upon socio-economic disparities that would reach to the suburbs.¹ In the Midwest, Milwaukee and Detroit are debating the merits and legality of group separation through African American immersion schools or all-Black boys' academies. While some educators remain committed to *Brown's* objective of integration, others view separation as the only means toward substantive racial equality. How can we make sense of these seemingly contradictory options?

One way to think through these issues is to consider the assumptions, beliefs, and principles at the heart of the various proposals. Historically, the public, or common, school was viewed as a place where children would come together and grow alike as Americans. Clearly, America is witnessing a retreat from this melting pot ideal. A desire for cultural distinctiveness requires that children be educated as members of their particular cultural group. Presumably culture, like religion, plays a primary role in generating shared values among a group of persons. Likewise, cultural groups have a stake in perpetuating shared values among their members to ensure cultural survival. Separate educational institutions allow parents to select schools for their children based on shared values or interests, including similar ideas about what constitutes a good life and a good education.

But, in American society, culture is inextricably linked to race and ethnicity. Since the *Brown* decision, race has constituted an illegitimate basis for organizing public schooling. In addition, Titles VI and IX clearly provide that no educational institution receiving federal funds may discriminate, including giving people "different aid, benefits, or services," on the basis of race or sex.² In light of recent calls for group separation, what some refer to as voluntary segregation, I would like to reconsider two aspects of anti-discrimination legislation and jurisprudence. First, I will explore the relationship between identity categories such as gender or race, and what constitutes the *equal treatment* of individuals. Second, I will examine whether gender or race are ever *legitimate grounds for association*, upon which public schools, or specific educational programs, might organize. Do groups of parents have any right to decide that their children should be schooled in a racially homogeneous setting? Should Black parents be entitled to choose this option to

maximize achievement for their children? Should White parents? Careful consideration of these questions requires some knowledge of both appropriate legal frameworks and fundamental political principles.

LEGAL BACKGROUND

In the 1896 Supreme Court case *Plessy v. Ferguson*, the Court found racially separate institutions constitutional and stated that Blacks were choosing to interpret separation as connoting inferiority. More than fifty years later, *Plessy's* "separate but equal" doctrine was rejected in *Brown v. Board of Education* (1954). Scholars searching for a principled grounding of the *Brown* reversal offer a few different interpretations of the decision. Perhaps the most popular interpretation is that *Brown* was premised on a principle of equality, such as equal protection under the Fourteenth Amendment. Another reading asserts that freedom of association was the fundamental right at stake.³ It is the latter position, an argument that both *Plessy* and *Brown* turned on associational rights, that I am interested in flushing out.

According to the freedom of association reading, the Court's decision in *Plessy* placed a premium on White's associational rights and granted further state legitimacy to racial segregation. In essence, freedom to associate for Whites precluded similar freedom for Blacks. Blacks were not free to associate with anyone, but rather compelled to associate only with one another. This compulsory association, combined with the fact that separate services were blatantly unequal, demonstrates how Whites' freedom of association rights disallowed equal treatment for Blacks.

Nearly sixty years later, the Warren Court decided that segregation was inherently unequal, not because of resource distribution, but because it insulted the worthiness of Blacks. The Court stated:

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.

To separate [children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.⁴

The *Brown* ruling overturned *Plessy* by deciding that Whites' freedom of association rights were denying equal protection to Blacks. Yet the language used by the Court — "*a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone*" — suggests something even deeper than denial of associational rights. Indeed, it sounds like the Court is equating a refusal to associate with a refusal to grant *equal status as humans*. Whereas *Plessy* privileged Whites' associational rights, *Brown* asserts Blacks' equal rights to associate by disallowing race as a grounds for exclusion from public schools.⁵

Thus, two key questions — "Is race a legitimate basis for association?" and "What are the requirements for equal treatment of persons in the public arena?" — were settled by *Brown* in ways antithetical to the *Plessy* Court. *Plessy* found that racial separation, absent resource inequality, was fine. Thus, equal treatment was

measured in terms of equal resources, even in different settings. The *Brown* Court disagreed, suggesting that racial separation causes feelings of inferiority that inhibit equal opportunity. Accordingly, equal treatment was mandated, and affirmative desegregation was identified as the best means to bring about substantive equality of educational opportunity. Remedial mandates to bring about integration indicate that equal protection is interpreted as similar treatment. Based upon *Brown*, race becomes *irrelevant* for the equal treatment of individual students and *illegitimate* as a basis for organizing public schools.

I would like to challenge some of the consequences of the *Brown* decision in light of recent demands for voluntary segregation by African Americans and women. I agree with the *Brown* Court insofar as gender and race are irrelevant to the *equal status of persons* — the principle which provides a moral basis for equal citizenship rights. When equal moral status, however, is interpreted to require similar treatment within public institutions, and disallows the association of groups based on common interests, I believe the relevance of gender and race to personhood has been misconstrued. I will draw upon feminist arguments regarding the nature of moral development and reasoning to demonstrate how identity differences, such as gender and ethnicity, have consequences for both substantive equal treatment and the associational rights of identity groups.

EQUAL STATUS AS MORAL AGENTS

The claim that gender and race are irrelevant to citizenship rights is based upon a premise that the only relevant feature of persons is our status as moral beings. Inasmuch as we all possess moral capacities, other incidental, or even accidental characteristics, cannot be used as justification for unequal rights and privileges. This moral grounding for *equal status* is politically realized in terms of formal equality between citizens, including proscriptions against public associations that exclude persons based upon irrelevant features. An exploration of John Rawls's "original position" will serve to both explain and complicate this relationship between our moral capacities and formal rights of citizenship.

In *A Theory of Justice and Political Liberalism*, John Rawls aims to establish means through which the principles of justice for a well-ordered society can be chosen and realized. His theory of justice attempts to protect the fundamental equality of persons through a system of fair social cooperation among groups adhering to a plurality of reasonable doctrines. In these works, he refers to individuals as moral, free, equal, and rational persons whose natures are best realized under conditions of justice chosen by parties to the "original position." This initial choice situation, a tool for social contract theorists, provides conditions for the selection of fairness principles that will best allow each person to pursue his/her own goods without disallowing others similar pursuits.

Rawls's original position is intended to represent an objective, general standpoint where parties can agree upon the principles of justice for the basic structures of democratic society. Within the original position, a "veil of ignorance" hides from us our "particular attachments and interests," along with our inclinations, aspirations, and conceptions of the good; the veil conceals anything that is irrelevant from

the standpoint of justice.⁶ Behind the veil of ignorance, the only relevant feature of persons is their possession of moral powers.⁷ A lack of information about irrelevant differences (which include race, sex, class, religion, and other private affiliations) allows parties to share a symmetrical position from which they decide principles about the fair distribution of social goods. In the original position: “equals in all relevant respects are to be represented equally....[Hence,] citizens, viewed as free and equal persons, when represented equally in the original position, are represented fairly.”⁸

Rawls’s intention with the original position is to set up a situation in which persons can imagine what fair social institutions might look like. He finds it necessary to hide the particularities of their social positions so that they will be unable to protect interests gained from privilege rather than fairness. For example, since my socio-economic status is merely “historical accident,” it should not be considered relevant to moral deliberation. If I do not know whether I am rich or poor, I am more likely to create tax laws that will be fair to persons from either group. Based on reason, parties to the original position bargain until consensus is reached regarding principles of social justice.

Use of the original position has opened Rawls’s theory of justice to attack from communitarians, feminists, and others. Critics charge that parties to the original position cannot possibly represent real human beings because they are disembodied and disembedded from social practices. In addition, they assert that this initial choice situation presents a monological model of moral deliberation which is based upon an impossible universality.⁹ In *Political Liberalism*, Rawls responds to the charge of universality by simply stating that his political conception of justice is freestanding, implying no metaphysical or epistemological doctrine.¹⁰ But Rawls presents an additional argument in defense of the original position. He says one cannot find a metaphysical conception of the self within his original position because it is not intended to represent real human beings. Rawls insists that it is wrongheaded to use the original position to interpret his views on the nature of the self because it is meant as a “device of representation.”

The original position is a thought device in which “parties” make moral determinations. Parties are not the same as citizens. Citizens are persons; parties are “rational agents of construction, mere artificial personages, inhabiting our device of representation.”¹¹ Parties do not suggest metaphysical or ontological assertions about human beings because they are hypothetical. They are simulations, role players pretending to be persons, intended to maximize the chances for fairness and for consensus in moral deliberations about justice.

Yet, Rawls’s simple assertion that parties are “pretend” does not negate the model of moral deliberation presented by his original position. Parties deliberate in isolation, behind a veil of ignorance, bargaining through proxy about fair principles until consensus among them is reached. Seyla Benhabib contends that this monological model of moral reasoning is based upon faulty Kantian presuppositions. She explains:

Kant's error was to assume that I, as a pure rational agent reasoning for myself, could reach a conclusion that would be acceptable for all at all times and places. In Kantian moral theory, moral agents are like geometers in different rooms who, reasoning alone for themselves, all arrive at the same solution to a problem.¹²

Rawls's parties are moral agents who reason like Kantian geometers. Thus, the original position, even as a device of representation, presents a strong commentary about the nature of moral reasoning. Moral agents are able to reach reasonable decisions, and agree on these decisions independent of each other, devoid of social context or knowledge of situational particularities. In this view, morality, and reason itself, transcend social context. Persons may be socially situated, but moral deliberation takes place objectively, outside of such contexts, in a place where persons are treated equally and fairly. The original position suggests that, within social contexts, persons may have differences, but as moral agents, they step outside of themselves to adopt what Iris Marion Young calls an "unsituated moral point of view."¹³

But this is only one reading of the original position. Susan Moller Okin suggests that Rawls is not asserting an a priori self who can reason from "nowhere." Rather, parties are capable of representing all social positions:

Those in the original position cannot think from the position of *nobody*, as is suggested by those critics who then conclude that Rawls's theory depends upon a "disembodied" concept of the self. They must, rather, think from the perspective of *everybody*, in the sense of *each in turn*. To do this requires, at the very least, both strong empathy and a preparedness to listen carefully to the very different points of view of others.¹⁴

Okin's reading of the original position as a standpoint from which all perspectives are considered makes it more amenable to concerns about particularity and social embeddedness. Her emphases on empathy and listening are characteristics of reciprocity and collective deliberation also stressed by both Benhabib and Young. Yet, there are also some important assumptions underlying Okin's reading. One is that it is *possible* for moral agents to reason from the perspective of everyone. Another assumption is that for singular agents, thinking for each in turn is a *desirable* model for moral deliberation in a pluralistic society. Careful consideration of both of these assumptions requires further elaboration of Rawls's portrayal of moral development, his public/private distinction, and Okin's critique of each.

Okin bases her interpretation of the original position in part on Rawls's description of moral development. She explains that Rawls views the family and other associations as places where our moral understanding grows as we move through a series of roles and positions. A sense of fairness is developed at a late stage, within the "morality of association." Okin contends that a crucial aspect of fairness is the capacity

to take up the different points of view of others and to learn "from their speech, conduct, and countenance" to see things from their perspectives. We learn to perceive, from what they say and do, what other people's ends, plans, and motives are....[This capacity] is essential for being able to think *as if* in the original position.¹⁵

According to her reading, family and associations play a critical role in Rawls's theory of moral development.

A problem for Okin then arises with how persons are to develop into fair and reasonable persons within an unjust society. She maintains that it is theoretically

possible, and even desirable, for persons to take the moral position of “everyone.” But because we live in a “gender-structured” society, characterized by gender domination, “there is such a thing as the *distinct standpoint of women*.”¹⁶ This is problematic for the original position. One can imagine persons who think alike being able to think as if they occupied another social position. But what if persons do not think alike?

The coherence of Rawls’s hypothetical original position, with its unanimity of representative human beings... is placed in doubt if the kinds of human beings we actually become in society differ not only in respect to interests, superficial opinions, prejudices, and points of view that we can discard for the purpose of formulating principles of justice, *but also in their basic psychologies, conceptions of the self in relations to others, and experiences of moral development*.¹⁷

If men’s and women’s moral constitution is *different*, we cannot assume that the best argument will be clear to all parties of a monological choice situation like that of the original position. The device is a useful tool for reflection: men may think about what it would mean for them to be pregnant, and this may influence their decisions, but this exercise does not mean that they can deliberate *like women* in all of their decisions.¹⁸

For Okin, there is a clear resolution to this predicament: we must move toward a non-gendered society where children will be equally parented and consequently will develop into similarly-constituted moral agents. She criticizes Rawls for disallowing this possibility through his public/private distinction which tolerates moral doctrines that do not respect the equality of women. Because Rawls is concerned with the stability of pluralistic societies, and because he aims to tolerate as many conceptions of the good as possible, his theory demands that the principles of justice are abided only within the public sphere of society. Private associations, including religions, are thereby protected in their beliefs that some persons are not equal, just so that they do not carry these beliefs into political deliberation.

Okin rejects this public/private distinction on two grounds. First, she asserts that it is inconceivable that persons could split themselves in such a way that, while at home, school, and church, women are viewed as inferior, but will be granted equal respect in the public realm (she must be referring to private schools). Second, she thinks that the self respect Rawls considers a primary good will be denied to girls who are raised in such an environment. In sum, Okin finds that Rawls negates the possibility of holding families to standards of justice, thereby problematizing the development of necessary political virtues in children.¹⁹

Okin’s criticisms of Rawls are based on the fact that social institutions have been, and continue to be, unjust for women. She believes that gender as a moral contingency is only relevant because we live in a gender-structured society. In her view, Rawls’s delineation of the public and private spheres would allow gender inequity to continue. Therefore, Okin would like to see a more permeable public/private distinction, whereby principles of justice would disallow patriarchal practices that threaten the development of equal respect for persons within future citizens. She presents a vision of a non sexist society in which it is possible and desirable for persons to reason from the position of “everybody.” Just institutions

would bring about moral commensurability, and shared moral reason would, in turn, reinforce principles of justice.

Ultimately, Okin falls into the same trap that she faults in Rawls's theory. They both stress the importance of family and social associations for moral identity development. Yet, each collapses the differences inherent to these realms into a unified ideal of shared moral reason. Rawls does this by making political reason autonomous from social contingencies. Okin grounds moral reason in socialization, and thus wants to guarantee just families to ensure that citizens will be similarly socialized to share comparable conceptions of reason and fairness. I am interested in disrupting this utopian vision; are morally distinct perspectives only due to domination and unequal nurturing? Indeed, Okin's argument suggests that a "distinct standpoint of women" is a deviant moral standpoint resulting solely from gender domination. And her argument for the desirability of shared reason weakens if we consider that the depth of moral difference existent in families and associations derives from more than historical inequalities.

To the extent that moral agency is achieved through socialization, moral agents are not fundamentally the same. Alternative moral perspectives need not be grounded in essentialistic differences between persons due to sex or race; rather, a variety of perspectives arises from different experiences in a gender- or race-structured society, or simply due to the presence of different cultural groups within society. Insofar as cultural differences influence moral development, moral agents will view different propositions as reasonable or unreasonable, and are therefore likely to arrive at different moral determinations. Communitarians, for instance, certainly think that, without domination, individuals with different social experiences undergo unique processes of moral development.

Now, as Okin argues, different morality-constituting experiences are in large part due to histories of gender- and race-based oppression. But I would like to argue that her rooting of a "distinct standpoint of women" in assumptions of inferiority and unequal treatment disallows possibilities for distinct standpoints that are not premised upon inequality. Okin argues that our gender-structured society has given rise to distinct moral standpoints between men and women. I agree. I believe that gendered identities have grown out of common historical and contemporary experiences, whereby gendered roles, along with their attendant values, local knowledges, and common interests have also arisen. Conceived in this fashion, gender difference starts to sound like cultural difference. Distinct standpoints become not only the outgrowth of sex-based inequity, but gender-based experiences and interests: gender as commonality, gender as rootedness.

What I am *not* trying to do here is build a romanticized notion of womanhood or femininity out of centuries of patriarchal exploitation. What I am suggesting is that gender constructs are so ingrained in our social psyches that just institutions will not eradicate gender difference. In addition, a yearning that gender difference might someday disappear seems rooted in beliefs about women's perspectives as deviant perspectives. To label distinct moral perspectives surrounding these roles as deviant seems harmful not only to women's equality, but to the moral texture of what it means to be human.

Similar arguments can be made for racial identity. Race itself is a social as opposed to a biological construct, which arose to serve imperialism and economic exploitation. Yet race is also intertwined with ethnic identities that celebrate the achievements, unique historical experiences, and social rootedness of distinct cultural groups. Even in a world of racial parity, distinct ethnic perspectives would, and should, continue to exist.

Through this discussion of moral perspectives, I have demonstrated how formal equality is premised upon assumptions about our moral status as human beings and the relevant features of persons as citizens. Rawls's conception of moral reasoning behind a "veil of ignorance" suggests that we are fundamentally the same as moral agents. Such views about our moral identities provide a backdrop for translating *equal status* into principles of formal equality and similar treatment within the public sphere. Okin acknowledges that we differ as moral agents based on socialized identities within a gender-structured society. Yet, she holds onto the possibility that such difference can be eradicated through just institutions, particularly those of the family, religion, and education. I disagree with Okin's position that moral similitude is possible or desirable. I believe that gendered identities are a residue of a gender-structured society, that ethnic identities remain from a race-structured society, and that the ensuing distinct standpoints add valuable texture to our moral fabric. I think that Okin and I share similar values in that we both seek just institutions. However, for her, justice will result in a moral commensurability external to citizens' particularities; for me, justice will result in distinct moral perspectives that are not predicated on assumptions of inferiority or unequal social relationships.

I contend that the consequences of acknowledging morally distinct standpoints based upon gendered or racialized identities are twofold: First, if the most relevant features of persons as citizens are our moral powers, and if our moral powers differ in kind based upon socialized identities, then substantive equality will sometimes require *different treatment*. Indeed, equal protection under the law will not be served if distinct gendered or racialized perspectives are not taken into account. Second, gender and race as constitutive of our moral identities undergirds a claim that *gender and race may provide legitimate grounds for association* in the public sphere. Let us return to the issues that initially framed our argument — racial segregation and all-boys schools — to investigate some implications of these claims.

DIFFERENT TREATMENT FOR BLACKS? FREEDOM OF ASSOCIATION FOR BOYS?

How helpful are these principles in assessing the claims put forward in Milwaukee and Detroit? A white woman who is against Milwaukee's African American Immersion Schools asserts that the schools are unconstitutional, educationally unsound, and morally wrong.²⁰ Constitutionality aside, all-male schools have been deemed illegal in terms of anti-discrimination legislation. According to Titles VI and IX, students cannot be separated on the basis of race or sex. Whether separate schooling is educationally sound raises an entirely different matter that I cannot discuss within the constraints of this paper. Suffice it to say that those who support separate schooling tend to cite effective schools research and bristle at the assumption that Blacks need Whites to provide them with a sound education. What

I have focused on in this paper is this woman's third claim: that separate schooling, based on either race or sex, is morally wrong.

Prior to *Brown*, racially segregated schooling in the U.S. was unquestionably morally wrong. Segregation was state-sanctioned, based upon premises that Blacks were inferior to Whites, and manifestly unequal in terms of resource distribution. Today, resources remain unequal, and few Whites claim that Blacks are inferior, but comparably few Whites choose to send their children to inner city schools with overwhelmingly African American and Latino populations. Legal segregation turned on a denial of the equal status of persons. Acknowledgment of equal status across racial lines, as a result of *Brown* and ensuing Civil Rights legislation, took the form of formal equality before the law: equal educational opportunity for Black children was interpreted as equal treatment in racially integrated schools.

Today, our context and our questions are very different. In relation to histories of gender and racial oppression, distinct social identities, roles, and cultures have developed. Born from inequality, these perspectives have taken on a life of their own; such views have intrinsic value to individuals belonging to those groups and offer distinct moral perspectives. Must race-blind equality disallow African Americans avenues for educating their young which enable cultural, and individual, survival amidst Eurocentrism? Does gender parity require gender sameness? Is separation of one identity group necessarily an instance of discrimination against another? Common sense tells us no. Yet, I am suggesting a firmer ground than common sense and an alternative ground to remedial action to justify the relevancy of identity categories to our status as citizens in certain cases. In this view, identity categories are not automatically dismissed as irrelevant or illegitimate. Instead, the *reasons* for the categories being invoked are strictly scrutinized. The reasons, rather than the categories themselves, become the target for legitimacy and relevancy concerns.

When we closely examine moral reasoning, we find that the primary thing humans share in our moral powers is an infinite capacity to be different. Acknowledging our radical situatedness as moral beings suggests that differential treatment and separate associations are not always predicated on presumptions of superiority, but cut to the core of genuinely respecting one another. Through a critical lens of moral pluralism, our ability to generalize across political contexts is severely limited; procedural neutrality gives ways to substantive equality, and universal laws bend toward particular reasons. The lines are not easily drawn, nor are decisions clear cut. But insofar as we are differently-constituted moral agents, I see no reason why our equal status as humans must be translated into *de facto* privilege for some, and *de jure* inequality for many "others."

1. See *Sheff V. O'Neill*, *West's Atlantic Reporter* 609 (St. Paul: West Publishing Company, 1992), 1072-76.

2. Specific information regarding Title IX is taken from Marcia L. Narine, *Single-Sex, Single Race Public Schools: A Solution to the Problems Plaguing the Black Community?* (Unpublished manuscript, April 1992).

3. For arguments that the *Brown* decision turned on the principle freedom of association as opposed to equality of opportunity see Kenneth A. Strike, "Toward a Moral Theory of Desegregation," in *Philosophy of Education: Eightieth Yearbook of the National Society for the Study of Education*, ed. Jonas Soltis (Chicago: NSSE, 1981) and Derrick Bell, "Brown and the Interest-convergence Dilemma," in *Shades of Brown: New Perspectives on School Desegregation*, ed. Derrick Bell (New York: Teachers College Press, 1980).
4. Mark G. Yudof, David L. Kirp, and Betsy Levin, *Educational Policy and the Law*, 3rd ed. (St. Paul: West Publishing Company, 1992), 472.
5. This line of argument closely follows that outlined in Strike, "Toward a Moral Theory of Desegregation."
6. John Rawls, *A Theory of Justice* (London: Oxford University Press, 1971), 516-17; 18.
7. John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), 79.
8. Rawls, *Political Liberalism*, 79-80.
9. See William Kymlicka, *Liberalism, Community, and Culture* (New York: Oxford University Press, 1989) for a discussion of five communitarian arguments against a liberal conception of the self, including the positions of Michael Sandel and Charles Taylor.
10. Rawls, *Political Liberalism*, 10-11.
11. *Ibid.*, 106.
12. Seyla Benhabib, *Situating the Self: Gender, Community and Postmodernism in Contemporary Ethics* (New York: Routledge, 1992), 163.
13. Iris Marion Young, *Justice and the Politics of Difference* (Princeton: Princeton University Press, 1990), 104.
14. Susan Moller Okin, *Justice, Gender, and the Family* (New York: Basic Books, Inc., 1989), 100-101.
15. *Ibid.*, 98.
16. *Ibid.*, 106. Okin makes this assertion based on the work of feminist theorists including Jean Baker Miller, Nancy Chodorow, Carol Gilligan, Nancy Hartsock, and others.
17. *Ibid.*, [emphases added].
18. *Ibid.*, 106-07.
19. Susan Moller Okin, "Political Liberalism, Justice, and Gender," *Ethics* 105 (October 1994): 38-39.
20. Narine, *Single-Sex, Single Race Public Schools: A Solution to the Problems Plaguing the Black Community?* 47.