United States Supreme Court Historical Rulings on Race in America

(Sources: Wikipedia)

The 1857 Dred Scott v. Sandford United States Supreme Court Decision

The 1857 Dred Scott versus Sandford United States Supreme Court decision rejected abolitionism and determined Black men, whether free or in bondage, had no legal rights under the United States Constitution. Many historians believe this was the catalyst for the Civil War which led to the ratifications of the Reconstruction Amendments...the Dred Scott decision was a landmark decision of the U.S. Supreme Court in which the Court held that the U.S. Constitution was not meant to include American citizenship for black people, regardless of whether they were enslaved or free, and is the rights and privileges that the Constitution confers upon American citizens could apply to them. The decision was made in the case of Dred Scott, an enslaved black man whose owners had taken him from Missouri, which was a slave-holding state, into Illinois and the Wisconsin Territory, which were free areas where slavery was illegal. When his owners later brought him back to Missouri, Scott sued in court for his freedom and claimed that because he had been taken into "free" U.S. territory, he had automatically been freed and was legally no longer a slave. Scott sued first in Missouri state court, which ruled that he was still a slave under its law. He then sued in U.S. federal court, which ruled against him, by deciding that it had to apply Missouri law to the case. He then appealed to the U.S. Supreme Court. In March 1857, the Supreme Court issued a 7-2 decision against Dred Scott. In an opinion, written by Chief Justice Roger Taney, the Court ruled that black people "are not included, and were not intended to be included, under the word, 'citizens' in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States." Taney supported his ruling with an extended survey of American state and local laws from the time of the Constitution's drafting in 1787 that purported to show that a "perpetual and impassable barrier was intended to be erected between the white race and the one which they had reduced to slavery." Because the Court ruled that Scott was not an American citizen, he was also not a citizen of any state and, accordingly, could never establish the "diversity of citizenship" that Article III of the U.S. Constitution requires for a U.S. federal court to be able to exercise jurisdiction over a case. After ruling on those issues surrounding Scott, Taney continued

further and struck down the entire Missouri Compromise as a limitation on slavery that exceeded the U.S. Congress's constitutional powers.

Although Taney and several of the other justices hoped that the decision would permanently settle the slavery controversy, which was increasingly dividing the American public, the decision's effect was the complete opposite. Taney's majority opinion suited the slaveholding states, but was intensely decried in all other states and the decision was a contributing factor in the outbreak of the American Civil War four years later, in 1861. After the Union's victory in 1865, the Court 's rulings in Dred Scott were voided by the Thirteenth Amendment to the U.S. Constitution, which abolished slavery except as punishment for a crime, and the Fourteenth Amendment, which guaranteed citizenship for "all persons born or naturalized in the United States, and subject to the jurisdiction thereof."

The Supreme Court's decision has been widely denounced ever since. Bernard Schwartz said that it "stands first in any list of the worst Supreme Court decisions—Chief Justice Charles Evans Hughes called it the Court's greatest self-inflicted wound. Junius P. Rodriguez said that it is "universally condemned as the U.S. Supreme Court's worst decision". Historian David Thomas Konig said that it was "unquestionably, our court's worst decision ever."

The 1868 Equal Protection Clause of the Fourteenth Amendment

The 1868 Equal Protection Clause from the text of the Fourteenth Amendment of the United States Constitution, provides "nor shall any State…deny to any person within its jurisdiction the equal protection of the laws." It is thought that the primary motivation for this clause was to validate the equality provisions contained in the Civil Rights Act of 1866, which guaranteed that all citizens would have the guaranteed right to equal protection by law. The Fourteenth Amendment applied substantially more constitutional restrictions against states than had applied before the Civil War. Although equality under the law is an American legal tradition dating to the Declaration of Independence, formal equality for many marginalized groups persisted. American law did not extend constitutional rights to Black Americans who were considered inferior to white Americans, and subject to chattel slavery in the slave states until the Emancipation Proclamation and the ratification of the Thirteenth Amendment.

The Thirteenth Amendment of 1865

Before an during the Civil War, the Southern states prohibited speech of pro-Union citizens, anti-slavery advocates, and northerners in general, since the Bill of Rights did not apply to the states during such times. During the Civil War, many of the Southern states stripped the state citizenship of many whites and banished them form their state, effectively seizing their property. Shortly after the Union Victory in the American Civil War, the thirteenth Amendment was proposed by Congress and ratified by the states of 1865, abolishing slavery. Subsequently, many ex-Confederate states then adopted Black Codes following the war, with these laws severely restricting the rights of blacks to hold property, including real property (such as real estate), and many forms of personal property, and to form legally enforceable contracts. Such codes also established harsher criminal consequences for blacks than for whites.

Civil Rights Act of 1866

Because of the inequality imposed by Black Codes, a Republican controlled Congress enacted the Civil Rights Act of 1866. The Act provided that all persons born in the United States were citizens (contrary to the Supreme Court's 1857 decision in Dred Scott versus Sandford), and required that "citizens of every race and color…[have] full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens.

President Andrew Johnson's Veto of the Civil Rights Act of 1866

President Andrew Johnson vetoed the Civil Rights Act of 1866 amid concerns (among other things) that Congress did not have the constitutional authority to enact such a bill. Such doubts were one factor that led Congress to begin to draft and debate what would become the Equal Protection Clause of the Fourteenth Amendment.

Passage of the Equal Protection Clause of the Fourteenth Amendment by a "Rump" Congress

Additionally, Congress wanted to protect white Unionists who were under personal and legal attack in the former Confederacy. The effort was led by the radical Republicans of both houses of Congress, including John Bingham, Charles Sumner, and Thaddeus Stevens. It was the most influential of these men, John Bingham, who was the principal author and drafter of the Equal Protection Clause. The Southern states were opposed to the Civil Rights Act, but in 1865 Congress, exercising its power under Article I, Section 5, Clause 1 of the Constitution, to "be judge of the …Qualifications of its own Members", had excluded Southerners from Congress, declaring that their states, having rebelled against the Union, could therefore not elect members of Congress. It was this fact—the fact that the Fourteenth Amendment was enacted by a "rump" Congress—that permitted the passage of the Fourteenth Amendment by Congress and subsequently proposed to the states.

Ratification of the Fourteenth Amendment

The ratification of the Fourteenth Amendment by the former Confederate states was imposed as a condition of their acceptance back into the Union. The 14th amendment was ratified by nervous Republicans in response to the rise of Black codes. This ratification was irregular in many ways. First there were multiple states that rejected the 14th amendment, but when their new governments were created due to reconstruction, these new governments accepted the amendment.

There were also two states, Ohio and New Jersey, that accepted the amendment and then later passed resolutions rescinding that acceptance. The nullification of the two state's acceptance was considered illegitimate and both Ohio and New Jersey were included in those counted as ratifying the amendment.

Many historians have argued that the 14th amendment was not originally intended to grant sweeping political and social rights to the citizens but instead to solidify the constitutionality of the 1866 Civil Rights Act. While it is widely agreed that this was a key reason for the ratification of the Fourteenth Amendment, many historians adopt a much wider view. It is a popular interpretation that the Fourteenth Amendment was always meant to ensure equal rights for all those in the United States.

This argument was used by Charles Sumner when he used the 14th amendment as the basis for his arguments to expand the protections afforded to Black Americans. Though the equal protection clause is one of the most cited ideas in legal theory, it received little attention during the ratification of the 14th amendment. Instead the key tenet of the Fourteenth Amendment at the time of its ratification was the Privileges and Immunities Clause. This clause sought to protect the privileges and immunities of all citizens which now included Black men. The scope of this clause was substantially narrowed following the Slaughterhouse Cases in which it was determined that a citizen's privileges and immunities were only ensured at the Federal level and that it was government overreach to impose this standard on the states. Even in this halting decision the Court still acknowledged the context in which the Amendment was passed, stating that knowing the evils and injustice the 14th amendment was meant to combat is key in our understanding of its implications and purpose.

With the abridgment of the Privileges and Immunities clause, legal arguments aimed at protecting Black American's rights became more complex and that is when the equal protection clause started to gain attention for the arguments it could enhance. During the debate in Congress, more than one version of the clause was considered. Here is the first version: "The congress shall have power to make all laws which shall be necessary and proper to secure…to all persons in the several states equal protection in the rights of life, liberty, and property." Bingham said about this version: "It confers upon Congress power to see to it that the protection given by the laws of the States shall be equal in respect to life and liberty and property to all persons."

The 1868 Equal Protection Clause of the Fourteenth Amendment

The main opponent of the first version of the 1868 Equal Protection Clause of the Fourteenth Amendment was Congressman Robert S. Hale of New York, despite Bingham's public assurances that "under no possible interpretation can it ever be made to operate in the State of New York while she occupies her present proud position." Hale ended up voting for the final version, however. When Senator Jacob Howard introduced that final version, he said: "It prohibits the hanging of a black man for a crime for which the white man is not to be hanged. It protects the black man in his fundamental rights as a citizen with the same shield which it throws over the white man. Ought not the time to be now passed when one measure of justice is to be meted out to a member of one caste while another

and a different measure is meted out to the member of another caste, both castes being alike citizens of the United States, both bound to obey the same laws, to sustain the burdens of the same Government, and both equally responsible to justice and to God for the deeds done in the body?

The 39th United States Congress proposed the Fourteenth Amendment on June 13, 1866. A difference between the initial and final versions of the clause was that the final version spoke not just of "equal protection" but of "the equal protection of the laws'. John Bingham said in January 1867: "no State may deny to any person the equal protection of the laws, including all the limitations for personal protection of every article and section of the Constitution..." By July 9, 1868, three-fourths of the states (28 of 37) ratified the amendment, and that is when the Equal Protection Clause became law.

Early history following ratification, Bingham said in a speech on March 31, 1871 that the clause meant no State could deny to any one "the equal protection of the Constitution of the United States...[or] any of the rights which it guarantees to all men", nor deny to anyone" any right secured to him either by the laws and treaties of the United States or of such State." At that time, the meaning of equality varied from one state to another.

Barring of Interracial Marriage

Four of the original thirteen states never passed any laws barring interracial marriage, and other states were divided on the issue in the Reconstruction era. In 1872, the Alabama Supreme Court ruled that the state's ban on mixed-race marriage violated the "cardinal principle" of the 1866 Civil Rights Act and of the Equal Protection Clause. Almost a hundred years would pass before the U.S. Supreme Court said: marriage is a civil contract, and in that character alone is dealt with by the municipal law. The same right to make a contract as is enjoyed by white citizens, means the right to make any contract which a white citizen may make. The law intended to destroy the distinctions of race and color in respect to the rights secured by it.

Public Schooling in the Era of Reconstruction

As for public schooling, no states during the era of Reconstruction actually required separate schools for blacks. However, some states (e.g., New York) gave local school districts discretion to set up

schools that were deemed separate but equal. In contrast, Iowa and Massachusetts flatly prohibited segregated schools ever since the 1850s.

Strauder v. West Virginia (1880)

In the United States, the year 1877 marked the end of Reconstruction and the start of the Gilded Age. The first truly landmark equal protection decision by the Supreme Court was Strauder v. West Virginia (1880). A black man convicted of murder by an all-white jury challenged a West Virginia statute excluding blacks from serving on juries. Exclusion of blacks from juries, the Court concluded, was a denial of equal protection to black defendants, since the jury had been "drawn from a panel from which the State has expressly excluded every man of [defendant's] race."

Civil Rights Act of 1875

The Civil Rights Act of 1875 sometimes the Enforcement Act or the Force Act, was a United States federal law enacted during the Reconstruction era in response to civil rights violation against African Americans. The bill was passed by the 43rd United States Congress and signed into law by United States President Ulysses S. Grant on March 1, 1875. The next important postwar case was the Civil Rights Cases (1883), in which the constitutionality of the Civil Rights Act of 1875 was at issue. The Act provided that all persons should have "full and equal enjoyment of...inns, public conveyances on land or water, theaters, and other places of public amusement." In its opinion, the Court explicated what has since become known as the "state action doctrine", according to which the guarantees of the Equal Protection Clause apply only to acts done or otherwise "sanctioned in some way" by the state. Prohibiting blacks from attending plays or staying in inns was "simply a private wrong". Justice John Marshall Harlan dissented alone, saying, "I cannot resist the conclusion that the substance and spirit of the recent amendments of the Constitution have been sacrifices by a subtle and ingenious verbal criticism." Harlan went on to argue that because (1) "public conveyances on land and water" use the public highways, and (2) innkeepers engage in what is "a quasi-public employment", and (3) "places of public amusement" are licensed under the laws of the states, excluding blacks from using these services was an act sanctioned by the state.

Yick Wo v. Hopkins (1886)

A few years later, Justice Stanley Matthews wrote the Court's opinion in Yick Wo v. Hopkins (1886). In it the word "person" from the 14th Amendment's section has been given the broadest possible meaning by the U.S. Supreme Court: These provisions are universal in their application to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality, and the equal protection of the laws is a pledge of the protection of equal laws. Thus the clause would not be limited to discrimination against African Americans, but would extend to other races, colors, and nationalities such as (in this case) legal aliens in the United States who are Chinese citizens.

Plessy v. Gerguson (1896)

In its most contentious Gilded Age interpretation of the Equal Protection Clause, Plessy v. Ferguson (1896), the Supreme Court upheld a Louisiana Jim Crow law that required the segregation of blacks and whites on railroads and mandates separate railway cars for members of the two races. The Court, speaking through Justice Henry B. Brown, ruled that the Equal Protection Clause had been intended to defend equality in civil rights, not equality in social arrangements. All that was therefore required of the law was reasonableness, and Louisiana's railway law amply met that requirement, being based on "the established usages, customs and traditions of the people."

Justice Harlan again dissented. "Everyone knows," he wrote, that the statute in question had its purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons...[I]n view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no cast here. Our Constitution is color-blind, and neither knows or tolerate classes among citizens. Such "arbitrary separation" by race, Harlan concluded, was "a badge of servitude wholly inconsistent with the civil freedom and the equality before the law established by the Constitution." Harlan's philosophy of constitutional colorblindness would eventually become more widely accepted, especially after World War II.

Missouri ex rel. Gaines v. Canada (1938)

The U.S. Supreme Court Building opened in 1935, inscribed with the words "Equal Justice Under Law" which were inspired by the Equal Protection Clause. In Missouri ex rel. Gaines v. Canada (1938), Lloyd Gaines was a black student at Lincoln University of Missouri, one of the historically black colleges in Missouri. He applied for admission to the law school at the all-white University of Missouri, since Lincoln did not have a law school, but was denied admission due solely to his race. The Supreme Court, applying the separate-but-equal principle of Plessy, held that a State offering a legal education to whites but not to blacks violated the Equal Protection Clause.

Skinner v. Oklahoma (1942)

Despite the undoubted importance of Brown, much of modern equal protection jurisprudence originated in other cases...Whatever its precise origins, the basic idea of the modern approach is that more judicial scrutiny is triggered by purported discrimination that involves "fundamental rights" (such as the right to procreation), and similarly more judicial scrutiny is also triggered if the purported victim of discrimination has been targeted because he or she belongs to a "suspect classification" (such as a single racial group). This modern doctrine was pioneered in Skinner v. Oklahoma (1942), which involved depriving certain criminals of the fundamental right to procreate: When the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as invidious a discrimination as if it has selected a particular race or nationality for oppressive treatment.

Shelley v. Kraement (1948)

In Shelley v. Kraemer (1948), the Court showed increased willingness to find racial discrimination illegal. The Shelley case concerned a privately made contract that prohibited "people of the Negro or Mongolian race" from living on a particular piece of land. Seeming to go against the spirit, if not the exact letter, of the Civil Rights Cases, the Court found that, although a discriminatory private contract could not violate the Equal Protection Clause, the courts' enforcement of such a contract could; after all, the Supreme Court reasoned, courts were part of the state.

Sweatt v. Painter and McLaurin v. Oklahoma State Regents (1950)

The companion cases Sweatt v. Painter and McLaurin v. Oklahoma State Regents, both decided in 1950, paved the way for a series of school integration cases. In McLaurin, the University of Oklahoma had admitted McLaurin, an African-American, but had restricted his activities there: he had to sit apart from the rest of the students in the classrooms and library, and could eat in the cafeteria only at a designated table. A unanimous Court, through Chief Justice Fred M. Vinson, said that Oklahoma had deprived McLaurin of the equal protection of the laws: There is a vast difference—a Constitutional difference—between restrictions imposed by the state which prohibit the intellectual commingling of students, and the refusal of individuals to comingle where the state presents no such bar. The present situation, Vinson said, was the former. In Sweatt, the Court considered the constitutionality of Texas's state system of law schools, which educated blacks and whites at separate institutions. The Court (again through Chief Justice Vinson, and again with no dissenters) invalidated the school system—not because it separated students, but rather because the separate facilities were not equal. They lack "substantial equality in the educational opportunities" offered to their students.

Brown v. the Board of Education (1954)

All of the cases, as well as the upcoming Brown case, were litigated by the National Association for the Advancement of Colored People. It was Charles Hamilton Houston, a Harvard Law School graduate and law professor at Howard University, who in the 1930s first began to challenge racial discrimination in the federal courts.

Thurgood Marshall, a former student of Houston's and the future Solicitor General and Associate Justice of the Supreme Court, joined him. Both men were extraordinarily skilled appellate advocates, but part of their shrewdness lay in their careful choice of which cases to litigate, selecting the best legal proving grounds for their cause.

In 1954 Brown v. Board of Education, the contextualization of the equal protection clause would change forever. The Supreme Court itself recognized the gravity of the Brown v. Board decision acknowledging that a split decision would be a threat to the role of the Supreme Court and even to

the country. When Earl Warren became Chief Justice in 1953, Brown had already come before the Court. While Fred M. Vinson was still Chief Justice, there had been a preliminary vote on the case at a conference of all nine justices. At that time, the Court has split, with a majority of the justices voting that school segregation did not violate the Equal Protection Clause.

Warren, however, through persuasion and good-natured cajoling—he had been an extremely successful Republican politician before joining the Court—was able to convince all eight associate justices to join his opinion declaring school segregation unconstitutional. In that opinion Warren wrote: To separate [children in grade and high schools] from others of similar age and qualifications solely because of their race generates a feeling of inferiority and to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone…We conclude that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal.

Warren discouraged other justices, such as Robert H. Jackson, from publishing any concurring opinion; Jackson's draft, which emerged much later (in 1988), included this statement: "Constitutions are easier amended than social customs, and even the North never fully conformed its racial practices to its professions". The Court set the case for re-argument on the question of how to implement the decision. In Brown II, decided in 1954, it was concluded that since the problems identified in the previous opinion were local, the solutions needed to be so as well. Thus the Court devolved authority to local school boards and to the trial courts that had originally heard the cases. (Brown was actually a consolidation of four different cases from four different states). The trial courts and localities were told to desegregate with "all deliberate speed."

Bolling v. Sharpe(1954)

Bolling v. Sharpe, 347 U.S. 497 (1954), is a landmark United States Supreme Court case in which the Court held that the Constitution prohibits segregated public schools in the District of Columbia. Originally argued on December 10–11, 1952, a year before *Brown v. Board of Education*, *Bolling* was reargued on December 8–9, 1953, and was unanimously decided on May 17, 1954, the same day as *Brown*. The *Bolling* decision was supplemented in 1955 with the second *Brown* opinion, which ordered desegregation "with all deliberate speed". In *Bolling*, the Court did not address school desegregation in

the context of the Fourteenth Amendment's Equal Protection Clause, which applies only to the states, but rather held that school segregation was unconstitutional under the Due Process Clause of the Fifth Amendment to the United States Constitution. The Court observed that the Fifth Amendment to the United States Constitution lacked an Equal Protection Clause, as in the Fourteenth Amendment to the United States Constitution. The Court held, however, that the concepts of Equal Protection and Due Process are not mutually exclusive, establishing the reverse incorporation doctrine. By its terms, the clause restrains only state governments. However, the Fifth Amendment's due process guarantee, beginning with Bolling v. Sharpe (1954), has been interpreted as imposing some of the same restrictions on the federal government: "Though the Fifth Amendment does not contain an equal protection clause, as does the Fourteenth Amendment which applies only to the States, the concepts of equal protection and due process are not mutually exclusive." In Lawrence v. Texas (2003) the Supreme Court added: "Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests." Some scholars have argued that the Court's decision in Bolling should have been reached on other grounds. For example, Michael W. McConnell has written that Congress never "required that the schools of the District of Columbia be segregated." According to that rationale, the segregation of schools in Washington D.C. was unauthorized and therefore illegal.

Baker v. Carr (1962)

The Supreme Court ruled in Nixon v. Herndon (1927) that the Fourteenth Amendment prohibited denial of the vote based on race. The first modern application of the Equal Protection Clause to voting law came in Baker v. Carr (1962), where the Court rule that the districts that sent representatives to the Tennessee state legislature were so malapportioned (with some legislators representing ten times the number of residents as others) that they violated the Equal Protection Clause. It may seem counterintuitive that the Equal Protection Clause should provide for equal voting rights; after all, it would seem to make the Fifteenth Amendment and Nineteenth Amendment redundant. Indeed, it was this argument, as well as on the legislative history of the Fourteenth Amendment, that Justice John M. Marshall Harlan (the grandson of the earlier Justice Harlan) relied in his dissent from Reynolds, Harlan quoted the congressional debates of 1866 to show that the framers did not intend for the Equal Protection Clause to extend to voting rights, and in reference to the Fifteenth and

Nineteenth Amendments, he said: “if constitutional amendment was the only means by which all men and, later, women, could be guaranteed the right to vote at all, even for federal officers, how can it be that the far less obvious right to a particular kind of apportionment of state legislators…can be conferred by judicial construction of the Fourteenth Amendment?

The Voting Rights Act of 1965

The Voting Rights Act of 1965 is a landmark piece of federal legislation in the United States that prohibits racial discrimination in voting. It was signed into law by President Lyndon B. Johnson during the height of the civil rights movement on August 6, 1965, and Congress later amended the act five times to expand its protections. Designed to enforce the voting rights guaranteed by the Fourteenth and Fifteenth Amendments to the United States Constitution, the act secured the right to vote for racial minorities throughout the country, especially in the South. According to the U.S. Department of Justice, the act is considered to be the most effective piece of federal civil rights legislation ever enacted in the country.

The act contains numerous provisions that regulate elections. The act's "general provisions" provide nationwide protections for voting rights. Section 2 is a general provision that prohibits every state and local government from imposing any voting law that results in discrimination against racial or language minorities. Other general provisions specifically outlaw literacy tests and similar devices that were historically used to disenfranchise racial minorities.

The act also contains "special provisions" that apply to only certain jurisdictions. A core special provision is the Section 5 preclearance requirement, which prohibits certain jurisdictions from implementing any change affecting voting without receiving preapproval from the U.S. attorney general or the U.S. District Court for D.C. that the change does not discriminate against protected minorities. Another special provision requires jurisdictions containing significant language minority populations to provide bilingual ballots and other election materials.

Section 5 and most other special provisions apply to jurisdictions encompassed by the "coverage formula" prescribed in Section 4(b). The coverage formula was originally designed to encompass jurisdictions that engaged in egregious voting discrimination in 1965, and Congress updated the

formula in 1970 and 1975. In *Shelby County v. Holder* (2013), the U.S. Supreme Court struck down the coverage formula as unconstitutional, reasoning that it was no longer responsive to current conditions The court did not strike down Section 5, but without a coverage formula, Section 5 is unenforceable.

Green v. School Board of New Kent County (1968)

Partly because of that enigmatic phrase, but mostly because of self-declared "massive resistance" in the South to the desegregation decision, integration did not begin in any significant way until the mid-1960s and then only to a small degree, in fact, much of the integration in the 1960s happened in response not to Brown but to the Civil Rights Act of 1964. The Supreme Court intervened a handful of times in the late 1950s and early 1960s, but its next major desegregation decision was not until Green v. School Board of New Kent County (1968), in which Justice William J. Brennan, writing for a unanimous Court, rejected a "freedom-of-choice" school plan as inadequate. This was a significant decision; "freedom-of-choice" plans had been very common responses to Brown. Under these plans, parents could choose to send their children to either a formerly white or a formerly black school. Whites almost never opted to attend black-identified schools, however, and blacks rarely attended white-identified schools.

Swann v. Charlotte-Mecklenburg Board of Education (1971) and Milliken v. Bradley (1974)

In response to Green v. School Board of New Kent County, many Southern districts replaced freedom-of-choice with geographically based schooling plans; because residential segregation was widespread, little integration was accomplished. In 1971, the Court in Swann v. Charlotte-Mecklenburg Board of Education approved busing as a remedy to segregation; three years later, though, in the case of Milliken v. Bradley (1974), it set aside a lower court order that had required the busing of students between districts, instead of merely within a district.

Milliken basically ended the Supreme Court's major involvement in school desegregation; however, up through the 1990s many federal trial courts remained involved in school desegregation cases, many of which had begun in the 1950s and 1960s. The curtailment of busing in Milliken v. Bradley is one of the several reasons that have been cited to explain why equalized educational opportunity in the

United States has fallen short of completion. In the view of various liberal scholars, the election of Richard Nixon in 1968 meant that the executive branch was no longer behind the Court's constitutional commitments. Also, the Court itself decided in San Antonio Independent School District v. Rodriguez (1973) that the Equal Protection Clause allows—but does not require—a state to provide equal educational funding to all students within the state. Moreover, the Court's decision in Pierce v. Society of Sisters (1925) allowed families to opt out of public schools, despite "inequality in economic resources that made the option of private schools available to some and not to others", as Martha Minow has put it.

Washington v. Davis (1976)

The result in Arlington Heights was similar to that in Washington v. Davis (1976), and has been defended on the basis that the Equal Protection Clause was not designed to guarantee equal outcomes, but rather equal opportunities; if a legislature wants to correct unintentional but racially disparate effects, it may be able to do so through further legislation. It is possible for a discriminating state to hide its true intention, and one possible solution is for disparate impact to be considered as stronger evidence of discriminatory intent. This debate, though, is currently academic, since the Supreme Court has not changed its basic approach as outlined in Arlington Heights.

Arlington Heights v. Metropolitan Housing Corp. (1977)

Discriminatory intent and disparate impact. Because inequalities can be caused either intentionally or unintentionally, the Supreme Court has decided that the Equal Protection Clause itself does not forbid governmental policies that unintentionally lead to racial disparities, though Congress may have some power under other clauses of the Constitution to address unintentional disparate impacts. This subject was addressed in the seminal case of Arlington Heights v. Metropolitan Housing Corp. (1977). In that case, the plaintiff, a housing developer, sued the city in the suburbs of Chicago that had refused to re-zone a plot of land on which the plaintiff intended to build low-income, racially integrated housing. On the face, there was no clear evidence of racially discriminatory intent on the part of Arlington Height's planning commission. The result was racially disparate, however, since the refusal supposedly prevent mostly African-Americans and Hispanics from moving in. Justice Lewis Powell, writing for the Court, stated, "Proof of racially discriminatory intent or purpose is required to

show a violation of the Equal Protection Clause." Disparate impact merely has an evidentiary value; absent a "stark" pattern, "impact is not determinative."

McClesky v. Kemp (1987)

For an example of how this rule limits the Courts powers under the Equal Protection Clause, see McClesky v. Kemp (1987). In that case a black man was convicted for murdering a white police office and sentenced to death in the state of Georgia. A study found that killers of whites were more likely to be sentenced to death than were killers of blacks. The Court found that the defense had failed to prove that such data demonstrated the requisite discriminatory intent by the Georgia legislature and executive branch.

New York "Stop and Frisk" Policy

The "Stop and Frisk" policy in New York allows officers to stop anyone who they feel looks suspicious. Data from police stops shows that even when controlling for variability, people who are black and those of Hispanic decent were stopped more frequently than white people, with these statistics dating back to the late 1990s. A term that has been created to describe the disproportionate number of police stops of black people is "Driving While Black." This term is use to describe the stopping of innocent black people who are not committing any crime. The Equal Protection Clause, made to protect all people equally and to ensure equal treatment under the law, is misused to allow for the mistreatment of different minority populations.

Affirmative Action

Affirmative Action. Affirmative action is the consideration of race, gender, or other factors, to benefit an underrepresented group or to address past injustices done to that group. Individuals who belong to the group are preferred over those who do not belong to the group, for example in educational admissions, hiring, promotions, awarding of contracts, and the like. Such action may be used as a "tie-breaker" if all other factors are inconclusive, or may be achieved through quotas, which allot a certain number of benefits to each group. During Reconstruction, Congress enacted race-conscious programs primarily to assist newly freed slaves who had personally been denied may advantages earlier in their lives. Such legislation was enacted by many of the same people who framed the Equal Protection

Clause, though that clause did not apply to such federal legislation, and instead only applied to state legislation. Likewise, the Equal Protection Clause does not apply to private universities and other private businesses, which are free to practice affirmative action unless prohibited by federal statute or state law. Several important affirmative action cases to reach the Supreme Court have concerned government contractors—for instance, Adarand Constructors v. Pena (1995) and City of Richmond v. J.A.Croson Co. (1989). But the most famous cases have dealt with affirmative action as practices by public universities: Regents of the University of California v. Bakke (1978), and two companion cases decided by the Supreme Court in 2003, Grutter v. Bollinger and Gratz v. Bollinger.

In Bakke, the Court held that racial quotas are unconstitutional, but that educational institutions could legally use race as one of many factors to consider in their admissions process. In Grutter and Gratz, the Court upheld both Bakke as a precedent and the admissions policy of the University of Michigan Law School. In dicta, however, Justice O'Connor, writing for the Court, said she expected that in 25 years, racial preferences would no longer be necessary. In Gratz, the Court invalidated Michigan's undergraduate admissions policy, on grounds that unlike the law school's policy, which treated race as one of many factors in an admissions process that looked to the individual applicant, the undergraduate policy used a point system that was excessively mechanistic.

In these affirmative action cases, the Supreme Court has employed, or has said it employed, strict scrutiny, since the affirmative action policies challenged by the plaintiffs categorized by race. The policy in Grutter, and a Harvard College admissions policy praised by Justice Powell's opinion in Bakke, passed muster because the Court deemed that they were narrowly tailored to achieve a compelling interest in diversity. On one side, critics have argued—including Justice Clarence Thomas in his dissent to Grutter—that the scrutiny the Court has applied in some cases is much less searching than true strict scrutiny, and that the Court has acted not as a principled legal institution but as a biased political one. On the other side, it is argued that the purpose of the Equal Protection Clause is to prevent the socio-political subordination of some groups by others, not to prevent classification; since this is so, non-invidious classifications, such as those used by affirmative action programs, should not be subjected to heightened scrutiny.

Shelley v. Kraemer, (1948), is a landmark United Supreme Court case that struck down racially restrictive housing covenants. The case arose after an African-American family purchased a house in St. Louis that was subject to a restrictive covenant preventing "people of the Negro or Mongolian Race" from occupying the property. The purchase was challenged in court by a neighboring resident, and was blocked by the Supreme Court of Missouri before going to the U.S. Supreme Court on appeal.

In a majority opinion that was joined by the other five participating justices, U.S. Supreme Court Chief Justice Fred Vinson struck down the covenant, holding that the Fourteenth Amendment's Equal Protection Clause prohibits racially restrictive housing covenants from being enforced. Vinson held that private parties could abide by the terms of a racially restrictive covenant, but that judicial enforcement of the covenant qualified as a state action and was thus prohibited by the Equal Protection Clause.

Federal Appeals Court Decision on Affirmative Action November 12, 2020
(Source: Politico)

Affirmative action in the United States is a set of laws, policies, guidelines, and administrative practices intended to end and correct the effects of a specific form of discrimination" that include government-mandated, government-approved, and voluntary private programs. The programs tend to focus on access to education and employment, granting special consideration to historically excluded groups, specifically racial minorities or women.

A federal appeals court on Thursday, November 12, 2020 agreed with a lower court ruling that Harvard University does not intentionally discriminate against prospective Asian American students. Two judges from the First Circuit Court of Appeals ruled that the district court was correct in ruling that Harvard's limited use of race in its admissions process in order to achieve diversity "is consistent with the requirements of Supreme Court precedent."

"Today's decision once again finds that Harvard's admissions policies are consistent with Supreme Court precedent, and lawfully and appropriately pursue Harvard's efforts to create a diverse campus that promotes learning and encourages mutual respect and understanding in our community,"

Harvard spokesperson Rachael Dane said. “As we have said time and time again, now is not the time to turn back the clock on diversity and opportunity.”

Judge Sandra Lynch, a Bill Clinton appointee, wrote the opinion. She also led most of the questioning during oral arguments in September, pressing for evidence of racial profiling and discrimination, along with Judge Juan Torruella, who was appointed by former President Ronald Reagan, though Torruella did not participate in issuing the ruling.

The background: Students for Fair Admissions’ appeal argued the district court was unable to determine that Harvard treats Asian American applicants fairly. It also put a spotlight on the university’s use of a “personal rating” in admissions decisions, which the group argued rates Asian American applicants lower than their peers and is discriminatory.

The Trump administration-backed lawsuit could be the Supreme Court’s next opening to ban affirmative action. Edward Blum, president of Students For Fair Admissions and a longtime anti-affirmative action activist, vowed Thursday to get the high court to take up the case. “While we are disappointed with the opinion of the First Circuit Court of Appeals, our hope is not lost,” Blum said in a statement. “This lawsuit is now on track to go up to the U.S. Supreme Court where we will ask the justices to end these unfair and unconstitutional race-based admissions policies at Harvard and all colleges and universities.”

What’s next: The administration-backed lawsuit could be the Supreme Court’s next opening to ban affirmative action…While the high court has upheld the use of race as a factor in college admissions multiple times, that could change under the court’s new conservative majority due to the confirmation of justices Amy Coney Barrett and Brett Kavanaugh, who replaced Anthony Kennedy, a key swing vote in the most recent opinion approving the use of race.