That “all men are created equal” was a truth so obvious, it needed no defense, according to the Declaration of Independence. Indeed, equality itself appeared to need no defense, as the Declaration next claimed that the function of government was not to guarantee natural equality, but to protect natural rights, and in particular, the right to liberty. Thus, the purpose of government was the prevention of tyranny, and not the promotion of equality.

That focus shifted following the Civil War. The Reconstruction Congress found the oppression of an entire race abhorrent and drafted the 13th, 14th, and 15th amendments to correct the situation. These amendments, which Southern states were required to ratify before readmission to the Union, were intended to end this unequal treatment by correcting those portions of the Constitution which could be used to support slavery or discrimination. And two Supreme Court Cases in particular, *Prigg v. Pennsylvania* (1842) and *Barron v. Baltimore* (1833) appear to have been especially targeted.

*Prigg* involved the Fugitive Slave Act and Article IV, Section 2 of the Constitution. Edward Prigg, who captured and returned a fugitive slave to her owner, was arrested and charged with kidnapping. The Court ruled that Article IV, Section 2, the “service or labour” clause, required states to assist in returning fugitive slaves to their owners. But several of the Justices went further, reading in the clause a positive affirmation of the property right of the slaveowner to the slave.

*Barron* involved the loss of property and livelihood because of the actions of the City of Baltimore. He claimed that this constituted a “taking” in violation of his rights guaranteed in the 5th Amendment. The Court agreed that Baltimore’s act amounted to a “taking” but argued that the guarantees contained in the Bill of Rights applied only to national action, not action by the states.

Of similar trouble to the Reconstruction Congress was *Barron v. Baltimore*, which involved not issues of equality, but property (as arguably did *Prigg*). In *Barron*, Mr. Barron lost his property and his livelihood because of the actions of the City of Baltimore. He claimed that this constituted a “taking” in violation of his rights guaranteed in the 5th Amendment. The Court agreed that Baltimore’s act amounted to a “taking” but argued that the guarantees contained in the Bill of Rights applied only to national action, not action by the states.

These two cases find their ultimate expression in *Dred Scott* (1856), the case that affirmed the property rights of slave owners, denied the claims to citizenship and equality of the Negro race, and voided the Missouri Compromise. Although it is grounded in some measure by a most curious understanding of race relations at the Founding, following on the heels of *Prigg* and *Barron*, and to some degree bound by *stare decisis*, the Court...
defends slavery and denies that the civil liberties enshrined in the Bill of Rights extend to the citizens of the states. That is, following Prigg, slaves are property, not persons, and following Barron, the states are free to deny constitutionally-guaranteed civil rights and civil liberties. It is this which the Civil War Amendments in general and the 14th Amendment in particular, attempted to change. The result is the requirement that the states extend to all citizens of the United States, the “equal protection of the laws.”

But this is perhaps easier said than done. The Founders either took human equality for granted, or believed that government need not enforce equality. But with the adoption of the 14th Amendment which requires the equal protection of the laws, it was the task of government, especially the Court, to determine just what “equal protection of the laws” required. Unsurprisingly, the Court interpreted the Equal Protection Clause as a group of lawyers might; what was protected, they said, was legal and political equality, not social or economic equality.

In Plessy v. Ferguson (1896), the Court determined that separate accommodations for the races are constitutionally permissible. The Equal Protection Clause does not require the intermingling of the races, merely their equal treatment under the law. Indeed, the Court suggested that legislation requiring integration was likely to fail, and that racism could only be eradicated by the slow and informal process of voluntary social interaction. The Court found the claim that segregation imposes a stigma on the excluded race without merit, as such a stigma is the result of that race’s assumptions regarding the purpose of the segregation.

Although the Court defended the notion of “separate but equal” regarding social or economic conditions, it protected the legal and political equality of the races. In 1880, the Court defended the rights of blacks to serve on juries (Strauder v. West Virginia, 1880). Six years later, the Court ruled that the Equal Protection Clause applied with equal force to Asians (Yick Wo v. Hopkins, 1886). And in 1927, the Court defended the rights of minorities to participate in political primaries (Nixon v. Herndon, 1927).

But it was not until 1954 that the Equal Protection Clause was extended beyond the legal and political realms to social and economic activity. In Brown v. Board of Education, the Court found persuasive the claim raised in Plessy that segregation necessarily stigmatized the excluded race, and that therefore, separate conditions could never be equal. A unanimous Court ordered the end of de jure segregation in education, finding, “We conclude that in the field of public education the doctrine of ‘separate but equal’ has
no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.”

In its interpretation of the Equal Protection Clause, the Court developed a doctrine of “suspect classifications” which, if involved in the policy at issue, would trigger “strict scrutiny.” In University of California Regents v. Bakke, Justice Powell, writing for a divided Court, employed the doctrine of suspect classifications to find a policy setting aside seats for minority students violated the Equal Protection Clause. He noted that suspect classifications had not been reserved only for those in minority positions. “Nor has this Court held that discreteness and insularity constitute necessary preconditions to a holding that a particular classification is invidious. ...These characteristics may be relevant in deciding whether or not to add new types of classifications to the list of “suspect” categories or whether a particular classification survives close examination. Racial and ethnic classifications, however, are subject to stringent examination without regard to these additional characteristics.” Thus, the Equal Protection Clause protects against reverse discrimination as well as discrimination against minorities. Nevertheless, Justice Powell also concluded that although racial quotas could not be established, race could be considered as a factor in admissions since a diverse student body was a compelling interest.

The Court’s reasoning in Bakke was recently confirmed in Gratz v. Bollinger and Grutter v. Bollinger, two cases testing admissions policies at the University of Michigan and the University of Michigan Law School respectively. In both cases, the admission of traditionally under-represented minorities constituted a compelling state interest, but the law school considered the applicants as individuals, thus meeting the requirement that the procedure be “narrowly tailored.” On the other hand, the University of Michigan treated all minorities equally, automatically awarding them twenty percent of the score needed for admission, and was thus not sufficiently narrowly-tailored to survive strict scrutiny.

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PLESSY v. FERGUSON (1896)

Case Background

Although the Declaration of Independence affirmed that “all men are created equal,” and had inalienable rights including liberty, African Americans were systematically denied their liberty with the institution of slavery. Even after the Civil War and the passage of the Thirteenth, Fourteenth, and Fifteenth Amendments, segregation was a fact of life in the United States. Throughout the country, the races remained separated by both custom and law.

With the end of Reconstruction, every southern state, as well as some northern ones, passed what came to be termed Jim Crow laws. These policies required segregation in public places. African Americans were denied equal access to public facilities like transportation, education, and the voting booth. In 1878, the Supreme Court held that states could not require integration on interstate common carriers. In 1890, the Court held that Mississippi could require segregation on modes of interstate transportation.

Five years later, Homer Plessy, a resident of Louisiana, decided to challenge a Louisiana law requiring segregation on railcars by purchasing a train ticket and sitting in a “whites only” car. Because Plessy was an “octoroon” (1/8th black), he was subject to the black codes of Louisiana. When he was questioned as to his status, he admitted to being an octoroon, and was arrested when he refused to leave the car. He appealed his case to the Supreme Court of Louisiana and eventually the United States Supreme Court, claiming that the Louisiana law violated the Fourteenth Amendment.
**DOCUMENT A**

*The Declaration of Independence, 1776*

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness....

- In what manner does the Declaration of Independence understand all people to be equal?

**DOCUMENT B**

*Thomas Jefferson, Notes on the State of Virginia, 1787*

Comparing [Negros] by their faculties of memory, reason, and imagination, it appears to me, that in memory they are equal to the whites; in reason much inferior, as I think one could scarcely be found capable of tracing and comprehending the investigations of Euclid; and that in imagination they are dull, tasteless, and anomalous.... This unfortunate difference of colour, and perhaps of faculty, is a powerful obstacle to the emancipation of these people.

- Contrast Jefferson’s views on racial equality with the assertion of the Declaration of Independence (Document A).

**DOCUMENT C**

*The Constitution of the United States, 1789*

*Article I, Section 2, Paragraph 3:* Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.

- Who are the “all other Persons” referred to in this document?
- How were these “all other persons” counted for the purpose of apportioning a state’s representatives and direct taxes?
DOCUMENT D

The Tenth Amendment, 1791
The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

- Restate the Tenth Amendment in your own words.

DOCUMENT E

Thomas Jefferson to Henri Gregoire, 1809
Be assured that no person living wishes more sincerely than I do, to see a complete refutation of the doubts I have myself entertained and expressed on the grade of understanding allotted to them [Negroes] by nature, and to find that in this respect they are on a par with ourselves. My doubts were the result of personal observation on the limited sphere of my own State, where the opportunities for the development of their genius were not favorable, and those of exercising it still less so. I expressed them therefore with great hesitation; but whatever be their degree of talent it is no measure of their rights. Because Sir Isaac Newton was superior to others in understanding, he was not therefore lord of the person or property of others. On this subject they are gaining daily in the opinions of nations, and hopeful advances are making towards their re-establishment on an equal footing with the other colors of the human family.

- How does Jefferson clarify his beliefs on the racial inferiority of blacks (Document B)?
Argument of John Quincy Adams, *Amistad Case*, 1841

Note: In 1839, Africans aboard the schooner *Amistad* revolted and demanded to be returned home. The captain instead brought them to New York, and the captives were to be sold as slaves. A legal battle followed over the question of the status of the captive Africans.

The Constitution of the United States recognizes the slaves, held within some of the States of the Union, only in their capacity of persons. ...The Constitution nowhere recognizes them as property. The words slave and slavery are studiously excluded from the Constitution. Circumlocutions are the fig-leaves under which these parts of the body politic are decently concealed. Slaves, therefore, in the Constitution of the United States are recognized only as persons, enjoying rights and held to the performance of duties.

That Declaration [of Independence] says that every man is “endowed by his Creator with certain inalienable rights,” and that “among these are life, liberty, and the pursuit of happiness.” ...The moment you come, to the Declaration of Independence, that every man has a right to life and liberty, an inalienable right, this case is decided. I ask nothing more in behalf of these unfortunate men, than this Declaration.

- What does Adams argue about the Constitution’s recognition of slaves?
- Why does Adams reference the Declaration of Independence?
What does the artist believe is the promise of the Declaration of Independence?
DOCUMENT H

Section of The Fourteenth Amendment, 1868

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....

Section. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

- What does the Fourteenth Amendment guarantee to residents of every state?
- Does Section 5 of this document change the meaning of the Tenth Amendment (Document D)?

DOCUMENT I

Civil Rights Cases, 1883

[Federal civil rights] legislation cannot properly cover the whole domain of rights appertaining to life, liberty, and property, defining them and providing for their vindication. That would ... make congress take the place of the state legislatures and to supersede them.

It is absurd to affirm that, because the rights of life, liberty, and property ... are by the [Fourteenth] Amendment sought to be protected against invasion on the part of the state without due process of law, Congress may, therefore, provide due process of law for their vindication in every case; and that, because the denial by a state to any persons of the equal protection of the laws is prohibited by the amendment, therefore congress may establish laws for their equal protection.

- Which level of government does this opinion imply has the power to correct state violations of rights to life, liberty and property?
DOCUMENT J


> What was Ferguson’s title?
> Did the United States Supreme Court affirm or overturn the decision of the Louisiana court?

*Courtesy National Archives, Plessy v. Ferguson, 163, #15248; Records of the Supreme Court of the United States; Record Group 267.*
**DOCUMENT K**

**MAJORITY OPINION**

**Majority Opinion (6-1), Plessy v. Ferguson, 1896**

The object of the [Fourteenth] 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. Laws permitting, and even requiring, their separation, in places where they are liable to be brought into contact, do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power. . . .

We consider the underlying fallacy of [Plessy’s] argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses 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 two 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. . . .

Legislation is powerless to eradicate racial instincts, or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. If the civil and political rights of both races be equal, one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the constitution of the United States cannot put them upon the same plane.

- What kinds of laws does the Court say that state legislatures have the rightful power to pass?
- What does the Court say is the basic flaw in Plessy’s argument?
- What does the Court argue about laws that try to abolish racial prejudices?
- Why is this decision said to have affirmed the doctrine of “separate but equal”? 

The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth, and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage, and holds fast to the principles of constitutional liberty. But in 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 caste here. Our constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful....

Sixty millions of whites are in no danger from the presence here of eight millions of blacks. The destinies of the two races, in this country, are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law. What can more certainly arouse race hate, what more certainly create and perpetuate a feeling of distrust between these races, than state enactments which, in fact, proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens? That, as all will admit, is the real meaning of such legislation as was enacted in Louisiana.

- What does the dissenting opinion mean by “Our constitution is color-blind”?
- What does the dissenting opinion claim is the “real meaning” of the Louisiana segregation law?
How does this photograph from 1940 reveal the legacy of the *Plessy* decision?
Brown v. Board of Education (1954)

The doctrine of “separate but equal” did not make its appearance in this Court until 1896 in the case of Plessy v. Ferguson....

Negro and white schools involved have been equalized, or are being equalized, with respect to buildings, curricula, qualifications and salaries of teachers, and other “tangible” factors. Our decision, therefore, cannot turn on merely a comparison of these tangible factors in the Negro and white schools involved in each of the cases. We must look instead to the effect of segregation itself on public education. ...Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.

- The Court acknowledges the growing “equality” of schools for blacks and whites. Why, then, will the Court overturn Plessy?