

Race AND the Constitution



Race AND the Constitution

Table of Contents

01

Introduction

02

The Declaration
and Slavery

04

The Constitution
and Slavery

07

A Truly Pro-Slavery
Constitution

09

The Civil War

11

Reconstruction:
Promise and Failure

15

The Civil Rights
Movement

18

Race at the
Supreme Court

20

Major Race-Related
Cases at the
Supreme Court

22

Modern Threats
to Equality

24

Endnotes and
Endorsements



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.”

—THE DECLARATION OF INDEPENDENCE

Introduction

Racial discrimination is as old as humanity. The temptation to treat people differently just because we think they are different from us is common. Sometimes people do it because they fear or hate other people. Sometimes they do it for personal gain. That temptation does not disappear when people form governments, but the consequences become more serious.

Some governments mandate racial discrimination.¹ Some treat it as a necessary evil. Others forbid it entirely. In most countries, the national policy on discrimination is just a matter of politics. Whoever gets power gets to decide whether discrimination will be allowed or outlawed. Not so in America. In America, principle is at stake.

America was founded on principles that transcend power. Might does not make right here. A law may be enacted by the proper process and still be wrong.

The Declaration of Independence—America’s first set of principles—says that “all men are created equal,” and the Constitution aims to give life to the Declaration’s principle of equality by guaranteeing equal rights and equal protection under the law. This principle means that neither the color of your skin nor the country of your birth nor the language of your ancestors is a legitimate reason for the government to treat you differently. Every person possesses in equal measure the unalienable rights that the government must protect because all of us, no matter what color we may be, are equally human.

Although the American people aspire to that principle, we have at times failed to live up to it. When it comes to race, America is always at a turning point. People are tempted to divide into tribes, and skin color is an old and familiar tribal standard. We are constantly choosing whether we will judge each other according to character or skin color, and because our government is of and by the people, we are constantly choosing whether it will do the same.



The Declaration of Independence and Slavery

The Declaration of Independence, along with the preamble of the Constitution and speeches and writings of our statesmen, help define the foundational character and values of America. The Declaration's most recognizable phrase—"all men are created equal"—is a standard to which we can hold both ourselves and our country.

What does equality mean? Of course, people aren't equal in their attributes. Some are tall, others short; some rich, others poor; some smart, others not. But all are equal in the two most

important ways: We are all endowed by God with the same unalienable rights, and no one is born with the privilege to rule over other people without their consent.² Thomas Jefferson said that "the mass of mankind has not been born with saddles on their backs, nor a favored few booted and spurred, ready to ride them legitimately, by the grace of god."³ "Men" in the Declaration is a substitute for "mankind" and includes everyone, no matter what they look like. Men and women can have different physical features, minds, and ethnicities, but none of those differences

undermines their fundamental equality as human beings who have the right to govern themselves and to be governed only with their consent.

The Declaration did not describe current conditions. Sadly, America fell short of the promise of human equality because the states permitted slavery.

Lincoln said, as a “stumbling block” to slavery and the seed of its future destruction.⁶

Which is exactly what it turned out to be. That principle of absolute equality became the battle hymn of the Union during the Civil War: “As He died to make men holy, let us die to make men

“[The Founders] said that man was entitled to be free, because he was endowed by his Creator with that right.... **They contended for no class, no condition.** They contended for humanity.”⁴

—JOHN P. HALE

But the existence of slavery did not mean that the principle of human equality was false. In fact, it is precisely because it is true that we know slavery is wrong. The Declaration was one of the standards that told the people they were not being good.

Defenders of slavery argued that the writers of the Declaration did not mean all mankind, but only white people. They were wrong, as John Hale and Abraham Lincoln explained. Lincoln saw that the line “all men are created equal” had “no practical use in effecting our separation from Great Britain.”⁵ Why then was it included in the document that declared that separation? Because the document also defined the character of the new nation. The line was included “for future use,”

free.”⁷ And hundreds of thousands did. At the price of “immeasurable human suffering,” the nation paid for the principle that “all men are created equal, are equal citizens, and must be treated equally before the law.”⁸

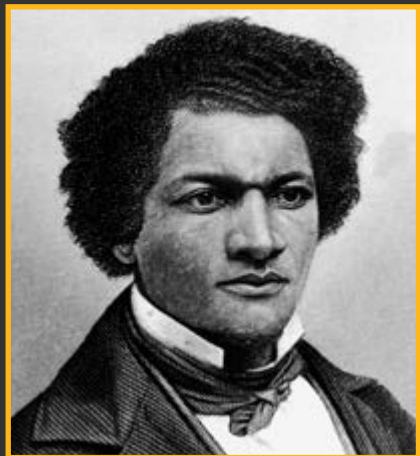
Lincoln’s great observation was that the struggle for absolute equality is never over. He said that the principle of absolute equality must be “constantly looked to, constantly labored for, and even though never perfectly attained, constantly approximated.”⁹ We are always tempted to deny other people their fundamental equality out of hatred, ignorance, or a desire for personal gain. The Declaration, therefore, is our nation’s compass, always pointing to what is right.

The Declaration and the Constitution

What is the relationship between the Declaration and the Constitution? Abraham Lincoln said that the Declaration of Independence was “an ‘apple of gold’ to us. The Union, and the Constitution, are the picture of silver, subsequently framed around it. The picture was made, not to conceal, or destroy the apple; but to adorn, and preserve it.”¹⁰ Lincoln is quoting from the Old Testament Book of Proverbs, which says that a good word (truth, praise, or

advice) is like a golden apple in a silver frame—something beautiful to be displayed and treasured. Lincoln is saying that the Declaration’s principle of human equality is one such treasure and that the Constitution is the way we preserve and display it. The Declaration gives the Constitution purpose. Equality cannot be supported without institutions that are made to protect it, and the Constitution creates institutions that can do just that.

Frederick Douglass



FREDERICK DOUGLASS (1817-1895) was an abolitionist, orator, and statesman—but before that, he had been a slave.

He knew better than anyone else the extent to which the country had fallen short of the Declaration's principle of absolute equality. Until he escaped to freedom, he had neither liberty nor equality. What he had instead was firsthand knowledge of injustice and scars on his back to remind him of it. Frederick Douglass hated this injustice, but he loved both the Declaration and the Constitution.

Through his studies of human nature and history, he came to believe that those documents offered the best hope of stamping out both slavery and racial discrimination.

The Constitution and Slavery

“Now, take the Constitution according to its plain reading, and I defy the presentation of a single pro-slavery clause in it. On the other hand it will be found to contain principles and purposes, ***entirely hostile to the existence of slavery.***”¹¹

—FREDERICK DOUGLASS

Is the Constitution pro-slavery or anti-slavery? This question is old, and its best answers were given when the stakes were highest, when the nation went to war with itself to answer it once and for all.¹²

In answering this question today, it helps to ask ourselves why Frederick Douglass called the Constitution “a glorious liberty document.”¹³ Although he initially thought that the Constitution was a “wicked compact,”¹⁴ he came to see that throwing away the Constitution would be like throwing away the compass on a ship.¹⁵ Moreover, throwing away the Constitution would also deny slaves the best argument they had for claiming their freedom. After all, the Declaration's principle of equality, although true, was meaningless without rules that guided the nation toward it—rules that the Constitution created and that good people could use to destroy slavery.

Douglass knew that the American people and their state and federal governments fell short when it

came to honoring and enforcing those rules. But where critics of the Constitution went wrong, he argued, was in thinking of the Constitution and the governments “as one and the same thing.”¹⁶ They are not. They are “as distinct from each other as the compass is from the ship.”¹⁷

“If the American government has been mean, sordid, mischievous, devilish, it is no proof whatever that the Constitution of government has been the same.”¹⁸

In fact, it was the Constitution itself that let Douglass hold the nation to account over slavery. The Constitution made concrete the “great principles” in the Declaration—the nation’s standards of good behavior.

To Douglass, whether the Constitution was pro-slavery or anti-slavery turned on whether it protected or undermined those principles. The question was: Does the Constitution protect a right to own other people?¹⁹ In other words, does it concede that some people have a right to rule others?

The answer is a resounding “No.” The Framers repeatedly refused to include any words in the Constitution that could be interpreted as creating property in people.²⁰ James Madison said during the Constitutional Convention that it would be “wrong to admit in the Constitution the idea that there could be property in men.”²¹ Although the Constitution tolerated slavery where it already existed, it did not protect it from abolition. In fact, it enshrined principles that would eventually lead to slavery’s demise.

For one thing, nowhere in either the Declaration or the Constitution are human beings classified by race, ethnicity, color, or anything else. Both documents recognize the rights of all people, persons, and citizens without any regard for what they look like.

But what about the Framers’ intent? Isn’t it relevant that some of the men who drafted and

ratified the Constitution owned slaves? Frederick Douglass answered those questions with one of his own: What is the Constitution? It is, he said, “a written instrument, full and complete in itself.”²² All that matters when interpreting written laws like the Constitution is “the text and only the text.”²³ The Framers’ intentions, “be they good or bad, be they for slavery or against slavery, are to be respected so far, and so far only, as they have succeeded in getting these intentions expressed in the written instrument itself.”²⁴

Nothing in the text of the Constitution protects slavery from abolition. Even where the Constitution refers to slavery, it always refers to slaves as persons to avoid denying them their inalienable rights. It is true that the Constitution itself did not free any slaves, but by referring to slaves as persons, the Constitution denied slaveholders the ability to claim that it protected the legitimacy of slavery. In short, the Constitution tolerated slavery where it existed but did not protect it.²⁵

This might seem like a small distinction, but it was, in fact, profound. For one thing, it meant that if the people of the slave states passed laws to abolish slavery—as most of the Founders hoped—defenders of slavery could not use the Constitution to defeat those laws. Second, it meant that Congress had the power to outlaw slavery in new territories, thus preventing slavery from expanding. Third, it kept the slave states in the Union, which gave free states power that they could—and later would—use to end slavery. If the Framers had tried to abolish slavery in the Constitution, the slave states would never have agreed to be part of the new country, and the free states would not have been able later to force them to follow the standards set by the Declaration of Independence.²⁶ There would have been no Civil War, no Emancipation Proclamation, and no Thirteenth Amendment.

Despite all of this, critics of the Constitution argued that several clauses actually did protect

slavery. One clause says that three-fifths of “other persons” (referring to slaves while still recognizing their humanity) will count toward representation. Another says that Congress cannot outlaw the importation of “such persons

Finally, Douglass turned to the so-called Fugitive-Slave Clause. He noted that an original draft of that clause was rejected by the Framers because it applied to slaves. He also noted that the clause refers to labor that is “due.” If a slave is a person, as the

“Abolish slavery tomorrow, and ***not a sentence or syllable of the Constitution need be altered.***”²⁷

— FREDERICK DOUGLASS

as any of the States now existing may think fit to admit” until 1808. One says that the militia may suppress insurrections. Another says that “no person held to service or labour” will be discharged from that labor by escaping to another state, but must be delivered to the person to whom labor “may be due.” Do these provisions defend slavery, as critics contended?

Frederick Douglass and others, like abolitionist legal scholar Lysander Spooner, showed that they do not.²⁸ Not one of these provisions denies slaves their inalienable rights, admits that slaveholders have property rights in slaves, or prevents the states from ending slavery. The plain text—which controls—does not mention slavery; therefore, these clauses cannot rightly be interpreted as doing so.

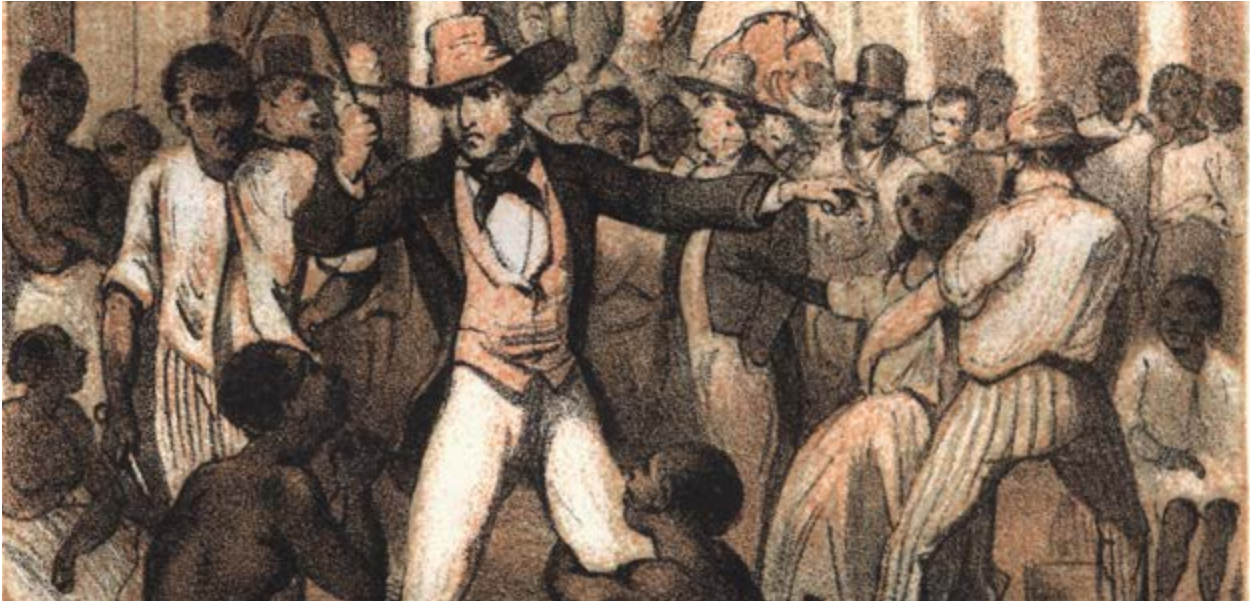
But even if these clauses are taken at their worst, Douglass argued, each still “leans to freedom, not to slavery.”²⁹ Article I, section 2 did not define slaves as three-fifths of a person; it reduced slave states’ representation in Congress and thus gave them an incentive to increase their representation by becoming free states. Article I, section 9 gave Congress the power to outlaw the international slave trade, which it did immediately in 1808. Article I, section 8 does not mention slave rebellions. What’s more, Douglass argued, slavery itself was “an insurrection by one part in the country against the just rights of another,” which meant that this clause gave the federal government the power to use force to end slavery.

Constitution says, and endowed with all the same rights as any other, as the Declaration says, can it be that his labor is “due” to someone who purports to own him in violation of those rights? Of course not. Douglass called the idea that a slave could owe his master anything “perfectly ridiculous.”³⁰

At first, some states did not respect the principles that the Constitution embodied. As Douglass said, however, that was a problem of the people, not of the Constitution itself. The Constitution was not pro-slavery, and the principle of absolute equality—the apple of gold that it framed—was anti-slavery.

But Douglass was not done with the Constitution’s critics. His most forceful response to their claim that the Constitution applied only to white people was: How dare you? “[H]ow dare any man who pretends to be a friend to the Negro thus gratuitously concede away what the Negro has a right to claim under the Constitution?”³¹ The plain language of the Constitution is “we the people”; not we the white people, not we the citizens, not we the privileged class, not we the high, not we the low, not we of English extraction, not we of French or of Scotch extraction, but “we the people.”³² Black people have the same right “to demand their liberty” that everyone else has.³³

It took the Civil War, Reconstruction, and the civil rights movement to convince some people that Frederick Douglass was right. But he was—and he still is. The Constitution’s protections are for everyone to claim, regardless of skin color.



A Truly Pro-Slavery Constitution

“I do not regard the Negro as my equal, and positively deny that he is my brother, or any kin to me whatever.”³⁴

—Stephen A. Douglas

What would a truly pro-slavery constitution look like? We don’t have to guess. Ardent defenders of slavery wrote just such a constitution for the breakaway Confederate States of America.

Alexander Stephens, Vice President of the Confederate States of America, explained one of the most fundamental differences between the two constitutions in an 1861 speech:

The prevailing ideas entertained by [Thomas Jefferson] and most of the leading statesmen at the time of the formation of the old constitution, were that the enslavement of the African was in violation of the laws of nature; that it was wrong in principle, socially, morally, and politically.... Those ideas, however, were fundamentally

wrong. They rested upon the assumption of the equality of races. This was an error....

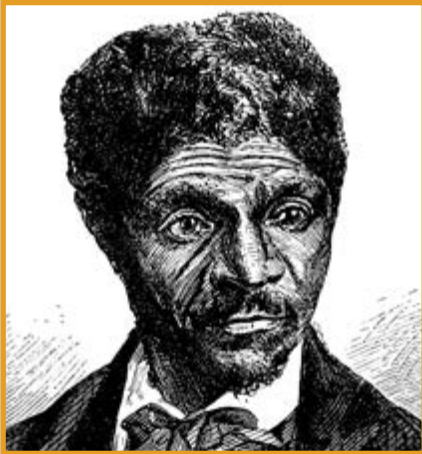
Our new government is founded upon exactly the opposite idea; its foundations are laid, its corner-stone rests, upon the great truth that the negro is not equal to the white man; that slavery subordination to the superior race is his natural and normal condition. This, our new government, is the first, in the history of the world, based upon this great physical, philosophical, and moral truth.³⁵

Many of slavery’s defenders shared Stephens’ view and rejected the U.S. Constitution precisely because they knew its principles were incompatible with slavery.

Of course, this view could never be squared with the Constitution and the Declaration that it framed. That is why the Confederacy had to draft a new constitution.

Dred Scott and Harriet Beecher Stowe

INSPIRING THE FIGHT FOR EQUALITY



DRED SCOTT (1799 - 1858) was a slave whose owner took him from Missouri to the free territory of Wisconsin. He sued for his freedom claiming that he had automatically been freed when he arrived in Wisconsin. In one of the most infamous decisions in Supreme Court history, Chief Justice Roger Taney ignored the plain text of the Constitution, rejected the idea that all men are created equal, and held that black people are not included when the Constitution says “citizens.” He repeated the arguments made by slavery’s defenders that black people were meant to be ruled by whites and had “no rights which the white man was bound to respect.”³⁶

Taney’s decision enraged people in free states and inspired more people to join the abolitionist movement and the newly founded, anti-slavery Republican Party. The party’s presidential candidate, Abraham Lincoln, made opposition to the Supreme Court’s decision a core of his platform. His election as President was the last straw for the slave states, sparking their secession and the Civil War.



HARRIET BEECHER STOWE (1811 - 1896) was first described by Abraham Lincoln as “the little woman who wrote the book that started this great war.” Stowe’s book was *Uncle Tom’s Cabin*, and it inspired the country’s conscience and commitment to equality. The novel told the story of Uncle Tom, a man who lived in slavery but, through his unfaltering witness to Christian love, charity, and sacrifice, embodied true freedom. Stowe’s story showed the people a terrifying image of what slavery was doing not only to slaves, but to the nation’s soul. It also showed the beauty of standing up for the principle that all men are created equal. It exposed the evils of slavery, but it also gave people hope and inspiration. *Uncle Tom’s Cabin* was the second-best-selling book of the century after the Bible, and together, those two books breathed fire into the abolitionist movement.

The Civil War

“A house divided against itself, cannot stand.’ I believe ***this government cannot endure permanently half slave and half free.***”³⁷

—ABRAHAM LINCOLN

The Civil War was about slavery, although both sides sometimes pretended that it was not. The southern states feared that the new Republican Party, led by President Abraham Lincoln, would try to end slavery in the South, but they knew that their moral arguments for slavery were not convincing to anyone but slavery’s staunchest defenders. So they argued that the real issue was the right to self-government. Stephen Douglas, Lincoln’s opponent in the presidential election of 1860, accused abolitionists of proposing to “destroy the right and extinguish the principle of self-government.”³⁸ Confederate President Jefferson Davis said similarly that “[w]e are not fighting for slavery. We are fighting for independence.”³⁹ But self-government and independence to do what? To enslave people.

For his part, Lincoln tried at first to preserve the Union without war by minimizing the two sides’ differences and denied that he would attempt to end slavery.⁴⁰ Shortly after war broke out, he tried to unify many factions in favor of the Union by denying that the war was about slavery:

My paramount object in this struggle is to save the Union, and is not either to save or to destroy slavery. If I could save the Union without freeing any slave I would do it, and if I could save it by freeing all the slaves I would do it; and if I could save it by freeing some and leaving others alone I would also do that.⁴¹

The truth, as Lincoln suggested in his House Divided speech, was that this war would either cut the country in two or see it become entirely free. Black Americans knew this. Frederick Douglass saw that they “comprehended the genius of this war before [white Americans] did”⁴² and that when Lincoln’s Secretary of State Henry Seward said that the war would not address slavery, they “did not believe him.”⁴³ It is no surprise that 200,000 black men fought for the Union and the eventual abolition of slavery across the nation.

They were right that a Union victory would end slavery. When Lincoln issued the Emancipation Proclamation, the war’s true cause took its place center stage. Slavery would either live on in an independent Confederacy or would die in the Union. True, the Emancipation Proclamation only freed slaves in the southern states, but its message and implications cannot be overstated. It was much more than a mere military order. It was, in the words of Henry M. Turner, Bishop of the African Methodist Episcopal Church, “one of the most memorable epochs in the history of the world.”⁴⁴ It was an unmistakable signal that the moral arguments against slavery had won. With that announcement, the Thirteenth Amendment—which ended slavery throughout the whole country—was inevitable. Congress passed the Amendment before the Civil War was even over, and it became law six months after the war’s end.

The Reconstruction Amendments

13th

THIRTEENTH AMENDMENT:

“Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”

14th

FOURTEENTH AMENDMENT:

“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.”

15th

FIFTEENTH AMENDMENT:

“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”

Reconstruction: Promise and Failure

“The war grew out of ***the systematic violation of individual rights by State authority***. The war ended with the vindication of individual rights by national power....It made the liberty and rights of every citizen in every State a matter of national concern.”⁴⁵

—SENATOR CARL SCHURZ, 1870

The black men who fought for the Union fought not only for freedom, but for civil and political equality too. Douglass urged black men to fight for the Union: “let [the black man] get an eagle on his button, and a musket on his shoulder, and bullets in his pocket, and there is no power on earth or under the earth which can deny that he has earned the right of citizenship in the United States.”⁴⁶ While some white Americans were still debating whether the war should or would end slavery, black Americans, sure that it should and would, were already thinking about the next goal.

Progress toward civil and political equality proceeded quickly after the Civil War. Just after the war, the Thirteenth Amendment became law, freeing all the slaves in the country. Shortly after that, the Fourteenth Amendment became law, requiring the states to treat all of their citizens as equals. Its first sentence declared that all Americans—regardless of color—are citizens. This overruled the *Dred Scott* decision, which had held that black Americans were not citizens. Its second sentence forbade states from denying citizens the rights that come with citizenship and from denying any persons their inalienable rights without due process of law. Finally, the amendment guaranteed all people the equal protection of the laws. In the words of Representative John Bingham, principal author of the Fourteenth Amendment, this clause

stood for the “foundation[al] principle” that “all citizens of the United States” enjoyed “absolute equality” both “politically and civilly before their own laws.”⁴⁷

If there had been any confusion in the past about whether the Constitution allowed governments to treat people differently based on race, it was gone. After the Fourteenth Amendment, the answer is a loud and clear “No.” In the words of Justice John Marshall Harlan, the Constitution “is color-blind, and neither knows nor tolerates classes among citizens.”⁴⁸

Two years after the Fourteenth Amendment guaranteed equality, the Fifteenth Amendment forbade the state and federal governments from restricting the right to vote based on race or color. This was the first (and still only) time the Constitution acknowledged that “people,” “persons,” and “citizens” have “race” and “color.” It did not do so to endorse such divisions, however, but to reaffirm that they are not a legitimate basis for treating people differently.

It was profoundly important that all of these amendments were written in universal terms. The Thirteenth Amendment did not forbid only black slavery. The Fourteenth Amendment did not guarantee only black Americans equal rights. And

the Fifteenth Amendment did not protect only black Americans' right to vote. They all applied to everyone. For this reason, the Supreme Court said that the amendments protected anyone and everyone, even if "the party interested may not be of African descent."⁴⁹

"This guarantee has rounded out and perfected our government, and will be a priceless heritage to posterity long after the race in whose behalf it was adopted has ceased to need its ***especial protection.***"⁵⁰

—JUDGE JOHN
WATSON BARR

It took only five years for the nation to ratify all three of these amendments. In that tiny span of time, the country went from being half-slave and half-free to "the world's first biracial democracy."⁵¹ But perhaps the most profound effect of these amendments was to shift the people's focus away from "states' rights," "state sovereignty," or the interests of racial groups and toward equal individual rights. After these amendments, every individual, simply because of his or her humanity, did indeed have "unalienable Rights."⁵² Now state governments had no legitimate power to stop people from claiming those rights, and every individual could demand equal protection of those rights. This was, in the words of Republican Senator Carl Schurz, "a revolutionary process of tremendous significance."⁵³

For a time, this process saw success. Even in the former Confederate states, many organizations devoted themselves to creating a truly multiracial republic. Southern conservatives fought for integration alongside southern populists and

northern Republicans.⁵⁴ Black citizens exercised the right to vote, won election to state and federal offices, and won court cases to vindicate their rights. And Congress passed two civil rights acts to guarantee that the law knew "no race, no color, no religion, no nationality, except to prevent distinctions on any of these grounds."⁵⁵

However, as too often happens in the course of human history, many people gave in to the ever-present temptation to divide and hate. It started when good people stopped fighting against racial discrimination.⁵⁶ Their retreat cleared the way for demagogues to create and exploit racial divisions for political power. They enacted discriminatory laws. They segregated common spaces and public transportation. They organized mobs, used violence, and passed unconstitutional laws to stop black citizens from voting. Nor was it just the southern states that started backsliding. Southern racists were helped a great deal by northern intellectuals who argued, as slavery's defenders had decades earlier, that black people were inferior to white people.⁵⁷ Black Americans were not the only targets of discriminatory laws. Similar laws targeted Chinese immigrants and their descendants.⁵⁸ The promise of absolute equality began to fade.

All of this was bad enough, but it was made even worse when the Supreme Court refused to defend the Fourteenth and Fifteenth Amendments. The plain text of those amendments gave the Supreme Court all the tools it needed to stop this cultural retreat from turning into a legal one, but it refused to do so. Over several years, the Court held that the "privileges or immunities of citizens" were essentially meaningless,⁵⁹ that states could pass laws to prevent black citizens from voting,⁶⁰ and that "equal protection of the laws" did not stop states from discriminating and segregating.⁶¹ In short, the Supreme Court permitted and then joined the retreat away from the "revolutionary process" that tried to protect individual rights for all people equally, regardless of color.

Plessy v. Ferguson

“[W]e cannot say that a law which authorizes or even requires the **separation of the two races** in public conveyances is unreasonable.”

—JUSTICE HENRY BILLINGS BROWN,
AUTHOR OF THE MAJORITY OPINION



The Supreme Court abandoned equal rights completely in *Plessy v. Ferguson*.⁶² Justice Henry Billings Brown, writing for the Court, held that a state could segregate train cars. Despite the Fourteenth Amendment’s guarantee of equality, Brown said that states had the power to segregate if segregation promoted the people’s “comfort” and preserved “public peace and good order.”⁶³ Racists in both the North and South insisted that black people would be better off keeping to themselves and that white people would be happier if they did not have to face the “constant disorder,” as one newspaper put it, of interacting

with “disagreeable” black people.⁶⁴ Brown said that there was nothing unequal about separation as long as the black train cars were just as nice as the white ones. This “separate but equal” rule, he insisted, did not imply that black people were inferior to white people.⁶⁵ That view was a “fallacy,” he said, just the overly sensitive “construction” that black people placed upon segregation.

Ultimately, *Plessy* made the Fourteenth Amendment meaningless. After that decision, state governments were free to make race the defining feature of every person’s life. If a state legislature thought that racial distinctions were positive goods, as slavery’s defenders had argued,⁶⁶ then the Court would consider them constitutional. In this way, *Plessy* rejected not only the Reconstruction Amendments, but the philosophy behind them. The amendments were built on the idea that the right approach to race issues was to protect all Americans’ rights equally. *Plessy* rejected that idea and held that the right way to approach race issues was to try to maximize the “comfort” and “peace” of abstract groups even at individuals’ expense.

The lone dissenter, Justice John Marshal Harlan, fought for equal rights. In what has since become the most famous dissent in Supreme Court history,



Adolph Plessy

HOMER ADOLPH PLESSY (1863 - 1925) was the man who gave his name to one of the most infamous decisions and the most famous dissent in Supreme Court history.

Plessy was from New Orleans, and during the early part of his life, schools were integrated, interracial marriage was lawful, and black men could vote and held elected offices.⁷² When Louisiana started enacting segregationist laws, he and several other people formed a citizens committee to challenge them. Plessy was one-eighth black and looked entirely white. One of his lawyers, Albion Winegar Tourg  e, thought this made him a good plaintiff because any segregation law would be arbitrary if applied to him.⁷³

Was Plessy black or was he white? Who got to choose? Should it have mattered? According to the Supreme Court, the state got to choose, and the state's opinion was all that mattered. The state said that Plessy was black. That meant that Plessy had no say in the question. He could not choose to live as a black man or choose to live as a white one. Neither could he choose to live as just a man. He had no say in the matter. The government forced him to make the skin color of one of his great-grandparents the defining feature of his life, and the Supreme Court said this was constitutional.

After losing at the Supreme Court, Plessy pleaded guilty to violating the segregated train law and paid a hefty fine. The citizens committee disbanded. He died in 1925 in a Louisiana that was much less equal than the one he grew up in. His cause survived him, however, and achieved a major victory 29 years later in *Brown v. Board of Education*.⁷⁴

he exposed the majority's opinion as a lie and a violation of the Constitution. "Every one knows," he said, that separate-but-equal is a "guise" that appears to give "equal accommodation for whites and blacks" but actually forces the latter "to keep to themselves."⁶⁷ The law put people of one race over those of another. This was unconstitutional, Harlan said, because:

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."⁶⁸

What does it mean that the law is colorblind? Echoing Frederick Douglass's observation that "[m]an is man, the world over,"⁶⁹ Harlan put it this way: "[t]he law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved."⁷⁰ In other words, colorblindness means that law does not treat people differently because of their skin color. It does not mean that the law is blind to race discrimination. Quite the opposite: It is a recognition that everyone has prejudice and that it should never be allowed to infect the law.

Harlan thought that discriminatory laws were not only wrong, but dangerous. He warned that they would "arouse race hate" and "create and perpetuate a feeling of distrust between these races."⁷¹ History would prove him right as Jim Crow laws spawned racial hatred and violence. Yet history would prove Harlan right in another way too. Eventually, through the efforts of civil-rights reformers, Harlan's colorblind Constitution would triumph over Brown's race-based one.

The Civil Rights Movement

“I have a dream that my four little children will one day live in a nation where they will not be judged by the color of their skin but by ***the content of their character.***”⁷⁵

—MARTIN LUTHER KING, JR.

Something surprising happened in 1950. Two years earlier, President Harry Truman had issued an executive order that abolished racial discrimination in the military,⁷⁶ but the armed forces were reluctant to fully integrate their personnel. As the Korean War took its toll on predominantly white frontline units, however, the Army was forced to reinforce them with black soldiers. The Army feared that this would lead to racial conflict, but the opposite happened. Race relations in the Army improved. After the war, those soldiers re-entered civilian life with positive experiences having lived, fought, and sacrificed for men of different races. Cracks began to form in the belief that people of different races ought to be separate.⁷⁷

More people started to remember what others had refused to forget: Frederick Douglass’s, John Bingham’s, and Justice Harlan’s hope for the colorblind Constitution. Making that hope a reality was the aim of the civil rights movement—a mass movement of legal and political advocacy and civil disobedience to guarantee equal rights and equal protection for everyone, regardless of skin color. Lawyers like Thurgood Marshall and Jack Greenberg brought lawsuits to try to persuade the Supreme Court to restore the Reconstruction Amendments, and people like Rosa Parks and the black students who sat at a whites-only lunch counter in Greensboro, North Carolina, disobeyed

segregationist laws and bravely faced the unjust consequences. Some, like Medgar Evers and William Lewis Moore, even died for their efforts to ensure that all people are treated equally.

Like abolitionists, civil rights reformers framed their fight in universal terms. Martin Luther King, Jr., said that the “magnificent words” of the Declaration of Independence and the Constitution were for “all men” and “every American.”⁷⁸ Marshall and Greenberg argued that the law must be colorblind and must not discriminate against “any racial group.”⁷⁹ Rosa Parks said that her fight was “for human rights for all people.”⁸⁰ What John Hale had said of the Founders could have been said of them:

“They contended for humanity.”⁸¹

Like Frederick Douglass, leaders of the movement argued that America’s founding principles were good, but the people had fallen short of them. The founding documents, King said, were a promise that everyone would be equally free, but America had “defaulted” on this promise “insofar as her citizens of color are concerned.”⁸² He was right.

Through the efforts of civil rights reformers, this began to change. It was in the courts that they won their earliest victories. In *Pierre v. Louisiana*, the Supreme Court held that prosecutors could not exclude black people

from a jury,⁸³ and in *Morgan v. Virginia*, the Court held that states could not segregate vehicles that crossed state lines.⁸⁴

Reformers' greatest triumph, however, came in *Brown v. Board of Education*, in which the Court held that separate schools are "inherently unequal."⁸⁵ This was more than a blow against Plessy's separate-but-equal doctrine. It was a fundamental shift in the way the Supreme Court approached race issues. In *Plessy*, the Court thought that the right way was to do what experts and popular opinion thought best for the comfort and peace of racial groups, even if that meant denying individuals equal rights; in *Brown*, the Court returned to the Reconstruction view that the right way to deal with race issues was to guarantee neutral and equal treatment for individuals.

Judicial victories were met with resistance and violence in the South and, to a lesser extent, in the North as well.⁸⁶ Reformers realized that judicial power was not sufficient to undo segregation, so they took their fight to other fields. They organized sit-ins and other forms of civil disobedience in which they intentionally violated unjust laws. Their self-discipline "touched the white South's respect for courage" and slowly changed public opinion.⁸⁷

Progress in changing attitudes was slow, but the movement achieved major legislative victories in the two decades after *Brown*. Between 1957 and 1968, Congress passed five major civil rights laws that gave the federal government the power to protect the right to vote and outlawed discrimination in public accommodations, public education, housing, and any programs that take federal money.⁸⁸ Like the Reconstruction Amendments, these laws were written in universal language. They applied to "any person," "any individual," and "all citizens."⁸⁹ And like the Fifteenth Amendment, they mentioned race and color (and other categories, like sex and religion) not to endorse those divisions,

but once again to say that they are not good reasons to treat people differently.

Something surprising had happened in 1950 when the Army integrated its units, and something surprising happened in 1965 after Congress passed the second-to-last of these five civil rights acts. A fault line between two visions for the civil rights movement opened, splitting the movement in two. Violent riots erupted in cities across the country. These were not the riots of white people protesting desegregation, which had terrorized the South after *Brown*. These were riots by young, mostly black people in the North who were discontented with the peacefulness, self-restraint, and commitment to colorblindness of the "old" civil rights movement.⁹⁰ They were angry with discrimination, with wealth disparities, with white people, with the leaders of the old civil rights movement, and with Western civilization itself, which they saw as the root cause of all that angered them. One of the leaders of this "black power" movement, Stokely Carmichael, said that their mission was to "smash everything Western civilization has created."⁹¹ They wanted the races to be separate once again, concluding that black Americans should become a "nation within a nation."⁹²

Leaders of the old civil rights movement, who had earlier observed with concern this new movement, called it a force of "bitterness and hatred."⁹³ Martin Luther King, Jr., for example, worried that the new movement would undo the good work of the old and lead the country to a "frightening racial nightmare."⁹⁴ The old leaders' experience with separate-but-equal was "longer and more bitter" than that of the young radicals, and they did not want to revisit that experience.⁹⁵

For a time, the old civil rights movement prevailed. In the years after *Brown* and the civil rights acts, every state and territory in the Union passed laws guaranteeing equal rights for all people.

Thurgood Marshall and Clarence Thomas



JUSTICE THURGOOD MARSHALL (1908 - 1993) was a civil rights attorney who used the Constitution to roll back many laws and prior judicial decisions that created and upheld segregation. Among other notable cases, he argued one of the cases related to *Brown v. Board of Education*. Early in his career, he was on the side of the “old” civil rights movement. In his advocacy, he embraced Harlan’s view that the Constitution is colorblind, arguing against using racial classifications to forcibly integrate schools.⁹⁶

Later in his career, however, Marshall retreated from this position and defended racial classifications and preferences. He claimed that the “principle of color-blindness” does not ban race-based benefits to black people, even if that meant giving race-based detriments to others.⁹⁷ In short, colorblindness prohibited discrimination against black people but not discrimination in their favor.

At the end of his career, Marshall retreated from the Constitution itself, calling it “defective” and its principles “outdated.”⁹⁸ In his view, liberty, justice, and equality were not absolute principles. They were malleable goals to be shaped over time by people with the “right ideas” about how to “better them.”⁹⁹ He believed that experts should use racial classifications to force equal outcomes across racial groups.



JUSTICE CLARENCE THOMAS (b. 1948) has a different view. As a young man, he too was angry with the twin injustices of segregation and condescension. He thought that all of America “was irretrievably tainted by racism.”¹⁰⁰ In his anger, he rejected the old civil rights movement and decided that he should fight to destroy “the oppressive machinery of American life.”¹⁰¹

Over time, however, he changed his mind. While at college, other black students wanted to segregate their housing, and Thomas wondered whether “we really want to do to ourselves what whites had been doing to us[.]”¹⁰² He also foresaw that other groups would claim the special preferences given to black people, which would create competition, division, and hatred.

Thomas also became concerned that making black people dependent on the government would be “a new kind of enslavement, one which ultimately relied on the generosity—and ever-changing self-interests—of politicians and activists.”¹⁰³ Worse, this dependence would “prove as diabolical as segregation” because it would replace the values of self-reliance, hard work, and personal dignity “without which [blacks] had no long-term hope of improving their lot.”¹⁰⁴ He concluded that although he had “every reason to be outraged by the experience of blacks in America,” he “had no right to confuse their collective sufferings” with his own lot. He was ultimately responsible for himself.

These observations led Thomas to embrace Justice Harlan’s view of the Constitution, concluding that the government must protect people from discrimination but should not try to equalize outcomes across groups. That sort of effort requires the government to treat people differently based on skin color, which “demeans us all.”¹⁰⁵



Race at The Supreme Court

“Eliminating racial discrimination means ***eliminating all of it.***”¹⁰⁶

—CHIEF JUSTICE JOHN ROBERTS

State and federal civil rights acts have forbidden racial and ethnic discrimination in most places, but it still happens, and sometimes the Supreme Court tolerates and even requires it. When and why does the Court do this?

The answers depend on whether a private party or a government entity is discriminating. When the discriminator is a private party, the Supreme Court permits some discrimination. When the discriminator is a government entity (for example, a public school, a state government, or a federal agency), the Supreme Court is stricter.

DISCRIMINATION IN THE WORKPLACE

For example, in the case of private employers, the Supreme Court not only permits some racial discrimination, but may even require it. Two cases created these exceptions to the rule against discrimination: *Griggs v. Duke Power*¹⁰⁷ and *United Steelworkers v. Weber*.¹⁰⁸ In *Griggs*, the Court created a theory of discrimination called “disparate impact.” Under this theory, intent

does not matter. An employer can be liable for discrimination if its job qualifications result in racial disparities. In that case, Duke Power offered manual laborers without high school diplomas the opportunity to work in higher-paying departments if they passed a standardized test. White applicants tended to do better on that test than black applicants did. This was not Duke Power’s doing or its intent, but the Court still held that the test was discriminatory. After *Griggs*, employers risked getting sued over disparities if they did not racially balance their employees.

Not surprisingly, employers started to do just that, and in *Weber*, the Supreme Court permitted it. In that case, Brian Weber’s employer created a promotion training program for its employees based on their seniority but with a preference for black employees. Weber was passed over for the program by less senior black employees simply because he was white. The Supreme Court said that this was fine because the civil rights acts are not really universal. Yes, the plain text protects every individual from discrimination “because of such individual’s race,”¹⁰⁹

but really, the Court insisted, the acts were meant to give black people special treatment.¹¹⁰ Thus, employers could give black employees preferential treatment at others' expense.

MAKING AMENDS

What explained this retreat from the universal language of the civil rights movement and the civil rights acts? *Griggs* and *Weber* arrived about 20 years after *Brown v. Board of Education* at a time when the “old” civil rights movement had fallen out of favor with intellectuals. They agreed with the black radicals and thought that discrimination should not be eliminated but should instead be turned around to help members of groups once hurt by it.

The Court was never willing, however, to give governments quite as much leeway as it allowed to private parties. With respect to governments, it has adopted the view of Reconstruction Republicans that the law should know “no race, no color, no religion, no nationality, except to prevent distinctions on any of these grounds.”¹¹¹ Governments may treat people differently based on race only to remedy the effects of its own past racial discrimination.¹¹² For example, after the government put Japanese Americans in internment camps, it was right for it to make amends to those people.

But the Court limits race-based remedies. The government cannot use racial preferences to try to fix vague lingering effects of historical discrimination.¹¹³ The reason that the Court requires such specific proof of cause and effect is that without it, governments could point to vague historical harms as a pretext for picking racial favorites.

DISCRIMINATION IN HIGHER EDUCATION

It used to be the case that one type of government (and government-funded) entity could pick racial favorites. For many years, the Supreme Court said that it would allow universities to discriminate for and against applicants on the basis of race because

it trusted universities when they said that racial balancing is good for education.¹¹⁴ As in times past, the Court permitted racial discrimination when experts thought it was a positive good. However, time proved that the Court's trust was misplaced.

In *Students for Fair Admissions v. Harvard*,¹¹⁵ the Court reversed course. Harvard and the University of North Carolina wanted racially balanced student bodies but found that members of certain races, especially Asians, tended to have much higher academic credentials than members of other races. On academic merit, Asian Americans earned more spots at the schools than the schools wanted them to have. So both institutions made race a critical factor in all stages of the admissions process. They lowered academic standards for people of some races, used stereotypes about racial groups to deny others, and in other ways made race the “determinative” factor for many applicants.¹¹⁶ Harvard and UNC assured the Court that this was for the good of their student bodies, but the Court was no longer willing to trust experts who said that discrimination could be a positive good.

Anyone who today thinks that some form of racial discrimination will prove ‘helpful’ should thus tread cautiously, lest racial discriminators succeed (as they once did) in using such language to disguise more invidious motives.”¹¹⁷

—Justice Clarence Thomas

As the Court reminded the universities, the “core purpose” of the Equal Protection Clause is “doing away with all governmentally imposed discrimination based on race,” and a “student must be treated based on his or her experiences as an individual—not on the basis of race.”¹¹⁸

In recent years, the tide of case law has surged toward equality, but it has not yet washed away all the old decisions like *Griggs* and *Weber*. Thus, in some contexts, whether the law upholds the colorblind principle remains unclear.

Major Race-Related Cases at the Supreme Court

- 1841 ***United States v. Schooner Amistad***, holding that slaves who took control of the slave ship they were on were not criminals because they had been unlawfully kidnapped onto the ship.
- 1856 ***Dred Scott v. Sandford***, holding that black people were not citizens and could not enjoy the rights and privileges of citizenship.
- 1883 ***The Civil Rights Cases***, holding that the Thirteenth and Fourteenth Amendments did not give Congress the power to outlaw private racial discrimination.
- 1886 ***Yick Wo v. Hopkins***, holding that a law that is not discriminatory on its face but is administered in a discriminatory way violates the Equal Protection Clause.
- 1896 ***Plessy v. Ferguson***, upholding segregated facilities if they are “separate but equal.”
- 1938 ***Missouri ex rel. Gaines v. Canada***, holding that if a state provides a school for white students, it must also provide one for black students.
- 1944 ***Korematsu v. United States***, holding that President Franklin Delano Roosevelt could put Japanese Americans in internment camps during World War II.
- 1946 ***Morgan v. Virginia***, holding that segregation on buses that cross state lines violated the Interstate Commerce Clause.
- 1948 ***Shelley v. Kraemer***, holding that racially discriminatory housing contracts cannot be enforced.
- 1950 ***Sweatt v. Painter***, holding that if separated school facilities were not in fact equal, the school had to let black students use the white facilities.
- 1953 ***Terry v. Adams***, holding that whites-only primary elections were unconstitutional.
- 1954 ***Brown v. Board of Education***, holding that “separate educational facilities are inherently unequal.”
- 1965 ***Heart of Atlanta Motel v. United States***, holding that Congress had the power to prohibit most private businesses from discriminating on the basis of race.

1967 ***Loving v. Virginia***, holding that laws banning interracial marriage violated the Equal Protection Clause.

1971 ***Griggs v. Duke Power***, creating the disparate impact theory.

1976 ***Washington v. Davis***, holding that laws with discriminatory effects do not violate the Constitution unless adopted with a racially discriminatory motive.

1977 ***Village of Arlington Heights v. Metropolitan***, creating a test to determine whether a law had a discriminatory motive.

1978 ***Regents of the University of California v. Bakke***, holding that universities can use racial preferences in admissions.

1979 ***United Steelworkers of America v. Weber***, holding that private employers may sometimes use racial preferences in hiring.

1980 ***Fullilove v. Klutznick***, holding that Congress can spend money in a racially discriminatory way to remedy past racial discrimination.

1986 ***Wygant v. Jackson Board of Education***, holding that societal discrimination is too vague a basis for racially discriminatory remedial programs.

1989 ***City of Richmond v. J.A. Croson Co.***, holding that discriminatory remedial programs are permissible only when the government identifies a specific instance of discrimination in which it had participated.

1995 ***Adarand Constructors v. Peña***, holding that racial preferences are subject to the strictest form of judicial scrutiny.

2003 ***Grutter v. Bollinger***, holding that universities may use racial preferences in admissions to achieve “the educational benefits that flow from a diverse student body.”

2003 ***Gratz v. Bollinger***, holding that a points-based admissions system that automatically favored all people of certain races was unconstitutional because it did not examine the “diversity contributions” of each applicant.

2023 ***Students for Fair Admissions v. Harvard***, holding that universities may no longer use racial preferences in admissions.

“There has been no one-way movement toward improved group relations, but instead many detours, oscillations, and even severe backward movements.”¹¹⁹

—THOMAS SOWELL



Modern Threats to Equality



ARGUMENT 1: There is no transcendent principle of equality. Groups that were once discriminated against should now be treated better than others. Proof of this is that America has often failed to live up to the principle of equality, so its founding documents are false.

RESPONSE: Just as Beethoven’s *Für Elise* is a beautiful piece of music even if one performer plays it badly, a principle can be true even if people sometimes fail to live up to it. In fact, it is precisely because humans are fallible that we look to principles to “guard us against our inevitable tendency to injustice.”¹²⁰ America’s principles give us standards by which we can judge the goodness or wrongness of our behavior, and they show us that if it was wrong to discriminate against one person yesterday, it is wrong to discriminate against another tomorrow. It is right, instead, to try to live up to the principles of equality and justice.



ARGUMENT 2: Because some white people in the past wielded power against black people, all white people today must be made to suffer to pay for this ancestral debt. What wealth and privilege white people

have should be taken and given to black people, and black people today should be given preferences at white people's expense. Yes, this will hurt innocent people, but in the words of Justice Lewis Powell, "innocent persons may be called upon to bear some of the burden of the remedy."¹²¹

RESPONSE: It is wrong to punish innocent people to benefit abstract groups.

What is more, this argument is the same old argument that justified some of the worst behavior in the past. Justice Henry Billings Brown did not think he was doing evil when he announced the separate-but-equal rule; he thought he was doing what was good for the peace and comfort of racial groups. Black power radicals who burned and looted people's homes and businesses did not think they were doing wrong; they thought that the good they hoped to do for their racial group outweighed the harm they caused to individuals.



ARGUMENT 3: Some non-white groups, like people of Asian descent, have now surpassed some white people in wealth and education, and so all of them, too, must be held back so that other less successful groups can rise.

RESPONSE: The racial groups that this argument tries to help are arbitrary. What Frederick Douglass said in 1867—that Americans make up so many races that “no man can remember”—is far truer today than it was then. The label “black” includes descendants of slaves, recent African immigrants, multiracial people, rich people, and poor people. People who fit under that label “def[y] all the ethnological and logical classifications.”¹²² Every other racial label is the same. Some white people descend from slave holders, some white people descend from slaves, and some are recent immigrants whose ancestors had nothing to do with it.

The label “Asian” is likewise meaningless. It refers to everyone who comes from the part of the planet between Pakistan and Japan and groups together 60 percent of the world's population. What does a wealthy Pakistani Muslim immigrant have in common with a poor American Christian whose ancestors came here from China 100 years ago? The answer is: probably nothing except their humanity. Or, in other words, everything that matters.

Ultimately, these arguments are recipes for division and hatred. Racial prejudice is “an ancient feeling among men,” and every time that we have given it control over our will and our behavior, it has “brought the nation to the verge of ruin.”¹²³ Nothing, Justice Harlan said, is surer to spark hatred than laws that treat people differently based on the color of their skin.¹²⁴ History has sadly proved him right, over and over.

If America chooses once again to turn its back on the hard path toward equality and follows once again the easier path toward racial division, it will find the same old thing waiting at the end of the path that has always waited there. The only question will be whether America is able to fight its way back yet again.

Endnotes

- 1 For an overview of government-required discrimination around the world see Thomas Sowell, *AFFIRMATIVE ACTION AROUND THE WORLD* (2005).
- 2 See Matthew Spalding, *We Still Hold These Truths* 42–44 (2009).
- 3 Thomas Jefferson, Letter to Roger Weightman, June 24, 1826.
- 4 Cong. Globe, 35th Cong., 1st Sess. 344 (1858) (statement of Rep. John P. Hale).
- 5 Abraham Lincoln, Reply to the Dred Scott decision, June 26, 1857.
- 6 *Id.*
- 7 Julia Ward Howe, Battle Hymn of the Republic, *THE ATLANTIC MONTHLY*, Feb. 1862.
- 8 *Students for Fair Admissions v. Harvard*, 143 S. Ct. 2141, 2208 (2023) (Thomas, J., concurring).
- 9 Abraham Lincoln, Reply to the Dred Scott decision, *supra* note 5.
- 10 Abraham Lincoln, Fragment on the Constitution and Union, Jan. 1861 (quoting Proverbs 25:11 (“A word fitly spoken is like apples of gold in pictures of silver.”)).
- 11 Frederick Douglass, What to the Slave Is the Fourth of July, July 5, 1852.
- 12 See Lysander Spooner, *THE UNCONSTITUTIONALITY OF SLAVERY* (1845).
- 13 Frederick Douglass, What to the Slave Is the Fourth of July, *supra* note 11.
- 14 Frederick Douglass, *The Constitution and Slavery*, Mar. 16, 1849.
- 15 Frederick Douglass, *The American Constitution and the Slave*, Mar. 26, 1860, reprinted in *DOUGLASS: SPEECHES & WRITINGS* (David W. Blight ed., 2022).
- 16 *Id.*
- 17 *Id.*
- 18 *Id.*
- 19 *Id.*
- 20 See Sean Wilentz, *NO PROPERTY IN MAN* (2018).
- 21 Notes on the Debates in the Federal Convention, Aug. 25, 1787.
- 22 Douglass, *The American Constitution and the Slave*, *supra* note 15.
- 23 *Id.*
- 24 *Id.* Today, we call this way of interpreting the Constitution “originalism.” In the past, no such distinction was necessary because it was the only way to interpret the Constitution. The Supreme Court later pioneered new ways to interpret the Constitution so that it could avoid enforcing the equality guarantees of the Fourteenth Amendment. This was a major mistake that the Court is still fixing today.
- 25 See Angela Sailor et al., *Slavery and the Constitution*, The Heritage Foundation Lecture No. 1320, Feb. 23, 2021.
- 26 See Frederick Douglass, *The Dred Scott Decision*, May 14, 1857 (“The dissolution of the Union would not give the North one single additional advantage over slavery to the people of the North, but would manifestly take from them many which they now certainly possess.”).
- 27 Frederick Douglass, *Address for the Promotion of Colored Enlistments*, July 6, 1863.
- 28 Spooner, *supra* note 12.
- 29 Douglass, *The American Constitution and the Slave*, *supra* note 15.
- 30 *Id.*
- 31 Frederick Douglass, *The Constitution of the United States: Is It Pro-Slavery or Anti-Slavery?*, Mar. 16, 1860, reprinted in *2 THE LIFE AND WRITINGS OF FREDERICK DOUGLASS* (Philip S. Foner ed., 1950).
- 32 Douglass, *The American Constitution and the Slave*, *supra* note 15.
- 33 *Id.*
- 34 Stephen A. Douglas, *Lincoln–Douglas Debates*, Aug. 21, 1858.
- 35 Alexander H. Stephens, *Cornerstone Speech*, Mar. 21, 1861.

- 36 *Dred Scott v. Sandford*, 60 U.S. 393, 407 (1856).
- 37 Abraham Lincoln, *House Divided*, June 16, 1858 (quoting either Matthew 12:25 (“[E]very city or house divided against itself shall not stand”) or Mark 3:25 (“And if a house be divided against itself, that house cannot stand.”)).
- 38 Stephen A. Douglas, *Speech in the Senate*, Mar. 3, 1845.
- 39 James R. Gilmore, *We Must Conquer*, THE ATLANTIC MONTHLY, Sep. 1864 (quoting Jefferson Davis).
- 40 Abraham Lincoln, *First Inaugural Address*, Mar. 4, 1861.
- 41 Abraham Lincoln, *Letter to Horace Greeley*, Aug. 22, 1862.
- 42 Douglass, *What the Black Man Wants*, Jan. 26, 1865.
- 43 *Id.*
- 44 Henry McNeal Turner, *Washington Correspondence Christian Recorder*, Jan. 10, 1863.
- 45 Cong. Globe, 41st Cong., 2d Sess. 3608 (1870) (statement of Sen. Carl Schurz).
- 46 Frederick Douglass, *Address for the Promotion of Colored Enlistments*, July 6, 1863.
- 47 Cong. Globe, 39th Cong., 1st Sess., 431 (1866) (Statement of Rep. John Bingham).
- 48 *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).
- 49 *Slaughter-House Cases*, 16 Wall. 36, 72 (1873).
- 50 *Claybrook v. City of Owensboro*, 16 F. 297, 301 (D. Ky. 1883).
- 51 Eric Foner, *THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION* (2019).
- 52 *The Declaration of Independence*.
- 53 Cong. Globe, 41st Cong., 2d Sess. 3607 (1870) (statement of Sen. Carl Schurz).
- 54 C. Vann Woodward, *THE STRANGE CAREER OF JIM CROW* 45–68 (commemorative ed., 2002).
- 55 3 Cong. Rec. 945 (1875) (statement of Rep. John Lynch).
- 56 Woodward, *supra* note 54 at 69–74, 81.
- 57 *Id.* at 81, 94–95.
- 58 See, e.g., *Gong Lum v. Rice*, 275 U.S. 78 (1927) (upholding the decision to deny a girl with Chinese ancestry entry to a “white” school); Exec. Order No. 9066, 3 CFR 1092 (1943) (ordering the internment of Americans of Japanese ancestry after the attack on Pearl Harbor).
- 59 *United States v. Cruikshank* 92 U.S. 542, 550 (1876); *Slaughter-House Cases*, 83 U.S. (16 Wall.) (1873).
- 60 *Williams v. Mississippi*, 170 U.S. 213 (1898).
- 61 *Plessy*, 163 U.S. at 537.
- 62 *Id.*
- 63 *Id.* at 550.
- 64 Editorial, *EVENING JOURNAL*, May 20, 1896, reprinted in *PLESSY V. FERGUSON: A BRIEF HISTORY WITH DOCUMENTS* 131 (Brook Thomas ed., 1997).
- 65 *Plessy*, 163 U.S. at 551.
- 66 See John C. Calhoun, *Slavery a Positive Good*, Feb. 6, 1837.
- 67 *Plessy*, 163 U.S. at 557 (Harlan, J., dissenting).
- 68 *Id.* at 559.
- 69 Frederick Douglass, *Our Composite Nationality*, Dec. 7, 1869.
- 70 *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting).
- 71 *Id.* at 560.
- 72 Keith Weldon Medley, *WE AS FREEMEN: PLESSY V. FERGUSON* 25 (2003).
- 73 *PLESSY V. FERGUSON: A BRIEF HISTORY WITH DOCUMENTS*, *supra* note 65, at 4.
- 74 347 U.S. 483 (1954).
- 75 Martin Luther King, Jr., *I Have a Dream*, Aug. 28, 1963.
- 76 Executive Order 9981, July 26, 1948.
- 77 Woodward, *supra* note 55 at 137–38.
- 78 King, *I Have a Dream*, *supra* note 75.
- 79 Jurisdictional Statement, *Anderson v. Martin*, 375 U.S. 399 (No. 51) at *11–12.
- 80 Rosa Parks, *Speech at the Million Man March*, Oct. 16, 1995.
- 81 Cong. Globe, 35th Cong., 1st Sess. 344 (1858) (statement of Rep. John P. Hale).
- 82 King, *I Have a Dream*, *supra* note 75.

- 83 306 U.S. 354 (1939).
- 84 328 U.S. 373 (1946).
- 85 347 U.S. 483, 495 (1954).
- 86 Woodward, *supra* note 54 at 166–68.
- 87 *Id.* at 170–71.
- 88 Civil Rights Act of 1957, Pub. L. No. 85-315 (1957); Civil Rights Act of 1960, Pub. L. No. 86-449 (1960); Civil Rights Act of 1964, Pub. L. 88-352 (1964); Voting Rights Act of 1965, Pub. L. 89-110 (1965); Civil Rights Act of 1968, Pub. L. 90-284 (1968).
- 89 See sources cited in *id.*
- 90 Woodward, *supra* note 54 at 215.
- 91 Quote reprinted in *id.* at 198.
- 92 *Id.* at 196 (quoting Floyd McKissick).
- 93 Martin Luther King, Jr., Letter from Birmingham Jail, April 16, 1963.
- 94 *Id.*
- 95 Woodward, *supra* note 55 at 217.
- 96 Transcript of Oral Argument, *Briggs v. Elliott*, 342 U.S. 350 (1952) (No. 273), reprinted in *ARGUMENT: THE ORAL ARGUMENTS BEFORE THE SUPREME COURT IN BROWN V. BOARD OF EDUCATION OF TOPEKA, 1952–55*, at 48 (L. Friedman ed. 1969).
- 97 Thurgood Marshall, Memorandum to the Conference, April 13, 1978.
- 98 Thurgood Marshall, *The Constitution's Bicentennial: Commemorating the Wrong Document?*, 40 *Vanderbilt L. Rev.* 1137 (1987).
- 99 *Id.*
- 100 Clarence Thomas, *MY GRANDFATHER'S SON* 50 (2008).
- 101 *Id.* at 48.
- 102 *Id.* at 56.
- 103 *Id.*
- 104 *Id.* at 56–57.
- 105 *Grutter v. Bollinger*, 539 U.S. 306, 353 (2003) (Thomas, J., dissenting).
- 106 *Students for Fair Admissions*, 143 S. Ct. at 2161.
- 107 401 U.S. 424 (1971).
- 108 443 U.S. 193 (1979).
- 109 Civil Rights Act of 1964, Title VII §703(a)(a).
- 110 443 U.S. 193, 202 (claiming that the Civil Rights Act was enacted for “the plight of the Negro in our economy”).
- 1113 Cong. Rec. 945 (1875) (statement of Rep. John Lynch).
- 112 *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).
- 113 *Id.*
- 114 See, e.g., *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978); *Grutter v. Bollinger*, 539 U.S. 306 (2003).
- 115 *Students for Fair Admissions*, 143 S. Ct. at 2141 (2023).
- 116 *Id.* at 2155.
- 117 *Id.* at 2196 (Thomas, J., concurring).
- 118 *Id.* at 2160, 2176.
- 119 Thomas Sowell, *RACE AND ECONOMICS* vi (1975).
- 120 Alexander Bickel, *THE MORALITY OF CONSENT* 134 (1975).
- 121 *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 281 (1986) (plurality opinion).
- 122 Frederick Douglass, *Our Composite Nationality*, *supra* note 69.
- 123 *Id.*
- 124 *Plessy*, 163 U.S. at 560 (Harlan, J., dissenting).

Endorsements



The Center for Equal Opportunity is a nonprofit, nonpartisan research and educational organization that studies and promotes colorblind equal opportunity in regard to issues of race and ethnicity nationwide.



Defense of Freedom Institute's mission is to defend and advance freedom and opportunity for every American family, student, entrepreneur, and worker and to protect our civil and constitutional rights at school and work.



The Equal Protection Project is devoted to the fair treatment of all persons without regard for race or ethnicity and so we investigate wrongdoing, educate the public, and litigate when necessary.



Freedom's Journal Institute advances the Kingdom of God through sociopolitical education and engagement rooted in a Biblical Worldview.

NATIONAL
ASSOCIATION
of SCHOLARS

The National Association of Scholars upholds the standards of a liberal arts education that fosters intellectual freedom, searches for the truth, and promotes virtuous citizenship.



Philanthropy Roundtable is a community of donors committed to advancing liberty, opportunity and personal responsibility and protecting the freedom of all Americans to support the causes and communities they care about.



The mission of Students for Fair Admissions is to end the use of race and ethnicity as a factor in college admissions and monitor compliance with the Supreme Court's opinion in *SFFA v. Harvard*.



TakeCharge is committed to supporting the notion that the promise of America is available to everyone regardless of race or social station.



The Texas Public Policy Foundation works tirelessly to make Texas and America the freest places on Earth.

Building
an America
where freedom,
opportunity,
prosperity,
and civil society
flourish.



214 Massachusetts Ave., NE | Washington, DC 20002
(202) 546-4400 | heritage.org