

# Lesson Plan / The 14<sup>th</sup> Amendment's Equal Protection Clause—Answer Key

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This lesson explores the evolution of the interpretation of the 14<sup>th</sup> Amendment's Equal Protection Clause through analysis of primary source excerpts from:

- 14<sup>th</sup> Amendment
- Congressional Debates on the 14<sup>th</sup> Amendment
- *The Civil Rights Cases* (1883)
- *Plessy v. Ferguson* (1896)
- *Brown v. Board of Education I* (1954)
- *Loving v. Virginia* (1967)
- *Reed v. Reed* (1971)
- *Regents of the University of California v. Bakke* (1978)
- *Obergefell v. Hodges* (2015)

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2. Handout 2: Primary Sources Relating to the 14<sup>th</sup> Amendment's Equal Protection Clause
3. Handout 3: Evolution of the 14<sup>th</sup> Amendment's Equal Protection Clause

# Timeline of Events and Cases, 1865–2015

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- 1865 & 1866** After the Civil War, former confederate states passed laws that accepted African Americans as free citizens but denied them many rights, including the right to vote, serve on juries, own and lease land, and own weapons. These laws became known as the **Black Codes**. The purpose of the laws was to preserve as many remnants of slavery as possible.
- July 1868** In response to the Black Codes, Congress passed **the 14<sup>th</sup> Amendment** and sent it to the states for ratification. The Amendment was ratified in July 1868 (former Confederate states were required to ratify the amendment as a condition of readmission to the United States).
- 1873** The ***Slaughter-House Cases*** were the first major cases in which the U.S. Supreme Court interpreted the 14th Amendment. The Court decided, in these cases, that the federal government could not protect all civil rights—only those rights traditionally associated with national citizenship, like free access to seaports. Fundamental civil rights, however, were the responsibility of the states, and each state could choose whether or not to protect those rights.
- 1875** Congress passed the **Civil Rights Act of 1875**, which forbade racial discrimination in public places and facilities such as hotels, public transportation, public parks, and juries.
- 1880** In ***Strauder v. West Virginia***, the U.S. Supreme Court struck down a West Virginia law that forbade African Americans from serving on juries. The Court decided it would violate the Equal Protection Clause to deny Black people the right to a jury that included Black peers while allowing White people to have juries full of White peers.
- 1883** The U.S. Supreme Court struck down the Civil Rights Act of 1875 in a consolidation of five cases now referred to as the **Civil Rights Cases**. In their decision, the Court said that the Civil Rights Act was unconstitutional because the federal government did not have authority under the 14th Amendment to prohibit discrimination by private individuals or businesses.
- 1886** In ***Yick Wo v. Hopkins***, the U.S. Supreme Court ruled that the city of San Francisco's discriminatory treatment of Chinese business owners violated the Equal Protection Clause. Even though the law regulating business licenses did not mention race, the city applied it unequally and gave building permit waivers to White business owners but not to Chinese business owners.

- 1896** In *Plessy v. Ferguson*, the U.S. Supreme Court said that Louisiana’s law requiring segregated rail cars for Black people and White people did not violate the Equal Protection Clause, so long as the facilities are equal. The decision created what became known as the “separate but equal” doctrine.
- 1938** In *Missouri ex rel. Gaines v. Canada*, the U.S. Supreme Court ruled that the University of Missouri Law School violated the Equal Protection Clause when it denied an African American applicant solely on the grounds of race and there were no other law schools in Missouri accepting African American applicants.
- 1948** In *Shelley v. Kraemer*, the U.S. Supreme Court held that private neighborhood agreements that forbade homeowners from selling or renting property to non-White buyers could not be enforced. The Court believed that one of the fundamental rights guaranteed under the Equal Protection Clause was the equal right for all to buy, own, and sell property.
- 1950** In *Sweatt v. Painter*, the U.S. Supreme Court ruled that the University of Texas’s separate law school for Black students violated the Equal Protection Clause because it had much fewer resources than the university’s law school for White students.
- 1954** In *Brown v. Board of Education of Topeka, Kansas*, the U.S. Supreme Court overturned *Plessy v. Ferguson* entirely by saying that separate public schools for White and Black students were “inherently unequal” and could, therefore, never be constitutional. The Court found that regardless of whether segregated schools had the same resources, separating students of color based on race seriously harmed their “hearts and minds in a way unlikely to ever be undone.”
- 1955** After *Brown v. Board of Education of Topeka, Kansas*, many states that wanted to preserve segregation refused to integrate their public schools. This resulted in the U.S. Supreme Court taking the case of *Brown v. Board of Education II* one year later, when they declared that school desegregation shall be implemented “with all deliberate speed.” However, the Court did not order that desegregation start immediately or on a specific timeline. The Court also left many decisions for how to desegregate to local school authorities. States with massive resistance to integration were, therefore, able to postpone it for years.
- 1964** Congress passed the **Civil Rights Act of 1964**, a law forbidding discrimination on the basis of race, ethnicity, national origin, religious affiliation, and sex in both private employment and in public accommodations. Public accommodations included privately owned hotels, movie theaters, and restaurants. In *Heart of Atlanta Motel v. United States*, a hotel that refused to rent rooms to African American guests challenged the constitutionality of the law. However, the U.S. Supreme Court upheld the law as constitutional under the Commerce Clause, which allows the federal government to regulate activity related to interstate commerce (trade).

- 1967** In *Loving v. Virginia*, the U.S. Supreme Court ruled unanimously that state laws banning interracial marriage were unconstitutional based on the Equal Protection Clause and the Due Process Clause of the 14th Amendment.
- 1971** In a unanimous decision in *Reed v. Reed*, the U.S. Supreme Court applied the Equal Protection Clause and ruled that state laws cannot give a preference to one sex over the other when choosing the person to manage the belongings of a deceased person.
- 1978** In Regents of the *University of California v. Bakke*, a White student who was not accepted to the University of California Davis School of Medicine argued that the school's affirmative action program, which reserved 16 out of 100 total seats for students who indicated they were members of a "minority group," violated the Equal Protection Clause. The U.S. Supreme Court ruled in favor of Bakke, saying that it was unconstitutional for public schools to have a race quota. However, the Court also said that schools could still consider race as one of many factors in admissions. This was because having a diverse student body improves the quality of education and, therefore, represented an important government interest.
- 2015** In *Obergefell v. Hodges* the U.S. Supreme Court found that state same-sex marriage bans violated the Equal Protection Clause because they denied gays and lesbians the right to marry—a right that straight people had. The Court determined that marriage was a fundamental right that all people have regardless of their sexual orientation. In practice this decision made same-sex marriage legal in all states.

# Primary Sources Relating to the 14<sup>th</sup> Amendment's Equal Protection Clause

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Questions to consider as you analyze the primary sources below:

- What was the purpose of the 14<sup>th</sup> Amendment's Equal Protection Clause when it was written and ratified?
- How has the Equal Protection Clause been interpreted by the U.S. Supreme Court in key cases?
- How did that interpretation change over time?
- What does the Equal Protection Clause mean today?
- What role did the case you are studying play in the evolution of the meaning?

Document Excerpts:\*

- Amendment XIV, Sections 1 and 5, ratified 1868
- Congressional Debates on the 14<sup>th</sup> Amendment
- *The Civil Rights Cases* (1883)
- *Plessy v. Ferguson* (1896)
- *Brown v. Board of Education I* (1954)
- *Loving v. Virginia* (1967)
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\* Note that in some cases the excerpted text from Supreme Court opinions uses dated race-related terms or conventions. These terms have been left intact in quoted material only.

## 14<sup>th</sup> Amendment, Sections 1 and 5, ratified 1868

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**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.

### Questions to Consider

1. Underline and define any key words from Sections 1 and 5.  
Student answers will vary, but they might underline:
  - **Jurisdiction** – the legal power/authority over a person or topic
  - **Abridge** – limit
  - **Privileges** – legal rights or advantages
  - **Immunities** – legal protections
  - **Due process** – the proper legal steps required for a government’s taking of life, liberty, or property to be fair and just (for example, notice that the government might take away your property is usually required because you have a right to defend yourself from the government’s decision in court)
2. Summarize Section 1 in your own words.  
Student answers will vary, but a summary might look like: Everyone born in the U.S. is a U.S. citizen as well as a citizen of the state where they live. States cannot make laws limiting the rights of U.S. citizens. States also cannot take away life, liberty, or property without going through the proper legal steps, and states must apply the law to everyone equally.
3. What are state governments prohibited from depriving people of?  
Life, liberty, and property (without due process). Students might also answer that state governments cannot deprive people of equal protection of the laws.
4. What does “equal protection of the laws” mean to you?  
Student answers will vary but might look like: Equal protection of the laws means the government treats you the same no matter your race, religion, gender, or national origin.
5. Why might Congress’ power guaranteed by Section 5 be needed?  
Student answers may vary but might look like: Section 5 is needed so Congress can enforce Section 1 if states do not want to comply with it. When the 14<sup>th</sup> Amendment was passed after the Civil War, Congress worried that former confederate states left to their own would not implement citizenship, due process, or equal protection for former enslaved people who had been emancipated (freed).

# Congressional Debates on the 14<sup>th</sup> Amendment

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*Rep. John Bingham's speech of February 28, 1866, introducing an initial draft of Section 1 of the 14<sup>th</sup> Amendment to the House of Representatives*

**Mr. Bingham:** The proposed constitutional amendment is as follows—The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property.

I repel the suggestion [that proponents of the Amendment] seek to ... take away from any State any right that belongs to it, or from any citizen of any State any right that belongs to him under that Constitution. The proposition pending before the House is simply a proposition to arm the Congress of the United States ... with the power to enforce the bill of rights as it stands in the Constitution today.

**Mr. Hotchkiss:** As I understand it, his object in offering this resolution and proposing this amendment is to provide that no State shall discriminate between its citizens and give one class of citizens greater rights than it confers upon another. If this amendment secured that, I should vote very cheerfully for it today; but as I do not regard it as permanently securing those rights, I shall vote to postpone its consideration ...

I understand the amendment as now proposed by its terms to authorize Congress to establish uniform laws throughout the United States upon the subject named, the protection of life, liberty, and property. I am unwilling that Congress shall have any such power. Congress already has the power to establish a uniform rule of naturalization and uniform laws upon the subject of bankruptcy. That is as far as I am willing that Congress shall go.

## Questions to Consider

1. How does the draft amendment that Rep. Bingham discussed differ from the final version of the 14<sup>th</sup> Amendment as ratified by the states?

The initial version introduced by Rep. Bingham did not include birthright citizenship. It includes the term “equal protection” but refers specifically to equal protection of rights in life, liberty, and property (as opposed to in all laws more generally). Also, the initial version does not include the term “due process.”

2. Congressman Bingham wrote this early draft of the 14<sup>th</sup> Amendment. Why might historians be particularly interested in what he had to say about the meaning of the Amendment?

Historians might be interested to know his intention with the Amendment to better interpret the meaning of Amendment that was finally adopted. Because the 14<sup>th</sup> Amendment (and the Constitution as a whole) is written in broad language, people often disagree on questions such as what “equal protection of the laws” specifically allows and does not allow the government to do.

For example, it is not clear from the phrase “equal protection” alone whether Congress could write a law to command the integration of segregated schools, which are generally regulated by state governments. Rep. Bingham’s speech helps show that the purpose of the 14<sup>th</sup> Amendment is not to take away power from state governments, but to order that state governments comply with the Bill of Rights.

3. What is Rep. Hotchkiss's concern about the proposed Amendment?

Rep. Hotchkiss's concern is that the proposed Amendment gives Congress too much power over state governments. He does not read the proposed Amendment as establishing equal rights between citizens, but rather believes it gives Congress the power to make national laws on life, liberty, and property. He believes the powers to make these laws should be left to each state to decide for itself, and he believes Congress's power to make nationwide laws on naturalization (citizenship) and bankruptcy is enough.

*Senator Jacob Howard's speech of May 23, 1866, introducing a nearly final version of the 14<sup>th</sup> Amendment to the Senate.*

The first section of the amendment ... declares that—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.

[All] these immunities, privileges, rights ... are [currently] secured to the citizen solely as a citizen of the United States and as a party in their courts. They do not operate in the slightest degree as a restraint or prohibition upon State legislation. ... but [apply] only to the legislation of Congress.

The great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees.

The last two clauses of the first section of the amendment disable a State from depriving not merely a citizen of the United States, but any person, whoever he may be, of life, liberty, or property without due process of law, or from denying to him the equal protection of the laws of the State. This abolishes all class legislation in the States and does away with the injustice of subjecting one caste of persons to a code not applicable to another. 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.

[The amendment] will, if adopted by the States, forever disable every one of them from passing laws trenching upon those fundamental rights and privileges which pertain to citizens of the United States, and to all persons who may happen to be within their jurisdiction. It establishes equality before the law, and it gives to the humblest, the poorest, the most despised of the race the same rights and the same protection before the law as it gives to the most powerful, the most wealthy, or the most haughty.

### **Questions to Consider**

1. What does Senator Howard say is the “The great object of the first section of this amendment?”  
The great object is “to restrain the power of the States and compel them at all times to respect these great fundamental guarantees.”
2. What “fundamental guarantees” will the 14<sup>th</sup> Amendment require states to respect?  
The “fundamental guarantees” referred to are the right to not have the government take life, liberty, or property without due process and the right to equal protection under the law.
3. What types of laws does Senator Howard say the last two clauses will abolish?  
Senator Howard says the last two clauses will abolish laws that would apply differently to people of different races and people with different amounts of wealth.

## The Civil Rights Cases (1883)

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*In these cases the U.S. Supreme Court ruled that the Civil Rights Act of 1875 was unconstitutional. That law banned certain forms of racial discrimination by private individuals and businesses.*

### Majority Opinion (Justice Bradley)

It is State action of a particular character that is prohibited [by the 14<sup>th</sup> Amendment]. Individual invasion of individual rights is not the subject matter of the amendment.

When a man has emerged from slavery, and, by the aid of beneficent legislation, has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen and ceases to be the special favorite of the laws, and when his rights as a citizen or a man are to be protected in the ordinary modes by which other men's rights are protected.

### Questions to Consider

1. In your own words, what is Justice Bradley saying in the majority opinion?  
Student opinions will vary but they might answer: Justice Bradley is saying that the 14<sup>th</sup> Amendment only prohibits the government from discriminating and does not prohibit private individuals or businesses from discriminating. According to Justice Bradley, this means the Civil Rights Act of 1875 was unconstitutional because the 14<sup>th</sup> Amendment does not give Congress the power to make a law forbidding discrimination in public accommodations.  
Justice Bradley is also implying that Black people had already been given equality because they were no longer enslaved, and that the Civil Rights Act of 1875 gave special treatment to Black people.
2. How many years passed between the end of the Civil War and this case? How were African Americans treated during that period?  
The Civil War ended in 1865, so about 18 years passed between the Civil War and the Civil Rights Cases. During this period, formerly-enslaved African Americans were treated extremely harshly – many states passed different Black Code laws that denied Black people many of the same rights as White people.
3. What is the difference between “State action” and “individual invasion of ... rights?” Which does the Court say is prohibited by the 14<sup>th</sup> Amendment?  
In Justice Bradley’s opinion, “State action” refers specifically to action taken by a state government, and “individual invasion of individual rights” refers to discrimination by individual people or businesses. The Court says the 14<sup>th</sup> Amendment prohibits discriminatory “State action.”
4. Why did the Court see the Civil Rights Act of 1875 as making African Americans “a special favorite of the laws?”  
Student answers may vary but might look like: The Court saw the Civil Rights Act of 1875 as making African Americans a favorite of the laws because it prohibited discrimination on the basis of race. Even though the Civil Rights Act of 1875 banned discrimination against people of all races on the basis of their race, the targets of this discrimination were most, if not all, African Americans while individuals and businesses doing the discrimination were white. The Court might believe that this unfairly favors Black people at the expense of White people who wanted to discriminate based on race.

## **Plessy v. Ferguson (1896)**

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*A state law required separate railway cars for Black and White passengers. Homer Plessy challenged the law as a violation of the 14<sup>th</sup> Amendment's guarantee of equal protection. The U.S. Supreme Court ruled that the law was constitutional.*

### **Majority Opinion (Justice Brown)**

... 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 colors ... . Laws permitting, and even requiring, their separation ... 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 ... .

So far, then, as a conflict with the fourteenth amendment is concerned, the case reduces itself to the question whether the statute of Louisiana is a reasonable regulation, and with respect to this there must necessarily be a large discretion on the part of the legislature. In determining the question of reasonableness, it is at liberty to act with reference to the established usages, customs, and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order.

We consider the underlying fallacy of the plaintiff'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 ... .

### **Questions to Consider**

1. What do the justices state is the objective of the 14<sup>th</sup> Amendment?  
The justices state that the 14<sup>th</sup> Amendment was meant to “enforce the absolute equality of the two races before the law.”
2. What criteria did the Supreme Court use to determine whether this law was “reasonable?”  
According to the Court, the reasonableness of the law was determined by “the established usages, customs, and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order.”
3. How do you respond to the Court's contention that if any inferiority is evident, it is only because “the colored race chooses” to interpret the act in that manner?  
Student responses will vary but might include thoughts on how this reasoning puts blame on the victim of discrimination instead of the perpetrator of it. Students might also discuss how it is implied that the “promotion of [people's] comfort” and the “preservation of the public peace and good order” require racially segregated railcars, which imply that integrated railcars would make people uncomfortable or

unsafe. Students might say that there is no reason for Black people to “choose” an interpretation of inferiority.

## **Dissenting Opinion (Justice Harlan)**

[The Thirteenth and Fourteenth] amendments, if enforced according to their true intent and meaning, will protect all the civil rights that pertain to freedom and citizenship ... .

These notable additions to the fundamental law were welcomed by the friends of liberty throughout the world. They removed the race line from our governmental systems. They had, as this court has said, a common purpose, namely to secure to a race recently emancipated, a race that through many generations have been held in slavery, all the civil rights that the superior race enjoy.

They declared, in legal effect, this court has further said,

that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color.

It was said in argument that the statute of Louisiana does not discriminate against either race but prescribes a rule applicable alike to white and colored citizens. But ... Everyone knows that the statutes in question had its origin in the 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.

... 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 present decision, it may well be apprehended, will not only stimulate aggressions, more or less brutal and irritating, upon the admitted rights of colored citizens, but will encourage the belief that it is possible, by means of state enactments, to defeat the beneficent purposes which the people of the United States had in view when they adopted the recent amendments of the constitution ...

### **Questions to Consider**

1. In arguing that the 13<sup>th</sup> and 14<sup>th</sup> Amendments in fact do apply to the Louisiana law, Justice Harlan particularly refers to the amendments' "true intent and meaning." What do you think he believed were the amendments' true intent and meaning?  
*Student answers will vary, but might include thoughts on how he may have believed the drafters wanted true equality between people of different races, with no implication of inferiority or superiority that could be read from segregating people by race.*
2. What does Justice Harlan believe is the real meaning behind the legislation enacted in Louisiana?

He believes the real purpose of the segregation law was “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.”

3. According to Justice Harlan, what effects will this type of legislation have on the United States and its citizens?

He believes this type of legislation will “not only stimulate aggressions ... upon the admitted rights of colored citizens, but will encourage the belief that it is possible, by means of state enactments, to defeat the beneficent purposes which the people of the United States had in view when they adopted the recent amendments of the constitution.”

In other words, Justice Harlan believes these types of laws will both contribute to hostility toward non-white people as well as encourage other states to pass laws to try and undermine the equality goals of the 13<sup>th</sup> and 14<sup>th</sup> Amendments.

## **Brown v. Board of Education (1954)**

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Brown v. Board of Education of Topeka, Kansas (I) *was a case challenging segregated schools. In a unanimous decision, the U.S. Supreme Court decided that state laws requiring separate but equal schools violated the Equal Protection Clause.*

### **Majority Opinion (Chief Justice Earl Warren)**

... Here ... there are findings below that the 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 these cases. We must look instead to the effect of segregation itself on public education ... .

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society ... . In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms ... .

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

Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding is amply supported by modern authority ... .

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 other similarly situated ... are ... deprived of the equal protection of the laws guaranteed by the 14<sup>th</sup> Amendment.

### **Questions to Consider**

1. How is the opinion of the Court in *Brown v. Board of Education* similar to the dissenting opinion in *Plessy v. Ferguson*?

*These two opinions are similar in that they express the belief that the Equal Protection Clause guarantees equality between people of different races that cannot be achieved with separate facilities. They are both concerned about the long-range effects of discrimination if left unchecked.*

2. In your own words, explain why Chief Justice Warren states that separate is inherently (by its nature) unequal.

Student answers will vary but might look something like: Chief Justice Warren believes racially segregated schools create inherent inequality because they give non-white students a feeling of inferiority that is deeply harmful to those students. White students in segregated schools are not impacted the same way.

## Loving v. Virginia (1967)

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*In Loving v. Virginia, Mildred and Richard Loving challenged Virginia's Racial Integrity Act of 1924, which made it a crime for a White person to marry outside their race. These "anti-miscegenation" laws were common in southern states. Mr. and Mrs. Loving traveled to Washington, DC, to marry and returned to their home in Virginia. Under the act, the Lovings were arrested and sentenced to two years in prison. The U.S. Supreme Court ruled unanimously that state laws banning interracial marriage were unconstitutional based on the Equal Protection Clause and the Due Process Clause of the 14<sup>th</sup> Amendment.*

### Majority Opinion (Chief Justice Earl Warren)

There can be no question but that Virginia's miscegenation statutes rest solely upon distinctions drawn according to race. The statutes proscribe generally accepted conduct if engaged in by members of different races. ... There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.

The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy.

The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men. Marriage is one of the "basic civil rights of man," fundamental to our very existence and survival. To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law.

### Questions to Consider

1. How did the interracial marriage ban violate the Equal Protection Clause?  
The ban violated the Equal Protection Clause because it forbade only White people from marrying people of color.
2. Why does Chief Justice Warren say interracial marriage bans deprived people of liberty without due process of law?  
According to Chief Justice Warren, marriage is fundamental right and therefore can only be limited for very compelling reasons. A racial classification, particularly one that embodies an idea of inferiority in non-white people, is far short of a compelling reason, and deprives both White people and their non-white partners of a fundamental liberty.
3. Do you think it was significant that this was a unanimous decision? Why/why not?  
Student answers will vary. Some might consider it unsurprising because Chief Justice Warren also led the unanimous decision in *Brown v. Board*. Other students might find it significant because of the contentiousness of the Civil Rights Movement at the time. Students familiar with *Obergefell v. Hodges* might point out that marriage law has long been governed by state law.

## Reed v. Reed (1971)

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*Idaho had a law that stated, “males must be preferred to females” when choosing the administrator of an estate. Sally Reed brought the lawsuit against her ex-husband after he was appointed the administrator to their deceased son’s estate because of this law. In Reed v. Reed, the U.S. Supreme Court applied the Equal Protection Clause and ruled that state laws cannot appoint administrators of estates solely due to a preference for one sex over another.*

### Majority Opinion (Chief Justice Warren Burger)

...[t]o give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment ... [T]he choice in this context may not lawfully be mandated solely on the basis of sex.

In applying that clause, this Court has consistently recognized that the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways. The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute.

A classification “must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.”

### Questions to Consider

1. Which group was affected by unequal treatment in *Reed v. Reed*?  
Women applying to become the executor of an estate were being treated unequally under the law in *Reed*, which gave preference to male applicants solely on the basis of sex.
2. When might states be allowed to treat persons differently as explained by Chief Justice Burger?  
According to Chief Justice Burger, states can only treat people differently when doing so is “reasonable, not arbitrary, and [rests] upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.”  
In other words, states might be (but are not necessarily always) allowed to treat people differently if the basis for that difference is reasonably connected to the goal of the law. The law struck down in *Reed* does not pass this test because the capacity to be the executor of an estate is unrelated to the sex of the applicant.
3. What types of laws might treat people differently but not violate the Equal Protection Clause?  
Student answers will vary. Some examples include: only disabled people can receive disability benefits, new drivers can have restrictions imposed that experienced drivers do not have, and minors (under 18 or 21 years of age) may not be able to buy alcohol or tobacco products.

## **Regents of the University of California v. Bakke (1978)**

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*In the early 1970s, the medical school of the University of California Davis devised a special admissions program to try to compensate for the historically unjust treatment of people of color, which involved reserving at least 16 spots out of 100 for students who indicated they were members of a “minority group.” Allan Bakke was a White applicant who was rejected despite having higher grades and test scores than some of the minority applicants who were accepted. Bakke filed suit, alleging that this admissions system violated the Equal Protection Clause and excluded him on the basis of race. The U.S. Supreme Court ruled in favor of Bakke and determined race quotas were unconstitutional. However, the Court maintained that race could be considered as one of many factors in admissions because having a diverse classroom contributes to a higher quality of education, which is an important government interest.*

### **Majority Opinion (Justice Powell)**

... The special admissions program is undeniably a classification based on race and ethnic background.

The guarantees of the Fourteenth Amendment extend to all persons. Its language is explicit: “No State shall ... deny to any person within its jurisdiction the equal protection of the laws.”

... The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal ...

... [R]ace or ethnic background may be deemed a “plus” in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates for the available seats.

In summary, it is evident that the Davis special admissions program involves the use of an explicit racial classification never before countenanced by this Court. It tells applicants who are not Negro, Asian, or Chicano that they are totally excluded from a specific percentage of the seats in an entering class. No matter how strong their qualifications, quantitative and extracurricular, including their own potential for contribution to educational diversity, they are never afforded the chance to compete with applicants from the preferred groups for the special admissions seats. At the same time, the preferred applicants have the opportunity to compete for every seat in the class.

### **Questions to Consider**

1. What reasoning did Justice Powell give for finding that the admissions program was unconstitutional?

Justice Powell argued that the admissions program violated the Equal Protection Clause by banning White applicants from the same opportunity to compete for the seats reserved for non-white students. However, non-white students could compete for the reserved seats as well as the rest of the seats open to applicants of all races.

2. In what way does this opinion allow the medical school to continue to consider race of its applicants?

The decision does not ban racial consideration altogether but allowed race to be considered as part of an applicant's overall application so long as the goal is to create a better education through a more diverse classroom. In other words, while the Court banned the use of racial quotas, it left room for schools to consider applicants' races as part of a wider review of the applicant.

## Obergefell v. Hodges (2015)

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*In July 2013, Jim Obergefell married his terminally ill partner, John Arthur, in Maryland because his home state of Ohio did not allow same-sex marriage. Arthur died shortly after the marriage. Obergefell wanted his name recorded as Arthur's legal spouse on his death certificate, but Ohio officials refused. Obergefell challenged the Ohio same-sex marriage ban, arguing that marriage was a fundamental right that was being unjustly denied to same-sex couples while being afforded to straight couples. In a 5–4 decision, the U.S. Supreme Court agreed and struck down state same-sex marriage bans as unconstitutional.*

### Majority Opinion (Justice Kennedy)

No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. ... It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right.

Under the Due Process Clause of the Fourteenth Amendment, no State shall 'deprive any person of life, liberty, or property, without due process of law.' ... Applying these established tenets, the Court has long held the right to marry is protected by the Constitution. In *Loving v. Virginia* ... which invalidated bans on interracial unions, a unanimous Court held marriage is 'one of the vital personal rights essential to the orderly pursuit of happiness by free men.'

Especially against a long history of disapproval of their relationships, this denial to same-sex couples of the right to marry works a grave and continuing harm. The imposition of this disability on gays and lesbians serves to disrespect and subordinate them. And the Equal Protection Clause, like the Due Process Clause, prohibits this unjustified infringement of the fundamental right to marry.

### Questions to Consider

1. How is the Equal Protection Clause applied in *Obergefell v. Hodges*?  
The Equal Protection Clause is applied to argue that it is unequal treatment by the law to allow straight people to marry their partners while forbidding gay and lesbian people from marrying their partners.
2. How is the Due Process Clause applied in *Obergefell v. Hodges*?  
The Due Process Clause is applied to argue that marriage is a fundamental liberty included in the "life, liberty, and property" rights protected by the 14<sup>th</sup> Amendment.
3. How did Justice Kennedy apply the precedent set in *Loving v. Virginia* to this case?  
Justice Kennedy applied *Loving v. Virginia* to argue that the Court has considered marriage to be a core and personal right, one that is necessary for "orderly pursuit of happiness by free men."

# Evolution of the Interpretation of the 14<sup>th</sup> Amendment's Equal Protection Clause

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Consider the primary sources you have analyzed and complete the following questions:

1. What was the purpose of the 14<sup>th</sup> Amendment's Equal Protection Clause when it was written and ratified?

The purpose of the Equal Protection Clause at the time the 14<sup>th</sup> Amendment was ratified was to afford Black people the same rights as White people and to order such protections be implemented in all states, not just the federal government.

2. How did that interpretation change over time?

Student answers may vary but may include thoughts on how the overall trend of the Equal Protection Clause has been toward increasing and protecting the rights of marginalized groups.

A significant change in thought occurred between *Plessy* and *Brown*, with Chief Justice Warren in *Brown* writing the famous phrase that separate-but-equal is “inherently unequal.” Another significant change occurred with *Loving* and *Obergefell*, when the Court determined Equal Protection applies to personal marriage choices.

3. What does the Equal Protection Clause mean today?

Student answers may vary, but might include thoughts on how the Equal Protection Clause means that every individual should be treated equally in the eyes of the law unless there is a very compelling reason not to (and the reason must be related to the purpose of the categorizing in the first place.)