



## Chapter 19: Close Up on the Supreme Court

# *Tinker v. Des Moines School District, 1969*

### Case Summary

In 1965, John Tinker, his sister Mary Beth, and a friend were sent home from school for wearing black armbands to protest the Vietnam War. The school had established a policy permitting students to wear several political symbols, but had excluded the wearing of armbands protesting the Vietnam War. Their fathers sued, but the District Court ruled that the school had not violated the Constitution. The Court of Appeals agreed with the lower court, and the Tinkers appealed to the Supreme Court.

*May public schools ban political protests?*

schools and on the country as a whole.

### More on the Case

Mary Beth Tinker eventually became a nurse and worked with the Veterans Administration. She later wrote that

it was "a privilege to work with our veterans who had sacrificed part of their lives.... I work with a lot of paraplegics and quadriplegics, and some of them were injured in the Vietnam War... So I don't have any regrets about it at all. I'm proud to have been a part of anything that stopped the war."

The Supreme Court has dealt with other school cases since *Tinker*. In *Bethel School District No. 403 v. Fraser, 1986*, the Court held that a high school student did not have the right under the First Amendment to use indecent language and sexual metaphors in a speech at a school assembly.

In *Hazelwood School District v. Kuhlmeier, 1988*, the Court ruled that school officials could regulate the content of the student newspaper in any reasonable way. The principal had deleted student articles about teen pregnancy and about the impact of parental divorce on students at the school. In both *Fraser* and *Kuhlmeier*, the Court emphasized that students in public schools do not always have the same First Amendment rights as adults in other settings.

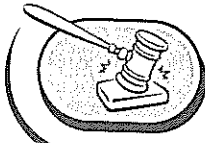
### The Court's Decision

In a 7-2 decision, the Supreme Court ruled that the students had the right to wear armbands to school to protest the Vietnam War. Justice Abe Fortas wrote for the majority. He first emphasized that students have First Amendment rights: "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." While schools certainly have the right to establish rules relating to "the length of skirts or the type of clothing, to hair style,...[or] aggressive, disruptive action or even group demonstrations," this case does not involve any of those issues. "The school officials banned and sought to punish petitioners for a silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of petitioners. There is here no evidence whatever of petitioners' interference, ...with the schools' work or of collision with the rights of other students to be secure and to be let alone. Accordingly, this case does not concern speech or action that intrudes upon the work of the schools or the rights of other students."

Justice Hugo Black dissented. He pointed out that the case involved a small number of students who refused to obey the instructions of school officials, and argued that allowing this behavior would have a negative effect on

### Questions for Discussion

1. Why would Justice Fortas have allowed the Des Moines school to regulate the length of Mary Beth Tinker's skirt, but not prevent her from wearing a black armband?
2. Why did the students prevail in *Tinker*, but not in *Fraser* and *Kuhlmeier*?
3. What facts did the Court take into account in reviewing the case and making their decision?



## Close Up on the Supreme Court Landmark Cases

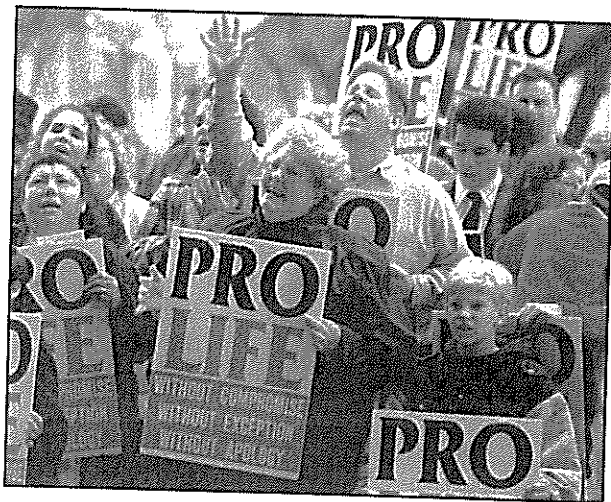
### *Roe v. Wade*, 1973

#### Historical Background

Since the Supreme Court's decision in *Roe v. Wade*, the legal, moral, and political controversy surrounding the abortion issue has polarized the American public. Two camps—one hailing *Roe* as a victory for “choice,” the other arguing that the decision deprives the unborn child of its “right to life”—squared off in the wake of the Court's decision. Their protracted political battle continues today. The deep political divisions that the case created, or revealed, reflect not only conflicting social and moral views, but conflicting views of the law as well. The case pitted two accepted doctrines against one another—the individual's “right to privacy” and the “compelling and overriding interest” of a State. *Roe v. Wade* sought an extension of the “right to privacy,” which the Court explicitly recognized for the first time in the case *Griswold v. Connecticut*, 1965. In that case, family counselors in Connecticut challenged a State law forbidding the use of “any drug, medicinal article or instrument for the purpose of preventing conception.” In *Griswold*, the Court decided that there was a “right of privacy” implied by the Bill of Rights. It ruled that the 1st, 3rd, 4th, 5th, 9th, and 14th Amendments together create a right of “marital privacy.”

#### Circumstances of the Case

In Texas, State law prohibited the termination



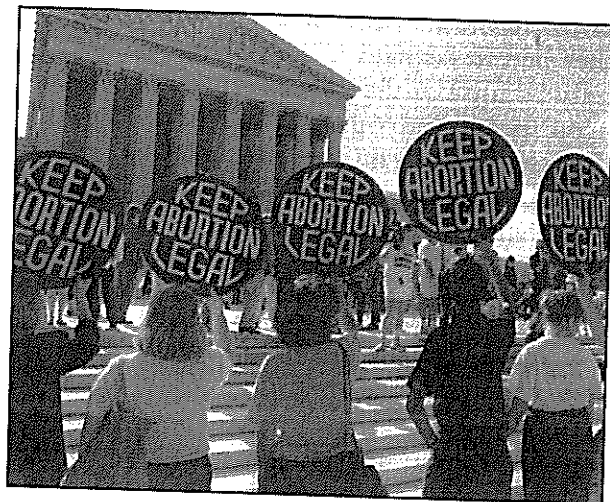
of a pregnancy by artificial means (surgery) except when the life of the mother was in danger. The statute was construed as a “nearly complete ban on abortion.” A Texas woman, claiming privacy as a “fundamental right,” challenged the Texas statute. In 1971 the case was argued before the Supreme Court. In 1972 it was argued again. *Roe* and a companion case from Georgia, *Doe v. Bolton*, were the first cases to test, in the Court, the newly recognized “right of privacy” against the “compelling interest” of the States to regulate abortions.

#### Constitutional Issues

This case involved the right of privacy as implied by Amendments 1, 3, 4, 5, 9, and 14 versus the police power of the States. Did States have a compelling and overriding interest in regulating the health, safety, and morals of the community? Was there an area of personal, marital, familial, and sexual privacy protected by the Bill of Rights? Was the Texas law an unreasonable invasion of privacy, or was it a reasonable exercise of the police power? Were women permitted to terminate pregnancies “at will,” or were fetuses “persons” with rights to be protected by the State?

#### Arguments

For *Roe*: Under the Bill of Rights, a woman has



*Americans on both sides of the abortion issue continue to fight for their beliefs today.*

## Close Up on the Supreme Court Landmark Cases *Roe v. Wade, 1973*



the right to terminate her pregnancy. It is improper for a State to deny individuals the personal, marital, familial, and sexual right to privacy. Moreover, in no case in its history has the Court declared that a fetus—a developing infant in the womb—is a person. Therefore, the fetus cannot be said to have any legal “right to life.” Because it is unduly intrusive, the Texas law is unconstitutional and should be overturned.

**For Wade:** The State has a duty to protect prenatal life. Life is present at the moment of conception. The unborn are people, and as such are entitled to protection under the Constitution. The Texas law is a valid exercise of police powers reserved to the States in order to protect the health and safety of citizens, including the unborn. The law is constitutional and should be upheld.

### Decision and Rationale

By a vote of 7–2, with Justices White and Rehnquist in dissent, the Court agreed with Roe and upheld her right to terminate a pregnancy in the first trimester (90 days). The Court observed that Section 1 of the 14th Amendment contained three references to “person.” In his majority opinion, Justice Blackmun noted that, for nearly all such references in the Constitution, “use of the word is such that it has application only post-natally. None indicates, with any assurance, that it has any possible prenatal application.”

Blackmun’s opinion carefully steered between

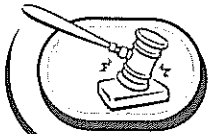
the right to privacy and the question of compelling State interest. On the first point, he wrote, the majority of the justices “do not agree” with Texas that the State “may override the rights of the pregnant woman that are at stake.” On the other hand, the State does have an “important and legitimate interest in protecting the potentiality of human life” and in protecting the mother’s health. Blackmun’s decision revolved around the development of the fetus during pregnancy. He held that during the first trimester, or three months, of a pregnancy, the woman in consultation with her physician had an unrestricted right to an abortion. During the second trimester, States could regulate abortion to protect a woman’s health. Finally, during the third trimester, the State’s interest in protecting the potential life of the fetus was sufficient to justify severe restrictions.

Approaching the matter of when life begins, Blackmun was clearly hesitant to commit the Court to any position.

Controversial when announced, the *Roe* decision remains at the center of the legal controversy over the right to privacy versus the rights of the unborn. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 1992, the Court reaffirmed *Roe*’s central holding but abandoned its trimester structure. The Court permitted States to require informed consent, a 24-hour waiting period, and/or parental notification, but held that States may not place an “undue burden” on a woman’s right to an abortion.

### Questions for Discussion

1. Is a right to privacy guaranteed by the Constitution? If so, what are the sources of that right? In what circumstances should that right be protected?
2. States have a “police power” that allows governments to establish and enforce regulations relating to the health, safety, welfare and morals of the community. Should abortion fall under the “police power” traditionally exercised by the state? Why or why not?



## Close Up on the Supreme Court Landmark Cases

### *Plessy v. Ferguson, 1896*

#### Historical Background

In the aftermath of Reconstruction, which ended in 1877, the Southern State governments again became—as they remained in the North—“white man’s governments.” The new State legislatures enacted Jim Crow laws to legally segregate the races and impose second-class citizenship upon African Americans. Enforced by criminal penalties, these laws created separate schools, parks, waiting rooms, and other segregated public accommodations. In its ruling in the *Civil Rights Cases* of 1883, the Court made clear that the Equal Protection Clause of the 14th Amendment provided no guarantee against private segregation. It would now be asked to rule on what protection the 14th Amendment offered in matters of public segregation.

In 1890, the Louisiana legislature passed a law requiring railroads to separate passengers on the basis of race. Trains that had two or more passenger cars were required to have designated seating for different races. If there was only one passenger car in a train, these cars were to be divided by a curtain or some other form of partition. A State fine of \$25 or up to 20 days in jail was the penalty for sitting in the wrong compartment.

Timidity in the protection of individual rights—as reflected in the *Civil Rights Cases* decision—was a dominant characteristic of the late 19th-century Court. Attacks on its authority after the infamous *Dred Scott* decision in 1857 still plagued the bench and reinforced its regressive tendencies.

#### Circumstances of the Case

Homer Adolph Plessy was a successful Louisiana businessman living in Baton Rouge. Comfortable in the society of both racial groups, Plessy had had one African-American grandparent. Although he did not consider himself African Amer-

ican, Louisiana law defined him as “octa-  
room”—one-eighth African American.

Plessy, acting on behalf of a committee that had been formed to challenge Jim Crow laws, intentionally broke the law in order to initiate a case. Returning by rail from New Orleans to Baton Rouge, Plessy was asked by railroad officials to sit in the segregated area of the train. He refused. Arrested and charged, Plessy petitioned the Louisiana Supreme Court for a writ against Ferguson, the trial court judge, to stop the proceedings against him for criminal violation of the State law. But the Louisiana State Supreme Court refused. Convicted and fined, Plessy then appealed to the Supreme Court of the United States.

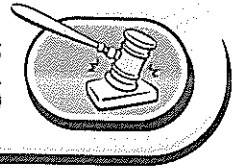
#### Constitutional Issues

The arguments in the case revolved around the 13th Amendment and the Equal Protection Clause of the 14th Amendment. Did the Louisiana law requiring segregated seating violate Plessy’s “equal protection” under the law? Was a State law requiring separate accommodations on a public conveyance for whites and African Americans a violation of equal protection? Should the State law be ruled unconstitutional and Plessy’s conviction overturned? Or would “separate but equal” facilities meet the standard of the 14th Amendment?



*Segregation on public buses continued until 1956 when it was banned by the Supreme Court.*

## Close Up on the Supreme Court Landmark Cases *Plessy v. Ferguson, 1896*



### Arguments

**For Plessy:** Segregated facilities violate the Equal Protection Clause. As a fully participating citizen, Plessy should not have been denied any rights of citizenship. He should not have been required to give up any public right or access. The Louisiana law violated the Equal Protection Clause and was, therefore, unconstitutional.

**For the State of Louisiana:** It is the right of each State to make rules to protect public safety. Segregated facilities reflected the public will in Louisiana. A separate but equal facility provided the protections required by the 14th Amendment and satisfied the demands of white citizens as well. If *The Civil Rights Cases* of 1883 made clear that segregation in private matters is of no concern to government, why should a State legislature be prohibited from enacting public segregation statutes?

### Decision and Rationale

Justice Henry B. Brown of Michigan delivered the 7-1 decision of the Court that upheld the Louisiana law requiring segregation. Brown noted that the law did not violate either the 13th or 14th Amendments. He stated that the 13th Amendment applied only to slavery, and the 14th amendment was not intended to give African Americans social equality but only political and civil equality with white people.

Using a line of reasoning that would echo across the next 60 years of political debate and Court opinion, Brown wrote that "Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differ-

ences...." In other words, legislation cannot change public attitudes, "and the attempt to do so can only result in accentuating the difficulties of the present situation," Brown wrote. Reflecting the common bias of the majority of the country at the time, Brown argued that "If the civil and political rights of both races be equal, one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane." The Court declared the Louisiana law a reasonable exercise of the State's "police power," enacted for the promotion of the public good.

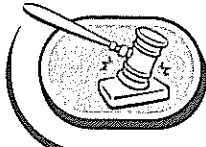
In the key passage of the opinion, the Court stated that segregation was legal and constitutional as long as "facilities were equal." Thus the "separate but equal doctrine" that would keep America divided along racial lines for over half a century longer came into being.

Somewhat ironically, while Brown, a Northerner, justified the segregation of the races, Justice John Marshall Harlan, a Southerner from Kentucky, made a lone, resounding, and prophetic dissent. "The Thirteenth Amendment...struck down the institution of slavery [and]...decreed universal civil freedom," Harlan declared. "Our Constitution is color-blind and neither knows nor tolerates classes among citizens." Harlan's dissent became the main theme of the unanimous decision of the Court in *Brown v. Board of Education* in 1954.

No great national protest followed in the wake of the Plessy decision. Segregation was an issue shunted off to the corner of our national life, and would remain so for nearly 60 years.

### Questions for Discussion

1. Reread the decision. Examine the quoted material. Consider the logic of the Court in determining that "separation" was not a violation of the 14th Amendment. Can you find any logical flaw? Explain.
2. To what extent would it be correct to explain the *Plessy* decision as an act of reconciliation aimed toward the South and its States' rights doctrine?



## Close Up on the Supreme Court Landmark Cases

# *Brown v. Board of Education of Topeka, 1954*

### Historical Background

Perhaps no other case decided by the Court in the 20th century has had so profound an effect on the social fabric of America as *Brown v. Board of Education of Topeka*. By the end of World War II, dramatic changes in American race relations were already underway. The integration of labor unions in the 1930s under the eye of the Fair Employment Practices Commission and the desegregation of the armed forces by President Truman in 1948 marked major steps toward racial integration.

The legal framework on which segregation rested—formally established in 1896 by the Court's *Plessy v. Ferguson* decision—was itself being dismantled. Challenged repeatedly by the National Association for the Advancement of Colored People (NAACP), the doctrine of "separate but equal" was beginning to crack. Beginning in 1938, the Supreme Court had, in a number of cases, struck down laws where segregated facilities proved to be "demonstrably unequal." The Court ordered the law schools at the University of Missouri and the University of Texas to be integrated in *Missouri ex rel. Gaines v. Canada*, 1938, and *Sweatt v. Painter*, 1950. Neither case had made the frontal assault needed to overturn the *Plessy* standard. However, the 1950s brought a new wave of challenges to official segregation by the NAACP and other groups.

### Circumstances of the Case

Linda Brown, an eight-year-old African-American girl, had been denied permission to attend an elementary school only five blocks from her home in Topeka, Kansas. School officials refused to register her at the nearby school, assigning her instead to a school for nonwhite students some 21 blocks from her home. Separate elementary schools for whites and nonwhites were maintained by the Board of Education in Topeka. Linda Brown's parents filed a lawsuit

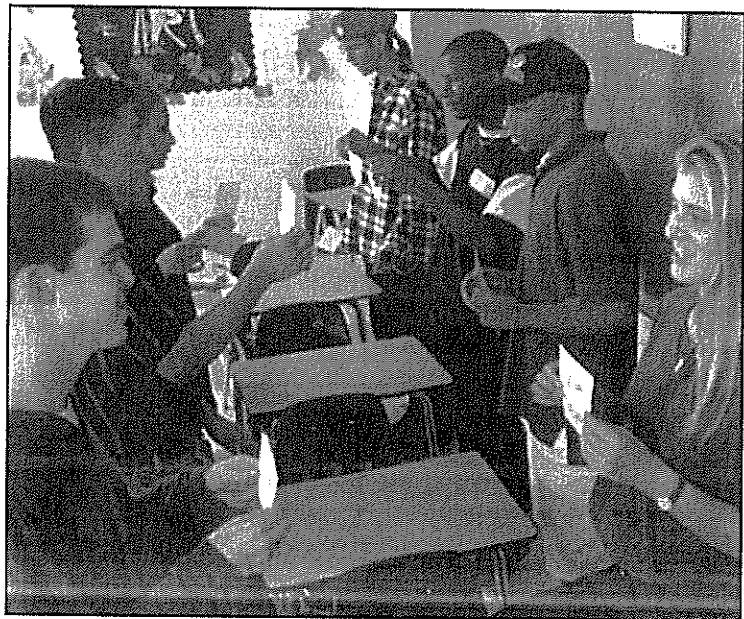
to force the schools to admit her to the nearby, but segregated, school for white students.

### Constitutional Issues

The central question addressed to the Court involved the Equal Protection Clause of the 14th Amendment. "Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive the children...of equal educational opportunities?" In short, the Court was asked to determine whether the segregation of schools was at all constitutional.

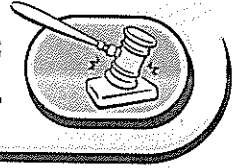
### Arguments

**For Linda Brown:** Led by Thurgood Marshall, an NAACP litigator who would be appointed to the Court in 1967, Brown's attorneys argued that the operation of separate schools, based on race, was harmful to African-American children. Extensive testimony was provided to support the contention that legal segregation resulted in both fundamentally unequal education and low self-esteem among minority students. The Brown family lawyers argued that segregation by law implied that African Americans were inherently inferior to whites.





## Close Up on the Supreme Court Landmark Cases *Brown v. Board of Education of Topeka, 1954*



For these reasons they asked the Court to strike down segregation under the law.

**For the Board of Education:** Attorneys for Topeka argued that the separate schools for nonwhites in Topeka were equal in every way, and were in complete conformity with the *Plessy* standard. Buildings, the courses of study offered, and the quality of teachers were completely comparable. In fact, because some federal funds for Native Americans only applied at the nonwhite schools, some programs for minority children were actually better than those offered at the schools for whites. They pointed to the *Plessy* decision of 1896 to support segregation and argued that they had in good faith created “equal facilities,” even though races were segregated. Furthermore, they argued, discrimination by race did not harm children.

### Decision and Rationale

For a unanimous Court (9–0), Chief Justice Warren wrote in his first and probably most significant decision, “[S]egregation [in public education] is a denial of the equal protection of the laws.” Accepting the arguments put forward by the plaintiffs, Warren declared: “To separate [some children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”

The Court quoted the Kansas court, which had held that “Segregation of white and col-

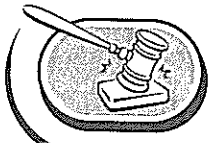
ored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school....”

Summing up, Warren wrote: “We conclude that in the field of public education the doctrine of ‘separate but equal’ has no place. Separate educational facilities are inherently unequal.... segregation [in public education] is a denial of the equal protection of the laws.”

The *Brown* decision did more than reverse the *Plessy* doctrine of “separate but equal.” It reversed centuries of segregationist practice and thought in America. For that reason, the *Brown* decision is seen as a transforming event—the birth of a political and social revolution. In a later case called *Brown II* (Warren had suggested two decisions—the first dealing with the constitutionality of segregation and the second with the implementation of the decision), the Court directed an end to school segregation by race “with all deliberate speed.” The *Brown* decision became the cornerstone of the social justice movement of the 1950s and 1960s. It finally brought the spirit of the 14th Amendment into practice, more than three-quarters of a century after that amendment had been passed.

### Questions for Discussion

1. Why was it significant that *Brown* was a unanimous decision of the Supreme Court?
2. What was the strongest argument in Chief Justice Warren’s majority opinion? Why?



## Close Up on the Supreme Court Landmark Cases *Dred Scott v. Sandford, 1857*

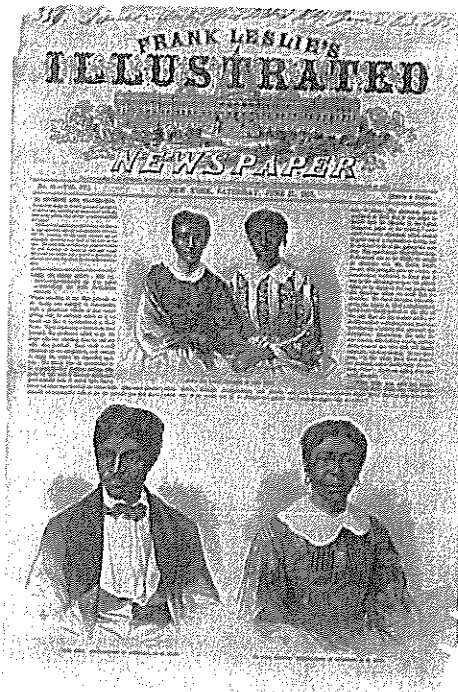
### Historical Background

By the mid-1850s, sectional conflict over the extension of slavery into the Western territories threatened to tear the nation apart. The Kansas-Nebraska Act of 1854 destroyed the tenuous balance struck 34 years before between “free States” and “slave States” in the Missouri Compromise. Under the banner of “popular sovereignty,” pro- and antislavery factions waged violent conflict for control of what came to be known as “bleeding Kansas” before that territory was admitted to the Union. With Congress sharply divided, reflecting the divisions in the nation, the Supreme Court took the unusual step of hearing the case of a fugitive slave suing for his freedom. Intended to be the definitive ruling that would settle the controversy threatening the Union for good, the case instead produced a divisive decision that pushed the nation one step closer toward the precipice of civil war.

John Marshall, in his time the single most influential advocate for strong National Government, had died in 1835. President Andrew Jackson appointed Roger B. Taney (pronounced Tawney). During his tenure as Chief Justice, Taney upheld strong national power, but with some modifications. Taney endorsed what is known as “dual sovereignty,” which implies that State and federal governments are “foreign” to each other; each is sovereign in its own right. By 1857, Taney presided over a Court that had expanded to nine justices and was divided—four Northerners and five Southerners, including Taney, sat on the bench.

### Circumstances of the Case

Dred Scott was a Missouri slave. Sold to Army surgeon John Emerson in Saint Louis around 1833, Scott was taken to Illinois, a free State, and on to the free Wisconsin Territory before returning to Missouri. When Emerson died in 1843, Scott sued Emerson’s widow for his freedom in the Missouri supreme court, claiming that his residence in the “free soil” of Illinois made him a free man. After defeat in State courts, Scott brought suit in a local federal court. Eleven years after Scott’s initial suit, the case came before the U.S. Supreme Court.



*An 1857 newspaper features a story covering the Dred Scott decision. Scott and his family are pictured on the cover.*

### Constitutional Issues

Did a slave become free upon entering a free State? Could a slave—or a black person—actually be entitled to sue in federal courts? Was the transportation of slaves subject to federal regulation? Could the Federal Government deny a citizen the right to property (interstate transportation of slaves/property) without due process of law? Could an item of property (a slave) be taken from the

owner without just compensation? And finally, was the Missouri Compromise a valid and constitutional action of the National Government? Could Congress prohibit slavery in a territory or delegate that power to a territory’s legislature?

### Arguments

**For Dred Scott:** When a person enters a free State or territory, the free status overrides the previous condition of servitude. Since slavery was forbidden in the free States and territories by federal and State laws, Dred Scott became free when he entered Illinois and Wisconsin.



## Close Up on the Supreme Court Landmark Cases *Dred Scott v. Sandford, 1857*



**For Sandford:** To deprive a person of property (in this case, Dred Scott) without due process or just compensation violated the 5th Amendment, which states that "No person shall be... deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation." Dred Scott was still a slave and no master's property rights could be limited or taken away by a State or federal law.

### Decision and Rationale

The Court decided 7-2 in favor of the slave owner. Every justice submitted an individual opinion justifying his position, with Chief Justice Taney's being the most influential.

According to Taney, African Americans, be they slave or free, were not citizens. As a slave, moreover, Scott was property and had no right to bring suit in federal courts. "In regard to the issue of Scott's becoming free when he moved to the free State of Illinois," Taney wrote, "the laws of the State in which the petitioner was currently resident, namely the slave State of Missouri, should apply."

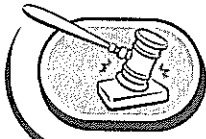
Of far more serious consequence, the Court also struck down the Missouri Compromise as unconstitutional, because it deprived property owners (slave owners) of the right to take their property anywhere in the United States, thus "depriving them of life, liberty and property under the 5th Amendment." Any line, or law, that limited the right of slave owners to utilize their property was unconstitutional. Taney then ruled that the Congress could not extend to any territorial governments powers that it did not

possess (in this case, the power to limit slavery). By declaring the Missouri Compromise unconstitutional, Taney not only destroyed one of the delicate compromises that had kept the union together for nearly four decades but also rejected the principle of popular sovereignty. Popular sovereignty, which held that territories could decide whether or not to allow slavery for themselves, had been strongly advocated by Stephen Douglas as the solution to the controversies in the federal territories that dominated the 1850s. This disallowance of popular sovereignty contributed to the national disorder over the spread of slavery.

The *Dred Scott* decision unleashed a storm of protest against the Court and the administration of President Buchanan, which supported the decision. The justices' plans to make a definitive ruling that would settle the controversy over slavery backfired as Republicans charged that a "Slave Power" conspiracy extended into the highest reaches of government. Violent struggles continued in the Kansas and Nebraska territories, where "free soil" and proslavery guerilla bands terrorized each other. A major landmark on the road to the Civil War, the *Dred Scott* decision was overturned with the adoption of the 13th and 14th amendments to the Constitution in 1865 and 1868. These amendments ended slavery and established firmly the citizenship of all persons, regardless of race, creed, or previous condition of servitude. As for Dred Scott, two months after the Supreme Court's decision, Emerson's widow sold Scott and his family to the Blow family, who freed them in May of 1857.

### Questions for Discussion

1. How do you account for (or explain) the Court's decision in *Dred Scott v. Sandford*?
2. Once Taney ruled that Scott did not have a right to bring a lawsuit, he could have simply dismissed the case. Why did he decide to deal with the issue of slavery in federal territories?



## Chapter 21: Close Up on the Supreme Court

# *Regents of the University of California v. Bakke, 1978*

### Case Summary

Allan Bakke filed suit after learning that minority candidates with lower qualifications had been admitted to medical school under a program that reserved spaces for "disadvantaged" applicants. The California Supreme Court ordered the school, the State-run University of California, to admit Bakke. The university then appealed to the United States Supreme Court.

### The Court's Decision

A splintered Supreme Court affirmed the judgment ordering Bakke's admission to the medical school of the University of California at Davis and invalidating the school's special admissions program. However, the Court did not prohibit the school from considering race as a factor in future admissions decisions. Justice Lewis Powell, Jr., announced the Court's judgment. Four justices agreed with his conclusions as to Bakke individually, and four other justices agreed with the ruling as to use of race information in the future.

Justice Powell wrote that "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." He did not, however, prohibit schools from considering race as one factor in the admissions process.

Justice Thurgood Marshall argued that race could properly be considered in an affirmative action program, a policy of taking positive steps to remedy the effects of past discrimination. "In light of the sorry history of discrimination and its devastating impact on the lives of Negroes, bringing the Negro into the mainstream of American life should be a state interest of the highest order. To fail to do so is to ensure that America will forever remain a divided society. I do not believe that the Fourteenth Amendment requires us to accept that fate."

*May public universities use admissions quotas?*

### More on the Case

The legal impact of *Bakke* was reduced by the disagreement among the justices. Because the Court had no single majority position, the case could not give clear guidance on the extent to which colleges could consider

race as part of an affirmative action program.

In *Texas v. Hopwood, 1996*, a federal appeals court found that a University of Texas affirmative action program violated the rights of white applicants. The law school was trying to boost enrollment of African Americans and Mexican Americans. The court assumed that the *Bakke* decision was no longer legally sound, and explicitly ruled that "the law school may not use race as a factor in law school admissions." The court continued: "A university may properly favor one applicant over another because of...whether an applicant's parents attended college or the applicant's economic and social background....But the key is that race itself cannot be taken into account." The Supreme Court refused to review the appeals court decision.

Affirmative action remains a controversial issue in California. In 1996, voters passed the California Civil Rights Initiative, generally known as "Proposition 209," which prohibited all government agencies and institutions from giving preferential treatment to individuals based on their race or gender. The Supreme Court also refused to hear an appeal from a decision upholding the constitutionality of the law.

### Questions for Discussion

1. To what extent did Justice Marshall disagree with Justice Powell?
2. Would *Bakke* allow a public university to set aside spaces for economically-disadvantaged applicants? Applicants whose parents had not attended college? Applicants from single-parent families?