

# ***BROWN V. BOARD AND BEYOND: RACIAL EQUALITY IN AMERICA*** **50 YEARS AFTER THE CIVIL RIGHTS ACT**

## 2014 PROGRAM GUIDE

### **I. Introduction**

ACS encourages its chapters to plan programming in the Spring of 2014 and beyond on issues related to the state of racial equality in our nation. As we approach the 60th anniversary of the Supreme Court's landmark ruling in *Brown v. Board of Education*, ordering the desegregation of public schools and renouncing the doctrine of "separate but equal," and the 50th anniversary of the passage of the Civil Rights Act of 1964, prohibiting discrimination on the basis of race, color, religion, sex, or national origin, we must appreciate the progress achieved by the civil rights movement, even as we critically assess the challenges that remain. ACS encourages chapters to host events across the country to explore both jurisprudential approaches to equality, as well as legal and policy questions about equality within particular contexts. This brief guide, along with its associated speaker list, has been designed to help chapters in their planning for such events. Out of necessity, this guide focuses only on a handful of issues associated with racial equality, but of course the struggle to achieve equality in the United States has occupied many battlefields. We encourage chapters to consult previous program guides on voting rights, immigration, and indigent defense, among others, which can be found at <http://www.acslaw.org/program-guides>, as well as to explore other related subjects, such as economic inequality and the equality of non-racial minorities.

### **II. Constitutional Interpretation, the Courts and Equality**

The longstanding debate over the proper role of the judiciary and principles of judicial decisionmaking is nowhere more apparent than in comparisons between the jurisprudence of the Supreme Court led by Chief Justice Earl Warren during the civil rights era and that of the current Roberts Court. Both have been subjected to claims of "judicial activism." What role did the Framers have in mind for the judiciary? What exactly is meant by "judicial activism," and are

some forms of it proper and others not? What role do courts have in advancing equality? See ACS Issue Brief by Geoffrey Stone and William Marshall, [The Framers' Constitution: Toward a Theory of Principled Constitutionalism](#); Lincoln Caplan, [Ruth Bader Ginsburg and Footnote Four](#); ACS Issue Brief by Alan Morrison, [Revisiting Judicial Activism: The Right and Wrong Kinds](#); David A. Strauss, [Is Carolene Products Obsolete?](#); and video of the 2013 ACS National Convention Plenary, [Courts, the Constitution, and Social Change](#).

Two constitutional provisions in particular were central to the Court's civil rights era jurisprudence: the Equal Protection Clause of the Fourteenth Amendment, upon which the Court rested its *Brown* decision, and the Commerce Clause, which the Court relied upon in 1964 in upholding the Civil Rights Act's prohibition on private discrimination in public accommodations in *Heart of Atlanta Motel v. U.S.* How has the Court's interpretation of the Equal Protection and Commerce Clauses changed over the last 50 years and what has been the impact on equality? What other constitutional provisions grant Congress the authority to enact civil rights legislation? See Jack Balkin, [The Reconstruction Power](#); Reva B. Siegel, [Foreword: Equality Divided](#); and Mario L. Barnes & Erwin Chemerinsky, [The Once and Future Equal Protection Doctrine?](#) See also [Hernandez v. Texas](#), the 1954 Supreme Court decision holding that equal protection principles apply beyond a "two-class" theory "based upon differences between 'white' and Negro," and the documentary film [A Class Apart](#) chronicling the *Hernandez* case.

### **III. Equality in Education**

Historically, the educational context was a primary focus of the battle for equality, and sixty years after *Brown v. Board*, this remains the case. The constitutionality of affirmative action programs continues to surface on the docket of the Supreme Court, as does the role race plays in governmental decisionmaking about education, more broadly.

#### **A. Affirmative Action**

Twenty-five years after striking down the use of quotas in university admissions in *Regents of the University of California v. Bakke*, the Supreme Court ruled in its 2003 *Grutter v. Bollinger* decision that diversity in higher education was a compelling governmental interest that justified the narrowly tailored consideration of race as a factor among others in admissions decisions. In contrasting the quota system at issue in *Bakke* with the University of Michigan Law

School's admissions program at issue in *Grutter*, the Court said “[u]niversities can ... consider race or ethnicity more flexibly as a “plus” factor in the context of individualized consideration of each and every applicant.”

Despite the majority opinion's prediction that perhaps affirmative action to achieve diversity would no longer be necessary in twenty-five years, only ten years later the Court agreed to review the case of *Fisher v. Texas*, a challenge to the admissions program utilized by the University of Texas in which race was a consideration. Amid dire predictions that the Court in *Fisher* might upend the state of the law and dismantle the existing affirmative action framework, it ruled only that the lower court had failed to apply sufficiently strict scrutiny as required by *Grutter* and *Bakke* and remanded the case for further consideration.

Progressives have put forth a variety of responses as those opposed to race-conscious affirmative action have seemed to find favor with a majority of the Roberts Court. In addition to maintaining that the consideration of race is necessary to promote diversity and remedy past discrimination, some have advanced the use of socioeconomic affirmative action, while others have argued for the elimination of legacy preferences.

What are the arguments for the continued use of race-based affirmative action? Can meaningful diversity be achieved through alternative means, such as the consideration of socioeconomic diversity? What will satisfy the Court's requirement of strict scrutiny set forth in *Fisher*? See Charles E. Daye, A. T. Panter, Walter R. Allen, Linda F. Wightman, [Does Race Matter in Educational Diversity? A Legal and Empirical Analysis](#); [Brief for Amici Curiae 65 Leading American Businesses in Support of Respondents](#) and [Consolidated Brief of Lt. Gen. Julius W. Becton, Jr. et al. as Amici Curiae in Support of Respondents](#), both filed in *Grutter*; Richard D. Kahlenberg, [A Better Affirmative Action](#); Sherilyn A. Ifill, [Race vs. Class: The False Dichotomy](#); Vinay Harpalani, [Fisher's Fishing Expedition](#); and Gene Nichol, [Race, Legacy and Affirmative Action](#).

## **B. Secondary School Integration**

In 2007, a fractured Supreme Court invalidated plans by the Jefferson County (Louisville), KY and Seattle, WA public school systems seeking to integrate their schools in the face of persistent racially segregated housing patterns. The school districts in Louisville and Seattle voluntarily used students' race in determining school assignments in order to promote

diversity and avoid racial isolation in their schools. In his plurality opinion subjecting the plans to strict scrutiny, Chief Justice Roberts rejected them as “racial balancing,” which he said is not permitted and thus cannot be a compelling governmental interest. At the end of his opinion, Roberts appears to be claiming the mantle of *Brown* when he states: “Before *Brown*, schoolchildren were told where they could and could not go to school based on the color of their skin. The school districts in these cases have not carried the heavy burden of demonstrating that we should allow this once again--even for very different reasons.” He further famously stated that “the way to stop discrimination on the basis of race is to stop discriminating on the basis of race.” In dissent, Justice Breyer asserted that the majority’s opinion was a significant departure from existing law and “undermines *Brown*’s promise of integrated primary and secondary education that local communities have sought to make a reality. This cannot be justified in the name of the Equal Protection Clause.”

What options are available to promote diversity in secondary education in light of the Court’s ruling striking down the Louisville and Seattle school assignment plans? Should diversity in secondary education be considered a compelling interest as it is in higher education? What should be made of the divergent views of *Brown*’s legacy held by Chief Justice Roberts and those of Justice Stevens, who in dissent claimed that Roberts’ invocation of *Brown* was “a cruel irony”? How does the decision in these cases and the affirmative action cases reflect a broader agenda on the part of the Roberts’ Court when it comes to race? See Charles J. Ogletree, Jr., Susan Eaton, [From Little Rock to Seattle and Louisville: Is “All Deliberate Speed” Stuck in Reverse?](#), 30 U. Ark. Little Rock L. Rev 279 (2008); Linda Greenhouse [The Fire Next Term](#); and video of the 2012 ACS National Convention Plenary, [The Resegregation of America: Race and the Roberts Court](#).

#### **IV. Equality and the Criminal Justice System**

From arrest to sentencing, racial inequality is reflected throughout the criminal justice system, suggesting the question: Is criminal justice the civil rights issue of the 21st century? In [The New Jim Crow: Mass Incarceration in the Age of Colorblindness](#), Michelle Alexander suggests that the “War on Drugs” has created a modern day caste system, one in which people of color are relegated to second-class citizenship and denied the rights won through the civil rights movement. Alexander’s account details the collateral consequences of imprisonment, which can

include the loss of voting rights, jury participation, public assistance, financial aid, and residency for non-U.S. citizens.

### **A. Racial Profiling**

The Fourth Amendment protects against “unreasonable searches and seizures,” the Fourteenth Amendment guarantees to all persons the “equal protection of the laws,” and the Supreme Court declared in 1996 in *Whren v. United States* that “the Constitution prohibits selective enforcement of the law based on considerations such as race,” yet according to the Department of Justice, African Americans and Latinos are three times more likely to be searched and twice as likely to be arrested during traffic stops when compared to white motorists. While racial profiling has been successfully challenged under the Fourth and Fourteenth Amendments, as demonstrated by the recent district court decision in the New York City “stop and frisk” case *Floyd, et al. v. City of New York, et al.*, existing Fourth Amendment jurisprudence may actually allow for biased policing. For example, the Supreme Court’s 1975 decision in *U.S. v. Brignoni-Ponce* held that “the likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor” in border police decisions to stop drivers. Relatedly, in *Arizona v. U.S.*, the Court recently upheld the provision of an Arizona law that requires law enforcement to check the immigration status of those they think may be in the country illegally, a provision many contend will lead police to racially profile those they think look Mexican.

What are the available checks on biased police practices? Is there consensus among the circuit courts of appeals as to how constitutionally impermissible racial profiling can be demonstrated, for example, with statistical evidence? Has the Supreme Court’s criminal justice jurisprudence shifted in other areas to provide lesser protection for suspects and defendants? What remains of the protections afforded criminal defendants by the Warren Court decisions of the 1960’s? In addition to immigration, is there legal support for racial profiling in other contexts, like national security? See American Civil Liberties Union and the Rights Working Group, [The Persistence of Racial and Ethnic Profiling in the United States](#); Chapter Seven of Goodwin Liu, Pamela S. Karlan, and Christopher H. Schroeder, [Keeping Faith with the Constitution](#); ACS Issue Brief by Christy E. Lopez, [Disorderly \(Mis\)Conduct: The Problem with](#)

[“Contempt of Cop” Arrests](#); and Gabriel J. Chin and Kevin R. Johnson, [Profiling's Enabler: High Court Ruling Underpins Arizona Immigration Law](#).

## **B. Mass Incarceration**

In recent years, the United States prison population has peaked at over 2 million people, making it the highest such population in the world. This unprecedented growth is a result of the War on Drugs policies of the past forty years like mandatory minimums, where we saw a 100:1 sentencing disparity for crack cocaine and powder cocaine offenses. According to the Sentencing Project, people of color have been disproportionately impacted in the War on Drugs, with minorities constituting 60% of the prison population and 1 in 3 African American men likely to go to prison in their lifetime. Recent governmental responses could reshape the landscape of mass incarceration. Congress lowered the cocaine sentencing disparity to 18:1 in the Fair Sentencing Act of 2010, and the Supreme Court upheld retroactive application of the Act in *Dorsey v. United States*. The Court also found that California’s overcrowded prisons violated the Eighth Amendment in its 2011 decision in *Brown v. Plata*.

Are there other governmental actions that will work to reduce mass incarceration? What constitutional tools, like the pardon power, can be used to correct the sentencing laws of the War on Drugs? Will decriminalization efforts, like those involving marijuana, reduce incarceration rates and disparities? See Report of the Sentencing Project to the United Nations Human Rights Committee, [Racial Disparities in the United States Criminal Justice System](#); ACS Issue Brief by Margaret Colgate Love, [Reinvigorating the Federal Pardon Process: What the President Can Learn from the States](#); ACS Issue Brief by Kara Gotsch, [‘After’ the War on Drugs: The Fair Sentencing Act and the Unfinished Drug Policy Reform Agenda](#); video of the 2013 ACS National Convention panel, [The Era of Mass Incarceration](#); and Eugene Jarecki’s film, [The House I Live In](#).

## **V. The Future of Disparate Impact**

In 1971, in *Griggs v. Duke Power Co.*, the Supreme Court held that Title VII of the Civil Rights Act of 1964 prohibits an employment practice that disproportionately impacts a protected class, even if it was not intended to do so, where the employer cannot demonstrate a “business necessity” for the practice. This disparate impact theory has subsequently been recognized in

other contexts, like fair housing, and was codified in the Civil Rights Act of 1991, which prohibits an "employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin." However, in 2009 in the case of *Ricci v. DeStefano* the Court ruled that the disparate treatment provision of Title VII was violated when the city of New Haven, Connecticut disregarded results from a test for promotion on which white firefighters had performed well but African American firefighters performed poorly, despite objections by the City that it would be open to liability for disparate impact. Justice Scalia, concurring in the majority opinion, took the opportunity to question the legitimacy of disparate impact doctrine, generally, suggesting it is in conflict with equal protection rights.

It appears that some members of the Court have been eager to consider Justice Scalia's contention, as evidenced by recent grants of certiorari. In *Magner v. Gallager* and most recently in *Mount Holly v. Mt. Holly Gardens Citizens in Action, Inc.*, the Court was to consider whether disparate impact claims are cognizable under the Fair Housing Act, but both cases were settled before resolution by the Court.

How has the law regarding disparate impact theory evolved since *Griggs*? How will "the war between disparate impact and equal protection," as Justice Scalia characterizes it, play out? What forms of race-conscious remedies are constitutional? See video of the 2011 ACS National Convention panel, [Disparate Impact's Future: From Griggs to Ricci and the Battle to Preserve Traditional Remedies](#); Reva B. Siegel, [From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases](#); and Stacy Seicshnaydre, [Will Disparate Impact Survive?](#)