

The Future of Race in America

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About this Lesson

In the 2003 Supreme Court ruling *Gratz v. Bollinger* Justice Sandra Day O'Connor argued that in 25 years racial preferences would not be needed to determine admissions into institutions of higher learning. With this lesson students will learn, using a hypothetical case, about the future of race in America by examining the "narrowly tailored" admission policy of the University of Kentucky in the year 2011. The policy requires students who wish to benefit from their race in the admissions process to submit to a DNA test proving their ethnic makeup. However, the university quickly learns that the makeup of their students' DNA does not always match how students perceive themselves or how others perceive them. In addition to examining this case, students will also learn about and analyze historic affirmative action cases. The lesson culminates with students viewing a clip of how some of the country's sharpest legal minds ruled on the future case in a moot court. For assessment, students will write a feature piece for a newspaper about affirmative action: past, present, and future.

Grade(s) Level

High School

Classroom Time**Materials**

Do Now Activity

Court Case Summaries

The Supreme Court and Affirmative Action- graphic organizer**Constitution Connections**

Articles

Amendments

Background

On Saturday, March 8th, 2008, as part of the National Constitution Center's annual Peter Jennings Project for Journalists and the Constitution, distinguished lawyers Charles Ogletree, the Harvard Law School Jesse Climenko Professor of Law, and Kathleen Sullivan, Stanley Morrison Professor of Law and Former Dean of Stanford Law School, argued a mock supreme court case before a panel of equally distinguished judges examining the possible debate over exactly who qualifies for racial preferences as America becomes increasingly multiracial. Students at Yale Law School, under the supervision of Professor Akhil Amar, developed a case which raises fascinating questions about identity, race, and equal protection under the law. Judges included Akhil Amar, the Southmayd Professor of Law and Political Science at Yale University, Ronald Castille, the Chief Justice of the Pennsylvania Supreme Court, Ida Chen, judge for the Philadelphia Court of Common Pleas, Michael Fitts, Dean and the Bernard G. Segal Professor of Law at the University of Pennsylvania Law School, Kent Jordan, judge for the U.S. Court of Appeals for the Third Circuit, Judith Kaye, Chief Judge of the Court of Appeals of the State of New York, Jane Roth, judge for the U.S. Court of Appeals for the Third Circuit, Ted Shaw, Professor of Professional Practice at Columbia Law School, and Dolores Sloviter, judge for the U.S. Court of Appeals for the Third Circuit.

Objectives

Students will:

- Analyze the different sides and implications of affirmative action.
- Understand the implications of legal precedent in the Federal Court system.
- Discuss historical landmark affirmative action court cases.

Standards**National Council for the Social Studies**

Individuals, Groups and Institutions

-help learners understand the concepts of role, status, and social class and use them in describing the connections and interactions of individuals, groups, and institutions in society.

Power, Authority, and Governance

-provide opportunities for learners to examine issues involving the rights, roles, and status of individuals in relation to the general welfare.

Activity

1. Distribute copies of the two student profiles below to students (or project them on an overhead).

<u>Instructions:</u>	Alice Knight	Randy Hart
Imagine you sit on a college admissions committee and you have one open position left in next year's class. <i>Which of the two students profiled here would you admit? Why did you pick the student you picked? Is there any other information it would have been useful to have?</i>	<u>Gender:</u> Female <u>Ethnicity:</u> East Asian/African-American <u>GPA:</u> 3.91 <u>SAT:</u> 2280 <u>Activities:</u> Volleyball Captain, Student Government Vice-President, Students Against Drunk Driving President	<u>Gender:</u> Male <u>Ethnicity:</u> African-American <u>GPA:</u> 3.72 <u>SAT:</u> 2040 <u>Activities:</u> Lacrosse Captain, Yearbook Editor, Elementary School Tutoring Program

2. Allow students time to read the two student profiles and answer the italicized questions in their notebook.
3. Determine the support for each applicant's admission by a show of hands poll. Probe the students' reasoning using the following discussion questions:
 - a. Why did you select the applicant you did?
 - b. Was race a factor in your decision? Should it be?
 - c. Should class be a factor in college admission?
 - d. Should colleges be allowed to ask your race or class in the application process?
 - e. How important is GPA?

4. *Extension Activity*: Share and analyze Table 1 with students.
- a. Does this new information change anyone's decision?

Table 1: U.S. Population and Undergraduate Students by Race (2000)

	White, Non- Hispanic	Black, non- Hispanic	Hispanic or Latino	Asian	American Indian / Alaska Native	Native Hawaiian/ other Pacific Islander	Other	More than one race
U.S. Population ¹ (18 years and older)	72.0%	11.2%	11.0%	3.7%	0.7%	0.1%	0.1%	1.3%
U.S. College Students ²	66.6%	12.2%	11.5%	5.2%	0.9%	0.8%	1.1%	1.7%

Sources:

1: U.S. Census Bureau. "Census 2000 PHC-T-1. Population by Race and Hispanic or Latino Origin for the United States: 1990 and 2000." <http://www.census.gov/population/cen2000/phc-t1/tab01.pdf>

2: National Center for Education Statistics. "Table: Percentage distribution of 1999–2000 undergraduates' race/ethnicity, their average age, and percentage distributions (by columns) of demographic characteristics for each racial/ethnic group." http://nces.ed.gov/das/library/tables_listings/show_nedrc.asp?rt=p&tableID=260&popup=true

5. Briefly explain what affirmative action is.

- First introduced by President Kennedy in 1961 as a temporary solution to redress past discrimination in the United States and to take active steps in "leveling the playing field" among all Americans.
- Affirmative action intends to promote access and representation in education, employment and business to groups that have historically been underrepresented.

6. Students will work in groups analyzing landmark affirmative action cases. Each group will have one of four cases. Using the graphic organizer, each group will answer the following questions:

- Why was this case brought to a lawsuit?
- What was the university's/school district's admission policy?
- Was the admission policy narrowly tailored to achieve diversity? Why?
- According to the Supreme Court, did the university/school district have a compelling interest to achieve diversity?

- How did the Supreme Court Rule in this case? What precedent was set?

7. Students find classmates with other cases in order to complete the graphic organizer. When students have completed this activity, each group will send a representative to stand along a continuum. Groups will determine whether their case supports or opposes affirmative action, along a scale of 1 to 10 (1 in support of affirmative action and 10 in opposition of affirmative action).

8. Students will report on the information they found and defend their position on the continuum. Additional discussion questions:

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

- What is a quota?
- What is the goal or point of a quota system?
- Do quotas successfully remedy past discrimination? Why or why not?
- Should universities use quota systems to determine admission? Why or why not?
- How did the Supreme Court rule on quota systems? Do you agree or disagree with this decision?

Grutter v. Bollinger (2003)

- According to Justice O'Connor, race conscious programs "must be limited in time," and that racial preferences will be unnecessary in 25 years. Do you agree or disagree? Why or why not?

Gratz v. Bollinger (2003)

- Chief Justice William Rehnquist rejected the idea that individual consideration is impractical for large universities. Do you agree or disagree? Why or why not?

Parents Involved in Community Schools v. Seattle School District No. 1 (2007)

- One reason Chief Justice Roberts rejected the school districts' policy was because they only focused on race to achieve diversity. What factors should schools focus on to achieve diversity?
- Does racial balance equal diversity?
- What factors should be examined to achieve diversity?
- According to Chief Justice Roberts, elementary schools do not have the same compelling interest as universities to achieve diversity. Do you agree or disagree? Why or why not?

9. Remind the students of the Do Now scenario and provide context for the hypothetical moot court case.

- The University of Kentucky had two highly publicized incidents dealing with its race-based affirmative action program.

- The University of Kentucky implemented a new admissions policy—only students that demonstrate more than 25% non-European ancestry will be considered in the affirmative action policy—DNA tests will be used as a “plus factor” and “narrowly-tailored” to achieve legitimate and compelling societal interests.
- Admissions policy greatly impacts the experiences of two students, Alice Knight and Randy Hart
- Randy Hart sues the University’s admission policy on the basis that it is unconstitutional and violates his genetic privacy rights.
- In mid-December, 2012, the United States Supreme Court agrees to review the case of *Hart v. University of Kentucky*

10. Students will be given the moot court case to read independently.

Assessment-Options

Students will write an Editorial to defend a side of affirmative action. In their editorial students will analyze the implications of legal precedent in the deciding the hypothetical case. Grading rubric is attached.

1. Part I. Students will write a synthesis of moot court Part II. Students will present their synthesis and defend their position in an oral presentation.

Further Resources

American Bar Association

<http://www.abanet.org/publiced/focus/spr98const.html>

Stanford Encyclopedia of Philosophy

<http://plato.stanford.edu/entries/affirmative-action/>

Federal Court Concepts: Chart showing how cases go through the Federal Court

<http://www.catea.gatech.edu/grade/legal/structure.html>

Rubric for Editorial

16-20	<ul style="list-style-type: none">○ Consistently uses accurate information.○ Demonstrates a logical plan of organization and coherence in the development of ideas.○ Develops ideas fully using such things as examples, reasons, details, explanations, and generalizations that are relevant and appropriate.○ Includes and fully explains 3_____.○ Consistently expresses ideas clearly.
11-15	<ul style="list-style-type: none">○ Generally uses accurate information.○ Develops the assigned topics using a general plan of organization.○ Demonstrates satisfactory development of ideas through the use of adequate support materials.○ Includes and fully explains 2_____.○ Generally expresses ideas clearly.
6-10	<ul style="list-style-type: none">○ Uses some accurate information.○ Attempts to develop the assigned topic, but demonstrates weakness in organization and may include digressions.○ Demonstrates weakness in the development of ideas with little use of support materials.○ Includes and fully explains 1_____.○ Has difficulty expressing ideas clearly.
1-5	<ul style="list-style-type: none">○ Uses little accurate information.○ Minimally addresses the assigned topic but lacks a plan of organization.○ Does not use support materials in the development of ideas or uses irrelevant material.○ Does not include or fully explain any _____.○ Does not express ideas clearly.
0	<ul style="list-style-type: none">○ Blank / No response

SCORE: _____

Comments/Suggestions:

¹Oral Presentation Evaluation Form

Name: _____

Date: _____

Class: _____

Exceptional	Admirable	Acceptable	Amateur
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Content

Coherence and Organization

Creativity

Material

Speaking Skills

Audience Response

Length of Presentation

COMMENTS:

Holistic Scale

3 Answer addresses most aspects of the question and uses sound reasons and cites and explains appropriate examples. Uses skills of evaluation as well as analysis and synthesis.

2 Answer deals with most aspects of the question and makes correct inferences, although minor errors may exist. Comprehension is on an inferential level and the key skills are synthesis and analysis.

1 Answer deals with material on a concrete, literal level that is accurate in most dimensions.

0 Answer is unresponsive, unrelated or inappropriate.

Note: Scale points are defined in more detail for each test question. For example, a social studies question that asks the student to draw conclusions about a table comparing information from several countries is scored as follows:

3 Response draws logical, clear conclusions which are somewhat developed.

2 Response draws some conclusions but may be brief, somewhat lacking in clarity, or have minor errors in logic.

1 Response draws at least one conclusion but it may be sparse or confusing.

0 Response draws no conclusion or is appropriate or unrelated to the task.

¹ Source: North Carolina Department of Public Instruction

Oral Presentation Rubric

Name: _____

Date: _____

Class: _____

	Exceptional	Admirable	Acceptable	Amateur
Content	An abundance of material clearly related to thesis; points are clearly made and all evidence supports thesis; varied use of materials	Sufficient information that relates to thesis; many good points made but there is an uneven balance and little variation	There is a great deal of information that is not clearly connected to the thesis	Thesis not clear; information included that does not support thesis in any way
Coherence and Organization	Thesis is clearly stated and developed; specific examples are appropriate and clearly develop thesis; conclusion is clear; shows control; flows together well; good transitions; succinct but not choppy; well organized	Most information presented in logical sequence; generally very well organized but better transitions from idea to idea and medium to medium needed	Concept and ideas are loosely connected; lacks clear transitions; flow and organization are choppy	Presentation is choppy and disjointed; does not flow; development of thesis is vague; no apparent logical order of presentation
Creativity	Very original presentation of material; uses the unexpected to full advantage; captures audience's attention	Some originality apparent; good variety and blending of materials/media	Little or no variation; material presented with little originality or interpretation	Repetitive with little or no variety; insufficient use of multimedia
Material	Balanced use of multimedia materials; properly used to develop thesis; use of media is varied and appropriate	Use of multimedia not as varied and not as well connected to thesis	Choppy use of multimedia materials; lacks smooth transition from one medium to another; multimedia not clearly connected to thesis	Little or no multimedia used or ineffective use of multimedia; imbalance in use of materials—too much of one, not enough of another
Speaking Skills	Poised, clear articulation; proper volume; steady rate; good posture and eye contact; enthusiasm; confidence	Clear articulation but not as polished	Some mumbling; little eye contact; uneven rate; little or no expression	Inaudible or too loud; no eye contact; rate too slow/fast; speaker seemed uninterested and used monotone
Audience Response	Involved the audience in the presentation; points made in creative way; held the audience's attention throughout	Presented facts with some interesting "twists"; held the audience's attention most of the time	Some related facts but went off topic and lost the audience; mostly presented facts with little or no imagination	Incoherent; audience lost interest and could not determine the point of the presentation
Length of Presentation	Within two minutes of allotted time +/-	Within four minutes of allotted time +/-	Within six minutes of allotted time +/-	Too long or too short; ten or more minutes above or below the allotted time

DO NOW

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Name: _____

The Supreme Court and Affirmative Action

Directions: As a group, use the case summaries to answer these questions about your case. When you have completed your assigned case, work with other groups to complete this worksheet.

Case	Why was this case brought to a lawsuit?	What was the university's/school district's admission policy?	Was the admission policy narrowly tailored to achieve diversity? Why?	According to the Supreme Court, did the university/school district have a compelling interest achieve diversity?	How did the Supreme Court Rule in this case? What precedent was set?
Regents of the University of California v. Bakke (1978)					
Grutter v. Bollinger (2003)					
Gratz v. Bollinger (2003)					
Parents involved in Community Schools v. Seattle School District No. 1 (2007)					

Case Summary

Regents of the University of California v. Bakke (1978):

A quota system for admitting minorities to medical school is illegal, though affirmative action in general is not. Affirmative action can serve a legitimate “substantial interest.”

The U.C. Davis Medical School had implemented a “special” admissions program that set aside sixteen out of one hundred spots for “economically and/or educationally disadvantaged” members of a “minority group.” Alan Bakke was a white applicant ineligible for the special program. He was rejected under the regular procedure and sued the University for race discrimination. The Justices’ reasoning was so fractured that the case yielded little clear “precedent.” Five Justices voted to strike down the special program. Four thought it violated a colorblind federal statute, while the fifth (Justice Powell) thought it violated the statute and the Equal Protection Clause by failing strict scrutiny.¹ On his (lone) view, the Medical School had a “compelling interest” in educational diversity, but the quota system was not “narrowly tailored” to achieve it because it did not provide individualized consideration to each applicant. Justice Powell also joined four different Justices to overturn the lower court’s ban on affirmative action generally. Those five agreed that states had a “substantial interest that legitimately may be served by a properly devised” affirmative action program. Powell’s interest was educational diversity, and he used a Harvard admissions system to demonstrate how it might be achieved through a narrowly tailored plan. Harvard did not use a quota, but rather gave a subjective “plus” for various qualities, of which race could be one. The other Justices thought the state had an interest in remedying past discrimination, and they applied the lower standard of intermediate scrutiny² because the racial classifications were not stigmatizing.

Case Summary

Grutter v. Bollinger (2003):

Student body diversity is a compelling state interest. Narrow tailoring requires individualized decisions and good-faith consideration of race-neutral alternatives.

The University of Michigan Law School had set up an affirmative action program specifically patterned on Powell's Harvard "plus" example in *Bakke*. The Law School's program evaluated all applicants on a variety of "soft variables," such as essays, recommendations, and "many possible bases for diversity." The Law School had a goal of enrolling a "critical mass" of underrepresented minorities but did not set up a separate program to achieve it. Barbara Grutter was a rejected white applicant who sued the University for race discrimination.

Justice O'Connor's majority held that strict scrutiny applied to "all racial classification," including affirmative action, and explicitly "endorse[d]" Powell's view that "student body diversity" is a compelling state interest. The Court then decided that the program was narrowly tailored. O'Connor explained that the key to narrow tailoring was "individualized consideration." The Law School did not separate minorities from other applicants or establish a quota to admit them. Instead, it applied the same "holistic" review to everyone, which was "flexible enough" to consider different kinds of diversity without "automatic" decisions based on any single factor. She also explained that narrow tailoring required "serious, good faith consideration" of "race-neutral" alternatives, not "exhaustion of every conceivable" one, and that the Law School had

1

A government entity may not engage in explicit ("facial") discrimination unless it has a "compelling interest" and the discrimination is "narrowly tailored" to serve that interest.

2

"Racial classifications designed to further remedial purposes 'must serve important governmental objectives and must be substantially related to achievement of those objectives.'"

Case Summary

Parents Involved in Community Schools v. Seattle School District No. 1 (2007):

A plurality of Justices decided two school districts had no compelling interest in racial classifications. Justice Kennedy provided the fifth vote to strike down the plans. He thought that one district had not explained its use of race sufficiently to carry its narrow-tailoring burden. The other district used a blunt “white/nonwhite” classification, which Kennedy found incompatible with the broad concept of diversity that can serve as a compelling interest.

The Court consolidated two cases, one involving a Seattle school district and the other a Louisville (Kentucky) district. The Seattle district generally allowed students to choose which of its high schools to attend. If more students chose a school than it could accept, the district used “tiebreakers” to decide. The second tiebreaker was race. The district classified children as “white” and “nonwhite,” and it tracked the composition of each school compared to that of the overall community. Although the district had never been subject to a desegregation order, it wanted to mitigate the effect of “racially identifiable housing patterns.” If the first tiebreaker did not resolve oversubscription, the district assigned children based on race to bring the school’s “balance” within 10% of the community’s. A number of students were rejected from their preferred schools, and their parents formed a nonprofit, Parents Involved, which sued the district for race discrimination.

The Louisville school district had been subject to a desegregation decree from 1973 until 2000, when the federal district court found that it had become “unitary,” not segregated. In 2001, the Louisville district started classifying students as “black” or “other,” and it adopted minimum and maximum acceptable percentages for black enrollment. For elementary school, the district created lists or “clusters” of schools and matched students and clusters based on student addresses. Louisville associated clusters and addresses to “facilitate integration.” New students could indicate preferences for schools within their clusters, and any students could apply to transfer. Students were not placed in schools whose enrollment percentages had reached the “extremes of the racial guidelines” if their race would “contribute to the racial imbalance.” The district could deny transfers because of lack of space or because of the racial guidelines. Meredith Bloom sued the Louisville district when it denied her son a 2002 transfer that would have had “an adverse effect on desegregation compliance.” Chief Justice Roberts wrote the majority opinion, joined by Justice Kennedy and three others. (Kennedy did not join some sections, which therefore did not count in the “majority opinion.”) Roberts’s majority started by noting that the Court had previously found two compelling interests related to education, remedying past intentional discrimination and diversity. The Louisville district did not claim the remedial interest because the district court had found in 2000 that it had already successfully “eliminated the vestiges” of past segregation. Roberts rejected the remedial interest for the Seattle district because it had not proven its schools were “ever segregated by law.” He emphasized past precedents in which “without more,” “racial imbalance” alone in schools was not unconstitutional.

The Chief also rejected the schools’ reliance on *Grutter’s* “diversity” for a number of reasons. First, Powell and *Grutter* had stressed that diversity was a broad concept, encompassing more than simply race or ethnicity. Here, the schools focused solely on race. Second, *Grutter* had emphasized individual assessment in its narrow tailoring analysis to ensure Michigan used racial classifications as “part of a broader assessment of diversity, and not simply [as part of] an effort to achieve racial balance.” For the school districts, however, race was often the “determinative” factor, much like the automatic bonus in *Gratz*. Third, the districts used a narrow concept of even racial diversity, limited to white/nonwhite (Seattle) and black/“other” (Louisville). Finally, Powell and *Grutter* had specifically based their concept of diversity on “considerations unique to institutions of higher education,” such as “expansive freedoms of

speech and thought,” that did not apply to elementary and secondary schools. Roberts also considered and rejected other compelling interests claimed by the districts, but Kennedy did not join his reasoning. Kennedy did agree that the districts had not adequately considered alternative race-neutral policies. Both districts’ classifications had a “minimal effect,” changing school assignments for only a small number of students, which could not justify the “extreme approach” of “[c]lassifying and assigning schoolchildren according to a binary conception of race.” Furthermore, neither district demonstrated it had considered race-neutral measures at all, far short of the “serious, good faith” efforts that *Grutter* required. Justice Kennedy joined most of the Chief’s opinion, including the part that distinguished *Grutter*, but disagreed that the districts had no compelling interest in diversity at all. He described the parts he did not join as “at least open to the interpretation that the Constitution requires school districts to ignore the problem of de facto resegregation in schooling.” Roberts had asserted that “the way to stop discrimination on the basis of race is to stop discriminating on the basis of race.” Kennedy agreed that a colorblind constitution is “an aspiration” that must “command our assent,” but thought that in the “real world ... it cannot be a universal constitutional principle.” Kennedy ultimately rejected both plans because they were not narrowly tailored. He thought the Louisville district had not described its plan in sufficient detail for him to understand how the district actually used racial classifications, so it was not impossible for the district to uphold its burden of proving narrow tailoring. The Seattle district, by contrast, had described its plan in detail, but Kennedy thought the narrow white/nonwhite classification did not ensure a broadly diverse student body, and sometimes even undermined that goal. He explained with an example from the majority opinion:

[A] school with 50 percent Asian-American students and 50 percent white students but no African-American, Native-American, or Latino students would qualify as balanced, while a school with 30 percent Asian-American, 25 percent African-American, 25 percent Latino, and 20 percent white students would not [because it would not be within 10% of the community balance].

Kennedy did not accept that a broad concept of diversity was compatible with a 50/50/0/0 balance, but not with a 30/20/25/25 balance.

Case Summary

Gratz v. Bollinger (2003):

“Automatic” treatment based on race is not compatible with the individualized consideration required of a narrowly tailored affirmative action program.

On the same day it announced *Grutter*, the Court struck down the University of Michigan’s undergraduate affirmative action program. Jennifer Gratz, a rejected “Caucasian” applicant, had sued the college for race discrimination. Michigan awarded each applicant “points” based on a variety of factors and admitted all applicants with over one hundred points. Underrepresented minorities automatically received twenty extra “bonus” points. Chief Justice Rehnquist’s majority held that the undergraduate program, unlike the Law School’s, was not narrowly tailored because it did not provide the “individualized consideration” stressed by Justice Powell and *Grutter*. Individualized assessment required considering each applicant as a whole, but Michigan awarded the automatic bonus without considering anything except race. In fact, the College generally did not provide individualized consideration for any applicant—a file had to be “flagged,” making individualization the exception rather than the rule. Finally, Michigan admitted that the automatic points were decisive for “virtually every minimally qualified underrepresented minority applicant.” Because the school initiated “flagging” only after it had distributed the automatic bonuses, this decisiveness meant that Michigan in fact almost never provided individual review for minority applicants. Rehnquist rejected the school’s argument that individual consideration was “impractical,” stating that “administrative challenges” could not