A Colorblind Constitution?
Then, Now, In 25 Years
# A Colorblind Constitution? Then, Now, in 25 Years

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“Our national story of a colorblind Constitution is marked by many ups and downs.”

Director’s Note

Is our Constitution colorblind? Insights examines this theme in the past, the present, and for the future.

The questions surrounding race and the Constitution are ones that, as teachers, you explore regularly with your students. Whether it be slavery, the Civil War, the 1960s Civil Rights Movement, the future of a multi-racial America, or U.S. Supreme Court cases such as Plessy v. Ferguson and Brown v. Board of Education, the topic of race occupies a central role in the social studies curriculum. We hope this issue of Insights will offer you new perspectives, teaching activities, and resources to complement your students’ textbooks and your own use of primary and secondary materials.

Three feature articles set the tone for a wide-ranging exploration of our theme. In the opening essay, historian Patricia Minter traces the idea of a colorblind Constitution, and the sometimes quite different realities, from the 18th century to Brown and its aftermath; it is a story marked by many ups and downs, rather than a simple linear progression. In the next essay, legal scholar and historian Robert Cottrol looks closely at American culture in the early 20th century, showing how Brown was the culmination of both legal strategy fostered by African-Americans and social changes brought about by, among other factors, two world wars. Legal scholar Vikram Amar brings us to the present day, as he analyzes the holdings and reasoning of two U.S. Supreme Court decisions in June 2003 that involved affirmative action programs at the University of Michigan (Grutter v. Bollinger and Gratz v. Bollinger).

Further discussion of affirmative action is offered in “Supreme Court Roundup,” where Charles Williams discusses the influence of several key amicus curiae briefs in these two cases. In “Voices,” we offer three contrasting points of view regarding Justice O’Connor’s assertion (in Grutter v. Bollinger) that affirmative action will no longer be necessary to achieve diversity 25 years from now.

Teaching activities and resources can be found throughout this issue. In “Learning Gateways,” Marshall Croddy and Bill Hayes outline a lesson that requires students to apply the 14th Amendment’s “equal protection of the laws” clause to some of today’s controversies. Discussion questions accompany each feature article, and sidebar boxes offer teaching ideas and strategies. Students learn not only in the classroom but also in service projects outside the classroom. Two stories about the outstanding work of “students in action” demonstrate this point, as students tackle questions of race and equality in their communities.

Mabel C. McKinney-Browning
Director, ABA Division for Public Education
A Colorblind Constitution?  
A Historian Takes the Long View

Egalitarian rhetoric collides with segregation and racism.

by Patricia Hagler Minter

As American society grows more diverse, the question of colorblindness as a desirable goal for public policy has once again appeared. Proponents both for and against policies such as affirmative action and the continuation of school desegregation plans like to cite the “colorblind Constitution” as their guiding principle. In this article, I trace the idea of “colorblindness” from the founding generation to the post-\textit{Brown} struggle to find a solution to the question of race in American legal culture.

R\textit{evolutionary principles guided the development of the Constitution and the Bill of Rights. But irreconcilable differences on the question of slavery rendered the Constitution silent on the subject. This article examines America’s unsteady progress toward racial equality through the firestorms of the founding generation, the Civil War, Reconstruction, Jim Crow, and \textit{Brown v. Board of Education}.}

A S\textit{pecter Haunting the Convention: Slavery and the Founders}

In 1775, the Continental Congress asserted in the \textit{Declaration of Causes and Necessity of Taking Up Arms} that Americans “resolved to die freemen rather than live Slaves.” The conception that the British Parliament desired to “enslave America” was a powerful rhetorical weapon as colonials developed a revolutionary consciousness. Yet these ideals of liberty and equality came into direct conflict with the realities of slavery and the existence of free blacks whose presence raised uncomfortable questions for the revolutionary generation. Patriots did not refer to the obvious contradiction of chattel slavery, but many recognized as long as they held half a million blacks in bondage that rhetoric about the defense of liberty would ring hollow. Enlightenment-era theories about natural rights provided a basis for abolitionist arguments.

When Americans rejected monarchy and embraced republicanism in 1776, the egalitarian promise of liberty for all was far from guaranteed. Conceptions of liberty...
and equality conflicted with the reality of racial subordination, not only of slaves but also of free blacks. Anti-slavery advocates enjoyed their greatest victories at the state level between 1776 and 1787, as several post-revolutionary state constitutions undermined the institution by incorporating abolition (Vermont, 1777), “free and equal” clauses (Massachusetts, 1780), and gradual emancipation of slavery (Pennsylvania, 1780; Connecticut and Rhode Island, 1784). When the framers of the Constitution convened in Philadelphia in 1787, slavery had morphed from a national issue into a sectional one.

Revolutionary principles sometimes triumphed over racialist ideology and class interests, but this would not be the case at the Constitutional Convention. Although many delegates were concerned about the obvious contradictions between egalitarian rhetoric and the continued existence of slavery (and a few expressed overtly abolitionist sentiments), there was little chance that the Convention would adopt any meaningful anti-slavery language as they framed the new governing document. Simply stated, Southern delegates were unwilling to accept any provisions that might threaten the region’s economy and the status of the region’s powerful planter class; without the Southerners’ support, constitutional ratification and continued union were impossible. The price of the Constitution was concession by anti-slavery delegates on the slavery question.

The issue of representation was not only the biggest victory for Southern delegates, but it also became the most lasting consequence of this compromised document, sowing the seeds of regional antipathy that exploded later in civil war. The words slave and slavery appear nowhere in the Constitution, but their ghostly presence loomed over the language on representation. Although they failed to win approval for counting of slaves as full persons, Southern delegates won the debate on whether or not slaves could count toward population for purposes of apportionment, mandating that apportioned representatives among the states “shall be determined by adding the Number of free Persons . . . and . . . three fifths of all other Persons.”

By wielding their human property for political power, Southerners increased their power in national government. Over the next seventy years, this became the means through which the Southern congressional delegations won political battles and shaped the Constitution into an overtly pro-slavery document. Although delegates eventually agreed to include a section gradually abolishing the odious trading of slaves by 1808 in Article IV, section 2 of the Constitution, the other significant pro-slavery victory for Southerners was the inclusion of the “fugitive slave clause” in the same section. This clause did not overtly address slavery, but its wording concerned interstate relations (comity) and suggested that states should not prevent slaveowners from retrieving their property, should slaves flee to another state. Once ratified, the U.S. Constitution did represent “a new order for the ages,” but at the same time it contained several “poison pills” that, while colorblind on their face, would make race and personal status into political and cultural issues that would spark the Civil War. Ultimately, the question of whether or not the Union would continue would be determined on the field of battle, not in the halls of Congress or the nation’s courtrooms.

“A New Birth of Freedom”: Civil War and the “New” Constitution

When the guns fell silent at Appomattox Courthouse in 1865, the promise to recreate the nation represented “a new birth of freedom” for all Americans. For no group were the stakes higher than for newly freed African-American men and women. The end of the Civil War brought a nascent demand for equality from blacks. Legally transformed from property to persons by the ratification of the Thirteenth Amendment in 1865, freed people now needed...
public policy to redefine the political and social landscape. For African Americans, a colorblind Constitution would have to be more than a “negative” that prevented whites from recreating a culture of enslavement. Instead, their vision of freedom encompassed guarantees of property rights, political rights, and the freedom to move freely within white society—to go into every arena where only recently they could not go. In 1865, Southern blacks organized state conventions (as their Northern counterparts had done before the war) and demanded that America finally deliver on the promises of the Declaration of Independence. Many members of the Republican Party (dubbed “Radicals”) shared this vision, and joined by their more moderate colleagues, they drafted the Fourteenth and Fifteenth Amendments to the Constitution. With the ratification of the three War Amendments, it appeared that the promise of a “colorblind Constitution” might be realized.

Battles over African-American voting during Reconstruction raged across the South, even as Southern states elected their first state-level black officeholders and Mississippi sent two African Americans to serve in Congress. Although the ratification of the Fifteenth Amendment in 1870 promised long-awaited political rights, the Republican framers argued that the federal government had an inherent right to protect its citizens, whether the threat came from state action or private acts of violence.

The U.S. Supreme Court, however, was reluctant to realize the full potential of the War Amendments to transform American legal and racial culture. In the Slaughterhouse Cases (1873), U.S. v. Cruikshank (1876), and U.S. v. Reese (1876), the Court interpreted the amendments in the narrowest possible fashion and struck down key portions of the Enforcement Acts as unconstitutional. Acts of individual violence or political discrimination were declared beyond the Constitution’s scope—only state action was subject to federal law. The Court’s decisions reflected a lack of commitment to pursuing aggressively the “equal protection of the laws.” But it also represented the Court’s reluctance to upset the long-established principle of federalism. As historian Donald Nieman put it, “Federalism was a principle that mattered . . . (but) this is not to say that race did not matter.” By 1883, however, race clearly mattered much less to the Court than attempting to restrict the revolutionary transformation of federalism that the War Amendments seemed to herald. In the Civil Rights Cases, the Court struck down the Civil Rights Act of 1875, the last piece of Radical legislation that tried to deliver on the promise of equal access in public accommodations. With the last piece of Reconstruction era protection effectively gutted, the Court cleared the path for Southern state legislatures to reverse gradually the colorblind, egalitarian policies of Reconstruction.

The Triumph of Jim Crow: Plessy and the Era of “Separate but Equal”

From the end of federal occupation in 1877 until the turn of the century, white Southern Democrats slowly reversed the Reconstruction-era policies. One major watershed in their efforts came in 1896 when the Supreme Court handed down its infamous decision in Plessy v. Ferguson. By setting the legal fiction of “separate but equal” as precedent and by conflating this fiction with “colorblindness,” the Court cleared the way for an era of legalized racial separation.

Homer Plessy, who self-identified his race as “mixed,” agreed to serve as plaintiff for a test case initiated by black New Orleans citizens to test the 1890 Louisiana law requiring railroads to provide “separate but equal accommodations” for black and white passengers. Lower federal courts had already reached decisions in several cases in the 1880s (involving black middle-class female plaintiffs), in which they relied on a version of the “separate but equal” standard; however, these decisions usually turned on the “equal” portion of the equation, ordering remedies for black plaintiffs forced into second-class coaches solely on account of race. The Supreme Court took a different turn on

FOR DISCUSSION

Was the Constitution truly colorblind when it was ratified in 1787? What, if any, references did the Constitution make to “slavery” or to “blacks”?

Was the Civil War an inevitable result of the framers’ unwillingness to solve the “slavery controversies”?

Are “colorblind” and “separate but equal” similar concepts? How might they be different in their meaning or application?
the legal fiction of “separate but equal” in Plessy’s case. Reading colorblindness completely out of the Fourteenth Amendment, Justice Henry Brown’s majority opinion upheld the Louisiana statute by asserting that the amendment’s framers surely understood that there was a deep aversion in America to racial intermingling. Instead of a colorblind society, he argued that the framers merely intended to guarantee “the absolute equality of the races before the law,” but not social equality in public accommodations. If the legal fiction of “separate but equal” carried any “badge of inferiority” for African Americans, Brown continued, “it is . . . solely because the colored race chooses to put that construction upon it.” By placing its stamp of approval upon legalized racial separation, the Court cleared the way for the proliferation of segregation laws in the South, which not only compromised social rights such as public accommodations and schools, but also led to the systematic dismantling of black political rights through disfranchisement. Black Southerners entered the new century stripped of the egalitarian promises of Reconstruction, America’s “second revolution.”

The Age of Segregation: The Road to Brown v. Board of Education

If the end of the nineteenth century witnessed the creation of a “colorblind” legal fiction to justify segregation, the first fifty-four years of the twentieth century found African Americans crafting a new ideology of egalitarianism and a legal strategy to reverse the fiction of “separate but equal.” Segregation and disfranchisement shaped the lives of blacks, particularly in the South, by limiting their political and social power. The realities of segregated schools were particularly devastating for black children in the Jim Crow South, where they presented the most visible evidence of the untruth of “separate but equal.”

The National Association for the Advancement of Colored People (NAACP), founded in 1909, would lead the legal campaign to eliminate legalized racial separation. Fighting Jim Crow in the federal courts, NAACP lawyers won victories against the grandfather clause (1915) and segregated housing ordinances (1917), which revealed the power of targeted litigation as an instrument for social change. Building on their successes, the NAACP formed an in-house litigation organization, the Legal Defense Fund. Led from 1935 to 1938 by Charles Houston and then afterwards by Thurgood Marshall, the LDF developed a legal strategy to fight Jim Crow by systematically proving that “separate but equal” was a pernicious legal fiction that masked overtly racist public policy denying African Americans even the most basic equal protection rights.

The LDF’s strategy was to file lawsuits in federal court that first targeted segregated higher education, where fundamental inequality was fairly easy to prove, winning key cases in 1938 and 1944 in which white law school and graduate school programs were ordered to admit black applicants, because the separate Jim Crow schools were inherently unequal. Once the NAACP’s legal team had established precedents that directly challenged the “separate but equal” doctrine, they then turned their attention to public primary and secondary schools.

By the early 1950s, when Marshall and his legal team launched their full offensive against segregated education, grass-roots support for civil rights had developed in black communities across the nation. Not only did many African Americans dream of equality in a colorblind society, but they also came to believe that it could happen in their lifetimes. The grass-roots support for this vision helped bring forward the five individual cases that would be argued and decided together as Brown v. Board of Education. Using social scientific evidence as well as precedents to argue that separate facilities based on race were inherently unequal and therefore unconstitutional, the NAACP’s lawyers attacked the Plessy decision at its very heart.

When Chief Justice Earl Warren announced the decision of a unanimous continued on page 27

For Further Reading


Brown and the Culture of Race

Racial attitudes slowly change, paving the road to Brown.

by Robert J. Cottrol

Brown v. Board of Education did not occur without a foundation. Rather, it was the product of a sustained litigation campaign by the NAACP. Equally important, Brown was the product of changing cultural attitudes toward African Americans. Find out how the experiences of two world wars and their aftermath also helped to bring about this landmark U.S. Supreme Court decision.

The Supreme Court’s 1954 school desegregation decision, Brown v. Board of Education, was an incredible achievement. It represented the triumph of years of planning a legal strategy against segregated education. It vindicated the hard work of attorneys like Charles Hamilton Houston, Jack Greenberg, Constance Baker Motley, Charles Black, Robert Carter, Thurgood Marshall, and others who maintained a faith, often against overwhelming evidence, that the Fourteenth Amendment’s guarantee of equal treatment under the law might actually be turned from a dead letter into a living reality. Before Brown, the law recognized separate and distinct castes. People were treated in radically different ways, depending on whether they were black or white. Since Brown, the law has rejected caste distinctions. The Civil Rights Movement and the gains that came from that movement would have been impossible without Brown.

The Legacy of Plessy
But how did Brown come about? Less than fifty years earlier, in 1896, the Supreme Court had declared segregation constitutional in Plessy v. Ferguson. As a result, blacks were treated unequally by both state and federal governments. Black schools were given a fraction of the funding received by white schools. Throughout the South, voting was largely restricted to whites. The United States fought two world wars with a segregated Jim Crow army. The Fourteenth Amendment (intended to guarantee equal treatment under the law to people of different races) and the Fifteenth Amendment (designed to prevent racial discrimination in voting)

“Before Brown, black and white people were treated in radically different ways.”

were dead letters in many parts of the country, particularly in the South where a majority of blacks lived.

So how did the Supreme Court move from Plessy to Brown? How were the NAACP and others able to breathe new life into the Civil War Amendments that were all but ignored in the first half of the twentieth century? To understand this, we have to realize that judicial decisions come about not only in response to legal doctrine and legal argument; they are also a reflection of the larger culture of which they are a part. Perhaps this should not be the case. There is certainly a persuasive argument to be made that judges, particularly when deciding issues involving constitutional rights, should stand above and beyond the common culture. After all, presumably, the purpose of the Constitution is to hold certain rights inviolable, above the passing passions of the day. Unfortunately, that rarely happens. It would be hard to look at the legal history of the United States, or indeed any other society, without acknowledging that the contemporary culture has a profound influence on legal thought and judicial opinion.

**Racism and American Culture circa 1900**

This relationship between law and the broader culture is critical to our understanding of how the Supreme Court moved from *Plessy to Brown*. To understand that transformation, we have to appreciate the profound changes in racial attitudes that occurred in America in the first half of the twentieth century. From our vantage point now, it is easy to forget how commonplace, even respectable, open expressions of bigotry were at the beginning of the last century. In 1909, the year of the founding of the NAACP, the United States was not only a land of strict legal segregation in the South, where nearly 90 percent of the black population lived; it was also a society where whites often felt free, indeed encouraged, to assault the dignity, safety and even lives of Negroes on a routine basis. The use of racial epithets—nigger, coon, darky, pickaniny, jigaboo, and the rest were routine. A black man, woman, or child might encounter such from a thug in the streets, in the speeches of a politician, or the writings of a novelist, or even in a popular song like the “Darktown Strutters Ball.”

There were other, more sinister expressions of the raw racism that infected early twentieth century America. Towns posted signs warning African Americans to leave town before sundown. Newspapers and prominent politicians defended lynchings in editorials and speeches. Race riots occurred, during which white mobs terrorized black communities while police ignored the carnage or assisted the mobs. Such raw racism was not the monopoly of the untutored mob; it was, instead, the received wisdom of many of the most learned men and women of the day. University classes regularly preached scientific racism, eugenics, and Social Darwinism. Historians wrote that the Reconstruction that produced the Fourteenth and Fifteenth Amendments was a tragic mistake, a time when a vengeful North imposed black rule on the white South. The popular culture reinforced the image of blacks as subhuman brutes, a theme vividly portrayed in Thomas Dixon’s pro-Ku Klux Klan novel, *The Clansman*, and in D. W. Griffith’s film, *Birth of a Nation*.

This atmosphere can help us understand why the federal judiciary was willing to ignore the Constitution and permit Jim Crow and disfranchisement. Judges were a part of the larger culture. They shared the racist sentiments of their day, including the conventional wisdom that the egalitarian sentiment that had placed the Fourteenth and Fifteenth Amendments into the Constitution was a mistake. In that atmosphere the Supreme Court, often as not, sided with those who argued for a restrictive view of the Constitution, one that would let much racial discrimination continue.

After the First World War, this thinking would slowly change. Fewer educated people were prepared to defend the kind of scientific racism prevalent at the start of the century. The growth of the social sciences played an important role in this rethinking. Increasingly, scholars like anthropologist Franz Boas were convincing educated men and women that culture and social environment, not biology, were largely responsible for observable differences among groups.

**World War II and Social Change**

The Second World War, in particular, helped bring about profound changes in the racial thinking of many ordinary Americans. This would not happen all at once. The armed forces began the war firmly committed to racial segregation; they ended the war only slightly
changed. Discrimination was rampant in the wartime America of the 1940s. Jim Crow put on a uniform for the duration. Segregation existed in much of civilian life as well.

But segregation and discrimination were only part of the story. The war produced a new militancy among African Americans. Negroes of that generation spoke of a double V—Victory against the Axis and Victory against racism at home. Films began to depict blacks in a different, more positive light. The stereotypical buffoons of 1930s movies were replaced by characters who played dignified soldiers helping to fight in the American cause; both the War Department and the NAACP insisted on these changes. A new image was developing. Social science also caused many people to think about race in different ways. The 1944 publication of Swedish sociologist Gunnar Myrdal’s *An American Dilemma* helped many Americans to see the contradiction between the professed democratic ideals of the nation and the realities of racial segregation and inequality.

The struggle against Nazi Germany also forced many people to question their long-held prejudices. The war forced many to take a hard, awful look at where racism could lead. That look began when ordinary men—G.I.s in the European theater—stumbled across the unbelievable, indeed the inconceivable, killing grounds with names like Dachau, Buchenwald, and Maluthausen. These camps left an impression that would never be erased in the minds of the men who actually walked through them, including their commanding general, Dwight D. Eisenhower. The Nuremberg trials, as well as massive press coverage of Nazi atrocities, served to inform the wider American public of the horrors of the Third Reich’s “Final Solution.” All of this would help make the easy, yet deep, racial prejudice, common earlier in the century, far less respectable after the Second World War.

**Post-World War II America**

By the postwar era, the ground had shifted significantly. Racism, at times deep racism, still existed. Legal segregation prevailed throughout the South. *De facto* segregation and discrimination existed throughout the nation. But racism lacked the strong backing of leading institutions and cultural elites that it had enjoyed earlier in the century. And more ordinary white Americans were beginning to see racism as un-American, incompatible with the ideals for which they had recently sacrificed so much during the war.

Other changes also came. Jackie Robinson’s integration of baseball, President Truman’s desegregation of the armed forces, and the 1948 election in which Truman proved that a Democrat could win without compromising with the segregationist South all indicated that a new era of race and national culture was dawning. The Supreme Court began to respond to the new racial atmosphere. In the 1948 case, *Shelly v. Kramer*, the Court prevented lower courts from enforcing racially restrictive covenants in home buying.

These cultural changes paved the way for the decision in *Brown*. As we approach the fiftieth anniversary of the 1954 decision, we should recognize that *Brown v. Board of Education* represented a legal milestone. But it represented something more. *Brown* also reflected profound cultural change. The nation had become uneasy with its most vexing contradiction, racial discrimination in a democratic society. That unease helped produce *Brown* and the still unfinished struggle that would follow.

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**FOR DISCUSSION**

Did the U.S. Supreme Court decision in *Plessy v. Ferguson* reflect the prevailing attitudes of the day in 1896? How?

What events during World War II helped pave the path to the *Brown* decision?

Under what circumstances might cultural attitudes influence judicial decisions like *Brown v. Board of Education*?
Two cases from the University of Michigan came before the U.S. Supreme Court in June of 2003. The Court upheld an affirmative action program at the law school, while striking down a different affirmative action program for undergraduate admission. Why? What does “diversity” mean in practice? Find out how Justice O’Connor’s majority opinion in *Grutter v. Bollinger* supports the value of educational diversity.

The Supreme Court’s 5-4 decision in *Grutter v. Bollinger*, upholding the University of Michigan Law School’s affirmative action program that used race as an admissions factor, was probably the biggest equal protection case in a generation. The key question addressed by the Court was whether the law school’s goal of assembling a “diverse” student body was a strong enough objective to permit the University to take into account the race of individual applicants. The Supreme Court has made clear for over 50 years that government is not entitled to consider the race of a person when doling out benefits or burdens absent some exceptional justification.

Legal Background
Before *Grutter*, the only exceptional justification that the Court had clearly recognized was government’s interest in providing a remedy to persons who themselves had been the victims of government racism in the past. That was the justification advanced by government in a series of cases during the 1980s and 1990s involving laws that directed public contracting dollars and public licenses to minority-owned businesses. Even though the Court in these cases said that remedying past discrimination can be a reason for taking the race of individuals into account, the Court made clear that such permissible race-based remedial programs are rare and very hard to structure.

The difficulty of demonstrating specific past discrimination—and the difficulty of narrowly crafting a remedial plan to perfectly fit the scope of that past discrimination—led a number of universities over the past few decades to defend their race-conscious admissions policies not in terms of redressing wrongs from the past, but rather

*Grutter stresses that access to law school determines access to political power.*

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in terms of creating a diverse learning environment that will benefit students in the present and the future. In doing so, universities drew heavily on language that Justice Lewis Powell wrote in his separate opinion in the famous Regents of the University of California v. Bakke case in 1978, where the Court reviewed a University of California-Davis Medical School admissions policy that reserved 16 out of 100 entering seats for racial minorities. Even though the UC-Davis program was struck down, Justice Powell wrote to make clear his belief that a properly devised plan designed to assemble a diverse student body can make use of an applicant’s race as one factor among many.

Before the Grutter ruling last summer, many wondered whether the diversity rationale advanced by Justice Powell a quarter century ago would be embraced by a majority of the current Supreme Court. One lower federal court, the Fifth Circuit Court of Appeals, had explicitly rejected Powell’s vision when it declared unconstitutional a University of Texas affirmative action program in the mid-1990s. In that decision, the Fifth Circuit pointed out that the diversity theory had never clearly garnered more than one vote (Justice Powell’s) on the high Court. (That Fifth Circuit ruling prompted the University of Texas’s so-called “ten percent” plan, whereby a student who graduates in the top ten percent of his or her high school class is guaranteed admission to a UT campus, regardless of SAT score. By de-emphasizing SAT performance, UT tried to obtain a diverse student body without taking into account the race of individual applicants. It will be interesting to see whether UT goes back to an explicitly race-conscious approach now that Grutter has repudiated the Fifth Circuit.)

One reason why many people (like the judges on the Fifth Circuit) expected Grutter to come out the other way is that the Supreme Court had spoken so disparagingly about government race consciousness—that is, government decisions that take the race of individuals into account—in all the cases over the past dozen or so years involving government contracting. The rhetoric that the Court employed in these cases (criticizing various race-based contracting dollar set-asides) seemed to doom almost all efforts by government to ever consider race. Moreover, in a number of cases involving the use of race (and gender) by government lawyers trying to remove would-be jurors whom the government thought might not be sympathetic to the government’s position, the Supreme Court indicated that it was “irrational” and “stereotypical” for government lawyers to assume that race could affect the kind of juror someone would make. This needlessly extreme language seemed to undercut the very premise on which diversity-based admissions programs are based: the notion that the race of an applicant might inform his or her views, attitudes, perspectives, and experiences in a way that might affect the kind of student she or he is. Notice here that the diversity rationale does not presume that all people of a given race think alike, or even that we can predict what the perspective of a majority of people of a given race will be on a particular question. Instead, diversity here is premised on the idea that it is rational and permissible to think that, in the main, a classroom with people of multiple races may reflect more and different perspectives than a class that is similar, except that it is of one race.

Analyzing Justice O’Connor’s Opinion
Justice Sandra Day O’Connor held the swing vote in Grutter—as she does in a number of other important constitutional areas. Her decision to join with the four traditionally more liberal Justices to create a five-Justice majority (for whom she wrote the opinion) to uphold the Michigan Law School program should not be altogether shocking.

First, Justice O’Connor cares deeply about settled societal expectations. Whether or not Justice Powell’s vision of educational diversity ever commanded five votes on the high Court, his approach was known, studied, and relied upon by thousands of college and
alumni are being asked to use race as a tool to accomplish diversity. O’Connor applauded that.

Second, the diversity rationale, unlike the remedy rationale, tends to be integrationist in character. Powell’s vision, acclaimed by the Grutter Court, is that people of different kinds—different races, different socioeconomic backgrounds, different familial situations, different geographical starting points, etc.—come together in the classroom and the dorm room to share with and educate each other. The remedy rationale, as invoked, say, in the contracting setting, doesn’t necessarily bring different folks together to interact at all. For example, if a certain percentage of contracting dollars in the construction of a public courthouse are directed toward electricians of color, there is no guarantee that those electricians will interact with and learn from the white plumbers who are also involved in the project.

Third, educational diversity has implications not just for economic equality, but political equality as well. As Justice O’Connor stressed in Grutter, access to law school determines access not only to good jobs, but also to political power. For O’Connor, it is important that universities, especially law schools, are important training grounds for political leaders—congresspersons, Senators, federal judges, and military top brass—in addition to corporate executives. By characterizing education as political, rather than simply economic (like the programs at issue in the contracting cases), Justice O’Connor tapped into a deep vein of Supreme Court decisions involving voting, jury service, and other political arenas in which the Court has been especially sensitive to the actual—and not just hypothetical—inclusion of minority groups. Indeed, Justice O’Connor had herself already voted before Grutter with the more liberal Justices to allow government to take race into account in one other setting—the drawing of voting district lines. Facilitating minority group access to legislative arenas is a theme that unites these districting cases with Grutter. That is one reason why it was helpful, for proponents of affirmative action, that the test case involved law schools, rather than, say, graduate physics departments, where the link to the political world would be more tenuous.

FOR DISCUSSION

The Supreme Court relied upon the importance of ensuring a diverse learning environment to uphold the affirmative action program at the University of Michigan Law School. Why is “diversity” important in education? For whom is it important?

Based upon the Supreme Court’s decisions in Grutter and Gratz, what kinds of affirmative action programs are permissible in college admissions? Which kinds are not permissible? Why?

Limits on the Pursuit of Diversity: Lessons from Grutter and Gratz

Of course, the Grutter case does not say that universities can use race to accomplish diversity any way they like. At the same time that it upheld the law school program, the Court struck down the University of Michigan undergraduate program, in Gratz v. Bollinger, on the ground that it used race too mechanically and formulaically. Unlike the law school program, which took the race of an individual into account in a flexible way along with all other aspects of his or her identity—grades, test scores, geographic background, employment history, advanced degrees, artistic talent, etc.—the undergraduate program virtually guaranteed admission to any minority applicant who was minimally academically qualified. The Grutter Court made clear that racial diversity can be pursued only if race is considered as just one component of the whole person; a program that reserves certain slots for people of certain races will be struck down because it uses race in a way that crowds out other criteria and thus does not respect this “whole person” principle.

But even though the lawyers for the undergraduate program argued that the high volume of their applications made a more mechanical process necessary, the undergraduate admissions office has quickly emulated the permissible, flexible (and in some ways inscrutable) law school “soft-plus” approach. Years from now, the undergraduate case, Gratz, will be a footnote to the much more important case upholding the use of race, Grutter.
Will Affirmative Action Be Necessary in 25 Years?

The Law School’s current admissions program considers race as one factor among many, in an effort to assemble a student body that is diverse in ways broader than race … Race-conscious admissions policies must be limited in time … We see no reason to exempt race-conscious admissions programs from the requirement that all governmental use of race must have a logical end point. In the context of higher education, the durational requirement can be met by sunset provisions … and periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity.

We take the Law School at its word that it would “like nothing better than to find a race-neutral admissions formula” and will terminate its race-conscious admissions program as soon as practicable. … It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education (Bakke, 1978). Since that time, the number of minority applicants with high grades and test scores has indeed increased … We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today. In summary, the Equal Protection Clause does not prohibit the Law School’s narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body.

The Opinion of the Court
(Justice Sandra Day O’Connor)
The education gaps probably won’t be closed in 25 years.

by Camille deJorna

As the 21st century unfolds, we have yet to overcome the divisions of the color line. How close are we to the national ideals that pave the road to genuine fairness, inclusion, opportunity, and social mobility? Will we be incrementally closer in 25 years? Courts will still have a constitutional duty to look at these issues in light of the prevailing social context.

Each morning I pass a lovely nursery school in Chicago that caters to an upscale urban neighborhood. Children arrive in brand-new luxury sport utility vehicles or by comfortable strollers from nearby high-rise buildings. But over the past two years, I have rarely seen an African American presence in that childcare program. The nursery school happens to be located in a building that also houses my neighborhood polling place. When I went to vote there this past spring, I casually asked the white volunteer worker if I was in the right place since the voting was taking place in a religious institution. Without looking at my voter registration card, the volunteer simply looked at me, a visibly identifiable woman of color, and replied, “No, I don’t think so.” Of course, I was in the right place. But I suppose he would be right, if he were relying on popular knowledge about racial housing patterns in Chicago.

A recent study for the Harvard Civil Rights Project indicates that racial and ethnic segregation continues to persist in Chicago and across the nation. In fact, the report notes that a recent analysis of the 2000 census data indicates that segregation in Chicago is at the same level now as it was in 1990. The Harvard Civil Rights Project reports that “close to 90% of African Americans in Chicago would have to move to a different school district to be integrated with their white counterparts; to create integrated Latino/White school districts, nearly half of all Latino children would have to move.” The report concludes that children are the most likely to suffer from segregation and warns that segregation will spread if left unaddressed.

As we celebrate the 50th anniversary of the landmark Supreme Court decision Brown v. Board of Education, the NAACP has filed a federal complaint against Florida’s Department of Education in an effort to achieve racial balance in the state’s school system. Currently, 73% of white fourth graders taking the Florida Comprehensive Assessment test scored at or above grade level, compared with 38% of Hispanics and 23% of Blacks.

The country’s need for affirmative action in 25 years will depend on whether we have eliminated dual school systems, closed the widening education and test score gaps, and strengthened minority high school completion rates. As William Bowen and Derek Bok report in their 1998 book, The Shape of the River, “many would be comforted if it were possible to predict, with some confidence, when it will no longer be necessary to abide by Justice Blackmun’s observation, that ‘to get beyond racism, we must first take account of race.’ ” Bowen and Bok acknowledge that “we do not know how to make such a prediction, and we would caution against adopting arbitrary timetables that fail to take into account how deep-rooted are the problems associated with race in America.”

While I may hope that in 2028 my grandsons will no longer need the protections of affirmative action to secure the best educational, housing, and employment opportunities that this great land has to offer, I’m not betting on it.

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A diverse democracy is a process, not an outcome.

by Frank H. Wu

In the spring of 2003, the United States Supreme Court upheld the constitutionality of affirmative action in a pair of cases involving the University of Michigan. In the majority opinion, Justice Sandra Day O’Connor approved of the goal of racial diversity in higher education to justify the race-conscious admissions process at the University of Michigan law school. Her opinion represented a major victory for supporters of the programs, even though the Court also struck down the plan used at the undergraduate level, apparently because of the use of numerical formulas benefiting African Americans and Hispanics. Justice O’Connor’s interpretation of the Fourteenth Amendment changed the basis for the plans, but it also emphasized the question of when the plans would cease to be necessary. This question is as important as it is misleading.

Perhaps because of the late Reverend Martin Luther King Jr.’s metaphor of a march toward a promised land of racial justice, even supporters of civil rights now often ask whether our struggle will ever end. Yet it may be that diversity is analogous to democracy, a process rather than an outcome. It may be with optimism rather than pessimism that we wish for it to continue. None of us would wish for democracy to be over, even if it is contentious. None of us should wish for diversity to be over, even if it, too, is contentious. The ideal for both democracy and diversity is vigorous participation in the perennial challenges.

Justice O’Connor has altered the analysis of affirmative action. Affirmative action has been supported with two distinct foundations.

“The first argument is that people of color, especially African Americans, suffered a systematic wrong through chattel slavery, legal segregation, and the many forms of racial prejudice. Consequently, according to this premise, individuals and groups who have suffered have a right to remedial justice.

The second argument is that any individual and all communities are entitled to equality of opportunity, which can be at least roughly measured by equality of outcomes, because a democracy must be inclusive to be legitimate. Therefore, by this rationale persons who are disadvantaged by gross disparities should be given a better chance through distributive justice.

In the Michigan cases, Justice O’Connor embraced the importance of diversity, the second argument. She protected efforts by colleges and universities to achieve diversity as a “compelling state interest.” She cited the many briefs filed in support of the University of Michigan, not only by civil rights groups but also by major corporations and military leaders. She acknowledged that affirmative action, despite the controversy, has been effective.

So Justice O’Connor’s question contains its own answer. Affirmative action, according to her reasoning, is necessary so long as there is the need to remedy racial discrimination or ensure racial diversity. We may hope that racial discrimination in its many forms ceases to afflict us. We also may strive to produce racial diversity in our many institutions. As long as we have democracy, we will have diversity. Both are principles that almost all of us are proud to claim, but they are better practiced as reality than promoted as rhetoric.

Frank H. Wu is a graduate of the University of Michigan Law School. He testified in the trial of its case and served as a visiting professor there. He is a law professor at Howard University and the author of Yellow: Race in America Beyond Black and White (Basic Books, 2001).
We need to re-define affirmative action.

by Clint Bolick

Will we “need” affirmative action 25 years from now? If by that we mean: Will black and Hispanic Americans share equally in the American Dream a quarter century from now? The answer is a sad and emphatic “No.” Continued “affirmative action” programs are not a solution; rather, they perpetuate the problem.

Despite enormous progress for minorities on many fronts, one problem that is rarely talked about persists and threatens to defeat efforts toward equality: the racial gap in education. As Abigail and Stephan Thernstrom report in their important new book, No Excuses: Closing the Racial Gap in Learning (Simon & Schuster, 2003), the racial gap in schools is “the most important civil rights issue of our time.”

The racial gap in schools, not current discrimination, is the explanation for why so few minority students possess the requisite qualifications for elite institutions of higher learning. So long as the civil rights establishment and policymakers continue to respond to the academic gap with the superficial quick-fix of racial preferences, it will never be solved, and massive preferences will be necessary to achieve anything close to numerical parity.

The racial gap in schools is severe and crippling. The National Assessment of Educational Progress reports that a majority of black students scored “below basic” in five of seven subjects tested, a category reserved for students unable to display even a “partial mastery of prerequisite knowledge and skills that are fundamental for proficient work” in their grade.

“Affirmative action programs are not a solution; rather, they perpetuate the problem.”

Likewise, the average black high school senior graduates at an academic level four years below the average white student. One would think that with increased education expenditures and massive affirmative action programs, the academic gap would change. It has: over the past ten years, the gap has actually increased by a full academic year. The crisis is growing worse, not better. That is because affirmative action is aimed not at curing the problem, but rather pretending it doesn’t exist. Indeed, by creating the cosmetic illusion of “diversity” in elite educational institutions, it makes people think the underlying problems are being solved, when in fact they are growing worse.

Only when the tool of racial preferences is removed from the policymaking arsenal are officials forced to confront the underlying problems. When the University of California was forbidden from using race in admissions, one of the steps it took was to send its own students out into the community to tutor failing students. That is true affirmative action.

Likewise, school choice programs—supported by large majorities of black and Hispanic parents but opposed by the civil rights establishment—have demonstrated a remarkable capacity to close the racial academic gap and boost high school graduation rates. Again, this type of approach is true affirmative action. Generating high-quality educational opportunities is much tougher than slapping students with a racial label and adding points to their test scores. But nothing short of that will truly solve the problem.

Next year we will celebrate the 50th anniversary of Brown v. Board of Education. Instead of continuing down the failed and divisive road of racial preferences, we should re-dedicate ourselves to fulfilling the promise of Brown: equal educational opportunities for all American schoolchildren.

Clint Bolick is vice president and national director of state chapters at the Institute for Justice. His latest book is Voucher Wars: Waging the Legal Battle over School Choice (Cato Institute, 2003).
During the 2002-2003 school year students at Edward Bell High School (EBHS) in rural Camp Hill, Alabama, participated in a national high school civic engagement initiative, Project 540. (See sidebar on p. 19.) At EBHS, students in Project 540 narrowed down their issues of concern to one major issue affecting their school and community. This team of students chose to focus their efforts on reversing a faculty desegregation court decree, Lee v. Macon County, which would force the transfer of seven of their eleven African-American teachers to other schools in the county.

Originally, in Lee v. Macon County, civil rights attorneys appealed to the federal court to integrate the schools of Macon County. After six months of deliberations, on August 13, 1963, federal judge Frank M. Johnson ordered Macon County, and all of the state of Alabama, to integrate its schools. Until this year, EBHS—located in neighboring Tallapoosa County—has not been in compliance with the court decree. School officials decided to take these steps in order to obtain “unitary status” in the county, a status that could not be obtained without a ratio of black to white teachers that was proportional to other schools in the county. EBHS has a 100% African-American student body.

Students at EBHS became outraged when they heard about the consequences of the court decree. With the transfer of these African-American teachers, the students felt that they were being stripped of their chance to grow up and learn what their older brothers and sisters learned before them. The teachers who were being transferred had
been there for many years and were members of the Camp Hill community. Students also felt that just as their standardized tests scores were beginning to improve, their teachers were being taken away.

Students used Project 540, and the student dialogues, as a platform to organize against *Lee v. Macon County* and take action to keep their teachers. They did this in several ways.

**Making a documentary video of their struggle.** With equipment purchased by Project 540, students at EBHS were trained in documentary film-making technique, and they then produced a segment detailing their campaign to keep their teachers. This segment is one of seven school vignettes featured in a documentary video to be broadcast over PBS stations beginning in January 2004.

**Presenting their case to the Camp Hill City Council.** Students presented their concerns to the members of the Camp Hill City Council and asked for their support in the fight to keep their teachers.

**Inviting one of the attorneys from *Lee v. Macon* to the school.** Students met with one of the attorneys to discuss their concerns regarding the removal of their teachers and to ask about possible recourse. They protested the court decision and the impact it would have on their educations.

**Investigating why school conditions suddenly improved once the arrival of the new teachers was nearing.** Both in their session with the attorney and in the documentary video, students raised questions about the sudden improvement of school conditions. It was the students’ belief that school conditions improved in anticipation of the arrival of the new white teachers.

**Meeting with the Superintendent’s office to present their objections.** A team of students met with the district superintendent and his Director of Personnel to voice their concerns about the removal of their teachers, and to challenge the district’s conclusions on the number of teachers that needed to be removed as a result of the court decree.

Although the students were ultimately unsuccessful in changing the court order in the short term, many of the students vowed to continue their fight for justice by going to the school board to insist that it hire more African-American teachers systemwide, so that the proportion of black teachers to white teachers would be more balanced (currently, 81% of teachers in Tallapoosa County are white; only 19% are black).
Triumph High School, an alternative high school in Cheyenne, Wyoming, has used an improv troupe to engage its students in the social studies curriculum. For ten years, the social studies department has hired artists-in-residence for one or two week stints to create drama productions. Social studies teachers Judy Kallal and Patrick Murphy thought that students’ talents should be used more effectively throughout the year, so as to be of more long-term value to the at-risk students at Triumph. Thus, the idea of an improv troupe was born. Grant money from the Wyoming Children’s Trust Fund paid a professional trainer for two weekend retreats and purchased uniforms for the troupe. The idea became a reality.

The improv troupe was well received by the community and Laramie County School District #1 schools. A new source of funding was needed to continue the improv training. Thinking that improv students who had completed training and the “Current Issues” class would be excellent trainers, the teachers and school sought and received funding for “Kids Helping Kids” from the Daniel’s Family Foundation. This grant paid student trainers a stipend and financed two weekend training sessions at a local mountain retreat center.

Each semester, approximately twelve students are trained. Training takes place both at the retreat and during the last 20 minutes of the 90-minute “Current Issues” class. For the remainder of the class, students research social issues pertinent to young people, including bullying, school violence, drug and alcohol abuse, child abuse, family problems, and teen pregnancy. Students select topics that concern them personally. From their research, students produce PowerPoint presentations, brochures, posters, and surveys that relate to their topics. Their products are then distributed to local schools and community agencies.

Students perform during class time and after school for other schools and organizations. When students perform, teachers, counselors, social workers, or community members suggest a topic. The students then have only two to five minutes to develop their improv before they perform. The reactions to the performances have always been positive. Students have performed at various local schools, Laramie County Community College, community organizations, and the Castle Rock, Colorado, schools.

Laramie County School District #1 Violence Prevention Coordinator, Mike Hahn, said that a recent troupe performance was one of the most powerful improvs that he has seen. The numerous times that the Triumph High School Improv Troupe has been invited back to schools reflects positively on the effective way that the students deliver the message to help other young people. Graduates say that improv has helped them to speak comfortably in front of groups and, especially important, to stay in school. As Ms. Kallal and Mr. Murphy say, “What could be better for students at an at-risk high school?”

**Student Voices**

*I have learned that ten minutes of my time may affect someone’s life forever and persuade kids to make better choices.*

_Alicia Altizer_

*We perform serious improvs that really reach out to help our audience.*

_Ameron Anderson_

*Improv has helped me by making me more aware of the social issues facing the young people in our schools today.*

_Chase Walker_

Judy Kallal is a social studies teacher at Triumph High School in Cheyenne, WY.
Notes on the Aftermath of Brown

by John Paul Ryan

Brown v. Board of Education is rightly celebrated as a landmark U.S. Supreme Court decision. Now approaching its fiftieth anniversary, this unanimous 1954 decision of the Warren Court confronted and sought to remedy racial exclusion, separation, and massive inequalities in our nation’s public schools, as the previous articles by Patricia Minter and Robert Cottrol ably remind us. But no Supreme Court case, however important, is self-enforcing. Lower courts, particularly federal district courts, frequently bear the responsibility to oversee the enforcement of Supreme Court decisions. For the Brown decision, this responsibility largely fell to “58 Lonely Men,” in the words of political scientist Jack Peltason, who studied how the federal district court judges of the era grappled with community sentiment, their own values, and an often-unpopular U.S. Supreme Court decision. Peltason found that many, but not all, southern judges heroically struggled to enforce Brown.

To address implementation issues, the Court heard Brown v. Board of Education II in 1955, where it issued the famous decree that school desegregation should proceed with “all deliberate speed.” While hoping that the Justice Department would prod hesitant states to begin desegregation, the Supreme Court in Brown II imposed the burden of desegregation on individual plaintiffs and the NAACP, according to legal scholar Dennis Hutchinson. Did Brown foster a more positive climate for plaintiffs? In one study, Francine Sanders found that the success rate of plaintiffs seeking desegregation in federal district courts rose dramatically from 33% in the ten years before the Brown decision to 72% in the ten years after Brown.

Court venue mattered greatly, however, in the aftermath of Brown. State courts did not embrace Brown warmly. Instead, the tendency of state courts to resist the implementation of Brown is evident in a recent study by Romero & Romero. They found that the percentage of pro-desegregation holdings in state supreme courts remained about the same before and after Brown. In both eras, only about 30% of state court decisions favored plaintiffs in desegregation cases.

Finally, political scientist Gerald Rosenberg points out that by 1964 only 2% of southern school districts had begun to integrate their schools. Rosenberg concluded that the 1964 Civil Rights Act and the 1965 Elementary and Secondary Education Act (ESEA), passed by Congress, were critical events that helped enforce Brown. In particular, the ESEA required desegregation as a condition for school districts to receive federal aid. Although only 7% of southern school districts in the late 1960s had their funds terminated for resisting desegregation, the threat spurred a wave of desegregation, including through school busing that was unanimously approved by the U.S. Supreme Court in Swann v. Charlotte-Mecklenburg Board of Education in 1971.

Like many narratives, the story of Brown’s impact is not one of steady and uniform success. Despite these shortcomings of implementation and compliance, however, Brown both set in motion—and reflected—cultural, legislative, and judicial forces that would slowly transform American society.

References


Learning Gateways

Apply the 14th Amendment to Modern Controversies

Following the Civil War, three important amendments to the Constitution were adopted. The 13th Amendment outlawed slavery. The 15th Amendment banned denying citizens the right to vote because of “race, color, or previous condition of servitude.” And the 14th Amendment, among other things, guaranteed every person “the equal protection of the laws.”

The guarantee of equal protection was not immediately upheld. In 1896, the U.S. Supreme Court ruled in Plessy v. Ferguson that the 14th Amendment did not outlaw racial segregation as long as “separate, but equal” facilities were provided. It was not until 1954 that the Plessy decision was overruled by Brown v. Board of Education. Then in a flurry of cases, the Supreme Court interpreted the 14th Amendment to outlaw all forms of legalized racial segregation. Even today, the Court continues to interpret and apply the 14th Amendment’s equal protection clause.

Diversity Checklist: Equal Protection Analysis

“No state shall … deny to any person within its jurisdiction the equal protection of the laws.”

14th Amendment Equal Protection clause

The equal protection clause has played a prominent role in civil rights cases. It requires that a state treat all individuals the same, when they are in similar conditions or circumstances. The following "SCOPE checklist" shows elements that the U.S. Supreme Court typically considers in equal protection cases:

State action. The equal protection clause applies only to action by a state or local government. The action can be a law, law enforcement, or other action.

Classification. Does the law or action confer or deny benefits to specific groups of people? Equal protection only applies to cases where people are classified into groups. What groups are involved?

Options. There are three levels of scrutiny that the Court can apply. The type of group determines the level of scrutiny. Find the level that applies in this case. Strict scrutiny is applied for racial and ethnic groups (known as “suspect classifications”). Intermediate scrutiny is applied to gender and illegitimacy (“quasi-suspect classifications”). Rational basis is the test applied for all other groups.

Purpose. What is the state’s purpose for the law or action? After determining the purpose, decide how strong the state’s purpose is. Is it ...

- A legitimate purpose for the state? (required for rational basis)
- An important state interest? (required for intermediate scrutiny); or
- A compelling state interest? (required for strict scrutiny)

Evaluate. As shown above, there are minimum requirements for each level of scrutiny. Does the law in question meet the requirement?

Marshall Croddy is Director of Programs and Materials Development and Bill Hayes is Senior Writer, both for the Constitutional Rights Foundation in Los Angeles.
Equal Protection of the Laws: Three Case Studies

You are justices on the U.S. Supreme Court. You must decide the three equal protection cases below. To analyze each case, use the “Diversity Checklist” (see p. 22) and provide reasons for your decisions.

Case 1: University Elementary School. One state's public university runs an elementary school on its campus. The elementary school serves as a research laboratory to test new teaching methods. The school carefully enrolls elementary students to make sure the student body represents a cross section of the state's various ethnic and social groups. A white couple has sued; their girl was denied admission because the school already had enough white students.

Does the university's action—denying the child's admission on account of her race—violate the 14th Amendment's equal protection of the laws?

☐ YES  ☐ NO  Explain

Case 2: The J Club. The J Club is an exclusive private club in a major city. Many of the city's most important business people belong, and many vital business connections are made there. The club has traditionally excluded minorities. Harry Smith, a prominent African-American businessman, recently arrived from another city, applied for membership, and was turned down on account of his race. Smith has sued, arguing that the denial violates the 14th Amendment.

Does the J Club's denial of Smith’s membership violate the 14th Amendment’s equal protection of the laws?

☐ YES  ☐ NO  Explain

Case 3: Serial Killer. Following a series of violent murders in a city, police have determined that the suspect is a black male who drives a red pickup truck. Police have started pulling over for minor traffic infractions all black men driving red pickup trucks. A black male who was pulled over has sued to stop police from continuing this practice.

Does the police practice of pulling over drivers because they are black, male, and driving red pickups violate the equal protection clause of the 14th Amendment?

☐ YES  ☐ NO  Explain
T
hanks in large part to the
Supreme Court’s unprece-
dented decision to allow
live radio broadcasts of the
oral arguments in the 2000 election
cases (a gesture repeated only once
since—in last term’s affirmative action
cases), public awareness of the role of
the Court may be at an all-time high.

Students who listened to the arguments
in either Bush v. Gore or Grutter v.
Bollinger/Gratz v. Bollinger no doubt
understand that the Supreme Court
does not “re-try” cases but instead
reviews the legal conclusions reached
by the lower courts. Students also real-
ize that, rather than listening to the tes-
timony of witnesses or inviting lawyers
to introduce items into evidence, the jus-
tices issue their rulings after examining
the lower court’s record, listening to
the parties’ oral arguments, and studying
their written arguments—the so-called
“merit briefs.”

Amicus Briefs
There is, however, one other important
resource available to the Court that is
less well-understood: the amicus curiae
(“friend of the Court”) brief, or amicus
for short. Amicus briefs are filed by
persons or organizations who, although
they are not parties to the lawsuit,
believe they have a stake in its outcome
as well as an argument, a perspective,
or information that needs to be brought
to the Court’s attention. By Court rule,
amicus briefs are limited to 30 booklet-
size pages (as opposed to the more gen-
erous 50-page limit for merit briefs).

How important are amicus briefs?
The answer is that it depends—both on
the reputation of the organization or
individual filing the brief and on the
predilections of the individual justices.
The Solicitor General’s amicus briefs,
for example, are generally thought to
receive respectful consideration by the
Court as a whole, no matter who is
occupying the White House. Not only
do the Solicitor General’s briefs pur-
port to present the views of the United
States Government, but over the
decades the office itself has earned a
reputation for producing especially
well written and scrupulously fair briefs
that strive to present both the facts and
opposing arguments in an objective
manner. That is not to say the Court
will always agree with the Solicitor
General (the Court rejected his views
in the affirmative action cases, for ex-
ample), but it is to say that the jus-
tices will almost always listen carefully
to what the Solicitor General has to say
on behalf of the government.

Some justices are thought to give
amicus briefs filed by other organizations
little consideration, while other justices
are thought to be generally more interested
in their arguments. (See sidebar on p. 26.)
Part of this difference may lie in how
closely the justice believes amicus briefs
follow the admonishment of Supreme
Court Rule 37, which by way of intro-
duction states: “An amicus curiae brief
that brings to the attention of the Court
relevant matter not already brought to
its attention by the parties may be of
considerable help to the Court. An ami-
cus curiae brief that does not serve this
purpose burdens the Court, and its fil-
ing is not favored.”

In truth, there are times when, upon
inspection, some amicus briefs appear
to offer little that was not already thor-
oughly discussed in the parties’ merit
briefs. Such amicus filings may be little
more than a public relations move, an
attempt to support a party’s position by
saying “me too.” In other cases, how-
ever, the amicus briefs can play an
important—and even crucial—role in
the justices’ deliberations. The Michigan
affirmative action cases decided in June
2003 are cases in point.

Grutter/Gratz v. Bollinger
Diversity. The key question in the con-
stitutional challenges brought in both
Grutter v. Bollinger (concerning law
school admissions) and Gratz v.
Bollinger (concerning undergraduate
admissions) was whether the govern-
ment...
ment has a “compelling interest” in maintaining racial diversity in higher education. If the Court concluded that diversity was not a compelling interest, it would be obliged to strike down the affirmative action programs in both the law school and undergraduate cases (and in many other cases to come). If, on the other hand, the Court concluded that diversity was a compelling interest, it could proceed to the next step in the constitutional analysis and ask whether the particular program was or wasn’t sufficiently “narrowly tailored” to further that compelling interest.

Of course, we now know that the Court concluded that diversity is a compelling interest. The Court also found that the law school’s admissions policy was narrowly tailored to further that interest, whereas the undergraduate school’s admissions policy was not. The “big question,” however—the question that determined whether the Constitution permits overt affirmative action policies in higher education at all—was the question of whether diversity is a compelling government interest. It fell to Justice Sandra Day O’Connor to provide the answer in her majority opinion in Grutter.

A Case of Four Briefs. In explaining why she was answering that question in the affirmative, Justice O’Connor leaned heavily on the “real world” perspectives offered by the amici with experience in the worlds of education, business, and the military. While more than 75 amicus briefs were filed in these two cases (most cases attract no more than a handful of amici on either side), O’Connor focused on four briefs in particular.

First, she cited the American Educational Research Association (AERA) for its amicus brief pointing to “the educational benefits that flow from student body diversity.” She noted that AERA’s brief analyzed and explained studies showing that “student body diversity promotes learning outcomes and ‘better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.’” Next, she noted that the amicus briefs from corporate giants 3M and General Motors “have made clear that the skills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints.”

The Military Perspective. Justice O’Connor appears to have been especially influenced by an amicus brief filed on behalf of Lt. Gen. Julius W. Becton Jr. and several dozens of other high-ranking, retired military officers and civilian leaders of the military. Their brief analyzed the history of race relations in the United States military, from President Truman’s executive order ending segregation in the armed services to the disastrous effect on unit morale and combat readiness caused by the lack of African-American officers during the Vietnam War to the key role played by affirmative action in rebuilding the nation’s military in the post-Vietnam era. O’Connor noted that after decades of firsthand experience with the responsibility of protecting the nation, these high-ranking officers and leaders all came to believe that a racially diverse officer corps is essential to the military’s “ability to fulfill its principal mission to provide national security.”

Justice O’Connor discussed this amicus brief at length. For example, she observed that “the primary sources

Who Filed Amicus Briefs in Grutter & Gratz?

More than 75 amicus briefs from individuals, groups of individuals, or organizations were filed in Grutter v. Bollinger, Gratz v. Bollinger, or (most often) both cases. About fifteen of these amicus briefs were filed in support of the individual plaintiffs challenging the university’s affirmative action policy, while the large majority was filed in support of the University of Michigan.

Among those organizations in support of the University were the American Bar Association, AFL-CIO, American Jewish Committee, Association of American Medical Colleges, College Board, National Asian Pacific American Legal Consortium, National Education Association, National Urban League, NOW Legal Defense and Education Fund, and the United Negro College Fund.

Among those in support of the plaintiffs were the Asian American Legal Foundation, Cato Institute, Center for Individual Freedom, Center for New Black Leadership, and the National Association of Scholars.

To read the amicus briefs filed in this case (and for further information about the cases), go to the University of Michigan Web site at: www.umich.edu/~urel/admissions

Research Tool

For updates, more information, and additional resources about these and other Supreme Court cases, visit insightsmagazine.org (click “Supreme Court Roundup”).
for the nation’s officer corps are the service academies and the Reserve Officers Training Corps (ROTC), the latter comprising students already admitted to participating colleges and universities.” At present, she said, “the military cannot achieve an officer corps that is both highly qualified and racially diverse unless the service academies and the ROTC used limited race-conscious recruiting and admissions policies.” And to fulfill its mission, the military “must be selective in admissions for training and education for the officer corps, and it must train and educate a highly qualified, racially diverse officer corps in a racially diverse setting.” Most importantly, O’Connor noted that the Court agreed with this amicus brief’s conclusion that it is “only a small step from this analysis to conclude that our country’s other most selective institutions must remain both diverse and selective.”

**Conclusion**

On reflection, it is easy to see why the Court found this military brief so useful. First, the retired officers and civilian military leaders on the brief all command respect, both by virtue of their service to their country and their bipartisanship. While the U.S. military prides itself on its apolitical nature, the signers nonetheless included, perhaps intentionally, officers and politicians associated with both Republican and Democratic leadership. On this brief, for example, both Gen. H. Norman Schwarzkopf of Operation Desert Storm fame and President Reagan’s National Security Advisor Robert “Bud” McFarlane stood comfortably with future Democratic presidential candidate Gen. Wesley Clark and former Nebraska Senator Robert J. Kerrey (D).

Secondly, these officers and leaders spoke with authority, referring to their concrete personal experiences in leading a military that depended on a highly qualified and diverse officer corps. Finally, by offering the Court the hard-won experience of military professionals—many of whom are decorated combat veterans—the brief presented a unique and obviously relevant perspective not duplicated by any of the merit briefs. In short, when these high-ranking, no-nonsense officers of all political persuasions bluntly stated that affirmative action was essential to our nation’s military combat capability and, thus, to our national security, the Court took notice.

**Research on Amicus Briefs**

During the past 70 years, there has been an enormous increase in the percentage of U.S. Supreme Court cases in which *amicus curiae* briefs were filed. Back in the 1930s, only 2% of all cases had *amicus* briefs; this rose to 23% in the period from 1953–1966; and by 1988, fully 80% of all cases had *amicus* briefs. Also, some justices are more likely than others to cite *amicus* briefs in their opinions. In a study of cases from 1953–1991, researchers found that a few justices cited, on average, almost one *amicus* brief for every written opinion. In contrast, other justices cited only one brief for every three or four opinions they wrote. Justices viewed to be “liberal” were no more likely than “conservative” justices to cite *amicus* briefs, which often contain social rather than legal perspectives. Reflecting her opinion in *Grutter*, Justice Sandra Day O’Connor cited *amicus* briefs more frequently than any other justice for the years of the study.

Court in Brown on May 17, 1954, Warren addressed social scientific evidence that “separate but equal” was in fact a pernicious fiction. Instead of overruling Plessy directly, however, which would imply that Southerners had supported a blatantly unconstitutional white supremacist system for over fifty years, he held that recent events had made segregation incompatible with equal protection. Citing the damage done to African-American children by the racial caste system perpetrated by Jim Crow schools, Warren concluded, “separate educational facilities are inherently unequal.” The following year, the Warren Court ordered federal judges to enforce the desegregation of Southern schools “with all deliberate speed.”

After Brown
First in the South and later in the rest of the country, whites mounted determined resistance campaigns against desegregation in the 1950s until the 1970s. They de-emphasized “speed” in favor of deliberate obfuscations of the integrated schools promised by Brown. When the fight over school desegregation moved back into the lower federal courts for enforcement, it also raised questions about the viability of a “colorblind” interpretation of the Constitution’s equal protection clause and, indeed, questions about whether a colorblind legal culture was even the right model for a society in which equality under the laws was a reality. This debate still persists, as federal courts continue to wrestle with the ideologies and realities of a “colorblind” Constitution.

Did You Know? Some Quick Facts about Brown v. Board of Education

- Brown was actually two decisions — a 1954 decision (Brown I) declaring separate schools “inherently unequal” and a 1955 decision (Brown II) authorizing implementation of school desegregation “with all deliberate speed.”
- Both Brown decisions were unanimous (9-0). Chief Justice Earl Warren worked hard to secure the support of Justice Robert Jackson, who had planned to write a concurring opinion, and Justice Stanley Reed, who had intended to dissent.
- Brown I actually involved five separate cases—in South Carolina (Briggs v. Elliott), Delaware (Gebhart v. Belton), Virginia (Davis v. School Board of Prince Edward County), the District of Columbia (Bolling v. Sharpe), and Kansas (Brown v. Board of Education of Topeka, Kansas).
- The plaintiff in the Kansas case was Linda Brown, an 11-year-old schoolchild in Topeka, Kansas.
- Topeka, Kansas, had segregated public elementary schools for white children and for African-American children. Linda Brown lived four blocks from the nearest white school, but two miles from the nearest African-American school.
- The Brown opinion relied heavily upon studies by psychologist Kenneth B. Clark on the negative effects of prejudice and discrimination on young children.
- Several organizations filed amicus curiae briefs in Brown on behalf of the plaintiffs, including the American Jewish Congress, the American Civil Liberties Union, the American Federation of Teachers, the Congress of Industrial Organizations (CIO), and the American Veterans Committee.
- Brown was the logical culmination of previous Supreme Court decisions, including ones that outlawed “separate but equal” facilities in law schools (Sweatt v. Painter, 1950) and graduate schools (McLaurin v. Oklahoma State Regents for Higher Education, 1950).
- Thurgood Marshall, who later served as the first African-American justice on the U.S. Supreme Court, led the litigation efforts on behalf of the NAACP in Brown.
- The Brown decisions addressed only public schools segregated by law. Later decisions and orders of the Supreme Court would strike down segregation (“Jim Crow”) laws in such venues as public transportation, state parks, and more.
Primary Documents

Avalon Project at Yale Law School
www.yale.edu/lawweb/avalon/

This site offers key historical legal documents. The 18th century documents include “An Act for the Gradual Abolition of Slavery, Pennsylvania, March 1, 1780” and the original drafts of state constitutions. 19th century documents include The Fugitive Slave Act of 1850.

The Civil Rights Act of 1875
chnm.gmu.edu/courses/122/recon/civilrightsact.html

Declared unconstitutional in 1883, the Act guaranteed to persons regardless of race, nativity, or religious belief, the right to sue public accommodations, the right to sue for personal damages, made it illegal to bar qualified people from serving on grand or petit juries, and gave the federal courts jurisdiction over cases arising under the Act.

Documenting the American South (DAS)
docsouth.unc.edu/index.html

A collection of sources on Southern history and culture from the colonial period through the first decades of the 20th century. The “Church in the Southern Black Community” e-texts include pamphlets from Henry McNeal Turner, a civil rights activist and bishop of the A.M.E. Church, about U.S. Supreme Court civil rights decisions of the era. From the Academic Affairs Library at the University of North Carolina at Chapel Hill.

Internment of San Francisco Japanese
www.sfmuseum.org/war/evactxt.html

A series of daily news articles appearing in the San Francisco News in 1942 related to the relocation and internment of Japanese Americans and immigrants during World War II, from the Museum of the City of San Francisco.

Japanese American Internment Camps during World War II
www.lib.utah.edu/spc/photo/9066/9066.htm

A series of photographs documenting the Japanese-American internment experience in two internment camps: Tule Lake, Calif., and Topaz, Utah. From the Special Collections Department, J. Willard Marriott Library, University of Utah, and Private Collections.

National Archives and Records Administration
Teaching with Document Series
www.archives.gov/digital_classroom/teaching_with_documents.html

Includes lessons on the Amistad Case, the Civil Rights Act of 1964, and the Equal Employment Opportunity Commission. Searches may be conducted online of the Teaching with Documents lesson plans.

State Constitutions
www.findlaw.com/11stategov/indexconst.html

Links to present-day state constitutions.

Suffering Under a Great Injustice: Ansel Adams's Photographs of Japanese-American Internment at Manzanar
memory.loc.gov/ammem/aamhtml/aamhome.html

Photographs documenting the Japanese internment at Manzanar from the Library of Congress American Memory Project.

U.S. Constitution
www.findlaw.com/casecode/constitution/

War Relocation Authority Camps in Arizona, 1942-1946
www.ccp.arizona.edu/images/jpamer/wraintro.html

Photographs documenting the internment experience in Arizona’s two Japanese internment camps.

Publications

Affirmative Action: A Dialogue on Race, Gender, Equality and Law in America.
Focus on Law Studies, Spring 1998, Vol. XIII, No. 2
www.abanet.org/publiced/focus/spr98toc.html

Nine legal, social science, and humanities scholars and other educational leaders discuss a wide range of viewpoints on affirmative action in theory and practice in this issue of Focus. Published by the American Bar Association Division for Public Education.

Michelle Parrini and Katie Fraser are program managers and editors and Hilary Glazer is electronic publishing manager for the ABA Division for Public Education in Chicago.

Presents a critique of framing race relations in the United States through a black-white model of race that ignores the experiences of other groups. Examines legal and social theories of racial discrimination, ethnic differences within the Asian-American population, nativism, and issues of citizenship, language, desegregation, and affirmative action.


A collection of articles in the legal genre of critical race theory.


Offers a series of articles about the Amistad and Dred Scott cases, as well as Plessy, Korematsu, Brown, and others.


A collection of essays from political scientists, historians, lawyers, and sociologists covering the origins of the Act, its consequences for public policy, and the future of Civil Rights in the United States.


A historical overview of affirmative action policies and Supreme Court review of their legislative intent.


Considers the concept of legal equality in a multiracial society through examination of issues such as self-governance of Native Americans, immigrant rights, affirmative action, racial redistricting, and curricular reform.


A legal history of segregation in education and the aftermath of the Brown decision.


Considers anti-miscegenation laws, judicial review of such legislation, and other aspects of inter-racial marriage.


A five-volume reference set covering Supreme Court cases about education, civil rights, the First Amendment, youth rights, health and social security.


A series of essays presenting opposing points of view on topics such as anti-Semitism and Black-Jewish relations, immigration and black relations, racial bias in law enforcement, environmental racism, race and public policy, college admissions policies, bilingual education, the role of slavery in contemporary race relations, and inter-ethnic alliances.

Films and Videos


30-minute video with teacher's guide. Four young Americans share their differing views on racism, equalit", and affirmative action. These participants also interview legal, civic, and media experts and are confronted with opinions much different from their own. Features film footage depicting critical moments in the history of American race relations.

Web Sites

Affirmative Action and Diversity Project aad.english.ucsb.edu

This site presents diverse opinions regarding affirmative action topics. It includes articles and theoretical analyses, policy documents, current legislative updates, and an annotated bibliography of research and teaching materials, and links. Housed at the University of California-Santa Barbara.

American Civil Rights Institute www.acri.org

The ACRI opposes affirmative action and advocates anti-affirmative action legislation; its Web site contains news, articles, legislation, and court opinions.

American Bar Association Commission on Brown v. Board of Education wwwabanet.org/brown

Provides materials on the background of the case, teaching ideas, and many links.

Ancestors in the Americas www.cetel.org/index.html

Companion Web site to PBS series about the Asian immigrant experience in America. Includes historical documents such as a California Supreme Court decision declaring that a Chinese man was inferior and could not testify in court (People v. Hall, 1854), the Chinese Exclusion Act, and its repeal.

Beyond Black and White: Affirmative Action in America activevoice.net/tvraceinitiative/beyondblackandwhite

PBS aired this Fred Friendly Seminar, in which panelists discussed their opposing views of affirmative action. Site includes a viewer's guide and links to other resources. A video is also available for purchase.

Brown Foundation for Educational Equity, Excellence and Research www.brownvboard.org

Includes lower court decisions in most of the Brown-related cases, an orientation handbook to the Brown decision, online student activity book, and past issues of the Brown Quarterly for classroom teachers.

Civil Rights: Law and History www.usdoj.gov/kidspage/crt/crtmenu.htm

Geared towards children, this site of the Civil Rights Division of the U.S. Department of Justice describes federal civil rights laws and gives examples from history that led to their passage.

The Civil Rights Project at Harvard University www.civilrightsproject.harvard.edu

The CRP serves as a resource for information on racial justice. Resources include action kits on civil rights issues.
Howard University School of Law, “Brown @ 50: Fulfilling the Promise” www.brownat50.org

Resources include an online chronology from the sixteenth-century arrival of African slaves on American shores to the 2003 Supreme Court decision in Gratz v. Bollinger. This site also includes many relevant primary resources and cases related to Brown.


This site offers detailed chronologies (of Brown and a broader look at the road toward quality education), press kits, articles, and background information.

See also NAACP at www.naacp.org

The National Association for the Advancement of Colored People is the oldest civil rights organization in the U.S. Its Web site provides history, time line, and program information.


Provides extensive background on the Civil Rights Movement and highlights 49 historic sites in 21 states, including essays on the historical significance of each site.

National Urban League, Inc. www.nul.org

Includes reports and other publications on current equality issues.

The Rise and Fall of Jim Crow www.pbs.org/wnet/jimcrows/stories_eventsunicivil.html

Companion Web site to the award-winning PBS documentary series that aired in 2003.

Separate Lives: Broken Dreams www.naatanet.org/separatelivesbrokendreams

Companion Web site for a 1993 documentary detailing the Chinese Exclusion Act (1882), which barred Chinese immigrants from U.S. citizenship by naturalization (repealed in 1943).

Online Lessons

Landmark U.S. Supreme Court Cases www.landmarkcases.org/index.html

Provides lessons for Brown, Plessy, and Dred Scott that offer biographies of key figures, background summaries of the cases for various reading levels, and a variety of classroom activities. Some lessons include excerpts of media coverage of decisions, political cartoons, maps, and other resources. From Street Law and the Supreme Court Historical Society.

Law Day www.lawday.org

This ABA site has much background material on Brown, as well as general ideas about celebrating Law Day in the community and schools.


Offers a variety of lessons for different grade levels on issues related to race and the constitution. Examples include:


Students learn about the June 23, 2003 Supreme Court rulings on affirmative action, research other affirmative action cases, initiatives, and propositions, and prepare for debates.


Examines desegregation during the Civil Rights Movement and a current study that finds that American schools are reverting to segregation.

Resources from the Constitutional Rights Foundation

The Challenge of Diversity is a 72-page supplementary text on issues of racial and ethnic diversity in the United States, published by the Constitutional Rights Foundation. This volume is divided into five units. Unit I: The Ideal of Equality focuses on the conflict between the ideals of the Declaration of Independence and the existence of slavery, sanctioned by the Constitution. Unit II: A Diverse Nation provides a brief historical review of the experiences and struggles of various ethnic groups during the 19th century and the first half of the 20th century. Unit III: Civil Rights Movement covers the turbulent period between 1954 and 1975 that changed America forever. It examines the social protests, landmark Supreme Court decisions, the Civil Rights Act of 1964 and Voting Rights Act of 1965, and Mexican-American activism. Unit IV: Issues and Policies explores current issues of diversity—affirmative action, bilingual education, multiculturalism, reparations, hate crimes, and the extent of progress in race relations. Unit V: Bringing Us Together tells of governmental and grass-roots efforts to bring people together and provides students with ideas and resources for service-learning projects. A separate teacher’s guide provides instructions for interactive lessons based on the text.

Each lesson in The Challenge of Diversity has a balanced reading, discussion questions, and an interactive activity aimed at fostering critical thinking. The lesson on the 14th Amendment in Learning Gateways is adapted from the unit on the Civil Rights Movement.

For further information, contact the Constitutional Rights Foundation, 601 South Kingsley Dr., Los Angeles, CA 90005; (213) 487-5590; www.crf-usa.org.
Here are some of the features you will find at the Web site for Insights on Law & Society at www.insightsmagazine.org.


Read about the dialogues on Brown v. Board of Education around the country and explore available resources to help you conduct a dialogue in your school or community.

Read the opinions in Grutter v. Bollinger and Gratz v. Bollinger, as well as many of the amicus curiae briefs filed in these two cases.

Learn more about the high schools featured in “Students in Action” — by visiting the Web sites of Triumph High School in Cheyenne, Wyoming, and Edward Bell High School in Camp Hill, Alabama. And read the full “Student Voices” briefly excerpted in this issue.

Learn more about earlier U.S. Supreme Court decisions on affirmative action that led up to the Grutter/Gratz decisions.

Find quickly the many online resources on race, the Constitution, and the Brown decision that are listed and annotated in the “Resource” section.

Read a variety of viewpoints and exchanges of opinion among leading scholars on the subject of affirmative action and the future of civil rights.

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The Internet, Law, and Culture

Read about the latest developments in the regulation of Internet content, the use of the Internet in political campaigns, and the effectiveness of restrictions on youth access to the 'Net. Adopt teaching strategies, lessons, and notes from classroom teachers.