

The Constitution, Reconstruction, and Race-Conscious Admissions



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A number of people in the United States agree that racial diversity in schools is an important factor in young people’s education. But there has been deep disagreement about how to achieve such diversity.

One method has been race-based college admissions. Generally called affirmative action, this method promotes admissions for people from certain historically disadvantaged racial and ethnic groups. Some Americans believe it is fair to take measures to advance traditionally excluded groups in society, including affirmative action. Others say that affirmative action is itself an unfair form of discrimination, and therefore oppose affirmative action.

In June of 2023, Pew Research conducted a nationwide survey on affirmative action in college admissions. It showed that half of adult Americans disapproved of affirmative action. One-third of Americans approved of it. The remaining people surveyed were not sure if they approved or disapproved.

Later in June 2023, the Supreme Court of the United States struck down race-based admissions at colleges and universities nationwide. In *Students for Fair Admissions v. President and Fellows of Harvard College*, the court decided that race-based admissions programs at both Harvard College (a private university) and the University of North Carolina (UNC) (a state school) were unconstitutional. Specifically, the court decided that the programs violated the equal protection clause of the 14th Amendment.

To understand the legal and social impacts of these cases, we need to look back in time to the Reconstruction era.

The Impact of Reconstruction

In 1863, President Abraham Lincoln issued the Emancipation Proclamation. It was during the American Civil War. This pivotal document changed the legal status of more than 3.5 million Black people in the Confederate states from enslaved to free. But the fight for racial equality was far from over.

When the Civil War ended in 1865, America entered a period known as Reconstruction. During this time, the U.S. government made efforts to repair – or reconstruct – the nation. It sought to amend the Constitution to counteract the political, social, and economic legacies of slavery and the aftermath of the Civil War.

Congress passed the 13th, 14th, and 15th Amendments to the U.S. Constitution, sometimes called the Reconstruction Amendments. The 13th Amendment abolished slavery. The 14th Amendment granted citizenship to anyone born in the United States. And the 15th Amendment protected against racial discrimination in voting.

The 14th Amendment also contained the equal protection clause. It states that “No State shall... deny to any person within its jurisdiction the equal protection of the laws.” It is meant to prevent state governments from denying their citizens the right to be treated equally under the law.



During the Reconstruction era, the U.S. government used its lawmaking and executive powers to further the goal of equal rights for every person regardless of race. The government established the Bureau of Refugees, Freedmen, and Abandoned Lands (the “Freedmen’s Bureau”) in the South. This agency assisted formerly enslaved Black people. It also assisted Southern white people who lost their homes and jobs in the war (the “refugees”).

The Freedmen’s Bureau worked to help set up a system of fair wages and working conditions for formerly enslaved people. It also created a formal education system for Black people, legally recognized marriages of Black people, and helped reunite Black families. By 1870, more than 1,000 schools for Black students were built in the South.

As we will see, the Reconstruction-era understanding of the equal protection clause was particularly important to the 2023 case.

The Harvard and UNC Cases

The case that ended with the Supreme Court’s 2023 decision began nine years earlier. In 2014, a nonprofit program called Students for Fair Admissions (SFFA) sued Harvard and UNC. SFFA argued that Harvard’s and UNC’s race-conscious admissions programs violated the equal protection clause of the 14th Amendment. Specifically, affirmative action led to unfair admission results for Asian American applicants.

The Supreme Court consolidated, or joined together, the two cases against the universities into one decision. This is common when the Supreme Court has to reconcile more than one decision on similar legal issues.

SFFA presented evidence that Asian American applicants were disfavored in the admissions process. For example, Harvard and UNC gave otherwise highly qualified Asian American applicants lower “personal rating” scores. These scores are based on admissions reviewers’ personal opinions, or what a Harvard dean of admissions once called a “hunch.”

In response, Harvard and UNC argued that their race-conscious admissions programs lead to measurable benefits for Black applicants. Black students who benefit from affirmative action tend to have higher incomes after college. In addition, racial diversity on campus prepares all graduates to live in a pluralistic society. Through



Widener Library at Harvard University in 2007.

affirmative action, these schools said they produce new knowledge from diverse outlooks.

Harvard and UNC relied on the Supreme Court case *Grutter v. Bollinger* (2003). In *Grutter*, the Supreme Court held that diversity on campus is a compelling (or extremely strong) government interest. A university may consider an applicant’s race as a “plus factor” to encourage diversity.

Harvard and UNC argued that their race-conscious admissions programs properly considered race as a “plus factor.” Race-conscious admissions increased enrollment for many historically excluded groups, including Black, Hispanic, and Native American students.

The Court’s Opinion and Reconstruction

Chief Justice John Roberts wrote the majority opinion, joined by five other justices. The majority held that Harvard’s and UNC’s race-conscious admissions programs violated the equal protection clause by treating college applicants differently based on their race.

The court did not explicitly overrule the *Grutter* case. However, the court stated that Harvard and UNC did not clearly show why diversity on their campuses was a compelling interest. Also, the court said the programs did not clearly show when they would no longer be necessary.

To explain the reasoning behind the court’s decision, the majority’s opinion looked back to the history of the





Collection of the Smithsonian National Museum of African American History and Culture

This image captures one of the many Freedmen's Schools established during Reconstruction, tasked with educating, clothing, and housing formerly enslaved people.

Reconstruction era. The court quoted from a congressional session in 1866 that explained the equal protection clause. The clause represented a “foundational principle” of “absolute equality of all citizens of the United States.”

The history of Reconstruction, the majority said, demanded that everyone be treated equally, regardless of their race. Therefore, the decision in *Students for Fair Admissions* demands that colleges and universities treat all applicants equally, regardless of their race.

The court described how the country failed to live up to the principle of racial equality after Reconstruction. Only in 1954 did the Supreme Court decide that racially segregated schools violated the equal protection clause in *Brown v. Board of Education*. “In the decades that followed [*Brown v. Board of Education*],” Chief Justice Roberts wrote, “this Court continued to vindicate the Constitution’s pledge of racial equality.”

In a notable passage, Roberts explained that race is not necessarily irrelevant to college admissions. Even without affirmative action, college applicants are not prohibited from describing “how race affected his or her life, be it through discrimination, inspiration, or otherwise.”

In a concurring opinion, Justice Clarence Thomas also discussed the Freedmen’s Bureau. According to Justice Thomas, the federal government created the Freedmen’s

Bureau to serve “newly freed slaves alongside white refugees.” Thus, the Freedmen’s Bureau did not benefit Black people “exclusively.” It was meant to be “colorblind.”

Dissenting Views

Justice Sonia Sotomayor and Justice Ketanji Brown Jackson wrote dissenting opinions and joined each other’s opinions. Justice Elena Kagan joined both of them, as well. Justice Sotomayor wrote that this ruling “rolls back decades of precedent and momentous progress.” To explain their reasoning, the dissenting justices also looked to the history of Reconstruction.

The dissenting justices interpreted the history of the Reconstruction era differently than the majority. They argued that Reconstruction illustrated that the federal government has made special efforts to protect traditionally excluded groups. The policies of Reconstruction, the dissenters argued, are precedent for policies of affirmative action. Both Reconstruction laws and affirmative action specifically addressed the needs of people who had experienced oppression.

The dissenting justices also quoted from a congressional session in 1866 to explain the 14th Amendment. A key goal was to “protect the black man in his fundamental rights as a citizen with the same shield which it throws over the white man.”



The dissenting justices emphasized that education was fundamental to the Reconstruction program. “Black people,” Sotomayor wrote, “were the targeted beneficiaries of the [Freedmen’s] Bureau’s programs, especially when it came to investments in education in the wake of the Civil War.” For example, the Freedmen’s Bureau provided land and funding to establish many of America’s historically Black colleges and universities (HBCUs).

The dissenting justices critiqued the court’s decision for imposing a “superficial rule of colorblindness.”

The dissenters emphasized that simply “[ignoring] race will not equalize a society that is racially unequal” and that true “[equality] recognizes acknowledgment of inequality.”

The *Students for Fair Admissions* case reflects a long-standing tension in the nation’s history on the true meaning of equality. Race-conscious admissions has been an important part of an ongoing conversation. As colleges and universities continue to seek diversity, the conversation will very likely continue in the years to come.

Writing & Discussion

1. How did the majority and dissenting opinions use the legacy of Reconstruction differently? Who do you think had the better argument and why?
2. One proposal for increasing diversity on campuses has been for colleges and universities to give “plus factors” to qualified students of low-income households. Do you think this would address the same historical issues as race-conscious admissions? Why or why not?
3. The Supreme Court left open the possibility that colleges and universities may ask applicants to show “how race affected his or her life, be it through discrimination, inspiration, or otherwise.” Is this approach different than race-conscious admissions? Might there be potential for abuse of this standard? Explain your answer with examples from the majority and dissenting opinions.

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ACTIVITY: RACE-NEUTRAL ALTERNATIVES

In 1996, voters in the state of California ended affirmative action in public universities. In response, California’s university system began using race-neutral alternatives to race-conscious affirmative action. (Examples of alternatives are listed below.)

After 25 years of experimenting with alternatives, vice chancellor for the University of California (UC) system Mitchell Chang said that UC schools have begun to restore racial diversity measured before the 1996 ban. “Some things worked better than other things,” said Chang, “And this is also work that doesn’t happen overnight.”

You are now on the governing board of your state’s public university system. Meet with three to four other members of your board. As a board, consider the following four race-neutral alternatives. How effective is each in achieving diversity? Rank them from *best* to *worst* and include at least *one reason* why you ranked each of the four the way you did. Be ready to have a spokesperson share your findings with the class.

1. **Expanded outreach and recruitment.** The universities should put more money toward recruiting students from high schools in lower-income areas, especially those students who are the first in their families to go to college.
2. **“Holistic” application review.** In addition to test scores and grades, universities should give weight to applicants’ extracurricular activities. Applicants can write essays in which they describe their lived experiences in high school.
3. **“Top ten percent” program.** High school students who graduate in the top ten percent of their class will be guaranteed admission to at least one state university. This includes all high schools in the state from diverse cities and neighborhoods.
4. **Increased scholarships for low-income students.** Universities should raise more money for more scholarships to help pay tuition for qualified applicants from lower-income households.



Standards Addressed

Emancipation Day: Past and Present

California History Social-Science Standard 8.9: Students analyze the early and steady attempts to abolish slavery and to realize the ideals of the Declaration of Independence. (6) Describe the lives of free blacks and the laws that limited their freedom and economic opportunities.

California History Social Science Framework (2016), Ch. 16, p. 379 – Grade 12: Students may wish to participate in any number of Constitution Day activities on September 17. Students address the question What are key tenets of American democracy? Teachers may want to highlight the emergence of a free, democratic system of government alongside an entrenched system of chattel slavery that lasted for nearly a century. The question How have American freedom and slavery coexisted in the nation's past? reminds students of the parallel—and seemingly paradoxical—relationship.

C3 Framework Indicators (National)

D2.His.1.9-12. Evaluate how historical events and developments were shaped by unique circumstances of time and place as well as broader historical contexts.

D2.His.12.9-12. Use questions generated about multiple historical sources to pursue further inquiry and investigate additional sources.

D2.His.15.9-12. Distinguish between long-term causes and triggering events in developing a historical argument.

Common Core State Standards: RH.6-8.4, RH.6-8.10; RL.8.10; WHST.6-8.10.

Endangered Species Act at 50 Years

California History-Social Science Standard 12.3. Students analyze the influence of the federal government on the American economy. (1) Understand how the role of government in a market economy often includes . . . addressing environmental concerns . . .

California History-Social Science Standard 12.4. Students analyze the unique roles and responsibilities of the three branches of government as established by the U.S. Constitution. (1) Discuss Article I of the Constitution as it relates to the legislative branch, including . . . the enumerated legislative powers; and the process by which a bill becomes a law.

California History-Social Science Standard 12.7. Students analyze and compare the powers and procedures of the national, state, tribal, and local governments. (8) Understand the scope of presidential power and decision making through examination of case studies . . .

C3 Framework Indicators (National)

D2.Civ.4.9-12. Explain how the U.S. Constitution establishes a system of government that has powers, responsibilities, and limits that have changed over time and that are still contested.

D2.Civ.13.9-12. Evaluate public policies in terms of intended and unintended outcomes, and related consequences.

Common Core State Standards: SL.11-12.1, SL.11-12.3, RH.11-12.1, RH.11-12.2, RH.11-12.10, WHST.11-12.10

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California History-Social Science Standard 8.11.1: List the original aims of Reconstruction and describe its effects on the political and social structures of different regions.

California History-Social Science Standard 8.11.3: Understand the effects of the Freedmen's Bureau and the restrictions placed on the rights and opportunities of freedmen, including racial segregation and "Jim Crow" laws.

California History-Social Science Standard 8.11.5: Understand the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution and analyze their connection to Reconstruction.

California History-Social Science Standard 11.10.2: Examine and analyze the key events, policies, and court cases in the evolution of civil rights, including *Dred Scott v. Sandford*, *Plessy v. Ferguson*, *Brown v. Board of Education*, *Regents of the University of California v. Bakke*, and California Proposition 209.

California History-Social Science Standard 12.5.1: Understand the changing interpretations of the Bill of Rights over time, including interpretations of the basic freedoms (religion, speech, press, petition, and assembly) articulated in the First Amendment and the due process and equal-protection-of-the-law clauses of the Fourteenth Amendment.

California History-Social Science Standard 12.5.4: Explain the controversies that have resulted over changing interpretations of civil rights, including those in *Plessy v. Ferguson*, *Brown v. Board of Education*, *Miranda v. Arizona*, *Regents of the University of California v. Bakke*, *Adarand Constructors, Inc. v. Peña*, and *United States v. Virginia (VMI)*.

C3 Framework Indicators (National)

D2.Civ.4.6-8. Explain the powers and limits of the three branches of government, public officials, and bureaucracies at different levels in the United States and in other countries.

D2.Civ.13.6-8. Analyze the purposes, implementation, and consequences of public policies in multiple settings.

D2.His.5.6-8. Explain how and why perspectives of people have changed over time.

D2.Civ.4.9-12. Explain how the U.S. Constitution establishes a system of government that has powers, responsibilities, and limits that have changed over time and that are still contested.

D2.Civ.13.9-12. Evaluate public policies in terms of intended and unintended outcomes, and related consequences.

D2.His.5.9-12. Analyze how historical contexts shaped and continue to shape people's perspectives.

Common Core State Standards: SL.6-8.1, SL.6-8.3, RH.6-8.1, RH.6-8.2, RH.6-8.10, WHST.6-8.10; SL.11-12.1, SL.11-12.3, RH.11-12.1, RH.11-12.2, RH.11-12.10, WHST.11-12.10

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BRIA is published by Teach Democracy, a nonprofit, non-partisan civic-education organization whose offices are in Los Angeles, California. Learn more at teachdemocracy.org.

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Series III, BRIA Vol. 1, No. 1, December 2023

Sources (continued. . .)

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