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“Is the Constitution
Color-blind?”

Poster

Is the Constitution Color-Blind?

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

—Equal Protection clause of the 14th Amendment

Issues of race and race relations have always been a constitutional dilemma. The Constitution of 1787 protected slavery—our nation’s original sin. In the centuries since—through Civil War, Jim Crow segregation, the Civil Rights era and beyond—constitutional debates about race and equality have shaped the nation, and changed our Constitution.



Writing in 1896, Justice John Marshall Harlan observed: “Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.” Today,

debates over affirmative action and equal opportunity still center on whether the Constitution tolerates distinctions on the basis of color. Believers in a color-blind Constitution say it does not. They say affirmative action is wrong because it treats people unequally. Believers in a color-conscious Constitution support affirmative action. They say that until racism disappears from our society, government may

take race into account to guarantee equal access to education and employment.

Now it’s your turn to answer the question:

Is the U.S. Constitution color-blind?

YES

- The Constitution demands that government treat people on the basis of individual merit, not as members of racial groups.
- The 14th Amendment should be interpreted to prohibit any and all discrimination, against racial minorities and whites alike.
- It is not fair to penalize people who themselves have committed no acts of discrimination for the past discrimination of others.

NO

- The Constitution demands that all people have a fair chance; sometimes that means government must make up for discrimination.
- The 14th Amendment should be interpreted to give special protection to African-Americans and other racial minorities that have experienced discrimination.
- In a color-conscious society, taking account of race is necessary to promote diversity.

INTRODUCTION

Grades:
9-10

Classroom Time:
1-45 minute class period

Constitution Connections:
Article I Section 2 Clause 3
Article I Section 9 Clause 1
14th Amendment

Articles Included:

A More Perfect Union: Barack Obama's Speech on Race at the National Constitution Center

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

United States Constitution

Affirmative Action & the Boundaries of Discrimination

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About this lesson

This research and deliberation activity is designed to encourage students to look at the issue of affirmative action from a variety of perspectives and then to find political, social and economic measures to address the issues of fairness and inequality. In any deliberation activity, compromise and listening will play a key role in finding common ground.

Objectives

The objective of this activity is for your students to evaluate multiple perspectives on the issues and determine what can be done to find common ground between those who believe the Constitution is color-blind and those who believe it to be color-conscious.

Students will be able to find ways for society and the government to overcome obstacles, which prevent us from all being treated equally in the eyes of society and the law.

What is deliberation?

The framers of the Constitution envisioned deliberation among a diverse citizenry who disagreed on issues because only through deliberation and compromise could Americans find common ground. Deliberation is a form of interpersonal communication which most often takes the form of public conversation. Deliberation is different from discussion because it is measured conversation and almost always leads to action. Deliberation is focused around an issue, generally laws or policy, but also can cover public behavior and cultural practices. The public includes everyone, not just experts and politicians, but everyday people who have an opinion on the topic. Current deliberation practices offer three possible choices or outcomes, and then arrange the conversation around the pros and cons of each.

Is deliberation debate?

Deliberation is often confused with debate, but the two are very different. Debate is a formally structured conversation between two opposing sides; some even define debate as a "quarrel." Debate creates a dichotomy while deliberation allows for careful consideration of many sides, so the best choice can be made. The two also differ because debate is between experts, while deliberation allows for input from laypeople. Essentially, debate is black and white, who is right and who is wrong, while deliberation allows for shades of gray.

Resources

Links to the articles used in this lesson and extension readings for this lesson are available at the National Constitution Center's website www.constitutioncenter.org/exchange.

ADVICE TO STUDENTS FOR CONSTITUTIONAL DELIBERATION

The National Constitution Center is located in Philadelphia, just a few steps from Independence Hall where the Constitution of the United States was written and signed during the summer of 1787. The men who came to Philadelphia that summer did so because they knew the direction of the country they loved needed to change. They deliberated for nearly four months and created a document that none thought was perfect. But they put forward a challenge to future generations: keep working towards the creation of a “more perfect Union.” The Center has been created to support this challenge and encourages visitors to walk in the steps of the founders and deliberate the future of their country.

The guidelines presented below have been created to provide you with advice and ideas on how to both present your arguments and hear those of others. The advice below was inspired by the rules adopted by the Constitutional Convention, as presented by George Wyeth of Virginia on May 28, 1787.

- Think through your idea before presenting it to the group, you may wish to make a few notes on paper to ensure your idea is clear.
- Listen carefully to other ideas and consider how to incorporate them into your own.
- When you are not speaking do not have other side conversations, read a book or document, or in another way distract the speaker.
- When challenging an idea, focus on the idea not the person you are challenging.
- Use the Constitution as support for your ideas, refer to the text and use it as a tool to support your argument.
- Do not dominate the conversation, do not speak more than twice before allowing everyone else the opportunity to be heard.
- Present you ideas directly to the facilitator or group leader.
- When developing your argument consider the position of the other side, and use these ideas to support or build compromise into your position.
- Wait to be acknowledged by the facilitator before speaking.

LESSON

OPENING

1. Ask your students to work individually to answer the following two questions. Then, ask them to share their answers with the class.

Q: Do you agree with affirmative action?

Students should base their opinion on their interpretation of the issue.

Q: Why do you feel this way about affirmative action?

Students should infer values connected to the issue.

2. Display the **Town Hall Wall** so that all of your students can see the poster. Next, ask them to first read the short description of the issue and then answer the question with a simple *Yes* or *No*.

Q: Is the Constitution color-blind?

Students are to answer *Yes* or *No*.

3. Have your students work individually to answer the following three questions. Then ask them to share their answers with the class. Record their answers on the board. Your students should write down the answers on the board in their notebooks for use in Steps 5 and 6.

Q: What values are associated with those who answered Yes?

Students should list moral principles or standards which they believe influence this choice.

Q: What values are associated with those who answered No?

Students should list moral principles or standards which they believe influence this choice.

Q: What values do you think both perspectives have in common?

Students should list moral principles or standards which influence both choices.

INVESTIGATION (part 1)

4. Divide your students into groups of four and provide each group with the following four articles. Assign each student one of the topics highlighted below. Using the provided documents ask each student to answer the assigned questions in their notebooks. Then, have each group share their answers with the class. Record their answers on the board. Your students should write the answers on the board in their notebooks for Steps 5 and 6.

Presidential policy: *A More Perfect Union*: Barack Obama's Speech on Race

Q: What do you think will be the president's policy on affirmative action?

Q: What evidence do you have to support your opinion?

Supreme Court decision: *Parents Involved in Community Schools v. Seattle School District No. 1*

Q: When did the Court say that race can be used and when did the Court say race could not be used?

Q: What evidence do you have to support your answer?

Constitution: *United States Constitution*

Q: Is the Constitution color-blind?

Q: What evidence do you have to support your opinion?

Congressional legislation: *Affirmative Action & the Boundaries of Discrimination*

Q: Why was affirmative action instituted and how did it attempt to change America?

Q: What evidence do you have to support your answer?

INVESTIGATION (part 2)

5. Staying in their group, ask each student to work individually to answer the following three questions in their notebooks:

INDEPENDENT Q & A

Q: What values do you and those who support your perspective on affirmative action have in common?

Students should use values listed in the **Opening** section.

Q: What evidence do you have to support your perspective?

Students should use evidence from the **Investigation (part 1)** section.

Q: What might be the political and social consequences of doing what you are suggesting?

Student answers should be based on previously listed values, evidence and student deduction.

6. Have the groups brainstorm answers to the following three questions. Have one member of each group record the answers to the **Group Q & A** and then present the group's answers to the class.

GROUP Q & A (TO BE PRESENTED TO THE CLASS)

Q: What values do people who support a perspective different from your own on affirmative action have in common?

Students should use values listed in the **Opening** section.

Q: What evidence do you have to support your perspective?

Students should use evidence from the **Investigation (part 1)** section.

Q: For those who have a different perspective, what could be the political and social consequences of doing what they have suggested?

Student answers should be based on previously listed values, evidence and student deduction.

DELIBERATION

7. Have the class brainstorm answers to the questions that follow. Record their answers on the board. If the same answer is given more than once, then mark it with a star to determine which answers the majority of the class agrees with and use these answers to find compromise answers.

CLASS Q & A

Q: Is it desirable or even possible to have a color-blind society?

Students are to answer **Yes** or **No**.

Q: If so, what sorts of public and private actions might promote a more color-blind society?

Students are to recommend programs and policies that the government and citizens can use that might work to promote a color-blind society.

Q: Is it possible to have a society that is both color-blind and racially diverse?

Students are to answer **Yes** or **No**.

Q: What sorts of programs or policies might promote both diversity and non-discrimination?

Students are to recommend economic and social programs and policies that might work to promote diversity and non-discrimination.

8. The compromise answers to the questions above can be uploaded to: www.exchangeideas.org for students around the country to view as part of our on going conversation at **The Exchange**.

STUDENT HANDOUT

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

FACTS OF THE CASE

The Seattle School District allowed students to apply to any high school in the District. Since certain schools often became oversubscribed when too many students chose them as their first choice, the District used a system of tiebreakers to decide which students would be admitted to the popular schools. The second most important tiebreaker was a racial factor intended to maintain racial diversity. If the racial demographics of any school's student body deviated by more than a predetermined number of percentage points from those of Seattle's total student population (approximately 40% white and 60% non-white), the racial tiebreaker went into effect. At a particular school either whites or non-whites could be favored for admission depending on which race would bring the racial balance closer to the goal.

QUESTION OF CONSTITUTIONAL LAW

Does a school district that normally permits a student to attend the high school of her choice violate the Equal Protection Clause (of the 14th Amendment) by denying the student admission to her chosen school because of her race in an effort to achieve a desired racial balance?

CONCLUSION

Yes. By a 5-4 vote, the Court...found the District's racial tiebreaker plan unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. Chief Justice John Roberts wrote in the plurality opinion that "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race." The Court acknowledged that it had previously held that racial diversity can be a compelling government interest in university admissions...[but] the District's plan involved no individualized consideration of students, and it employed a very limited notion of diversity ("white" and "non-white"). The District's goal of preventing racial imbalance did not meet the Court's standards for a constitutionally legitimate use of race: "Racial balancing is not transformed from 'patently unconstitutional' to a compelling state interest simply by relabeling it 'racial diversity.'" The Court held that the District's tiebreaker plan was actually targeted toward demographic goals and not toward any demonstrable educational benefit from racial diversity. The District also failed to show that its objectives could not have been met with non-race-conscious means. In a separate opinion concurring in the judgment, Justice Kennedy agreed that the District's use of race was unconstitutional but stressed that public schools may sometimes consider race to ensure equal educational opportunity.

The Oyez Project, *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. (2007), available at: http://www.oyez.org/cases/2000-2009/2006/2006_05_908/

United States Constitution

Article I Section 2 Clause 3	Representatives and direct taxes shall be apportioned among the several states which may be included within this union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three fifths of all other Persons.
Article I Section 9 Clause 1	The migration or importation of such persons as any of the states now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.
14th Amendment Section 1	All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Check out our interactive U.S. Constitution @ www.constitutioncenter.org/constitution

STUDENT HANDOUT

Affirmative Action & the Boundaries of Discrimination (excerpts)

The Supreme Court's decision in *Brown v. Board of Education* (1954, 1955) ended the practice of "separate but equal" treatment for blacks and whites in the United States and heralded a new age in constitutional law, but a decade passed before Congress addressed the question of how to broaden legal protections against discrimination.

President Lyndon B. Johnson...made passage of the Civil Rights Act a priority for his administration. Johnson cajoled and arm wrestled previously hostile southern Democrats to join with their liberal northern counterparts to enact the legislation, the most significant in the nation's history. Its most important provision, *Title VI*, ended legally sanctioned discrimination and specifically prohibited preferences based on race, ethnicity, or national origin in programs supported by federal funds. Another provision prohibited discrimination based on sex.

Simply stating that discrimination would no longer be tolerated did not translate into bringing new opportunity to those people who had suffered prejudicial treatment. The question became how to overcome the tension between an individual's claim to equal treatment by a state, and that state's responsibility to foster equality among its citizens. In June 1965, President Johnson spoke to the graduating class of Howard University about the need to bring the ideal of equal opportunity into balance with equality of results. For Johnson the answer was with what he termed "affirmative action" programs. Johnson noted that "You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, 'you are free to compete with others' and still justly believe that you have been completely fair." Johnson went on to explain that "[i]t is not enough to open the gates of opportunity. All our citizens must have the ability to walk through those gates."

Affirmative action policies awarded public contracts, jobs, admission to higher education, and other social benefits on the basis of membership in *designated groups*, or *protected classes*...who were victims of past discrimination. Affirmative action is premised on the idea of group rather than individual rights, and *emphasizes equality of results rather than equality of opportunity*. The *racial and gender preferences* inherent in affirmative action have been repeatedly challenged by individuals, often white males, who are not members of a protected class. They claim what is called *reverse discrimination*. The "reverse" in reverse discrimination means discrimination directed against white people. The problem, critics of the policy argue, is that discrimination is discrimination, no matter who it is directed against, white or black.

These critics insist that the government should never chose sides based on race and ethnicity. Affirmative action is a retreat from the goal of a *color-blind society* in which each individual is judged on his or her merit. People opposed to affirmative action assert that any preferences based on race or gender violates the *equal protection clause of the Fourteenth Amendment*, which orders that "No State shall...deny to any person within its jurisdiction the equal protection of the laws." They also argue that affirmative action flies in the face of the words of *Title VI* itself, which provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

Title VI of the Civil Rights Act of 1964 encouraged greater opportunity for people of all races; it also sought to remedy past racial bias by spending federal funds in ways that would benefit particular racial or other minority groups. A private institution, such as a university or college, was not required to practice affirmative action as long as it did not accept federal funds. If it did, however, then it was required to adopt and follow an affirmative action plan. The Supreme Court has addressed affirmative action in such diverse matters as voting rights, housing sales and rentals, employment, contracts for public works projects, and university admissions and financial aid. It has considered not only the use of race but also sex as a basis on which to distribute certain benefits. At the center of the Court's deliberations has been the hotly contested issue of whether an affirmative action program can specify a quota for any group, such as a racial minority or women, to receive a particular benefit. A sharply divided Court has generally accepted affirmative action programs and the limited use of quotas, although it struggled to do so.

Hall, Kermit L., and John J. Patrick. *The Pursuit of Justice: Supreme Court Decisions That Shaped America*. New York: Oxford Univ. Press (in association with JusticeLearning.org), 2006.
Available online: www.sunnylandsclassroom.org.

STUDENT HANDOUT

A More Perfect Union (excerpts)

speech by Barack Obama at the National Constitution Center on March 18 2008

"We the people, in order to form a more perfect union."

Two hundred and twenty one years ago, in a hall that still stands across the street, a group of men gathered and, with these simple words, launched America's improbable experiment in democracy. Farmers and scholars; statesmen and patriots who had traveled across an ocean to escape tyranny and persecution finally made real their declaration of independence at a Philadelphia convention that lasted through the spring of 1787.

Of course, the answer to the slavery question was already embedded within our Constitution—a Constitution that had at its very core the ideal of equal citizenship under the law; a Constitution that promised its people liberty, and justice, and a union that could be and should be perfected over time.

And yet words on a parchment would not be enough to deliver slaves from bondage, or provide men and women of every color and creed their full rights and obligations as citizens of the United States. What would be needed were Americans in successive generations who were willing to do their part—through protests and struggle, on the streets and in the courts, through a civil war and civil disobedience and always at great risk—to narrow that gap between the promise of our ideals and the reality of their time.

This was one of the tasks we set forth at the beginning of this campaign—to continue the long march of those who came before us, a march for a more just, more equal, more free, more caring and more prosperous America. I chose to run for the presidency at this moment in history because I believe deeply that we cannot solve the challenges of our time unless we solve them together—unless we perfect our union by understanding that we may have different stories, but we hold common hopes; that we may not look the same and we may not have come from the same place, but we all want to move in the same direction—towards a better future for our children and our grandchildren.

Just as black anger often proved counterproductive, so have these white resentments distracted attention from the real culprits of the middle class squeeze—a corporate culture rife with inside dealing, questionable accounting practices, and short-term greed; a Washington dominated by lobbyists and special interests; economic policies that favor the few over the many. And yet, to wish away the resentments of white Americans, to label them as misguided or even racist, without recognizing they are grounded in legitimate concerns—this too widens the racial divide, and blocks the path to understanding.

...working together we can move beyond some of our old racial wounds, and that in fact we have no choice if we are to continue on the path of a more perfect union.

For the African-American community, that path means embracing the burdens of our past without becoming victims of our past. It means continuing to insist on a full measure of justice in every aspect of American life. But it also means binding our particular grievances—for better health care, and better schools, and better jobs—to the larger aspirations of all Americans—the white woman struggling to break the glass ceiling, the white man who's been laid off, the immigrant trying to feed his family. And it means taking full responsibility for own lives—by demanding more from our fathers, and spending more time with our children, and reading to them, and teaching them that while they may face challenges and discrimination in their own lives, they must never succumb to despair or cynicism; they must always believe that they can write their own destiny.

In the white community, the path to a more perfect union means acknowledging that what ails the African-American community does not just exist in the minds of black people; that the legacy of discrimination—and current incidents of discrimination, while less overt than in the past—are real and must be addressed. Not just with words, but with deeds—by investing in our schools and our communities; by enforcing our civil rights laws and ensuring fairness in our criminal justice system; by providing this generation with ladders of opportunity that were unavailable for previous generations. It requires all Americans to realize that your dreams do not have to come at the expense of my dreams; that investing in the health, welfare, and education of black and brown and white children will ultimately help all of America prosper.

WE THE PEOPLE

Our country faces enormous challenges—the economy, the war in Iraq, healthcare, the environment and education. We need citizens who believe that democracy demands more than voting in November. A sustainable democracy needs citizens who believe in taking part in our nation’s political, social and economic discourse. The responsibility for maintaining a democracy that protects the freedoms enshrined in our Constitution is in the hands of the people.

This is why Abraham Lincoln’s words 145 years ago still ring true today:

“...government of the people, by the people, for the people...”

BE HEARD

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