

## Achieving Diversity:

### The Question of Affirmative Action in College Admissions

#### Overview

In this lesson, students read and discuss a background briefing on U.S. Supreme Court decisions addressing affirmative action in higher education, as well as current litigation and debates on this issue. Students then take on the roles of university trustees and decide the best admissions policy for a college to ensure equal protection of the laws.

#### Standards and Topics

- CCSS.ELA-LITERACY.RH.11-12.1 Cite specific textual evidence to support analysis of primary and secondary sources, connecting insights gained from specific details to an understanding of the text as a whole.
- CCSS.ELA-LITERACY.RH.11-12.2 Determine the central ideas or information of a primary or secondary source; provide an accurate summary that makes clear the relationships among the key details and ideas.
- CCSS.ELA-LITERACY.SL.11-12.4 Present information, findings, and supporting evidence, conveying a clear and distinct perspective, such that listeners can follow the line of reasoning, alternative or opposing perspectives are addressed, and the organization, development, substance, and style are appropriate to purpose, audience, and a range of formal and informal tasks.

**Topics: affirmative action, equal protection, 14th Amendment, diversity, university admissions, U.S. Constitution**

#### Objectives

Students will be able to:

1. Define affirmative action and related legal terminology.
2. Explain the U.S. Supreme Court's decisions in key cases related to affirmative action and college admissions (*Regents of University of California v. Bakke* (1978), *Grutter v. Bollinger* (2003), *Gratz v. Bollinger* (2003), and *Fisher v. University of Texas* (2016)).
3. Consider current issues related to affirmative action that are currently being litigated and discussed in the United States.
4. Develop evidence-based claims and arguments about the connection between university admissions policies and equal protection of the laws under the 14th Amendment to the U.S. Constitution.

## Materials

[Handout A: Affirmative Action](#) at the University (one per student)

[Slide pack](#) for parts I, II, and III

[Handout B: The Board of Trustees](#) (one per student)

[Handout C: Analyze on Your Own: Affirmative Action & Equal Protection](#) (one per student; can be copied on reverse of Handout B)

## Procedure

### I. Focus Discussion

A. Write on the board, or project onto a screen, the following:

#### **14th Amendment to the United States Constitution (ratified 1868)**

(Section 1) . . . No state shall . . . 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.

*NOTE: This is on slide 2 of the slide pack provided for this lesson.*

B. Tell students that these are the “due process” and “equal protection” clauses. Congress added them to the Constitution to protect freed slaves from discrimination by *state* laws after the Civil War. They have been used ever since to challenge state laws that might unfairly discriminate based on race or ethnicity. Tell students that in this lesson, they will focus on how the equal protection clause has been interpreted and applied in the context of *public* colleges and universities. (Title VI of the Civil Rights Act of 1964 provides similar protections in the context of private universities as the equal protection clause affords in the context of public universities.)

### II. Reading: Affirmative Action in University Admissions: Recent Decisions and Ongoing Challenges

A. Give each student a copy of [Handout A: Affirmative Action at the University](#) and instruct students to read it on their own.

B. Once all students have read Handout A, check for understanding by asking factual questions based on the text. Specifically:

- What is affirmative action?
- What is “strict scrutiny”?
- How did the University of Texas at Austin’s two-tiered admissions policy work?
- What was Abigail Fisher’s argument against this policy?
- Why did the university argue this policy was still necessary?
- How did the Supreme Court rule in *Fisher* when it heard the case for a second time in 2016?

*NOTE: These questions are listed on Slides 3 and 4 of the slide pack provided for this lesson.*

### III. Activity: Role Play: Board of Trustees

- A. Divide students into groups of five (groups of odd numbers of students work best for this activity). Each group is a board of trustees.
- B. Give each student a copy of [Handout B: The Board of Trustees](#), and go over the instructions with them.

Tell students they are now trustees of a public university charged with setting, among other things, the admissions policy for the university. They need to decide on the goal of the admissions policy and address the question of affirmative action at the school.

- C. Each group should do the following:
  - Discuss and answer this question: What should be the goal of the admissions policy at your university?
  - Look at each of the proposed policies on affirmative action and discuss the pros and cons of each.
  - Decide which policy your university should adopt. If none of the listed policies are attractive, combine policies or create your own.
  - Be prepared to report on your decisions and the reasons for them.

*NOTE: These instructions are listed on slide 5 of the slide pack provided for this lesson and on Handout B.*

- D. Ask each group to report back to the class with its decision. Lead students in a whole-class discussion as you explore trends or similarities and differences between the decisions of the various groups.
- E. Debrief the activity with the class. Walk them through the following questions.
  - Which policy proposal seems most aligned to the 14th Amendment's equal protection of the laws? Why?
  - Which seems least aligned to the 14th Amendment's equal protection of the laws? Why?
  - Did your board create a new proposal? If so, how well does it align with the 14th Amendment?

*NOTE: These debriefing questions are listed on slide 6 of the slide pack provided for this lesson.*

### IV. Assessment/Closure

- A. The cases presented in this lesson reveal quite different visions of college admissions and of the purpose of a university education for individuals and for society.

Use [Handout C](#) to have students consider two contrasting quotations about these issues and provide written analysis (at least two paragraphs) of how these perspectives do or don't reflect adequate equal protection, as required by the 14th Amendment.

(See note above under “Materials” for photocopying Handouts B and C onto one two-sided sheet.).

- B. The following instructions are detailed on Handout C and on slide 7 of the slide pack provided for this lesson.

Considering the history and application of the 14th Amendment by the courts, as well as past Supreme Court rulings on affirmative action in university admissions, examine the following two quotations then answer the question in bold below.

*“The ultimate goal is to have the Supreme Court . . . end the use of race and ethnicity [in college admissions] once and for all. That’s the goal of this organization, and this organization will stay active until that happens.”*

-- SFFA Founder & President, Edward Blum,  
in interview with “More Perfect” podcast

*"The Court’s decision [in the Fisher case] ensures that public universities, such as the University of Texas at Austin, may lawfully take steps to increase racial diversity on campus, thus fostering new opportunities for generations of children of all races while also helping advance a more just and tolerant society."*

-- NAACP Statement on Supreme Court Decision  
in *Fisher v. University of Texas*

**Which perspective do you think better reflects the guarantee of equal protection, as required by the 14th Amendment? Explain your answer.**

Be sure to cite specific evidence from Handout A and from the role play.

- C. For the full source of each of these quotations, please consult the following links.

To hear the full interview of Edward Blum by the podcast *More Perfect*, click [here](#). To read the full NAACP Statement on the Supreme Court’s decision in *Fisher*, click [here](#).

# Affirmative Action at the University

The term affirmative action has been in wide use in the United States since 1961. In that year, President John F. Kennedy issued an executive order calling for its use in employment decisions in government contracts. Since then, university admissions has been one area of American life where affirmative action has been hotly debated and frequently challenged. In several cases since 1978, the matter has made its way to the U.S. Supreme Court.

- *Regents of University of California v. Bakke* (1978): In this case, a white student named Allan Bakke was twice denied admission to medical school at UC Davis in California. He claimed that UC Davis denied his admission because of his race. The university's policy was to reserve 16 spaces for qualified minority students. Bakke challenged the policy. The Supreme Court struck down the use of racial quotas in college and university admissions. The Supreme Court declared that racial quotas were violations of the equal protection clause of the 14th Amendment and that equal protection of the laws protects both minorities and non-minorities. The Supreme Court also decided that diversity in college classrooms is still a "compelling state interest" and that, while quotas are not allowed, affirmative action may be used to achieve this diversity.
- *Grutter v. Bollinger* (2003): This case was brought by a white student who was denied admission to the University of Michigan Law School. The student had a high undergraduate GPA and law-school admissions test score. The university based its admissions policy on the *Bakke* decision. It argued that achieving diversity within its student body was a compelling interest and used race as one factor in admissions. In a 5-4 decision, the Supreme Court held that the equal protection clause did not prohibit the law school's "narrowly tailored use of race in admissions decisions" because the university did not accept or reject students automatically based on their race.
- *Gratz v. Bollinger* (2003): In this case, two qualified white applicants to the University of Michigan undergraduate program were denied admission. The University of Michigan used a system that awarded points to applicants based on several factors. These included high school grades, test scores, and alumni relationships. The university added points to a candidate's application if he or she was part of what the university determined to be an "underrepresented minority." In a 6-3 decision, the Supreme Court held that the system of automatically awarding points to every minority candidate wasn't narrowly tailored enough to meet the standard of strict scrutiny.

## Vocabulary

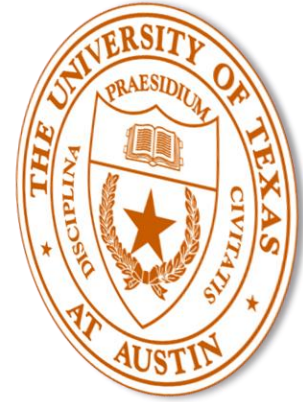
**affirmative action:** refers to a set of procedures designed to eliminate unlawful discrimination among applicants, remedy the results of such prior discrimination, and prevent such discrimination in the future.

**quota:** a fixed number that must be met to fulfill a requirement; in the context of affirmative action, a racial quota is a minimum number of non-white minority applicants that the school must accept.

**strict scrutiny:** a form of judicial review that courts use to determine the constitutionality of certain laws or policies. To pass strict scrutiny, the legislature must have passed the law to further a "compelling governmental interest," and must have narrowly tailored the law to achieve that interest. In the context of admissions policies at state universities, the courts have shown that the policies must meet these same standards.

*Legal definitions are from Wex, a free legal dictionary and encyclopedia sponsored and hosted by the Legal Information Institute at the Cornell Law School.*

<https://www.law.cornell.edu/wex>



## Admissions at the University of Texas

In 1998, the University of Texas at Austin implemented a two-tiered admissions policy for undergraduate applicants. The top tier was linked to the Top Ten Percent Law, under which all Texas high school students in the top 10% of their high school class were assured admission into any public university in the state. No more than 75% of the university's incoming class could be admitted under this law. This meant that the majority of the University of Texas's entering freshmen came from this first admissions tier.

For all other applicants (who competed for the remaining 25% of incoming spots), the university applied separate admissions criteria. These applicants were in the second tier. Admissions counselors evaluated a number of factors in the second tier, including standardized test scores, personal essays, examples of leadership, work experience, as well as race and ethnicity.

### Abigail Fisher

Abigail Fisher, a white Texan, applied to the University of Texas at Austin in 2008. She was not in the top 10 percent of her senior class, so her application was evaluated under the second tier of the admissions policy. The university denied her admission, and Fisher sued the university. She claimed that the university's consideration of race improperly influenced the outcome of her application.

Fisher argued that Texas's first-tier approach to undergraduate admissions — the Top Ten Percent tier — already achieved diversity in the classroom. Therefore, consideration of race in the second-tier admissions policy was unnecessary.

The University of Texas responded that the diversity gained from the first tier was largely due to racial segregation in Texas public school districts. By adding more variety *within* minority groups at the university, the second tier of the university's admissions approach supplied an extra and needed degree of diversity to the student body.

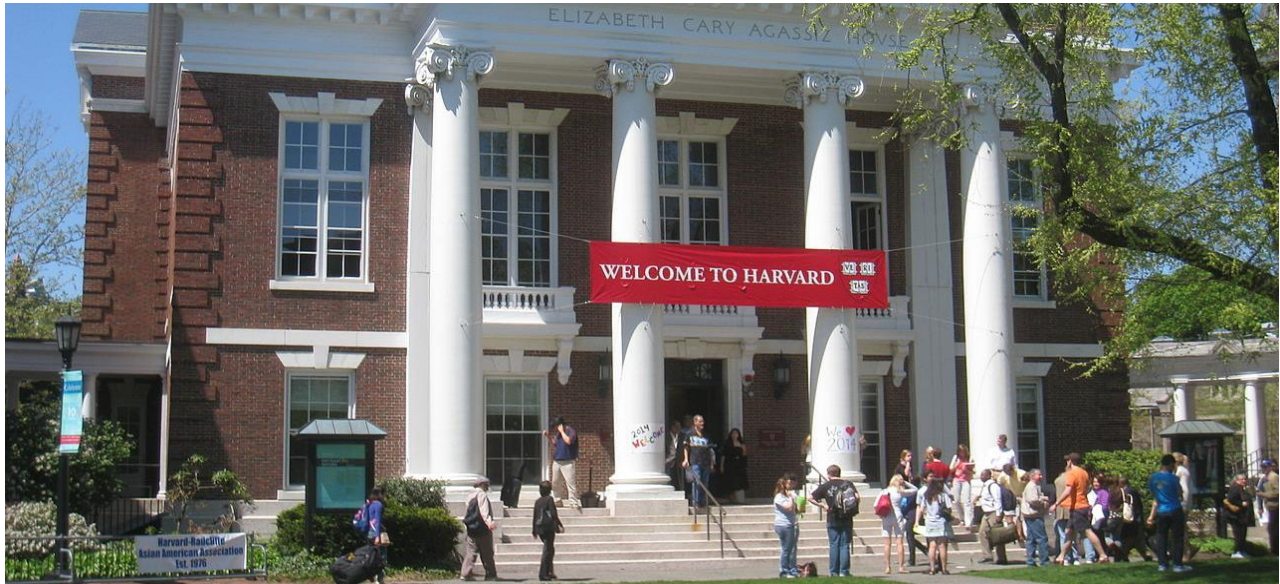
Both the District Court and the U.S. Court of Appeals agreed that the two-tiered admissions policy did not violate the equal protection clause of the 14th Amendment. Fisher appealed the lower courts' rulings to the Supreme Court, which accepted review of the case.

### *Fisher v. University of Texas*

When the Supreme Court first considered the *Fisher* case in 2013, its response was mainly a procedural one. It remanded (sent back) the case to the Court of Appeals because it did not apply the right standard of review (which was strict scrutiny) and had improperly deferred to the university's "good faith" in implementing the policy. The Supreme Court emphasized that federal courts have a duty to independently evaluate whether racial preferences in university admissions are "essential to its educational mission."

This decision set an important precedent. After *Fisher I*, lower courts would not be able to defer to a university's assessment that its own admissions formula was necessary to achieve a compelling state interest through narrowly tailored means.

In 2016, the Supreme Court once again heard the case of *Fisher v. Texas*. Once again, the Court of Appeals had reaffirmed the lower court's ruling that the admissions policy was constitutional. In a



Daderoy/Wikimedia Commons

4-3 decision, the Supreme Court decided that the use of race as one factor in the admissions process did not violate the equal protection clause of the 14th Amendment. Justice Anthony Kennedy described the consideration of race in this case as “but a factor of a factor of a factor.” (Justice Elena Kagan did not participate in the decision because she had been involved in the case before becoming a Supreme Court justice.)

## Current Legal Challenges to Affirmative Action in College Admissions

Since *Fisher*, one of the most high-profile challenges to affirmative action has been a lawsuit brought against Harvard University by an organization called Students for Fair Admissions (SFFA). The case against Harvard had an important factor in common with *Fisher*’s case. SFFA’s founder and president Edward Blum was the person who recruited Abigail Fisher to challenge the University of Texas’s admissions process in court. Blum and SFFA have also mounted legal challenges to the admissions policies at the University of North Carolina at Chapel Hill.

In a 2017 interview with the podcast *More Perfect*, Blum explained the mission of his organization: “The ultimate goal is to have the Supreme Court . . . end the use of race and ethnicity [in college admissions] once and for all. That’s the goal of this organization, and this organization will stay active until that happens.”

The Harvard case represented a different approach to challenging affirmative action. In this case, SFFA was charging that Harvard’s admissions policies discriminated not against white students, but against Asian American students. The Harvard case was also different from previous lawsuits because it targeted the policies of a private, rather than a public, university. (The Civil Rights Act of 1964 provides similar protections in the context of private universities, like Harvard, as the equal protection clause provides in the context of public universities.)

Harvard is one of the most prestigious universities in the world. Competition for undergraduate admission to this storied institution is fierce. In the round of applications for the class of 2022, 42,749 students applied, but only 2,024 were admitted. The vast majority of these applicants are highly qualified. Indeed, among domestic U.S. applicants in 2015 (for the class of 2019), more than 8,000 had a perfect grade point average. In that year, Harvard accepted 1,990 students to its freshman class.

In its case against Harvard, SFFA alleged that the university’s admissions policies were overly subjective and implicitly biased against Asian-Americans. Harvard’s policies include the

calculation of a “personal score” based on a range of character traits. Harvard argued that its admissions process is “nuanced” (as described in the *Boston Globe*) and designed to ensure a diversity on campus. Harvard claimed that SFFA examined and cited statistical data only selectively in order to support its claims of discrimination against Asian-Americans.

In her October 2019 ruling, U.S. District Court Judge Allison Burroughs described Harvard’s admissions policy as “not perfect” but held that it was constitutional. Her decision spelled out that “the Court is unable to identify any individual applicant whose admissions decision was affected and finds that the disparity in the personal ratings did not burden Asian American applicants significantly more than Harvard’s race-conscious policies burdened white applicants. Further, *there is no evidence of any discriminatory animus or conscious prejudice*” (emphasis added). In other words, upon examining the evidence presented, she did not see any one case of an Asian-American student who was denied admission because of Harvard’s policy. Furthermore, she did not see any evidence of the kind of bias SFFA had claimed existed, including any deliberate attempt by Harvard to discriminate against Asian-American applicants. SFFA announced immediately after Judge Burroughs’s ruling that they would appeal the decision.

## Operation Varsity Blues and Public Opinion

The issue of fairness in college admissions has received extra public attention since the Justice Department announced Operation Varsity Blues in March 2019. This criminal investigation exposed a multimillion-dollar bribery scheme by wealthy parents to ensure their sons and daughters admission at elite universities, such as Georgetown University, Yale University, the University of Texas, and the University of Southern California. U.S. Attorney Andrew Lelling said the case “is about the widening corruption of elite college admissions through the steady application of wealth combined with fraud.”

Some of the same issues in debates over affirmative action appear in the Operation Varsity Blues scandal. Shortly after the scandal broke, Brookings Institution fellow Andre Perry, Ph.D., wrote an essay in which he stressed that elite universities have always been deliberately exclusive places to which highly qualified people of color (and women) had to fight to be admitted at all. Opponents of affirmative action, such as Edward Blum, often argue that beneficiaries of affirmative action are “taking spots” at colleges and universities that should belong to someone else. But Perry counters that wealthy parents have been much more likely to distort the admissions process than, for example, students whom the University of Michigan labelled “underrepresented minorities.”

The context of SFFA’s cases and the continued fallout from Operation Varsity Blues is important. Public opinion of affirmative action in the United States is divided, but support might be on the rise. A Gallup poll released in February 2019 showed that when asked if they favor affirmative action programs “for racial minorities,” 61% of Americans said yes. The poll also showed for the first time that a majority of white Americans (57%) indicated that they support affirmative action programs. A Pew Research Center survey also released in February 2019, however, showed that 73% of Americans say “race and ethnicity” should not be a factor in college admissions, and only 7% say race should be a “major factor” in college admissions.

What accounts for the different statistics? Writing for *The Chronicle of Higher Education*, Eric Hoover argues that it depends on how the question is asked. When Gallup asks generally if Americans support “affirmative action,” they will tend to say “yes.” The term “affirmative action” itself is positive. But when Pew Research Center asks specifically about affirmative action *in college admissions* and asks about specific factors, from race to grades to community service, then Americans tend to favor grades above all else. According to Pew, college graduates are more likely to say that race should be a factor in college admissions.



# The Board of Trustees

In this activity, you are a trustee of a public university charged with setting, among other things, the admissions policy for the university. You and your fellow trustees will decide on the goal of the admissions policy and address the question of affirmative action at the school.

1. With your fellow trustees, you should do the following:
  - a. Discuss and answer this question: *What should be the goal of the admissions policy at our university?*
  - b. Look at each of the proposed policies on affirmative action and discuss the pros and cons of each.
  - c. Decide which policy your university should adopt. If none of the listed policies are attractive, combine policies or create your own.
  - d. Be prepared to report on your decisions and the reasons for them.
2. Each group should report its decisions and the class should discuss them.

## Proposed Policies on Affirmative Action

1. **Top Ten Percent.** Adopt a policy similar to Texas' Top Ten Percent Law (see Handout A for details).
2. **Race or Ethnicity as a Plus Factor.** Adopt an affirmative action program that makes race a plus factor, but not the only factor, in determining admission.
3. **Class-Based Affirmative Action.** Give applicants a plus factor if they are from low-income families.
4. **Grades and Test Scores Only.** Base university admission on high school grades and SAT scores only.

# Analyze on Your Own

## Affirmative Action & Equal Protection

Considering the history and application of the 14th Amendment by the courts, as well as past U.S. Supreme Court rulings on affirmative action in university admissions, examine the following two quotations. Then, answer the question in bold below.

*“The ultimate goal is to have the Supreme Court . . . end the use of race and ethnicity [in college admissions] once and for all. That’s the goal of this organization, and this organization will stay active until that happens.”*

-- SFFA Founder & President, Edward Blum  
in an interview with the WNYC podcast *More Perfect*

*“The Court’s decision [in the Fisher case] ensures that public universities, such as the University of Texas at Austin, may lawfully take steps to increase racial diversity on campus, thus fostering new opportunities for generations of children of all races while also helping advance a more just and tolerant society.”*

-- Statement of the National Association for the Advancement of Colored People (NAACP)  
on the Supreme Court Decision in *Fisher v. University of Texas*

**Which perspective do you think better reflects the guarantee of equal protection as required by the 14th Amendment? Explain your answer.**

Be sure to cite specific evidence from Handout A and from the role play (“The Board of Trustees”).