

Social Studies - Operational

Enduring Understanding: Equality is a balancing act that requires continual review and revision.

Race and the 14th Amendment

Essential Question: How has the 14th Amendment’s equal protection clause affected racial discrimination in the United States?

Lesson Overview

In this two-part lesson, students analyze manuscripts as primary sources on the application of the 14th Amendment’s equal protection clause to issues of racial discrimination in U.S. history. In Part I, students discuss a letter from George L. Vaughn to Thurgood Marshall, both attorneys in the U.S. Supreme Court case of *Shelley v. Kraemer* (1948), a case in which the 14th Amendment was applied to invalidate state enforcement of racial covenants that prohibited the sale of property to African Americans. Then, students closely read a few paragraphs from a pamphlet produced by the NAACP on the case of *UC Regents v. Bakke* (1978), a case invalidating quotas in affirmative action for medical school under the 14th Amendment’s equal protection clause. In Part II, students read and discuss a background briefing on affirmative action in higher education. Students conduct a role-play simulation activity on deciding the best admissions policy for a college to ensure equal protection of the laws.

Lesson Objectives

Students will be able to:

- Analyze in detail manuscript primary sources to determine the central ideas and the meaning of key words and phrases (e.g., “restrictive covenants” and “affirmative action”).
- Make inferences about the content, context, and relevance of the primary sources to the development of equal protection of the laws under the 14th Amendment to the U.S. Constitution.
- 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.
- Defend claims based upon text of primary and secondary sources in making policy-based arguments.

Lesson Materials

Part I

- Handout A: Source Analysis Questions (1 per student)
- “George L. Vaughn to Thurgood Marshall concerning *Shelley v. Kraemer*, January 13, 1947.” (1 per student)

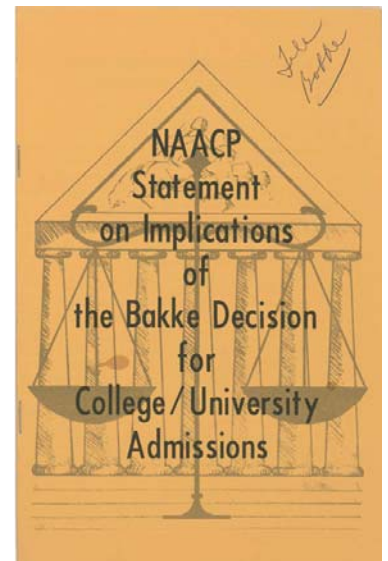
- Handout B: Close Reading of the NAACP Statement (1 per student)
- “NAACP Statement on the Implications of the Bakke Decision for College /University Admissions. Pamphlet. Baltimore: NAACP, [1978].” (1 per student)

Part II

- Handout C: Affirmative Action in American Colleges (1 per student)
- Handout D: The Board of Trustees (1 per student)

Sources

- “George L. Vaughn to Thurgood Marshall concerning *Shelley v. Kraemer*, January 13, 1947. Typed letter.” <http://www.loc.gov/exhibits/naacp/world-war-ii-and-the-post-war-years.html#obj12>
- “NAACP Statement on the Implications of the Bakke Decision for College /University Admissions. Pamphlet. Baltimore: NAACP, [1978].” <http://www.loc.gov/exhibits/naacp/a-renewal-of-the-struggle.html#obj8>



Lesson Prep

Part I

Copy Handouts A, B, and readings from the Library of Congress
Alternatively, students can read the documents at the URLs provided

Part II

Copy Handout C: Affirmative Action in American Colleges
Copy Handout D: The Board of Trustees

Lesson Implementation

Part I

A. Introduction

1. Explain to students that they are going to explore and answer the following question:

How has the 14th Amendment’s equal protection clause affected racial discrimination in the United States?

2. 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.

3. Tell students that these are the “due process of law” and “equal protection of the laws” clauses. Congress added them to the Constitution to protect freed slaves from discrimination in 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 the equal protection clause.

4. Tell students they are going to work individually and in small groups to examine primary sources that will help them answer the question.

B. Small Group Discussion of Racial Covenants

1. Divide students into pairs and distribute Handouts A and B. Pairs should read the source on Handout B and answer the Source Analysis Questions on Handout A. They should discuss with their partners the answers to the questions.

2. Brief Discussion

After students have had time to discuss the source in their pairs, tell them that the 1917 Supreme Court case of *Buchanan v. Warley* held that laws that racially segregated neighborhoods violated the equal protection clause. As a result, property sellers put racially restrictive covenants in deeds, so that homes could not be sold to black buyers.

Tell students that George L. Vaughn was an attorney in St. Louis representing J.D. Shelley, who was an African American home buyer. Fellow attorney Thurgood Marshall (who worked for the NAACP at the time) represented black home buyers in another case. In the letter, Vaughn was sharing information about the Shelley case with Marshall.

Eventually, both Vaughn’s and Marshall’s cases were united in the Supreme Court case of *Shelley v. Kraemer* (1948). The Supreme Court decided in that case that racial covenants themselves were not unconstitutional, but also that the equal protection clause prohibited state courts from enforcing them.

After debriefing the students on *Shelley v. Kraemer*, ask:

- What was the most interesting fact you learned in Vaughn’s letter?
- What did this letter tell you about equality in the United States?
- How does “equal protection of the laws” in the 14th Amendment apply in this case?

C. Close Reading of NAACP Statement

1. Distribute Handouts C and D. Read through the instructions on Handout C and answer any questions students may have.

2. Students should read through the entire source first, as described on Handout C. Students can complete all the parts of part 1 on Handout C for homework.

3. Review with students the answers to part 1, including the key terms. Check for understanding before continuing to parts 2 and 3.

4. Divide students into small groups. Students should complete parts 2 and 3 individually.

5. After students have completed parts 2 and 3, students should share their answers in their small groups. Each student should have a chance to speak and be heard in their small groups.

6. Brief Discussion

Tell students that the *Bakke* decision was the first of many Supreme Court decisions on the use of affirmative action programs in higher education (post-high school). Allan Bakke was a white applicant to medical school at UC Davis in California. When he was not accepted, he sued the university, citing the university's racial quota system for minority applicants. The court struck down the use of racial quotas in college and university admissions as violations of the equal protection clause. According to the court, equal protection of the laws protected minorities and non-minorities alike.

The court decided, however, that diversity in college classrooms is still a "compelling state interest." Affirmative action, therefore, was constitutional under the 14th Amendment (and the Civil Rights Act of 1964). Race could still be a factor in college and university admissions. As one of several factors, the use of race did not violate the equal protection clause.

After debriefing the students on *Bakke v. UC Regents*, ask:

- What was the most interesting fact you learned in the NAACP Statement?
- What did the Statement tell you about equality in the United States?
- How does "equal protection of the laws" in the 14th Amendment apply in this case?

Part II

A. Introduction

Explain to students that they will look more closely at the history of affirmative action since the *Bakke* decision.

B. Background on Affirmative Action and the 14th Amendment

Divide students into groups of five (groups of odd numbers of students work best for this activity). Distribute Handout E. Students should work individually to read Handout E.

Once all students have read Handout E, check for understanding by reviewing the answers with them:

C. Activity: Board of Trustees

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

2. Divide students into small groups. Each group is a board of trustees.

3. Each group should do the following:

- a. Discuss and answer this question: What should be the goal of the admissions policy at your 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.

4. Each group should report its decisions, and the class should discuss them.

Lesson Reflection and Assessment

1. Debrief the activity with the class. Ask:

- 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?
- How has the 14th Amendment's equal protection clause affected racial discrimination in the United States?

2. Writing Assessment

Have students write a three-paragraph essay answering the question:

What is the best policy colleges and universities should adopt to increase diversity on their campuses?

Have them use evidence from the primary sources, the secondary-source reading, and the policy proposals they discussed in their essay.

The essay should introduce and explain their claim in a thesis statement in the first paragraph. The next paragraph should include a topic sentence and address any alternate or opposing claims and explain the reasons for those opposing claims. Finally, the last paragraph should include a topic sentence and should evaluate the strengths and weaknesses of the student's original claim before concluding that that claim identifies the best policy.

Standards Alignment

Common Core State Standards

Reading in History/Social Studies

CCSS.ELA-Literacy.RH.11-12.1
CCSS.ELA-Literacy.RH.11-12.2
CCSS.ELA-Literacy.RH.11-12.3
CCSS.ELA-Literacy.RH.11-12.4
CCSS.ELA-Literacy.RH.11-12.5
CCSS.ELA-Literacy.RH.11-12.6
CCSS.ELA-Literacy.RH.11-12.10

Writing in History/Social Studies

CCSS.ELA-Literacy.WHST.11-12.1.A-D
CCSS.ELA-Literacy.WHST.11-12.7
CCSS.ELA-Literacy.WHST.11-12.9
CCSS.ELA-Literacy.WHST.11-12.10

ELA - Literacy: Speaking & Listening

CCSS.ELA-Literacy.SL.11-12.1
CCSS.ELA-Literacy.SL.11-12.3
CCSS.ELA-Literacy.SL.11-12.4
CCSS.ELA-Literacy.SL.11-12.6

C3 Framework

D2.Civ.9-12
D2.Civ.13-12
D2.His.3-12
D2.His.5-12
D2.His.12-12
D2.His.15-12
D2.His.16-12
D4.1-12

CA History-Social Science Standards

Historical and Social Sciences Analysis Skills (Grades Nine Through Twelve)

- Chronological and Spatial Thinking 1, 2
- Research, Evidence, and Point of View 4
- Historical Interpretation 1, 2, 4

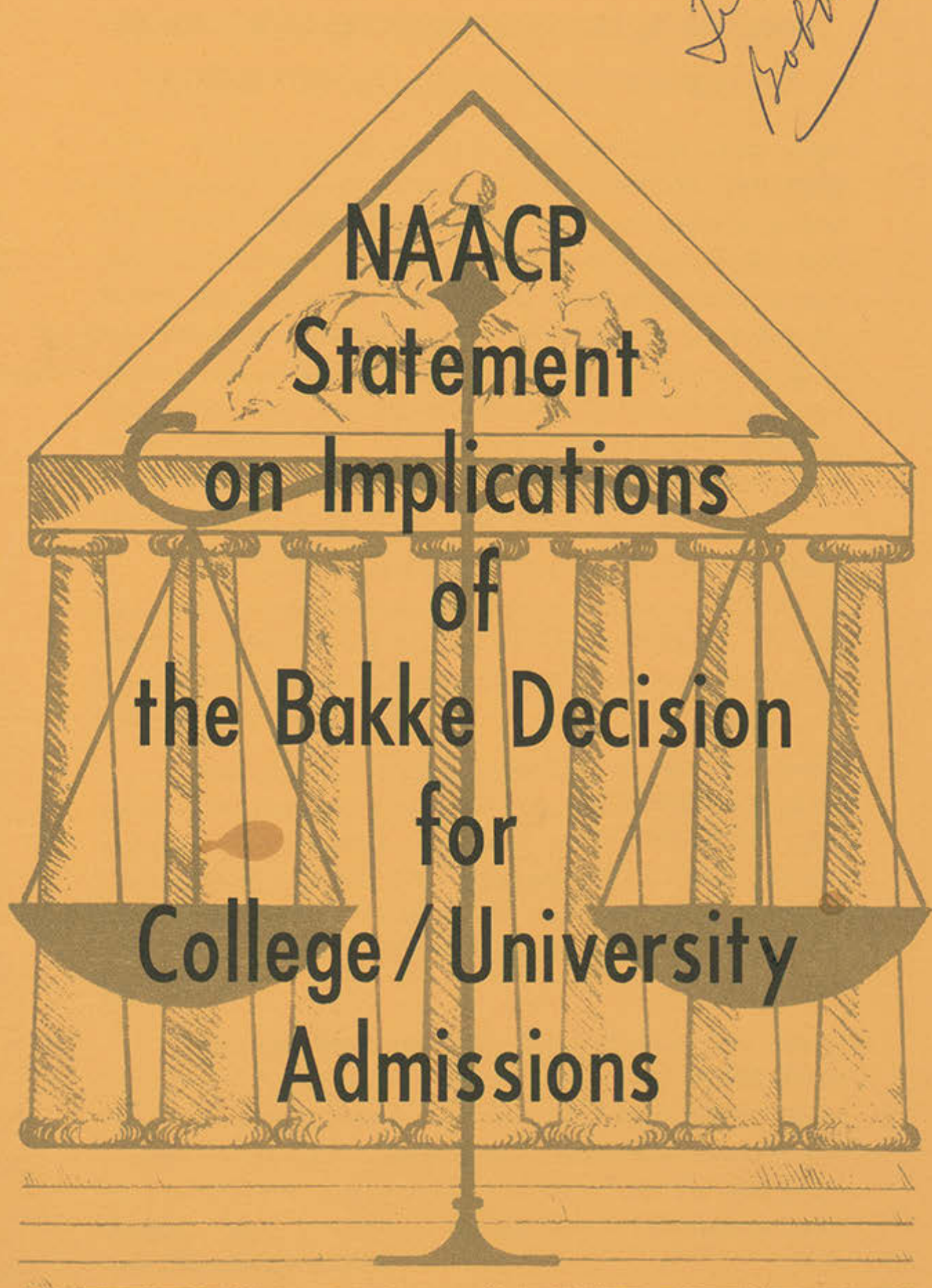
Content

- 11.10.2
- 11.10.3
- 11.10.4
- 12.5.1
- 12.5.4
- 12.10

IL Social Studies Standards

SS.IS.3.9-12
SS.IS.6.9-12
SS.IS.9.9-12
SS.CV.3.9-12
SS.CV.4.9-12
SS.CV.7.9-12
SS.CV.8.9-12
SS.H.1.9-12
SS.H.3.9-12
SS.H.5.9-12
SS.H.7.9-12
SS.H.8.9-12
SS.H.9.9-12

*File
Bakke*



**NAACP
Statement
on Implications
of
the Bakke Decision
for
College / University
Admissions**

NAACP Statement on the Implications of the Bakke Decision for College /University Admissions. Pamphlet. Baltimore: NAACP, [1978]. NAACP Records, Manuscript Division, Library of Congress (140.00.00) Courtesy of the NAACP
[Digital ID # na0140p1]
<http://www.loc.gov/exhibits/naacp/a-renewal-of-the-struggle.html>

NAACP STATEMENT ON IMPLICATIONS OF THE BAKKE DECISION FOR COLLEGE/UNIVERSITY ADMISSIONS

The NAACP has carefully reviewed the decision of the U.S. Supreme Court in the case of **Allan Bakke vs. University of California Board of Regents** and has concluded that educational institutions need not be chilled, confused, or deterred in their good-faith efforts to promote equal opportunity in college/university admissions. It is clear that the Court has upheld the use of **race** as an important factor in order to integrate the student body, and the professions. It has therefore, approved explicitly the underpinning of (voluntary) affirmative action plans, that take race into account as a means of insuring opportunity for racial minorities.

The **Bakke** decision itself was very narrow, and limited to voluntary affirmative action plans connected with **admissions** programs of institutions of higher learning. In the Court's decision, the nine Justices could agree on very little, even in this limited field.

Four Justices (Burger, Stevens, Stewart, and Rehnquist) wrote opinions stating that the **constitutionality** of affirmative action or quotas was **not** involved in the **Bakke** case. Their opinion was that Title VI of the 1964 Civil Rights Act required absolute color-blindness, and that Bakke was discriminated against. **Their view of the case was rejected by the majority.**

Four Justices (Marshall, White, Brennan and Blackman) wrote that the statute and its regulations **require** affirmative action plans where minorities have been absent from a program in the past. Their opinion states that not only can race be constitutionally used as a factor, but that the Davis Medical School program of making race a controlling factor was **not** unconstitutional.

Justice Powell wrote the **controlling** opinion, and stated that whenever race is used to decide who gets admitted to an educational institution, it must be for a legitimate purpose, (to promote diversity in the student body) and it must be used in such a way so as not to be the sole or controlling factor so as not to exclude others (non-racial minorities) completely. Justice Powell indicated that the applications of racial minorities by virtue of their minority status may be given extra weight in order to integrate the class. He felt that the Davis Medical School's affirmative action plan was too rigid, in that it excluded non-minorities altogether from any consideration and was, in his view, therefore, unconstitutional. Justice Powell therefore joined the four Justices who voted that the Davis Plan should not be approved, but he then joined the other four Justices who voted that race may be used under proper circumstances.

Affirmative Action plans, goals, and timetables and quotas are used in a variety of situations. Some (as was the case at Davis Medical School) are voluntary; some are required by state and federal statutes; and others are ordered by courts. Justice Powell indicated that if there had been any evidence of discrimination prior to the Davis special admissions program that set aside 16 seats for racial minorities, the program **would** have been approved.

The **Bakke** decision of the Supreme Court clearly indicates the following state of the law:

1. If any employer, school system or other public agency is sued in court and the court finds that illegal racial discrimination has existed, the court has the authority to order affirmative action remedies, including goals and timetables, quota hiring and promotions and teacher and pupil assignments based on race.

2. If a racial discrimination lawsuit is **settled** without going to trial, as part of the settlement (consent decree) the court may approve goals or quotas.
3. If a federal, state or local legislative body determines that racial exclusion has existed in some program and passes a law requiring affirmative action plans using race factors, that law will be held constitutional.
4. If an administrative agency (such as HEW, Department of Labor, or HUD) investigates a program or an industry and has reason to believe racial exclusion has taken place, its affirmative action requirements including goals and timetables based on race will be upheld.
5. If an employer, union, or public agency decides to adopt an affirmative action plan for the purpose of bringing racial and cultural diversity to its workforce or program, may base its decisions concerning employment or admissions partly on race provided:
 - a. all qualified applicants have a chance to compete;
 - b. minority race may be considered "a plus" or be given extra weight, but it cannot be the exclusive, controlling factor;
 - c. the use of race must be part of a "flexible" evaluation system;
 - d. race must be used in a way that genuinely includes minorities in, not as a subterfuge for racial exclusion.

It is important to understand that the qualifications

listed above apply only when there is **no** finding or evidence of past racial exclusion. If there is evidence of past exclusion on the basis of race, greater reliance on racial factors to remedy past illegal conduct is appropriate.

While the NAACP argued to the Supreme Court in support of the Davis "special admissions" program and we consider the Court's rejection of that program to be a major disappointment, it was by no means a defeat for effective affirmative action programs. The most serious harm done by the **Bakke** decision lies in the public misconception of the case. People who have never approved of affirmative efforts to integrate our society and those who will attempt to dismantle existing affirmative action plans may seek support in the fact that the Court ordered that the Davis plan be altered. For them, however, the **Bakke** case is more a symbolic victory than an actual one. Actually, minority status as a "plus" factor to be given extra weight in a selection process, in order to produce racial and ethnic diversity, has been held to be constitutionally valid. It is important to understand this central fact concerning the case so that a national misunderstanding of **Bakke** does not take hold.

We encourage all educational institutions to renew their commitment to affirmative action and to indicate that commitment through public announcements, and by stepping up efforts to increase the representation of racial minorities in their student bodies, faculties, and administration.

A dual track admissions program which sets aside a specific number of positions for minority applicants is not unlawful where there **has** been past discrimination.

The NAACP recognizes that there are some new colleges and universities on the horizon which will claim that they have not practiced racial discrimination, and that low,

if any, representation of minorities in their classes is due entirely to neutral or racially unbiased decision making. However, the NAACP believes that societal discrimination against blacks is as much at issue, and to be corrected, as much as any single institution's past behavior. The U.S. Supreme Court, in the **Bakke** decision, overlooked this important consideration, mainly that the California State University system had long discriminated against blacks and other racial minorities.

At the Davis Medical School, only one black was admitted since it opened its doors, before the special admissions program. With the Minority Student Program that set aside 16 seats for racial minorities only 4 blacks were admitted in 1971, 5 in 1972, 6 in 1973, and 6 in 1974. No black students were admitted through regular admissions during these years.

This pervasive pattern of exclusion and discrimination was as much "state action" as it was the practice of any one educational institution in the State.

In the same context, when the State could have offered aid, support, and inducements to promote racial integration at its educational units, it instead created and established new units. In lieu of providing proper resources to enroll substantial numbers of black and brown students, there surfaced in California the incredulous assertion that these "new" institutions -- such as Davis Medical School -- have not existed long enough to have a discernible record of past discrimination to justify an affirmative action (race-conscious) remedy. Evidence is overwhelming and convincing that blacks have been excluded from professional schools and careers as a consequence of state-actions.

Moreover, because of the documented failure of most public school systems across the nation to efficiently and

properly educate black students, the need for recognizing extraordinary and superior effort on the part of black youth to overcome educational deficiencies is compelling for affirmative action. In this regard, admission to the college or professional school is not enough, but only the first step. Schools must be prepared and committed to providing supportive services for each student who desires it, including adequate financial aid, counseling, and tutorial assistance, in a non-segregated, unstigmatizing manner. This does **not** contemplate a lowering of standards at all, - but a commitment to eliminating artificial and arbitrary barriers to equal opportunity for all.

An affirmative action program in education that seeks to increase the representation of racial minorities must set goals and timetables to measure the effectiveness of its recruitment, admissions, and retention efforts. The NAACP supports the use of goals and timetables appropriate for the school and community that insure fair representation of racial minorities, and moves beyond the tokenism which aggravates racial isolation on campus.

A properly functioning affirmative action program does not treat all black students alike. All minority or black students should not be placed in "special admissions" categories or programs and, thereby, viewed as economically or educationally disadvantaged "because" they happen to be black. Such policies are the door to a dungeon, and are likely to lead to the segregation and stigmatizing of black students.

The NAACP has long been concerned about this practice of educational institutions to stigmatize all black students, regardless of their qualifications, by placing them in so-called "special admission" categories. It is curious that at a time the nation and media have concentrated their attention on so-called "reverse discrimination," -- code words for

making out a case that whites are being deprived of some right -- no one has addressed the **double-wrong** done to blacks who are automatically placed in so-called special categories, and thereby systematically deprived of their rights to enjoy a reputation as scholars, and persons unquestionably qualified for admission to professional schools.

For example, the black student who graduated from Davis Medical School with highest honors was a graduate of Stanford University after only three years of matriculation -- a feat which required exceptional talent and performance in and of itself. She had also taken a master's degree, before going to medical school. Yet this exceptionally qualified scholar, because she was black, was admitted as a "special student" at Davis Medical School. This is a further indication, that white institutions continue to raise their standards for blacks and view blacks differently from white applicants, irrespective of qualifications.

Programs designed to reach the high potential underachiever have been used instead to admit the best qualified of the minority applicants, and the brightest black students are then stigmatized as "special-admittees." That is, at best, a deceitful and harmful practice, depriving a student who should be given "special consideration" of that opportunity because the highly qualified black is admitted in his place. It is a double-wrong, because the high-potential underachiever of whatever race is denied equal opportunity, and the black high-achiever is denied his justified place among scholars.

In no case, should the route of a student's admission to the school attach a stigma, or follow him throughout his matriculation. Affirmative action required to recruit, admit, and retain minority students must be part of an overall commitment to integrate the student body, faculty, and curricula, and to make "qualifications" for access more realistic, reliable

NAACP Statement on the Implications of the Bakke Decision for College /University Admissions. Pamphlet. Baltimore: NAACP, [1978]. Page 5. NAACP Records, Manuscript Division, Library of Congress (140.00.04) Courtesy of the NAACP [Digital ID # na0140p5] <http://www.loc.gov/exhibits/naacp/a-renewal-of-the-struggle.html>

indicators of ability and potential.

Wherever admissions procedures are re-cast and clarified so as to insure the increased representation of racial minorities, there ought to be, as a matter of educational policy, **less** reliance on standardized (aptitude) test scores, and more consideration of more reliable factors of achievement, capability and potential, such as grades, letters of reference and recommendation, community service, extra-curricular activities, and evidence of the candidates having overcome handicaps or disadvantage to the point of being self-motivated and persistent in attainment of academic and personal achievement.

If you have any questions whatsoever please contact the National Office of the NAACP.

Margaret Bush Wilson, Chairman NAACP
National Board of Directors

Dr. Montague Cobb, President

Benjamin L. Hooks, Executive Director

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trialization Center of Huntington, West Virginia.

Handout A

Source Analysis Questions

Source: "George L. Vaughn to Thurgood Marshall concerning Shelley v. Kraemer, January 13, 1947"



What do you notice about this text first?

What kind of document is it?

Who created it? Where was it created? When was it created? What was the purpose of this text?

Describe anything about this text that looks strange or unfamiliar.

What can you tell from the text about what a restrictive covenant is? Why is the author concerned about restrictive covenants?

What does the text tell you about the effect of restrictive covenants in St. Louis?

What else can you learn from examining this text?

What do you wonder about after reading the text? (Who? What? When? Where? Why? How?)

GEO. L. VAUGHN

ATTORNEY AND COUNSELLOR-AT-LAW

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2216 Market St.

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J A N

1 3

1947

145 JAN 15 '47

Mr. Thurgood Marshall
Special Counsel for N.A.A.C.P.
20 W. 40th St.
New York, 18, N. Y.

Dear Mr. Marshall:

On my return to the city after the holidays, I received your letter of December 30, 1946, and I am herewith making acknowledgment of the same, and thanking you for it.

I am enclosing herewith a copy of the Opinion of the Court in the recently decided case of Kraemer et al versus Shelley et al; also a copy of my Motion for a Rehearing and for Modification of the Opinion and Decision, as well as of the Suggestions in Support thereof.

As to your request for a copy of my Brief, I am sorry that I am unable to comply with it, for the reason that I was cut short in the number furnished me by the printers and the call for same has been heavy. I am now down to the minimum number of copies necessary for me to work with. However, I am sending you herewith a copy of the points in the Statement, Brief and Argument of Respondents in which the various federal questions were raised. In addition to these federal questions, I have raised still another in my Motion for a Rehearing as you will note by reference to paragraphs 1 and 7 of the Motion for Rehearing.

In Respondents Return and Answer to the Petition of the plaintiff, among other defenses, the ruling in *Gandolfo versus Hartman*, 49 Fed. 181, that, "Any result inhibited by the Constitution can no more be accomplished by Contract of individual citizens than by legislation, and the courts should no more enforce the one than the other," was pleaded and the application of that rule to the facts in this case invoked. It was further pleaded that restrictive agreements and restrictive covenants in deeds had been resorted to since the ruling in *Buchanan versus Warley*, 245 U. S. 60, as a means of bringing about residential segregation and of creating ghettos in Missouri and the city of St. Louis and else where; that the Negro population in St. Louis had increased from 40,000 in 1910 to more than 117,000 in 1946, and that the area occupied by Negroes in said city had been restricted by means of these agreements and covenants to practically the same size as that occupied by them in 1910, resulting in gross over-crowding and increased ill health, disease, crime, moral and juvenile delinquency and death and the court was asked to exercise its

Page one

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Mr. Thurgood Marshall 1-13-47 Page two.

power and jurisdiction to eliminate said conditions and to afford relief from said dire results.

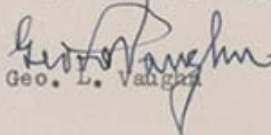
These additional facts may help to throw further light on this case. Since the agreement was signed in 1911 numerous Negro families have moved into the city blocks in question, successively occupying various parcels of property, with one Negro family succeeding another, all without complaint or action on the part of the signers of said agreement or their assigns. Of course, these are state questions but they do throw additional light upon the situation.

I shall be happy to confer with you further about this case, as well as to have you enter it. The Supreme Court of Missouri has taken no action so far on my Motion for Modification and for Rehearing, but as soon as any thing is done I shall immediately notify you.

The decision was rendered by the court En Banc, so that it will be unnecessary to file a Motion for Transference, since that is the highest court in this state having jurisdiction of the question involved.

With best wishes, I beg to remain,

Respectfully yours,


Geo. L. Vaughn

GLV:mm

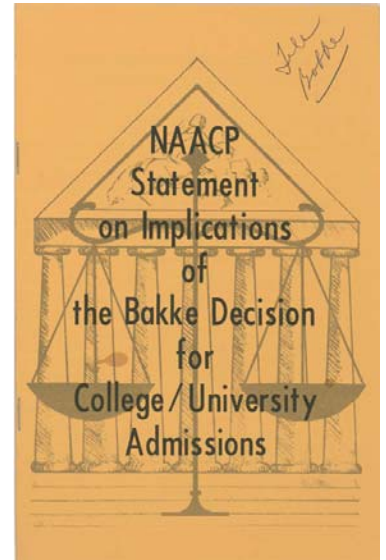
ENCLOSURES: ~~Three~~ Four
(Opinion, 7 pages;
Motion Rehearing, 7 pages,
Statement, 4pages.)
Suggestions, 7 pages.

Close Reading of NAACP Statement

Source: "NAACP Statement on the Implications of the Bakke Decision for College /University Admissions. Pamphlet. Baltimore: NAACP, [1978]"

1. Read through the entire NAACP Statement without stopping to think about any particular section. Pay attention to your first impression as to what the Statement is about. Also, look up the definitions for the key terms below used in the Statement. Pay attention to how these terms are used in the Statement.

Describe anything you see on the page besides words, such as images or decorations.



What do you notice about this text selection first?

Who created it? Where was it created? When was it created? What was the purpose of this text?

Describe anything about this text that looks strange or unfamiliar.

Key Terms

quota

affirmative action

admissions

2. Re-read the *first six paragraphs* of the Statement. Underline the main points. Circle words or phrases that are unknown or confusing to you. Write down any questions or comments you have in the margins.

3. Next, briefly answer the following questions on the first six paragraphs.

What can you tell from the text about the Supreme Court decision in *Bakke v. University of California Board of Regents*?

What does the text selection tell you about the use of affirmative action in medical school admissions?

What can you tell about the variety of opinions on the Supreme Court in this case?

What else can you learn from examining this text?

What do you wonder about after reading the text? (Who? What? When? Where? Why? How?)

Affirmative Action in American Colleges After *Fisher v. Texas*

In 2003, the Supreme Court issued two landmark affirmative action decisions in *Gratz v. Bollinger* and *Grutter v. Bollinger*, both cases stemming from practices at the University of Michigan. The majority of the court in *Gratz* held that the university's point system in undergraduate admissions violated the equal protection clause. The majority in *Grutter* upheld the university's law school admissions policy that used race and ethnicity as a plus factor.

After the *Gratz* and *Grutter* decisions, the University of Texas at Austin enacted a two-tiered admissions approach for undergraduate applications. The top tier was linked to the Top Ten Percent Law passed by the state legislature in the mid-1990s. Under this law, all Texas high school students in the top 10 percent of their high school class are assured admission into any public university in the state. The majority of the University of Texas' entering freshmen come from this admissions tier.

For those applicants who do not fall within the top tier, the university applies a separate admissions criteria. Admissions counselors evaluate a greater number of factors than class rank when looking at applications in the second tier. The University of Texas reviews factors such as standardized test scores, personal essays, examples of leadership, work experience, and race and ethnicity when making admissions decisions in the second tier.

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

Fisher argued that Texas's top tier approach to undergraduate admissions — the Top Ten Percent tier — already achieved a "critical mass" of diverse perspectives in the classroom. Therefore, the additional consideration of race in the second tier admissions policy was unnecessary.

The University of Texas responded that the diversity gained from the Top Ten Percent tier is largely due to the school segregation present in Texas public school districts. By adding more variety *within* minority groups at the university, the second tier of the university's admissions approach supplies an extra degree of diversity to the student body.

Both the district court and the court of appeals ruled that the University of Texas's two-tiered admissions approach fit within the constitutional framework set up by *Bakke* and *Grutter*. It

thus 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

In a 7-1 opinion, the court majority upheld *Gratz* and *Grutter* in key respects. According to Justice Anthony Kennedy, who wrote the majority opinion, the academic and professional benefits that arise from a diverse classroom are still considered to be a compelling government interest. Additionally, racial preferences are still constitutionally permissible in some contexts.

Justice Kennedy instructed public universities to consider race-neutral paths to achieve diversity. *Bakke* had asserted that race-conscious policies were permissible only if they were able to achieve a compelling state interest "with greater precision than any alternative means." According to the majority, a race-conscious admissions approach must be "necessary" for a university to achieve diversity, and no other "workable race-neutral alternatives" are available to achieve diversity.

The Supreme Court, however, remanded (sent back) the *Fisher* case to the Fifth Circuit Court of Appeals because the lower courts had not been thorough in their review. The lower courts had deferred to the university's judgment that it had made a good faith effort in narrowly tailoring its admissions criteria. But the majority in *Fisher* rejected this passive judicial approach and argued that it is the duty of federal courts to determine whether racial preferences in the particular university are "essential to its educational mission."

In their concurring opinions, Justice Scalia and Justice Thomas went further than the majority on the question of affirmative action. These justices believe that all racial preferences in higher education admissions decisions are indefensible under the 14th Amendment.

Justice Ginsburg provided the lone dissent in *Fisher*. In her opinion, she asserted that the University of Texas's two-tiered admissions approach followed the *Grutter* precedent and ought to be deemed constitutionally appropriate.

Practical Consequences of *Fisher*

In many ways, the *Fisher* decision represents a judicially moderate opinion. Instead of attacking the controversial topic of affirmative action head-on, the court opted for an indirect approach, focusing on questions of judicial procedure and keeping the *Bakke*, *Gratz*, and *Grutter* precedents intact.

In fact, after hearing the court's decision, the University of Texas responded, "Today's ruling will have no impact on admissions decisions we have already made or any immediate impact on our holistic admissions policies."

Although the University of Texas feels comfortable with its current admissions policies, many legal scholars believe that the *Fisher* decision will make universities even more leery about how they incorporate racial preferences into admissions decisions. Pressure will be placed on universities to demonstrate clearly the need for affirmative action programs.

Fisher may deter universities from using race-conscious admissions criteria. Instead, pressured by conservative voters and legal groups about the empirical justification for racial preferences, universities likely may begin emphasizing applicants' socioeconomic status and family data in order to earn greater diversity in the classroom.

Fisher tremendously affects federal courts also. Lower courts will have to be more meticulous when deciding cases regarding affirmative action in higher education. Courts will be required to subject public universities' admissions policies to the strict scrutiny requirements. They will not be able to defer to a university's assessment that its own admissions formula is necessary to the achievement of a compelling interest and that the university implements the formula using narrowly tailored means. Courts now must discern the necessity of race-conscious policies, case-by-case.

In 2016, the Supreme Court once again heard the case of *Fisher v. Texas*, this time after the federal court of appeals had reaffirmed the lower court's ruling that the admissions policy was constitutional. In a 4-3 decision, the Supreme Court decided that the use of race as a factor in the admissions process did not violate the equal protection clause of the 14th Amendment.

The Board of Trustees

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

1. Form small groups. Each group is a board of trustees.
2. Each group should do the following:
 - a. Discuss and answer this question: What should be the goal of the admissions policy at your 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.
3. 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 article for details).
- 2. Race or Ethnicity as a Plus Factor.** Adopt an affirmative action program similar to that of the University of Michigan Law School (see article for details).
- 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.