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Teaching Strategies & Assessments to Disrupt Implicit and Explicit Bias
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Sample Case Brief:

The Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978)

Procedural Posture: After being denied admission to the Medical School at the University of California, Davis for the second time in 1974, Allan Bakke brought suit against the Regents of the University of California in state court. Bakke's complaint requested mandatory, injunctive, and declaratory relief to compel his admission to the Medical School, and alleged that Davis' special admissions program worked to exclude him from admission on the basis of his race in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, the California Constitution, and section 601 of Title VI of the Civil Rights Act of 1964. The Regents of the University of California cross-claimed for a declaration that its special admissions program was lawful.

The state trial court ruled for Bakke, finding that the special admissions program operated as an unconstitutional racial quota because it reserved 16 of 100 spaces for financially and educationally disadvantaged students, and insulated them from competition with the whole of the admissions pool. The court also found that the special admissions program violated Title VI of the Civil Rights Act of 1965. The court went on to declare that the University could not take race into account in any admissions decisions, but that Bakke was not entitled to admission to the medical school because he could not prove that but for the special admissions program he would not have been admitted.

The Supreme Court of California granted certiorari. In considering the issue of the whether the special admissions program was Constitutional, the Court applied a strict scrutiny analysis to the Equal Protection Clause claim. It found that the special admissions program violated the Equal Protection Clause because it was not the least intrusive means of achieving the compelling state interests of integrating the medical profession and increasing the number of physicians serving minority populations. It also ordered Mr. Bakke's admission to medical school because the University could not show that Mr. Bakke would not have been admitted but for the special admissions program.

The Supreme Court of the United States granted certiorari and issued a plurality opinion finding: (1) the special admissions program to be unconstitutional and violative of Title VI and the Equal Protection Clause under a strict scrutiny analysis; (2) it Constitutionally permissible for universities to use race as a factor in admissions to address substantial and chronic minority underrepresentation; and (3) Mr. Bakke was entitled to admission to the medical school because the University could not prove that but for the special admissions program he would not have been admitted.

Facts: In 1968, the Medical School at the University of California, Davis opened with a class of 50 students. *(p. 272)* Three years later in 1971, the class size increased to 100 students. *(p. 272)* Between 1971-1973, the faculty developed a special admissions program to operate in tandem with its regular admissions program. *(pp. 272-273)* The special admissions program was specifically designed to address the underrepresentation of disadvantaged students in the entering class. *(p. 272)* Under the regular admissions program, prospective students submitted their applications in the July preceding the Fall class they wished to enter. *(p. 273)*. Due to the large volume of applications, the medical school used a pre-screening process to tighten the viable pool of applicants. Applicants with grade point averages of less than 2.5 on a 4.0 scale were rejected. *(p. 273)*. 1/6 of the applicants were invited for personal interviews. *(pp. 273-274)* After the interviews were completed, the persons conducting the interviews and other members of the admissions committee ranked each interviewee on a scale of 1 to 100. *(p. 274)* The rankings took into account the following: interview summaries, MCAT scores, general GPA, GPA in science courses, letters of recommendation, extracurricular activities, and geographical data. *(p. 274)*. In 1973 a perfect score was 500 (there were 5 voting members on the admissions committee), in 1974, 600. *(p. 274)* The full committee made offers of admission on a rolling basis. *(p. 274)* The chair of the committee placed names on a waiting list. *(p. 274)* These names were not ranked in order of preference, but the chair was free to include people who were deemed to possess "special skills." *(p. 274)*

The special admissions program operated under a special admissions committee staffed by predominantly minorities. *(p. 274)* The application form for 1973 asked candidates to indicate whether they wanted to be considered as "economically and/or educationally disadvantaged applicants"; the application form for 1974 asked candidates whether they wanted to be considered as members of a minority group (Blacks, Chicanos, Asians, and American Indians). *(p. 274)* If the applicant answered yes to any of these questions, then the committee considered them for admission under the special admissions program. *(p. 274)* No policy defined "disadvantaged"; rather, the chairperson of the special committee screened each application to assess whether the applicant demonstrated "economic or educational deprivation." *(pp. 274-275)*. Aside from this process, the path to admissions for candidates followed pretty much the same as for applicants considered under the general admissions process. *(p. 275)* The main differences were that applicants considered for special admissions did not have to meet the 2.5 or above G.P.A. requirement and 1/5 of special admissions applicants (as opposed to 1/6 of regular applicants) were granted an interview. *(p. 275)* After the interviewing process, the special admissions committee assigned a score to special admissions applicants and then forwarded the most desirable candidates to the regular committee. *(p. 275)* No further ranking or scoring occurred at this point; special admissions applicants were not considered in comparison to general admissions applicants. *(p. 275)* However the general admissions committee could reject applicants that did not meet course requirements or whose applications had further deficiencies. *(p. 275)* The special admissions committee recommended applicants until the seats reserved for special admissions candidates were filled (16). *(p. 275)* No white people were admitted under the special admissions program during the time in question, despite designating themselves as disadvantaged. *(p. 276)*.

Allan Bakke applied to the medical school in 1973 and 1974, and was considered under the general admissions program in both years. *(p. 276)* He was rejected in both years and was not placed on the waiting list. *(p. 276)* In 1973 and 1974, applicants were admitted to the

medical school under the special admissions program whose GPAs and admissions scores were significantly lower than Mr. Bakke's. *(p. 276)*

Issue: Under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, the California Constitution, and § 601 of Title VI of the Civil Rights Act, is a special admissions program for a state university's medical school both an impermissible racial quota and race conscious admissions policy when (1) the state's purpose in enacting the program was to help integrate the medical profession and increase the number of doctors serving minority patients; (2) applicants considered under the special admissions program were only rated against each other and not the general admissions pool; (3) the program set aside a defined number of seats for economically and/or educationally disadvantaged and racial and ethnic minority students for which only those students could compete; and (4) a number of white students applied under the program but none were admitted?

RD:

Synthesis of Authorities *(Racial Quota)*

The Fourteenth Amendment provides that: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." *(p. 289)* The Supreme Court of the United States has consistently held that rights guaranteed by the Fourteenth Amendment are individual, personal rights and must be applied to individuals equally. *(p. 289- 290)* Classifications of individuals that are based on race and ethnic background are racial classifications. *(pp. 288-289)* Of these types of classifications, the Supreme Court has stated that: "Distinctions between citizens solely because of their ancestry are by their very nature odious to the free people whose institutions are founded upon the doctrine of equality." For this reason, racial classifications are suspect classifications and subject to a strict scrutiny analysis under the United States Constitution. *(pp. 290-291)*

Although the provision itself was cast in race neutral terms *(p. 293)*, Congress' immediate purpose in enacting the Fourteenth Amendment was to ensure that newly freed slaves were given equal protection under the Constitution that was previously denied to them. *(p. 291)* However, the legal development of the Equal Protection Clause coincided historically with immigration, and the increasing divide between ethnic and racial minorities and majority groups in power. *(p. 292)* Accordingly, the Supreme Court has read the Equal Protection Clause broadly to include all ethnic groups who face unequal treatment and discrimination at the hands of the state. *(pp. 292-293)* Its application is universal regardless of race, ethnicity, or culture, and is not dependent upon minority status as a static, fixed variable. *(pp. 293-294; 295 -299)*

Because the terms "majority" and "minority" change in accordance with history and politics, it would be ill considered for the Court to grant preferential treatment to a group based on its status at a particular historical period. *(p. 295)* As it pertains to white people, all white people have a distinct racial and ethnic make-up and each group can demonstrate historically a point at which it was the minority or majority. *(pp. 295-296)* To fix any one group's discrimination in time, however, would serve to grant it preferential treatment even when that group was no longer historically disadvantaged. *(pp. 296-297)*. Furthermore, a

court cannot assess justice in terms of preferential treatment. *(p. 298)* In doing so, it would have to grant benefits to one group and advance their status at the expense of another group. *(p. 298)* Moreover, it would be inequitable for one group to bear the cost of redressing a wrong to another group not of its own making. *(p. 298)* The inequities the burdened group would have to bear would increase racial tensions and support the notion that certain groups are incapable of advancing in society as individuals, and without preferential treatment. *(p. 298)*. Therefore, the equal application of Constitutional rights requires that an individual be protected from racial classifications because they burden personal rights, not because the individual belongs to a particular group. *(p. 299)*

In this context, diversity is broader than ethnic diversity and that more expansive definition of diversity is a compelling state interest. *(p. 314-315)* Admissions decisions that take diversity into account must not burden one group at the expense of another, or impermissibly infringe upon individual rights. *(p. 314)* When the state utilizes a racial classification to achieve an arguably compelling interest, that classification must be necessary to achieve the state's interest. *(p. 314-315)* A State can achieve a compelling interest in diversity by using race and ethnicity as a "plus' factor along with other admissions criteria and evaluating all applicants in the same pool. *(pp. 316-317)* Using race and ethnicity in this manner allows for each applicant to be treated individually in admissions decisions in accordance with the Constitution. *(p. 318)*

Factual Analysis *(Racial Quota)*

The medical school's special admissions policy is a dual admissions policy that narrowly views diversity in terms of race and ethnicity. Accordingly, it is not the expansive diversity that constitutes a compelling state interest and that is protected by the United States Constitution. *(p. 315)* Applicants considered under the special admissions policy are isolated from competing with the students in the general admissions pool, because a certain amount of seats are set aside for them. *(p. 320)* Their treatment is inequitable when compared to those applicants considered under the general admissions pool, because special admissions applicants have the ability to compete for all of the general admissions slots in addition to those reserved under the special admissions program. *(p. 320)* Thus, by using such a racial classification in its admissions decisions, the State violates the individual rights of those applicants who fall outside of the classification in contravention of the Equal Protection Clause of the Fourteenth Amendment. *(p. 320)*

Synthesis of Authorities
(Race Conscious Admissions Policy)

It is constitutional for a university to set diversity in its student body as a goal. *(p. 312)* Such a goal is part and parcel of the First Amendment to the United States Constitution, and covers a university's exercise of academic freedom. *(p. 312)* A university may "determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." *(p. 312)* Diversity as a goal is applicable at the undergraduate, graduate, and professional school levels. *(p. 313)* Of professional schools in particular, the Supreme Court opined that: "The law school, the proving ground for learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students and no one who has practiced law would choose to

study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned." *(p. 314)* The court made similar observations for medical schools, as doctors also interact with all segments of a community. *(p. 314)*

A state's efforts to address, remediate, and eliminate identified discrimination is a substantial interest, but a state may not utilize a classification to these ends that disadvantages another group absent concrete findings of the discrimination alleged. *(pp. 307-309)* If a state uses a suspect classification, it must show that its purpose in doing so is "substantial" and that the classification used is necessary for it to achieve its purpose. *(p. 305)* Absent these findings, the state's purpose is neither substantial nor compelling. *(pp. 308-309)*

Factual Analysis
(Race Conscious Admissions Policy)

The medical school articulated the following purposes for its special admissions program: "(i) reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession; (ii) countering the effects of societal discrimination; (iii) increasing the number of physicians who will practice in communities currently underserved; and (iv) obtaining the educational benefits that flow from an ethnically diverse student body." *(p. 306)* With respect to (i), the court struck down any attempt by the University to remedy historic deficits through guaranteed percentages of traditionally disfavored minorities in each entering class. *(p. 307)* As it discussed in detail in its analysis of the special admissions program, the Court again reiterated that preference for an individual simply because of that individual's membership in a particular group is unconstitutional on its face. *(p. 307)* As for (ii), the Court found that the University had neither defined "societal discrimination," nor produced any data to show specific acts of societal discrimination that it sought to address with its special admissions policy. *(p. 307)* Because the University could not identify and prove discrimination had occurred, then it could not justify burdening a group of unaffected individuals to remedy the wrong. *(pp. 307-310)* In considering (iii), the Court found that the University presented no data to show that a person's membership in a minority group correlated to their desire to help members of a minority group upon attaining a medical degree. *(p. 310)* An applicant's statement that they had an interest in helping minority communities after graduating from medical school did not actually mean that they would do so. *(p. 310)* Lastly, (iv) reflects a valid and constitutionally permissible goal. However, diversity is a broad concept not solely expressed in racial or ethnic terms. *(pp. 314-315)* Because the University could not show that its special admissions program (a racial classification) was necessary to achieve diversity broadly conceived, and that the policy was the only way to achieve diversity, then (iv) also failed to pass Constitutional muster. *(pp. 315-316)*.

Holding:

Under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, the California Constitution, and § 601 of Title VI of the Civil Rights Act, a special admissions program for a state university's medical school is both an impermissible racial quota and race conscious admissions policy when (1) the state's purpose in enacting

the program was to help integrate the medical profession and increase the number of doctors serving minority patients; (2) applicants considered under the special admissions program were only rated against each other and not the general admissions pool; (3) the program set aside a defined number of seats for economically and/or educationally disadvantaged and racial and ethnic minority students for which only those students could compete; and (4) a number of white students applied under the program but none were admitted. First, an admissions program that sets aside a defined number of seats for individuals because of their membership in a racial or ethnic group and isolates that group from competing with those who fall outside of it violates the Equal Protection Clause guarantee of protection for individual rights. Under such an admissions scheme, individuals are not evaluated as individuals, but only as members of a particular group.

Second, a state's articulated purpose to address discrimination and underrepresentation is compelling as long as the state can show the existence of actual discrimination and underrepresentation. Identified and proven discrimination/underrepresentation may be addressed through a race conscious admissions policy that is narrowly tailored to achieve that purpose. Narrow tailoring requires the state to show that the policy at issue is the only means available to achieve its declared purpose. If the state fails to show its policy is narrowly tailored, then a court will find the policy unconstitutional in violation of the Equal Protection Clause.