Teacher: Maria Manza
Lesson: Affirmative Action - Supreme Court Precedent & the Current Social Debate
Time: 90 Minutes

Materials: PowerPoint, Triad Handout with 14th Amendment and case summaries; Handouts for controversial issue exercise

NOTE: Once the Fisher decision comes down from the Court, this lesson plan will obviously change quite substantially. I would encourage teachers to add the Fisher decision to the lecture portion on the history of affirmative action and ask students what they think of the decision, whether or not they agree with it, how it will impact our country, and what else should be done moving forward. The Fisher decision will no doubt generate media and possibly more litigation. I hope the historical foundation and activities in this plan provide teachers with a template to adapt with evolving content on this issue.

I. Goals
a. Introduce students to the history of and the issues surrounding affirmative action
b. Encourage students to think critically about affirmative action
c. Develop analysis and speaking skills

II. Objectives
a. Knowledge objectives: As a result of this class, students will be better able to:
   i. Explain key points in U.S. history related to affirmative action
   ii. Articulate the benefits and challenges of affirmative action policies
b. Skills objectives: As a result of this class, students will be better able to:
   i. Articulate arguments based on legal precedent
   ii. Begin to predict legal outcomes based on precedent and judicial interpretation
   iii. Begin to articulate policy objectives

c. Attitude objectives: As a result of this class, students will be better able to feel:
i. That federal policy has important ramifications on daily life

ii. That public policy changes over time and that student’s have valuable ideas and opinions to contribute in analyzing such policies

iii. That it is possible to have respectful conversations about controversial topics

III. Classroom Methods

a. Lecture, Small Group Discussion: History of Affirmative Action: PowerPoint (25 minutes)
   i. Set Ground Rules:
      1. This is a very charged subject.
      2. We need to be respectful during this discussion while voicing our thoughts, opinions and questions.
      3. Many people disagree about this issue, and differing viewpoints are healthy.
      4. If, at any point, you are uncomfortable, please put your head down on your desk or motion to one of your teachers, and one of your street law teachers will talk to you about what you are feeling individually outside the classroom.

ii. Define & explain “affirmative action”
   1. For the past half century, one of the primary tools for addressing racial, ethnic and gender inequality has been “affirmative action” policies.
   2. First used in the early 1960s, the phrase “affirmative action” now refers to a complex set of policies created by different branches of state and local government intended to improve opportunities for minorities and women giving them preference in admissions to higher education, government and private sector employment, and government contracts.

iii. Break students into groups of 4 (six groups total, number 1-6, and combine two groups for groups of three in Triad exercise below).

iv. Go through “History of Affirmative Action” PowerPoint, with icebreaker questions designed to get students to think critically about the issue of affirmative action.

v. Ask for volunteers to read the historical summaries out loud.

vi. After each section, have the small groups discuss the questions while teachers circulate to check in, answer questions, or discuss with students.

vii. Questions:
   1. Question after 1940s & 1960s: Given the remarkable and widespread racial discrimination of the 1960s, did these policies go far enough?
2. **Questions after 1960s & 1980s:** Does a quota system go far enough, or too far? Is a quota system that favors racial minorities “reverse discrimination”, or does it simply level the playing field?

3. **Questions after present synopsis:** Is affirmative action, as a policy, something that should continue? What about the idea of “equality of opportunity”? Should affirmative action exist for categories other than race, such as low-income individuals?

viii. Ask students to share with the larger group after each set of questions.

b. **Triad Exercise:** Arguing from Precedent - Affirmative Action Case Study (30 minutes: 15 minutes to read and discuss with groups, 3 minutes for each group to present, 6 minutes for debrief)

i. Combine groups and create three larger groups:
   1. Attorneys representing the plaintiff in the Fisher case
   2. Attorneys representing the University in the Fisher case
   3. Supreme Court Justices

ii. Pass out handouts with the text of the Fourteenth Amendment’s Equal Protection Clause and summaries of the Bakke, Grutter and Fisher cases.

iii. Ask the students to read summaries of the Bakke and Grutter cases.

iv. Ask the students to analyze the Fisher case based on the Bakke and Grutter cases. Show the students the facts of the Fisher case. Ask them to predict how the Supreme Court will decide the case.

v. Ask the attorney teams to come up with arguments for their side & have them designate a speaker.

vi. Ask the justices to read and discuss the cases and determine how they will vote.

vii. Ask the plaintiffs to present their argument.

viii. Ask the defense to present their argument.

ix. Poll the justices to see how they decided the case. Ask them to explain why.

x. Ask the students to discuss how it felt to take the side they were assigned. What do they think personally should happen?

c. **Controversial Topic Exercise:** Current debate on Affirmative Action (30 minutes)

i. Now that you have tried your hand at Supreme Court decision-making, let’s shift over to the current social debate on affirmative action.

ii. Explain to students that we will be doing a controversial topic exercise.

iii. We will read excerpts from recent articles and books addressing affirmative action.

iv. Explain to students that they will read through excerpts on their own and then write down responses to the questions.

v. Explain to students that they will then pair up to discuss their answers before sharing with the group.

vi. Pass out handouts & give students a time limit to read, have student volunteers read portions of the excerpts from the slides, or a
combination of the two, whatever makes more sense for your class. (15 minutes)
vii. Have students discuss in pairs. (2 minutes non-stop talking by first student, and then they switch) (5 minutes total)
viii. Teachers will then poll students on answers to the questions posed & lead a group discussion. (10 minutes)
ix. Ask students to pay attention to the media and notice when affirmative action is mentioned or talked about. How is the issue framed? Ask students to bring examples to class if they come across any.

IV. Assignment – For Journals
a. Consider what we discussed in class today – Supreme Court precedent and the current debate before the Court, the excerpt from “The New Jim Crow”, and the excerpts from the Economist and Above the Law. Answer the following questions:
   i. Should affirmative action policies remain in place for school admission and job placement?
   ii. How could affirmative action policies be improved?
   iii. Do affirmative action policies help or harm underrepresented populations?
Affirmative Action Precedent - Triad Exercise

The Fourteenth Amendment of the Constitution was ratified by the states in 1868, principally to prevent southern states from discriminating against freedmen. The text of the amendment states that:

_No State shall . . . deny to any person within its jurisdiction the equal protection of the laws._

The exact meaning of the Fourteenth Amendment’s Equal Protection Clause has been debated since its ratification. Some contend that it prohibits a state governmental agency from ever classifying individuals on the basis of their race. Others argue that governmental agencies may classify citizens based on race in order to fulfill the higher purpose of the Fourteenth Amendment (basically, to protect the civil rights of all Americans). A state governmental program may classify individuals on the basis of race if two criteria are met: 1) the program must promote a compelling government interest; and 2) the program must be “narrowly tailored”—that is, it must be no broader than necessary—to serve that compelling government interest.

**Current Supreme Court Case**

Fisher v. University of Texas

The University of Texas has an admissions system in which students within the top 10% of each Texas high school’s graduating class are admitted, regardless of race. Students that do not fall within the top 10% are considered based on academics, talents, leadership qualities, family circumstances, and race. Abigail Fisher was a white student with a 3.59 GPA, was in the top 12% of her class. She was in numerous extra curriculars, and scored an 1180 on her SAT, which fell in between the 1120 and 1370 scores of the 25th and 75th percentiles of the incoming class at the University of Texas. She was denied admission to the University of Texas and sued, arguing that the University of Texas admissions policy for students not in the top 10% of the class violated the 14th Amendment of the United States Constitution.

**Problem**

*Groups 1 & 2*: You represent Noel Fisher. Argue that the University of Texas system violates the Equal Protection Clause by improperly considering race in college admissions. Support your argument based on the rulings in Bakke and Grutter.

*Groups 3 & 4*: You represent the University of Texas. Argue that the admissions system does not violate the Equal Protection Clause. Support your argument based on the rulings in Bakke and Grutter.
Groups 5 & 6: You are a Supreme Court justice. Consider the arguments of both parties and reach a decision as to whether or not the University of Texas system violates Equal Protection. Be prepared to defend your decision to your fellow justices.

**Supreme Court Precedent**

Regents of the University of California v. Bakke (1978)

Allan Bakke (pronounced “Bah-kee”) applied to the University of California-Davis Medical School. The Medical School, when Bakke applied in 1973, had two admissions programs: one that whites with certain criteria (GPA, MCAT scores, evaluation scores, extracurricular) would be admitted through and another special program designed for minority applicants. Minority applicants had sixteen seats set aside specifically for them and went through a “special admissions” program that did not require them to meet a 2.5 GPA requirement of other candidates. Bakke, who was white, applied to the school in 1973 and 1974 and was denied both times. In both years, minority applicants were admitted under the "special admissions" program with GPAs, MCAT scores and evaluation scores significantly lower than Bakke's.

Bakke then filed suit seeking an injunction to allow him into the medical school claiming that the school had discriminated against him on the basis of his race and thus violated his rights under the Equal Protection Clause of the Fourteenth Amendment, the California Constitution, and Title VI of the Civil Rights Act of 1964.

The Supreme Court ruled that race could be one, but only one, of numerous factors used by discriminatory boards, like those of college admissions. Justice Powell found that quotas insulated minority applicants from competition with the regular applicants and were thus unconstitutional because they discriminated against regular applicants. This was an example of reverse discrimination. Justice Powell, however, stated that universities could use race as a “plus” factor.


The case originated in 1996 when Barbara Grutter, a white Michigan resident with a 3.8 GPA and 161 Law School Admissions Test (LSAT) score, was rejected by the University of Michigan Law School. She said she was rejected because the Law School used race as the "predominant" factor, giving applicants belonging to underrepresented minority groups (African Americans, Hispanics, and Native Americans) a significantly greater chance of admission than White and Asian American applicants with similar credentials. She argued that the university had no compelling interest to justify the use of race in that way. The named defendant in the case was Lee Bollinger, the president of the university, who argued that the goal of the policy was to achieve racial diversity in the student body by giving minorities an advantage.

The Supreme Court found that the United States Constitution "does not prohibit the law school's narrowly tailored use of race in admissions decisions to further a compelling interest in
obtaining the educational benefits that flow from a diverse student body." The Court held that the law school's interest in obtaining a "critical mass" of minority students was a "tailored use." Justice O'Connor noted that sometime in the future, perhaps twenty-five years hence, racial affirmative action would no longer be necessary to promote diversity. The opinion implied that affirmative action should not be allowed permanent status and that eventually a "colorblind" policy should be implemented.
Controversial Issue Exercise

Read the following excerpts and then answer the questions at the end. After working individually, you’ll pair up and discuss your answers. Then we’ll have a group discussion.

“The New Jim Crow” by Michelle Alexander, published 2010 (pp. 244-251)

Racial justice advocates should consider...whether affirmative action...has been functioned more like a racial bribe than a tool of racial justice. Affirmative action, particularly when it is justified on the grounds of diversity rather than equity (or remedy), masks the severity of racial inequality in America, leading to greatly exaggerated claims of racial progress and overly optimistic assessments of the future of African Americans.

Racial justice advocates should reconsider the traditional approach to affirmative action because (a) it has helped to render a new caste system largely invisible; (b) it has helped to perpetuate the myth that anyone can make it if they try; (c) it has encouraged the embrace of a “trickle down theory of racial justice”; (d) it has greatly facilitated the divide-and-conquer tactics that gave rise to mass incarceration; and (e) it has inspired such polarization and media attention that the general public now (wrongly) assumes that affirmative action is the main battlefront in U.S. race relations.

As recent data shows, however, much of black progress is a myth. The child poverty rate is actually higher today than it was in 1968. Unemployment rates in black communities rival those in Third World Countries. One recent study indicates that the elimination of race-based admissions policies would lead to 63% decline in black graduates at all law schools & a 90% decline at elite law schools.

“Time to Scrap Affirmative Answer” The Economist, April 27, 2013

“In their book “Mismatch”, Richard Sander & Stuart Taylor produce evidence that suggests affirmative action reduces the number of blacks who qualify as lawyers by placing black students in law schools for which they are ill-prepared, causing many to drop out. Had they attended less demanding schools, they might have graduated.”

Many of these policies were put in place with the best of intentions: to atone for past injustices and ameliorate their legacy. No one can deny that, for example, blacks in America have suffered grievous wrongs, and continue to suffer discrimination. Favouring members of these groups seems like a quick and effective way of making society fairer. Most of these groups have made great progress. But establishing how much credit affirmative action can take is hard, when growth also brings progress and some of the good—for example the confidence-boosting effect of creating prominent role models for a benighted group—is intangible. And it is impossible to know how a targeted group would have got on without this special treatment.
Selection on the basis of race is neither fair nor an efficient way of doing so. Affirmative action replaced old injustices with new ones: it divides society rather than unites it. Governments should tackle disadvantage directly. If a school is bad, fix it. If there are barriers to opportunity, remove them.


In 1920, Lydia C. Chamberlain, a woman from Des Moines who moved to Manhattan, donated her $500,000 estate to create a fellowship at Columbia University. The fellowship had a few restrictions. Notably, recipients were not allowed to study “law, medicine, dentistry, veterinary surgery or theology.” Ha. Seems reasonable. Oh, and the recipients had to be from Iowa and had to move back to Iowa after completing their studies. This kind of dead-hand control should really not be allowed in our modern, global society, but that’s not why the “Lydia C. Roberts graduate and traveling fellowships” is making news today. It’s making news because the other restriction is that recipients of the fellowship have to be white. “Of the Caucasian race” is the exact formulation. This isn’t just a story about racism, it’s a story about institutional advantages white people have that some of them pretend to not even be aware of...

There are white people running around here who have been helped out in their lives just because they are white, and they don’t even know it. That’s the luxury of being white in America: good stuff happens to you and you don’t even have to question why.

I can’t get a job without some toothless yokel somewhere INCORRECTLY telling me that I only got my job “because I’m black.” Then there’s the one Supreme Court justice who tries to tell me that the only way to stop idiot white people from making stupid assumptions is to discontinue helping black people to level the playing field.

Institutional racism isn’t some guy in a hood burning crap on your lawn. It’s guys like this who will look at you straight in the face and say “I’ve worked for every penny I’ve gotten,” oblivious to the fact that all the levers are pulled in their direction.

In the time Columbia gave out this fellowship (they stopped in 1997), countless numbers of white people from Iowa have been helped out just ’cause they’re white people from Iowa, and they don’t even know it. They don’t consider themselves beneficiaries of racial injustice. And many of them don’t try to even the score.
Questions

1. Which article resonates the most with you and why? Which points are most convincing?

2. Has race-based affirmative action achieved its goals of making up for past discrimination to improve minorities’ economic and educational opportunities?

3. Do race-based affirmative action programs promote equality of opportunity?
Supreme Court Precedent & the Current Social Debate
Ground Rules

- This is a very charged subject
- We need to be respectful during this discussion while voicing our thoughts
- Many people disagree about this issue, and differing viewpoints are healthy
- If, at any point, you are uncomfortable, please put your head down on your desk, and one of your street law teachers will talk to you about what you are feeling individually outside the classroom
For the past half century, one of the primary tools for addressing racial, ethnic and gender inequality has been “affirmative action” policies. First used in the early 1960s, the term affirmative action now refers to a complex set of policies created by different branches of state and local government intended to improve opportunities for minorities and women giving them preference in admissions to higher education, government and private sector employment, and government contracts.

- Count off into groups, 1-6.
**Early History of Affirmative Action Policies**

- **1940s** — President Franklin Roosevelt created the President’s Committee on Fair Employment Practice (FEPC) to investigate allegations of discrimination in federal employment and contracting. This was the first federal agency since the post-Civil War Reconstruction that was created solely to address problems of minorities. Without funding and little authority, the agency was more symbolic than effective.

- **1960s** — President John Kennedy becomes the first president to sign an executive order requiring federal agencies and their private contractors take “affirmative action” to ensure that employment and contracting were not racial discriminatory. However, the intent was not to explicitly consider race in employment decisions. The point was to make sure minorities were not being excluded for reasons unrelated to job performance.

**Question:** Given the remarkable and widespread racial discrimination of the 1960s, did these policies go far enough?
1960s—President Lyndon Johnson pushes for the Civil Rights Act of 1964, creating the Equal Employment Opportunity Commission (EEOC), which was the first agency authorized by Congress to promote equal opportunity and continues its work today. More significant was the program’s incentive plan in which contractors and employers could include in their bid the number of minority employees it would hire if given the contract. Though not intended to be a quota system, it was used by employers to get an advantage on the competition.

1980s—President Ronald Reagan was opposed to programs such as affirmative action which favored minorities in jobs, education, and awarding government contracts. Conservative politicians like Reagan felt it amounted to reverse discrimination by granting minority groups special advantages that were denied the majority of citizens. The administration stopped requiring contactors doing business with the federal government to comply with affirmative action programs. Reagan’s justice department supported a number of legal challenges to affirmative action.

Questions: Does a quota system go far enough, or too far? Is a quota system that favors racial minorities reverse discrimination, or does it simply level the playing field?
The Present—many states (including Washington) have banned affirmative action as examples of reverse discrimination. Affirmative action policies are increasingly under attack on the grounds that the racial discrimination that affirmative action was designed to address is no longer as common, or might even be eliminated. Critics of affirmative action have instead argued for “equality of opportunity.”

Question: Is affirmative action, as a policy, something that should continue? What about the idea of “equality of opportunity”?

Question: Should affirmative action exist for categories other than race, such as low-income individuals?
Groups 1 & 2: Attorneys representing the plaintiff in the Fisher case
Groups 3 & 4: Attorneys representing the University (the defendant) in the Fisher case
Groups 5 & 6: Supreme Court Justices
The 14th Amendment’s Equal Protection Clause

“No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”
Fisher v. University of Texas:

- Admissions system automatically admits top 10% of each high school’s graduating class in Texas
- Students who fall outside of top 10% are admitted based on academics, talents, leadership, family circumstances & race
- White student with 3.59 GPA (top 12%), extra-curricular activities, 1180 on SAT was denied admission & sued
Regents of the University of California v. Bakke (1978):

- Bakke (white) applied to UC Davis Medical School & was denied

- 2 admissions programs in place at the time:
  - White applicants with certain GPA, test scores & activities
  - Special program for minority applicants where 16 seats set aside & lower GPA requirement

- Court:
  - Race can be one, but not only one, of numerous factors used in admissions (+ factor)
  - Quotas unconstitutional

- Grutter (white) rejected from University of Michigan law school with 3.8 GPA & 161 LSAT
- Race used as “predominant” factor, giving applicants from underrepresented minority groups a significantly greater chance of admission
- Grutter argued that University did not have compelling interest to justify race factor
- Court: Law school had interest in obtaining “critical mass” of minority students, which is an allowable “tailored use” of race
Groups 1 & 2: You represent Noel Fisher. Make your best arguments for why the admissions system violates the 14th Amendment by improperly considering race.

Groups 3 & 4: You represent the University. Argue that admissions system does not violate the 14th Amendment.

Groups 5 & 6: As Supreme Court Justices, consider arguments from both sides and decide whether or not admissions process is proper.
Supreme Court Decision-Making Debrief

- How did it feel to make arguments on the side you were assigned?
- What do you personally think should happen in this case?
- How did it feel to serve as a Justice?
- What do you think the Court will decide?
The Current Social Debate on Affirmative Action

- Recent articles & books show that affirmative action and its future are still extremely controversial.
- Again, please show respect for your fellow classmates & be open to differing perspectives.
The Current Debate

- Michelle Alexander’s “The New Jim Crow”
- The Economist’s “Time to Scrap Affirmative Action”
- Above the Law’s “Columbia Scholarship Scandal Shows How White People Are Still Helped by Institutional Racism”
“Racial justice advocates should consider…whether affirmative action… has been functioned more like a racial bribe than a tool of racial justice.” p. 244

“Affirmative action, particularly when it is justified on the grounds of diversity rather than equity (or remedy), masks the severity of racial inequality in America, leading to greatly exaggerated claims of racial progress and overly optimistic assessments of the future of African Americans.” p. 246
“As recent data shows, however, much of black progress is a myth.”

“The child poverty rate is actually higher today than it was in 1968. Unemployment rates in black communities rival those in Third World Countries.”

“One recent study indicates that the elimination of race-based admissions policies would lead to 63% decline in black graduates at all law schools & a 90% decline at elite law schools.”
“In their book “Mismatch”, Richard Sander & Stuart Taylor produce evidence that suggests affirmative action reduces the number of blacks who qualify as lawyers by placing black students in law schools for which they are ill-prepared, causing many to drop out. Had they attended less demanding schools, they might have graduated.”
“Selection on the basis of race is neither fair nor an efficient way of doing so. Affirmative action replaced old injustices with new ones: it divides society rather than unites it.”

“Governments should tackle disadvantage directly. If a school is bad, fix it. If there are barriers to opportunity, remove them.”
Above the Law

- White woman from Iowa created fellowship at Columbia University for students from Iowa and of “Caucasian race”

- “There are white people running around here who have been helped out in their lives just because they are white, and they don’t even know it. That’s the luxury of being white in America: good stuff happens to you and you don’t even have to question why.”
“I can’t get a job without some toothless yokel somewhere INCORRECTLY telling me that I only got my job “because I’m black.” Then there’s the one Supreme Court justice who tries to tell me that the only way to stop idiot white people from making stupid assumptions is to discontinue helping black people to level the playing field.”

“Institutional racism isn’t some guy in a hood burning crap on your lawn. It’s guys like this who will look at you straight in the face and say “I’ve worked for every penny I’ve gotten,” oblivious to the fact that all the levers are pulled in their direction.”
Activity

- Take 10 minutes to read through excerpts individually & answer questions posed on the handout.
- Take 5 minutes and discuss your answers with your neighbor:
  - First student explains answers for 2 minutes without interruption
  - Second student then explains their answers for 2 minutes without interruption
- Teachers will then poll students on answers & lead a group discussion.
Consider what we discussed in class today – Supreme Court precedent and the current debate before the Court, the excerpt from “The New Jim Crow”, and the excerpts from the Economist and Above the Law.

Answer the following questions:
- Should affirmative action policies remain in place for school admission and job placement?
- How could affirmative action policies be improved?
- Do affirmative action policies help or harm underrepresented communities?