That “all men are created equal” was a truth so obvious, it needed no defense, according to the Declaration of Independence. Indeed, equality itself appeared to need no defense, as the Declaration next claimed that the function of government was not to guarantee natural equality, but to protect natural rights, and in particular, the right to liberty. Thus, the purpose of government was the prevention of tyranny, and not the promotion of equality.

That focus shifted following the Civil War. The Reconstruction Congress found the oppression of an entire race abhorrent and drafted the 13th, 14th, and 15th amendments to correct the situation. These amendments, which Southern states were required to ratify before readmission to the Union, were intended to end this unequal treatment by correcting those portions of the Constitution which could be used to support slavery or discrimination. And two Supreme Court Cases in particular, *Prigg v. Pennsylvania* (1842) and *Barron v. Baltimore* (1833) appear to have been especially targeted.

**Prigg** involved the Fugitive Slave Act and Article IV, Section 2 of the Constitution. Edward Prigg, who captured and returned a fugitive slave to her owner, was arrested and charged with kidnapping. The Court ruled that Article IV, Section 2, the “service or labour” clause, required states to assist in returning fugitive slaves to their owners. But several of the Justices went further, reading in the clause a positive affirmation of the property right of the slaveowner to the slave.

**Barron** involved not issues of equality, but property (as arguably did *Prigg*). In *Barron*, Mr. Barron lost his property and his livelihood because of the actions of the City of Baltimore. He claimed that this constituted a “taking” in violation of his rights guaranteed in the 5th Amendment. The Court agreed that Baltimore’s act amounted to a “taking” but argued that the guarantees contained in the Bill of Rights applied only to national action, not action by the states.

These two cases find their ultimate expression in *Dred Scott* (1856), the case that affirmed the property rights of slave owners, denied the claims to citizenship and equality of the Negro race, and voided the Missouri Compromise. Although it is grounded in some measure by a most curious understanding of race relations at the Founding, following on the heels of *Prigg* and *Barron*, and to some degree bound by *stare decisis*, the Court
defends slavery and denies that the civil liberties enshrined in the Bill of Rights extend to the citizens of the states. That is, following Prigg, slaves are property, not persons, and following Barron, the states are free to deny constitutionally-guaranteed civil rights and civil liberties. It is this which the Civil War Amendments in general and the 14th Amendment in particular, attempted to change. The result is the requirement that the states extend to all citizens of the United States, the “equal protection of the laws.”

But this is perhaps easier said than done. The Founders either took human equality for granted, or believed that government need not enforce equality. But with the adoption of the 14th Amendment which requires the equal protection of the laws, it was the task of government, especially the Court, to determine just what “equal protection of the laws” required. Unsurprisingly, the Court interpreted the Equal Protection Clause as a group of lawyers might; what was protected, they said, was legal and political equality, not social or economic equality.

In Plessy v. Ferguson (1896), the Court determined that separate accommodations for the races are constitutionally permissible. The Equal Protection Clause does not require the intermingling of the races, merely their equal treatment under the law. Indeed, the Court suggested that legislation requiring integration was likely to fail, and that racism could only be eradicated by the slow and informal process of voluntary social interaction. The Court found the claim that segregation imposes a stigma on the excluded race without merit, as such a stigma is the result of that race’s assumptions regarding the purpose of the segregation.

Although the Court defended the notion of “separate but equal” regarding social or economic conditions, it protected the legal and political equality of the races. In 1880, the Court defended the rights of blacks to serve on juries (Strauder v. West Virginia, 1880). Six years later, the Court ruled that the Equal Protection Clause applied with equal force to Asians (Yick Wo v. Hopkins, 1886). And in 1927, the Court defended the rights of minorities to participate in political primaries (Nixon v. Herndon, 1927).

But it was not until 1954 that the Equal Protection Clause was extended beyond the legal and political realms to social and economic activity. In Brown v. Board of Education, the Court found persuasive the claim raised in Plessy that segregation necessarily stigmatized the excluded race, and that therefore, separate conditions could never be equal. A unanimous Court ordered the end of de jure segregation in education, finding, “We conclude that in the field of public education the doctrine of ‘separate but equal’ has
no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.”

In its interpretation of the Equal Protection Clause, the Court developed a doctrine of “suspect classifications” which, if involved in the policy at issue, would trigger “strict scrutiny.” In University of California Regents v. Bakke, Justice Powell, writing for a divided Court, employed the doctrine of suspect classifications to find a policy setting aside seats for minority students violated the Equal Protection Clause. He noted that suspect classifications had not been reserved only for those in minority positions. “Nor has this Court held that discreteness and insularity constitute necessary preconditions to a holding that a particular classification is invidious. ...These characteristics may be relevant in deciding whether or not to add new types of classifications to the list of “suspect” categories or whether a particular classification survives close examination. Racial and ethnic classifications, however, are subject to stringent examination without regard to these additional characteristics.” Thus, the Equal Protection Clause protects against reverse discrimination as well as discrimination against minorities. Nevertheless, Justice Powell also concluded that although racial quotas could not be established, race could be considered as a factor in admissions since a diverse student body was a compelling interest.

The Court’s reasoning in Bakke was recently confirmed in Gratz v. Bollinger and Grutter v. Bollinger, two cases testing admissions policies at the University of Michigan and the University of Michigan Law School respectively. In both cases, the admission of traditionally under-represented minorities constituted a compelling state interest, but the law school considered the applicants as individuals, thus meeting the requirement that the procedure be “narrowly tailored.” On the other hand, the University of Michigan treated all minorities equally, automatically awarding them twenty percent of the score needed for admission, and was thus not sufficiently narrowly-tailored to survive strict scrutiny.

**Dr. Warner Winborne** is Assistant Professor of Political Science at Hampden-Sydney College in Virginia, where his particular areas of interest include Aristotle, Adam Smith, and Thomas Hobbes. The Executive Director for the Center for the Study of the Constitution, he specializes in the Fourth, Ninth, and Fourteenth Amendments. He has presented papers at the Midwest Political Science Association’s annual conferences, chaired a roundtable discussion of Lani Guinier’s and Gerald Torres’ The Miner’s Canary at the American Political Science Association conference, and is the author of Modernization and Modernity: Thomas Hobbes, Adam Smith and Political Development.
Case Background

The phrase “affirmative action” first appeared in a 1961 executive order by President John F. Kennedy, barring federal contractors from discriminating on the basis of race, creed, color, or national origin. President Lyndon B. Johnson echoed this phrasing in his own policies and speeches. Congress later passed the Civil Rights Act of 1964, barring discrimination by any institutions receiving federal money.

The University of California at Davis Medical School, a public school, was founded in 1966. The first class of fifty students was made up of forty-seven white students and three of Asian descent. In order to achieve a more racially diverse student body, in 1970 the University took what it described as affirmative action by creating two separate admissions programs. The general program required a 2.5 GPA, an interview, letters of recommendation, and test scores. The special program, for which only disadvantaged members of minority groups were eligible, had no GPA cutoff.

By 1973, the class size had doubled to 100, and of those 100 spaces, sixteen were reserved for minority applicants in the special program. Applicants to the special program competed only against each other for admission, and did not compete against applicants to the general admissions program.

Allan Bakke, a Caucasian, applied twice to the medical school, and was rejected both times. His GPA and test scores, however, were higher than those of any of the students accepted into the special program. He sued the school, charging that the special admissions program amounted to a quota system that discriminated against whites.
**DOCUMENT A**

Section of the Fourteenth Amendment, 1868
No state shall ... deny to any person within its jurisdiction the equal protection of the laws.

- Why was this amendment passed in 1868?

**DOCUMENT B**

Executive Order 10925, 1961
Establishing The President’s Committee On Equal Employment Opportunity

[Federal government contractors] will not discriminate against any employee or applicant for employment because of race, creed, color, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin.

- What does “affirmative action” mean?
- What does “without regard to” mean?
“Civil Rights Legislation,” 1963

- What is the point of view of the cartoonist?
DOCUMENT D

Title VI of the Civil Rights Act of 1964

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

- Does the policy stated in this document differ from that in Document B? If so, how?

DOCUMENT E

President Lyndon Johnson, Speech at Howard University, 1965

You do not wipe away the scars of centuries by saying: “Now, you are free to go where you want, do as you desire, and choose the leaders you please.” You do not take a man who for years has been hobbled by chains, liberate him, bring him to the starting line of a race, saying, “You are free to compete with all the others,” and still justly believe you have been completely fair. ...This is the next and more profound stage of the battle for civil rights. We seek not just freedom but opportunity—not just legal equity but human ability—not just equality as a right and a theory, but equality as a fact and as a result.

- Restate this excerpt from Johnson’s speech in your own words.
- How does this understanding of equality differ from that expressed in Documents B and D?
### UC-Davis Medical School Program Demographics, 1970-1974

<table>
<thead>
<tr>
<th>Number of minority students accepted under special programs, 1970-1974</th>
<th>Number of minority students accepted under general program, 1970-1974</th>
</tr>
</thead>
<tbody>
<tr>
<td>Black</td>
<td>21</td>
</tr>
<tr>
<td>Mexican American</td>
<td>30</td>
</tr>
<tr>
<td>Asian</td>
<td>12</td>
</tr>
</tbody>
</table>

### Minority student enrollment in medical school, 1972

- Total number of minority students enrolled in medical schools in the United States: 800
- Number of minority students enrolled in medical schools outside traditionally African American colleges: 160

Source: Bakke Record 210, 223, 231, 234

- Summarize the chart data in one or two sentences.
### Education by Race Statistics, 1940-1980

<table>
<thead>
<tr>
<th></th>
<th></th>
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<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>WHITES</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Less than five years elementary school</td>
<td>10.9%</td>
<td>8.9%</td>
<td>6.7%</td>
<td>4.2%</td>
<td>1.9%</td>
</tr>
<tr>
<td>High School Diploma</td>
<td>26.1%</td>
<td>36.3%</td>
<td>43.2%</td>
<td>57.4%</td>
<td>71.9%</td>
</tr>
<tr>
<td>Four or more years of college</td>
<td>4.9%</td>
<td>6.6%</td>
<td>8.1%</td>
<td>11.6%</td>
<td>18.4%</td>
</tr>
<tr>
<td><strong>BLACKS</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Less than five years elementary school</td>
<td>41.8%</td>
<td>32.6%</td>
<td>23.5%</td>
<td>14.7%</td>
<td>9.1%</td>
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<tr>
<td>High School Diploma</td>
<td>7.7%</td>
<td>13.7%</td>
<td>21.7%</td>
<td>36.1%</td>
<td>51.4%</td>
</tr>
<tr>
<td>Four or more years of college</td>
<td>1.3%</td>
<td>2.2%</td>
<td>3.5%</td>
<td>6.1%</td>
<td>7.9%</td>
</tr>
</tbody>
</table>

- Summarize the chart data in one or two sentences.
**DOCUMENT H**

**Alan Bakke’s Credentials, 1973-1974**

<table>
<thead>
<tr>
<th></th>
<th>Science GPA</th>
<th>Overall GPA</th>
<th>MCAT percentile</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alan Bakke</td>
<td>3.44</td>
<td>3.46</td>
<td>96</td>
</tr>
<tr>
<td>Average of regular</td>
<td>3.51</td>
<td>3.49</td>
<td>81</td>
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<tr>
<td>admittees, 1973</td>
<td></td>
<td></td>
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<tr>
<td>Average of special</td>
<td>2.62</td>
<td>2.88</td>
<td>46</td>
</tr>
<tr>
<td>admittees, 1973</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Average of regular</td>
<td>3.36</td>
<td>3.29</td>
<td>69</td>
</tr>
<tr>
<td>admittees, 1974</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Average of special</td>
<td>2.42</td>
<td>2.62</td>
<td>34</td>
</tr>
<tr>
<td>admittees, 1974</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Source: Bakke Record 210, 223, 231, 234

- How did Bakke’s GPA and MCAT scores compare to those of students accepted from both the regular and special programs?

**DOCUMENT I**

**UC-Davis’s Reply to Bakke’s Query on Age, 1972**

Note: By 1971, Alan Bakke had served four years as a United States Marine, including one tour in Vietnam. He had also completed a Master’s Degree in mechanical engineering, was a father of two, and was 32 years old. When he decided to apply to medical school, he wrote to more than ten medical schools, including UC-Davis, asking about their policy on considering applicants’ ages.

[Dear Mr. Bakke:]

When an applicant is over thirty, his age is a serious factor which must be considered. ...The Committee believes that an older applicant must be unusually highly qualified if he is to be seriously considered....

- Does this information change your assessment of Bakke’s credentials from Document H?
DOCUMENT J

Oral Arguments, 1978

Colvin [representing Bakke]: Race is an improper classification in this system... we believe it to be unconstitutional.

Justice Burger: Why? Because it is rigidly limited to sixteen [spots set aside in each class for minorities]?

Colvin: No, because the concept of race itself as a classification becomes in our history and in our understanding an unjust and improper basis on which to judge people.

Justice Marshall: Would it be constitutional if it was one [space that was set aside for minority students]?

Colvin: No. Whether it is one, one hundred, two—

Justice Marshall: You are talking about your client [Bakke’s] rights. Don’t these underprivileged people have rights?

Colvin: They certainly have the right to compete—

Marshall: To eat cake.

Colvin: They have the right to compete. They have the right to equal competition.

Marshall: So the numbers are just unimportant?

Colvin: The numbers are unimportant. It is the principle of keeping a man out because of his race that is important.

Marshall: You’re arguing about keeping someone out, and the other side is arguing about getting somebody in.

Colvin: That’s right.

Contrast Bakke’s lawyer’s argument with President Johnson’s assertion in Document E.

DOCUMENT K


Note: This memo was circulated while the Justices were considering the case.

The decision in this case depends on whether you consider the action of [UCD Medical School] as admitting certain students or excluding certain other students.

What two approaches to the Bakke case does Justice Marshall identify?
Plurality Decision (5-4), Regents of the University of California v. Bakke, 1978

The guarantees of the Fourteenth Amendment extend to all persons. Its language is explicit. ...The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal. ...Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake....

Hence, the purpose of helping certain groups whom the faculty of the Davis Medical School perceived as victims of “societal discrimination” does not justify a classification that imposes disadvantages upon persons like [Bakke], who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered....

[A] diverse student body ... clearly is a constitutionally permissible goal for an institution of higher education. ...Ethnic diversity, however, is only one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body....

In summary, it is evident that the Davis special admissions program involves the use of an explicit racial classification never before countenanced by this Court. It tells applicants who are not Negro, Asian, or Chicano that they are totally excluded from a specific percentage of the seats in an entering class. No matter how strong their qualifications, quantitative and extracurricular, including their own potential for contribution to educational diversity, they are never afforded the chance to compete with applicants from the preferred groups for the special admissions seats.

In enjoining petitioner [UC-Davis] from ever considering the race of any applicant, however, the courts below failed to recognize that the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin. For this reason, so much of the California court’s judgment as enjoins petitioner from any consideration of the race of any applicant must be reversed.

- Of the two approaches identified by Marshall in Document K, which does the Court appear to have adopted?
- How does the Court define terms such as “equal” and “protection” in this ruling?

I agree with the judgment of the Court only insofar as it permits a university to consider the race of an applicant in making admissions decisions. I do not agree that petitioner’s admissions program violates the Constitution. For it must be remembered that, during most of the past 200 years, the Constitution, as interpreted by this Court, did not prohibit the most ingenious and pervasive forms of discrimination against the Negro. Now, when a State acts to remedy the effects of that legacy of discrimination, I cannot believe that this same Constitution stands as a barrier....

The position of the Negro today in America is the tragic but inevitable consequence of centuries of unequal treatment. Measured by any benchmark of comfort or achievement, meaningful equality remains a distant dream for the Negro....

It is because of a legacy of unequal treatment that we now must permit the institutions of this society to give consideration to race in making decisions about who will hold the positions of influence, affluence, and prestige in America. For far too long, the doors to those positions have been shut to Negroes. If we are ever to become a fully integrated society, one in which the color of a person’s skin will not determine the opportunities available to him or her, we must be willing to take steps to open those doors....

In what way does Marshall agree with the majority decision? How does he depart from it?

The Court endorses Justice Powell’s view that student body diversity is a compelling state interest that can justify using race in university admissions. The Court defers to the Law School’s educational judgment that diversity is essential to its educational mission....

The Law School’s admissions program bears the hallmarks of a narrowly tailored plan. To be narrowly tailored, a race-conscious admissions program cannot “insulat[e] each category of applicants with certain desired qualifications from competition with all other applicants.” Instead, it may consider race or ethnicity only as a “‘plus’ in a particular applicant’s file.”...It follows that universities cannot establish quotas for members of certain racial or ethnic groups or put them on separate admissions tracks.

- How did this ruling affirm the one in Regents of the University of California v. Bakke?