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.

According to the Declaration of Independence, the function of government was not to guarantee natural equality, but to protect natural rights. That focus shifted following the Civil War.

Of similar trouble to the Reconstruction Congress was *Barron v. Baltimore*, which 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.

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Case Background

In 1978, the Supreme Court handed down a fractured ruling on affirmative action in public universities. In *Regents of the University of California v. Bakke*, the plurality decision found UC-Davis’s special admissions program to be a quota that was not consistent with the Equal Protection Clause of the Fourteenth Amendment. Twenty-five years later, two affirmative action cases originating at the University of Michigan reached the Court. Both cases concerned Caucasian applicants who believed they had been unfairly denied admission because of the university’s admissions policies.

In *Grutter v. Bollinger* (2003), the Court examined the university’s Law School program, which sought to admit a “critical mass” of minority students. The second case, *Gratz v. Bollinger*, concerned the admissions policy of the University’s Literature, Science and Arts School (LSA). This admissions program automatically awarded 20 points out of the 100 necessary for acceptance to members of minority groups. The legal reasoning for affirmative action in the two Michigan cases was partially different from the reasoning in *Bakke*. Affirmative action began as a way of compensating groups for unjust discrimination they had suffered. By 2003, the University of Michigan based its reasoning on promoting diversity.

In *Grutter v. Bollinger* and *Gratz v. Bollinger*, the Court had a chance to clarify its ruling in *Bakke* and determine the extent to which public universities could constitutionally consider race as a factor in admissions.
DOCUMENT A

Frederick Douglass, What the Black Man Wants: An Address Delivered in Boston, Massachusetts, 1865

[I]n regard to the colored people, there is always more that is benevolent, I perceive, than just, manifested towards us. What I ask for the negro is not benevolence, not pity, not sympathy, but simply justice. The American people have always been anxious to know what they shall do with us. ...I have had but one answer from the beginning. Do nothing with us! Your doing with us has already played the mischief with us. Do nothing with us! If the apples will not remain on the tree of their own strength, if they are worm-eaten at the core, if they are early ripe and disposed to fall, let them fall! ...And if the negro cannot stand on his own legs, let him fall also. All I ask is, give him a chance to stand on his own legs! Let him alone! ...[Y]our interference is doing him positive injury.

▷ What are Douglass’s main ideas?

DOCUMENT B

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 added to the Constitution in 1868?
▷ Does this amendment require the government to give a hand up to those who need it or that it treat everybody the same?

DOCUMENT C


The history of the exclusion of Negro children from white public schools is too well known and recent to require repeating here. That Negroes were deliberately excluded from public graduate and professional schools—and thereby denied the opportunity to become doctors, lawyers, engineers, and the like is also well established....

(continued on next page)
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....

For Negro adults, the unemployment rate is twice that of whites. ...Although Negroes represent 11.5% of the population, they are only 1.2% of the lawyers and judges, 2% of the physicians, 2.3% of the dentists, 1.1% of the engineers and 2.6% of the college and university professors....

In light of the sorry history of discrimination and its devastating impact on the lives of Negroes, bringing the Negro into the mainstream of American life should be a state interest of the highest order. To fail to do so is to ensure that America will forever remain a divided society.

Neither [the Fourteenth Amendment’s] history nor our past cases lend any support to the conclusion that a university may not remedy the cumulative effects of society’s discrimination by giving consideration to race in an effort to increase the number and percentage of Negro doctors.

- Why does Marshall argue that public universities should be able to give consideration to an applicant’s race?

**DOCUMENT D**

_University of Michigan Law School Brief, 2003_

[The Law School seeks to] admit a group of students who individually and collectively are among the most capable ... with substantial promise for success in law school... and a strong likelihood of succeeding in the practice of law and contributing in diverse ways to the well-being of others ... [and] to enroll a critical mass of minority students.

[The Law School seeks to achieve] a mix of students with varying backgrounds and experiences who will respect and learn from each other and to achieve that diversity which has the potential to enrich everyone’s education and thus make a law school class stronger than the sum of its parts.

- What do you think the University means by “critical mass”?
- How does the Law School’s justification for racial considerations differ from that of Marshall’s in Document C?

[T]he Law School seeks to “enroll a critical mass of minority students.” The Law School’s interest is not simply “to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin.” That would amount to outright racial balancing, which is patently unconstitutional....

The current Dean of the Law School ... did not quantify “critical mass” in terms of numbers or percentages. He indicated that critical mass means numbers such that underrepresented minority students do not feel isolated or like spokespersons for their race. ...The Law School’s concept of critical mass is defined by reference to the educational benefits that diversity is designed to produce....

We find that the Law School’s admissions program bears the hallmarks of a narrowly tailored plan....[T]ruly individualized consideration demands that race be used in a flexible, non-mechanical way. It follows from this mandate that universities cannot establish quotas for members of certain racial groups ... Universities can, however, consider race or ethnicity more flexibly as a “plus” factor in the context of individualized consideration of each and every applicant....

When using race as a “plus” factor in university admissions, a university’s admissions program must remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant’s race or ethnicity the defining feature of his or her application....

Here, the Law School engages in a highly individualized, holistic review of each applicant’s file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment.... There is no policy ... of automatic acceptance or rejection based on any single “soft” variable. Unlike the program at issue in Gratz v. Bollinger, the Law School awards no mechanical, predetermined diversity “bonuses” based on race or ethnicity....

It has been 25 years since [the ruling in Bakke] first approved the use of race to further an interest in student body diversity in the context of public higher education. ...We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.

- Why did the Court uphold the Law School’s admissions program?

The Law School has offered no explanation for its actual admissions practices and, unexplained, we are bound to conclude that the Law School has managed its admissions program, not to achieve a “critical mass,” but to extend offers of admission to members of selected minority groups in proportion to their statistical representation in the applicant pool. But this is precisely the type of racial balancing that the Court itself calls “patently unconstitutional.”...

*Note: The following charts are taken from Rehnquist’s opinion.*

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- What argument does Rehnquist make about the Law School’s “actual admissions practices”?
- Is his argument supported by this data?

**DOCUMENT G**


The University of Michigan Law School’s mystical “critical mass” justification for its discrimination by race challenges even the most gullible mind. The admissions statistics show it to be a sham to cover a scheme of racially proportionate admissions.

- Scalia concurred with the majority in part and dissented in part. Is this document an example of his concurrence [agreement] with the decision, or with his dissent?

Frederick Douglass, speaking to a group of abolitionists almost 140 years ago, delivered a message lost on today’s majority. ...Like Douglass, I believe blacks can achieve in every avenue of American life without the meddling of university administrators.

The Law School, of its own choosing, and for its own purposes, maintains an exclusionary admissions system that it knows produces racially disproportionate results. Racial discrimination is not a permissible solution to the self-inflicted wounds of this elitist admissions policy....

I agree with the Court’s holding that racial discrimination in higher education admissions will be illegal in 25 years. ...I respectfully dissent from the remainder of the Court’s opinion and the judgment, however, because I believe that the Law School’s current use of race violates the Equal Protection Clause and that the Constitution means the same thing today as it will in 300 months.

- Why does Thomas reference Frederick Douglass’s address (Document A)?
- What is Thomas’s view of the Court’s prediction that racial discrimination in higher education admissions will be illegal in 25 years?

The [LSA] considers a number of factors in making admissions decisions, including high school grades, standardized test scores, high school quality, curriculum strength, geography, alumni relationships, leadership, and race. During [the period of this case], the University has considered African-Americans, Hispanics, and Native Americans to be “underrepresented minorities,” and it is undisputed that the University admits virtually every qualified applicant from these groups. The current guidelines use a selection method under which every applicant from an underrepresented racial or ethnic minority group is automatically awarded twenty points of the 100 needed to guarantee admission.

We find that the University’s policy, which automatically distributes 20 points, or one-fifth of the points needed to guarantee admission, to every single “underrepresented minority” applicant solely because of race, is not narrowly tailored to achieve the interest in educational diversity that respondents claim justifies their program.

Even if [a Caucasian student’s] “extraordinary artistic talent” rivaled that of Monet or Picasso, the applicant would receive, at most, five points under the LSA’s system. At the same time, every single underrepresented minority applicant ... would automatically receive 20 points for submitting an application. Clearly, the LSA’s system does not offer applicants the individualized selection process....

We conclude, therefore, that because the University’s use of race in its current freshman admissions policy is not narrowly tailored to achieve respondents’ asserted compelling interest in diversity, the admissions policy violates the Equal Protection Clause of the Fourteenth Amendment.

→ Why did the Court strike down the LSA’s admissions program?

→ How did the LSA admissions policy differ from the Law School policy (Document D)?

The very nature of a college’s permissible practice of awarding value to racial diversity means that race must be considered in a way that increases some applicants’ chances for admission. It is hard to see what is inappropriate in assigning some stated value to a relevant characteristic, whether it be reasoning ability, writing style, running speed, or minority race.

It suffices for me that there are no set-asides and that consideration of an applicant’s whole spectrum of ability is no more ruled out by giving 20 points for race than by giving the same points for athletic ability or socioeconomic disadvantage.

- Why would Souter have upheld the LSA’s admissions policy?


If honesty is the best policy, surely Michigan’s accurately described, fully disclosed College affirmative action program is preferable to achieving similar numbers through winks, nods, and disguises.

- How does Ginsburg compare the program in *Gratz* (“fully disclosed”) to the program in *Grutter* (“winks, nods, and disguises”)?
According to this document, what will be the result of this ruling when it comes to affirmative action programs in public universities? Evaluate this prediction.

**DIRECTIONS**

Answer the Key Question in a well-organized essay that incorporates your interpretations of Documents A-L, as well as your own knowledge of history.

**KEY QUESTION**

Evaluate the Court’s reasoning in upholding *Grutter* while striking down *Gratz*. 
What argument does the cartoonist make about the concept of “preferential treatment” in higher education?