NCSS 2014 Session 825 Bill of Rights Institute

Affirmative Action: Reverse Discrimination, Social Justice, or Equal Protection?

SUPREME COURT DBQs

Exploring the Cases that Changed History
by Warner Winborne, Ph.D.

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.

*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

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.
KEY QUESTION

Appraise the claim that the University of California at Davis special admissions program resulted in unconstitutional reverse discrimination.

Documents you will examine:

A  Section of the Fourteenth Amendment, 1868
B  Executive Order 10925, 1961
C  “Civil Rights Legislation,” 1963
D  Title VI of the Civil Rights Act of 1964
E  President Lyndon Johnson, Speech at Howard University, 1965
F  Program Demographics, 1970-1974
G  Education by Race Statistics, 1940-1980
H  Alan Bakke’s Credentials, 1973-1974
I  UC-Davis’s Reply to Bakke’s Query on Age, 1972
J  Oral Arguments, 1978
L  Plurality Decision (5-4), Regents of the University of California v. Bakke, 1978
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?
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

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

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<td>3.5%</td>
<td>6.1%</td>
<td>7.9%</td>
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- Summarize the chart data in one or two sentences.
**DOCUMENT H**

Alan Bakke’s Credentials, 1973-1974

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<th>Science GPA</th>
<th>Overall GPA</th>
<th>MCAT percentile</th>
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<td>96</td>
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<td>Average of regular admittees, 1973</td>
<td>3.51</td>
<td>3.49</td>
<td>81</td>
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<tr>
<td>Average of special admittees, 1973</td>
<td>2.62</td>
<td>2.88</td>
<td>46</td>
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<tr>
<td>Average of regular admittees, 1974</td>
<td>3.36</td>
<td>3.29</td>
<td>69</td>
</tr>
<tr>
<td>Average of special admittees, 1974</td>
<td>2.42</td>
<td>2.62</td>
<td>34</td>
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</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?

**DIRECTIONS**

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

**KEY QUESTION**

Appraise the claim that the University of California at Davis special admissions program resulted in unconstitutional reverse discrimination.

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?
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.
KEY QUESTION

Evaluate the Court’s reasoning in upholding *Grutter* while striking down *Gratz*.

A Frederick Douglass, *What the Black Man Wants: An Address Delivered in Boston, Massachusetts*, 1865
B Section of the Fourteenth Amendment, 1868
D University of Michigan Law School Brief, 2003
L “U of M Case,” 2003
**DOCUMENT A**

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

[In 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?

[The 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. ... Truly 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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<td>1.0%</td>
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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**

**Opinion of Antonin Scalia, Grutter v. Bollinger, 2003**

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”)?
DOCUMENT L

“U of M Case,” 2003

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?
UNIT TWO: Equal Protection and Affirmative Action

Regents of the University of California v. Bakke

Document A: To protect the rights of former slaves.

Document B: 1. Positive steps. 2. Paying no attention to.

Document C: Congress is being forced by the demands of African Americans to pass civil rights legislation.

Document D: Yes. Executive Order 10925 applied only to federal government contractors. Title VI of the Civil Rights Act of 1964 applied to “any program or activity receiving Federal financial assistance.”

Document E: 1. Historic disadvantages are not rectified by mere equality of opportunity. True equality is equality of results. 2. The first document implies that equality of opportunity is sufficient for true equality. Johnson asserts that equality is measured by results.

Document F: Under the “special program” a significantly higher number of minorities (particularly blacks and Mexican-Americans) were accepted to medical school than were accepted under the “general program.” Nationally, most minority medical students went to “traditionally African American colleges.”

Document G: While the percentages of education achieved for both races increased, blacks lagged significantly behind whites in all categories.

Document H: His scores for both years were comparable to those accepted into the general program, but far exceeded the scores of students admitted to the special program.

Document I: Answers will vary.

Document J: Equality is in opportunity, not in results, as asserted by President Johnson.

Document K: As admitting certain students on the basis of race, or excluding certain students on the basis of race.

Document L: 1. The case is about excluding certain applicants on the basis of race. 2. “Equal” means treating everyone the same; “protection” means security from discrimination.

Document M: Marshall agreed that the race of an applicant can be taken into consideration when determining admission. Marshall disagreed that the Equal Protection Clause prevents a university from providing additional opportunities to particular races in its admissions policy.

Grutter v. Bollinger and Gratz v. Bollinger

Document A: By trying to help African Americans, the white Americans are not giving blacks a chance to stand on their own two feet.

Document B: 1. To protect the rights of former slaves. 2. Answers will vary.

Document C: As a way of remedying the long history of discrimination against African Americans.

Document D: 1. Answers will vary. 2. Marshall said racial preferences were needed to remedy past wrongs. The Law School based its affirmative action program on the claimed educational benefits for all students that result from a diverse student body.

Document E: It did not have a quantified goal of minority enrollment, but rather used race as a “plus factor” in a flexible way that allowed individual consideration.

Document F: It was masking a quota-system of proportional admissions. 2. Yes.

Document G: Dissent.

Document H: 1. Because it provides eloquent, historical support for his position. 2. If it will be unconstitutional in 25 years, it must be unconstitutional now.

Document I: 1. The automatic 20 points awarded on the basis of race did not allow for individual consideration of applicants and therefore violated the Equal Protection Clause. 2. The LSA policy awarded specific points for race, the Law School policy did not.
CASE BRIEFING SHEET

Case Name and Year: ____________________________

Facts of the Case: ________________________________________________________________

What is the constitutional question that the Supreme Court must answer? 
(This is a yes/no question and spells out the specific part of the Constitution at issue.)

______________________________________________________________________________

______________________________________________________________________________

What constitutional principles are indicated in the case? ___________________________

______________________________________________________________________________

Summary of one side’s arguments: ____________________________ Summary of the other side’s arguments: ____________________________

______________________________________________________________________________

______________________________________________________________________________

How would you decide the case and why? _________________________________________

______________________________________________________________________________

______________________________________________________________________________

How did the Supreme Court majority decide the case and why? ______________________

______________________________________________________________________________

______________________________________________________________________________

What were the main points raised in any dissenting opinions? _______________________

______________________________________________________________________________

______________________________________________________________________________

What other Supreme Court cases are related in important ways? ____________________

______________________________________________________________________________
ONLINE RESOURCES

Consult any of the following websites for additional resources to learn more about the Supreme Court and landmark cases.

http://billofrightsinstitute.org/resources/educator-resources/landmark-cases/
www.oyez.org
http://www.supremecourt.gov/
http://www.law.cornell.edu/supct/cases/name.htm
http://www.scotusblog.com/
<table>
<thead>
<tr>
<th>Attorney/judge's position</th>
<th>How did majority/disagreeing attorney(s) align with each attorney's position?</th>
<th>Additional notes:</th>
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Use this form to show which attorney/attorneys would probably use each document provided, and why.
MOOT COURT PROCEDURES

Preparation

- Encourage students to use the background knowledge they have developed. Attorneys and Justices of the U.S. Supreme Court apply a great deal of background and historical knowledge.

- Caution students that "gotcha" questions within the classroom context are not productive. "Justices" should not ask questions that, based on their background and class activities, would not be fair game.

- Decide whether students will be allowed to use online resources via their smartphones during the exercise—there are good arguments both for using and for not using them.

- Recommendation—do not allow "Justices" to interrupt the attorneys in the first time or two that you run moot courts. They can ask their questions at the end of each attorney's oral arguments.

- Encourage teamwork among "attorneys" in their presentations. Each team should have a lead attorney, but others will help fill in as needed.

Divide class into 3 groups: 9 Justices, advocates for the petitioner, and advocates for the respondent (A fourth group could be journalists.)

- Give time for planning: Justices decide what questions they want answered in oral arguments; advocates for each side plan their oral arguments.

- Allow equal time for presentation of each side, including interruptions from Justices (or not—your choice). In the U.S. Supreme Court, each side has 30 minutes, and the Justices interrupt continuously.

- Justices deliberate and announce decision. Deliberation is actually done in strict privacy in the U.S. Supreme Court conference, but you decide for your class.

At the beginning of each session of the Supreme Court, the Marshal of the Court (Court Crier) announces:

"Oyez! Oyez! Oyez! All persons having business before the Honorable, the Supreme Court of the United States, are admonished to draw near and give their attention, for the Court is now sitting. God save the United States and this Honorable Court!"

The Chief Justice will begin the oral argument phase by saying, "Petitioner, you may begin."

The petitioner's attorney says, "Mr. Chief Justice, and may it please the Court..."

Debrief: Discuss both the content of the case (Constitutional principle and its application) and the processes employed. Consider thinking and planning process, civil discourse process, and the application of these skills outside the classroom.
TIPS FOR THESIS STATEMENTS AND ESSAYS

Thesis Statement: The thesis statement condenses your arguments to a nutshell and appears in the opening paragraph, but it is not written until AFTER you have planned your overall response. (Planning process shown in table below.)

A good thesis statement—

• Fully addresses all parts of the prompt, while acknowledging the complexity of the issue.

• Clearly takes a side—makes a declarative statement that one thing was more important, more persuasive, etc. than another. Since the verb in the prompt is often something like “assess” or “evaluate,” the thesis statement should show which side the writer takes.

• Suggests a “table of contents” or road map for the essay—shows what elements enter into consideration.

• Begins an essay that is proven by abundant and persuasive facts and evidence.

In a DBQ essay, the student writes a well-organized response to target a specific prompt, analyzing pertinent documents in order to support his/her thesis. The steps described here will guide the process of handling the documents. (For Advanced Placement US History the response must include BOTH outside information AND information from the documents. On US History AP exams, one of the essays that must be written under timed conditions is the DBQ.)

DBQ Do and Don’t

<table>
<thead>
<tr>
<th>Steps</th>
<th>Do</th>
<th>Don’t</th>
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<tr>
<td>1. Analyze the prompt and divide it into its components. A graphic organizer helps with this step.</td>
<td>Fully address the prompt. It is better to address all parts of the prompt, even if you must do some in a way that is less complete, than to spend all your time on just one of two parts or 3 of 4 parts.</td>
<td>Neglect part of the prompt because you spent too much time on the part you know more about.</td>
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<td>2. Plan to prove your point. It is best to begin by planning the overall structure BEFORE even looking at the documents.</td>
<td>Organize your thoughts before writing the thesis statement. What are the logical points your essay needs to include?</td>
<td>Write a “laundry list” that simply summarizes each document.</td>
</tr>
<tr>
<td>Steps</td>
<td>Do</td>
<td>Don't</td>
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<td>3. Check the documents to see how you can use them as tools.</td>
<td>Strive to use all the documents; but be sure you accurately understand their main ideas.</td>
<td>Take quotes or ideas out of context to use them in a manner other than the author intended.</td>
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<td>4. Ask yourself when writing every paragraph: “How does this help to prove my thesis?”</td>
<td>Analyze to prove the position asserted in the thesis statement. Analysis is not the same thing as description or narrative. Merely making a series of true statements is not analysis. Key to analysis—is the essay answering the “So what?” question?</td>
<td>Use 1st-or 2nd-person pronouns “I think the Supreme Court has the authority to use judicial review because...” “Have you ever wondered how the Supreme Court got the authority to overturn federal laws?”</td>
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<td>5. Manage time wisely; writing long quotes will eat up thinking time.</td>
<td>Use relevant facts, evidence, proof. A well-chosen brief phrase in quotations and worked into your own sentence is powerful.</td>
<td>Use lengthy quotes. Pad the paper in an attempt to conceal a lack of analysis.</td>
</tr>
<tr>
<td>6. Give credit to sources.</td>
<td>Cite sources using the author’s name and/or document title.</td>
<td>Write “According to Document B,...”</td>
</tr>
<tr>
<td>7. Think as you write!</td>
<td>Let logic and analysis drive the essay.</td>
<td>Let documents drive the essay.</td>
</tr>
</tbody>
</table>