"The guarantees of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color."—Justice POWELL

"[W]e cannot ... let color blindness become myopia which masks the reality that many 'created equal' have been treated within our lifetimes as inferior both by the law and by their fellow citizens."—Justices BRENNAN, WHITE, MARSHALL, and BLACKMUN

"[I]t is more than a little ironic that, after several hundred years of class-based discrimination against Negroes, the Court is unwilling to hold that a class-based remedy for that discrimination is permissible."—Justice MARSHALL

"In order to get beyond racism, we must first take account of race."—Justice BLACKMUN

Regents of the University of California v. Bakke

438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978).

As part of its plan for "affirmative action," the Medical School of the University of California at Davis established a special admissions program for members of minority groups, allotting to them 16 of the 100 places in each entering class. In 1973 and 1974, the school denied admission to Allan Bakke, a white male, even though, according to the supposed standards for acceptance, he scored well above most candidates admitted under the special program. (The mean College Grade Point Average of those admitted in 1974 under the special program was 2.62; Bakke's was 3.51 on a scale in which A = 4, B = 3, C = 2, D = 1, and F = 0. On the national Medical College Admission Test, Bakke scored in the ninety-sixth percentile on verbal aptitude and in the ninety-seventh on scientific aptitude; the average scores of those admitted under the special program were at the thirty-fourth and thirty-seventh percentiles. Moreover, at least one person so admitted had had a C- average in college and scored in the lower third of the country on both verbal and scientific aptitude.)

After his second rejection, Bakke filed suit in a state court, which held Davis's affirmative action plan unconstitutional because it was based on race. The court, however, refused to order Bakke's admission on grounds that he had not proved that he would have been admitted in the absence of the special program. Both Bakke and Davis appealed parts of the judgment. California's Supreme Court ruled that the affirmative action plan violated both the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964. (The most relevant section, 601, reads: "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." The Medical School at Davis was receiving federal financial aid.) The court ordered Bakke admitted. Davis then sought and obtained certiorari from the U.S. Supreme Court.

The Justices could not agree on an opinion for the Court. Four (Brennan, White, Marshall, and Blackmun) thought the affirmative action plan constitutional and legal under Title VI and voted to deny Bakke admission. Four (Burger, Stewart, Rehnquist, and Stevens) believed that Title VI outlawed Davis's plan and voted for Bakke's admission. This even division made the role of the ninth Justice, Lewis F. Powell, decisive.

Mr. Justice **POWELL** announced the judgment of the Court. ...

... I believe that so much of the judgment of the California court as holds petitioner's special admissions program unlawful and directs that respondent be admitted to the Medical School must be affirmed. For the reasons expressed in a separate opinion, my Brothers The Chief Justice [Burger], Mr. Justice Stewart, Mr. Justice Rehnquist, and Mr. Justice Stevens concur in this judgment. ...

I also conclude ... that the portion of the court's judgment enjoining petitioner from according any consideration to race in its admissions process must be reversed. For reasons expressed in separate opinions, my Brothers Mr. Justice Brennan, Mr. Justice White, Mr. Justice Marshall, and Mr. Justice Blackmun concur in this judgment. ...

II

[Justice Powell analyzed the wording and legislative history of Title VI of the Civil Rights Act of 1964 and concluded that it proscribed "only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment." Thus he moved to the basic constitutional question: Did California's plan of affirmative action deny Bakke equal protection?]

III

A ...

... [T]he parties fight a sharp preliminary action over the proper characterization of the special admissions program. Petitioner prefers to view it as establishing a "goal" of minority representation. ... Respondent ... labels it a racial quota. This semantic distinction is beside the point: the special admissions program is undeniably a classification based on race and ethnic background. To the extent that there existed a pool of at least minimally qualified minority applicants to fill the 16 special admissions seats, white applicants could compete only for 84 seats in the entering class, rather than the 100 open to minority applicants. Whether this limitation is described as a quota or a goal, it is a line drawn on the basis of race and ethnic status.

The guarantees of the Fourteenth Amendment extend to persons. Its language is explicit: "No state shall ... deny to any person within its jurisdiction the equal protection of the laws." It is settled beyond question that the "rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. ..." 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.

Nevertheless, petitioner argues that the court below erred in applying strict scrutiny to the special admissions programs because white males ... are not a "discrete and insular minority" requiring extraordinary protection from the majoritarian political process. [United States v.] Carolene Products Co. (1938). This rationale, however, has never been invoked in our decisions as a prerequisite to subjecting racial or ethnic distinctions to strict scrutiny. 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. [Korematsu v. United States (1944).]

B ...

Although many of the Framers of the Fourteenth Amendment conceived of its primary function as bridging the vast distance between members of the Negro race and the white "majority," the Amendment itself was framed in universal terms, without reference to color, ethnic origin, or condition of prior servitude. ...

Over the past 30 years, this Court has embarked upon the crucial mission of interpreting the Equal Protection Clause with the view of assuring to all persons "the protection of equal laws," Yick Wo [v. Hopkins (1886)]. ... Because the landmark decisions in this area arose in response to the continued exclusion of Negroes from the mainstream of American society, they could be characterized as involving discrimination by the "majority" white race against the Negro minority. But they need not be read as depending upon that characterization for their results. It suffices to say that "[o]ver the years, this Court consistently repudiated '[d]istinctions between citizens solely because of their ancestry' as being 'odious to a free people whose institutions are founded upon the doctrine of equality.' " Loving v. Virginia (1967), quoting Hirabayashi v. United States (1943).

Petitioner urges us to adopt for the first time a more restrictive view of the Equal Protection Clause and hold that discrimination against members of the white "majority" cannot be suspect if its purpose can be characterized as "benign." The clock of our liberties, however, cannot be turned back to 1868. [Brown v. Board of Education (1954).] It is far too late to argue that the guarantee of equal protection to *all* persons permits the recognition of special wards entitled to a degree of protection greater than that accorded others. ...

Once the artificial line of a "two-class theory" of the Fourteenth Amendment is put aside, the difficulties entailed in varying the level of judicial review according to a perceived "preferred" status of a particular racial or ethnic minority are intractable. The concepts of "majority" and "minority" necessarily reflect temporary arrangements and political judgments. ... [T]he white "majority" itself is composed of various minority groups, most of which can lay claim to a history of prior discrimination. ... There is no principled basis for deciding which

groups would merit "heightened judicial solicitude" and which would not. ...

Moreover, there are serious problems of justice connected with the idea of preference itself. First, it may not always be clear that a so-called preference is in fact benign. Courts may be asked to validate burdens imposed upon individual members of particular groups in order to advance the group's general interest. ... Nothing in the Constitution supports the notion that individuals may be asked to suffer otherwise impermissible burdens in order to enhance the societal standing of their ethnic groups. Second, preferential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection. ... Third, there is a measure of inequity in forcing innocent persons ... to bear the burdens of redressing grievances not of their making.

By hitching the meaning of the Equal Protection Clause to these transitory considerations, we would be holding, as a constitutional principle, that judicial scrutiny of classifications touching on racial and ethnic background may vary with the ebb and flow of political forces. Disparate constitutional tolerance of such classifications well may serve to exacerbate racial and ethnic antagonisms rather than alleviate them. ... Also, the mutability of a constitutional principle, based upon shifting political and social judgments, undermines the chances for consistent application of the Constitution from one generation to the next, a critical feature of its coherent interpretation. ... In expounding the Constitution, the Court's role is to discern "principles sufficiently absolute to give them roots throughout the community and continuity over significant periods of time, and to lift them above the level of the pragmatic political judgments. ..." A[rchibald] Cox, *The Role of the Supreme Court in American Government* 114 (1976).

If it is the individual who is entitled to judicial protection ... rather than the individual only because of his membership in a particular group, then constitutional standards may be applied consistently. Political judgments regarding the necessity for the particular classification may be weighed in the constitutional balance ... but the standard of justification will remain constant. This is as it should be, since those political judgments are the product of rough compromise struck by contending groups within the democratic process. When they touch upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest. ...

IV

We have held that in "order to justify the use of a suspect classification, a State must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is 'necessary ... to the accomplishment' of its purpose or the safeguarding of its interest." In re Griffiths (1973); *Loving*. ...

A

If petitioner's purpose is to assure within its student body some specified percentage of a

particular group merely because of its race or ethnic origin, such a preferential purpose must be rejected ... as facially invalid. Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids. E.g., *Loving*, *Brown.*

B

The State certainly has a legitimate and substantial interest in ameliorating, or eliminating ... the disabling effects of identified discrimination. ... We have [, however,] never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations. ... After such findings ... the governmental interest in preferring members of the injured groups at the expense of others is substantial, since the legal rights of the victims must be vindicated. ... Petitioner does not purport to have made, and is in no position to make, such findings. ... Lacking this capability, petitioner has not carried its burden of justification on this issue.

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 ... who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered. ...

C

Petitioner identifies, as another purpose of its program, improving the delivery of health care services to communities currently underserved. It may be assumed that in some situations a State's interest in facilitating the health care of its citizens is sufficiently compelling to support the use of a suspect classification. But there is virtually no evidence in the record indicating that petitioner's special admissions program is either needed or geared to promote that goal. ...

D

The fourth goal asserted by petitioner is the attainment of a diverse student body. This clearly is a constitutionally permissible goal for an institution of higher education. Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body. ... Thus, in arguing that its universities must be accorded the right to select those students who will contribute the most to the "robust exchange of ideas," petitioner invokes a countervailing constitutional interest, that of the First Amendment. In this light, petitioner must be viewed as seeking to achieve a goal that is of paramount importance in the fulfillment of its mission.

... [E]ven at the graduate level, our tradition and experience lend support to the view that the contribution of diversity is substantial. ... Physicians serve a heterogeneous population. An otherwise qualified medical student with a particular background—whether it be ethnic,

geographic, culturally advantaged or disadvantaged—may bring to a professional school of medicine experiences, outlooks and ideas that enrich the training of its student body and better equip its graduates to render with understanding their vital service to humanity.

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. Although a university must have wide discretion in making the sensitive judgments as to who should be admitted, constitutional limitations protecting individual rights may not be disregarded. ... [T]he question remains whether the program's racial classification is necessary to promote this interest. ...

V

A

... The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element. Petitioner's special admissions program, focused solely on ethnic diversity, would hinder rather than further attainment of genuine diversity. The experience of other university admissions programs which take race into account in achieving the educational diversity valued by the First Amendment, demonstrates that the assignment of a fixed number of places to a minority group is not a necessary means toward that end. An illuminating example is found in the Harvard College program:

> In recent years Harvard College has expanded the concept of diversity to include students from disadvantaged economic, racial and ethnic groups. ...
>
> In practice, this new definition of diversity has meant that race has been a factor in some admission decisions. When the Committee on Admissions reviews the large middle group of applicants who are "admissible" ... the race of an applicant may tip the balance in his favor just as [may] geographic origin. ... A farm boy from Idaho can bring something ... that a Bostonian cannot offer. Similarly, a black student can usually bring something that a white person cannot offer. ...
>
> ... [T]he Committee has not set target-quotas for the number of blacks, or of musicians, football players, physicists or Californians. ... [Rather] in choosing among thousands of applicants who are not only "admissible" academically but have other strong qualities, the Committee, with a number of criteria in mind, pays some attention to distribution among many types and categories of students. ...

In such an admissions program, race or ethnic background may be deemed a "plus" in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates for the available seats. The file of a particular black applicant may be examined for his potential contribution to diversity without the factor of race being decisive when compared,

for example, with that of an applicant identified as an Italian–American if the latter is thought to exhibit qualities more likely to promote beneficial educational pluralism. Such qualities could include exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor, or other qualifications deemed important. ...

This kind of program treats each applicant as an individual in the admissions process. The applicant who loses out on the last available seat to another candidate receiving a "plus" on the basis of ethnic background will not have been foreclosed from all consideration for that seat simply because he was not the right color or had the wrong surname. It would mean only that his combined qualifications, which may have included similar nonobjective factors, did not outweigh those of the other applicant. His qualifications would have been weighed fairly and competitively, and he would have no basis to complain of unequal treatment. ...

It has been suggested that an admissions program which considers race only as one factor is simply a subtle and more sophisticated—but no less effective—means of according racial preference than the Davis program. A facial intent to discriminate, however, is evident in petitioner's preference program and not denied in this case. No such facial infirmity exists in an admissions program where race or ethnic background is simply one element—to be weighed fairly against other elements—in the selection process. ...

B ...

... [W]hen a State's distribution of benefits or imposition of burdens hinges on the color of a person's skin or ancestry, that individual is entitled to a demonstration that the challenged classification is necessary to promote a substantial state interest. Petitioner [California] has failed to carry this burden. ...

[*Affirmed in part and reversed in part.*]

Opinion of Mr. Justice **BRENNAN,** Mr. Justice **WHITE,** Mr. Justice **MARSHALL,** and Mr. Justice **BLACKMUN,** concurring in the judgment in part and dissenting. ...

I ...

The Fourteenth Amendment, the embodiment in the Constitution of our abiding belief in human equality, has been the law of our land for only slightly more than half its 200 years. And for half of that half, the Equal Protection Clause of the Amendment was largely moribund. ... Worse than desuetude, the Clause was early turned against those whom it was intended to set free, condemning them to a "separate but equal" status before the law, a status always separate but seldom equal. Not until 1954 was this odious doctrine interred by our decision in *Brown* and its progeny. ... Even then inequality was not eliminated with "all deliberate speed." ... [O]fficially sanctioned discrimination is not a thing of the past.

Against this background, claims that law must be "colorblind" or that the datum of race is

no longer relevant to public policy must be seen as aspiration rather than as description of reality. ... [W]e cannot—and ... need not under our Constitution or Title VI ... —let color blindness become myopia which masks the reality that many "created equal" have been treated within our lifetimes as inferior both by the law and by their fellow citizens.

II

[The four Justices then examined the text and legislative history of the Civil Rights Act of 1964 and concluded that the statute did not outlaw affirmative action plans such as that of Davis.—**Eds.**]

III

A

The assertion of human equality is closely associated with the proposition that differences in color or creed, birth or status, are neither significant nor relevant to the way in which persons should be treated. Nonetheless, the position ... summed up by the shorthand phrase "[o]ur Constitution is color-blind," Plessy v. Ferguson (1896) (Harlan, J., dissenting), has never been adopted by this Court as the proper meaning of the Equal Protection Clause. Indeed, we have expressly rejected this proposition on a number of occasions.

Our cases have always implied that an "overriding statutory purpose" could be found that would justify racial classifications. ... We conclude, therefore, that racial classifications are not *per se* invalid under the Fourteenth Amendment. Accordingly, we turn to the problem of articulating what our role should be in reviewing state action that expressly classifies by race, e.g. *Loving, Korematsu.*

B ...

Unquestionably we have held that a government practice or statute which restricts "fundamental rights" or which contains "suspect classifications" is to be subjected to "strict scrutiny" and can be justified only if it furthers a compelling government purpose and, even then, only if no less restrictive alternative is available. ... But no fundamental right is involved here. ... Nor do whites as a class have any of the "traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." [San Antonio v. Rodriguez (1973).] See *Carolene Products* n. 4. ...

... Nor ... [do] the University's purposes contravene the cardinal principle that racial classifications that stigmatize—because they are drawn on the presumption that one race is inferior to another or because they put the weight of government behind racial hatred and separatism—are invalid without more. ...

On the other hand ... this case ... should [not] be analyzed by applying the very loose rational-basis standard of review that is the very least that is always applied in equal protection cases. ... [A] number of considerations ... lead us to conclude that racial classifications designed to further remedial purposes " 'must serve important governmental objectives and must be substantially related to achievement of those objectives.' " Craig v. Boren (1976). First, race, like "gender-based classifications too often [has] been inexcusably utilized to stereotype and stigmatize politically powerless segments of society." ... Second, race, like gender and illegitimacy, ... is an immutable characteristic which its possessors are powerless to escape or set aside. While a classification is not *per se* invalid because it divides classes on the basis of an immutable characteristic ... it is nevertheless true that such divisions are contrary to our deep belief that "legal burdens should bear some relationship to individual responsibility or wrongdoing" ... and that advancement sanctioned, sponsored, or approved by the State should ideally be based on individual merit or achievement. ...

In sum, because of the significant risk that racial classifications established for ostensibly benign purposes can be misused, ... to justify such a classification an important and articulated purpose for its use must be shown. In addition, any statute must be stricken that stigmatizes any group or that singles out those least well represented in the political process to bear the brunt of a benign program. ...

IV

Davis's articulated purpose of remedying the effects of past societal discrimination is, under our cases, sufficiently important to justify the use of race-conscious admissions programs where there is a sound basis for concluding that minority underrepresentation is substantial and chronic, and that the handicap of past discrimination is impeding access of minorities to the medical school. ...

B

Properly construed, ... our prior cases unequivocally show that a state government may adopt race-conscious programs if the purpose of such programs is to remove the disparate racial impact its actions might otherwise have and if there is reason to believe that the disparate impact is itself the product of past discrimination, whether its own or that of society at large. There is no question that Davis's program is valid under this test. ...

Davis clearly could conclude that the serious and persistent under-representation of minorities in medicine ... is the result of handicaps under which minority applicants labor as a consequence of a background of deliberate, purposeful discrimination against minorities in education and in society generally, as well as in the medical profession. From the inception of our national life, Negroes have been subjected to unique legal disabilities impairing access to equal educational opportunity. ... The generation of minority students applying to Davis Medical School since it opened in 1968 ... clearly have been victims of this discrimination. ... [T]he conclusion is inescapable that applicants to medical school must be few indeed who endured the effects of *de jure* segregation, the resistance to *Brown*, or the equally debilitating pervasive

discrimination fostered by our long history of official discrimination ... and yet come to the starting line with an education equal to whites. ...

C

The second prong of our test—whether the Davis program stigmatizes any discrete group or individual and whether race is reasonably used in light of the program's objectives—is clearly satisfied by the Davis program.

It is not even claimed that Davis's program in any way operates to stigmatize or single out any discrete and insular, or even any identifiable, nonminority group. Nor will harm comparable to that imposed upon racial minorities by exclusion or separation on grounds of race be the likely result of the program. ...

Nor was Bakke in any sense stamped as inferior by the Medical School's rejection of him. ... Unlike discrimination against racial minorities, the use of racial preferences for remedial purposes does not inflict a pervasive injury upon individual whites in the sense that wherever they go or whatever they do there is a significant likelihood that they will be treated as second-class citizens because of their color. ...

D

We disagree with the lower courts' conclusion that the Davis program's use of race was unreasonable in light of its objectives. ... [T]here are no practical means by which it could achieve its ends in the foreseeable future without the use of race-conscious measures. ...

E

Finally, Davis's special admissions program cannot be said to violate the Constitution simply because it has set aside a predetermined number of places for qualified minority applicants rather than using minority status as a positive factor to be considered in evaluating applications of disadvantaged minority applicants. For purposes of constitutional adjudication, there is no difference between the two approaches. In any admissions program which accords special consideration to disadvantaged racial minorities, a determination of the degree of preference to be given is unavoidable, and any given preference that results in the exclusion of a white candidate is no more or no less constitutionally acceptable than a program such as that at Davis. ...

Separate opinion of Mr. Justice **WHITE**. ...

[Justice White contended that Title VI of the Civil Rights Act of 1964 did not provide for enforcement by private action, and that consequently the courts had no jurisdiction in Bakke's case.**—Eds.**]

Mr. Justice **MARSHALL**.

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.... At every point from birth to death the impact of the past is reflected in the still disfavored position of the Negro.

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.

I do not believe that the Fourteenth Amendment requires us to accept that fate. Neither its 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....

It is plain that the Fourteenth Amendment was not intended to prohibit measures designed to remedy the effects of the Nation's past treatment of Negroes.... Since the Congress that considered and rejected the objections to the 1866 Freedmen's Bureau Act concerning special relief to Negroes also proposed the Fourteenth Amendment, it is inconceivable that the Fourteenth Amendment was intended to prohibit all race-conscious relief measures.... Such a result would pervert the intent of the Framers by substituting abstract equality for the genuine equality the Amendment was intended to achieve....

While I applaud the judgment of the Court that a university may consider race in its admissions process, it is more than a little ironic that, after several hundred years of class-based discrimination against Negroes, the Court is unwilling to hold that a class-based remedy for that discrimination is permissible. In declining to so hold, today's judgment ignores the fact that for several hundred years Negroes have been discriminated against, not as individuals, but rather solely because of the color of their skins. It is unnecessary in 20th-century America to have individual Negroes demonstrate that they have been victims of racial discrimination; the racism of our society has been so pervasive that none, regardless of wealth or position, has managed to escape its impact. The experience of Negroes in America has been different in kind, not just in degree, from that of other ethnic groups. It is not merely the history of slavery alone but also that a whole people were marked as inferior by the law. And that mark has endured. The dream of America as the great melting pot has not been realized for the Negro; because of his skin color he never even made it into the pot....

Most importantly, had the Court been willing in 1896, in *Plessy*, to hold that the Equal

Protection Clause forbids differences in treatment based on race, we would not be faced with this dilemma in 1978. We must remember, however, that the principle that the "Constitution is color-blind" appeared only in the opinion of the lone dissenter. The majority of the Court rejected the principle of color-blindness, and for the next 58 years, from *Plessy* to *Brown*, ours was a Nation where, *by law*, an individual could be given "special" treatment based on the color of his skin.

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. I do not believe that anyone can truly look into America's past and still find that a remedy for the effects of that past is impermissible....

I fear that we have come full circle. After the Civil War our Government started several "affirmative action" programs. This Court in the Civil Rights Cases (1883) and *Plessy* destroyed the movement toward complete equality. For almost a century no action was taken, and this nonaction was with the tacit approval of the courts. Then we had *Brown* and the Civil Rights Acts of Congress, followed by numerous affirmative-action programs. *Now*, we have this Court again stepping in, this time to stop affirmative-action programs of the type used by the University of California.

Mr. Justice **BLACKMUN**. ...

I suspect that it would be impossible to arrange an affirmative action program in a racially neutral way and have it successful. To ask that this be so is to demand the impossible. In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently. We cannot—we dare not—let the Equal Protection Clause perpetuate racial supremacy. ...

Mr. Justice **STEVENS,** with whom The Chief Justice [**BURGER**], Mr. Justice **STEWART,** and Mr. Justice **REHNQUIST** join, concurring in part and dissenting in part. ...

... Our settled practice ... is to avoid the decision of a constitutional issue if a case can be fairly decided on a statutory ground. ... The more important the issue, the more force there is to this doctrine. In this case, we are presented with a constitutional question of undoubted and unusual importance. Since, however, a dispositive statutory claim was raised at the very inception of this case, and squarely decided in the portion of the trial court judgment affirmed by the California Supreme Court, it is our plain duty to confront it. Only if petitioner should prevail on the statutory issue would it be necessary to decide whether the University's admissions program violated the Equal Protection Clause of the Fourteenth Amendment.

Section 601 of the Civil Rights Act of 1964 provides:

> 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.

The University, through its special admissions policy, excluded Bakke from participation in its program of medical education because of his race. The University also acknowledges that it was, and still is, receiving federal financial assistance. The plain language of the statute therefore requires affirmance of the judgment below. A different result cannot be justified unless that language misstates the actual intent of the Congress that enacted the statute or the statute is not enforceable in a private action. Neither conclusion is warranted. ...

Editors' Notes

(1) **Query:** To what degree was the division of Justice Powell from Justices Brennan, White, Marshall, and Blackmun the result of a difference on the question whether the equal protection clause protects individual rights or group rights? See the discussion of this general point in the Introductory Essay to this Section, at pp. 899–900. To what extent did it stem from a difference concerning the implications of *Carolene Products*?

(2) **Query:** What should we make of Powell's concern that an admissions program "treat each applicant as an individual in the admissions process"? And his concern that each individual be compared with all other candidates for all of the available seats, not just, say, 84 out of 100 seats? Does equal protection require treatment as an individual? Is Powell worried here about a symbolic expressive harm?

(3) **Query:** The opinion of Brennan et al. made much of the claim that affirmative action does not "stigmatize" whites. To what extent is "stigma" relevant to interpretation of the Equal Protection Clause? To determining whether affirmative action programs embody prejudice against discrete and insular minorities within the meaning of *Carolene Products*? Under such an approach, should we be less suspicious when majorities disadvantage themselves to benefit minorities (e.g., in affirmative action programs) than we are when majorities disadvantage minorities out of racial prejudice or hostility? See John Hart Ely, *Democracy and Distrust* 170–72 (Cambridge: Harvard University Press, 1980).

(4) **Query:** Justice Blackmun states in dissent that "in order to get beyond racism, we must first take account of race." He continues: "And in order to treat some persons equally, we must treat them differently." What does he mean? Is he persuasive? Or is this a misguided example of mistaking the disease as the cure, as Antonin Scalia argued while he was still a law professor? "The Disease as Cure," 1979 *Wash. U. L. Q.* 147.

(5) Justice Marshall writes: "[I]t is more than a little ironic that, after several hundred years of class-based discrimination against Negroes, the Court is unwilling to hold that a class-based remedy for that discrimination is permissible. In declining to so hold, today's judgment ignores the fact that for several hundred years Negroes have been discriminated

against, not as individuals, but rather solely because of the color of their skins." Does Powell have an adequate response to Marshall's argument? Do any of the justices who argue in subsequent cases that the Equal Protection Clause secures individual rights, not group rights? (See, e.g., Justice O'Connor's majority opinion and Justice Scalia's concurring opinion in Adarand Constructors, Inc. v. Pena [1995; reprinted as in the next case] and O'Connor's majority opinion in Grutter v. Bollinger (2003; reprinted below, p. 984).)

(6) The opinion of Brennan et al. also alluded to a different level of scrutiny and so to a different, lower level, test called "intermediate scrutiny," which the Court created to consider challenges to classifications based on sex; Brennan explained and applied that test for the Court in Craig v. Boren (1976; reprinted below, p. 1027). That test requires that the classification "serve important [not compelling] governmental objectives and must be substantially related [not narrowly tailored or necessary] to achievement of those objectives." Brennan would have applied "intermediate scrutiny," not "strict scrutiny," to affirmative action plans. The debate concerning whether strict scrutiny or intermediate scrutiny properly applies to such plans continued in City of Richmond v. J.A. Croson (1989; available at www.princeton.edu/aci) and Metro Broadcasting v. FCC (1990). But in *Adarand*, the Court held that strict scrutiny applies.