Regents of the University of California v. Bakke

MR. JUSTICE POWELL announced the judgment of the Court.

This case presents a challenge to the special admissions program of the petitioner, the Medical School of the University of California at Davis, which is designed to assure the admission Page 438 U. S. 270 of a specified number of students from certain minority groups. The Superior Court of California sustained respondent's challenge, holding that petitioner's program violated the California Constitution, Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*, and the Equal Protection Clause of the Fourteenth Amendment. The court enjoined petitioner from considering respondent's race or the race of any other applicant in making admissions decisions. It refused, however, to order respondent's admission to the Medical School, holding that he had not carried his burden of proving that he would have been admitted but for the constitutional and statutory violations. The Supreme Court of California affirmed those portions of the trial court's judgment declaring the special admissions program unlawful and enjoining petitioner from considering the race of any applicant. * Page 438 U. S. 271

It modified that portion of the judgment denying respondent's requested injunction and directed the trial court to order his admission.

For the reasons stated in the following opinion, 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, MR. JUSTICE STEWART, MR. JUSTICE REHNQUIST, and MR. JUSTICE STEVENS concur in this judgment. Page 438 U. S. 272

I also conclude, for the reasons stated in the following opinion, 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.

Affirmed in part and reversed in part.

I

**

The Medical School of the University of California at Davis opened in 1968 with an entering class of 50 students. In 1971, the size of the entering class was increased to 100 students, a level at which it remains. No admissions program for disadvantaged or minority students existed when the school opened, and the first class contained three Asians but no blacks, no Mexican-Americans, and no American Indians. Over the next two years, the faculty devised a special admissions program to increase the representation of "disadvantaged" students in each Medical

School class. [Footnote 1] The special program consisted of Page 438 U. S. 273 a separate admissions system operating in coordination with the regular admissions process.

Under the regular admissions procedure, a candidate could submit his application to the Medical School beginning in July of the year preceding the academic year for which admission was sought. Record 149. Because of the large number of applications, [Footnote 2] the admissions committee screened each one to select candidates for further consideration. Candidates whose overall undergraduate grade point averages fell below 2.5 on a scale of 4.0 were summarily rejected. *Id.*at 63. About Page 438 U. S. 274 one out of six applicants was invited for a personal interview. *Ibid.* Following the interviews, each candidate was rated on a scale of 1 to 100 by his interviewers and four other members of the admissions committee. The rating embraced the interviewers' summaries, the candidate's overall grade point average, grade point average in science courses, scores on the Medical College Admissions Test (MCAT), letters of recommendation, extracurricular activities, and other biographical data. *Id.* at 62. The ratings were added together to arrive at each candidate's "benchmark" score. Since five committee members rated each candidate in 1973, a perfect score was 500; in 1974, six members rated each candidate, so that a perfect score was 600. The full committee then reviewed the file and scores of each applicant and made offers of admission on a "rolling" basis. [Footnote 3] The chairman was responsible for placing names on the waiting list. They were not placed in strict numerical order; instead, the chairman had discretion to include persons with "special skills." *Id.* at 63-64.

The special admissions program operated with a separate committee, a majority of whom were members of minority groups. *Id.* at 163. On the 1973 application form, candidates were asked to indicate whether they wished to be considered as "economically and/or educationally disadvantaged" applicants; on the 1974 form the question was whether they wished to be considered as members of a "minority group," which the Medical School apparently viewed as "Blacks," "Chicanos," "Asians," and "American Indians." *Id.* at 65-66, 146, 197, 203-205, 216-218. If these questions were answered affirmatively, the application was forwarded to the special admissions committee. No formal definition of "disadvantaged" Page 438 U. S. 275 was ever produced, *id.* at 163-164, but the chairman of the special committee screened each application to see whether it reflected economic or educational deprivation. [Footnote 4] Having passed this initial hurdle, the applications then were rated by the special committee in a fashion similar to that used by the general admissions committee, except that special candidates did not have to meet the 2.5 grade point average cutoff applied to regular applicants. About one-fifth of the total number of special applicants were invited for interviews in 1973 and 1974. [Footnote 5] Following each interview, the special committee assigned each special applicant a benchmark score. The special committee then presented its top choices to the general admissions committee. The latter did not rate or compare the special candidates against the general applicants, *id.* at 388, but could reject recommended special candidates for failure to meet course requirements or other specific deficiencies. *Id.* at 171-172. The special committee continued to recommend special applicants until a number prescribed by faculty vote were admitted. While the overall class size was still 50, the prescribed number was 8; in 1973 and 1974, when the class size had doubled to 100, the prescribed number of special admissions also doubled, to 16.*Id.* at 164, 166.

From the year of the increase in class size -- 1971 -- through 1974, the special program resulted in the admission of 21 black students, 30 Mexican-Americans, and 12 Asians, for a total of 63

minority students. Over the same period, the regular admissions program produced 1 black, 6 Mexican-Americans, Page 438 U. S. 276 and 37 Asians, for a total of 44 minority students. [Footnote 6] Although disadvantaged whites applied to the special program in large numbers, *see* n 5, *supra,* none received an offer of admission through that process. Indeed, in 1974, at least, the special committee explicitly considered only "disadvantaged" special applicants who were members of one of the designated minority groups. Record 171.

Allan Bakke is a white male who applied to the Davis Medical School in both 1973 and 1974. In both years, Bakke's application was considered under the general admissions program, and he received an interview. His 1973 interview was with Dr. Theodore C. West, who considered Bakke "a very desirable applicant to [the] medical school." *Id.* at 225. Despite a strong benchmark score of 468 out of 500, Bakke was rejected. His application had come late in the year, and no applicants in the general admissions process with scores below 470 were accepted after Bakke's application was completed. *Id.* at 69. There were four special admissions slots unfilled at that time, however, for which Bakke was not considered. *Id.* at 70. After his 1973 rejection, Bakke wrote to Dr. George H. Lowrey, Associate Dean and Chairman of the Admissions Committee, protesting that the special admissions program operated as a racial and ethnic quota. *Id.* at 259. Page 438 U. S. 277

Bakke's 1974 application was completed early in the year. *Id.* at 70. His student interviewer gave him an overall rating of 94, finding him "friendly, well tempered, conscientious and delightful to speak with." *Id.* at 229. His faculty interviewer was, by coincidence, the same Dr. Lowrey to whom he had written in protest of the special admissions program. Dr. Lowrey found Bakke "rather limited in his approach" to the problems of the medical profession, and found disturbing Bakke's "very definite opinions which were based more on his personal viewpoints than upon a study of the total problem." *Id.* at 226. Dr. Lowrey gave Bakke the lowest of his six ratings, an 86; his total was 549 out of 600. *Id.* at 230. Again, Bakke's application was rejected. In neither year did the chairman of the admissions committee, Dr. Lowrey, exercise his discretion to place Bakke on the waiting list. *Id.* at 64. In both years, applicants were admitted under the special program with grade point averages, MCT scores, and benchmark scores significantly lower than Bakke's. [Footnote 7]

After the second rejection, Bakke filed the instant suit in the Superior Court of California. [Footnote 8] He sought mandatory, injunctive, and declaratory relief compelling his admission to the Medical School. He alleged that the Medical School's special admissions program operated to exclude him from the Page 438 U. S. 278 school on the basis of his race, in violation of his rights under the Equal Protection Clause of the Fourteenth Amendment, [Footnote 9] Art. I, § 21, of the California Constitution, [Footnote 10] and § 601 of Title VI of the Civil Rights Act of 1964, 78 Stat. 252, 42 U.S.C. § 2000d. [Footnote 11] The University cross-complained for a declaration that its special admissions program was lawful. The trial Page 438 U. S. 279 court found that the special program operated as a racial quota because minority applicants in the special program were rated only against one another, Record 388, and 16 places in the class of 100 were reserved for them. *Id.* at 295-296. Declaring that the University could not take race into account in making admissions decisions, the trial court held the challenged program violative of the Federal Constitution, the State Constitution, and Title VI. The court refused to order Bakke's

admission, however, holding that he had failed to carry his burden of proving that he would have been admitted but for the existence of the special program.

Bakke appealed from the portion of the trial court judgment denying him admission, and the University appealed from the decision that its special admissions program was unlawful and the order enjoining it from considering race in the processing of applications. The Supreme Court of California transferred the case directly from the trial court, "because of the importance of the issues involved." 18 Cal.3d 34, 39, 553 P.2d 1152, 1156 (1976). The California court accepted the findings of the trial court with respect to the University's program. [Footnote 12] Because the special admissions program involved a racial classification, the Supreme Court held itself bound to apply strict scrutiny. *Id.* at 49, 553 P.2d at 1162-1163. It then turned to the goals of the University presented as justifying the special program. Although the court agreed that the goals of integrating the medical profession and increasing the number of physicians willing to serve members of minority groups were compelling state interests, *id.* at 53, 553 P.2d at 1165, it concluded that the special admissions program was not the least intrusive means of achieving those goals. Without passing on the state constitutional or federal statutory grounds cited in the trial court's judgment, the California court held Page 438 U. S. 280 that the Equal Protection Clause of the Fourteenth Amendment required that "no applicant may be rejected because of his race, in favor of another who is less qualified, as measured by standards applied without regard to race."

Id. at 55, 553 P.2d at 1166.

Turning to Bakke's appeal, the court ruled that, since Bakke had established that the University had discriminated against him on the basis of his race, the burden of proof shifted to the University to demonstrate that he would not have been admitted even in the absence of the special admissions program. [Footnote 13] *Id.* at 63-64, 553 P.2d at 1172. The court analogized Bakke's situation to that of a plaintiff under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-17 (1970 ed., Supp. V), *see, e.g., Franks v. Bowman Transportation Co.*, 424 U. S. 747, 424 U. S. 772 (176). 18 Cal.3d at 64, 553 P.2d at 1172. On this basis, the court initially ordered a remand for the purpose of determining whether, under the newly allocated burden of proof, Bakke would have been admitted to either the 1973 or the 1974 entering class in the absence of the special admissions program. App. A to Application for Stay 4. In its petition for rehearing below, however, the University conceded its inability to carry that burden. App. B to Application for Stay A19-A20. [Footnote 14] The Page 438 U. S. 281 California court thereupon amended its opinion to direct that the trial court enter judgment ordering Bakke's admission to the Medical School. 18 Cal.3d at 64, 553. P.2d at 1172. That order was stayed pending review in this Court. 429 U.S. 953 (1976). We granted certiorari to consider the important constitutional issue. 429 U.S. 1090 (1977).

II

In this Court, the parties neither briefed nor argued the applicability of Title VI of the Civil Rights Act of 1964. Rather, as had the California court, they focused exclusively upon the validity of the special admissions program under the Equal Protection Clause. Because it was possible, however, that a decision on Title VI might obviate resort to constitutional

interpretation, *see Ashwander v. TVA*, 297 U. S. 288, 297 U. S. 346-348 (1936) (concurring opinion), we requested supplementary briefing on the statutory issue. 434 U.S. 900 (1977).

A

At the outset, we face the question whether a right of action for private parties exists under Title VI. Respondent argues that there is a private right of action, invoking the test set forth in *Cort v. Ash*, 422 U. S. 66, 422 U. S. 78 (1975). He contends Page 438 U. S. 282 that the statute creates a federal right in his favor, that legislative history reveals an intent to permit private actions, [Footnote 15] that such actions would further the remedial purposes of the statute, and that enforcement of federal rights under the Civil Rights Act generally is not relegated to the States. In addition, he cites several lower court decisions which have recognized or assumed the existence of a private right of action. [Footnote 16] Petitioner denies the existence of a private right of action, arguing that the sole function of § 601, *see* n 11, *supra*, was to establish a predicate for administrative action under § 602, 78 Stat. 252, 42 U.S.C. § 2000d-1. [Footnote 17] In its view, administrative curtailment of federal funds under that section was the only sanction to be imposed upon recipients that Page 438 U. S. 283 violated § 601. Petitioner also points out that Title VI contains no explicit grant of a private right of action, in contrast to Titles II, III, IV, and VII, of the same statute, 42 U.S.C. §§ 2000a-3(a), 2000b-2, 2000c-8, and 2000e-5 =(f) (1970 ed. and Supp. V). [Footnote 18]

We find it unnecessary to resolve this question in the instant case. The question of respondent's right to bring an action under Title VI was neither argued nor decided in either of the courts below, and this Court has been hesitant to review questions not addressed below. *McGoldrick v. Companie Generale Transatlantique*, 309 U. S. 430, 309 U. S. 434-435 (1940).*See also Massachusetts v. Westcott*, 431 U. S. 322 (1977); *Cardinale v. Louisiana*, 394 U. S. 437, 394 U. S. 439 (1969). *Cf. Singleton v. Wulff*, 428 U. S. 106, 428 U. S. 121 (1976). We therefore do not address this difficult issue. Similarly, we need not pass Page 438 U. S. 284 upon petitioner's claim that private plaintiffs under Title VI must exhaust administrative remedies. We assume, only for the purposes of this case, that respondent has a right of action under Title VI. *See Lau v. Nichols*, 414 U. S. 563, 414 U. S. 571 n. 2 (1974) (STEWART, J., concurring in result).

B

The language of § 601, 78 Stat. 252, like that of the Equal Protection Clause, is majestic in its sweep:

"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 concept of "discrimination," like the phrase "equal protection of the laws," is susceptible of varying interpretations, for, as Mr. Justice Holmes declared,

"[a] word is not a crystal, transparent and unchanged, it is the skin of a living thought, and may vary greatly in color and content according to the circumstances and the time in which it is used."

Towne v. Eisner, 245 U. S. 418, 245 U. S. 425 (1918). We must, therefore, seek whatever aid is available in determining the precise meaning of the statute before us. *Train v. Colorado Public Interest Research Group*, 426 U. S. 1, 426 U. S. 10 (1976), quoting *United States v. American Trucking Assns.*, 310 U. S. 534, 310 U. S. 543-544 (1940). Examination of the voluminous legislative history of Title VI reveals a congressional intent to halt federal funding of entities that violate a prohibition of racial discrimination similar to that of the Constitution. Although isolated statements of various legislators, taken out of context, can be marshaled in support of the proposition that § 601 enacted a purely color-blind scheme, [Footnote 19] without regard to the reach of the Equal Protection Page 438 U. S. 285 Clause, these comments must be read against the background of both the problem that Congress was addressing and the broader view of the statute that emerges from a full examination of the legislative debates.

The problem confronting Congress was discrimination against Negro citizens at the hands of recipients of federal moneys. Indeed, the color blindness pronouncements cited in the margin at n19 generally occur in the midst of extended remarks dealing with the evils of segregation in federally funded programs. Over and over again, proponents of the bill detailed the plight of Negroes seeking equal treatment in such programs. [Footnote 20] There simply was no reason for Congress to consider the validity of hypothetical preferences that might be accorded minority citizens; the legislators were dealing with the real and pressing problem of how to guarantee those citizens equal treatment.

In addressing that problem, supporters of Title VI repeatedly declared that the bill enacted constitutional principles. For example, Representative Celler, the Chairman of the House Judiciary Committee and floor manager of the legislation in the House, emphasized this in introducing the bill:

"The bill would offer assurance that hospitals financed by Federal money would not deny adequate care to Negroes. It would prevent abuse of food distribution programs whereby Negroes have been known to be denied food Page 438 U. S. 286 surplus supplies when white persons were given such food. It would assure Negroes the benefits now accorded only white students in programs of high[er] education financed by Federal funds. It would, in short, *assure the existing right to equal treatment* in the enjoyment of Federal funds. It would not destroy any rights of private property or freedom of association."

110 Cong.Rec. 1519 (1964) (emphasis added). Other sponsors shared Representative Celler's view that Title VI embodied constitutional principles. [Footnote 21]

In the Senate, Senator Humphrey declared that the purpose of Title VI was "to insure that Federal funds are spent in accordance with the Constitution and the moral sense of the Nation." *Id.* at 6544. Senator Ribicoff agreed that Title VI embraced the constitutional standard:

"Basically, there is a constitutional restriction against discrimination in the use of federal funds; and title VI simply spells out the procedure to be used in enforcing that restriction."

Id. at 13333. Other Senators expressed similar views. [Footnote 22]

Further evidence of the incorporation of a constitutional standard into Title VI appears in the repeated refusals of the legislation's supporters precisely to define the term "discrimination." Opponents sharply criticized this failure, [Footnote 23] but proponents of the bill merely replied that the meaning of Page 438 U. S. 287 "discrimination" would be made clear by reference to the Constitution or other existing law. For example, Senator Humphrey noted the relevance of the Constitution:

"As I have said, the bill has a simple purpose. That purpose is to give fellow citizens -- Negroes -- the same rights and opportunities that white people take for granted. This is no more than what was preached by the prophets, and by Christ Himself. It is no more than what our Constitution guarantees."

Id. at 6553. [Footnote 24]

In view of the clear legislative intent, Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment.

III

A

Petitioner does not deny that decisions based on race or ethnic origin by faculties and administrations of state universities are reviewable under the Fourteenth Amendment. *See, e.g., Missouri ex rel. Gaines v. Canada,* 305 U. S. 337(1938); *Sipuel v. Board of Regents,* 332 U. S. 631 (1948); *Sweatt v. Painter,* 339 U. S. 629 (1950); *McLaurin v. Oklahoma State Regents,* 339 U. S. 637 (1950). For his part, respondent does not argue that all racial or ethnic classifications are *per se* invalid. *See, e.g., Hirabayashi v. United States,* 320 U. S. 81 (1943); *Korematsu v. United States,* 323 U. S. 214 (1944); *Lee v. Washington,* 390 U. S. 333, 390 U. S. 334 (1968) (Black, Harlan, and STEWART, JJ., concurring); *United Jewish Organizations v. Carey,* 430 U. S. 144 (1977). The parties do disagree as to the level of judicial scrutiny to be applied to the special admissions program. Petitioner argues that the court below erred in applying strict scrutiny, as this inexact term has been Page 438 U. S. 288 applied in our cases. That level of review, petitioner asserts, should be reserved for classifications that disadvantage "discrete and insular minorities." *See United States v. Carolene Products Co.,* 304 U. S. 144, 304 U. S. 152 n. 4 (1938). Respondent, on the other hand, contends that the California court correctly rejected the notion that the degree of Judicial scrutiny accorded a particular racial or ethnic classification hinges upon membership in a discrete and insular minority and duly recognized that the "lights established [by the Fourteenth Amendment] are personal rights." *Shelley v. Kraemer,*334 U. S. 1, 334 U. S. 22 (1948).

En route to this crucial battle over the scope of judicial review, [Footnote 25] the 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 in the Medical School. Respondent, echoing the courts below, labels it a racial quota. [Footnote 26] Page 438 U. S. 289

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. [Footnote 27]

The guarantees of the Fourteenth Amendment extend to all 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 rights established are personal rights,"

Shelley v. Kraemer, *supra* at 334 U. S. 22. *Accord, Missouri ex rel. Gaines v. Canada*, *supra* at 305 U. S. 351; *McCabe v. Atchison, T. & S.F. R. Co.*, 235 U. S. 151, 235 U. S. 161-162 (1914). The guarantee of equal protection cannot mean one thing when applied to one individual and something else when Page 438 U. S. 290 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 program because white males, such as respondent, are not a "discrete and insular minority" requiring extraordinary protection from the majoritarian political process. *Carolene Products Co.*, *supra* at 304 U. S. 152-153, n. 4. 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. [Footnote 28] *See, e.g., Skinner v. Oklahoma ex rel. Williamson*, 316 U. S. 535, 316 U. S. 541 (1942); *Carrington v. Rash*, 380 U. S. 89, 380 U. S. 96-97 (1965). 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. *See, e.g., Massachusetts Board of Retirement v. Murgia*, 427 U. S. 307, 427 U. S. 313 (1976) (age); *San Antonio Independent School Dist. v. Rodriguez*, 411 U. S. 1, 411 U. S. 28 (1973) (wealth); *Graham v. Richardson*, 403 U. S. 365, 403 U. S. 372 (1971) (aliens). Racial and ethnic classifications, however, are subject to stringent examination without regard to these additional characteristics. We declared as much in the first cases explicitly to recognize racial distinctions as suspect:

"Distinctions between citizens solely because of their ancestry are, by their very nature, odious to a free people Page 438 U. S. 291 whose institutions are founded upon the doctrine of equality." *Hirabayashi*, 320 U.S. at 320 U. S. 100.

"[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny."

Korematsu, 323 U.S. at 323 U. S. 216. The Court has never questioned the validity of those pronouncements. Racial and ethnic distinctions of any sort are inherently suspect, and thus call for the most exacting judicial examination.

B

This perception of racial and ethnic distinctions is rooted in our Nation's constitutional and demographic history. The Court's initial view of the Fourteenth Amendment was that its "one pervading purpose" was "the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised dominion over him." *Slaughter-House Cases*, 16 Wall. 36, 83 U. S. 71 (1873). The Equal Protection Clause, however, was "[v]irtually strangled in infancy by post-civil-war judicial reactionism." [Footnote 29] It was relegated to decades of relative desuetude while the Due Process Clause of the Fourteenth Amendment, after a short germinal period, flourished as a cornerstone in the Court's defense of property and liberty of contract. *See, e.g., Mugler v. Kansas*, 123 U. S. 623, 123 U. S. 661 (1887); *Allgeyer v. Louisiana*, 165 U. S. 578 (1897); *Lochner v. New York*, 198 U. S. 45 (1905). In that cause, the Fourteenth Amendment's "one pervading purpose" was displaced. *See, e.g., Plessy v. Ferguson*, 163 U. S. 537 (1896). It was only as the era of substantive due process came to a close, *see, e.g., 291 U. S. New* Page 438 U. S. 292 *York*, 291 U. S. 502 (1934); *West Coast Hotel Co. v. Parrish*, 300 U. S. 379 (1937), that the Equal Protection Clause began to attain a genuine measure of vitality, *see, e.g., United States v. Carolene Products*, 304 U. S. 144 (1938); *Skinner v. Oklahoma ex rel. Williamson, supra.*

By that time ,it was no longer possible to peg the guarantees of the Fourteenth Amendment to the struggle for equality of one racial minority. During the dormancy of the Equal Protection Clause, the United States had become a Nation of minorities. [Footnote 30] Each had to struggle [Footnote 31] -- and, to some extent, struggles still [Footnote 32] -- to overcome the prejudices not of a monolithic majority, but of a "majority" composed of various minority groups of whom it was said -- perhaps unfairly, in many cases -- that a shared characteristic was a willingness to disadvantage other groups. [Footnote 33] As the Nation filled with the stock of many lands, the reach of the Clause was gradually extended to all ethnic groups seeking protection from official discrimination. *See Strauder v. West Virginia*, 100 U. S. 303, 100 U. S. 308(1880) (Celtic Irishmen) (dictum); *Yick Wo v. Hopkins*, 118 U. S. 356 (1886) (Chinese); *Truax v. Raich*, 239 U. S. 33, 239 U. S. 41(1915) (Austrian resident aliens); *Korematsu, supra*, (Japanese); *Hernandez v. Texas*, 347 U. S. 475 (1954) (Mexican-Americans). The guarantees of equal protection, said the Court in Page 438 U. S. 293 *Yick Wo*, "are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws." 118 U.S. at 118 U. S. 369.

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," *Slaughter-House Cases, supra,* the Amendment itself was framed in universal terms, without reference to color, ethnic origin, or condition of prior servitude. As this Court recently remarked in interpreting the 1866 Civil Rights Act to extend to claims of racial discrimination against white persons, "the 39th Congress was intent upon establishing in the federal law a broader principle than would have been necessary simply to meet the particular and immediate plight of the newly freed Negro slaves."

McDonald v. Santa Fe Trail Transportation Co., 427 U. S. 273, 427 U. S. 296 (1976). And that legislation was specifically broadened in 1870 to ensure that "all persons," not merely "citizens," would enjoy equal rights under the law. *See Runyon v. McCrary*, 427 U. S. 160, 427 U. S. 192-202 (1976) (WHITE, J., dissenting). Indeed, it is not unlikely that, among the Framers, were many who would have applauded a reading of the Equal Protection Clause that states a principle of universal application and is responsive to the racial, ethnic, and cultural diversity of the Nation. *See, e.g.*, Cong.Globe, 39th Cong., 1st Sess., 1056 (1866) (remarks of Rep. Niblack); *id.* at 2891-2892 (remarks of Sen. Conness); *id.* 40th Cong., 2d Sess., 883 (1868) (remarks of Sen. Howe) (Fourteenth Amendment "protect[s] classes from class legislation"). *See also* Bickel, The Original Understanding and the Segregation Decision, 69 Harv.L.Rev. 1, 60-63 (1955).

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 Page 438 U. S. 294 equal laws," *Yick Wo, supra* at 118 U. S. 369, in a Nation confronting a legacy of slavery and racial discrimination. *See, e.g., Shelley v. Kraemer*, 334 U. S. 1 (1948); *Brown v. Bard of Education*, 347 U. S. 483 (1954); *Hills v. Gautreaux*, 425 U. S. 284 (1976). 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 has 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, 388 U. S. 1, 388 U. S. 11 (1967), quoting *Hirabayashi*, 320 U.S. at 320 U. S. 100. 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." [Footnote 34] Page 438 U. S. 295

The clock of our liberties, however, cannot be turned back to 1868. *Brown v. Board of Education, supra* at 347 U. S. 492; *accord, Loving v. Virginia supra* at 388 U. S. 9. 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. [Footnote 35]

"The Fourteenth Amendment is not directed solely against discrimination due to a 'two-class theory' -- that is, bad upon differences between 'white' and Negro." *Hernandez*, 347 U.S. at 347 U. S. 478.

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. As observed above, the white "majority" itself is composed of various minority groups, most of which can lay claim to a history of prior discrimination at the hands of the State and private individuals. Not all of these groups can receive preferential treatment and corresponding judicial tolerance Page 438 U. S. 296 of distinctions drawn in terms of race and nationality, for then the only "majority" left would be a new minority of white Anglo-Saxon Protestants. There is no principled basis for deciding which groups would merit "heightened judicial solicitude" and which would not. [Footnote 36] Courts would be asked to evaluate the extent of the prejudice and consequent Page 438 U. S. 297 harm suffered by various minority groups. Those whose societal injury is thought to exceed some arbitrary level of tolerability then would be entitled to preferential classifications at the expense of individuals belonging to other groups. Those classifications would be free from exacting judicial scrutiny. As these preferences began to have their desired effect, and the consequences of past discrimination were undone, new judicial rankings would be necessary. The kind of variable sociological and political analysis necessary to produce such rankings simply does not lie within the judicial competence -- even if they otherwise were politically feasible and socially desirable. [Footnote 37] Page 438 U. S. 298

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 a particular group in order to advance the group's general interest. *See United Jewish Organizations v. Carey*,430 U.S. at 430 U. S. 172-173 (BRENNAN, J., concurring in part). 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 based on a factor having no relationship to individual worth. *See DeFunis v. Odegaard*, 416 U. S. 312, 416 U. S. 343 (1974) (Douglas, J., dissenting). Third, there is a measure of inequity in forcing innocent persons in respondent's position 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 Page 438 U. S. 299 racial and ethnic antagonisms, rather than alleviate them. *United Jewish Organizations, supra* at 430 U. S. 173-174 (BRENNAN, J., concurring in part). 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. *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, 157 U. S. 650-651 (1895) (White, J., dissenting). 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 of a particular time and place."

A. Cox, The Role of the Supreme Court in American Government 114 (1976).

If it is the individual who is entitled to judicial protection against classifications based upon his racial or ethnic background because such distinctions impinge upon personal rights, 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, *Korematsu v. United States*, 323 U. S. 214(1944), 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. [Footnote 38] 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. The Constitution guarantees that right to every person regardless of his background. *Shelley v. Kraemer,* 334 U.S. at 334 U. S. 22; *Missouri ex rel. Gaines v. Canada*,305 U.S. at 305 U. S. 351. Page 438 U. S. 300

C

Petitioner contends that, on several occasions, this Court has approved preferential classifications without applying the most exacting scrutiny. Most of the cases upon which petitioner relies are drawn from three areas: school desegregation, employment discrimination, and sex discrimination. Each of the cases cited presented a situation materially different from the facts of this case.

The school desegregation cases are inapposite. Each involved remedies for clearly determined constitutional violations.*E.g., Swann v. Charlotte-Mecklenburg Board of Education*, 402 U. S. 1 (1971); *McDaniel v. Barresi*, 402 U. S. 39 (1971); *Green v. County School Board*, 391 U. S. 430 (1968). Racial classifications thus were designed as remedies for the vindication of constitutional entitlement. [Footnote 39] Moreover, the scope of the remedies was not permitted to exceed the extent of the Page 438 U. S. 301 violations. *E.g., Dayton Board of Education v. Brinkman*, 433 U. S. 406 (1977); *Milliken v. Bradley*, 418 U. S. 717 (1974); *see Pasadena City Board of Education v. Spangler*, 427 U. S. 424 (1976). *See also Austin Independent School Dist. v. United States*,429 U.S. 990, 991-995 (1976) (POWELL, J., concurring). Here, there was no judicial determination of constitutional violation as a predicate for the formulation of a remedial classification.

The employment discrimination cases also do not advance petitioner's cause. For example, in *Franks v. Bowman Transportation Co.*, 424 U. S. 747 (1976), we approved a retroactive award of seniority to a class of Negro truckdrivers who had been the victims of discrimination -- not just by society at large, but by the respondent in that case. While this relief imposed some burdens on other employees, it was held necessary "*to make [the victims] whole for injuries suffered on account of unlawful employment discrimination.'" Id. at 424 U. S. 763, quoting Albemarle Paper Co. v. Moody, 422 U. S. 405, 422 U. S. 418 (1975). The Courts of Appeals have fashioned various types of racial preferences as remedies for constitutional or statutory violations resulting in identified, race-based injuries to individuals held entitled to the preference. E.g., Bridgeport Guardians, Inc. v. Bridgeport Civil Service Commission, 482 F.2d*

1333 (CA2 1973); Carter v. Gallagher, 452 F.2d 315 (CA8 1972), modified on rehearing en banc, id. at 327. Such preferences also have been upheld where a legislative or administrative body charged with the responsibility made determinations of past discrimination by the industries affected, and fashioned remedies deemed appropriate to rectify the discrimination. E.g., Contractors Association of Eastern Pennsylvania v. Secretary of Labor, 442 F.2d 159 (CA3), cert. denied, 404 U.S. 854 (1971); [Footnote 40] Associated General Page 438 U. S. 302 *Contractors of Massachusetts, Inc. v. Altshuler, 490 F.2d 9 (CA1 1973), cert. denied, 416 U.S. 957 (1974); cf. Katzenbach v. Morgan,384 U. S. 641 (1966). But we have never approved preferential classifications in the absence of proved constitutional or statutory violations. [Footnote 41]* Nor is petitioner's view as to the applicable standard supported by the fact that gender-based classifications are not subjected to this level of scrutiny. *E g., Califano v. Webster*, 430 U. S. 313, 430 U. S. 316-317 (1977); *Craig v. Boren*, 429 U. S. 190, 429 U. S. 211 n. (1976) (POWELL, J., concurring). Gender-based distinctions are less likely to create the analytical and practical Page 438 U. S. 303 problems present in preferential programs premised on racial or ethnic criteria. With respect to gender, there are only two possible classifications. The incidence of the burdens imposed by preferential classifications is clear. There are no rival groups which can claim that they, too, are entitled to preferential treatment. Classwide questions as to the group suffering previous injury and groups which fairly can be burdened are relatively manageable for reviewing courts. *See, e.g., Califano v. Goldfarb*, 430 U. S. 199, 430 U. S. 212-217 (1977); *Weinberger v. Wiesenfeld*, 420 U. S. 636, 420 U. S. 645 (1975). The resolution of these same questions in the context of racial and ethnic preferences presents far more complex and intractable problems than gender-based classifications. More importantly, the perception of racial classifications as inherently odious stems from a lengthy and tragic history that gender-based classifications do not share. In sum, the Court has never viewed such classification as inherently suspect or as comparable to racial or ethnic classifications for the purpose of equal protection analysis.

Petitioner also cites *Lau v. Nichols*, 414 U. S. 563 (1974), in support of the proposition that discrimination favoring racial or ethnic minorities has received judicial approval without the exacting inquiry ordinarily accorded "suspect" classifications. In *Lau*, we held that the failure of the San Francisco school system to provide remedial English instruction for some 1,800 students of oriental ancestry who spoke no English amounted to a violation of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, and the regulations promulgated thereunder. Those regulations required remedial instruction where inability to understand English excluded children of foreign ancestry from participation in educational programs. 414 U.S. at 414 U. S. 568. Because we found that the students in *Lau* were denied "a meaningful opportunity to participate in the educational program," *ibid.*, we remanded for the fashioning of a remedial order. Page 438 U. S. 304 *Lau* provides little support for petitioner's argument. The decision rested solely on the statute, which had been construed by the responsible administrative agency to each educational practices "which have the effect of subjecting individuals to discrimination," *ibid.* We stated: "Under these state-imposed standards, there is no equality of treatment merely by providing students with the same facilities, textbooks, teachers, and curriculum, for students who do not understand English are effectively foreclosed from any meaningful education."

Id. at 414 U. S. 566. Moreover, the "preference" approved did not result in the denial of the relevant benefit -- "meaningful opportunity to participate in the educational program" -- to

anyone else. No other student was deprived by that preference of the ability to participate in San Francisco's school system, and the applicable regulations required similar assistance for all students who suffered similar linguistic deficiencies. *Id.* at 414 U. S. 570-571 (STEWART, J., concurring in result).

In a similar vein, [Footnote 42] petitioner contends that our recent decision in *United Jewish Organization v. Carey*, 430 U. S. 144 (1977), indicates a willingness to approve racial classifications designed to benefit certain minorities, without denominating the classifications as "suspect." The State of New York had redrawn its reapportionment plan to meet objections of the Department of Justice under § 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c (1970 ed., Supp. V). Specifically, voting districts were redrawn to enhance the electoral power Page 438 U. S. 305 of certain "nonwhite" voters found to have been the victims of unlawful "dilution" under the original reapportionment plan. *United Jewish Organizations,* like *Lau*, properly is viewed as a case in which the remedy for an administrative finding of discrimination encompassed measures to improve the previously disadvantaged group's ability to participate, without excluding individuals belonging to any other group from enjoyment of the relevant opportunity -- meaningful participation in the electoral process.

In this case, unlike *Lau* and *United Jewish Organizations,* there has been no determination by the legislature or a responsible administrative agency that the University engaged in a discriminatory practice requiring remedial efforts. Moreover, the operation of petitioner's special admissions program is quite different from the remedial measures approved in those cases. It prefers the designated minority groups at the expense of other individuals who are totally foreclosed from competition for the 16 special admissions seats in every Medical School class. Because of that foreclosure, some individuals are excluded from enjoyment of a state-provided benefit -- admission to the Medical School -- they otherwise would receive. When a classification denies an individual opportunities or benefits enjoyed by others solely because of his race or ethnic background, it must be regarded as suspect. *E.g., McLaurin v. Oklahoma State Regents,*339 U.S. at 339 U. S. 641-642.

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, 413 U. S. 717, 413 U. S. 721-722 (1973) (footnotes omitted); *Loving v. Virginia,* 388 U.S. at 388 U. S. 11; *McLaughlin v. Florida*, 379 U. S. 184, 379 U. S. 196 (1964). The special admissions Page 438 U. S. 306 program purports to serve the purposes of: (i) "reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession," Brief for Petitioner 32; (ii) countering the effects of societal discrimination; [Footnote 43] (iii) increasing the number of physicians who will practice in communities currently underserved; and (iv) obtaining the educational benefits that flow from an ethnically diverse student body. It is necessary to decide which, if any, of these purposes is substantial enough to support the use of a suspect classification. Page 438 U. S. 307

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 not as insubstantial, but 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 v. Virginia, supra* at 388 U. S. 11; *McLaughlin v. Florida, supra* at 379 U. S. 198; *Brown v. Board of Education,* 347 U. S. 483 (1954).

B

The State certainly has a legitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination. The line of school desegregation cases, commencing with *Brown,* attests to the importance of this state goal and the commitment of the judiciary to affirm all lawful means toward its attainment. In the school cases, the States were required by court order to redress the wrongs worked by specific instances of racial discrimination. That goal was far more focused than the remedying of the effects of "societal discrimination," an amorphous concept of injury that may be ageless in its reach into the past.

We have 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. *See, e.g., Teamsters v. United States,* 431 U. S. 324, 431 U. S. 367-376 (1977); *United Jewish Organizations,*430 U.S. at 430 U. S. 155-156; *South Carolina v. Katzenbach,* 383 U. S. 301, 383 U. S. 308 (1966). After such findings have been made, 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. In such a case, the Page 438 U. S. 308 extent of the injury and the consequent remedy will have been judicially, legislatively, or administratively defined. Also, the remedial action usually remains subject to continuing oversight to assure that it will work the least harm possible to other innocent persons competing for the benefit. Without such findings of constitutional or statutory violations, [Footnote 44] it cannot be Page 438 U. S. 309 said that the government has any greater interest in helping one individual than in refraining from harming another. Thus, the government has no compelling justification for inflicting such harm.

Petitioner does not purport to have made, and is in no position to make, such findings. Its broad mission is education, not the formulation of any legislative policy or the adjudication of particular claims of illegality. For reasons similar to those stated in 438 U. S. isolated segments of our vast governmental structures are not competent to make those decisions, at least in the absence of legislative mandates and legislatively determined criteria. [Footnote 45] *Cf. Hampton v. Mow Sun Wong,* 426 U. S. 88 (1976); n. 41, *supra.* Before relying upon these sorts of findings in establishing a racial classification, a governmental body must have the authority and capability to establish, in the record, that the classification is responsive to identified discrimination. *See, e.g., Califano v. Webster,* 430 U.S. at 430 U. S. 316-321; *Califano* Page 438 U. S. 310

v. Goldfarb, 430 U.S. at 430 U. S. 212-217. 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 like respondent, who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered. To hold otherwise would be to convert a remedy heretofore reserved for violations of legal rights into a privilege that all institutions throughout the Nation could grant at their pleasure to whatever groups are perceived as victims of societal discrimination. That is a step we have never approved. *Cf. Pasadena Cty Board of Education v. Spangler*, 427 U. S. 424 (1976).

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. [Footnote 46] The court below addressed this failure of proof:

"The University concedes it cannot assure that minority doctors who entered under the program, all of whom expressed an 'interest' in practicing in a disadvantaged community, will actually do so. It may be correct to assume that some of them will carry out this intention, and that it is more likely they will practice in minority Page 438 U. S. 311 communities than the average white doctor. (*See* Sandalow, Racial Preferences in Higher Education: Political Responsibility and the Judicial Role (1975) 42 U.Chi.L.Rev. 653, 688.) Nevertheless, there are more precise and reliable ways to identify applicants who are genuinely interested in the medical problems of minorities than by race. An applicant of whatever race who has demonstrated his concern for disadvantaged minorities in the past and who declares that practice in such a community is his primary professional goal would be more likely to contribute to alleviation of the medical shortage than one who is chosen entirely on the basis of race and disadvantage. In short, there is no empirical data to demonstrate that any one race is more selflessly socially oriented or by contrast that another is more selfishly acquisitive." 18 Cal.3d at 56, 553 P.2d at 1167.

Petitioner simply has not carried its burden of demonstrating that it must prefer members of particular ethnic groups over all other individuals in order to promote better health care delivery to deprived citizens. Indeed, petitioner has not shown that its preferential classification is likely to have any significant effect on the problem. [Footnote 47]

D

The fourth goal asserted by petitioner is the attainment of a diverse student body. This clearly is a constitutionally permissible Page 438 U. S. 312 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. Mr. Justice Frankfurter summarized the "four essential freedoms" that constitute academic freedom:

"'It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail 'the four essential freedoms' of a university -- to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.'"

Sweezy v. New Hampshire, 354 U. S. 234, 354 U. S. 263 (1957) (concurring in result).

Our national commitment to the safeguarding of these freedoms within university communities was emphasized in *Keyishian v. Board of Regents*, 385 U. S. 589, 385 U. S. 603 (1967):

"Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us, and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment. . . . The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.' *United States v. Associated Press*, 52 F.Supp. 362, 372."

The atmosphere of "speculation, experiment and creation" -- so essential to the quality of higher education -- is widely believed to be promoted by a diverse student body. [Footnote 48] As the Court Page 438 U. S. 313 noted in *Keyishian*, it is not too much to say that the "nation's future depends upon leaders trained through wide exposure" to the ideas and mores of students as diverse as this Nation of many peoples.

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.

It may be argued that there is greater force to these views at the undergraduate level than in a medical school, where the training is centered primarily on professional competency. But even at the graduate level, our tradition and experience lend support to the view that the contribution of diversity is substantial. In *Sweatt v. Painter*, 339 U.S. at 339 U. S. 634, the Page 438 U. S. 314 Court made a similar point with specific reference to legal education:

"The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students, and no one who has practiced law, would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned."

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. [Footnote 49]

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. Respondent urges -- and the courts below have held -- that petitioner's dual admissions program is a racial classification that impermissibly infringes his rights under the Fourteenth Amendment. As the interest of diversity is compelling in the context of a university's admissions program, the question remains whether the Page 438 U. S. 315 program's racial classification is necessary to promote this interest. *In re Griffiths,* 413 U.S. at 413 U. S. 721-722.

V

A

It may be assumed that the reservation of a specified number of seats in each class for individuals from the preferred ethnic groups would contribute to the attainment of considerable ethnic diversity in the student body. But petitioner's argument that this is the only effective means of serving the interest of diversity is seriously flawed. In a most fundamental sense, the argument misconceives the nature of the state interest that would justify consideration of race or ethnic background. It is not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups, with the remaining percentage an undifferentiated aggregation of students. 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. [Footnote 50]

Nor would the state interest in genuine diversity be served by expanding petitioner's two-track system into a multi-track program with a prescribed number of seats set aside for each identifiable category of applicants. Indeed, it is inconceivable that a university would thus pursue the logic of petitioner's two-track program to the illogical end of insulating each category of applicants with certain desired qualifications from competition with all other applicants. Page 438 U. S. 316

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. Harvard College now recruits not only Californians or Louisianans but also blacks and Chicanos and other minority students. . . ."

"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' and deemed capable of doing good work in their courses, the race

of an applicant may tip the balance in his favor just as geographic origin or a life spent on a farm may tip the balance in other candidates' cases. A farm boy from Idaho can bring something to Harvard College that a Bostonian cannot offer. Similarly, a black student can usually bring something that a white person cannot offer. . . . [*See* Appendix hereto.]"

"In Harvard College admissions, the Committee has not set target quotas for the number of blacks, or of musicians, football players, physicists or Californians to be admitted in a given year. . . . But that awareness [of the necessity of including more than a token number of black students] does not mean that the Committee sets a minimum number of blacks or of people from west of the Mississippi who are to be admitted. It means only that, 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 Page 438 U. S. 317 types and categories of students."

App. to Brief for Columbia University, Harvard University, Stanford University, and the University of Pennsylvania, as *Amici Curiae* 2-3.

In such an admissions program, [Footnote 51] 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. In short, an admissions program operated in this way is flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight. Indeed, the weight attributed to a Page 438 U. S. 318 particular quality may vary from year to year depending upon the "mix" both of the student body and the applicants for the incoming class.

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 under the Fourteenth Amendment. [Footnote 52]

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. "A boundary line," as Mr. Justice Frankfurter remarked in another connection, "is none the worse for being narrow." *McLeod v. Dilworth*, 322 U. S. 327, 322 U. S. 329 (1944). And a court would not assume that a university, professing to employ a facially nondiscriminatory admissions policy, would operate it as a cover for the functional equivalent of a quota system. In short, good faith Page 438 U. S. 319 would be presumed in the absence of a showing to the contrary in the manner permitted by our cases. *See, e.g., Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U. S. 252 (1977); *Washington v. Davis*, 426 U. S. 229 (1976); *Swain v. Alabama*,380 U. S. 202 (165). [Footnote 53]

B

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. At the same time, the preferred Page 438 U. S. 320 applicants have the opportunity to compete for every seat in the class.

The fatal flaw in petitioner's preferential program is its disregard of individual rights as guaranteed by the Fourteenth Amendment. *Shelley v. Kraemer*, 334 U.S. at 334 U. S. 22. Such rights are not absolute. But when a State's distribution of benefits or imposition of burdens hinges on ancestry or the color of a person's skin, that individual is entitled to a demonstration that the challenged classification is necessary to promote a substantial state interest. Petitioner has failed to carry this burden. For this reason, that portion of the California court's judgment holding petitioner's special admissions program invalid under the Fourteenth Amendment must be affirmed.

C

In enjoining petitioner 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.

VI

With respect to respondent's entitlement to an injunction directing his admission to the Medical School, petitioner has conceded that it could not carry its burden of proving that, but for the existence of its unlawful special admissions program, respondent still would not have been admitted. Hence, respondent is entitled to the injunction, and that portion of the judgment must be affirmed. [Footnote 54] Page 438 U. S. 321

|438 U.S. 265app|

APPENDIX TO OPINION OF POWELL, J.

Harvard College Admissions Program [Footnote 55]

For the past 30 years, Harvard College has received each year applications for admission that greatly exceed the number of places in the freshman class. The number of applicants who are deemed to be not "qualified" is comparatively small. The vast majority of applicants demonstrate through test scores, high school records and teachers' recommendations that they have the academic ability to do adequate work at Harvard, and perhaps to do it with distinction. Faced with the dilemma of choosing among a large number of "qualified" candidates, the Committee on Admissions could use the single criterion of scholarly excellence and attempt to determine who among the candidates were likely to perform best academically. But for the past 30 years, the Committee on Admissions has never adopted this approach. The belief has been that, if scholarly excellence were the sole or even predominant criterion, Harvard College would lose a great deal of its vitality and intellectual excellence, and that the quality of the educational Page 438 U. S. 322 experience offered to all students would suffer. Final Report of W. J. Bender, Chairman of the Admission and Scholarship Committee and Dean of Admissions and Financial Aid, pp. 20 *et seq.* (Cambridge, 1960). Consequently, after selecting those students whose intellectual potential will seem extraordinary to the faculty -- perhaps 150 or so out of an entering class of over 1,100 -- the Committee seeks -- "variety in making its choices. This has seemed important . . . in part because it adds a critical ingredient to the effectiveness of the educational experience [in Harvard College]. . . . *The effectiveness of our students' educational experience has seemed to the Committee to be affected as importantly by a wide variety of interests, talents, backgrounds and career goals as it is by a fine faculty and our libraries, laboratories and housing arrangements.*"

Dean of Admissions Fred L. Glimp, Final Report to the Faculty of Arts and Sciences, 65 Official Register of Harvard University No. 25, 93, 10105 (1968) (emphasis supplied).

The belief that diversity adds an essential ingredient to the educational process has long been a tenet of Harvard College admissions. Fifteen or twenty years ago, however, diversity meant students from California, New York, and Massachusetts; city dwellers and farm boys; violinists, painters and football players; biologists, historians and classicists; potential stockbrokers, academics and politicians. The result was that very few ethnic or racial minorities attended Harvard College. In recent years, Harvard College has expanded the concept of diversity to include students from disadvantaged economic, racial and ethnic groups. Harvard College now recruits not only Californians or Louisianans, but also blacks and Chicanos and other minority students. Contemporary conditions in the United States mean that, if Harvard College is to continue to offer a first-rate education to its students, Page 438 U. S. 323 minority representation in the undergraduate body cannot be ignored by the Committee on Admissions.

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" and deemed capable of doing good work in their courses, the race of an applicant may tip the balance in his favor just as geographic origin or a life spent on a farm may tip the balance in other candidates' cases. A farm boy from Idaho can bring something

to Harvard College that a Bostonian cannot offer. Similarly, a black student can usually bring something that a white person cannot offer. The quality of the educational experience of all the students in Harvard College depends in part on these differences in the background and outlook that students bring with them.

In Harvard College admissions, the Committee has not set target quotas for the number of blacks, or of musicians, football players, physicists or Californians to be admitted in a given year. At the same time the Committee is aware that, if Harvard College is to provide a truly heterogen[e]ous environment that reflects the rich diversity of the United States, it cannot be provided without some attention to numbers. It would not make sense, for example, to have 10 or 20 students out of 1, 100 whose homes are west of the Mississippi. Comparably, 10 or 20 black students could not begin to bring to their classmates and to each other the variety of points of view, backgrounds and experiences of blacks in the United States. Their small numbers might also create a sense of isolation among the black students themselves, and thus make it more difficult for them to develop and achieve their potential. Consequently, when making its decisions, the Committee on Admissions is aware that there is some relationship between numbers and achieving the benefits to be derived from a diverse student body, and between numbers and providing a reasonable environment for those students admitted. But Page 438 U. S. 324 that awareness does not mean that the Committee sets a minimum number of blacks or of people from west of the Mississippi who are to be admitted. It means only that, 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.

The further refinements sometimes required help to illustrate the kind of significance attached to race. The Admissions Committee, with only a few places left to fill, might find itself forced to choose between A, the child of a successful black physician in an academic community with promise of superior academic performance, and B, a black who grew up in an inner-city ghetto of semi-literate parents whose academic achievement was lower, but who had demonstrated energy and leadership, as well as an apparently abiding interest in black power. If a good number of black students much like A, but few like B, had already been admitted, the Committee might prefer B, and vice versa. If C, a white student with extraordinary artistic talent, were also seeking one of the remaining places, his unique quality might give him an edge over both A and B. Thus, the critical criteria are often individual qualities or experience not dependent upon race but sometimes associated with it.

* MR. JUSTICE STEVENS views the judgment of the California court as limited to prohibiting the consideration of race only in passing upon Bakke's application. *Post* at 438 U. S. 408-411. It must be remembered, however, that petitioner here cross-complained in the trial court for a declaratory judgment that its special program was constitutional, and it lost. The trial court's judgment that the special program was unlawful was affirmed by the California Supreme Court in an opinion which left no doubt that the reason for its holding was petitioner's use of race in consideration of ay candidate's application. Moreover, in explaining the scope of its holding, the court quite clearly stated that petitioner was prohibited from taking race into account in any way in making admissions decisions:

"In addition, the University may properly as it in fact does, consider other factors in evaluating an applicant, such as the personal interview, recommendations, character, and matters relating to the needs of the profession and society, such as an applicant's professional goals. In short, the standards for admission employed by the University are not constitutionally infirm except to the extent that they are utilized in a racially discriminatory manner. Disadvantaged applicants of all races must be eligible for sympathetic consideration, and no applicant may be rejected because of his race in favor of another who is less qualified, as measured by standards applied without regard to race. We reiterate, in view of the dissent's misinterpretation, that we do not compel the University to utilize only 'the highest objective academic credentials' as the criterion for admission."

18 Cal.3d 34, 54-55, 553 P.2d 1152, 1166 (1976) (footnote omitted). This explicit statement makes it unreasonable to assume that the reach of the California court's judgment can be limited in the manner suggested by MR. JUSTICE STEVENS.

** MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN join Parts I and V-C of this opinion. MR. JUSTICE WHITE also joins Part III-A of this opinion.

[Footnote 1]

Material distributed to applicants for the class entering in 1973 described the special admissions program as follows:

"A special subcommittee of the Admissions Committee, made up of faculty and medical students from minority groups, evaluates applications from economically and/or educationally disadvantaged backgrounds. The applicant may designate on the application form that he or she requests such an evaluation. Ethnic minorities are not categorically considered under the Task Force Program unless they are from disadvantaged backgrounds. Our goals are: 1) A short-range goal in the identification and recruitment of potential candidates for admission to medical school in the near future, and 2) Our long-range goal is to stimulate career interest in health professions among junior high and high school students."

"After receiving all pertinent information selected applicants will receive a letter inviting them to our School of Medicine in Davis for an interview. The interviews are conducted by at least one faculty member and one student member of the Task Force Committee. Recommendations are then made to the Admissions Committee of the medical school. Some of the Task Force Faculty are also members of the Admissions Committee."

"Long-range goals will be approached by meeting with counselors and students of schools with large minority populations, as well as with local youth and adult community groups."

"Applications for financial aid are available only after the applicant has been accepted, and can only be awarded after registration. Financial aid is available to students in the form of scholarships and loans. In addition to the Regents' Scholarships and President's Scholarship programs, the medical school participates in the Health Professions Scholarship Program, which

makes funds available to students who otherwise might not be able to pursue a medical education. Other scholarships and awards are available to students who meet special eligibility qualifications. Medical students are also eligible to participate in the Federally Insured Student Loan Program and the American Medical Association Education and Research Foundation Loan Program."

Applications for Admission are available from:

Admissions Office

School of Medicine

University of California

Davis, California 95616

Record 195. The letter distributed the following year was virtually identical, except that the third paragraph was omitted.

[Footnote 2]

For the 1973 entering class of 100 seats, the Davis Medical School received 2,464 applications. *Id.* at 117. For the 1974 entering class, 3,737 applications were submitted. *Id.* at 289.

[Footnote 3]

That is, applications were considered and acted upon as they were received, so that the process of filling the class took place over a period of months, with later applications being considered against those still on file from earlier in the year.*Id.* at 64.

[Footnote 4]

The chairman normally checked to see if, among other things, the applicant had been granted a waiver of the school's application fee, which required a means test; whether the applicant had worked during college or interrupted his education to support himself or his family; and whether the applicant was a member of a minority group. *Id.* at 666.

[Footnote 5]

For the class entering in 1973, the total number of special applicants was 297, of whom 73 were white. In 1974, 628 persons applied to the special committee, of whom 172 were white. *Id.* at 133-134.

[Footnote 6]

The following table provides a year-by-year comparison of minority admissions at the Davis Medical School:

bwm:

Special Admissions Program General Admissions Total

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Blacks Chicanos Asians Total Blacks Chicanos Asians Total

1970. . . . 5 3 0 8 0 0 4 4 12

1971. . . . 4 9 2 15 1 0 8 9 24

1972. . . . 5 6 5 16 0 0 11 11 27

1973. . . . 6 8 2 16 0 2 13 15 31

1974. . . . 6 7 3 16 0 4 5 9 25

ewm:

Id. at 216-218. Sixteen persons were admitted under the special program in 1974, *ibid.*, but one Asian withdrew before the start of classes, and the vacancy was filled by a candidate from the general admissions waiting list. Brief for Petitioner 4 n. 5.

[Footnote 7]

The following table compares Bakke's science grade point average, overall grade point average, and MCAT scores with the average scores of regular admittees and of special admittees in both 1973 and 1974. Record 210, 223, 231, 234:

bwm:

Class Entering in 1973

MCAT (Percentiles)

Quanti- Gen.

SGPA OGPA Verbal tative Science Infor.

Bakke 3.44 3.46 96 94 97 72

Average of regular

admittees. 3.51 3.49 81 76 83 69

Average of special

admittees. 2.62 2.88 46 24 35 33

Class Entering in 1974

MCAT (Percentiles)

Quanti- Gen.

SGPA OGPA Verbal tative Science Infor.

Bakke. 3.44 3.46 96 94 97 72

Average of regular

admittees. 3.36 3.29 69 67 82 72

Average of special

admittees. 2.42 2.62 34 30 37 18

ewm:

Applicants admitted under the special program also had benchmark scores significantly lower than many students, including Bakke, rejected under the general admissions program, even though the special rating system apparently gave credit for overcoming "disadvantage." *Id.* at 181, 388.

[Footnote 8]

Prior to the actual filing of the suit, Bakke discussed his intentions with Peter C. Storandt, Assistant to the Dean of Admissions at the Davis Medical School. *Id.* at 259-269. Storandt expressed sympathy for Bakke's position and offered advice on litigation strategy.
Several *amici* imply that these discussions render Bakke's suit "collusive." There is no indication, however, that Storandt's views were those of the Medical School, or that anyone else at the school even was aware of Storandt's correspondence and conversations with Bakke. Storandt is no longer with the University.

[Footnote 9]

"[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws."

[Footnote 10]

"No special privileges or immunities shall ever be granted which may not be altered, revoked, or repealed by the Legislature; nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens."

This section was recently repealed, and its provisions added to Art. I, § 7, of the State Constitution.

[Footnote 11]

Section 601 of Title VI, 78 Stat. 252, provides as follows:

"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."

[Footnote 12]

Indeed, the University did not challenge the finding that applicants who were not members of a minority group were excluded from consideration in the special admissions process. 18 Cal.3d at 44, 553 P.2d at 1159.

[Footnote 13]

Petitioner has not challenged this aspect of the decision. The issue of the proper placement of the burden of proof, then, is not before us.

[Footnote 14]

Several *amici* suggest that Bakke lacks standing, arguing that he never showed that his injury -- exclusion from the Medical School -- will be redressed by a favorable decision, and that the petitioner "fabricated" jurisdiction by conceding its inability to meet its burden of proof. Petitioner does not object to Bakke's standing, but inasmuch as this charge concerns our jurisdiction under Art. III, it must be considered and rejected. First, there appears to be no reason to question the petitioner's concession. It was not an attempt to stipulate to a conclusion of law or to disguise actual facts of record. *Cf.*Swift & Co. v. Hocking Valley R. Co., 243 U. S. 281 (1917).

Second, even if Bakke had been unable to prove that he would have been admitted in the absence of the special program, it would not follow that he lacked standing. The constitutional element of standing is plaintiff's demonstration of any injury to himself that is likely to be redressed by favorable decision of his claim. *Warth v. Seldin*, 422 U. S. 490, 422 U. S. 498(1975). The trial court found such an injury, apart from failure to be admitted, in the University's decision not to permit Bakke to compete for all 100 places in the class, simply because of his race. Record 323.

Hence, the constitutional requirements of Art. III were met. The question of Bakke's admission *vel non* is merely one of relief.

Nor is it fatal to Bakke's standing that he was not a "disadvantaged" applicant. Despite the program's purported emphasis on disadvantage, it was a minority enrollment program with a secondary disadvantage element. White disadvantaged students were never considered under the special program, and the University acknowledges that its goal in devising the program was to increase minority enrollment.

[Footnote 15]

See, e.g., 110 Cong.Rec. 5255 (1964) (remarks of Sen. Case).

[Footnote 16]

E.g., Bossier Parish School Board v. Lemon, 370 F.2d 847, 851-852 (CA5), *cert. denied,* 388 U.S. 911 (1967); *Natonbah v. Board of Education,* 355 F.Supp. 716, 724 (NM 1973); *cf. Lloyd v. Regional Transportation Authority,* 548 F.2d 1277, 1284-1287 (CA7 1977) (Title V of Rehabilitation Act of 1973, 29 U.S.C. § 790 *et seq.* (1976 ed.)); *Piascik v. Cleveland Museum of Art,* 426 F.Supp. 779, 780 n. 1 (ND Ohio 1976) (Title IX of Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.* (1976 ed.)).

[Footnote 17]

Section 602, as set forth in 42 U.S.C. § 2000d-1, reads as follows:

"Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made and, shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or(2) by any other means authorized by law: Provided, however, That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program

or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report."

[Footnote 18]

Several comments in the debates cast doubt on the existence of any intent to create a private right of action. For example, Representative Gill stated that no private right of action was contemplated:

"Nowhere in this section do you find a comparable right of legal action for a person who feels he has been denied his rights to participate in the benefits of Federal funds. Nowhere. Only those who have been cut off can go to court and present their claim."

110 Cong.Rec. 2467 (1964). *Accord, id.* at 7065 (remarks of Sen. Keating); 6562 (remarks of Sen. Kuchel).

[Footnote 19]

For example, Senator Humphrey stated as follows:

"Racial discrimination or segregation in the administration of disaster relief is particularly shocking; and offensive to our sense of justice and fair play. Human suffering draws no color lines, and the administration of help to the sufferers should not."

Id. at 6547. *See also id.* at 12675 (remarks of Sen. Allott); 6561 (remarks of Sen. Kuchel); 2494, 6047 (remarks of Sen. Pastore). *But see id.* at 15893 (remarks of Rep. MacGregor); 13821 (remarks of Sen. Saltonstall); 10920 (remarks of Sen. Javits); 5266, 5807 (remarks of Sen. Keating).

[Footnote 20]

See, e.g., id. at 7064-7065 (remarks of Sen. Ribicoff); 7054-7055 (remarks of Sen. Pastore); 6543-6544 (remarks of Sen. Humphrey); 2595 (remarks of Rep. Donohue); 2467-2468 (remarks of Rep. Celler); 1643, 2481-2482 (remarks of Rep. Ryan); H.R.Rep. No. 914, 88th Cong., 1st Sess., pt. 2, pp. 24-25 (1963).

[Footnote 21]

See, e.g., 110 Cong.Rec. 2467 (1964) (remarks of Rep. Lindsay). *See also id.* at 2766 (remarks of Rep. Matsunaga); 2731-2732 (remarks of Rep. Dawson); 2595 (remarks of Rep. Donohue); 1527-1528 (remarks of Rep. Celler).

[Footnote 22]

See, e.g., id. at 12675, 12677 (remarks of Sen. Allott); 7064 (remarks of Sen. Pell); 7057, 7062-7064 (remarks of Sen. Pastore); 5243 (remarks of Sen. Clark).

[Footnote 23]

See, e.g., id. at 6052 (remarks of Sen. Johnston); 5863 (remarks of Sen. Eastland); 5612 (remarks of Sen. Ervin); 5251 (remarks of Sen. Talmadge); 1632 (remarks of Rep. Dowdy); 1619 (remarks of Rep. Abernethy).

[Footnote 24]

See also id. at 7057, 13333 (remarks of Sen. Ribicoff); 7057 (remarks of Sen. Pastore); 5606-5607 (remarks of Sen. Javits); 5253, 5863-5864, 13442 (remarks of Sen. Humphrey).

[Footnote 25]

That issue has generated a considerable amount of scholarly controversy. *See, e.g.*, Ely, The Constitutionality of Reverse Racial Discrimination, 41 U.Chi.L.Rev. 723 (1974); Greenawalt, Judicial Scrutiny of "Benign" Racial Preference in Law School Admissions, 75 Colum.L.Rev. 559 (1975); Kaplan, Equal Justice in an Unequal World: Equality for the Negro, 61 Nw.U.L.Rev. 363 (1966); Karst & Horowitz, Affirmative Action and Equal Protection, 60 Va.L.Rev. 955 (1974); O'Neil, Racial Preference and Higher Education: The Larger Context, 60 Va.L.Rev. 925 (1974); Posner, The *DeFunis* Case and the Constitutionality of Preferential Treatment of Racial Minorities, 1974 Sup.Ct.Rev. 1; Redish, Preferential Law School Admissions and the Equal Protection Clause: An Analysis of the Competing Arguments, 22 UCLA L.Rev. 343 (1974); Sandalow, Racial Preferences in Higher Education: Political Responsibility and the Judicial Role, 42 U.Chi.L.Rev. 653 (1975); Sedler, Racial Preference, Reality and the Constitution: *Bakke v. Regents of the University of California*, 17 Santa Clara L.Rev. 329 (1977); Seeburger, A Heuristic Argument Against Preferential Admissions, 39 U.Pitt.L.Rev. 285 (1977).

[Footnote 26]

Petitioner defines "quota" as a requirement which must be met, but can never be exceeded, regardless of the quality of the minority applicants. Petitioner declares that there is no "floor" under the total number of minority students admitted; completely unqualified students will not be admitted simply to meet a "quota." Neither is there a "ceiling," since an unlimited number could be admitted through the general admissions process. On this basis, the special admissions program does not meet petitioner's definition of a quota.

The court below found -- and petitioner does not deny -- that white applicants could not compete for the 16 places reserved solely for the special admissions program. 18 Cal.3d at 44, 553 P.2d at 1159. Both courts below characterized this as a "quota" system.

[Footnote 27]

Moreover, the University's special admissions program involves a purposeful, acknowledged use of racial criteria. This is not a situation in which the classification on its face is racially neutral, but has a disproportionate racial impact. In that situation, plaintiff must establish an intent to discriminate. *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U. S. 252, 429 U. S.

264-265 (1977); *Washington v. Davis,* 426 U. S. 229, 426 U. S. 242 (1976); *see Yick Wo v. Hopkins,* 118 U. S. 356(1886).

[Footnote 28]

After *Carolene Products,* the first specific reference in our decisions to the elements of "discreteness and insularity" appears in *Minersville School District v. Gobitis,* 310 U. S. 586, 310 U. S. 606 (1940) (Stone, J., dissenting). The next does not appear until 1970. *Oregon v. Mitchell,* 400 U. S. 112, 400 U. S. 295 n. 14 (STEWART, J., concurring in part and dissenting in part). These elements have been relied upon in recognizing a suspect class in only one group of cases, those involving aliens. *E.g., Graham v. Richardson,* 403 U. S. 365, 403 U. S. 372 (1971).

[Footnote 29]

Tussman & tenBroek, The Equal Protection of the Law, 37 Calif.L.Rev. 341, 381 (1949).

[Footnote 30]

M. Jones, American Immigration 177-246 (1960).

[Footnote 31]

J. Higham, Strangers in the Land (1955); G. Abbott, The Immigrant and the Community (1917); P. Roberts, The New Immigration 66-73, 86-91, 248-261 (1912). *See also* E. Fenton, Immigrants and Unions: A Case Study 561-562 (1975).

[Footnote 32]

"Members of various religious and ethnic groups, primarily but not exclusively of Eastern, Middle, and Southern European ancestry, such as Jews, Catholics, Italians, Greeks, and Slavic groups, continue to be excluded from executive, middle-management, and other job levels because of discrimination based upon their religion and/or national origin."

41 CFR § 60-50.1(b) (1977).

[Footnote 33]

E.g., P. Roberts, *supra,* n 31, at 75; G. Abbott, *supra,* n 31, at 270-271. *See generally* n 31, *supra.*

[Footnote 34]

In the view of MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN, the pliable notion of "stigma" is the crucial element in analyzing racial classifications, *see, e.g., post* at 438 U. S. 361, 438 U. S. 362. The Equal Protection Clause is not framed in terms of "stigma." Certainly the word has no clearly

defined constitutional meaning. It reflects a subjective judgment that is standardless. All state-imposed classifications that rearrange burdens and benefits on the basis of race are likely to be viewed with deep resentment by the individuals burdened. The denial to innocent persons of equal rights and opportunities may outrage those so deprived, and therefore may be perceived as invidious. These individuals are likely to find little comfort in the notion that the deprivation they are asked to endure is merely the price of membership in the dominant majority, and that its imposition is inspired by the supposedly benign purpose of aiding others. One should not lightly dismiss the inherent unfairness of, and the perception of mistreatment that accompanies, a system of allocating benefits and privileges on the basis of skin color and ethnic origin. Moreover, MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN offer no principle for deciding whether preferential classifications reflect a benign remedial purpose or a malevolent stigmatic classification, since they are willing in this case to accept mere *post hoc* declarations by an isolated state entity -- a medical school faculty -- unadorned by particularized findings of past discrimination, to establish such a remedial purpose.

[Footnote 35]

Professor Bickel noted the self-contradiction of that view:

"The lesson of the great decisions of the Supreme Court and the lesson of contemporary history have been the same for at least a generation -- discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society. Now this is to be unlearned, and we are told that this is not a matter of fundamental principle, but only a matter of whose ox is gored. Those for whom racial equality was demanded are to be more equal than others. Having found support in the Constitution for equality, they now claim support for inequality under the same Constitution."

A. Bickel, The Morality of Consent 133 (1975).

[Footnote 36]

As I am in agreement with the view that race may be taken into account as a factor in an admissions program, I agree with my Brothers BRENNAN, WHITE, MARSHALL, and BLACKMUN that the portion of the judgment that would proscribe all consideration of race must be reversed. *See* 438 U. S. *infra.* But I disagree with much that is said in their opinion.

They would require, as a justification for a program such as petitioner's, only two findings: (i) that there has been some form of discrimination against the preferred minority groups by "society at large," *post* at 438 U. S. 369 (it being conceded that petitioner had no history of discrimination), and (ii) that "there is reason to believe" that the disparate impact sought to be rectified by the program is the "product" of such discrimination:

"If it was reasonable to conclude -- as we hold that it was -- that the failure of minorities to qualify for admission at Davis under regular procedures was due principally to the effects of past discrimination, then there is a reasonable likelihood that, but for pervasive racial discrimination,

respondent would have failed to qualify for admission even in the absence of Davis' special admissions program." *Post* at 438 U. S. 365-366.

The breadth of this hypothesis is unprecedented in our constitutional system. The first step is easily taken. No one denies the regrettable fact that there has been societal discrimination in this country against various racial and ethnic groups. The second step, however, involves a speculative leap: but for this discrimination by society at large, Bakke "would have failed to qualify for admission" because Negro applicants -- nothing is said about Asians, *cf., e.g., post* at 438 U. S. 374 n. 57 -- would have made better scores. Not one word in the record supports this conclusion, and the authors of the opinion offer no standard for courts to use in applying such a presumption of causation to other racial or ethnic classifications. This failure is a grave one, since, if it may be concluded on this record that each of the minority groups preferred by the petitioner's special program is entitled to the benefit of the presumption, it would seem difficult to determine that any of the dozens of minority groups that have suffered "societal discrimination" cannot also claim it in any area of social intercourse. *See* 438 U. S. *infra.*

[Footnote 37]

Mr. Justice Douglas has noted the problems associated with such inquiries:

"The reservation of a proportion of the law school class for members of selected minority groups is fraught with . . . dangers, for one must immediately determine which groups are to receive such favored treatment and which are to be excluded, the proportions of the class that are to be allocated to each, and even the criteria by which to determine whether an individual is a member of a favored group. [*Cf. Plessy v. Ferguson,* 163 U. S. 537, 163 U. S. 549, 163 U. S. 552(1896).] There is no assurance that a common agreement can be reached, and first the schools, and then the courts, will be buffeted with the competing claims. The University of Washington included Filipinos, but excluded Chinese and Japanese; another school may limit its program to blacks, or to blacks and Chicanos. Once the Court sanctioned racial preferences such as these, it could not then wash its hands of the matter, leaving it entirely in the discretion of the school, for then we would have effectively overruled *Sweatt v. Painter,* 339 U. S. 629, and allowed imposition of a 'zero' allocation. But what standard is the Court to apply when a rejected applicant of Japanese ancestry brings suit to require the University of Washington to extend the same privileges to his group? The Committee might conclude that the population of Washington is now 2% Japanese, and that Japanese also constitute 2% of the Bar, but that, had they not been handicapped by a history of discrimination, Japanese would now constitute 5% of the Bar, or 20%. Or, alternatively, the Court could attempt to assess how grievously each group has suffered from discrimination, and allocate proportions accordingly; if that were the standard, the current University of Washington policy would almost surely fall, for there is no Western State which can claim that it has always treated Japanese and Chinese in a fair and evenhanded manner. *See, e.g., Yick Wo v. Hopkins,* 118 U. S. 356; *Terrace v. Thompson,* 263 U. S. 197; *Oyama v. California,* 332 U. S. 633. This Court has not sustained a racial classification since the wartime cases of *Korematsu v. United States,* 323 U. S. 214, and *Hirabayashi v. United States,* 320 U. S. 81, involving curfews and relocations imposed upon Japanese-Americans."

"Nor, obviously, will the problem be solved if, next year, the Law School included only Japanese and Chinese, for then Norwegians and Swedes, Poles and Italians, Puerto Ricans and Hungarians, and all other groups which form this diverse Nation would have just complaints."

DeFunis v. Odegaard, 416 U. S. 312, 416 U. S. 337-340 (1974) (dissenting opinion) (footnotes omitted) .

[Footnote 38]

R. Dahl, A Preface to Democratic Theory (1956); Posner, *supra,* n 25, at 27.

[Footnote 39]

Petitioner cites three lower court decisions allegedly deviating from this general rule in school desegregation cases:*Offermann v. Nitkowski,* 378 F.2d 22 (CA2 1967); *Wanner v. County School Board,* 357 F.2d 452 (CA4 1966); *Springfield School Committee v. Barksdale,* 348 F.2d 261 (CA1 1965). Of these, *Wanner* involved a school system held to have been *de jure*segregated and enjoined from maintaining segregation; racial districting was deemed necessary. 357 F.2d at 454. *Cf. United Jewish Organizations v. Carey,* 430 U. S. 144 (1977).
In *Barksdale* and *Offermann,* courts did approve voluntary districting designed to eliminate discriminatory attendance patterns. In neither, however, was there any showing that the school board planned extensive pupil transportation that might threaten liberty or privacy interests. *See Keyes v. School District No. 1,* 413 U. S. 189, 413 U. S. 240-250 (1973) (POWELL, J., concurring in part and dissenting in part). Nor were white students deprived of an equal opportunity for education.

Respondent's position is wholly dissimilar to that of a pupil bused from his neighborhood school to a comparable school in another neighborhood in compliance with a desegregation decree. Petitioner did not arrange for respondent to attend a different medical school in order to desegregate Davis Medical School; instead, it denied him admission, and may have deprived him altogether of a medical education.

[Footnote 40]

Every decision upholding the requirement of preferential hiring under the authority of Exec.Order No. 11246, 3 CFR 339 (1964-1965 Comp.), has emphasized the existence of previous discrimination as a predicate for the imposition of a preferential remedy. *Contractors Association of Eastern Pennsylvania; Southern Illinois Builders Assn. v. Ogilvie,* 471 F.2d 680 (CA7 1972); *Joyce v. McCrane,* 320 F.Supp. 1284 (NJ 1970); *Weiner v. Cuyahoga Community College District,* 19 Ohio St.2d 35, 249 N.E.2d 907, *cert. denied,* 396 U.S. 1004 (1970). *See also Rosetti Contracting Co. v. Brennan,* 508 F.2d 1039, 1041 (CA7 1975); *Associated General Contractors of Massachusetts, Inc. v. Altshuler,* 490 F.2d 9 (CA1 1973), *cert. denied,* 416 U.S. 957 (1974); *Northeast Constr. Co. v. Romney,* 157 U.S.App.D.C. 381, 383, 390, 485 F.2d 752, 754, 761 (1973).

[Footnote 41]

This case does not call into question congressionally authorized administrative actions, such as consent decrees under Title VII or approval of reapportionment plans under § 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c (1970 ed., Supp. V). In such cases, there has been detailed legislative consideration of the various indicia of previous constitutional or statutory violations, *e.g., South Carolina v. Katzenbach,* 383 U. S. 301, 383 U. S. 308-310 (1966) (§ 5), and particular administrative bodies have been charged with monitoring various activities in order to detect such violations and formulate appropriate remedies. *See Hampton v. Mow Sun Wong,* 426 U. S. 88, 426 U. S. 103 (1976).

Furthermore, we are not here presented with an occasion to review legislation by Congress pursuant to its powers under § 2 of the Thirteenth Amendment and § 5 of the Fourteenth Amendment to remedy the effects of prior discrimination.*Katzenbach v. Morgan,* 384 U. S. 641 (1966); *Jones v. Alfred H. Mayer Co.,* 392 U. S. 409 (1968). We have previously recognized the special competence of Congress to make findings with respect to the effects of identified past discrimination and its discretionary authority to take appropriate remedial measures.

[Footnote 42]

Petitioner also cites our decision in *Morton v. Mancari,* 417 U. S. 535 (1974), for the proposition that the State may prefer members of traditionally disadvantaged groups. In *Mancari,* we approved a hiring preference for qualified Indians in the Bureau of Indian Affairs of the Department of the Interior (BIA). We observed in that case, however, that the legal status of the BIA is *sui generis. Id.* at 417 U. S. 554. Indeed, we found that the preference was not racial at all, but

"an employment criterion reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to . . . groups . . . whose lives and activities are governed by the BIA in a unique fashion."

Ibid.

[Footnote 43]

A number of distinct subgoals have been advanced as falling under the rubric of "compensation for past discrimination." For example, it is said t.hat preferences for Negro applicants may compensate for harm done them personally, or serve to place them at economic levels they might have attained but for discrimination against their forebears. Greenawalt, *supra,*n 25, at 581-586. Another view of the "compensation" goal is that it serves as a form of reparation by the "majority" to a victimized group as a whole. B. Bittker, The Case for Black Reparations (1973). That justification for racial or ethnic preference has been subjected to much criticism. E. Greenawalt, *supra,* n 25, at 581; Posner, *supra,* n 25, at 16-17, and n. 33. Finally, it has been argued that ethnic preferences "compensate" the group by providing examples of success whom other members of the group will emulate, thereby advancing the group's interest and society's interest in encouraging new generations to overcome the barriers and frustrations of the past. Redish, *supra,* n 25, at 391. For purposes of analysis these subgoals need not be considered separately.

Racial classifications in admissions conceivably could serve a fifth purpose, one which petitioner does not articulate: fair appraisal of each individual's academic promise in the light of some cultural bias in grading or testing procedures. To the extent that race and ethnic background were considered only to the extent of curing established inaccuracies in predicting academic performance, it might be argued that there is no "preference" at all. Nothing in this record, however, suggests either that any of the quantitative factors considered by the Medical School were culturally biased, or that petitioner's special admissions program was formulated to correct for any such biases. Furthermore, if race or ethnic background were used solely to arrive at an unbiased prediction of academic success, the reservation of fixed numbers of seats would be inexplicable.

[Footnote 44]

MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN misconceive the scope of this Court's holdings under Title VII when they suggest that "disparate impact" alone is sufficient to establish a violation of that statute and, by analogy, other civil rights measures. *See post* at 438 U. S. 363-366, and n. 42. That this was not the meaning of Title VII was made quite clear in the seminal decision in this area, *Griggs v. Duke Power Co.*, 401 U. S. 424 (1971):

"*Discriminatory preference* for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of *artificial, arbitrary, and unnecessary* barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification."

Id. at 401 U. S. 431 (emphasis added). Thus, disparate impact is a basis for relief under Title VII only if the practice in question is not founded on "business necessity," *ibid.*, or lacks "a manifest relationship to the employment in question," *id.*at 401 U. S. 432. *See also McDonnell Douglas Corp. v. Green*, 411 U. S. 792, 411 U. S. 802-803, 411 U. S. 805-806 (1973). Nothing in this record -- as opposed to some of the general literature cited by MR. JUSTICE BRENNAN, MR JUSTICE WHITE, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN -- even remotely suggests that the disparate impact of the general admissions program at Davis Medical School, resulting primarily from the sort of disparate test scores and grades set forth in n 7, *supra*, is without educational justification.

Moreover, the presumption in *Griggs* -- that disparate impact without any showing of business justification established the existence of discrimination in violation of the statute -- was based on legislative determinations, wholly absent here, that past discrimination had handicapped various minority groups to such an extent that disparate impact could be traced to identifiable instances of past discrimination:

"[Congress sought] to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the *status quo* of prior discriminatory employment practices."

Griggs, supra at 401 U. S. 429-430. *See, e.g.*, H.R.Rep. No. 914, 88th Cong., 1st Sess., pt. 2, p. 26 (1963) ("Testimony supporting the fact of discrimination in employment is overwhelming"). *See generally* Vaas, Title VII: The Legislative History, 7 B. C. Ind. & Com.L.Rev. 431 (1966). The Court emphasized that

"the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group."

401 U.S. at 401 U. S. 430-431. Indeed, § 703(j) of the Act makes it clear that preferential treatment for an individual or minority group to correct an existing "imbalance" may not be required under Title VII. 42 U.S.C. § 2000e-2(j). Thus, Title VII principles support the proposition that findings of identified discrimination must precede the fashioning of remedial measures embodying racial classifications.

[Footnote 45]

For example, the University is unable to explain its selection of only the four favored groups -- Negroes, Mexican-Americans, American Indians, and Asians -- for preferential treatment. The inclusion of the last group is especially curious in light of the substantial numbers of Asians admitted through the regular admissions process. *See also* n 37, *supra*.

[Footnote 46]

The only evidence in the record with respect to such underservice is a newspaper article. Record 473.

[Footnote 47]

It is not clear that petitioner's two-track system, even if adopted throughout the country, would substantially increase representation of blacks in the medical profession. That is the finding of a recent study by Sleeth & Mishell, Black Under-Representation in United States Medical Schools, 297 New England J. of Med. 1146 (1977). Those authors maintain that the cause of black underrepresentation lies in the small size of the national pool of qualified black applicants. In their view, this problem is traceable to the poor premedical experiences of black undergraduates, and can be remedied effectively only by developing remedial programs for black students before they enter college.

[Footnote 48]

The president of Princeton University has described some of the benefits derived from a diverse student body:

"[A] great deal of learning occurs informally. It occurs through interactions among students of both sexes; of different races, religions, and backgrounds; who come from cities and rural areas, from various states and countries; who have a wide variety of interests, talents, and perspectives; and who are able, directly or indirectly, to learn from their differences and to stimulate one

another to reexamine even their most deeply held assumptions about themselves and their world. As a wise graduate of ours observed in commenting on this aspect of the educational process, 'People do not learn very much when they are surrounded only by the likes of themselves.'"

"* * * *"

"In the nature of things, it is hard to know how, and when, and even if, this informal 'learning through diversity' actually occurs. It does not occur for everyone. For many, however, the unplanned, casual encounters with roommates, fellow sufferers in an organic chemistry class, student workers in the library, teammates on a basketball squad, or other participants in class affairs or student government can be subtle and yet powerful sources of improved understanding and personal growth."

Bowen, Admissions and the Relevance of Race, Princeton Alumni Weekly 7, 9 (Sept. 26, 1977).

[Footnote 49]

Graduate admissions decisions, like those at the undergraduate level, are concerned with

"assessing the potential contributions to the society of each individual candidate following his or her graduation -- contributions defined in the broadest way to include the doctor and the poet, the most active participant in business or government affairs and the keenest critic of all things organized, the solitary scholar and the concerned parent."

Id. at 10.

[Footnote 50]

See Manning, The Pursuit of Fairness in Admissions to Higher Education, in Carnegie Council on Policy Studies in Higher Education, Selective Admission in Higher Education 19, 57-59 (1977).

[Footnote 51]

The admissions program at Princeton has been described in similar terms:

"While race is not, in and of itself, a consideration in determining basic qualifications, and while there are obviously significant differences in background and experience among applicants of every race, in some situations, race can be helpful information in enabling the admission officer to understand more fully what a particular candidate has accomplished -- and against what odds. Similarly, such factors as family circumstances and previous educational opportunities may be relevant, either in conjunction with race or ethnic background (with which they may be associated) or on their own."

Bowen, *supra*, n 48, at 8-9.

For an illuminating discussion of such flexible admissions systems, *see* Manning, *supra*, n 50, at 57-59.

[Footnote 52]

The denial to respondent of this right to individualized consideration without regard to his race is the principal evil of petitioner' special admissions program. Nowhere in the opinion of MR. JUSTICE BRENNAN, MR JUSTICE WHITE, MR. JUSTICE MARSHALL, and MR JUSTICE BLACKMUN is this denial even addressed.

[Footnote 53]

Universities, like the prosecutor in *Swain*, may make individualized decisions, in which ethnic background plays a part, under a presumption of legality and legitimate educational purpose. So long as the university proceeds on an individualized, case-by-case basis, there is no warrant for judicial interference in the academic process. If an applicant can establish that the institution does not adhere to a policy of individual comparisons, or can show that a systematic exclusion of certain groups results, the presumption of legality might be overcome, creating the necessity of proving legitimate educational purpose.

There also are strong policy reasons that correspond to the constitutional distinction between petitioner's preference program and one that assures a measure of competition among all applicants. Petitioner's program will be viewed as inherently unfair by the public generally, as well as by applicants for admission to state universities. Fairness in individual competition for opportunities, especially those provided by the State, is a widely cherished American ethic. Indeed, in a broader sense, an underlying assumption of the rule of law is the worthiness of a system of justice based on fairness to the individual. As Mr. Justice Frankfurter declared in another connection, "[j]ustice must satisfy the appearance of justice."*Offutt v. United States,* 348 U. S. 11, 348 U. S. 14 (1954).

[Footnote 54]

There is no occasion for remanding the case to permit petitioner to reconstruct what might have happened if it had been operating the type of program described as legitimate in 438 U. S. *supra. Cf. Mt. Healthy City Board of Ed. v. Doyle,* 429 U. S. 274, 429 U. S. 284-287 (1977). In *Mt. Healthy,* there was considerable doubt whether protected First Amendment activity had been the "but for" cause of Doyle's protested discharge. Here, in contrast, there is no question as to the sole reason for respondent's rejection -- purposeful racial discrimination in the form of the special admissions program. Having injured respondent solely on the basis of an unlawful classification, petitioner cannot now hypothesize that it might have employed lawful means of achieving the same result. *See Arlington Heights v. Metropolitan Housing Dev. Corp.,* 429 U.S. at429 U. S. 265-266. No one can say how -- or even if -- petitioner would have operated its admissions process if it had known that legitimate alternatives were available. Nor is there a record revealing that legitimate alternative grounds for the decision existed, as there was in *Mt. Healthy.* In sum, a remand would result in fictitious recasting of past conduct.

[Footnote 55]

This statement appears in the Appendix to the Brief for Columbia University, Harvard University, Stanford University, and the University of Pennsylvania, as *Amici Curiae.*