Inevitably, as affirmative action spread and took on the new meaning of giving minorities special preferences in employment, government contracting, and university and college admissions, the practice became highly controversial. Critics claimed the programs were discriminatory on the basis of race in violation of the equal protection clause of the Fourteenth Amendment where state action was involved, or the equal protection component of the Fifth Amendment due process clause for federal programs. Arguably, state and federal "reverse racial discrimination" was still unconstitutional discrimination.

The seminal precedent setting affirmative action decision came in the Bakke case in 1976. The University of California medical school at Davis had an affirmative action admissions program that set aside 16 out of 100 places for a "minority group" (blacks, Chicanos, Asians, American Indians). Bakke, a white applicant whose test scores were better than those required of minority applicants, sued when the school denied him admission.

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UNIVERSITY OF CALIFORNIA REGENTS V. BAKKE

438 U.S. 265 (1978)

Mr. Justice Powell announced the judgment of the Court.

. . . The special admissions program is undeniably a classification based on race and ethnic background. To the extent that there existed a pool of at least minimally qualified minority applicants to fill the 16 special admissions seats, white applicants could compete only for 84 seats in the entering class, rather than the 100 open to minority applicants. Whether this limitation is described as a quota or a goal, it is a line drawn on the basis of race and ethnic status.

The guarantees of the Fourteenth Amendment extend to all persons. Its language is explicit: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." . . . The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal.

Nevertheless, petitioner [University of California] argues that the court below [California Supreme Court, which overturned the program] 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.

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 [racial] classification is invidious. . . .

. . . Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination. . . .

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. . . .

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. . . . 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 extent of the injury and the consequent remedy will have been judicially, legislatively, or administrative 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, it cannot be 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. . . .

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 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. 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.

During the 1980s the Supreme Court appeared to apply different constitutional standards to national and state and local affirmative action programs. Essentially, a close majority and sometimes plurality of the Court held that Congress has broad remedial power under the Fourteenth Amendment's Section 5 to remedy the effects of past societal discrimination by passing affirmative action programs, such as minority set-aside programs for small businesses receiving federal funds. At the same time, Supreme Court conservatives were able to marshal a majority or plurality that applied stricter constitutional standards to state and local programs. In the latter area the Court sometimes overturned state and local affirmative action programs as unjustified racial discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment. Only if the states or localities could prove that their affirmative action programs were designed to remedy the effects of past discrimination would the Supreme Court uphold them. The result of these Supreme Court opinions was that Congress had far more leeway to pass affirmative action legislation than did the states or local governments.*

The Supreme Court, in a 5–4 decision, held in *Adarand Constructors v. Pena*, 515 U.S. 200 (1995), that strict judicial scrutiny would be applied to both federal and state action, requiring Congress for the first time to make findings supporting a compelling government interest in affirmative action programs.

*Compiler's note: Major cases concerning congressional authority in affirmative action include *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Metro Broadcasting, Inc. v. Federal Communications Commission*, 497 U.S. 547 (1990). For state and local affirmative action authority see, for example, *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986); *United States v. Paradise*, 480 U.S. 149 (1987); *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989).