Supreme Court of the United States
Memorandum

Drafts of editing revisions were revised before final printing. These merely illustrate the editing process in my chambers.

Sally - There go to file downstairs. There are portions of drafts for my opinion. They show the evolution of the opinion.
The fourth goal asserted by petitioner is the attainment of a diverse student body, and this clearly is a constitutionally permissible goal for an institution of higher education. Academic freedom, though not a constitutional right in itself, long has been viewed as a special concern of the First Amendment. This freedom of a university to make its own judgments as to the education for which it is responsible includes the selection its student body. Mr. Justice Frankfurter eloquently summarized the "four essential freedoms" that comprise 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. The Open Universities in South Africa." Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring).

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

The atmosphere of "speculation, experiment and creation" - so essential to the quality of higher education - is widely believed to be promoted by a student body diverse in many respects. As we noted in Keyshian, 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.

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 school level our tradition and experience lend support to the view that the contribution of diversity is substantial. Physicians serve our heterogeneous population. A medical student with a particular background - whether it be ethnic, geographic, cultural advantaged or disadvantaged -
may bring experiences, outlooks and ideas to a professional school of medicine that enrich the experience of its student body and better equip its graduates to render with understanding their vital service to humanity. But ethnic diversity is only one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body. And, 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. Specifically, in this case, 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 served by the program is certainly substantial, the question that remains is whether the program's racial classification is necessary to promote this interest. In re Griffiths, supra 413 U.S., at 721-22. We turn now to that question.
We may assume 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 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. It is not simply an interest in select ethnic diversity in which a specified percentage of the student body is in effect guaranteed to be ethnic (as defined by the university) and the remaining percentage composed of undifferentiated whites. The desired diversity - that which does further a substantial state interest - encompasses a far broader base of qualifications and characteristics of which racial or ethnic origin is only a single element.

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 the two-track program to the illogical end of insulating each category of applicants with certain desired qualifications from competition with all other applicants.

Other universities have not found it necessary to adopt any such system. An illuminating example of an admissions system designed to achieve meaningful diversity in the broad sense of this term is found in the Harvard College program mentioned above:

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, 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 applicable may tip the balance in his favor just as geographic origin or a life spent on a
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. (Appendix, Amicus Brief filed on behalf of Harvard, Columbia, Pennsylvania and Stanford).

The Harvard College program specifically eschews quotas:

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 the 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. (Appendix Harvard, et al, Amicus Brief).

In an admissions program like that described above race or ethnic background may be deemed a "plus" in an applicant's file, but it does not insulate him from a fair comparison with all other candidates for the available seats. A particular black applicant may be viewed as a potential contributor to diversity without the factor of race being decisive when compared, for example, with an applicant identified as an Italian-American the latter may possess qualities more likely to promote beneficial educational pluralism. Such qualities could
include leadership ability, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor or other qualities deemed at the time to be relevant. In short, an admissions program operated in this way is flexible enough to consider all pertinent elements of diversity and to place them on the same footing for consideration, although not necessarily receiving the same weight. Indeed, the weight attributed to a particular quality may vary from year to year depending upon the "mix" both of the student body and the applicants for the incoming class. The applicant who loses out on the last available seat to an applicant receiving a "plus" on the basis of an ethnic background will not have been foreclosed from consideration 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 non-objective factors, did not outweigh those of the other applicant. His qualifications, however, would have been weighed competitively and he would have no legitimate basis to complain of unequal treatment.
It has been suggested that the Harvard type program is simply a somewhat sophisticated— but not more effective— means of articulating racial preference and warding off any semblance of discrimination against minority students than the Davis program. The latter, on the other hand, is claimed to be more honest and direct in its means of attaining its desired goal. I must not say. Whatever may be said as to sophistication levels of these two great universities, this would be irrelevant to the present inquiry. What is discernible is that in a facial intent to discriminate on the basis of race’s preference programs, not denied in this case, and such facial inferiority exist in an admission program where race or ethnic background is simply one to be weighed against other elements— in the selection process. The court would not assume that a university, professing to employ such an admission policy, would be if as a cover for the functional equivalent of an effect under a guise system. In short, good faith would be presumed almost a showing to the contrary in manner permitted by our cases (e.g. cite Davis, Gring ton)
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"... 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. The Open Universities in South Africa." Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring.)

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may bring experiences, outlooks and ideas to a professional school of medicine that enrich the experience of its student body and better equip its graduates to render with understanding their vital service to humanity. But ethnic diversity is only one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body. And, 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. Specifically, in this case, 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 served by the program is certainly substantial, the question that remains is whether the program's racial classification is necessary to promote this interest. In re Griffiths, supra 413 U.S., at 721-22. We turn now to that question.
We may assume 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 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. It is not simply an interest in selective ethnic diversity in which a specified percentage of the student body is in effect guaranteed to be ethnic (as defined by the university) and the remaining percentage composed of undifferentiated whites. The desired diversity - that which does further a substantial state interest - encompasses a far broader base of qualifications and characteristics of which racial or ethnic origin is only a single element. Petitioner's special admissions program, focused solely on ethnic diversity, would hinder rather than further attainment of genuine diversity.

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.

Other universities have not found it necessary to adopt any such system, whether two or multi-tracked. An illuminating example of an admissions system designed to achieve meaningful diversity in the broad sense of this term 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 applicable 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. (Appendix, Amicus Brief filed on behalf of Harvard, Columbia, Pennsylvania and Stanford). See Appendix hereto.

But the Harvard College program specifically eschews quotas:
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 the 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. (Appendix Harvard, et al, Amicus Brief).

In an admissions program like that described above race or ethnic background may be deemed a "plus" in a particular applicant's file, but it does not insulate him from a fair comparison with all other candidates for the available seats. A particular black applicant may be viewed as a potential contributor to diversity without the factor of race being decisive when compared, for example, with an applicant identified as an Italian-American where the latter is thought to possess qualities more likely to promote beneficial educational pluralism. Such qualities could include unique personal talents or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor or other qualifications deemed at the time to be relevant. In short, an admissions program operated in this way is flexible enough to consider all pertinent elements of diversity and to place them on the same footing for consideration, although not
necessarily receiving the same weight. Indeed, the weight attributed to a particular quality may vary from year to year depending upon the "mix" both of the student body and the applicants for the incoming class. The applicant who loses out on the last available seat to an applicant receiving a "plus" on the basis of an ethnic background will not have been foreclosed from consideration 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 non-objective factors, did not outweigh those of the other applicant. His qualifications, however, would have been weighed fairly and competitively and he would have no legitimate basis to complain of unequal treatment.

It has been suggested that the Harvard-type program is simply a subtle and more sophisticated - but no less effective - means of according racial preference than the Davis program. The latter, however, is claimed to be a more candid means of attaining a desired goal. Whatever may be said as to the sophistication levels of the programs of these two great universities, this would be irrelevant to the present inquiry. A facial intent to discriminate 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 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 would be presumed absent a showing to the
contrary in the manner permitted by our cases. See, e.g.,
Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977); 
Washington v. Davis, 426 U.S. 229 (1976); Swain v. Alabama, 
If the college institution'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 constitutionally impermissible. 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., McLaughlin v. Florida, 397 U.S. 184 (1964); Brown v. Board of Education, supra, 483, 495 (1954).

The state certainly has a legitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effects of past 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 towards its attainment. In the school cases, the state was required by court order to redress the wrongs worked by specific and identifiable racial discrimination. But the goal was far more focused than the remedying of the effects of "societal discrimination". As laudable as this may be
as a general overall purpose, societal discrimination is ageless in its reach into the past, and its presently relevant dimensions are amorphous - and caustion too tenuous - to justify remedial action when it disadvantages persons not deemed to suffer from society's past sins.
VI

In summary, it is evident that the Davis special admission program goes far beyond any state action ever 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, qualitative and extracurricular, including their own potential for contribution to educational diversity, they never have the chance to compete with applicants from the preferred groups for special admission seats. At the same time, the preferred applicants also have the opportunity to compete for every seat in the class. Although not in itself dispositive, the discriminatory nature of this program is accentuated by the limiting of the preferred groups to three categories when other ethnic groups - as well as economically disadvantaged points - may well merit equal group consideration.

But the fatal flaw in Petitioner's preferential program is its disregard of individual rights as guaranteed by the Fourteenth Amendment. Shelley v. Kramer, 334 U.S. 1, 22 (1948). Such rights are not absolute. But when a state's distribution of benefits or imposition of burdens...
hinges on the color of a person's skin or on his ancestry, he is entitled to a clear showing that the challenged classification is necessary to promote a substantial state interest. Petitioner has failed to carry this heavy burden. The discrimination is simply incidious.
Petitioner identifies, as another purpose of its program, improving the delivery of health care services to communities currently underserved. No one would question the substantiality of a state's interest in the health care of its citizens. But assuming that this interest is sufficiently compelling to support the use of a suspect classification, there is virtually no evidence in the record indicating that petitioner's special admissions program is either needed or geared to promote that interest. The court below addressed this failure to demonstrate any significant relation between the asserted goal and the challenged classification:

The University concedes it cannot assure that minority doctors who entered under the program, all of whom express an "interest" in participating 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 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.
Petitioner simply has not carried its burden of demonstrating that it must prefer members of a particular ethnic group over other individuals in order to promote better health care delivery to deprived citizens. Indeed, Petitioner has not even shown that its preferential classification is likely to have a significant effect on the problem.
A

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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.

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admissions program where race or ethnic background is simply one element - be weighed fairly against other elements - in the selection process. 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 would be presumed absent a showing to the contrary in the manner permitted by our cases. (Bob - cite Davis, Arlington)/
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In summary, it is evident that the Davis special admission program goes far beyond any state action ever 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, qualitative and extracurricular, including their own potential for contribution to educational diversity, they never have the chance to compete with applicants from the preferred groups for special admission seats. At the same time, the preferred applicants also have the opportunity to compete for every seat in the class. Although not in itself dispositive, the discriminatory nature of this program is accentuated by the limiting of the preferred groups to three categories when other ethnic groups - as well as economically disadvantaged points - may well merit equal group consideration.

But the fatal flaw in Petitioner's preferential program is its disregard of individual rights as guaranteed by the Fourteenth Amendment. Shelley v. Kramer, 334 U.S. 1, 22 (1948). Such rights are not absolute. But when a state's distribution of benefits or imposition of burdens
hinges on a color of a person's skin or on his ancestry, he is entitled to a clear showing that the challenged classification is necessary to promote a substantial state interest. Petitioner has failed to carry this heavy burden. The discrimination is simply invidious.
1. 12 - 115, 212, 687 all production 3. what can possibly within a single activity.
Possibly add, as a note, something along the following lines:

The state interest in diversity of a university's student body - whether at the graduate or undergraduate level - has a dual aspect. A great deal of the learning on a campus occurs outside of the classroom and laboratory. It comes through interactions among students, not just with respect to the disciplines of the curriculum, but more broadly from the associations between students with diverse backgrounds and with different talents and views. This type of learning experience, helpful during college or graduate years, also better prepares the graduate for useful citizenship as well as for chosen vocation.
The memoranda to the Conference and the briefs dealing with Title VI have confirmed my belief that there is no easy or satisfactory alternative to resolution of the constitutional issue. There is little doubt that there was no legislative intent to have Title VI depart from the dictates of the Fourteenth Amendment. The underlying questions of liability will be the same.

Thus, it may be that the narrower mode of decision would be to avoid reaching out for the statutory grounds.

A decision under Title VI would require resolution of several questions not argued or addressed below, e.g., whether there is an implied right of private action under Title VI, whether such a right entails private relief, and whether it requires exhaustion of administrative remedies. Since the underlying issues of liability will be the same, there seems to be no reason to drag these problems into the case in an effort to avoid the question already presented. For those reasons, I am circulating this memorandum expressing my views on standing and my tentative views on the constitutional issue.
The Medical School of the University of California at Davis (hereinafter Davis) had two admissions programs for the entering class of 100 students—the regular admissions program and the special admissions program. Under the regular procedure, candidates whose overall undergraduate grade point averages fell below 2.5 on a scale of 4.0 were summarily rejected. About one out of six applicants was then given an interview, following which he was rated on a scale of 1 to 100 by each of the committee members (five in 1973 and six in 1974), his rating being based on the interviewers' summaries, his overall grade point average, his science courses grade point average, and his Medical College Admissions Test (MCAT) scores, letters of recommendation, extracurricular activities, and other biographical data, all of which resulted in a total "benchmark score." The full admissions committee then made offers of admission on the basis of their review of the applicant's file and his score, considering and acting upon applications as they were received. The committee chairman was responsible for placing names on the waiting list and had discretion to include persons with "special skills." A separate committee, a majority of whom were members of minority groups, operated the special
admissions program. The 1973 and 1974 application forms, respectively, asked candidates whether they wished to be considered as "economically and/or educationally disadvantaged" applicants and members of a "minority group" (blacks, Chicanos, Asians, American Indians). If an applicant was found to be "disadvantaged," he would be rated similarly to the general admissions applicants; special candidates did not have to meet the 2.5 grade point cut-off. About one-fifth of the special applicants were invited for interviews in 1973 and 1974, following which they were given benchmark scores, and the top choices were then given to the general admissions committee; special candidates were not rated or compared with general candidates, but could be rejected for failure to meet course requirements or other specific deficiencies. The special committee continued to recommend candidates until 16 special admission selections had been made. During a four-year period 63 minority students were admitted to Davis under the special program and 44 under the general program. No disadvantaged whites were admitted under the special program, though many applied. Respondent, a white male, applied to Davis in 1973 and 1974, in both years being considered only under the general admissions program. Though he had a 468 out of 500 score in 1973 he was rejected, no general applicants with scores less than 470 being accepted after
respondent's application, which was filed late in the year, had been completed. At that time four special admission slots were still unfilled. In 1974 respondent applied early, and though he had a total score of 549 out of 600, he was again rejected. In neither year was his name placed on the discretionary waiting list. In both years special applicants were admitted with significantly lower scores than respondent's. After his second rejection, respondent filed this action in state court for mandatory injunctive and declaratory relief to compel his admission to Davis, alleging that the special admissions program operated to exclude him on the basis of his race in violation of the Equal Protection Clause of the Fourteenth Amendment, a provision of the California Constitution, and §601 of Title VI of the Civil Rights Act of 1964, which provides, inter alia, that no person shall on the ground of race or color be excluded from participating in any program receiving federal financial assistance. Petitioner cross-claimed for a declaration that its special admissions program was lawful. The trial court found that the special program operated as a racial quota, because minority applicants in that program were rated only against one another, and 16 places in the class of 100 were reserved for them. Declaring that petitioner could not take race into account in making admissions
decisions, the program was held to violate the Federal and State Constitutions and Title VI. Respondent's admission was not ordered, however, for lack of proof that he would have been admitted but for the special program. The California Supreme Court, applying a strict-scrutiny standard, concluded that the special admissions program was not the least intrusive means of achieving the goals of the admittedly compelling state interests of integrating the medical profession and increasing the number of doctors willing to serve minority patients. Without passing on the state constitutional or federal statutory grounds the court held that the Equal Protection Clause 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." Since petitioner could not satisfy its burden of demonstrating that respondent, absent the special program, would not have been admitted, the court ordered his admission to Davis. Held: The judgment is affirmed in part and reversed in part.

18 Cal. 3d 34, 553 P. 2d 1152, affirmed in part and reversed in part.
As I am in agreement with the view that race may be taken into account as a factor in an admissions program, I am in accord with the result reached in this case by the plurality opinion of Justices Brennan, White, Marshall and Blackmun. But I do not agree with much of what is said in their opinion. In my view, no decision of this Court has ever held - or even intimated - that:

"... government may adopt race conscious programs if the purpose of such programs is to remove the disparate racial impact of government actions and if there is reason to believe that disparate impact is itself the product of past discrimination, whether their own or that of society at large."

Post at _____.

As the opinion concedes that there was no history of discriminatory action by government against minorities at Davis (Post at ______), the plurality bases its position solely on "past discrimination... [by] society at large". Indeed, the emphasis throughout the opinion is on "societal discrimination", rooted in the evils of slavery.
The plurality thus would require as justification for Davis type programs, only two findings: (i) that there has been societal discrimination, and (ii) that "there is reason to believe" that the disadvantage sought to be rectified by the program is "the product" of such discrimination. Post at ___, ___, and ___. The plurality opinion puts it this way with respect to Bakke and the Davis program:

"If it was reasonable to conclude -- as we hold that it was -- that the failure of Negroes 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's special admission program". Post at ___.

The sweeping effect of this type of reasoning is unprecedented in our constitutional system. The first step in the analysis, whether or not there has been past societal discrimination, requires no proof. The second step is merely a giant speculative leap: "but for" this discrimination by society over the past centuries, Bakke
"would have failed to qualify for admission" because Negro applicants (nothing is said about Orientals) would have made better scores. Apart for the fact that not one word in the record — either as to the Davis program or indeed in the relevant literature — supports this assumption, it is a judgment predicated neither upon principle nor any standard that any court can apply.

In short, as sympathetic as one may be to the aspirations and ideals expressed with such feeling in the plurality opinion, it opens wide vistas of standardless and unprincipled decision making, perhaps without parallel in our history.