# SUPREME COURT OF THE UNITED STATES

No. 93–1841

ADARAND CONSTRUCTORS, INC., PETITIONER *v.* FEDERICO PENA, SECRETARY OF TRANSPORTATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

[June 12, 1995]

JUSTICE THOMAS, concurring in part and concurring in the judgment.

I agree with the majority's conclusion that strict scrutiny applies to *all* government classifications based on race. I write separately, however, to express my disagreement with the premise underlying JUSTICE STEVENS' and JUSTICE GINSBURG's dissents: that there is a racial paternalism exception to the principle of equal protection. I believe that there is a "moral [and] constitutional equivalence," *post*, at 3, (STEVENS, J., dissenting), between laws designed to subjugate a race and those that distribute benefits on the basis of race in order to foster some current notion of equality. Government cannot make us equal; it can only recognize, respect, and protect us as equal before the law.

That these programs may have been motivated, in part, by good intentions cannot provide refuge from the principle that under our Constitution, the government may not make distinctions on the basis of race. As far as the Constitution is concerned, it is irrelevant whether a government's racial classifications are drawn by those who wish to oppress a race or by those who have a sincere desire to help those thought to be disadvantaged. There can be no doubt that the paternalism that appears to lie at the heart of this program is at war with the principle of inherent equality that underlies and infuses our Constitution. See Declaration of Independence ("We

hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness”).

These programs not only raise grave constitutional questions, they also undermine the moral basis of the equal protection principle. Purchased at the price of immeasurable human suffering, the equal protection principle reflects our Nation's understanding that such classifications ultimately have a destructive impact on the individual and our society. Unquestionably, "[i]nvidious [racial] discrimination is an engine of oppression," *post*, at 3. It is also true that "[r]emedial" racial preferences may reflect "a desire to foster equality in society," *ibid*. But there can be no doubt that racial paternalism and its unintended consequences can be as poisonous and pernicious as any other form of discrimination. So-called "benign" discrimination teaches many that because of chronic and apparently immutable handicaps, minorities cannot compete with them without their patronizing indulgence. Inevitably, such programs engender attitudes of superiority or, alternatively, provoke resentment among those who believe that they have been wronged by the government's use of race. These programs stamp minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are "entitled" to preferences. Indeed, JUSTICE STEVENS once recognized the real harms stemming from seemingly "benign" discrimination. See *Fullilove* v. *Klutznick*, 448 U. S. 448, 545 (1980) (STEVENS, J., dissenting) (noting that "remedial" race legislation "is perceived by many as resting on an assumption that those who are granted this special preference are less qualified in some respect that is identified purely by their race").

In my mind, government-sponsored racial discrimination based on benign prejudice is just as noxious as discrimination inspired by malicious prejudice.[1] In

[1]It should be obvious that every racial classification helps, in a narrow sense, some races and hurts others. As to the races benefitted, the classification could surely be called

each instance, it is racial discrimination, plain and simple.

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"benign." Accordingly, whether a law relying upon racial taxonomy is "benign" or "malign," *ante*, at 5 (GINSBURG, J., dissenting); see also, *ante*, at 6 (STEVENS, J., dissenting) (addressing differences between "invidious" and "benign" discrimination), either turns on "`whose ox is gored,'" *Regents of the Univ. of California* v. *Bakke*, 438 U. S. 265, 295 n. 35 (1978) (Powell, J.) (quoting, A. Bickel, The Morality of Consent 133 (1975)), or on distinctions found only in the eye of the beholder.