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 GINSBURG, with whom JUSTICE BREYER joins, dissenting.

For the reasons stated by JUSTICE SOUTER, and in view of the attention the political branches are currently giving the matter of affirmative action, I see no compelling cause for the intervention the Court has made in this case. I further agree with JUSTICE STEVENS that, in this area, large deference is owed by the Judiciary to "Congress' institutional competence and constitutional authority to overcome historic racial subjugation." *Ante*, at 12–13 (STEVENS, J., dissenting); see *id.*, at 14–15.[1] I write separately to underscore not the differences the several opinions in

[1]On congressional authority to enforce the equal protection principle, see, *e.g., Heart of Atlanta Motel, Inc.* v. *United States*, 379 U. S. 241, 286 (1964) (Douglas, J., concurring) (recognizing Congress' authority, under §5 of the Fourteenth Amendment, to "pu[t] an end to all obstructionist strategies and allo[w] every person—whatever his race, creed, or color—to patronize all places of public accommodation without discrimination whether he travels interstate or intrastate."); *id.*, at 291, 293 (Goldberg, J., concurring) ("primary purpose of the Civil Rights Act of 1964 . . . is the vindication of human dignity"; "Congress clearly had authority under both §5 of the Fourteenth Amendment and the Commerce Clause" to enact the law); G. Gunther, Constitutional Law 147–151 (12th ed. 1991).

this case display, but the considerable field of agreement—the common understandings and concerns—revealed in opinions that together speak for a majority of the Court.

The statutes and regulations at issue, as the Court indicates, were adopted by the political branches in response to an "unfortunate reality": "[t]he unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country." *Ante*, at 35 (lead opinion). The United States suffers from those lingering effects because, for most of our Nation's history, the idea that "we are just one race," *ante*, at 2 (SCALIA, J., concurring in part and concurring in judgment), was not embraced. For generations, our lawmakers and judges were unprepared to say that there is in this land no superior race, no race inferior to any other. In *Plessy* v. *Ferguson*, 163 U. S. 537 (1896), not only did this Court endorse the oppressive practice of race segregation, but even Justice Harlan, the advocate of a "color-blind" Constitution, stated:

> "The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty." *Id.*, at 559 (Harlan, J., dissenting).

Not until *Loving* v. *Virginia*, 388 U. S. 1 (1967), which held unconstitutional Virginia's ban on interracial marriages, could one say with security that the Constitution and this Court would abide no measure "designed to maintain White Supremacy." *Id.*, at 11.[2]

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[2]The Court, in 1955 and 1956, refused to rule on the constitutionality of antimiscegenation laws; it twice declined to accept appeals from the decree on which the Virginia Supreme Court of Appeals relied in *Loving*. See *Naim* v. *Naim*, 197 Va. 80, 87 S. E. 2d 749, vacated and remanded, 350 U. S. 891 (1955), reinstated and aff'd, 197 Va. 734, 90 S. E. 2d 849, app. dism'd, 350 U. S. 985

The divisions in this difficult case should not obscure the Court's recognition of the persistence of racial inequality and a majority's acknowledgement of Congress' authority to act affirmatively, not only to end discrimination, but also to counteract discrimination's lingering effects. *Ante*, at 35 (lead opinion); see also *ante*, at 6 (SOUTER, J., dissenting). Those effects, reflective of a system of racial caste only recently ended, are evident in our workplaces, markets, and neighborhoods. Job applicants with identical resumes, qualifications, and interview styles still experience different receptions, depending on their race.[3] White and African-American consumers still encounter different deals.[4] People of color

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(1956). *Naim* expressed the state court's view of the legislative purpose served by the Virginia law: "to preserve the racial integrity of [Virginia's] citizens"; to prevent "the corruption of blood," "a mongrel breed of citizens," and "the obliteration of racial pride." 197 Va., at 90, 87 S. E. 2d, at 756.

[3]See, *e.g.*, H. Cross, *et al.*, Employer Hiring Practices: Differential Treatment of Hispanic and Anglo Job Seekers 42 (Urban Institute Report 90–4, 1990) (*e.g.*, Anglo applicants sent out by investigators received 52% more job offers than matched Hispanics); M. Turner, *et al.*, Opportunities Denied, Opportunities Diminished: Racial Discrimination in Hiring xi (Urban Institute Report 91–9, 1991) ("In one out of five audits, the white applicant was able to advance farther through the hiring process than his black counterpart. In one out of eight audits, the white was offered a job although his equally qualified black partner was not. In contrast, black auditors advanced farther than their white counterparts only 7 percent of the time, and received job offers while their white partners did not in 5 percent of the audits.").

[4]See, *e.g.*, Ayres, Fair Driving: Gender and Race Discrimination in Retail Car Negotiations, 104 Harv. L. Rev. 817, 821–822, 819, 828 (1991) ("blacks and women

looking for housing still face discriminatory treatment by landlords, real estate agents, and mortgage lenders.[5] Minority entrepreneurs sometimes fail to gain contracts though they are the low bidders, and they are sometimes refused work even after winning contracts.[6] Bias both conscious and unconscious, reflecting traditional and unexamined habits of thought,[7] keeps up barriers that must come down if equal opportunity and nondiscrimination are ever genuinely to become this country's law and practice.

Given this history and its practical consequences, Congress surely can conclude that a carefully designed affirmative action program may help to realize, finally, the "equal protection of the laws" the

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simply cannot buy the same car for the same price as can white men using identical bargaining strategies"; the final offers given white female testers reflected 40 percent higher markups than those given white male testers; final offer markups for black male testers were twice as high, and for black female testers three times as high as for white male testers).

[5]See, *e.g.*, A Common Destiny: Blacks and American Society 50 (G. Jaynes & R. Williams eds., 1989) ("[I]n many metropolitan areas one-quarter to one-half of all [housing] inquiries by blacks are met by clearly discriminatory responses."); M. Turner, *et al.*, U. S. Department of Housing and Urban Development, Housing Discrimination Study: Synthesis i–vii (1991) (1989 audit study of housing searches in 25 metropolitan areas; over half of African-American and Hispanic testers seeking to rent or buy experienced some form of unfavorable treatment compared to paired white testers); Leahy, Are Racial Factors Important for the Allocation of Mortgage Money?, 44 Am. J. Econ. & Soc. 185, 193 (1985) (controlling for socioeconomic factors, and concluding that "even when neighborhoods appear to be similar on every major mortgage-lending criterion except race, mortgage-lending outcomes are still unequal").

Fourteenth Amendment has promised since 1868.[8]

The lead opinion uses one term, "strict scrutiny," to describe the standard of judicial review for all governmental classifications by race. *Ante*, at 34–36. But that opinion's elaboration strongly suggests that the strict standard announced is indeed "fatal" for classifications burdening groups that have suffered discrimination in our society. That seems to me, and, I believe, to the Court, the enduring lesson one should draw from *Korematsu* v. *United States*, 323 U. S. 214 (1944); for in that case, scrutiny the Court described as "most rigid," *id.*, at 216, nonetheless yielded a pass for an odious, gravely injurious racial classification. See *ante*, at 12 (lead opinion). A *Korematsu*–type classification, as I read the opinions in this case, will never again survive scrutiny: such a

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[6]See, *e.g.*, *Associated General Contractors* v. *Coalition for Economic Equity*, 950 F. 2d 1401, 1415 (CA9 1991) (detailing examples in San Francisco).

[7]Cf. *Wygant* v. *Jackson Bd. of Ed.*, 476 U. S. 267, 318 (1986) (STEVENS, J., dissenting); *Califano* v. *Goldfarb*, 430 U. S. 199, 222–223 (1977) (STEVENS, J., concurring in judgment).

[8]On the differences between laws designed to benefit an historically disfavored group and laws designed to burden such a group, see, *e.g.*, Carter, When Victims Happen To Be Black, 97 Yale L. J. 420, 433–434 (1988) ("[W]hatever the source of racism, to count it the same as racialism, to say that two centuries of struggle for the most basic of civil rights have been mostly about freedom from racial categorization rather than freedom from racial oppression, is to trivialize the lives and deaths of those who have suffered under racism. To pretend . . . that the issue presented in *Bakke* was the same as the issue in *Brown* is to pretend that history never happened and that the present doesn't exist.").

classification, history and precedent instruct, properly ranks as prohibited.

For a classification made to hasten the day when "we are just one race," *ante*, at 2 (SCALIA, J., concurring in part and concurring in judgment), however, the lead opinion has dispelled the notion that "strict scrutiny" is "`fatal in fact.'" *Ante*, at 35 (quoting *Fullilove* v. *Klutznick*, 448 U. S. 448, 519 (1980) (Marshall, J., concurring in judgment)). Properly, a majority of the Court calls for review that is searching, in order to ferret out classifications in reality malign, but masquerading as benign. See *ante*, at 26–28 (lead opinion). The Court's once lax review of sex-based classifications demonstrates the need for such suspicion. See, *e.g.*, *Hoyt* v. *Florida*, 368 U. S. 57, 60 (1961) (upholding women's "privilege" of automatic exemption from jury service); *Goesaert* v. *Cleary*, 335 U. S. 464 (1948) (upholding Michigan law barring women from employment as bartenders); see also Johnston & Knapp, Sex Discrimination by Law: A Study in Judicial Perspective, 46 N. Y. U. L. Rev. 675 (1971). Today's decision thus usefully reiterates that the purpose of strict scrutiny "is precisely to distinguish legitimate from illegitimate uses of race in governmental decisionmaking," *ante*, at 26 (lead opinion), "to `differentiate between' permissible and impermissible governmental use of race," *id.*, at 27, to distinguish "`between a "No Trespassing" sign and a welcome mat.'" *Id.*, at 28.

Close review also is in order for this further reason. As JUSTICE SOUTER points out, *ante*, at 7 (dissenting opinion), and as this very case shows, some members of the historically favored race can be hurt by catch-up mechanisms designed to cope with the lingering effects of entrenched racial subjugation. Court review can ensure that preferences are not so large as to trammel unduly upon the opportunities of others or interfere too harshly with legitimate expectations of persons in once-preferred groups.

See, *e.g.*, *Bridgeport Guardians, Inc.* v. *Bridgeport Civil Service Comm'n*, 482 F. 2d 1333, 1341 (CA2 1973).

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While I would not disturb the programs challenged in this case, and would leave their improvement to the political branches, I see today's decision as one that allows our precedent to evolve, still to be informed by and responsive to changing conditions.