IN THE

Supreme Court of the United States

OCTOBER TERM 1977

No. 76-811

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,
Petitioner,

vs.

ALLAN BAKKE,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF CALIFORNIA

BRIEF FOR PETITIONER

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Brief for Petitioner

OPINIONS BELOW

The opinion of the California Supreme Court is reported at 18 C.3d 34, 132 Cal. Rptr. 680, 553 P.2d 1152.

JURISDICTION

The California Supreme Court denied the University's petition for rehearing on October 28, 1976 (R.494).[1] The petition for a writ of certiorari was filed on December 14, 1976 and was granted on February 22, 1977. 97 S.Ct. 1098. The jurisdiction of this Court rests on 28 U.S.C. § 1257(3).

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1. "R" references are to the record filed in this Court.

QUESTION PRESENTED

When only a small fraction of thousands of applicants can be admitted, does the Equal Protection Clause forbid a state university professional school from voluntarily seeking to counteract effects of generations of pervasive discrimination against discrete and insular minorities by establishing a limited special admissions program that increases opportunities for well-qualified members of such racial and ethnic minorities?

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part: "... nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT

The medical school of the University of California at Davis opened in 1968, adding 50 to the total number of places in the nation's medical schools. In short order the faculty realized (as have the faculties of most medical and law schools in this country over the past decade) that existing admissions criteria failed to allow access for any significant number of minority students (R. 15, 57-58, 67, 85-86). Racial and ethnic minorities at that time comprised over 23% of the population of California (including about 7% blacks and at least 14% Mexican Americans).[2] The entering class of 1968 at Davis contained no blacks, no Chicanos, three Asians, and no American Indians (R. 216, 232).

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2. These figures are estimates based upon the results of the 1970 census, as adjusted. U.S. Bureau of the Census, Department of Commerce, Pub. No. PC(1)-D6, UNITED STATES CENSUS OF POPULATION: 1970, *Detailed Characteristics*, California, Section 1, Table 139 (1973); Mexican-American Population Commission of California, MEXICAN-AMERICAN POPULATION IN CALIFORNIA: April 1973 at 8. (1973).

In the two years that followed, the medical school faculty fashioned and implemented a special admissions "Task Force" program[3] to compensate for the effects of societal discrimination on historically disadvantaged racial and ethnic minorities (R. 67, 159-60). Among the objectives of this program were enhanced diversity in the student body and the profession, improved medical care in underserved minority communities, elimination of historic barriers to medical careers for disadvantaged members of racial and ethnic minority groups, and increased aspiration for such careers on the part of minority students (R. 67-68). It was the judgment of the Davis faculty that the Task Force program was the "only method" that would achieve significant enrollment of minority applicants (R. 67-68).

The program has led to entering classes at Davis of substantially greater racial and ethnic diversity than in 1968. From 1970, the first year of operation of the program, until 1973 and 1974, the years at issue in this case, minority students were admitted as follows:

	Task Force Program				General Admissions				Total
	Blacks	Chicanos	Asians	Total	Blacks	Chicanos	Asians	Total	Minorities
1970[4]	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	2	15	0	4	5	9	24[5]

3. The "Task Force" program at Davis was part of a nationwide effort in which a prominent role was played by a Task Force of the Association of American Medical Colleges; see the Report of that Task Force to the Inter-Association Committee on Expanding Educational Opportunities in Medicine for Blacks and Other Minority Students (April 22, 1970).

4. The entering class of 1970 consisted of a total of 52 students; the total class was increased the following year to 100, the level at which it has remained (R. 215, 282).

5. The data appearing in this table are at R. 216-18. The record indicates that there were 16 Task Force admittees in 1974. *Ibid.*

Under the general admissions procedure at Davis, grade-point averages and scores on the Medical College Admissions Test ("MCAT") are of major importance, but they are not determinative. Individual attributes unrelated to formal credentials are given weight, as are factors of importance to the profession, such as whether the applicant originates from and may be likely to return to an area where health care services are in short supply (R. 64-65, 180, 183). Applicants must submit, in addition to college transcripts and MCAT scores, a description of extracurricular and community activities, a history of work experience, personal comments regarding reasons for wanting to attend medical school, and letters of recommendation (R. 62, 197-200, 231-40, 282). Because the number of applicants annually far outstrips the number of available places (e.g., by ratios of 25 and 37 to 1 for 1973 and 1974) and because admissions is an arduous and time-consuming process, applicants with undergraduate grade-point averages below an arbitrarily picked figure are summarily rejected (R. 63, 205, 219, 282). Of the remaining applicants, those whose files reflect particular promise are granted personal interviews with members of the admissions committee (R. 62-63).

The person conducting an interview prepares a summary of the meeting and then assigns the applicant a score of 0 to 100. The score given takes into account many factors

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The Brief of Amici Curiae in opposition to certiorari in this case pointed out, at p. 23 n.12, that in that year there were only 15 Task Force admittees. In its Reply to that Brief of Amici, the University acknowledged this to be a fact. In 1974, one Task Force admittee withdrew before the start of classes and, despite the existence of a Task Force waiting list, admission was then granted to a non-minority applicant from the regular admissions process. The reduction of Task Force admittees in 1974 from 16 to 15 occurred after the close of discovery in this case and did not become known to counsel until recently. See Reply to Brief of Amici Curiae in Opposition to Certiorari, p. 5, n.4.

relating to the applicant, including formal credentials, letters of recommendation, demonstration of motivation, character and imagination, the type and locale of the applicant's anticipated practice, whether the applicant is likely to add diversity or make a special contribution to the student body, and the interviewer's assessment of the applicant's potential in medicine. After the interview, other members of the admissions committee review the file, including the interview summary (but minus the score assigned by the interviewer), and assign their own scores. The grades of individual interviewers and reviewers are then cumulated into a total or "benchmark" number. Benchmarks are used as the primary but not wholly controlling basis for final decisions on admission (R. 63-65, 156-58, 180).

Applicants to the Task Force program submit the same materials as applicants for general admission (R. 161, 169, 197-200, 282). Final selection of Task Force applicants, as of applicants for general admission, is made by the full admissions committee (R. 166). However, as to those students, the full committee acts on the recommendations of a Task Force subcommittee, which has the responsibility for processing Task Force applicants (R. 65-67). In practice only disadvantaged members of racial and ethnic minority groups are admitted under the Task Force program (R. 171). The materials submitted by minority applicants to the Task Force program are screened to determine if those applicants are disadvantaged, and those who are not are referred to the general admissions process (R. 65-66, 170). The files of the disadvantaged minority applicants are further screened in order to select those to be invited for a personal interview (R. 66). In the years at issue in this litigation, the Task Force program selected for interviews and further consideration some candidates who had grade-

point averages below the cut-off figure employed in the general admissions process (R. 175). The ensuing interviewing and rating procedures parallel those employed in general admissions (R. 66, 164).

All students admitted are fully qualified to meet the requirements of a medical education at Davis (R. 67). In 1973 and in 1974, 16 and 15 students, respectively, out of an entering class of 100 were admitted pursuant to the Task Force program (R. 67, 221, 282).[6] The Task Force goal set by the faculty for those years was 16 students (R. 164-66). The students admitted pursuant to the program were chosen from a pool of minority applicants more than ten times the size of the group that could be offered admission, let alone the smaller number that could actually be enrolled (R. 205, 219, 282).

Respondent applied for admission to the medical school for the entering classes of 1973 and 1974 (R. 69). His was one of 2,464 applications for admission for 1973 (R. 205, 282), and one of 3,737 applications for 1974 (R. 219, 282). Respondent was a highly rated applicant who came very close to admission (R. 254, 308; Pet. App. 108a). He applied under the general admissions program in both years, and in both years he was granted an interview (R. 69). Students admitted on recommendation of the Task Force subcommittee in 1973 and 1974 often had MCAT test scores, grade-point averages, and benchmark ratings lower than respondent (R. 175-82).

Following his second rejection, respondent brought suit in state court against the Regents of the University of California (the University). The trial court upheld respondent's claim that the challenged program discriminated

6. See note 5, *supra*.

against white applicants on the basis of race and therefore violated the Equal Protection Clause (Pet. App. F, p. 117a). However, it refused to order respondent's admission, because he had not met the burden of proving that he actually would have been admitted in the absence of the Task Force program (Pet.App. F, pp. 116a, 117a).

The California Supreme Court took the case directly from the trial court, "prior to a decision by the Court of Appeal, because of the importance of the issues involved." 18 C.3d at 39. The highest state court held the challenged program unconstitutional "because it violates the rights guaranteed to the majority by the equal protection clause of the Fourteenth Amendment of the United States Constitution." *Id.* at 63. Conceding, at least for the purposes of argument, that the objectives of the Task Force program were not only proper but compelling, the court, wholly without support in the record, theorized that alternatives, such as increasing the number of medical schools, aggressive recruiting or exclusive reliance on disadvantaged background without regard to race, would somehow achieve real racial diversity without giving any weight whatsoever to race. *Id.* at 54-55. The court also ruled that the trial court erred in imposing on respondent the burden of proof as to whether he would have been admitted in the absence of the Task Force program. *Id.* at 63-64. In its opinion as originally released, the court directed that the case be remanded to the trial court for redetermination of that issue with the University bearing the burden of proof (Pet.App. A, p. 38a).

The University filed a petition for rehearing (R. 445). In that petition, the University conceded that, given respondent's high rating in the admissions process, it would not be able to sustain the burden of proving that respondent would not have achieved admission in the absence of the

Task Force program.[7] The court below denied rehearing (Pet.App. B) but modified its initial opinion to direct that respondent be admitted (Pet.App. C).

SUMMARY OF ARGUMENT

One of the things in which the nation may take great pride since the end of World War II has been its willingness to address in actions, rather than simply words, the racial injustices that are the unhappier parts of our legacy. In that era, and for the first time in this century, we have undertaken to deal vigorously and realistically with the American dilemma by significant and persevering effort

7. R. 451, 487-88. The University resisted below, as it resists today, the contention that it should bear the burden of proof on whether respondent's admission in fact turned on the existence or nonexistence of the Task Force program. The University's concession in its rehearing petition does not constitute a reversal of that position. Rather, it reflects simply that, in light of respondent's proximity to admission in the years at issue, whether he would have been admitted in the absence of the challenged program is, practically speaking, a question of where the burden of proof on that issue is allocated. The trial court in this case found that respondent would not have attained admission in either 1973 or 1974 even if there had been no Task Force program (R. 389-90; Pet.App. 116a-117a). However, in making that finding, the trial court was operating on the premise that respondent bore the burden of proof (R. 383; Pet.App. 111a). Even on that assumption, the court in its notice of intended decision declared: "There appears to the Court to be at least a possibility that [respondent] might have been admitted absent the 16 favored positions on behalf of minorities" (R. 308; Pet.App. 108a). Furthermore, although respondent's numerical rating did not put him in a group that was certain of admission, it must be remembered that numerical ratings are not wholly controlling in the regular admissions process (R. 63-65). In addition, in a report prepared in response to a complaint filed by respondent with the Department of Health, Education and Welfare (see R. 281), the chairman of the admissions committee declared, "[H]ad additional places been available, individuals with Mr. Bakke's ratings would likely have been admitted to the medical School [in 1973] as well" (R. 254).

and by making the difficult adjustments inevitably involved in seeking to bring the reality of our society closer to its aspirations. This Court played a major role in articulating and imparting momentum to this commitment, but the Court has not acted alone. The commitment to relegate the lingering burdens of the past to the past has run deeply and widely throughout the country, among a great many of its institutions.

The problem also runs deep and wide. The dismantling of the formidable structures of pervasive discrimination requires great endurance, and the courage to maintain the necessary great effort.

That the obstacles are formidable was clear from the outset. But their true complexity only began to appear after the first successful steps had been taken. Nonetheless, those institutions that, in the exercise of their appointed roles, confront at close range the enduring effects of what has been handed down to us have not shrunk from the commitment when the unforeseen complexities began to reveal themselves. Thus, when it became clear in the 1960's that dismantling of formal racial barriers did not itself bring long-alienated minorities into the mainstream, the widespread response was not abandonment of the commitment but effort to seek new ways to undo the continuing effects of past discrimination and to achieve the benefits of a truly open, racially diverse society.

The response was not only widespread; it sprang from a broad range of independent and autonomous sources. No central authority directed this effort. Yet toward the end of the last decade, many governmental and private institutions, including this Court, came concurrently to the realization that a real effort to deal with many of the facets of the legacy of past racial discrimination

unavoidably requires remedies that are attentive to race, that color is relevant today if it is to be irrelevant tomorrow. This discovery and response was found in many sectors of society; the school desegregation area was a major arena, but the same phenomenon was found in employment, housing, and many other areas, including professional education.

This case concerns access of minorities to professional education and careers, specifically in medicine. The experience of the professional schools in the 1960's mirrored the picture elsewhere. The falling of formal racial barriers failed to lead to participation by significant numbers of minorities. All but two medical schools in the nation remained virtually all-white islands in a multiracial society. Indeed, in terms of the numbers of minorities entering medical schools, a threat of retrogression appeared.

At about the same time that other parts of the society were independently arriving at similar conclusions, many medical schools and national professional organizations came to the realization that the only effective solution lay through race-conscious admissions programs. The use of racially-blind admissions criteria resulted in near-total exclusion of historically disfavored minorities during a period when the competition for medical school places was only normally intense. The end of the last decade saw a dramatically heightened over-all demand for admission to medical school, which inevitably carried with it a sharp escalation in the level of formal credentials of those attaining admission. These schools soon realized that failure to devise and implement race-conscious admissions policies would prolong indefinitely essentially all-white student bodies and the extreme scarcity and isolation of minority physicians. Medical schools, like many other institutions in the society, found it both appropriate and necessary to

address a problem historically cast in racial terms through remedial programs employing racial criteria.

Race-sensitive measures were employed in medical school admissions, as elsewhere, because they were found to be necessary, not because of an ignorance of the concerns that may inhere in the use of such means, even for remedial purposes. In programs like that at issue in this controversy, the relevant concern is not for quotas, for any slur or stigma against any particular group, for any corruption of meritocratic principles, or for any singling out of any particular ethnic group to bear the brunt of the program. There has been a tendency to inject such concerns into this matter, but on analysis they prove to be irrelevant, misleading, or both. The relevant concern is for a potential for the arousal of racial awareness in a society that is striving to put behind it past tendencies to view persons in racial and ethnic terms. The identification of this concern represents the beginning, rather than the end, of the requisite analysis. And, on balance, as well as under all of the controlling authorities, the potential for the arousal of racial awareness inescapably contained in programs like that of the Davis medical school, when weighed against the significant benefits to be achieved, does not violate the Equal Protection Clause.

State action that arouses racial awareness in circumstances where the potential for harm is very high and where the state's purpose is to inflict injury through such arousal contravenes the Equal Protection Clause, as this Court has recognized. Nevertheless, this and other Courts have repeatedly upheld the utilization of racial criteria for the purposes of achieving racial diversity in schools and countering the effects of a legacy of discrimination, despite the inevitable arousal of racial awareness prompted by such means. The school desegregation cases, as well as

other lines of authority, reflect the ultimate judgment that the benefits to be had from utilization of truly effective remedies justify the transient societal costs and the incidental effects on some whites. There is a distinction between color-blindness and myopia, a line that has been kept clear in these cases. They are determinative authority for reversal in the instant case. But the University does not rest there. The same result follows if resort be had to other lines of authority.

The standard of strict judicial scrutiny does not apply to this case. That standard is appropriately applied to racial classifications aimed at harming discrete and insular minorities, to groups historically alienated and denied a voice in political affairs. To apply stringent scrutiny to measures intended to aid such groups, and when majoritarian processes are plainly unimpaired, would stand the Equal Protection Clause on its head and lead to an unwarranted, unjustified, and aberrational degree of judicial intervention in intractable matters of educational policy properly reserved to the states and to educators.

Regardless of the standard of review or burden of justification, the Davis medical school program comports with the Equal Protection Clause. The traditional standard of review properly applies, and the program plainly meets it; there is the most rational relationship between means and ends. An intermediate standard of review is not warranted by the circumstances, but the program in any event meets such a standard. Finally, although strict judicial scrutiny is wholly inappropriate, the program passes even that barrier. The ends of the program are as compelling as imaginable in our country today. The fit between means and ends is as tight as possible. There are no effective alternatives. Unless the ends of the program are to be held illegal or unless the state is to be left with compelling interests that it

is powerless to vindicate, the result below must be reversed even on the standard least favorable to the University's position.

ARGUMENT

Introductory

The outcome of this controversy will decide for future decades whether blacks, Chicanos and other insular minorities are to have meaningful access to higher education and real opportunities to enter the learned professions, or are to be penalized indefinitely by the disadvantages flowing from previous pervasive discrimination. Affirmance of the judgment below would mark a return to virtually all-white professional schools. The professions would remain white enclaves. Reversal would permit continuation of admissions programs, like the one at Davis, fashioned by educators who have agreed that "[t]he greatest single handicap the ethnic minorities face is their underrepresentation in the professions of the nation." The Carnegie Commission on Higher Education, A Chance to Learn, 12-13 (1970). It would also allow educators, rather than lawyers and judges, to deal with intractable matters of educational policy.

Today, only a race-conscious plan for minority admissions will permit qualified applicants from disadvantaged minorities to attend medical schools, law schools and other institutions of higher learning in sufficient numbers to enhance the quality of the education of all students; to broaden the professions and increase their services to the entire community; to destroy pernicious stereotypes; and to demonstrate to the young that educational opportunities and rewarding careers are truly open regardless of ethnic origin. Applicants for admission to professional schools

greatly outnumber the available places. Until their cultural isolation is relieved by full participation in all phases of society, historically alienated minorities would be screened out by all racially blind methods of selection. There is, literally, no substitute for the use of race as a factor in admissions if professional schools are to admit more than an isolated few applicants from minority groups long subjected to hostile and pervasive discrimination.

A fundamental error of the court below lies in its failure to recognize this necessity. The court did not deny the great values of the goals of the medical school faculty. It opined, however, upon sheer speculation, without citation to evidence in or studies outside the record, that significant numbers of minority medical students could be enrolled by reliance on "neutral" alternatives, such as recruitment. Although the University believes that the California court exceeded the judicial function in substituting its judgment for that of educators and for that reason alone must be reversed, its error was compounded by the fact that it was wrong. Its "alternatives" are illusory. None of them would lead to significant minority participation. A quixotic attempt to employ some of them would grievously harm educational values considered fundamental by most faculties.

Most professional schools in this country today utilize special-admissions programs. Since the governing boards of these schools are not given to the employment of ineffective means, it is no accident that these programs employ racial criteria. These entities will recognize (as they have in the past) the fallacies and false hopes in the admissions policies espoused by the court below. Most professional schools predictably will be unwilling to engage in subterfuge and, in the event of an affirmance, would simply shut down their special-admissions programs. They

would be consigned to watching the number of minority students in their schools dwindle to disappearance and to hoping and waiting, much as the country hoped and waited in the 1920's and 1930's, for the end of an era in which the tyranny of abstract legal formulas bars gravely needed reform efforts undertaken by entities other than the judiciary.

Some faculties, reading between the lines of the opinion below or of an affirmance at this Court and in a desperate hope to preserve significant minority enrollment, might resort to *sub rosa* race lines. This would represent *sub silentio* acknowledgment of the by now obvious point that a problem historically cast in racial and ethnic terms admits only of solutions unavoidably defined in racial and ethnic terms. However attractive this course might appear at first, ultimately it would lead to three grave difficulties.

First, perhaps even the most ardent exponents of *realpolitik* would agree that whatever the case for hypocrisy and disingenuousness in other arenas, it may be intolerable in a university. Second, the racial criteria at issue here, unlike those that harm the discrete, powerless minorities, are realistically susceptible to alteration or elimination by majoritarian or representative processes. Surreptitious resort to racial and ethnic criteria would impair the ability of these processes to control any abuses. Finally, an effort to disguise purpose undoubtedly would encumber the judicial process, but ultimately it would not totally frustrate judicial scrutiny. If deliberate reliance in any form on factors of race or ethnicity as a means for dealing with past or present exclusion of minorities from professional schools and the professions constitutes invidious discrimination, as the court below held, then a program purportedly neutral on its face but in fact applied for the purpose of obtaining color-conscious results could in time be demon-

strated to be illegal. Accordingly, an effort to achieve the ends of the Davis program while disclaiming, with a knowing wink, reliance on race very likely would bring grief to a faculty that made the attempt. It would certainly bring to the courts a continuous burden of supervision of the admissions processes of the nation's professional schools.

Despite the tenor of the opinion below, it simply is not true that a judicial striking down of the challenged program won't make much of a difference, that faculties nationwide would find effective alternatives, and that significant minority participation in professional education for the foreseeable future would be likely to continue. There is no such easy way out, notwithstanding the opinion of the court below. The fundamental importance of this case calls for a clear-eyed recognition of what is really at stake and for a resistance to the inclination to blink, or worse to mask, the consequences of an affirmance.

> The faculty of the Davis medical school, like this Court, "was rightly concerned that childhood deficiencies in the education and background of minority citizens, resulting from forces beyond their control, not be allowed to work a cumulative and invidious burden on such citizens for the remainder of their lives." *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 806 (1973).

The faculty sought to shorten the distance between the concept of formal equality of opportunity and the actuality of real inequality of opportunity. Whether such voluntary, remedial efforts will be permitted to continue, and whether the doors, so recently opened, to the traditionally white professional schools are in fact to remain open to historically excluded minorities, will turn on the result in this case.

The country is well-served by programs like the one at the Davis medical school. They are positive proof to those

so long excluded from positions of responsibility that all citizens are truly to be offered a chance to perform in professional roles. Without such programs, the promise of *Brown v. Board of Education* rings hollow in professional education, for our time and, perhaps, for a very long time to come.

I

The Legacy of Pervasive Racial Discrimination in Education, Medicine and Beyond Burdens Discrete and Insular Minorities, as Well as the Larger Society. The Effects of Such Discrimination Can Not Be Undone by Mere Reliance on Formulas of Formal Equality. Having Witnessed the Failure of Such Formulas, Responsible Educational and Professional Authorities Have Recognized the Necessity of Employing Racially-Conscious Means to Achieve True Educational Opportunity and the Benefits of a Racially Diverse Student Body and Profession.

A. THE LEGACY OF DISCRIMINATION CONTINUES TO BURDEN AND TO OBSTRUCT THE ADVANCEMENT OF DISCRETE AND INSULAR RACIAL MINORITIES.

1. The delay in implementing Brown v. Board of Education is but one of the elements of the experience of growing up as a member of a racial minority in this country.

Students applying for admission to medical school in 1970, the first year of operation of the Davis Task Force program, would in ordinary course have begun elementary school in 1954, the year this Court decided *Brown v. Board of Education,* 347 U.S. 483. *Brown* eloquently expressed the goal of educational opportunity unimpaired by the effects of racial discrimination, but implementation of the commitment expressed in *Brown* has taken years and is even today not complete. A rectification of such magnitude cannot occur overnight, especially when it encounters resistance at the local level. Minority students entering medical schools in the 1970's are from the generation of minority students who have seen the hope but not the promise of *Brown.* This

Court spoke to the delay in implementing *Brown* at about the time the Davis program got under way:

> "Over the 16 years since *Brown II,* many difficulties were encountered in implementation of the basic constitutional requirement that the State not discriminate between public school children on the basis of their race. Nothing in our national experience prior to 1955 prepared anyone for dealing with changes and adjustments of the magnitude and complexity encountered since then. Deliberate resistance of some to the Court's mandates has impeded the good-faith efforts of others to bring school systems into compliance. The detail and nature of these dilatory tactics have been noted frequently by this Court and other courts." *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 13 (1971).

Still more recent cases on this Court's docket, from cities of the North and West as well as the South, testify to the continued prevalence of serious obstacles to the achievement of desegregated schools. And for every case which reaches this Court there are hundreds, or thousands, of similar problems in other places which are faced only administratively or by lower courts or indeed not litigated at all. Moreover, even a state such as California, which is one of the most open societies in the country, cannot claim to have been (or to be) free of discrimination on the basis of race. The California school desegregation cases alone contradict any such assertion,[8] and they again represent only the tip of the iceberg. But California could not, in any event, insulate itself from the effects of segregated education else-

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8. *See, e.g., Crawford v. Board of Education of the City of Los Angeles,* 17 C.3d 280, 130 Cal.Rptr. 724, 551 P.2d 28 (1976); *Soria v. Oxnard School District,* 386 F. Supp. 539 (C.D. Cal. 1974); *Spangler v. Pasadena City Board of Education,* 311 F. Supp. 501 (C.D. Cal. 1970). *See generally,* C. Wollenberg, ALL DELIBERATE SPEED: SEGREGATION AND EXCLUSION IN CALIFORNIA'S SCHOOLS, 1855-1975 (1976).

where in the nation. It is not simply that persons from other states have a constitutional right to become California residents if they wish. *See, e.g., Shapiro v. Thompson,* 394 U.S. 618 (1969). Many have actually exercised that right, including particularly substantial numbers of minorities from the South, the major cities of the North, and elsewhere. For example, 41% of American-born blacks residing in California in 1970 were born in the South—more than were born in California.[9] These individuals are residents of the state, but to the extent that they have endured segregated education elsewhere, they cannot escape its consequences merely by emigrating to California.

Ultimately, however, the legacy of past discrimination is not limited to the harmful effects of segregated education. Unequal education, however significant and immediately relevant, is but one facet of a much more pervasive pattern of discrimination against minority persons in this country:

> "Racial generalizations are pervasive and have traditionally operated in the same direction—to the disadvantage of members of the minority group. A person who is denied one opportunity because he or she is short or overweight will find other opportunities, for in our society height and weight do not often serve as the bases for generalizations determining who will receive benefits. By contrast, at least until very recently, a black was not denied *an* opportunity because of his or her race, but denied virtually *all* desirable opportunities. As door after door is shut in one's face, the individual acts of discrimination combine into a systematic and grossly inequitable frustration of opportunity."[10]

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9. The figures are essentially the same for the age-group most eligible for medical school (20-24 years old). U.S. Bureau of the Census, Dep't of Commerce, Pub. No. PC(1)-DC6, UNITED STATES CENSUS OF POPULATION: 1970, *Detailed Characteristics, California,* Section 1, Table 140 (1973).

10. Brest, Foreword: *In Defense of the Antidiscrimination Principle,* 90 HARV.L.REV. 1, 10 (1976) (italics original).

Growing up black, Chicano, Asian, or Indian in America is itself an experience which transcends the particular fact of segregated education. The history and culture of each of these groups is different, and thus to some extent is the precise nature of the experience. But these groups all constitute

> "ethnic minorities separated not only by substantially different attitudes and experiences but by continued educational disadvantages. [They] also share a disadvantage resulting from circumstances of their particular racial mixture. More of their members are visibly distinguishable from the dominant majority by their darker skin and certain related physical features. The prejudice of whites against people with darker skins has a long history. It is expressed in negative attitudes that encourage the preservation of this psychological distance between [these] ethnic groups and whites that their cultural differences had already created. Even efforts by members of these minorities to merge with the majority have been deterred by this color prejudice.
>
> "Each of [these] minority groups has been separated and alienated within the United States. . . ."[11]

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11. C. Odegaard, MINORITIES IN MEDICINE: FROM RECEPTIVE PASSIVITY TO POSITIVE ACTION 1966-76 at 8 (1977) [hereinafter cited as MINORITIES IN MEDICINE]. The quoted passage speaks originally of American Indians, Black Americans, Mexican Americans, and Puerto Ricans, but its reasoning clearly applies fully to Asian Americans. The Court's own cases of course provide a documentary record of the history of discrimination against the groups included in the Davis program. *See, e.g., Bolling v. Sharpe,* 347 U.S. 497 (1954); *Hernandez v. Texas,* 347 U.S. 475 (1954); *Oyama v. California,* 332 U.S. 633 (1948); *Morton v. Mancari,* 417 U.S. 535 (1974). Because they share a history of uninterrupted discrimination and near-total alienation based in substantial part on color, these groups differ from other ethnic minorities. These groups are referred to in this brief as racial minorities or as minorities. The term "race" is vague and imprecise if not inaccurate, but as the court below observed: "Unfortunately lexicon is imprecise and until an improved taxonomy emerges we shall probably be compelled to discuss problems such as that before us in terms of race." 18 C.3d at 46.

In other words, including those of this Court, to grow up a member of one of these groups is to be of a discrete and insular minority in this country.[12]

The difficulties inherent in growing up as a member of a discrete and insular minority are encountered throughout society. The problem is societal in nature. This case deals with one aspect of the broader societal problem—medical schools and medicine—and with the efforts of a medical school to address those facets of the larger problem which fall within its appointed role. Because this case on its facts involves medical school admissions, we turn now to the legacy of discrimination in the context of medicine.

2. The most significant fact about doctors from minority groups is that they are so few, and the most significant fact about health care for such groups is that it is scarce and inferior.

The ramifications of societal discrimination for minority doctors extend to every aspect of their professional lives. Black doctors have been isolated and constricted by denial of opportunities in their training, their practice, and their professional status.[13] Restrictions on the access of black

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12. The difference between growing up as a member of the majority and growing up as a member of a racial minority can be illustrated by comparing respondent's life experiences with those he would have encountered if black. Respondent was born in the midwest (R. 112). Subsequently he moved with his parents to Florida, where he attended Coral Gables High School in Dade County (*Ibid.*). In moving to Florida, his parents had the comfort of knowing that respondent would be eligible for the best public high school education available. That would not have been true if respondent had been black, for in the years in which respondent attended high school, Florida practiced *de jure* discrimination and "complete actual segregation of the races, both as to teachers and pupils, still prevailed in the public schools of [Dade] County." *Gibson v. Board of Public Instruction of Dade County, Florida,* 272 F.2d 763, 766 (CA5 1959).

13. Because extensive documentation is available only for blacks, the discussion in this part of the brief focuses on that minority group. What data are available suggest that the picture for other minorities is not essentially different. See text at and n. 22, *infra.*

medical graduates to advanced clinical training and to specialty board certification have resulted in fewer specialists among black physicians than among white.[14] The relative paucity of blacks on the faculties of American medical schools exceeds even the degree of their scarcity in the profession.[15] Racial barriers have often obstructed hospital appointments necessary to effective practice.[16] Such appointments, continuing education, valuable professional contacts, and even specialty certification have turned upon membership in the state or local medical society.[17] Yet it was not until 1968 that the American Medical Association prohibited racial bars to membership in its state and local affiliates.[18] And in 1971 the House of Delegates of that organization found it necessary to adopt a resolution threatening suspension of local units which continued to practice racial exclusion.[19]

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14. M. Seham, BLACKS AND AMERICAN MEDICAL CARE 57, 71 (1973) [hereinafter cited as BLACKS AND MEDICAL CARE]; Haynes, *Distribution of Black Physicians in the United States,* 210 J.A.M.A. 93, 95 (1969); Melton, *Health Manpower and Negro Health: The Negro Physician,* 43 J.MED.EDUC. 798, 806 (1968); Johnson, *History of the Education of Negro Physicians,* 42 J.MED.EDUC. 439, 442-43 (1967).

15. *Datagram: Ethnic Group Members on U.S. Medical Faculties,* 51 J.MED.EDUC. 69, 70 (1976). And 36% of the black members of medical faculties serve at Howard University, Meharry Medical College, and the University of Puerto Rico. *Id.*

16. BLACKS AND MEDICAL CARE, 71-77.

17. *Id.* at 75; Melton, *supra* note 14, at 806.

18. BLACKS AND MEDICAL CARE, 74.

19. *Id.* at 81.

The presence or absence of minority members in medical societies can also make a difference in the way those organizations address important questions of health care. Thus, for example, it would be not merely insensitive, but unthinkable, for the head of a medical society with substantial numbers of minority members to make the following public statement, attributed to the president of the American Medical Association in 1968:

> "[The president] said that the medical profession should not be blamed for this group's ["people in big-city ghettos"]

The data could be multiplied. But the most important fact about minority doctors is that there are so few of them. The 1970 census reported 6,002 black physicians out of 279,658 physicians in the United States, or 2.1% of the total.[20] The reported ratio of black physicians to blacks is far lower than the physician/non-physician ratio for the nation at large. For blacks, that ratio is 1/4248. For the population generally, it is 1/649. The shortage of black physicians is most acute in the deep South, where in some states the physician/non-physician ratios among blacks has been reported to be in the range of 1/15,000 to 1/20,000.[21] The picture for Mexican Americans and American Indians is almost certainly worse yet.[22]

The scarcity and inferior status of minority physicians is mirrored by the scarcity and inferiority of health care services for minorities. The distressing status of health care for minorities is amply chronicled elsewhere:

> "Every measure of health we have shows striking differences between the white and nonwhite population, and this gap is becoming a chasm in spite of all the advanced technical resources in our country. Blacks in our country do not live as long as whites; black mothers die in childbirth more often than whites and

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inability or lack of willingness to educate themselves, for the conditions in which they live, for the lack of transportation to allow them to visit existing health care institutions, and for their reluctance to see a physician in a free clinic until their condition is beyond help." AMA News, April 8, 1968, p. 8.

20. U.S. Bureau of Health Manpower, Dep't of Health, Education and Welfare, Pub. No. (HRA) 76-22, *Minorities and Women in the Health Fields: Applicants, Students and Workers* at 9 (1975).

21. Thompson, *Curbing the Black Physician Manpower Shortage*, 49 J.MED.EDUC. 944, 945-46 (1974).

22. The data are very sparse. See MINORITIES IN MEDICINE 33; Applewhite, *Blacks in Public Health*, 66 J.N.M.A. 505, 506 (1974); THE NEW YORK TIMES, June 6, 1974, at 36, col. 5 (letter from William E. Cadbury, Jr., Executive Director, National Medical Fellowships, Inc.).

their babies are more likely to be premature, stillborn, or dead in their first year of life. Blacks visit doctors less frequently than whites and when they go to the hospital they are more likely than whites to need a longer stay, which reflects the fact that they have been medically neglected. In almost every category of illness, the morbidity and death rates among blacks are higher than among whites. Blacks suffer proportionately more acute and chronic illnesses. In 1960 the death rate for blacks from pulmonary tuberculosis was roughly four times that of the white population, and the number of active cases among blacks was three times as high. According to the Public Health Service data, in 1962 the incidence of reported syphilis among blacks was ten times greater than among whites and the death rate was about four times as high. Hypertension, diabetes, cirrhosis of the liver, and malignant neoplasms also affect blacks more than they do whites. . . .

"Black death rates relating to such communicable diseases as whooping cough, meningitis, measles, diphtheria, and scarlet fever are particularly high. This, of course, is because frequently black children have not been immunized. And in almost every category of causes of deaths for infants, the rate for blacks is 39.5 per 1,000 live births, almost twice as high as for whites (20.8). . . . The difference cannot be attributed to income alone, since when the death rates of infants from low-income families are analyzed, race still makes the difference. The infant death rate for families whose income is less than $3,000 is 27.3 per 1,000 live births for white families, and 42.5 for blacks; when family income is between $3,000 and $4,900, the rate for whites is 22.1, and 46.8 for blacks." [23]

To suggest that the paucity of minority physicians is reflected in poor medical care for minorities is not to suggest that only blacks can treat blacks or that only Asians

23. BLACKS AND MEDICAL CARE 9-11.

should treat Asians or that only Chicanos should be trained to treat Chicanos. It is simply to recognize the reality that many forces, including economics, idealism, and continuing patterns of discrimination, commonly bring minority physicians back into minority communities, where the shortage of health services is most severe, and that as a society we have refrained from compelling other physicians to locate their practices in those areas.

> "If you could insist, for instance, that the people who come into the professional schools make a contract for 10 or 20 year terms to serve low-income people, then you would have no need to be racially selective. But the fact of the matter is you could neither make nor enforce such a contract. Therefore, one must be more explicit in favoring those people who, in fact, are more likely to make a commitment to serve in that sector of the community that has the most acute medical and public health needs for a long term. Viewed from that quasi-contractual perspective, independently of the race of the people involved, then I think you can have the proper focus on what needs to be done in the admission policies. Operating on that theory of a contract in its social sense, I think it is safe to say that there is an overwhelming disproportion of probability that black people will return by necessity of culture and custom to the black community, to use their talents. It is not a philosophical position, it is a statistical position. It is justified not on the basis of the theory of differences of color, but on the practical necessities of the deprivation of peculiar enclaves within our society that we need to be concerned with a new racially-selective education."[24]

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24. Jenkins, *The Howard Professional School in a New Social Perspective*, 62 J.N.M.A. 167 (1970). There are data showing that doctors of non-racial ethnic groups (Anglo-Saxon, Irish, Italian, Jewish, and Polish) tend to "specialize in serving their fellow-ethnics." Lieberson, *Ethnic Groups and the Practice of Medicine*, 23 Am. Soc. Rev. 542, 546 (1958). There is also a strikingly high

B. UNTIL THE ADVENT OF SPECIAL-ADMISSIONS PROGRAMS, MEDICAL SCHOOLS, EXCEPT FOR TWO TRADITIONALLY BLACK, WERE WHITE ISLANDS IN A MULTI-RACIAL SOCIETY.

1. Formal barriers against minority participation in medical schools did not fall until very recently and, by itself, the elimination of those restraints did not produce racial diversity. Indeed, mere reliance on formulas of formal equality raised the threat of retrogression, rather than the prospect of progress.

The beginning of this decade witnessed the advent of minority special-admissions programs. Before then, medical schools in the United States had always been white islands in a multi-racial society, except for traditionally black Howard University and Meharry Medical College. For the longest portion of our history after the end of slavery, minorities were excluded from many, if not most, medical schools by law or by official school policies.[25] The final collapse of state *de jure* barriers was unquestionably mandated in 1954. Over the following years, state schools fell into line, with varying degrees of implementation of the requirements of *Brown*.[26] In addition, many private schools responded to the moral imperative of *Brown*, although the last of the explicit discrimination policies in medical schools was not abandoned until 1971.[27] As the formal barriers dropped,

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percentage of minority medical students interested in practicing in physician shortage areas. *See* R. Mantovani, T. Gordon & D. Johnson, *Medical School Indebtedness and Career Plans* 1974-75 at 28, 32, 50 (DHEW Pub. No. (HRA) 77-21, 1976). See also J. Curtis, BLACKS, MEDICAL SCHOOLS, AND SOCIETY 147 (1971); Elesh and Schollaert, *Race and Urban Medicine: Factors Affecting the Distribution of Physicians in Chicago*, 13 J. HEALTH & SOC. BEH. 236 (1972).

25. As late as 1948, 26 of the country's 77 medical schools stated publicly that no blacks need apply. D. Reitzes, NEGROES AND MEDICINE 8 (1958).

26. As of 1964, five state schools had still not complied. Raup & Williams, *Negro Students in Medical Schools in the United States*, 39 J.MED.EDUC. 444, 445 (1964).

27. *Id.* at 444: BLACKS AND MEDICAL CARE 45.

minority applicants were, finally, at least considered for admission. But even adherence to admissions formulas of formal equality made no significant difference in the pattern of exclusion of minorities from medical school. The continued exclusion was a function of persistent discrimination in lower levels of education and in society, later intensified by the greatly heightened general demand for medical school admission. Indeed, in an ironic—and potentially ominous—twist, the ending of official racial discrimination apparently had the effect of reducing the total number of black medical students in the country, when Howard and Meharry began admitting significant numbers of whites and the predominantly white schools did not yet have special-admissions programs.[28] The total number of blacks in medical school, and the percentage of them in the historically white schools, was substantially less in 1963-1964 than it had been in 1955-1956 and did not return to the earlier level until 1968-1969.[29] In academic year 1968-1969, when the record of minority participation was as good as it had ever been, black Americans constituted eight-tenths of one per-

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28. The total number of black medical students in the United States in 1961-62 was 771. The number dropped the following year to 715, and rose only to 735 in 1967-68. Meanwhile, black enrollment in all schools other than Howard and Meharry remained essentially unchanged from 1961-62 to 1962-63 (171 and 173 respectively), and rose (to 211) in 1967-68. The black enrollment at Howard and Meharry dropped sharply from 595 to 542 between 1961-62 and 1962-63, accounting for virtually the entire reduction in the total of black medical students in the country at that time. It dropped still further, to 514, in 1967-68. The data for 1961-62 and 1962-63 are from Hutchins, Reitman, & Klaub, *Minorities, Manpower and Medicine,* 42 J.MED.EDUC. 809, 815 (1967). The data for 1967-68 are derived from Crowley & Nicholson, *Negro Enrollment in Medical Schools,* 210 J.A.M.A. 96, 97 (1969). As to the admission of whites to the traditionally black medical schools, see Hutchins, Reitman, & Klaub, *supra,* at 815; J. Curtis, MEDICAL SCHOOLS AND SOCIETY 113-14 (1971).

29. MINORITIES IN MEDICINE 19, and sources cited.

cent, and Mexican Americans less than two-tenths of one percent, of the total enrollment in the white schools.[30]

2. Despite the persistence of discrimination, a pool of fully qualified minority applicants existed by the late 1960's, but the steep rise in demand for medical school admission, coupled with the sharp increase in the numerical credentials of those admitted, continued to exclude minorities.

Although the years since *Brown* have seen the elimination of formal barriers against minorities, the same period has witnessed a dramatic increase in the general demand for admission to professional schools.[31] That growth in demand for admission, particularly to medical and law schools, has left far behind the time when all or most qualified applicants could be admitted. Moreover, that increase in the overall number of applicants for the limited number of places in professional schools in the last decade frustrated the goal of bringing historically suppressed minorities into the mainstream of graduate education and professional life by mere reliance on the excision of formal discrimination.

Despite the persistent effects of past discrimination, a pool of fully qualified minority applicants for medical schools existed by the late 1960's and early 1970's. At the same time, the greatly increased size of the pool of all applicants in the last decade inevitably escalated sharply

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30. American Indians were one-fortieth of one percent and Mainland Puerto Ricans less than one-one-hundredth of one percent. (The actual numbers were 9 and 3, respectively, out of a total enrollment of 35,180.) The proportion of American Orientals was a little over one percent. Dove, *Minority Enrollment in U.S. Medical Schools, 1969-70 Compared to 1968-69,* 45 J.MED.EDUC. 179, 180 (1970). Data are available only for certain years prior to 1968-69, when the Association of American Medical Colleges began to report statistics on minorities on a regular basis. See Hutchins, Reitman & Klaub, n. 28 *supra,* at 814-15.

31. Medical school figures are as follows: In 1960-61, 14,397 persons applied for 8,560 positions. In 1970-71, 24,987 applicants competed for 11,500 places. By 1975-76, the number of applicants had risen to 42,303 while the number of available places had risen more slowly, to 15,365. For a table of application activity over the preceding 22 years, see 236 J.A.M.A. 2961 (1976).

the numerical credentials of those admitted pursuant to historical admissions policies.[32] A large gap opened, which has not yet closed, between the test scores and college records exhibited by whites and those exhibited by minorities.[33] Because of the gap in these credentials between minorities and whites, the reliance placed on numerical indicators of predicted academic performance in the late 1960's continued to limit admission almost exclusively to whites.[34]

Medical schools traditionally have not relied on numerical indicators to the degree that law schools do today.[35] Medical school admissions processes historically have placed more emphasis on noncognitive factors, including those disclosed by personal interviews, candidates' written statements, and letters of recommendation. But the increased reliance on noncognitive elements in the medical school world has never meant the abandonment of cognitive factors. Indeed, for some years following the launching of Sputnik in 1957, medical school faculties, among others, accentuated scientific skills and research. This concentra-

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32. See *Medical Education in the United States, 1975-76,* 236 J.A.M.A. 2949, 2962, 2963 (1976); *Medical Education in the United States, 1966-67,* 202 J.A.M.A. 753 (1967). The data are summarized and discussed in Cuca, Sakakeeny & Johnson, THE MEDICAL SCHOOL ADMISSIONS PROCESS: A REVIEW OF THE LITERATURE 1955-76 at 130-34 (1976) (an Association of American Medical Colleges report) [hereinafter cited as AAMC REVIEW: MEDICAL SCHOOL ADMISSIONS].

33. See Johnson, Smith & Tarnoff, *Recruitment and Progress of Minority Medical School Entrants 1970-72,* 50 J.MED.EDUC. 713, 755 (1975); Dube & Johnson, *Medical School Applicants, 1973-74 Supplementary Tables,* Table S-6 (AAMC 1976); Gordon, *Descriptive Study of Medical School Applicants, 1975-76,* at 70, App.Table A-1 (AAMC 1977); Waldman, *Economic and Racial Disadvantage As Reflected in Traditional Medical School Selection Factors: A Study of 1976 Applicants to U.S. Medical Schools* (AAMC 1977)

It should be noted that the MCAT score often given the greatest weight by medical school admissions officials is the one for the science section. The quantitative score is at times also considered to be of importance.

34. See pp. 27-28, *supra,* and accompanying notes.

35. See AAMC REVIEW: MEDICAL SCHOOL ADMISSIONS 75.

tion on the scientific mission ahead of medical schools' other charges led to an unusually heavy reliance on numerical admissions criteria.

During the past ten years, the vast majority of medical school faculties have taken a much wider view of their role, reemphasizing their responsibilities for educating effective clinicians and practitioners. In selecting among a continually expanding pool of well-qualified applicants, these schools have sought to admit a significant number of applicants with characteristics more directly related to the broad range of needs and responsibilities of medical education and to the varied requirements of effective delivery of health care. The increased relative weight given nonnumerical criteria—such as motivation, character, ability to cope, interest in career patterns for which there is a special need, orientation toward human as well as scientific concerns—and the definition and balance of those elements, varied from school to school. But in ea h, the admissions process produced a class in which each student was not only well-qualified cognitively but was further "particularly qualified" for membership, one no less than another, because of personal characteristics judged by that faculty to be relevant to the needs of the educative community and the profession.[36]

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36. "[W]hereas 20 years ago most admissions officers were primarily concerned with choosing the academically best qualified applicants, today's admissions officers are trying to recruit and select students who will also meet the objectives of their institutions and of society." AAMC REVIEW: MEDICAL SCHOOL ADMISSIONS 9. See also *id.* at 2-9, 44, 127-31, and sources cited. See also MINORITIES IN MEDICINE 69-76.

The Davis medical school put substantial emphasis on noncognitive factors in its regular admissions process. The point is graphically, if inadvertently, made by the table appearing at page 11 of the Brief for Respondent in Opposition to Certiorari. The table demonstrates that respondent's numerical credentials, in every category except one (in one year) for both of the years he applied, exceeded the average of all students admitted through regular admissions.

Special-admissions programs, like the one at Davis, represent a logical extension of the rejection of an excessive degree of reliance on science-related indicators. The first step away from the doctor-as-scientist model was aimed at producing a more diverse student body and profession. But this step did not, by itself, lead to racial diversity in the medical schools, nor a substantial number of minority physicians. The width of the gap between the numerical indicators of various groups continued to bar minorities from medical education.[37] Many schools recognized that a further step towards tempered reliance on numerical indicators, particularly in light of concerns about their accuracy in the case of historically alienated minorities,[38] was both necessary and appropriate in order to obtain the benefits of significant minority participation. Those schools made this further step without forfeiting the value of cognitive indicators as rough tools for sorting out those who are unqualified or as one rough guide in selecting among those who are objectively qualified.

In sum, the institutions that took the next step of adopting programs like the one at Davis continued the process of broadening the scope of admissions criteria to bring them more closely into line with a broad range of educational imperatives and pressing needs in the profession and the larger society. Thus, in the view of these schools, the students admitted under these programs were as "par-

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37. This is reflected in the small number of minorities who were admitted through regular admissions at Davis in the years shown in the record. See page 3, *supra*.

38. Few empirical studies are available even today. AAMC REVIEW: MEDICAL SCHOOL ADMISSIONS 50-51 discusses two: Johnson, Smith and Tarnoff, n. 33 *supra*, and an unpublished paper by Feitz. See also Simon and Covell, *Performance of Medical Students Admitted Via Regular and Admissions-Variance Routes*, 50 J.MED. ED. 237 (1975). The Davis faculty took such concerns into account (R. 68-69).

ticularly qualified" for admission as anyone else given a place in the class. That these students were likely to make life choices different from those of science-oriented graduates of a decade before was seen as a virtue rather than a loss. To restrict faculties in making these judgments, to elevate once more the role of numerical indicators in an arid conformity to a concept of formal equality found inadequate by those faculties, would reinstate, at least for the foreseeable future, a realm of virtually all-white medical schools.

C. SPECIAL-ADMISSIONS PROGRAMS ARE INTENDED TO FURTHER GOALS UNIVERSALLY RECOGNIZED AS COMPELLING. THE INVESTMENT OF EFFORT IN SUCH PROGRAMS IN PROFESSIONAL SCHOOLS HAS BEEN NATIONWIDE, AND REFLECTS A NATIONWIDE RECOGNITION, SHARED BY THIS COURT, THAT THE ENDURING EFFECTS OF RACIAL DISCRIMINATION CANNOT BE COUNTERED BY MERE ABOLITION OF FORMAL BARRIERS.

The Davis program, like its counterparts nationwide, represents a voluntary effort by a medical school faculty to further the process initiated in *Brown v. Board of Education*. The ends of the program are universally recognized as compelling. The ends include reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession, countering the effects of educational deprivation and societal discrimination, and obtaining the educational and societal benefits that flow from racial and ethnic diversity in a medical school student body. The goals are not restricted to increasing the number of medical school students and doctors from the ranks of minority groups or to obtaining the benefits of the recognition that, in a multi-racial world, applicants from minority backgrounds may possess skills not shared broadly by applicants from other backgrounds. Nor are they limited to increasing aspirations among minorities

that have viewed medicine as a field closed to them and thus unworthy of pursuit, or to destroying persistent and pernicious stereotypes, among minorities and non-minorities alike, that it is not the proper "place" for minorities to aspire to become physicians. The goals also include increasing the skills of non-minority medical school students and physicians. As a result of the integrated education made possible by the Davis program, white students will develop an enhanced awareness of the medical concerns of minorities and of the difficulties of effective delivery of health care services in minority communities. They will also stand a better chance of developing a rapport with their future minority patients, no matter where they encounter such patients. Although the challenged program does not oblige a future physician to restrict his or her choices, the Davis program may prompt more white physicians to practice in minority communities, traditionally areas with a shortage of doctors. Even if the non-minority graduates of the Davis medical school do not make that choice in locating their practices, the challenged program will have permitted them to build bonds to minority physicians for future consultation and referral, to the mutual benefit of physicians and patients. White physicians graduating from Davis during the life of the challenged program will possess greater skills and be better doctors than would be possible without the program.[39]

The adoption of the Task Force program by the Davis faculty followed the formal recommendation of the Association of American Medical Colleges that "[m]edical schools

39. Minority physicians graduated from Davis will also be better doctors than they would have been absent an integrated education. Of course, this point can't be carried too far, for the obvious reason that absent the Davis program and similar programs across the country, most minorities now in medical school would not receive a medical education at all—integrated or otherwise.

must admit increased numbers of students from geographic areas, economic backgrounds and ethnic groups that are now inadequately represented,"[40] and was part of a nationwide effort undertaken by many medical schools about that time to achieve a significant number of minority medical students in the United States.[41] That effort was endorsed by leading professional organizations, including the American Medical Association, the National Medical Association, and the American Hospital Association, as well as the Association of American Medical Colleges.[42] The effort was not restricted to medical schools or to medical professional groups. Law school and other faculties across the country, as well as other responsible authorities, including the executive branch of the federal government, have voluntarily and independently adopted racially-conscious means to counter the enduring bane of pervasive discrimination.

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40. *Association of American Medical Colleges: Proceedings for 1968*, 44 J.MED.EDUC. 349 (1969).

41. This effort was race-conscious from the outset. It will be noted that the national Task Force referred to in note 3, *supra*, had the stated purpose of expanding educational opportunity for "Blacks and Other Minorities." The Association of American Medical Colleges established an Office of Minority Affairs in 1969, which was supported by funds from the federal government and the Alfred P. Sloan Foundation. For a summary of national activity during this period, see MINORITIES IN MEDICINE 23-27. See also note 51, *infra*.

42. These organizations formed the Inter-Association Committee which received and endorsed the Report of the Task Force on Expanding Educational Opportunities in Medicine for Blacks and Other Minority Students, see n. 3, *supra*. Financial support for programs to increase minority participation came from a variety of national sources. Early instances are mentioned in n. 41, *supra* and in MINORITIES IN MEDICINE at 23-27. In 1972, the Robert Wood Johnson Foundation made a $10,000,000 grant "for use by medical schools from 1972 to 1976 in recruiting and retaining students who are female, from underrepresented minority groups, and/or from rural areas. It was assumed that these individuals would be more apt to meet the geographical and specialty manpower needs of the nation." AAMC REVIEW: MEDICAL SCHOOL ADMISSIONS 7-8.

The substantial investment of effort in these programs has not been lightly made, nor was it a function of academic theorizing or uncabined idealism. Rather, it was a realistic assessment of what is necessary to deal with a real-world problem.

In choosing the challenged means, the Davis medical school reflected an increasing national awareness that, whatever might occur in an ideal society historically free of centuries of invidious and pervasive discrimination against the members of insular minority groups, in the real world the mere elimination of formal barriers against minorities could not actually produce equality of opportunity. The widespread conclusion of professional school faculties and others that affirmative, race-conscious steps, rather than merely dropping formal barriers, were necessary to this end paralleled an identical conclusion by this Court in the context of particularized racial discrimination in public school systems. *Green v. County School Board,* 391 U.S. 430 (1968). As this Court has recognized in the school desegregation cases, the effects of deeply-ingrained and long-standing discrimination cannot be overcome overnight, or simply by the abandonment of formal barriers. Exclusive resort to a "color-blind" formalism, "against the background of segregation, would render illusory the promise of *Brown v. Board of Education.*" *North Carolina State Board of Education v. Swann,* 402 U.S. 43, 45-46 (1971).

D. FURTHERANCE OF THE GOALS OF THE DAVIS PROGRAM AND ITS COUNTERPARTS NATIONWIDE UNAVOIDABLY REQUIRES THE USE OF RACIALLY-CONSCIOUS MEANS.

The means chosen by the Davis medical school are the means most directly related to the desired ends. The faculty chose racially-conscious means because it concluded nothing else would work. "To have done otherwise would

have severely hampered the [faculty's] ability to deal effectively with the task at hand." *McDaniel v. Barresi*, 402 U.S. 39, 41 (1971).

The court below based its result largely on the premise that racially-neutral means would further the goals of the Davis program. That premise is wholly false. There are no effective alternatives to attainment of the desired ends. One of the California court's proposals, expanding the number of medical schools, is, of course, beyond the control of medical school faculties, but the decisive answer is its unrealism in today's era of dwindling financial resources.[43] Another, "aggressive programs" of identification and recruitment of prospects, simply ignores the great amount of such activity which has been going on for some years,[44]

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43. In his dissenting opinion, Justice Tobriner aptly described this proposal as a "cruel hoax." 18 C.3d at 90. Apart from its unrealism, this proposal overlooks an obvious fact demonstrated by the experience at the Davis medical school when it opened its doors and did not employ a special-admissions program—whatever additional places in medical school are created are likely to be filled overwhelmingly by white students. That has certainly been true for the increased number of places which have become available even since special-admissions programs started. Between 1968-69 and 1974-75, enrollment in American medical schools increased by 17,721 (from 35,833 to 53,554). *Minorities and Women in the Health Fields*, n. 20 *supra*, at 13 (1975). In the absence of special-admissions programs, virtually all of these new seats would have been occupied by whites. As it was, whites still received the lion's share: 13,436 (76%) of the new places went to whites. *Ibid.* It is also worth noting that in the 1975-76 entering class nationwide, whites were 82% of all applicants and received 85% of the available places. Gordon, *Descriptive Study of Medical School Applicants, 1975-76*, at 32 (1977).

44. The California court spoke of identifying and recruiting disadvantaged students without regard to race. 18 C.3d at 55. Even aside from the fundamental fallacy which this proposal shares with any predicated upon obtaining significant numbers of minority students by use of a disadvantage referent, see text at and notes 46-48, *infra*, its futility is separately demonstrated by the fact that extensive identification and recruitment programs explicitly addressed to minority prospects as such have been func-

as well as the fact that the known existence of real opportunities for admission to medical school constitutes a far more powerful magnet than—and an essential condition to the success of—any recruiting efforts.[45] Similarly, the proposal for a special admissions program based on disadvantage without regard to race also founders on the rock of reality. A racially "neutral" disadvantaged program would produce results essentially indistinguishable from total abolition of special-admissions, for at least two reasons. First, whites greatly outnumber minorities at every income level.[46] Second, the gap between numerical indicators exhib-

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tioning for years and have not obviated the necessity for admissions programs. The lower court's proposal for "remedial schooling" similarly ignores the substantial activities to this end, begun years before the institution of special-admissions programs. For a brief description of some of the nationwide identification, recruitment, and pre-admission remedial training programs, see MINORITIES IN MEDICINE 20-27. This summary does not, of course, include the myriad programs carried on by individual schools.

45. The point would seem self-evident. There is reason to believe, however, that the known availability of real opportunities for admission may be particularly important to the educational ambitions of young minority students. See Kerckhoff & Campbell, *Race and Social Status Differences in the Explanation of Educational Ambition,* 55 J.SOC.FORCES 701 (1977).

46. The court below may have been attracted to its disadvantaged proposal by the thought that minority groups have a very high proportion of lower-income families. That is a fact: *e.g.,* 76% of black families, and 70% of those of Spanish origin, had 1969 incomes below $10,000. But it is also true that of all families with such lower incomes, 85% were white, and only 15% minorities (5% were of Spanish origin). U.S. Bureau of the Census, Department of Commerce, Pub. No. PC (2)-8A, UNITED STATES CENSUS OF POPULATION: 1970 *Sources and Structure of Family Income,* pp. 1-12.

It should also be noted that far more whites than minorities possess the essential requisites for medical school, such as a high school or college diploma. Of the population 25 and over in 1970, 11.3% of whites, but only 4.5% of blacks, had had four (or more) years of college; 54.3% of whites had graduated from high school, but only 31.4% of blacks had done so. *Id., Subject Reports,* Pub. No. PC(2)-B, Educational Attainment, pp. 30-44.

ited by whites and by minorities remains just as wide when only applicants from lower-income families are considered as it is in the universe of all applicants.[47] Thus, adoption of a truly racially "neutral" disadvantaged approach would do little more than substitute less-affluent whites for more-affluent whites. Whatever the desirability of such a result, it would not achieve the goal of significant minority participation.[48]

The proposals put forward by the court below are presumably those it considered most likely to succeed, yet they patently must fail. This is surely evidence of the wisdom of this Court's admonition that the "lack of specialized knowledge and experience" among judges counsels against judicial interference with the decisions of responsible authorities in areas such as this, involving the "most persistent and difficult questions of educational policy." *San Antonio Independent School District v. Rodriguez*, 411

A study by the Association of American Medical Colleges found that of applicants from families with less than $10,000 income, 71% were white and 29% were "underrepresented minorities". Moreover, since most of the substantial number who had failed to identify themselves were thought to be white, the 71% figure may well be an underestimate. Waldman, *Economic and Racial Disadvantage as Reflected in Traditional Medical School Selection Factors: A Study of 1976 Applicants to U.S. Medical Schools* (AAMC 1977).

It is also worthy of note that the absolute number of applicants with known scores and parental incomes under $10,000 who were from "underrepresented minorities" was only 1,416 (out of a total pool of 40,328). The number of such applicants who were accepted in medical schools was 462. The total number of all "underrepresented minorities" accepted in medical school was at least 1,200. *Ibid.*

47. *Ibid.*

48. Projections of a "disadvantaged" special-admissions program (using less-than-$10,000 family income as the criterion) which used MCAT science scores or grade-point averages as selectors showed that "underrepresented minorities" actually admitted to medical schools would constitute between 2% and 3% of the class. *Ibid.*

U.S. 1, 42 (1973). It is also evidence that the solution by way of "alternatives" is non-existent.

It is almost certainly impossible to admit more than an isolated few minorities by resort to any referent truly neutral as to race. With regard to all such referents that have any conceivable relevance to medical school admissions (such as poverty, rural or inner-city background, etc.), nonminorities greatly outnumber minorities.[49] Even if the gap in the numerical credentials were totally ignored, any admissions program based on such a referent could allow enrollment of a significant number of minorities only if its scope were large enough to encompass the bulk of all admissions to every class.[50] To give a program such hegemony would force a medical school to commit far more of its limited resources, in number of available spaces and otherwise, to this end than can be appropriately devoted to the service of any one of its multifold missions. Such an approach would also mean abandonment of educational values

49. A few examples should suffice. As to location of residence: 86% of urban dwellers in 1970 were white and only 14% from other racial groups (6% were of Spanish heritage); of those residing in central cities, 77% were whites and 23% were of other racial groups (7% were of Spanish heritage). U.S. Bureau of the Census, Department of Commerce, CENSUS OF POPULATION: 1970, vol. 1, *Characteristics of the Population, Part 1, United States Summary,* p. 1-262.

Efforts to focus on educationally-deprived background would provide no more useful referent: Of all 1970 families headed by a person not a high school graduate which include children under 18, 82% were white and 18% were minorities (8% were of Spanish origin). *Id., Subject Reports,* Final Report PC(2)-4A, *Family Composition,* pp. 103-05.

50. The degree to which whites outnumber minorities with regard to any conceivably relevant referent, see n. 49, *supra,* demonstrates that abolishing all reliance on numerical criteria is no solution, quite apart from the fact that, to the extent that those criteria are of value, to discard them would be to cast out the baby with the bath water.

deemed fundamental by most faculties and governing boards. Thus, any referent which is not simply a proxy for race will not work. And any referent which is a proxy for race would presumably be no less invalid under the decision of the court below than a directly race-sensitive measure. *Cf. Guinn v. United States,* 238 U.S. 347 (1915).

However, a recognition of the unavoidable relationship between color-conscious means and color-conscious ends does not represent a promotion of frequent, unnecessary or undisciplined use of race or ethnic lines, even for professedly benign purposes, in attempting to deal with societal problems. The University does not quarrel with the proposition that lines drawn on the basis of race or ethnic origin must be approached "somewhat gingerly." *Vulcan Society v. Civil Service Commission,* 490 F.2d 387, 398 (CA2 1973). The use of such lines in this instance represents, rather, a judgment that they are a prerequisite to any real effort to deal with an acute manifestation of the American dilemma.

It is inconceivable that the Davis faculty could have been unaware that dangers may inhere in the use of any race or ethnic line. It is equally inconceivable that any of the numerous medical school faculties that have launched counterpart programs could have suffered from such ignorance. The programs exist nationwide.[51] The faculties that have

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51. MINORITIES IN MEDICINE *supra* note 12, at 11-12, summarizing Wellington & Gyorffy, *Report on Survey and Evaluation of Equal Education Opportunity in Health Profession Schools,* Table II.

Sensitivity of faculties to the dangers which may inhere in use of racial criteria has at times resulted in the employing of euphemisms. For example, the program at Davis was originally described as one "to increase opportunities in medical education for disadvantaged citizens" (R. 160). As experience has accrued, and the importance of candor has become more evident, there has been increasingly open acknowledgment of the explicit racially-

adopted and implemented them are comprised of men and women of considerable commitment to moral principle who are as acutely aware of the risks of race lines as any element of our society. For at least the last three decades, educators have repeatedly been at the center of this country's efforts to grapple with the disabilities historically imposed on persons because of their color or ancestry. Educators have seen first hand the damage that racial or ethnic antagonism can inflict on young people, minority and nonminority alike. Moreover, the feelings aroused by the use of racial criteria in an educational context have been brought personally to the attention of many faculty persons through the concerns expressed, often vociferously, by disappointed applicants

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conscious nature of these programs. For example, the effectiveness of these programs in attracting minority students to apply to medical school, see note 45, *supra*, as well as the admissions process, requires open identification of the racially-conscious element. Thus, the application form, which serves to convey as well as elicit information, became quite explicit. Many medical schools use a single form which an applicant files centrally through the American Medical College Application Service; this form includes questions asking for an applicant's self-description in terms of specific racial and ethnic categories and whether the applicant wishes "to be considered as a minority group applicant" (R. 236). Davis joined the American Medical College Application Service in 1974, thus adopting the organization's form as its own (R. 146).

Many programs and activities of the Association of American Medical Colleges were explicitly race-conscious from the outset. See, *e.g.*, the booklet "Minority Student Opportunities in United States Medical Schools 1969-70" published by that Association, and subsequent annual editions containing minority enrollment statistics for each school.

Regardless of the degree of explicitness in nomenclature, as the Council of Graduate Schools in the United States stated as the final conclusion of its survey in 1973, "it is clear that for almost all institutions the students who are recruited into their special programs are identified as 'minority' students rather than 'disadvantaged.' While it is well known that not all minority students are disadvantaged, for the purposes of institutional policy and efforts, a minority designation is operationally the most significant descriptor." Hamilton, *Graduate School Programs for Minority/Disadvantaged Students* 82 (1973).

and alumni whose children have not attained admission. Universities have had and will inevitably continue to have a deep concern, rooted in both principle and practicality, about any use of race-conscious measures.

In addition to weighing the concerns prompted by any reliance on race, even for remedial purposes, the University, including the Davis faculty, must at the same time carry out the full scope of its responsibilities. Vested by the state with authority to determine admissions policies, California Constitution, Article IX, Section 9, the University and its faculties must do more than simply decide which individuals will be allowed the benefits of a medical education. Admissions policies play an important role in determining the nature and quality of the educational experience shared by those in the student body. Perhaps slightly more indirectly but surely no less effectively, those policies, in conjunction with those of other schools, determine the make-up of the medical profession and its effectiveness in delivering needed health care services to all parts of the society. Responsible exercise of the admissions authority vested in medical faculties thus justifies, if it does not demand, attention to the effects of the legacy of racial discrimination and serious efforts to seek to undo those effects in the areas of educational and professional concern. Recognizing that only racially-conscious means can work toward those ends, the Davis faculty, like many others, properly discharged its responsibilities when it made the judgment that the concerns prompted by racial criteria are unavoidable and are outweighed by the benefits.

Color-conscious special-admissions programs are not viewed as a permanent fixture of the admissions landscape. The underlying philosophy of programs like the one at Davis is that they will eliminate the need for themselves

and then disappear.[52] The theory of the programs envisions that the extending of an opportunity for admission to the most capable minority students in this era will render unnecessary any reliance on special-admissions for ensuing generations.[53] The programs also reflect a concern that if affirmative steps are not taken, there is an unacceptable risk of freezing minorities out of professional life for the foreseeable future. The programs represent a transitional means, a short-term necessity in the process of moving towards a truly free and open multi-racial society.

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52. The court below suggested that diminution or ending of the programs would not be possible, because "human nature suggests that a preferred minority will be no more willing than others to relinquish an advantage once it is bestowed." 18 C.3d at 62. At least one professional school, the law school of the University of California at Berkeley, has already disproved the implication of this assertion. The faculty in 1975 eliminated Japanese-Americans from that school's special-admissions program and reduced the participation of Chinese-Americans in light of the number of applicants from these groups gaining admission through general admissions. See Brief for Sanford H. Kadish, et al., as Amici Curiae on certiorari in the instant case, p. 25, n. 8.

53. The programs also reflect an educational judgment that important educational and health care benefits accrue from the presence of more than an isolated few minority students in medical schools. If the programs do what they are supposed to, this end will also be maintained despite the disappearance of the programs.

Of course, the programs may fail. A generation or two from now the numerical indicators of various minorities may continue to lag behind other groups (but see Sowell, *New Light on Black I.Q.*, THE NEW YORK TIMES MAGAZINE, March 27, 1977, pp. 56-62) or only a small number of the members of a particular group may opt for a medical career. Whatever the legal status of the programs upon such an ultimate turn of events, the possibility of such results does not argue for ending the experiment now.

II

An Admissions Program Adopted Voluntarily by a State Medical School to Counter the Effects of Pervasive Discrimination and to Secure the Educational Benefits of Racial and Ethnic Diversity in a Student Body Accords with the Equal Protection Clause.

A. A STATE'S USE OF RACIAL CRITERIA, EVEN FOR A REMEDIAL PURPOSE, IS UNDENIABLY A CAUSE FOR CONCERN. HOWEVER, AN ACCURATE ASSESSMENT, RATHER THAN AN EXAGGERATION, OF THE BASIS FOR CONCERN IS IN ORDER. FURTHERMORE, IDENTIFYING THE REAL BASIS FOR CONCERN REPRESENTS THE BEGINNING, NOT THE END, OF THE APPROPRIATE INQUIRY.

Although the Davis program employs racial criteria for remedial rather than hostile purposes, there can be no denying that the use of such criteria in any context is a cause for concern. However, a case of this magnitude calls for an accurate assessment of the risks that may be raised. Because this is an area where emotions are easily aroused and labels seem to develop a life of their own, examination of the real basis for concern should begin by setting aside matters too easily, but inaccurately, injected into this case.

1. The Davis program does not resurrect the insidious quotas of another era. It sets a goal not a quota; there is nothing of constitutional significance in the use of a number to define the goal.

"Quota" is a label sometimes applied to this case, as by the court below, 18 C.3d at 62, perhaps because that term stirs such emotions. It evokes memories of an era of deliberate exclusion by the dominant group of more than a limited number of members of certain "classes." Obviously that is not true in the instant case. Today, the label quota might signify a floor, a ceiling, or both. None of these attributes appears in the Davis program, and it is misleading to use the term quota with regard to that pro-

gram. The Davis program sets a goal, not a quota. There is no floor below which minority presence is not permitted to fall. The medical school does not admit unqualified applicants in order to insure that each entering class contains a particular number of minorities. Every student admitted to Davis is fully qualified. If in a given year less than sixteen well-qualified Task Force applicants are available for admission to Davis, the goal will not be met. Of course, given the current demand for medical education, a shortage of qualified minority applicants promises to be a rare event. The number of applicants of every background has grown to such levels that the problem has become one of turning away qualified minority applicants rather than being unable to meet the admissions goal.[54] Likewise, there

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54. As indicated at p. 6, *supra*, minorities admitted to Davis through the Task Force program were chosen from a pool of disadvantaged minority applicants far more than 10 times the number of those that could be admitted.

The major study of the academic progress of minority students admitted to medical schools not long after special-admissions programs had taken substantial effect nationwide reported:

"The most encouraging fact to emerge in the analysis of the retention/attrition data was that all the racial groups entering in 1970 and 1971 had retention figures higher than 91 percent at the end of their first year in medical school. Compared with other graduate and professional schools, this is very favorable. Moreover, it should dispel the rumor of exceptionally high attrition among minority students.

"For the two classes studied, black students had slightly lower retention rates than did whites or most of the other minorities. For the 1970 and 1971 entering classes, the retention rates for blacks were 95 percent and 91 percent respectively, as compared with 98 percent and 97 percent for white students. These rates for blacks are similar to the national rates of a decade ago before the applicant pool was expanded and before maximum efforts were made to improve retention rates. It seems likely that with a concentrated effort by students, faculty, and administrators and with the expanding applicant pool noted . . . , future black student attrition figures could approximate even more closely the exceptionally low national average." Johnson, Smith & Tarnoff, *Recruitment and Progress of Minority Medical School Entrants 1970-72,* 50 J.MED. EDUC. 713, 738 (1975) (footnotes omitted).

is no ceiling on minorities; the medical school does not restrict them to the number coming through special-admissions. The total of minority students varies from year to year, looking at the entire entering class, no matter how admitted.

The claim of a quota against whites is a red herring; there is nothing in the Task Force program's use of a particular number that either adds or detracts from respondent's claim. To be sure, a strained argument of a ceiling of 84 and 85 spaces can be made from respondent's viewpoint for the years in issue. But acceptance of that argument would mean that any time a minority student is admitted by a school treating race as a factor in admissions, there is a ceiling on whites, even if the ceiling is 99 out of 100. From respondent's vantagepoint, it is difficult to see the significance, in a constitutional sense, of the particular scope of the special-admissions program. Respondent's constitutional attack would remain the same if the number admitted through the challenged program was one in one year, 30 in the next, 16 in each year, or 16 and then 15. His position is that *any* diminution in his chances for admission brought about by any reliance on racial criteria is forbidden by the Fourteenth Amendment. The label "quota" comes in on his side of the case for emotional, rather than analytical, purposes.

Goals of increasing minority participation can be defined in terms of a number or in terms of a range or approximation, such as "approximately 15 to 20 percent . . . if there are sufficient qualified applicants available." Admissions Policy Statement for the Law School of the University of Washington, § 6, reprinted in appendix to opinion of Douglas, J., dissenting, in *DeFunis v. Odegaard,* 416 U.S. 312, 347 (1974). The choice of a particular numerical goal

versus a range or band leads, presumably, to somewhat less variation from year to year in the number of students entering through special-admissions. But the choice of a particular numerical goal in favor of a range has no independent significance. Either represents nothing more than a policy judgment about such matters as how much of the school's limited resources should be devoted to the service of one among its many missions. Indeed, to the extent that the use of a particular number limits the delegation to an admissions committee of authority over such matters, it may be seen as a virtue.

Finally, the concept of quota is commonly linked to the evocative label "proportional representation"—the notion of insuring representation of each group in the student body in strict proportion to the percentage it comprises of the general population. If this is what is meant by quota, it is equally inapplicable to the instant case. The Davis Task Force program makes no effort to achieve proportional representation, as shown by the lack of relationship between the size of its program (15% to 16% of the entering classes in the years at issue) and the percentage of minorities in the California population (approximately 25%) and by the fluctuating pattern of total minority enrollment at Davis from year to year. And certainly it cannot be seriously contended that the program is intended to achieve proportional representation in the profession. The disparity between the numbers of whites and minorities in medicine is so extreme that it would be generations before even rough parity would result. If any distinct constitutional issues are raised by efforts to achieve proportional representation, *cf. Hughes v. Superior Court,* 339 U.S. 460 (1950), they are not present here.

2. The relevant concern in the utilization of racial criteria for remedial purposes in admissions is not the infliction of any slur or stigma or the infringement of any right to admission on the basis of relative merit, however defined.

Plainly not presented here is the stigmatic harm to minorities inflicted by "measures designed to maintain White Supremacy." *Loving v. Virginia,* 388 U.S. 1, 11 (1967). But it is nevertheless said by some that the Davis program threatens to depict minorities as incapable of holding their own. Respondent is plainly in no position to assert this claim. In any event, it is conjectural, deceptive, and an utterly unsound basis for deciding this case.[55] It overlooks the insistence that all students be fully qualified, the intensity of the demand among all groups for a medical education, the refusal to lower academic or curricular requirements in the medical school, and the existence of state and national licensing examinations as a condition of entry into the profession. It also overlooks the fact that the program expresses a judgment by medical educators that minority students "bring to the profession special talents and views which are unique and needed."[56]

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55. It would be absurd to invalidate special admissions programs out of a misguided concern for effects on minorities, who stand to gain most from such programs and who, as indicated by the *amici* in this case, are ardent exponents of the programs. The attitude of minority students about the supposed stigmatic effects of such programs is, perhaps, aptly summarized by a recent remark related to one of the authors of this brief: "Just let me have some of that establishment stigma."

Plainly there is no purpose to stigmatize in these programs, unlike what was presented in cases such as *Loving.* Indeed, the programs evidence a societal commitment to the elimination of racial barriers and the overcoming of the effects of past discrimination. These programs are at the other pole from the official heartlessness and purpose to degrade and injure that confronted the Court in the *Loving* line of cases.

56. Statement of the Executive Council of the Association of American Medical Colleges, December 16, 1970, quoted in MINORITIES IN MEDICINE, at 26.

If any stigma exists here, it obviously differs radically from what the Court encountered in cases like *Loving*. In such cases, minorities had no choice; they could not escape the state-imposed brand of inferiority and undesirability. If it can be viewed as demeaning or degrading to be accepted for admission to a medical school in today's world, the prospective "victim" can simply choose not to apply. Judging by the number of applicants for special-admissions programs, minority students plainly do not take seriously any purported risk of stigma. Any claim of stigma in this case also exaggerates the importance of admissions circumstances in the context of an entire career. In that, the relevant framework, minority students and physicians will be judged solely by their capabilities and performance. Moreover, minorities who, once given the opportunity, prove to themselves that they can perform to the high standards demanded of all medical students will develop the confidence that can only come from having met the rigorous requirements of the medical school curriculum, a confidence that will serve them well in their professional careers. Nor should it be overlooked that if minorities are excluded from medical schools, they obviously won't have an opportunity to prove to others that they can perform well in medicine.

If the choice is between a concern for a purported stigma and essentially all-white medical schools, the answer is obvious. The most damaging stigma derives from total exclusion or a merely token admission. It reinforces the notion that minorities have no place in medical schools, or in the "best" medical schools, or in the profession. The demolition of such pernicious and debilitating stereotypes is an important goal of programs like the one at Davis. The presence and accomplishments of more than a handful of minorities in medicine will, in the long run, break down and

ultimately destroy such stereotypes. If in the short run the programs fail to counter existing biases, the "cure" of outlawing them will only perpetuate the real evil and forfeit a real remedy for destroying fundamental racial and ethnic misconceptions in the long run.

Giving weight to racial or ethnic background in the admissions process is also said to threaten a commitment by the country to a meritocratic principle of making choices solely on the basis of individual accomplishment and ability. The exclusive object, according to this view, must be to obtain the best possible doctors. Special-admissions programs purportedly endanger this requirement, and pose an unacceptable risk to the incentives for individual achievement. The argument posits that those students with the highest grade-point averages and MCAT scores will make the best doctors, that these students will be deterred from excellence if they see students with lower formal credentials admitted ahead of others with higher credentials, and that there will ensue an intolerable loss to society in productivity and efficiency.

The premises underlying the plea to meritocracy in opposition to the Davis program are false. Even if it were possible to get agreement on ranking "the best doctors"—somehow measuring a general practitioner in an underserved rural area against a pathologist in a university hospital[57]—the assumption that students with the highest numerical indicators will necessarily be the best doctors is completely questionable: MCAT scores and college grade-

57. See AAMC REVIEW: MEDICAL SCHOOL ADMISSIONS 43-45, and sources there cited. The AAMC Review quotes the following from an article, "neither the first nor the last to point out that:

" 'Presumably the goal of medical education is to produce "good" doctors of medicine. What constitutes the good doctor, however, and how to evaluate the constituent factors remains the most perplexing problem in the field.' " *Id.* at 44.

point averages do not correlate *that* well even with initial performance in medical school, let alone with subsequent clinical training and experience.[58] For another, it rests on the assumption, or the set of assumptions, that the best medical education necessarily occurs in the company of other students selected solely on the basis of formal credentials and without encountering significant diversity, in particular racial and ethnic diversity, in other students. These assumptions are, the University submits, patently false. In any event, nothing in the Constitution compels a faculty to adopt them as educational policy.

From another perspective, respondent's view of merit assumes a hierarchical right to admission, defined by comparative numerical indicators—that the higher an applicant's test scores and grade-point averages, the more his or her right to admission. There is no such right. Furthermore, even though formal credentials do provide some degree of reliable prediction, such credentials do not permit the degree of refined prediction that would be required to support the proposition that the comparative likelihood of outstanding performance, even in the pre-clinical years, can be precisely established by listing applicants in the order of their formal credentials. The formal credentials simply are not that reliable as predictors, and medical school faculties know this.[59]

Formal credentials have different roles to play in the two distinct functions of the admissions process: (i) the separation of the qualified from the unqualified; and (ii) the selection for admission from the pool of qualified applicants (a pool which, in today's medical schools, always dramatically exceeds the number of available spaces).

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58. *Id.* at 43-45, 56-59, 68-69 and sources there cited.

59. See AAMC Review: Medical School Admissions 43-70, and sources there cited.

Formal credentials can be treated as administrative cutoff points and thereby considerably reduce the burden of eliminating the unqualified from consideration. Under today's admissions pressures, the inclination to find shortcuts can produce over-inclusive results. Due to their formal credentials, some applicants receive no consideration at all today even though they are qualified.

The role of the formal credentials in the process of selecting among the pool of qualified is far more limited. Faculty judgments carry much more weight in this area, and those judgments encompass much more than the ranking of formal credentials, which are important in the selection phase, but not determinative. In choosing among those who are qualified, medical school faculties seek to serve a broad range of goals, such as diversity in the student body, attempting to find future doctors with a preference for research, for general practice or for critically needed specialties, or encouraging the diversion of medical services from urban to rural areas. It cannot seriously be claimed that a faculty is blocked from pursuing such goals by any compulsion to work backward down a list of applicants ranked solely by formal credentials. The point that relative formal credentials do not by right control perhaps may be best illustrated by a hypothetical example. A faculty might conclude that, after the qualified, not-qualified sorting is finished, further reliance on formal credentials is unwarranted. It might turn to a lottery to allocate the available spaces among those deemed qualified. It could hardly be argued that such a system violated any constitutional right to admission on the basis of relatively high credentials.[60]

60. For the reasons noted at p. 39, *supra,* reliance on a lottery would not be a viable alternative to the Davis program. White applicants outnumber minorities to such a degree that minority representation would be very small, especially after the use of a lottery became known and whites who don't apply today stepped forward. A lottery would also require total rejection of the merit principle.

The University should not be heard to say that merit does not have an important role to play in medical school admissions, as elsewhere. To the contrary, it is a paramount consideration. Indeed, the University believes that the Davis medical school serves the merit principle by utilizing a total admissions program, general and Task Force, that in the judgment of that school produces the mix of students most directly correlated with the needs of medical education and of the medical profession. However, even if the principle were correctly defined as the opponents of these programs would have it, it is simply not true that the principle has complete hegemony in this country, in constitutional law, or in medical school admissions. Surely university regents and faculties, just as the government in this country, must be able to serve other goals as well. Examples of this proposition abound, such as veterans' preferences, efforts to recruit medical students likely to practice in rural areas, and preferences for American Indians in federal government employment. *E.g., Morton v. Mancari,* 417 U.S. 535 (1974). It is entirely appropriate for a state medical school to shape its admissions policies to attempt to increase the number of doctors practicing in inner-city, rural or other

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At the Davis medical school, the "benchmark" scores, as they were called by the court below, 18 C.3d at 42, took into account factors other than numerical credentials and that some students admitted under the Task Force program had benchmarks lower than respondent. But this does not mean that respondent's application exhibited greater "merit" than some Task Force students. The scores that went into the "benchmark" ratings were assigned by two different groups of people. A passing grade at one school may be a 55 while another uses a 65 or 70 standard, but the discrepancy carries no significance as to the relative height of the standards at the two schools. In addition, even if the scales were identical, the disparity between Task Force and general committee ratings is scarcely surprising. The numerical indicators constitute a very substantial component of the "benchmark" ratings, and the gap in those numerical indicators between Task Force and other admittees could only be expected to be reflected in the comparative "benchmark" figures.

medically-underserved areas and to attempt to provide its students with the kind of integrated medical education that will equip them all—minority and white alike—to perform more capably in a pluralistic society. Indeed, the state may properly expect such decisions of its medical schools' governing bodies. Surely, it is also true that it is not for the courts to posit a particular view of the merit principle and then to mandate exclusive adherence to it by independent entities commissioned by the citizenry to make decisions on matters of social policy of abundant complexity and minimal susceptibility to fixed answers.

Another of the harms said to support invalidation of the Davis program is the injury to respondent and those in his category. No doubt the existence of the Davis program diminishes the chances that respondent, and those in his position, will attain admission. But it is diminution, not exclusion, which is the issue, and the diminution is both marginal and similar in effect to a host of other factors beyond the control of an applicant that reduce the odds of admission. Special-admissions programs do not "fence out" whites (or imply any racial slur or stigma with respect to them). *Cf. United Jewish Organizations of Williamsburgh, Inc. v. Carey,* 97 S.Ct. 996, 1009-10 (1977) (opinion of White, J., joined by Stevens, J., and Rehnquist, J.). They do not even significantly reduce the number of whites, who continue to fill the lion's share of spaces in medical schools. Indeed, the growth in the number of spaces in medical schools since the mid-1960's, coupled with the relatively limited scope of special-admissions programs, means that there are more spaces available to a white applicant today than there were before there were such programs.[61] Furthermore, plainly a purpose to harm respondent or those in his position (or anyone else) does not

61. See note 43, *supra.*

underlie the program. "The clear purpose with which the [state] acted . . . forecloses any finding that it acted with the invidious purpose of discriminating against white [applicants]." *Williamsburgh, supra,* at 1017 (opinion of Stewart, J., joined by Powell, J.). The Davis program is not meant to reward the individuals admitted under it nor to penalize those who have a lessened opportunity for admission as a result of it. The goal is to contribute to the nation's effort to move to a free and open multiracial society. Unfortunately the objectives of the program cannot be furthered without effect on some individuals. These effects are incidental to the program, although obviously not to respondent.

The pursuit of some societal goals unavoidably displaces some individuals. The Court explicitly recognized this, as well as recognizing that such displacement is not, by itself, determinative, in *Morton v. Mancari,* 417 U.S. 535, 544-45 (1974) (footnotes omitted):

> "Congress was well aware that the proposed preference [for Indians in employment] would result in employment disadvantages within the BIA for non-Indians. Not only was this displacement unavoidable if room were to be made for Indians, but it was explicitly determined that gradual replacement of non-Indians with Indians within the Bureau was a desirable feature of the entire program for self-government."

As in *Morton v. Mancari,* where the placing of Indians in positions of responsibility was a "desirable feature" of the programs, the introduction of minorities to the practice of medicine, and the concomitant destruction of prototypes, is a desirable feature of the Davis program. And, as in *Morton v. Mancari,* the achievement of that goal leads unavoidably to the displacement of some whites.

Respondent has no constitutional right to receive a medical school education. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973). Insofar as injury to respondent personally is concerned, this case cannot be distinguished analytically from the case of a family displaced from its home by an urban renewal project, or of an urban applicant whose chances for admission are reduced by an admissions policy aimed at increasing the number of doctors likely to practice in remote areas. The standing requirements of constitutional litigation throw the spotlight on respondent's personal disappointment, and respondent undeniably is an attractive candidate whose obvious abilities and sincere desire to attend medical school poignantly demonstrate the hardships of an era when many are willing and qualified but few are called to serve. Nevertheless, it would be erroneous to conclude that the displacement of respondent has any independent constitutional significance, given that, as often true when compelling societal goals are pursued, it is unavoidable to achieve the desired ends.[62]

Technically speaking, it is inaccurate to describe the injury to respondent as "displacement." Stated precisely, the injury to him is a diminished opportunity to obtain a benefit that he has not previously enjoyed; the state has not

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62. Some have suggested that it is not entirely accurate to view those in respondent's position as wholly innocent victims of a reform program and that the correct characterization is, in essence, incidental beneficiaries of past discrimination. *E.g.*, Greenawalt, *Judicial Scrutiny of "Benign" Racial Preference in Law School Admissions*, 75 COL.L.REV. 559, 585 (1975):

> ". . . [I]nsofar as it makes sense to assume that without discrimination many more blacks would qualify without preference, a state might assume that borderline whites who are admitted in the absence of preferential policies are 'indirectly benefitting' from discrimination of which they are completely innocent. If they are excluded because of preferential policies, they may be put in the position they would have been in if the discrimination had never occurred."

taken away from him a position already achieved, nor has it denied him an advancement to which, in the absence of a remedial scheme, he could otherwise show clear entitlement. In the context of remedial use of racial criteria, a court might, as has the Second Circuit, draw a distinction between a hiring preference, which "deals with the public at large, none of whose members can be identified individually in advance. . . .," and a preference which affects directly "a small number of readily identifiable candidates for promotion. . . ." *Kirkland v. Department of Correctional Services*, 520 F.2d 420, 429, reh. en banc denied, 531 F.2d 5 (1975), cert. denied, 97 S.Ct. 73 (1976). That court upheld the former type of remedy, but ruled out the latter on the ground that it actually displaced individual whites easily identifiable in advance who, years before, had made career commitments with expectations of advancement that would be frustrated by the challenged racial remedy. *Ibid.* Whether the difference in disruption between hiring and promotion preferences supports the legal distinction drawn by the Second Circuit—a matter the Court need not reach in this case—the possible invalidity of a promotion preference is of no benefit to respondent. The effects of the Davis program more closely resemble those of the hiring preference upheld in *Kirkland* than the effects of the promotion preference struck down. From the viewpoint of the Davis program, respondent was a member of "the public at large, none of whose members can be identified individually in advance." *Ibid.*

3. The relevant basis for concern is a potential for the arousal of racial awareness. Identifying that concern represents the beginning, not the end, of the requisite analysis.

The relevant concern to explore and weigh in assessing the Davis program is the risk of reinforcement of color-consciousness in a society that is striving to put behind it

tendencies to make judgments about the relative worth of individuals on racial or ethnic bases. Allocating benefits pursuant to a process that employs racial criteria is simply not like using other referents. In part, this is because extending benefits to minorities for any reason, including an effort to alleviate past burdens imposed on them, arouses feelings of simple racism—the animus of a few members of the majority against discrete and insular minorities and the desire to preserve a position of permanent subordination for such groups.[63] This form of ignorance, which the Court has confronted in virulent form in such cases as *McLaughlin v. Florida*, 379 U.S. 184 (1964), and which the country has made great strides in putting behind it,[64] is

63. See MINORITIES IN MEDICINE, 10, quoting Everett Cherrington Hughes, April 1958, in his introduction to Reitzes, Negros and Medicine xxxi (1958):

"We must not overlook the possibility that the very hangover from some of the disabilities of Negro Americans may allow for a resurgence of prejudice and prejudicial action. If, as seems the case, a good many more Negroes could get into medical schools than now qualify, it is easy for people to say, 'I told you so!' and to fall back into old practices. One of our most serious questions of social policy is, then, this: Shall we merely try hard to act as if race had never existed? Or shall we undertake to remove by special action the handicaps left over from our long history of racial discrimination? Some Americans will argue that the first course is better; it would be the old-fashioned, laissez-faire, liberal course. Others will argue that, even at the risk of what might be called counter-discrimination, we must reduce the handicaps, provided we do not reward mediocrity."

64. The stereotyping that accompanies past modes of thinking with regard to minorities sometimes dies hard, despite the best efforts to overcome it. An example is the conception of some that respondent is more deserving of admission to medical school than minorities because he tried so hard and wanted so much to attain admission. No doubt respondent is a sincere and committed applicant who has bent enormous effort to the goal of admission. But the notion that the successful minority applicants didn't try as hard as respondent to be able to attend medical school or weren't as eager to go must be resisted, if it is based on nothing more than a tendency to view minorities as less motivated than whites or as operating on the premise that the world owes them a living. Destruction of such harmful stereotypical thinking about minorities is an important goal of the Davis program.

irrelevant to the instant case and may be put to one side. In part, feelings are aroused by the remedial use of racial criteria because such an action is viewed by some as public acknowledgement of past mistreatment of discrete and insular minorities. No one likes to be reminded, particularly by an official entity, of a history of societal misbehavior—even if, or perhaps particularly if, the individual reminded had nothing to do with past discriminatory acts. But this emotional resistance to unhappy memories, like simple racism, must not be the basis for precluding those universities that voluntarily choose to do so from taking the steps they deem necessary to counter the lingering effects of past discrimination and to secure the benefits of a diverse student body.

What remains is a principled concern that "any legal classification by race weakens the government as an educative force."[65] As a society we are striving to make real Mr. Justice Jackson's ideal that race or color be viewed as a "neutral fact . . . constitutionally an irrelevance." *Edwards v. California*, 314 U.S. 160, 185 (1941) (Jackson, J., concurring). Any reliance on color as a factor may impede progress to that goal. Although, for the reasons developed above, the University submits that other supposed dangers from the Davis program are not in fact presented, are illusory, or on analysis prove to be irrelevant or of minimal weight,[66] it does not deny that there is a

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65. Kaplan, *Equal Justice in an Unequal World,* 61 NW.L.REV. 363, 379 (1966).

66. Conceivably a special admissions program could by design or practice single out a particular ethnic group for exclusion in order to make room for special admits, rather than distributing its burdens among all groups not favored. Such a model plainly does not describe the Davis program. If such a program existed, obviously it would be proper to subject it to the most stringent judicial scrutiny, and the program should not survive review. But that does not warrant a judicial ban against all color-conscious special admission programs.

residuum of legitimate concern for the arousal of racial and ethnic awareness. However, the identification of this justifiable concern and a recognition that it must be dealt with in the instant case represents the beginning, not the end, of the requisite legal inquiry. Failure to perceive this point represents one of the errors committed by the court below.

Having identified the race-related risk truly at issue in this case, it is now appropriate to turn to whether that risk requires judicial invalidation of the Davis program. As demonstrated below, the cases plainly establish the permissibility of the program voluntarily undertaken by the Davis medical school. However, before turning to that demonstration, the risk really at issue should be put in proper perspective. The medical school was not writing on a clean slate. It did not arouse color consciousness where none had existed before. It acted against the background of an unhealthy and debilitating race consciousness that, despite the enormous strides made in our lives, our society has not yet erased. To an unfortunate degree, stereotypical thinking persists that it is unusual for a minority to be a physician. The Davis faculty sought to attack this lingering and negative color awareness directly with the best tools at its disposal. To produce a true demolition of color-consciousness in the long run, it employed color-conscious means in the short run. It took an essential step towards ending the life of the sterotype that minorities are not up to a professional role. It chose to recognize their potential to be qualified and productive physicians. In short, it saw these students as having ordinary human potential. This recognition by the Davis faculty is the antithesis of counter-educative. It is pro-educative, in the most fundamental sense.

B. THE DECISIONS OF THIS COURT AND OTHER COURTS SUSTAINING THE USE OF RACIAL CRITERIA TO ENHANCE RACIAL DIVERSITY IN SCHOOLS AND TO COUNTER THE EFFECTS OF DISCRIMINATION ESTABLISH THAT THE AROUSAL OF RACIAL AWARENESS INEVITABLY PRODUCED BY SPECIAL-ADMISSIONS PROGRAMS DOES NOT RENDER THEM INVALID.

The Court has explicitly recognized that harm may result from an arousal of racial awareness; state action designed solely to achieve such a harmful effect is forbidden by the Fourteenth Amendment. *Anderson v. Martin,* 375 U.S. 399 (1964). Yet, despite its recognition that enhanced color-consciousness may be harmful, the Court has approved, not forbidden, the employment of racial criteria to increase racial diversity in schools and to counter the effects of discrimination. *E.g., United States v. Montgomery County Board of Education,* 395 U.S. 225 (1969). *Cf. Franks v. Bowman Transportation Co. Inc.,* 96 S.Ct. 1251 (1976). Such cases demonstrate that "the history of equitable decrees utilizing racial criteria fairly establishes the broad principle that race may play a legitimate role in remedial policies." *United Jewish Organizations of Williamsburgh, Inc. v. Carey,* 97 S.Ct. 996, 1013 n. 2 (1977) (Brennan, J., concurring). Indeed, in the school desegration cases, the Court has emphasized that racial remedies are inevitable in pursuing the desired ends:

> "Just as the race of students must be considered in determining whether a constitutional violation has occurred, so also must race be considered in formulating a remedy. To forbid, at this stage, all assignments made on the basis of race would deprive school authorities of the one tool absolutely essential to fulfillment of their constitutional obligation to eliminate existing dual school systems." *North Carolina State Board of Education v. Swann,* 402 U.S. 43, 46 (1971).

See also *McDaniel v. Barresi,* 402 U.S. 39, 41 (1971).

This Court's repeated approval of teacher assignments by race to counter the effects of discrimination in school systems presents a pointed illustration that race-conscious remedies today are often a key to the irrelevance of race tomorrow. *E.g., Davis v. Board of School Commissioners,* 402 U.S. 33, 35 (1971); *United States v. Montgomery County Board of Education, supra.* When a black teacher is ordered into a previously all-white school, there can be little doubt about immediate arousal of racial awareness. Many if not most children in that teacher's class will confront daily and at close range, perhaps for the first time, someone from another race holding a position of authority and respect. In time, racial awareness will fade. It will become commonplace for the students in the teacher's class to view the person before them as first a teacher, a professional, and only incidentally as a black. Progress will have been made in eroding a damaging racial stereotype. The direct analogy to the process involved in the Davis medical school program need not be belabored.

To be sure, the school desegregation cases in which this Court has directed the use of racial remedies have involved *de jure* discrimination, which is absent in this case. But the significance of *de jure* discrimination in those cases relates solely to the limits on the coercive remedial powers of a federal court. Such powers are properly invoked only to correct the effects of a constitutional violation, and under this Court's rulings only *de jure* discrimination violates the Equal Protection Clause. *E.g., Keyes v. School District No. 1,* 413 U.S. 189 (1973). The issue posed here is not what a federal court could order the Davis faculty to do, but what that faculty may do voluntarily. The constitutionality of the University's voluntary choice of racial criteria to obtain the educational benefits of a multi-racial student body was

explicitly acknowledged by this Court in *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 16 (1971):

> "School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities; absent a finding of a constitutional violation, however, that would not be within the authority of a federal court."

Accord, North Carolina State Board of Education v. Swann, supra, 402 U.S. at 45. Moreover, the Court, recently held that entities other than the judiciary may employ race-sensitive means to remedy the effects of generalized societal discrimination without a prior finding of a past *de jure* violation of the Fourteenth Amendment. *United Jewish Organizations of Williamsburgh, Inc. v. Carey, supra.* As Mr. Justice White declared, when speaking for a plurality of the Court in that case, "The permissible use of racial criteria is not confined to eliminating the effects of past discriminatory districting or apportionment." 97 S.Ct. at 1007.

Numerous state and lower federal courts have upheld the utilization of racial criteria to increase racial diversity in schools and to counter the effects of discrimination, despite an absence of *de jure* discrimination. In the context of voluntary efforts by state and local officials to overcome the effects of *de facto* discrimination in schools, judicial approval of race-conscious means has been unanimous. See, *e.g., Springfield School Committee v. Barksdale,* 348 F.2d 261 (CA1 1965); *Offermann v. Nitkowski,* 378 F.2d 22 (CA2 1967); *Wanner v. County School Board,* 357 F.2d 452 (CA4

1966); *Fuller v. Volk,* 250 F.Supp. 81 (D.N.J. 1966); *State* ex rel *Citizens Against Mandatory Bussing v. Brooks,* 80 Wash.2d 121, 492 P.2d 536 (1972); *Tometz v. Board of Education,* 39 Ill.2d 593, 237 N.E.2d 498 (1968); *School Committee v. Board of Education,* 352 Mass. 693, 227 N.E.2d 729 (Mass. 1967) appeal dismissed 389 U.S. 572 (1968); *Booker v. Board of Education,* 45 N.J. 161, 212 A.2d 1 (1965); *Balaban v. Rubin,* 14 N.Y.2d 193, 199 N.E.2d 375, 250 N.Y.S. 2d 281, cert. denied 379 U.S. 881 (1964); *Morean v. Board of Education,* 42 N.J. 237, 200 A.2d 97 (1964). There are a number of reported decisions reaching the issue of whether racially-alert special-admissions programs contravene the Equal Protection Clause. The courts in these cases, except the court below, have upheld the constitutionality of such programs. *Alevy v. Downstate Medical Center,* 39 N.Y.2d 326, 348 N.E.2d 537, 384 N.Y.S.2d 82 (1976); *DeFunis v. Odegaard,* 82 Wash.2d 11, 507 P.2d 1169 (1973), vacated as moot, 416 U.S. 312 (1974); *Rosenstock v. Board of Governors,* 423 F.Supp. 1321 (M.D.N.C. 1976).

Apart from the explicit rejection of the notion in *Swann,* it would be nonsense to conclude that an absence of *de jure* discrimination blocks the Davis faculty from voluntarily adopting race-conscious means to promote racial and ethnic diversity in the student body. The Court has mandated the employment of racial remedies in the school desegregation cases. The law is not so absurd as to command a remedy that is itself unconstitutional. Furthermore, it would be worse than irrational to restrict the use of color-conscious admissions programs to medical schools with a history of purposeful discrimination. Not only would this eliminate such programs only in the schools likely to adopt them voluntarily, it would grant authority to use racial criteria only to the very institutions that have shown a propensity to abuse racial classifications in the past.

The court below ignored this Court's pronouncement in *Swann, supra,* about the latitude accorded faculties to increase voluntarily racial pluralism in schools. It attempted to distinguish the school desegregation cases on the theory that the employment of racial remedies in those cases injured no one. It dismissed on two grounds the view that court-ordered bussing injures the affected white children—the absence of a right to attend a segregated school system and the notion that the burden of being bussed does not measure up to the injury of a reduced chance of admission to medical school. 18 C.3d at 46-47.

Respondent has no greater right to attend an all-white school than did the white children in the school desegregation cases. Beyond that, the accuracy of the California court's assessment of the injury to a young child bussed away from a neighborhood school relative to the injury to an adult whose chances for admission to professional school are diminished slightly is not beyond dispute. *Cf., Keyes v. School District No. 1,* 413 U.S. 189, 249-250 (1973) (separate opinion of Powell, J.). In any event, to weigh the two harms is only to say that there are degrees of injury. The constitutionally significant fact is injury, of whatever degree, in both cases. If attention to race were barred by any hard-and-fast rule under the Equal Protection Clause, it would be as unconstitutional in the one case as the other.

But there is another aspect to the school desegregation decisions of this Court that render them indistinguishable from the instant case, as well as determinative authority for the constitutionality of the challenged programs, if injury to individual whites is to be viewed, as by the court below, as a controlling issue. In upholding orders compelling the desegregation of faculties, those cases have approved the use of racial criteria that injure individual whites to a

degree that may exceed the injury to individual whites caused by special-admissions programs. For example, in *Carr v. Montgomery County Board of Education,* 289 F. Supp. 647 (M.D.Ala. 1968), the district court ordered faculty desegregation, pursuant to a fixed racial ratio, and ordered that the ratio be accomplished by hiring and assignment. *Id.* at 654. (The ratios in *Carr* have been maintained for a number of years. See 377 F.Supp. 1123, 1133, 1143 (M.D.Ala. 1974)). This order, which requires hiring by race and which, inevitably, produces instances in which white teaching applicants are rejected in favor of blacks and in which white teachers are compelled, on pain of dismissal, to teach in schools they would not attend voluntarily, was affirmed by this Court. *United States v. Montgomery County Board of Education, supra. See also Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. at 19-20; *Davis v. Board of School Commissioners,* 402 U.S. at 35. Disappointed white teaching applicants in such cases are in a position indistinguishable from that of respondent in this case.

Rejection of the applications of some whites due to special-admissions programs is unavoidable. The goals of enhancing racial diversity in schools and countering the effects of discrimination cannot be furthered without some reduction in the number of whites admitted, and certainly the reduction in overall white enrollment caused by those programs has not been extreme. The school desegregation cases stand for the proposition that injury to some whites unavoidably prompted by the pursuit of race-conscious remedial ends does not contravene the Equal Protection Clause. See also *Franks v. Bowman Transportation Co., Inc., supra.* The federal courts of appeals have upheld this proposition in a variety of contexts, including teacher promotion, *Porcelli v. Titus,* 431 F.2d 1254 (CA3 1970), cert.

denied 402 U.S. 944 (1971), and employment cases, including those brought directly under the Fourteenth Amendment. *E.g., Vulcan Society v. Civil Service Commission,* 490 F.2d 387 (CA2 1973); *NAACP v. Allen,* 493 F.2d 614 (CA5 1974); *Carter v. Gallagher,* 452 F.2d 315 (CA8) (en banc) cert. denied 406 U.S. 950 (1972).[67]

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67. Race-conscious remedies have also been upheld by the lower federal courts under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) *et seq.* and under Executive Order 11246, 30 F.R. 12319, as amended, 32 F.R. 14303, 34 F.R. 12985, requiring federal contractors to take affirmative action to recruit and employ racial minorities. *See, e.g., Patterson v. American Tobacco Company,* 535 F.2d 257, 273-74 (CA4), cert. denied, 97 S.Ct. 314 (1976):

> "Uniformly . . . Title VII has been construed to authorize district courts to grant preferential relief as a remedy for unlawful discrimination. *Rios v. Enterprise Association Steamfitters Local 638 of U.A.,* 501 F.2d 622, 628-31 (2d Cir. 1974); *United States v. N. L. Industries, Inc.,* 479 F.2d 354, 377 (8th Cir. 1973); *Southern Illinois Builders Association v. Ogilvie,* 471 F.2d 680, 683-86 (7th Cir. 1972); *United States v. Ironworkers Local 86,* 443 F.2d 544, 552-53 (9th Cir. 1971) [cert. denied, 404 U.S. 984 (1971)]; *United States v. International Brotherhood of Electrical Workers, Local No. 38,* 428 F.2d 144, 149-51 (6th Cir. 1970) [cert. denied, 400 U.S. 943 (1970)]; *Local 53 of International Ass'n of Heat & Frost I. & A. Workers v. Vogler,* 407 F.2d 1047, 1053-54 (5th Cir. 1969). This construction of the Act is in harmony with other cases which authorize preferential relief from unlawful employment discrimination in situations where Title VII is not applicable. *Associated General Contractors of Massachusetts, Inc. v. Altshuler,* 490 F.2d 9, 16-18 (1st Cir. 1973) [cert. denied, 416 U.S. 957 (1974)]; *Carter v. Gallagher,* 452 F.2d 315, 330 (8th Cir. 1971) [cert. denied, 406 U.S. 950 (1972)]; *Contractors Association of Eastern Pennsylvania v. Secretary of Labor,* 442 F.2d 159, 172, 176-77 (3d Cir. 1971) [cert. denied, 404 U.S. 854 (1971)]. In all, eight circuits have approved some form of temporary preferential relief for discriminatory employment practices. . . ."

In the Executive Order cases, utilization of remedial racial criteria has been approved by the courts of appeals in the absence of findings that the particular companies or unions compelled to take affirmative action have themselves committed past illegal acts. *E.g., Altshuler* and *Contractors Association,* both cited in the quotation from *Patterson, supra.* With regard to the concept of "color-blindness," the court in *Altshuler* stated:

> "It is by now well understood . . . that our society cannot be completely colorblind in the short term if we are to have a

In sum, decisions of this and other Courts in the context of school desegregation and elsewhere sustain the use of remedial racial criteria for the purposes of the Davis program, despite the unavoidable arousal of racial awareness prompted by such means. The judgment below must be reversed on the basis of those decisions alone. In the remainder of this brief, the University will demonstrate that other lines of authority lead to precisely the same result.

C. THE STANDARD OF STRICT JUDICIAL SCRUTINY IS INAPPLICABLE IN THIS CASE.

In 1938 the Court recognized that "prejudice against discrete and insular minorities may be a special condition which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." *United States v. Carolene Products Co.,* 304 U.S. 144, 152 n.4. Proceeding from that premise, the Court subsequently, with some exceptions, *Korematsu v. United States,* 323 U.S. 214 (1944); *Hirabayashi v. United States,* 320 U.S. 81 (1943), has applied a

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colorblind society in the long term. After centuries of viewing through colored lenses, eyes do not quickly adjust when the lenses are removed. Discrimination has a way of perpetuating itself, albeit unintentionally, because the resulting inequalities make new opportunities less accessible. Preferential treatment is one partial prescription to remedy our society's most intransigent and deeply rooted inequalities." 490 F.2d at 16.

Cf. Brooks v. Beto, 366 F.2d 1, 24 (CA5 1966):

"Although there is an apparent appeal to the ostensibly logical symmetry of a declaration forbidding race consideration in both exclusion and inclusion, it is both theoretically and actually unrealistic. Adhering to a formula which in words forbids conscious awareness of race in inclusion postpones, not advances, the day when this terrible blight of racial discrimination is exterminated."

standard of strict judicial scrutiny to classifications designed to single out, to stigmatize, and to harm discrete and insular minorities. *E.g., Loving v. Virginia,* 388 U.S. 1 (1967); *McLaughlin v. Florida,* 379 U.S. 184 (1964). Precisely because racial and ethnic minorities historically have been isolated and often denied an effective voice in majoritarian processes, the Court has shown special solicitude for the protection of such groups from measures intended to "reflect racial animosity." *Oyama v. California,* 332 U.S. 633, 663 (1948) (Murphy, J., concurring).

The force of the Court's commitment to the concerns of those insular groups with a history of mistreatment and exclusion from the mainstream of political life has occasionally prompted language of great power. Ironically, the most powerful language appears in two cases for which the Court has been sharply criticized for failing to extend adequate protection to a contemporaneously unpopular minority. *Korematsu, supra; Hirabayashi, supra.* In *Korematsu,* the Court declared that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect." 323 U.S. at 216. In *Hirabayashi,* it proclaimed that "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." 320 U.S. at 100.

The Court's declarations in *Korematsu* and *Hirabayashi,* coupled with the first Mr. Justice Harlan's description of our Constitution as "color-blind," *Plessy v. Ferguson,* 163 U.S. 537, 559 (1896) (Harlan, J., dissenting), are essential clauses in an evolving charter of freedom from invidious racial discrimination in this country. They are necessary guideposts on the long and as yet unfinished road to the end of subordination of historically subjugated and alienated minorities. But, like clauses in a constitution, those

declarations cannot be read out of context, for "only a misconception of the past leads to the conclusion that it imposes . . . an obligation of 'color-blindness.'"[68] This Court has refused to declare race lines *per se* invalid. *E g., Loving v. Virginia, supra; McLaughlin v. Florida, supra.* The cases subjecting racial classifications to strict judicial scrutiny uniformly have arisen in the context of efforts to maintain or worsen the position of subordination and degradation of discrete and insular minority groups. The very reasons that led to the erection of high judicial barriers in cases like *Loving* and *McLaughlin* demonstrate the inappropriateness of that approach here. The Davis program and similar admissions programs elsewhere have as one of their principal purposes and direct effects the alleviation, in a modest but important way, of the suppression of racial minorities. Furthermore, those who bear the burdens of such programs are neither members of groups especially susceptible to race-related injuries nor in need of protection from the results of normal political processes. The Davis program represents "no racial slur or stigma with respect to whites or any other race. . . ." *United Jewish Organizations of Williamsburgh, Inc. v. Carey,* 97 S.Ct. at 1009 (opinion of White, J.). The program "is cast in a remedial context

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68. Sandalow, Racial Preferences in Higher Education: Political Responsibility and the Judicial Role, 42 U.CHI.L REV. 653, 666 (1975). *See* Freund, Constitutional Dilemmas, 45 B.U.L.REV. 13, 20 (1965) (footnotes omitted):

> "Can race or color be made the basis of a legislative classification? The most important point to be made in considering this question is that the color-blind test is not a term of art found in the Constitution but a phrase from the first Mr. Justice Harlan's dissenting opinion in *Plessy v. Ferguson,* or more precisely a phrase taken by him from the brief filed in that case by the gifted novelist-lawyer Albion Tourgee. The phrase became a liberal rallying cry, like liberty of contract in the early days of free enterprise, and each of them, if pushed to a drily logical extreme can become the reverse of liberal."

with respect to a disadvantaged class rather than in a setting that aims to demean or insult any racial group." *Id.* at 1012 (Brennan, J., concurring).

When race-sensitive means are employed against historically disfavored racial minorities, strict judicial scrutiny, an exception in the general scheme of judicial review, is appropriate because of the peculiar susceptibility of such groups to race-related harms. In this country such groups have been subjected to a network of restrictions and prejudices, to a matrix of repeated subjection to discrimination depicting them as inferior. Actions directed against them, or benefits denied them, on racial or ethnic grounds expand or intensify that matrix, compound the feeling of frustration at every level of life, and inflict psychological injury. Furthermore, racial minorities traditionally have been alienated from others; they have been unable to form unions with other groups to bring an end to mistreatment through the political organs of government.[69] This Court has recognized both elements in its definitive statement of the attributes of a suspect class as one "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritorian political process." *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 28 (1973).

Obviously respondent and those in his position possess none of the attributes that have led the Court to define

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69. *Cf.* Wechsler, Toward Neutral Principles of Constitutional Law, 73 HARV.L.REV. 1, 33 (1959):

> "[*Brown v. Board of Education*] must have rested on the view that racial segregation is, in principle, a denial of equality to the minority against whom it is directed; that is, the group that is not dominant politically and, therefore, does not make the choice involved."

suspect classes and to trigger strict scrutiny. Indeed, to apply the suspect classification doctrine to defeat the Davis program would "stand the equal protection clause on its head."[70] Respondent has suffered a diminished chance of obtaining a position in medical school, but the program he attacks "does not add to the burdens of an already disadvantaged discrete minority." *Califano v. Goldfarb*, 97 S.Ct. 1021, 1033 (1977) (separate opinion of Stevens, J.). Without minimizing the significance to respondent of not attaining admission, it remains true that his non-admission does not carry with it the stigmatic and degrading injury suffered by the discrete and insular groups singled out by the state in cases like *Loving*. The injury to respondent is an isolated incident in his life. It is not a reinforcement of the pervasive discrimination that members of alienated minority groups encounter constantly and repeatedly throughout their lives. It will not engender in respondent's own mind any belief that he is innately inferior, nor will it prompt others to so view him. There is not, in short, invidious discrimination against respondent.

Moreover, the spectrum of groups not included within special-admissions programs have a realistic recourse to political processes to protect themselves. "The majority needs no protection against discrimination. . . ." *Hunter*

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70. Redish, Preferential Law School Admissions and the Equal Protection Clause, 22 U.C.L.A.L.Rev. 343, 357 (1974). *See Alevy v. Downstate Medical Center*, 39 N.Y.2d 326, 334-35, 348 N.E.2d 537, 544-45, 384 N.Y.S.2d 82, 89 (1976):

> "It would indeed be ironic and, of course, would cut against the very grain of the amendment, were the equal protection clause used to strike down measures designed to achieve real equality for persons whom it was intended to aid. We reject, therefore, the strict scrutiny test for benign discriminations [in medical school admissions] as, in our view, such an application would be contrary to the salutary purposes for which the Fourteenth Amendment was intended."

v. Erickson, 393 U.S. 385, 391 (1969).[71] The majority, or, putting it another way, groups that historically have commonly coalesced into political majorities, have a life-or-death control over special-admissions programs. Unlike the insular racial groups accorded suspect-class status in the Court's strict scrutiny cases, respondent's group has control over its own political destiny. Thus, unlike the *Loving* line of cases, it would be a corruption, rather than an application, of the appropriate role of judicial review to decide this case under a standard of strict judicial scrutiny. It would also be at war with the central purpose of the Fourteenth Amendment—a special solicitude for ameliorating the hardships visited on blacks. See Bickel, The Original Understanding and the Segregation Decision, 69 Harv.L.Rev. 1, 60 (1955).

A fundamental error of the court below was its treatment of the injury to respondent as triggering strict scrutiny. This equates the injury to respondent with the injury suffered by a member of a traditionally alienated minority group when the state takes action against that group. Obviously this is incorrect. Paradoxically, the California court recognized that there was no invidious, stigmatic harm to respondent like the harm appearing in this Court's strict-scrutiny, race-classification cases. 18 C.3d at 50-51. The absence of such harm and the absence of any frustration of normal political processes renders strict scrutiny inapplicable. Such an exertion of judicial power becomes aberrational and deeply troubling when those conditions do not obtain. Whatever standard of review properly controls in this case, it is not strict scrutiny.[72]

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71. See Ely, The Constitutionality of Reverse Racial Discrimination, 41 U.CHI.L.REV. 723, 735 (1974).

72. Infringement of a fundamental right, like injury to a suspect class, will also trigger strict judicial scrutiny. However, that

D. REGARDLESS OF THE WEIGHT OF THE BURDEN OF JUSTIFICATION, THE DAVIS PROGRAM DOES NOT CONTRAVENE THE EQUAL PROTECTION CLAUSE.

1. The means chosen by the medical school are rationally related to the desired ends, and under this Court's precedents the challenged program is therefore constitutional.

The Davis program does not constitute invidious racial discrimination, does not injure a suspect class, and does not infringe a fundamental right. It follows that the case is governed by "the traditional standard of review, which requires only that the State's system be shown to bear some rational relationship to legitimate state purposes." *San Antonio Independent School District, supra,* 411 U.S. at 40.

The means chosen by the medical school bear not only a rational relationship to the desired ends, they are the means most directly related to those ends, indeed, the only effective means. Since the fit between means and ends is as tight as possible, and since the state ends are not only legitimate but extraordinarily compelling, there can be little doubt that the University prevails under the traditional standard of review. *E.g., McGowan v. Maryland,* 366 U.S. 420, 426 (1961).

That the rational-basis standard of review governs this case is demonstrated by the Court's treatment of race-conscious remedies in the school desegregation cases, *supra,* which have never subjected the employment of such reme-

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staircase to upper tier review is also closed in this case. Respondent has no constitutional right to a medical school education. *San Antonio Independent School District v. Rodriguez,* 411 U.S. 1 (1973). Nor can respondent reach the upper tier by claiming infringement of a constitutionally-protected right against racial discrimination in medical school admissions. The Fourteenth Amendment shelters him from invidious discrimination, not simply discrimination. The discrimination against respondent is not invidous for the very reasons that respondent does not fall into a suspect class.

dies to a test of strict scrutiny. The applicability of the traditional equal-protection standard is also demonstrated by other precedents. This Court has applied the traditional standard of review to race-sensitive measures designed to remedy deprivations suffered by alienated minorities, even though such measures would invoke the most stringent judicial scrutiny if used for an opposite and invidious purpose. *Lau v. Nichols,* 414 U.S. 563 (1974); *Katzenbach v. Morgan,* 384 U.S. 641 (1966). *Cf. Morton v. Mancari,* 417 U.S. 535 (1974). These cases reject strict scrutiny, which to date this Court has never applied to racial criteria employed for remedial purposes, because the rationale for its application is absent when the program at issue assists rather than harms discrete and insular minorities. The point is, perhaps, best illustrated by comparing the standard of review applied in *United Jewish Organizations of Williamsburgh, Inc. v. Carey, supra,* with the standard that would have governed if *Williamsburgh* had involved attempted dilution of black voting strength.

The "wide scope of discretion" (*McGowan v. Maryland,* 366 U.S. at 425) the Fourteenth Amendment leaves to the states in the realm of education further demonstrates the applicability of the rational-basis test. *San Antonio Independent School District,* 411 U.S. at 42-43. Formulating admissions standards is an integral part of establishing educational policy. Delegation of the duty to fashion educational policies commonly flows from state legislatures to university governing boards, regents and faculties. In California, the University's authority over educational policy and admissions is given directly by the state constitution.[73] It is, of course, irrelevant to this Court how California

73. Cal. Const. art. IX, § 9.

chooses to distribute its governmental authority. *Sweezy v. New Hampshire,* 354 U.S. 234, 256 (1957) (Frankfurter, J., concurring). The relevant point is that the citizens of the state have chosen the University as the entity with responsibility for grappling with the intractable problems of choosing the optimum mix of students for the maximum benefit of education in the school, of contribution to the profession, and ultimately to the society. Intrusive judicial review interferes drastically with that process of democratic government. Such interference should be reserved for the comparatively rare instances when circumstances compel it, and such circumstances are not presented by this case. An effort by the judiciary, under the rubric of strict judicial scrutiny, to fashion admissions standards is very likely to lead to the kinds of mistakes made by the court below. In this instance, it would also gravely harm the healthy "federalism" now presented by a system under which universities across the country are permitted to fashion their own programs without any stultifying central controls.[74]

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74. As the Court further noted in *San Antonio Independent School District, supra,* in a cognate context:
"The ultimate wisdom as to these and related problems of education is not likely to be divined for all time even by the scholars who now so earnestly debate the issues. In such circumstances, the judiciary is well advised to refrain from imposing on the States inflexible constitutional restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions to educational problems and to keeping abreast of ever-changing conditions." 411 U.S. at 43.

See also Frankfurter, J., concurring, in *Sweezy v. New Hampshire,* 354 U.S. 234, 263 (1957) (quoting from a South African report):
"'. . . 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.'"

2. If use of racial criteria in a remedial context triggers an intermediate standard of review, the Davis program meets such a standard.

The authorities cited previously in this brief demonstrate that remedial racial criteria, as employed in the Davis program, are to be judged by the traditional equal-protection standard. However, intermediate standards have begun to appear in recent years, as in the gender classification cases. *E.g., Craig v. Boren,* 97 S.Ct. 451, 457 (1976) (". . . [C]lassification by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.") The Court recently employed such a standard in upholding a gender classification intended to remedy the effects of economic discrimination against women. *Califano v. Webster,* 97 S.Ct. 1192 (1977) (Per curiam). Moreover, one member of the Court stated in *Williamsburgh* that there may be a "need for careful consideration of the operation of any racial device, even one cloaked in preferential garb." 97 S.Ct. at 1014 (Brennan, J., concurring).

The University acknowledges that the Davis program is not without costs to society. The existence of similar costs has prompted some courts to adopt an intermediate level of review. *See Alevy v. Downstate Medical Center, supra; Germann v. Kipp,* 14 Fair Empl. Prac. Cas. 1197. (W.D.Mo. 1977). These cases suggest that the state's use of racial criteria for remedial purposes must be well-justified, but is not suspect. Such cases recognize that "the mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying [the challenged] scheme." *Weinberger v. Wiesenfield,* 420 U.S. 636, 648 (1975). But the test employed in these cases does not lead, as does the standard of strict scrutiny, to a degree of judicial intervention wholly unwarranted by the concerns raised by programs like the one at Davis.

The University disputes the contention that an intermediate standard is necessary in the case of a program, like that at Davis, adopted by a responsible educational institution commissioned by the citizenry to make hard decisions on matters of educational policy traditionally reserved to the states. However, if an intermediate test is to be employed in this case, the Davis program plainly meets it. No one contends that the program has a disguised invidious purpose. Obviously the program does not arouse racial awareness for the purpose of harming discrete and insular minorities. See *Anderson v. Martin,* 375 U.S. 399 (1964). Nor is this an instance in which a discrete minority group is singled out to bear the brunt of some state program. Likewise this is not a case of a preference for minorities that serves no purpose whatsoever. See *McDonald v. Santa Fe Trail Transportation Co.,* 427 U.S. 273 (1976). To be sure there is here a greater arousal of racial awareness than there is, for example, in race-conscious census questions and statistics. See *Tancil v. Woolls,* 379 U.S. 19 (1964). But the degree of racial awareness prompted by the Davis program should not lead to invalidity, particularly when balanced against the significance of the benefits to be obtained.

The goals of the Davis program meet any standard of significance; they are compelling, perhaps as compelling as any ever presented to this Court. They are of a remedial nature, seeking to counter the effects of past discrimination; no question is raised as to that. The faculty concluded that the chosen means were effective, not only more effective than alternatives but the only effective means. The reasonableness of that judgment has been demonstrated thus far by the introduction of more than an isolated number of minorities into the medical school and by the orderly advance of those students through the curriculum. The pro-

gram has only begun. It is far too early to conclude that it has outlived its usefulness, and there is no basis for concluding that it will become a fixture beyond the point that the basis for its adoption disappears.[75] The program is of limited scope. The entire student body has scarcely been turned over to minorities; it cannot be said that whites have been denied an adequate representation. Whites continue, and will continue, to comprise by far the largest percentage of the student body. There may come a time when it would be appropriate for the Court to conclude that the program has been in place too long, assuming that it has not by then been altered or eliminated. Plainly, it would be totally premature to reach such a judgment at this stage.

Of principal importance, "the gain to be derived from the preferential policy outweighs its possible detrimental effects." *Alevy, supra,* 39 N.Y.2d at 336, 348 N.E. 2d at 545, 384 N.Y.S. 2d at 90. If permitted by the judiciary to continue, the program will make its contribution to the demolition of debilitating, pervasive, and unhealthy stereotypes about the role of minorities in medicine, as well as to the improvement of all physicians who experience the multi-racial education offered at Davis. If, as a society, we truly intend to permit those faculties that choose to do so to deal realistically with the task left unfinished in the years since *Brown,* such programs must be permitted to continue.

3. Measured against the standard of strict judicial scrutiny, the Davis program is constitutional.

The ends of the Davis program are among the most compelling imaginable in this country today, clearly sufficient to

75. See note 52, *supra.*

meet any criterion of the legitimacy and exigency of the state's interest. The means chosen are the most direct and best fitted to those ends. There are no other means more precisely tailored, or indeed of any kind, which will effectively serve the desired ends. The goal being to counteract the effects of past discrimination on the basis of race, the means are necessarily racially-conscious. Only such means can work; the only possibly effective "alternatives" (if indeed any can be conceived of) would be those which are plainly and obviously only a proxy for race. Thus, although both reason and authority call for a less rigid standard, the Davis program is valid even under the test of strict judicial scrutiny.

The court below found the Davis program invalid only by misconstruing the precedents of this Court. It cited as its leading authority *Dunn v. Blumstein,* 405 U.S. 330 (1972),[76] yet ignored both parts of this Court's statement in that case that

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76. The California court cited only three cases in support of its construction of the strict scrutiny standard: *Dunn v. Blumstein,* 405 U.S. 330, 342-43 (1972); *Loving v. Virginia,* 388 U.S. 1, 11 (1967); and *McLaughlin v. Florida,* 379 U.S. 184, 192-93 (1964). 18 C.3d at 49, 553 P.2d at 1162, 132 Cal.Rptr. at 690. *Dunn* is discussed in the text. The Court in *Loving,* as stated explicitly at the page cited, held the challenged statutes invalid because they were "measures designed to maintain White Supremacy," an objective entirely repugnant to the Constitution. *McLaughlin* held at the page cited that there was no rational relationship between the means employed in the criminal statute under attack and all but one of the purposes asserted by the state. As to that one end which the Court was willing to assume might not be invalid and as to which the challenged means might be related, the opinion at a later point went off on the ground that those means were not even claimed to be needed to advance that end—that the state had "offered no argument" that its policy could not be "as adequately served" by other, existing legislation already on its books. 379 U.S. at 196. The ends sought by the Davis program are surely permissible constitutionally, and the University has maintained throughout this case that those ends were not being adequately served at all by the preexisting admissions program—let alone "as adequately" as by the program under attack.

> "[b]y requiring classifications to be tailored to their purpose, we do not secretly require the impossible." *Id.* at 360.

The California court did not require "classifications to be tailored to their purpose" but rather the contrary, holding that the means most fitted to the ends were *ipso facto* the most invalid, and it did "secretly require the impossible." It brought this about by formulating and imposing as a requirement for sustaining the Davis program that the University demonstrate that no means, however indirect and loosely fitted, which the California court might, at the appellate level, imagine could conceivably serve to advance in any degree the desired objectives. This is literally the impossible requirement of proving a universal negative. It is to say that the state may recognize compelling ends, but it may not vindicate them. When this Court has looked to the availability of alternative means as a way of assessing the real need for a challenged measure, it has focused upon other existing legislation (often that already in effect in the very state), *e.g., Dunn v. Blumstein,* 405 U.S. at 346-47, 348-49, 353-54; *McLaughlin v. Florida,* 379 U.S. 184, 196 (1964); *In re Griffiths,* 413 U.S. 717, 725-27 (1973), or upon common sense alternatives readily perceivable as better-fitted means to the same ends, *e.g., Dunn v. Blumstein,* 405 U.S. at 348, 351-52; *Lubin v. Panish,* 415 U.S. 709, 718-19 (1974); *Sugarman v. Dougall,* 413 U.S. 634, 645-46 (1973); *Shelton v. Tucker,* 364 U.S. 479, 487-90 (1960). Moreover, when the necessity for and the operation of challenged legislative means was not readily perceivable, this Court has proceeded not by speculation but by careful inquiry including, where appropriate, remand for further hearing at the trial level.

Storer v. Brown, 415 U.S. 724, 738-44 (1974). The California court recognized no such bounds, as demonstrated by its reliance on the "clearly fanciful speculation" (Tobriner, J., dissenting, 18 C.3d at 90) that building more medical schools could be a feasible and effective means to achieve the desired ends. Without such bounds, with its range of hypotheticals unlimited even by fidelity to realism, that court was both theoretically and practically imposing a condition impossible of fulfillment.

When this Court, applying the test of strict scrutiny, has examined the relationship of means to ends, it has (as stated in the quotation from *Dunn v. Blumstein, supra,* and in a host of other cases) looked for the closest fit between the means chosen and the objectives sought by the state: the more the means are precisely tailored to the accepted ends, the greater their validity. The court below totally inverted this approach. It proceeded from the remarkable proposition that the means most precisely fitted to the state's ends were presumptively—or, more accurately, *per se*—invalid. It declared that other, indirect and less fitted means (assuming they exist) were to be preferred so long as they might in any degree advance the stated objectives.

In fact, what the California court did was not to examine means at all, but to substitute ends of its choice for those selected by the medical school. The point can perhaps be made most clearly by illustration. It is conceivable that the ends sought by the Davis program might be furthered in some degree by giving a preference on admission to veterans who saw combat in Vietnam, to persons who grew up in families headed by a female who had not graduated from high school, or to applicants who score below a certain level on the MCAT; indeed, it is entirely possible that each of these categories might contain a higher proportion of minorities than the category espoused by the court below,

the economically disadvantaged.[77] Yet it seems beyond belief that the California court would hold that the University had to accept a program based on any of these as a preferred alternative to the Davis program. What must distinguish these hypothetical examples is that the California court approves of a medical faculty seeking to bring the economically disadvantaged into the mainstream of its school and the profession, but not those defined by the other referents —*i.e.*, that it is choosing the ends which the medical school can pursue.

The court below thus denied the Davis faculty the right to pursue the ends of its choice except to the extent that those ends might conceivably be served indirectly by a program designed to forward goals selected by the court. Even aside from the resort to hypocrisy which this holding would force upon the medical school if it elected to follow the route thus laid out for it, the approach of the California court represents a degree of judicial interventionism in the name of the federal Constitution far beyond any sanctioned by the decisions of this Court. It involves not only a judicial definition of acceptable ends, but an unparalleled judicial scrutiny of means with the requirement that judicially endorsed means be employed even though the judiciary concedes that they may not work. Disregarding the judgment of the Davis faculty that the means it selected were essential, as well as all other reasons for realizing that no other means can be effective, the court below also ignored this Court's admonition that "the Con-

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77. For example, families with children under 18 headed by a female who was not a high school graduate were, according to the 1970 census, 60% white and 40% minorities (11% were of Spanish origin). U.S. Bureau of the Census, Department of Commerce, Pub. No. PC(2)-4A, UNITED STATES CENSUS OF POPULATION: 1970, *Family Composition*, pp. 103-105. Compare the data on the economically disadvantaged, note 46, *supra*, and on all households headed by a non-high school graduate, note 49, *supra*.

stitution does not require the State to choose ineffectual means to achieve its aims." *Storer v. Brown,* 415 U.S. 724, 736 (1974).

Ultimately, what the court below did was to hold the use of racial criteria invalid *per se.* This Court has consistently rejected such a position, even where the race-conscious measure under attack reflected hostile discrimination against a racial minority. *E.g., McLaughlin v. Florida,* 379 U.S. at 191-93. In the final analysis, the California court has refused to recognize the legitimacy, let alone the truly compelling nature, of the goal of counteracting the effects of past color discrimination. This again is inconsistent with the decisions of this Court. *E.g., Swann v. Charlotte-Mecklenburg Board of Education, supra; United Jewish Organizations of Williamsburgh v. Carey, supra; cf. Califano v. Webster, supra; Morton v. Mancari, supra.*

The Davis program meets the most rigorous strict scrutiny that can be found in this Court's cases, and thus reversal is required on the basis of those cases alone. But there is yet another reason why reversal must follow if such scrutiny is to be applied to this case. That reason appears in a more recent line of authority. This Court has rarely confronted in any area a compelling state interest of sufficient magnitude to require precise definition of the necessary-means element of the strict scrutiny standard. That situation has arisen in recent years in the context of various state rules restricting candidates' access to the ballot. These have been challenged as infringing upon associational and voting rights under the First and Fourteenth Amendments, as well as upon the right to equal protection of the laws. The importance of the state's objectives in protecting the integrity of the electoral process was (as is the state interest in this case) hardly open to

question. The constitutional interests alleged to be invaded by the state's measures were (far more than in the present case) also clearly undeniable. Addressing the definition of strict scrutiny in that context, this Court held that state-chosen means are valid, despite competing fundamental constitutional claims, if they are measures "reasonably taken in pursuit of vital state objectives that cannot be served equally well in significantly less burdensome ways." *American Party of Texas v. White,* 415 U.S. 767, 781 (1974). Essentially similar formulations were applied in *Storer v. Brown,* 415 U.S. 724, 729, 736 (1974); *Lubin v. Panish,* 415 U.S. 709, 716-19 (1974); *Bullock v. Carter,* 405 U.S. 134, 144, 147-49 (1972).

The ballot-access cases share with the present case the fundamental quality that the objectives advanced by the state as the proximate cause and justification of the measures under attack are unquestionably of the highest order of importance. From this aspect, the learning of *American Party* and the other cases in its line as to the meaning of "necessary" within the strict scrutiny standard, and the proper relevance thereto of possible "alternative" means, governs in the present case. The validity of the Davis program under the standard of those cases surely needs no further elaboration.

Under any standard of strict scrutiny which does not require the impossible, the Davis program is valid. Its goals represent a compelling state interest of the highest magnitude. Its means are precisely tailored to those goals and are essential for their achievement. No other means exist, except ineffectual ones. Unless mere invocation of the standard is to be automatically "fatal in fact,"[78] a con-

78. Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,* 86 HARV. L.REV. 1, 8 (1972).

clusion which this Court has explicitly rejected, the Davis program meets the requirements of strict scrutiny.

CONCLUSION

To invalidate the voluntary, remedial program at issue would be to elevate formal notions of equality at the cost of real inequality. It would be to repeat the mistake of *Lochner v. New York*, 198 U.S. 45 (1905).

> "Equal protection, not color-blindness, is the constitutional mandate, and the experience with liberty of contract should caution against an absolute legal criterion that ignores practical realities. Measures to correct racial imbalance are like those to correct an imbalance in the bargaining position of labor. At least as transitional measures they may serve to promote, not to deny, the equal protection of the laws. Of course, the conclusion is reached more easily if the state itself has contributed to the present disadvantage by past discrimination; but in any case a disadvantage which exists on racial grounds should be correctible by favored treatment. This the state may do, but need not; it rests in the realm of allowable policy. . . ." Freund, *Constitutional Dilemmas*, 45 B.U.L.Rev. 13, 20 (1965).

The University does not contend that all professional schools must employ special-admissions programs or that all such programs must resemble the Davis program. Rather, the University submits that the Equal Protection Clause does not prohibit those professional schools that voluntarily choose to do so from adopting such programs, that the correct result is to permit educators, in the exercise of the discretion lodged in them, to select from a broad range of admissions criteria. An affirmance in this case would not only sacrifice this essential discretion to an arid

formula, it would also stand as one of those rare but tragic instances in which the judiciary has contributed to the continued subordination of racial minorities. *E.g., Berea College v. Kentucky*, 211 U.S. 45 (1908).

For these and the other reasons set forth in this brief, the judgment of the court below should be reversed.

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