IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-811

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,

Petitioner,

—v.—

ALLAN BAKKE,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF CALIFORNIA

BRIEF OF THE SOCIETY OF AMERICAN LAW TEACHERS, *AMICUS CURIAE*

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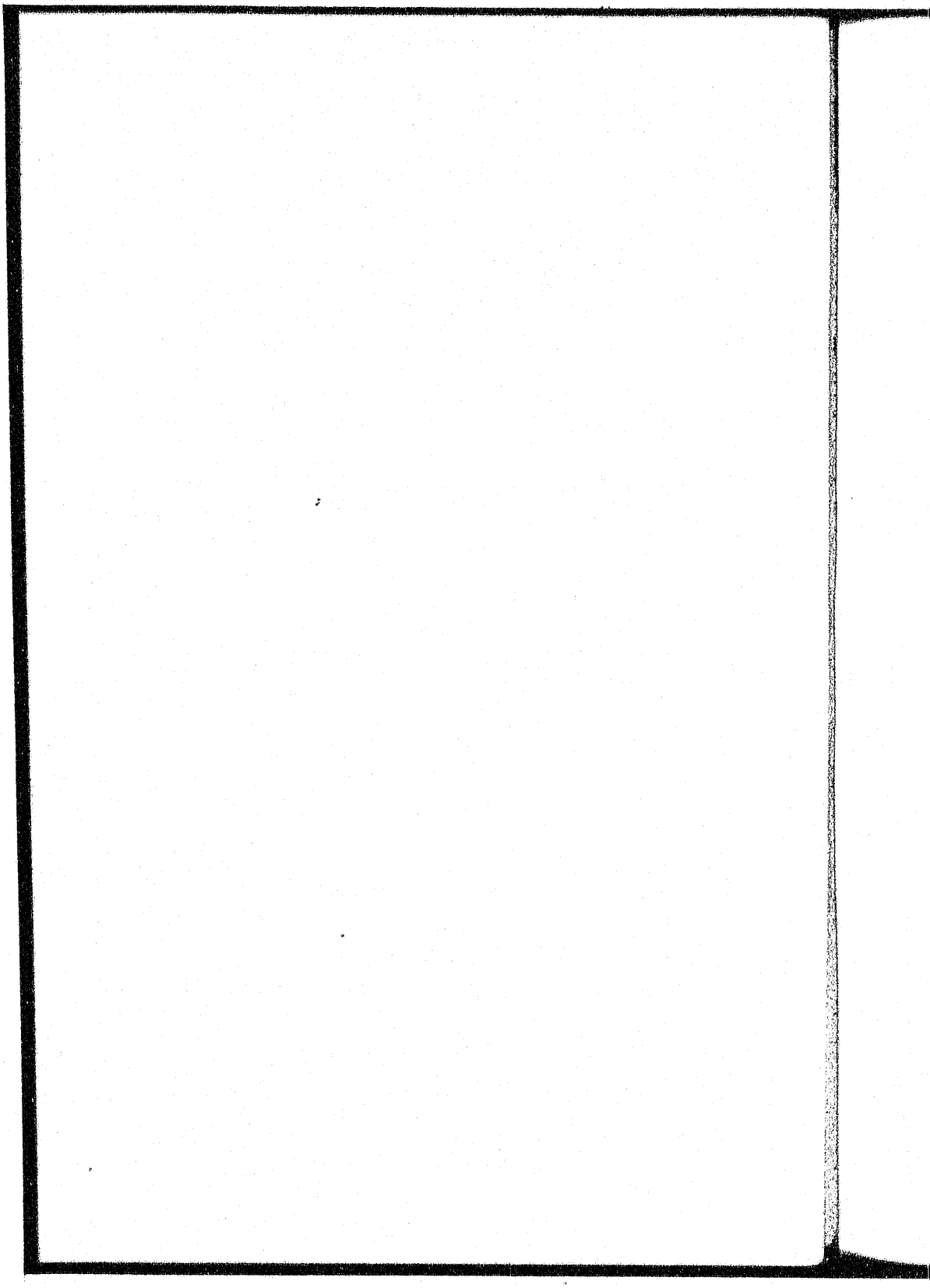

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Interest of the Amicus Curiae*

The Society of American Law Teachers is a professional organization, formed in 1973, of approximately 500 professors of

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* Letters of consent from all parties to the filing of this brief have been lodged with the Clerk of the Court.

law at more than 120 law schools in the United States. Among its stated purposes is the encouragement of fuller access of racial minorities to the legal profession, and since its inception the Society has been active in supporting the adoption and maintenance of special minority admissions programs at American law schools. Its position is that special minority admissions programs are fully consistent with the requirements of the Constitution. It has filed an amicus curiae brief in support of the constitutionality of the special minority admissions program of the medical school of the University of California at Davis when the present case was before the Supreme Court of California.

Special minority admissions programs are widespread in American law schools today. While the scope and objectives of special minority admission programs vary somewhat among law schools, and while such programs may differ somewhat between law schools and medical schools, law school and medical school programs are sufficiently similar that this Court's decision with respect to one will have a direct impact on the other as well. The efforts of American law schools to alleviate the serious shortage of lawyers who are members of racial minorities will be placed in grave jeopardy if this Court invalidates the special minority admissions program of the medical school of the University of California at Davis.

For these reasons, the Society of American Law Teachers files this brief urging this Court to reverse the decision of the Supreme Court of California and to

uphold the constitutionality of the medical school's special minority admissions program.

ARGUMENT

Introduction and Summary

The central issue in this case is whether the Constitution prohibits a state university from making limited use of racial criteria in determining admission to its professional schools. In an effort to alleviate the serious shortage of racial minorities in the medical profession, the medical school of the University of California at Davis has taken racial criteria into account in determining the admission of a limited number of applicants to its entering classes. This limited use of racial criteria resulted in the admission of 16 minority applicants to the 100 places available in the entering class of 1974. The specially-admitted applicants had lower numerical ratings than some of the non-minority applicants who were not admitted, but all of the special admittees were considered by the admitting officials to be fully qualified for admission and to be fully capable of completing the course of study leading to the doctor of medicine degree. Such limited use of racial criteria in determining admission to the number of places available in medical and law schools today is absolutely necessary in order to alleviate the serious shortage of racial minorities in the medical and legal professions, given the realities of the admissions situation, and its interaction with the cumulative effects of past discrimination against racial minorities.

The medical school faculty made the determination that the limited use of racial

criteria was the only feasible way by which the admission of a reasonable number of minority applicants could be secured. (Tr. 67-68). The same determination has been made by other medical schools and by law schools throughout the country, and it is very realistic. See generally Morris, Constitutional Alternatives to Racial Preference in Higher Education Admissions, 17 Santa Clara L. Rev. 279 (1977). The purpose in attempting to secure the admission of a reasonable number of minority applicants to medical schools and law schools is to make a start in alleviating the serious shortage of minority physicans and lawyers in the United States today. That such a shortage exists admits of no dispute. Although the black population of the United States is over 11%, 1975 Statistical Abstract, table 26, only slightly over 2% of all physicians and under 2% of all lawyers are black, and among other racial-ethnic minorities, such as Chicanos, Puerto Ricans, and Native-Americans, the shortage is even more extreme. See generally the discussion in O'Neill, Racial Preference and Higher Education: The Larger Context, 60 Va. L. Rev. 925, 943-944 (1974).

It is the position of the amicus that, at this time in our Nation's history, the Constitution does not prohibit a state university from making limited, non-invidious use of racial criteria in determining admission to its professional schools, when it reasonably concludes that this is the only feasible way by which the admission of a reasonable number of minority applicants can be secured and a start toward eliminating the serious shortage of minority physicians and lawyers can at last be made.

1. The Constitution does not prohibit the limited use of racial criteria by a state. What the Constitution prohibits is the practicing of invidious racial discrimination. The limited use of racial criteria by a state university in determining admission to its professional schools does not constitute invid' 's discrimination, because it advances a valid state interest relating to achieving full equality for racial minorities in American society. In most circumstances the use of racial criteria does result in a finding of invidious racial discrimination because race ordinarily is "irrelevant to any constitutionally acceptable legislative purpose," McLaughlin v. Florida, 379 U.S. 184, 192 (1964), so that the use of racial criteria is not "necessary to the accomplishment of some permissible state objective independent of the racial discrimination that it was the object of the Fourteenth Amendment to eliminate." Loving v. Virginia, 388 U.S. 1, 11 (1967). By the same token, however, the use of racial criteria is not unconstitutional where it does not amount to invidious racial discrimination, such as where it serves a racially neutral purpose, Tancil v. Wools, 379 U.S. 19 (1964), or where it is related to eliminating the consequences of past discrimination, Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971), or where it is related to advancing a valid state interest, such as achieving full equality for racial minorities in the political process. United Jewish Organizations of Williamsburgh v. Carey, _____ U.S. _____, 97 S.Ct. 996 (1977). Since the limited and non-stigmatizing use of racial criteria in the medical school's special admissions program was de-

signed to advance the valid state interest in alleviating the serious shortage of minority physicians, it does not constitute invidious racial discrimination and is not as such unconstitutional.

The California Supreme Court erred in determining the constitutionality of the special admissions program under the "compelling state interest" test. The proper test for determining the constitutionality of the use of racial criteria is the test of invidious racial discrimination, as set forth in the applicable decisions of this Court. In applying the test of invidious racial discrimination, this Court has never found it necessary to distinguish between "compelling" and "legitimate" state objectives, nor to consider whether such objectives could be achieved by "less drastic means." It has instead consistently invalidated the use of racial criteria directed against racial minorities, because it has found that such use was not remotely "necessary to the accomplishment of some permissible state objective independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate." Loving v. Virginia, supra. In this connection, it should be noted that invidious racial discrimination in favor of racial minorities is just as unconstitutional as invidious racial discrimination against racial minorities, and that what the Constitution prohibits is all invidious racial discrimination, whether it be practiced by the state at the instance of whites or whether it be practiced by the state at the instance of racial minorities, and whether the victims are racial minorities

or whites, or both. Cf. Castenda v. Partida, ____ U.S. ____, 97 S.Ct. 1272 (1977). What the Constitution does not prohibit, as indicated above, is the limited non-stigmatizing use of racial criteria where this use is reasonably related to advancing a valid state interest, United Jewish Organizations of Williamsburgh v. Carey, supra, such as alleviating the serious shortage of minority physicians. Regardless of the continued vitality of the "compelling state interest" test and the "two-tier" approach that it embodies in other areas, it simply has no application to the present case. The question here is whether the use of racial criteria in the medical school's special admissions program constitutes invidious racial discrimination, and under the standards that this Court has promulgated to determine that question, it clearly does not.

2. The limited use of racial criteria in the medical school's special admissions program is not violative of the Fourteenth Amendment, because (a) the medical school could reasonably conclude that the use of such criteria was the only way by which the admission of a reasonable number of minority applicants could be secured, and (b) the effect of the program is not to exclude white applicants as a group, but only some individual white applicants who could have been excluded in any event if there had been any departure from strict reliance on comparative objective indicator scores. The necessity for this limited use of racial criteria, related to advancing the valid state interest in alleviating the serious shortage of minority physicians, results both from the excess of qualified applicants of all races over the

limited number of available places, which in practice has required that great reliance be put on comparative objective indicator scores to determine admission, and from the position of minority applicants as a group relative to white applicants as a group in regard to comparative objective indicator scores.

Admission to medical schools and law schools today necessarily results in the exclusion of a large number of qualified applicants, and most institutions have concluded that the only realistic way to draw the line as to who will be admitted and who will be excluded is to rely heavily on comparative objective indicator scores. Because racial minorities as a group in this country have received substantially less benefit from primary and secondary education than have whites as a group - as a result of the racially segregated nature of public education in this country coupled with the substantially higher incidence of poverty among racial minorities as a group - determining admission solely on the basis of comparative objective indicator scores will result in the substantial exclusion of racial minorities from the limited number of available places in medical schools and law schools today. Cognizant of the effects of historic patterns of discrimination, in order to secure the admission of a reasonable number of minority applicants and to make at least a start toward alleviating the serious shortage of minority physicians and lawyers, medical schools and law schools throughout the country have taken race into account in the admission process, resulting in the admission of a

reasonable number - here 16 out of the 100 students to the 1974 entering class - of fully qualified minority applicants.

The existence of the special admissions program here presumably resulted in the exclusion of some white applicants - of whom the respondent Bakke may or may not have been one - who might have been admitted if the program had not been in effect. In this sense these white applicants may be considered to have suffered "detriment" from the existence of the program, but the same "detriment" would have been suffered if the medical school had made any number of departures from strict reliance on comparative objective indicator scores, as the California Supreme Court clearly recognized that it could do. 553 P.2d at 1166. There is no reason why a different result should obtain because it departed from strict reliance on comparative objective indicator scores and took race into account, when it concluded that this was the only way that the admission of a reasonable number of minority applicants could be secured, and when the practice does not discriminate against white applicants as a group.

The use of racial criteria in the medical school's special admissions program is directly related to advancing the value of black freedom, embodied in the Fourteenth Amendment and in the Wartime Amendments, taken as a whole. See e.g., Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968); Runyon v. McCrary, 427 U.S. 160 (1976). Insofar as this may have resulted in a departure from complete racial neutrality, the use of racial criteria was limited and designed to strike

a reasonable accommodation between competing group and individual interests, and between the Fourteenth Amendment value of black freedom and the Fourteenth Amendment value of racial neutrality. If the Fourteenth Amendment does not "mandate any per se rule against using racial factors in districting and apportionment," United Jewish Organizations of Williamsburgh v. Carey, _____ U.S. _____, 97 S.Ct. 996, 1007 (1977), the amicus respectfully submits that it does not mandate any per se rule against the limited use of racial criteria in determining admission to professional school either, and that where, as here, such use was designed only to secure the admission of a reasonable number of minority applicants, and thus to strike a reasonable accommodation between competing interests and constitutional values, it is fully constitutional.

3. Even if the constitutionality of the special admissions program must be determined under the "compelling state interest" test, the California Supreme Court erred in concluding, particularly on the state of the record in this case, that the racial objectives which is assumed to be "compelling" could be advanced by "less drastic means." The chairman of the medical school's admissions committee and the associate dean of the medical school testified that "in the judgment of the faculty of the Davis medical school, the special admissions program is the only method whereby the school can produce a diverse student body." (Tr. 67-68). This testimony established prima facie that non-racial alternatives realistically were not available or efficacious, and shifted the burden of proof on the issue of "less

drastic means" to Bakke. Since he introduced no evidence whatsoever on this score, he failed to carry his burden of proof on the constitutional issue, and the Court was required to uphold the constitutionality of the medical school's special admissions program. Cf. Village of Arlington Heights v. Metropolitan Housing Development Corp., _____ U.S. _____, 97 S.Ct. 555 (1977).

I.

THE CONSTITUTION DOES NOT PROHIBIT A STATE UNIVERSITY FROM USING RACIAL CRITERIA TO A LIMITED DEGREE IN DETERMINING ADMISSION TO ITS PROFESSIONAL SCHOOLS, WHERE THIS IS DONE FOR THE PURPOSE OF ALLEVIATING THE SERIOUS SHORTAGE OF MINORITY PHYSICIANS AND LAWYERS RESULTING FROM THE CUMULATIVE EFFECTS OF SOCIETAL RACIAL DISCRIMINATION.*

A.

What the Constitution Prohibits is Not the Use of Racial Criteria by a State, but the Practicing of Invidious Racial Discrimination, and the Limited Use of Racial Criteria by a State University in Determining Admission to its Professional Schools Does Not Constitute Invidious Discrimination, Because it Advances a Valid State Interest Relating to Achieving Full Equality for Racial Minorities in American Society.

This Court has held repeatedly, most recently in United Jewish Organizations of Williamsburgh v. Carey, _____ U.S. _____, 97

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* Many of the points in Parts I and II of the Argument are discussed more fully in Sedler, Racial Preference, Reality and the Constitution, 17 Santa Clara L. Rev. 329 (1977).

S.Ct. 996 (1977), that racial criteria may be used by the state where such use is reasonably related to the advancement of a valid state interest. What the Constitution prohibits is not any use of racial criteria or any consideration of race, see e.g., Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971), Tancil v. Wools, 379 U.S. 19 (1964), but invidious racial discrimination. In most circumstances the use of racial criteria will result in invidious racial discrimination, because ordinarily race is "irrelevant to any constitutionally acceptable legislative purpose," McLaughlin v. Florida, 379 U.S. 184, 192 (1964), so that the use of racial criteria is not "necessary to the accomplishment of some permissible state objective independent of the racial discrimination that it was the object of the Fourteenth Amendment to eliminate." Loving v. Virginia, 388 U.S. 1, 11 (1967). See also Anderson v. Martin, 375 U.S. 399 (1964).

By the same token, however, in those limited circumstances where the use of racial criteria serves a racially neutral purpose, as in Tancil, or relates to eliminating the present consequences of past discrimination, as in Swann, or relates to advancing what this Court has found to constitute a valid state interest, as in United Jewish Organizations, such use does not amount to invidious racial discrimination and is not prohibited as such by the Constitution.

The limited, non-stigmatizing use of racial criteria by the Davis medical school in its special admissions program is directly related to advancing the valid state interest in alleviating the serious shortage of minority

physicians, and similarly, the limited use of racial criteria by law schools in their special admissions programs is directly related to alleviating the serious shortage of minority lawyers. The importance of this value, of the "promise of freedom" in the Wartime Amendments has been consistently recognized by this Court. Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968); Runyon v. McCrary, 427 U.S. 160 (1976); Fitzpatrick v. Bitzer, 427 U.S. 445 (1976); United Jewish Organizations of Williamsburgh v. Carey, supra.[1] When the state acts to alleviate the serious shortage of minority physicians and lawyers, it is acting to make the "promise of freedom" a reality for blacks and for other racial-ethnic minorities, such as Chicanos, Puerto Ricans and Native-Americans, who like blacks, have been subject to extreme victimization and discrimination solely because of the

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1. As one commentator has noted: "[T]he main thrust of the Thirteenth, Fourteenth and Fifteenth Amendments was the construction of a penumbra of legal commands which were designed to raise the race of freedmen from the status of inferior beings - a status imposed by the system of chattel slavery - to that of free men and women, equal participants in the hitherto white political community consisting of the 'people of the United States.'" Kinoy, The Constitutional Right of Negro Freedom, 21 Rutgers L. Rev. 387, 388 (1967).

color of their skin.[2] Its use of racial criteria for this purpose, therefore, advances a valid state interest. Since this is so, the use of racial criteria does not amount to invidious racial discrimination and is not as such unconstitutional. While the existence of the special admissions program, based on this limited use of racial criteria, may result in the exclusion of some white applicants who might have been admitted if the program had not been in effect, this alone does not render it unconstitutional, since as will be demonstrated subsequently, the use of racial criteria by the Davis medical school in its special admissions program is limited and clearly reasonable in the circumstances presented. The point to be emphasized at this juncture is that where the use of racial criteria is directly related to the advancement of a valid state interest, such use does not amount to invidious racial discrimination and is not as such unconstitutional.

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2. For present purposes, since other racial-ethnic minorities are included in the medical school's special admissions program, it is sufficient to note that the medical school could reasonably conclude that since these minorities are "non-white" and have suffered the same kind of victimization and discrimination as blacks, the needs and value of the special admissions program apply equally to them.

B.

The Proper Test for Determining the Constitutionality of the Use of Racial Criteria in Special Admissions Programs is the Test of Invidious Racial Discrimination Rather than the Test of "Compelling State Interest."

The California Supreme Court did not approach the question of the constitutionality of the limited use of racial criteria in the medical school's special admissions program with reference to whether such use amounted to invidious racial discrimination. Instead it focused on what it saw to be the racial classification involved in the special admissions program and held that as a result, the program's constitutionality had to be sustained under the very exacting "compelling state interest" test. Although it assumed that the state's interests in alleviating the serious shortage of minority physicians and in integrating the medical school were "compelling," it held that the racial classification was unconstitutional on the ground - although there was no evidence in the record whatsoever on this point - that those interests might be advanced, even if not as effectively, by what it saw as "non-racial alternatives." Thus, the program was held to be unconstitutional because it failed to satisfy the "less drastic means" aspect of the "compelling state interest" test.

While, as will be demonstrated in Part III of the Argument, the court's "armchair speculation" as to the availability and efficacy of non-racial alternatives to advance

the assumedly "compelling" racial objective was completely unwarranted on the state of the record in this case, its invalidation of the program under the "compelling state interest" test could be anticipated once it held that this "seemingly insurmountable standard," Dunn v. Blumstein, 405 U.S. 330, 363-364 (1972) (Burger, C.J., dissenting) had to be hurdled. Particularly when a court engages in "armchair speculation" as to available alternatives, it will nearly always be possible to find that alternative means would, to some extent, accomplish the assumedly "compelling" objective, although perhaps not as effectively as the means that were chosen. Invocation of the "compelling state interest" test then frequently becomes result dispositive. See, e.g. San Antonio Independent School District v. Rodriquez, 411 U.S. 1 (1973). This may explain why in recent years this Court has been reluctant to create any new "suspect classifications," or "fundamental rights." See e.g., Stanton v. Stanton, 421 U.S. 7 (1975); Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976); San Antonio Independent School District v. Rodriques, supra; Lindsey v. Normet, 405 U.S. 56 (1972). It may also well be that this Court is moving away from the "two-tier" approach to equal protection and due process questions in favor of a "sliding scale" standard of review. See e.g., Weber v. Aetna Casualty & Surely Co., 406 U.S. 164, 172-173 (1972); Vlandis v. Kline, 412 U.S. 441, 456 (1973) (White, J., concurring); San Antonio Independent School District v. Rodriquez, supra, at 98-99 (Marshall, J., dissenting).

Regardless of the continued vitality

of the "two-tier" approach in other areas, it simply has no application to the present case. When dealing with the permissible use of racial criteria, this Court has not purported to test the racial classification involved in such use against the "compelling state interest" standard, but has focused on the question of whether, in the circumstances presented, the use of racial criteria itself amounted to invidious racial discrimination. The unsoundness of analyzing the validity of a racial classification as such for constitutional purposes stems both from the fact that in most circumstances race is indeed "irrelevant to any constitutionally acceptable legislative purpose," McLaughlin v. Florida, 379 U.S. 184, 192 (1964), and from the fact that in American society, classification by race "is one which usually, to our national shame, has been drawn for the purpose of maintaining racial inequality." Norwalk CORE v. Norwalk Development Agency, 395 F.2d 920, 931-932 (2d Cir. 1968). Applying the test of invidious racial discrimination, this Court has consistently invalidated the use of racial criteria directed against racial minorities, because it has found that such use was not remotely "necessary to the accomplishment of some permissible state objective independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate." Loving v. Virginia, 388 U.S. 1, 11 (1967). The use of racial criteria, therefore, amounted to invidious racial discrimination and was unconstitutional. It is this purposeless and invidious racial discrimination, then, this discrimination for discrimination's sake, that this Court has consistently invalidated. See e.g., Gomillion v.

Lightfoot, 364 U.S. 339 (1960); McLaughlin v. Florida, supra; Anderson v. Martin, 375 U.S. 399 (1964); Loving v. Virginia, supra; Hunter v. Erickson, 393 U.S. 385 (1969).

At the same time, recognizing the significance of race in American society and the history of discrimination and victimization against racial minorities, this Court has sustained the use of racial criteria when it was shown to be non-discriminatory and to serve a racially neutral purpose, Tancil v. Wools, 379 U.S. 19 (1964), when it was shown to be related to eliminating the consequences of past discrimination, Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971), and when it was shown to be related to the advancement of a valid state interest, such as insuring the full participation of racial minorities in the political process. United Jewish Organizations of Williamsburgh v. Carey, _____ U.S. _____, 97 S.Ct. 996 (1977).

It should be noted in this regard that invidious racial discrimination in favor of racial minorities is just as unconstitutional as invidious racial discrimination against racial minorities. If, for example, in a city where blacks predominate, an ordinance were passed reserving all public facilities for the exclusive use of blacks, that ordinance would be patently unconstitutional, cf. New Orleans City Park Improvement Association v. Detiege, 358 U.S. 54 (1958), because it serves no purpose "independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate." McLaughlin v. Florida, supra. The Constitution prohibits all invidious racial discrimination, whether it be practiced

by the state at the instance of whites or whether it be practiced by the state at the instance of racial minorities, and whether the victims are racial minorities or whites, or both. Cf. Castaneda v. Partida, _____ U.S. _____, 97 S.Ct. 1272 (1977).

What the Constitution does not prohibit is the use of racial criteria in certain circumstances, necessarily few in number, where such use advances a valid state interest. And one of these circumstances most clearly is where the limited use of racial criteria is necessary to overcome the present consequences of a history of discrimination directed against racial minorities, consequences that are reflected both in a serious shortage of minority physicians and lawyers, and in the unlikelihood, given the realities of the admissions situation interacting with those consequences, that a reasonable number of minority applicants will be admitted to professional schools today if race is not taken into account.

In the view of the California Supreme Court, this Court supposedly adopted the "compelling state interest" test to determine the constitutionality of the use of racial criteria, at least in recent times,[3]

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3. In Hirabayashi v. United States, 320 U.S. 81 (1943), and Korematsu v. United States, 323 U.S. 214 (1944), this Court was not dealing with a racial classification, but a classification based on national origin from a country with which the United States was at war. While it is highly doubtful whether those decisions would be followed (con't.)

in McLaughlin v. Florida, supra, and Loving v. Virginia, supra. Although in those cases this Court did refer to racial classifications as being "constitutionally suspect and subject to the most rigid scrutiny," see e.g., McLaughlin at 192, it did so in the context of noting that race was "in most circumstances irrelevant to any constitutionally acceptable legislative purpose." Id. In neither case did this Court find it necessary to distinguish between "compelling" and "legitimate" state objectives, nor did it find it necessary to consider whether such objectives could be achieved by "less drastic means." In neither case was the state able to suggest any conceivable valid legislative purpose that was advanced by the use of racial criteria, so that as this Court noted in McLaughlin, the use of racial criteria was "reduced to an invidious discrimination forbidden by the Equal Protection clause," Id. at 192-193, and as it noted in Loving, "There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification." 388 U.S. at 11. The irrelevancy of

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today, they did not involve the question of what constitutes invidious racial discrimination and certainly furnish no warrant for maintaining that the constitutionality of the use of racial criteria must be tested against the "compelling state interest" standard. See the discussion of this point in Sedler, Racial Preference, Reality and the Constitution, 17 Santa Clara L. Rev. 329, 368-370 (1977).

the "two-tier" approach when dealing with the constitutionality of the use of racial criteria is further demonstrated by Bolling v. Sharpe, 347 U.S. 497 (1954), where this Court, applying the supposedly less restrictive "rational basis" test, noted simply that no legitimate purpose was served by racial segregation in the schools, and by Anderson v. Martin, supra, where it again simply noted that there was "no relevance in the State's pointing up the race of the candidate as bearing upon his qualifications for office." 375 U.S. at 403.

The point to be emphasized is that since in most circumstances, race is "irrelevant to any constitutionally acceptable legislative purpose," McLaughlin at 192, the "compelling state interest" test is of no utility in determining the constitutionality of the use of racial criteria. In most circumstances, the use of racial criteria simply cannot advance any valid state interest, so that such use is invidious and hence unconstitutional. At the same time, given the significance of race in American society and the history of discrimination and victimization against racial minorities, the consequences of which are being felt most cogently today, in certain limited circumstances, the use of racial criteria, particularly when directed toward overcoming the consequences of past discrimination and victimization against racial minorities as a group, may advance a valid state interest, so that it does not amount to invidious racial discrimination and is not as such proscribed by the Constitution. United Jewish Organizations of Williamsburgh v. Carey, supra; Swann v. Charlotte-Mecklenburg Board of Education, supra.

The California Supreme Court committed serious constitutional error in failing to approach the question of the constitutionality of the limited use of racial criteria in the medical school's special admissions program with reference to the standards promulgated by this Court to determine what constitutes invidious racial discrimination. As a result, it struck down that program, the constitutionality of which, as will be demonstrated more fully in Part II of the Argument, clearly can be sustained under those standards.

II.

THE LIMITED USE OF RACIAL CRITERIA IN THE DAVIS MEDICAL SCHOOL'S SPECIAL ADMISSIONS PROGRAM IS NOT VIOLATIVE OF THE FOURTEENTH AMENDMENT.

A.

The Medical School Could Reasonably Conclude that Without this Limited Use of Racial Criteria, the Normal Workings of the Admissions Process, Interacting with the Cumulative Effects of Discrimination Against Racial Minorities as a Group, Would Result in the Substantial Exclusion of Minority Applicants and thus Perpetuate the Serious Shortage of Minority Physicians.

The primary justification for the limited use of racial criteria in determining admission to the Davis medical school and to medical schools and law schools throughout the country relates to the desire of these institutions to help alleviate the serious shortage of minority physicians and lawyers.[4]

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4. The admission of minority students under the special admissions program will also serve the objective of integrating the medical schools and the law schools. But since the objective of alleviating the serious shortage of minority physicians and lawyers will (con't.)

The necessity for such use in order to secure the admission of a reasonable number of minority applicants results both from the excess of qualified applicants of all races over the number of available places in medical schools and law schools today, which in practice has required that great reliance be put on comparative objective indicator scores to determine admission, and from the position of minority

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in effect incorporate, the integration objective, the latter objective does not require independent justification, and it is not necessary for this Court to consider in the present case whether the use of racial criteria for integration purposes in the context of special admissions programs is constitutionally permissible. Cf. Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971); Otero v. New York City Housing Authority, 484 F.2d 1122 (2d Cir. 1973).

The state's interest in alleviating the serious shortage of minority physicians and lawyers is not premised on the assumtion that only minority physicians and lawyers can serve minority patients and clients. Rather it is that minority persons should have a choice as individuals to follow their own preferences, and that in order to have that choice, there must be a substantial number of minority physicians and lawyers available. Moreover, in the past at least, white physicians and lawyers have shown no great disposition toward meeting the needs of racial minorities for medical and legal services.

applicants as a group relative to white applicants as a group in regard to comparative objective indicator scores.[5]

For many years the number of qualified applicants for admission to medical school has vastly exceeded the number of available places. In the present case, for example, there were 3737 applicants for 100 places in the medical school's 1974 entering class. 553 P.2d at 1155. In Alvey v. Downstate Medical Center, 39 N.Y.2d 326, 348 N.E.2d 537 (1976), where the constitutionality of the medical school's special admissions program was sustained, the medical school had 6300 applicants for 216 places. In the last decade or so, the same "admissions crush" has affected the law schools as well. In DeFunis v. Odegaard, 416 U.S. 312, 314 (1974), for example, the University of Washington law school had 1601 applications for 150 places. In 1973, it was estimated that despite the rather large number of law schools in this country, including some that are accredited only in a single state, there were two qualified applicants for every available law school place. See the

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5. Minority applicants as a group may be regarded as members of self-perpetuating racial underclasses. See Morris, Constitutional Alternatives to Racial Preferences in Higher Education Admissions, 17 Santa Clara L. Rev. 279 (1977).

discussion in Redish, Preferential Law School Admissions and the Equal Protection Clause: An Analysis of the Competing Arguments, 22 U.C.L.A. L. Rev. 343, 361, n. 85 (1974).

In order to make a choice that is both seemingly fair to the large number of qualified applicants and realistic in light of the resources available to the institutions, most medical schools and law schools have placed primary reliance on what may be called objective academic indicators, in particular, standarized aptitude tests such as the MCAT and LSAT, and undergraduate grade point averages, and admit those applicants who have the highest objective indicator scores in relation to each other. Making the choice on this basis is seemingly fair to the applicants, since the criteria of choice are "neutral," and is a matter of realistic necessity for most institutions, which do not have the resources to make what is in any event a very questionable determination of the "inherent ability" or "comparative merit" of each applicant, or to assess intangible factors such as motivation, personality, professional aptitude and the like.

These objective indicators can only predict - and it is a matter of some debate as to how effectively they actually do predict - comparative academic performance while in school. The LSAT, for example, is designed only to predict first year academic performance in law school, and primarily operates at the upper and lower levels: students who score relatively high on these tests are likely to perform at a relatively high level in law school, while those who score relatively low are likely to perform

relatively poorly in comparison with other students. See generally the discussion in Consalus, The Law School Admission Test and the Minority Student, 1970 U. Toledo L. Rev. 501. But all students having an LSAT score above a certain level are likely to complete successfully the program of instruction and to obtain their degree. Moreover, the law schools at least do not claim that there is necessarily any correlation between academic performance in law school and success as a lawyer, since law schools provide only academic training and do not attempt to teach the myriad of other skills that are necessary for success as a lawyer. See the discussions in Griswold, Some Observations on the DeFunis case, 75 Colum. L. Rev. 512, 515 (1975); Brief for the Association of American Law Schools as Amicus Curiae at 5-6, DeFunis v. Odegaard, 416 U.S. 312 (1974); Brief for the Law School Admissions Council as Amicus Curiae, id. at 10-11. It also appears that there may not be a strong correlation between academic performance in medical school and success as a physician either. See e.g., the discussion in Price, Taylor, Richards and Jacobsen, Measurement of Physician Performance, 39 J. Med. Educ. 203-210 (1964)

What all of this means is that the process of admission to medical schools and law schools today necessarily results in the exclusion of a large number of qualified applicants, at least some of whom might turn out to be more competent practitioners than those who actually are admitted. Given the excess of fully qualified applicants over the number of available places, the line has to be drawn somewhere, and most institutions have

decided that the most realistic way to draw the line is on the basis of comparative objective indicator scores.

However, as will be demonstrated below, because of the cumulative effects of racial discrimination and victimization on racial minorities as a group in American society, strict reliance on comparative objective indicator scores will result in the substantial exclusion of racial minorities from the limited number of available places in medical schools and law schools today and will perpetuate the serious shortage of minority physicians and lawyers. To their credit, the Davis medical school and medical schools and law schools throughout the country have forthrightly recognized the racial dimensions of the problem and have established special admissions programs that involve the limited use of racial criteria to secure the admission of a reasonable number of minority applicants.

It must be emphasized that the minority applicants who are admitted under the special admissions program are, in the opinion of the admitting authorities, fully qualified to complete the course of study, and in fact, the great majority of them do so. They are subject to the same standards of academic performance as the students admitted on the basis of comparative objective indicator scores, and are subject to the same state examination and licensing requirements. As a result of these special admissions programs, in recent years there has been some slight increase in the number of minority physicians and lawyers, and a

start toward alleviating the serious shortage of minority physicians and lawyers in this country has at last been made.

The reason why strict reliance on comparative objective indicator scores will result in the substantial exclusion of racial minorities from the limited number of available places in medical schools and law schools today relates to the cumulative effects of racial discrimination and victimization on racial minorities as a group in American society. Racial minorities as a group will perform less well in regard to objective academic indicators when compared to whites as a group because racial minorities as a group have received substantially less benefit from primary and secondary education in this country than have whites as a group. The fact that they have received substantially less benefit from primary and secondary education in comparison to whites results from the racially segregated nature of public education in this country, coupled with the substantially higher incidence of poverty among racial minorities as a group.

As regards racial minorities, segregation interacts with poverty to produce a condition of extreme educational deprivation in racially segregated schools. A much larger proportion of minority children than white children grow up in poverty - it is not necessary to set out at length the now all too familiar statistics showing the substantial income gap between racial minorities and whites in this country and the substantially higher incidence of real

poverty among racial minorities[6] - so that a racially segregated school is likely to be an "economically disadvantaged" school as well. Not only do children from "economically disadvantaged" homes as a group for obvious reasons start out with diminished educational opportunities in comparison with children from "economically advantaged" homes, but it is clear that the most significant school factor affecting academic achievement is the social class composition of the school. In a school in which "economically advantaged" children predominate, the level of academic achievement, among both "economically advantaged" and "economically disadvantaged" children, will be higher than in a school in which "economically disadvantaged" children predominate. See generally J. Coleman, et al., Equality of Educational Opportunity 298-304 (1966). While there is some evidence that racial segregation per se is an academic handicap to minority students, see e.g., 1 U.S. Comm. on Civil Rights, Racial Isolation in the Public Schools 81-91 (1967), this fact is of little real significance, since, given the class composition of the minority population, predominantly minority schools will usually be predominantly "economically disadvantaged" schools as well.

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6. Nearly 40% of all minority children grow up in families with income below low income level compared with 11% of white children. 1975 Statistical Abstract, table 652. Of families with income of less than $5,000 the minority percentage is approximately three times that of whites. Id., table 632.

The overwhelming number of minority children in this country, until very recently, have received the great part of their primary and secondary education in racially segregated, predominantly "economically disadvantaged," and very frequently tangibly inferior schools, see e.g., Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967), aff'd., 408 F.2d 175 (D.C.Cir. 1969), schools which did not and were not intended to maximize their academic potential. The diminished educational opportunities resulting from racial segregation in the schools have adversely affected all the minority students who were required to attend them, including those coming from "economically advantaged" backgrounds. While more minority students are now attending and graduating from college, the academic handicap and unfulfilled potential resulting from their generally inferior primary and secondary educational experience can never be erased, and it is this that puts them at a clear disadvantage in comparison with white students as a group, who not only started out in a better position due to the economically superior condition of whites as a group, but who are far more likely to have had an educational experience that maximized their academic potential.[7]

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7. All of this is, of course, relative. But both nationally, and within a given state, the system of public primary and secondary education is likely to have maximized the academic potential of whites as a group far more so than that of racial minorities as a group.

This has been the experience of by far the largest part of minority students who are in college today and who will be applying for admission to medical school and law school over the next few years. In the south, of course, very little actual desegregation occurred until this Court's decisions in Green v. School Board of New Kent County, 391 U.S. 430 (1968), and Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971), so that if 1969 is used as the starting date of substantial school desegregation in the south (1972 would probably be more realistic), until at least 1985, a minority student from the south applying to medical school or law school would likely not have attended desegregated schools during his or her full educational experience.

Outside of the south, actual desegregation is even less advanced. Fully 60% of all blacks, for example, reside in the central cities, 1975 Statistical Abstract, table 31, where adherence to the "neighborhood school" method of student assignment, building upon existing residential racial segregation, has produced a condition of extreme racial isolation in the public schools. See generally Office for Civil Rights, U.S. Dept. of Health, Education and Welfare, Directory of Public Elementary and Secondary Schools in Selected Districts (1972); U.S. Senate Select Comm. on Equal Educational Opportunity, Toward Equal Opportunity, S.Rep. No. 92-000, 92nd Cong., 2d Sess. (1972). The degree of racial isolation is intensify-

ing every day.[8] While in recent years the racial segregation existing outside of the south has increasingly been found to be de jure rather than de facto, it is the segregation itself, (with the resulting attendance of minority children in predominantly "economically disadvantaged" and very frequently tangibly inferior schools) that is educationally harmful to the minority child. See the discussion in Keyes v. School District No. 1, Denver, 413 U.S. 189, 228-230 (Opinion of Powell, J.).

In California, racial segregation in the schools has been found to exist in virtually every district having any substantial minority population.[9] Los Angeles:

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8. The degree of racial isolation is the same with respect to other racial-ethnic minorities, who have either been segregated separately, see e.g., United States v. Texas Education Agency, 467 F.2d 848 (5th Cir. 1972), or together with blacks. See Keyes v. School District No. 1, Denver, 413 U.S. 189, 197-198 (1973).

9. The California Supreme Court has rejected the de jure - de facto distinction, and has held that all racial segregation is harmful to minority children, so that school boards in that state have an obligation to take affirmative action to eliminate actual segregation. See the discussion in Crawford v. Board of Education of Los Angeles, supra, 551 P.2d at 33-42.

Crawford v. Board of Education v. City of Los Angeles, 17 Cal. 3d 280, 551 P.2d 28 (1976); Pasadena: Spangler v. Pasadena City Board of Education, 427 F.2d 1352 (9th Cir. 1970); Jackson v. Pasadena City School District, 59 Cal.2d 876, 372 P.2d 878 (1963). San Bernardino: NAACP v. San Bernardino City Unified School District, 17 Cal.3d 311, 551 P.2d 48 (1976). San Diego: People ex rel. Lynch v. San Diego Unified School District, 19 Cal. App.3d 252, 96 Cal.Rptr. 658 (1971). San Francisco: Johnson v. San Francisco Unified School District, 500 F.2d 349 (9th Cir. 1974); San Francisco Unified School District v. Johnson, 3 Cal.3d 937, 479 P.2d 669 (1971). Santa Barbara: Santa Barbara School District v. Superior Court, 13 Cal.3d 315, 530 P.2d 605 (1975).

Since by far the largest part of minority applicants for medical school and law school today have had this inferior educational experience that did not maximize their academic potential, it should not be surprising that minority applicants as a group, although fully qualified for admission, will not score as well with respect to the objective academic indicators as whites as a group, who are far more likely to have had an educational experience that did maximize their academic potential, and who as a group started out with a clear advantage due to the economically superior condition of whites as a group. If racially segregated education is indeed "inherently unequal," Brown v. Board of Education I, 347 U.S. 483, 495 (1954), then racial minorities as a group in this country have been made "inherently unequal" in comparison with whites as a group, and this "inherent inequality" comes through most clearly when

racial minorities are competing with whites for a limited number of available places in medical school and law school.

It can be argued that at least where the racial segregation in primary and secondary schools in a particular state was for the most part de jure rather than de facto, a state university is constitutionally prohibited from basing admission to its professional schools solely on comparative objective indicator scores, since to do so is to perpetuate the present effects of past discrimination. Cf. Swann v. Charlotte-Mecklenburg Board of Education, supra. But that question is not presented in this case. The question presented here is whether the Constitution permits the state to consider the present effects of the denial of full and equal educational opprotunities for racial minorities. For this purpose it is irrelevant whether the racial segregation in the state's public schools was de facto or de jure; in either case, from an educational standpoint the result of such segregation has been that the academic potential of minority children has not been maximized, and minority applicants as a group, though fully qualified for admission, cannot be expected to perform as well with respect to objective academic indicators in comparison to white applicants as a group. This being so, surely it is reasonable for the state, in order to advance its valid interest in alleviating the serious shortage of minority physicians and lawyers, to take account of the practical realities and of the present effects of the failure to maximize the academic potential of racial minorities as a group, and to use racial criteria to a

limited degree in the admission process for the purpose of securing the admission of a reasonable number of minority applicants.

B.

Insofar as the Medical School's Special Admissions Program May Have Resulted in the Exclusion of Some Individual White Applicants Who Might Have Been Admitted if the Special Admissions Program Had Not Been in Effect, It Does Not, For that Reason, Offend the Constitution.

As a result of the medical school's special admission program, which involved the limited use of racial criteria, 16 out of the 100 available places in the 1974 entering class were filled by minority applicants, who, in the opinion of the medical school's admitting officials, were fully qualified to complete the course of study leading to the degree.[10] Presumably

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10. The Davis medical school chose to limit its special admissions program to minority applicants from "economically disadvantaged" backgrounds. But since a state may make a "legislative determination" with reference to group characteristics, it would be equally reasonable for a state university, in order to advance the valid state interest in alleviating the serious shortage of minority professionals, to take race into account with respect to all minority applicants, including those who were not (con't.)

if the special admissions program had not been in effect and all of the 100 places had been filled solely on the basis of comparative objective indicator scores, 16 additional white applicants, of whom the respondent Bakke may or may not have been one, would have been admitted to the medical school in 1974.[11] In this sense these 16 white applicants may be considered to have suffered "detriment" from the existence of the special admissions program and from the limited use of racial criteria that it embodies. But the same "detriment" would have been suffered if the medical school had departed from strict reliance on the comparative objective indicator scores to fill those 16 places for any other reason. There is no

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"economically disadvantaged" or who had not been compelled to attend racially segregated schools. Such a classification would be only mildly overinclusive and would avoid the need to make elusive, and intrusive individualized determinations of "disadvantage."

11. The fact that these sixteen white applicants had higher comparative objective indicator scores than the sixteen minority applicants who were admitted under the special admissions program in no sense means that they were "more worthy" or "more qualified" to become physicians than the minority applicants. It means only that they had higher comparative objective indicator scores, which, considering the superior educational opportunities enjoyed by whites as a group in California compared to those enjoyed by racial minorities as a group, is not at all surprising.

question as to the medical school's entitlement to depart from strict reliance on comparative objective indicator scores, for, as the California Supreme Court emphasized, the medical school was not required to utilize only the "highest objective academic indicators" as the sole criterion for admission. 553 P.2d at 1166. Indeed, even on the questionable assumption that the comparative objective indicator scores represented "comparative merit," there is no principle that requires the government to distribute "benefits" on the basis of "comparative merit." If there were, then veterans preference in civil service, for example, would be unconstitutional, which it clearly is not. See e.g., Koelfgen v. Jackson, 355 F. Supp. 243 (D. Minn. 1972), aff'd. mem., 410 U.S. 976 (1973). The medical school could have given preference to returning veterans, and in addition, as the California Supreme Court again specifically recognized, it could have given preference to "disadvantaged" applicants, or to applicants who demonstrated an intention to practice in an area in which there was a shortage of physicians. 553 P.2d at 1152. In all of these instances, the applicants with higher comparative objective indicator scores would have been excluded, without a constitutional eyebrow being raised.

Why, then, it may be asked, should a different result obtain because the medical school tried to overcome the effects of racial discrimination by departing from strict reliance on comparative objective indicator scores and taking into account the fact that some applicants were members

of racial minorities? This was done for the purpose of advancing the valid state interest of alleviating the serious shortage of minority physicians, and because the medical school concluded that in light of the generally inferior educational opportunities of racial minorities as a group in comparison to whites as a group, this was the only way that the admission of a reasonable number of qualified minority applicants could be secured. Since the purpose of the special admissions program was to overcome the effects of past discrimination against racial minorities and to bring about some degree of racial equality in the medical profession, it can be held that the special admissions program is fully constitutional because it was not intended to and does not in fact advance a racially discriminatory purpose. See United Jewish Organizations of Williamsburg v. Carey, ____ U.S. _____, 97 S.Ct. 996, 1016-1017 (1977) (Opinion of Stewart, J.).

Leaving this point aside, and assuming that the 16 white applicants who might have been admitted if the special admissions program had not been in effect have suffered "racial detriment," the question is still whether the Constitution prohibits the use of racial criteria otherwise related to advancing a valid state interest, if it results in any "detriment" to whites.

The argument that taking race into account, even for the purpose of insuring full equality for racial minorities in American society, as reflected here in trying to alleviate the serious shortage of

minority physicians, is necessarily unconstitutional if it produces any "detriment" to whites is premised on the assumption that "favoring" racial minorities in any way at all is inconsistent with the Fourteenth Amendment value of racial neutrality. But the primal value of the Fourteenth Amendment and of the Wartime Amendments, taken as a whole, was not the value of racial neutrality, but the value of black freedom, designed to achieve full equality for the newly freed blacks in American society and to secure in that society a place for blacks as a group equal to that enjoyed by whites as a group.[12] As this Court so long ago observed when speaking of the Fourteenth Amendment's guarantee of equal protection of the laws:

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12. Insofar as other racial-ethnic minorities, such as Chicanos, Puerto Ricans, and Native-Americans have been subject to extreme victimization and discrimination because of the color of their skin and insofar as they have been assimulated to blacks for purposes of societal racism, they can likewise be assimilated to blacks for the purpose of being brought within the Wartime Amendments' guarantee of black freedom. And a state university, seeking to make black freedom a reality by alleviating the serious shortage of black physicians in American society, may similarly assimilate these racial-ethnic minorities to blacks and include them within the scope of its special admissions program.

> "[i]f other rights are assailed by the States which properly and necessarily fall within the protection of these articles, that protection will apply, though the party interested may not be of African descent. But what we do say, and what we wish to be understood, is, that in any fair and just construction of any section or phrase of these amendments, it is necessary to look to the purpose which we have said was the prevailing spirit of them all, the evil which they were designed to remedy, and the process of continued addition to the Constitution, until that purpose was supposed to be accomplished, as far as constitutional law can accomplish it." The Slaughter-house Cases, 83 U.S. (16 Wall.) 36, 72 (1883).

Considering the Wartime Amendments as a whole, they may be deemed to have created a constitutional right of black freedom, designed to overturn forever the premise that blacks were an inferior and subordinate class, and to insure that they would be equal participants in that community consisting of the "people of the United States." See the discussion in Kinoy, The Constitutional Right of Negro Freedom, 21 Rutgers L. Rev. 387, 388 (1967).

It was this constitutional right of black freedom that was recognized by this Court in cases such as Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968), and Runyon v. McCrary, 427 U.S. 160 (1976), where it held that Congress could prohibit all racial discrimination

by private persons, so as to keep the promise of full equality that was made to blacks on behalf of the Nation by the enactment of the Wartime Amendments. Racial neutrality is also a Fourteenth Amendment value, but surely it cannot be contended that it must abrogate and supplant the primal value of black freedom. When a state university, cognizant of the serious shortage of minority physicians and lawyers, and of the educational deprivation of racial minorities as a group, uses racial criteria to a limited degree in order to secure the admission to its professional schools of a reasonable number of fully qualified minority applicants, it is acting in the best sense to implement the constitutional value of black freedom. If in so doing, it departs to a limited extent from complete racial neutrality, this is because, to that extent, it has found it necessary to prefer one constitutional value over another. As the New York Court of Appeals observed in upholding a state medical school's special admissions program, which like the program of the Davis medical school, involved the limited use of racial criteria: "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." Alvey v. Downstate Medical Center, 39 N.Y.2d 326, 348 N.E.2d 537, 544-545 (1976). The Constitution does not prohibit the state from acting to advance the value of black freedom, and the "detriment" that its action here may cause to some white applicants is no different from the "detriment" suffered by any other person when the state makes a constitutionally permissible choice between competing values and interests.

It is important to emphasize that the action of the medical school in the present case was not designed to and did not have the effect of subordinating the value of racial neutrality to the value of black freedom, but of striking a reasonable accommodation between these two values of the Fourteenth Amendment. In the view of the amicus, the Fourteenth Amendment requires that such a reasonable accommodation be made. Suppose the highly unlikely event that a state embarked on a "crash program" to increase the number of minority physicians and lawyers and decreed that for the next five years only minority applicants would be admitted to the state's medical schools and law schools. Although this exclusive use of racial criteria to determine admission to medical school and law school would advance the valid state interest in alleviating the serious shortage of minority physicians and lawyers, and in this respect the constitutional value of black freedom, it would do so at the cost of completely subordinating the value of racial neutrality and completely denying access to medical school and law school to white applicants. Such total exclusion of white applicants, it is submitted, can justifiably be termed "reverse discrimination," and would be unconstitutional, because the means chosen by the state to achieve its objective did not strike a reasonable accommodation between the interests of racial minorities as a group and the interests of white applicants as a group, and between the Fourteenth Amendment value of black freedom and the Fourteenth Amendment value of racial neutrality.

Of course, this is not what was done

by the Davis medical school and is not what has been done by medical schools and law schools throughout the country.[13] The special admissions programs adopted by medical schools and law schools involve only the limited use of racial criteria to secure the admission of a reasonable number of qualified minority applicants. The great bulk of the available places are filled on the basis of comparative objective indicator scores, which means that, as here, they will be filled by white applicants. Thus, the special admissions program does not cause "detriment" to white applicants as a group, and results only in the exclusion of some individual white applicants, who could have been excluded for a number of other reasons and could have been excluded in any event if there was any departure from strict reliance on comparative objective indicator scores. Insofar as the special admissions program makes use of racial criteria, then, it strikes a reasonable accommodation between competing group and individual interests and between the

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13. As one commentator has observed, when the white majority provides a benefit to racial minorities, it is not "likely to be tempted either to underestimate the needs and deserts of whites relative to those of others, or to overestimate the costs of devising an alternative classification that would extend to certain whites the advantages generally extended to blacks." Ely, the Constitutionality of Reverse Racial Discrimination, 41 U. Chi L. Rev. 723, 735 (1974).

Fourteenth Amendments values of black freedom and racial neutrality.

The matter of striking a reasonable accomodation between competing group and individual interests, and because the use of racial criteria is involved, between the Fourteenth Amendment values of black freedom and racial neutrality, is illustrated by the decisions of the federal courts of appeals with respect to the constitutionality of affirmative minority hiring remedies. These courts have consistently held that some preference can be given to minority applicants in the hiring process until a minimum percentage of the workforce is composed of minorities, but that all of the available jobs cannot be reserved for minority applicants, and that they can be hired only in a reasonable proportion to white applicants. See e.g., Castro v. Beecher, 459 F.2d 725 (1st Cir. 1972); Vulcan Society v. Civil Service Commission, 490 F.2d 387 (2d Cir. 1973); Erie Human Relations Commission v. Tullio, 493 F.2d 371 (3rd Cir. 1974); NAACP v. Allen, 493 F.2d 371 (3rd Cir. 1974); Carter v. Gallagher, 452 F.2d 315 (8th Cir.) cert. denied, 406 U.S. 950 (1972).[14] In this way, the affirmative hiring remedy does not result in

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14. As the Eighth Circuit observed in Carter v. Gallagher, at 330:

> "The absolute perference ordered by the trial court would operate as a present infringement of those non-minority group persons who are (con't.)

"detriment" to white workers as a group, although it may as to individual white workers who might have been hired if the affirmative hiring remedy had not been imposed. As such, it strikes a reasonable accommodation between the Fourteenth Amendment values of black freedom and racial neutrality.[15] The same approach was taken by the New York Court of Appeals in Alvey v. Downstate Medical Center, supra, where

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> equally or superiorally qualified for the fire fighter's positions; and we hesitate to advocate implementation of one constitutional guarantee by the outright denial of another. Yet we acknowledge the legitimacy of erasing the effects of past racially discriminatory practices . . . To accommodate these conflicting considerations, we think some reasonable ratio for hiring minority persons who can qualify under the revised qualification standards is in order for a limited period of time until there is a fair approximation of minority representation consistent with the population mix in the area."

15. In this situation the imposition of the affirmative hiring remedy is imposed to overcome the present effects of past discrimination by the particular employer. But the minority workers who are benefited thereby are not necessarily the ones who have been the victims of the past discrimination, and the white applicants who may suffer "detri- (con't.)

it upheld the constitutionality of the medical school's special admissions program, noting that the use of racial criteria in such a program had to be limited in scope and designed to secure only the admission of a reasonable number of minority applicants.

In United Jewish Organizations of Williamsburgh v. Carey, _____ U.S. _____, 97 S.Ct. 996 (1977), this Court, although with differing rationales, agreed on the constitutionality of a state's use of racial criteria in legislative redistricting, where this was designed to achieve full equality for racial minorities in the political process, although it caused "detriment" to white voters residing in the affected legislative districts by diluting their political power. The Court noted that while the effect of the

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ment" thereby in no way have benefited from the past discrimination. The point is that here the affirmative hiring remedy advances the valid state interest in securing equal employment opportunities for racial minorities as a group while in the present case the special admissions program advances the valid state interest in alleviating the serious shortage of minority physicians and lawyers. In both situations the limited use of racial criteria strikes a reasonable accommodation between competing group and individual interests and between competing constitutional values. And, of course, the use of racial criteria, where it advances a valid state interest, is "not confined to eliminating the effects of past discrimina[tion]." United Jewish Organizations of Williamsburgh v. Carey, _____ U.S. _____, 97 S.Ct. 996, 1007 (1977).

redistricting was to give racial minorities an effective voting majority in some districts, it did not "fence out" the white population from effective participation in the political processes of the county or unfairly cancel out white voting strength. 97 S.Ct. at 1010. What the state did was to take race into account in order to "achieve a fair allocation of political power between white and non-white voters." Id. at 1011. In effect the state struck a reasonable accommodation between competing group interests and between the Fourteenth Amendment value of black freedom - reflected by a "fair allocation of political power" - and the Fourteenth Amendment value of racial neutrality - reflected by the fact that the redistricting did not unfairly cancel out white voting strength.

The same reasonable accommodation characterizes the special admissions program of the Davis medical school and of medical schools and law schools throughout the country. If the Fourteenth Amendment does not "mandate any per se rule against using racial factors in districting and apportionment," Id. at 1007, the amicus would respectfully submit that it does not mandate any per se rule against the limited use of racial criteria in determining admission to professional school either,[16] and that

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16. The reasonableness of the use of racial criteria in the present case is not affected by the fact that the medical school identified a specific number of places that it expected to be filled by minority applicants. Despite (con't.)

where the use of such criteria strikes a reasonable accommodation between the interests of racial minorities as a group and the interests of white applicants as a group, and thus between the Fourteenth Amendment values of black freedom and of racial neutrality, it is fully constitutional.[17]

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the emotional reaction conjured up by the use of the term "quota," the number "16" (which was not invariably used every year) was chosen as a result of the informed judgment of the faculty as to what number would in fact be produced by the good faith application of its standards. It may be noted in this regard that in 1974 only 88 out of 628 minority applicants were even granted interviews. 553 P.2d at 1158.

17. In this connection, it may be noted that while the use of gender-based criteria has generally been found to be invidious, because it advanced no valid state interest independent of a "mandatory preference on the basis of sex," Reed v. Reed, 404 U.S. 71, 76 (1971), this Court has sustained the constitutionality of the use of gender-based criteria, without further differentiation, when it was shown to be reasonably related to overcoming the consequences of past discrimination against women as a group. Kahn v. Shevin, 416 U.S. 351 (1974); Califano v. Webster, _____ U.S. _____, 97 S.Ct. 1192 (1977).

III.

EVEN IF THE CONSTITUTIONALITY OF THE SPECIAL ADMISSIONS PROGRAM MUST BE DETERMINED UNDER THE "COMPELLING STATE INTEREST" TEST, THE CALIFORNIA SUPREME COURT ERRED IN CONCLUDING, PARTICULARLY ON THE STATE OF THE RECORD IN THIS CASE, THAT THE RACIAL OBJECTIVES WHICH IT ASSUMED TO BE "COMPELLING," COULD BE ADVANCED BY "LESS DRASTIC MEANS."*

As the amicus has argued previously, the "compelling state interest" test and the "two-tier" approach that it embodies, regardless of its continued vitality in other areas, simply has no application to the present case, in view of the body of doctrine that this Court has developed to determine the constitutionality of a state's use of racial criteria. But even on the assumption that this is not so, the California Supreme Court's application of the "compelling state interest" test in the present case to invalidate the medical school's special admissions program was manifestly improper. Although that court assumed that the medical school's special admissions program advanced "compelling" state interests in alleviating the serious shortage of minority physicians and in integrating the medical school, it held that the program was unconstitutional because those objectives could be achieved, although perhaps not as effectively, by the

* The points in Part III of the Argument are discussed more fully in Morris, Constitutional Alternatives to Racial Preferences in Higher Education Admissions, 17 Santa Clara L. Rev. 279 (1977).

use of non-racial alternatives, so that the program did not satisfy the "less drastic means" aspect of the "compelling state interest" test.

Apart from the questionable propriety of considering the availability of non-racial alternatives to advance a "compelling" objective that is racial in nature, compare Alvey v. Downstate Medical Center, 39 N.Y.2d 326, 348 N.E.2d 537 (1976), the California Supreme Court was completely unwarranted in engaging in rank "armchair speculation" as to the availability and efficacy of the non-racial alternatives that it posited. This is particularly so, since there was no evidence whatsoever in the record dealing with the availability and efficacy of these alternatives, or contradicting the medical school's judgment that the special admissions program was the only way that the admission of a reasonable number of minority applicants could be secured. The chairman of the medical school's admissions committee and the associate dean of the medical school testified that "in the judgment of the Davis medical school, the special admissions program is the only method whereby the school can produce a diverse student body." (Tr. 67-68) (emphasis added). This testimony established prima facie that non-racial alternatives realistically were not available or efficacious, and shifted the burden of proof on the issue of "less drastic means" to Bakke. It was then incumbent on Bakke to introduce evidence as to the availability and efficacy of non-racial alternatives, and he introduced no evidence whatsoever on this score. Since the assailant failed to carry

his burden of proof on this question, the court was required to uphold the constitutionality of the special admissions program. Cf. Village of Arlington Heights v. Metropolitan Housing Development Corp., _____ U.S. _____, 97 S.Ct. 555 (1977).

Instead the court proceeded to engage in the rankest sort of "armchair speculation" as to the availability and efficacy of non-racial alternatives and proceeded to invalidate one of the very few societal efforts designed to achieve full equality for racial minorities and to overcome the cumulative effects of societal discrimination and victimization against them, on the ground that the assumedly "compelling" racial objectives could be advanced by means "less detrimental to the rights of the majority." 553 P.2d at 1164-1165. The court said that the medical school could make an "individualized determination" of the "inherent ability" of each applicant, and that it could take into account factors relating to the "needs of the profession and society, such as an applicant's professional goals." 553 P.2d at 1166. But it is precisely this kind of "individualized determination" that is itself suspect when a large number of fully qualified applicants have applied for a limited number of available places. The reason why medical schools and law schools today must place heavy reliance on comparative objective indicator scores to allocate the limited number of available places is precisely because they have concluded that in light of the large number of qualified applicants, they cannot make an "across the board" determination of the "inherent ability" and "comparative merit" of every

applicant. The matter of "taking into account the applicant's professional goals" also would be of dubious efficacy in increasing the number of minority students, since once this was known to be a consideration, a large number of applicants would suddenly assert a desire to practice in minority communities, although heretofore white physicians have apparently not felt a compelling urge to do so. And, of course, once the applicant was admitted, the medical school would have no way of coercing compliance with the previously stated "professional goals." It was certainly reasonable for the medical school to conclude, in light of the available empirical evidence,[18] that, as they are now, minority physicians would be far more likely than white physicans to practice in minority communities and to be concerned with meeting the medical and health needs of minorities.

The court also said that while the medical school could not take race into account, it could give preference to "disadvantaged applicants of all races." 553 P.2d at 1166-1167. Since racial minorities as a group are proportionately more "dis-

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18. See e.g., U.S. Dept. of Health, Education & Welfare, Characteristics of Black Physicians in the United States (1975); Johnson et al., Recruitment and Progress of Minority Medical School Entrants, 1970-1972, J. Med. Educ., Supplement 50 (July, 1975); Tilson, Stability of Employment in OEO Neighborhood Health Centers, 11 Medical Care, No. 5 (1973).

advantaged" than whites as a group, the use of the "disadvantaged" criterion would, the court assumed, insure the admission of some minority applicants. Its assumption in this regard demonstrates most clearly the difference between deciding cases on the basis of "armchair speculation" and on the basis of evidence in the record. Apart from the fact that the increased admission of "disadvantaged" whites, regardless of whether it might be justified on other grounds, would not advance the racial objectives assumed by the court to be "compelling," it is clearly erroneous to believe that the use of the "disadvantaged" criterion would result in the admission of very many minority applicants.

In the first place, while proportionately there is a substantially higher incidence of "economic disadvantage" among racial minorities as a group than among whites as a group, in strict numbers terms - which is what is important here - there are more "economically disadvantaged" whites than there are "economically disadvantaged" racial minorities. For example, in 1974 there were 6.2 million white children under 18 years of age in families below low-income level compared to 4.0 million non-white children, although only 11.2% of all white children were in families below low-income level, compared with 38.4% of all non-white children. 1975 Statistical Abstract, tables 359, 652. Even assuming that "disadvantaged" minorities as a group scored equally well on the objective academic indicators in comparison with "disadvantaged" whites as a group, there would still be a substantially higher number of whites competing for the

"disadvantaged" places than racial minorities.

Beyond this, "disadvantaged" whites as a group are likely to score better on the objective academic indicators in comparison with "disadvantaged" minorities as a group, because, given the racially segregated nature of public education in this country, they are likely to have received more benefit as a group from primary and secondary education than "disadvantaged" minorities as a group. This is so in part because "disadvantaged" whites more often than not will have received their primary and secondary education in predominantly white and very likely predominantly "advantaged" schools, and because racial segregation itself, usually in tangibly inferior schools, adversely affects the academic performance of minority children. Thus, as far as whites as a group are concerned, "economic disadvantage" does not necessarily produce an equivalent "educational disadvantage." The "better" education that "disadvantaged" whites as a group have received is likely to be reflected in higher comparative objective indicator scores,[19]

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19. For example, recent Law School Admission Data Service statistics indicate that in the applications for the nationwide entering class of 1977, using the lower cut-off point of a 2.5 GPA and a 500 LSAT score, over 1000 white applicants characterized their socio-economic status as low. The total number of minority applicants in this category, without regard to socio-economic status, was approximately 350. See the discussion in Sedler, Racial Preference, Reality and The Constitution, 17 Santa Clara L. Rev. 329, 343-344, 56 (1977).

so that the use of the "disadvantaged" criterion will most certainly favor "disadvantaged" whites and is not likely to result in the admission of any substantial number of "disadvantaged" minority applicants. As to the effect of the "disadvantaged" criterion on the increased admission of racial minorities, see also Brief of Law School Deans on Petition for Certiorari, Regents of the University of California v. Bakke, No. 76-811, Oct. Term, 1976, pp. 28-29.

The California Supreme Court was completely unwarranted, on the basis of the record in the present case, in concluding that non-racial alternatives would advance to any degree at all the racial objectives that it assumed to be "compelling." Since the uncontradicted evidence presented by the medical school showed that in the judgment of its faculty only the special admissions program would secure the admission of a reasonable number of minority applicants, the burden was on Bakke to demonstrate the availability and efficacy of alternative means. When he introduced no evidence on this point, the court, under a proper application of the "compelling state interest" test, was required to uphold the constitutionality of the special admissions program.

The importance of the substantive issues involved in this case does not alter the fact that constitutional questions, like other questions, must be determined in accordance with recognized principles relating to the allocation of the burden of proof. Indeed, precisely because important substantive issues are involved here, issues going to whether the state can make limited use of racial criteria in order to insure

full equality for racial minorities and to overcome the cumulative effects of discrimination and victimization against them, it is absolutely crucial that these issues be properly developed, and when their resolution depends on factual determinations, there must be proof to support these determinations in the record. If the California Supreme Court was going to apply the "compelling state interest" test here, it was not permitted to engage in "armchair speculation" as to the availability and efficacy of "less drastic means." Since the uncontradicted evidence introduced by the medical school showed that in the judgment of its faculty only the special admissions program would secure the admission of a reasonable number of minority applicants, the burden shifted to Bakke to demonstrate the availability and efficacy of "less drastic means." When he failed even to attempt to sustain this burden, the court was required to reject the constitutional challenge. Cf. Village of Arlington Heights v. Metropolitan Housing Development Corp., supra.

CONCLUSION

For the reasons stated herein, the amicus respectfully submits that the judgment of the Supreme Court of California should be reversed.

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