No. 76-811

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,

Petitioner,

v.

ALLAN BAKKE,

Respondent.

BRIEF OF THE BOARD OF GOVERNORS OF RUTGERS, THE STATE UNIVERSITY OF NEW JERSEY, THE RUTGERS LAW SCHOOL ALUMNI ASSOCIATION AND THE STUDENT BAR ASSOCIATION OF THE RUTGERS SCHOOL OF LAW—NEWARK *AMICI CURIAE*

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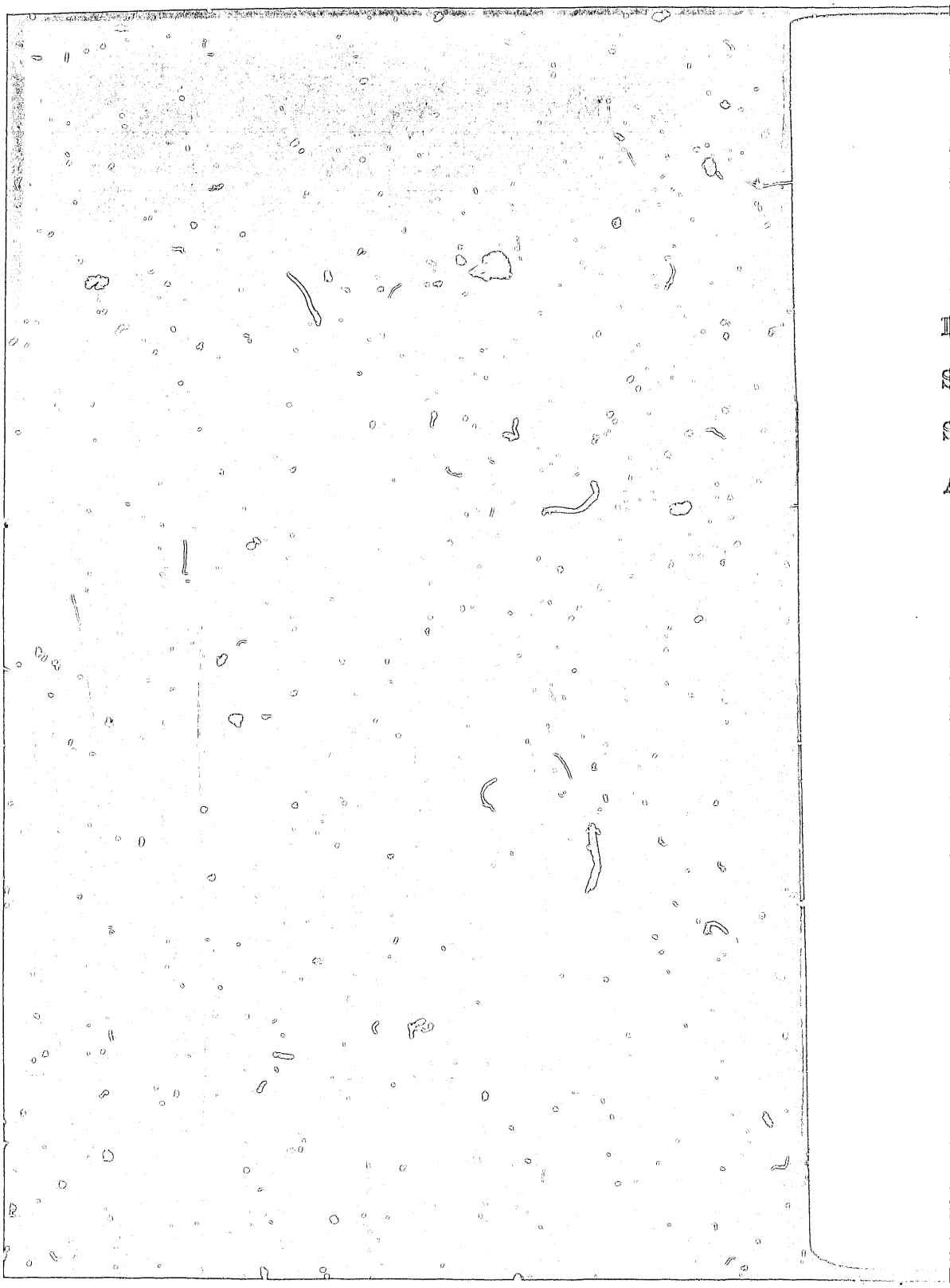

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IN THE

Supreme Court of the United States

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Interest of *Amici*

The Board of Governors of Rutgers, The State University of New Jersey, governs the entire university system, with its many campuses and some 40,000 graduate and

undergraduate students. As a state institution, it is responsible for providing equal educational opportunity for all New Jersey residents.

In accord with that responsibility, the Board of Governors accepted the mandate of the New Jersey Governor's Select Committee on Civil Disorders[1] to utilize its resources to "make equality real" for black people. This responsibility has in part been fulfilled by the successful implementation at the Rutgers Law School in Newark of a substantial minority admissions program, described in more detail below (Point IV). Almost two hundred minority students have been graduated from the Law School since the inception of its special admissions program in 1968. Two hundred sixteen are currently enrolled. But despite its success, the Law School program represents only first steps toward full minority participation in the legal profession. Affirmance by this Court of the California Supreme Court's decision would threaten to reduce drastically the number of minority students entering and graduating from Rutgers and eventually would erode the initial progress that has been made. For this reason, the Board of Governors is vitally concerned about the outcome of this case. It therefore joins as *amicus curiae* herein.

The Rutgers Law School Alumni Association is an organization of the graduates of the Law School which numbers approximately 1400 members. The alumni, many of whom attended Rutgers Law School after its minority student program was initiated, saw the program grow and

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[1] This Committee was established following the riots which swept the state's urban population centers in the summer of 1967. Among its ten members were two former governors of the state and a future federal appeals judge.

develop successfully not only for minority admittees but for the entire Law School community. Indeed, many of the members of the Alumni Association were an integral part of the pioneering effort begun in 1968 and actively participated in the development of the program. Those members profited immeasurably from a racially integrated law school experience.

The Association joins as *amicus curiae* in support of the Rutgers Law School's efforts to increase legal services within the minority communities and to increase minority representation in the legal profession of New Jersey. Its members are proud of their school's success in increasing dramatically the number of minority lawyers practicing successfully in New Jersey in a variety of public and private settings. The Association is deeply concerned that the Rutgers minority student program be preserved and continued.

The Student Bar Association (SBA) is the duly elected student government for the Rutgers Law School in Newark. Its constituency is approximately 80% white and 20% black, hispanic, and other minorities. The SBA represents a large number of students who were drawn to Rutgers because of the diversity of its student body and the richness of its curriculum. For many of these students, Rutgers represents the most intense integrated experience they have had.

The SBA is committed to a pluralistic student body which enables students to learn from each other and to understand and appreciate each other's cultural differences and perspectives. The SBA recognizes that law school graduates cannot uphold the mandate of justice and equality unless those graduates understand what that mandate means to the broad spectrum of the American population.

The SBA joins as *amicus curiae* because of its concern that an erosion of the minority student program will deny present and future students the benefits of an integrated education.

Amici have received the written consents of the petitioner and respondent to file this brief. Those consents have been filed with the Clerk of the Court concurrently with the filing of this brief.

Statement

The years that followed *Brown* v. *Board of Education*, 347 U.S. 483 (1954), brought a legalistic form of equality to blacks and other minorities that has in large measure been a form without substance. The full societal participation which is the hallmark of true equality has yet to be achieved. Judicial betrayal of the Reconstruction Amendments from the mid-1870's until 1954 created a racism so deeply institutionalized that it no longer needs the explicit support of the law for its continuation. Even in parts of the country where de jure segregation has long been outlawed, racial exclusion, discrimination, and stigmatization are so pervasive that, in 1968, the Kerner Commission[2] found us moving rapidly toward two societies, separate and unequal. Race conscious affirmative action in higher education is an essential mechanism for breaking that continuum.

This Court is the ultimate guardian of the Constitution. Its decisions affect not merely the body of American law but the essential character of American life. Just as the whole nation bore the consequences of judicial eviscera-

[2] *Report of the National Commission on Civil Disorders* (1968).

tion of the Thirteenth, Fourteenth, and Fifteenth Amendments in the nineteenth century, it will bear the consequences in daily life of the decision made here.

This case is a watershed. It marks the place at which the Court must decide whether the journey toward a truly race neutral society will be continued or abandoned.

Summary of Argument

The program of the Davis Medical School fulfills the command of the Thirteenth Amendment to eradicate all of the badges and incidents of servitude. The gross exclusion of blacks and similar racial minorities from the professions is one of those badges and incidents. It is a key element in a system of exclusion and stigmatization that perpetuates their second class status even without the explicit support of the law. California has the responsibility under the Thirteenth Amendment to aid in the eradication of the badges and incidents of servitude. The Thirteenth Amendment creates a reservoir of power on which California may draw to implement a reasonable program for the greater inclusion of minorities in medical training and the medical profession. The University of California has done no more than that.

Bakke has no Fourteenth Amendment claim that overrides this implementation of the Thirteenth Amendment. The Equal Protection Clause does not always require the states to be color blind. The Fourteenth Amendment was passed to enforce the Thirteenth, not to subvert it. It cannot be used to strike down a program that is a direct implementation of the Thirteenth Amendment. As a white male, Bakke does not fall within any class that requires the overriding protection of the Court. He is not a mem-

ber of a discrete and insular minority that has traditionally been excluded from the body politic. His failure to gain entrance to the medical school in no way stigmatizes him, nor does it constitute a racial slur. Whites as a class have not in any way been fenced out by California's successful integration of its medical school. California had the power to undertake a program directed toward racial integration without a showing of past discrimination by the medical school.

The action of the University of California parallels a host of judicial, legislative, and executive steps taken since this Court's decision in *Brown* v. *Board of Education,* 347 U.S. 483 (1954) in an effort to dismantle a separate and unequal system for blacks and other racial minorities. The continuing vigor of all of these remedial actions will be stultified if the California court is affirmed.

As shown by the experience of Rutgers Law School, race conscious special admissions programs work to accomplish the central task of our society, the elimination of institutionalized racial exclusion.

ARGUMENT

I.

The Thirteenth Amendment applies to this case and requires its reversal.

A. The Thirteenth Amendment commands the eradication of all the badges and incidents of servitude.

This case again brings before the Court the central problem of American life. The nature of the problem is plain: we purport to aspire to the full integration of blacks and similarly situated minorities[3] into all facets of the American social fabric but our aspirations are undermined

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[3] American Indians, Hispano-Americans, and Asian-Americans are also persons of color belonging to racial classes whose position makes them subject to the badges and incidents of servitude. Social scientists have defined minorities as groups of people " 'who, because of their physical or cultural characteristics, are singled out from the others in the society in which they live for differential and *unequal treatment,* and who therefore regard themselves as objects of collective discrimination. The existence of a minority in a society implies the existence of a corresponding dominant group with higher social status and greater privileges. Minority status carries with it the *exclusion from full participation* in the life of society.' " G. Simpson & J. Yinger, *Racial and Cultural Minorities: An Analysis of Prejudice and Discrimination* 11 (4th ed. 1972) (emphasis added). Pursuant to Title VII of the Civil Rights Act of 1964, the United States Equal Employment Opportunity Commission requires reporting firms to provide periodic employment statistics on blacks, orientals, American Indians, and Spanish surnamed Americans. Employer Information Report Form EEO-1. These groups fit the social science definition, as the EEOC has recognized. Although in this brief *Amici* emphasize the excluded condition of black Americans, the situation of these other racial minorities replicates in varying degrees the situation of blacks.

by the stubborn pervasiveness of race prejudice and by the inescapable fact that racial minorities remain in a subordinate economic, political, and social condition, where they have always been kept in American society.

That subordination is a manifestation "of slavery unwilling to die." *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 445 (1968) (Douglas, J., concurring). The Thirteenth Amendment embodies the principle that slavery and all its badges and incidents are prohibited. *Id.* at 437-44; *Civil Rights Cases,* 109 U.S. 3, 20 (1883). It compels reversal of the California court's decision in this case.

B. The gross exclusion of blacks and similar racial minorities from the medical profession is one of the badges and incidents of servitude.

Dred Scott v. *Sandford,* 60 U.S. (19 How.) 393, 15 L. Ed. 691 (1856) was a more pernicious and wide ranging opinion than is sometimes remembered. It did not merely uphold the institution of chattel slavery or strike down the Missouri Compromise. It established that blacks were members of a separate, inferior caste and were not protected by any constitutional mandate.

> They [black people] had for more than a century before been regarded as beings of an inferior order; and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they have no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it. This opinion was at that time fixed and uni-

> versal in the civilized portion of the white race. It was regarded as an axiom in morals as well as in politics, which no one thought of disputing, or supposed to be open to dispute; and men in every grade and position in society daily and habitually acted upon it in their private pursuits, as well as in matters of public concern, without doubting for a moment the correctness of this opinion.

15 L.Ed. at 701-702. Chief Justice Taney noted that only a constitutional amendment could alter the condition of "this unfortunate race" if it were unjust. *Id.* at 702.

The Thirteenth Amendment was passed precisely to eradicate the inferior status and condition of blacks in America. *United States* v. *Jefferson County Bd. of Educ.*, 372 F.2d 836 (5th Cir. 1966), *aff'd en banc,* 380 F.2d 385 (5th Cir.), *cert. denied,* 389 U.S. 840 (1967). *See* Kinoy, *The Constitutional Right of Negro Freedom,* 21 Rutgers L. Rev. 387 (1967). Its broad mission is reflected in the congressional debates that accompanied its passage. Senator Wilson of Iowa, one of the cosponsors of the amendment, responded to the argument that the Emancipation Proclamation was sufficient to free the slaves. He noted that more was required.

> Servitudes differ in degree and they differ in kind, but the most important . . . the one that is at once most significant and least changeable is the difference in degree; a man may be nominally free, but if he is a workman without capital and lives in a state of society of which it may be said 'once a peasant, always a peasant; once a factory operative, always a factory operative . . .' he has little to boast of his freedom and would find it hard to discover where it ministers to his elevation or happiness.

CONG. GLOBE, 39th Cong., 2nd Sess. 175 (1865). Even its opponents recognized that the Thirteenth Amendment meant the full participation of blacks in American society and not merely a changed legal status. Representative Mallory of Kentucky raised the spectre of social equality as an objection to the amendment.

> We know the status of the negro. But adopt this amendment to the Constitution, and so far from removing a disturbing element from discussion do we not introduce hundreds of distracting questions in the place of one which we propose now to get rid of, and springing from this very act necessarily? I renew the inquiry, what does the gentleman propose to do with the negroes if they be liberated by the constitutional amendment? . . . I know hundreds of the Republican party . . . who would have fought to the bitter end against setting . . . free the negroes to remain in the states where they were freed and to control the destinies of government by the exercise of the elective franchise, *maintaining an equality with the white man, socially, civilly, politically.*

CONG. GLOBE, 38th Cong., 2nd Sess. 179 (1865) (emphasis added).

The Thirteenth Amendment was thus manifestly intended not merely to ban chattel slavery as a legal institution, but to recast the position of blacks in the economic and political life of America.

> As Justice Harlan clearly saw in the Civil Rights Cases (1883), 109 U.S. 3, 3 S.Ct. 18, 22 L.Ed. 835, *the Wartime Amendments created an affirmative duty that the States eradicate all relics, "badges and indicia of slavery" lest Negroes as a race sink back into "second-class" citizenship.*

United States v. *Jefferson County Bd. of Educ., supra,* at 873. (Opinion of Circuit Judge John Minor Wisdom. Emphasis in original.)

But the mandate of the Thirteenth Amendment has never been fully honored. The pernicious exclusion of blacks from full integration following Reconstruction—the continuation of the badges and incidents of servitude—was and has continued to be embodied in a deep-rooted social system that is extremely slow to change.

The institutions of society combined early in our history to keep blacks and similarly situated minorities from participation in the economic, political, and social mainstream. Reconstruction ended with the Compromise of 1877. The possibility of a fully integrated society was destroyed by Jim Crow and the complete subjection of blacks to a virulent system of exclusion and stigmatization.[4]

This Court hardly need be reminded of its historical share of responsibility for the imposition and maintenance of second-class citizenship. *Berea College* v. *Kentucky,* 211 U.S. 45 (1908); *Cumming* v. *Richmond County Bd. of Educ.,* 175 U.S. 528 (1899); *Plessy* v. *Ferguson,* 163 U.S. 537 (1896); *Civil Rights Cases,* 109 U.S. 3 (1883); *United States* v. *Reese,* 92 U.S. 214 (1875). The impact of *Plessy* was not only to give approval to a Jim Crow system that was already in place, but to provide legal and moral authority for the great expansion of

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[4] *See generally* H. Aptheker, *A Documentary History of the Negro People in the United States* 565-606 (1968); L. Bennett, *Before the Mayflower: A History of Black America* 220-41 (1969); J. Franklin, *From Slavery to Freedom* 310-15 (3d ed. 1967); R. Kluger, *Simple Justice,* ch. 3, 4 (1975); C. Woodward, *The Strange Career of Jim Crow* (3d ed. 1974).

Jim Crow. C. Woodward, *The Strange Career of Jim Crow* (3d ed. 1974). *Berea College* went so far as to uphold a law prohibiting the voluntary integration of a college.

A cohesive system of stigmatization and exclusion thus was erected with the support of the law. It provided and still provides an all but impenetrable barrier to the effectuation of the broad intent of the Thirteenth Amendment. Legal rules, social customs, institutional actions and norms, and majority stereotyped perceptions all combined to support and reinforce each other. The legally required separation of the races in schools, in public life, and even in private life, *see Loving* v. *Virginia,* 388 U.S. 1 (1967); *McLaughlin* v. *Florida,* 379 U.S. 184 (1964), assured that when blacks and whites interacted at all, it would be with assumptions of black inferiority. School segregation and employment discrimination ensured that blacks as a class were denied incomes and social status comparable to whites. Segregated social institutions, such as the armed forces which separated the races until the 1940's, further supported the myth of black inferiority. Enforced separation in turn confirmed and still confirms white misperceptions that racial minorities, and blacks in particular, are inferior. Those misperceptions fuel the continuing exclusion of minorities.[5]

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[5] The interdependence of social institutions and racial stereotypes is a generally accepted principle in social psychology. *See, e.g.,* G. Allport, *The Nature of Prejudice* (1954); G. Simpson & J. Yinger, *Racial and Cultural Minorities: An Analysis of Prejudice and Discrimination* (4th ed. 1972) ("Once fixed in the culture, they [stereotyped mental pictures of other groups] react back upon [the culture], guiding the interaction of the groups involved." *Id.* at 153 (footnote omitted)).

One attribute of the system is the gross economic suppression of blacks and similar racial minorities. The 1975 median income for white families was $14,268 while for minority families it was only $9,321. U. S. Dept. of Commerce, Bureau of the Census, *Statistical Abstract of the United States* 405 (Table 650) (1976). This disparity has not appreciably changed over the years. A. Brimmer, *The Economic Position of Black Americans: 1976,* 40 (1976). During the same year, 29.3% of minorities, as compared with 9.7% of the white population, had incomes below the poverty line. *Statistical Abstract, supra,* at 415 (Table 673). In 1976, the unemployment rate for minorities was almost double that of whites: 13.6% as compared to 7.5% for whites. *Id.* at 361 (Table 582). This kind of disparity in income and unempolyment rates supports the invidious mythology that "blames the victim" for his disfavored condition.[6]

Other disparities are found in the relative educational status of whites and racial minorities. As of 1975, 57.5% of the black population in the United States over 25 years of age had not graduated from high school and 12.3% had attended school for less than five years. For the entire population the corresponding figures were 37.5% and 4.2% respectively. *Id.* at 123 (Table 198). In 1975, 14.5% of the white population who were at least twenty-five years old, but only 6.4% of the black population, had completed four or more years of college. *Id.* at 123 (Table 199). It has become increasingly clear that "[t]o succeed without such credentials is difficult for whites, but almost impossible for minorities." *Second Newman Report: National Policy and Higher Education, Report of a Spe-*

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[6] *See* W. Ryan, *Blaming the Victim* (1971) describing the phenomenon whereby the visible consequences of exclusion are utilized to justify further exclusion.

cial Task Force to the Secretary of Health, Education and Welfare 27 (1973). This racial exclusion from higher education and the professions has been the logical consequence of an educational system that has inappropriately labeled, classified, and tracked minority students into a set of educational experiences or programs that have severely limited their opportunities for education and work in later life.[7]

Substantial exclusion from the professions is both an outcome and an essential link in perpetuating this suppressed condition of blacks and other racial minorities. The medical profession is one of the most highly paid and high status professions in our society. Yet, in 1970, blacks, who made up 11.1% of the total population, comprised only 2.1% of physicians. U.S. Dept. of HEW, *Minorities and Women in the Health Field*, Tables 1, 5 (1976). This means that one out of every 560 white Americans, but only one out of 3,800 black Americans, were physicians. These extremely disparate figures are, of course, tied to years of exclusion from medical training. In 1940, for example, only 145 of the 5,000 students who graduated from medical schools were black. All but 15 of these black students graduated from black medical schools. President's Committee on Civil Rights, *To Secure These Rights* 67 (1947). This exclusion is still manifest today. Through their use of affirmative action programs, medical schools have made some progress over the last decade towards integration of the medical profession.[8]

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[7] Several cases have taken cognizance of this. *See, e.g., Serna* v. *Portales Mun. Schools,* 351 F. Supp. 1279 (D.N.M. 1972); *P.* v. *Riles,* 343 F. Supp. 1306 (N.D. Cal. 1972); *Diana* v. *California State Bd. of Educ.,* Civ. No. C7037 RFD (N.D. Cal., filed Jan. 1970); *Hobson* v. *Hansen,* 269 F. Supp. 401 (D.D.C. 1967).

[8] *See generally* C. Odegaard, *Minorities in Medicine: From Receptive Passivity to Positive Action, 1966-76* 102-03 (1977). We discuss this in more depth at Point III, p. 46, *infra.*

Many years of concentrated effort to include minorities in medical training will be required, however, to cure the overall disparity.

The exclusion of blacks and other minorities from the medical profession is replicated throughout the professions and other types of high-income/high status employment. For example, minority lawyers made up only 3.3% of the 396,000 lawyers employed in 1976;[9] and black lawyers made up only 1.7%.[10] As recently as 1974, blacks occupied only 1.5% of the total number of professional jobs in firms that reported to the Equal Employment Opportunity Commission. A. Brimmer, *The Economic Position of Black Americans: 1976,* 29-30 (1976).

These economic and educational data demonstrate unmistakably that blacks and similar racial minorities continue to be deprived of full participation in the benefits of the nation.

That condition reinforces their continued stigmatization. Low economic and educational status supports as-

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[9] Bureau of Labor Statistics, *Employment and Earnings* 8 (Table 1) (Jan. 1977).

[10] In testimony before the Senate Subcommittee Hearing on CLEO Appropriations for Fiscal Year 1976, held in April 1976, James Caldwell of the ABA estimated that there were approximately 7,500 black lawyers and 380,000 white lawyers in the profession.

Even the black lawyers who had the fortitude to embark upon a legal career in a hostile white world were formally excluded from some of the profession's important institutions, such as the American Bar Association and the Washington, D. C. Bar Association, until about 20 years ago. J. Javits, *Discrimination-U.S.A.* 227 (1960). They were also excluded from most law schools until *Sweatt* v. *Painter,* 339 U.S. 629 (1950) was decided. H. Davie, *Negroes in American Society* 163 (1949).

sumptions by the majority of the inferiority of persons of color. These assumptions of inferiority are the basic and necessary foundation for social norms that guide and perpetuate majority discriminatory behavior.[11] By this circular process, the exclusionary system begun with the approval of the law has now achieved a life of its own.

The system of exclusion has not been, and cannot be, effectively undone merely by the elimination of de jure racism. Our social institutions must also act directly on the economic, political, and social attributes of the system, which has fixed upon racial minorities a pervasively inferior status, the palpable badge and incident of continuing servitude. To install fully the mandate of the Thirteenth Amendment, all of the parts of the system of exclusion must be dismantled.

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[11] In *Clark* v. *Universal Builders, Inc.*, 401 F.2d 324 (7th Cir. 1974), for instance, defendant homesellers were charged with violating 42 U.S.C. § 1982 by including a "ghetto tax" in the price of homes they sold to blacks. They argued that if the market price of homes for blacks was higher than the price of comparable homes for whites, that was merely the result of other acts of discrimination which constricted the housing market for blacks and drove up prices and that they did not violate the law by taking advantage of the condition of the housing market with respect to blacks. The Seventh Circuit Court of Appeals, however, rejected this limiting interpretation and held that a claim of discrimination could be made out under the Act "by proof of exploitation of a discriminatory situation already existing and created in the first instance by the action of persons other than defendants." 401 F.2d at 328. The badges and incidents of servitude necessarily may encompass more than specific discriminatory acts.

C. The University of California's race-conscious admissions program is a direct and effective means to overcome the badges and incidents of servitude as they continue in the medical profession.

In the first two years of the University of California's Medical School at Davis, extremely few minority applicants were accepted for admission. Continuation of that situation plainly would have served to perpetuate the badges and incidents of servitude as they are manifested in the medical profession. The medical school's direct action to integrate its student body and the medical profession through the use of race-conscious admissions procedures constitutes a substantial effort to disrupt the interdependent and self-perpetuating nature of the system of racial exclusion. It serves both to increase the number of minority physicians and to create the visible presence of qualified minority professionals which is necessary to counteract pervasive prejudicial stereotypes about the lack of capacity of minority group persons.

The faculty of the medical school at Davis, authorized by the Regents of California, is fully competent to determine that the continued exclusion of blacks and similar racial minorities from the medical profession is a badge and incident of servitude. The term "badges and incidents" is not frozen into the Constitution with a single meaning. It is a broad standard that permits society's institutions "rationally to determine what are the badges and the incidents of slavery." *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 440 (1968). Congress, for instance, has determined that it should include private acts of racial discrimination with respect to the purchase or lease of real estate (42 U.S.C. § 1982) and the making of contracts (42 U.S.C. § 1981), including contracts for employment, *Johnson* v. *Railway Express Agency*, 421 U.S. 454

(1975) and schooling, *Runyon* v. *McCrary,* 427 U.S. 160 (1976). The numerous federal statutes, executive orders, and regulations detailed in Point III, *infra,* flowing from both the legislative and executive branches, also give content to the term by authorizing affirmative action to eliminate a wide variety of minority exclusions. But the power to identify and eliminate the badges and incidents of servitude is not exclusively vested in the federal government. It may be exericsed by the states as well.

The Thirteenth Amendment has two sections. The first, as we have shown, was broadly intended, and has been broadly construed, to create a strong national policy to obliterate all "badges and incidents" of slavery. *See, e.g., Jones* v. *Alfred H. Mayer Co., supra; Runyon* v. *McCrary, supra.* The second gives Congress the power to enforce that amendment. Because the federal government has only the express or implied powers granted to it by the federal Constitution, *see, e.g., McCulloch* v. *Maryland,* 17 U.S. (4 Wheat.) 316 (1819),[12] the framers of the Thirteenth Amendment felt that it was necessary to make absolutely clear, by section two of the amendment, that Congress had the authority to enforce section one. But responsibility to enforce the Constitution exists no less on the state than on the federal level. U.S. Const. art. VI. *See, e.g., Cooper* v. *Aaron,* 358 U.S. 1, 18-19 (1958).

No specific grant of power need be made to the states to authorize this enforcement. Such power is inherent in

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[12] "This government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only those powers granted to it . . . . is now universally admitted." 17 U.S. at 405.

the residual or police powers of the states.[13] *Cf. Leisy* v. *Hardin,* 135 U.S. 100 (1890). This was made clear by supporters of the Thirteenth Amendment in post-ratification debates concerning the constitutionality of the Civil Rights Act of 1866 which had been drawn pursuant to the amendment's authority. "So far as there is any power in the states to limit, enlarge, or declare civil rights, all these are left to the states [by the Thirteenth Amendment and acts adopted pursuant thereto.]" CONG. GLOBE, 39th Cong., 1st Sess. 1832 (1866).[14] So long as the state's

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[13] The classic explication on the police powers of the states is to be found in E. Freund, *The Police Power* (1904). Section two of the Thirteenth Amendment, explicitly granting enforcement powers to Congress, was not intended to deprive the states of similar power. Because of the federal nature of the government, an explicit grant was thought to be necessary for the federal Congress but not for the states.

[14] *See also* the remarks of Senator Trumball, 39th Cong., 1st Sess., at 77, where he refers to "local legislation" to "provide for the real freedom" of former slaves. It should be noted that many who supported the Thirteenth Amendment did so because of a "natural rights" philosophy which was deeply held. *See* tenBroek, *Thirteenth Amendment to the Constitution of the United States,* 39 Cal. L. Rev. 171, 197-200 (1951); Buchanan, *The Quest for Freedom: A Legal History of the Thirteenth Amendment,* 12 Hous. L. Rev. 1, 18-21 (1974-75). The thought that the states were precluded in some way from effectuating the Thirteenth Amendment would have been anathema to them.

It is instructive, in this regard, to note that Representative Bingham, the prime framer of the Fourteenth Amendment, discussed the role of state governments in explaining the need for that amendment:

> The nation cannot be without that constitution, which made us "one people"; the nation cannot be without the state governments to localize and enforce the rights of the people under the constitution . . . centralized power, decentralized administration expresses the whole philosophy of the American system.

CONG. GLOBE. 42nd Cong., 1st Sess., Appendix at 85 (1871).

actions are not inconsistent with congressionally proclaimed policy, they must therefore be upheld.

While it might be argued that, for institutional reasons, courts should not by themselves venture beyond dealing with the legal rules that are implicated in the badges and incidents of servitude, other social institutions, including instrumentalities of the states, are fully competent to go further. *Compare Palmer* v. *Thompson,* 403 U.S. 217 (1971) *with Jones* v. *Alfred H. Mayer Co., supra.* As Justice Brandeis wrote: "It is one of the happy incidents of the federal system that a single courageous State may . . . serve as a laboratory; and try novel social and economic experiments." *New State Ice Co.* v. *Liebmann,* 285 U.S. 262, 311 (1932) (dissenting opinion). It is especially appropriate that the states and their agencies should have the power to experiment with remedies when they are attempting to insure fundamental rights.

No rights are more fundamental than those which flow from the command of the Thirteenth Amendment. Davis' affirmative action program is such an experiment. It clearly meets the test adopted in *Jones* v. *Alfred H. Mayer Co., supra,* from *McCulloch* v. *Maryland,* 17 U.S. (4 Wheat.) 316, 421 (1819):

> Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional

392 U.S. at 443.

II.

Bakke has no Fourteenth Amendment claim that overrides the University of California's implementation of the Thirteenth Amendment.

A. The California Supreme Court erroneously interpreted the Fourteenth Amendment in a manner that eviscerates the Thirteenth Amendment.

By failing to consider the significance of the Thirteenth Amendment, the California Supreme Court grossly distorted the application of the equal protection doctrine to this case. It established colorblindness as a virtually insuperable command of the Fourteenth Amendment. Reading the Fourteenth Amendment in this way strikes at the very core of the Thirteenth. As we have demonstrated above, the badges and incidents of servitude continue to be imposed on persons of color and only on them.[15] The elimination of the badges and incidents means achieving a change in that condition. As these concepts apply in this case, eliminating the badges and incidents requires an increase in the number and percentage of blacks and similar racial minorities in medical schools and the medical profession. Inevitably and logically, such a remedy must identify the victims of racial exclusion on the basis of their race. Furthermore, the remedy must be directed primarily at specific racial minorities: it is their condition that must be changed. A colorblind application of the Fourteenth Amendment will only "operate to 'freeze' the status quo of prior discriminatory . . . practices,"

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[15] Involuntary servitude can be imposed on persons without regard to color. This is also in violation of the Thirteenth Amendment. But this case involves the principal application of the Amendment, to the condition of blacks and similar racial minorities.

Griggs v. *Duke Power Co.*, 401 U.S. 424, 430 (1971) long before this country has reached the point of true equality of opportunity.

The need to undo the badges and incidents of servitude provides the basis for reconciling 42 U.S.C. § 1981 and Title VII of the Civil Rights Act of 1964, which apply to whites as well as minorities, with affirmative action programs. While firing whites because of their race may violate those statutes, *McDonald* v. *Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976), other employment decisions may be legitimate if done pursuant to an affirmative action program. *Id.* at 280-81n. 8. Title VII and 42 U.S.C. § 1981 embody a goal of disregarding race that is at least as strong, and probably stronger,[16] than any similar principle found in the Fourteenth Amendment. Yet, the principle of race blindness does not invariably apply in all employment situations. When an employer acts pursuant to a carefully constructed affirmative action plan that has been designed directly to undo the conditions in which blacks and similar racial minorities are kept, such an action advances the purposes of the statutes. Because the purposes of the statutes are being fulfilled, colorblindness need not apply.

Similarly, the Fourteenth Amendment is preeminently an enforcer of the Thirteenth. Using it to strike down a program that implements the Thirteenth, as the California Supreme Court has done, flies in the face of the historical circumstances of its passage. The Fourteenth Amendment

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[16] We argue in the following sections that racial distinctions should only be suspect under the Fourteenth Amendment when a discrete and insular minority is victimized by them or a slur or stigma is attached to them. Thus, the Fourteenth Amendment embodies a principle of race blindness only with respect to certain groups or certain situations.

was passed to ensure that the evils proscribed by the Thirteenth were permanently and unmistakably ended.[17] The Black Codes, adopted after the passage of the Thirteenth Amendment

> imposed upon the colored race onerous disabilities and burdens, and curtailed their rights in the pursuit of life, liberty, and property to such an extent that their freedom was of little value. . . .
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> These circumstances . . . forced upon the statesmen who had conducted the Federal government in safety through the crisis of the rebellion, and who supposed that by the thirteenth article of amendment they had secured the result of their labors, the conviction that something more was necessary in the way of constitutional protection to the unfortunate race who had suffered so much. They accordingly passed through Congress the proposition for the fourteenth amendment.

Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 70 (1872). *See generally* Buchanan, *The Quest for Freedom: A Legal History of the Thirteenth Amendment, Chapter II,* 12 Hous. L. Rev. 331, 332-34 (1975).

The California Supreme Court further distorted the Equal Protection Clause of the Fourteenth Amendment by applying what it styled a "less detrimental means"

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[17] This is one point on which all historians of the Fourteenth Amendment agree. *See, e.g.,* H. Flack, *The Adoption of the Fourteenth Amendment* (1908); J. tenBroek, *The Antislavery Origins of the Fourteenth Amendment* (1951); L. Warsoff, *Equality and the Law* (1938); Fairman, *Does the Fourteenth Amendment Include the Bill of Rights?,* 2 Stan. L. Rev. 5 (1949).

standard. *See Bakke* v. *Regents of the Univ. of Cal.*, 18 Cal. 3d 34, 49, 553 P.2d 1152, 1162, 132 Cal. Rptr. 680, 690 (1976). In so doing, it inevitably doomed the effort of the University of California to give life to the Thirteenth Amendment by putting the University to the impossible task of disproving a negative, that is, that no effective race-blind method was available to achieve that result. The court gave no authority for its particular formulation of the "less detrimental means" test or its idiosyncratic application to this case. Actually, if this test applies at all,[18] the legal standard is more properly formulated as the most "precise" means or most narrow means. For instance, in *Sugarman* v. *Dougall*, 413 U.S. 634 (1973), this Court held, in the face of a suspect classification, that

> the means the State employs must be *precisely* drawn in light of the acknowledged purpose.
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> Section 53 is neither *narrowly confined nor precise* in its application.

Id. at 643 (emphasis added). This statement of the standard, rather than the California court's misleading application of it, is consistent with a similar standard used in situations involving First Amendment and other fundamental rights. *See, e.g., Shelton* v. *Tucker*, 364 U.S. 479, 488 (1960) (a legitimate government "purpose cannot be pursued by means that *broadly* stifle fundamental personal liberties when the end can be more narrowly achieved") (emphasis added); *Kramer* v. *Union Free School Dist.*, 395 U.S. 621, 632 (1969) (New York limitation on the franchise did not accomplish its purpose "with sufficient precision").

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[18] Immediately below, we argue that it should not.

The University's program completely satisfies this standard when the standard is properly defined. The purpose of the medical school's program is to eliminate the badges and incidents of servitude in the medical school and the medical profession through the racial integration of those institutions and not merely to eliminate some non-racial socio-economic disadvantage. The method used to achieve that end—identifying from among a large group of qualified applicants those who belong to racial minorities and assuring that a representative proportion of those applicants are admitted to the school—is the most precise and direct way of increasing minority representation at the school and in the medical profession. The method chosen is not a single degree broader than the crucial goal which the University seeks to achieve.[19]

Not only did the California court misconstrue a standard derived from the First Amendment context; it erred in even importing that standard into a case such as this, which requires a reconciliation of Thirteenth Amendment and purported Fourteenth Amendment interests. The most precise means test was derived to adjust conflicts between the fundamental rights of citizens and the police powers of the government. It serves to prevent an overbroad limitation of fundamental rights. But in this case, the competing claims are different. The government's interest in implementing the command of the Thirteenth Amendment carries a fundamental importance in our constitutional scheme far beyond the simple application of the police power. On the other side of the balance, Bakke's

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[19]The California court seemed to invite the creation of some obfuscatory method to achieve racial inclusion without overtly considering race. *Amici* submit, however, that alternative "non-racial" methods would be equally vulnerable to attack as race conscious methods in disguise.

claimed interest in having his race ignored, even if that interest is deemed to call for strict scrutiny by the Court,[20] is not written directly into the Constitution and is not "fundamental" as that concept has been developed with regard to other interests, such as freedom of speech or voting.[21] If having one's race ignored were in itself a fundamental right, this Court could not have allowed the explicit racial sorting approved in *United Jewish Organizations of Williamsburgh, Inc.* v. *Carey,* 45 U.S.L.W. 4221 (March 1, 1977).

Amici urge this Court to reject the California court's use of a "less detrimental means" test which not only precludes the eradication of the badges and incidents of servitude but misconstrues and misapplies the standard developed by this Court. Until these badges and incidents are eradicated, the Thirteenth and Fourteenth Amendments must retain the balance with which they were adopted, and the Fourteenth cannot require colorblindness.

B. The California Court erred in applying the strict scrutiny test in this case.

In determining whether or not a classification is suspect, and thus subject to strict scrutiny, this Court has looked to whether or not "[t]he system of alleged dis-

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[20] We argue below in Point II-B that it does not call for such scrutiny.

[21] While disregarding race in decision-making may be viewed as a desirable goal, it is not the only principle embodied in the Equal Protection Clause and is not an absolute limit on the means used to achieve that goal. *See* Wasserstrom, *Racism, Sexism and Preferential Treatment: An Approach to the Topics,* 24 U.C.L.A. L. Rev. 581 (1977).

crimination and the class it defines have . . . the traditional indicia of suspectness: the class is . . . 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 majoritarian political process." *San Antonio Indep. School Dist.* v. *Rodriguez,* 411 U.S. 1, 28 (1973). *See Mathews* v. *Lucas,* 427 U.S. 475 (1976); *Frontiero* v. *Richardson,* 411 U.S. 677 (1973).

The California court ignored the *Rodriguez* test and its underlying rationale. Instead, it chose to introduce a new and anomalous formulation of the equal protection standard of review. The California court's formulation requires the application of strict scrutiny "where the classification results in detriment to a person because of his race," *Bakke, supra* at 49, 553 P.2d at 1162, 132 Cal. Rptr. at 690, regardless of the fact that no "stigma is cast upon them because of their race." *Id.* at 50, 553 P.2d at 1163, 132 Cal. Rptr. at 691. Affirmance of California's standard of review would mark a dangerous departure from this Court's careful interpretation of the Equal Protection Clause. It would require the very result that this Court recently rejected in *United Jewish Organizations of Williamsburgh, Inc.* v. *Carey,* 45 U.S.L.W. 4221 (March 1, 1977), *i.e.* a color-blind application of that clause.[22]

The equal protection test articulated in *Rodriguez* is the logical formulation of this Court's concern with prejudice against insular and discrete minorities. This focus

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[22] As Professor Paul Freund has written, "[e]qual 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." Freund, *Constitutional Dilemmas,* 45 B.U.L. Rev. 13, 20 (1965).

has been clear since the Court's earliest decisions. *See, e.g., Yick Wo.* v. *Hopkins,* 118 U.S. 356 (1886); *Strauder* v. *West Virginia,* 100 U.S. 303 (1879). Similarly, the "more exacting" scope of review called for in footnote 4 of the *Carolene Products* case was aimed at the

> review of statutes directed at particular . . . racial minorities . . . [where] 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 Prod. Co.,* 304 U.S. 144, 152n. 4 (1938) (emphasis added).[23]

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[23] Although it could be argued that remedial racial classifications are "directed at minorities," J. Skelly Wright has stated:

> I submit that compensatory legislation favoring Negroes would not be unconstitutional even though it made racial classifications and even though similar legislation favoring whites would violate equal protection. . . . [T]he function of equal protection here is to shield groups or individuals from stigmatization by government. Whether or not particular legislation stigmatizes is largely a sociological question requiring consideration of the structure and history of our society as well as examination of the statute itself. Legislation favoring Negroes, then, would be constitutional because it is rational *and* because in *our* society it would not stigmatize whites.

Wright, *The Role of the Supreme Court in a Democratic Society—Judicial Activism or Restraint?,* 54 Cornell L. Rev. 1, 17-18 (1968). *See also* Judge Wright's opinion in *Hobson* v. *Hansen,* 269 F. Supp. 401, 492-503 (D.D.C. 1967).

(Footnote continued on following page)

Racial classifications that serve to keep a historically disadvantaged race in a disadvantaged position, *see Hunter* v. *Erickson*, 393 U.S. 385 (1969); *Anderson* v. *Martin*, 375 U.S. 399 (1964) or that brand a race as inferior, *see Loving* v. *Virginia*, 388 U.S. 1 (1967); *McLaughlin* v. *Florida*, 379 U.S. 184 (1964); *Brown* v. *Board of Educ.*, 347 U.S. 483 (1954), therefore violate the constitutional guarantee of equal protection. But where the purpose of the classification is not to discriminate against a minority group, *see Tancil* v. *Woolls*, 379 U.S. 19 (1964) or where there is an obligation to take affirmative steps to promote racial integration, *see Otero* v. *New York City Hous. Auth.*, 484 F.2d 1122 (2d Cir. 1973), a racial classification will be upheld "even though this may in some instances not operate to the immediate advan-

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(Footnote continued from preceding page)

Amici are also aware of the concern that a "purportedly preferential race assignment may in fact disguise a policy that perpetuates disadvantageous treatment of the plan's supposed beneficiaries." *United Jewish Organizations of Williamsburgh, Inc.* v. *Carey*, 45 U.S.L.W 4221, 4229 (March 1, 1977) (Brennan, J., concurring). That danger is not present in this case. It is quite true that special programs that label groups as "culturally deprived," "exceptional children," and "physically and mentally handicapped" may result in stigmatization. But there are criteria that distinguish these from preferential treatment. Labelling on the one hand, is a method of social control where those who have power in decision-making (the majority) limit the opportunities of the minority by giving them a label that emphasizes disability and lower social status. Preferential treatment, on the other hand, is a method that reduces social control by the majority by expanding and equalizing opportunities of the minority group based on the strengths and potentialities of these individuals. It is agreed that the minority students admitted to the University of California under the Davis program are fully qualified to study medicine and become doctors. To say preferential admissions may increase stigma for the special group therefore misunderstands the substance of the special admissions program.

tage of some nonwhite [historically disadvantaged] persons." *Id.* at 1125.

Bakke has not claimed he is a member of an "insular and discrete minority" that has historically been relegated to a "position of powerlessness" or that is in need of the Court's protection against "the majoritarian political process." On the contrary, whites continue to enjoy an artificially superior position that represents the final legacy of chattel slavery. Whites are twice as likely as blacks to finish high school or college, and even more likely to become professional persons, but only half as likely to be unemployed.[24] As a group, whites will earn more, live in better housing, control the political and economic processes in the country, and even live longer than blacks. In short, a classification of whites bears none of the traditional indicia of "suspectness."[25]

More than a century ago, this Court recognized that, when a member of the majority group is affected by a legislative classification, the remedy is at the polls. *Slaughter—House Cases,* 83 U.S. (16 Wall.) 36 (1873). Heretofore, it has not departed from that rationale and has limited the application of a strict standard of review to classifications affecting "insular and discrete minorities" that have been relegated to positions of powerlessness. *See Examining Bd. of Eng'rs, Architects & Sur-*

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[24] U.S. Dept. of Commerce, Bureau of the Census, *Statistical Abstract of the United States* 123, 361, 373 (Tables 198, 199, 582, 601, 602) (1976).

[25] It should also be noted, as Justice Stevens recognized in *Craig* v. *Boren,* 97 S. Ct. 451, 464 n.1 (1976), that "[m]en as a general class have not been the victims of the kind of historic, pervasive discrimination that has disadvantaged other groups." Bakke is not entitled to any special protection arising out of his status as a white male.

veyors v. *Otero,* 426 U.S. 572 (1976); *Frontiero* v. *Richardson,* 411 U.S. 677 (1973); *Hernandez* v. *Texas,* 347 U.S. 475 (1954) (Mexican-Americans).

The Court's formulation of the suspect class doctrine is based upon important principles of constitutional law. The separation of powers doctrine and deference to our system of federalism mandate that the Court refrain from acting as a super legislature when the interests of those who control the majoritarian political process are affected by legislative action. Conversely, majoritarian forces cannot legislatively strip away the rights of those who do not have access to or an equivalent amount of influence on the legislative process. *South Carolina State Highway Dep't* v. *Barnwell Bros., Inc.,* 303 U.S. 177 (1938); *McCulloch* v. *Maryland,* 17 U.S. (4 Wheat.) 316 (1819). By subjecting legislation that affects majoritarian nonvictimized interests to strict scrutiny, the Court would create "a situation which invites conflict between the courts and the legislature." *Koelfgen* v. *Jackson,* 355 F. Supp. 243, 251 (D. Minn. 1972), *aff'd,* 410 U.S. 976 (1973).

The justifications for the University of California's admissions program meet any standard of review properly applied under the Fourteenth Amendment. We have already argued that the complete implementation of the Thirteenth Amendment is, in the fullest sense of the term, a compelling need in our society. But the University of California has substantial justifications even beyond that, which fully support its program.

First, there are gross and tragic disparities in the incidence of death and disease between whites and nonwhites. The infant mortality rate in 1950, for example, was 26.8 for whites and 44.5 for nonwhites. In 1971, this disparity was 16.8 for whites as opposed to 30.2 for nonwhites, a difference of 13.4 and a decrease over the 21-

year period of 37.7% for whites and 31.1% for nonwhites. Darity, *Crucial Health & Social Problems in the Black Community,* J. Black Health Perspectives 30, 42 (June/July 1974). Similiarly, in 1940 the maternal mortality rate was 2½ times as high for nonwhites as for whites, *id.* at 44, but in 1971 nonwhite mothers died in child birth four times as often as white mothers. Spruce, *Toward a Larger Representation of Minorities in Health Careers,* 64 J. Nat'l Med. A. 432-36 (Sept. 1972). In addition, a 1974 report showed that hypertension is 60% higher in nonwhites, and kidney disease and death that result from it are twice as likely to strike nonwhites in their peak earning years of 45-54 as whites. Mills, *Each One Teach One,* J. Black Health Perspectives 1, 5-10 (Aug./Sept. 1974). The death rates for cardiovascular diseases, influenza and pneumonia, diabetes, liver diseases, and tuberculosis are also alarmingly higher for nonwhites than for whites. Darity, *Crucial Health & Social Problems in the Black Community, supra,* at 46. Finally, since 1920 the gap in life expectancy between whites and nonwhites has narrowed by only 2.9 years, from 9.6 years to 6.7 years. In 1971, life expectancy was 71.9 years for whites and 65.2 years for nonwhites. *Id.* at 34.

Such inequalities in medical condition demonstrate a compelling need to increase the number and percentage of minority physicians. Recent studies have demonstrated that minority physicians are more likely to engage in primary care practices, particularly in medically underserved areas. Such physicians are locating at unprecedented rates in the rural and urban South and in large cities where there are concentrations of low income populations. Also of great significance is the fact that minority physicians are more likely than other graduates of American medical schools to practice in large city public hospitals, neighborhood health centers, and other public insti-

tutions responsible for providing medical services to low income, typically underserved populations.[26]

Second, the racial integration of medical schools directly serves to stimulate the quality of education that takes place there and to heighten the sensitivity of medical students to the perceptions and needs of a variety of groups. Diversity, particularly in a setting such as a school where the students have many common goals, can foster interest and curiosity and encourage mutual respect and understanding. *See* M. Deutsch, *The Resolution of Conflict* (1973); Cook, "Motives in a Conceptual Analysis of Attitude Related-Behavior" *Nebraska Symposium on Motivation*, 179 (1969); Cook, The Affect of Unintended Interracial Contact upon Racial Interaction and Attitude Change, Final Report, U. S. Office of Education, Project No. 5-1320 (1971).

C. The University of California's program does not deprive Bakke of any constitutionally protected rights.

There is no question that the University of California could have reserved spaces in the class based on any number of criteria (such as marital relationship to currently

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[26] *Physician Choice of Specialty and Geographic Location*: *A Survey of the Literature*, Chapter 9, Medicare-Medicaid Reimbursement Policies (Institute of Medicine, National Academy of Sciences, March, 1976); Johnson, *et al.*, *Recruitment and Progress of Minority Medical School Entrants, 1970-1972*, J. Med. Educ., Supplement 50 (July 1975); Long & Hansen, *Trends in Return Migration to the South*, 12 Demography 601-14 (Nov. 1975); *Statistical Abstract, supra*, Table 16; Tilson, *Stability of Employment in OEO Neighborhood Health Centers*, 11 Med. Care No. 5, 384-400 (1973); U.S. Dept. of HEW Health Resources Administration, Bureau of Health Resources Development, *Characteristics of Black Physicians in the United States*, (1975).

enrolled students or residence in certain geographic areas), even though each of these alternatives would have reduced Bakke's chances as much or even more than the system he challenges here. The California Supreme Court explicitly permitted the University of California to establish a preferential admissions program for "disadvantaged" students, even though Bakke's chances for admission would be burdened at least as severely under such a program as they are under the current one. In terms of Bakke's opportunity to attend medical school, the current admissions plan is no more detrimental to Bakke's interests than other concededly legitimate plans.

If Bakke has any constitutional claim at all, it must be in the fact that his race was considered, not in the fact that his chances of admission were diminished. But that claim, too, must fail on close scrutiny. The Constitution is not color blind. Consideration of race can indeed violate the Equal Protection Clause when it invidiously imposes a racial slur or stigma. *See United Jewish Organizations of Williamsburgh, Inc.* v. *Carey,* 45 U.S.L.W. 4221 (March 1, 1977). Bakke, however, has suffered no racial slur or stigma by his failure to be admitted. His exclusion from an admissions program that was directed at "disadvantaged minorities" does not in any way suggest that he is unworthy. It is not part of a social ideology that holds *whites* to be inferior. He is not part of a group that has generally been stigmatized or deprived. He cannot justifiably feel insulted or demeaned any more by his nonadmission than he could if he were rejected for some other reason, such as residence, age, or marital status.

Furthermore, the University of California's use of race as a criterion for minority admissions is analogous to ra-

cial hiring programs that have been approved in nine circuits.[27]

Quotas in employment discrimination cases are not instruments of "reverse discrimination." Rather, they are a vehicle for achieving that rightful place in the work force that minorities would have occupied but for their minority status. *Rios* v. *Steamfitters Local 638,* 501 F.2d 622 (2d Cir. 1974); *Contractors Ass'n* v. *Secretary of Labor,* 442 F.2d 159 (3d Cir.), *cert. denied,* 404 U.S. 854 (1971).[28] Minority admissions programs are also a legitimate vehicle for opening a rightful place in professional employment to qualified members of a heretofore racially excluded class.

They are also analogous to the use of mathematical ratios to achieve racially balanced faculties and staffs as a step toward desegregating our school systems.[29] Al-

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[27] *United States* v. *Ironworkers Local 86,* 443 F.2d 544 (9th Cir.), *cert. denied,* 404 U.S. 984 (1971); *Carter* v. *Gallagher,* 452 F.2d 315 (8th Cir. 1971), *cert. denied,* 406 U.S. 950 (1972); *United States* v. *United Brotherhood of Carpenters & Joiners, Local 169,* 457 F.2d 210 (7th Cir.), *cert. denied,* 409 U.S. 851 (1972); *Arnold* v. *Ballard,* 12 FEP Cases 1613 (6th Cir. 1976); *Local 53, International Ass'n of Heat & Frost Insulators & Asbestos Workers* v. *Vogler,* 407 F.2d 1047 (5th Cir. 1969); *Patterson* v. *American Tobacco Co.,* 535 F.2d 257 (4th Cir. 1976); *United States* v. *International Union of Elevator Constructors, Local 5,* 538 F.2d 1012 (3d Cir. 1976); *Rios* v. *Steamfitter Local 638,* 501 F.2d 622 (2d Cir. 1974); *Morgan* v. *Kerrigan,* 530 F.2d 431 (1st Cir. 1976).

[28] S. Rep. No. 415, 92nd Cong., 1st Sess. 6 (1971); H.R. Rep. No. 238, 92nd Cong., 1st Sess. 4 (1971), *as cited in Franks* v. *Bowman Transp. Co.,* 424 U.S. 747, 764 n.21 (1976).

[29] *See, e.g., United States* v. *Montgomery Bd. of Educ.,* 395 U.S. 225 (1969); *Armstead* v. *Starkville Mun. Separate School Dist.,* 461 F.2d 276, 280-81 (5th Cir. 1972); *Porcelli* v. *Titus,* 431 F.2d 1254, 1257-58 (3d Cir. 1970); *Kemp* v. *Beasley,* 389 F.2d 178, 187-88 (8th Cir. 1968); *Yarbrough* v. *Hulbert-West Memphis School Dist. No. 4,* 380 F.2d 962, 969 (8th Cir. 1967); *United States* v. *Jefferson County Bd. of Educ.,* 372 F.2d 836, 902 (5th Cir. 1966).

though such a ratio requires individual whites to bear a part of the burden of desegregation, this Court has approved because it "promises realistically to work, and promises realistically to work *now*." *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 20 (1971), *citing United States* v. *Montgomery County Bd. of Educ.*, 395 U.S. 225, 235-36 (1969) (emphasis in original).

In none of these desegregation cases has the possible injury to individual prospective white faculty members triggered a compelling state interest test. Nor have the classifications been considered suspect or violative of the equal protection rights of white persons. Rather, in the face of arguments that minority preferences in faculty promotions were "racial discrimination in reverse," the Third Circuit, for example, has held that

> State action based partly on considerations of color, when color is not used per se, and in furtherance of a proper governmental objective, is not necessarily a violation of the Fourteenth Amendment.
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> . . . [T]o permit a great imbalance in faculties . . . would be in negation of the Fourteenth Amendment to the Constitution and the line of cases which have followed Brown v. Board of Education.

Porcelli v. *Titus, supra,* at 1257-58.

Absent a showing that Bakke has been deprived of a constitutionally protected right or that he has suffered stigmatization because of his race, this Court should not dismantle the University of California's program merely because Bakke did not get into its medical school. An affirmance in this case would preclude the admission of

many minority applicants who can legitimately expect to be admitted if the program continues, and might even lead to the ouster of approximately 60 minority students who are presently enrolled in the school. Although Bakke did not gain admission, this Court should conclude that "a sharing of the burden of the past discrimination is presumptively necessary [and] is entirely consistent with any fair characterization of equity jurisdiction, particularly when considered in light of our traditional view that '[a]ttainment of a great national policy . . . must not be confined within narrow canons for equitable relief deemed suitable by chancellors in ordinary private controversies.' *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. at 188." *Franks* v. *Bowman Transp. Co.*, 424 U.S. 747, 777-78 (1976) (footnote omitted).[30]

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[30] While this decision was made in the context of a court-imposed remedy, this Court also noted that its ruling was broad enough to encompass voluntary agreements designed to ameliorate the effects of past discrimination since they are "a national policy objective of the 'higest priority'." 424 U.S. at 779.

See also United Jewish Organizations of Williamsburgh, Inc. v. *Carey*, 45 U.S.L.W. 4221 (March 1, 1977) (Brennan, J., concurring). While cases such as *Franks* v. *Bowman Transp. Co., supra,* arose in the form of judicial decrees, the role of the judiciary is not an exclusive one:

> . . . even a legislative policy of remedial action can be closely tied to prior discriminatory practices or patterns. . . . I believe, therefore, 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, supra,* at 4229 n.2.

D. The Davis program does not unconstitutionally burden the majority.

The California court erroneously inferred that because "the special admission program denies admission to some white applicants solely because of their race," *Bakke, supra,* at 47, 553 P.2d at 1161, 132 Cal. Rptr. at 689, "whites suffer a grievous disadvantage by reason of their exclusion from the University on racial grounds." *Id.* at 50, 553 P.2d at 1163, 132 Cal. Rptr. at 691.

The California decision collides with this Court's recent holding in *United Jewish Organizations of Williamsburgh, Inc.* v. *Carey,* 45 U.S.L.W. 4221 (March 1, 1977). Whites as a group are not excluded from the Davis Medical School. Rather, they make up 84% of the student body. Hence, the plan does not serve to underrepresent the white race generally and does not constitute invidious discrimination against whites as a class, despite the undeniable reality that individual whites were affected. *See id.* at 4227 (plurality opinion), 4231 (Stewart, J., and Powell, J., concurring). As Justice White, writing for the Court in *United Jewish Organizations of Williamsburgh, Inc.* v. *Carey, supra,* explained:

> There is no doubt that in preparing the 1974 legislation, the State deliberately used race in a purposeful manner. But its plan represented no racial slur or stigma with respect to whites or any other race, and we discern no discrimination violative of the Fourteenth Amendment.

Id. at 4227.

The Davis program similarly used race as a criterion but, as the California Supreme Court found, the plan did not represent a racial slur or stigma on white applicants.

Bakke, supra, at 50-51, 553 P.2d at 1163, 132 Cal. Rptr. at 691.

In addition, the "burden" whites bear because of the Davis program is analogous to the "burden" placed on white voters in *United Jewish Organizations of Williamsburgh, Inc.* v. *Carey, supra.* Just as the redistricting which "deliberately increased the non-white majorities in certain districts in order to enhance the opportunity for election of non-white representatives" did not violate constitutional guarantees provided "there was no fencing out of the white population from participation in the political processes," *id.* at 4227, a race conscious admissions program deliberately designed to increase the number of minority students in medical schools in order to increase medical service in minority communities does not violate constitutional guarantees where whites are not fenced out of the medical profession.

E. California had the power to institute the minority admissions program, as a means to further the general welfare, without a showing of past discrimination by the medical school.

The California court erred in concluding that, without any showing of past discrimination by the University, the minority admissions program violated equal protection. *Bakke, supra* at 57-60, 553 P.2d at 1168-69, 132 Cal. Rptr. at 696-97. In implementing remedial programs, state authorities have wider latitude than federal courts. A federal court has equitable power to impose such a program only to the extent required to remedy specific violations of law. *Compare Hills* v. *Gautreaux,* 425 U.S. 284 (1976) *with Milliken* v. *Bradley,* 418 U.S. 717 (1974). State authorities, however, have the power to use such means as they prefer, including special admissions program, as long

as the means are reasonably related to the public welfare. *Gerrman* v. *Kipp,* 45 L.W. 2486 (W.D. Mo. April 7, 1977).

The California court confused limits on judicial equitable power with the constitutional principles applicable to this minority admissions program. It said that

> [i]t is unconstitutional reverse discrimination to grant a preference to a minority employee in the absence of a showing of prior discrimination by the particular employer granting the preference. Obviously, this principle would apply whether the preference was compelled by a court or voluntarily initiated by the employer. . . . Thus, there is no merit in the assertion of the dissent that there is some undefined constitutional significance to the fact that the University elected to adopt the special admission program and was not compelled to do so by court order. To the victim of racial discrimination the result is not noticeably different under either circumstance.

Bakke, supra, at 58-59, 553 P.2d at 1169, 132 Cal. Rptr. at 697.[31] Nothing in the Constitution requires that state

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[31] The California Supreme Court also relied on *Chance* v. *Board of Examiners,* 534 F.2d 993 (2d Cir. 1976) and *Kirkland* v. *New York State Department of Correctional Services,* 531 F.2d 5 (2d Cir. 1975) for the proposition that remedial action is impermissible absent a finding of past discrimination. A correct reading of these cases is that *court* imposed minority preference programs were an inappropriate exercise of the court's equitable power on the basis of the records of the cases before the circuit court. The court did not hold that a preferential remedy, absent a finding of prior discrimination, violated equal protection. State action is limited by the constitutional standard of equal protection and not by the limits of equitable jurisdiction.

authorities make a specific finding of their own previous discrimination before instituting measures in the public welfare to improve the lot of disadvantaged minorities.

This Court has recognized that the discretionary power of public authorities to enforce constitutional rights is broader than is the power of the judicial branch. *See Katzenbach* v. *Morgan*, 384 U.S. 641, 653 (1966). In the context of the federal Voting Rights Act, the Court clearly stated: "The permissible use of racial criteria is not confined to eliminating the effects of past discriminatory districting or apportionment." *United Jewish Organizations of Williamsburgh, Inc.* v. *Carey, supra,* at 4226. The difference between the limits of equity jurisdiction and the constitutional limit on race conscious remedies was sharply delineated by this Court in *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 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.

Basic considerations of federalism require that state and local governments have the power constitutionally to employ benign racial classifications to further the public welfare. *Gerrman* v. *Kipp, supra.* It is well settled that the states "have constitutional authority to experiment with new techniques" that are not violative of constitu-

tional guarantees. *Day-Brite Lighting, Inc.* v. *Missouri,* 342 U.S. 421, 423 (1952). Any other holding would threaten the wide range of programs that states have undertaken in order to increase opportunities for minorities in employment through the use of racially conscious hiring ratios and goals and evaluations of state employment procedures.[32]

> To use the Fourteenth Amendment as a sword against such State power would stultify that Amendment. Certainly the insistence by individuals on their private prejudices . . . ought not have a higher constitutional sanction than the determination of a State to extend the area of nondiscrimination beyond that which the Constitution itself exacts.

Railway Mail Ass'n v. *Corsi,* 326 U.S. 88, 98 (1954) (Frankfurter, J., concurring). Just as the Newark school administration in *Porceill* v. *Titus,* 431 F.2d 1254 (3d

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[32] *See, e.g.,* District of Columbia, 34 CDRR § 19.3, CCH-EPG ¶ 21,560.53; Maine, Me. Rev. Stat. tit. 5 ch. 65, §§ 781-790, 2 Me. Rev. Stat. Ann. tit. 5, §§ 781-90 (West, 1964); Arizona, Ariz. Civil Rts. Comm, Employment Selection Procedures, § 13 (1972), CCH-EPG ¶ 20,495.13; Colorado, Colo. Civil Rts. Comm., Guidelines on Employment Testing Procedures, § 13 (1972), CCH-EPG ¶ 21,060; Illinois, Ill. Fair Employment Practices Commission Affirmative Action on State Contracts (1975) CCH-EPG ¶ 27,475.07; Iowa, Iowa Admin. Code. 240-2.13 (601a), Employment Selection Procedures; Kansas, Kan. Admin. Reg. § 21-30-18, Guidelines on Employee Selection Procedures and Recruitment (1975); Maryland, CCH-EPG ¶ 23,850 (1972); New York, 9 NYCCR 466.5 (1969), State Div. of Human Rts., Approval of Minority Group Plans (1976) CCH-EPG ¶ 26,053; Ohio Civil Rts. Comm., Guidelines on Goals and Timetables for Affirmative Action Programs (1974) CCH-EPG ¶ 26,695; Washington, Wash. Admin. Code 162-18-010 *et seq.* (1974).

Cir. 1970) was allowed to include minority status as a favorable consideration for employee promotion without any finding that past discriminatory practices or a constitutional mandate required such a color-conscious program, the Davis Medical School should be allowed to give preference after a determination has been made that the specially admitted students are qualified for admission.

Although preferential admissions programs bear at least a reasonable relationship to the public welfare, such programs may still "serve to stimulate our society's latent race consciousness," and may be "viewed as unjust by many in our society, especially by those individuals who are adversely affected by a given classification." *United Jewish Organizations of Williamsburgh, Inc.* v. *Carey, supra,* at 4229 (Brennan, J., concurring). These considerations require that state authorities balance the benefits of such programs with possible undesirable effects. The test, however, does not require that past discrimination be found but rather that

> when a decisionmaker embarks on a policy of benign racial sorting, he must weigh the concerns that I have discussed against the need for effective social policies promoting racial justice in a society beset by deep-rooted racial inequities.

Id.

In the *Carey* case, this test was met by procedures under the Voting Rights Act that enabled administrators and courts to strike the balance. Similarly, benign racial classifications in hiring, housing, and telecommunications (detailed in notes 34-37, *infra*) have been upheld and are consistent with the *Carey* balancing test. The test has also been met by affirmative minority hiring programs instituted by the executive branch, rather than Congress.

In the present case, the California authorities meet the same test. The program confers substantial benefits on minorities and on society at large. There is no evidence that it has any undesirable effects upon minorities. No complaint has been heard from them. Since all who have been admitted under the program are fully qualified to study medicine, their admission imposes no hidden slur or stigma on them. The balance between the need for the program and the considerations adverted to by Mr. Justice Brennan was rationally and properly struck in favor of the program's implementation.

The California court therefore applied the wrong standard. It confused the state's broad power to design programs to further the public welfare without a showing of past discrimination with a court's more narrow equitable power to remedy specific constitutional violations.[33] It would be truly ironic for this Court to deny states the right to act voluntarily to ameliorate the effects of past discrimination and to promote racial integration when

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[33] The infirmity of the California court's approach is illustrated by its reliance on *Brunetti* v. *City of Berkeley*, 12 FEP Cases 937 (N.D. Cal. 1975). In *Brunetti*, the court invalidated a municipal plan that provided for minority hiring preference by reasoning that "[t]he cases clearly indicate that preferential treatment of minorities is required and permitted only during a period of transition to a work force in which all vestiges of past discrimination have been eliminated by affirmative action." *Id.* at 939. Such a holding assumes that the municipality could only correct its own past discrimination and that its constitutional power to take steps to guarantee its historically disadvantaged citizens an actual, continuing opportunity for access to municipal employment is lost once a municipality has eliminated the disproportionately low percentage of minorities in its work force at a particular point in time. *Contra, Gerrman* v. *Kipp*, 45 L.W. 2486 (W.D. Mo. April 7, 1977).

that right has been accorded to unions and private employers,[34] as well as the Executive Branch,[35] Congress,[36]

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[34] *Pellicer* v. *Brotherhood of Ry. & S.S. Clerks,* 118 F. Supp. 254 (1953), *aff'd,* 217 F.2d 205 (1954), *cert. denied,* 349 U.S. 912 (1955) (union and employer may voluntarily modify a seniority system to eradicate the effects of past discrimination since this is a national policy of the highest priority); *Franks* v. *Bowman Transp. Co.,* 424 U.S. 747 (1976).

EEOC v *AT&T,* 419 F. Supp. 1022 (E.D. Pa. 1976) (consent decree ordering affirmative action in transfers and promotions "eminently accomplishes the purpose of Title VII" despite absence of evidence of AT&T's discrimination in transfer and promotions policies and its denial of liability for such discrimination), *aff'd* —— F.2d ——, Nos. 76-2217, 76-2281, 76-2285 (3d Cir. April 22, 1977).

[35] *Contractors Ass'n of E. Pa.* v. *Secretary of Labor,* 311 F. Supp. 1002 (E.D. Pa. 1970), *aff'd,* 442 F.2d 159 (3d Cir. 1971), *cert. denied,* 404 U.S. 852 (1971) (the use of specific percentage goals and timetables "to remedy the perceived evil that minority tradesmen have not been included in the labor pool available for the performance of construction projects in which the federal government has a cost and performance interest" does not violate equal protection.)

The constitutionality of Executive Order 11246, requiring affirmative action by federal contractors has been affirmed in *Contractors Ass'n, supra; Weiner* v. *Cuyahoga Community College District,* 19 Ohio St. 2d 35, 249 N.E 3d 907, 908 (1969), *cert. denied,* 396 U.S. 1004 (1970); *Joyce* v. *McCrane,* 320 F. Supp. 1284 (D.N.J. 1970); *Southern Illinois Builders Ass'n* v. *Ogilvie,* 327 F. Supp. 1154 (S.D. Ill. 1971), *aff'd,* 471 F.2d 680 (7th Cir. 1972); *Associated General Contractors of Mass.* v. *Altshuler,* 490 F.2d 9, 197 (1st Cir. 1973), *cert. denied,* 416 U.S. 957 (1974).

[36] *Morton* v. *Mancari,* 417 U.S. 535 (1974) (preferential treatment of tribal Indians in BIA hiring pursuant to the Indian Civil Rights Act of 1968, 25 U.S.C. § 1301-41 (1970) is constitutional.)

and administrative agencies.[37] Until minorities have been thoroughly integrated into our society, the states must be allowed, if not required, to take affirmative steps to eliminate the racial discrimination that has become engrained in our nation.

III.

Affirmance of the *Bakke* decision will stultify the ability of political institutions to respond to the social reality of race-based inequality.

Since *Brown* v. *Board of Education,* 347 U.S. 483 (1954), our nation's social and political institutions have struggled to dismantle a separate and unequal system. Responding to the unkept promises of the previous century and resultant turmoil in the streets, Congress enacted the Civil Rights Acts of the 1960's. A body of case law has thereby begun to develop that is directed at some of the most crucial aspects of the American dilemma.

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[37] *TV 9* v. *FCC,* 495 F.2d 929 (D.C. Cir. 1973) (the Federal Communications Commission not only can, but must, consider favorably the presence of minority interests in ownership of a television station when the Commission considers an application for a broadcast license. "Inconsistency with the Constitution is not to be found in a view of our developing life which accords merit to Black participation among principals of applicants for television rights." *TV 9, supra* at 936. *See also Garrett* v. *FCC,* 513 F.2d 1056 (D.C. Cir. 1975).

In *Otero* v. *New York City Housing Authority,* 484 F.2d 1122 (2d Cir. 1973), the second circuit held that the state authority's duty to promote racial integration took precedence over its own regulations that dislocated tenants receive first priority for new rental units.

It is easy to forget that the development of that law was neither obvious nor inevitable. It was the product of a flexible and responsive political process that grappled with the issues that are inherent in this inequality when the best way to the future was unclear. The issues are as deep and as troublesome now as they were then. As we have demonstrated in Point I, the badges and incidents of servitude have not been eradicated. An affirmance in this case would deprive our social and political institutions of the flexibility needed to complete the task they have just begun. Race conscious affirmative action mandates have become an integral part of civil rights law. Title VI of the Civil Rights Act, for example, declares:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

42 U.S.C. § 2000d (1970).

HEW regulations implementing Title VI require that recipients of federal funding who have "previously discriminated against persons on the ground of race, color, or national origin . . . must take affirmative action to overcome the effects of prior discrimination." 45 C.F.R. § 80.3(b)(6)(i) (1976). The regulations further provide that "[e]ven in the absence of such prior discrimination, a recipient in administering a program may take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color, or national origin." 45 C.F.R. § 80.3(b)(6)(ii) (1976). Similarly, a host of other government agencies have adopted affirmative action regulations pur-

suant to various civil rights acts. *See, e.g.,* Department of Agriculture, 7 C.F.R. § 15.3(b)(6)(i) and (ii) (1977); Nuclear Regulatory Commission, 10 C.F.R. § 4.12(f) (1977); Small Business Administration, 13 C.F.R. §§ 112.3 (b)(3), 113.3-1(a) (1977); Civil Aeronautics Board, 14 C.F.R. § 379.3(b)(3) (1977); National Aeronautics and Space Administration, 14 C.F.R. §§ 1250.103-2(7)(e), 1250.103-4(f) and (g) (1977); Tennessee Valley Authority, 18 C.F.R. § 302.3(b)(6) (1976); Agency for International Development, 22 C.F.R. § 209.4(b)(6) (1976); Department of State, 22 C.F.R. § 141.3(b)(5)(i) and (ii) (1976); Housing and Urban Development, 24 C.F.R. § 1.4(b)(6) (1976); Department of Justice, 28 C.F.R. § 31.3(b)(6)(i) and (ii) (1976); Department of Labor, 29 C.F.R. § 31.3(6)(i) and (ii), (7)(i) and (ii) (1976); Department of Defense, 32 C.F.R. § 300.4(4)(i) and (ii) (1976); Veterans Administration, 38 C.F.R. § 18.3(b)(6)(i) and (ii) (1976); General Services Administration, 41 C.F.R. §§ 101-6.204-2(a)(4), 101-6.206(i) and (j) (1976); Department of the Interior, 43 C.F.R. § 17.3(b)(4)(i) and (ii) and (d) (1976); National Science Foundation, 45 C.F.R. § 611.3(b)(6) (1976); Community Services Administration, 45 C.F.R. § 1010.4(b) and (d) (1976). In requiring tax-exempt educational institutions to be racially non-discriminatory, the Internal Revenue Service has determined that it is *not* discriminatory to favor racial minority groups when the purpose and effect is to promote a racially non-discriminatory policy. I.R.S. Rev. Proc. 75-50 § 3.02. *See also* I.R.S. Reg. § 53.4945-4(b)(1), Ex. 2.

This Court's decision in *Griggs* v. *Duke Power Co.,* 401 U.S. 424 (1971) is a clear affirmance of the congressional intent manifested by Title VII, 42 U.S.C. § 2000e *et seq.,* to eradicate employment patterns that historically have excluded minorities. To achieve the Act's purpose, the

federal courts have sanctioned quotas or numerical goals as remedies for past discrimination and its effects.[38] The past discrimination that triggers the quota remedy is demonstrable by the impact of employer screening practices upon excluded groups. *Griggs* v. *Duke Power Co., supra.* Special admissions programs of professional schools are a similar response by state agencies to the reality that minorities are disproportionately excluded from professional employment. Reflective of this is the substantial increase in minority enrollees in medical schools. Over the past nine years enrollment for all minorities in medical school has risen from 2.4% in 1968 to 8.1% in 1976, with the percentage of black enrollees rising from 2.2% to 6.2%.[39] C. Odegaard, *Minorities in Medicine: From Receptive Passivity to Positive Action, 1966-76,* 31 (1977). This laudable turnabout came after more than two-thirds of the nation's medical schools modified their admissions criteria "by adding to the list of biographical considerations attention to race or ethnic background related in particular to underrepresented minorities." *Id.* at 102-03). Affirmance of the California

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[38] *See* Point II, *supra. See also EEOC* v. *AT&T,* 506 F.2d 735 (3d Cir. 1974), *aff'g in part and dismissing in part,* 365 F. Supp. 1105 (E.D. Pa. 1973); *United States* v. *National Lead Indus., Inc.,* 479 F.2d 354 (8th Cir. 1973); *Contractors Ass'n* v. *Secretary of Labor,* 442 F.2d 159 (3d Cir.), *cert. denied,* 404 U.S. 854 (1971).

[39] It is significant that a recent study showed that the retention rate for minorities in medical schools compares favorably with the retention rate for non-minorities, thus dispelling the myth that minority entrants are unqualified. Johnson, *et al., Recruitment and Progress of Minority School Entrants, 1970-72,* J. Med. Educ., Supplement 50, 713 (1975); C. Odegaard, *Minorities in Medicine: From Receptive Passivity to Positive Action* 34-41 (1977).

Supreme Court could, in an instant, eliminate the slow progress toward integration so far achieved by the nation's medical schools.

Admission to professional schools is the key to entry into the higher echelons of the American work force. Unless professional schools can employ a *Griggs*-type test, analyzing minority access to professional training and the professions specifically in terms of race, the employment discrimination that Title VII was designed to eradicate will continue for positions of power and influence in this country.[40]

It flies in the fact of reason to suggest that what may be done by the legislative, executive, and judicial branches of the federal government to effectuate the Thirteenth, Fourteenth, and Fifteenth Amendments may not be done by the educational agencies of the states to achieve the same objective.

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[40] On a *Griggs* "impact" analysis of minority access to professional training, it is clear that traditional admissions criteria have erected an extraordinary barrier that has prevented minorities from attaining professional status. That barrier has been so pofound as to constitute, prima facie, a showing of intentional exclusion.

See the concurring opinion of Justice Stevens in *Washington* v. *Davis,* 426 U.S. 229, 252-56 (1976), where he explains:

> Frequently the most probative evidence of intent will be objective evidence of what happened rather than evidence describing the subjective state of mind of the actor.

Id. at 253.

See also McDonnell Douglas Corp. v. *Green,* 411 U.S. 792, 805 n.19 (1973), *quoting* Blumrosen, *Strangers in Paradise: Griggs* v. *Duke Power Co. and the Concept of Employment Discrimination,* 71 Mich. L. Rev. 59, 92 (1972), in which the Court indicates that statistics of racial composition may themselves be "reflective of restrictive or exclusionary practices."

This Court's affirmance of the California Supreme Court's decision would inevitably call into question not only the power and duty of the states to support the Constitution but federal power to pursue a flexible and efficient course to end institutionalized racial exclusion.

IV.

The Rutgers minority student program demonstrates that special admissions programs can "work" and "work *now*" to effectuate the Thirteenth Amendment.

The Rutgers Law School has attempted by its minority student program to meet the concerns expressed by Mr. Justice Brennan at the dedication of the Law School building in 1966:

> [T]he law schools have experienced almost no success in attracting Negro college students to law as a career. . . .
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> . . . . And I am sure all of us will agree that, as [has been] said, "There are reasons why a special effort should be made to attract Negro students to law study. In the effort to provide equal rights and opportunities for Negro citizens, there are heavy responsibilities and burdens for lawyers to carry. These can best be met by a Bar which includes Negro lawyers in significant numbers, for it is those lawyers who most clearly understand the problems and difficulties faced by members of the Negro community. In bringing legal counsel to the poor, in administering criminal justice, as well as in the struggle for civil rights, an increased number of Negro lawyers can make a great contribution."

Brennan, *The Law School of Tomorrow,* 89 N.J.L.J. 801, 807-08 (1966).

In 1968, less than 100 members of the New Jersey Bar of 8,000 were minority persons. The failure of the Law School to increase that number was reflected in the fact that, out of approximately 1,200 students who had graduated between 1960 and 1968, only 12 were black. The faculty recognized that this exclusionary pattern had two major results. First, it restricted the availability of legal services to the nonwhite population of the state and the representation of the nonwhite population within the legal/political system. Second, and equally important, an overwhelmingly white student body necessarily would fail to provide "the interplay of ideas and the exchange of views with which the law is concerned." *Sweatt* v. *Painter,* 339 U.S. 629, 634 (1950). Therefore, black students were being denied access to a legal education and white students were being denied the kind of education that would prepare them to practice law in a heterogeneous and complex society.

In 1968, on an experimental basis, the Law School faculty established a minority student program. The program added 20 places to the first-year class that were reserved for the special admission of qualified black and other minority students, with the goal of increasing that number to 40 in the following year. In 1973 the success of this experiment led the faculty to expand the program to include 50 minority students as an addition to each entering class, assuming a regularly admitted class of 200, or an addition of 25% minorities to any entering class.

Aware of the disproportionate impact of the LSAT in denying qualified minority applicants the opportunity to attend law school, the minority student program considers

the leadership ability, work and community experience, and demonstrated achievements of applicants in addition to traditional admissions criteria. This method has been highly successful in identifying qualified applicants for the study of law and has had a major positive impact on minority representation in the legal profession. More than this, many of the program's graduates have brought their training and special insights to areas of public law in which the need is greatest for the minority community. Almost 200 minority persons have graduated from the Law School since 1971. Of the 112 who responded to surveys about their careers, at least 24 have been employed in legal services, at least 35 have worked or are working in prosecution or defense work, or in municipal, state, and federal governments. Five are involved in legal education. Graduates of the program include a Newark municipal court judge, the director of the Maryland Human Rights Commission, and Newark's Police Director. Still another has moved from an Assistant Deanship at Rutgers Law School to the national staff of the Council on Legal Education Opportunities. Some are engaged in other "public interest" law and many others are in private practice in firms, with corporations or on their own.

The program's success, however, is not limited to the increase in the number of minority group members who are studying and practicing law. Rather, the institutional character of Rutgers Law School has been reshaped and revitalized by its minority student program. The once predominantly white and isolated institution, situated in the heart of the depressed urban center of Newark, has become increasingly involved through curricular changes, clinical programs, and student projects in the problems and needs of the Newark community. This increased sensitivity and involvement is one of the program's major achievements.

Far from being the "special favorite of the laws", *Civil Rights Cases,* 109 U.S. 3, 25 (1883), the students and graduates of the Rutgers minority student program are visible evidence that the laws can be made to function without disproportionately favoring the white majority and with justice to minority Americans.

CONCLUSION

Race-blind professional school admissions systems will be constitutionally appropriate when we have obeyed fully the command of the Thirteenth Amendment. But if the Fourteenth Amendment, adopted in aid of the Thirteenth, is now utilized as an insurmountable barrier to the achievement of equal status for minorities we will once again have betrayed the central mission of the Reconstruction Amendments.

The decision of the California Supreme Court should be reversed.

Respectfully submitted,

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Certification of Service

I, Jonathan M. Hyman, a member of the bar of this Court, certify that I have served copies of the foregoing brief on Donald Reidhaar, Esq., University of California, 590 University Hall, Berkeley, CA 94720, attorney for petitioner, and Reynold Colvin, Esq., Jacobs, Blanckenburg, May and Colvin, 111 Sutter, San Francisco, CA 94104, attorney for respondent, by mailing, first-class, postage prepaid, in accordance with Rule 33(1) of this Court, this 7th day of June 1977.

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