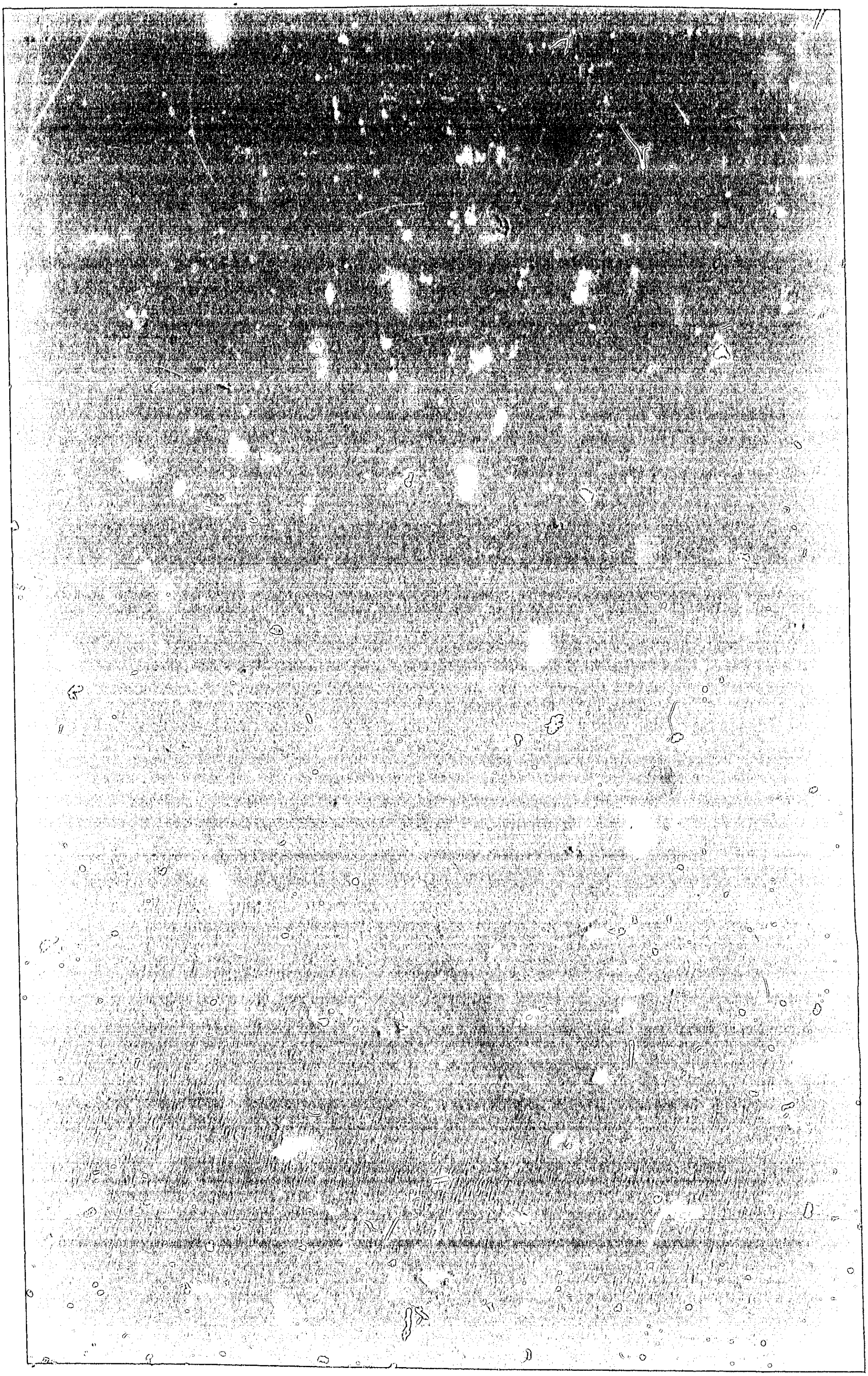

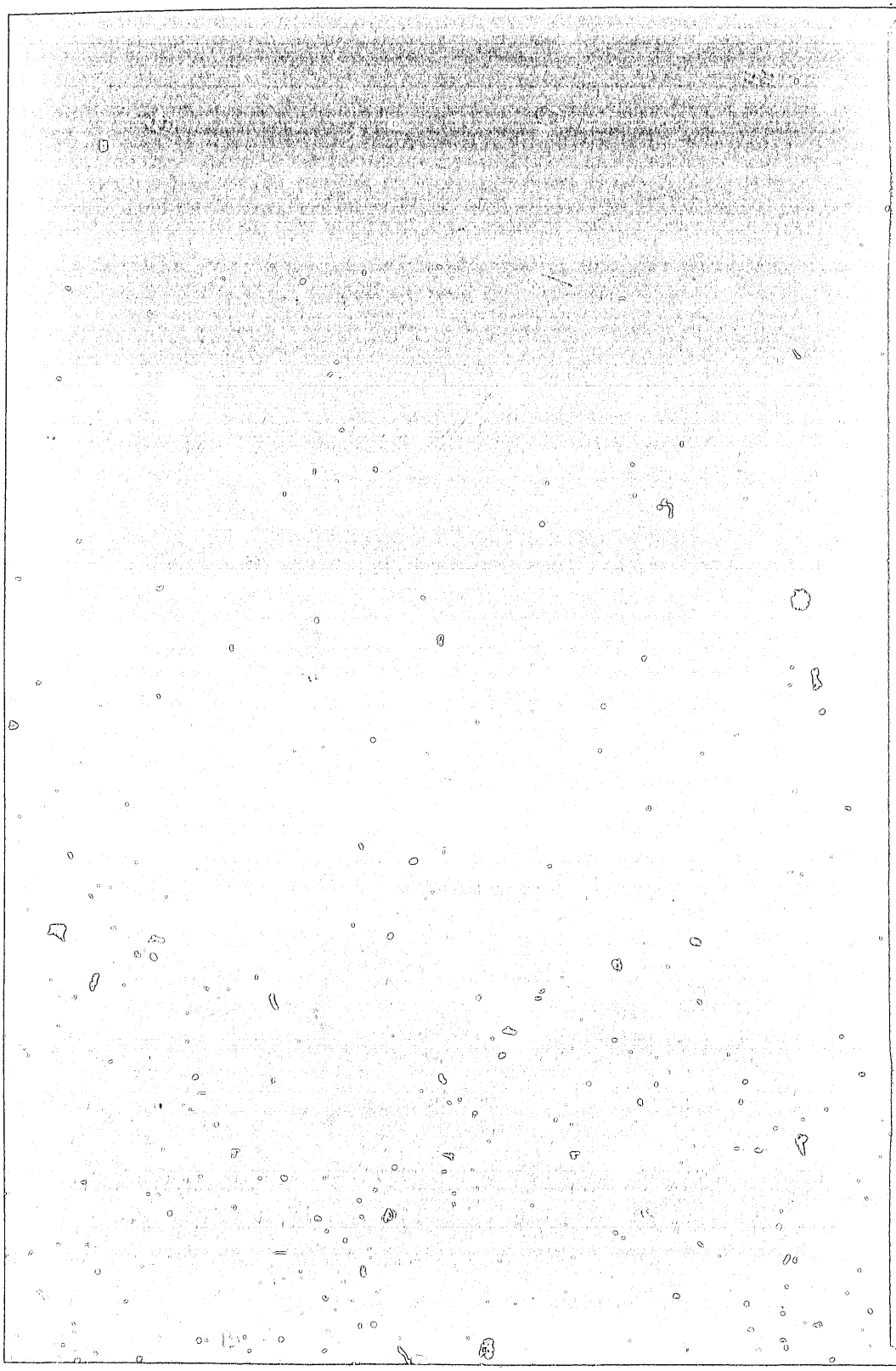

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IN THE

Supreme Court of the United States

October Term, 1976

No. 76-811

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,

Petitioners,

v.

ALLAN BAKKE,

Respondent.

BRIEF OF *AMICI CURIAE*

The Puerto Rican Legal Defense and Education Fund and Aspira of America

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Interest of the *Amici*[1]

The Puerto Rican Legal Defense and Education Fund, Inc. exists to secure the civil rights of Puerto Ricans through litigation and education. Aspira of America, Inc. is a national organization of Puerto Rican educators and students which was established for the purpose of insuring equal educational opportunity for Puerto Ricans and other Hispanic persons. Both organizations, with headquarters in New York City, have worked to foster affirmative action programs for Puerto Ricans interested in pursuing professional education.

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[1] Letters of the petitioners and respondent giving their consent to file this brief have been filed with the Clerk of this Court.

Hispanic persons constitute the second largest minority in this country. As of 1975, about one of every twenty persons in the continental United States was of Spanish origin. Among this Hispanic population, nearly 1.7 million persons were Puerto Ricans residing on the mainland.[2]

Puerto Rican college graduates, who will be directly affected by this Court's ruling on the merits, have long been the victims of educational deprivation. They have been aptly described as survivors—the "few who have survived the public schools, who have overcome the language barrier, who have somehow found the money, or who have convinced their families to forego the income they could produce. . . ."[3] However, educational deprivation has taken its toll. Puerto Rican college graduates who are intent on attending professional school often do not have scholastic grade-point averages on a par with those of non-minority students.[4] The failures of the educational system to which Puerto Ricans have particularly been victim often have had an impact as well on their performance on standardized admissions examinations for professional schools.[5]

In the last few years, factors other than the numerical measures traditionally so heavily relied on have come to be considered in the admission process. In part because "the applicant pool of today includes an abundant number

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[2] United States Bureau of the Census, Population Characteristics, "Persons of Spanish Origin in the United States: March 1975," Series P-20, No. 290 (Feb. 1976), at 3. United States citizenship was conferred upon all Puerto Ricans in 1917 by the Jones Act, 48 U.S.C. § 731 *et seq.*

[3] United States Commission on Civil Rights, *Puerto Ricans in the Continental United States: An Uncertain Future* 123 (1976), quoting from Hearings before the Senate Committee on Equal Educational Opportunity of the United States Senate, 91st Cong., 2d Sess., Part 8, "Equal Educational Opportunity for Puerto Rican Children" (November 1970), at 3797.

[4] C.E. Odegaard, *Minorities in Medicine, 1966-1976,* 112 (1977).

[5] *Id.* at 112; *cf.* also, United States Commission on Civil Rights, *Puerto Ricans in the Continental United States: An Uncertain future,* at 127.

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of students with acceptable MCAT scores and GPA's, admissions committees can now give more attention to noncognitive criteria.''[6] Increasingly, due recognition has been given to the importance of noncognitive measures in recruiting and selecting qualified applicants, especially with respect to disadvantaged minority students:

> Admissions decisions focus on assessment of intellectual potential and academic qualifications. While the two are closely related, they are not identical, especially in the situation of minority students, many of whom have experienced socioeconomic and educational disadvantage.[7]

Even with recent changes in admissions programs there has been no enormous influx of minority persons into professional schools. Indeed, minority enrollment in medical schools in New York City has declined in recent years,[8] and there is today but a handful of mainland Puerto Rican doctors.[9] The increased numbers of persons admitted to medical schools in recent years have overwhelmingly been non-minority.[10]

Nonetheless, small but important gains have been made of late in the numbers of Puerto Rican medical students.[11]

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[6] Association of American Medical Colleges, *The Medical School Admissions Process. A Review of the Literature 1955-76,* 134 (1976).

[7] National Board on Graduate Education, Washington, D.C. *Minority Group Participation in Graduate Education* 152-153 (1976).

[8] Caress, B., with Kossy, J., *The Myth of Reverse Discrimination: Declining Minority Enrollment in New York City's Medical Schools* (Health Policy Advisory Center 1977).

[9] See note 24, *infra.*

[10] Odegaard, *op. cit.,* at 30.

[11] *Id; cf.* also, United States Department of Labor, Bureau of Labor Statistics, *A Socio-Economic Profile of Puerto Rican New Yorkers* 55 (1975).

The 71 admitted in 1975-1976 are not many, but they are a great many more than the three admitted in 1968-1969, who represented a scant three one-hundredths of one percent (.03%) of the total first year medical school population that year. It is imperative that what little affirmative action voluntarily has taken place at the professional school level to remedy the consequences of discrimination should be unequivocally approved by this Court.

Introductory Statement

Past discrimination against discrete and insular minorities in this country has had a particularly devastating impact on minority access to our system of professional education. Minority persons have been in large part excluded from the professions; not coincidentally, minority communities are critically underserved by those professions. Seeking to remedy these problems, institutions charged with furthering the public interest have in recent years adopted policies in such areas as admissions and employment which are explicitly aimed at neutralizing the effect of past discrimination *now*. The crucial issue before the Court is whether these "affirmative action" efforts, which have begun to produce small but measurable gains toward equal opportunity, are at odds with the constitutional commands they were created to implement.

The University of California Medical School at Davis established a special admissions program in order to open up professional education to those victimized by past discrimination. The University gave some consideration, in selecting among qualified applicants, to racial and ethnic background. That much seems beyond doubt, and *amici'* defense of the program has assumed as much. No more than that, however, can be gleaned from the present record. Insofar as an assessment of the program may turn

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on analysis of the *extent* to which racial and ethnic factors were considered, this record will not permit so refined a judgment.

Indeed, rarely has so important a case—one in which an attempt is made to delimit a state's right voluntarily to remedy the consequences of discrimination—come before the Court on such an incomplete, ambiguous record. It is uncertain precisely how the program operated. The court proceedings below did not touch upon the program's justification in prior racial discrimination.[12] No evidence was offered on the demonstrable need today for the program or as to the inefficacy of alternatives.

The deficiencies in this record were not due to a failed attempt at proof or the unavailability of evidence. Rather, they were due to the singular nature of this proceeding: an applicant to a professional school challenged as "reverse discrimination" on racial grounds a program for which he was ineligible in any event, and the school, anxious to have an advisory ruling on the validity of the program, joined in the effort to obtain a prompt ruling on the merits. This was not a lawsuit marked by the clash of adverse interests at trial which normally could be relied upon to produce a complete, well-developed record.[13]

A decision by this Court as to the validity of the special admissions program may have wide impact on the civil rights of minorities for years to come. For the Court to

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[12] The complete lack of evidence of past discrimination should not be surprising. There was no party to this litigation in whose interest it would have been to present such evidence. It would clearly have been embarrassing if not detrimental to the University to produce evidence or even concede that it had discriminated against minorities in the past. Certainly, Bakke would not have presented such evidence.

[13] Telling evidence of the lack of adversariness is the "stipulation" in the California Supreme Court. On appeal from the Superior Court, the California Supreme Court ruled that the University had the burden of establishing that Bakke would not have been admitted to the Davis Medical School in the absence of the special admissions

reach the merits on this scant record will preclude a fully informed decision. It should therefore decline to do so. Nonetheless, this *amicus curiae* brief is addressed primarily to the merits of the underlying issues, for these are the concerns which prompted its filing.

ARGUMENT

THE SPECIAL ADMISSIONS PROGRAM OF THE DAVIS MEDICAL SCHOOL IS CONSTITUTIONAL.

Increasingly in recent years, institutions affected with the public interest have come to consider, in connection with decisions such as whom to admit or employ, the race and ethnic background of applicants. They have done so in order to remedy the effects of past discrimination which either was practiced by or affected those institutions. The Davis Medical School is among the institutions which have taken voluntary steps to neutralize the consequences of such discrimination. Like many other medical schools, it has recognized the need to increase minority participation in the medical profession and to improve the quality of medical services provided to minority communities. In utilizing admissions criteria that are sufficiently flexible to permit some consideration to be given to applicants from disadvan-

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program. Accordingly, in its September 16, 1976 order the Supreme Court remanded the issue to the trial court. However, it did not intimate that the evidence presented by the University at trial was insufficient; it merely stated that the evidence must be evaluated in light of the different burden (18 Cal. 3d at 64, 553 P.2d at 1172, 132 Cal. Reptr. at 700). In an attempt to confer jurisdiction, the University attached to its petition for rehearing in the California Supreme Court a "stipulation" which, contrary to the evidence and the prior position pressed by the University at trial, purports to concede that the University could not meet this burden. On the basis of this "stipulation," the California Supreme Court then ordered Bakke's admission. Regardless of the University's motivation for signing the "stipulation" and the effect given to it by the California Supreme Court, it must be treated as a nullity by this Court. *United States* v. *Felin & Co.*, 334 U.S. 624 (1948); *Swift & Co.* v. *Hocking Valley Ry. Co.*, 243 U.S. 281 (1917).

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taged and minority backgrounds,[14] the University has adopted the position taken by the Association of American Medical Colleges (AAMC) that minority students "bring to the profession special talents and views which are unique and needed." AAMC, Statement on Medical Education of Minority Group Students, December 16, 1970.

There is no indication that in taking these additional factors into account the University planned to admit or ever did admit a fixed number of minority persons regardless of their qualifications. Rather, there is every indication that all of those admitted to the special admissions program were fully qualified.[15] This program did not effect discrimi-

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[14] The validity of traditional academic criteria is an issue not before this Court. The majority below reasoned, on the basis of the rule enunciated in *Washington* v. *Davis*, 426 U.S. 229 (1976), that a discriminatory purpose could not be inferred solely from the fact that traditional academic criteria may have a disproportionate impact on minority group applicants. 18 Cal. 3d at 60, 553 P.2d at 1169, 132 Cal. Rptr. at 697. The majority, however, recognized that neither party before it had an interest in raising such a claim. *Id.* at n.29. Plainly, it would be arbitrary for the University to rely solely on objective criteria which substantial research has shown to have limited predictive value. *Washington* cannot be read as preventing the University from adjusting its admissions procedures to compensate for the bias in a test instrument which for administrative and other reasons the University has decided not to abandon altogether.

[15] The limited amount of evidence available indicates that minority persons admitted to medical schools via affirmative action programs were rated as performing at approximately the same levels of competence as those admitted under regular admissions programs. *See* Marshall, Margolis, and Joseph, *Impact of a Retention Program for Disadvantaged Medical Students upon the Medical School Community*, 50 J. Med. Ed. 805 (1975); Simon, and Covell, *Performance of Medical Students Admitted via Regular Admission-Variance Routes*, 50 J. Med. Ed. 237 (1975). Physicians are possessed of many qualities that traditional testing techniques cannot and perhaps will never be able to measure. Exclusive reliance on paper credentials would almost certainly exclude some of the most talented majority as well as minority applicants. To avoid this result, educational institutions have traditionally been accorded wide latitude in considering academic and non-academic criteria for all applicants. Given the lack of precision of the traditional academic measurements as predictors of performance in medical school, and the likelihood

nation, in reverse or otherwise; rather, it neutralized the effects of past discrimination. The University's consideration of race and ethnic origin in selecting among otherwise qualified applicants thus amounted not to giving a "preference" to certain applicants but to expanding the criteria considered in making an admissions decision because the ones formerly employed were deficient—deficient as to all students, but especially as to minority students.[16]

A. It Is Permissible For the University to Consider Ethnic and Racial Background As One of the Many Factors in Selecting Among Qualified Applicants For Admission.

This Court has never declared that under the Constitution all classifications based partially upon race or ethnic status are presumptively "suspect." Indeed, on several occasions this Court has upheld the benign use of race-conscious remedial techniques, *Franks* v. *Bowman Transp. Co.*, 424 U.S. 747, 774-5 (1976); *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 25 (1971); *United States* v. *Montgomery County Board of Education,* 395 U.S. 225 (1969), even where these were part of a policy administered by nonjudicial government agencies. *United Jewish Organizations of Williamsburgh, Inc.* v. *Carey,* 45 U.S.L.W. 4221 (March 1, 1977); *Morton* v. *Mancari,* 417 U.S. 535, 554 (1974). In the employment discrimination context, for ex-

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that such criteria have a built-in cultural bias, *see* Blaxall, *Minority Students in Health Professional Schools: Progress is Being Made,* 3 The Black Bag 81 (1974), adjustments in the admissions process and resort to additional criteria which reflect an applicant's qualifications are entirely justified, if not required.

[16] In the strictly logical sense, expanding the criteria considered could be regarded, all other things being equal, as the giving of a preference by comparison with the procedures formerly used. But that view, of course, begs two critical questions: whether the criteria formerly employed were constitutionally exclusive or exhaustive of all others, and whether in practice all other things *were* equal.

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ample, considerations of race, ethnicity or sex in hiring have been approved as necessary to fulfill a national policy of eradicating the effects of previous discrimination.[17] Assignments by race have likewise become a well-established device for desegregating the nation's school systems.[18] In these and other areas in which there has historically been discrimination, the power of courts to employ racially, ethnically and sexually based remedies has come to be well established.[19]

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[17] *Franks* v. *Bowman Transp. Co.*, 424 U.S. 747 (1976); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975); *Arnold* v. *Ballard*, 12 Empl. Prac. Dec. (CCH) ¶ 11,000 (6th Cir. 1976); *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 (3rd Cir. 1976); *Rios* v. *Enterprise Association Steamfitters Local 638*, 501 F.2d 622 (2d Cir. 1974); *United States* v. *United Brotherhood of Carpenters & Joiners, Local 69*, 457 F.2d 210 (7th Cir.), *cert. denied*, 409 U.S. 851 (1972); *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); *Local 53, International Ass'n of Meat & Frost Insulators & Asbestos Workers* v. *Vogler*, 407 F.2d 1047 (5th Cir. 1969).

[18] *E.g., Keyes* v. *School District No. 1*, 413 U.S. 189 (1973); *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971); *Green* v. *County School Board*, 391 U.S. 430 (1968).

[19] The Court has been keenly aware that the impact of the same remedial devices it has sanctioned for minorities has been both substantial and very often difficult for majority persons to accept. *See, e.g., Franks* v. *Bowman Transp. Co.*, 424 U.S. at 775-78; *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. at 26-27. The courts have by no means been insensitive to these concerns, but have uniformly resolved 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. at 777-78.

Decisions of this Court establish a fundamental, constitutional distinction between racial classifications which invidiously discriminate and those which have the benign remedial effect, grounded in the language and purpose of the Thirteenth and Fourteenth Amendments,[20] of promoting "those fundamental rights which are the essence of civil freedom." *Civil Rights Cases,* 109 U.S. 3, 22 (1883). The Equal Protection Clause does not compel the application of an "exacting" standard of review merely because the special admissions program employed a classification based on race and ethnic origin.

The central purpose of the Fourteenth Amendment was to preclude the states from treating recently freed blacks in a discriminatory manner. The Court initially took the position that the Amendment's only purpose was to protect the constitutionally emancipated slaves, *Slaughter-House Cases,* 83 U.S. 36, 81 (1873), and termed as "suspect" classifications based upon "race" which discriminated against blacks. *See, e.g., McLaughlin* v. *Florida,* 379 U.S. 184 (1964); *Brown* v. *Board of Education,* 347 U.S. 483 (1954). As equal protection doctrine has evolved, this special protection of the Fourteenth Amendment has been extended to other victimized minorities in positions comparable to that of blacks. *See, e.g., Graham* v. *Richardson,* 403 U.S. 365 (1971); *Hernandez* v. *Texas,* 347 U.S. 475 (1954); *Oyama* v. *California,* 332 U.S. 633 (1948); *Yick Wo* v. *Hopkins,* 118 U.S. 356 (1886).

The Court has applied the "strict scrutiny" standard in reviewing racially based classifications only on behalf of individuals or groups that historically have suffered from pervasive discrimination and thus are particularly vulnerable to the damaging effects of a racial classification. In

[20] The history of these amendments is thoroughly analyzed in *Jones* v. *Alfred H. Mayer Co.,* 392 U.S. 409 (1968). *See also,* Brief of The Board of Governors of Rutgers, the State University of New Jersey, *et al.,* submitted as *amici curiae.*

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determining whether application of such a stringent standard is appropriate, this Court has looked at whether

> [t]he system of alleged discrimination 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 Independent School District v. *Rodriguez*, 411 U.S. 1, 28 (1973). *See also, Examining Board of Engineers, Architects and Surveyors* v. *Flores de Otero*, 426 U.S. 572 (1976); *Frontiero* v. *Richardson*, 411 U.S. 677 (1973).[21]

The persons or groups on whose behalf the "strict scrutiny" standard has been applied share three significant characteristics. First, they labor under the continuing effects of previous discrimination and deprivation. Second, they share immutable characteristics, those of race or national origin, which have been used to stigmatize and set them apart from members of the majority group. *See e.g.*, Comment, *Developments in the Law—Equal Protection*, 82 Harv. L. Rev. 1065, 1173-74 (1969). Finally, they historically have been powerless within the political arena. Wechsler, "Toward Neutral Principles of Constitutional Law," in H. Wechsler, *Principles, Politics and Fundamental Law* 3, 45 (1961).

None of the factors which have led the Court to treat certain classifications as constitutionally "suspect" is pres-

[21] For example, the Court has found that ". . . Hispanos constitute an identifiable class for purposes of the Fourteenth Amendment," and that " '[o]ne of the things which the Hispano has in common with the Negro is economic and cultural deprivation and discrimination,' " thus calling for stricter judicial scrutiny of state action. *Keyes* v. *School District No. 1*, 413 U.S. 189, 197-98 (1973).

ent here. Majority applicants not admitted to the medical school were not part of a class suffering from the continuing effects of discrimination and deprivation. Nor could it be said they were politically powerless, or that the actions of the University which affected them were motivated by a discriminatory intent. The obvious remedial nature of the admissions policy, and the fact that it was designed and implemented by governmental bodies not dominated by minorities, further negate any possibility that the University was motivated by racial animus toward majority group applicants. *Compare United Jewish Organizations of Williamsburgh, Inc.* v. *Carey,* 45 U.S.L.W. at 4230 (Brennan, J., concurring) *with McDonald* v. *Santa Fe Trail Transp. Co.,* 427 U.S. 273 (1976).[22]

Moreover, the majority below conceded the special admissions program did not cast a stigma on non-minority applicants on account of their race. 18 Cal.3d at 51-52, 553 P.2d at 1163, 132 Cal. Rptr. at 691. There is no evidence to suggest that it had the purpose or effect of dislodging any recognizable subgroup of non-minorities or that the program had a disproportionate impact on any such subgroup. The special admissions program did not bring about underrepresentation of the white race generally, nor did it have

[22] Increasingly in recent years this Court has determined that in order to render a racial classification suspect there must be some finding that the classification was motivated by an "invidious discriminatory purpose." *Arlington Heights* v. *Metropolitan Housing Development Corporation,* 45 U.S.L.W. 4073, 4077 (January 11, 1977); *Washington* v. *Davis,* 426 U.S. 229, 242 (1976). Although designed to give some consideration to race, the special admissions program did not create a racially "invidious" procedure because there was no purpose systematically to exclude or segregate; the program rather was intended to neutralize the discriminatory impact of traditional selection criteria. Unlike the complainant in *McDonald* v. *Santa Fe Trail Transp. Co.,* 427 U.S. 273 (1976), Bakke did not allege and could not prove that the University's action which affected him reflected a racial animus.

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the effect of "fencing out" the white population from a professional education. At best, the evidence suggests that any burdens imposed by the special admissions program have been shared by those who have not been disadvantaged, both minority and non-minority alike. *United Jewish Organizations of Williamsburgh, Inc.* v. *Carey,* 45 U.S.L.W. at 4227. In sum, the special admissions program "represented no racial slur or stigma with respect to whites or any other race." *Id.*

The program certainly did not stigmatize its intended beneficiaries. It grew out of an acute awareness among educators and administrators that existing selection criteria were inadequate for all applicants. In expanding those criteria, the University, as have others, has recognized that its previous ability to make comparisons among applicants was imprecise at best. Thus, any perception that minority students, as judged by the standards previously relied on, are "less qualified" has and always has had little basis in reality. If anything, it is the failure to institute a program which considers the effects of past discrimination that has a stigmatizing effect on minorities, because underrepresentation of minorities in a professional school may be perceived by them and others as reflective of lesser ability. Further, the voluntary, affirmative character of the University's program in any event makes it less likely that minorities will be stigmatized than would a judicial decree granting race-conscious remedial relief, perhaps after a lengthy, strenuously contested controversy.

Such voluntary undertakings deserve constitutional sanction. The Court has recognized that nonjudicial governmental bodies have an authority to remedy constitutional violations which is broader than the power conferred on the judiciary. *See, Katzenbach* v. *Morgan,* 384 U.S. 641, 653 (1966). Indeed, this authority includes the power to take

remedial action reaching beyond the immediate effects of prior discriminatory practices. *United Jewish Organizations of Williamsburgh, Inc.* v. *Carey,* 45 U.S.L.W. at 4226. In *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. at 16, for example, this Court noted:

> 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.

Thus, as a matter of precedent and of policy it would be error to hold that the limitations of equity jurisdiction are applicable to nonjudicial governmental bodies. A contrary rule would vest the power to remedy discrimination exclusively in courts and usurp the authority of legislatures and executive agencies. Clearly such a result would work counter to the purposes of the Reconstruction Amendments, the civil rights statutes, and the decisions of this Court.

In conclusion, the considerations employed in the University's admissions process did not create suspect classifications and were not in any sense invidiously discriminatory. This Court in evaluating the special admissions program should therefore apply the traditional standard of review under the Equal Protection Clause. It need only consider whether the University's program and the classifications employed are rationally related to achieving a

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legitimate governmental purpose. *See, e.g., Kahn* v. *Shevin*, 416 U.S. 351 (1974).

Amici will argue in the following point that even if the Court does apply the "strict scrutiny" standard, it is clear that the program was necessary to achieve a compelling state interest. Because that argument necessarily involves the same issues as are involved in showing that the program passes muster under the lesser burden of constitutional justification argued for here, *amici* defer more extended discussion of that matter until the next point.

B. The University's Special Admissions Program Furthers Compelling State Interests in Remedying the Consequences of Discrimination and Serving the the Unmet Health Needs of Minority Communities.

California's special admissions program withstands constitutional examination even under the "strict scrutiny" standard. The program embodies and seeks to satisfy two basic compelling state interests: increasing minority participation in the medical profession in order to remedy the consequences of past discrimination, and training doctors likely to serve the needs of critically underserved minority communities.[23] The failure to acknowledge either the legiti-

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[23] There were other interests served by the program as well. The dissent below noted one important interest:

> [I]n *Swann* v. *Board of Education, supra,* 402 U.S. 1, 16, 91 S.Ct. 1267, 1276, the Supreme Court explicitly confirmed that school authorities are constitutionally empowered to utilize benign racial classifications to achieve racially balanced schools "in order to prepare students to live in a pluralistic society." *The special admission process at issue here, of course, was in fact implemented for just such an educational purpose, to provide a diverse, integrated student body in which* all *medical students might learn to interact with and appreciate the problems of all races as to adequately prepare them for medical practice in a pluralistic society.* This educational interest in a diverse student body is no mere "makeweight"; undergraduate schools and professional institutions of the highest caliber have long

macy of those interests or the appropriateness of attempting to further them through the medical school admissions process leads some observers mistakenly to characterize this as a "reverse discrimination" case. This narrow position fails to acknowledge the multiplicity of legitimate interests the state has in the medical school admissions process at governmentally supported institutions. If, however, these interests are accorded due recognition, even under the most stringent test applied under the Equal Protection Clause, the program must be seen as constitutionally valid.

The most fundamental interest California has sought to further through this affirmative action program is remediating the consequences that past discrimination has wrought on a profession affected with the public interest. Other groups participating in this litigation have amply demonstrated the extent to which previous discrimination in education, employment and other areas has lessened the opportunities for and thus the numbers of minority doctors. Such discrimination has affected Puerto Ricans particularly acutely, and the result has been that the numbers of Puerto Rican doctors on the mainland United States, though not

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recognized that the quality of one's educational experience is "affected as importantly by a wide variety of interests, talents, backgrounds and career goals [in the student body] as it is by a fine faculty and . . . libraries [and] laboratories . . ." (65 Official Register of Harvard U. No. 25 (1968), pages 104-105) Thus, given the race and ethnic background of the great majority of students admitted by the medical school, *minority applicants possess a distinct qualification for medical school simply by virtue of their ability to enhance the diversity of the student body.*

18 Cal. 3d. at 85, 553 P.2d at 1157, 132 Cal. Rptr. at 715 (emphasis added).

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known precisely, is by all accounts exceedingly small.[24] This Court has repeatedly recognized that remedying the consequences of past discrimination is a governmental concern of the highest order. *See, e.g., Hills* v. *Gautreaux,* 425 U.S. 284 (1976); *Lau* v. *Nichols,* 414 U.S. 563 (1974); *Green* v. *County School Board,* 391 U.S. 430 (1968). Plainly the most certain way—indeed the only way—to satisfy that interest is to determine to admit greater numbers of qualified minority persons to medical schools.

The other, equally compelling governmental interest which the program has sought to further is increasing the number of doctors who will dedicate some or all of their professional efforts to improving the delivery of medical help to the chronically underserviced communities of the poor. Provision of adequate health services is beyond doubt a governmental concern of the highest order. *See, e.g., Memorial Hospital* v. *Maricopa County,* 415 U.S. 250, 259-261 & n.15 (1974).

The inadequacy of medical services generally available to minority persons in disadvantaged communities, as well as the failure of efforts to involve licensed physicians to a greater extent in serving those communities, is well known. As a Senate Report recently stated, "[p]rivate physicians are as hard to find in some neighborhoods of New York as in backward rural counties of the South." S. Rep. No. 93-1133, 93d Cong., 2d Sess. 62 (1974). This problem is par-

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[24] Data compiled from federal government agencies by the Bureau of the Census are inadequate to determine the number of Puerto Rican doctors. The classification category used by these agencies is "Spanish-surnamed" and includes not only a predominant number of Mexican-Americans but also more than seven thousand Filipinos. *See* Smith, *Foreign Physicians in the United States,* 66 J. Nat'l. Med. Ass'n 77 (1974). In New York, as of 1970 there were 146 Puerto Rican physicians (M.D.'s and osteopaths) out of a total of 38,269 physicians in the state—approximately one-third of one percent. New York State Department of Labor, Labor Research Report No. 1. *Occupational Trends of Negroes and Puerto Ricans in New York State 1960-1970,* 13 (1975).

ticularly acute for language-minority persons. A high percentage of Puerto Ricans speak only or largely Spanish, and thus not even all of the limited medical resources available to other minorities are available to them.[25]

These compelling governmental interests—enhancing educational opportunities for disadvantaged minorities in order to remedy the consequences of previous discrimination, and providing for the currently unmet health needs of impoverished minority communities—have been inadequately if at all furthered by existing school admissions policies.[26] Those who would deny the University the ability to adopt admissions policies designed to advance these social

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[25] It is fairly evident that language or other barriers may be injurious to the patient's receiving the best advice and assistance from a doctor. *See* Hammonds, *Blacks in the Urban Health Crisis,* 66 J. Nat'l. Med. Ass'n 226 (1974); Lurie and Lawrence, *Communication Problems Between Rural Mexican Patients and their Physicians: Description of a Solution,* 42 Am. J. Ortho-Psychiatry 77 (1972). Diagnostic ability, among other things, may suffer. *See* Letter to the Editor, 295 N.E.J. Med. 293 (July 29, 1976). Explaining a medical problem is a complex task that requires greater linguistic facility (*e.g.*, ability to describe symptoms precisely, and perhaps even to understand some technical terminology) than do most other personal contacts. Furthermore, speaking to a professional person in other than one's native language about a physical or mental problem is a stressful, anxiety-producing interaction that may even impair further a person's normal ability to speak in English. See Madsen, "Society and Health in the Lower Rio Grande Valley," in J.H. Burma, ed., *Mexican-Americans in the U.S.: A Reader* (1970).

[26] There has been an extraordinary increase in the number of applicants to medical school. In 1965, the number of applicants and the number of applications submitted to medical schools totaled 18,703 and 87,111, respectively. In 1975, the number of applicants increased by 126% to 42,303 and the number of applications increased by 320% to 366,040. Association of American Medical Colleges, *The Medical School Admissions Process—A Review of the Literature 1955-76,* 12. If existing admissions criteria were relied on exclusively there would be few if any minority admissions because relatively few minority persons apply. Of the 42,303 applications submitted in 1975, 2288 were submitted by Black-Americans, 132 by American Indians, 427 by Mexican Americans and 202 by mainland Puerto Ricans. *Id.* at 144.

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concerns have sought to focus on the narrower, emotionally laden issue of whether applicants were admitted according to strict rank order of grades and test scores. Judging applications exclusively by these measures, which have been so heavily relied upon for so long, has in the view of some come to be equated with so fundamental an American concept as the merit system. The equation is spurious.

It has increasingly been recognized that the conventional academic credentials, the Medical College Aptitude Test (MCAT) and the Grade Point Average (GPA), reveal relatively little about the abilities of most if not all applicants. These traditional criteria may measure certain skills that are important for the study of medicine—and even that point is far from certain. Their correlation with and ability to predict competence in professional practices is yet more dubious.[27]

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[27] There is substantial doubt about whether traditional criteria yield measurements that are predictive. *See, e.g.,* National Board on Graduate Education, *Minority Group Participation in Graduate Education* 152-153 (1976). Numerous scholarly studies have questioned whether objective criteria accurately predict academic and professional performance of minority applicants and whether paper academic credentials provide an equitable basis for comparison. *See* Weymouth and Weigin, *Pilot Programs for Minority Students: One School's Experience,* 51 J. Med. Ed. 668 (1976); Marshall, *Minority Students for Medicine and the Hazards of High School,* 48 J. Med. Ed. 134 (1973); Nelson, Bird, and Rogers, *Educational Pathway Analysis for the Study of Minority Representation in Medical School,* 46 J. Med. Ed. 745 (1971); Whittico, *The Medical School Dilemma,* 61 A.M.A.J. 185 (1969). In addition, research has suggested that objective criteria are of doubtful utility as predictors of majority student performance as well. *See, e.g.,* Turner, *et al., Predictors of Clinical Performance,* 49 J. Med. Ed. 338 (1974) (low correlation between MCAT scores and clinical medical school performance); Bartlett, *Medical School and Career Performances of Medical Students with Low MCAT Test Scores,* 42 J. Med. Ed. 231 (1967) (low MCAT not significantly related to class rankings, academic warnings, academic honors, internship appointments, faculty appointments and later careers). *See also,* Price, *et al., Measurement and Predictors of Physician Performance* (University of Utah Press 1971); Rhoades, *et al., Motivation, Medical School Admissions and Student Performance,* 49 J. Med. Ed. 1119 (1974); Gough, *Evaluation of Performance in Medical Training,* 39 J. Med. Ed. 679 (1964).

The attempt to equate reliance on grades and test scores with the use of the merit system in admissions policies also does not comport with historical realities. Medical schools have never based their admissions decisions solely on academic criteria.[28] Professional institutions entrusted with the responsibility for making decisions that greatly affect the public interest have always reserved to themselves the right to use admissions decisions to further legitimate policies of the institution and the profession. For example, some medical schools have sought to admit applicants who will bring diversity and distinction because of special interests or sensitivities; if an applicant expresses an interest in becoming a family physician, the University, like many institutions, will weigh this heavily because it recognizes serious, unmet needs in this area.

Similarly, many medical schools' admissions criteria have, because of statutory law or state policy, traditionally accorded some significance to the residence or background of applicants in order to further legitimate social goals.[29] California residents who express an interest in returning to areas of the state which currently are not adequately served by the profession, especially in Northern California, are given special consideration. Many medical schools have determined that this type of practical approach enhances the possibility that underserved areas will be adequately staffed by doctors.[30]

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[28] Ceithaml, *Appraising Non-intellectual Characteristics,* 3 J. Med. Ed. 47, 53 (1957).

[29] *See* Transcript of Superior Court proceedings, at 65. Frequently these preferences for state residents are expressed in terms of a quota. *See, e.g., Clark* v. *Redeker,* 406 F.2d 883 (8th Cir.), *cert. denied,* 396 U.S. 862 (1969).

[30] Other examples include consideration of whether the applicant is a relative of an alumnus or alumna of the institution (presumably to encourage and solidify support for the institution among its graduates) or is the spouse of a current student (a policy the University followed, presumably to encourage practice as a family or to avoid dividing professional families during the training of the spouses, *see* Transcript of Superior Court proceedings, at 183).

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A similar assumption for similar reasons is made in recruiting minority persons for the special admissions programs. The consideration of the minority status of some applicants is a measure reasonably calculated to increase medical services to poorly served minority communities. It is sensible to assume, as the University did in the absence of contrary evidence, that minority doctors from disadvantaged backgrounds are more likely than others to be empathetic to the needs and problems of these communities and thus to want to serve them.[31] This assumption is particularly valid in the case of Spanish-speaking minorities. Regardless of where he or she chooses to practice medicine, a doctor from the Spanish-speaking minority community is an important asset to the large numbers of Spanish-dominant persons in this country.[32]

By correcting the deficiencies in its admissions procedures, which had perpetuated the effects of discrimination at earlier educational levels and had restricted access of racial minorities to the profession, and by developing new procedures for selecting qualified minority applicants, the University has chosen a precise, direct means of achieving the state's compelling goals. Indeed, in light of the urgent need for swift remedies, the special admissions program is the *least* restrictive method of accomplishing the desired

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[31] *See e.g.,* Cooper, *The Government Concern Regarding Post-Graduate Training and Health Care Delivery,* 36 Am. J. Cardiology 555 (1975); Herrera, *Chicano Health Professionals,* Agenda (Winter, 1974), at 10-11; Jackson, *The Effectiveness of a Special Program for Minority Group Students,* 47 J. Med. Ed. 620 (1972); Applewhite, *A New Design for Recruitment of Blacks into Health Careers,* 61 A.J.P.H. 202 (1971).

[32] Spanish is the mother tongue of 83% of mainland Puerto Ricans. 72% usually speak in Spanish at home. The United States Commission on Civil Rights, *Puerto Ricans in the Continental United States: An Uncertain Future* 32 (1976).

objectives.[33] Alternatives for attaining the same objectives that were suggested by the California Supreme Court, such as expanding recruitment programs and focusing remedial efforts on the primary and secondary school levels, are desirable of themselves but do not insure effective and prompt solutions. Expanded recruitment has been a central element of affirmative action programs in recent years, but recruitment by itself is not a remedy for the effects of past educational discrimination below the professional school level. Concentrating attention solely on discrimination at these lower levels of education, though again desirable on its own merits, will postpone meaningful progress for years.

Measured against alternatives, then, or considered by themselves, the admissions procedures utilized by the special admissions program are reasonable and rational means of attaining the compelling interests implicated here. In the process of perfecting admissions techniques, other procedures for accomplishing the desired ends may well become available. For the present time, however, the program established by the University is the most realistic and practical approach. It does not impose an undue burden on the majority as a whole; majority applicants continue to receive the vast majority of acceptances. No majority applicant has been deprived of careful consideration, and no unqualified minority applicant has been admitted.

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[33] The California Supreme Court assumed *arguendo* that the program served a compelling state interest. It then found that the University failed to demonstrate "that the basic goals of the program cannot be substantially achieved by means less detrimental to the rights of the majority." 18 Cal. 3d at 53, 553 P.2d at 1165, 132 Cal. Rptr. at 693. The imposition of so heavy a burden of justification on the University was improper. Such a burden is only applicable in the presence of "invidious" discrimination or a denial of a fundamental interest. *San Antonio Independent School District* v. *Rodriguez,* 411 U.S. at 40.

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Most importantly, the special admissions program has been demonstrated to be necessary and effective and "promises realistically to work *now*." *Green County School Board,* 391 U.S. 430, 439 (1968). The achievement of so compelling a goal as the eradication of the continuing effects of past discrimination cannot be delayed on the speculation that other means to accomplish that goal may be found tomorrow.

CONCLUSION

The Court should not entertain this case on the merits. If it does so, the judgment of the California Supreme Court should be reversed.

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