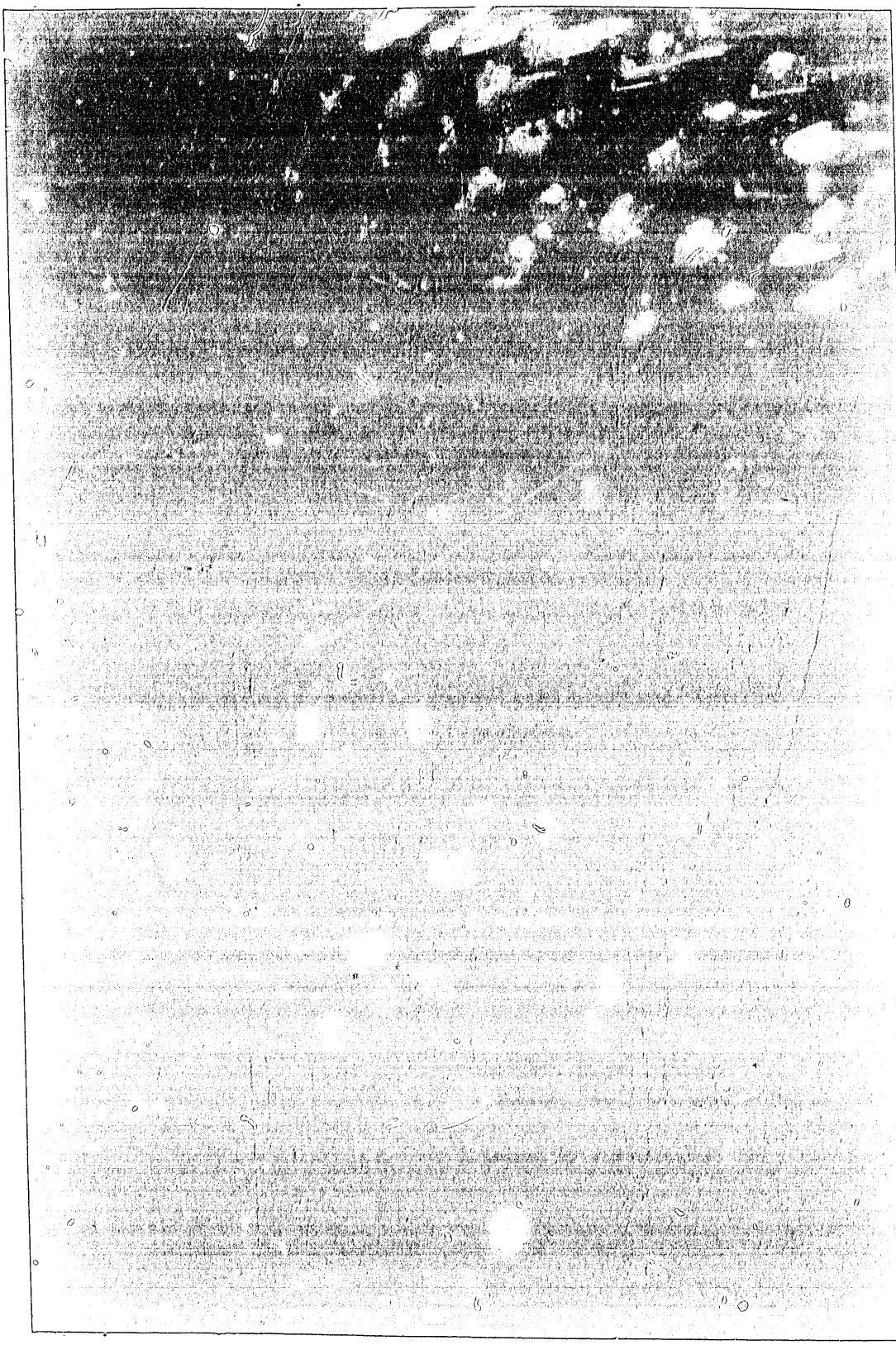

In The

Supreme Court of the United States

Spring Term, 1977

No. 76-811

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,

Petitioner,

v.

ALLAN BAKKE,

Respondent

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

BRIEF OF THE BLACK LAW STUDENTS UNION OF YALE UNIVERSITY LAW SCHOOL, AMICUS CURIAE, IN SUPPORT OF PETITIONER

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CONSENT TO FILING

This Amicus Curie brief is filed with the written consent of counsel for the parties in this proceeding.

OPINIONS BELOW

The opinion of the trial court is not reported. The case proceeded directly from the trial court to the highest state court.

The opinion of the Supreme Court of California is reported in 18 Cal. 3d 34, 553 P.2d 1152 (1976).

QUESTION PRESENTED

Does the special admission program at the School of Medicine at the University of California at Davis discriminate against nonminority applicants to the medical school?

INTEREST OF THE AMICUS

The Yale Law School Black Students Union (BLSU) is a student organization at Yale Law School consisting of black students who are currently enrolled in the Law School. It was founded in 1968 and was organized to promote the interests of Afro-Americans and African students. In addition to its attempts to focus and articulate the viewpoints of black students within the university community it also has consistently attempted to utilize the expertise of its constituency to speak out on legal issues which vitally affect Afro-Americans in all segments of our society.

As students who were admitted to Yale Law School because of its willingness to utilize admissions criteria other than high test scores and grade point averages and its recognition of the desirability of creating a law school community which reflects the cultural, racial and socio-economic diversity extant in the larger society we believe that we are in a unique position to assess the intellectual, cultural and societal value of affirmative action programs in professional schools. Moreover, the interest of the BLSU in this case transcends its membership and extends to all minority students who have been admitted to professional and graduate schools because of affirmative action programs.

We submit this brief because we believe that the ideals expressed in the Constitution of the United States can never be fully realized unless disadvantaged racial minorities are given an opportunity to matriculate in predominately white institutions of higher education, including graduate and professional schools, and after completing their training, to prac-

tice their profession in both predominately white, integrated and minority communities throughout the country. In short, we believe that special admissions programs which admit minority students to academic institutions using differential criteria for the benefit of the University community in general, and minority groups in particular, are consitutionally permissionable.

STATEMENT OF THE CASE

"It is surely one of the great ironies of American constitutional history that after 350 years of legally enforced and/or sanctioned oppression of black people, the belated recognition of [the rights of minority group members] to equality before the law is now urged as a bar to the achievement of that very equality."[1] Irony notwithstanding, it is that argument that is again[2] urged upon this Court.

Allan Bakke, respondent, applied for admission at the School of Medicine of the University of California at Davis (hereafter, the University) in 1973[3] and 1974; he was rejected on both occasions.

Bakke, a white male, applied pursuant to the "regular" admission procedures. He held both a B.S. and a M.S. in mechanical engineering from the University of Minnesota. His overall grade point average (OGPA) was 3.51; his scientific grade point average (SGPA) was 3.45; his Medical College Admissions Test (MCAT) scores were: verbal, 96; quantitative, 94; science, 97; and general knowledge, 72. In 1973, he was interviewed by the University Admissions officials and received a rating of 468. The maximum rating in 1973 was 500. His rating was two points lower than any applicant admitted under the University's regular

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[1]Amicus Curiae Brief submitted by Board of Governors of Rutgers University, *Defunis* v. *Odegaard*, 416 U.S. 312 (1924) 7-8.

[2]See, *Bakke*, v. *The Regents of the University of California*, 18 Cal. 3d. 34, 553 P.2d. 1152 (1976)

[3]Bakke's application was treated in the same manner as other regular admission applications in both of the years that he applied. In 1973, however, his application did not arrive until late in the application process. Hence, it was not reviewed until March 14, 1973. By this time, 123 of the 160 regular admits had been notified of their acceptances.

admissions procedures. Moreover, there were fifteen applicants who received ratings of 469, and another twenty applicants who also received ratings of 468. Any or all of these thirty-five applicants might have been admitted before Bakke.

In 1974 Bakke applied for admission so early that he was interviewed before his file was complete. His rating was 549; the maximum rating in 1974 was 600. There were twelve applicants with ratings above 549, however, and three others with ratings of 549 who failed to make the University's "Alternates List". Furthermore, twenty applicants who received ratings above 549 and who were placed on the "Alternates List" were nonetheless denied admission.

Having been rejected a second time, Bakke filed suit against the University. He claimed that because the University, pursuant to its "special" admission procedures, admitted applicants "less qualified" than he, he had suffered a legal wrong. The thrust of Bakke's legal claim is underscored by a description of the salient characteristics of the University's special and regular admission procedures.

Regular Admission Procedure

Under the regular admission procedures, a committee screens the applications to determine which applicants will be granted interviews. The committee is composed of approximately 14-15 faculty members and 14-15 students.[4] This committee evaluates each applicant's entire record. It considers such criteria as

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[4]In 1973 there were more faculty members than students on the committee. In 1974, however, the number of faculty members and students serving on the committee was identical.

teacher recommendations, college grades, MCAT scores, employment experience, and personal background.[5] Additionally it indulges the administrative presumption that no applicant whose college OGPA is below 2.5 (on a 4.0 scale) should be granted an interview.[6] Utilizing these criteria, the admissions committee granted interviews to 815 of 2644 applicants in 1973 and 462 of 3737 applicants in 1974.

When Bakke applied for admission in 1973, only one initial interview was conducted; a faculty member conducted the interview. In 1974, two preliminary interviews were conducted: one by a faculty member, the other by a student. The interviewers reviewed the applicant's file, prepared a written summary of the interview, and then assessed the applicant's potential contribution to the University and the profession. Finally, the interviewer, having performed all those tasks rates each applicant on a scale of 1-100.

At this point, the interviewer's written summaries and the applicant's file are passed on to a subcommittee[7] of the full admissions committee. The interviewer's specific rating is withheld to permit each of the subcommittee members to make an independent evaluation of the desirability of each applicant. Ultimately the sum of the ratings given by the initial interviewers, combined with the ratings given by the

[5]The Committee also considered graduate school grades (if any) and extra-curricular activities.

[6]Not all applicants who had OGPAs above 2.5 were granted interviews however.

[7]In 1973 there was one interviewer and four committee members — a combined rating of 500 was possible. In 1974, there were two interviewers and four committee members — a combined rating of 600 was possible.

subcommittee members forms the basis for the University's admission decision. It should be noted, however, that the University has adopted a preferential admissions policy both for those persons whose spouses have already been admitted to the medical 615 school; and those applicants who intend to practice medicine in areas of the country where there is currently a shortage of doctors.

In each medical school class there were but one hundred places. Yet in both 1973 and in 1974 eighty-four of these places were reserved for applicants who applied through the "regular" admission procedure.

Special Admission Procedure

The University has published a pamphlet entitled "Program to Increase Opportunities in Medical Education for Disadvantaged Citizens" to inform eligible applicants of its "special" admission procedures. Minority applicants[8] who are from disadvantaged socioeconomic, cultural, or educational backgrounds are so eligible.

The special admission committee was composed of both faculty members and students. All of the student members and most of the faculty members of the committee were minority group members. The faculty chairman of this committee reviews each application to determine eligibility. He notes such indicators as whether the applicant was: (1) granted a fee waiver; (2) a participant in an equal opportunity program in

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[8]Evidently, only members of the following minority groups were eligible for the special admissions program: Black/Afro-American; American Indian; Mexican-American or Chicano; Oriental/Asian American; Puerto-Rican (Mainland); Puerto-Rican (Commonwealth); Cuban; and Other.

college; or (3) a work-study student as an undergraduate. He also considers the occupational and educational background of the applicant's parents.[9] After the eligibility determination, the committee determines whether an interview should be granted.

To determine whether an interview will be granted, the committee considered the applicant's entire record, paying particular attention to factors such as the applicant's motivation and desire to serve in a minority community. Unlike the applicants in the "regular" admission program, however, applicants in the "special" admission program were not subject to the presumption that an OGPA below 2.5 precludes either an interview or admission.[10]

Each applicant, who was granted an interview, was interviewed by a faculty member and a student member of the committee. As in the "regular" admission procedure, each interviewer prepared a written summary of the interview and ranked the applicant on a scale of 1 to 100. The applicant's file was then submitted to a subcommittee of the "special" admission committee. Again the specific rating of the interviewer wa withheld to permit each of the subcommittee members to make an independent evaluation. These evaluations were then condensed and submitted to the "regular" admission committee which ultimately determined which of the minority applicants would be admitted. This process continued

[9]Minority applicants who were ineligible for consideration in the "special" admissions program are considered under the "regular" admission procedures.

[10]Under this admission procedure, in 1973, 71 of 297 minority applicants to the medical school were interviewed; and in 1974, 88 of 628 were selected for interview.

until 16 minority students had been accepted and expressed an intention to enroll at the University.

SUMMARY OF ARGUMENT

Amicus will argue that it is constitutionally permissable for medical schools to consider race as one of the criteria in their admissions policy to meet the compelling state interest in overcoming the effects of past racial exclusion of blacks and other minority group members from these schools and in alleviating the acute shortage of minority doctors which exists throughout the country. In fact, it will be our contention that there is an affirmative responsibility on all medical schools which are directly or indirectly supported by Federal and/or state funds to take affirmative steps to end the historic pattern of exclusion of minority persons from the medical profession.

We believe that the affirmative responsibility of publicly supported state and private medical schools emanates from several sources. First, the nation's medical schools must bear a substantial share of society's responsibility for the general exclusion of minorities from the medical profession and its various institutions and organizations. Furthermore, if systematic and sustained legal, socio cultural, economic, political and educational discrimination over hundreds of years against minority group members has created academic experiences for whites which have not been shared by or available to minority group members then it would be sheer folly to expect minority persons to perform as well in a culture-based credentials contest. Consequently, we argue that medical schools should be permitted to depart from strict credentialism in favor of a system which allows for the possibility of admission to otherwise qualified minority applicants.

Secondly, we believe that publicly supported medical schools may, consonant with sound constitutional principles, admit members of specially disadvantaged racial groups on the grounds that not only do the individual graduates acquire power, prestige and influence but that these important resources inure to the benefit of the entire racial group. Additionally, the presence of members of racially disadvantaged students in medical schools will undoubtedly have a beneficial effect upon the entire medical school community. Both white and minority students and faculty members will undoubtedly alter, in some fashion, their perceptions about members of the other group. However, the important point is that an increase in the number of black, American Indian, Puerto Rican, Mexican American, and Asian doctors will place some of these persons in important and influential policy positions throughout the country, raise aspirations of all members of the group and generate a process whereby members of these racial minority groups can, through their power and influence, help to eliminate the strikingly different educational experiences of white and minority group individuals in their formative years — thus leading to a time when the necessity for affirmative action programs will be eliminated.

Finally, we will contend that minority students admitted to medical schools pursuant to special programs are not stigmatized by these special programs.

ARGUMENT

I

Benign Racial Classifications Which Are Adopted to Assure Equality of Opportunity By Eliminating The Present Effects of Past Discrimination Are Constitutionally Permissible.

Amicus, while ackowledging that most racial classifications which have been reviewed by this Court have been held to be constitutionally impermissible, asserts that these cases have almost universally involved instances of invidious racial discrimination. See e.g., *Loving* v. *Virginia*, 388 U.S. 1 (1967); *McLaughlin* v. *Florida*, 379 U.S. 184 (1964). Correlatively, this Court has frequently had occasion to review, and in many instances sustained racial classifications intended to alleviate the present effects of prior discrimination. See *United Jewish Organizations of Williamsburgh, Inc.* v. *Carey*, U.S. 97 S. Ct. 996 (1977); **Franks** v. *Bowman Transportation Co.*, 424 U.S. 747 (1976); *McDaniel* v. *Barresi*, 402 U.S. 39 (1971); and *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971).

While we do not believe that it is neccessary for this Court to strictly scrutinize the racial classification involved in this case, we nevertheless believe that even if the Court utilizes this rigorous standard of review, the affirmative action program at the University can be upheld as being constitutionally permissible. For, in this instance, the racial classification would meet the compelling state interest test of the strict scrutiny standard, since minority admissions programs serve to lessen the impact of institutional racism in higher education.

As the conventional wisdom has it racism will decline with the cessation of overt discrimination and with the elimination of its legal forms. Racism appears to most people as an individual problem for which one is capable of avoiding responsibility. When we perceive the larger structure of discrimination there is a sense that somehow its objective forms are unrelated to our daily lives; that we are not responsible for the injustices we see. On one level this is correct. We are born into social circumstances over which we have no control and we live our lives out of that particular context. That particular social contexts are preferred or provide greater access to social resources is a realization that comes late in life and has produced much guilt, arrogance, frustration and anger. In this sense we are all victims of the injustices to which we have become accustomed.

It is important, however, that we place this case in an institutional context. We do not believe that it is possible for this Court or any other social institution to successfully deal with the issues of affirmative action without taking into account the pervasiveness of *institutional* racism, that is, the relationship of social organization to racist effect regardless of the intent of particular personalities involved. It seems inexorably clear by now that adherence to certain procedures is likely to make particular results more predictable, however racist their impact might be. In this case, admission to the University's Medical School based solely upon the use of one's Medical College Admission Test and grade point average would mean a drastic reduction in the number of minority persons admitted. Notwithstanding the reality that the socalled "objective criteria" have never been linked to the native

abilities or individual potentialties of minority persons.

We believe that one of the reasons the processes of discrimination are so tenacious is that, in the operation of what has been labelled systemic racism each institutional sector in our society depends upon the results produced by every other sector. Thus deficiencies in education produce lowered success in business and employment which produces lower income which will produce poorer quality housing in neighborhoods that support inferior schools and the institutional actor in each sector is able to eschew responsibility for the plight of minorities in society.

As minority students at a prestigious university the nature of the interlocking relationship of institutional sectors is acutely apparent to us, through our study of the legal system as well as our interactions with our fellow students. We feel that two of the most potent antedotes to this interlocking relationship whose racist effects grew out of an historical milieu that includes hundreds of years of slavery and legally enforced racism are: (1) judicial intervention to disrupt the continuity of sectorial discrimination; and (2) judicial approval of affirmative action programs which will assure the presence of members of specially disadvantaged groups in all of the various social institutions *at all levels.* We cannot emphasize the importance of the aforementioned words, "at all levels." Our matriculation at Yale Law School, our acquaintance with our white colleagues, our exposure to the frequent important dignitaries who visit the Law School, including Supreme Court Justices, and our limited exposure to the operation of the legal and social

system has convinced us that a truly successful assault upon institutional racism cannot be made unless minorities are given access to those institutions which wield considerable power in our society. We cannot help but believe that institutional racism is in far too many instances maintained and perpetuated because of the absence of qualified minorities in positions of power in powerful institutions in society. And, there appears to be considerable evidence that there are certain educational institutions in this country whose graduates disproportionately occupy these powerful [11] positions in institutions capable of exerting considerable influence on national, state and local policy.

We do not argue that all minority graduates of first-rate medical schools will dedicate their careers to obtaining positions of power and influence in order to help the more disadvantaged members of their racial group. Some will, while others will not. In either event society will be better off. In the case of those minority doctors who aspire to and obtain influential positions in national, state or local medical associations it is possible that they can be instrumental in initiating policies which will have a beneficial effect upon those most in need of medical services which will include a substantial portion of minorities. For those who choose to devote their energies almost exclusively to the practice of medicine, whether it be in black, white or integrated communities the superior education and post medical school training will undoubtedly enable them to be highly competent practitioners who will gain the respect of their patients and colleagues.

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[11] See Pierson, *The Education of American Leaders - Comparative Contributions of U.S. Colleges and Universities* (1969)

In summary, we urge the Court to consider the pernicious effects of institutional racism upon members of specially disadvantaged racial minority groups and to hold that insofar as the University's affirmative action program helps to eliminate or at least ameliorate those effects that this is a compelling enough state interest to justify the program.

II

Intent or purpose to discriminate, which is the key to the showing of an invidious discrimination, is not here present.

There is an additional reason why this Court should not find the classifications made in this case an invidious discrimination in the constitutional sense, and one therefore subject to strict scrutiny. The key to the showing of an unconstitutional racial classification, this court has repeatedly held, is a "racially discriminatory purpose" on the part of the decisionmaker, *Washington* v. *Davis*, 426 U.S. 229, 240 (1976); *Village of Arlington Heights* v. *Metropolitan Housing Development Corporation*, — U.S. —, 97 S.Ct. 555, 563 (1977). Although it may be unclear what precise standard of proof attaches to an assertion of discriminatory purpose, a plurality of this Court has made clear that mere use of race "in a purposeful manner" is not sufficient unless a "racial slur or stigma" is intended or inferred, or the classification can be shown independently to have been intended to violate a constitutional right. *United Jewish Organizations of Williamsburgh, Inc.*, v. *Carey*, — U.S. —, 97 S.Ct. 996, 1009-1010 (opinion of White, J.).

While the special admissions program of the University concededly necessitated a purposeful use of race,

amicus contends that respondents have not carried their burden of proving anything more. The court below concluded that there was no "aura of inferiority" cast upon applicants not included in the special program, and thus no stigma, *Bakke* v. *Regents of University of California*, 18 Cal.3d 34, 50 (1976). Beyond this, it is hard to see how the actions of the University could be construed as having intent or purpose to violate the Equal Protection Clause of the Fourteenth Amendment, as respondents charge.

In *Washington* v. *Davis*, *supra*, the administration to applicants for positions on the District of Columbia police force of an examination with a demonstrable disproportionate impact on blacks was challenged on constitutional grounds. But the Court declined to find the requisite intent, largely because the police department had made affirmative efforts to recruit black officers. *Id.*, at 246. The California Supreme Court in deciding *Bakke* also drew this inference from that case. *Bakke*, *supra*, 18 Cal.3d at 58, n.25. We contend that the situation in the instant case is analogous. Even with the special admissions program, 84 of 100 spaces in the entering class were filled with students not from disadvantaged backgrounds. If the existence of a voluntary affirmative action program in *Washington* v. *Davis* was strong evidence that there was no unconstitutional discriminatory purpose as regards a racial minority, then surely the fact that the overwhelming majority of spaces in the entering class are "reserved" for individuals not from disadvantaged background is powerful evidence in the instant case that no constitutionally proscribed discriminatory intent as regards the majority exists. To say anything else is to make the scarcely credible statement that it

should be *easier* to prove unconstitutional discrimination against the majority than against a minority.

The majority below evaded consideration of this paradox by asserting that the alleged discrimination here at issue was not only against whites as a race or nondisadvantaged applicants as a group, but also against Allen Bakke as an individual. *Bakke, supra,* 18 Cal.3d at 47, n.11. It is indeed indisputable that the Fourteenth Amendment protects individuals as much as groups, *see Shelley* v. *Kraemer,* 334 U.S. 1, 22 (1948). And yet, to assert a denial of equal protection is in effect to claim that a group classification has been unfairly made. As Professors Karst and Horowitz have noted:

> Classification implies a selection of certain attributes as the relevant ones—the "merits." Once this selection is made, an individual is classified either with those who possess the relevant attributes or with those who do not. Consequently, to complain against a classification scheme is not merely to say, "I am wronged," but to say, "We are wronged." Every lawsuit based on claim to equal protection is, in spirit, a class action. Karst and Horowitz, *Affirmative Action and Equal Protection,* 60 VA.L.REV. 955, 959 (1974).

Cf, generally Tussman and tenBroek, *The Equal Protection of the Laws,* 37 CAL.L.REV. 341 (1949). Thus in the instant case, the basis of Bakke's suit is not that he was denied admission; he had no constitutional right to be admitted. Rather, the basis of his claim is that he was denied admission *as a result* of the school's purposeful use of a racial classification. He is in fact

asserting that by using such a classification, the school is denying a group its rights. But in order to prove such an assertion, he has the burden of showing, as we have said, that the administration of the University acted with intent to deprive the group of its rights. *Amicus* contends that on the facts of this case, that burden has not been and can not be met.

III

Special Admissions Programs In Institutions Of Higher Education Do Not Stigmatize Members Of Racial Minority Groups Who Are The Beneficiaries Of Such Programs.

Perhaps the clearest articulation of the argument that affirmative action programs serve to stigmatize minority group members was made by Justice Douglas in his dissent in *DeFunis* v. Odegaard, 416 U.S. 312 (1974) when he stated:

> A segregated admissions process creates suggestions of stigma and caste no less than a segregated classroom, and in the end it may produce that result despite its contrary intentions. One other assumption must be clearly disapproved, that Blacks or Browns cannot make it on their individual merit. That is a stamp of inferiority that a state is not permitted to place on any lawyer. *Id.* at 343.

Support for this position can be found in the writings of scholars who have stated that the danger inherent in a program which gives special consideration to members of groups is that it may give rise to the implication that members of these groups are intellectually

inferior;[12] we submit that the failure to adopt special admissions programs would needlessly give rise to an even greater implication that the *absence* of minority students was due to intellectual inferiority rather than the deprivations of opportunity which they have suffered.

We believe that those who like Justice Douglas argue that affirmative action programs operate as a stigma on racial minority groups and for that reason alone are constitutionally suspect could not be more mistaken in their assertations.

We ground our belief on three basic premises.

(1) that America's minorities are not similarly situated with the Anglocentric, white, middle-class majority;

(2) that because of the socio-cultural, economic, political and educational differences between minority and nonminority persons in this nation, it is irrational and unfair to expect minority students to demonstrate their latent capabilities and potentialities on entrance tests and other traditional criteria for selection normed on the life experiences of privileged whites; and,

(3) given the vital function and role of higher education in America today, minorities ought to be given fair access to all institutions of higher education - elite as well as nonelite - on at least a proportional basis if the American caste system is to be finally shattered and the societal goal of equal opportunity for all individuals is to be attained. This means, of course, that

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[12]See e.g., T. Sowell, *Black Education Myths and Tragedies* (1972); Kaplan, "Equal Justice In An Unequal World; Equality for the Negro - The Problem of Special Treatment," 61 NW U.L. Rev 363 (1966).

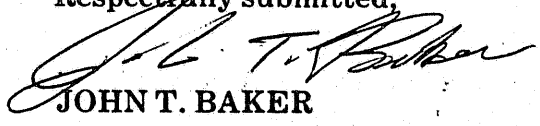
one of the aims of educational institutions should be the development of special programs such as affirmative action to offset the intrinsic biases of the admissions procedures of colleges, and universities, as well as graduate and professional schools in the United States. For only through such programs can higher education help our nation to fulfill the democratic-egalitarian values America has always preached, but so rarely practiced.

Hence, rather than to stigmatize minority group members, special admission programs serve only to provide for such persons *equal* access to educational opportunities on the basis of more realistic entrance criteria. At the same time, these programs assist in the creation of a situation wherein all students in the academic environment receive a critical exposure to the history, contemporary experiences, and cultural heritage of *all* the racial and ethnic groups in this country. In effect then, such programs accomplish nothing more than to permit America's institutions of higher learning to fulfill their duty to society of providing America's youth with the values, skills, flexibility and depth of outlook necessary to assume useful roles in a pluralistic nation that is itself part of a larger, heterogeneous global community.

CONCLUSION

For the reasons stated it is respectfully submitted that the decision of the Supreme Court of California be reversed.

Respectfully submitted,



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PROOF OF SERVICE

I, John T. Baker, Attorney for the Amicus Curie and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 7th day of June, 1977, I served copies of the foregoing Brief on petitioners and respondents therein named, by mailing copies in a duly addressed envelope, with postage prepaid, to Reynold H. Colvin, Esquire, 111 Sutter Street, San Francisco, California 94104 *and* Donald L. Reidhaar, Esquire, 590 University Hall, 2200 University Avenue, Berkeley, California 94720.

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