IN THE

Supreme Court of the United States

October Term, 1976

No. 76-811

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,
Petitioner,

v.

ALLAN BAKKE,
Respondent.

On Writ of Certiorari to the Supreme Court of California

BRIEF OF COLUMBIA UNIVERSITY, HARVARD UNIVERSITY, STANFORD UNIVERSITY AND THE UNIVERSITY OF PENNSYLVANIA AS AMICI CURIAE

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June 7, 1977

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INTEREST OF THE AMICI CURIAE

The institutions on whose behalf this brief is submitted are private universities of a particular kind. They are institutions which differ in geography and history, in size, in resources, and in structure; but they are united by a principle which transcends their differences—namely, that the governing standard for establishing and maintaining class-

room and research functions alike is, not quantity or multiplicity, but excellence. Underlying this principle is the conviction that a university's highest function is to give people of great talent and motivation the opportunity to participate, as students and as teachers, in rigorous intellectual training and equally rigorous intellectual inquiry —and thereby simultaneously to enlarge today's corpus of knowledge and creative works, and to develop tomorrow's cohorts of physicians and poets, physicists and planners, philosophers and politicians.

In pursuing this function and these goals, colleges and universities, with rare exceptions, historically have been accorded freedom from external influence and intrusion. Our society has recognized that higher education can flourish only so long as educators have substantial independence to formulate and implement the policies by which it is transmitted.[1] This freedom is not unfettered, and it entails an equal measure of responsibility. When, however, the problem is central to the educational process as is the determination of the qualifications of students, when educators are searching in good faith for solutions, and when applicable legal norms are in doubt, we believe that the cause of education, and hence the welfare of our society, are best served by judicial restraint.

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[1]In our view, it does not matter for the resolution of the issues in this case whether the Regents and officers of the University of California take a major part in shaping the admissions policies of particular schools or delegate effective authority to the faculties of the several schools. But we would advise the Court that in our institutions faculties have the dominant role in shaping admissions policies. This brief speaks for our institutions as such—not for faculty members collectively or individually. Among other things, we seek in this brief to preserve the substantial independence of our faculties, including the freedom to adopt admissions policies different from those we here defend. (Four of the lawyers whose names appear on this brief are deans of the law schools of the *amici* institutions, and as such have some oversight responsibility for admissions processes; however, they sign this brief not in their decanal capacities, nor as representatives of their faculties, but as individual lawyers.)

Up to about a decade ago, it was the fact (not designedly, but the fact nonetheless) that the student bodies of the *amici* institutions were overwhelmingly white,[2] and their faculties almost exclusively so. Belatedly, these institutions —like many other colleges and universities—recognized that they were disserving their educational goals in two important ways: (1) By not enrolling minority students in significant numbers, the *amici* were continuing to deny intellectual house room to a broad spectrum of diverse cultural insights, thereby perpetuating a sort of white myopia among students and faculty in many academic disciplines—most particularly the professions, the social sciences and the humanities. (2) The *amici* were doing next to nothing to enlarge the minute minority fraction (no more than 1% in many fields) of the pool of persons with doctoral-level graduate and professional training—the pool from which the *amici* and comparable institutions draw their faculties, and also the pool from which, increasingly, local and national leaders in the public and private sectors tend to be selected.

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[2]The *amici* institutions were not unique in this regard. As of the academic year 1955-56, there were only 761 black medical students in the country. This figure rose slightly, to 771, by the 1961-62 academic year, but declined to 715 in 1963. Hutchins, Reitman & Klaub, *Minorities, Manpower, and Medicine*, 42 J. Med. Educ. 809 (1967).

The entering class in medical schools for 1968-69 contained 266 black students, or 2.7% of the total first year enrollment; 3 Native Americans, or 0.03%; 20 Mexican Americans, or 0.2%; and 3 Puerto Rican students, or 0.03%. The 2.7% figure for blacks, small as it is, is somewhat misleading, since fully half of these students were enrolled at the predominantly black institutions of Howard and Meharry. Thus, at any particular predominantly white institution, the actual percentage of black students was likely to be significantly smaller. Association of American Medical Colleges enrollment data, *cited in* C. Odegaard, *Minorities in Medicine: From Receptive Passivity to Positive Action* 28-29 (Josiah Macy, Jr. Foundation 1977).

It was to alleviate these serious educational deficiencies in their training and research programs that the *amici* (and numerous other colleges and universities) developed admissions programs designed to increase minority enrollment. Intensive recruitment of minority applicants could not of itself begin to insure a genuinely diverse student body in institutions as selective as the *amici* institutions. Most of the schools in these institutions are highly selective—*i.e.,* there are so many more applicants than places available; and, more important, the number of applicants with a high probability of successful or indeed distinguished academic performance so greatly exceeds the available spaces—that admissions decisions based on racially neutral criteria, which take no account of the educational deficit under which America's non-whites have labored throughout our history, would not yield a large enough number of minority students to achieve substantial diversity. Thus, in choosing among a large number of clearly qualified candidates for admission, these schools are seeking to achieve their educational goals through conscious treatment of an applicant's membership in a minority racial group as a favorable factor in the consideration of his application.[3] The judgment and opinion of the California Supreme Court put the attainment of these goals in jeopardy:

1. The narrow issue for decision in the instant case is whether the medical school of a state university may not only accord favorable consideration to minority applicants

[3] "Racial group" and similar phrases are not used in this brief with any pretense of scientific accuracy. When we refer to a racial minority such as blacks we mean a group that is perceived as "black" by most Americans, and has suffered various forms of discrimination and been isolated to some degree from social and cultural contact with white Americans as a conseqence. In particular, no genetic connotations are intended. A large number of American blacks have some white ancestors. Similar observations are appropriate with respect to references to other racial minorities in this brief.

but for this purpose may also establish a special admissions program limited to disadvantaged members of minority racial groups, with the earmarking of 16 places in an entering class of 100 for persons selected through that special program. The decision of this Court may apply narrowly only to a program of the precise kind employed at the Medical School of the University of California at Davis. But the implications of an affirmance of the decision of the Supreme Court of California may threaten many other more flexible types of admissions programs at the *amici* institutions and similar colleges and universities. The threat is perceived as especially serious in light of many of the contentions and observations expressed in the majority opinion of the California Supreme Court.

2. While the instant case involves a state university, we are apprehensive that a judgment of affirmance by this Court would threaten the continuation by private universities of admissions policies that they believe to be educationally vital.

a) Private as well as public universities have various relationships, financial and otherwise, with federal and state agencies. The standards for determining whether a given degree of governmental involvement is sufficient to render the Fourteenth Amendment applicable to otherwise private activity have been pieced out by this Court on a case-by-case basis. While courts have generally declined to apply the Amendment to private universities, we cannot be certain as to the ultimate disposition of this question.

b) A decision of this Court holding the admissions program at Davis unconstitutional under the Fourteenth Amendment might influence the construction of statutory prohibitions against discrimination to which some or all of the *amici* might be subject. These include Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000 (d) (1970), forbidding discrimination in any program receiving federal

financial assistance; 42 U.S.C. § 1981 (1970), prohibiting some forms of discrimination in willingness to enter into contracts, including contracts to provide education; and a number of state and local laws forbidding racial and other discrimination in admissions by educational institutions.

3. Even if private universities are not legally constrained in their freedom to pursue admissions policies that they deem educationally most sound, they will be harmed if public universities are denied similar freedom. Diversity in background, including race, within faculties is important, enriching the interchange of ideas and offering role models to minority students. The pool of outstanding scholars and teachers from which faculties are selected is fed by graduates of both private and state universities. To dry up a major potential source of minority faculty members—minority applicants not admitted to state institutions because their exceptional talents had not yet manifested themselves when they applied for admission—would make achievement of the faculty recruitment objectives of all universities more difficult.

4. If state universities are forbidden to consider race in admissions, private universities, even if free of similar legal constraints, would face uncomfortable choices. It might be felt that programs held by this Court to violate the Fourteenth Amendment if undertaken by state schools could not be pursued in good conscience by private universities. Others might argue that pluralism in American society is sufficiently important that, so long as their actions were not illegal, private universities should feel free to adhere to their principles without regard to what might or might not be permissible for state universities. A third point of view might be that private universities should attempt vastly to increase the number of minority students in order to compensate for the restrictions imposed upon state universities. We would greatly prefer to reach decisions on

admissions solely on educational considerations, undistracted by a debate likely to be divisive and destructive.

We hope that our experience and perspectives may be of assistance to the Court in its treatment of the difficult questions raised by this case.

The following private universities have indicated their general support for the arguments advanced in this brief and join the *amici* in urging reversal of the judgment of the California Supreme Court:

Brown University
Duke University
Georgetown University
Massachusetts Institute of Technology
University of Notre Dame
Vanderbilt University
Villanova University

SUMMARY OF ARGUMENT

I.

When a university must choose among many more qualified applicants for admission than it can accept, choices are made on the basis of educational objectives. Expected academic performance is a significant criterion but only one of several. There are important educational values in having a student body with diverse interests and backgrounds. Such factors as extra-curricular activities, employment experience, and geographical distribution have traditionally been taken into account, because a student body with varied backgrounds and interests provides the most stimulating intellectual environment.

For the same reason, many universities regard membership in a minority race as a favorable factor to be considered along with others in deciding whom to admit. The differences in experience that arise out of growing up black, or Chicano, or Puerto Rican, or Native American, enable students who are members of those groups to introduce into the university community important perceptions and understandings. An educational process enriched in this way is not only of great importance to students: it broadens the perspectives of teachers and thus tends to expand the reach of the curriculum and the range of the scholarly interests of the faculty.

Furthermore, by making conscious efforts to include more minority students in their undergraduate and professional programs, universities are better performing the function of providing tomorrow's leaders in all walks of life. If our pluralistic society is to achieve its objective of increasing the number of minority doctors, judges, corporate executives, university faculty members and government officials, universities must make available to qualified minority students the opportunity to gain the necessary education.

II.

The Supreme Court of California appears to acknowledge the constitutional propriety of selecting a racially diverse student body. But the court has held that this permissible end must be sought without taking race into account—an anomalous circuity insisted upon in the belief, unsupported by the record, that racially random processes would somehow produce a student body of sufficient racial diversity.

We appreciate the concerns which underlie the California court's reluctance to sanction racially defined processes. But we disagree with the California court's conjecture—and it is only conjecture, flatly contradicted by the only testimony of record—that universities can achieve racially diverse student bodies without taking into account the race of those applying for admission. Our institutions' experience confirms that the substitute devices suggested by the California court are incapable of fulfilling this constitutionally legitimate objective.

The principal alternative suggested was the establishment of a larger program for the admission of the "disadvantaged," regardless of race. But disadvantage—whether predicated on cultural or economic criteria—is not synonymous with membership in an ethnic minority. While a disproportionate number of minority group members is disadvantaged, most of the disadvantaged in this country are white. To be sure, programs according favorable treatment to disadvantaged applicants may also serve important educational purposes. If honestly administered, however, and if disadvantage is not treated merely as a euphemism for race, a program for the disadvantaged in lieu of a program of similar scope for minorities would sharply reduce the admission of minority applicants. In order to ensure adequate representation of minority students, the number of disadvantaged students admitted would have to

be so increased that the very diversity we are trying to achieve would be destroyed, critical educational goals and standards would be endangered, and the capacities of financial aid programs for students would be overwhelmed.

Other alternatives propounded by the Supreme Court of California would also be ineffective. Total abandonment of attention to grade point averages and test scores would deprive us of tools that are valuable in screening applicants and in comparing applicants of similar backgrounds; in their absence the process of selection would be far more difficult and undoubtedly less effective. The alternative of quickly enlarging or adding to the number of medical schools (or other graduate or undergraduate schools) is politically and fiscally incredible and educationally unsound; moreover, while it would presumably increase the total number of minority students admitted it would not enlarge their proportion in any school or class and thus would not achieve the educational values afforded by diversity in students' racial backgrounds.

III.

Favorable treatment of minority group members in university admissions is sharply different from discrimination against minorities. It is in no way invidious, nor does it work to the disadvantage of groups unable to protect themselves in the political process. *See San Antonio Independent School District* v. *Rodriguez,* 411 U.S. 1, 28 (1973); *United States* v. *Carolene Products Co.,* 304 U.S. 144, 152-53 n. 4 (1938).

Educational policy is an area traditionally accorded, and particularly appropriate for, judicial restraint. *See San Antonio Independent School District* v. *Rodriguez,* 411 U.S. at 42-43; *Sweezy* v. *New Hampshire,* 354 U.S. 234, 263 (1957) (concurring opinion). Needs and goals, as reflected

in admissions policies, vary from university to university and among different schools in the same university. Educators need substantial freedom to search for better solutions to difficult educational problems, freedom denied by the kind of judicial intervention practiced by the Supreme Court of California.

Constitutional questions—particularly those of great moment, as in the instant case—should not be decided in the abstract but only in the context of a full factual record. There was no such record in this case. The decision of the California Supreme Court was based on assumptions of fact not put to proof. On what that court thought to be the critical issue, the availability of less restrictive alternative means to attain concededly valid goals, its decision was predicated solely on its own conjectures and ignored uncontradicted testimony in the record to the contrary. The decision of an important constitutional question involving momentous issues of educational policy should rest on firmer foundations.

ARGUMENT

I. *The Inclusion of Qualified Minority Group Members in a Student Body Serves Important Educational Objectives.*

At our institutions, as at many others, there are far more applicants for admission than there are places in the entering classes. The large majority of applicants are fully qualified, as indicated by factors such as their grade point averages and test scores, to perform successfully the academic work that would be required of them should they be admitted. The most difficult task of the admissions committees is, therefore, to select from among these "qualified" applicants those who will be admitted.

In making this selection, colleges and universities can apply a wide variety of criteria that will vary from in-

stitution to institution and even among schools within a university. The choice of criteria will depend upon educational objectives. In our institutions, particularly in the selection of undergraduates, diversity in the student body has been an important educational objective. In addition to predicted academic performance, factors believed to contribute to diversity and strength of a student body, such as geographical distribution, employment experience, musical skills, extracurricular activities and travel, are all regarded as legitimate and relevant, and usually taken into account without controversy.[4]

Academic ability has not, therefore, been the sole criterion for selecting students at our institutions. In choosing among applicants qualified to do the academic work, factors other than predicted academic performance may well be determinative in reaching admissions decisions. The ultimate question is which candidates from among the "qualified" pool will contribute most, in the context of an entire class, to the achievement of the institution's educational objectives.[5]

A policy of increasing the number of students from minority groups is, in our judgment, the best choice for all of our students because it is the best way to achieve a diverse student body. A primary value of liberal education

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[4]Although some of our professional schools give great weight to predicted academic performance and hence relatively less weight than our undergraduate and other professional schools to the other factors mentioned here, even in those schools elements of diversity may be decisive in a limited but significant number of cases.

[5]Set forth in the Appendix to this brief is a description of the criteria applied in selecting students for admission to Harvard College, the rationale for the choice of these criteria, and some indication of the relative weight given to different criteria, including minority status, in particular admissions decisions. This description applies generally to the selection of undergraduates at the other three *amici* institutions.

should be exposure to new and provocative points of view, at a time in the student's life when he or she has recently left home and is eager for new intellectual experiences. Minority students add such points of view, both in the classroom and in the larger university community.

Just as diversity makes the university a better learning environment for the student, so it makes the university a better learning environment for the faculty member. The university's encouragement of variety in ideas is, to the scholar, a most appealing aspect of academic life. It has been the experience of many university teachers that the insights provided by the participation of minority students enrich the curriculum, broaden the teachers' scholarly interests, and protect them from insensitivity to minority perspectives. Teachers have come to count on the participation of those students. Indeed, present faculty support for admissions of more minority students stems in part from an appreciation for past contributions, and from loyalty to friendships with particular individual students whom teachers might otherwise never have come to know.

Finally, there is an additional, related, yet independently compelling, educational purpose served by enlarging the universe of highly trained minority persons—namely, diversifying the leadership of our pluralistic society. The training of leaders has been a traditional and fundamental educational responsibility and one which, with the maturing of our society, rests with special weight on colleges and universities. As Chief Justice Vinson stated for this Court in *McLaurin v. Oklahoma,* 339 U.S. 637, 641 (1950), striking down arbitrary constraints on a black graduate student's free interchange with white fellow students:

> Our society grows increasingly complex, and our need for trained leaders increases correspondingly. Appellant's case represents, perhaps, the epitome of

that need, for he is attempting to obtain an advanced degree in education, to become, by definition, a leader and trainer of others. Those who will come under his guidance and influence must be directly affected by the education he receives.

Today American colleges and universities are taking important steps to meet the "need for trained leaders" identified by this Court twenty-seven years ago. It would be quixotic—and tragic—for this Court now to find that the Constitution prevents academic institutions from taking those steps necessary and proper to fulfillment of an educational responsibility so vital to the welfare of the nation.

By our admissions programs, we are not merely contributing to the cause of increasing the numbers of minority leaders and public servants—although of course we wish very much to do that. We are also broadening the perceptions of our majority students, and we believe that this will be reflected in qualities that they will retain for the rest of their lives. A central function of the teacher is to sow the seeds for the next generation of intellectual leaders, and this, indeed, is a main reason why many university instructors find that an ethnically diverse student body helps them to fulfill their teaching roles. In short, we hope that by these efforts, the leadership of the next generation—majority and minority members alike—will be the better, the wiser and the more understanding.

II. *Unless Race May Be Considered in Admissions Decisions, Selective Institutions Will Not Be Able to Achieve Adequately Diverse Student Bodies While Maintaining Other Significant Educational Values.*

The educational goals discussed above cannot be realized by any racially neutral procedure known to us. The problem, as we have previously noted, is simply this. Selective institutions such as ours receive applications from

many more persons than they have room for.[6] Some of those applicants are plainly not qualified for admission. That is, it cannot be predicted with confidence by looking at their test scores and prior academic performance that they will survive in, much less contribute to, the academic course they wish to pursue. Others, few in number, are so exceptional, by reference to test scores, grades and prior achievement, that their admission is a virtual certainty.

What remains then, from the original pool of applicants,

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[6]For example, the number of applicants and matriculants at the medical schools of the *amici* institutions for the classes entering in 1973-1976 were as follows:

	Applicants	Matriculants
1973		
Columbia	3,789	147
Harvard	3,045	168
Stanford	4,131	89
Pennsylvania	3,898	160
1974		
Columbia	4,458	147
Harvard	3,258	165
Stanford	4,553	94
Pennsylvania	4,124	160
1975		
Columbia	5,042	147
Harvard	3,210	165
Stanford	4,662	86
Pennsylvania	4,895	160
1976		
Columbia	4,927	148
Harvard	3,670	168
Stanford	5,117	86
Pennsylvania	5,246	160

is a large number of applicants, still much larger than the number of available spaces, who can, on the basis of relevant predictors, successfully complete the academic course of their choice. It is from this number that the balance of the entering class must be selected.

The unfortunate fact of life in this country is that applicants who are members of minority groups tend, as a general matter, not to score as well as whites on the standardized tests to which reference is made in the admissions process. We think it unnecessary to labor here the reasons for this phenomenon. The educational deprivations which minorities have suffered in this country are well known to the Court.

Choosing from among the many who are qualified in order to achieve, among other things, the racial and ethnic diversity so important to our institutions, cannot be left to chance. There are many ways to achieve diversity, perhaps as many as there are institutions and schools within institutions which seek such diversity. It is, however, essential to any program designed to serve this end that race be specifically considered in choosing a student body.

The California Supreme Court chose to ignore the informed views of the educators and suggested instead its own strategies to reach what it conceded were legitimate ends. Most prominently, it suggested that colleges and universities accord preferential treatment to the "disadvantaged." It also suggested as possible approaches more aggressive recruiting, the abandonment of reference to test scores and grade point averages, and finally, the expansion of the size or number of educational institutions. As we attempt to demonstrate below, these suggestions will not work. If selective colleges and universities are forbidden to give weight to the fact that an applicant is a member of a racial minority group, there will almost certainly be an abrupt decline in minority enrollments.

A. Minority Status Must Be Considered Independently of Economic or Cultural Deprivation.

The California Supreme Court has expressed the view that the Davis Medical School's present efforts to achieve a racially mixed class are unconstitutional because there is a less restrictive alternative—namely, admitting a larger number of disadvantaged students without regard to their race. However, criteria based on disadvantage which take no account of race are useful only as a supplement to, and not a substitute for, criteria based on race.

The California court does not define the term "disadvantage" explicitly, but it apparently intends to refer to the Davis criteria having to do with the occupational background and education of the student's parents and the family's financial situation. But being disadvantaged is not synonymous with being black, or Chicano, or Puerto Rican, or Native American. While disproportionate numbers of minority group members are economically disadvantaged, the minority experience is distinct from the experience of proverty. Growing up black—even middle-class black—involves a whole range of different encounters, perceptions, and reactions. To educate all students to deal with the problems of the society that we have, rather than the one we would like to have, we need the contribution of those whose lives have been different because their race is different.[7] Indeed, our institutional needs for diversity would be inadequately met if our minority students included only those from depressed socioeconomic backgrounds.

[7]Minority students who are also poor are, in effect, doubly disadvantaged. For, paradoxically, membership in a racial minority can be considered a disadvantage in itself, even while it is a special cultural and social experience which enriches minority individuals and the university communities of which they become part. The prevalent stereotyping of minority group members, which can undermine their academic aspirations and achievements early in life, and the calamitous psychological effects of the continued *de facto* segregation of grade and high schools in this country, suggests that minority applicants should receive particularly careful consideration quite apart from any economic deprivation.

Moreover, since admissions programs that take account of race many have other purposes than, or in addition to, increasing the number of disadvantaged students, disadvantage alone does not go far enough. We have noted that disadvantage is not synonymous with membership in an ethnic minority for the purpose of achieving our shared goal of diversity in our student bodies. In addition, it takes no cognizance of the purpose, to which many colleges and universities subscribe, of providing minority youth with role models, and it does not provide for the benefits only minorities can bring to a profession. Insofar as admissions programs are designed to improve society in any of these ways, racially neutral criteria are beside the point.

The avowed end of the Davis Medical School is to increase the number of disadvantaged minority students in its classes and not merely to adjust applicants' test scores to reflect better their purely academic qualifications. The California Supreme Court assumes the constitutionality of this end, but holds that the Medical School is constitutionally prohibited from achieving it candidly; the court implies instead that universities can bring minority admissions to approximately the level they desire by adjusting the importance attached to various non-racial criteria which are currently used, or might be used, in the admissions process. We respectfully submit that this suggestion is based on ignorance of the fact that adjustments honestly applied cannot go far enough to accomplish concededly legitimate purposes without endangering other critical institutional goals. Alternatively, it is an invitation to colleges and universities to do covertly what they have been forbidden to do openly.

B. Use of a Racially Neutral Standard of "Disadvantage" Would Reduce the Number of Minority Matriculants.

Use of a racially neutral standard of disadvantage, as urged by the California court, would reduce the number

of places open to minority applicants for admission to American colleges and universities. This is so because most Americans who are disadvantaged—most of the poor and the culturally deprived—are white.[8] Once a color-blind preference for the disadvantaged was implemented white students not currently applying to selective institutions because of the unlikelihood of admission would presumably apply, and qualify for admission, in much greater numbers. If a preference for the disadvantaged were applied honestly, and not as a euphemism for a preference for minority group members, the number of minority applicants admitted would drop off sharply.

Theoretically, the number of disadvantaged admitted could be increased, with the hope than an adequate number of minority members would be picked up in the process. It is difficult to calculate how large a fraction of each class would have to be earmarked for the disadvantaged in order to bring in a sufficient number of minority students to achieve the goal of diversity, but in some schools it might well absorb the entire class. A significant increase in the number of spaces reserved for disadvantaged students would almost surely endanger other critical educational goals and standards. Moreover, there would be no way for universities to support large numbers of disadvantaged students through financial aid.[9] The school would thus be

[8]In 1972, of a total of 24.5 million persons who were below the poverty level established by the United States government, 16.2 million were white. U.S. Bureau of Census, *Statistical Abstract of the United States* 389, Table No. 631 (1974). *See also* Sandalow, *Racial Preferences in Higher Education: Political Responsibility and the Judicial Role,* 42 U. Chi. L. Rev. 653, 690 (1975).

[9]This difficulty was noted in the dissenting opinion of the California Supreme Court. *Bakke* v. *Regents of the Univ. of Cal.,* 18 Cal. 3d 34, 90, 553 P.2d 1152, 1190, 132 Cal. Rptr. 680, 718 (1976). *See also* Sandalow, *supra* note 8, at 691.

The author of one study concludes that, due to the difficulties minority students face in integrating themselves into a culturally

forced to choose between grossly inadequate aid for everyone admitted under the program—a rather hollow offer of admission—or reserving to some portion of the disadvantaged admittees a subsistence level of support, an effective exclusion of most of the recruited students. And even if sufficient financial aid were available, the very diversity sought to be achieved would be defeated—all for the sake of complying with the apparent conclusion of the California Supreme Court that it is proper for an educational institution to take measures for the purpose of increasing minority admissions as long as it uses indirect means to do so.

"Seeking out" disadvantaged students of high potential, as suggested by the Supreme Court of California, might increase slightly the number of such minority persons who apply. Again, unless the search were part of a program that included favorable weight to minority status, the end result would be an increase in white, not black or Chicano, admissions.[10] The California court seems unaware of the fact that vigorous efforts to identify and recruit talented minority students have been made by almost all selective schools for about a decade and that more intensified efforts

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alien environment, financial burdens fall more heavily on them than on their economically disadvantaged majority counterparts. M. Miskel, *Minority Student Enrollment,* Research Currents, Nov. 1973, at 3 (ERIC Clearing House on Higher Education). *See also* C. Odegaard, *Minorities in Medicine: From Receptive Passivity to Positive Action* 63-65 (Josiah Macy, Jr. Foundation 1977). Ironically, the pressure to increase special admissions to include all economically disadvantaged comes just at a time when general economic conditions and decreased government spending threaten even the limited programs presently in existence. B. Caress & J. Kossy, *The Myth of Reverse Discrimination: Declining Minority Enrollment in New York City's Medical Schools* 6 (Health Policy Advisory Center, Inc. 1977). A related problem is the cost of providing remedial education for admitted students with deprived educational backgrounds. Odegaard, *supra* at 126.

[10]The same would be true of the court's proposal that remedial schooling be provided for disadvantaged students of all races.

are not likely to have much incremental effect.[11] Indeed, after a certain point the process tends to become a competitive one in which a number of schools all attempt to woo the most promising minority students, rather than adding substantially to the pool of such students to be considered for admission.[12] Even when combined with vigorous recruitment efforts, consideration of disadvantage is no answer to the problems the Davis admissions program sought to solve. Moreover, it seems likely to us that this alternative, like most of the others suggested by the Cali-

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[11]Every one of the 89 medical schools sampled in one survey undertaken for the Department of Health, Education and Welfare engaged in minority recruitment activities. J. Wellington & P. Gyorffy, *Report of Survey and Evaluation of Equal Education Opportunity in Health Profession Schools* (San Francisco: University of California 1975), *quoted in* C. Odegaard, *Minorities in Medicine: From Receptive Passivity to Positive Action* 99 (Josiah Macy, Jr. Foundation 1977). In addition, the American Association of Medical Colleges has since 1970 administered a Medical Minority Applicant Registry to assist schools in their recruitment efforts. *Odegaard, supra,* at 108. Similar programs exist to assist minority students' entrance into college.

One reason that increased recruitment is not likely to have much effect is that proportionately fewer blacks and other minority group members graduate from four-year colleges of the sort that have traditionally supplied medical schools. Relatively large numbers are concentrated in two-year community colleges. Overbea, *Why Statistics of Growth Don't Tell Everything about Blacks' Enrollment in College,* Christian Science Monitor, March 21, 1977, at 26, col. 1; Brown & Stent, *Black College Undergraduates, Enrollment and Earned Degrees,* 6 J. Black Stud. 5, 10 (1975). In addition, with the exception of Asian-Americans, fewer graduate in fields such as biochemistry and life sciences, which provide the background necessary for medical school. Educational Testing Service, *Graduate and Professional School Opportunities for Minority Students* 4 (6th ed. 1975-77, Princeton); Atelsek & Gomberg, *Bachelors Degrees Awarded to Minority Students, 1973-1974,* at 8 (Higher Educ. Panel Rep., No. 24, American Council on Education, January 1977).

[12]*See* C. Odegaard, *Minorities in Medicine: From Receptive Passivity to Positive Action* 100 (Josiah Macy, Jr. Foundation 1977); Knauss, *Developing a Representative Legal Profession,* 62 A.B.A. J. 591, 593 (May 1976).

fornia Supreme Court, which are discussed below, would, if implemented, diminish the number of spaces available to respondent and to others similarly situated.

C. Other Alternatives Suggested by the Supreme Court of California Would Also Be Ineffective.

The other alternatives suggested by the California Supreme Court have even less potential. One suggestion was to dispense with numerical criteria completely, and abandon use of test scores and grade point averages. However, with all of their shortcomings, these yardsticks are not irrelevant: when used with restraint and discretion we have found them valuable tools in measuring the probable academic performance of applicants.[13] Test scores and grade point averages help to define the universe of those qualified to do creditable and rewarding work in highly selective academic institutions, and they furnish clues as to those individuals among the qualified group who will gain the most from, and contribute the most to, academic opportunities which must be rationed among a limited number. That is the substantial utility of these numerical indicators.[14]

Total abandonment of numerical standards would result in giving too much weight to such subjective and manipulable factors as personal recommendations and statements of career goals; for some it would constitute an invitation to invidious discrimination. Academic quality would undoubtedly deteriorate, yet without any assurance that an adequate level of minority admissions could be maintained.

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[13]*See, e.g.*, A. Carlson & C. Werts, *Relationships Among Law School Predictors, Law School Performance and Bar Examination Results* (E.T.S. 1976); Law School Admission Council, *Law School Admission Bulletin 1976-1977* (E.T.S.).

[14]We think it appropriate to add that we know of no empirical demonstration that there is a direct correlation, although our intuition suggests that there is a correlation, between academic performance at such institutions and ultimate career "success," however success may be defined.

Finally, from a purely administrative point of view, even well-endowed colleges and universities such as *amici* can ill afford the substantial diversion of resources to vastly enlarged admissions staffs which abandonment of numerical admissions criteria would require, at least when the benefits are so doubtful and the economic horizon is so bleak.

The Supreme Court of California also suggests that a less restrictive means for enlarging minority admissions would be to increase the size or number of medical schools. It seems unrealistic in the extreme to assume that there would or could be a nationwide or statewide jump in the number of selective schools, medical or otherwise, or in the size of those existing. Quite apart from the staggering costs involved, new institutions of outstanding quality cannot be rolled off an assembly line overnight, nor can existing schools be dramatically expanded in size without severe adverse effects on instruction and scholarship. Moreover, if America's enormous and growing investment in higher education is to continue to be responsibly administered, the aggregate number of persons trained in medicine and other disciplines must turn on the nation's aggregate needs. In contrast, the California court's casual approach would require a major reallocation of resources not to train needed professionals but to accommodate those large numbers of disadvantaged persons only a fraction of whom would constitute the minority student population whose advanced training is of priority educational importance.[15]

In short, the less restrictive means for increasing minority admissions that the Supreme Court of California said

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[15]In recent years, for example, first year enrollment in U.S. medical schools increased from 10,422 in 1969 to 15,295 in 1975—an increase of almost one half. In spite of vigorous recruitment efforts and minority admissions programs, only 890 of the 4,873 added positions went to minority students. B. Caress & J. Kossy, *The Myth of Reverse Discrimination: Declining Minority Enrollment in New York City's Medical Schools* 5 (Health Policy Advisory Center, Inc. 1977).

were available, and on the basis of which it held the program at Davis unconstitutional, seem to us, on examination, illusory. Unlike our present admissions systems, which preserve the dual goals of diversity and academic achievement, each would fail either to enroll minority students in sufficient numbers or to maintain our present standards of excellence—or both. At least, most educators so conclude. The contrary view of the California court rests, we respectfully submit, on judicial conjecture—certainly not on facts of record, nor on inferences properly drawn from patterns of university experience of which a court might reasonably take judicial notice.

The only evidence in the record on the subject was the uncontradicted declaration of Dr. George H. Lowery, Associate Dean and Chairman of the Admissions Committee at Davis Medical School, that his "experience as Chairman of the Admissions Committee has convinced [him] that there would be few, if any, Black students and few Mexican-Americans, Indians, or Orientals from disadvantaged backgrounds in the Davis Medical School, or any other medical school, if the special admissions program and similar programs at other schools did not exist." (R. 67-68).

The experience of our own institutions both reinforces the judgment of Dr. Lowery that programs taking minority status into account in admissions are necessary, and suggests that the alternatives posited by the Supreme Court of California are entirely unrealistic.

III. *The Judgment of the Supreme Court of California Should Be Reversed.*

The guiding principle of freedom under which American colleges and universities have grown to greatness is that these institutions are expected to assume and exercise

responsibility for the shaping of academic policy without extramural intervention. A subordinate corollary principle—critical for this case—is that deciding who shall be selected for admission to degree candidacy is an integral aspect of academic policy-making. The linked principles emerge clearly from the moving manifesto—relied upon by Mr. Justice Frankfurter twenty years ago—of distinguished educators who were vainly seeking to preserve their country's vanishing academic freedom, to wit, the embattled senior scholars of the University of Cape Town and the University of Witwatersrand:

> ... It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail "the four essential freedoms" of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.[16]

The fact that academic institutions are within the ambit of the First Amendment does not mean that they are immune from the law's norms. Indeed, when academic institutions have pursued admissions policies the antithesis of the policy challenged here, this Court has properly brought them to book. *Sweatt* v. *Painter,* 339 U.S. 629 (1950); *Missouri ex rel. Gaines* v. *Canada,* 305 U.S. 337 (1938). But the rarity of instances of judicial intervention in academic affairs proves the rule that governmental displacement of the authority of those primarily vested with academic responsibility is contrary to our traditions. Were it otherwise, as Mr. Webster put it in the memorable argument

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[16]Quoted by the Justice in his concurring opinion in *Sweezy* v. *New Hampshire,* 354 U.S. 234, 263 (1957), in which Mr. Justice Harlan joined.

which prevailed in this Court in the *Dartmouth College* case,[17]

> learned men will be deterred from devoting themselves to the service of such institutions, from the precarious title of their offices. Colleges and halls will be deserted by all better spirits, and become a theater for the contention of politics. Party and faction will be cherished in the places consecrated to piety and learning. These consequences are neither remote nor possible only. They are certain and immediate.

Nor are the principles of academic freedom protective only of private institutions, such as the *amici.* These principles likewise safeguard the integrity of public institutions, when they or those who are their members are threatened by unwarranted external intrusions. *See Sweezy* v. *New Hampshire,* 354 U.S. 234, 262-63 (1957); *cf. Hamilton* v. *Regents of University of California,* 293 U.S. 245 (1934).

In undertaking to circumscribe the informed and good faith discretion of those vested with authority to determine the admissions policies of the Medical School of the University of California at Davis, the California Supreme Court has trenched upon the freedom of that School to determine for itself crucial questions of academic policy. Moreover, this judicial intrusion has been based upon a constitutional ruling which, with all respect, we believe to be palpably inadequate to the several substantial issues presented by this litigation. As we have argued above, we think that implementation of the California Supreme Court's judgment will predictably preclude the achievement in this century of educational goals of great moment to which hundreds of American colleges and universities are committed.

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[17] *Trustees of Dartmouth College* v. *Woodward,* 4 Wheat. 518, 599 (1819).

We argue below that the court's explanation of its judgment is doctrinally unpersuasive.

As we have demonstrated, the admissions process has never been entirely impersonal, quantifiable, or "objective." What distinguishes this case from all the non-cases that have seldom been thought worth litigating is that the additional element taken into account here is race.

Special treatment based on race touches sensitive nerves. But the reason for this is the long tragic history of attention to race for the purpose of discriminating *against* blacks and other minorities. The problem of admissions programs designed to augment the number of minority students involves delicate issues.[18] But it is not the same as *discrimination against minorities,* and no amount of rhetoric can make it the same.

The purpose of the special treatment of minorities in university admissions, at Davis as elsewhere, is not to discriminate against majority applicants. Indeed, the purpose is not only or even primarily to confer benefits upon members of minorities; where the principal goals are to improve the quality of teaching and learning for majority as well as

[18]The special admissions program at Davis set aside 16 places in a class of 100 for disadvantaged members of minority groups. Although we question the wisdom of this aspect of the Davis program, we are not persuaded that such a program is unconstitutional. The choice at Davis was only among, and the designated spaces would only be filled by, qualified applicants, and the percentage of places earmarked for minority members was smaller than their share of the state's population; in this context, designation of a precise number of places may be a reasonable way of ensuring that enough minority applicants are admitted to provide sufficient diversity in the student body.

If, nevertheless, the procedure at Davis should be held unconstitutional, we would urge the Court to limit its decision to that particular technique and to the facts and circumstances pertaining at Davis rather than cast into doubt the wide variety of other more flexible approaches designed to produce truly diverse student bodies.

minority students and to diversify this nation's leadership, the fact that there may be a consequential difference in the effect on different races does not constitute invidious or stigmatic discrimination.[19]

The use of race as a touchstone for governmental action has been upheld in a number of contexts. Racial residential patterns may, and indeed in some cases must, be considered in the assignment of students to schools[20] and in the use of such remedial measures as busing.[21] The use of similar data in delineating legislative districts has also been upheld.[22] Specific attention to race has been permitted, and often required, to achieve equality in employment opportunity.[23] As stated by the United States Court of Appeals for the

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[19]In fact, a recent study points out that in every year subsequent to adoption of minority admissions policies by medical schools, the number of spaces available for white applicants has increased. The reason cited is an overall expansion of medical enrollments, of which nonminority students have been the overwhelming beneficiaries. Thus, while "[a] persistent rumor, abetted by recent reverse discrimination law suits, holds that middle class sons cannot get into medical school because of preferential treatment accorded minority applicants . . . [t]he facts simply do not support the case." B. Caress & J. Kossy, *The Myth of Reverse Discrimination: Declining Minority Enrollment in New York City's Medical Schools* 1 (Health Policy Advisory Center, Inc. 1977).

A similar situation exists in undergraduate admissions, where minority gains have not kept pace with the increase in white enrollment. Brown, *Minority Enrollment and Representation in Institutions of Higher Education* 2 (Ford Foundation Report by Urban Ed., Inc. 1974).

[20]*E.g., Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 29-31 (1971); *North Carolina State Bd. of Educ.* v. *Swann*, 402 U.S. 43 (1971).

[21]*E.g., Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971).

[22]*United Jewish Organizations of Williamsburgh, Inc.* v. *Carey*, 97 S. Ct. 996 (1977).

[23]*E.g., United States* v. *Wood, Wire & Metal Lathers Local 46*, 471 F.2d 408 (2d Cir.), *cert. denied*, 412 U.S. 939 (1973); *Carter* v. *Gallagher*, 452 F.2d 327 (8th Cir.) *(en banc)*, *cert. denied*, 406 U.S. 950 (1972); *Contractors Ass'n of E. Pa.* v. *Secretary of Labor*, 442 F.2d 159 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971).

First Circuit, "our society cannot be completely colorblind in the short term if we are to have a colorblind society in the long term."[24] And this Court has unanimously sustained a systematic official preference for tribal Native Americans in the allocation of employment opportunities in the Bureau of Indian Affairs. *Morton* v. *Mancari,* 417 U.S. 535 (1974). The unique history and constitutional status of Native Americans, of which this Court properly took account in that case, are surely no more compelling than the unique history and constitutional status of those for whom the Civil War Amendments were written and ratified.

Analogies may also be found in areas other than race, such as sex discrimination, where this Court has upheld favorable treatment of a class because it had previously been discriminated against. *Califano* v. *Webster,* 97 S. Ct. 1192 (1977); *Schlesinger* v. *Ballard,* 419 U.S. 498 (1975); *Kahn* v. *Shevin,* 416 U.S. 351 (1974).

In these cases and others, the courts have shown understanding of the difficulties of legislators and administrators faced with the problems of the real America of today with all its blemishes, rather than conjuring up rules for the ideal, prejudice-free, society that we hope to attain. This Court was certainly not cheered by its knowledge, in *United Jewish Organizations of Williamsburgh, Inc.* v. *Carey,* 97 S. Ct. 996 (1977), that voters tend to choose candidates of their own races, but it recognized the significance of this fact in upholding the legislative districting there challenged.[25]

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[24] *Associated Gen. Contractors of Mass.* v. *Altschuler,* 490 F.2d 9, 16 (1st Cir. 1973), *cert. denied,* 416 U.S. 957 (1974).

[25] In *Williamsburgh,* counsel for petitioner, on oral argument, challenged racial delineation of legislative districts in the following terms: "Race is not part of the political process. Race is an impermissible standard...." *Transcript of Argument,* at 33. Mr. Robert H. Bork, the then Solicitor General, responded: "And I was astounded

Interestingly, the Supreme Court of California seems to accept at least some of these realities. It assumed *arguendo* that admitting a significant number of minority students served a compelling state interest. Unfortunately, it then embarked on a dead-ended detour in which it contended that the Medical School at Davis should have achieved its purpose of increasing the number of minority students through the use of devices that purported to be doing something else (and which, as shown above, would have been ineffective, disingenuous, or both).

It has been the experience of the *amici,* as we believe it has been that of most educational institutions, that the remedies for the problems resulting from a long history of racial discrimination are elusive. The hopes induced by *Brown* v. *Board of Education*[26] in 1954, that within a generation racial inequalities in educational opportunity and achievement would be eradicated, have not been realized. Universities need some elbow-room in which to experiment in their quest for solutions. This Court recognized the intractability of the problem of preventing racial discrimination in voting when it upheld the use of extraordinary

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when Mr. Lewin said that race is not a part of our political process. Race has been *the* political issue in this country since it was founded. And we may regret that that is a political reality, but it is a reality, that's what the Fifteenth Amendment is about, what the Civil War was about, it's what the Constitution was in part about, and it's a subject we struggle with politically today." *Id.,* at 62.

We recognize, and indeed we are profoundly sympathetic with, the concerns underlying the Chief Justice's dissent, and Mr. Justice Brennan's concurrence, in *Williamsburgh.* We believe that the limited use of race for which we here contend is respectful of those concerns. Race is, as Mr. Bork argued, "a reality" which is central to our history. Avoidance of reality is not conducive to sound construction of the Constitution. What the Constitution requires is that majorities not use their power to injure or degrade minorities. That constitutional infirmity does not inhere in this case.

[26]347 U.S. 483 (1954).

measures to cope with it in *South Carolina* v. *Katzenbach*.[27] A similar response is urgently needed here.

This case would seem to be particularly appropriate for the exercise of judicial restraint. The policy questions are difficult, and conscientious educators are dealing with them to the best of their abilities, undoubtedly making mistakes but learning as they do, always with the goal of improving the instructional and scholarly quality of their institutions. Presumptions of constitutionality, which should always weigh heavily with this Court, are reinforced by considerations of federalism where states are severally striving for answers, and further reinforced where the Court is being asked to substitute its judgment for that of educators.

In *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1, 42 (1973), educational policy was described as an "area in which this Court's lack of specialized knowledge and experience counsels against premature interference with the informed judgments made at state and local levels. Education, perhaps even more than welfare assistance, presents a myriad of 'intractable economic, social, and even philosophical problems.'" The problems of racial inequality involved in the instant case are certainly no less intractable than those of financial inequality that the Court was considering in *Rodriguez*. Equally applicable here is the Court's further statement in *Rodriguez* (*Id.* at 43):

> The ultimate wisdom as to these and related problems of education is not likely to be divined for all time even by the scholars who now so earnestly debate the issues. In such circumstances, the judiciary is well advised to refrain from imposing on the States inflexible constitutional restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions to educational problems and to keeping abreast of ever-changing conditions.

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[27] 383 U.S. 301 (1966).

In *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971), this Court declared:

> 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 . . . .

Is such discretion appropriate only for elementary and high school authorities, but barred to educators at colleges and graduate schools?

The educational and other values relevant to admissions policy vary from state to state, from university to university, and even among schools in the same university. For example, a liberal arts college or a law school, where a large measure of verbal interchange among students is vital to the educational process, might attach more importance to diversification of background among the student body than would an engineering school. A Hispanic language background might be more important in terms of post-graduation community service in law or medicine than in fields in which oral communication is less important. Such questions of educational policy are therefore necessarily difficult, complex, and inherently not susceptible of simple answers universally applicable. Educators need to be free to make decisions reflecting their professional judgments concerning these values, not subject to the restraints of a judicially imposed strait jacket.[28]

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[28]As universities, and particularly private universities, we have focused principally in this *amicus* brief upon the educational values upon which our admissions policies are predicated. But we do not wish thereby to be perceived as disparaging additional reasons on the

One of the very purposes of taking minority status into account in admissions programs is to speed the time when that is no longer necessary, when applicants from all races and ethnic groups will have overcome the handicaps of previous generations of prejudice and will be able to compete for admission to selective educational institutions on terms nearly enough equal that special efforts will not be needed in order to acquire sufficiently diverse and representative student bodies. When the time comes, programs like that at Davis and other programs, both similar and distinguishable, all over the country will presumably be terminated. If not, when the need for such programs has ended, this Court can take a fresh look at them. That which is constitutional now may cease to be constitutional then, if facts and circumstances have changed. *E.g.*, *Chastleton Corp.* v. *Sinclair,* 264 U.S. 543 (1924).

There are hopeful signs that the problem may be temporary. In recent years, Japanese-Americans have had sufficiently high grades and test scores that at some institutions the need for their inclusion in special admissions programs is no longer necessary. The same may be true with respect to Chinese-Americans.[29]

We do not know how much vitality remains in the approach, until recently followed by this Court, of dividing

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basis of which other institutions find further justification for such policies.

For example, while we have not based our argument upon the need for ensuring that professional services be made fully and effectively available to minority communities, such concerns would seem to be entirely appropriate for a state government, and thus for that state's universities.

[29]For example, in 1975 the law school of the University of California at Berkeley eliminated Japanese-American participation in its special admissions program and reduced participation of Chinese-Americans in light of the success of these groups in gaining admission through the regular admissions process. Brief for the Deans of the California Law Schools in Favor of the Petition for Certiorari, at 25 n. 8.

equal protection cases into two sharply separated categories;[30] in one, a measure was held valid if it had any rational relationship to a legitimate state objective, while in the other a compelling state interest had to be shown. In the latter situation, a corollary was that the challenged program would be invalid if its purposes could be achieved by less restrictive means.

Cases applying the more stringent standard where racial discrimination was involved have been cases in which the discrimination was against minorities.[31] As noted in this Court's seminal *Carolene Products* footnote, while there is normally a heavy presumption that governmental action is constitutional, "prejudice against discrete and insular mi-

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In college enrollment Asian-Americans are already more than proportionately represented, Brown, *Minority Enrollment and Representation in Institutions of Higher Education* 2 (Ford Foundation Report by Urban Ed., Inc. 1974), particularly in physical and life sciences. Educational Testing Service, *Graduate and Professional School Opportunities for Minority Students* 4 (6th ed. 1975-77, Princeton). It is therefore unlikely that special admission policies will be necessary in the future, at least for medical schools.

[30]*See, e.g., Craig* v. *Boren,* 429 U.S. 190 (1976), at 210-11 (Powell, J., concurring), and at 211-12 (Stevens, J., concurring); *San Antonio Ind. School Dist.* v. *Rodriguez,* 411 U.S. 1, 98-99 (1973) (Marshall, J., dissenting); *Dandridge* v. *Williams,* 397 U.S. 471, 520-21 (1970) (Marshall J., dissenting); *See also Alevy* v. *Downstate Medical Center,* 39 N.Y. 2d 326, 348 N.E.2d 537, 384 N.Y.S.2d 82 (1976); Gunther, *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,* 86 Harv. L. Rev. 1, 17-48 (1972).

[31]We recognize that admissions programs designed to include minorities can theoretically be applied to so many minority groups that their cumulative effect might truly be deemed exclusionary towards the white majority, or towards some ethnic sub-groups within that majority. If and when that happens, this Court can deal with it; it has always been capable of recognizing and dealing with differences of degree. But the reservation of 16 places out of 100 at Davis for minorities cannot fairly be thought to be exclusionary of majorities, and any comparison to the quotas once imposed upon Jewish applicants at some schools is clearly hyperbole. Horror cases can be dealt with if they ever arise. Conjuring them up is scarcely a contribution to the analysis of sharply different situations.

norities 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."[32] The distinction strongly suggests that the normal presumption of constitutionality should be applied to measures such as favorable consideration of minority status in state university admissions, since the majority has available the political strength with which to protect itself if it regards its interests as threatened.

Certainly, those applicants assertedly discriminated against at Davis were a class no less amorphous and politically no less powerful than the complainants in *San Antonio Independent School District* v. *Rodriguez,* 411 U.S. 1, 28 (1973) (footnote omitted), concerning whom this Court stated:

> However described, it is clear that appellees' suit asks this Court to extend its most exacting scrutiny to review a system that allegedly discriminates against a large, diverse, and amorphous class, unified only by the common factor of residence in districts that happen to have less taxable wealth than other districts. The system of alleged discrimination and the class it defines have none of the traditional indicia of suspectness: the class is not 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.[33]

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[32]*United States* v. *Carolene Products Co.,* 304 U.S. 144, 152 n.4 (1938).

[33]Compare the refusal to treat 18- to 20-year olds as a "discrete and insular minority" in *Oregon* v. *Mitchell,* 400 U.S. 112, 295 n.14, 296 (1970) (Opinion of Mr. Justice Stewart, concurred in by Chief Justice Burger and by Mr. Justice Blackmun). As to those over 50, see *Massachusetts Bd. of Retirement* v. *Murgia,* 427 U.S. 307 (1976).

But whether or not, in a conventional equal protection context, there is one standard for judging, or two, or more, the question remains whether, in a case such as the instant one—in which the attention to race was not invidious, and was beneficial rather than harmful to minorities—it was even constitutionally relevant to inquire whether alternative, non-racially defined, means of achieving the state's benign purposes could be devised. And, if so, should the university have had imposed upon it the burden of proof that there were no less restrictive alternatives that were feasible—and imposed only on appeal, with the university being accorded no opportunity to return to the trial court to introduce evidence on the point?

We think the foregoing questions should be answered in the negative. However they are answered, there remain serious problems concerning the types of procedures appropriate for deciding difficult constitutional questions. Should the California Supreme Court have made its own findings, not based upon anything in evidence, that there were such alternatives? Finally, and most importantly, should this Court let stand a decision, predicated entirely on conjecture, on a constitutional question of great importance —especially where there is every reason to believe that the facts necessary to test (and, we submit, disprove) the feasibility of the state court's hypothetical alternatives are available and could be adduced at a trial?

This case was decided by the Supreme Court of California upon a record almost devoid of relevant evidence. Apart from the pleadings, the record consisted principally of a declaration under oath of Associate Dean Lowery, and Dr. Lowery's deposition taken by plaintiff's attorney. In particular, on those issues crucial to the decision of the court below—the feasibility of other means, not race-oriented, for accomplishing the University's goals—the only evidence was that of Dr. Lowery, and its substance was that there existed no such means. Although uncontra-

dicted, it was disregarded by the Supreme Court of California, which reached its own conclusions presumably on the basis of its own assumed expertise.

In short, one of the most serious constitutional issues of this era is now before this Court on a record that offers no factual basis upon which the conclusions of the California court can be sustained. Whether or not it is appropriate under California procedural doctrines to hold that the burden of proof is on the state to show that there are no less drastic means for accomplishing its ends, a decision by this Court on a vital constitutional issue should not rest upon the niceties of pleading or the vicissitudes of burden of proof.

Perhaps in a lawsuit involving nothing more than the conflicting claims of private parties it is proper that decisions be based upon such factors. This is not such a case. In a long line of decisions, this Court has refused to decide questions of constitutionality in the abstract, without the experience and knowledge that would be added by a full factual record. Especially where facts critical to the determination of a constitutional issue were not in evidence but merely presumed on the basis of pleadings, stipulations, or motions to dismiss or for summary judgment, the Court has remanded so that evidence might be taken.[34]

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[34] *E.g., Morales* v. *New York*, 396 U.S. 102 (1969); *Naim* v. *Naim*, 350 U.S. 891 (1955); *Polk Co.* v. *Glover*, 305 U.S. 5 (1938); *Borden's Farm Products Co.* v. *Baldwin*, 293 U.S. 194 (1934); *City of Hammond* v. *Schaffi Bus Line*, 275 U.S. 164 (1927); *Chastleton Corp.* v. *Sinclair*, 264 U.S. 543 (1924); *cf. Rescue Army* v. *Municipal Court*, 331 U.S. 549, 568-76 (1947); *Chicago & Grand Trunk Ry.* v. *Wellman*, 143 U.S. 339, 346 (1892).

If this Court were to think that remand is appropriate in this case, the *amici* institutions would be willing to furnish facts from their own experience in amplification of the record in such fashion as may be proper under California procedure.

As stated by then Professor Frankfurter in *A Note on Advisory Opinions,* 37 Harv. L. Rev. 1002, 1004-05 (1924): "Concepts like 'liberty' and 'due process' are too vague in themselves to solve issues. They derive meaning only if referred to adequate human facts. Facts and facts again are decisive." The same can surely be said of concepts like "equal protection," "compelling state interest," or "less restrictive means."[35]

[35] "The nature of the 'compelling state interest' standard" was specifically referred to as an example of a constitutional area in which facts are vital, in Monaghan, *Constitutional Adjudication: The Who and When,* 82 Yale L. J. 1363, 1372 (1973). "In our country we have made our wager on a Constitution and a Court. When the Court attends with care to the facts of the controversy before it, and develops the constitutional issues as they arise from those facts, the great principles of liberty are advanced." Pollak, *Securing Liberty Through Litigation—The Proper Role of the United States Supreme Court,* 36 Mod. L. Rev. 113, 127 (1973).

CONCLUSION

As Mr. Webster advised this Court in the *Dartmouth College* case: "The case before the Court is not of ordinary importance, nor of everyday occurrence. It affects not this college only, but every college...." 4 Wheat. at 599. This case is one in which the California Supreme Court has sought to displace the traditional authority of university faculties, officers, and trustees, who according to our traditions have primary responsibility to determine academic policy. The case is one in which the California court has placed the Fourteenth Amendment athwart the path belatedly opened by America's academic institutions to the very groups to whom the Amendment promised citizenship and equality. The case is one in which the California court has sought to soften its untoward invocation of the Amendment by opining (contrary to the record, and contrary to the clear consensus of responsible university officials) the availability of alternate paths which are, we submit, illusory.

If this Court concludes that the case turns on the reality *vel non* of the alternate paths conjured up by the California Supreme Court, remand for further fact-finding is in order. If however, the Court shares the conviction of the *amici* that the California Supreme Court erred as to the law and ignored facts which are patent and decisive, it is

clear that the judgment of the California Supreme Court should be reversed.

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June 7, 1977

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*The substantial contributions to this brief of Ms. R. Lea Brilmayer, Associate in Law at Columbia University Law School, are gratefully acknowledged.

APPENDIX

Harvard College Admissions Program

For the past 30 years Harvard College has received each year applications for admission that greatly exceed the number of places in the freshman class. The number of applicants who are deemed to be not "qualified" is comparatively small. The vast majority of applicants demonstrate through test scores, high school records and teachers' recommendations that they have the academic ability to do adequate work at Harvard, and perhaps to do it with distinction. Faced with the dilemma of choosing among a large number of "qualified" candidates, the Committee on Admissions could use the single criterion of scholarly excellence and attempt to determine who among the candidates were likely to perform best academically. But for the past 30 years the Committee on Admissions has never adopted this approach. The belief has been that if scholarly excellence were the sole or even predominant criterion, Harvard College would lose a great deal of its vitality and intellectual excellence and that the quality of the educational experience offered to all students would suffer. Final Report of W. J. Bender, Chairman of the Admission and Scholarship Committee and Dean of Admissions and Financial Aid, pp. 20 *et seq.* (Cambridge, 1960). Consequently, after selecting those students whose intellectual potential will seem extraordinary to the faculty —perhaps 150 or so out of an entering class of over 1,100— the Committee seeks—

> variety in making its choices. This has seemed important . . . in part because it adds a critical ingredient to the effectiveness of the educational experience [in Harvard College] . . . *The effectiveness of our students' educational experience has seemed to the Committee to be affected as importantly by a wide variety of interests, talents, backgrounds and career goals as it is by a fine faculty and our libraries, laboratories and housing arrangements.* (Dean of Admissions Fred L. Glimp, Final

Report to the Faculty of Arts and Sciences, 65 Official Register of Harvard University No. 25, 93, 104-105 (1968) (emphasis supplied).

The belief that diversity adds an essential ingredient to the educational process has long been a tenet of Harvard College admissions. Fifteen or twenty years ago, however, diversity meant students from California, New York, and Massachusetts; city dwellers and farm boys; violinists, painters and football players; biologists, historians and classicists; potential stockbrokers, academics and politicians. The result was that very few ethnic or racial minorities attended Harvard College. In recent years Harvard College has expanded the concept of diversity to include students from disadvantaged economic, racial and ethnic groups. Harvard College now recruits not only Californians or Louisianans but also blacks and Chicanos and other minority students. Contemporary conditions in the United States mean that if Harvard College is to continue to offer a first-rate education to its students, minority representation in the undergraduate body cannot be ignored by the Committee on Admissions.

In practice, this new definition of diversity has meant that race has been a factor in some admission decisions. When the Committee on Admissions reviews the large middle group of applicants who are "admissible" and deemed capable of doing good work in their courses, the race of an applicant may tip the balance in his favor just as geographic origin or a life spent on a farm may tip the balance in other candidates' cases. A farm boy from Idaho can bring something to Harvard College that a Bostonian cannot offer. Similarly, a black student can usually bring something that a white person cannot offer. The quality of the educational experience of all the students in Harvard College depends in part on these differences in the background and outlook that students bring with them.

In Harvard College admissions the Committee has not set target-quotas for the number of blacks, or of musicians, football players, physicists or Californians to be admitted in a given year. At the same time the Committee is aware that if Harvard College is to provide a truly heterogenous environment that reflects the rich diversity of the United States, it cannot be provided without some attention to numbers. It would not make sense, for example, to have 10 or 20 students out of 1,100 whose homes are west of the Mississippi. Comparably, 10 or 20 black students could not begin to bring to their classmates and to each other the variety of points of view, backgrounds and experiences of blacks in the United States. Their small numbers might also create a sense of isolation among the black students themselves and thus make it more difficult for them to develop and achieve their potential. Consequently, when making its decisions, the Committee on Admissions is aware that there is some relationship between numbers and achieving the benefits to be derived from a diverse student body, and between numbers and providing a reasonable environment for those students admitted. But that awareness does not mean that the Committee sets a minimum number of blacks or of people from west of the Mississippi who are to be admitted. It means only that in choosing among thousands of applicants who are not only "admissible" academically but have other strong qualities, the Committee, with a number of criteria in mind, pays some attention to distribution among many types and categories of students.

The further refinements sometimes required help to illustrate the kind of significance attached to race. The Admissions Committee, with only a few places left to fill, might find itself forced to choose between A, the child of a successful black physician in an academic community with promise of superior academic performance, and B, a black who grew up in an inner-city ghetto of semi-literate parents

whose academic achievement was lower but who had demonstrated energy and leadership as well as an apparently-abiding interest in black power. If a good number of black students much like A but few like B had already been admitted, the Committee might prefer B; and vice versa. If C, a white student with extraordinary artistic talent, were also seeking one of the remaining places, his unique quality might give him an edge over both A and B. Thus, the critical criteria are often individual qualities or experience not dependent upon race but sometimes associated with it.