IN THE

Supreme Court of the United States

OCTOBER TERM 1976

No. 76-811

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,

Petitioner,

v.

ALLAN BAKKE,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

BRIEF OF THE NATIONAL FUND FOR MINORITY ENGINEERING STUDENTS, AMICUS CURIAE

David Ginsburg
Lee R. Marks
Martha Jane Shay
GINSBURG, FELDMAN AND BRESS
1700 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
Attorneys for Amicus Curiae

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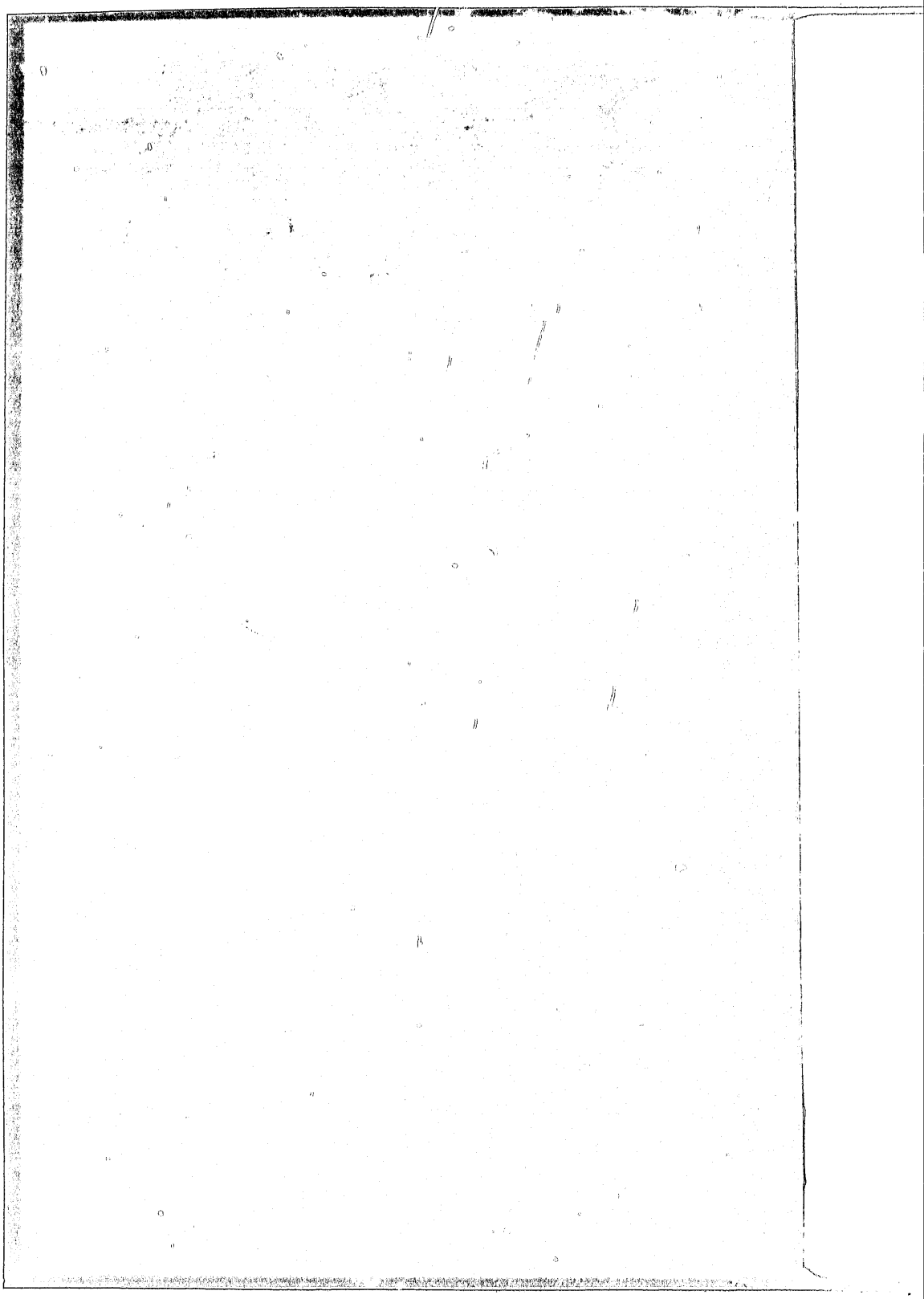

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INTEREST OF THE AMICUS

1. Description of NFMES

a. The NFMES Effort

The National Fund for Minority Engineering Students ("NFMES") is a non-profit corporation organized in October 1974

> to increase the participation of underrepresented, disadvantaged minorities (including Blacks, Puer-

> to Ricans, Mexican-Americans, and American Indians) in the engineering profession by enabling members of such minorities to acquire an engineering education. . . . *Articles of Incorporation, Article Third.*

NFMES raises and provides scholarship funds to engineering schools for the support of minority engineering students. Some 70 engineering schools across the country receive funds from NFMES. Participating schools must agree to increase recruiting activities among minority groups, to meet agreed upon minority enrollment goals, to use NFMES funds to supplement rather than to replace funds normally used to help minority engineering students, to provide services for minority students, and to report periodically to NFMES.

The participating engineering schools select the students who are to receive scholarship awards; these students must be academically qualified, and they must be selected from the four target minorities. All scholarships are based on need.

In 1976-1977, the first full year of operation, NFMES is providing scholarship assistance for 718 students, which represents about five percent of all minority engineering students in this country and about 10 percent of minority engineering freshman. In 1977-1978, NFMES will continue to support these 718 students and, in addition, will provide assistance for approximately 400 more students. NFMES has raised $2.3 million in the past two and a half years, has pledges for an additional $2.2 million, and expects to raise $2.75 million in contributions and pledges annually. About 80% of the contributions and pledges come from large industrial corporations; the balance comes from foundations and individuals.

b. The Background of NFMES

NFMES represents a nationwide effort by United States industry[1] to increase the number of minority engineers. It was formed because of deep concern about the lack of minority engineers.

Addressing the Engineering Education Conference in 1972, J. Stanford Smith, Chairman of International Paper Company, said

> Of the 43,000 engineers graduated in 1971, only 407 were Black and a handful were other minorities or women. One percent. It takes about fifteen to twenty-five years for people to rise to top leadership positions in industry. So if industry is getting one percent minority engineers in 1972, that means that in 1990, that's about the proportion that will emerge from the competition to top leadership positions in industry. . . .
>
> Gentlemen, this is a formula for tragedy. Long before the year 1990, a lot of minority people are going to feel that they have been had. Already there are angry charges of discrimination with regard to upward mobility in industry, whereas the real problem, clearly visible today, is that

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[1]In addition to trustees from the academic world and from minority groups, the Board of Trustees includes the Chairmen of the Boards of American Can Company, The Bechtel Group, General Electric Company, General Motors Corporation, The Goodyear Tire & Rubber Company, Hewlett-Packard Company, International Business Machines Corporation, International Paper Company, Rockwell International Corporation, Standard Oil Company of California, Union Carbide Corporation, and United States Steel Corporation; it also includes the Presidents of E. I. du Pont & Nemours & Company and International Harvester Company and the Executive Vice President of American Telephone and Telegraph Company. Trustees personally attend Board meetings, solicit funds, and are otherwise involved in NFMES affairs.

> there just aren't enough minority men and women who have taken the college training to qualify for professional and engineering work. . . .
>
> To put the challenge bluntly, unless we can start producing not 400 but 4,000 to 6,000 minority engineers within the decade, industry will not be able to achieve its goals of equality, and the nation is going to face social problems of unmanageable dimensions.[2]

In response to this problem, numerous groups focused on the need to increase minority representation in engineering. In December 1972 the Engineers' Council for Professional Development co-sponsored with other organizations a task force known as the Minority Engineering Education Effort; the task force called for a 10 to 15-fold increase in minority engineering graduates by the mid-1980s. In May 1973 the National Academy of Engineering sponsored a symposium which called for a similar increase. The Academy subsequently established its Committee on Minorities in Engineering, and helped establish the National Advisory Council for Minorities in Engineering.

In late 1973, as the next step, the Alfred P. Sloan Foundation encouraged and funded the formation of an *ad hoc* task force to recommend ways to increase the number of minority engineers. The 17 members of the task force — officially named The Planning Commission for Expanding Minority Opportunities in Engineering — were drawn from universities, industry, professional associations, and scholarship programs. Their efforts extended over seven months and resulted in a report entitled *Minorities in Engineering: A Blueprint for Action*, (1974) [hereinafter cited as *Sloan Report*].

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[2]Address by J. Stanford Smith to the Engineering Education Conference, Crotonville, N.Y., July 25, 1972. Mr. Smith has been Chairman of the Board of Trustees of NFMES since NFMES was organized.

The *Sloan Report* concluded that the

> single most important barrier today to increasing minority participation in engineering is the lack of adequate financial aid for minority college students. At 12.

The *Sloan Report* recommended

> the establishment of a single national organization to raise and distribute essential new funds for financial aid to minority engineering college students. *Id.*

NFMES was organized by the National Academy of Engineering (through its Committee on Minorities in Engineering), on the recommendation of the National Advisory Council for Minorities in Engineering and the Sloan Foundation, as the "single national organization" called for by the *Sloan Report*.

The findings of the *Sloan Report*, and its recommendations, were thus the result of a sustained examination of the lack of minority representation in engineering — and of ways to remedy it — by industry, the profession, educators, and minorities.

2. NFMES' Concern

The specific question before this Court is whether a state medical school violates the Equal Protection Clause by setting aside places in its entering class to be filled by minority applicants under a special admissions program. In light of the extensive efforts to reduce the underrepresentation of minorities in higher education, the case has obvious importance for colleges and universities throughout the United States. We assume that Petitioners and other *amici* will address the implications for admissions programs, and for higher education generally, of affirming the opinion below.

NFMES is concerned that affirmance will substantially hamper and delay efforts to increase the number of

minority engineers. These efforts are important not only to achieve parity in the professions but because engineering is one route to top management positions in industry. If minorities are to be adequately represented in the top positions of major corporations, there must be an adequate number of minority engineers. Moreover, a growing pool of qualified minority engineers is important for the continued vitality of industry. Large corporations are hiring minority engineers in rapidly increasing numbers; they believe that it is right to do so, and in addition they are frequently obligated to do so.[3] Qualified minority engineers must be trained quickly enough to meet the demand. As indicated above, it is the consensus of industry leaders, engineers, educators, and others that only through NFMES and like programs can the demand be met.

Even though we can distinguish the NFMES effort from the University of California's special admissions program,[4] affirmance of the opinion below would almost surely prevent NFMES from achieving its objectives. Even if the Court decided the case on the narrowest possible grounds, there would be a period of uncertainty during which university administrators and corporate donors might understandably be cautious about contributing to or working with any programs that used race as a selection criterion.

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[3] See 42 U.S.C. §2000e; 42 U.S.C. §2000e-2; 41 C.F.R. 60-2.

[4] Because the NFMES scholarship funds are generated solely to assist minority engineering students, and must be used to supplement rather than to replace existing scholarship funds, the NFMES program does not "have the effect of depriving persons who were not members of a minority group of benefits which they would otherwise have enjoyed," *Bakke v. Regents of the University of California*, 132 Cal. Rptr. 680, 688, 553 P.2d 1152, 1160 (1976). Similarly, the lack of access to a specific source of financial assistance "cannot be equated with the absolute denial of a professional education." *Bakke*, 132 Cal. Rptr. at 689, 553 P.2d at 1161. Nonetheless, NFMES scholarships are available only to members of four minority groups.

During this period, NFMES and similar programs would be in grave danger of atrophying.

NFMES could avoid the constitutional problems raised by this case in either of two ways: first, it could award scholarships to students directly, without involving engineering schools; and second, it could award scholarships to culturally or economically deprived engineering students of any race — and hope that enough of them were members of the four target minorities to justify the program. Neither way is satisfactory.

By working through engineering schools, NFMES stimulates institutional changes in minority recruitment, enrollment, educational support programs, and financial aid, to help ensure a permanent increase in the pool of minority engineering students. Otherwise, NFMES' scholarship dollars might be nothing more than a substitute for existing resources. NFMES also relies on the expertise of engineering schools in selecting qualified students and in disbursing funds. An essential part of the NFMES program would thus be sacrificed if NFMES had to abandon its current relationships with engineering schools.

Given the objectives and origins of NFMES, it would be difficult to open the program to disadvantaged persons generally. The engineering profession has traditionally attracted people from low socio-economic backgrounds, with the exception of minorities. Thus, the fundamental concerns that NFMES addresses are racial concerns, not cultural or economic concerns. And it would dissipate limited resources to cast a broad net when the real objectives are limited. What may give rise to a "formula for tragedy," to "social problems of unmanageable dimensions," is the absence of Blacks and other minority engineers, not the absence of engineers from backgrounds of poverty.

NFMES looks to 1990 and beyond and to fair opportunities for all to join the top ranks of industry, government, and the professions. The program attempts to forestall those who would say "we have been had" and to offer meaningful opportunity — now. It is part of a national effort, joined in by schools and universities, professional groups, industry, government, and others to redress the imbalances caused by 200 years of unlawful discrimination.

Those who argue that the Constitution bars this effort argue that the Constitution must be color-blind or racially neutral; so it must be, in time. For the better part of 200 years, however, the Constitution was not color-blind or racially neutral. It was relied upon to sanction the discriminatory practices that caused the underrepresentation of minorities in higher education and the professions. It would be the ultimate irony to perpetuate the unequal condition of Blacks and other minorities now in the name of a color-blind Constitution. Discrimination on account of race is a shadow that we must remove. Once it is removed, the Constitution should indeed be color-blind. But if we determine to be color-blind now, while the effects of past discrimination are still pervasive, and to rely solely on "racially neutral means" to remove these effects, we are likely to need more time — measured in decades — than we can safely assume we have.

The parties have consented to the filing of this brief, as evidenced by letters on file with the Court.

QUESTION PRESENTED

Whether the Equal Protection Clause prohibits state supported professional schools from voluntarily using preferential admissions programs to reduce the underrepresentation of minorities in such schools and in the professions, when such underrepresentation was caused by past *de jure* segregative practices engaged in by others, at least until the taint of the past segregative practices is dissipated.

SUMMARY OF ARGUMENT

If there were evidence of past discrimination at the medical school of the University of California at Davis, this would be a routine discrimination case. The courts have not hesitated to *order* that school boards, universities, or employers implement affirmative action programs where there has been a showing of past discrimination. *Carter v. Gallagher*, 452 F.2d 315 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972); *Porcelli v. Titus*, 431 F.2d 1254 (3d Cir. 1970), *cert. denied*, 402 U.S. 944 (1971).

In this case there is no showing of past discrimination by Petitioner, and no effort to compel Petitioner to take remedial action. Instead there is a *voluntary* effort by Petitioner to participate in a nationwide effort to reduce the underrepresentation of minorities in professional schools and in the professions caused by past unlawful conduct engaged in generally, although not by Petitioner. As the dissenting opinion below noted

> It is anomalous that the Fourteenth Amendment that served as the basis for the requirement that elementary and secondary schools could be *compelled* to integrate should now be turned around to *forbid* graduate schools from voluntarily seeking that very objective. *Bakke*, 132 Cal. Rptr. at 719, 553 P.2d at 1191. (Emphasis in original).

We argue below that the Equal Protection Clause does not prohibit such voluntary efforts. The argument is, we believe, squarely before this Court for the first time, although it finds strong support in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971).

We also believe that this Court can decide the case before it on grounds that fall squarely within prior decisions. The court below acknowledged that a racial classification does not violate the Equal Protection Clause if the classification serves a "compelling state interest" and there are no

reasonable alternative ways to meet that interest. *Bakke*, 132 Cal. Rptr. at 690, 553 P.2d at 1162.[5] The California Supreme Court assumed that the University's objectives "met the exacting standards required to uphold the validity of a racial classification insofar as they establish a compelling go[illegible]mental interest." *Bakke*, 132 Cal. Rptr. at 693, 553 P.2d at 1165. The court rejected the special admissions program on the ground that the University had failed to establish that it could not serve those objectives in alternative ways. We argue below, as others will undoubtedly argue, that no alternatives are available. If this Court accepts the factual proposition that only through preferential programs like the one before it can the underrepresentation of minorities in higher education and the professions be reduced within an acceptable period of time, it can and should reverse the court below on the basis of established case law.

Finally, when there has been an unlawful invasion of a constitutionally protected right, remedial steps must be taken until the connection between the invasion and the result "becomes so attenuated as to dissipate the taint". *Nardone v. United States*, 308 U.S. 338, 341 (1939). Affirmative action programs should thus be permitted only until the conditions caused by past discrimination have been ameliorated. When minorities have a meaningful opportunity to train for and enter the practice of medicine, law, engineering, architecture, pharmacy, etc., special admissions programs and similar affirmative action programs will no longer be necessary or constitutionally permissible. *Reeves v. Eaves*, 411 F. Supp. 531, 534 (N.D. Ga. 1976).

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[5]There is of course serious question whether the court below was correct in applying the "compelling state interest" test rather than the "rational basis" test. We accept *arguendo* the application of the "compelling state interest" test.

ARGUMENT

I. THERE ARE NO "RACIALLY NEUTRAL MEANS" OF REDUCING THE UNDERREPRESENTATION OF MINORITIES IN ENGINEERING SCHOOLS AND IN THE ENGINEERING PROFESSION.

The court below held that increasing the number of minority students in professional schools[6] serves a "compelling state interest." At least with respect to engineering, it is the considered judgment of industry, educators, and the profession that special programs, employing race as a selection criterion, are necessary to reduce underrepresentation.

As noted, the organization of NFMES in 1974 was the result of a long and concerted effort by industry, educators, and the engineering profession to deal with the underrepresentation of minorities in engineering. A 1970 report prepared for the Manpower Administration of the United States Department of Labor found that

> time alone is not increasing the underrepresentation of the U.S. black in the engineering profession. During the last eight years there has been virtually no increase in the percentages of blacks in engineering education *except for special programs that some colleges have instituted to encourage and retain these students.* R. Kiehl, *Opportunities for Blacks in The Profession of Engineering*, 13-14 (1970). (Emphasis added).

In contrast to the extraordinary shortage of admissions places available generally in law and medicine[7] "[t]here is sufficient room in engineering schools that minority enrollment could be multiplied several times without taxing

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[6]Only medical schools were at issue but similar reasoning applies to law, engineering, and other professional schools.

[7]Some 3,000 applicants competed for 100 admissions places in the medical school of the University of California at Davis.

the schools' capacity," *Sloan Report* 2, and "[t]here seems to be no question but that there are widespread education and employment opportunities for blacks in engineering and in technicians' work," Kiehl, *supra*, at 14.

Thus, despite the suggestion of the court below that underrepresentation might be ameliorated by increasing the number of places available in the medical school, at least in engineering the underrepresentation of minorities is not the result of the absence of admission places[8] or job opportunities. With an abundance of both, there was "virtually no increase in the percentages of blacks in engineering education except for the special programs that some colleges have instituted to encourage and retain these students." *Id.*

The *Sloan Report* found that "the single most important barrier today to increasing minority participation is the lack of adequate financial aid for minority college students". *Sloan Report* 12. The task force responsible for the *Sloan Report* was drawn from industry, universities, minority groups, and the profession; its considered judgment should not lightly be disregarded. *Cf.* J. Weinstein & M. Berger, *Weinstein's Evidence §702[02]* (1975) J. Wigmore, *Evidence* §1923 (3d ed. 1940); K. Davis, *Administrative Law Text* §502 at 127, §14.11 at 287 (3d ed. 1972).

II. THE UNDERREPRESENTATION OF MINORITIES IN THE PROFESSIONS TODAY IS THE RESULT OF UNCONSTITUTIONAL, SEGREGATIVE PRACTICES AND LAWS.

That minority groups are numerically underrepresented in the professions is beyond question. In 1970 Blacks, Chicanos, Puerto Ricans, and American Indians constituted 2.8% of the engineers in the United States and

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[8]We note that Mr. Bakke has a degree in engineering. N.Y. Times, April 3, 1977, §5 (Magazine), at 43, col. 1.

14.4% of the total population. *Sloan Report* 1. Blacks alone accounted for about 11% of the total population in 1970.[9] but only 2.06% of all architects, 1.25% of all lawyers and judges, 2.04% of physicians, 2.46% of dentists, 2.14% of pharmacists, and 1.12% of engineers. *See* page 26, *infra.* If this were the result of accident, or the free choice of Blacks and other minorities to eschew the professions, no constitutional questions would arise. Of course, it is not. In this section, we show that underrepresentation of minorities in the professions is the result of *de jure* segregative practices that effectively barred minority groups from higher education, including professional schools, until recently.

We deal primarily with Blacks because the case law and the data deal primarily with Blacks. Other minorities have suffered the same unconstitutional privations. This Court has held that "Hispanos constitute an identifiable class for purposes of the Fourteenth Amendment" and noted that "Hispanos suffer from the same educational inequities as Negroes and American Indians." *Keyes School District No. 1, Denver, Colorado,* 413 U.S. 189, 197 (1973). *See Serna v. Portales Municipal Schools,* 499 F.2d 1147 (10th Cir. 1974); *United States v. Texas Education Agency,* 467 F.2d 848 (5th Cir. 1972); *Cisneros v. Corpus Christi Independent School District,* 467 F.2d 142 (5th Cir. 1972), *cert. denied,* 413 U.S. 920 (1973). Upholding an employment preference in favor of Indians, this Court recently said:

> The Indians have not only been thus deprived of civic rights and powers, but they have been largely deprived of the opportunity to enter the more important positions in the service of the very bureau which manages their affairs. Theoretically, the Indians have the right to qualify for the Federal civil

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[9]U.S. Bureau of the Census, *Census of Population: 1970, General Population Characteristics, Final Report PC(1)-B1 United States Summary,* 1-293, Table 60.

> service. In actual practice there has been no adequate program of training to qualify Indians to compete. . . . 78 Cong. Rec. 11729 (1934) as cited in *Morton v. Mancari*, 417 U.S. 535, 544 (1974).

We deal primarily with higher education because college and professional training are prerequisites for a professional career. Segregation in higher education, however, is only part of the story. Segregative practices in the professions themselves contributed to the underrepresentation of minorities.[10] And there is no need to remind this Court of the measures by which the Southern States — in which the vast majority of Blacks lived until recently — unlawfully prevented Blacks from obtainining elementary and high school educations.

It is not an answer to say that segregative practices among schools of higher education have ceased. This Court has recognized that inequalities produced by unlawful segregation are not remedied solely by cessation of the unlawful practices. *Green v. County School Board*, 391 U.S. 430 (1968); *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971); *Geier v. Dunn*, 337 F. Supp. 573 (M.D. Tenn. 1972).

A. Prior to *Brown v. Board of Education*, Southern States Did Not Provide "Separate But Equal" Education for Blacks.

Prior to *Brown v. Board of Education*, 347 U.S. 483 (1954), the law required "separate but equal" educational facilities. *Plessy v. Ferguson*, 163 U.S. 537 (1896). The evidence is conclusive that the education available to Blacks, at least in the District of Columbia and the

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[10] *See Cypress v. Newport News General and Nonsectarian Hospital Ass'n*, 375 F.2d 648 (4th Cir. 1967); H. Morais, *The History of the Negro in Medicine*, 135, 147, 153 (1967); J. Auerbach, *Unequal Justice*, 65-66, 210-17 (1976).

Southern and border states, was separate but not equal. In 1940 some 80% of all Blacks lived in these states; 70% of all Blacks lived in these states in the 1950's.[11] Segregative practices in the South thus affected a substantial majority of all Blacks.

1. Higher education available to Blacks in the 17 Southern and border states was qualitatively and quantitatively inferior to that available to Whites.

In 1942 the United States Office of Education issued a study documenting the quantity and quality of higher education available to Blacks. II *National Survey of the Higher Education of Negroes. General Studies of Colleges for Negroes* (U.S. Office of Education 1942) [hereinafter cited as *Survey].* The *Survey* focused on education opportunities available in 1940 in the District of Columbia and in the 17 Southern and border states in which the vast majority of Blacks lived.[12]

In some of these states, segregation of the races in separate schools was mandated by the state constitution; in others, it was statutory; in at least four states it was a crime to allow Blacks and Whites to share the same classrooms.

a. Quantity of education

The *Survey* noted that

> No state makes adequate provision, when measured in terms of its provision for white per-

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[11]U.S. Bureau of the Census, *Statistical Abstract of the United States: 1960*, 30, Table 27 (81st ed. 1960) for figures from which percentages were computed. In addition to the District of Columbia, the states included are: Alabama, Arkansas, Delaware, Florida, Georgia, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, and West Virginia.

[12]The *Survey* noted that few Negroes attended northern colleges and universities, that large numbers of northern Negroes went south to attend college, and that few southern Negroes attended northern schools. *Survey 79*, Table 56; 82.

> sons, for the graduate education of Negroes. . . . Professional offerings are virtually nonexistent in public institutions for Negroes and are available in only a few private institutions. No state which provides racially separate facilities at the level of higher education provides adequate facilities for the professional education of its Negro citizens. At 21-22.

In 1940 only five private and seven public institutions provided graduate or professional training for black students in the 17 Southern and border states and in the District of Columbia. The 12 institutions accommodated 1,864 students. In 11 states no graudate work was available in black institutions. In 16 states a law curriculum was offered for Whites, but it was available at black institutions in only two states. Similarly, in 13 of the 17 states the study of medicine was available at white institutions, but was offered at black institutions in only two states.

With respect to engineering, the *Survey*[13] found that for the 1939-40 academic year

—190 fields of specialization in engineering were available in all-white institutions, public and private, but only 10 fields of specialization were available in black-only institutions.

—Each state and the District of Columbia offered at least three and as many as 21 different fields of engineering specialty in white-only institutions. The median offering per state was nine.

—13 of the 17 states offered *no* engineering training for Blacks. Private institutions in the District of Columbia and Alabama offered three and two fields of specialization respectively. Public institutions in North Carolina offered three, Oklahoma one, and Texas one.

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[13] *Survey* 10, Table 6.

The *Survey* noted that

> in only 1, or possibly 2, of the [black-only] institutions which list fields of specialization in engineering are these curricula standard engineering curricula. In the other institutions these fields are chiefly for teacher training or trade training."[14] *Survey* 13 n.3.

Graduate work in engineering was available to Whites in each of the 17 states in at least three and in as many as 18 fields of specialization. *Survey* 14, Table 7. No graduate work in engineering was available to Blacks. *Id.*

In the fall of 1947, only some 600 of the country's 25,000 medical students were Black. There were only two black medical schools in the country, Howard in the District of Columbia and Meharry in Tennessee. Lack of interest in attending medical school was not the cause of the underrepresentation of Blacks. Some 1,351 applicants competed for 74 places at Howard; Meharry enrolled 55 of its 800 applicants. H. Morais, *The History of the Negro in Medicine* 94 (1967).

b. Quality of education

The Survey also documented the "sharp" differences in the quality of education offered to Blacks and Whites; it concluded that "in each of the States the public institutions for Negroes are inferior, qualitatively, to the public institutions for white persons." *Survey* 22.

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[14]The limited offerings in engineering were not unique. For instance, in commerce, whose primary function the report described as "prepar[ing] individuals for participation in business and commercial pursuits," the following fields were not available to Blacks: Accounting, advertising, banking and finance, business statistics, clothing and textile merchandising, engineering and business administration, management, manufacturing, marketing, personnel, administration, public utilities, real estate, retailing, foreign service. *Survey* 11-12.

Accreditation by the Association of American Universities ("AAU") was the chief measure of the quality of instruction. In 1938, 79 White-only institutions of higher learning in the 17 Southern and border states and the District of Columbia were accredited by the AAU; there was at least one public and one private white institution accredited in each state. The AAU had accredited only two private institutions for Blacks, and no public institutions for Blacks, in any of the 17 states or the District of Columbia. *Survey* 16, Table 9.

2. The states employed a variety of devices and tactics to continue to deny equal higher education to Blacks.

In 1938 this Court held that if a state offered a specific field of graduate or professional study to Whites, it had to provide a substantially equal opportunity to Blacks, either by providing equivalent graduate or professional schools for Blacks or by permitting Blacks to attend white schools. *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938). *Gaines* also held unconstitutional the widespread practice of giving black residents tuition grants to attend out-of-state schools when a course of study available to white residents was not available at black institutions.

Although *Gaines* was decided in 1938, out-of-state tuition programs continued into the 1960's. *See Gantt v. Clemson Agricultural College*, 320 F.2d 611 (4th Cir.), *cert. denied* 375 U.S. 814 (1963). And despite the clear holding of *Gaines*, it took two decisions of this Court and one district court decision to persuade the University of Oklahoma to admit Blacks on an equal basis to its law and graduate schools when the state did not offer equivalent courses in its Black schools. *Sipuel v. Board of Regents*, 332 U.S. 631 (1948); *McLaurin v. Oklahoma State Regents for Higher Education*, 87 F. Supp. 526 (W.D. Okla. 1948); *McLaurin v. Oklahoma State Regents for Higher Education*, 339 U.S. 637 (1950).

To avoid *Gaines* and *Sipuel*, the governors of 14 states entered into an interstate compact for regional education.[15] The compact created jointly owned and operated professional educational institutions in the professional, technological, and scientific fields. The theory was that if a state could not provide training for Blacks within its borders, it could satisfy its constitutional obligations by contracting for that training at an institution within the 14-state compact. The compact was struck down in *McCready v. Byrd*, 73 A.2d 8 (md.), *cert. denied*, 340 U.S. 827 (1950).

In the early 1950's, the courts found, time and again, that Blacks were not being provided with equal opportunities for higher education. *Sweatt v. Painter*, 339 U.S. 629 (1950); *Bruce v. Stilwell*, 206 F.2d 554 (5th Cir. 1953); *McKissick v. Carmichael*, 187 F.2d 949 (4th Cir.), *cert. denied*, 341 U.S. 951 (1951), *Constantine v. Southwestern Louisiana Institute*, 120 F. Supp. 4177 (W.D. La. 1954); *Battle v. Wichita Falls Junior College District*, 101 F. Supp. 82 (N.D. Tex. 1951), *aff'd*, 204 F.2d 632 (5th Cir. 1953), *cert. denied*, 347 U.S. 974 (1954); *Wilson v. Board of Supervisors*, 92 F. Supp. 986 (E.D. La. 1950), *aff'd*, 340 U.S. 909 (1951); *Parker v. University of Delaware*, 75 A.2d 225 (Ch. Del. 1950).

B. *Brown v. Board of Education* Did not End Segregative Practices in Higher Education.

Brown v. Board of Education did not put an end to the segregative practices that effectively denied professional

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[15] Alabama, Arkansas, Florida, Georgia, Louisiana, Maryland, Missisippi, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, and West Virginia were the original signatories to the compact. Kentucky joined later.

training to Blacks.[16] If it had, the taint from the practices before *Brown* might well have been dissipated by now.

1. Some states refused to recognize that *Brown* applied to institutions of higher education.

In 1955 three Negroes were denied admission to the University of North Carolina. By resolution, the University reaffirmed its policy of denying admission to Blacks. The students filed suit; the court rejected the University's contention that *Brown* "did not decide that the separation of the races in schools on the college and university level is unlawful". *Frasier v. Board of Trustees*, 134 F. Supp. 589, 592 (M.D. N.C. 1955), *aff'd*, 350 U.S. 979 (1956). After quoting extensively from the *Brown* decision the court concluded:

> In view of these sweeping pronouncements, it is needless to extend the argument. There is nothing in the quoted statements of the court to suggest that the reasoning does not apply with equal force to colleges as to primary schools. Indeed, it is fair to say that they apply with greater force to students of mature age in the concluding years of their formal education as they are about to engage in the serious business of adult life. *Frasier v. Board of Trustees*, 134 F. Supp. at 592-93.

See Lucy v. Adams, 134 F. Supp. 235, 238 (N.D. Ala.), *aff'd*, 228 F.2d 619 (5th Cir.), *cert. denied*, 351 U.S. 931 (1955).

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[16] When *Brown* was decided, about 70% of all blacks lived in states with segregated school systems. The Court in *Brown* noted that "in the North segregation in public education has persisted in some communities until recent years. It is apparent that such segregation has long been a nationwide problem, not merely one of sectional concern". 347 U.S. at 491 n.6.

In 1956 this Court observed that even before *Brown* it had "ordered the admission of Negro applicants to graduate school without discrimination because of color." It said:

> As this case involves the admission of a Negro to a graduate professional school *there is no reason for delay*. He is entitled to *prompt* admission. . . . *Florida ex rel. Hawkins v. Board of Control*, 350 U.S. 413, 413-14 (1956). (Emphasis added).

More than a decade later, this principle was still being reiterated by the courts.[17] In *Lee v. Macon County Board of Education*, 267 F. Supp. 458 (M.D. Ala.), *aff'd*, 389 U.S. 215, (1967), the District Court found that the state's colleges were maintained on a segregated basis. It held:

> [T]hese schools have been and continue to be operated as if Brown v. Board of Education were inapplicable in these areas. . . . It is quite clear that the defendants have abrogated, and openly continue to abrogate, their affirmative duty to effectuate the principles of Brown v. Board of Education, *supra. Lee v. Macon County Board of Education*, 267 F. Supp. at 474.

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[17]Tennessee's reluctant compliance with the law is documented in *Booker v. Tennessee Board of Education*, 240 F.2d 689 (6th Cir.), *cert. denied*, 353 U.S. 965 (1957). The state devised a gradual integration plan under which graduate students would be admitted in the 1955-56 academic year, college seniors the following year, juniors the year after that, etc. Under the plan it would be 1959-60 before any black freshmen were admitted. The University contended that the stepped approach was necessary to prevent overcrowding. The court found this defense inadequate noting particularly that 143 non-residents of Tennessee were enrolled in the University.

2. A variety of devices were employed by the states to frustrate the application of *Brown* to higher education.

As constitutional provisions and statutes requiring a dual school system were struck down, other forms of maintaining the status quo were devised.

a. Certificates

In 1956, the Louisiana legislature passed a law requiring applicants to institutions of higher education to present a certificate of eligibility and good moral character signed by their former principals and superintendents. The legislature also passed a law which provided, in effect, that principals and superintendents would lose their jobs if they signed the certificates for Black applicants. The laws had the intended result of maintaining dual school systems. The court struck them down stating:

> The fact that a transparent device is used, calculated to effect this same result, does not make the legislation less unconstitutional. *Ludley v. Board of Supervisors*, 150 F. Supp. 900, 903 (E.D. La. 1957), *aff'd*, 252 F.2d 372 (5th Cir.), *cert. denied*, 358 U.S. 819 (1958).

In Georgia, admission to the university system required a certification of good moral character, based on personal acquaintance and attested to by alumni of the institution that the student desired to attend. This device was struck down in *Hunt v. Arnold*, 172 F. Supp. 847 (N.D. Ga. 1959). The court declared:

> The effect of the alumni certificate requirement upon Negroes has been, is, and will be, to prevent Negroes from meeting this admission requirement. 172 F. Supp. at 856.[18]

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[18]The court also declared invalid Georgia's out-of-state tuition program for Blacks which was still in operation despite this Court's declaration, over twenty years earlier, that such programs were unconstitutional.

As late as 1962, the requirement of certificates was still being challenged in the courts. *Meredith v. Fair*, 305 F.2d 343 (5th Cir.), *cert. denied*, 371 U.S. 828 (1962).

The court found that:

> One of the most obvious dodges for evading the admission of Negroes to 'white' colleges is the requirement that an applicant furnish letters or alumni certificates. . . . The University's continued use of the requirement seems completely unjustifiable in view of decisions denying the use of such certificates at Louisiana State University and at the University of Georgia. We regard the continued insistence on the requirement as demonstrable evidence of a State and University policy of segregation that was applied to Meredith. *Meredith*, 305 F.2d at 352.

b. Appropriations

In 1961 the court struck down a 1956 Georgia law making maintenance of a one-race school a condition precedent to the receipt of state funds. *Holmes v. Danner*, 191 F. Supp. 394, 400 (M.D. Ga.), *stay denied*, 364 U.S. 939 (1961).

A similar legislative scheme in South Carolina was struck down in 1962. *Gantt v. Clemson Agricultural College*, 320 F.2d 611 (4th Cir.), *cert. denied*, 375 U.S. 814 (1963).[19]

c. Accreditation

In 1963 Harold A. Franklin, a Negro, challenged the admission requirement of the Graduate School at Auburn University that an applicant possess an undergraduate degree from an accredited institution. The court held that in the context of Alabama's overall higher education

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[19]The court also struck down South Carolina's out-of-state tuition grant program which was still in operation

program, the rule denied equal protection. *Franklin v. Parker*, 223 F. Supp. 724, 726 (M.D. Ala. 1963), *modified*, 331 F.2d 841 (5th Cir. 1964). The court said

> It is the State of Alabama . . . that causes and permits the lack of accreditation of Alabama State College and it is the State of Alabama that causes or allows Auburn University's requirement concerning admission from an accredited institution. . . . [T]he State of Alabama is as much to blame for the plaintiff's inability to satisfy Auburn's requirement for admission to its Graduate School as if "it had deliberately set out to bar the plaintiff from Auburn solely because he is a Negro." *Franklin v. Parker*, 223 F. Supp. at 727.

Alabama was not the only state to use the accreditation requirement to perpetuate segregation. In *Meredith v. Fair*, the court commented on a requirement of the University of Mississippi that transfer students have prior training at "approved" institutions. The court said

> Translating, the Registrar said that this means that Meredith could not transfer to the University because Jackson State College was not a member of the Southern Association of Colleges and Secondary Schools. It also means that the Board, which runs Jackson State too, could set up at Jackson State and other Negro colleges a program inherently incapable of ever being approved. . . . The reason was never valid, and again demonstrates a conscious pattern of unlawful discrimination. *Meredith*, 305 F.2d at 353.

d. "Private" Character of Schools

In several states, universities attempted to escape the reach of the Fourteenth Amendment by denominating themselves "private institutions. *Guillory v. Administrators of Tulane University*, 203 F. Supp. 855 (E.D. La.

1962). *See Hammond v. University of Tampa*, 344 F.2d 951 (5th Cir. 1965).

C. The Segregative Practices in Higher Education Caused the Underrepresentation of Minorities in the Professions.

The denial of equal educational opportunity is the denial of opportunity to enter a profession. The practice of any profession today is contingent on graduation from an accredited course of study. Entry to a profession is barred absent higher education. Even before *Brown*, this Court struck down barriers to higher education for a black student because such barriers denied the opportunity to become "a leader and a trainer of others." *McLaurin v. Oklahoma State Regents for Higher Education*, 339 U.S. at 641. In *Brown*, the need for equal education was based in part on the place of education as the "principal instrument . . . in preparing . . . for later professional training". 347 U.S. at 493.

As discussed above, the opportunity for Blacks to obtain professional training has not historically been equal to that provided for Whites; segregative practices persisted long after this Court demanded that they cease. *De jure* segregation in higher education may have been more prominent in the Southern and border states, but it has affected virtually all Blacks because they lived in those states. In 1940, 80% of all Blacks lived in those states; in 1950, 70%; and in 1960, 60%.[20] By 1970, only 56% of the black population lived there.[21]

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[20] See note 11 *supra* for source of figures for 1940 and 1950; the 1960 figure was computed from U.S. Bureau of the Census, *Statistical Abstract of the United States: 1970*, 27, Table 28 (91st ed. 1970).

[21] U.S. Bureau of the Census, *Census of Population: 1970, General Population Characteristics, Final Report PC(1)-B1 United States Summary*, 1-293, Table 60.

The following data, computed from U. S. Census figures,[22] demonstrates the effect of the unconstitutional practices on the entry of Blacks into selected professions.

Blacks as Percentage of Employed (Male) in Selected Professions

Year	1940	1950	1960	1970
(Blacks as Percentage of Total Population)	(9.7)	(9.9)	(10.5)	(11)
Profession				
Architects	0.4	0.6	0.41	2.06
Lawyers & Judges	0.6	0.8	1.1	1.25
Physicians & Surgeons	2.2	2.1	2.1	2.04
Dentists	2.1	2.1	2.65	2.46
Pharmacists	1.0	1.4	1.11	2.14
Engineers	0.1	0.3	0.48	1.12
Civil	0.1	0.4	0.78	1.30
Electrical	0.1	0.3	0.48	1.37

From 1940 to 1960 only negligible gains were recorded. By 1970, some significant advances had been registered, although not in medicine. With the advent of minority admissions programs in the late 1960's and early 1970's, greater progress is being made.

III. AFFIRMATIVE ACTION PROGRAMS CAN BE REQUIRED WHEN A STATE SUPPORTED SCHOOL HAS DISCRIMINATED AGAINST MINORITIES.

It has been clear since 1968, with respect to dual school systems, that school authorities are "clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial

[22]See Appendix A for Census data from which the percentages were computed.

discrimination would be eliminated root and branch". *Green v. County School Board*, 391 U.S. at 437-38 (1968).

The mere cessation of past segregative practices does not satisfy this duty. "Open-door" policies and "neighborhood school" programs have fallen when they "fail to counteract the continuing effects of past school segregation". *Swann*, 402 U.S. at 28. *See also, Keyes v. School District No. 1, Denver, Colorado*, 413 U.S. 189 (1973); *Geier v. Dunn*, 337 F. Supp. 573 (M.D. Tenn. 1972).

The adoption of racially neutral plans has also been held to be insufficient. Statutes that forbid the assignment of students "on account of race or for the purpose of creating a racial balance or ratio in the schools" have been struck down; such statutes, "against the background of segregation, would render illusory the promise of Brown v. Board of Education". *North Carolina State Board of Education v. Swann*, 402 U.S. 43, 45-46 (1971). The same standards apply to higher education. *Norris v. State Council of Higher Education*, 327 F. Supp. 1368 (E.D. Va), *aff'd mem.*, 404 U.S. 907, (1971). *Geier v. Dunn.*

This Court has rejected arguments that the Constitution requires assignments to be made on a "color blind basis". *Swann*, 402 U.S. at 19. In *North Carolina State Board of Education v. Swann*, the Court said:

> Just as the race of students must be considered in determining whether a constitutional violation has occurred, so also must race be considered in formulating a remedy. 402 U.S. at 46.

And the Court has specifically supported quotas in school, districting, and employment cases. *Swann: United Jewish Organizations v. Carey*, 45 U.S.L.W. 4221, 4226 (March 1, 1977) "[A] reapportionment cannot violate the Fourteenth . . . Amendment merely because a State uses specific numerical quotas in establishing a certain number of black majority districts"; *Bridgeport Guardians Inc. v.*

Members of Bridgeport Civil Service Commission, 482 F.2d, 1333 (2d Cir. 1973) *cert. denied*, 421 U.S. 991 (1975) (entry level hiring); *Rios v. Enterprise Assn. Steamfitters Local 638*, 501 F.2d 622 (2d Cir. 1974); *Vulcan Society v. Civil Service Commission*, 490 F.2d 387 (2d Cir. 1973).

Thus, under prevailing law, the special admissions program at issue in this case would have been permissible under the Equal Protection Clause, and might have been required, if there were evidence of past discrimination by the Regents of the University of California.

IV. PROFESSIONAL SCHOOLS ARE PERMITTED TO UNDERTAKE AFFIRMATIVE ACTION PROGRAMS FOR A LIMITED TIME WHERE UNDERREPRESENTATION OF MINORITIES IN SUCH SCHOOLS, AND IN THE PROFESSIONS, RESULTS FROM WIDESPREAD SEGREGATIVE PRACTICES IN THE PAST.

Brown v. Board of Education was decided in 1954. A child born in that year would now be old enough to apply to medical school. If unlawful discrimination had ceased in 1954 there would, perhaps, be no need for continued remedial efforts today. But the promise of *Brown* has not been fulfilled.

> [M]any difficulties were encountered in implementation of the basic constitutional requirement that the State not discriminate between public school children on the basis of their race. . . . Deliberate resistance of some to the Court's mandates has impeded the good faith efforts of others to bring school systems into compliance. The detail and nature of these dilatory tactics have been noted frequently by this court and other courts. . . . [I]n 1968, very little progress had been made. . . . *Swann*, 402 U.S. at 13.

In 1968 this Court ordered school authorities to develop a plan that "promises realistically to work *now*". *Green v.*

County School Board, 391 U.S. at 439. (Emphasis in original). In 1969, "fresh evidence of dilatory tactics" appeared; the Court ordered that the remedy "be implemented *forthwith*." *Swann*, 402 U.S. at 14. Desegregation orders have been issued against school systems in the non-Southern states. *Keyes v. School District No. 1, Denver, Colorado*, 413 U.S. 189 (1973). California is no exception. *Crawford v. Board of Education*, 130 Cal. Rptr. 724, 551 P.2d 28 (1976).

The children of *Brown* — the graduates of an equal educational system — have not yet been born. We deal in *Bakke* with a generation that was promised equality but not given it.

We argued in the preceding section that affirmative action programs, including those that rely on quotas, may be required when the party before the court has discriminated in the past. We argue here that professional schools should be permitted voluntarily to undertake such programs as part of the effort to reduce the underrepresentation of minorities in the professions and in professional schools — underrepresentation caused by segregative practices.

A. Voluntary Efforts to Eliminate the Effects of Past Discrimination Have Been Supported by This Court and Are Consistent with National Policy.

In *Swann* this Court distinguished between the measures that school authorities could undertake as a matter of discretion, "absent a finding of a constitutional violation", and measures that a federal court could order them to undertake to remedy a constitutional violation. It noted that "judicial powers may be exercised only on the basis of a constitutional violation" 402 U.S. at 16. The Court noted, however, that school authorities had broad discretion to act

voluntarily "absent a finding of constitutional violation". Mr. Chief Justice Burger said

> School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. *To do this as an educational policy is within the broad discretionary powers of school authorities; absent a finding of a constitutional violation, however, that would not be within the authority of a federal court.* 402 U.S. at 16. (Emphasis added).

Congress as well as this Court has emphasized the importance of voluntary efforts to eliminate the effects of discrimination. Discussing the Civil Rights Act of 1964, which prohibited racial discrimination in voting, public accommodations, education, and employment, the House of Representatives stated

> [The Act] is general in application and national in scope. No bill can or should lay claim to eliminating all of the causes and consequences of racial and other types of discrimination against minorities. There is reason to believe, however, that national leadership . . . will create an atmosphere conducive to voluntary or local resolution of other forms of discrimination. H.R. Rep. No. 914, 88th Cong., 2d Sess. *Reprinted in* 1964 U.S. Cong. & Adm. News 2391, 2393.

The Senate Report noted "the measure speaks on the problem solving level with primary reliance placed on voluntary and local solutions. Only when these efforts break down would the residual right of enforcement come into play". S. Rep. No. 872, 88th Cong., 2d Sess. *Reprinted in* 1964 U.S. Cong. & Adm. News 2355, 2356.

This case represents a *voluntary* response to the problem of eliminating the vestiges of segregation from education and employment. It represents both the exercise of the "broad discretionary powers of school authorities" referred to in *Swann* and the local initiative on which Congress placed "primary reliance" in 1964. In contrast, the cases that usually reach this Court represent a "break down," an exercise of the "residual right of enforcement."

B. The Professions and Professional Schools Are National in Character and Are Entitled to Remedy the Effects of Past *De Jure* Segregative Practices.

When *Gaines* and its progeny were decided, most Blacks lived in the South. Professionals were commonly educated in and practiced in the states in which they grew up. Conditions have changed. Blacks and other minorities are widely dispersed. Professional schools no longer serve the parochial interests of a single state; they draw their student populations from a wide geographic area, and their graduates practice in many different places. The standards of professional education are national and are frequently set by the professions themselves. State supported professional schools both contribute to and benefit from a nationwide pool of students and graduates. Professional schools have responsibilities to the professions they serve.[23] In light of the national character of higher education and of the professions, the Court should not prevent professional schools from voluntarily undertaking, as an exercise of citizenship, to remedy the nationwide underrepresentation of minorities caused by widespread discrimination in the past. State universities should be permitted voluntarily to

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[23] In *Bakke*, the Petitioner states that its special admission program was necessary to integrate the profession. *Bakke*, 132 Cal. Rptr. at 692, 553 F.2d at 1164. The court did not respond to this point.

remedy the *de jure* segregative practices of schools in other states.

C.The Focus of the Court Below Was Too Narrow.

In holding that "the University has not engaged in past discriminatory conduct" *Bakke*, 132 Cal. Rptr. at 697, 553 P.2d at 1169, the court below apparently focused solely on whether the medical school at the University of California at Davis had discriminated in the past. It considered neither discrimination in the system of higher education administered by Petitioner — the Regents of the University of California — nor evidence of discrimination in California's elementary and secondary schools.

Segregation in the California school system is well documented. In one decision Mr. Justice Douglas said: "[T]here is a showing here that the State is maintaining a segregated school system for the Blacks and Chicanos that is inferior to the schools it maintained for the Whites." *Gomperts v. Chase*, 404 U.S. 1237, 1239-40 (1971). *See generally Johnson v. San Francisco Unified School District*, 339 F. Supp. 1315 (N.D. Cal. 1971), *vacated*, 500 F.2d 349 (9th Cir. 1974); *Soria v. Oxnard School District Board of Trustees*, 328 F. Supp. 155 (C.D. Cal. 1971), *vacated*, 448 F.2d 579 (9th Cir. 1973), *cert. denied*, 416 U.S. 951 (1974); *Spangler v. Pasadena City Board of Education*, 311 F. Supp. 501 (C.D. Cal. 1970). *Crawford v. Board of Education; Jackson v. Pasadena City School District*, 31 Cal. Rptr. 606, 382 P.2d 878 (1963). Segregation in elementary and secondary schools — whether *de jure* or *de facto* — must affect the ability of minority students to compete for admission to universities.

Discrimination by one agency of a state may not be sufficient to justify court orders requiring affirmative action programs against another agency of the state. It should, however, be sufficient to justify voluntary efforts. It seems inconsistent to prohibit the University of California at

Davis from *voluntarily* undertaking remedial programs while simultaneously *ordering* California elementary and secondary schools to adopt similar programs.

D. Voluntary Affirmative Action Programs Are Permitted Even When Past Discrimination Has Been *De Facto* Rather Than *De Jure*.

Even with respect to *de facto* segregation, the Constitution does not bar voluntary efforts to eliminate the effects of past discrimination.[24]

> That there may be no constitutional duty to act to undo *de facto* segregation, however, does not mean that such action is unconstitutional. *Offermann v. Nitkowski*, 378 F.2d 22, 24 (2d Cir. 1967).

Federal and state courts have routinely confirmed the authority of school boards and state agencies to reduce and eliminate *de facto* segregation and racial imbalance. *Deal v. Cincinnati Board of Education*, 369 F.2d 55 (6th Cir. 1966), *cert. denied*, 389 U.S. 847 (1967); *Wanner v. County*

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[24] Mr. Justice Powell would go further, and eliminate the distinction between *de facto* and *de jure* discrimination:

> The focus of the school desegregation problem has not shifted from the South to the country as a whole. Unwilling and footdragging as the process was in most places, substantial progress toward achieving integration has been made in Southern States. No comparable progress has been made in many non-southern cities with large minority populations primarily because of the *de facto/de jure* distinction nurtured by the courts and accepted complacently by many of the same voices which denounced the evils of segregated schools in the South. But if our national concern is for those who attend such schools, rather than for perpetuating a legalism rooted in history rather than present reality, we must recognize that the evil of operating separate schools is no less in Denver than in Atlanta. *Keyes*, 413 U.S. at 218 (footnotes omitted).

School Board of Arlington County, 357 F.2d 452 (4th Cir. 1966); *Springfield School Committee v. Barksdale*, 348 F.2d 261 (1st Cir. 1965); *Quality Education for All Children Inc. v. School Board*, 362 F. Supp. 985 (N.D. Ill. 1973); *Pennsylvania Human Relations Commission v. Chester School District*, 427 Pa. 157, 233 A.2d 290 (1967); *Booker v. Board of Education*, 45 N.J. 161, 212 A.2d 1 (1965); *Addabbo v. Donovan*, 16 N.Y. 2d 619, 261 N.Y.S. 2d 68, 209 N.E.2d 112, *cert. denied*, 382 U.S. 905 (1965); *Vetere v. Allen*, 15 N.Y. 2d 259, 258 N.Y.S.2d 677, 206 N.E. 2d 174, *cert. denied*, 382 U.S. 825 (1965); *Guida v. Board of Education*, 26 Conn. Sup. 121, 213 A.2d 843 (1965). As noted by the dissenting opinion in *Bakke*, these cases authorize the use of "racial classification to undo *de facto* school segregation, even if such *de facto* segregation is not itself unconstitutional". 132 Cal Rptr. at 705 n.4, 553 P.2d at 1177 n.4. The result is the same in the employment area.[25] *Id.* n.5-6. And in cases involving districting and apportionment, this Court has said, "[t]he permissible use of racial criteria is not confined to eliminating the effects of past discriminatory practices." *United Jewish Organizations*, 45 U.S.L.W. at 4226.

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[25]The cases cited do not deal with quotas but the employment cases frequently uphold the use of goals. The difference between "quotas" and "goals" may not always be apparent. The Office of Federal Contract Compliance, for example, requires each government contractor who has more than 50 employees and a contract of $50,000 or more to develop an affirmative action program. 41 C.F.R. 60-1.40(a). The contractor is required to establish goals "which should be attainable" 41 C.F.R. 60-2.12(a). "Goals may not be rigid and inflexible quotas which must be met, but must be targets reasonably attainable by means of applying every good faith effort to make all aspects of the entire affirmative action program work". 41 C.F.R. 60-2.12(e). It would obviously behoove a prudent contractor to make sure that his goal was attained.

E. Once Minorities Have Achieved Equal Access to Professional Schools and to the Professions, Affirmative Action Programs Would No Longer Be Permissible Under the Equal Protection Clause.

Absent the past history of segregation and discrimination, there would obviously be no basis for interpreting the Equal Protection Clause as prohibiting discrimination against one race but not another or as sanctioning favored treatment for any race. If the predicate for affirmative action programs is the need to remedy past wrongs, as we believe it is, then obviously the programs must cease once the wrongs have been remedied. This is standard constitutional doctrine.

An unlawful invasion of a constitutional right requires that remedial steps be taken until the connection between the invasion and the result "becomes so attenuated as to dissipate the taint". *Nardone v. United States*, 308 U.S. at 341. *Accord, Lyons v. Oklahoma*, 322 U.S. 596 (1944); *Wong Sun v. United States*, 371 U.S. 471 (1963). This "test of causation . . . distinguishes between a result caused by a constitutional violation and one not so caused." *Mt. Healthy City School District v. Doyle*, 97 S. Ct. 568 (1977).

A discrimination case "does not differ fundamentally from other cases involving the framing of equitable remedies to repair the denial of a constitutional right." *Swann* at 15.

Until minorities have had a meaningful opportunity to train for and enter the practice of medicine, law, engineering, architecture, pharmacy, etc., the voluntary use of special admissions programs and similar affirmative action programs is, we contend, constitutionally permissible. Once a balance has been struck, further preferential treatment would be unlawful discrimination. *Reeves v. Eaves*, 411 F. Supp. 531, 534 (N.D. Ga. 1976).

CONCLUSION

If this Court upholds the University of California's special admissions program, the voluntary desegregation of educational institutions and of the professions can proceed with a minimum of court intervention. If the voluntary efforts of the University are struck down, all public voluntary programs are likely to suffer, increasing the burden on the courts as the only forum for relief from past discrimination. As Mr. Justice Powell noted in *Keyes*,

> Communities deserve the freedom and the incentive to turn their attention and energies to this goal of quality education, free from protracted and debilitating [court] battles. . . . 413 U.S. at 2719.

Mr. Bakke's position is not without sympathy, but it is hardly unique. All affirmative action programs assist minority students or employees at the expense of their white counterparts — just as 200 years of discrimination did the reverse.

> Where some employees now have lower expectations than their co-workers because of the influence of [racial discrimination] . . . they are entitled to have their expectations raised even if the expectations of others must be lowered in order to achieve the statutorily mandated equality of opportunity. *Robinson v. Lorillard Corporation*, 444 F.2d 791, 800 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971).

We respectfully suggest that the underrepresentation of minorities in professional schools and in the professions is "a formula for tragedy," that minority representation can be increased within a tolerable time only through voluntary special admissions programs and similar affirmative ac-

tion programs, and that the Constitution does not prohibit such programs.

Respectfully submitted,

David Ginsburg
Lee R. Marks
Martha Jane Shay

Ginsburg, Feldman and Bress
1700 Pennsylvania Avenue, N. W.
Washington, D. C. 20006

Attorneys for Amicus Curiae

The National Fund for Minority
Engineering Students

Appendix A
Selected Employment Statistics
1940 — 1970

Occupation (Male)	Total(%)	White(%)	Negro(%)	Other Races[5]
1940[1]				
Civil Engineers	80,171(100%)	80,008(99.8%)	95(0.1%)	68(0.1%)
Electrical Engineers	53,103(100%)	52,991(99.8%)	79(0.1%)	33(0.1%)
Mechanical Engrs.	82,225(100%)	82,156(99.9%)	54(0.1%)	45(0.1%)
Other Technical Engineers	29,029(100%)	29,005(99.9%)	10(0.0%)	14(0.0%)
Lawyers & Judges	173,456(100%)	172,329(99.4%)	1,013(0.6%)	14(0.0%)
Physicians & Surgeons	157,041(100%)	153,388(97.7%)	3,395(2.2%)	258(0.2%)
Dentists	69,074(100%)	67,470(97.7%)	1,463(2.1%)	141(0.2%)
Pharmacists	76,131(100%	75,250(98.8%)	769(1.0%)	112(0.1%)
Architects	19,899(100%)	19,793(99.5%)	80(0.4%)	26(0.1%)
1950[2]				
Civil Engineers	121,386(100%)	120,590(99.3%)	460(0.4%)	336(0.3%)
Electrical Engineers	105,278(100%)	104,742(99.5%)	337(0.3%)	199(0.2%)
Lawyers & Judges	174,205(100%)	172,719(99.1%)	1,367(0.8%)	119(0.1%)
Physicians & Surgeons	180,233(100%)	175,783(97.5%)	3,769(2.1%)	681(0.4%)
Dentists	72,810(100%)	71,062(97.6%)	1,525(2.1%)	223(0.3%)
Pharmacists	80,855(100%)	79,500(98.3%)	1,147(1.4%)	208(0.3%)
Architects	23,823(100%)	23,594(99.0%)	135(0.6%)	94(0.4%)
1960[3]				
Civil Engineers	156,434(100%)	153,258(97.96%)	1,227(0.78%)	1,949(1.24%)
Electrical Engineers	180,314(100%)	177,382(98.37%)	883(0.48%)	2,049(1.12%)
Lawyers & Judges	201,556(100%)	198,828(98.64%)	2,218(1.10%)	510(0.25%)
Physicians & Surgeons	214,235(100%)	205,657(95.99%)	4,509(2.10%)	4,069(1.89%)
Dentists	85,070(100%)	81,927(96.30%)	2,261(2.65%)	882(1.03%)
Pharmacists	84,803(100%)	82,551(97.34%)	1,543(1.11%)	709(0.83%)
Architects	29,391(100%)	28,798(97.98%)	122(0.41%)	471(1.60%)
1970[4]				
Engineers	1,213,071(100%)	1,177,858(97.09%)	13,624(1.12%)	35,082(2.89%)
Civil	173,775(100%)	166,639(95.89%)	2,266(1.30%)	7,690(4.43%)
Electrical	280,429(100%)	270,377(96.41%)	3,843(1.37%	9,339(3.33%)
Lawyers & Judges	263,506(100%)	258,839(98.22%)	3,309(1.25%)	3,573(1.36%)
Physicians & Surgeons	254,854(100%)	239,190(93.85%)	5,216(2.04%)	17,072(6.70%)
Dentists	89,800(100%)	86,252(96.04%)	2,218(2.46%)	2,204(2.45%)
Pharmacists	97,181(100%)	93,632(96.34%)	2,084(2.14%)	3,142(3.23%)
Architects	54,194(100%)	51,541(95.10%)	1,120(2.06%)	2,250(4.15%)

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[1]U.S. Bureau of the Census, *Census of Population: 1940, Vol. III, The Labor Force, Part 1, United States Summary*, 88, Table 62.

[2]U.S. Bureau of the Census, *Census of Population: 1950, Vol. II, Characteristics of the Population, Part 1, United States Summary*, 1-276, Table 128.

[3]U.S. Bureau of the Census, *Census of Population: 1960; Subject Reports, Occupational Characteristics, Final Report, PC(2)-7A*, 21, Table 3.

[4]U.S. Bureau of the Census, *Census of Population: 1970, Subject Reports, Final Report, PC (1)-B1, Occupational Characteristics*, 593, Table 3.

[5]Other races includes: Japanese, Chinese, Filipinio, American Indian, and persons of Spanish origin. *Id.*