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 AMICUS CURIAE YOUNG AMERICANS FOR FREEDOM

FELIX & ZIMMAR, INC., P.S.
By JENNINGS P. FELIX
MARCO DE FUNIS
Counsel for Amicus Curiae

Office and Post Office Address:
3010 First Avenue
Seattle, WA 98121

CRAFTSMAN & NET PRESS — SEATTLE, WASHINGTON

SUBJECT INDEX

TABLES OF AUTHORITY

Table of Cases

Page

Constitutional Provision

Statutes

Textbooks

Other Authorities

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 AMICUS CURIAE YOUNG AMERICANS FOR FREEDOM

This brief amicus curiae is filed by the Young Americans for Freedom with the consent of the parties, as provided for in Rule 42 of the Rules of this Court.

INTEREST OF THE AMICUS

Young Americans for Freedom is a non-profit corporation organized under the laws of the State of D laware, with national headquarters in Washington, D.C., and local chapters throughout the United States. Young Americans

for Freedom has approximately 55,000 members most of whom are students and faculty of high school, colleges, and universities. Its members are found on practically all college campuses throughout the United States including the University of Washington and University of California at Davis. Membership in Young Americans for Freedom is open to every race, creed, color and religion and minorities and women hold national and regional offices in the organization.

The average age of the Young Americans for Freedom member is 20 years old, an age where they are dramatically confronted with the affirmative action programs, both in education and employment. Such programs sometimes benefit, sometimes burden its members requiring the organization to take an objective stance in opposing the Davis Medical School "quota" program.

One goal of the Young Americans for Freedom is the advancement of quality education. If graduate and professional schools must select applicants then such selection should be on the basis of individual merit rather than as a member of a selected minority group. Furthermore no group, minority or otherwise, should be stigmatized as lesser qualified and have lower standards of admission applied to them.

The issue of affirmative action and racial and ethnic quotas is a matter of particular importance to the Young Americans for Freedom. Their concern with the ultimate principles of equality and the fundamental constitutional doctrines of due process and equal protection and the applications of those doctrines to the every day practices of colleges, universities and employers, underscores their interest in this present action.

Special admission programs which place primary reliance upon race and ethnicity for entry, reject the concept of equality which is fundamental to the Constitution. The educational and employment areas seem to be swept away by the overpowering need to institute such programs to the detriment of the "minority persons" admitted as well as those excluded. No special privileges or immunities need or should be given any race or ethnic group to provide for fair access for all groups into professional and employment markets. Only the best qualified should be hired and admitted. The Young Americans for Freedom opposes affirmative action quotas on grounds that they are violative of the equal protection clause of the 14th amendment of the United States Constitution and the civil rights legislation of 1870.

QUESTIONS PRESENTED

The court below phrased the question presented as follows:

> In this case we confront a sensitive and complex issue: Whether a special admissions program which benefits a disadvantaged minority student who applies for admission to a medical school of the University of California at Davis (hereinafter University), offends the constitutional rights of better qualified applicants denied admission because they are not identified with a minority.

COURT BELOW

The court below concluded:

> That the program administered by the University (of California at Davis) violates the constitutional rights of non-minority applicants because it affords preference on the basis of race, to persons who, by the University's own standards, are not as qualified for the study of medicine as non-minority applicants denied admission.

SUMMARY OF ARGUMENT

The practice of establishing racial quotas and giving preference to certain minority groups for admission to graduate, professional and more particularly, medical school,, soley because of race, violates the equal protection clause of the Fourteenth Amendment of the United States Constitution.

Davis Medical School gave preferences to certain "minorities" by admitting them with lower qualifications than certain whites and further, reserved sixteen places for the minorities. By admitting the lesser qualified minorities and excluding respondent on the basis of race, the medical school has invidiously discriminated against him. The intensity of the invidious discrimination is only appreciated when one realizes the fact that rejection by the home state Medical School usually forecloses the applicant from ever getting his medical education and becoming a doctor. The petitioner's actions reject the principle that a man should not be judged on the basis of his skin color or the country of his origin, but rather as an individual.

A long line of United States Supreme court cases from *Plessy v. Ferguson,* 163 U.S. 537 (1896) to *Brown v. Board of Education* 347 U.S. 483 (1954) demonstrate the evolving principle of a color blind constitution in which neutral equality rather than race conscious equality prevails. More recent cases indicate the constitution as well as federal civil rights legislation are available to ensure the equality of all races and ethnic groups, including whites.

Racial discrimination, whether affirmative or negative, is presumed to be unconstitutional. Race has no bearing on qualifications for intellectual or educational pursuits, and attempts to use race to qualify certain minorities for the

study of medicine run awry of the constitutional prohibitions against it. Race itself is a suspect criteria and classifications utilizing it are subjected to the strictest scrutiny. Only a compelling state interest may justify classifications based on race. The only instance of such a compelling state interest was the preservation of national security in war time. No compelling state interest is found here. Further as race is a suspect criteria no lesser standard of review is warranted either.

Davis Medical School's discriminatory admissions program further violates 42 USC §1981, 16 STAT. 44. §1981 applies to whites as well as blacks or to any other race and provides all persons with the right to be protected against discrimination on the basis of race in making or entering into contracts. Davis Medical School refused to enter into a contract with the respondent on the basis that the respondent was white. By doing so it violated the Act. Thus, not only on the basis of the Constitution, but also on the basis of civil rights legislation the judgment of the court below should be affirmed.

ARGUMENT

A. The 14th Amendment's Equal Protection Clause Prohibits the Practice of Reverse Discrimination by the Davis Medical School

The Constitution of the United States of America, in the 14th Amendment, the first section, requires the State as follows:

> [n]or shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person, within its jurisdiction the equal protection of the laws.

It is therefore axiomatic under this clause that a State body may not act in any way to discriminate for or against

a person because of his race. For example, see *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 90 S. Ct 1598, 26 L. Ed. 2d 142 (1970); *Brown v. Board of Education*, 347 U.S. 483, ... S. Ct. ....., 98 L. Ed. 873 (1954).

B. Reverse Discrimination as Practiced by Employers, and Institutions of Higher Education Is Always Harmfull to the Excluded Applicant, but the Medical School Admissions Process Intensifies This Harm Giving Greater Cause For Judicial Concern

Professional schools and especially medical schools, have faced an onslaught of applications for the last ten years. Applicants have better credentials every year. Grade point averages and test scores improve so that applicants can't get accepted with credentials adequate the year before.

State supported schools usually have restrictions as to residency and take the vast majority of their students from the pool of State residents. The Medical Admission Requirements Bulletin of the Association of American Medical Colleges 1976-77, states at p. 13:

> Residence restrictions, as indicated in the individual entries in Chapter 10, are generally firmly adhered to. Usually a State supported Medical School is required by law to give preference to residents of that State. A resident usually pays substantially lower tuition to publicly supported schools.
>
> The situation is actually more complex, however, than the above discussion would imply. Some private schools give residents preference. Many schools, both public and private, indicate some sort of preference for residents of neighboring States . . .
>
> In recent years the percentage of State residents admitted has risen for both publicly owned and privately owned Medical Schools . . .
>
> Clearly applicants should recognize their best chances for admission lie with Medical Schools within their

> own State and with private Medical Schools of neighboring States. Selection by a public school in another State is highly improbable unless a nonresident candidate has exceptionally strong credentials.

Plaintiff/respondent's plight was not lessened by the fact that there are five State supported Medical Schools in California, since the competition for seats is as intense as anywhere in the United States. For example, the 1976-77 Medical School Admission Requirements Bulletin states that the University of California at San Francisco had 4,096 applicants for 96 first year positions; the University of California at Los Angeles had 4,139 applicants for 147 first year positions; the University of California at Irvine had 3,371 applicants for 70 first year positions; the University of California at Davis had 3,737 applicants for 100 first year positions for the 1974-75 class. The above schools all have affirmative action programs so that regardless of the school he applied to, Mr. Bakke would be facing difficulty and discrimination.

In effect, application to a State Medical School is a zero sum game when the admission of some applicants precludes the admission of others. (See Kerney, Snell & Thompson, *Introduction to Finite Mathematics,* Prentice Hall, 3rd Ed. p. 373.)

It is rare for an applicant to obtain medical education in another State's Medical School or a private school, while being rejected by his home State school. It is even more rare to obtain admission in the home State Medical School having been previously rejected. American Medical College Application Service Bulletin for 1976-77 states, as follows, at p. 18:

> In general, applicants who reapply with credentials

essentially unchanged from those of a previous attempt will not secure a place in a first year class.

The stark reality of the Medical School Admissions process is that being denied admission forces the applicant to make alternative lifetime career plans.

Preferential admissions policies based on a racial quota clearly foreclose highly qualified applicants, such as respondent Bakke, from ever obtaining Medical School education. From the applicants' viewpoint, such programs represent discrimination invidious to them, on the sole basis of race.

C. Special Privileges and Immunities Accorded to Some Applicants, Denied Plaintiff the Equal Protection of the Laws

It is undisputed that special privileges were accorded certain racial and ethnic groups for admission to Davis Medical School which were not granted to plaintiff.

For example: "disadvantaged minorities" were not even directly compared with "non-minority" applicants, for admission. The State Supreme Court of California stated in *Bakke*, its opinion, 132 Cal.3d 680; 553 P.2d 1152 (1977) at 1161 as follows:

> Of the 100 admission opportunities available in each year's class, 16 are set aside for disadvantaged minorities, and the Committee admits applicants who fall into this category until the 16 places are filled. Since the pool of applicants available in the year is limited it is obvious that this procedure may result in acceptance of minority students whose qualifications for medical study, under the standards adopted by the University itself, are inferior to those of some white applicants who are rejected.

The court went on to state:

> The rating of some students admitted under the special

> program in 1973 and 1974 was as much as 30 points below that assigned to Bakke and other non-minority applicants denied admission. Furthermore, white applicants in the general admission program with a grade point average below 2.5 were, for that reason alone, summarily denied admission, whereas some minority students in the special admission program were admitted with grade point averages considerably below 2.5.

Apparently petitioner is torn between achieving proportional representation and maintaining some semblance of standards for admission as their brief indicates on p. 47 minorities constitute 25% of the population of California and yet comprise 15% to 16% of the Davis Medical School admittees.

As stated in the brief of petitioner, numbers are not the primary issue but rather whether the school may arbitrarily use race as a means of making certain scarce resources available to some individuals and thus denying them to others on the sole basis of race. This court in the case of *Adickes v. S.H. Kress Co., supra,* stated:

> Few principles of law are more firmly stitched into our constitutional fabric than the proposition that a State may not discriminate against a person because of his race, or the race of his companions . . .

Affirmative action programs pose tremendous difficulties, conceptionally, contractually and constitutionally. They are in direct contradiction to the literal interpretation of laws of non-discrimination. Not one of the amici nor any of the parties denies that ideally racial discrimination should not exist. A man should be judged not on the basis of his skin color, the country of his origin or his religion, but rather as an individual. Rather than accept the above view, petitioner apparently views applicants as either a minority or a

member of the "white majority". Davis Medical School fails to consider the tremendous individual injury sustained by a highly qualified white applicant who is rejected. It is no consolation emotionally or to his constitutional rights that, his "race" is still represented.

Petitioner's position is unfounded on two counts: First, it assumes the majority group is monolithic, when in fact it is pluralistic (see Lavinsky, DeFunis Symposium, (1975) 75 Columbia L. Rev. 520 at 527). Jews, Poles, Italians, Japanese, Chinese, are all a part of the "majority" now. These dissimiliar groups have each endured past discrimination. Who but the most sheltered could avoid hearing words such as Kike, Dago, Wop, Polack, Chink, Shanty Irish, and Jap. Yet what protection or special treatment is accorded these groups who have in the past and still suffer the effects of overt discrimination?

Petitioner contends that the "majority" has greater access to the political process than its preferred minorities. The average white has no more access to the political process than the average Black, or the average Chicano. It may be that he has less since being white rarely carries with it membership in any identifiable interest group. No "white majority" exists. It's a myth that should not be perpetuated. Respondent had no special access into the political process but rather went to the courts just as blacks, chicanos, and native americans have done to protect his or her *individual* rights.

D. Whites, Blacks, Chicanos, Asians and All Other Americans Have the Right to Be Protected From Unlawful Discrimination on Account of Race, Creed or Color

In *Peters v. Kiff*, 407 U.S. 493, 33 L. Ed. 2d 83, 92 S. Ct. 2163 (1972) this court held a white criminal defendant was entitled to challenge the systematic exclusion of Negroes from jury service in Muscogee County, Georgia. And in *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 34 L. Ed. 2d 415, 93 S. Ct. 364 (1972) this court held a white tenant had standing to sue to desegregate the apartment complex he lived in. A recent case, *McDonald v. Sante Fe Trail Transportation Co., (and Teamsters Local 988)*, 49 L. Ed. 2d 493, (Advance No. 2, August 20, 1976) held where two white employees charged with misappropriating property from their employer were dismissed while a black employee, similarly charged was not, such conduct constituted discrimination and violated Title VII of the Civil Rights Act of 1964. The court specifically held that 42 USCA §1981 which grants to "all persons" the same right to make, and enforce, contracts "as is enjoyed by White citizens", protected White citizens as well as Blacks. The opinion states at p. 49 L.Ed. at 502:

> Fairly read, the complaint asserted that the petitioners were discharged for their alleged participation in the misappropriation of cargo entrusted to Sante Fe but that a fellow employee, likewise implicated, was not so disciplined, and that the reason for the discrepancy in discipline was that the favored employee is Negro while petitioners are White. See *Conley v. Gibson*, 355 U.S. 41, 45-46, 2 L. Ed 2d 80 (1957). While Sante Fe may decide that participation in theft of cargo may render an employee unqualified for employment, this criteria must be 'applied alike to all members of all races', and Title VII is violated if as petitioners allege it was not.

Not only are the Civil Rights Acts applicable to whites as well as blacks, but also is the 14th Amendment. Although it has been argued that the 14th Amendment's protection was designed to remedy discrimination against Negroes' such arguments have been discredited time and time again by the application of the 14th Amendment to every kind of claimant, including corporations. For example, *Smith v. Cahoon,* 283 U.S. 553, 75 L. Ed. 1264 (1931); *Kentucky Finance Corp. v. Paramount Auto Exchange Corp.,* 252 U.S. 544, 67 L. Ed. 1112 (1923); *Hines v. Davidowitz,* 312 U.S. 52, 85 L. Ed. 581 (1941); *Skinner v. Oklahoma,* 316 U.S. 535, 86 L. Ed. 1655 (1942); *Lewis K. Lidgett Co. v. Baldridge,* 278 U.S. 105, 73 L. Ed. 204 (1928); *Takahashi v. Fish & Game Commission,* 334 U.S. 410, 92 L. Ed. 1478 (1948).

That plaintiff/respondent may be of the white race bears no more on his access to protection from discrimination than if he were black, yellow, or even green. Davis Medical School in attempting to discriminate "a little" against whites has discriminated severely against Mr. Bakke and is subject to all the restrictions against racial discrimination.

E. Equal Treatment Under Law Has Been the Evolving Concept of the 14th Amendment's Equal Protection Clause

Plessy v. Ferguson, 163 U.S. 537, was decided in 1896. The Supreme Court upheld Jim Crow segregation laws and espoused the "separate but equal" doctrine. Although the doctrine itself has been justly criticized, the grievious wrong that occurred was that the "equal" part of the doctrine was never enforced, only segregation was.

It slowly became recognized that legal separation of races fostered the notion of inequality and second class citizenship. In *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938), this court held the fact that refusal by Missouri to admit plaintiff, a black student, was a violation of the equal protection clause since he could not obtain his legal education from the State of Missouri which had but one all white law school. Even though plaintiff could obtain his legal education in another State and could obtain a scholarship, the court held that was not equality.

Sipuel v. Board of Regents, 332 U.S. 631 (1948) held that the equal protection clause of the 14th Amendment of the United States Constitution was violated by the fact that blacks were prohibited from attending the all white law school and there were no black facilities in the State. *Sweet v. Painter*, 339 U.S. 629 (1958) held that the black plaintiff's constitutional right to equal protection of the laws was violated by Texas denying him admission to its all white law school and construed the separate but equal doctrine strictly by finding facilities for blacks and whites were not equal.

On the same day, *McLaurin v. Oklahoma State Regents*, 339 U.S. 629 (1950) was decided and the "separate but equal" doctrine was further developed to require equality in all institutional areas which are part of a broader educational process, such that there would be no special seats reserved for blacks only, no separate cafeteria lines, etc.

The decisions grounded an awareness that artificial barriers to obtaining an education were unconstitutional and in violation of the equal protection clause.

In *Brown v. The Board of Education*, 374 U.S. 483, 74

S. Ct. 686, 98 L. Ed. 873 (1954), the separate but equal doctrine was rejected and the court focused on the fact that artificial separation of children from others of similar age and qualification solely because of their race engenders feelings of inferiority in the segregated children. The court pondered the effect of segregation on the hearts and minds of the young Negro children and doubted that it could ever be undone. Overruling *Plessy v. Ferguson, supra,* the court held *de jure'* segregation in public schools a violation of the equal protection clause. *Brown* culminated a changing value structure where neutral equality as opposed to race conscious equality has taken precedence and controls today.

F. It Is Clear That a State Cannot Function Without Legislatively Classifying Persons Within Its Jurisdiction for Various Purposes and Treating Some Different From Others. That Necessity Does Not Prevent Challenge When the Classifications Go Awry of the Constitution

Any state classification is subject to challenge in denying the group subjected to the classification the equal protection of the laws. A class or classification may be irrational, over inclusive or underinclusive or may invade a constitutionally protected right or be based on criteria which are constitutionally suspect.

G. Racial Classifications Are Suspect and Presumed Unconstitutional Whether Negative or Affirmative

If based upon suspect criteria, a classification must be supported by a finding of a compelling state interest to sustain it, *Koramatsu v. United States,* 323 U.S. 214 (1944), *Brown v. Board of Education, supra.* Racial classifications or ethnic classifications fall into this category

as being constitutionally suspect. This is so whether they are negative or they are affirmative in intent. (*See Anderson v. San Francisco School Dist.*, 357 F. Supp. 248 (1972) and *Pennsylvania v. Glickman*, 370 F. Supp. 724 (1974) (D.C. W.D. PA)). *Loving v. Virginia*, 388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1018, (1967), established doctrine that a racial classification imposed by official State sources is presumed to be invalid under the equal protection clause.

> We deal here with a classification based upon the race of the participants, which must be viewed in light of the historical fact the central purpose of the 14th Amendment was to eliminate racial discrimination emaninating from official sources in the State. This strong policy renders racial classifications 'constitutionally suspect, *Bolling v. Sharp*, 347 U.S. 497; and subject to the most rigid scrutiny, *Koramatsu v. U.S.*, 323 U.S. 214, 216; and 'in most circumstances irrelevant' to any constitutionally acceptable legislative purpose. *Hairabayeshi v. U.S.*, 320 U.S. 81, 100. *McLaughlin v. Florida*, 379 U.S. 184, 191, 192).

The court in *Shelley v. Kramer*, 334 U.S. 1, at 22 (1948), stated:

> Equal protection under the laws is not achieved through indiscriminate imposition of inequalities.

Strauder v. West Virginia, 100 U.S. 303 (1880) shows the court's concern against racial classifications dates back to the passage of the 14th Amendment.

> If in those states where the colored people constitute a majority of the entire population, a law should be enacted excluding all White men from jury service, . . . we apprehend no one would be erred to claim that it would not be a denial to White men of the equal protection of the laws. Nor, if a law was passed excluding all naturalized Celtic Irishmen, would there be any doubt of its inconsistency with the spirit of the amendment.

Although racial classifications are subjected to strict scrutiny by the courts; when quotas are involved, an even greater standard of scrutiny should be applied, as quotas are diametrically in opposition to the concept of individual merit and freedom of choice. Here only the *most* compelling of interests should be permitted as justification.

The only decisions of the United States Supreme Court to uphold classifications based on race were the cases of *Koramatsu v. United States, supra,* and *Hirabayashi v. United States,* 320 U.S. 81 (1943) *supra.* These cases were a product of the World War II internment of Japanese-American citizens and were justified only on the grounds of essential national security of the State. Furthermore, those cases have been subjected to adverse criticism of both legal and popular nature.

The Washington State Supreme Court in *DeFunis v. Odegaard,* 82 Wn.2d 11, 507 P.2d 1169 (1973) vacated as moot 416 U.S. 312 (1974) held that there was a compelling state interest to justify the State Law School's use of a racial classification to grant preferences to blacks and other minorities for admission. Yet, the same Washington court has revealed an inconsistency in *Puget Sound Gillnetters v. Moos,* 88 Wn.2d 677, ... P.2d ...., (Adv. No. 12, July 1, 1977) where it indicated that racial classification of Indian and non-Indian fishermen was not proper and that the equal protection clause prevented the State Dept. of Fisheries from giving the Indians any special privileges on account of race. The court stated at 684 as follows:

> But were we to assume that the Department of Fisheries has the authority to adopt regulations designed for the purpose of allocating fish among competing claimants, we would be confronted by constitutional provisions which stand in the way of its doing so in a

manner which discriminates among fishermen of the same class.

> Since Indians are citizens of the United States and of this state—and not citizens of a foreign power—they are subject to the constitutions of these governments. The restrictions which these documents place upon governmental action apply to actions taken with regard to these citizens. Thus, they can neither be denied equal protection of the laws nor granted special privileges and immunities. Classification which distinguishes between commercial and noncommercial fishermen has a reasonable basis in fact, which is related to the legitimate governmental purposes of conservation and promotion of the economic welfare of the state. *Distinctions between fishermen based upon their race or ethnic background are not proper.* Treaties protecting Indian rights in the state's natural resources should be read so as to harmonize their provisions with constitutional mandates if this can reasonably be done. We think the construction which this court placed upon the words "in common with" in the case of *Department of Game v. Puyallup Tribe, Inc.*, 86 Wn.2d 664, 548 P.2d 1058 (1976), achieves this purpose, and accords with the intent expressed in the treaties. (Emphasis supplied)

It is contended that there is no compelling State interest shown here by the Davis Medical School to be sufficient to justify its use of a racial quota in selecting first year medical school students.

It has been contended that although the admissions program at the University of California involves discrimination on the basis of race, such discrimination is not invidious and therefore is not constitutionally suspect. This argument focuses on those minority group members who have received preferential treatment, not the individual who is discriminated against by that treatment.

The rights guaranteed by the 14th Amendment are per-

sonal to the individual. The United States Supreme Court in *Shelley v. Kramer,* 334 U.S. 1, 22, aid:

> The rights created by the first section of the 14th Amendment are by its terms guaranteed to the individual. The rights established are personal rights.

The racial quota which resulted in Mr. Bakke's denial of admission was discrimination which was not benign insofar as he was concerned. The court below stated as follows at 553 P.2d 1152:

> That Whites suffer a grievous disadvantage by reason of their exclusion from the University on racial grounds is abundantly clear. The fact that they are not also invidiously discriminated against in the sense that a stigma is cast upon them because of their race, as is often the case when discriminatory conduct is directed toward a minority, does not justify the conclusion that race is a suspect classification only if the consequences of the classification are detrimental to the minorities.

Swan v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 91 S. Ct. 1267, 28 L. Ed. 2d 554 (1971) and the line of federal court cases approving racial classifications to integrate public schools are distinguishable from this present case, as they deal only with the mixing of races. They involve a situation where the State has undertaken a *duty* to provide education for all its children and to equalize the education that they are providing them. The courts have sanctioned the mixing of races in the public schools. In those cases there was no merit selection of whites or blacks but rather there was only an across the board *requirement* to education and to educate equally without preference by race.

Some employment cases under the Civil Rights Act of 1964 (42 USC, §2000E, et seq.) have indicated racial classifications are permissible. Although many of those cases

have upheld the right of minorities to certain preferences in employment, those cases have by and large been based on a finding that the defendant had practiced discrimination in the past and that the preferential treatment of minorities was necessary to grant them the opportunity for equality, which would have been theirs but for the past discriminatory conduct.

The court below at 1168, has interpreted the line of cases to read that:

> Absent finding of past discrimination—and thus the need for remedial measures to compensate minorities for the prior discriminatory practices of the employer —the federal courts, with one exception, have held that the preferential treatment of minorities in employment is invalid on the ground that it deprives a member of the majority of the benefit because of his race. (*Chance v. Board of Examiners*, 2d Cir. 1976, 44 Law Week 2343; *Kirkland v. New York State Dept. of Correctional Serv.*, 2d Cir. 1975, 525 F.2d 420 . . .

The employment cases are also distinguishable to the extent employment is open ended while denial to admission to Medical School effectively forecloses an individual from ever entering that profession which substantially increases the harm to the affected applicant.

The petitioner and some amici argue that past discrimination has created self-perpetuating underclasses in society. These underclasses have been ferreted out and labeled Blacks, Chicanos, American-Indians, and Asian-Americans. They argue that the State has power to benignly discriminate in their favor at the expense of all other members of society. This they contend does not violate any concepts of equality, but actually only serves to further the cause of equality. From the point of view of the rejected applicant,

the Davis Medical School seems to be offering Orwell's *Animal Farm* equality where all people are equal in the eyes of the law, but some are more equal than are others.

H. Racial Criteria Are Per Se Suspect and Are Subject to Strict Judicial Scrutiny. No Intermediate Standard of Review Is or Should Be Used

Alevy v. Downstate Medical Center, 39 N.Y.2d 326, 348 N.E.2d 537, 384 N.Y.S. 82 (1976), is cited by petitioner for the application of a "substantial interest test" to determine whether a racial quota on admissions to Medical School is constitutional. The test is found in dictum in *Alevy* as the rejected applicant there would not have been admitted to Medical School even if there was no affirmative action program. The test is stated in *Alevy* as follows:

> In proper circumstances reverse discrimination is constitutional. However, to be so, it must be shown that a substantial interest underlies the policy and practice and further, that no non-racial or objectionable racial classification will serve the same purpose.

This "substantial interest test", is alleged to be less strict than the compelling State interest test but stronger than the rational basis test. Exactly, where this test lies is hard to tell except that it is sufficiently lenient to permit reverse racial discrimination. The *Alevy* test provides no protection at all for the person who is not included in the minority group. It permits some to be more equal than others before the law, apparently if an administrative State agency feels that it is important. The substantial interest test really covers up the constitutional issue of whether or not reverse discrimination violates the equal protection clause of the 14th Amendment. What the *Alevy court* has done is to assume that reverse discrimination is constitutional, prepare a standard of re-

view that would insure it to be constitutional, and then apply that standard of review. One would hardly be amazed therefore to find reverse discrimination being held constitutional.

Justice Douglas in his dissent in *DeFunis v. Odegaard,* 416 U.S. 312, 40 L. Ed. 2d 164 (1974), stated his abhorrence to racial criteria in the selection of students to law school. His remarks have application to any situation where qualifications and competency are at odds with race in a closed or semi-closed environment, such as this present case. Justice Douglas stated:

> Consideration of race as a measure of an applicants qualifications normally introduces a capricious and irrelevant factor working an invidious discrimination. *Anderson v. Martin,* 375 U.S. 399, 402, 11 L. Ed. 2d 430, 84 S. Ct. 454; *Loving v. Virginia,* 388 U.S. 1, page 10; 18 L. Ed. 2d 1010, 87 S. Ct. 1817, *Harper v. Virginia Board of Elections,* 383 U.S. 663, 16 L. Ed. 2d 169, 86 S. Ct. 1079. Once race is a starting point, educators and courts are immediately embroiled in competing claims of different racial and ethnic groups that would make difficult, manageable standards consistent with the equal protection clause." . . .

Justice Douglas stated in *DeFunis* at 40 L. Ed. 2d 178:

> A finding that the state school employed a racial classification in selecting its students subjects it to the strictest scrutiny under the equal protection clause.

Justice Douglas saw the critical importance of avoiding racial classifications in selecting students for medical school, law school, and higher education in general.

Justice Douglas elaborated on his concern in *DeFunis,* 40 L. Ed. 2d 180, as follows:

> There is no constitutional right for any race to be preferred . . .

> There is no superior person by constitutional standards . . .
>
> Whatever his race, he had a constitutional right to have his application considered on its individual merits in a racially neutral manner.

Justice Douglas' dissent in *DeFunis, supra,* at 181, describes the invidious nature and difficulties that result from using racial labels and quotas as follows:

> The reservation of a proportion of the law school class for members of selected minority groups is fraught with similar dangers, for one must immediately determine which groups are to receive such favored treatment and which are to be excluded, the proportions of the class that are to be allocated to each, and even the criteria by which to determine whether individuals are members of a favored group. There is no assurance that a common agreement can be reached, and first the schools, and then the courts, will be buffeted with competing claims. . . . It may well be that racial strains, racial susceptibility to diseases, racial sensitiveness to environmental conditions that other races do not experience, may in the extreme situation justify differences in racial treatment that no fair-minded person would call "invidious" discrimination. Mental ability is not in that category. All races can compete fairly at all professional levels. So far as race is concerned, any state sponsored preference to one race over another in that competition is, in my view, "invidious" and violative of the equal protection clause.

No lesser standard of review is called for by Justice Douglas and his remarks are clearly applicable to the case at hand.

Here, unlike the case of *United Jewish Organization v. Cary,* .... U.S. ...., 51 L. Ed. 2d 229, 97 S. Ct. 996 (1977), where no showing was made that reapprotionment and reorganization of legislative districts preferred one race

over another or had any deleterious effect on white voting strength, the facts here involve respondents exclusion from attendance at Medical School even though he was better qualified than certain minority members who were admitted. Where a school lowers standards for admission to minorities on the basis of their race, its action implies unequivocally, that as a group, certain minorities are not up to the capacity of whites and must be compared on a different basis. As Justice Douglas stated in *DeFunis, supra* at 184:

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

Flaherty and Sheard, "*DeFunis, the Equal Protection Dilemma: Affirmative Action Quotas,* 12 Duquesne L. Rev. 745 at p. 785, present a development of the "affirmative action reasoning carried out a few steps further and present a rather unsettling scenerio as follows:

> The unfortunate aspect of any government sponsored benefit program is the natural tendency of everyone to demand benefits from the largesse. No doubt every racial and ethnic group can find some disadvantage, organize, and then demonstrate for recognition. Political expediency will require the acceptance of those demands, and the granting of appropriate benefits based on that discrimination. If the legislatures do not act, the court must act. And so, the list will grow . . For 20 years (governmental units) have attempted to remedy the racial-ethnic wrongs and make restitution to the extent that government can. They have, however, stopped short of the goal by limitation of the groups to only the very obvious. If we continue to apply the test, they would have found many other

group disadvantage situations on a local or a national scale. Every state or city has groups of citizens in disadvantaged pockets which are readily identifiable by race, culture, or national origin—ethnics. Now, to provide equal protection of the laws, one of the most basic of the democratic tenets, and to maintain consistency, the test must be applied to all races and all ethnics, if it is to be applied at all . . . Then the more serious problem is inevitable. As each new group is added to the preferential minorities list, the non-preferential ethnics will have their share of educational and employment opportunities decreased, which in turn will stimulate them to get on the others' (priorities') lists.

The next step is political. Once any ethnic group has organized and shown its qualifications, politics would require governmental acceptance of this new group. What political candidate of the future would dare to follow the usual practice of whirlwind tours through the ethnic neighborhoods, eating their kielbasi, pizza, strudels, or stuffed cabbage in return for their votes, without a promise of equality of treatment for that ethnic group. Carrying out such promises can only be done by specific legislative enactment. Vote swapping and horse trading will produce the appropriate legislation. Either ethnics will be added, or the programs will terminate. The latter is politically inexpedient—rather, political suicide. So the list grows.

Obviously, it is only a question of time before everyone will declare an ethnic identity in order to get priorities. Within a very short period the only group without priorities will be the WASP's, who by then should be sufficiently *legally* disadvantaged to qualify as members of a legally disadvantaged minority group, so they too, will be finally declared a disadvantaged minority. The effective result here will be that 100 per cent of the population will eventually belong to the priority group. At this stage, priorities will no longer resolve the problems of the disadvantaged, as priorities for all are no longer priorities. Another more permanent remedy will have to be found. The govern-

ment must either abandon the whole program of priorities or adopt a formal racial-ethnic quota program.

Such a spectre is self-defeating, divisive of society and contrary to the concept of individual liberty, that we should be judged and rewarded not for what our color or our race or ethnic group is, but for ourselves and our individual merit. To avoid this spectre, race or ethnicity cannot be used as the criteria for the disbursement of public benefits. Neutral criteria, based on individual merit, are the only acceptable alternatives.

I. Davis Medical School Has Not Attempted Alternatives and Thus Even Should Less Scrutiny Be Applied Its Racial Quota Program Fails

Davis Medical School has reserved 16 seats for "disadvantaged minorities". No white person can qualify even though he be a member of a "disadvantaged" group. No alternative measures were attempted to select applicants by neutral or non-racial criteria applied fairly. Rather Davis Medical School argues in its brief at p. 37 that neutral measures are inadequate. Petitioner's program gives no special consideration to a poor White Child, who had divorced parents, lived on welfare, went to a ghetto school, and suffers all the indignities associated with poverty but would consider a black applicant who had endured some disadvantage even though that disadvantage was far less severe. Such a program is patently unfair.

Davis Medical School has not attempted to use disadvantage, alone or in conjunction with other neutral criteria to select its applicants, but shrugs its shoulders in a state of what it believes to be hopelessness, without making the effort.

If the comparative disadvantage of applicants is not applied across the board, one will end up in future years with a Medical School class composed of advantaged whites and disadvantaged minorities. Leaving disadvantaged whites in a hopeless position forever prevented from entering Medical School.

Alternatives to racial quotas such as increased recruiting efforts are also dismissed by Davis Medical School as insufficient. They argue that recruiting efforts have gone on for several years apparently without much success. One must thus question either the quality of the recruiting effort or the desire of the minority college graduates to enter medicine. In evaluating recruiting efforts one must take cognizance of the fact that there are other professions and vocations which offer substantial remuneration and which require a shorter period of time to enter and to gain financial reward. Top minority college graduates may well be drawn away from medicine, law and other graduate education by the ability to achieve greater and earlier success in other market places.

Medical School admissions criteria for many years have included the medical college admissions test (MCAT) as well as the undergraduate record. These criteria have been challenged as being less relevant for certain ethnic minorities such as Blacks, Chicanos and American Indians. The medical college admissions test has been particularly criticized. For example the final report of the American Medical College National Task Force, September 1973 states:

> In addition, the MCAT has been criticized as being culturally biased, particularly against racial and ethnic minorities students, and as over emphasizing detailed factual information rather than principles and concepts.

There are the studies which indicate the examination does have value at least insofar as predicting the minority students' success in pre-clinical programs. See Evans, Worstman, & Jackson, *Traditional Criteria as Predictors of Minority Students Success in Medical School,* Vol. 50, Journal of Medical Education, October 1975. Nevertheless, even should the MCAT be "culturally biased" the answer is not racial quotas but rather development of a better test and a more developed admissions process which better considers the various pertinent factors.

Special high school and college remedial programs sponsored by medical schools are another alternative whereby the students with the deprived educational background could receive extra tutoring and take additional classes to make up for those defects in the background.

The court below was sensitive to the wide variety of alternatives available to Davis Medical School and without prescribing particular alternatives, ruled that the petitioner's choice of racial quotas was constitutionally unacceptable.

J. The Court Need Not Reach the Constitutional Issue, as Federal Statute, 42 USC §1981 Prohibits Petitioner From Discriminating Against Respondent on the Basis of Race and Compels His Admission to Medical School

42 USC §1981 protects Allan Bakke from unlawful discrimination practiced on him by the University of California Medical School at Davis. The statute reads in pertinent part as follows:

> All persons within the jurisdiction of the United States shall have the same right in every State or territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all

> laws and proceedings for the security of persons and property as enjoyed by White citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 USCA §1981 is a codification of the century old Civil Rights Act of 1866 reinacted in 1870, 16 Stat. 44. On its face it relates primarily to racial discrimination in making and enforcement of contracts. Respondent, Allen Bakke, sought to enter into a contract for attendance at the Davis Medical School. The Medical School refused to enter into the relationship with defendant Bakke because of his race. This triggers application of §1981.

Racially, this present appeal presents the flip side of a recent case before this court entitled *Runyon v. McCrary,* ..... U.S. ....., 96 S. Ct. 2586, 49 L. Ed. 415 (1976). *Runyon,* held that parents of black children had a cause of action against private white schools which denied their children admission because of race and that private as well as public action can be subject to §1981 suits. The court relied on *Jones v. Alfred H. Mayer,* 392 U.S. 409, 88 S. Ct. 2186, 2204-2205, 21 L. Ed. 2d 1189 (1968), which dealt with §1982 but relied on the same analysis of legislative history as §1981 and §1982 are both codified from Section 1 of the Civil Rights Act of 1870.

In *Runyon, supra,* the court stated:

> A Negro's Section 1 right to make and enforce contracts is violated if a private owner or operator refuses to extend to a Negro, solely because he is a Negro, the same opportunity to enter into contracts as he extends to White offerees.

McDonald v. Santa Fe Trail Transportation Co., supra, held that §1981 was intended to prohibit discrimination against all races not just blacks. This court stated:

> First, we cannot accept the view that the terms of §1981 excluded application to racial discrimination against White persons. On the contrary, the statute explicity applies to "*all* persons" including White persons. (Emphasis supplied)

Although this court in Footnote 8 at 96 S. Ct. 2578, stated that Santa Fe disclaimed that the actions complained of were part of an affirmative action program and that the court did not consider the permissibility of such a program, the principles embodied in the court's opinion have full force and impact on this case where 16 seats were specifically reserved for "disadvantaged minorities".

No history of past discrimination was shown by the Davis Medical School, and no judicial decree required remedial measures to be taken. Rather, a racial quota was established to fulfill the desire of the faculty of Davis to have an integrated student body.

It must be obvious that discrimination endured by respondent Bakke is no less discrimination because he is white. The effect of that discrimination on him as an individual is just as agonizing and debilitating as if he were black. Although the drafters of the Act of 1870 probably never imagined such discrimination could take place, there is little doubt that their Act protects against it.

Application of 42 USC §1981 to *Bakke* serves to strike down its affirmative action quota without resort to the Fourteenth Amendment of the United States Constitution.

CONCLUSION

Professor Lino A. Graglia's article "Special Admission of the 'Culturally Deprived' to Lawschool" 119 Penn. L. Rev. 351 at p. 352 encapsulates the objections to "reverse discrimination" as follows:

> That unjust societally imposed disadvantages—such as those imposed by reason of race—should be not only removed but also compensated for is, I believe, entirely sound. I am disturbed, however, that this should itself be attempted by means of racial or ethnic discrimination. Discrimination in favor of some racial or ethnic groups necessarily is or appears to be discrimination against others. Perhaps discrimination in favor of a minority can be distinguished from discrimination against a minority, but America consists of minorities and I fear the claims that could be made or conditions justified if this distinction should be generally accepted. True and complete elimination of racial discrimination is as close as I had hoped to see the approach of the millenium. Societally approved racial discrimination even as a temporary expedient to rectify past racial discrimination, dilutes the purity of that goal and undermines our most basic ideal that individual merit and individual need should be the only relevant considerations for societally distributed rewards and benefits.

The judgment of the court below should be affirmed.

Respectfully submitted,

FELIX & ZIMMAR, INC., P.S.
By JENNINGS P. FELIX
MARCO DE FUNIS
Counsel for Amicus Curiae