IN THE

Supreme Court of the United States

October Term, 1977

No. 76-811

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, *Petitioner,*

v.

ALLAN BAKKE, *Respondent.*

On Writ of Certiorari to the Supreme Court of California

BRIEF OF AMERICAN JEWISH COMMITTEE, AMERICAN JEWISH CONGRESS, HELLENIC BAR ASSOCIATION OF ILLINOIS, ITALIAN-AMERICAN FOUNDATION, POLISH AMERICAN AFFAIRS COUNCIL, POLISH AMERICAN EDUCATORS ASSOCIATION, UKRAINIAN CONGRESS COMMITTEE OF AMERICA (CHICAGO DIVISION) AND UNICO NATIONAL, *AMICI CURIAE*

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

Cases:

Statutes:

Executive Order:

Other Authorities:

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This brief is submitted with the consent of the parties.

Statement of the Case

1. Introduction

In 1973 and again in 1974, respondent Allan Bakke, applied for and was denied admission to the recently established Medical School of the University of California at Davis ("the Medical School"). Bakke thereafter brought suit, claiming that he had been denied admission solely by reason of his race. The Regents of the University of California ("the University"), on behalf of the Medical School, denied Bakke's claims and filed a cross-complaint for a declaratory judgment that the admissions policy of the Medical School was lawful.

The trial court found that the Medical School's admissions policy, through its special admissions program, utilized a racial quota and had discriminated against Bakke because of his race. It enjoined the Medical School from considering respondent's "race or that of any other applicant in passing upon his application for admission." The trial court also determined that Bakke had not carried the burden of proving that he would have been admitted had the Medical School not discriminated, and denied that part of his petition seeking an injunction ordering his admission.

The University appealed the trial court's holding that the Medical School's admissions policy was unconstitutional and Bakke appealed the trial court's denial of an order requiring his admission. On September 26, 1976, the Supreme Court of California, with one judge dissenting, affirmed the trial court's judgment that the Medical School's admissions policy violated the Equal Protection Clause of the Fourteenth Amendment. It also reversed

the trial court's denial of an injunction to Bakke, finding that it had improperly allocated the burden of proof.

The University sought rehearing and a stay of enforcement of the decision. In that application, it conceded that, given Bakke's high rating in the admissions process, it would be unable to sustain its burden of proof that Bakke would not have been admitted even if there had been no special admissions program for minority applicants. The California Supreme Court denied a stay or rehearing and modified its initial opinion to direct that Bakke be admitted.

On February 22, 1977, this Court granted certiorari.

2. The Medical School's Admissions Policy

The Medical School at the University of California at Davis opened in 1968. In its first year, it accepted 50 students. Of the 564 who applied, 22 were classified according to the University's records as minority applicants, and three were accepted.[1] The following year, 34 minority applicants applied and 14 were accepted.[2] The record is silent as to whether the University engaged in or considered any special programs directed toward increasing the number of minority applicants or minority acceptances during these two years. Further, the record is silent as to the breakdown of students in terms of culturally or economically disadvantaged backgrounds. The University thereupon established its special admissions program which program is being challenged by this action.

1. Of the minority applicants, three were blacks, one was Chicano and eighteen were Asians.

2. Two of the six blacks who applied and one of the four Chicanos who applied were accepted.

For 1973 and 1974, there were 100 places in the entering class of the Medical School. Applications for these places were processed under one of two sets of procedures containing separate sets of standards. Applicants processed through the regular admissions program competed for 84 of the places in the entering class. Applicants processed through the special admissions program competed for 16 of the places in the entering class. The faculty by resolution adopted the number 16. The record does not reveal the basis for this choice.

3. The Regular Admissions Program

For the years 1973 and 1974, the University received 2,464 and 3,737 applicants respectively. Over-all grade-point average (OGPA) and scores on the Medical College Admissions Test (MCAT) were the major factors considered for admission. An applicant with an over-all grade point average below 2.5 on a scale of 4.0 was summarily rejected. Those applicants with higher averages were evaluated and some were selected for interviews.

In 1973, applicants invited for interviews were interviewed by a faculty member of the Admissions Committee. In 1974, a student member of the Committee also interviewed applicants. Following the interview, each applicant was rated. The ratings considered the applicant's overall grade-point average, his grade-point average in science courses ("SGPA"), his medical admissions test scores, his letters of recommendation, and the interviewers' evaluations. The ratings were then ranked and letters of acceptance were sent out based primarily upon this ranking.

4. The Special Admissions Program

The special admissions program was implemented in 1969, purportedly to increase the number of disadvantaged students attending the University. In fact, it was open only to members of stated racial and ethnic minority groups. No whites were admitted under this program.[3] A special subcommittee composed of faculty members primarily from minority backgrounds and students entirely from minority backgrounds were responsible for processing such applicants.

In 1973, the practice was for applicants to indicate on their application form whether they wanted to be considered by a special committee as "economically or educationally disadvantaged." The form did not define this formula and the University never reduced any definition of the phrase to writing. On the 1974 application form, prepared by the American Medical College Application Service, applicants, in addition to being asked if they wished to be considered minority applicants, were asked to describe themselves as "Black/Afro-American, American Indian, White/Caucasian, Mexican/American or Chicano, Oriental/Asian American, Puerto Rican (Mainland), Puerto Rican (Commonwealth), Cuban or other."[4] Invitations were then extended to such applicants for interviews by the subcom-

3. For the years 1971 through 1974, 272 white applicants applied who were regarded by the University as disadvantaged.

4. Apparently, the University did not keep statistics keyed to the application forms. Rather, applications and acceptances were kept for 1973 and 1974 in categories of "Black, Chicano, White Economic Disadvantaged, American Indian and Asian." It would appear from these statistics that either no Puerto Ricans or Cubans applied or that they were not considered by the University as minority applicants.

mittee without regard to the 2.5 summary rejection standard applicable to those applying under the general admissions program.

Following the interviews, the subcommittee rated its special applicants and made recommendations to the full Admissions Committee. The Admissions Committee generally followed the subcommittee's recommendations. The subcommittee continued to make recommendations until all 16 places reserved for minority applicants were filled.

For 1973, students were admitted under the special program with overall grade-point averages as low as 2.11. In 1974, the low was 2.21. These figures wese substantially below the figures applicable to those admitted under the regular program and even well below the summary rejection point of 2.5 applicable to those seeking admission under that program.

5. Bakke's Application

In 1973 and 1974, when Bakke submitted his applications for admission to the Medical School, he did not apply for the special admissions program. His overall grade-point (OGPA) average was 3.51 (on a scale of 4.0), with an average of 3.45 in science courses (SGPA). His Medical College Admission Test percentile (MCAT) scores were: Verbal—96%; Quantitative—94%; Science—97%; and General—72%. A comparison between Bakke and those admitted under the regular program and those admitted under the special program is shown by the following chart:

1973

	SGPA	*OGPA*	*MCAT percentile*			
			Verbal	*Quantitative*	*Science*	*General*
Respondent	3.45	3.51	96	94	97	72
Regular Program (Average)	3.51	3.49	81	76	83	69
Regular Program (Range)	2.57 to 4.00	2.81 to 3.99				
Special Program (Average)	2.62	2.88	46	24	35	33
Special Program (Range)	2.11 to 2.93	2.11 to 3.76				

1974

	SGPA	*OGPA*	*MCAT percentile*			
			Verbal	*Quantitative*	*Science*	*General*
Respondent	3.45	3.51	96	94	97	72
Regular Program (Average)	3.36	3.29	69	67	82	72
Regular Program (Range)	2.50 to 4.00	2.79 to 4.00				
Special Program (Average)	2.42	2.62	34	30	37	18
Special Program (Range)	2.20 to 3.89	2.21 to 3.45				

In 1973, Bakke's interviewer stated that Bakke must be considered a "very desirable applicant." He was nonetheless rejected and was again rejected in 1974.[5]

Question to Which This Brief Is Addressed

Is petitioner's special admission quota system, which discriminates on the basis of race, violative of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution?

Interest of the *Amici*

The American Jewish Committee is a national organization which was founded in 1906 for the purpose of protecting the civil and religious rights of Jews. It has always been the conviction of this organization that the security and the constitutional rights of American Jews can best be protected by helping to preserve the security and the constitutional rights of all Americans, irrespective of race, creed or national origin, including specifically the right to equal educational opportunity for all individuals.

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5. After the rejection in 1973, Bakke protested the Medical School's admissions policy. In 1974, he was interviewed by Dr. Lowrey, to whom he had written protesting the Medical School's admissions policy. Dr. Lowrey and Bakke discussed among other things the University's quota system. Dr. Lowrey thereupon found that Bakke was "rather limited in his approach" and that he had "very definite opinions which were based more on his personal viewpoint than upon a study of the total problem" (Record on Appeal, page 226. Hereinafter R.) Unlike the other two interviewers, Dr. Lowrey gave Bakke a very low rating. To the extent Bakke's second rejection was predicated upon his political opposition to the University's special admission program, the rejection raises serious First Amendment questions.

The American Jewish Congress is a national organization of American Jews founded in 1918 and concerned with the preservation of the security and constitutional rights of American Jews through preservation of the rights of all Americans. Since its creation, it has vigorously opposed racial and religious discrimination in employment, education, housing and public accommodations and has supported programs which would increase opportunities for disadvantaged minorities to speed the day when all Americans may enjoy full equality without regard to race.

The Hellenic Bar Association of Illinois is an organization of attorneys in that state of Greek extraction or descent. Its essential purpose is to foster better relations between attorneys and the communities which they serve.

The Italian-American Foundation identifies issues and areas of concern that are of interest and affect Italian-Americans in their communities throughout the United States; stimulates and examines issues which emphasize the role of Italian-Americans in government, industry and education-related areas; and develops curricula and materials for use in schools on all levels in the history, experience and contributions to culture of Italian Americans.

The Polish American Affairs Council is an organization in the metropolitan Philadelphia area which works toward the formulation and the implementation of domestic public policy that takes into account the needs and concerns of the Polish American Community on the local, municipal, state and federal levels in both the public and private sectors of society.

The Polish American Educators Association is an organization of those of Polish descent who have an interest in education in order to serve the needs of the members, and the needs of the Polish American community within the framework of American society.

The Ukrainian Congress Committee of America, Chicago Division, is an umbrella organization of all Ukrainian-American civic, church, educational, cultural, sports and youth organizations in the Chicago metropolitan area. The organization represents the interests of the Ukrainian community at the city, state and federal government levels and is also engaged in charitable activities by assisting needy immigrants.

Unico National is a service organization of Italian-Americans with chapters throughout the United States. The primary purposes of this organization are to foster the Italian-American heritage and culture, and to provide needed services for people of all nationalities, races or creeds. During the past few years, Unico National has been seriously engaged in a campaign to alleviate problems due to mental health, as well as Cooley's Anemia, a disease which affects Mediterranean people in particular.

We submit this brief because we believe that our system of constitutional liberties would be gravely undermined if the law were to give sanction to the use of race in the decision-making processes of governmental agencies and because we believe that disadvantaged students can be aided by other procedures that are both constitutional and practical. We believe that petitioner's position would sacrifice

the basic principles of racial equality for expediency and short term advantage. It would use the grossest sort of stereotypes to decide who "deserves" an advantage. The concepts underlying petitioner's position, we believe, are factually, educationally and psychologically unsound, legally and constitutionally erroneous and profoundly damaging to the fabric of American society.

Summary of Argument

I. A. The rights guaranteed by the Equal Protection Clause of the Fourteenth Amendment are individual and personal. The Clause does not create group rights. Hence, the University's refusal to consider respondent's application without regard to his race constituted at least a *prima facie* violation of the Clause.

B. Racial distinctions made by state agencies are presumptively unconstitutional and can be justified, if at all, only by pressing public necessity.

C. The Equal Protection Clause applies to all forms of racial discrimination. There is no basis for any claim that it protects only minorities or that it bars only "invidious" discrimination.

D. The Clause bars racial quotas, no matter how they may be disguised. The decisions of this Court leave no room for imposition of such quotas by state universities.

II. A. Petitioner has failed to show that element of legitimacy, urgency and pressing need that is essential to

nullify the constitutional condemnation of quotas and other racially discriminatory practices.

There is little or no support for, and substantial evidence against, the four assumptions on which petitioner's case is based: (1) that minority applicants have special skills; (2) that the special program will supply needed medical care to minority communities; (3) that the program will increase the awareness of non-minority doctors; and (4) that it will encourage them to locate in minority communities.

Petitioner's argument necessarily means that there is a "proper" proportion of representation of each group in each profession or calling. Acceptance of this concept would profoundly damage the fabric of our society.

Although petitioner asserts that the special program is necessary to undo the effects of past societal discrimination, its program embodies a blunderbuss approach which is not narrowly drawn to achieve a legitimate end. The Constitution gives no warrant for the adoption of such programs by administrative officials, without legislative authority, carefully drawn standards and appropriate limitations on possible abuses.

B. Quotas can be upheld as appropriate only if their harmful effects are ignored. Petitioner's case requires ignoring the injustice done to individuals such as respondent. Its special program benefits many who need no special favors and passes over others who do. It reduces the value of professional education for both majority and minority students.

C. The concept that race is an appropriate qualification for any profession or occupation has been expressly condemned by Congress and by state anti-discrimination agencies.

D. The violation here of Bakke's individual right to equal protection of the laws is clear. The preferential admissions system operated by petitioner can claim fairness only by ignoring how it injures individuals and concentrating on how it affects groups. The Equal Protection Clause does not permit such an approach.

III. Petitioner's legitimate objective can and should be achieved without the use of procedures that make admission depend on race. Barring use of such procedures would not bar consideration of such factors as genuine disadvantage—cultural, educational and economic. It would not bar special procedures designed to seek out disadvantaged applicants or the careful review of admissions procedures to eliminate tests and other factors that may be culturally biased. A school could also take a variety of steps to overcome the effects of educational handicaps.

Petitioner makes no effort to show that such steps have been tried. The record makes it clear that the University moved directly to an admissions procedure that was based on race. Its brief repeatedly draws a false dichotomy between its quota procedure and blind reliance on academic scores. A middle road can and should be explored.

IV. Petitioner's special admissions procedure is not justified by prior decisions of this Court. The decisions which it cites that deal with public school desegregation

are distinguishable both on the ground that all the persons involved in those cases did in fact get a public school education and on the ground that consideration of race was permitted in those cases only to the extent that it was necessary to correct past segregatory practices by the school districts involved. There is no evidence of racial segregation or discrimination by the Medical School. Further, the employment cases relied on all dealt with the correction of past wrongs by the employer involved. And the courts have repeatedly stressed that relief is to be granted only when it cannot be avoided. The cases in other areas cited by petitioner are distinguishable on similar grounds.

ARGUMENT

POINT ONE

Racial discrimination by a government agency can be upheld, if at all, only upon a showing that it was compelled by pressing public necessity.

A. Equal Protection as an Individual Right

It is well settled that the right to equal protection granted by the Fourteenth Amendment is an individual and personal one, not a group right. For example, in *Shelley* v. *Kraemer*, 334 U.S. 1, 22 (1948), this Court said:

> The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights. It is, therefore, no answer to these petitioners to say that the Court may also be induced to deny white persons rights of ownership and occupancy on grounds of race or color. Equal protection of the laws is not achieved through indiscriminate imposition of inequalities.

Other decisions of this Court which have stressed the personal nature of the rights guaranteed by the Equal Protection Clause are *Sweatt* v. *Painter*, 339 U.S. 629, 634 (1950); *McLaurin* v. *Oklahoma State Regents*, 339 U.S. 637, 642 (1950); *Henderson* v. *United States*, 339 U.S. 816, 824, 825 (1950); *Mitchell* v. *United States*, 313 U.S. 80, 97 (1941); and *McCabe* v. *Atchison, Topeka & Santa Fe Railway*, 235 U.S. 151, 161 (1914).

If a given racial group had the constitutional right to membership as a group in the student body of a state

institution, it would necessarily follow that individuals of a different racial background would have to be refused admission. However, although different racial groups in this country may well have different interests, the decisions cited above establish that there is no such thing as a group right under the Fourteenth Amendment. If an individual is denied admission to a state institution even though he is better qualified than other who have been accepted, and if the denial is due to the fact that he is or is not a member of a particular racial or ethnic group, his personal and individual right to be free from discrimination has been infringed. Accordingly, the fact that members of other groups have suffered discrimination in the past is no justification for present discrimination against an individual.

In the instant case, respondent Bakke has been deprived of his constitutional right to be considered for admission to the Medical School as an individual applicant without regard to his race. This, we submit, constitutes at least a *prima facie* violation of his rights under the Equal Protection Clause.

B. The Presumptive Illegality of Racial Discrimination

"[R]acial classifications are 'obviously irrelevant and invidious'." *Goss* v. *Board of Education,* 373 U.S. 683, 687 (1963); *Steele* v. *Louisville & Nashville R. Co.,* 323 U.S. 192, 203 (1944). For this reason, the adoption of such classifications by a state agency is "suspect" and justifiable only by "pressing public necessity." *Korematsu* v. *United States,* 323 U.S. 214, 216 (1944). It bears a "very heavy burden of justification," *Loving* v. *Vir-*

ginia, 388 U.S. 1, 2 (1967), and must be subjected to the "most rigid scrutiny" *Korematsu, supra.* See also *McLaughlin* v. *Florida,* 379 U.S. 184, 191-2, 196 (1964). The weight of the burden laid upon the states under this principle is illuminated by the fact that, except in the Japanese Exclusion cases,[6] handed down during the stresses of a wartime emergency, and in those cases dealing with remedies for past illegal discrimination discussed in Point IV below, this Court has never upheld governmental action which deprived an individual of an opportunity or a benefit on grounds of race or ancestry. We do not believe that petitioner, or the *amici* which have filed briefs in its support, would want this Court to rest a decision on a reaffirmation of the presently dubious authority of the Exclusion Cases.

In *McLaughlin* v. *Florida,* 379 U.S. 184 (1964), which dealt with a cohabitation statute which imposed a greater penalty when the participants were members of different races, this Court said (at 191-2):

> But we deal here with a classification based upon the race of the participants, which must be viewed in light of the historical fact that the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the

6. *Korematsu, supra* and *Hirabayashi* v. *United States,* 320 U.S. 81 (1943), upholding the exclusion of Japanese Americans from large sections of the West Coast, involved a temporary deprivation in time of war and threatened invasion which the Court deemed justified as necessary to meet the danger of sabotage and espionage. Even so, those decisions have been severely criticized on both legal and factual grounds. Ten Broek, Barnhart and Matson, *Prejudice, War and the Constitution,* pp. 308-9, 325-334 (1954); Grodinz, *Americans Betrayed: Politics and the Japanese Evacuation* (1949); Rostow, *The Japanese American Cases—A Disaster,* 54 Yale L.J. 489 (1945).

States. This strong policy renders racial classifications "constitutionally suspect." *Bolling* v. *Sharpe,* 347 U.S. 497, 499, 98 L. ed. 884, 886, 74 S. Ct. 693, and subject to the "most rigid scrutiny," *Korematsu* v. *United States,* 323 U.S. 214, 216, 89 L. ed. 194, 198, 65 S. Ct. 193; and "in most circumstances irrelevant" to any constitutionally acceptable legislative purpose, *Hirabayashi* v. *United States,* 320 U.S. 81, 100, 87 L. ed. 1774, 1786, 63 S. Ct. 1375. Thus it is that racial classifications have been held invalid in a variety of contexts. See, e.g., *Virginia Board of Elections* v. *Hamm,* 379 U.S. 19, 13 L. ed. 2d 91, 85 S. Ct. 157 (designation of race in voting and property records); *Anderson* v. *Martin,* 375 U.S. 399, 84 S. Ct. 454 (designation of race on nomination papers and ballots); *Watson* v. *City of Memphis,* 373 U.S. 526, 10 L. ed. 2d 529, 83 S. Ct. 1314 (segregation in public parks and plagrounds); *Brown* v. *Board of Education,* 349 U.S. 294, 99 L. ed. 1083, 75 S. Ct. 753 (segregation in public schools).

In invalidating the statute in *McLaughlin,* the Court added that an enactment based on a racial classification, ". . . even though enacted pursuant to a valid state interest, bears a heavy burden of justification, as we have said, and will be upheld only if it is necessary, and not merely rationally related, to the accomplishment of a permissible state policy" (at 196). Accord, *Loving* v. *Virginia,* 388 U.S. 1 (1967); *Hunter* v. *Erickson,* 393 U.S. 385 (1969); *Frontiero* v. *Richardson,* 411 U.S. 677 (1973).

Furthermore, those seeking to justify a particular course of governmental discrimination must show not only that a pressing public necessity exists but also that it cannot be dealt with by other—nondiscriminatory—means. *McLaughlin* v. *Florida, supra,* 379 U.S. at 196. Relying on that deci-

sion, this Court said in *In re Griffiths,* 413 U.S. 717, 721-2 (1973), a case involving discrimination against aliens:

> In order to justify the use of a suspect classification, a State must show that its purpose or interest is both constitutionally permissible and substantial, *and that its use of the classification is "necessary . . . to the accomplishment" of its purpose or the safeguarding of its interests.* (Emphasis supplied.)

C. Applicability of the Equal Protection Principle to All Forms of Racial Discrimination

While historically the impetus for the adoption of the Fourteenth Amendment was the determination to bring to Negroes full rights of citizenship, this Court has uniformly held that it applies with equal force to discrimination by a state against members of any racial or ethnic group. *Oyama* v. *California,* 332 U.S. 633 (1948); *Yick Wo* v. *Hopkins,* 118 U.S. 356 (1886).[7] Moreover, its application has not been restricted to those forms of racial discrimination that are regarded as "invidious" because they stigmatize and denote the inferiority of a minority group. Racial classifications which oppress members of the minority and majority racial groups with equal force have been found constitutionally defective without reference to the issue of

7. This Court has recently reiterated, in interpreting Sec. 703(a)(1) of Title VII of the Civil Rights Act of 1964, 42 U.S.C., Sec. 2000e-2(a)(1) that: "The emphasis of both the language and the legislative history of the statute is on eliminating discrimination in employment; similarly situated employees are not to be treated differently solely because they differ with respect to race, color, religion, sex or national origin. This is true regardless of whether the discrimination is directed against majorities or minorities." *Trans World Airlines, Inc.* v. *Hardison,* U.S. , 53 L. Ed.2d 113, 123 (1977). See also *McDonald* v. *Santa Fe Trail Transportation Co.,* 427 U.S. 273, 280 (1976).

"stigma."[8] *McLaughlin* v. *Florida*, 379 U.S. 184 (1964); *Loving* v. *Virginia*, 388 U.S. 1, 10 (1967); see also *Shelley* v. *Kraemer*, *supra*; *Buchanan* v. *Warley*, 245 U.S. 60 (1917).

Petitioner insists that the "strict scrutiny" requirement, in so far as it applies to racial discrimination, operates only when the discrimination injures minorities (Br., pp. 68-73). The argument rests, in large part, on the theory that the requirement applies only where "discrete and insular minorities" are affected (p. 68). That phrase was originally used in *United States* v. *Carolene Products Company*, 304 U.S. 144, 152 n. 4 (1938). The concept was subsequently applied in a line of cases involving various forms of freedom of expression, and came to be known as "The Firstness of the First." Cahn, *The Firstness of the First Amendment*, 65 Yale L.J. 464 (1956). The application of the "strict scrutiny" test to race originated in the Japanese Exclusion cases, *supra*, as petitioner notes (Br., p. 69). Neither there, nor in later cases, did this Court suggest that its purpose was to protect only minority racial groups. Rather, it was based on the view, central to the concept of equal protection embodied in the Fourteenth Amendment, that: "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people . . ." *Hirabayashi*, *supra*, 320 U.S. at 100.

8. Realistically speaking, the racial classification herein is doubly "invidious." Since its underlying rationale must be that minority groups, *qua* minorities, cannot compete for limited admission places on the same terms as nonminority applicants, it "stigmatizes" the minorities. And since its effect is to deny highly desired places to nonminority applicants because they are of one race rather than another, it is "invidious" as to them. We point out also that polarization resulting from racial discrimination and segregation is exacerbated when the classification is declared and established by an agency of the state. That was explicitly recognized by this Court in *Brown* v. *Board of Education of Topeka*, 349 U.S. 473, 494 (1954).

To survive legal challenge, then, it is immaterial whether a racial classification is "benign" or "invidious." Rather, the test is whether the classification can be "shown to be necessary" (*McLaughlin, supra*) to "the accomplishment of some permissible state objective." *Loving, supra,* at 11.

D. Quotas and Reverse Discrimination

Not surprisingly, the University insists that its special admissions program should not be viewed as a "quota" (Br., pp. 44-47).[9] Since "quota" is a painful word to many people because it is reminiscent of past injustices,

9. It is interesting to note the quite different position on the issue of quotas taken by Archibald Cox, counsel for petitioner here, as the attorney for *amicus curiae,* Harvard College, in *DeFunis* v. *Odegaard* (p. 51):

> From a constitutional standpoint, the difference between giving favorable but undefined weight to minority status and fixing a specific numerical target for the admission of at-least-minimally-qualified minority applicants may not be significant. But the differences are so important in terms of educational philosophy and fairness among individuals as to lead us to suggest that the question should be reserved. Even in an age seeking only to reduce the disadvantages which minority groups generally suffer as the ingrained consequences of earlier hostile official and private discrimination, the allocation of a fixed target-quota of places proportionate to the ratio of the minority in the population seems to assert a group entitlement based solely upon numbers. Fixed target-quotas for each minority close places to individual members of different groups regardless of any number or degree of relevant qualifications. They impart a quite different philosophy than a teaching that in the competition for a limited number of places some adjustment must be made for social objectives but they are to be weighed in individual cases along with other claims to the places available. Whether the differences have constitutional significance it is unnecessary now to decide. . . .

it is often replaced by a euphemism such as "ratio" or "reasonable representation."[10]

Any such semantic maneuvers to evade the trial court's explicit finding of fact, however, would be irrelevant here, since it is admitted that a fixed number, 16, of the 100 places available in each of the affected classes was reserved for those applicants who were members of certain specified racial or ethnic groups.[11] Such a procedure, setting floor quotas for certain groups, inevitably sets ceiling quotas for other groups. The resulting injustice is palpable, particularly for the individual who would have been admitted but for his race. We submit that the principles laid down in the decisions reviewed above plainly apply to this form of discrimination.

First, there is no doubt that the Equal Protection Clause bars racial discrimination in admissions to state

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10. See, *e.g.*, Raab, *Quotas by Any Other Name,* Commentary, January 1972.

"One of the marks of a free society is emphasis on achieved status over ascribed status, the ascendance of performance over ancestry. . . . Achieved status is that aspect of democracy which represents the primacy of the individual, and of individual freedom." American Jewish Committee, *Group Life in America, A Task Force Report* (1972), pp. 85-86.

11. The University says that this is not so since, if it ever failed to find 16 such applicants who are not "fully qualified," it would admit more than 84 applicants under the regular admission procedure (Br., 44-45). We submit that the theoretical possibility that this "rare event," as petitioner describes it (*ibid.*), may occur is not entitled to constitutional significance. Further, this suggestion itself demonstrates that, despite a pool of 30 to 40 times the number of applicants for places under the general admission program, requiring the rejection of very highly qualified students, the Medical School would "scrape the bottom of the barrel" of acceptable minority students before even considering these highly qualified nonminority students. *Cf.* Bowers, Foreword to Odegaard, *Minorities in Medicine: From Receptive Passivity to Positive Action,* 1966-76 (1977), vi: "Enough qualified minority group applicants are simply not available."

universities. *Sweatt* v. *Painter, supra.* In *Florida ex rel. Hawkins* v. *Board of Control,* 350 U.S. 413 (1956), this Court in a *per curiam* decision ordered the black plaintiff, who was denied admission solely because of race, admitted to the University of Florida School of Law "under the rules and regulations applicable to other qualified applicants" (at 414), even though a black law school was then available to him at Florida A. & M. University. This, we believe, is the law today and, indeed, should be the law.

Second, this Court has repeatedly condemned the concept of quotas in cases dealing with employment. More than 60 years ago, it struck down state-imposed employment quotas based on alienage, holding that state action which has the effect of denying certain inhabitants the right to work for a living on grounds of race or nationality is violative of the Equal Protection Clause because it is destructive of the "very essence of the personal freedom and opportunity . . . it was the purpose of the Amendment to secure." *Truax* v. *Raich,* 239 U.S. 33, 41 (1915). The same result was reached 35 years later in *Hughes* v. *Superior Court of California,* 339 U.S. 460 (1950), which presented the question whether the Supreme Court of California had the right to enjoin a union from picketing which was conducted for the purpose of forcing a quota system upon an employer. This Court noted that the California court had held "that the conceded purpose of the picketing in this case—to compel the hiring of Negroes in proportion to Negro customers—was unlawful even though pursued in a peaceful manner" (at 462). The Court also quoted the part of the California decision explaining why a quota system is discriminatory, i.e., that

those seeking to set up a quota system "would, to the extent of the fixed proportion, make the right to work for Lucky dependent not on fitness for the work nor on an equal right of all, regardless of race, to compete in an open market, but rather, on membership in a particular race" (at 463-464). The Court went on to say (at 464):

> To deny to California the right to ban picketing in the circumstances of this case would mean that there could be no prohibition of the pressure of picketing to secure proportional employment on ancestral grounds of Hungarians in Cleveland, of Poles in Buffalo, of Germans in Milwaukee, of Portuguese in New Bedford, of Mexicans in San Antonio, of the numerous minority groups in New York, and so on through the whole gamut of racial and religious concentrations in various cities.

In affirming the California Supreme Court decision granting the injunction against the picketing, this Court held, in effect, that the picketing was unlawful because its purpose, to establish a quota based on race, was unlawful. In Fourteenth Amendment terms, any state action in support of a racial quota system inevitably clashes with the Equal Protection Clause. See, also *Flanagan* v. *President & Directors of Georgetown University,* 417 F. Supp. 377 (D.D.C. 1970); *Anderson* v. *San Francisco Unified School District,* 357 F. Supp. 248 (N.D. Cal. 1972).

The racial classification imposed by petitioner and the theory under which it has been rationalized partake of the same evils which this Court correctly perceived in *Truax* and *Hughes.* The racial admission practices challenged here should be similarly invalidated.

POINT TWO

Petitioner has failed to show a pressing public necessity for its admitted course of racial discrimination.

A. Petitioner's Claim of Pressing Public Necessity

None of the interests which petitioner has advanced in justification of its discriminatory action has that element of legitimacy, urgency and awesome need which this Court has held essential to overcome our traditional abhorrence of racial quotas. Indeed, not only do the considerations advanced fail to satisfy the burden of urgent necessity but they are themselves antithetical to the basic principles on which our society and its institutions are founded. See, *Mulkey* v. *Reitman,* 64 Cal. 2d 529, 544, 413 P. 2d 825, 835 (1966), *aff'd,* 387 U.S. 369 (1967); *Gomillion* v. *Lightfoot,* 364 U.S. 339 (1960).

Petitioner argues that its quota program is justified because (1) "applicants from minority backgrounds may possess skills not shared broadly by applicants from other backgrounds" (Br. p. 32); (2) medical care for minority groups is scarce and inferior and minority doctors will return to minority communities to use their talents (Br. p. 25); (3) minority students will enhance the awareness of white students of minority health problems and increase "rapport with their future minority patients" (Br. p. 33); and (4) the collegiality of medical school life will encourage non-minority graduates to locate their practices in minority communities and build bonds for future consultation and referral (Br. p. 33).

Petitioner cites no support for these assumptions other than its own hopes and speculation; in many instances, there is already substantial authority to the effect that the underlying assumptions are in fact groundless.[12]

Assumption No. 1. The minority groups included in the special program have some unique skills not shared by persons of other races.

Although petitioner makes this point at two places in its brief (pp. 32, 48), it nowhere suggests what these skills are. It is not surprising that no skills are specified since the claim that particular skills are racially based comes perilously close to the adoption of discredited theories of genetic differences among the races. Surely this claim deserves no serious consideration.

Assumption No. 2. Medical care for minorities is scarce and inferior and minority applicants will return to minority communities to remedy this situation.

Although there is no doubt that medical care for minorities and in fact for the poor of all races must be improved, it is highly doubtful that the best or even an effective approach to ameliorating the health problems of minorities lies in quota programs for minority medical students. Even so staunch a defender of minority preference programs for

12. There is a basic incongruity that pervades petitioner's claims —the fact that almost an equal number of minority students were admitted under the general and special admissions programs. It is never explained why the assumptions on which petitioner's case rests are valid only as to 50 per cent of the admitted minority students.

professionals as former University of Washington President Odegaard[13] has recognized that:

> There is, however, no necessary connection between the emergence from the educational process of a minority physician and his becoming a deliverer of medical care to a minority community. For many other groups, education, higher education, and preparation to become a physician have been roads to upward mobility, away from poverty and continued association with the community from which they came. It will certainly be such a road for individuals from the minorities with which the nation is now concerned.

Odegaard's conclusion that minority physicians admitted as a result of special programs will not necessarily practice in underserved areas of minority population is corroborated by other studies. Thompson[14] points out that in 1972 the highest concentration of black physicians was found in California, New York and the District of Columbia, whereas the southern states of Georgia and North Carolina which ranked third and fifth respectively in total black population in 1960 and 1970, did not even rank in the top ten of black physician distribution. Thompson notes further that "black physicians are liekly to shun the ghettoes of many of our large metropolitan cities." He concludes that the concentration of black physicians in any given area of the country cannot be definitively linked to the concentration of the black population in any given area. He also notes that black physicians tend to migrate to areas where

13. Dr. Odegaard was the respondent in *DeFunis* v. *Odegaard*, 416 U.S. 312 (1974). Odegaard, *Minorities in Medicine: From Receptive Passivity to Positive Action* 1966-76 (1977) 151.

14. Thompson, Curbing the Black Physician Manpower Shortage, 49 *Journal of Medical Education*, 944, 947, 948, 949 (1974).

they can make more money and where, as in California, they are not subject to discrimination by the local medical societies and the general non-black population.

What scanty evidence there is reveals similar operative factors in the career plans of Mexican-American medical students.[15] A recent study concluded that, like their non-minority counterparts, the vast majority of the Mexican-American students do not intend to practice family or community medicine, where their alleged linguistic and cultural sensitivity might be useful, but to follow the more traditional path of sub-specialization. Again like their non-minority counterparts, only a small proportion plan to move into underserved rural areas and small cities in which a significant percentage of the Chicano population is located. The overall tendency is to return to neighborhoods of towns and cities which have no shortage of physicians.

Odegaard, *supra,* recognized that the solution to the problem of effective delivery of medical care to minority communities does not necessarily depend on the racial or ethnic composition or nature of the student body but is much more closely linked to the nature of the school's curriculum, its clinical program and its success in training more family care physicians and fewer medical specialists. Thus he points out that both minority and majority medical students can be educated to the problems of the poor communities through effective clinical programs. He notes (p. 152):

> Many schools are so situated that there are minority communities in the environs. If the school engages

15. Kaufert, Martinez and Quesada, "A Preliminary Study of Mexican-American Medical Students," 50 *Journal of Medical Education* 856, 860, 861, 862, September 1975.

> in forays outside the established medical centers for the purpose of seeing, learning about, and serving primary care needs, the faculty and students cannot help but become more familiar with the particularities of various kinds of communities—including minority communities. They will learn firsthand the medical needs of patients, and the opportunities and difficulties attendant on serving them. They cannot help but see a range of problems different from those to which medical educators have been accustomed in the secondary and tertiary care centers.

Most teaching hospitals of which medical schools are a part are located in large urban areas and tend to have many minority and poor patients as well as service personnel of many races. Students, white and black, serving in these hospitals have ample opportunity to meet minority group members, to be with them as patients and observe the health problems and the living conditions which afflict the poor of all ethnic and racial groups.

Assumption No. 3. The presence of minority students in school will enhance whites' awareness of minority problems.

The post-*Brown* white medical student has had twelve years of primary and secondary education and four years of college as well as exposure to newspapers, radios, television and everyday living in our multi-racial society. It is fatuous to say that the presence of some black faces in medical school will "develop in white students 'an anhanced awareness of the medical concerns of minorities' and of the difficulties of effective delivery of health care services in minority communities" (Br. p. 33).

Medical concerns unique to particular racial groups, e.g. Tay-Sachs disease or sickle-cell anemia, are rare. The medical concerns which are significant for members of minority groups who are currently underserved by the medical profession tend to be those of the patient population generally, made more acute by the inadequacies of medical services provided to the poor, irrespective of race.

Malnutrition, lead paint poisoning, and rat bites are found in poor patients, not in minority medical students who are mostly young, healthy, and often of middle class background and life experience.

Rapport, if it is created at all between students, is hardly likely to have any significant effect on rapport with patients of an entirely different socio-economic group. If rapport is deemed a valid ingredient in dealing with these concerns, people who identify with these problems regardless of race should be sought. Since the University's premise for a racially conscious quota is that criteria such as "disadvantage" would result in reduced percentages of minorities, the University necessarily acknowledges that many of its non-minority applicants also can be identified with poverty-related medical concerns. Its premise thus defeats its own stated objective.

Assumption No. 4. The collegiality of medical school life will prompt more non-minority physicians to locate in minority communities and build bonds for future consultation and referral to minority physicians.

The possibility that contact with a greater number of students from particular racial and ethnic groups will spur

"white physicians to practice in minority communities" and will "build bonds to minority physicians for future consultation and referral" are cited to justify minority preference programs. Both are speculative hopes with no supporting data. In view of the wide geographic dispersal of students and graduates of medical schools and the existing evidence as to the factors which influence location of doctors, minority and nonminority, the lack of support for these particular claims is not surprising. Further, the suggestion that race should enter into the choice of a consultant or into medical referrals is inappropriate.

Thus, in the absence of more substantial data on this point, as well as on all other claimed justifications for the University's preferential policy, it would not appear appropriate for this Court to give sanction to a policy which, absent proof of past discrimination by the University in question, deprives any individual of a significant opportunity on racial grounds and does so in the name of promoting a series of social benefits which are dubious at best.

Although petitioner denies that it contends that only minorities can treat other minorities, or that it is seeking any form of proportional representation for minority groups in the medical profession, both of these contentions are implicit in the arguments it makes. What does it mean to argue that minorities "bring to the profession special talents and views which are unique and needed" (Br., p. 48)? What it means is that the University believes race is a job-related factor for physicians, or at least for a certain percentage of them, and hence a legitimate qualification for medical students.

The "compelling state interest" thus postulated by the University assumes *inter alia* that only members of a particular ethnic group can understand, respond to, and represent members of that group or communicate their needs and aspirations, both in the classroom and in the practice of medicine. This assumption embodies a kind of "group think" in which all members of a particular group have sets of views and values arising out of an identical life experience. It assumes that race and ethnicity outweigh all other factors in the formulation of views and needs. It represents the ultimate denial of a trained physician's ability to transcend his own life-style, experience and group identity in the effective discharge of his professional responsibilities.

Stripped of the four assumptions discussed above, petitioner's case for its preferential admissions system is reduced to reliance on the one concept that certain minority groups are underrepresented in medical schools and the medical profession and that racial quotas are the remedy for that situation. In effect, therefore, petitioner is arguing that there is a "proper" proportion of representation for each group and that certain minorities have a right, entitled to recognition as a "compelling state interest," to have available a substantially proportionate number of doctors for their use. If this is so, minority groups have an equal right to a proportionate number of hospital personnel, prosecutors and judges, and so forth. It is not significant that petitioner's minority quota is not proportionate to the minority population of California (although clearly it is close to being propor-

tionate to the minority population of the nation as a whole). What is significant is that petitioner argues that minorities are "underrepresented" and the cure for such "underrepresentation" is a quota.

Under this premise, as applied to the legal profession, an indigent defendant would be entitled not only to court-appointed counsel, but to an attorney who is a member of his particular racial or ethnic group. Doctors and hospitals with predominantly minority practice could, with constitutional propriety, refuse to hire non-minority employees on the ground that they could not properly serve their patients.[16]

We submit that the concept that underlies petitioner's case is factually and psychologically unsound, legally and constitutionally erroneous and profoundly damaging to the fabric of American society. It must be remembered that legitimization of racial quotas as a necessary means to achieve adequate understanding of the needs, views and values of minority groups cannot be confined to medical schools and the medical profession. Similar arguments with respect to the practice of law were made in defense

16. Conversely, acceptance of this view would endanger progress toward integration of minority practitioners in firms with predominantly nonminority clients. Over the years, we have consistently supported the now well-established principle that discrimination in employment cannot be justified on the ground that minority employees are unable effectively to understand or deal with those of another race or that customers or clients of a particular shop or firm feel more "comfortable" with those of their own racial, religious or ethnic background. Is that discredited notion now to be reintroduced in reverse garb? Cf. *Sibley Memorial Hospital* v. *Wilson*, 488 F. 2d 1338 (D.D.C. 1973) (a male nurse's claim of sex discrimination for failure to assign him to female patients found cognizable).

of quotas and preferences in *DeFunis* v. *Odegaard,* 82 Wash. 2d 11, 507 P. 2d 1169 (1973), vacated as moot, 416 U.S. 312 (1974). They prompted Justice Douglas to say, in his separate opinion in that case (at 342):

> The Equal Protection Clause commands the elimination of racial barriers, not their creation in order to satisfy our theory as to how society ought to be organized. The purpose of the University of Washington cannot be to produce black lawyers for blacks, Polish lawyers for Poles, Jewish lawyers for Jews, Irish lawyers for Irish. It should be to produce good lawyers for Americans and not to place First Amendment barriers against anyone. [*sic*]

Petitioner's theory, of course, would apply with equal validity to psychologists, social workers, bankers, businessmen, political officeholders and a broad spectrum of economic, professional and governmental occupations, with equally profound and divisive implications. The result would be a race-conscious society in which a proportionate number of places in colleges, professional schools and occupational categories would be set aside for members of particular racial and ethnic groups.

This is neither a whimsical nor a farfetched view. Proposals for racial proportional representation in schools of dentistry, education, architecture and other service professions are regularly advanced and in many cases adopted, each resting on the same premise as that underlying the policy adopted and applied by the petitioner. And, of course, the widespread practice of preferences in law school admissions is well-documented. O'Neil, "*Preferential Ad-*

missions: *Equalizing Access to Legal Education,*" 2 Toledo L. Rev. 283 (1970).

But the consequences of that theory extend even further. The argument that only persons of a particular group can understand and respond to the needs and demands of that group cannot be limited to minority racial groups. If valid, it would be equally applicable to ethnic, religious and sexual groups. The same demands for proportionality in schools, professions and occupations could justifiably be made by representatives of these groups and, where proportionality is lacking, the application of racial, ethnic, religious or sexual classifications to eliminate the imbalance would be asserted to be constitutionally valid. This, too, is neither a speculative nor a hypothetical possibility; it is a developing trend based on the model of racial quotas.[17]

A society permeated by racial, ethnic, religious and sexual proportional representation would be something quite different from the ideal we have striven for so long. Far from being regarded as abhorrent, invidious and irrelevant, racial and ethnic classifications would be officially sanctioned and recognized in all walks of life; each professional or officeholder would be regarded, and would regard himself, as a representative of the group from whose quota he comes; and individual aspirations would be limited by

17. A Consent Decree approved by a United States District Judge on September 8, 1972, in *NAACP* v. *Imperial Irrigation District,* No. 70-302-GT (U.S.D.C., Southern District of California), provided that defendants shall take all actions necessary to insure that the proportions of all racial and ethnic groups employed at the Imperial Irrigation District shall be equal to their proportions in the general population of Imperial County. The target date for achieving these objectives is January 1, 1984.

the proportionate size of the group to which the individual belongs.

Petitioner makes much of the fact that the racial quota program at issue here is necessary to erase the scars inflicted on the post-*Brown* generation by the lingering effects of state-imposed segregation. There is no doubt that the intentional segregation outlawed by *Brown* exacted a heavy toll and that the vestiges of segregation and discrimination persist in many areas of this nation to this day. Nevertheless, by contrast, in some areas of the nation, statewide segregated education never existed and, in many states, laws prohibiting discrimination in employment, housing and public accommodations were enacted as early as 1945, nine years before *Brown*. The years since then have been marked by significant black progress. Many members of minority groups have been able to achieve a substantial measure of affluence and professional recognition and to live and work in unsegregated milieus.

The handful of cases cited by petitioner (Br., p. 18) indicating racial discrimination in some California local communities cannot justify a racial quota program in a statewide medical school. There is no indication that any black applicant to Davis came from any of these communities or experienced a segregated education; if he did, individual consideration, not a pervasive racial quota program, would be the appropriate remedy.

Petitioner's special program, however, makes no distinction between the minority applicant whose lowered scores can be attributed to obstacles arising from economic or educational disadvantage due to race discrimination and

those who have attended the finest prep schools and colleges.[18] It is interesting in this regard that petitioner discusses what was available to Bakke because he is white (Br., p. 21, n. 12) but failed to supply evidence below so that a comparison could be made to the special admissions students admitted in his stead.

If individual blacks applying to Davis Medical School have suffered economic hardship because they encountered discrimination, attended segregated schools or lived in segregated neighborhoods, these facts could be brought to the attention of the Admissions Committee and their records evaluated accordingly. Any other system of preferences based on mere membership in a group which, because of its color or physiognomy, has suffered discrimination can only result in a society in which race consciousness and partisanship become the significant operative forces and race prejudice, rather than being minimized, is legitimated.

Petitioner also argues (p. 42) that the Davis faculty and the numerous other medical school faculties which have instituted preferential programs are "as acutely aware of the risks of race lines as any element in our society." It argues further that decisions as to the necessity of the quota program, which ethnic and racial groups should benefit from it, the extent of the benefit and, most important of all, when it shall be terminated, should all be left to educators "in the exercise of the discretion with respect to

18. Petitioner itself acknowledges that the nation's special minority programs are not limited to the economically disadvantaged when at Br., p. 37, n. 46 it points out that less than a third of the underrepresented minorities accepted in medical schools in 1976 had parental incomes under $10,000.

admissions policy lodged in them'' by the California state Constitution (pp. 42, 86).

Although in a system of limited places some discretion must inevitably be granted educators to choose among individual candidates, the exercise of educational discretion, in which petitioner's officials have expertise, is not involved in this case. At issue here is a basic question of broad social policy with direct and fundamental constitutional implications: Shall racial preferences in admission to medical school be accorded selected racial and ethnic minorities in order to increase the number of medical students and doctors who are members of these preferred groups above the level which might exist absent such preferences? This is a question which goes far beyond the admissions policy of any one school or for that matter the conduct and circumstances of a particular profession. Its implications can change the very character of our society. So significant a decision cannot and should not be left to the judgment of individual institutions, no matter how distinguished. And certainly it cannot be left to a small group of faculty members in such institutions. The doctors who formed the Davis Task Force which set up the Special Program and the personnel who administer it were not trained in those disciplines which might equip them to grapple with the complex issues of broad social and constitutional policy raised by problems of racial quotas. Nor, despite the references in petitioner's brief (p. 42), did they have any mandate from the people of California or from any elected official to make the significant and far-reaching decisions embodied in the special program. The nature of the legislative process, and the administrative rule-making process as well, is such that

the result is ordinarily accompanied by a statement of the underlying rationale, which reviewing courts can evaluate. Here, both the process and the result reflect not rationale but confusion, making it difficult if not impossible to evaluate the product.

It is unclear whether petitioner's rationale is premised upon the need for remedial provisions to compensate for disadvantages resulting from (a) historical class discrimination (*e.g.*, descendants of slaves or interned Japanese); (b) current class discrimination (*e.g.*, inner city or reservation residents); or (c) current personal discrimination. The remedy should be keyed to the rationale and the proposed social engineering would be different in each case. Here, the vagaries of the actual special admissions program reflect a total failure on the part of the University to focus in on the rationale and to adopt a solution geared to that rationale. The reason for this failure may be that, if the University articulated its rationale, the impropriety of the remedy would become clear. Specifically, if the rationale is historical class discrimination, this historical wrong could only be compensated for over a period of time and those entitled to compensation would be many and diverse and not coterminous with those given special treatment by the University. If the rationale is present class discrimination, the remedy must be geared to eliminating all present factors reflective of that discrimination. Those entitled to compensation would not be those who fit into historical classifications. The categories given preferential treatment would have to be reflective of present social structures. Again, this would not be coterminous with those given special treatment by the University. Finally, if the rationale

is present personal discrimination, individual remedies must be fashioned. The use of categories reflective of group identification would be fundamentally inconsistent with the rationale. Here, of course, the remedy adopted by the University would exacerbate the evil.

One of the philosophical underpinnings of petitioner's case is that medical schools must enjoy the latitude to select their students as they see fit—subject, of course, to reasonable criteria as determined by the schools, and that they may fashion appropriate means to achieve the ends they deem appropriate (Br., p. 83). In this view, a medical school is considered to have the right to adopt a racially preferential admissions scheme, free of "judicial interventionism" and, implicitly, of other governmental intrusion as well. Ironically, however, if petitioner were to prevail and the validity of racial quotas in admission to institutions of higher education were to be upheld by this Court, it is not an unreasonable expectation that the Department of Health, Education and Welfare would require *de facto* quotas as a condition for receipt of Federal benefits by professional schools in general and by medical schools in particular throughout the country. Failure to achieve the requisite numbers could result in a threat of loss of governmental aid to the institutions and to their students. Such a consequence would mean that a faculty's autonomy to select among candidates for admission to such schools would be circumscribed, not validated. *See, e.g.,* Glazer, *The New York Times,* July 30, 1977 p. 19.

B. The Harmful Effects of Racial Quotas in University Admissions

Quotas can be seen as an appropriate means of dealing with a pressing public problem only if their harmful effects are ignored. We submit that petitioner is asking this Court to do just that.

There are a number of reasons why racially discriminatory classifications in professional school admission practices are unsound. The most important of these is their manifest unfairness to individuals.[19] Ineluctably they penalize innocent persons who bear no personal responsibility for historic wrongdoing. Moreover, while assuredly most people of color in this country are culturally "disadvantaged," not all are, nor are all whites by any stretch of the imagination properly to be considered "advantaged." Rarely if ever, for instance, have whites from poverty-stricken Appalachia been singled out as a group for preferential educational treatment.[20] Nor has favoritism been bestowed on members of other ethnic groups

19. A non-minority applicant is immediately rejected if his OGPA is less than 2.5. However, minority applicants with OGPAs as low as 2.11 have been accepted by the Medical School. The differences in MCAT scores between Bakke and minority applicants is extraordinary. The "benchmark" ratings for accepted minority applicants, which include assessments of all relevant factors, nonscholastic as well as academic, fall far below those of Bakke and the average accepted non-minority applicant. The Medical School undeniably discriminates against non-minorities solely on the basis of race and admits less qualified minorities in lieu of more qualified non-minority applicants. Bakke was better qualified, according to the Medical School's own ratings than almost all minority applicants who were admitted.

20. For the years 1971 through 1974 the University kept statistics which included white economically disadvantaged. Of the 272 such applicants, none were accepted under the special program.

which credibly can claim to have been subject to generalized societal discrimination—Italians, Poles, Jews, Greeks, Slavs—as a result of which at least some such persons bear the economic and cultural scars of prejudice and thus could be deemed entitled to preference as a form of restitution. As but one example, while Poles comprise 6.9% of the population in the Chicago metropolitan area, the percentage of Poles on the boards of directors of the 106 largest corporations in that area is only 0.3%. Barta, Report prepared by The Institute of Urban Life for The National Center for Urban Ethnic Affairs (1973).

On the other hand, preferential systems such as the one challenged here do confer benefits on some blacks and Hispanics who have come to this country recently—for example, from Mexico, Jamaica and Cuba—and who cannot be said to have been injured by past discrimination in this country.[21]

Preferences also create the danger that, once race is accepted as a factor in admissions, it will progressively affect the operation of the school generally. For example, it is likely that, in the interest of demonstrating the success of the admissions policy, there will be a strong temptation to grade disadvantaged minority students on a scale less rigorous than that by which others are measured—or to reduce failure criteria for all students. If this does hap-

21. In a discrimination case now pending in the Colorado Supreme Court (*DeLeo* v. *Bd. of Regents of the University of Colorado,* Index No. 2745-5), the plaintiff was first considered by an admissions committee as a minority applicant because it was assumed from his surname that he was of Hispanic extraction. When it was learned that he was of Italian extraction, he was dropped from further consideration.

pen (and some believe it already has[22]), minority students will perceive that they are beneficiaries of a double standard, which is apt to play havoc with their own self-esteem, not to mention the impact it may have on others who manage to graduate without any favoritism.[23]

A significant adverse side effect of preferential treatment is likely to be that those minority students of high abilty and accomplishment who excel strictly on merit will nevertheless carry the stigma upon graduation that they, too, were beneficiaries of a double standard. As Justice Douglas said in his separate opinion in the *DeFunis* case, *supra* (416 U.S. at 342): "A segregated admissions process creates suggestions of stigma.... That is a stamp of inferiority that a State is not permitted to place on any lawyer."[23a]

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22. See James Nelson Coleman's column, "From Under My Afro," in the Cleveland *Sunday Press* of November 15, 1973, entitled, "Preferential Policies Could Backfire."

23. "Why does the sense of the injustice call actively for equality? One explanation is that equal treatment of all within a recognized class is a necessary attribute of any legal order; the very concept of law requires this minimal regularity." Cahn, *The Sense of Injustice,* p. 15 (*New University Press,* 1949).

23a. In a news release from the A. Philip Randolph Institute on November 29, 1973, "In Memory of Arthur Logan," the Institute's Executive Director, Bayard Rustin, observed:

> He (Dr. Logan) worked tirelessly to root out discrimination from the medical profession. And he was forever encouraging young blacks to take up medicine as a profession, because he believed firmly in its worth. But he believed that black doctors should undergo the same discipline and meet the same standards as others. He was adamantly opposed to the lowering of standards; he understood too well that this would irreparably damage not only the medical profession but also the black community itself.

Also germane to the issue of racially preferential admission to professional schools, and of artificially imposed proportional representation therein on the basis of race, are the following excerpts from the widely syndicated column by Roy Wilkins, the distinguished retired Executive Director of the National Association for the Advancement of Colored People, in the New York *Post* of March 3, 1973:

> . . . It is ridiculous for Negroes to claim that because they are 40 percent of the population, they should have 40 percent of the jobs, 40 percent of the elected offices, etc.
>
> This is self-defeating nonsense, for no person of ability wants to be limited in his horizons by an arbitrary quota or wants to endure unqualified people in positions that they fill only because of a numerical racial quota.
>
> . . . Ignoring the decades in which black college students were on a "zero quota" basis, they went into college admissions policies which on some campuses set aside a percentage of places for black applicants. In some places white applicants with excellent records have been made to stand aside for blacks with inferor records.
>
> . . . Such practices and, in fact, the whole black-tilted system are doing no favors to Negro applicants. God knows it is true that the cards have been deliberately stacked against blacks. Every feasible step, even those costing extra money, should be taken to correct this racialism.
>
> But there must not be a lowering of standards. Negroes need to insist on being among the best, not on being the best of the second- or third-raters. . . .

In his book, *Black Education, Myths and Tragedies,* Thomas Sowell, an outstanding economist who attended public school in Harlem, and is now at Stamford University

in Palo Alto in California, forcefully articulated his own aversion to quotas as a remedy for past deprivation (at 292):

> . . . the actual harm done by quotas is far greater than having a few incompetent people here and there —and the harm that will actually be done will be harm primarily to the *black* population. What all the arguments and campaigns for quotas are really saying, loud and clear, is that *black people just don't have it,* and that they will have to be *given* something in order to have something. The devastating impact of this message on black people—particularly black young people—will outweigh any few extra jobs that may result from this strategy. Those black people who are already competent, and who could be instrumental in producing more competence among the rising generation, will be completely undermined, as black becomes synonymous—in the minds of black and white alike—with incompetence, and black achievement becomes synonymous with charity or payoffs.

Considerations such as these may well account for the fact that popular opposition to racial preferences is almost as strong among minority groups as it is in the general population. That is shown by a Gallup Poll taken in March, 1977. In that poll, 83% of the general population expressed opposition to preferential treatment in higher education and employment for both women and minority group members, and favored use of the criterion of ability as measured by tests, notwithstanding past discrimination. 64% of the non-white participants in this survey answered the same way (*The Gallup Opinion Index,* June 1977).[24]

24. The question asked was: "Some people say that to make up for past discrimination, women and members of minority groups should be given preferential treatment in getting jobs and places in college. Others say that ability, as determined by test scores, should be the main consideration. Which point comes closest to how you feel on this matter?"

C. Statutory Condemnation of Racial Quotas

The concept that race is a job-related qualification for any profession or occupation has been explicitly repudiated by the Congress of the United States. In formulating Federal antidiscrimination policy, Congress provided that race or color could never be a qualification for any position. It made no exemption for the professions. Thus, although Title VII of the Civil Rights Act of 1964 permits employers to utilize such suspect classifications as national origin, sex or religion, if they can establish them to be a "bona fide occupational qualification," the Act provides no such exemption for alleged qualifications based on race or color. 42 U.S.C. Section 2000e-2(e). Furthermore, in Title VII Congress squarely prohibited employers from voluntarily granting preferential treatment to members of racial, ethnic, religious or sexual groups in order to correct "imbalance" in their work forces. 42 U.S.C. Section 2000e-2(j) (1964).

Similarly, state regulatory agencies administering state fair employment practices statutes containing exceptions for "bona fide occupational qualifications" early held that race and color were not job-related qualifications.[25]

In construing Title VII of the Civil Rights Act of 1964 (42 U.S.C. Section 2000e-15) in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), which held that job qualification standards must be performance-related, this Court said (at 430, 431):

25. See, *e.g., Survey Associates, Inc.* discussed in *Report of Progress,* New York State Commission Against Discrimination (1948, p. 73) (color held not to be a "bona fide occupational qualification" for a social worker working with black clients).

> Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.

Although *Griggs* dealt with job discrimination rather than educational discrimination, the philosophy which undergirds it cannot be reconciled with petitioner's admission policy. In enacting Section 703(j) of Title VII (42 U.S.C. Section 2000e-2(j)), Congress abjured preferential treatment as a remedy for racial imbalance in employment. If preferential treatment based on race is deemed to be an improper remedy for an employment situation involving a proven history of racial discrimination, as in *Griggs,* it is *a fortiori* an improper remedy for an educational situation, closely related to employment opportunity, where there is no proof of such a history. *Griggs,* therefore, is highly apposite here.

In his dissenting opinion in *DeFunis, supra,* Chief Justice Hale of the Supreme Court of Washington cited with approval the employment discrimination ruling in *Anderson* v. *San Francisco Unified School District,* 357 F. Supp. 248 (N.D. Cal. 1972), in which the court rejected a racially preferential scheme for promotion of public school administrators. In so doing, he observed (at 249):

> Preferential treatment under the guise of "affirmative action" is the imposition of one form of racial discrimination in place of another. The questions that must be asked in this regard are: must an individual sacrifice his right to be judged on his own merit by accepting discrimination based solely on the color of his skin? How can we achieve the goal of equal opportunity for all if, in the process, we deny equal opportunity to some?

The decision in *Anderson, supra,* was grounded in part on Title VI, Section 601, of the Civil Rights Act of 1964 (42 U.S.C. §2000d) in which Congress made clear its intent to bar discrimination against any person on the basis of race "under any program or activity receiving Federal financial assistance."

Similarly, the District Court for the District of Columbia has recently concluded that Title VI prohibits a university which receives federal funds from according minority group students preferential treatment in the allocation of financial aid and has awarded a white graduate damages equal to the difference between the amount of aid he received and the amount which he would have received had he not been Caucasian. *Flanagan* v. *President & Directors of Georgetown Univ.,* 417 F. Supp. 377 (D.D.C. 1976).

This Court has recently demonstrated sensitivity to the rights of non-preferred individuals in the general context of reverse discrimination. In *Franks* v. *Bowman Transportation Company,* 424 U.S. 747 (1976), it held that minority group plaintiffs who had established discrimination were entitled to retroactive seniority in accordance with the "make-whole" objective of Title VII. The seniority for which the plaintiff had asked was "only seniority status

retroactive to the date of individual application, rather than some form of arguably more complete relief. No claim is asserted that nondiscriminated employees holding OTR positions they would not have obtained but for the illegal discrimination should be deprived of the seniority status they have earned." *Id.* at 776. Nevertheless, Justices Powell and Rehnquist, concurring in part were careful to emphasize that, while retroactive "benefit" seniority is an appropriate remedy, "competitive" seniority, which disadvantages other employees, should not be awarded. Chief Justice Burger agreed, noting that such a remedy would be at the expense of individual employees and adding that one cannot "[rob] Peter to pay Paul." *Id.* at 781. *See also McDonald* v. *Santa Fe Trail Transportation Co., supra,* (Title VII bars discrimination against whites).

Even more recently, this Court, in *Teamsters (IBT)* v. *U.S.,* —— U.S. ——, 52 L. Ed. 396 (1977), after confirming the determination that the company had engaged in systematic patterns of discrimination, considered the question of the remedy for an employer's pre-Act discrimination in terms of the existing seniority agreement. The Court held that a bona fide seniority system was lawful even though it "locked in" employees and perpetuated the effect of pre-Act discrimination. No relief was afforded to employees who suffered pre-Act discrimination.

As to post-Act discriminations, this Court was careful to direct that remedies be applicable to demonstrable victims. Further, the Court highlighted the concern for balancing the equities between the victim and innocent parties. Here, of course, we are not dealing with demon-

strable individual victims of discrimination. Rather, the claim is a class discrimination balanced against innocent victims. Certainly, the inequity to a Bakke here is far greater than the inequity to those with seniority in *Teamsters (IBT)* v. *U.S.*, and the minority students admitted herein are not victims nearly to the extent as were those individuals personally discriminated against therein.

D. Violation of Individual Rights

In this case, the violation of the individual rights guaranteed by the Fourteenth Amendment (*supra,* pp. 15-24) is clear. It is conceded that, all other things being equal, Bakke would have been admitted to the Medical School if he had been a member of one of the races covered by the special program or if there had not been a special admissions program based on race.

Petitioner seeks to obscure that fact by speaking in terms of "a reduced chance of admission to medical school" (Br., p. 65). It argues that ". . . it is diminution, not exclusion, which is the issue. . . ." (Br., p. 54). But it gives the show away when it says (Br., p. 55):

> Unfortunately the objectives of the program cannot be furthered without effect on some individuals. These effects are incidental to the program, *although obviously not to respondent.* (Emphasis supplied.)

Petitioner leaves no room to doubt that it wants this Court to make equal protection a matter of group rights rather than individual rights when it says that "it cannot be said that whites have been denied an adequate representation." (Br., p. 79).

We submit that, when a governmental agency bases an admissions policy on a whole series of arbitrary and factually unsound assumptions, as we have shown, it engages in precisely the kind of conduct that the Equal Protection Clause was designed to prevent. The fact is that, contrary to the assumptions underlying petitioner's admissions policy, many whites suffer economic and cultural deprivation; many are blighted by poverty; many attend inadequate schools; and many must work while in school to support themselves and their families. This is ignored by an admission procedure which casts all disadvantaged applicants who are members of certain minority groups into one pool and all non-minority applicants regardless of background into another, and compares members of each group only with the others in that group. Through this procedure, racial assumptions are arbitrarily and unconstitutionally applied so as to defeat the personal rights of individuals to be free from discrimination on grounds of race.

If the command of equal protection is to be obeyed, the Medical School must compare all applicants with each other on the basis of all pertinent factors—of which race, as such, is not one—giving each factor its due weight. Only in this way can the constitutional demand of justice and equality be met.[26]

26. Petitioner asserts (Br., p. 5) that, "in practice only disadvantaged members of racial and ethnic minority groups are admitted under the Task Force program" (R. 171). The record, however, is not as clear as petitioner would have us believe that only "disadvantaged" applicants are accepted for the program. While, at the cited page of the record, Dr. Lowrey, Chairman of the Admissions Committee, recited a hypothetical example of a minority applicant ineligible for the Task Force program—a black son of a physician who breezed through four consecutive years of college—he also stated

(footnote continued on next page)

POINT THREE

The legitimate objectives of petitioner's admission policy can and should be achieved without making admission depend to any extent on race.

We have shown above (pp. 18-19) that the "compelling necessity" test includes a requirement that a government agency seeking to justify a course of racial discrimination must show that its objectives cannot be achieved in any other way. That requirement has not been met here by petitioner.

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in an affidavit, listing several apparently racially neutral indicators of disadvantage, that (R. 66):

> Additionally, the Special Admissions Committee considers the applicant's status as a member of a minority group as an element which bears on economic or educational deprivation. . . .

Petitioner further asserts (Br., p. 6) that all students admitted under the special program were qualified. Proof of this claim is allegedly supported by the assertion that those chosen came from a pool of minority students ten times larger than the size of the group offered admission. Clearly, "qualified" is a relative term and, in reality, with a limited number of places available only those accepted are qualified. In any event, the figures used by petitioner to justify its claim defy analysis. Of the 297 applicants who sought admission in 1973 under the special program, at least 73 were not considered because they were white. Of the remaining applicants a relatively large percentage were not deemed disadvantaged, since 15 of 31 minority students were accepted under the general program. It is also logical to assume that of those remaining some were not qualified. For example, Dr. Lowrey testified that the only recommendations from the subcommittee not accepted by the full committee were applicants who either did not take, or had received less than satisfactory grades in, required courses. If recommended applicants had not fulfilled prerequisites, it can be assumed that some students not recommended also failed to fulfill such requirements. Further, it would appear from the record that a reasonably large percentage of those accepted chose not to attend. When all these factors are considered, the relevant pool may be as low as 1 out of 2 and not 1 out of 10. The inequity of such a program when compared to admissions for others is enormous. Only one out of 30 to 40 applicants was admitted under the regular program.

It is true, unfortunately, that experience has demonstrated that the mere existence of constitutional and statutory prohibitions of discrimination—in education or employment—is not enough to erase the cumulative effects of the pervasive and deeply rooted discriminatory practices of past decades. Those members of minority groups who have themselves suffered special educational and economic hindrance on the basis of their race are clearly entitled to special educational help to enable them to take full advantage of the legal requirements of equal treatment. A key problem for our society is to accomplish this without impairing the right of individuals to be considered without regard to their race. We submit that petitioner has not shown that that cannot be done.

Barring the University of California from using admission procedures which treat applicants differently solely because of race would not bar it from considering the problems of disadvantaged students and assisting them in overcoming cultural or economic handicaps, thereby expanding the educational opportunities of our nation's historically deprived minorities, among others. A school could encourage applications from all groups in the community and engage in particularly vigorous recruiting in areas and institutions where there are likely to be large numbers of disadvantaged students. It could also provide compensatory educational preparation, both prior to admission and during school attendance, for those whose backgrounds have handicapped them scholastically. The record does not disclose any effort by petitioner in this direction. Rather, the record suggests that the expediency of racial quotas was chosen as the first and only effort to increase minority representation in the school.

Faced with these facts, petitioner is forced to suggest that the issue here is a choice between, on the one hand, the kind of racial preference it has adopted and, on the other, elevation of "the role of numerical indicators in an arid conformity to a concept of formal equality" (Br., p. 32); or "the mere elimination of formal barriers against minorities" (Br., p. 35); or adopting "the assumption that students with the highest numerical indicators will necessarily be the best doctors" (Br., p. 50).[27] The court below expressly rejected this false dichotomy. It emphasized that its condemnation of race in petitioner's admission policy did not mean that admissions must be based exclusively or primarily on academic test scores. It said (553 F. 2d at 1165, 1166):

> We observe and emphasize in this connection that the University is not required to choose between a racially neutral admission standard applied strictly according to grade point averages and test scores, and a standard which accords preferences to minorities because of their race.
>
> * * *
>
> While minority applicants may have lower grade point averages and test scores than others, we are aware of no rule of law which requires the University to afford determinative weight in admissions to these quantitative factors.
>
> * * *
>
> We reiterate, in view of the dissent's misinterpretation, that we do not compel the University to utilize only "the highest objective academic credentials" as the criterion for admission.

27. To support this argument, some of the *amici* compare the proportion of minority group members in student bodies created with racial preferences with the proportion in others created with no kind of affirmative action effort. Plainly, the comparison should be with programs in which the measures suggested above were used.

More important than the University's use of this dichotomy in its brief is the fact that it has obviously applied it in practice. There can be no doubt that the University moved directly from exclusive or primary reliance on mechanical criteria to an admission program that made race a key factor from the beginning. With but two years of experience during which there was no effort to consider alternatives, the University switched directly to an effort which was "race-conscious from the outset" (Br., p. 34, n. 41).

In view of this, petitioner's assertion that the alternatives to race suggested by the court below are "wholly without support in the record" (Br., p. 7) comes with little grace. There is at least an equal lack of support for petitioner's flat assertion that the lower court's proposed alternatives are "illusory" and would not "lead to significant minority participation" (Br., p. 14). Petitioner has not tried these alternatives and it offers no evidence that they have been adequately tried elsewhere.[28]

Finally, we believe that it is peculiarly inappropriate for petitioner to suggest that, if forced to stop using race as an admissions criterion, most professional schools "would simply shut down their special-admissions programs" (Br., p. 14). Does this mean that, if the decision below is affirmed, the Medical School at Davis will halt all further affirmative action efforts? Rather, it suggests

28. With respect to one of them, efforts to seek out minority group applicants, it has been noted that some medical school admissions officers have given "no more than lip service to black recruitment" (John Z. Bowers, MD, President, Josiah Macy, Jr. Foundation, in the foreword to Odegaard, *supra*).

that expediency has been chosen over constitutional requirements and that numerical glosses are all the University is willing to offer.

Schools may and, we think, should evaluate both grades and test scores in the light of a candidate's background; whether he came from a culturally impoverished home; the nature and quality of the schools he attended; whether family circumstances required him to work while attending school; whether he chose to participate in athletics, the orchestra, school newspaper, literary magazine, campus government; whether he had demonstrated a concern and interest in the broader community by political activity or volunteer work among the sick or underprivileged; and whether he had manifested leadership, industry, perseverance, self-discipline and intense motivation. As the court below recognized, all of these factors may constitutionally and legitimately be considered by the school.[29] In sum, we believe that weight should be given to the reality that some disadvantaged candidates have demonstrated the capability of surmounting handicaps, whether such handicaps were occasioned by discrimination, poverty, chronic illness or other factors, because grades and test scores alone may not measure the true potentialities of such candidates.

Moreover, if petitioner were to conclude that the medical profession as presently composed fails to serve the

29. Petitioner suggests that reducing one applicant's chance of admission by using such factors to favor another applicant is not legally distinguishable from consideration of the factor of race (Br., p. 54). This ignores the fact that the Fourteenth Amendment requires that discrimination on the basis of race be treated entirely differently from discrimination on other grounds. See Point I, *supra.*

disadvantaged elements in society, then it could also consider whether applicants for admission, irrespective of race or ethnicity, manifest a genuine commitment to serve those groups currently lacking adequate service.[30] Indeed, it could expressly offer special consideration in the admissions process to those who enter into a binding commitment to serve for a specified period in an urban ghetto, barrio or Indian reservation.

All of these procedures would result in greater educational opportunities for members of our society's historically deprived minorities, as well as other applicants who are economically and culturally deprived; none of them would offend the Constitution. But what the school may not do, we submit, is to classify applicants for admission on the basis of race or ethnicity and so structure its selection process as to admit an essentially predetermined proportion of members of certain groups.

Programs designed to augment the numbers of disadvantaged minority individuals attending professional schools should not await the professional school threshold. The initiatives must begin much earlier. As recently as June 27, 1977, this Court unanimously held that Federal courts may order school districts to provide remedial education programs, such as remedial speech and reading classes, to help black children recover from the effects of attending illegally segregated schools. *Milliken* v. *Bradley,* 45

30. It has been noted that there is no reason to assume that minority group graduates will necessarily choose to serve in the minority group community. Indeed, it is clear that this cannot be demanded of them. Obviously, they must have both the right and the opportunity to practice wherever they wish.

U.S.L.W. 4873 (1977). We strongly endorse such remedies. We believe, too, that vigorous efforts should be made at the junior high school level to identify promising disadvantaged students, especially in poor neighborhoods and in schools with large minority group enrollments, so as to provide at this early stage the necessary guidance for them to plan for professional careers.[31] On the senior high school level, there is need for additional federally funded remedial programs, such as Upward Bound and College Discovery, to stimulate and to assist students who appear to have the capabilities for professional careers but who, because of limiting economic and cultural circumstances, may have no such aspirations or prospects.

Moreover, no promising student should be excluded from college, graduate or professional school because of lack of funds. There is a critical need to expand public college open enrollment programs for high school graduates, as has been done in the City University of New York, coupled with financial aid and part-time opportunities, to facilitate attendance by disadvantaged students. Subsidized summer institutes for disadvantaged college students who aspire to be admitted to medical school should be made available to enable such students to actualize their potentialities and to compete successfully with other aspirants.

31. "The predominantly Black National Medical Association has started a nationwide recruitment campaign for more Black medical students. 'We're not only trying to define and seek out the bright, young medical student,' explained the NMA board member, Dr. Ross Miller, 'but we also want to do whatever is necessary to see that that student is successful in *finishing* his medical courses and becoming a good physician.' NMA members will help young Black students as early as the ninth grade, plan the curricula that offers them a solid background in the sciences." Fleischman, *Let's Be Human, supra,* December 1973—January 1974.

The problem of standards inevitably is a difficult and complex one. Every effort should be made to achieve performance validation of all examinations and criteria for admission to institutions of higher learning. Genuinely bias-free selection standards urgently need to be implemented wherever they may be absent. Once students are admitted to universities, on whatever level, all those who encounter difficulty should receive as much help as they may require to enable them to qualify for graduation.

POINT FOUR

The racial preferential treatment policy of the Medical School is not sanctioned by past decisions dealing with correction of illegal discrimination.

The cases relied upon by petitioner and by the dissenting judge below to justify use of racial criteria in medical school admission procedures fall into three basic classes: those involving the desegregation of racially separate public elementary and secondary school systems, those seeking to remedy specific acts of employment discrimination in a particular industrial establishment, and those involving other areas. All three groups of cases are fundamentally distinguishable. None upholds the use of racial classification or preference in the admission of applicants to a limited number of places in a particular educational institution.

A. The School Cases

The school desegregation cases differ from the case at bar in that they involve a pool of white and black students all of whom, regardless of their background or educational

potential, must be admitted and educated by the particular system. Race is used only to determine placement in a particular unit of the school system. No student has a constitutional right superior to any other student to attend a particular school in the system. Therefore, when race is used in that placement procedure in order to achieve a valid and constitutionally mandated public educational objective, i.e., integrated public schools, no one has been "preferred" and no one has been deprived of equal protection of the laws. All students have obtained what state and Federal Constitutions guarantee: a public education in an integrated school. That is far different from the situation at bar. Here, racial classifications have been instituted to determine who will fill the limited number of seats available. As a result of the operation of this admissions procedure, Bakke, because of his race, has been denied a medical school education entirely.

The University has argued that this distinction is not apposite on the ground that racial classifications in the service of school integration inconvenience non-minorities. We submit that the court below correctly disposed of that argument (553 P. 2d 1152, 1160-1161):

> Whatever the inconveniences and whatever the techniques employed to achieve intergration, no child is totally deprived of an education because he cannot attend a neighborhood school, and all students, whether or not they are members of a minority race, are subject to equivalent burdens. As the Supreme Court has said numerous times since *Brown* v. *Board of Education* (1954) 347 U. S. 483, there is no right to a segregated education. The disadvantages suffered by a child who must attend school some distance from his home or is

transferred to a school not of his qualitative choice cannot be equated with the absolute denial of a professional education, as occurred in the present case.

Furthermore, in the school cases, the courts have approved consideration of the racial composition of student bodies solely as a remedy to desegregate schools previously subject to illegal segregation. *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U. S. 1 (1971); *North Carolina State Board of Education* v. *Swann,* 402 U. S. 43 (1971); *Green* v. *County School Board,* 391 U.S. 430 (1968).

As this Court noted in *North Carolina State Board of Education* v. *Swann, supra,* the adoption of apparently neutral "color blind" school assignment plans by a previously segregated system would render illusory the promise of *Brown* for it would deprive school authorites of the one "tool absolutely essential to fulfillment of their constitutional obligation to eliminate existing dual school systems" (402 U.S. at 46). To assure the effective disestablishment of an officially maintained segregated school district and the creation of a "unitary system," this Court has upheld desegregation plans which take race into account in the allocation of the student body among the various schools in the system.[32]

Here, there is no showing of prior discrimination by the recently established Medical School at Davis. Furthermore,

32. This Court has held that, once a school attendance zone scheme ordered by a court as a remedy for illegal segregation by a school district has achieved its objective, the court may not require the district to continue to rearrange its zones in order to insure that the racial mix desired by the court is maintained in perpetuity. *Pasadena City Board of Education* v. *Spangler,* —— U.S. —— (1976), 44 U.S.L.W. 5114 at 5117.

there is no evidence, and it is not claimed by any party, that the University as a whole has ever engaged in racial discrimination or segregation. Thus, this case lacks the element which conspicuously distinguishes the school cases—the use of racial classifications solely and only to the extent necessary to remedy illegal discrimination practiced by the particular school system. Here the University admittedly seeks to use racial classifications to attempt to remedy action and inaction not by itself but by other medical schools, by hospitals, by medical societies and by society in general.[33]

There is a vital distinction, we submit, between remedial action to correct specific illegal acts of discrimination and a general rule allowing preferential treatment to seek to undo the effects of past discrimination by society at large. Correction of conduct committed by an individual defaulter can be and has been restricted to situations in which the default is precisely delimited and clearly established. Furthermore, the relief given is tailored to correct the particular situation and is usually imposed under the authority of a court or other tribunal.

It is quite different to give every state university, and all other official bodies as well, license to ignore the constitutional prohibition of racial discrimination whenever they allege it is necessary to do so to correct the effects of past societal discrimination. There is no reliable pro-

33. Petitioner states that, in its discussion of the denial of opportunities in medical training and practice, it has focused on the situation with respect to blacks because the data on Mexican-Americans, American Indians and other minority groups are sparse (Br., p. 21, n. 13, p. 23, n. 22). We submit that substantial departures from the normal constitutional prohibition of racial discrimination cannot be allowed to rest on such a shaky foundation.

cedure for determining the existence or scope of such past discrimination or its impact, if any, on the operations of the institution in question; nor are there standards for determining how recent, how pervasive or how gross societal discrimination must have been to warrant preferential treatment, what correlation there must be between past discrimination and present handicaps or at what point the right to a racial preference terminates.[34] Finally, there are no agreed-upon ways to determine what measures are necessary to effect a remedy or even what groups shall be the beneficiaries of such preference.

Relaxation of the constitutional requirement of equal treatment should not be permitted on so vague a basis. The effect, we submit, would be hardly different from outright nullification of the whole concept of equal protection.

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34. Petitioner flatly asserts that "the underlying philosophy of programs like the one at Davis is that they will eliminate the need for themselves and then disappear" (Br., p. 42). In support of this pious hope it offers only the fact that one law school has eliminated cans, American Indians and other minority groups are sparse (Br., or reduced the participation of two racial groups in its special program as they were accepted through general admissions (Br., p. 43, n. 52). This one incident can not be regarded as proof that administrators will return to color-blind admissions policies at Davis or other professional schools as soon as they are no longer needed. Petitioner's own statistics show that its general admissions process has admitted a substantial number of Asians (*e.g.*, 13 out of the total class of 100 in 1973) but that it is nevertheless continuing to admit Asians under the Task Force Program (Br., p. 4).

B. Employment Cases

The employment cases cited by the dissent below[35]—like the school cases—are characterized by judicial findings of specific prior discriminatory acts by the particular institution or employer involved.[36] The problem in formulating a remedial order is to overcome the residual effects of past discrimination by that employer. As noted by the Second Circuit, "while quotas merely to attain racial bal-

35 "Title VII" (42 U.S.C., Section 2000e, *et seq.*) decisions include *Franks* v. *Bowman Transportation Co., Inc.*, 96 S. Ct. 1251 (1976); *United States* v. *Wood, Wire and Metal Lathers International Union, Local No. 46* (2d Cir. 1973), 471 F. 2d 408, *cert. den.* 412 U.S. 939; *United States* v. *Local Union No. 212, Int'l Brotherhood of Electrical Workers* (6th Cir. 1973), 472 F. 2d 634; *United States* v. *Ironworkers Local 86* (9th Cir. 1971), 443 F. 2d 544, *cert. den.* 404 U.S. 984; *Patterson* v. *American Tobacco Company* (4th Cir. 1976), 535 F. 2d 257, *cert. den.* 97 S. Ct. 314 (1976).

"Executive Order" (Exec. Order 11246, 30 C.F.R. 12319 as amended 32 C.F.R. 14303; 34 C.F.R. 12985) decisions: See *Contractors Ass'n of Eastern Pa.* v. *Secretary of Labor* (3d Cir. 1971), 442 F. 2d 159, *cert. den.* 404 U.S. 854 (Philadelphia Plan); *Weiner* v. *Cuyahoga Community College District* (1969), 19 Ohio St. 2d 35 (249 N.E. 2d 907) (Cleveland Plan); *Joyce* v. *McCrane* (D.N.J. 1970), 320 F. Supp. 1284 (Newark Plan); accord *Southern Illinois Builders Ass'n* v. *Ogilvie* (7th Cir. 1972), 471 F. 2d 680 (state affirmative action plan); *Associated Gen. Contractors of Mass., Inc.* v. *Altshuler* (1st Cir. 1973), 490 F. 2d 9, *cert. den.* 416 U.S. 957 (1974) (same).

36. Judge Tobriner asserted that this Court, in *Washington* v. *Davis*, 436 U.S. 229 (1976), explicitly approved benign racial classifications in recruiting. The *Washington* majority had considered the police department's "affirmative efforts . . . to recruit black officers" to be evidence negating "any inference that the Department discriminated on the basis of race or that 'a police officer qualified on the color of his skin rather than ability.'" *Id.* at 246. This language makes it evident that the *Washington* majority did not consider that the special recruiting efforts made by the department had the effect of excluding anyone from a position because of race. If a recruitment program may reach out to previously unsolicited or undersolicited segments of the community, it does not follow that such a program may constitutionally be permitted if it is part of a system to exclude anyone from benefits—employment or a place at medical school—on the basis of race.

ance are forbidden, quotas to correct past discriminatory practices are not . . ." *United States* v. *Wood, Wire and Metal Lathers International Union, Local No. 46,* 471 F. 2d 408 (2nd Cir.), *cert. den.* 412 U.S. 939 (1973). Because of discrimination in hiring and promotion policies, segregated seniority lines, and non-job-related tests, the existing work force is not composed as it should have been had constitutional standards of non-discrimination been maintained. In a discriminatorily created work force, only a limited number of job openings occur from time to time. Under these circumstances, a racially "neutral" policy superimposed on a racially shaped pattern would not effectively remedy and disestablish the discriminatory system. It would instead, perpetuate the effects of discrimination. Accordingly, the courts have reluctantly[37] found it necessary to employ racial classifications in fashioning remedies. As recently stated by the Second Circuit in *Kirkland* v. *New York State Dept. of Correctional Services,* 520 F. 2d 420 (2nd Cir.), *reh. den.* 531 F. 2d 5 (1975), *cert. den.* 97 S. Ct. 1122 (1976), "[t]he replacement of individual rights and opportunities with a system of statistical classifications based on race is repugnant to the basic concepts of a democratic society."

37. See, *e.g., Vulcan Society* v. *Civil Service Commission,* 360 F. Supp. 1265, 1277-78, 5 FEP Cases 1225, 1239-40 (remedies based on racial classifications called "counterproductive," tending to "generate resentments"), *aff'd,* 490 F. 2d 387 (2nd Cir. 1973) (temporary quota system approved "somewhat gingerly" and "only because no other method was available for affording appropriate relief without impairing essential city services"); *Bridgeport Guardians, Inc.* v. *Civil Service Commission,* 482 F. 2d 1333, 1340 (2nd Cir. 1973) (quota relief approved "somewhat gingerly"); *Castro* v. *Beecher,* 459 F. 2d 725, 736 (1972) (effort at compensatory racial relief termed "crude" to "be pursued with sensitivity and restraint"); *Shield Club* v. *City of Cleveland,* 370 F. Supp. 251 (N.D. Ohio 1973) (quota ordered, remedy choices found freighted with "weakness and individual and group inequities").

But admission to a class at a university is fundamentally different. Each year all the positions are open for selection. There is no question of filling a few vacancies in an existing discriminatorily created work force. Rather, to use the employment analogy, it is as though the whole work force were hired anew each year. Thus, there is no issue of perpetuating discrimination (which here did not exist in any event) and no need or justification for imposing racial classifications or preferences in the annual admission of an entire new school class.[38]

Petitioner also relies on *Morton* v. *Mancari,* 417 U.S. 535 (1974), in which this Court upheld a federal statute granting preference for American Indians in federal government employment (Br., pp. 53, 55). However, this Court was careful to narrow its decision in that case to the "unique legal status of Indian tribes under federal law." The preference in that case, it said, was "granted to Indians not as a discrete racial group, but rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion" (417 U.S. at 554). The preference at Davis is purely racial and without any such intimations of long-established and sanctioned separate status. Indeed, the alleged objective is integration rather than preservation of a quasi-sovereign people.

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38. If an analogy is to be made from petitioner's "remedial" program in education to the employment situation, it would mean imposing quota requirements on all employers in an industry wherever it was regarded as public knowledge that some employers in the industry had engaged in discrimination.

C. The Other Cases

The cases in fields other than employment and education[39] cited by the dissent below also involve public entities which had specific histories of discriminatory acts which the decisions sought to overcome. In these other fields, as in education, violation of constitutional rights provides "the necessary predicate for the entry of a remedial order" against the offender. *Hills* v. *Gautreaux,* 425 U.S. 284, 297 (1976) (public housing, tenant selection), applying the reasoning of *Milliken* v. *Bradley,* 418 U.S. 717 (1974). *Milliken* had rejected a comprehensive metropolitan area school desegregation plan "because it contemplated a judicial decree restructuring the operation of local government entities that were not implicated in any constitutional violation." *Hills* v. *Gautreaux, supra,* 425 U.S. at 296.

As we have shown in every instance where the use of race has been permitted for remedial purposes, whether it be in a school or voting district or in fact anywhere, the courts have consistently adhered to the requirement that there be a history of racial discrimination by the entity involved. They have not permitted private parties or groups, whether university faculties or employers, to deny

39. *Brooks* v. *Beto,* 366 F. 2d 1 (5th Cir. 1966) (selection of grand juries); *Otero* v. *New York City Housing Authority,* 484 F. 2d 1122 (2d Cir 1973) (public housing tenant selection); and *Gautreaux* v. *Chicago Housing Authority,* 304 F. Supp. 736 (N.D. Ill. 1969) (same). The one decision considered an exception by the majority below, *Porcelli* v. *Titus,* 431 F. 2d 1254 (3d Cir. 1970), (selection of school administrators), rests uncertainly on *Brown* v. *Board of Education.* Even if it might be considered a proper extension of the rights of school children to desegregated classes, it seems to assume an existing segregation of pupils in the subject school system. In any case, however, it is of doubtful validity.

admission to schools or jobs on the basis of race except as a specific corrective measure carefully delimited as to area and time and to affect only those guilty of discrimination.

Neither universities nor employers have received judicial sanction to discriminate on racial grounds to satisfy their own notions of what may be necessary to cure societal discrimination in the past.

The case of *United Jewish Organizations of Williamsburgh* v. *Carey*, —— U.S. —— 97 S. Ct. 1251 (1976), does not support petitioner's effort to justify the assumption of this power. The legislative redistricting there approved as a remedial measure did not deprive anyone of the right to vote. Thus, as in the school cases, no individual was denied a benefit.

More important, none of the protections which Justice Brennan relied on to insure that the proper balance was struck between the admitted dangers of race-centered remedies and the need for effective social policies promoting racial justice is present in this case. No responsible legislative body has directly confronted the undesirable "counter-educational costs" of opting for an activist race-conscious remedy. There is no Congressional legislation such as the Voting Rights Act, enacted after "voluminous" legislative consideration and representing an unequivocal and well defined Congressional consensus about not only the existence of the "insidious and pervasive" evil of voting rights violation but also the need for race-centered measures.

Finally, not only is respondent's deprivation total but, because the opportunity to attend school is uniquely an individual opportunity and not merely a means of advancing an interest one shares with others, respondent here derived no protection, as the complaining voters did in *Williamsburgh,* from the fact that other whites were represented in the Medical School. Thus, none of the considerations which led the Court in *Williamsburgh* to ignore the counter-productive aspects of race-centered remedies exists in this case. These aspects remain unmitigated and unrestrained in their capacity for mischief.

Conclusion

We submit that petitioner's position sacrifices the principle of racial equality for a short term advantage. It permits each generation to conclude that a prior generation was disadvantaged and to repair the discrimination by discriminating against members of the current generation. The process is likely to be interminable, particularly when it is caught up in campus, community and political pressures. There is no cut-off principle. Though most of the justification for the position is said to come from an effort to compensate for slavery, there is no limit in the Medical School's action to descendants of slaves; there is no limitation to blacks; the policy includes Mexican-Americans and Asian-Americans—those who were arguably wronged by the United States and those who came recently. It includes Hispanic-Americans with no real effort to distinguish among them. In short, it uses the grossest sort of stereotypes to decide who "deserves" an advantage.

For the foregoing reasons, we respectfully urge that the judgment of the California Supreme Court be affirmed.

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