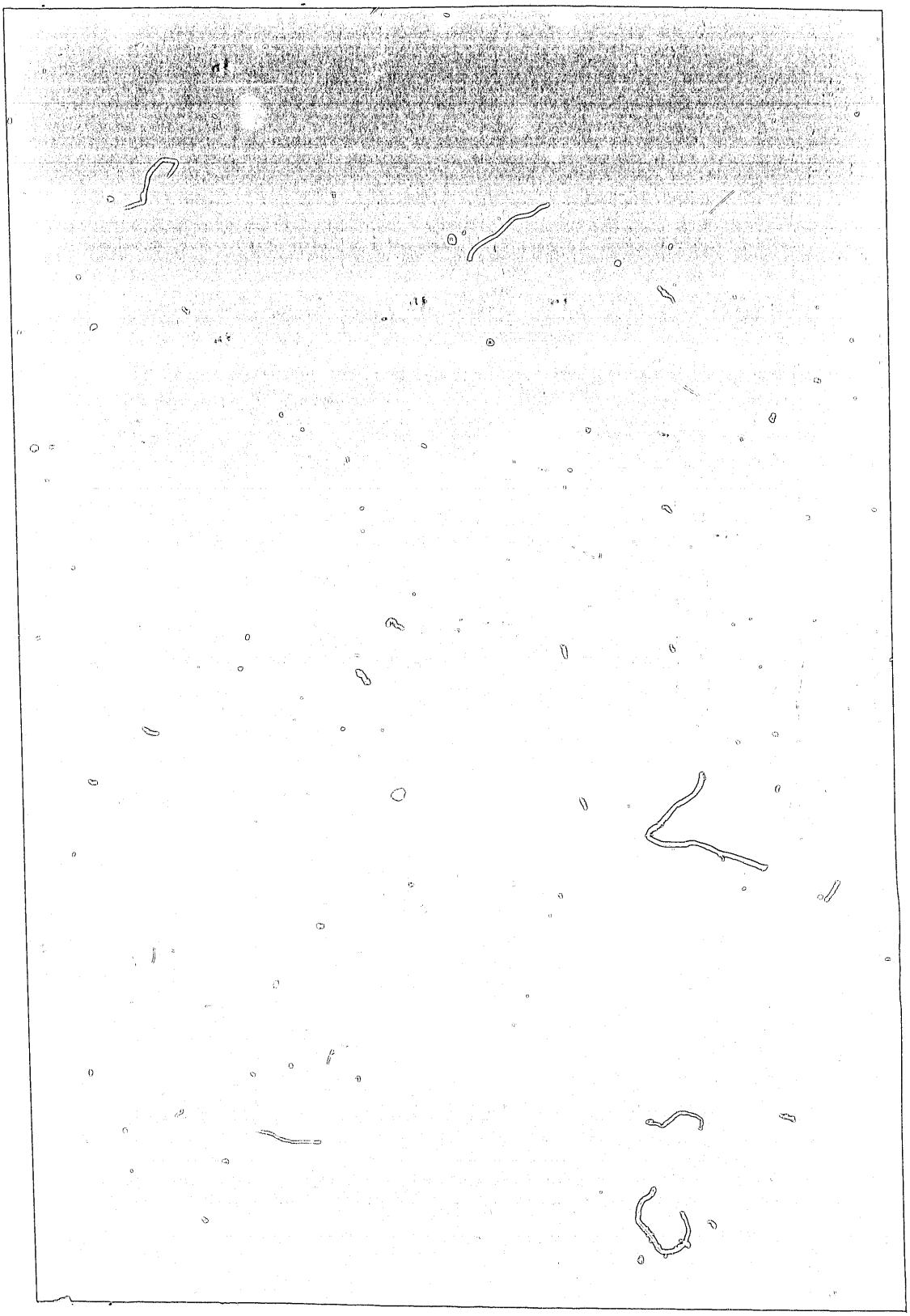

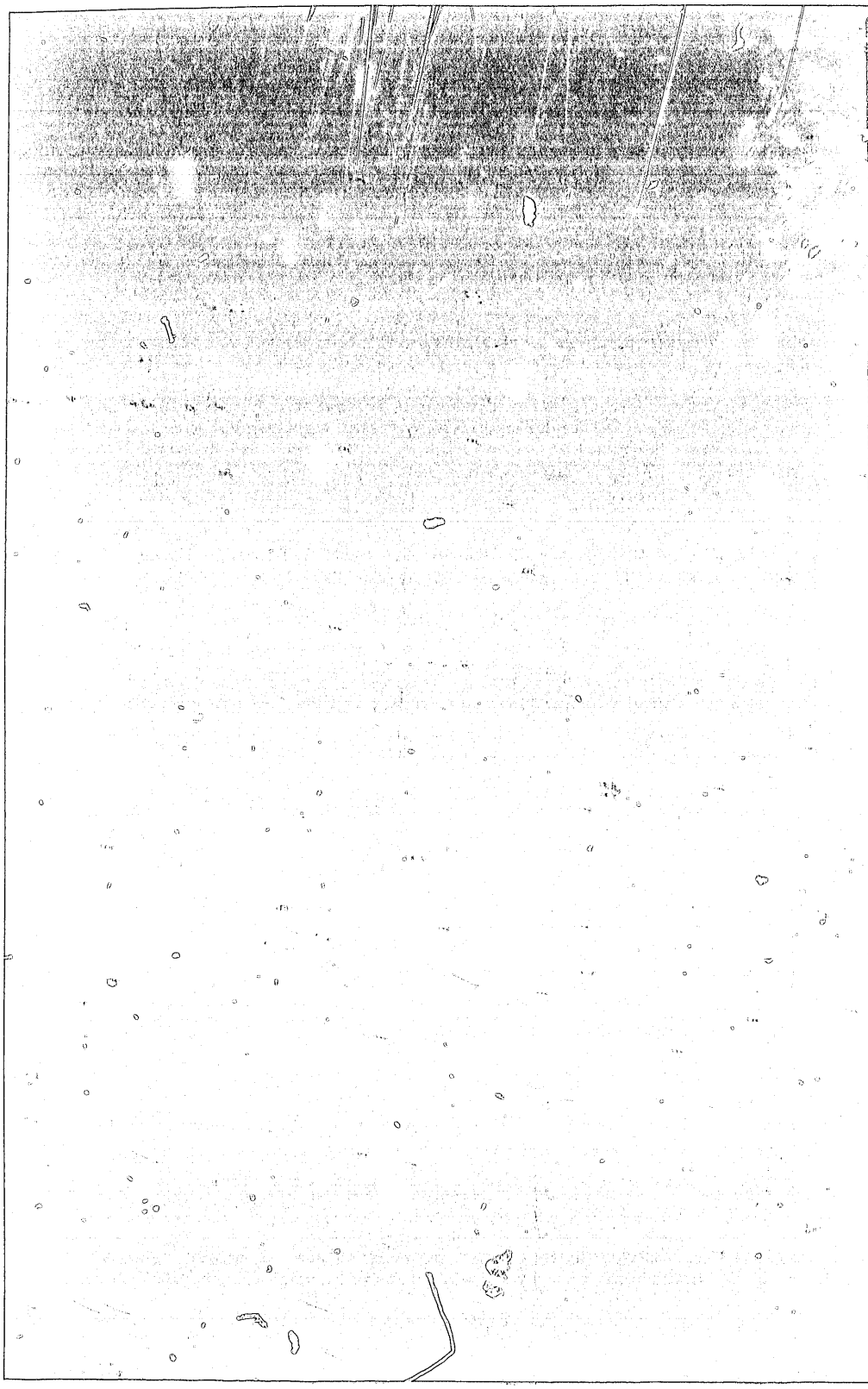

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-811

REGENTS OF THE UNIVERSITY OF CALIFORNIA,

Petitioner,

v.

ALLAN BAKKE,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF CALIFORNIA

BRIEF OF AMERICAN SUBCONTRACTORS ASSOCIATION, AMICUS CURIAE IN SUPPORT OF RESPONDENT

This brief is filed by Amicus Curiae American Subcontractors Association, pursuant to Supreme Court Rule 42 and letters of consent from both parties, which have been previously filed with the Court.

INTEREST OF THE AMICUS

The American Subcontractors Association (ASA) is a national trade association with over 5,000 members, representing subcontractors engaged in the entire spectrum of work

required on construction worksites. Over 80% of the work performed on both public and private construction is performed by subcontractors. The purpose of ASA is to establish and maintain communications between local chapters of subcontractors and to represent the subcontractor before governmental agencies and other industry organizations which affect subcontractors, all with the objective of insuring an equitable and competitive marketplace in which a subcontractor may do business.

In excess of 36 billion dollars worth of new construction work annually performed in this country is for federal, state, or local governmental bodies.[1] Qualifying for construction contracts awarded by these governments, and subcontracts awarded by the contractors, is becoming subject to more and more conditions based on racial criteria, as detailed more fully in the *Argument* hereinafter. Many of these conditions are blatant quotas requiring a minimum percentage of a contract to go to minority persons or to firms controlled by minority persons,[2] while other schemes are more subtle in design. In all cases, however, the non-minority subcontractor is being denied the right to compete equally for contracts for which it is just as qualified, or more qualified, to perform the work, solely on the basis of the non-minority racial makeup of its ownership.

Thus, the question of " 'reverse discrimination', pure and simple"[3] is becoming an everyday issue in the awarding of the millions of dollars of public construction contracts. It is also becoming a "life or death" question for the non-minority subcontractor who has always performed primarily public

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[1] U.S. Department of Commerce, 23 *Construction Review*, No. 3, at 15 (April/May 1977). This 1976 figure also represents 25% of the value of total new construction put in place in 1976, $144,821,000,000.

[2] *See, e.g.*, Public Works Employment Act of 1977, Pub. L. No. 95-28, §103, 91 Stat. 116 (1977).

[3] *United Jewish Organizations of Williamsburgh, Inc. v. Carey*, ____ U.S. ____, 97 S.Ct. 996, 1014-1015 (1977) (Brennan, J., concurring).

work, yet now finds himself completely closed out of this line of work. The resolution of the question of whether the admirable goal of rectifying the effects of past discrimination can ever justify such a severe burden and denial of rights to this nation's non-minority citizens is of grave importance to ASA and its subcontractor members.

While the facts of this case and those of the minority business utilization requirements of contracting agencies may be distinguishable in many ways, the rationale of any decision in this case reversing the decision of the California Supreme Court will certainly be applicable to any litigation challenging minority business utilization requirements. Therefore, ASA respectfully submits that this Court should consider the ramifications of the issue herein on other forms of "reverse discrimination" being practiced today, before it reaches its decision in the case at bar. We are convinced that approval by this Court of the practices at issue herein, on the bases relied upon by the Petitioner and the amici filing in support of Petitioner, could only be taken as tacit encouragement of other forms of "reverse discrimination", of which the minority business utilization contract requirements are only one example.[4]

SUMMARY OF ARGUMENT

This case involves the constitutional question only tangentially reached by the Court last Term of " 'reverse discrimination', pure and simple", *United Jewish Organizations of Williamsburgh, Inc. v. Carey*, U.S. ____, 97 S. Ct. 996,

[4]The minority business utilization requirements with which ASA is most concerned apply not only to construction projects, but to *all procurement* by most of the governmental bodies which have such requirements. Therefore, the $36,000,000,000 worth of *new construction* contracts is only the tip of the iceberg of public contracts to which such "preferential" requirements are or may be attached.

1014-1015 (1977) (Brennan, J., concurring). The Respondent Allan Bakke was denied admission by the Davis Medical School, even though Bakke was admittedly more qualified for admission than many minority applicants who were admitted under a special program for the admission of minorities but who would not qualify under the School's regular admission procedures.

Whether the special program constitutes a "preference" or a "quota", it is clear that the result is the unequal treatment of non-minority persons such as Bakke and minority persons applying under the special programs, solely on the basis of race. In fact, in arguing that a program preferring "disadvantaged" students would not suffice to meet the School's objectives, Petitioner admits that the preference is based, not on the disadvantaged background of the applicant, but totally on the factor of race.

There has been no showing of past acts of racial discrimination committed by either Bakke or the Petitioner, and the effect of the program in excluding Bakke is neither incidental nor "benign". Accordingly, none of the cases and authorities which confirm the constitutional validity of race-conscious remedies to address specific past acts of discrimination[5] support the validity of Petitioner's "voluntary" state-imposed "benign" remedies intended to rectify societal discrimination favoring minority persons at the expense of Bakke and other non-minority individuals.

Rather, this Court's recent cases indicate that Bakke's constitutional rights are infringed by Petitioner's scheme to favor a race or races of which he is not a member, because the Constitution guarantees equal protection of the law to *all* persons, whether they be members of a "majority" or

[5] *E.g., United Jewish Organizations of Williamsburgh, Inc. v. Carey*, ____ U.S. ____, 97 S.Ct. 996 (1977); *Franks v. Bowman Transportation Co. Inc.*, 424 U.S. 747 (1976); *Albemarle Paper Company v. Moody*, 422 U.S. 405 (1975); *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

"minority" group. *Cf. McDonald v. Santa Fe Trail Transportation Co.*, 273 U.S. (1976); *Washington v. Davis*, 426 U.S. 229 (1976); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). None of this Court's cases have indicated that any individual entitled to protection of the federal civil rights laws and the Fourteenth Amendment of the Constitution, upon which such laws are based, may be forced to bear substantial individual burdens as a result of state programs intended to redress society's "legacy of discrimination", unless such programs are specifically addressed to *causes* and *effects* of particular instances of past discrimination. In such cases, non-minority persons displaced by remedies flowing from such programs are not harmed, except to the extent they are deprived of benefits gained only through actual, specific acts of racial discrimination. *See, e.g., Franks v. Bowman Transportation Co., supra*, at 774-775.

Nor is Petitioner's preferential admissions program sustainable on the basis that it serves a compelling state interest. The racial classifications clearly set up by Petitioner's program have long been held by this Court to subject the governmental interests to strict scrutiny, requiring proof of a compelling state interest which cannot be served in any manner less offensive to the rights of those subject to the discrimination. *E.g., McLaughlin v. Florida*, 379 U.S. 184 (1964).

Petitioner's arguments center on the need for more minority doctors, and the consequent need to break, or avoid, the restraints on medical school qualifications which our societal "legacy of discrimination" (Brief for Petitioner, at 10) has imposed. Petitioner argues that society has historically placed minority persons at such a disadvantage culturally and educationally that no minority person will ever "catch up" enough to gain one of the increasingly-rare positions in the nation's medical schools. We submit that such a rationale for arguing a "compelling" interest is an insult to the inherent intellectual capacities of minority persons. Furthermore, it is a forceful statement of the gross injustice done to non-minority persons rejected for admission to one of the limited number of positions in medical school which would have been theirs

but for a racial preference granted to a less qualified applicant.

The fact is that the competition for admission to medical school is indeed very tight. That is hardly a reason to arbitrarily, on the basis of race alone, deny admission to a non-minority student who has worked and studied most of his life to reach that goal and practice in that profession. Neither is it justifiable to deny a non-minority businessman the right to pursue government contracts on an equal basis with his minority-owned competitors, purely on the basis of past societal racial discrimination. Yet, this would be a logical extension of Petitioner's arguments.

Such an approach totally ignores the more analytical and less arbitrary alternatives available to put the "disadvantaged" person or business on an equal footing with the non-minority person or business, whether majority or minority, on an equal footing with other persons or businesses with which he is in competition. Petitioner's rejection of alternatives to its special admissions program, such as the case-by-case consideration *in its regular admissions procedure* of the cultural and educational handicaps confronted by an individual applicant, on the basis that such alternatives will not result in *as many* minority admissions *as soon* as would a racial preference plan, reveals Petitioner's objective to be a circumvention of less onerous alternatives by the imposition of a strictly racial numerical "quota". Such an objective does not rise to the level of justifying the racial disability placed upon Respondent Bakke.

ARGUMENT

I.

THE RELIANCE OF THE DAVIS PREFERENTIAL ADMISSIONS PROGRAM ON RACIAL CRITERIA IS NEITHER COMPELLED NOR SANCTIONED BY THE CASES SUSTAINING CAREFULLY TAILORED REMEDIES ADDRESSED TO SPECIFIC ACTS OF PAST DISCRIMINATION.

A. The purposes and effects of the Davis program are to correct societal discrimination at the expense of non-minority persons' rights.

Our society is now on the brink of entering into a new and distinctly different phase in the continuing effort to effectuate its basic precept that "all men are created equal" and its constitutional command that all persons are entitled to "equal protection of the laws." The established concept of "affirmative action" has heretofore focused upon precluding discrimination founded upon race, ethnic origin or other such immutable characteristics, eradicating the direct effects of any prior discrimination of that nature and insuring for the future equal opportunity to all persons without regard to such characteristics. However, under the new approach, typified by the preferential admission program now before the Court, the focus of "affirmative action" would transition to requiring that certain segments of our pluralistic society be "preferred" in their dealings with the government by way of preferences or quotas favoring certain prescribed racial or ethnic "minorities" considered to be chronically disadvantaged. It is now, at its incipient stage, that this new concept of societal engineering should be recognized as an unwarranted extrapolation of the principles carefully evolved by judicial authorities dealing on a constitutional plane with the eradication of racial discrimination in all facets of our society. Indeed, to the extent that such racially preferential practices impose direct

and significant burdens upon individuals not falling within the protected categories of persons, in unfocused response to general "societal discrimination", as does the Davis program here in issue, they are violative of the very precepts and constitutional guarantees which such practices are purported to implement.

The special admissions program under scrutiny is designed specifically to effect admission into the Davis Medical School of a specified "goal" number of disadvantaged members of racial or ethnic "minorities". While the Petitioner maintains that all persons admitted to the medical school, whether by way of general or special admissions programs, are "qualified", it is clear that the "minority" persons benefitted by that special program often had lower qualifications based upon the various objective criteria employed in the gemeral admission process than non-minority applicants, including the Respondent, who were not admitted to the medical school. Thus, distilled to its essence, this special preferential admission program had the direct effect of excluding the Respondent and others from admission to the medical school in favor of minority applicants who were, as a general proposition, probably less, and certainly not more, qualified for admission by all articulated standards other than race.

The basis upon which this preferential distinction operated, and continues to operate, is founded solely upon racial or ethnic considerations. Without question, had such preferential treatment been accorded persons in the racial or ethnic "majority"[6] to the exclusion or detriment of "minority"

[6]Indeed, the threshold problem in administering governmental preferences based upon a distinction between "minority" or "majority" interests is defining the precise segments of society which are to be afforded such preferential treatment. Chief Justice Burger identified the inherent problem in attempting to administer the fixed rights arising under the Constitution on a sliding scale based upon "minority" or "majority" type characterizations in his dissenting opinion in *United Jewish Organizations of Williamsburgh, Inc. v. Carey*, ____ U.S. ____, 97 S.Ct. 996 (1977). Addressing the slightly different context of legislative district apportionment, he noted that the segment of our

(continued)

individuals, it would be constitutionally invalid as a deprivation under the Equal Protection Clause of the Fourteenth Amendment. The issue now posed to this Court is whether it is a distinction of constitutional consequence that here the preferential status is afforded racial and ethnic minorities to the detriment of non-minority persons.

Given the uncontrovertably resultant deprivation imposed on racial grounds, the point of departure in the constitutional analysis of the preferential admission program is its conceded purpose "to compensate for the effects of *societal discrimination* on historically disadvantaged racial and ethnic minorities." (Emphasis added) (Brief For Petitioner, at 3). In implementing such a program, the Petitioner seeks to serve general objectives which, as a matter of sociological theory and governmental policy, may be laudable indeed, but the means which it has selected simply cannot pass constitutional muster. Clearly, neither the Respondent nor any other person, including those benefitted by the preferential admission program, have an absolute constitutional right to receive a medical school education. However, they each do have a

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(footnote continued from preceding page)
society generally described as "white" included a "veritable galaxy of national origins, ethnic backgrounds, and religious denominations." *Id.* at 1020. Because the white "majority" is pluralistic and not monolithic, it therefore simply cannot be assumed that the governmental interests of all members of this "majority" are even substantially aligned. *Id.* at 1020. *See also* Lavinsky, *DeFunis Symposium*, 75 COL. L. REV. 520, 527 (1975). In fact, the interest of the various constituent segments of the purported "majority" may well conflict as a result of internal prejudices and biases among and between such segments. In similar fashion, the segment of society frequently referred to as "non-white" or "minority" is, itself, pluralistic in nature with its own internal jealousies, prejudices and biases running among and between its subcategories. As a composite of numerous religious, ethnic and socioeconomic backgrounds and national origins, our society is one of many "minorities" and few, if any, "majorities," each segment of which has its own unique perspectives and interests. Governmental action should not prefer the interests of one segment to the detriment of another on the basis of such arbitrary and inherently suspect classifications.

constitutional right to be considered as a potential recipient of such a benefit without regard to racial, ethnic or other impermissable considerations once the government elects to make such a limited opportunity as an education available. As the United States District Court for the District of Columbia aptly observed in *Flanagan v. President and Directors of Georgetown College*, 417 F.Supp. 377, 384 (D.D.C. 1976):

> While an affirmative action program may be appropriate to ensure that all persons are afforded the same opportunities or are considered for benefits on the same basis, it is not permissible when it allocates a scarce resource (be it jobs, housing, or financial aid) in favor of one race to the detriment of others.

There has been no effort to demonstrate or even contend that the University has engaged in any prior overt acts of discrimination against "minority" individuals which have directly resulted in the present pervasive disadvantages and disabilities suffered by such individuals. Certainly the Respondent and non-minority persons similarly situated have not previously engaged in such discriminatory conduct. If responsibility must be borne for such disadvantages resulting from historically and culturally pervasive racial biases and prejudices, it must be borne by our society as a whole. This disadvantaged status flows ultimately from our unfortunate history of racial discrimination in facets of society not remedied or even directly affected by this preferential graduate school admission program, such as in the critical areas of primary education, employment, housing and voting rights. These *underlying causes* of minority disadvantage can be and, to some degree, have been directly identified, confronted and appropriately remedied. However, the purportedly "remedial" program now in issue is not *remedial* in any sense of the word, since it is, at the very least, one step removed from the pervasive and pernicious underlying causes of minority disadvantage. This is not an effort designed to correct "the condition that offends the Constitution," *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16

(1971), but rather a program intended only to compensate for the cumulative and collective effects of societal discrimination without reaching the conditions causing it. This purely compensatory effect merely affords retribution on solely racial grounds to a certain few "minority" individuals for their disadvantaged status. The Respondent is, thus, treating only the symptoms and not the illness of racism. *Cf. Cramer v. Virginia Commonwealth University*, 415 F.Supp. 673, 677 n.2 (E.D. Va. 1976).

Moreover, it is retribution which is exacted *from* a few innocent members of the racial majority. Here, the Respondent and the others similarly situated who have been displaced by this racially or ethnically oriented preferential admission program have suffered a very real and significant deprivation as a direct and inevitable consequence of the Petitioner's design to admit a certain designated number of "minority" applicants. In the absence of the racially or ethnically based preference for minorities, it would appear that the Respondent and others not entitled to such preferential treatment would have gained admission. As a practical matter they have been purposefully excluded from admission because, and only because, of racial considerations. Although presumptively innocent of any discriminatory conduct on their own part, these few individuals must, therefore, bear the brunt on behalf of society at large of such an approach to "affirmative action".

B. None of the authorities relied upon by Petitioner support the validity or appropriateness of state-imposed broad racial preferences to remedy the "legacy of discrimination" of society at large.

The Petitioner, and the numerous Amici submitting briefs in support of the Petitioner, urge that this case fits comfortably into the existing composite of judicial authorities defining and delimiting the rights and remedies arising under

the Fourteenth Amendment and its guarantee of equal protection to all persons. Indeed, however, the existing authorities fall far short of even condoning, let alone compelling, such racially preferential practices which, although attempting to address problems of a societal scope and origin, have the not so incidental practical effect of substantially disadvantaging non-preferred individuals. In several different contexts, the decisions of this Court and their progeny spawned in the lower federal courts have unquestionably endorsed the carefully restrained utilization of racial criteria or considerations for the purposes of remedying and countering the effects of prior discrimination against racial minorities. Nevertheless, as will be discussed, these involved circumstances in which it was possible to identify a particular source of discrimination and the casual relationship between that source and the consequences flowing from it. Accordingly, appropriate remedies could be fashioned which were narrowly and specifically tailored to eradicating the source and rectifying the particular consequences of such discriminatory conduct without overstepping the countervailing individual and governmental interests.

On the other hand, the program now in question, and others analogous to it, are administratively evolved governmental efforts at achieving racial diversity in certain aspects of society which has heretofore been absent because of the secondary effects of amorphous discrimination which pervades our society as a whole. It does not focus on a particular source of overt discriminatory action and seek to address that problem alone. Hence, it cannot endeavor to benefit the particular members of the racial minority who were injured by any specific acts of racial discrimination or to only burden the perpetrators of such acts. Endorsement of such a program involving specific preferences which necessarily work to disadvantage and burden a racial group, albeit the conceptual "majority", would extend the established concept of "affirmative action" by a quantum leap beyond any statutory or constutional basis. Euphemistic characterizations of such

programs as "remedial" or "benign" are nothing more than exercises in semantics and neither mitigate the very real negative impact on affected members of the unpreferred racial class nor enhance the constitutional viability of such programs.

There is no question that the Petitioner, as any governmental body, is afforded wide latitude in fulfilling its proper societal and governmental function. But this proposition merely begs rather than resolves the ultimate question of whether the Petitioner's proper function is served by such racially oriented and exclusionary preferences. Reference to this Court's holding in *Morton v. Mancari*, 417 U.S. 535 (1974), that a governmentally imposed "Indian preference" program was "tied rationally to the fulfillment of Congress' unique obligation toward the Indians," *Id.* at 555, is unavailing to the Petitioner. The Court in reaching that decision recognized that the Indian preference statute represented a very specific response to a very specific and unique situation evolving out of the historical and legal context pertaining *only* to American Indians. The preferential program here in issue is not nearly so restricted in design or effect.

The Petitioner draws freely and substantially from the public school desegregation cases in support of the general proposition that race-conscious remedies are available, and indeed on occasion mandated, in certain corrective settings. While we cannot quarrel with this abstract principle, it is critical to consider the context of such cases and the limitations which inhere to it, in contradistinction to the racially based preferences now in issue. The school cases have uniformly arisen in the context of compulsory public education at the primary and secondary levels and have been directed to the task of achieving public school systems wholly free of purposeful racial discrimination. Pursuant to the mandate of *Brown v. Board of Education*, 347 U.S. 483 (1954), the interest effectuated by this line of authority is "the elimination of state-mandated or deliberately maintained dual school systems", *Milliken v. Bradley*, 418 U.S. 717, 737

(1974), which constituted specific, intentional acts of state imposed racial discrimination. The response of this Court was to require that, in the event of default by state authorities, the judiciary act to eliminate this discrimination and its consequences in accordance with traditional equitable principles. *Brown v. Board of Education*, 349 U.S. 294 (1955).

However, the Court cautioned that these equitable powers may be invoked "only on the basis of a constitutional violation" shown to exist and that "the nature of the violation determines the scope of the remedy." *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971). *See also Milliken v. Bradley, supra.* Thus, any remedy imposed must be determined by the specific nature and extent of a demonstrated constitutional violation and must be precisely drawn only to eliminate the cause and rectify the direct consequences of such violation. Against that backdrop, this Court has acknowledged that race-conscious remedies may be necessary to redress prior race-conscious discrimination. *See, e.g., Swann v. Charlotte-Mecklenburg Board of Education, supra; North Carolina State Board of Education v. Swann*, 402 U.S. 43 (1971). Even in such situations, however, appropriate racially oriented remedial steps are only those which are directly responsive to a demonstration of prior overt and intentional discrimination.

Furthermore, the effects of such remedial decrees did not impinge upon the constitutional rights of non-minority individuals since no one has a right to attend a public school of any particular racial balance and no individuals were excluded from or otherwise deprived of the benefits afforded in the nature of a public school education. In resolving the competing interests pertinent to imposition of racially based remedies, the judiciary needed only to balance the imperative of elimination of prior racial discrimination against the practicalities of school administration. The individual constitutional rights of non-minority persons did not even enter the equation, since they were not detrimentally affected. Consequently, there is no direct constitutional analogy to be

made between the instant "remedial" preferences and any remedial usage of racial or ethnic considerations in the line of judicial authority evolving out of the distinctly different context of the public school desegregation cases.

Similarly, in the employment discrimination context racially cognizant remedies have been endorsed by this Court and other federal courts. But, again, it has been in response to a judicial finding of a specific instance of discriminatory behavior and in remedy of the consequences flowing directly from it. In the context of an action based upon Title VII of the Civil Rights Act of 1964, this Court observed that "[d]iscriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed." *Griggs v. Duke Power Company*, 401 U.S. 424, 431 (1971); *see McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 278-280 (1976).[7] Thus the statutory rights granted by Title VII and § 1981 terminated far short of commanding "that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group." *Griggs v. Duke Power Company, supra*, at 430-431.

Although these cases were concerned with application of the Civil Rights Acts and not constitutional provisions, the respective elements of which are not "identical", *Washington v. Davis*, 426 U.S. 229 (1976), in a general sense at least the letter and spirit of the constitutional

[7] In addition, in *Sante Fe*, the Court held that the protections of 42 U.S.C. §1981 (1970) applied to whites as well as non-whites, even though the statute contained the phrase "as is enjoyed by white citizens" and it was designed to implement the freedom from bondage guaranteed to Negro citizens by the Thirteenth Amendment. 427 U.S. at 286-287. If the protections of a statute such as §1981, which appears on its face to be primarily concerned with non-whites, also apply to whites or non-minority persons, *a fortiori*, the same result should apply to Fourteenth Amendment protections, the language of which does not explicitly refer to protection of minorities.

provisions form the basis from which the statutory rights were drawn. Therefore, it would appear that the ultimate bounds against which the Court was measuring the parameters of such statutes were those of constitutional origin prohibiting invidious discrimination on the basis of ethnic, racial or other impermissible classifications. At the very least, these recent decisions clearly indicate this Court's reluctance to employ different standards in determining and enforcing individual rights based upon "minority" or "majority" characterizations.

In giving effect to these congressional proscriptions against racial discrimination in employment, this Court has further emphasized that, while it serves primarily a prospective, prophylactic objective, "[i]t is also the purpose of Title VII to make persons whole for injuries suffered on account of unlawful employment discrimination." *Albemarle Paper Company v. Moody*, 422 U.S. 405, 418 (1975). In furtherance of this "make-whole" purpose, Congress accordingly invested the judiciary with full equitable powers to permit the fashioning of remedies affording the necessary economic and affirmative equitable relief to restore the individual suffering from the effects of employment discrimination to the rightful place he would have occupied were it not for the past unlawful discrimination. *Id. See also Franks v. Bowman Transportation Company, Inc.*, 424 U.S. 747 (1976).

Thus, the scope of equitable relief available under Title VII is both determined and limited by the same general equitable principles applicable to the public school desegregation cases that federal courts are only empowered to fashion such relief as the particular circumstances of a case may require to effect restitution. *Id.* at 1264; *see Milliken v. Bradley*, 417 U.S. 717, 746 (1974). This is, in the first instance, contingent upon a judicial finding of a particular act of unlawful discrimination in employment and then a judicial determination of necessity as to the dimensions of equitable relief required to effect restitution. In this regard, this Court has acknowledged that if the equitable relief necessary to afford the "make-whole" remedy incidentally conflicts with the economic interests of

other employees, the latter must sometimes give way. For instance, in the context of retroactive "senority" benefits, this Court has resolved that:

> it is apparent that denial of seniority relief to identifiable victims of racial discrimination on the sole ground that such relief diminishes the expectations of other, arguably innocent, employees would if applied generally frustrate the central "make-whole" objective of Title VII. These conflicting interests of other employees will, of course, always be present in instances where some scarce employment benefit is distributed among employees on the basis of their status in the seniority hierarchy. But, as we have said, there is nothing in the language of Title VII, or in its legislative history, to show that Congress intended generally to bar this form of relief to victims of illegal discrimination, and the experience under its remedial model in the National Labor Relations Act points to the contrary. Accordingly, we find untenable the conclusion that this form of relief may be denied merely because the interests of other employees may thereby be affected. "If relief under Title VII can be denied merely because the majority group of employees, who have not suffered discrimination, will be unhappy about it, there will be little hope of correcting the wrongs to which the Act is directed." *United States v. Bethlehem Steel Corp.*, 446 F.2d 652, 663 (CA2 1971). (footnote omitted).

Franks v. Bowman Transportation Company, Inc., *supra*, at 774-775.

The practical and constitutional effect of this correlative imposition of burdens on non-minority employees by affording benefits to minority employees is mitigated, however, by several considerations not applicable to the preferential admission situation. First, it is founded upon a specific demonstration and judicial finding of the existence of a discriminatory hiring pattern and a judicial determination that such a remedy is necessary to eradicate the specific effects of the prior discrimination in hiring. Second, any displacement of non-minority individuals will benefit only those individuals

who have been adversely affected by such acts of discrimination and would merely give effect to the seniority status they would have achieved but for the prior discriminatory conduct of the employer.

Dealing specifically in the context of the constitutional viability of "remedial" racial quotas in the employment context, the Second Circuit first observed, as its premise, that "[t]he replacement of individual rights and opportunities by a system of statistical classifications based on race is repugnant to the basic concepts of a democratic society." *Kirkland v. New York State Department of Correctional Services*, 520 F.2d 420, 427 (2nd Cir. 1975), *reh. en banc den.*, 531 F.2d 5 (1975), *cert. den.*, ____ U.S. ____, 97 S.Ct. 73 (1976); *accord, DeFunis v. Odegaard*, 416 U.S. 312, 320, 333-342 (1974) (Douglas, J., dissenting). The Court of Appeals went on in the *Kirkland* case to note that even in the context of specific remedial decrees having a direct nexus with demonstrated prior acts of unlawful employment discrimination, "[o]ur Court has approached the use of quotas in a limited and 'gingerly' fashion." 520 F.2d at 427. And, in reviewing the prior cases in that circuit, that court concluded that "[i]n each of these cases [in which remedial relief included "quota" dimensions], there was a clear-cut pattern of long-continued and egregious racial discrimination. In none of them was there a showing of identifiable reverse discrimination." *Id.* at 427.

Thus, as with the school desegregation cases, the decisions of this Court pertaining to employment discrimination and appropriate remedies in response to it lend no direct support for the Petitioner's constitutional position here in view of the indirect nature and exclusionary effect of this racially preferential admission program.

Last term this Court was confronted at least tangentially with the "thorny question" of the constitutional viability of the concept of "reverse discrimination" in *United Jewish Organizations of Williamsburgh, Inc. v. Carey*, ____ U.S. ____, 97 S.Ct. 996, 1013 (1977 Brennan, J., Concurring). In that case, the Court addressed contentions of

white voters comprising a distinct Hasidic Jewish community that a legislative reapportionment plan proposed by Kings County, New York, was deliberately drawn along racial lines solely for the purpose of achieving a "racial quota" or balance affording minority elements of the population a substantial majority in certain legislative districts. This, the plaintiffs contended, was a violation of their Fourteenth and Fifteenth Amendment rights.

While a majority of this Court concluded that the constitutional rights of the plaintiffs had not been infringed by the proposed legislative reapportionment plan, it is apparent from the diversity of views and rationales expressed in the several concurring opinions that this decision was not intended and should not now be relied upon as an unrestrained approval of "remedial" racial quotas or "benign" reverse discrimination. The Court was dealing solely with the narrow question of the propriety of racial criteria employed by local governments in good faith attempts to comply with the specific requirements of the Voting Rights Act respecting reapportionment of legislative districts. The closest the Court came to a consensus in the *Carey* case was with respect to the proposition that this *particularized application* of the Voting Rights Act in the *specific circumstances* involved was constitutionally permissable. Since "the Act was itself broadly remedial in the sense that it was 'designed by Congress to banish the blight of racial discrimination in voting. . . .' *South Carolina v. Katzenbach*, 383 U.S. 301, 308, 86 S.Ct. 803, 808, 15 L.Ed.2d 769 (1966)," 97 S.Ct. at 1005, it was a necessary consequence that compliance with the Act "would often necessitate the use of racial considerations in drawing district lines." *Id.* at 1006.

While such remedial use of racial criteria in this limited context is not the function of a particular judicial finding of prior racially discriminatory conduct on the part of the government, it is statutorily subject to a judicial review procedure and is directly pursuant to a clear congressional mandate addressed to rectification of a particular and

identifiable historical source of racial discrimination. Recognizing the stringency of such legislatively imposed and administratively implemented remedies, Justice White observed in his opinion in *Carey* that:

> Although [such remedies] . . . were "an uncommon exercise of congressional power," we nevertheless sustained the Act as a "permissibly decisive" response to "the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetrating voting discrimination in the face of adverse federal court decrees." (Citation omitted.)

Id. at 1005-1006. This specific legislative response was addressed to the impracticalities of a case-by-case litigation approach to eradication of persistent and subtle forms of racial discrimination directly affecting the electoral process so fundamental to our democratic principles. As this Court has noted, "the political franchise of voting" is a "fundamental political right, because preservative of all rights." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). *See also Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966); *Reynolds v. Sims*, 377 U.S. 533 (1964).

In view of these particular, unique concerns inherent in the voting rights context and the remedial measures specifically addressed to eliminating existing vestiges of racial discrimination depriving "minority" interests of a meaningful participation in the democratic process, the Court's conclusion in *Carey* that the admittedly race-oriented reapportionment was not violative of any of the non-minority plaintiffs' constitutional rights does not lend itself to rubber stamp application to *any* legislative or administrative attempt to employ racial preferences or quotas to effect what are perceived as "remedial" purposes. It is still imperative to look at the correlative effects of such "remedial" action on the non-preferred individuals, as indicated by the observations replete throughout the concurring opinions in *Carey* that the limited usage of racial criteria in establishing legislative districts did *not* minimize or unfairly cancel out white voting strength and

did *not* "fence out" the non-minority population from participation in the political process. There simply was no *exclusion* of one segment of the population in preference of another resulting from that particular use of racial considerations. Moreover, it is still necessary, even with respect to remedial policies and requirements of legislative or administrative derivation, to insure that the need for racially oriented remedial action "can be closely tied to prior discriminatory practices or patterns." *Id.* at 1013, n.2.

Thus, these existent judicial authorities may in the aggregate stand for the general proposition that racial consciousness may play a proper and legitimate role in formulation of remedial policies. However, they do not give license to any governmental authority, legislative, administrative or judicial, to afford racially or ethnically based preferences to certain "minority" individuals which directly exclude and disadvantage certain other racial or ethnic groups, when such preferential treatment is not in response to any prior discriminatory practices or conduct but rather seeks only to compensate for or "remedy" the generalized effects of indeterminant causes of societal discrimination. None of the persons benefitted by the preferential admission process are thereby being returned to their "rightful place" in society or being "made whole" in response to prior acts of discrimination, and yet the Respondent and others similarly situated are being "fenced out" as a direct result of this racial classification. This would result in governmental action depriving the excluded racial group of its constitutional rights not to be disadvantaged on racial grounds without a correlative vindication of any particular constitutional rights of the benefitted racial and ethnic minorities. Thus, this is not even a case on which conflicting constitutional rights must be balanced and reconciled since the *only* rights of constitutional stature at stake here are those of the Respondent.

II.

RESPONDENT HAS BEEN DENIED HIS FOURTEENTH AMENDMENT RIGHT TO EQUAL PROTECTION BY VIRTUE OF PETITIONER'S PREFERENTIAL ADMISSIONS PROGRAM.

A. The preferential admissions program creates a subject classification and must be subjected to strict scrutiny as have other racial classifications.

The classification imposed by Petitioner for facilitation of its preferential admissions policy is a classification based not on the cultural, economic, or educational disadvantages and deprivations which may have been suffered by the applicant, but solely on the basis of the applicant's race. In contraposition to such classifications, one of the central purposes and effects of the Equal Protection Clause of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the states. *Washington v. Davis,* 426 U.S. 229 (1976); *McLaughlin v. Florida,* 379 U.S. 184 (1964); *Shelly v. Kraemer,* 334 U.S. 1 (1948). Accordingly, racial classifications have traditionally been deemed constitutionally "suspect" by this Court, and have been subject to strict scrutiny in assessing their validity. *Loving v. Virginia,* 388 U.S. 1 (1967).

A classification subject to strict scrutiny must satisfy two specific tests for its validity to be upheld. First, the governmental objective upon which the suspect classification is based must serve and promote a "compelling state interest". *Shapiro v. Thompson,* 394 U.S. 618 (1969); *McLaughlin v. Florida, supra.* Second, if the state can demonstrate such an overriding goal, the classification must meet an even more stringent additional requirement: the state must demonstrate that the creation of the challenged classification is the best means to accomplish that end, i.e., that there is no less discriminatory means available for effectuating the compelling objective, thereby demonstrating the absence of *alternative means. Dunn v. Blumstein,* 405 U.S. 330, 343 (1972); *Shelton v. Tucker,* 364 U.S. 479 (1960).

The proposition that the most clearly established suspect classifications are those involving race and national origin needs no citation. The classic statement of Mr. Justice Harlan, dissenting in *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896), that the "constitution is color-blind, and neither knows nor tolerates classes among citizens," itself appears a mandate that any racial classification be held invalid *per se*. However, this Court in its decisions since *Brown v. Board of Education*, 347 U.S. 483 (1954), has made clear that not only are certain racial classifications permitted, but may on occasion be required by the lower courts to remedy past illegal discrimination. *Louisiana v. United States*, 380 U.S. 145 (1965); *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971); *Green v. County School Board*, 391 U.S. 430 (1968). Only upon *rigid judicial scrutiny* should such classifications be upheld, however, and a review of those cases which have allowed racial classifications reveals not only the presence of specific past discrimination factors dissimilar to the general societal discrimination present in the case at bar, but also the *absence* of an exclusion of individual constitutional rights necessarily resulting from those racial classifications. (See pp. 14-18, *supra*.)

It has been suggested that strict judicial scrutiny in the context of "reverse discrimination" is inappropriate in view of a purported purpose of the equal protection clause being to protect and benefit minority groups. It is true that this Court has allowed certain racial "classifications" which were established to benefit minorities without meeting any test of "compelling interest". *See generally Lau v. Nichols*, 414 U.S. 563 (1974); *Katzenbach v. Morgan*, 384 U.S. 641 (1966). However, cases like *Lau* and *Katzenbach* have upheld challenged programs merely on the grounds that they bear some rational relationship to a legitimate state objective only in those situations where the measures which increase benefits for minorities do not *simultaneously deprive non-minority groups of significant benefits to which they are entitled and would otherwise enjoy*. Similarly, the decisions of this Court

allowing racial classifications when those classifications have been designed to remedy the effects of past official policies of discrimination and specific acts of past discrimination involve no such simultaneous deprivation. *See generally Louisiana v. United States, supra; Swann v. Charlotte-Mecklenburg Board of Education, supra; Green v. County School Board, supra.* Desegregation and busing to achieve racial balance do not have the effect of precluding anyone, whether black or white, from obtaining an education; further, those methods of achieving racial balance constitute as much of an inconvenience to blacks as whites. The situations in regard to preferential admissions, minority business utilization quotas, and other areas in which the issue of reverse discrimination is most critical, presents a substantially different situation.

Therefore, if the compelling state interest test is not to be applied in all situations, a distinction must be drawn: statutory and state prompted schemes utilizing racial classifications solely to improve the situation of minorities need not automatically be subjected to strict scrutiny; *however, measures which benefit minority persons by divesting non-minority persons of benefits which they have earned and to which they are entitled create depriviations based on race and are no different from the racial depriviations which the Court has historically subjected to the strict scrutiny standard.*

Petitioner and other Amici have contended that even if preferential admissions can be viewed as causing a deprivation based on race, the deprivation does not have the effect of stigmatizing a "discreet and insular minority," or reflect hostility towards such group. The purported corollary to this assertion is that such "benignly motivated" discrimination, as opposed to "invidious" discrimination, does not require application of the compelling state interest test.

This characterization of discrimination as "invidious" only when it is directed against a particular minority, and "benign" otherwise, has little if any support, as is indicated by the dearth of legal authority usually accompanying such assertions. Contrariwise, this Court on occasion has implied that

the 'invidious" nature of discrimination is independent of whether it is directed toward majority or minority groups. In *Griggs v. Duke Power Company*, 401 U.S. 424 (1971), Chief Justice Burger stated for the majority:

> 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. *Id.* at 431 (Emphasis added).

Nor has this Court restricted "invidiousness" to *racial* discrimination. *Shapiro v. Thompson*, 394 U.S. 618 (1969).

Indeed, the very definition of the word "invidious" militates against Petitioner's characterization. Webster's defines "invidious" as "1. envious . . . 2. likely to incur ill will or hatred, or to provoke envy; giving offense, especially, by discriminating unfairly . . . 3. enviable, desirable . . ." *Webster's New Twentieth Century Dictionary* 966 (2d ed. 1966). Not only is it clear by this litigation that Allan Bakke has every right to be "envious" and feel "ill will" regarding his exclusion from admission to the Davis Medical School, but the whole tone of the definition of the word emphasizes the effect on the *victim* of the "invidious" act, not the *intent* of the perpetrator of the act. Therefore, when Petitioner argues that its policies do not "invidiously" discriminate because it bears no ill will nor does it intend to stigmatize any individual, it misses the point. The important consideration is the nature of the effect on the individual affected by the discrimination: is it, as to him, "unfair" or "likely to *incur* ill will or hatred, or to *provoke* envy"? *Id.* (emphasis added). As has been previously shown, this consideration is also the thrust of this Court's previous cases where "suspect" classifications are involved.

Accordingly, it is of no consequence to this constitutional analysis that the persons preferred in this case are members of

a racial or ethnic "minority". Disparate government treatment afforded persons on the basis of race or ethnic considerations is "invidious" in the constitutional sense whether it discriminates against "minority" or "majority" individuals.

Moreover, the "benignly motivated discrimination" argument ignores practical considerations and potential results of such a policy. There are other elements inherent in any deprivation because of race which in our society indicate that such deprivation is, in Chief Justice Stone's words, "odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943). Preferential admissions and minority business utilization quotas all reject the concept that an individual should be allowed to succeed solely on his own merit and accomplishments without regard to characteristics with which he was born and over which he has no control. Accordingly, a compelling state interest must be shown to justify such preferences or quotas. In this context, classifications based on race cannot be distinguished from classifications based on sex, illegitimacy and other personal characteristics which have historically prompted discrimination. *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972). In *Frontiero*, Mr. Justice Brennan reasoned as follows:

> [S]ince sex, *like race and national origin*, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate "the basic concept of our system that legal burdens should bear some relationship to individual responsibility. . . ." 411 U.S. at 686 (Emphasis added). (Citations omitted).

Additionally, such preferential programs and quotas tend to retard achievement of a general public acceptance of the concept of total racial equality, and perhaps even more importantly, they constitute a potential "backlash" of stigmatization. Justice Brennan voiced this concern in his

concurring opinion in *United Jewish Organizations of Williamsburg, Inc. v. Carey*, ____ U.S. ____, 97 S.Ct. 996 (1977):

> Furthermore, even preferential treatment may act to stigmatize its recipient groups, for although intended to correct systemic or institutional inequities, such a policy may imply to some the recipients' inferiority and especial need for protection. Again, these matters would not necessarily speak against the wisdom or permissibility of selective, benign racial classifications. But they demonstrate that the considerations that historically led us to treat race as a constitutionally "suspect" method of classifying individuals are not entirely vitiated in a preferential context. *Id.* at 1014 (footnote omitted).

Because preferential treatment, despite benevolent purposes, may effectively stigmatize blacks and other minorities, it therefore deserves the same strict scrutiny afforded any racial classification directly causing harm to these "discreet and insular" minorities. Justice Douglas effectively articulated this consideration in his dissent in *DeFunis v. Odegaard*, 416 U.S. 312, 343 (1974), as follows:

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

Further, lest these concerns be considered speculative, it should be noted that both white and black scholars and public figures have recognized this danger.[8]

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[8] Speaking of preferential employment programs, Professor Kaplan has noted:

> [I]t may be that enforced preferential treatment might actually dampen the motivation of Negroes who could never really know to what extent their achievements were based upon merits, and to what degree upon an artificial preference. Redish, *Preferential Law School Admissions and the Equal Protection Clause: An Analysis*

(continued)

Thus, the "stigma" argument which has been suggested as negating the necessity of a strict scrutiny standard is by no

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of the Competing Arguments, 22 U.C.L.A. L. REV. 343, 367 n.111 (1974) (citing Kaplan, *Equal Justice in an Unequal World: Equality for the Negro–The Problem of Special Treatment*, 61 N.W. U.L. REV. 363, 378 (1966)).

Dr. Kenneth Clark, a leading black psychologist, has argued as follows:

> Racism emerges in both blatant and more difficult to answer, subtle manifestations. In the academic community, it began to be clear in the 1960's that apparently sophisticated and compassionate theories used to explain slow Negro student performance might themselves be tainted with racist condescension. Some of the theories of "cultural deprivation", "the disadvantaged," and the like . . . were backed for the most part by inconclusive and fragmentary research and much speculation. The eagerness with which such theories were greeted was itself a subtly racist symptom. *Id.* at 368 (citing Clark, *The Social Scientist, the Brown Decision, and Contemporary Confusion*, ARGUMENT (L. Friedman, ed. 1969)).

Thomas Sowell, who attended public school in Harlem and later became Associate Professor of Economics at UCLA, has written as follows:

> . . . the actual harm done by quotas . . . will actually [do] . . . 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. *Id.* at 368 (citing T. SOWELL, BLACK EDUCATION, MYTHS AND TRAGEDIES 292 (1972)).

One black law graduate has described his first year experience at law school as follows:

> Traditionally, first-year law students are supposed to be afraid, or at least awed; but our fear was compounded by the uncommunicated realization that perhaps we were not authentic law students and the uneasy suspicion that our classmates knew we were not, and, like certain members of the faculty, had developed paternalistic attitudes toward us. *Id.* at 369 n.114 (citing MacPherson, *The Black Law Student: A Problem of Fidelities*, Atlantic, April, 1970, at 93, 99).

(continued)

means itself of sufficient viability to warrant a lesser equal protection standard. In the context of school preferential admission programs, application of the strict scrutiny equal protection test would insure that because of the potentially severe stigma which minority group members may suffer as a by-product of such preferential programs, these programs will be permitted only if the state can convince the courts that there in fact exists a compelling need for them, and that no less restrictive alternatives are available.

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Roy Wilkins, Executive Director of the NAACP, has decried quotas as limitations upon an individual's potential. He has stated:

> This is self-defeating nonsense, for no person of ability wants to be limited in his horizons by arbitrary quotas or wants to endure unqualified people in positions that they fill only because of a numerical racial quota....
>
> 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.* Amicus Brief for Petitioners by Advocate Society, American Jewish Committee, Joint Civic Committee of Italian Americans and Unico National at 23-24, *DeFunis v. Odegaard*, 416 U.S. 312 (1974), quoting New York Post, March 3, 1973 (emphasis added).

Perhaps the clearest indication of public opinion in this area can be gleaned from a recent Gallup Poll on the subject, wherein 1550 both white and non-white adults were asked the following question:

> "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 of view comes closest to how you feel on this matter?"

Overall the public voted 8-to-1 in favor of ability. *Non-whites voted more than 2-to-1 in favor of ability. The Gallup Poll*, May 1, 1977 (emphasis added).

B. The state interests advanced by Petitioner in support of its preferential admissions policy are not sufficiently compelling or substantial to justify the racial classification entailed.

Before the validity of a classification subject to strict scrutiny can be upheld the governmental objective upon which the suspect classification is based must first be shown to serve a "compelling state interest". *McLaughlin v. Florida*, 379 U.S. 184 (1964). Not only are the state interests asserted by Petitioner of a sufficiently questionable nature to preclude justification under a strict scrutiny standard, but neither are they substantial enough when weighed against the individual interests at stake to withstand analysis under a lesser standard of equal protection. It is, of course, the position of this Amicus that in view of the suspect character of the racial classification in the case at bar, this Court must subject it to the most rigid scrutiny. However, should the Court deem a lesser equal protection standard applicable, it is submitted that an analysis under such lesser standard will necessarily yield the same result.

In his dissenting opinion in *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976), Mr. Justice Marshall proposed the abandonment of the "two-tiered" equal protection approach and the institution of a new test which focuses "upon the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive, and the state interests asserted in support of the classification." *Id.* at 318 (citations omitted).

The New York Court of Appeals in *Alevy v. Downstate Medical Center*, 39 N.Y.2d 326, 348 N.E.2d 537 (1976), has itself utilized Justice Marshall's approach and developed a middle-range substantial state interest test to evaluate special admissions programs for racial minorities. In order to meet this intermediate standard, it must be shown that "the gain to

be derived from the preferential policy outweighs its possible detrimental affects." *Id.* at 336, 348 N.E.2d at 545. The *Alevy* approach requires not only that the program must further some legitimate governmental purpose, but also that the policy have a substantial basis in actuality, and a showing must be made that no non-racial or less objectional racial classification will suffice. *Id.* at 336-337, 348 N.E.2d at 546. Therefore, the necessity of showing the absence of less restrictive means is not dispensed with, although the court there did not consider whether less objectional alternatives were available because a prima facie case of discrimination was not established.

It is submitted that under such an intermediate equal protection test, the key considerations are still balancing of interests and a showing by the state that there are no less restrictive alternatives available.[9] In any balancing of interests

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[9] At least one commentator has suggested that some of the equal protection decisions of this Court during recent years illustrate a greater level of judicial intervention than normally has been given under the rational basis test, but without applying the strict scrutiny of the compelling state interest test. Gunther, *In Search Of Evolving Doctrine On A Changing Court: A Model For A Newer Equal Protection*, 86 HARV. L. REV 1 (1972). This suggested standard requires the judiciary to review state classifications to insure that there exists a substantial rational link between the classification and the asserted state purpose.

In view of the important individual interests at stake in the context of reverse discrimination, it is submitted that any approach which fails to allow an affirmative review and a balancing of the substantive state goals relative to the individual interest involved is inappropriate. Additionally, examination of the decisions by this Court which purportedly have employed this "newer" equal protection standard reveals that in no instance has this standard been applied to actual *suspect* classifications or with respect to *fundamental* rights. *E.g.*, *Jackson v. Indiana*, 406 U.S. 715 (1972) (concerning state provisions for pre-trial commitment of incompetent criminal defendants); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (classification based on marital status); *United States Department of Agriculture v. Moreno*, 413 U.S. 528 (1973) (receipt of food stamps); *Reed v. Reed*, 404 U.S. 71 (1971) (classification based on sex); *Jimenez v. Weinberger*, 417 U.S. 628

(continued)

in the context of reverse discrimination, either in the specific situation of preferential admissions or with respect to minority business utilization quotas, the emphasis must be on the various interests of the state relative to the interest of the individual who experiences some deprivation of rights.

As has been demonstrated in Part I of the *Argument*, the primary state interests purportedly supporting Petitioner's preferential admission policies are general societal interest in more racial minority involvement and the court sanctioned interest in the elimination of the effects of past discrimination. With respect to general societal interest, Petitioner has asserted a need for more physicians from racial minority groups. However, Petitioner has failed to show that there is any clear evidence that minority medical students eventually practice in areas where there are large racial minority populations. Hence, it is unclear whether racial minority groups would receive any better health care as a result of the medical school's racial preferences. It has also been asserted that an increase in minority physicians will improve doctor-patient relationships among racial minorities. Again, there is no basis for the assumption that the minority students will ever, as practicing physicians, serve substantial members of racial minority patients. Moreover, it would appear that facilitating better interracial physician-patient relationships is a more laudable goal than encouraging relationships in which race becomes a transcending characteristic. Mr. Justice

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(1974) (classification based on illegitimacy). The recent case of *Trimble v. Gordon*, 45 U.S.L.W. 4395 (U.S., April 26, 1977), is an appropriate example of the purported lesser standard of review, but this case also involved a classification based on *illegitimacy*, as opposed to the strictly racial context of the instant case. As an additional consideration, it is suggested that even assuming the viability of this suggested intermediate test, in the volatile context of preferential admission programs an examination of less restrictive alternatives is necessarily in order. *See* Redish, *Preferential Law School Admissions and the Equal Protection Clause: An Analysis of the Competing Arguments*, 22 U.C.L.A. L. REV. 343, 370 (1974).

Douglas, dissenting in *DeFunis v. Odegaard*, 416 U.S. at 342, has noted:

> 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. . . .

In short, the general societal interest which the state asserts in support of its preferential admissions policy is at best questionable, and at worst, racially prejudicial in itself. It is certainly not of the compelling or even substantial nature necessary to justify the existence of such policies either under a strict scrutiny approach or under the less demanding intermediate equal protection test discussed previously.

It has also been asserted that the state has an interest in overseeing the elimination of the effects of past discrimination. This Court has approved attempts at eliminating the effects of past discrimination in such cases as *Louisiana v. United States, supra*, and *Swann v. Charlotte-Mecklenburg Board of Education, supra.* Before this particular state interest can be weighed against the individual interest involved, however, consideration must be given to the distinction between "past discrimination" in the context of those cases relative to the past general societal discrimination relied upon in the instant situation. In *Franks v. Bowman Transportation Co., supra*, this Court confirmed that when a lower court finds specific past acts of discrimination, its powers in fashioning remedies are far reaching. In these types of cases, however, individuals disadvantaged by the remedy fashioned by the court are affected only to the extent that they profited as a result of the past specific wrong. Accordingly, the interest of the state in correcting the effects of such "past discrimination" is very strong. It is less clear whether "de facto" societal discrimination is the type of past discrimination which should prompt broad remedial action by the

courts or the state. This type of past discrimination generally involves situations where the discrimination has its roots in particular social practices, rather than state mandated policies. *See, e.g., Swann v. Board of Education, supra; Griggs v. Duke Power Company, supra; Washington v. Davis, supra.*

The type of "past discrimination" which purportedly has prompted the preferential admissions policies at issue in the case at bar is an extension beyond even *de facto* societal discrimination. Here, there are no allegations of any specific acts of discrimination nor prior discriminatory policies in the admission program. The only basis of any "past discrimination" in the situation presented by the case at bar is grounded in very general societal discrimination. In the *DeFunis* decision, Mr. Justice Douglas suggested in his dissent that if the Law School Admission Test were found to contain cultural bias, there may be grounds for invalidating it, and if there were a finding of specific unequal opportunities in the lower levels of education, that finding might be a consideration for preferential treatment on an individual basis. 416 U.S. at 330-340. However, the thrust of Justice Douglas' dissent in this area precluded the use of a quota which would grant preferential treatment to an entire class on the basis of race without individual findings of actual discrimination. Thus, it would appear that the purported effects of "past discrimination" which the state has an interest in eliminating in the instant situation are far removed from the specific acts of past discrimination which prompted this Court's decisions in *Louisiana v. United States, supra*, and subsequent cases. Moreover, the deprivation suffered by the Respondent and others similarly situated is far in excess of any individual interest which existed in those prior cases which have approved race-conscious remedies of past discrimination. For example, the decision in *Swann* could not be attacked for its adverse effect on the majority, because there was none. There, the inconvenience of busing necessary to fulfill the Court's order of school desegregation was shared by blacks and whites alike, and no child of any race was deprived of an education.

In the preferential admissions context, however, quotas present a potential bar to otherwise qualified majority applicants in obtaining an education, in view of the current overcrowdedness of medical schools. Accordingly, in the context of the case at bar, the state interest in eliminating the effects of past discrimination has no support in prior discrimination cases and must yield to the individual interest at stake, whether the equal protection test employed is one of strict scrutiny or a lesser intermediate standard of review.

C. Assuming arguendo the presence of a sufficiently compelling or substantial state interest to justify petitioner's preferential admissions policy, other less drastic means are available to achieve substantially the same result.

Even if the requisite state interest justifying Petitioner's racial classification is shown to exist, the Petitioner still must demonstrate the absence of less restrictive alternatives to its asserted policies of preferential admissions. In *Shelton v. Tucker*, 364 U.S. 479 (1960), this Court emphasized that "... even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle personal liberties when the end can be more narrowly achieved." Not only is Petitioner's preferential admissions program violative of the constitutional rights of *non-minority* students, but such racial categorization also has a potentially adverse affect on the minority applicants themselves, by virtue of the stigma which is created. Whether the strict scrutiny standard of equal protection review or a lesser intermediate standard is applied by the Court, such classification in the presence of less restrictive alternatives is prohibited.

A preferential admissions program which grants a preference or special consideration on the sole basis of race or national origin necessarily exceeds the bounds necessary to accomplish the purported goals of such a program. If, as

discussed *supra*, the goal is to remedy the effects of past societal discrimination, strict racial categorization sweeps too broadly because it gives admission preference to *all* members of those particular minorities addressed. For example, a black student who is the son of a black doctor from a New York suburb, who has attended the "best" schools and who may well have had every cultural and economic opportunity of his white counterpart, will be given admission preference over truly disadvantaged students from other racial groups. Such preference contravenes all principles of fairness and equality. Additionally, to the extent that one of Petitioner's goals is to find applicants who are likely to return to disadvantaged areas and practice among racial minorities, a strictly racially categorized preferential admissions program fails to take into account those non-minority applicants who may be desirous of practicing among racial minorities. In this connection, Petitioner could draw its categorization around racially neutral parameters, with the emphasis being instead on *disadvantaged* and *underprivileged* applicants. Here, the criteria could emphasize economic, educational and cultural deprivation, as opposed to the arguably irrelevant classification of race or ethnic minority. However, Petitioner's desire for more racial minorities as students would also be facilitated by this approach, as the sources and authorities relied upon by Petitioner and Amici supporting Petitioner show that a disproportionate number of truly disadvantaged students will be members of racial minorities.

Additionally, the goals of facilitating professional minority involvement and eliminating the effects of past discrimination could also be met by programs established to identify disadvantaged minority students with professional career potentialities at the high school and junior high school level, and subsequently rendering all possible financial and other assistance to enable them to fulfill their potential. Further assistance could be provided at the college level through open enrollment measures in public colleges, financial aid and special remedial educational programs. These programs, in

addition to being less restrictive of the constitutional rights of non-minority students, would also have the advantage of allowing those disadvantaged minority students *to help themselves.* In contrast, it is submitted that any automatic racial preference can never have the effect of actually motivating higher performance, but rather nurtures the implication of an inherent lack of superior intellectual capacity of a minority individual. Further, the financial aid aspect of such programs could be extended to the graduate schools themselves, and by tying such aid to commitments by students to work in a particular underprivileged or minority area for a period of time after graduation the state goal of increasing professional assistance in these particular areas could thereby also be facilitated.

It has also been suggested that a detailed case-by-case approach, closely examining each applicant to determine whether he or she actually has been the victim of discrimination or deprivation, would be a less restrictive alternative with substantially the same effect as racially categorized preferential admissions programs. *See* Redish, *supra*, at 397-400 (1974). Opponents counter by emphasizing the resulting administrative inconvenience. However, arguments based on administrative inconvenience have not been received hospitably in this context by this Court. *See generally Frontiero v. Richardson*, 411 U.S. 677 (1973); *Kahn v. Shevin*, 416 U.S. 351 (1974). Additionally, it would appear that administrative inconvenience could hardly rise to the level of legitimating such a substantial imposition on individual constitutional rights as is present in the instant situation. A case-by-case approach, combined with vigorous recruiting, would necessarily result in an increase in the number of minority law graduates, and would not result in the corresponding deprivation which is the necessary result of Petitioner's present racially categorized admissions program.

In response to the discussion of such available alternatives by the court below, *Bakke v. Regents of the University of California*, 553 P.2d 1152, 1166, 1167 (1976), Petitioner argues that the alternatives suggested do not as adequately meet the ends sought to be accomplished, i.e., the admission of racial minorities (Brief for Petitioner, at 82-83). Thus, it seems that the purpose of Petitioner's plan is solely the admission of greater numbers of minority applicants, without intending to rectify any prevailing instances or past causes of discrimination. Contrary to Petitioner's argument, however, it should be axiomatic that an intent merely to increase numbers of one race in a particular governmental program can never be a "compelling state interest" justifying invidious discrimination against one of another race.

III.

POLICY CONSIDERATIONS AND THE RAMIFICATIONS OF THIS CASE ON OTHER INSTANCES OF GOVERNMENTAL "REVERSE DISCRIMINATION" FAVOR REJECTION OF PETITIONER'S GROUNDS FOR PREFERENTIAL TREATMENT.

Apart from the question of whether the preferential admissions plan administered by Petitioner can be validated on *any* grounds, Amicus respectfully submits that no decision should be reached in this case without consideration of the far-reaching ramifications on other instances of "reverse discrimination." In particular, we submit that a decision for the Petitioner on the basis of the arguments relied upon, i.e., racial preferences are an appropriate and allowable response to "a legacy of discrimination" imposed by American society on "historically disfavored minorities" (Brief for Petitioner, at 10, 11); that discrimination against those in the political (racial) majority in favor of (politically) "powerless" minorities is constitutionally sustainable (Brief for Petitioner, at 15); and that a state instrumentality has the constitutional discretion to adopt preferential and discriminatory quotas which no court has the power to adopt as remedies (Brief for Petitioner, at 62, 63), would go far beyond the previous cases decided by this Court.

In so doing, the Court's decision would invite myriad other schemes of preferences purportedly designed, and legislatively proclaimed, to rectify all legacies of discrimination in our society. As an example, we shall briefly discuss the application of the principles at issue herein to the minority business utilization requirements of government procurement contracts, to which we have briefly alluded in the INTEREST OF THE AMICUS, *supra.*

Several state, local, and federal instrumentalities have already adopted statutes, ordinances, or regulations which mandate, in one form or another, that a minimum percentage

of the contracts awarded by the particular public instrumentality, or the dollar amount of those contracts, be awarded, or subcontracted, to minority businesses.

For instance, the Public Works Employment Act of 1977, *supra*, provides at § 103 that "[e]xcept to the extent that the Secretary [of Commerce] determines otherwise, no grant shall be made under this Act for any local public works project unless the applicant gives satisfactory assurance to the Secretary that at least 10 per centum of the amount of each grant shall be expended for minority business enterprises."[10]

In addition, the Oakland Unified School District of Alameda County, California, and the San Francisco Unified School District, both have announced and pursued contracting policies requiring contractors to subcontract at least 25% of their contracts to minority businesses. *Associated General Contractors of California, et al. v. San Francisco Unified School District, et al.*, ____ F.Supp. ____ (N.D. Cal., No. C-76-2244 SAW, May 17, 1977); *Construction Industry Council of the East Bay, et al. v. Oakland Unified School District of Alameda County, et al.*, Alameda County Superior Court, No. 475573-7 (pending).

More subtle schemes not invoking any set quote, but rather a "preference" or "goal", which have allegedly been enforced in contract prequalification conferences with contractor-bidders in such a way as to require utilization of minority businesses by contractors who are awarded contracts, are also in existence and under legal attack. *American Road Builders Association of Iowa, Inc., et al. v. Coleman, et al.*, U.S. Dist.

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[10]This statutory provision is implemented in a regulation which provides that no grant will be made "unless at least ten percent of the amount of such grant will be expended for contracts with and/or supplies from minority business enterprises." 13 C.F.R. §317.19(b)(1) (1976). "Minority business enterprise" is defined as "a business at least fifty percent of which is owned by minority group members or, in the case of a publicly owned business, at least fifty-one percent of the stock of which is owned by minority group members." 13 C.F.R. §317.2 (1976).

Ct. for S. Dist. of Iowa, Civil Action No. 76-7-2 (pending); *East Atlanta Construction Company, et al. v. City of Atlanta, et al.*, Fulton County, Georgia, Superior Court, Civil Action No. C-22288 (pending).

As discussed previously, regarding the Davis preferential admissions plan, establishment of quotas or preferences in favor of "minority" owned enterprises in governmental contracting matters expands the established concept of "affirmative action" beyond any statutory or constitutional basis. Moreover, the social and political premises upon which such a substantial change in social policy is founded are dubious at best. Presumably, the policy underlying such preferential advantages is to encourage or to promote participation of minority enterprises in government contracting matters so that they can compete on an even basis with non-minority firms. But, contrary to the proscriptions in *Griggs v. Duke Power Company, supra*, and *McDonald v. Santa Fe Trail Transportation Company, supra*, these efforts can have no other effect than to prefer and give unlawful advantage to the favored minority contractors regardless of how their other qualifications measure up to their competition.

Furthermore, as a practical matter, such a policy would likely have an effect which is entirely counter-productive of its purported intent. Since, as the premise underlying this policy acknowledges, there are relatively few minority owned or controlled businesses that have the present capability to perform in the various construction trades, the few that exist occupy virtually a monopolistic position vis-a-vis the non-minority firms. The natural consequences of this is that there would be little or no incentive at all for the minority enterprise to endeavor to become competitive on an equal basis with non-minority contractors as long as they are the recipients of special treatment. Such a racially or ethnically based preference in the award of government contracts, to the extent that it overrides the economic considerations embodied in the competitive bidding process, contradicts and defeats the

entire principle underlying awarding public contracts to the lowest monetary bidder fit and able to satisfactorily perform the construction work. Such preferences would work not only to the disadvantage of the competing non-minority businesses but also of the general public which would be required to pay more to potentially receive less. Finally, such a mechanical emphasis on minority "control" or "ownership" in parcelling out governmental largess overlooks the distinct possibility that a particular "minority" business is not competitively disadvantaged to begin with or that a purportedly "minority" enterprise is nothing more than a sham in which the external appearance belies the fact that its functional "control" resides with non-minority interests merely seeking to cash in on the bounty. Thus, the potential for abuse and harm to all business and public interests is substantial.

Of course, the necessary correlative effect of a government "preference" in dispensing construction contracts is discrimination against non-minority businesses which are competing with the favored minority enterprises for the same business. In so doing, the government contracting agency would be drawing distinctions having substantial effects on business entities based solely upon the racial or ethnic makeup of its owning or controlling interest. Such a policy would be directed to and affect *business relationships* rather than the *employment relationships* which have heretofore been a focal point of the affirmative action programs. This intrusion by the government into the interrelationships of business entities as between and among themselves and the government contracting agencies would be an unwarranted extension of the concept of "affirmative action" as it has evolved from its constitutional and statutory sources. Yet, approval of such contracting policies, based on the historical disadvantage of the minority contractor in obtaining government contracts, would be the logical result of this Court's acceptance of Petitioner's arguments in the instant case.

Preferential treatment of minority owned or controlled enterprises in government contracting matters does not

promote a "compelling state interest" but, rather, contradicts the substantial and compelling public interest in having government contracts awarded to the lowest monetary bidder fit and able to satisfactorily perform the contract. This amounts to a rejection of the fundamental precept in our democratic, pluralistic society that merit and ability, and not racial, ethnic or other irrelevant characteristics, should control one's relationship with society and its government, and also a rejection of the corollary of that precept that the most qualified, capable and price competitive businessmen should be entitled to obtain contracts awarded on a competitive basis by the government.

All businesses qualified to do business with their government, regardless of the racial makeup of their ownership, are citizens entitled to equal opportunity to obtain government contracts. Amicus and its thousands of subcontractor members are proud of our nation, its growth and accomplishments, and its commitment to eradication of racial discrimination in our national life. We submit that the use of racial preferences in the awarding of the business of the nation's local, state, and federal governments contravenes these principles and subverts the competitive bidding systems under which most governments have always awarded contracts.

Yet, upholding of the Petitioner's case and Petitioner's arguments can only lead to approval of these first fledgling attempts to disregard the principles of competitive bidding covered by most public procurement statutes, ordinances, and regulations. Therefore, we urge this Court to carefully consider the far-reaching consequences of Petitioner's unique and unprecedented arguments, and to refrain from pitching over the bluff into the abyss of blanket approval of "benign" racial discrimination justified ever so tangentially by some vestige of prior societal discrimination.

If the circumstances and needs found in the instant case are, nevertheless, deemed so compelling as to justify reversal of the lower court's decision, we submit that the Court's rationale and opinion should be carefully tailored to the

controlling facts and special circumstances, rejecting Petitioner's blunderbuss arguments which would sustain virtually any "benign" governmental racial quota or preference.

CONCLUSION

Petitioner has argued that the admitted discrimination against non-minorities by its preferential admissions program is a perfectly legitimate educational policy choice, and the unhappy adverse effect on Respondent Bakke and others similarly situated is an acceptable social cost outweighed by the greater good accomplished for our society by its program.

In adopting such a cavalier attitude toward the social and political options which this Court is asked to legitimate for the first time in our nation's history, Petitioner not only dismisses as inconsequential the "incidental" loss of Respondent Bakke's own constitutional rights to equal protection of the laws and the lack of any judicial precedent for such acts, but also fails to even fully acknowledge the detriment to Bakke. Rather, it argues that the discrimination practiced against non-minorities in general, and the detriment to Bakke in particular, is not a matter for either judicial or social concern because Petitioner harbors no intent to harm or stigmatize Bakke, or to inflict any sort of hatred or retribution.

The Washington Supreme Court succintly articulated the obvious weakness in such an argument, which Petitioner struggles mightily to overlook or avoid, that "the minority admissions policy is certainly not benign with respect to non-minority students who are displaced by it." *DeFunis v. Odegaard*, 507 P.2d 1169, 1182 (Cal. 1973). The ultimate judgment which this Court must make in this case is whether Bakke may be singled out by a state institution for loss of his constitutional right to an equal chance at pursuing his chosen profession, without any evidence of any culpable conduct on

his part or that of the institution, purely on the historical accident of his birth and application for admission to medical school occurring in the generation in which the state sought to right the wrongs done in and by past generations of American society. We urge the Court not to proceed down such a route, which will ultimately endanger the cherished rights of all citizens to an equal, competitive opportunity to pursue the best this country has to offer.

For the foregoing reasons, the judgment of the California Supreme Court should be affirmed.

Respectfully submitted,

McNEILL STOKES
IRA J. SMOTHERMAN, JR.
DAVID R. HENDRICK
JOHN C. McINTYRE, JR.
Stokes & Shapiro
2300 First National Bank Tower
Atlanta, Georgia 30303

Counsel for Amicus Curiae, American Subcontractors Association