IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-811

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,

Petitioner,

vs.

ALLAN BAKKE,

Respondent.

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

BRIEF FOR AMICUS CURIAE HENRY A. WAXMAN IN SUPPORT OF RESPONDENT

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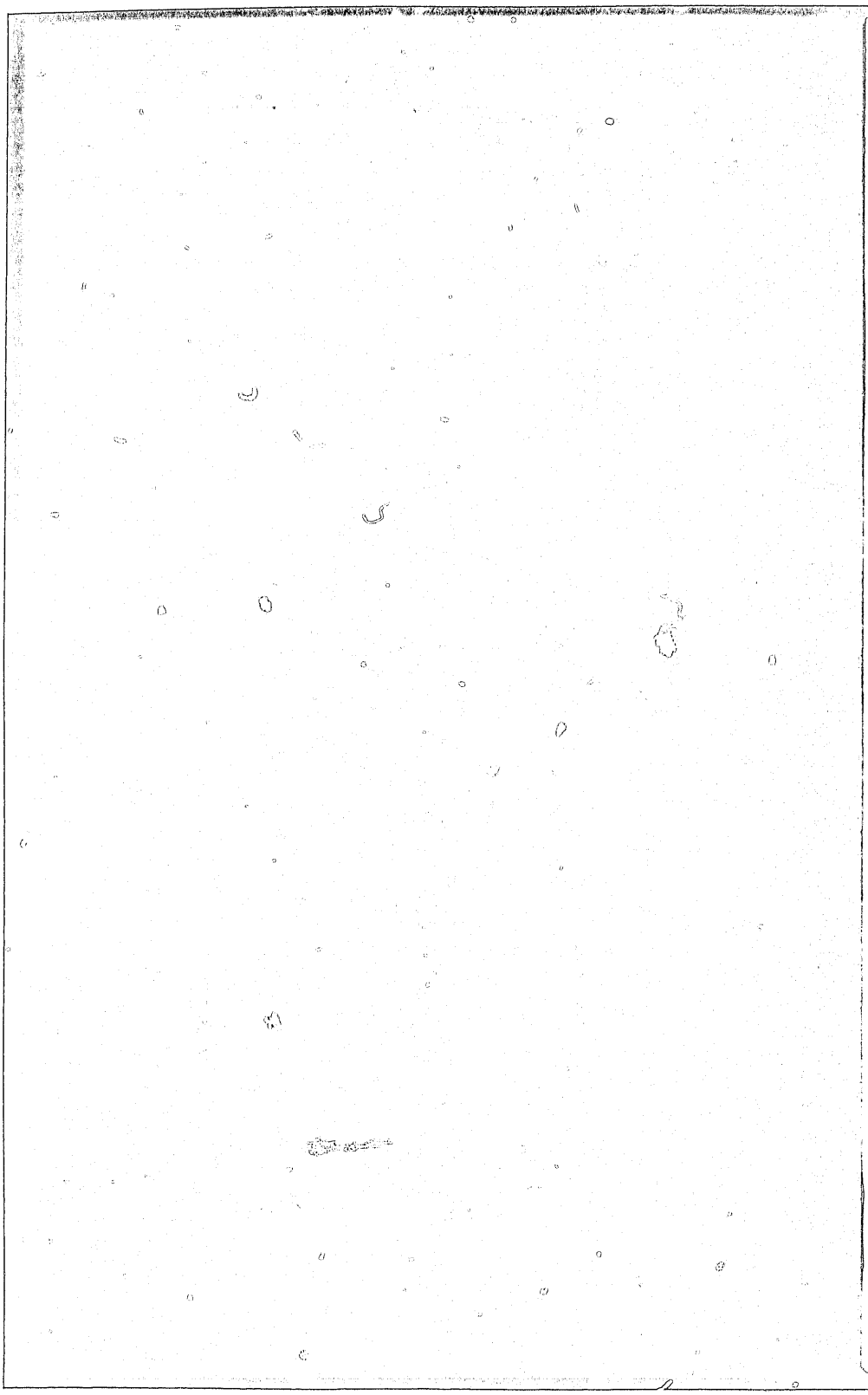

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OPINION BELOW

The opinion of the California Supreme Court is reported at 18 C.3d 34, 132 Cal. Rptr. 680, 553 P.2d 1152.

JURISDICTION

The jurisdiction of this Court is set forth in 28 U.S.C. § 1257(3). The petition for a writ of certiorari was filed on December 14, 1976, after the California Supreme Court denied on October 28, 1976, a petition filed by the University of California for rehearing.

CONSENT OF THE PARTIES

Both the Regents of the University of California and Allan Bakke, by their attorneys, have given their consent to the filing of this brief as required by Rule 42.2 of the Rules of the Supreme Court of the United States. Their letters of consent are on file with the Clerk of this Court.

QUESTION PRESENTED

May a state constitutionally discriminate against white applicants to its medical school on the basis of race?

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides:

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

INTEREST OF THE AMICUS

The Amicus, the Honorable Henry A. Waxman, is a Member of Congress representing the 24th Congressional District of California. Representative Waxman is a member of the California Bar Association, and a member of the bar of this Court. Representative Waxman served three terms as a California State Assemblyman, where he was Chairman of the California Assembly Health Committee. He is currently a member of the House of Representatives Subcommittee on Health and the Environment, and authored an unsuccessful amendment to the Health Manpower Act to prohibit grants to medical schools that discriminate on the basis of race by way of numerical quotas.

STATEMENT

The Amicus Curiae for Respondent concurs in the Statement of the Brief for the Respondent.

SUMMARY OF THE ARGUMENT

Because of his race, Allan Bakke was denied the opportunity to compete for all the places in the entering class of the University of California Medical School at Davis. A significant quota of places were reserved for other races. Had Bakke been black, Chicano, or Asian, such exclusion would certainly have been unconstitutional. The exclusion of white persons because of their race is no less so.

This Court has held that state action employing a racial classification is constitutionally suspect and subject to the strictest scrutiny. Only in time of war and dire public emergency, and only then, has this Court found a compelling state interest sufficient to justify the use of a racial classification to satisfy the strict scrutiny test.

Davis Medical School argues that it is not unconstitutional to discriminate against a member of the white majority. It suggests that since this "benign" racial classification does not stigmatize traditionally disfavored minorities, it should be judged by a more permissive standard of review.

Racial discrimination against white persons as a race is a new phenomenon in our law. Yet the Equal Protection clause is perfectly applicable. Distinctions based on immutable birth characteristics are generally irrelevant to any legitimate legislative purpose; this factor alone often determines that a classification is suspect.

All persons regardless of race are entitled to the same constitutional safeguards. We live in a diverse society. Ethnic and racial groups are difficult to define with precision, but the Davis Special Admissions program fails to take this into account. It perpetuates racial generalizations. The "white majority" excluded by the Special Admissions Program is not a monolith. It contains a varied mixture of other minorities — Jews, Italians, Irish, Poles — who themselves are sometimes vulnerable to prejudice.

Davis Medical School asserts racial quotas against whites are not "stigmatizing". Yet lower admissions standards are stigmatizing for the very minority applicants allegedly benefited by the quota and the preferred status at issue in this case. A segregated admissions process implies that blacks, Chicanos and Asians cannot compete on the basis of individual merit.

To summarize, racial classifications which exclude white persons are as invidious and as suspect as those which exclude racial minority groups. They are subject to the same standard of strict review. Davis Medical School, as this brief will demonstrate, has failed to show its race-conscious admissions program should not be struck down under the Equal Protection clause of the Fourteenth Amendment of the United States Constitution.

ARGUMENT

Introductory

This Court's decision on "reverse discrimination" in medical school admissions will be historic. Education admissions policies, particularly at the post-graduate level, are rarely a subject for judicial review. Yet this case merits judicial oversight because Davis Medical School has two sets of admissions criteria and determines which criteria apply to a given applicant on the basis of his race. This Court will determine how American professional schools will admit racial minorities into their student body and ultimately into the medical profession itself.

All fair-minded people agree minorities must not be deliberately excluded from our professional schools. However, the Davis Special Admissions Program crosses a critical line between affirmative action and deliberate unfairness. The Davis program does not give members of a disadvantaged group an edge in the competition for places in medical school; it eliminates the concept of competition altogether. The Special Admissions Program is not af-

firmative action toward equal opportunity; its quotas eliminate equal opportunity.

In a free society, performance is more important than ancestry. Only aristocracies and racist societies assign their people to classes based on their heredity. The American democratic ideal is that achieved status, not assigned status, is what matters.

The primacy of the individual, rather than the group he belongs to, is the trademark of American democracy. Our Constitutional protections are based on the belief — not that persons exist to serve the state — but rather that the individual has a protected right to be his unique self and be his best without governmental interference.

The courts, the Congress, the Executive Branch, and the hearts and minds of our people must address a common goal. We must dismantle unconstitutional barriers which slow progress toward a free and open multiracial society. Ironically, the Davis Special Admission Program, because it is race-conscious, is such a barrier.

That the Special Admission Program was well intended does not make it fair or constitutional. To resurrect quotas, to perpetuate separatism through a race-conscious admissions program, is not the best response to racial minorities' yearning to overcome a tragic legacy of low self-esteem and underepresentation in the professions.

After the civil disorders of the 1960's the Kerner Commission in 1968 concluded that:

> "Our nation is moving toward two societies, one black, one white — separate and unequal."[1]

The Davis Task Force admissions policy at issue in this case furthers this very separatism.

To have two standards for admission to medical school, one academically more permissive than the other, could

[1] *Report of the National Advisory Commission on Civil Disorders*, 1968, p. 1.

lead to two standards of health care in America. This could perpetuate color-consciousness in employment of doctors, and in the patients who seek them out or refuse their care.

The time is at hand to decide whether status as a medical school applicant can be based solely on race. If the Davis Task Force race-conscious admissions program is sustained, there will be a double standard for medical school admissions — one for white applicants, and one for blacks, Chicanos, and other generally disadvantaged minorities.

What is far more serious is that sustaining the Davis Task Force program will create two standards in the law based solely on race. The rights of white students under the Equal Protection Clause of the Fourteenth Amendment would be different than the rights of a minority group student.

Historically black people were the first to receive the protection afforded by the Equal Protection clause. Yet this court has applied the Equal Protection clause to assure that everyone similarly situated regardless of race stands equal before the law.

Membership in America's white majority does not make one immune to discriminatory state action. For example, this Court held unanimously that women, although a majority, have been discriminated against by state action. *Reed v. Reed*, 404 U.S. 71 (1971). Majorities do not always receive equal, much less preferred treatment.

The Equal Protection clause promises race-neutral treatment regardless of which race petitions for justice. It should be so applied in this case.

ARGUMENT

I

RACE-CONSCIOUS ADMISSIONS PROGRAMS ARE NOT THE ONLY OR BEST MEANS OF ABOLISHING RACIAL DISCRIMINATION; SUCH PROGRAMS PERPETUATE RACISM AND SEPARATISM IN THE UNITED STATES.

A. The Davis Medical School Special Admissions Plan Assumes Racial Minorities Are Educationally Inferior And Cannot Compete On An Equal Basis.

Petitioner points out that 41% of American-born blacks residing in California in 1970 were born in the South,[2] as justification for the race-conscious Davis Task Force admissions program, which was an attempt to compensate for the effects of segregated schooling. Such a statistic may be completely irrelevant to the Davis Medical School student body. Not all American-born blacks residing in California apply to Davis Medical School. Furthermore, Petitioner ignores any prejudicial effect blacks experienced in northern schools.

To assume that all blacks born in the South, regardless of when they moved from there, received an education that incapacitates them for admission under Davis's general admissions standards is to make a broad generalization which ignores the details of each black applicant's qualifications and special abilities.

B. Racial Minorities Have Not Been Discriminated Against Equally.

In 1954, this Court decided *Brown v. Board of Education*, 347 U.S. 483. *Brown's* goal of dismantling segregated public education systems has still not been totally achieved. Both racial prejudice and the *Brown*

[2]Brief for the Petitioner, p. 19.

decision have affected different minorities in this country to different degrees. Yet all racial minorities are treated alike under the Davis Special Task Force program.

Actually, the experience of blacks and Asians is quite different. For example, at least one professional school, the law school of the University of California at Berkeley, has already eliminated from that school's special admissions program Japanese-Americans because of the number of applicants from this group able to gain admission through the regular admissions program.[3]

The burden of discrimination does not affect each member of a racial minority equally, nor can the experience of all racial minorities be equated.

The flaw in the Davis Task Force program is its attempt to atone for a historic pattern of discrimination by equating race with educational inferiority or superiority. It assumes racial minorities cannot compete on an equal basis. This perpetuates the racial stereotypes *Brown v. Board of Education* was intended to bring to an end.

Not every member of a racial minority typifies the history, culture, or socio-economic standing of the majority of his race. The Davis quota system is intended to compensate for the cultural, financial, and educational deprivation suffered by black Americans, for example. Yet the program does not "select out" racial minority members who are not "typical" of their disadvantaged race. A middle class Jamaican student who may not be disadvantaged in any way still qualifies for the Davis Special Admissions Program. A white student who comes from a poor rural background receives no such preferred treatment. Such a white student should not be discriminated against because of his race nor because his life experience is not statistically the average.

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[3]Brief for the Petitioner, p. 43, fn.52.

C. Admission Of Racial Minorities To Medical School Will Not Necessarily Improve The Medical Care Given To Disadvantaged Minorities.

Petitioner simplistically concludes there is a cause and effect relationship between underepresentation of minorities in medical school and the poor quality of health care received by racial minorities.[4]

There are at least five flaws in such a conclusion. First, it is not documented that minority students return to the disadvantaged communities from which they came to provide superior health care. Second, there are other reasons that disadvantaged minorities receive poor health care. Often minorities have a financial barrier to certain forms of treatment, including most recently abortion. *Maher v. Rowe*, 432 U.S. ____ (1977), and *Beal v. Doe*, 432 U.S. ____ (1977).

Third, there are many white rural Americans who are medically underserved. One cannot automatically equate lack of medical care with race, as Petitioner attempts to do. Fourth, if one takes Petitioner's argument about service to particular minority communities to its ultimate conclusion, it is obvious it perpetuates racial separatism. Despite a disclaimer, what Petitioner truly advocates is black doctors for black communities, Chicano doctors for Chicano communities, and white doctors for Caucasian communities.

Fifth, and most importantly, Petitioner never shows how the Davis Task Force admission quotas will match doctors to the racial communities that are medically underserved. Could a Chicano administer appropriate and sensitive care to the black community? Petitioner apparently thinks not, because it argues that racial minorities in America are "discrete";

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[4]Brief for the Petitioner, p. 23.

> "Growing up black, Chicano, Asian or Indian in America is itself an experience which transcends the particular fact of segregated education. The history and culture of each of these groups is different, and thus, to some extent is the precise nature of the experience."[5]

What Petitioner ignores is the individuality and special talents of the *members* of these groups.

It should also be pointed out that health care must be initiated by the patient in many instances. The uneducated and poor are less likely to request health care or recognize symptoms than the more educated. The poor can least afford to miss work for a doctor's appointment. The poor are least likely to have a telephone to make such an appointment. The near-poor who do not qualify for Medicaid may have difficulty getting treatment from a doctor or hospital seeking assurance that the patient can pay for services rendered.

The fact that Medicaid is available to 25 million Americans is further proof that the reasons racial minorities receive inadequate health care are very complex. We do not know that increasing the number of black doctors in the medical profession will automatically improve the health of racial minorities in this country.

D. Racial Admissions Quotas Have Failed To Accomplish Their Goal: American Medical Schools Are Still Predominantly White And Attended By Students From The Middle Class And Upper Middle Class.

Petitioner concedes that admissions quotas have not drastically altered the homogeneous student body characterizing most medical schools:

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[5]Brief for the Petitioner, p. 20.

> "Special admissions programs . . . do not significantly reduce the number of whites, who continue to fill the lion's share of spaces in medical schools. Indeed, the growth in the number of spaces in medical schools since the mid-1960's, coupled with the relatively limited scope of special admissions programs, means that there are more spaces available to a white applicant today than there were before there were such programs."[6]

The barrier which now keeps racial minority representation low in medical schools is the enormous cost of a medical education. It is the most expensive professional training anyone can acquire. Many racial minorities' members cannot afford tuition, do not have collateral for loans, and cannot afford the loss of income during the years a medical education requires.

E. Quotas Are Not Constitutionally Compelled.

1. Illegal barriers excluding racial minorities from medical schools have already been eliminated.

The medical profession in the United States, like other institutions in our society, exercised racial discrimination in the past which appalls us today. Racial discrimination barred membership in state and local medical societies, hospital appointments, and specialty certification. However, such bars are now prohibited by law and by the American Medical Association.

Petitioner concedes that the last vestiges of explicit racial discrimination policies against minorities in medical schools were abandoned in 1971.[7] Petitioner further con-

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[6]Brief for the Petitioner, p. 54.

[7]*Ibid.*, p. 26.

cedes that once these formal barriers were dropped, minority applicants were not arbitrarily excluded from admission.[8] Petitioner attributes the failure of many racial minority students to present admission credentials competitive with white applicants to "persistent discrimination in lower levels of education and in society."[9]

The most obvious solution to such discrimination then is in the education racial minorities receive *before* they reach professional school. Participation in compensatory programs or the total overhaul of our public schools are ways to overcome educational gaps which exclude some members of racial minorities from competition for medical school admission.

Lowering admission standards for racial minorities does not correct educational deficiencies; it ignores, and even perpetuates them. It postpones a day of reckoning with that deficiency until a later time: to the day a racial minority member takes his exam for board certification, for example.

Petitioner assumes that statistical integration in the student body will result in actual integration of medical school class members. This may or may not be so. Some racial minorities, including black and Chicano students, have their own fraternal organizations in professional school for mutual support and mutual concerns. This may be laudable, but it may also indicate that the amount of cross fertilization that goes on between racial minority students and white students cannot be measured and should not be exaggerated.

Petitioner justifies the Davis Task Force by asserting the program was established in response to a formal recommendation of the Association of American Medical Colleges that:

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[8]Brief for the Petitioner, pages 26-27.

[9]*Ibid.*, p. 27.

> "[M]edical schools must admit increased numbers of students from geographic areas, economic backgrounds and ethnic groups that are now inadequately represented."[10]

But admission of students on the basis of geographic areas and economic backgrounds is constitutionally different from admission on the basis of race. Race, unlike the other categories, is a suspect classification.

Petitioner refers to "insular minorities", yet it is not clear what this means. If Petitioner means that each race is distinct and separate from others in American society, then once again Petitioner perpetuates a notion of racial separatism this Court does not endorse. *Loving v. Virginia,* 388 U.S. 1 (1967).

2. Petitioner concedes a pool of fully qualified minority applicants existed by the late 1960's.

Petitioner contradicts his earlier statement — that slow implementation of the *Brown* decision handicapped the present generation of medical school minority applicants — when he states that in the late 1960's "a pool of fully qualified minority applicants existed".[11]

Petitioner uses the term "fully qualified applicant" but never defines what that term means. If it means the minority students were qualified under the Davis standards, then it is unclear why the Davis Task Force admissions policy was even necessary.

Petitioner argues that "the greatly increased size of the pool of all applicants in the last decade inevitably escalated sharply the numerical credentials of those admitted".[12]

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[10]Brief for Petitioner, p. 33-34, citing *Association of American Medical Colleges: Proceedings for 1968,* 44 J. Med. Educ. 349 (1969).

[11]*Ibid.*, p. 28.

[12]*Ibid.*, p. 28-29.

Petitioner is unable to explain, however, why credentials escalated for white students but not for racial minority students during a period when American schools were being desegregated.

Petitioner argues that "the reliance placed on numerical indicators of predicted academic performance in the late 1960's continued to limit admission exclusively to whites."[13] Such an argument generalizes that virtually all members of non-Caucasian groups, regardless of their individual educational background or socio-economic class, are inferior test-takers. Such a generalization perpetuates a racial stereotype without regard to the special abilities of individual applicants.

Furthermore, the solution to placing too much reliance on standardized tests is to de-emphasize this factor in making admission decisions. Petitioner indicates that medical schools are already considering other factors in appraising candidates for admission:

> "Medical schools have placed more emphasis on non-cognitive factors, including those disclosed by personal interviews, candidates' written statements, and letters of recommendation."[14]

If this is so, then it is unclear why a special admissions policy is still used for racial minorities. A race-conscious admissions program is not a logical adjunct to an admissions program which already weighs non-cognitive as well as cognitive functions.

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[13]Brief for the Petitioner, p. 29. Petitioner suggests that cognitive tests may not accurately evaluate racial minorities, but then concedes there is inadequate documentation to make such an argument. Brief for Petitioner, p. 31, fn.38.

[14]*Ibid.*, p. 29.

3. While a race-conscious admission standard may stem from laudable motivation, this does not make it constitutionally acceptable.

Petitioner argues that since the ends of the Davis Task Force program are laudable the program is constitutionally justifiable.[15] That the ends justify discriminatory means is not a recognized principle of American constitutional law. That race-conscious admissions programs are now nationwide does not validate them. Pernicious segregation in American schools was nationwide for decades, but that did not prevent this Court from finding it unconstitutional.

Petitioner argues that a goal of the Davis Task Force admissions program is to enhance Caucasian students' awareness of the medical problems of racial minorities. There is no guarantee that the Davis Special Admissions Program would promote this goal. One cannot assume that every member of a racial minority, regardless of his socioeconomic status, typifies the medical concerns of the minority group he belongs to. Health problems of certain racial groups are not distinctly different from those of the general population simply because of race.

4. The goals of the Davis Medical School Special Admissions Program can be achieved without resort to a race-conscious double standard.

Racially-neutral means can further the goals espoused by the Davis Task Force program. Race-conscious programs are not compelled. For example, if economic barriers prevent racial minorities from attending medical school, then their education must be generously subsidized.

[15] Brief for the Petitioner, p. 32.

Minority groups do have a very high proportion of lower income families.[16]

If too few members of racial minorities are finishing college,[17] then the college education of needy students should be subsidized as well, and whatever programs are necessary for college skills and motivation must be offered. The college degree is an essential prerequisite to admission to professional school.

II

A RACE-CONSCIOUS ADMISSIONS PROGRAM DELIBERATELY ADOPTED BY A STATE MEDICAL SCHOOL VIOLATES THE FOURTEENTH AMENDMENT'S EQUAL PROTECTION CLAUSE.

A. A State Medical School Violates The Equal Protection Clause When Racial Criteria Alone Confer On Some Applicants A Preferred Status.

Petitioner alleges that what is determinative about the Davis Task Force program is that it was well intended rather than hostile towards any race.[18] For Equal Protection purposes, this is not the proper test. A short time ago in our history, segregationists claimed their intentions were "protective" — yet that did not make school segregation constitutional. Good intentions do not make good law, necessarily. What is determinative is that the Davis Task

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[16]76% of black families, and 70% of those of Spanish origin, had 1969 incomes below $10,000. U.S. Bureau of the Census, Department of Commerce, Pub. No. PC (2)-8A, United States Census of Population: 1970 *Sources and Structure of Family Income*, pp. 1-12.

[17]In 1970, of the population 25 and older, only 4.5% of blacks had four or more years of college. U.S. Bureau of the Census, Department of Commerce, *Subject Reports*, Pub. No. PC (2)-B, Educational Attainment, pp. 30-44.

[18]Brief for the Petitioner, p. 44.

Force program was voluntary: the medical school willfully and knowingly established a race-conscious admissions program.

1. The Davis Task Force Program institutionalized invidious quotas based on race.

Petitioner argues that the Davis Task Force program is not a quota system because deliberate exclusion by the dominant group is not present.[19] Yet deliberate exclusion on the basis of race from a certain number of places is discriminatory regardless of which race is affected.[20] Members of a majority are not immune to unconstitutional discrimination as the lengthening line of cases involving denial of rights of women demonstrate.[21] Furthermore, the so-called dominant white majority alluded to in Petitioner's brief is itself fragmented by ethnic and religious groups which have been victims of discrimination.

The means used by Davis Medical School are not precisely tailored to its alleged goals. Because race, not financial disadvantage, is the threshold criterion for admission through the Davis Task Force, the Special Admissions Program allows and enhances middle-class and upper middle class blacks' and Chicanos' admission. The life circumstances of a white applicant from Appalachia may be economically, intellectually, and culturally more disadvantaged than the black middle class applicant whose parents are both teachers. The Davis Medical School Special Admissions Program is not particularized enough to deal with this situation fairly.

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[19]Brief for the Petitioner, p. 44.

[20]*McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, (1976).

[21]*Reed v. Reed*, 404 U.S. 71 (1971).

Petitioner justifies the Davis program on the grounds that it is temporary.[22] Brief duration does not make a program which is unconstitutional constitutional. In implementing *Brown v. Board of Education* courts deferred too often to states' claims that a particular discriminatory practice was only temporary.

2. Quotas Based on Race Are Discriminatory Where There Are No Quotas Based on Ethnic Groups.

There are dozens of ethnic groups which are underrepresented in American higher education. Don't principles of equity and consistency require that these groups have a percentage of places in first year medical school assigned to them? How could such a program be administered? Isn't assignment of a preferred status on the basis of race a denial of equal protection to those who, because of their ethnic background, were victimized by social and economic discrimination?

3. Quotas inflict a stigma on racial minorities.

The Davis Task Force sets a lower standard for minority applicants to meet. It is based on the assumption that racial minorities cannot in significant numbers meet the general admissions' high academic criteria. Such a program stigmatizes the very groups it purports to help. Since white students and faculty will not know which racial minority students were admitted under the general admissions program, they may assume that such members of the class were all admitted under a lower academic standard, even if that is not the case.

[22] Petitioner's Brief, p. 42-43.

4. Quotas demoralize medical education because admission is no longer based on relative merit.

Competitiveness characterizes American medical schools and the effort to get admitted to them. It is demoralizing for applicants whether they are racial minority members or not to see that different standards are applied depending on one's race. The resentment caused by conferring preferred status based on race will stifle efforts toward a more free and open multiracial society.

Petitioner argues that Allan Bakke has no constitutional right to a medical school education.[23] It is true that education is a privilege, not a right, unless the state has created such a right through the state constitution or the holding out of an expectation of benefit.[24] Yet this principle applies equally to the minority applicants to Davis Medical School. This makes the preferred status they are granted an even more egregious violation of the Equal Protection clause.

5. Quotas cannot be administered fairly to conform with Equal Protection guarantees.

The administration of racial quotas is as unfair and discriminatory as the exclusions they attempt to correct.

How can a state school equitably satisfy all the claimants who seek preferred admissions status based on past discrimination? How does a quota system compare the discrimination suffered by one race with that suffered by another? How can a quota system deal fairly with a person whose membership in more than one racial group makes him impossible to classify? What percentage of minority

[23] Brief for the Petitioner, p. 56.

[24] *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, (1973).

racial background will be required for someone to qualify for the racial quota?

These questions are asked rhetorically. To answer them offends our Constitution's promise of Equal Protection of the laws, and the principles of our democratic institutions.

6. Arousal of racial antagonisms is a valid concern of this Court in deciding if California's reason for using racial quotas is compelling.

We are moving toward the goal of a free and open multiracial society. In such a society the relative merit of an individual will not be based on the suspect classification of race. Race will be a —

> "[N]eutral fact . . . constitutionally an irrelevance".
>
> *Edwards v. California*, 314 U.S. 160, 185 (1941) (Jackson, J., concurring.)

This Court has recognized that state action which results in the arousal of racial antagonism is forbidden by the Fourteenth Amendment. *Anderson v. Martin*, 375 U.S. 399 (1964). Petitioner concedes that:

> "The University does not deny there is a residuum of legitimate concern for the arousal of racial and ethnic awareness."[25]

That the University is sensitive to arousal of racial antagonisms is a reason to dismantle the Special Admissions Program; it is not a legal justification for continuing the program.

[25] Brief for the Petitioner, p. 59-60.

B. Decisions Of This Court Sustaining Racial Criteria Involved Cases With Fact Patterns Clearly Distinguishable From This Case.

In time of war and public emergency this Court found that state action employing a racial classification was justified by a compelling state interest sufficient to satisfy the strict scrutiny standard. *Korematsu v. United States*, 323 U.S. 214 (1944), and *Hirabayashi v. United States*, 320 U.S. 81 (1943). Yet these cases are clearly distinguishable on the facts — Japanese Americans were deprived of their liberty on the ground of national security during World War II. These cases are unique in American law, and are not representative at all of the way the Equal Protection clause is applied today.

The school desegregation cases in which this Court directed the use of race-conscious remedies involved *de jure* discrimination, which is absent in this case.

In *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), a school desegregation decision, and *Lau v. Nichols*, 414 U.S. 563 (1974), involving bilingual education for Chinese Americans, this Court approved color-conscious policies for remedial purposes. But these cases are crucially different than the case before us. Neither *Swann* nor *Lau* involved the use of a quota to reject better-qualified non-minority applicants solely because of their race, as does the Davis Special Admissions Program. This Court has rejected a "fixed racial balance or quota". *Winston-Salem/Forsyth County Board of Education v. Scott*, 404 U.S. 1221, 1227 (1971).

Nor can *Alevy v. Downstate Medical Center of the State of New York*, 39 N.Y. 2d 326, 348 N.E. 2d 537, 384 N.Y.S. 2d 82 (1976), be used to justify the Davis Special Admissions Program. It was found by the court in *Alevy* that the plaintiff would not have been entitled to admission even if there had been no special program. No fixed quota was

involved in *Alevy*, and minority and non-minority applicants were competing together.

Contrast *Alevy* to this case. Here 16 places were set aside for the medical school's Special Admissions Program. Those places were available exclusively to minority students competing only amongst themselves. Racial status is the indispensable threshold requirement for admission to these seats.

It is presumptuous of Petitioner to argue that the judiciary evidences "lack of specialized knowledge and experience" to decide an education case.[26] The *Rodriguez* case is distinguishable. It concerned a school finance program interwoven with a state tax code — historically and constitutionally a legal area to which the federal judiciary will defer. By contrast, the case at bar presents an issue not of economics or state taxation, but simple justice, just as in *Brown v. Board of Education*. One can only guess how the fabric of our democracy would have suffered if this Court had deferred to the expertise of state officials and legitimized school segregation in that case.

This case is distinguishable from *Green v. County School Board*, 391 U.S. 430 (1968). In that case, the U.S. Supreme Court concluded affirmative, race-conscious steps might be needed to overcome racial discrimination in the public schools. But *Green* involved compulsory public schooling for all children residing in a particular district. In this case, on the other hand, we are discussing — not compulsory education provided to all on an equal basis, but the privilege of a professional education in a field for which only top students are eligible.

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[26]Brief for Petitioner, p. 38, citing *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 42 (1973).

C. The Standard Of Strict Judicial Scrutiny Is Applicable In This Case.

State discrimination based on race triggers application of the strict scrutiny test to this case. *Dunn v. Blumstein,* 405 U.S. 330, 342-43 (1972); *Loving v. Virginia,* 388 U.S. 1, 11 (1967); *McLaughlin v. Florida,* 379 U.S. 184, 192-93 (1964). *McLaughlin v. Florida* held state action employing a racial classification —

> "[C]onstitutionally suspect . . . subject to the most rigid scrutiny . . . and in most circumstances irrelevant to any constitutionally acceptable legislative standard".
>
> *McLaughlin v. Florida,* at 191-192.

Distinctions based on characteristics at birth are generally irrelevant to legitimate legislative purposes. The fact that a characteristic is immutable often determines if its classification is suspect. *Sail'er Inn Inc. v. Kirby,* 95 Cal. 329 (1971); and *Frontiero v. Richardson,* 411 U.S. 677 (1973).

D. The Davis Special Admissions Quota System Violates The Equal Protection Clause Of The Fourteenth Amendment Because The State Cannot Demonstrate A Compelling State Interest To Justify A Race-Conscious Admissions Program.

If Davis could show that the race-conscious admissions program was compelled because it was the only way to achieve the goal of equity in our educational system or in our society for minorities, then the program could be upheld. However, this is not the case. Under strict scrutiny, the state must not only show that its goal is compelling; it must also prove there is no less invidious way of achieving the objective. This Court stated in *Dunn v. Blumstein:*

> "If there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a state may not choose the way of greater interference. If it acts at all, it must choose less drastic means."
>
> *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972)

During the 1960's the term "affirmative action" connoted at least five different responses made to correct the historic legacy of discrimination:

1) Recruiting qualified applicants from disadvantaged groups.
2) Eliminating cultural bias in criteria used to select among applicants.
3) Providing special training and apprenticeship for qualifiable applicants to make them competitive with everyone else.
4) Changing long-range factors, (such as housing, and secondary school environment), which affect motivation to learn and succeed.
5) Giving preferential treatment to certain applicants because they were discriminated against in the past.

The Davis Special Admissions Program addresses itself only to the fifth and least constitutional of these five options for affirmative action.

Davis Medical School cannot show that the *only* way of increasing minority representation and attaining a diverse student body is by a fixed quota affording an absolute preference to 16 racial minority applicants on the basis of their race.

Furthermore, Petitioner cannot show how the Special Admissions Program will benefit racial minorities at large. The Special Admissions Program, and others like it nationally, affect such a small number of people that they

will not significantly improve the lot of disadvantaged minorities in this country. Petitioner concedes:

> "[I]t cannot seriously be contended that the program is intended to achieve proportional representation in the profession. The disparity between the numbers of whites and minorities in medicine is so extreme that it would be generations before even rough parity would result."[27]

How then can Davis Medical School argue that its program for racial minorities is so compelling that constitutional safeguards do not apply? The means used by Davis Medical School are not precisely tailored to its alleged goals. The Health Manpower Act[28] and Medicaid[29] will do far more to improve the delivery of health care to the disadvantaged of all races than the Davis Task Force. The Health Manpower Act authorizes awards to health or educational entities for health manpower programs which will improve the distribution, supply, quality, utilization, and efficiency of health personnel and the health services delivery system. Support has been provided for the development of area health education centers (AHEC's), the training of physician assistants, and the identification and encouragement of disadvantaged students with a potential for training in the health professions, among other activities. In fiscal 1975, funding was at the level of $12 million for AHEC's, $8 million for physician assistant training, $6.7 million for career opportunity grants (disadvantaged students), and $19.5 million for other manpower initiatives.[30]

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[27]Brief for the Petitioner, p. 47.

[28]The Comprehensive Health Manpower Training Act of 1971, P.L. 92-157.

[29]Title XIX of the Social Security Act.

[30]Subcommittee on Health and the Environment of the Committee on Interstate and Foreign Commerce, "A Discursive Dictionary of Health Care." U.S. House of Representatives, Feb. 1976, p. 73.

Similarly, Medicaid is a Federally-aided, State operated and administered program which provides medical benefits for certain low-income persons in need of health and medical care. The program, authorized by title XIX of the Social Security Act, is basically for the poor. It does not cover all of the poor, however, but only persons who are members of one of the categories of people who can be covered under the welfare cash payment programs — the aged, the blind, the disabled, and members of families with dependent children where one parent is absent, incapacitated or unemployed. Under certain circumstances States may provide Medicaid coverage for children under 21 who are not categorically related. Subject to broad Federal guidelines, States determine the benefits covered, program eligibility, rates of payment for providers, and methods of administering the program. Medicaid is estimated to provide services to some 25 million people, with Federal-State expenditures of approximately $12.5 billion in fiscal year 1975.[31]

When Davis Medical School assumed voluntarily the responsibility for deciding the amount of discrimination suffered by certain racial groups, and for setting an arbitrary quota based on that discrimination, it was not exercising a legitimate state function. Assigning preferred status to certain groups, solely because of their race, is not a governmental function. The role of a state medical school is to educate students to practice medicine.

CONCLUSION

This Court should invalidate the race-conscious Davis Medical School Special Task Force admissions policy as a violation of the Equal Protection clause of the Fourteenth Amendment. The program is based on a racial stereotype

[31] Subcommittee on Health and the Environment. "A Discursive Dictionary . . .", *supra*, p. 97.

— that racial minorities are not capable of the academic excellence demonstrated by white applicants.

The program has the potential for grave harm. First, the Davis program, and others like it across the country, could kindle resentment and renew racial antagonisms. Second, the Davis Special Admissions program will fail to significantly change the representation of disadvantaged minorities in the medical profession. Third, it would be tragic indeed if the State of California, because of programs like the Davis Task Force, lost the resolve to improve the lot of racial minorities disadvantaged by our society. Programs such as the Special Admissions project at Davis cause many to think that enough is being done.

Enough is not being done. The reasons why minorities are under-represented in our professions are complex. There is a web of causation as complicated as the sociology of our nation. Discriminatory preferred status is not the answer for bringing racial minorities into the mainstream of the medical profession. Discovering and changing how poverty has profoundly affected racial minorities in this country is essential.

As the Kerner Commission Report concluded starkly, fundamental change in our whole society is necessary, not cosmetic, arbitrary programs:

> "What white Americans have never fully understood — but what the Negro can never forget — is that white society is deeply implicated in the ghetto. White institutions created it; white institutions maintain it, and white society condones it."[32]

The State of California can do better than the Davis Task Force. Our entire society suffers if our educational standards are compromised. There *are* racial minority members

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[32] Report of the National Advisory Commission on Civil Disorders, p. 2.

who compete successfully for admission to medical school. We must learn why some persons are motivated to compete and achieve, and others cannot.

To patronize minority groups with a lower standard of admission is to deny them their birthright in America: the right to achieve on an equal footing with everyone else. How can a minority student ever feel genuine pride in academic achievement, when from admission on so much less is expected from him?

A medical education is one of the most highly prized of all attainments. It should be available to those who seek it on an equal basis.

Race-conscious quotas have no place in a democratic society. There is in America no constitutional right to preferred status based on race. An enduring truth in our culture, whether one looks at the legend of Solomon deciding between two mothers claims or Shakespeare's Portia describing the exact pound of flesh, is that justice is not a precise percentage.

The Davis admissions quota penalizes a specific individual, such as Allan Bakke, who is not responsible for the historical wrong that is to be righted. He is wronged in being so penalized, and the Equal Protection clause is violated because he is penalized for his race, not for his actions. This Court must restore to our institutions of higher learning the full protection of the Equal Protection clause. The Davis Special Admissions Program should be struck down.

Respectfully submitted,

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