No. 76-811

In the Supreme Court of the United States

OCTOBER TERM, 1977

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,
PETITIONER

v.

ALLAN BAKKE

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

GRIFFIN B. BELL,
Attorney General,
WADE H. McCREE, Jr.,
Solicitor General,
DREW S. DAYS, III,
Assistant Attorney General,
LAWRENCE G. WALLACE,
Deputy Solicitor General,
FRANK H. EASTERBROOK,
Assistant to the Solicitor General,
BRIAN K. LANDSBERG,
JESSICA DUNSAY SILVER,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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QUESTIONS PRESENTED

1. Whether a state university admissions program may take race into account to remedy the effects of societal discrimination.

2. If so, whether, as applied to respondent, petitioner's admissions process operated in a constitutionally permissible manner.

INTEREST OF THE UNITED STATES

Congress and the Executive Branch have concluded that race must sometimes be taken into account in order to achieve the goal of equal opportunity. They have adopted numerous minority-sensitive programs,

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which are collected in Appendix A to this brief. They also have established several programs to assist persons handicapped by their language background (see Appendix B to this brief). For example, the Department of Commerce provides technical and financial assistance to promote enterprises owned by members of minority groups, and the Department of Health, Education, and Welfare provides financial assistance to help colleges and universities increase the number of minority faculty, students, and investigators engaged in biomedical research. The Public Works Employment Act of 1977 provides that applicants for public works grants must give assurances that at least ten percent of each grant will be expended "for minority business enterprises" (Pub. L. 95–28, 91 Stat. 116, 117). Moreover, pursuant to Executive Order 11246, 30 Fed. Reg. 12319, as amended by Executive Order 11375, 32 Fed. Reg. 14303, enterprises holding federal contracts must take affirmative action to correct disproportionately low employment of racial minorities. These and other programs might be affected by the Court's disposition of this case.

The United States has concluded that voluntary efforts to increase the participation of racial minorities in activities throughout our society that were formerly closed to them should be encouraged. See the Policy Statement on Affirmative Action Programs for State and Local Government Agencies, 41 Fed. Reg. 38814. The United States also encourages appropriate minority-sensitive efforts in programs supported by federal funds (see, *e.g.*, 45 C.F.R. 80.3(b)(6)(ii)).

Moreover, several departments and agencies of the Executive Branch have the responsibility to enforce legislation passed by Congress to protect persons from unlawful discrimination on account of race. For example, the Attorney General may intervene in actions of general public importance involving assertions of racial discrimination; he may also sue upon a claim that any person has been denied admission to a public college because of race, and he may bring suit to prevent racial discrimination in federally-assisted programs. See the Civil Rights Act of 1964, 78 Stat. 248, 252, 266, 42 U.S.C. 2000c–6, 2000d and 2000h–2. The Court's decision in this case could affect that enforcement responsibility.[1]

The United States is committed to achieving equal opportunity and preventing racial discrimination. For the reasons discussed in this brief it has concluded that the achievement of both goals can be attained by the use of properly designed minority-sensitive programs that help to overcome the effects of years of discrimination against certain racial and ethnic minorities in America.

STATEMENT

A. FACTS

The Medical School of the University of California at Davis opened in 1968. The entering classes of that year and of the following year included one Chicano, two black, and 14 Asian-American students out of a

[1] Respondent's claim was based in part upon Section 2000d.

total of 100 (R. 215–216).[2] This proportion compared unfavorably with the aggregate proportion of these three groups to the general population of California—25.7 percent.[3]

In 1969 the faculty of the Medical School adopted a resolution establishing a special admissions program for disadvantaged applicants (R. 216). Under that program, sometimes called the "task force" program, between 1970 and 1974 the school admitted 71 minority persons: 26 blacks, 33 Chicanos and 12 Asian-Americans (R. 216–218). An additional 49 minority persons, including 41 Asian-Americans, were admitted through the regular admissions process during those years (R. 216–218). Of the 451 students entering between 1970 and 1974, 120 (or 26.6 percent) were members of minority groups.

On June 20, 1974, respondent brought suit in California Superior Court alleging that as a result of the special admissions program the Medical School had, in 1973 and 1974,[4] denied him admission solely be-

[2] "R." refers to the record that has been filed with the Clerk of this Court.

[3] U.S. Bureau of Census, 1970 Census, Vol. I, *Characteristics of the Population*, California, Part 6, p. 6–387 (1973). The percentages of the population are: persons of Spanish language or surnames, 14.7 percent; blacks, 7.0 percent; Asian-Americans (persons of Japanese, Chinese or Filipino descent), 2.65 percent. American Indians made up 0.45 percent of the California population in 1970. Spanish language or surnamed persons may be of any race. For computation purposes Spanish-speaking or surnamed persons are assumed to be white.

[4] We refer throughout this brief to medical school classes by the year in which the class entered. Applications for an entering class are received beginning in July of the year before the one in which the class will enter (R. 150).

cause of his race. He sought declaratory relief and an order to compel his admission (App. 1–4). The defendants filed a cross-complaint, seeking a declaration that the special admissions program was lawful (App. 9–11).

Counsel agreed to dispense with an evidentiary hearing and to submit the case to the court on the facts set out in the pleadings and in the declaration and deposition (with exhibits) of George H. Lowrey, Chairman of the Admissions Committee and Associate Dean of Student Affairs at Davis (R. 282).

1. THE REGULAR ADMISSIONS PROCESS

The admissions committee at the medical school is composed of faculty and students chosen by the Dean of the school (R. 62, 148–149). Several faculty members screen each application to determine whether an applicant shows sufficient promise to be invited for an interview (R. 62, 150). An interview is a necessary step in the application process; no one is admitted without being interviewed. No applicant in the regular program with a grade point average below 2.5 is interviewed (R. 63, 151).[5] Although other factors are considered in deciding who is interviewed, there are no written standards (R. 151). Interviews are conducted by one faculty member of the admissions committee and, since 1974, one student member. The interviewers write summaries evaluating each applicant's potential contribution to

[5] Although it is not made explicit, it appears from the record that grade point averages are scaled from 0.0 to 4.0 (R. 63).

the medical profession. On the basis of the file (including grades and test scores) and interview summaries, the interviewers and four other committee members each rate each applicant on a scale of 0 to 100 (R. 155–159).

All committee members attend an orientation session in which they discuss the importance of various factors, including the basic requirements for admission, the depth of study in science and the humanities, the quality of undergraduate training, and personal information including letters of recommendation, extracurricular activities, personal comments and career plans (R. 62).[6] Each numerical rating (also called a "benchmark score") is a subjective evaluation of the applicant's potential contribution to the medical profession, and the rating is intended to reflect all of the salient factors, including not only those mentioned above but also character, motivation, contemplated type of practice, and contemplated location of practice (R. 64–65, 180).[7] Committee members also consider objective criteria such as college grade point average and scores on the Medical College Admission Test (MCAT), a four-part standardized test taken by medical school applicants, in the course of evaluating each applicant and assigning a benchmark score (R. 152). The record does not indicate the relative weight of these factors in the selection process.

[6] The record does not reveal whether there are written guidelines for evaluating the applicants.

[7] The record indicates that some preference is given to applicants who are from (and express an interest in returning to practice in) areas of northern California that are in need of physicians; preference is also given to spouses of accepted applicants (R. 64–65, 183). The record does not indicate what weight these factors carry in the selection process.

The combined numerical rating is the "major factor" in selection, but it is not rigidly followed (R. 63, 182–183). Because acceptance letters are sent periodically, a rating that will warrant admission early in the selection process may not do so later (R. 64). In addition, there are two situations in which an applicant with a lower numerical rating may be chosen over one with a higher score. First, a file may be updated with information received after the rating is made. The decision to "accept people out of the order of their numerical rating" because of added information is made by the full admissions committee (R. 64, 182–183). Second, a list of those whose scores are "very close to admission" is created to fill places that may be available because of an unexpectedly low rate of acceptance by those offered admission, or because of attrition; the Dean of Admissions selects from this list those whom he believes will bring "special skills or balance" to the class (R. 64). See Pet. App. 8a.

2. THE SPECIAL ADMISSIONS PROGRAM

Sixteen percent of the places in each class are reserved for applicants admitted through the special admissions program.[8] The special admissions pro-

[8] Before 1971 the entering class was 52, and eight places were earmarked for the special admissions program; in 1971 the entering class was increased to 100, and the special admissions program to 16 (R. 164, 215).

gram is administered primarily by a special admissions committee, comprised principally of faculty and students who are members of minority groups (R. 161–163, 165, 169, 251–252). Applicants referred to the special admissions committee could be interviewed even though their grade point averages would not have justified interviews by the regular committee (R. 175). The special admissions committee selected applicants that, in its view, should be admitted, and it referred their files to the regular admissions committee, which made the final admission decision (R. 165).

Although there is some evidence that the 16 slots earmarked for special admissions could be varied when that was justified by unexpected circumstances,[9] Dr. Lowrey stated that the special admissions committee "would continue to approve and process Task Force applications until 16 had been accepted" (R. 168). The trial court found that 16 places were reserved for minority applicants (Pet. App. 114a–115a), and the University did not challenge that finding on appeal (*id.* at 2a n. 1, 10a–11a).

[9] Only 15 places were filled from the special admissions program in 1971 and in 1974 (R. 217–218). Petitioner explains (Br. 3–4 n. 5) that in 1974 one person admitted through the special admissions program withdrew after he had accepted the offer of admission, and that this place was filled by an applicant to the regular admissions program even though there was a special admissions waiting list.

a. Racial composition of applicants and students

The record includes the following corrected statistics regarding regular and special admissions (R. 214–215, 216–218, 205, 207, 219):

Entering class	Total applicants	Referred to special committee	Interviews		Offers		Matriculations	
			Total	Special	Total	Special	Total	Special
1968	564	—	—		104	—	48	—
1969	1,038	—	—		99	—	52	—
1970	1,338	104	—		80	—	52	8
1971	2,433	146	—		160	—	100	15
1972	[1] 2,046	169	628	64	192	—	100	16
1973	2,464	[2] 297	886	71	[3] 185	[4] 20	[5] 100	16
1974	3,737	628	550	88	157	26	99	[5] 16

[1] This figure is reported as 2,050 as of May 8, 1973 (R. 207).
[2] This figure is reported as 291 as of May 8, 1973 (R. 205).
[3] This figure is reported as 162 as of May 8, 1973 (R. 207).
[4] This figure is reported as of May 8, 1973 (R. 205). Dr. Lowrey indicated that there were 32 special admissions offers (R. 69), and this may reflect later data.
[5] But see note 9, *supra*.

The racial composition of students enrolled in the Medical School was (R. 174, 216–218):

Entering class	Applications referred to special committee		Race of regular admittees		
	Total	Minority	Black	Chicano	Asian-American
1968	—	[1] 22	—	—	3
1969	—	34	2	1	11
1970	104	104	0	0	4
1971	146	140	1	0	8
1972	169	148	0	0	11
1973	297	224	0	2	13
1974	628	456	0	4	[2] 5

Entering class	Minority admittees		Race of special admittees		
	Total	Special	Black	Chicano	Asian-American
1968	3	—	—	—	—
1969	14	—	—	—	—
1970	12	8	5	3	—
1971	24	15	4	9	2
1972	27	16	5	6	5
1973	31	16	6	8	2
1974	[3] 26	[4] 16	6	7	3

[1] These figures represent minority applicants prior to institution of the special admissions program.
[2] One American Indian was also admitted through the regular process in 1974 (R. 218).
[3] The document in the record indicates 25 but appears to reflect an error in addition (R. 218).
[4] Petitioner contends that there were only 15 special admittees in 1974. See note 9, *supra*.

b. Eligibility for the special admissions program

Each applicant's interest in the special admissions program is initially ascertained from his application for admission. The 1973 application form asked each applicant whether he wished to be considered by a special admissions subcommittee for applicants from "economically and educationally disadvantaged backgrounds" (R. 232). In 1974 Davis began using a nationwide application processing service, whose standard application asked whether the applicant wished to be considered as a "minority group applicant" (R. 65, 197).[10] Only those who responded affirmatively were referred to the special admissions committee (R. 65, 171). In 1974 applicants were not asked whether they wished to be considered for a program for the disadvantaged (R. 197). Applications of whites, blacks, Chicanos, American Indians and Asian-Americans were referred to the special admissions committee (R. 65, 216–218).

The special admissions program is open only to those who are considered disadvantaged, a determination made by the chairman of the special admissions committee. The chairman makes this decision on the basis of the application, which reveals whether the applicant was granted a waiver of application fee, was a participant in an educational opportunity program in college, worked during undergraduate years or interrupted his or her education to support himself or herself or family members, and the occupation and educational level of the applicant's parents (R. 65). Applicants from minority backgrounds who are not considered disadvantaged are referred to the regular admissions process (R. 66).[11]

[10] The term "minority" was not defined. A separate question on the application listed the following categories, in addition to white, under the question "How do you describe yourself?": Black/Afro-American, American Indian, Mexican-American or Chicano, Oriental/Asian-American, Puerto Rican (Mainland), Puerto Rican (Commonwealth), Cuban, Other (R. 197).

Dr. Lowrey stated that the program was open to all disadvantaged applicants, but that membership in a minority racial group was considered "as an element which bears on economic or educational deprivation" (R. 65–66). It is not clear what weight race is given in the determination that a person is or is not disadvantaged. Counsel for the Medical School stated (Pet. App. 92a) that "minority status is * * * considered as one factor in determining a disadvantaged status," but Dr. Lowrey explained that "[i]n choosing among the disadvantaged applicants favorable weight is given to minority group membership in determining relative disadvantage because minority applicants from disadvantaged backgrounds labor under special handicaps in American society" (R. 67).

Written material distributed about the program characterizes it as one for disadvantaged students

[11] See the tables at page 9, *supra*, which show that after the special admissions program began many members of minority groups were also admitted through the regular admissions process. Of the 380 entering students so admitted, 41 (10.8 percent) were Asian-Americans, 6 (1.6 percent) were Chicanos, 1 (0.3 percent) was black, and 1 (0.3 percent) was American Indian.

and does not mention racial considerations (R. 65, 195, 196, 248). Although many non-minority persons applied for the program (R. 65, 216–218), every person admitted through it for the classes of 1970 to 1974 was black, Chicano, or Asian-American (R. 216–218). The record does not indicate whether any whites were interviewed or offered admission. The trial court found that no white applicant had ever been admitted through the program and that (Pet. App. 115a) "[i]n practice this special admissions program is open only to members of minority races and members of the white race are barred from participation therein."

c. The process of selection

A special admissions committee, composed of students and faculty the majority of whom, in 1973, were from ethnic minorities (R. 162–163, 169, 251–252), considers each application.[12] The special admissions committee reviews applications in the same manner as the regular admissions committee and assigns a numerical rating to each applicant (R. 66).[13]

[12] The Supreme Court of California stated (Pet. App. 6a) that the special admissions committee "consists of students who are all members of minority groups, and faculty of the medical school who are predominantly but not entirely minorities." Faculty members of the special admissions committee also were members of the regular admissions committee (R. 196), although they served primarily on the special committee (R. 162, 168).

[13] Members of the special admissions committee were given no formal instructions on selection of students (R. 163), but they were given a statement on the purposes of the program (R. 163, 196).

The chairman of the special admissions committee screens the applications to determine who will be invited for an interview (R. 66). The record does not disclose what criteria the chairman uses in making this decision, but applicants with grade point averages lower than 2.5 are not automatically eliminated (R. 175), and some have been admitted (R. 210, 223).[14]

At appropriate intervals the chairman of the special admissions committee refers several of the "most promising" special admissions applicants to the regular admissions committee with recommendations that they be admitted; the regular admissions committee reviews the applicants and determines whether to accept the special committee's recommendations (R. 66–67, 165–166). The regular admissions committee has in some cases rejected recommendations (R. 166–167).

The trial court found that (Pet. App. 115a) "[a]pplicants in the special admissions program are rated for admission purposes only against other applicants in this program and not against applicants under the general admissions program."[15] That finding was not challenged on appeal, but the record does not indicate

[14] In 1972, 37.9 percent of special applicants were interviewed, compared with 30.0 percent of regular applicants. In 1973 the figures were 23.9 percent (special) and 37.6 percent (regular); in 1974 they were 14 percent (special) and 14.9 percent (regular) (see page 9, *supra*).

[15] It is not clear whether the court was referring to assignment of a numerical rating or comparative evaluation of applicants after ratings are assigned.

whether special applicants are compared with regular applicants whose applications are considered at the same time.

All those admitted are considered by the Medical School to be qualified to practice medicine and to contribute to the school and the medical profession. Dr. Lowrey stated (R. 67):

> Every admittee to the Davis Medical School, whether admitted under the regular admissions program or the special admissions program, is fully qualified for admission and will, in the opinion of the Admissions Committee, contribute to the School and the profession.

d. Purpose of the program

Dr. Lowrey stated that it was the judgment of the faculty that (R. 67):

> the special admissions program is the only method whereby the school can produce a diverse student body which will include qualified students from disadvantaged backgrounds.

Dr. Lowrey believed that without the program there would be few disadvantaged minority students at Davis (R. 67–68).[16]

Dr. Lowrey gave several reasons why the faculty had instituted the program: (1) the paucity of minority persons in the medical profession; (2) the benefits to students and physicians of achieving diversity in the student body and the profession through admission of minority applicants; (3) the need to train

[16] These statements were not challenged or refuted by respondent.

minority physicians who would serve the needs of disadvantaged minority communities by working in those communities and would encourage non-minority physicians to do so also;[17] (4) the need to train physicians who would serve as examples to encourage younger persons from minority backgrounds to aspire to professional careers; and (5) the need to give special consideration to minority applicants because, as a result of poor education, economic burdens, and lack of family support, test scores and grades do not necessarily reflect their abilities (R. 67–69).

3. RESPONDENT'S APPLICATION

Respondent applied to Davis for the classes beginning 1973 and 1974 (R. 231, 236). He did not request consideration in either year as a disadvantaged applicant (R. 232, 236). He was granted an interview in both years (R. 69).

In 1973 the admissions committee gave respondent a "benchmark" rating of 468 (R. 179–180),[18] and he was comparatively high among regular applicants (R. 180).[19] Respondent's application was received late in the admissions process, however, and he was not interviewed until after a majority of the positions in the class (and 12 special admissions positions) had

[17] Every applicant admitted through the special admissions program has expressed an interest in practicing in a disadvantaged community (R. 68). It is not clear whether respondent expressed such an interest (R. 228).

[18] The maximum possible rating that year was 500.

[19] The record contains the following information regarding grade point averages and MCAT scores (R. 189–190, 210, 223):

been filled (R. 64, 69–70). Dr. Lowrey recalled that regular admittees had ratings as low as 452. He stated that the "average" rating of special admittees was probably 10 to 30 points below respondent's, but that the overall "range * * * [was] comparable" to that of regular admittees (R. 181).[20]

The defendants initially contended in the trial court and on appeal that the special program did not cause respondent's rejection in 1973 because most of the places had been filled by the time his application was ready to be considered, and the remaining places would have gone to those with higher scores and to those on the list of alternates, which did not include respondent (R. 69–70).

	Science grade point average	Overall grade point average	MCAT verbal score [1] (percentile)	MCAT science score [1] (percentile)
Respondent	3.45	3.51	96	97
Mean Scores				
1973 Entering Class:				
Regular Admittees	3.51	3.49	81	83
Special Admittees	2.62	2.88	46	35
1974 Entering Class:				
Regular Admittees	3.36	3.29	69	82
Special Admittees	2.42	2.62	34	37
Ranges				
1973:				
Regular Admittees	2.57–4.0	2.81–3.99		
Special Admittees	2.11–2.93	2.11–3.76		
1974:				
Regular Admittees	2.5–4.0	2.79–4.0		
Special Admittees	2.02–3.89	2.21–3.45		

[1] Verbal and science scores are considered more significant than scores on the quantitative and general information portions of the MCAT exam (R. 152, 153).

[20] No other evidence establishes the numerical ratings of regular or special admittees (R. 181–182).

In 1974 respondent made an early application and was interviewed early (R. 70–71). His rating of 549 on a scale with a maximum of 600 was equivalent to that in 1973, but there were more applicants with higher scores ahead of him (*ibid.*).[21] Respondent was rejected not only by Davis but also by 12 other medical schools (R. 49–50, 51).[22]

B. THE STATE COURTS' OPINIONS

1. THE SUPERIOR COURT

The Superior Court found (Pet. App. 114a–115a) that the special admissions program was not open to white applicants, and it concluded that their exclusion from competition for 16 of the 100 places at the Medical School violated the California Constitution and the Fourteenth Amendment of the United States Constitution (*id.* at 107a, 117a). The court reasoned that any program using race was arbitrary and unfair, and it did not discuss the justifications that had been offered in support of the program.

The court entered a declaration that the special admissions program was unconstitutional and enjoined petitioner from "considering [respondent's] race or the race of any other applicant in passing upon his application for admission" (Pet. App. 120a). It denied respondent's request to be admitted to the Medical School because it concluded that respondent

[21] His 1973 rating was 93.6 percent of the maximum; his 1974 rating was 91.5 percent of the maximum.

[22] Bakke was informed by two schools that his age—33 in 1973—played a part in his rejection (R. 49–50, 52).

had not carried his burden of establishing that, but for the Medical School's use of race, he would have been admitted (*id.* at 107a–108a, 111a, 116a–117a).

2. THE SUPREME COURT OF CALIFORNIA

Both petitioner and respondent appealed. Petitioner challenged the Superior Court's holding and declaratory judgment that the special admissions program is unconstitutional; respondent contested the court's holding that he should be denied relief because he failed to prove that he would have been admitted if the 16 places had not been reserved for minority applicants.

The Supreme Court of California agreed to hear the case in advance of decision by the intermediate appellate court (Pet. App. 4a). It affirmed the Superior Court's decision that the special admissions program is unconstitutional, but in so doing it relied only on the Fourteenth Amendment.

After describing the admissions process at the Medical School, the Supreme Court of California observed that racial classifications may sometimes be constitutionally employed—for example, in assigning students to public schools to achieve integration (Pet. App. 13a). The court concluded, however, that the use of race by the Medical School must be judged by especially rigorous standards because "the extension of a right or benefit to a minority [had] the effect of depriving persons who were not members of a minority group of benefits which they would otherwise have enjoyed" (*ibid.*). When race is used to assign a student to one school rather than to another to eradicate the effects of previous discrimination, all students still receive an education, and whites and minority students alike share the burden of transportation (*id.* at 13a–14a); the consequences of the use of race are quite different, the court reasoned, where there is competition for a limited number of places and race is used as a criterion of exclusion. The fact that the use of race therefore might treat minorities "benignly" did not obviate the need for exacting judicial scrutiny.[23]

The court characterized the central issue of the case as "whether the rejection of better qualified applicants on racial grounds is constitutional" (Pet. App. 16a). Applying the "strict scrutiny" test for racial classifications that "result in detriment to a person because of his race" (*id.* at 17a, footnote omitted), the court examined petitioner's justifications for the special admissions program at Davis.[24]

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[23] Quoting from *DeFunis* v. *Odegaard*, 82 Wash. 2d 11, 32, 507 P. 2d 1169, 1182, vacated as moot, 416 U.S. 312, the court observed that "'the minority admissions policy is certainly not benign with respect to nonminority students who are displaced by it'" (Pet. App. 17a n. 12).

[24] The court rejected (Pet. App. 18a–19a) the argument that less exacting scrutiny should be applied because the use of race cut in favor of traditionally disadvantaged groups. The court stated (*id.* at 19a n. 16) that no discernible majority was discriminating against itself, and it reasoned that the Equal Protection Clause protects persons as persons, not only as members of racial groups (*id.* at 20a). Thus, the court concluded, respondent had a personal right not to suffer loss because of his race, and it did not matter whether he was a member of a minority racial or ethnic group.

It summarized four justifications that had been offered in support of the special admissions program (Pet. App. 21a–22a): the desire to increase the racial diversity of the medical profession and the student body; the need to train minority physicians who would serve as role models for other members of minority groups; the need to increase the number of physicians serving minority communities; and the belief that minority physicians would have greater rapport with minority patients and consequently be more effective.

It rejected (Pet. App. 23a) arguments about rapport and the need for minority physicians to serve minority patients, on the grounds that they were unsupported, parochial and relied on racial stereotypes. Although the court stated that the remaining objectives were legitimate and important, it concluded that the Medical School had not demonstrated that these objectives could not be achieved by other mean (*ibid.*). The court suggested (*id.* at 24a–26a) that the Medical School might increase the size of its classes, reduce its reliance on grades in selecting from among disadvantaged students of all races, and increase its efforts to recruit disadvantaged students. The court also suggested (*id.* at 28a) that the Medical School could give a preference to applicants of any race who expressed willingness to practice in disadvantaged communities, and that it could institute clinical courses to induce students to do so. Because, "[s]o far as the record discloses, the University has not considered the adoption of these or other nonracial

alternatives to the special admission program" (*id.* at 26a), the court concluded that the Medical School had not established a compelling need for the special admissions program.

The court distinguished a line of cases that had upheld race-conscious relief for employment discrimination (Pet. App. 29a–32a). It found no evidence that the Medical School had engaged in discrimination, and it declined to consider the argument of several *amici* that reliance on grade point averages and MCAT scores was discriminatory.[25]

The court also stated that, as a practical matter, preferences are difficult to abolish even after they have served their purpose (Pet. App. 36a). It concluded that "[w]hile a program can be damned by semantics, it is difficult to avoid considering the University scheme as a form of an education quota system, benevolent in concept perhaps, but a revival of quotas nevertheless. * * * To uphold the University would call for the sacrifice of principle for the sake of dubious expediency and would represent a retreat in the struggle to assure that each man and woman shall be judged on the basis of individual merit alone, a struggle which has only lately achieved success in removing legal barriers to racial equality" (*id.* at 36a–37a).

[25] That argument had not been raised in the trial court, and nothing in the record either supports or refutes the argument that grades and MCAT scores are insufficiently related to performance in medical school or in the profession, or that the MCAT is culturally biased (Pet. App. 31a–32a).

Turning to respondent's appeal from the decision denying him admission to the Medical School, the court concluded that the Medical School, not respondent, should bear the burden of proof (Pet. App. 37a–39a). It therefore remanded the case for further proceedings at which the Medical School would be required to establish, if it could, that even in the absence of the unconstitutional program respondent would have been denied admission.[26] After the Medical School conceded that it would be unable to meet that burden of proof, the court modified its opinion and judgment to provide that respondent must be admitted (*id.* at 80a).

Justice Tobriner dissented (Pet. App. 39a–78a). He stated that (*id.* at 60a–61a; footnote omitted): "[h]eightened judicial scrutiny is * * * appropriate when reviewing laws embodying invidious racial classifications, because the political process affords an inadequate check on discrimination *against* 'discrete and insular minorities.' * * * By the same token, however, such stringent judicial review is not appropriate when, as here, racial classifications are utilized remedially *to benefit* such minorities, for under such circumstances the normal political process can be relied on to protect the majority who may be incidentally injured by the classification scheme." Applying that standard, he would have held that the special admissions program did not offend the Constitution.

[26] The court indicated that its decision would apply retroactively only to applicants who had filed suit before the date of its opinion (Pet. App. 38a n. 34).

INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves a special admissions program that takes race into account. The parties have portrayed the case as an appropriate vehicle for definitive resolution of numerous constitutional questions that may arise with respect to minority-sensitive programs. But deficiencies in the record of this case make it inappropriate for the Court to anticipate these questions. In our view, only one question should be finally resolved in the present posture of this case: whether a state university admissions program may take race into account to remedy the effects of societal discrimination. We submit that it may.

The record does not afford an adequate basis for the exploration of other questions (cf. *Morales* v. *New York*, 396 U.S. 102). It is enough to say that the opinion of the Supreme Court of California applied an erroneous legal standard. At all events the present record is plainly insufficient to permit the formulation of detailed principles that would determine the constitutionality of the many other federal and state programs that take race into account in various ways and for various purposes. We believe that the Court's decision should leave for consideration in cases dealing with other specific programs, on a proper record, specific questions that may arise concerning those programs. Cf. *Wheeler* v. *Barrera*, 417 U.S. 402, 426–427.

I

Within the confines of this case, we examine the justification for minority-sensitive programs and the constitutionality of taking race into account in making decisions concerning admissions to professional school. The most important principle involved here is that because the effects of racial discrimination are not easily eliminated, mere neutrality toward race often is inadequate to rectify what has gone before. The Court therefore has upheld on many occasions remedial orders that require the government to use race to assist in the remedial process. As the Court explained in *North Carolina State Board of Education* v. *Swann,* 402 U.S. 43, 46, "[j]ust as the race of students must be considered in determining whether a constitutional violation has occurred, so also must it be considered in formulating a remedy."

This principle extends beyond public rectification of public wrongs. Race may be considered in devising remedies for private discrimination. *Franks* v. *Bowman Transportation Co.,* 424 U.S. 747. Race may be considered in carrying out a prophylactic program to prevent racially disadvantageous outcomes, whether or not they would violate the Constitution. *United Jewish Organizations of Williamsburgh, Inc.* v. *Carey,* 430 U.S. 144. And race may be taken into account in avoiding racially disproportionate effects of employment testing practices. *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405.

Congress, which has a special responsibility to interpret and to enforce the Civil War Amendments, has determined that minority-sensitive programs are necessary to rectify the continuing consequences of discrimination. Many federal programs make explicit use of race, and the Executive Branch has joined Congress in endorsing voluntary efforts by States and private parties to do likewise when necessary to break down the barriers that have separated the races for so long.

II

States and their subdivisions are not limited to addressing only the effects of their own discrimination. Racial discrimination in society as a whole may make it difficult for a professional school fairly to evaluate the abilities and promise of minority applicants without taking race into account. Moreover, this Court has recognized that "substantial benefits flow to both whites and blacks from interracial association" (*Linmark Associates, Inc.* v. *Township of Willingboro,* No. 76–357, decided May 2, 1977, slip op. 10), and those benefits cannot be achieved unless each institution in society may consider the consequences of racial discrimination by others. There is no need for a professional school to await a judicial decision that it has itself violated principles of equality before it may begin to redress inequality created by others.

If, as we argue, a professional school may take into account the likely effects of societal discrimi-

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nation in making admissions decisions, it follows that the school may employ minority-sensitive admissions procedures. This Court has witnessed a history of discrimination against minority groups that does not require repetition here. That discrimination has affected the medical profession no less than other professions.

III

When a State considers race in distributing benefits, its program must be examined carefully for two reasons. First, a racial classification that purports to be benign—that is, to assist the victims of discrimination—may in fact be invidious in purpose or effect. Second, the State may not take account of race unless that is necessary to achieve an important governmental objective. Race ordinarily "bears no relation to the individual's ability to participate in and contribute to society." *Mathews* v. *Lucas,* 427 U.S. 495, 505. The United States has undertaken to foster the principle that race is unrelated to merit or qualification and is not generally a legitimate basis for distributing opportunities. To do otherwise would be to risk reverting to the very thinking that has in the past resulted in invidious discrimination. The Fourteenth Amendment protects all persons without regard to their race, and that protection can be assured only by careful examination of minority-sensitive state action.

Such an inquiry, however, does not call for the rejection of minority-sensitive programs that are designed to serve remedial purposes and that are tailored to that end. The courts' central concern should be whether the program is designed and applied to remedy the effects of past discrimination. Such a design often will require use of race rather than case-by-case determinations of discrimination.

Societal discrimination may have left minority applicants to professional schools with credentials less impressive than they otherwise would have had. Because competition for admission is keen, even small differences in such credentials may determine whether applicants will be admitted or rejected. It is appropriate to take race into account to adjust for differences in credentials that may have been caused by discrimination but do not reflect differences in ability to succeed or in ability to contribute to the medical profession and the health of the general population.

The admissions process involves many difficult and subjective decisions. For example, admissions committees often must consider whether grades from one college are comparable to those from another, or whether an applicant with higher grades should be admitted before one with greater self-discipline. Other pertinent considerations are no less subjective. Because admissions decisions involve comparisons of intangible qualifications, educational institutions require wide latitude in making these decisions.

Moreover, there is no adequate alternative to the use of minority-sensitive admissions criteria. The Supreme Court of California suggested increasing the

size of the Medical School's classes. But whether the Medical School admits 100, 200, or 500 students, minority applicants still will be handicapped by the consequences of prior discrimination. The court also suggested replacing consideration of race with special consideration for disadvantage. At any level of personal or parental income, however, applicants who are from minority groups face an extra hurdle—the lingering effects of pervasive racial discrimination—that other applicants do not. Cf. *Califano* v. *Webster,* No. 76–457, decided March 21, 1977.

IV

Under the principles we have discussed above, the judgment of the Supreme Court of California should be reversed to the extent that it forbids the Medical School to operate any minority-sensitive admissions program.

The remaining question is whether respondent is entitled to admission to the Medical School. We have argued that it is constitutional in making admissions decisions to take race into account in order fairly to compare minority and non-minority applicants, but it is not clear from the record whether the Medical School's program, as applied to respondent in 1973 and 1974, operated in this manner.

The trial court found, and the University does not contest, that 16 places in the class were reserved for special admittees. The record does not establish, however, how this number was chosen, whether the

number was inflexible or was used simply as a measure for assessing the program's operation, and how the number pertains to the objectives of the special admissions program.

It also is unclear whether there was any comparison of minority with non-minority applicants. The regular admissions committee played some role in the selection of all 100 students, but the record does not reveal what that role was. If there was a fair comparison of regular and special applicants by the regular admissions committee, this would indicate that race had not been used improperly.

The deficiencies in the evidence and findings—which pertain to both the details of the program and the justifications that support it—may have been caused by the approach both parties, and both courts below, took to this case. They asked only whether it was permissible for the Medical School to use race at all. We believe that it is permissible to make minority-sensitive decisions, but that it is necessary to address, as well, questions concerning *how* race was used, and for what reasons. The findings with respect to these latter, critical questions are insufficient to allow the Court to address them.

Accordingly, the judgment of the Supreme Court of California should be vacated to the extent that it orders respondent's admission, and the case should be remanded for further appropriate proceedings to address the questions that remain open. In all other respects the judgment should be reversed.

ARGUMENT

I

RACE MAY BE TAKEN INTO ACCOUNT TO COUNTERACT THE EFFECTS OF PRIOR DISCRIMINATION

A. THIS COURT HAS HELD THAT MINORITY-SENSITIVE DECISIONS ARE ESSENTIAL TO ELIMINATE THE EFFECTS OF DISCRIMINATION IN THIS COUNTRY

The effects of racial discrimination are not easily eliminated. Because discrimination breeds other inequalities, the Court has recognized that simple elimination of future discrimination may well be insufficient to rectify what has gone before. Mere neutrality often is inadequate (*Green* v. *County School Board,* 391 U.S. 430, 438).[27]

In *United States* v. *Montgomery County Board of Education,* 395 U.S. 225, the Court upheld an order that teachers be dispersed on a racial basis throughout a desegregating school system. In *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 19–25, the Court explained that the race of students and teachers could be taken into account in devising a remedy for racial discrimination. And in *North Carolina State Board of Education* v. *Swann,* 402 U.S. 43, the Court held that a statute forbidding the assignment of students on the basis of race was unconstitutional, because it would hinder the implementation of necessary remedies. The Court explained (402 U.S. at 46): "Just as the race of students must be considered in determining whether a constitutional violation has occurred, so also must race be considered in formulating a remedy." [28]

Consideration of race also is necessary in devising remedies for private discrimination. *Franks* v. *Bowman Transportation Co.,* 424 U.S. 747, held that seniority credits could be awarded on a racial basis, and *International Brotherhood of Teamsters* v. *United States,* No. 75–636, decided May 31, 1977, amplified that principle. Both cases, moreover, recognized that although remedial measures inevitably would upset the expectations of other persons, most of whom would be white, this was not a sufficient objection to the implementation of effective remedies.

Moreover, the remedial use of race has not been confined to the elimination of discrimination that has been proven by traditional means. For example, Congress concluded that, in order to protect the voting rights of certain minority groups against subtle dilu-

[27] See *Boston Chapter, N.A.A.C.P., Inc.* v. *Beecher,* 504 F. 2d 1017, 1027 (C.A. 1), certiorari denied, 421 U.S. 910 ("The goal of color blindness, so important to our society in the long run, does not mean looking at the world through glasses that see no color; it means only that all colors are moral equivalents, to be treated on an equal basis"). Unlike the situation in which the State needlessly injects race into what might otherwise be a racially-neutral undertaking (see *Anderson* v. *Martin,* 375 U.S. 399), once racial discrimination has taken place it is often necessary to use race a second time to bring about a neutral result.

[28] See also *Dayton Board of Education* v. *Brinkman,* No. 76–539, decided June 27, 1977, which indicated once more that race could be taken into account both in ascertaining the degree of racial separation caused by the discrimination and in devising a remedy that would eliminate only that increment, and no more. Such a procedure necessarily requires extensive use of racial criteria.

tion, it was necessary to consider the race of the persons who would be affected by legislative reapportionments. The prophylactic statute Congress enacted—the Voting Rights Act of 1965—is *about* race, and its administration is perfused with the requirement of color-consciousness. Race must be taken into account to prevent racially disadvantageous outcomes, not simply to rectify past discrimination. This Court has upheld this use of race. *United Jewish Organizations of Williamsburgh, Inc.* v. *Carey,* 430 U.S. 144; see *Georgia* v. *United States,* 411 U.S. 526, 531 (describing the Act as "concerned with * * * the reality of changed practices as they affect Negro voters").

Finally, color-conscious decisions are made regularly to implement the Civil Rights Act of 1964. For example, *Griggs* v. *Duke Power Co.,* 401 U.S. 424, held that Title VII of that Act prohibits the use of employment tests that have a substantial racially disparate effect, unless the employer can prove that the tests are job related. Even then "it remains open to the complaining party to show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in 'efficient and trustworthy workmanship.' " *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 425. And in *Albemarle Paper,* in dealing with a test that appeared to screen out black applicants for employment at a disproportionately high rate, the Court concluded that, in validating such a test as job related, employers could be required to counteract its racially disparate effects by resorting to racial cri-

teria. They could, in other words, be required in appropriate circumstances to "differentially validate" their employment tests—to use one passing score for blacks and another for whites, so that the test would predict success on the job equally well for both racial groups. The conscious use of race in making such employment decisions can help prevent subtle discrimination and help the employer to achieve a result that ultimately will not be racially biased.

B. BOTH THE LEGISLATIVE AND EXECUTIVE BRANCHES OF THE FEDERAL GOVERNMENT HAVE ADOPTED MINORITY-SENSITIVE PROGRAMS FOR THE PURPOSE OF ELIMINATING THE EFFECTS OF PAST DISCRIMINATION

The use of race is supported by many programs established by Congress, which has a special responsibility for interpreting and enforcing the Civil War amendments to the Constitution (see *South Carolina* v. *Katzenbach,* 383 U.S. 301, 327). See, *e.g.,* Appendix A to this brief. Congress has authorized expenditures for many of these measures, most recently in the Public Works Employment Act of 1977, Pub. L. 95–28, 91 Stat. 116, 117, which requires the dedication of part of public works grants for minority business enterprises. Congress adopted this program in order to promote and strengthen minority-owned businesses. See 123 Cong. Rec. H1436–H1437 (daily ed., February 24, 1977).

Perhaps the most prominent minority-sensitive program of the federal government is the enforcement of Executive Order 11246, 30 Fed. Reg. 12319, as amended, 32 Fed. Reg. 14303. The Executive Order

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requires federal contractors to take affirmative action to prevent disproportionately low employment of women and minorities in their work forces, starting from the assumption that most disproportionately low employment is the result of discrimination—if not of the contractor involved, then of someone else.[29] The constitutionality and legality of this program has been repeatedly upheld.[30]

The Executive Branch has devoted extensive efforts over the past several years to developing minority-sensitive programs that will address the consequences of past discrimination. For example, Title VI of the Civil Rights Act of 1964, 78 Stat. 252, as amended, 42 U.S.C. 2000d *et seq.*, prohibits racial discrimination in the operation of federally assisted programs. The Medical School, as the receipient of federal assistance

[29] Department of Labor regulations require that if there are disparities between the proportion of available minority workers and their employment, the employer must establish goals and timetables for correcting the disparity. 41 C.F.R. 60–2.10.

[30] See, *e.g.*, *Contractors Association of Eastern Pennsylvania* v. *Secretary of Labor*, 442 F. 2d 159 (C.A. 3), certiorari denied, 404 U.S. 854; *Rossetti Contracting Co.* v. *Brennan*, 508 F. 2d 1039 (C.A. 7); *Northeast Construction Co.* v. *Romney*, 485 F. 2d 752 (C.A. D.C.). For a history of the Executive Order and the response to it in Congress and the courts, see Comment, *The Philadelphia Plan: A Study on the Dynamics of Executive Power*, 39 U. Chi. L. Rev. 732 (1972).

Moreover, in enacting the 1972 amendments to Title VII of the Civil Rights Act of 1964, Congress considered and rejected the option of altering Executive Order 11246. The history of this consideration is recounted in Comment, *supra*, 39 U. Chi. L. Rev. at 747–760. The present Congress is again considering the question. See, *e.g.*, 123 Cong. Rec. H6099–H6106 (daily ed., June 17, 1977).

(A. 8), is bound by Title VI. The Department of Health, Education, and Welfare, with the approval of the President, has promulgated regulations that interpret the requirements of Title VI.[31]

These regulations, which are codified at 45 C.F.R. Part 80, provide that "[e]ven in the absence of * * * prior discrimination [by the recipient of federal funds], a recipient in administering a program may take affirmative action to overcome the effects of conditions which [result] in limiting participation by persons of a particular race, color, or national origin" (45 C.F.R. 80.3(b)(6)(ii)). The regulations offer the following illustration (45 C.F.R. 80.5(j)):

> Even though an applicant or recipient has never used discriminatory policies, the services and benefits of the program or activity it administers may not in fact be equally available to some racial or nationality groups. In such circumstances, an applicant or recipient may properly give special consideration to race, color, or national origin to make the benefits of its program more widely available to such groups, not then being adequately served. For example, where a university is not adequately serving members of a particular racial or nationality group, it may establish special recruitment policies to make its program better known and more readily available to such group, and take other steps to provide that group with more adequate service.

[31] Regulations adopted to enforce Title VI require the approval of the President. 42 U.S.C. 2000d–1.

The Equal Employment Opportunity Coordinating Council, a joint body of several federal agencies,[32] has issued a Statement on Affirmative Action Programs for State and Local Governmental Agencies.[33] The Statement encourages state and local governments to adopt affirmative action programs as necessary complements of vigorous enforcement of anti-discrimination laws. The Council concluded that properly-designed minority-sensitive programs are instrumental in ensuring "that positions * * * are genuinely and equally accessible to qualified persons, without regard to their race * * *." The Council endorsed the establishment of goals that would reduce "substantial disparities" between the number of qualified persons and their acceptance for employment. It also concluded that it would be necessary and appropriate to take race into account in recruiting, training programs, and the evaluation of selection methods.

[32] The Council was established by statute to develop and implement "agreements, policies and practices designed to * * * eliminate conflict * * * and inconsistency among the * * * agencies * * * of the Federal Government responsible for the * * * enforcement of equal employment opportunity * * * policies." Section 715 of the Civil Rights Act of 1974, as amended, 86 Stat. 111, 42 U.S.C. (Supp. V) 2000e–14. The member agencies include the Department of Justice, the Department of Labor, the Equal Employment Opportunity Commission, the Civil Service Commission, and the Civil Rights Commission.

[33] The Statement appears at 41 Fed. Reg. 38814–38815. We have reproduced it as Appendix C to this brief.

We do not, of course, contend that States have the same authority as Congress to define violations of the Civil War amendments. Nevertheless, States have broad authority to promote the purpose of those amendments. A State therefore is free, within constitutional constraints, to undertake remedial minority-sensitive measures that are designed, like the Fourteenth Amendment itself,[34] to break down the barriers that have separated the races.[35]

[34] The three Civil War amendments to the Constitution reflect the judgment of the Nation that a person's race ought not be a reason to inflict disadvantage upon him. The Thirteenth Amendment ended the enslavement of blacks, and the Fifteenth Amendment guaranteed that the vote could not be withheld on racial grounds. Although the Equal Protection Clause of the Fourteenth Amendment did not mention race, it was widely understood, and quickly interpreted by this Court, as protecting black people from unequal treatment. *Strauder* v. *West Virginia*, 100 U.S. 303.

[35] Voluntary action to promote integration has been upheld repeatedly. See, *e.g.*, *Porcelli* v. *Titus*, 431 F. 2d 1254 (C.A. 3), certiorari denied, 402 U.S. 944 (integration of public school faculties); *Springfield School Committee* v. *Barksdale*, 348 F.2d 261 (C.A. 1) (integration of students in public schools); *Otero* v. *New York City Housing Authority*, 484 F. 2d 1122 (C.A. 2) (integration of public housing); *Associated General Contractors of Massachusetts, Inc.* v. *Altshuler*, 490 F. 2d 9 (C.A. 1), certiorari denied, 416 U.S. 957 (integration of workforce of government contractor).

II

THE UNIVERSITY COULD PROPERLY CONCLUDE THAT MINORITY-SENSITIVE ACTION WAS NECESSARY TO REMEDY THE LINGERING EFFECTS OF PAST DISCRIMINATION

A. MINORITY-SENSITIVE RELIEF IS NOT LIMITED TO CORRECTION OF DISCRIMINATION PERPETRATED BY THE INSTITUTION OFFERING RELIEF

The Supreme Court of California concluded that the Medical School's policy cannot be justified by any need to overcome the effects of past discrimination because the Medical School has not been found to have engaged in discrimination (Pet. App. 29a–32a). That conclusion is erroneous for two reasons: first, the University is not limited to correcting the effects of its *own* discrimination, but it can take into account the consequences of discrimination elsewhere in society; second, institutions need not await judicial determinations before attempting to overcome their own discrimination.

It would make no sense to conclude that a university can take race into account only to compensate for its own discrimination. Each group of applicants comes before a university only once. Although in some cases a remedy may be needed to break down a discriminatory pattern in the administration of a university's admissions program, whether the university previously practiced discrimination of this sort is not a necessary part of the justification for a special

admissions program. The principal, and more generally applicable, justification, rather, is that racial discrimination elsewhere in society makes it difficult fairly to evaluate the abilities and promise of each new applicant without taking his race into account in evaluating his credentials.

This Court has recognized the importance of eliminating the consequences of discrimination and "that substantial benefits flow to both whites and blacks from interracial association." *Linmark Associates, Inc.* v. *Township of Willingboro,* No. 76–357, decided May 2, 1977, slip op. 10. See also *Trafficante* v. *Metropolitan Life Insurance Co.,* 409 U.S. 205. It follows that no institution is limited to rectifying only its own discrimination. If it were, the consequences of discrimination that spilled over from the discriminator to society at large would be irreparable, and the victims of discrimination would be doomed to suffer its consequences without even the prospect of voluntary assistance.

The Court has not adopted so confining a view. In *Califano* v. *Webster,* No. 76–457, decided March 21, 1977, the Court sustained a federal statute that gave greater retirement benefits to women than to men. The statute was not justified on the argument that the retirement system had itself discriminated against women; it was justified, rather, by the fact that the private labor market had for decades discriminated against women. The Court concluded that this compensation from public funds for essentially private

discrimination was constitutional. Cf. *Kahn* v. *Shevin*, 416 U.S. 351. The same principle applies here.

Since the University may attempt to take into account the consequences of discrimination elsewhere in society, it follows that there is no need for a formal declaration that the University itself engaged in discrimination. Moreover, even when an institution is attempting to correct its own discrimination it may do so without awaiting litigation. See *McDaniel* v. *Barresi*, 402 U.S. 39, 41 (school district may take race into account in formulating voluntary plan of integration). It would be pointless to require expensive and lengthy litigation before an institution may undertake voluntarily to correct its own wrongs.[36] Federal statutes do not require it. For example, the requirement of Title VII of the Civil Rights Act of 1964 to use minority-sensitivity in choosing and validating employment tests to avoid unjustified racially disproportionate results is not contingent upon a prior finding of racial discrimination by each employer,[37] nor is the requirement in the Voting Rights Act to take race into account in drawing district lines.[38]

[36] See also the cases collected in note 35, *supra*.

[37] See *Albemarle Paper Co.* v. *Moody*, *supra*; *Dothard* v. *Rawlinson*, No. 76–422, decided June 27, 1977, slip op. 7–10; *International Brotherhood of Teamsters* v. *United States*, *supra*, slip op. 9 n. 15, 22.

[38] *United Jewish Organizations*, *supra*, 430 U.S. at 157 (opinion of White, J.) ("the Act's prohibition against instituting new voting procedures * * * [and its requirement to take race into account] is not dependent upon proving past unconstitutional apportionments").

B. DISCRIMINATION AGAINST MINORITY GROUPS HAS HINDERED THEIR PARTICIPATION IN THE MEDICAL PROFESSION

This Court has witnessed a history of discrimination against minority groups that does not require repetition here. See, *e.g.*, *Brown* v. *Board of Education*, 347 U.S. 483; *Keyes* v. *School District No. 1, Denver, Colorado*, 413 U.S. 189; *Hernandez* v. *Texas*, 347 U.S. 475; *Lau* v. *Nichols*, 414 U.S. 563.

Although we have made progress in eliminating discrimination case-by-case, the major civil rights laws have been effective for little more than a decade. The pervasive effects of past discrimination remain with us. The vast majority of our racial and language minorities remain poorer and less educated, suffer greater unemployment, and are less able to influence the forces—economic, social, and political—that bear upon their lives than is the white majority.[39] To the extent we are still a nation of "haves" and "have-nots" the dividing line is in part a function of race.

[39] In 1969 the percentage of families with incomes below the poverty level was 3½ times higher among black than among white families. 8.6 percent of white families had incomes below the poverty level compared to 29.8 percent of black families and 20.4 percent of families of Spanish heritage (U.S. Bureau of the Census, 1970 Census, Vol. I, *Characteristics of the Population*, United States Summary, 1–400).

Minorities have received less education than white persons. Among persons 25 years old and over, 54.5 percent of whites had completed four years of high school or more. Only 31.4 percent of black persons and 36.0 percent of persons of Spanish heritage had completed high school. In the same age group, 11.3 percent of all white persons had completed four years of college or more, while only 4.4 percent of black persons and 6.0 percent of persons of Spanish heritage had finished college. Median school years

Discrimination has not been remote from the lives of the minority medical school applicants at Davis. Many black California residents lived in the South

completed among whites were 12.1, among blacks 9.8, and 9.6 among persons of Spanish heritage (*id.* at 1–386).

In 1974 the unemployment rate among nonwhites was twice that of whites: 9.9 percent compared to 5.0 percent (U.S. Bureau of the Census, *Current Population Reports*, *The Social and Economic Status of the Black Population in the United States 1974* 64 (1975)). In 1976, among men of Spanish origin, the unemployment rate was 10.7 percent; among women it was 12.5 percent (U.S. Bureau of the Census, *Current Population Reports*, *Persons of Spanish Origin in the United States: March 1976* 10).

Minority group members hold low-paying and low status jobs at a higher rate than whites. In 1970 only 10.2 percent of black persons and 13.6 percent of Spanish heritage persons held professional, managerial and administrative positions, compared to 23.9 percent of all white persons. 12.0 percent of black persons, 11.8 percent of persons of Spanish heritage, and only 5.3 percent of white persons held jobs as laborers. The disparity is even greater among service and private household workers—28.1 percent of black persons, 15.1 percent of persons of Spanish heritage, and only 11.1 percent of white persons held such jobs (1970 Census, Vol. 1, *Characteristics of the Population*, *supra*, at 1–746 to 1–748).

The figures for Asian-Americans (Japanese, Chinese, and Filipino only) are somewhat different. The number of families with incomes below the poverty level was 8.8 percent (U.S. Bureau of the Census, *Subject Reports—Japanese, Chinese, and Filipinos in the United States* 42, 101, 160). Among Asian-American persons 25 years old and over, 62.2 percent had completed four years of high school and 20.4 percent had completed four or more years of college. The median school years completed among Japanese-Americans was 12.5, among Chinese-Americans it was 12.4 and among Filipino-Americans it was 12.2 (*id.* at 9, 68, and 127). Only 2.0 percent of Asian-Americans were unemployed (*id.* at 13, 72, 142). 29.1 percent of Asian-American persons held professional, managerial, and administrative positions, while 7.2 percent were laborers, and 16.9 percent were service and private household workers (*id.* at 31, 90, 149).

while it was still largely segregated.[40] Minorities educated in California were subjected to widespread discrimination.[41] Racial discrimination against generations of blacks and other racial minorities stamps its mark on future generations.[42] The Medical School

[40] In 1970, 41.1 percent of all American-born black persons residing in California had been born in the South. Almost 48 percent of all American-born blacks between the ages of 20–29, and living in California, were born in the South (U.S. Bureau of the Census, 1970 Census, Vol. I, *Characteristics of the Population*, California, p. 6–1149 (1973)).

[41] See Appendix B to the brief for the NAACP Legal Defense and Educational Fund as *amicus curiae*. In fiscal year 1976, 34 school districts in California received basic grants under the Emergency School Aid Act, 86 Stat. 354, as amended, 20 U.S.C. (Supp. V) 1601 *et seq.*, to eliminate isolation of minority group students.

[42] There may be support for the conclusion that educational disadvantage among those applying for medical school is a function of race rather than of the parental income of applicants. A recent study indicates that grade point averages and MCAT scores of low-parental-income white applicants to the 1976–1977 first year classes of all medical schools are not markedly different from those of higher-parental-income white applicants, but that the scores and grades of minority applicants (blacks, American Indians, Mexican-Americans and mainland Puerto Ricans) are decidedly lower. The following table is based on Table 1 of that study:

	All applicants		White		Minorities	
Parental Income	More than $10,000	Less than $10,000	More than $10,000	Less than $10,000	More than $10,000	Less than $10,000
Undergraduate Mean GPA	3.30	3.15	3.34	3.27	2.80	2.79
MCAT Subtest:						
Verbal Ability	545	510	553	548	466	438
Science	579	535	589	571	480	456

Waldman, *Economic and Racial Disadvantage as Reflected in Traditional Medical School Selection Factors: A Study of 1976 Applicants to U.S. Medical Schools* 15 (1977). (This study was prepared for the American Association of Medical Colleges.)

faculty here apparently recognized that the prior academic performance of disadvantaged minority applicants might not fully reflect their capabilities because of poor schooling, economic burdens, and lack of family support (R. 67–69). This concern supports a program to overcome the effects of discrimination.

Discrimination palpably has affected the medical profession. The opportunities for black persons to obtain medical educations in this country have been extremely limited. For most of the past one hundred years, black persons were systematically excluded from the medical schools in the South [43] and only token numbers were admitted to medical schools in the North.[44] Consequently, black persons seeking

[43] At the end of World War II, all 26 of the medical schools located in Southern or border States (one-third of the approved medical colleges in the United States) were closed to blacks because of their race. The first black student was admitted to a Southern medical school in 1948, when Edith Mae Irby was permitted to register at the University of Arkansas. Morais, *The History of the Negro in Medicine* 137 (1967). Integration of Southern medical schools was avoided in 1948 by 14 Southern governors, who signed a regional compact that, in part, provided financial assistance to Meharry Medical College for the education of black students who had been denied admission to medical schools within their States. Murray, *States' Laws on Race and Color* 24–28 (Ala.), 81–82 (Fla.), 91–96 (Ga.), 183–187 (La.), 201–205 (Md.), 241–245 (Miss.), 333–338 (N.C.), 363–368 (Okla.), 410–414 (S.C.), 432–436 (Tenn.), 666–675 (1951). These States adopted this method of providing medical education despite the fact that it already had been held unconstitutional. See *Missouri ex rel. Gaines* v. *Canada*, 305 U.S. 337.

[44] In 1947 a total of 82 black students were enrolled at 20 predominantly white schools outside of the South. Morais, *supra*, at 94.

medical educations were forced to rely principally on the two predominantly black medical schools—Howard University College of Medicine in Washington, D.C., and Meharry Medical College in Nashville, Tennessee—which trained approximately 90 percent of all black physicians who were educated in this country.[45]

As racially discriminatory admissions policies were slowly abandoned, black enrollment at traditionally white medical schools increased. Between 1947–1948 and 1969–1970 the number of black students attending medical schools almost doubled, yet the percentage of black students among the total enrollment remained fairly constant at approximately 2.6 percent.[46] In 1950 approximately 2.2 percent of all physicians were black,[47] while almost 10 percent of the total population was black.[48] By 1970, 11.1 percent of the population of the United States was black,[49] yet the percentage of black physicians remained un-

[45] Morais, *supra*, at 137.

[46] Curtis, *Blacks, Medical Schools, and Society* 34, 41 (1971). In 1947–1948, 588 black students were 2.59 percent of the total medical school enrollment. In 1969–1970, 1042 blacks accounted for 2.75 percent of all medical students. The only substantial variation from these percentages occurred in 1968–1969, when black enrollment dropped to 2.18 percent. *Id.* at 34.

[47] Reitzes, *Negroes and Medicine* xxvii (1958).

[48] U.S. Bureau of the Census, 1970 Census, Vol. I, *Characteristics of the Population*, United States Summary 1–262.

[49] 1970 Census, Vol. I, *Characteristics of the Population*, *supra*, at 1–262.

changed.[50] Members of other minority groups, too, are not likely to become physicians.[51]

[50] 1970 Census, Vol. I, *Characteristics of the Population*, *supra*, at 1–739.

[51] In 1969–1970 American Indians were less than 0.1 percent of the medical school enrollment, 0.07 percent of all physicians, and 0.4 percent of the total population. Mexican-Americans represented 0.4 percent of all medical students and 2.2 percent of the total population. Mainland Puerto Ricans accounted for less than 0.1 percent of the medical school enrollment and 0.7 percent of the total population. No data are available on the numbers of Mexican-Americans and Mainland Puerto Ricans who are physicians. Dube, *Datagram: U.S. Medical Student Enrollments 1968–1969 Through 1972–1973*, 48 J. Med. Educ. 293, 296 (1973); 1970 Census, Vol I, *Characteristics of the Population*, *supra*, at 1–262; 1970 Census, *Subject Reports:* Final Report PC(2)–7A, Occupational Characteristics 593; Final Report PC(2)–1C, Persons of Spanish Origin IX.

There is no apparent under representation of Asian-American persons. The Asian-American population of the United States has been estimated by the 1970 census to be 1.5 million, or .75 percent of the total population. 1970 Census, Vol. I, *Characteristics of the Population supra*, at 1–261, 1–593, 1–594 (The census figure has become outdated in light of substantial immigration during the 1970s. Projections indicate that the Asian-American population will exceed three million by 1980 (United States Department of Health, Education, and Welfare, Office of Health Resources Opportunity, *Identification of Problems in Access to Health Services and Health Careers for Asian Americans*, II–5–7 (1976)).) More than one-third of that number live in California. 1970 Census, Vol. I, *Characteristics of the Population*, *supra*, at p. 6–86. 3.6 percent of all physicians in the United States are Asian-Americans. U.S. Bureau of the Census, *Subject Reports*, Final Report PC (2)–7A, 12 Occupational Characteristics (1973). It is not clear how many of those physicians were educated in the United States. A study prepared by the Center for Health Services Research and Development of the American Medical Association indicates that, in 1970, 9,904 foreign medical graduates in this country were graduates of medical schools in Japan, China and the Philippines. Of those, 9,796 were born outside of the United States. Haug and Martin, *Foreign Medical Graduates in the United States*, *1970* 292–293 (1971). From 1968–1969 through 1972–1973, the percentage of Asian-Americans among all medical students ranged from 1.2 percent to 1.5 percent. Dube, *Datagram: U.S. Medical Student Enrollments*, *1968–1969 Through 1972–1973*, 48 J. Med. Educ. 293, 296 (1973). From 1973–1974 through 1976–1977 it rose from 1.7 percent to 2.0 percent. Dube, *Datagram: U.S. Medical Student Enrollment*, *1972–1973 Through 1976–1977*, 52 J. Med. Educ. 164, 166 (1977). Moreover, Asian-Americans as a group appear to score as well or better than whites on the MCAT and in grade point averages. Gordon, *Descriptive Study of Medical School Applicants 1975–1976*, Appendix Table A–1 (1977).

At the same time, no one can doubt that this racial group has been the subject of discrimination in this country. See, *e.g.*, *Yick Wo* v. *Hopkins*, 118 U.S. 356; *Ex parte Endo*, 323 U.S. 283. Nor is it clear that discrimination against Asian-American persons is a thing of the past. *Lau* v. *Nichols*, 414 U.S. 563. Discrimination may take subtle forms, and the admission of large numbers of Asian-American students does not preclude the possibility of discrimination. In 1975–1976 Asian-American applicants were accepted into medical schools at a somewhat lower rate (31.7 percent) than whites (37.2 percent). Gordon, *Descriptive Study of Medical School Applicants*, *1975–1976*, Appendix Table A–1 (1977).

Black physicians encountered obstacles to their professional development after graduation from medical school. Until the 1940s only black hospitals or hospitals serving a predominantly black population would accept black physicians for internships and residencies,[52] and black physicians were largely excluded from election to specialty boards.[53] Racially discriminatory hospital practices continued until recent times.[54]

[52] Melton, *The Negro Physician*, 43 J. Med. Educ. 802 (1968).

[53] Morais, *supra*, at 97.

[54] See, *e.g.*, *Simkins* v. *Moses H. Cone Memorial Hospital*, 323 F. 2d 959 (C.A. 4) (*en banc*), certiorari denied, 376 U.S. 938.

Black physicians also have been excluded from membership in local affiliates of the American Medical Association (AMA), a prerequisite for membership in the national organization.[55] Although in 1964 the AMA rejected the practice of racial exclusion by its affiliates,[56] as late as 1968 many local affiliates in the South still excluded black physicians from membership.[57] Moreover, because an appointment to a hospital staff usually required membership in the local medical society, blacks were excluded from hospital staffs because of their race.[58]

In 1968 the Association of American Medical Colleges (AAMC)[59] formally recognized the disproportionately low enrollment of minorities in medical schools as a problem.[60] Johnson, Smith and Tarnoff, *Recruitment and Progress of Minority Medical School Entrants 1970–1972,* 50 J. Med. Educ. 713, 721 (1975 Supp.). During 1969–1970 an AAMC task force issued

[55] Morais, *supra*, at 153.

[56] Curtis, *supra*, at 24.

[57] Melton, *supra*, 42 J. Med. Educ. at 799.

[58] Morais, *supra*, at 153. See also *Cypress* v. *Newport News General and Nonsectarian Hospital Association*, 375 F. 2d 648 (C.A. 4).

[59] The AAMC includes among its members all American and Canadian medical schools. Association of American Medical Colleges, *Medical School Admission Requirements 1978–1979* iii (1977).

[60] In 1968 the AAMC Assembly adopted the following recommendation: "Medical schools must admit increased numbers of students from geographic areas, economic backgrounds and ethnic groups that are now inadequately represented." Johnson, Smith, and Tarnoff, *supra*, at 721.

a report recommending that medical schools increase the proportion of minorities enrolled, and it included specific numerical goals.[61] In November 1970 the AAMC Assembly adopted a resolution urging schools to undertake and continue affirmative action programs. AAMC, *Medical School Admission Requirements 1978–1979* 9 (1977). Many of the medical schools in the country became involved between 1968 and 1971 in efforts to assure equal educational opportunity.[62] The special admissions program of the Davis Medical School is part of this trend.

[61] The task force recommended a goal for minority (black, Mexican-American, American Indian and Puerto Rican) admissions of 12 percent by 1975–1976. *Report of the Task Force to the Inter-Association Committee on Expanding Educational Opportunities in Medicine for Blacks and Other Minority Students* 1 (1970). The report was endorsed by the American Hospital Association, the American Medical Association, and the National Medical Association, as well as the AAMC. Johnson, Smith, and Tarnoff, *supra*, at 721.

[62] Odegaard, *Minorities in Medicine* 11 (1977), citing Wellington and Gyorffy, *Draft Report of Survey and Evaluation of Equal Educational Opportunity in Health Profession Schools* Table II (1975). In 1972 Wellington and Gyorffy surveyed the traditionally white health profession schools. All of the medical schools responding—89 out of 112—had recruitment programs directed toward minority or disadvantaged students (Wellington and Gyorffy, *Draft Report of Survey and Evaluation of Equal Educational Opportunity in Health Profession Schools* Table VIII). Twenty-seven percent of the schools reported that they had as a goal some stated percentage of minority students in their entering class (*ibid.*). At 16 percent of the medical schools, minority or disadvantaged students were selected for admission by a different group than that which selected all other students (*ibid.*). More than two-thirds of the responding medical schools had modified

III

THE CENTRAL ISSUE ON JUDICIAL REVIEW OF A MINORITY-SENSITIVE PROGRAM IS WHETHER IT IS TAILORED TO REMEDY THE EFFECTS OF PAST DISCRIMINATION

When a State considers race in distributing benefits, its program must be examined carefully for two reasons. First, a racial classification that purports to be benign, *i.e.*, to aid the victims of past racial discrimination, may prove to be as invidious, in purpose or effect,[63] as traditional racial classifications have been. *United Jewish Organizations of Williamsburgh, Inc.* v. *Carey, supra,* 430 U.S. at 173–174 (Brennan, J., concurring). Assertion of a benign purpose should not immunize a racial classification against a searching judicial inquiry. See *Weinberger* v. *Wiesenfeld,* 420 U.S. 636, 648.

Second, the State may not take account of race where such consideration is not necessary to achieve a legitimate governmental objective. The Constitu-

admissions procedure in order to permit entry of greater numbers of minority students; three-fourths of the responding schools had modified admissions criteria for minorities (*ibid.*). One-half of the responding medical schools had pre-enrollment programs for minorities (*ibid.*). Eighty percent of the responding medical schools had special financial programs for minority or disadvantaged students (*ibid.*).

[63] For example, laws intended to benefit some women have been struck down because they operate to the disadvantage of others. See, *e.g.*, *Weinberger* v. *Wiesenfeld*, 420 U.S. 636. Moreover, such a law may be based on stereotypes and, as a result, operate to reinforce them. *Ibid.*

tion places restraints on the use of race as a sorting mechanism because it "bears no relation to the individual's ability to participate in and contribute to society." *Mathews* v. *Lucas,* 427 U.S. 495, 505. The United States has undertaken to foster the principle that race itself is unrelated to merit or qualification and to discourage the belief that race is generally a legitimate basis for distributing opportunities.[64] To do otherwise would risk encouraging divisiveness and political organization along racial lines, emphasizing the importance of race and perpetuating thinking in racial terms.[65] Moreover, it would risk reverting to the very thinking that has in the past resulted in invidious discrimination—the consideration of racial stereotypes to the exclusion of individual characteristics. The Fourteenth Amendment protects all per-

[64] Kaplan, *Equal Justice in An Unequal World: Equality for the Negro—The Problem of Special Treatment*, 61 Nw. U.L. Rev. 363, 375–380 (1966). See *United Jewish Organizations of Williamsburgh, Inc.* v. *Carey, supra*, 430 U.S. at 174 (Brennan, J., concurring). See also O'Neil, *Preferential Admissions: Equalizing the Access of Minority Groups to Higher Education*, 80 Yale L.J. 699, 709–710 (1974); Greenawalt, *Judicial Scrutiny of "Benign" Racial Preference in Law School Admissions*, 75 Colum. L. Rev. 559, 570–573 (1975).

[65] Legislation along racial lines that purports to be benign may stigmatize a beneficiary group by implying "to some the recipients' inferiority and especial need for protection." *United Jewish Organizations of Williamsburgh, Inc.* v. *Carey, supra*, 430 U.S. at 173–174 (Brennan, J., concurring). But any possible stigma must be weighed against the benefits to the group to determine the purpose and effect of the legislation. Moreover, since such a stigma would be directed at the group as a group, the benefits to the group as a whole should be examined.

sons without regard to race,[66] and that protection can be assured only by close examination of minority-sensitive state action.[67]

[66] This Court's treatment of employment discrimination against white persons demonstrates this point. *McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U.S. 273, held that civil rights statutes passed immediately after the Civil War protect white persons against racial discrimination. The Court considered and rejected arguments, similar to those made by petitioner, that white persons were not in need of protection against racial discrimination; the Court examined in detail the debates during the Reconstruction Congresses and concluded that the legislators who had proposed the Fourteenth Amendment intended, in the contemporaneous legislation at issue in that case, to shield members of all races from discrimination. "Unlikely as it might have appeared in 1866 that white citizens would encounter substantial racial discrimination * * * the 39th Congress was intent upon establishing in the federal law a broader principle than would have been necessary simply to meet the particular and immediate plight of the newly freed Negro slaves" (427 U.S. at 295–296). That conclusion applies to the Fourteenth Amendment—which was proposed in substantial measure to settle Congress' constitutional authority to enact civil rights legislation—no less than to the statutes under consideration in *McDonald*.

The Court observed (427 U.S. at 281 n. 8) that it was not presented with a question concerning "an affirmative action program," and it did not pass upon the propriety of such a program. We do not interpret *McDonald* as establishing a statutory bar against use of race that is more complete than the constitutional rule. We refer to the case not to show that affirmative action programs are forbidden but to demonstrate that the Fourteenth Amendment demands that they be examined carefully. See also *Trans World Airlines, Inc.* v. *Hardison*, No. 75–1126, decided June 16, 1977, slip op. 6–7.

[67] Congress has been sensitive to these concerns, and it has provided that race should not be used for certain purposes. 42 U.S.C. 1981 forbids discrimination against white persons (see *McDonald* v. *Santa Fe Trail Transportation Co.*, *supra*). 42 U.S.C. 3766(b) provides that the Law Enforcement Assistance Administration may not condition any grant upon the refusal of the recipient to eliminate racial imbalance in its workforce. See also 122 Cong. Rec. S17320 (daily ed., September 30, 1976). Section 703(j) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e–2(j), provides that nothing in Title VII "shall be interpreted to require any employer * * * to grant preferential treatment to any individual or to any group because of the race * * * or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race" employed.

Section 703(j) does not, of course, apply here since this is not an employment case; moreover, the Medical School adopted the special admissions program voluntarily, and Section 703(j) does not purport to limit the programs that may be voluntarily adopted. But the judicial treatment of Section 703(j) is instructive. The courts have recognized in it an attempt by Congress to differentiate between using race to rectify previous discrimination and using race to attain racial balance for its own sake. Accordingly, they have upheld orders based upon findings of past discrimination and designed to overcome racial imbalance caused by that discrimination. See, *e.g.*, *Rios* v. *Enterprise Association*, 501 F. 2d 622 (C.A. 2); *Boston Chapter, N.A.A.C.P., Inc.* v. *Beecher*, *supra*. This is much the same position that this Court has adopted, on constitutional grounds, in school desegregation cases. See, *e.g.*, *Dayton Board of Education* v. *Brinkman*, *supra*; *Swann* v. *Charlotte-Mecklenburg Board of Education*, *supra*. Cf. *Drummond* v. *Acree*, 409 U.S. 1228 (Powell, J., in chambers). The fact that Congress has resolved the competing interests in this fashion strongly suggests that States and private parties should be entitled to consider race in a similar fashion.

At the same time, such an inquiry does not call for rejection of minority-sensitive programs when employed in a remedial manner. As we have discussed above (see pages 30–40, *supra*), the lingering consequences of past use of race should be addressed. As

long as prior discrimination has present effects, mere neutrality to race is insufficient. *Green* v. *County School Board,* 391 U.S. 430. As long as the effects of past racial discrimination persist, the employment of race-consciousness in rectifying that discrimination should not be abandoned.

Judicial review of such programs should not be curtailed because of assertions that the programs reflect a decision by a particular majority to discriminate against itself. This Court has on other occasions rejected similar arguments. *Lucas* v. *Forty-Fourth General Assembly of Colorado,* 377 U.S. 713, 736–737; *Castaneda* v. *Partida,* No. 75–1552, decided March 23, 1977; *Craig* v. *Boren,* 429 U.S. 190, 197. Of course, the circumstances of a program's adoption are pertinent to the judicial inquiry.[68] But the Court's central concern should be whether the program is tailored in design and application to remedy the effects of past discrimination. See pages 30–40, *supra.*

[68] *Morton* v. *Mancari,* 417 U.S. 535, upheld a statute giving tribal Indians a preference for employment in the Bureau of Indian Affairs. Similarly, *United States* v. *Antelope,* No. 75–661, decided April 19, 1977, upheld a classification that in some cases (depending on state law) treated an Indian defendant more harshly than a similarly situated white defendant. The Court explained (slip op. 4) that "legislation with respect to Indian tribes * * * is not based upon impermissible racial classifications. Quite the contrary, classifications expressly singling out Indian tribes as subjects of legislation are expressly provided for in the Constitution * * *." Since legislation pertaining to tribal Indians does not have a racial basis, the Indian cases do not support either petitioner or respondent here.

A. A PROGRAM IS TAILORED TO REMEDY THE EFFECTS OF PAST DISCRIMINATION IF IT USES RACE TO ENHANCE THE FAIRNESS OF THE ADMISSIONS PROCESS

As we have pointed out at pages 30–33, *supra,* this Court has held that race may properly be considered for remedial purposes. When a governmental agency undertakes to ensure that the effects of past discrimination are not allowed to mask an individual's merit, it necessarily takes race into consideration. Although in some circumstances it is possible to determine whether a particular person has been harmed by discrimination, and to provide particular relief to persons so harmed (see, *e.g., International Brotherhood of Teamsters* v. *United States, supra,* slip op. 48–49 and n. 62), that determination often cannot be made. Racial discrimination has been pervasive in our society. People who are educationally and economically disadvantaged are particularly likely to have been affected by discrimination. Moreover, a minority community, as a whole, may suffer the effects of exclusion of its members from economic and educational advantages. Although it may be practical to require an institution to address the results of its own discrimination on a case-by-case basis,[69] it is necessary to use another approach when an institution tries to cope with the effects of discrimination by society as a whole.

[69] This is not universally the case. The remedies used in school desegregation cases are general; relief is not limited to individual students who may have been assigned to school for racial reasons. Because racial discrimination in the operation of schools has pervasive effects, the remedy is not confined to identifiable victims.

Societal discrimination may have left minority applicants with credentials less impressive than they would have possessed if they (and their forebears) [70] had not been subjected to discrimination. Because competition for admission to professional schools is keen, even small differences in such criteria as grades and entrance test scores may make the difference between admission and rejection. Decades of discrimination by public bodies and private persons may have far-reaching effects that make it difficult for minority applicants to compete for admission on an equal basis. The consequences of discrimination are too complex to dissect case-by-case; the effects on aspirations alone may raise for minority applicants a hurdle that does not face white applicants to professional schools. A professional school dealing with imponderables of this sort ought not be confined to the choice of either ignoring the problem or attempting the Sisyphean task of discerning its importance on an individual basis. When individual measurement would be impractical, a State properly may use categorical means. Cf. *Gaston County* v. *United States,* 395 U.S. 285, 295–296; *Califano* v. *Webster, supra; Kahn* v. *Shevin, supra.* See also *Milliken* v. *Bradley,* No. 76–447, decided June 27, 1977, slip op. 15 (discrimination can "breed other inequalities" that call for generalized relief).

[70] Because learning and development in the home in the early childhood years can be particularly important to the formation of aspirations and intellectual achievement, the effects of discrimination may be transmitted from one generation to another.

It might be said in response that such an argument would not apply to admissions to professional schools. Applicants to professional schools have been successful in the competition to enter college and they have received a college education. Only the best of the minority applicants to professional school can be chosen. This process of selecting from among the minority applicants means that a professional school will admit only those minority applicants who have suffered the least from discrimination.

We believe, however, that this response would be incomplete. It compares members of minority groups to one another. The pertinent comparision should be between the most highly qualified whites and the most highly qualified blacks, Chicanos and Asian-Americans: who, among these "most highly qualified" persons, are more likely to have suffered because of discrimination, either in their personal lives or because it influenced their upbringing, career aspirations, or intellectual development? The residual and pervasive effects of societal discrimination may keep the most highly qualified minority applicants from having credentials quite as impressive as those of the most highly qualified white applicants. And, because there are vastly more white applicants than minority applicants, even a small difference in such credentials can have a great effect on the prospects of admission.[71]

[71] An illustration may be helpful. Suppose that 1000 people apply for 100 positions in a professional school. Suppose, further, that 20 percent of the applicants come from minority groups that have been the victims of recent discrimination. The professional school decides to admit the 100 applicants with the highest grade point averages in college. If the discrimination had lingering

Race may be pertinent to admissions decisions because it gives information that will be helpful

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effects on the minority applicants—because they were required to work during college and had less time to study, because discrimination in primary and secondary education meant that they came to college less well prepared, because the environment in which they were raised was less conducive to intellectual development, or for any of numerous other reasons—we would expect each applicant to do slightly less well in obtaining high college grades. The median grade point average for whites might be 3.0, and the median for minority applicants might be 2.6. The difference would be only slightly significant, but it would produce striking results. The following table represents the expected distribution of grades:

Grade range	Number of Applicants	
	Whites (800 total)	Minorities (200 total)
3.7 to 4.0	24	1
3.5 to 3.69	40	2
3.3 to 3.49	80	6
3.1 to 3.29	136	10
2.9 to 3.09	200	20
2.7 to 2.89	136	34
2.5 to 2.69	80	50
2.3 to 2.49	40	34
Below 2.3	64	33

In order to take the 100 applicants with the highest grade point averages, the school would accept every applicant with a grade point average higher than 3.5. This would include 64 whites and three minority applicants. The 33 remaining places would be filled from the pool of applicants with averages between 3.3 and 3.49. The ratio of whites to minority applicants in that pool is approximately 13 to one. The school would therefore accept 31 whites and two minority applicants or 30 whites and three minority applicants. The expected final distribution of the class would be 94 or 95 whites and five or six members of minority groups. This example demonstrates how the large number of white applicants, coupled with even a small effect attributable to past discrimination, can lead to the selection of an overwhelmingly white class unless race is taken into account.

in understanding the meaning of the credentials that an applicant presents. A grade point average of 2.6 produced by a minority applicant may indicate every bit as much potential to be a physician as a 3.0 average by a white applicant, because the minority applicant has demonstrated not only the ability to succeed in obtaining grades but also the determination and ability to overcome non-academic hurdles. The evaluation of the meaning of the 2.6 average is assisted by cognizance of color. Such considerations are identical in principle to the "differential validation" of employment tests approved in *Albemarle Paper Co.* v. *Moody, supra.* The criteria for admission to a professional school operate much like the employment tests given by private employers, and consideration of the race of professional school applicants can validly serve much the same function as differential validation of employment tests: it can adjust for differences in credentials that may be caused by race but have little or nothing to do with the ability to succeed.

In other words, race may properly be taken into account to increase the pool of apparently "qualified" applicants and to evaluate them more accurately. Especially in light of the impracticality of devising rigid rules to govern admissions decisions, race may be useful to provide more complete information about the meaning of credentials that, standing by themselves, do not fully reveal the applicant's abilities and potential. The Medical School's benchmark scores, for example, do not reflect a simple addition of points

representing quantifiable achievements. Grades given by different colleges, or in different courses, or even by different professors, are not fungible indicia of either achievement or ability. And the circumstances under which grades are earned (*e.g.*, while also working elsewhere, despite inferior preparatory education, or despite the psychological and other burdens of racial discrimination) are also highly pertinent. For all these reasons, raw scores do not convert directly into accurate assessments of aptitude for professional achievement.

Professional schools therefore must have discretion to seek to make judgments about applicants that cannot be captured in a simple formula. See *United Jewish Organizations, supra,* 430 U.S. at 173 (Brennan, J., concurring); Brest, *The Supreme Court, 1975 Term, Forward: In Defense of the Antidiscrimination Principle,* 90 Harv. L. Rev. 1, 19, 31 (1976). In searching for those applicants most likely to contribute to the medical profession, medical schools look not only at aptitude to learn but also at motivation, self-discipline, personal interests, and the extent to which applicants can diversify and enrich the profession. The admissions process involves many difficult and subjective decisions. Often admissions committees must ask whether an applicant with higher grades should be admitted over one with more self-discipline. Comparisons of this sort are common and inescapable. The fact that the question calls for consideration of so many imprecise factors suggests the wisdom of deference to the answer given by the admissions committees charged with making such decisions every day.

A particularly intensive search for minority applicants is essential to a properly administered affirmative action admissions program. It is constitutionally permissible, for example, for a professional school to conclude that it is not administratively worthwhile to interview non-minority applicants with less than a particular grade point average. The large number of white applicants may make it too unlikely that any with less than that average would ultimately be admitted even if interviewed. The added factor of minority disadvantage, however, can make it appropriate not to observe the same cut-off point in offering interviews to minority applicants. And we see nothing constitutionally improper in the initial screening of minority applicants by a committee with specialized knowledge of, or insights into, their peculiar qualifications. These can all be appropriate measures in seeking to enhance the fairness of the admissions process.

In making the difficult admissions decisions, reasonably selected numerical targets for minority admissions can be useful as a gauge of the program's effectiveness.[72] The United States has found such an approach useful in other contexts. For example, a

[72] Any substantial disparity between the available minority population and the rate of admissions (or employment, in employment cases) gives rise to a rebuttable inference that discrimination is at work and makes it appropriate to take steps to correct that condition. See, *e.g.*, *Hazelwood School District* v. *United States*, No. 76–255, decided June 27, 1977; *Dothard* v. *Rawlinson, supra; International Brotherhood of Teamsters* v. *United States, supra; Castaneda* v. *Partida, supra; Albemarle Paper Corp.* v. *Moody, supra; Griggs* v. *Duke Power Co., supra.*

policy statement issued on March 23, 1973, by the Department of Justice, the Department of Labor, the Civil Service Commission and the Equal Employment Opportunity Commission, endorses the use of flexible goals that "help measure progress in remedying discrimination." It points out, however, that "[a]ny system which requires that considerations of relative abilities and qualifications be subordinated to considerations of race * * * has the attributes of a quota system which is deemed to be impermissible * * *."

The policy statement concluded that an employer should not "be required to hire a less qualified person in preference to a better qualified person, provided that the qualifications used to make such relative judgments realistically measure the person's ability * * *." In other words, "persons are to be judged on individual ability," and it is most useful to take race into account in making selections among applicants "who are substantially equally well qualified." The statement recognized, however, that the adoption of qualifications that themselves exclude substantial numbers of minority applicants makes the usefulness of the standards suspect and calls for reassessment.[73]

[73] The policy statement is reproduced as Appendix D to this brief. It also appears at CCH Employment Practices ¶ 3775. These guidelines were designed with the employment context in mind. They should be interpreted, therefore, insofar as admission to professional schools is concerned, in light of what we have said earlier (pages 58–61, *supra*) about the imprecision of admissions criteria and the need of these institutions to have wide latitude in making admissions decisions.

B. THERE IS NO ADEQUATE ALTERNATIVE TO THE USE OF MINORITY-SENSITIVE ADMISSIONS CRITERIA

The Supreme Court of California concluded that a compelling case for the use of a minority-sensitive admissions program had not been made out because the University had not established that non-racial criteria would be ineffective to achieve the University's legitimate goals (see Pet. App. 23a–28a). The Supreme Court of California suggested two major approaches that the University might try: expansion of the size of medical school classes and extension of a preference to all disadvantaged applicants.

The suggestion to increase the size of the class is beside the point; it would not answer the question whether, at any given size of class, the admissions committee may take color into account. The same problem confronts medical schools whether they admit 100, 200 or 500 students: unless race is taken into account, there will be very few black and Chicano students in the class. Minority applicants will continue to be handicapped by the lingering effects of discrimination.

The suggestion to replace a preference for race with a preference for economically disadvantaged applicants fares no better. Previous discrimination may handicap economically disadvantaged black and Chicano applicants even compared with other disadvantaged applicants.[74] Professional schools cannot fairly compare disadvantaged persons to one another (or disadvantaged to non-disadvantaged persons) without

[74] See note 42, *supra*.

taking race into account. At any level of personal (or parental) income, being black or Chicano is an extra disadvantage; even among the materially disadvantaged there is a hierarchy, the lower rungs of which are filled by the victims of especial prejudice.

The statute at issue in *Califano* v. *Webster, supra,* may illustrate this point. Congress allowed women, in computing entitlements to retirement benefits, to disregard three more low-earnings years than men. As a result, women obtained slightly higher retirement benefits than they would have received if they, like men, had taken the three low-earnings years into account; without considering those years, women's average income, upon which benefits were based, was increased. The Court held that this statute was a rational means of compensating women for discrimination against them in the labor market.

It might have been argued in *Webster* that, if Congress were concerned about the low wages earned by women, it should have increased the retirement benefits of all persons who experienced low earnings. But this would not have worked. At any level of skill women were earning, as a result of discrimination, less than they would have earned if they had been men. If a man and a woman each had an income of $5,000 yearly, this would not have established the absence of discrimination. But for the discrimination, the woman might have been earning $6,000. The only way to restore even rough equality in the payment of retirement benefits was to treat the woman as if she had been earning more—that is, to give women a pref-

erence, even among low-wage earners. Moreover, because it was impossible for practical reasons to determine which women had been victimized by discrimination over the course of a lifetime, it was both necessary and fair to give the adjustment to all women.[75]

So it is with minority applicants to professional schools. In order to restore victims of discrimination to the position they would have occupied but for the discrimination, and to make a fair assessment of their achievements and potential, it is proper to credit them with having surmounted obstacles not faced by non-victims. The need and justification for such special consideration exist whether the Medical School concentrates upon the affluent or the poor. The argument that race must be replaced with a reliance upon poverty assumes that race is but a proxy for some "more germane [basis] of classification" (*Craig* v. *Boren, supra,* 429 U.S. at 198). For the reasons we have discussed, however, race has an importance of its own in this context that is not dependent in any way upon being a proxy for other things. The Medical School therefore is entitled to make an independent use of race.[76]

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[75] Even with the assistance of the statutory adjustment, women received lower average retirement benefits than did men. Slip op. 5, n. 5.

[76] It is far from clear, moreover, that the options suggested by the Supreme Court of California would help respondent. The extension of preferential treatment to all materially disadvantaged applicants would simply reduce still further the emphasis placed

IV

THE SUPREME COURT OF CALIFORNIA APPLIED INCORRECT LEGAL STANDARDS IN EVALUATING THE CONSTITUTIONALITY OF THE SPECIAL ADMISSIONS PROGRAM

A. THE DECLARATORY JUDGMENT FORBIDDING THE USE OF MINORITY-SENSITIVE ADMISSIONS PROGRAMS SHOULD BE REVERSED

The judgment of the trial court (Pet. App. 120a) includes a declaratory order that the special admissions program violated the Fourteenth Amendment of the Constitution. Although this declaratory judgment does not on its face specify that any minority-sensitive program also would violate the Constitution, it probably has this meaning in light of the conclusion of the trial court, with which the Supreme Court of Cali-

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by the Medical School on academic credentials. Since respondent relies upon his academic credentials rather than upon any personal disadvantage as the basis for admission, it must follow that he would be no better off if the Medical School had followed the course suggested by the California court.

This assessment is confirmed by a study of all 1972 high school graduates applying to four year colleges. The study, conducted by the Office of Education of the Department of Health, Education, and Welfare, indicates that any selection system based upon disadvantage, and designed to enroll members of minority groups comparable to the proportions of these groups in the general population, would require that a very large portion of college classes be selected from among disadvantaged applicants. This would close many places in the class to non-disadvantaged applicants with higher grades. Carroll, *A Comparative Analysis of Three Admission/Selection Procedures* (1977) (H.E.W. Technical Paper 77–D4). In other words, a general preference for disadvantaged applicants would leave applicants like respondent worse off than they are under a system of preferences for minority applicants.

fornia agreed, that the Constitution forbids *any* use of race in making admissions decisions. Moreover, the trial court's judgment with respect to respondent personally declares that the University shall not consider respondent's race "or the race of any other applicant" (*ibid.*) in passing on respondent's application for admission.

The declaratory judgment concerning the special admissions program as a whole responds to the University's counterclaim for an order approving its use of minority-sensitive decisionmaking. It therefore survives the order of the Supreme Court of California (Pet. App. 80a) that respondent be admitted to the Medical School.

We believe that the declaratory aspects of the judgment below are erroneous. We have discussed at length the reasons supporting the propriety of minority-sensitive decisionmaking in the process of admitting applicants to professional schools. To the extent that the judgment of the state courts forbids on federal constitutional grounds the formulation and administration of an affirmative action program consistent with the principles we have set out, it should be reversed.

B. WHETHER RESPONDENT WAS WRONGFULLY DENIED ADMISSION TO THE MEDICAL SCHOOL SHOULD NOT BE DECIDED ON THE PRESENT RECORD

Under the analysis developed above, it is constitutional in making admissions decisions to take race into account in order fairly to compare minority and non-minority applicants. It is not clear from the

record whether the Davis program operated in this manner. The findings of the trial court leave unresolved serious questions concerning operation of the special admissions program at Davis in 1973 and 1974. We briefly note some of these questions.

1. The trial court found (Pet. App. 111a, 115a), and the University does not contest, that 16 places were reserved for special admittees. But one question not resolved by the findings is whether there was any comparison of special with regular applicants. Although the trial court found that regular and special applicants were "rated" separately (Pet. App. 115a), it did not determine whether all applicants were compared by the regular admissions committee. The evidence we have summarized at pages 8–14, *supra*, indicates that the regular admissions committee played some role in the selection of all 100 students, but it does not indicate what that role was.

It also is unclear whether or how the benchmark ratings of special applicants were compared against the benchmark ratings of regular applicants. The trial court found that some special applicants who were admitted had benchmark scores substantially lower than those of respondent and some other regular applicants who were not admitted (Pet. App. 115a). On the other hand, at least one regular applicant who was admitted had a benchmark rating lower than that of respondent (R. 181), and there was some evidence that the "range" of benchmark scores among special applicants was comparable to that of regular

applicants (R. 181).[77] The record does not permit a direct comparison of the benchmark scores of regular and special applicants,[78] but if there was a comparison of regular and special applicants by the regular admissions committee prior to selection, this would indicate that race had not been used improperly. This inquiry is pertinent to this case, which involves a professional school. This Court need not decide whether such an inquiry is necessary in determining the proper use of race in other admissions programs or other situations.

2. The trial court found that a "pre-determined quota of 16" special applicants to be admitted (Pet. App. 115a) had been set aside. It is not clear what the court meant by "quota."[79] We have argued above

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[77] It is not clear whether "range" refers to median scores, to the number of points between the highest and lowest scores, or to the absolute rating number.

[78] We have discussed some deficiencies in the record. Two other questions also require resolution before it is possible to draw conclusions regarding the extent to which regular and special applicants are compared. First, if there are differences in the benchmark scores of regular and special applicants who are accepted for admission, may this difference be explained by the fact that different faculty members and students evaluated the applicants? Second, is race taken into account in assigning benchmark scores? The difference in the composition of the committees (rather than any difference in the qualifications of the applicants) may explain apparent differences in benchmark evaluations, and any further apparent difference might disappear if the regular admissions committee were charged with taking race into account after the special committee had assigned its benchmark ratings based on other considerations.

[79] The trial court seems to have used "quota" to refer to any numerical designation (see Pet. App. 115a, 117a). But not all

that the Constitution permits a professional school to seek to achieve reasonable goals or targets (in contrast to rigid exclusionary quotas) for minority admissions, because success in achieving these goals is a measure of the effectiveness of a program in overcoming the present effects of racial discrimination. But because any target or goal should be reasonably related to the program's justifications, it is helpful to know why a particular target is selected. The record contains no explanation for the selection of the number 16 (see Pet. App. 2a n. 1). Moreover, it is not clear whether the number was inflexible or was used simply as a standard for assessing the program's operation.

3. It is not clear from the record why Asian-American persons are included in the special program. There is no doubt that many Asian-American persons have been subjected to discrimination. But although we do not know the application rates for Asian-Americans at Davis, the available evidence suggests that Asian-American applicants are admitted in substantial numbers even without taking special admissions into account. In 1973, 13 of the 84 regular admissions places in the class were filled by Asian-American students, although no more than six percent of the young college graduates in California are Asian-American.[80] Other data also suggest that Asian-Amer-

numbers are "quotas;" that question depends on how the number was used and for what reason, matters that the trial court did not explore.

[80] Compare the table at page 9, *supra*, with the information compiled by the census. In 1970, black persons represented 2.5 percent, Spanish-speaking and Spanish-surnamed persons 5.8 percent, and other racial minorities 5.6 percent of the persons in California with college degrees and between the ages of 20 and 29. 1970 Census, Vol. I, *Characteristics of the Population*, California *Supra*, at pp. 6–1271 to 6–1272. The potential Asian-American college graduates represent an unknown proportion of the "other" minorities in the census compilation.

ican applicants compete successfully for professional school admission without the assistance of special consideration.[81] Although it may well be that disadvantaged Asian-American persons continue to be in need of the special program to overcome past discrimination, the record is silent on that question.[82]

4. As we have argued above, minority-sensitive programs designed to overcome the effects of past discrimination upon applicants to medical school are constitutional. Petitioners have asserted additional justifications for such programs, including, for example, the relative likelihood of minority physicians serving minority communities. Regardless of the merit of such justifications if substantiated, the record contains no evidence to demonstrate that they would support the particular special admissions program at issue here.

5. Deficiencies in the record and in the findings of the trial court thus prevent a final assessment of the constitutionality of the University's special admissions program. The trial court addressed its findings to the question whether the special admissions program employed race in some manner; it did not address the question, which we believe is highly significant, of *how* race was used, and why.

[81] See notes 39 and 51, *supra*.

[82] The record contains no information with respect to the reason for including Asian-Americans in the special admissions program, and the University's brief does not discuss Asian-American applicants. Compare Br. 21 n. 13 with Br. 23 and n. 22.

Both petitioner and respondent argued in the trial court and on appeal that this case could be resolved by answering a simple question: was the Medical School using race in making admissions decisions? The evidence introduced by the parties, and the findings made by the trial court, were addressed to this question. The Supreme Court of California, too, viewed it as dispositive. Consequently, the findings, and, indeed, the record are in many respects silent concerning how race was taken into account, and for what reason. Responsibility for that silence cannot be assigned to either party; both parties to this case took what we have concluded is an incorrect approach to difficult and unsettled legal questions.

This Court should not assume the role of the state courts in analyzing the record to supply necessary findings. Since the inadequacy of the findings is attributable to application of an erroneous legal standard, it is most appropriate to give the lower courts an opportunity to amplify those findings in light of the principles expressed in the Court's opinion.

Moreover, even if the evidence and findings were sufficient to permit a final resolution of the question whether the special admissions program was constitutional, the question would remain whether respondent is entitled to admission. Even if it were proper to conclude that the program was unconstitutional, the University would be entitled to show, if it could, that respondent still would have been denied admission. See, *e.g., Mt. Healthy City School District Board of Education* v. *Doyle,* 429 U.S. 274,

285–287. The Supreme Court of California offered petitioner the opportunity to make such a showing (Pet. App. 38a–39a), and the University conceded that it could not show that, but for the existence of the special admissions program, respondent would not have been admitted (Pet. App. 80a). But the state court's offer, and the University's concession, were based on the incorrect principle, reflected in the state courts' opinions, that race could not be taken into account at all in making admissions decisions. Under the principles discussed in this brief, however, race has a legitimate use in making admissions decisions. Even if the Medical School used race in an impermissible way, therefore, the Supreme Court of California should have allowed the University an opportunity to establish on remand that respondent would not have been admitted if the special admissions program had been administered in a way consistent with constitutional principles. That remand order would be quite different from the one the state court actually entered.

In sum, we believe that the judgment of the Supreme Court of California should be vacated and the case remanded for further proceedings consistent with the views expressed here. See *Dayton Board of Education* v. *Brinkman, supra.* The trial court should have an opportunity to make appropriate findings based on the existing record. Furthermore, the state courts may deem it appropriate to permit either party to introduce additional evidence that might bear on the constitutional issues. The Supreme Court of California also might conclude that it is appropriate to

relieve petitioner of its concession in light of the legal principles established by this Court's opinion.

CONCLUSION

Insofar as the judgment of the Supreme Court of California declares that the Medical School may not consider the race of applicants for the purpose of operating a properly administered affirmative action admissions program, the judgment should be reversed. Insofar as the judgment orders that respondent be admitted to the Medical School, the judgment should be vacated and the case should be remanded for further proceedings consistent with the views we have discussed.

Respectfully submitted.

GRIFFIN B. BELL,
Attorney General.
WADE H. MCCREE, JR.,
Solicitor General.
DREW S. DAYS, III,
Assistant Attorney General.
LAWRENCE G. WALLACE,
Deputy Solicitor General.
FRANK H. EASTERBROOK,
Assistant to the Solicitor General.
BRIAN K. LANDSBERG,
JESSICA DUNSAY SILVER,
Attorneys.

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APPENDIX A

FEDERAL DOMESTIC ASSISTANCE PROGRAMS PROVIDING ASSISTANCE TO RACIAL MINORITY GROUPS

Agency	Program and catalogue No.[1]	Description and budget
Department Commerce.	Minority Business Enterprise (11.800).	Grants to government agencies; contracts and technical assistance to minority businesses to promote and expand minority enterprises (est. FY 1977—$11,478,000).
Department of Health, Education, and Welfare.	Mental Health Training Grants (13.244).	Grants to public and private institutions for training professionals in area of mental health and mental illness—includes minority group projects (est. FY 1977—$68,263,000).
	Minority Biomedical Support (13.375).	Grants to higher educational institutions to increase number of ethic minority faculty, students, and investigators engaged in biomedical research (est. FY 1977—$7,783,000).
	Emergency School Aid Act—Basic Grants to Local Educ. Agencies (13.525).	Grants to elementary and secondary local educational agencies to implement plans to eliminate, reduce, or prevent isolation of minority group students (est. FY 1977—$126,850,000).
	Emergency School Aid Act—Pilot Programs (13.526).	Grants to elementary and secondary local educational agencies with large minority (or over 50% minority) enrollments, for implementing plans to eliminate, reduce, or prevent isolation of minority group students (est. FY 1977—$32,250,000).
	Emergency School Aid Act—Special Programs and Projects (13.529).	Grants to public or nonprofit private organizations for programs to resolve special problems in communities during school desegregation, to benefit students, parents, and faculty (est. FY 1977—$17,200,000).
	Emergency School Aid Act—Educational Television (13.530).	Grants to public and nonprofit private organizations for development of multiethnic television programs for elementary and secondary school children (est. FY 1977—$6,450,000).

See footnotes at end of table.

Agency	Program and catalogue No.[1]	Description and budget
	Emergency School Aid Act—Special Programs (13.532).	Grants to educational agencies for programs to reduce, eliminate and prevent minority group isolation and aid children in overcoming educational disadvantages of minority group isolation (est. FY 1977—$21,500,000).
	Ethnic Heritage Studies Program (13.549).	Grants to public or private nonprofit organizations to provide opportunities for students to study their own cultural heritage and that of others (est. FY 1977—$1,800,000).
	Special Programs for the Aging (13.633).	Grants to states for support of programs for older persons (especially low income and minority older persons) by planning and social services (est. FY 1977—$122,000,000).
	Special Programs for the Aging—OAA Model Projects (13.634).	Grants (contracts) to public or private nonprofit organizations for projects with new approaches to coordinated health, social, and welfare services for older persons—priority given to minority, limited English-speaking, and rural elderly (est. FY 1977—$12,000,000).
	Minority Access to Research Careers (13.880).	Grants and research contracts to assist minority institutions to train greater numbers of scientists and teachers in health-related fields (est. FY 1977—$173,000).
National Science Foundation.	Science Education Improvement (47.048).	Grants to organizations and higher educational institutions to improve capabilities for science education and training—special assistance to higher educational institutions with majority black and majority Spanish-speaking enrollments (est. FY 1977—$36,800,000).
Small Business Administration.	Minority Business Development—Procurement Assistance (59.006).	Special services to businesses owned by disadvantaged (including minorities) to help them become independent and self-sustaining (est. FY 1977—$3,669,000).
	Minority Vendors Program (59.019).	Special services to minority, socially- or economically-disadvantaged businesses to help them find new business opportunities and identify business deficiencies (est. FY 1977— not available).

[1] This information, derived from the Office of Management and Budget publication *1976 Catalogue of Federal Domestic Assistance*, does not purport to be exhaustive. The Catalogue provides a listing of 1,026 Federal programs and activities which furnish assistance or benefits.

APPENDIX B

Federal Domestic Assistance Programs Providing Assistance to Persons Who Do Not Speak Fluent English

Agency	Program and catalogue No.	Description and budget
Department of Health, Education, and Welfare.	Billingual Education (13.403).	Grants to states for bilingual education for non-English speaking children or for limited English speaking ability children from low-income families (est. FY 1977—$90,000,000).
	Emergency School Aid Act—Bilingual Education Projects (13.528).	Grants to educational agencies for bilingual or bicultural programs to help students and faculty by minimizing cultural barriers to equal educational opportunity (est. FY 1977—$8,600,000).
	Bilingual Vocational Training (13.558).	Grants to educational agencies for training of disadvantaged youth with limited education and limited English speaking ability in various semiskilled and skilled occupations (est. FY 1977—$0).
	Special Programs for the Aging (OAA) (13.634).	Grants (contracts) to public or private nonprofit organizations to develop new health, social, and welfare services and coordination of these services for the aged (including minority, limited English-speaking and rural older persons) (est. FY 1977—$12,000,000).

APPENDIX C

Affirmative Action Programs for State and Local Government Agencies

POLICY STATEMENT

The Equal Employment Opportunity Coordinating Council was established by Act of Congress in 1972, and charged with responsibility for developing and implementing agreements and policies designed, among other things, to eliminate conflict and inconsistency among the agencies of the Federal government responsible for administering Federal law prohibiting discrimination on grounds of race, color, sex, religion, and national origin. This statement is issued as an initial response to the requests of a number of State and local officials for clarification of the Government's policies concerning the role of affirmative action in the overall equal employment opportunity program. While the Coordinating Council's adoption of this statement expresses only the views of the signatory agencies concerning this important subject, the principles set forth below should serve as policy guidance for other Federal agencies as well.

1. Equal employment opportunity is the law of the land. In the public sector of our society this means that all persons, regardless of race, color, religion, sex, or national origin shall have equal access to positions in the public service limited only by their ability to do the job. There is ample evidence in all sectors of our society that such equal access

frequently has been denied to members of certain groups because of their sex, racial, or ethnic characteristics. The remedy for such past and present discrimination is twofold.

On the one hand, vigorous enforcement of the laws against discrimination is essential. But equally, and perhaps even more important, are affirmative, voluntary efforts on the part of public employers to assure that positions in the public service are genuinely and equally accessible to qualified persons, without regard to their sex, racial or ethnic characteristics. Without such efforts equal employment opportunity is no more than a wish. The importance of voluntary affirmative action on the part of employers is underscored by Title VII of the Civil Rights Act of 1964, Executive Order 11246, and related laws and regulations—all of which emphasize voluntary action to achieve equal employment opportunity.

As with most management objectives, a systematic plan based on sound organizational analysis and problem identification is crucial to the accomplishment of affirmative action objectives. For this reason, the Council urges all State and local government to develop and implement results oriented affirmative action plans which deal with the problems so identified.

The following paragraphs are intended to assist State and local governments by illustrating the kinds of analyses and activities which may be appropriate for a public employer's voluntary affirmative action plan. This statement does not address remedies imposed after a finding of unlawful discrimination.

2. Voluntary affirmative action to assure equal employment opportunity is appropriate at any stage of the employment process. The first step in the con-

struction of any affirmative action plan should be an analysis of the employer's work force to determine whether percentages of sex, race or ethnic groups in individual job classifications are substantially similar to the percentages of those groups available in the work force in the relevant job market who possess the basic job related qualifications.

When substantial disparities are found through such analyses, each element of the overall selection process should be examined to determine which elements operate to exclude persons on the basis of sex, race, or ethnic group. Such elements include, but are not limited to, recruitment, testing, ranking, certification, interview, recommendations for selection, hiring, promotion, etc. The examination of each element of the selection process should at a minimum include a determination of its validity in predicting job performance.

3. When an employer has reason to believe that its selection procedures have the exclusionary effect described in paragraph 2 above, it should initiate affirmative steps to remedy the situation. Such steps, which in design and execution may be race, color, sex or ethnic "conscious," include, but are not limited to, the following:

The establishment of a long term goal, and short range, interim goals and timetables for the specific job classifications, all of which should take into account the availability of basically qualified persons in the relevant job market;

A recruitment program designed to attract qualified members of the group in question;

A systematic effort to organize work and re-design jobs in ways that provide opportunities for persons

lacking "journeyman" level knowledge or skills to enter and, with appropriate training, to progress in a career field;

Revamping selection instruments or procedures which have not yet been validated in order to reduce or eliminate exclusionary effects on particular groups in particular job classifications;

The initiation of measures designed to assure that members of the affected group who are qualified to perform the job are included within the pool of persons from which the selecting official makes the selection;

A systematic effort to provide career advancement training, both classroom and on-the-job, to employees locked into dead end jobs; and

The establishment of a system for regularly monitoring the effectiveness of the particular affirmative action program, and procedures for making timely adjustments in this program where effectiveness is not demonstrated.

4. The goal of any affirmative action plan should be achievement of genuine equal employment opportunity for all qualified persons. Selection under such plans should be based upon the ability of the applicant(s) to do the work. Such plans should not require the selection of the unqualified, or the unneeded, nor should they require the selection of persons on the basis of race, color, sex, religion or natural origin. Moreover, while the Council believes that this statement should serve to assist State and local employers, as well as Federal agencies, it recognizes that affirmative action cannot be viewed as a standardized program which must be accomplished in the same way at all times in all places.

Accordingly, the Council has not attempted to set forth here either the minimum or maximum voluntary steps that employers may take to deal with their respective situations. Rather the Council recognizes that under applicable authorities, State and local employers have flexibility to formulate affirmative action plans that are best suited to their particular situations. In this manner, the Council believes that affirmative action programs will best serve the goals of equal employment opportunity.

Respectfully submitted,

HAROLD R. TYLER, JR.,
Deputy Attorney General and Chairman of the Equal Employment Coordinating Council.

MICHAEL H. MOSKOW,
Under Secretary of Labor.

ETHEL BENT WALSH,
Acting Chairman, Equal Employment Opportunity Commission.

ROBERT E. HAMPTON,
Chairman, Civil Service Commission.

ARTHUR E. FLEMMING,
Chairman, Commission on Civil Rights.

Because of its equal employment opportunity responsibilities under the State and Local Government Fiscal Assistance Act of 1972 (the revenue sharing act), the Department of Treasury was invited to participate in the formulation of this policy statement; and it concurs and joins in the adoption of this policy statement.

Done, this 26th day of August 1976.

RICHARD ALBRECHT,
General Counsel, Department of the Treasury.

APPENDIX D

MEMORANDUM—PERMISSIBLE GOALS AND TIMETABLES IN STATE AND LOCAL GOVERNMENT EMPLOYMENT PRACTICES

This Administration has, since September 1969, recognized that goals and timetables are in appropriate circumstances a proper means for helping to implement the nation's commitments to equal employment opportunities through affirmative action programs. On the other hand, the concepts of quotas and preferential treatment based on race, color, national origin, religion and sex are contrary to the principles of our laws, and have been expressly rejected by this Administration.

Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, conferred on the Justice Department and the Equal Employment Opportunity Commission enforcement responsibilities for eliminating discriminatory employment practices based upon race, color, national origin, religion, and sex by state and local government employers as set forth in that Act. In addition, under the Intergovernmental Personnel Act and the merit standards statutes, the Civil Service Commission has an obligation to attempt to move state and local governments toward personnel practices which operate on a merit basis. The Department of Labor and other Executive Branch agencies have responsibilities in the area of equal employment opportunities as it affects state and local government

employers. This memorandum addresses the question of how the agencies in the Executive Branch (e.g., CSC, EEOC, Justice, Labor and other Federal agencies having equal employment opportunity responsibilities) should act to implement the distinction between proper goals and timetables on the one hand, and impermissible quotas and preferences on the other, with due regard for the merit selection principles which many states and local governments are obliged to follow, and which some state and local government employers do not properly follow with regard to equal employment opportunities.

All of the agencies agree that there is no conflict between a true merit selection system and equal employment opportunities laws—because each requires nondiscrimination in selection, hiring, promotion, transfer and layoff, and each requires that such decisions be based upon the person's ability and merit, not on the basis of race, color, national origin, religion or sex. The problems arise when an employer pays only lip service to the concept of merit selection, but in fact follows employment practices which discriminate on the basis of race, color, etc.

All of the agencies recognize that goals and timetables are appropriate as a device to help measure progress in remedying discrimination. All agencies recognize that where an individual person has been found to be the victim of an unlawful employment practice as defined in the Act he or she should be given "priority consideration" for the next expected vacancy, regardles of his relative "ability ranking" at the time the new hire is made—this because absent the act of discrimination, he or she would be on the job. All agencies also recognize that it may be appropriate for a court to order an employer to make a

good faith, nondiscriminatory effort to meet goals and timetables where a pattern of discriminatory employment practices has been found.

All agencies recognize the basic distinctions between permissible goals on the one hand and impermissible quotas on the other. Quota systems in the past have been used in other contexts as a quantified limitation, the purpose of which is exclusion, but this is not its sole definition. A quota system, applied in the employment context, would impose a fixed number or percentage which must be attained, or which cannot be exceeded; the crucial consideration would be whether the mandatory numbers of persons have been hired or promoted. Under such a quota system, that number would be fixed to reflect the population in the area, or some other numerical base, regardless of the number of potential applicants who meet necessary qualifications. If the employer failed, he would be subject to sanction. It would be no defense that the quota may have been unrealistic to start with, that he had insufficient vacancies, or that there were not enough qualified applicants, although he tried in good faith to obtain them through appropriate recruitment methods.

Any system which requires that considerations of relative abilities and qualifications be subordinated to considerations of race, religion, sex or national origin in determining who is to be hired, promoted, etc., in order to achieve a certain numerical position has the attributes of a quota system which is deemed to be impermissible under the standards set forth herein.

A goal, on the other hand, is a numerical objective, fixed realistically in terms of the number of vacancies expected, and the number of qualified applicants avail-

able in the relevant job market. Thus, if through no fault of the employer, he has fewer vacancies than expected, he is not subject to sanction, because he is not expected to displace existing employees or to hire unneeded employees to meet his goal. Similarly, if he has demonstrated every good faith effort to include persons from the group which was the object of discrimination into the group being considered for selection, but has been unable to do so in sufficient numbers to meet his goal, he is not subject to sanction.

Under a system of goals, therefore, an employer is never required to hire a person who does not have qualifications needed to perform the job successfully; and an employer is never required to hire such an unqualified person in preference to another applicant who is qualified; nor is an employer required to hire a less qualified person in preference to a better qualified person, provided that the qualifications used to make such relative judgments realistically measure the person's ability to do the job in question, or other jobs to which he is likely to progress. The terms "less qualified" and "better qualified" as used in this memorandum are not intended to distinguish among persons who are substantially equally well qualified in terms of being able to perform the job successfully. Unlike quotas, therefore, which may call for a preference for the unqualified over the qualified, or of the less qualified over the better qualified to meet the numerical requirement, a goal recognizes that persons are to be judged on individual ability, and therefore is consistent with the principles of merit hiring.

In some job classifications, in which the newly hired person learns on the job the skills required, and where there is no extensive education, experience or training required as prerequisite to successful job performance, many applicants will possess the necessary basic qualifications to perform the job. While determinations of relative ability should be made to accord with required merit principles, where there has been a history of unlawful discrimination, if goals are set on the basis of expected vacancies and anticipated availability of skills in the market place, an employer should be expected to meet the goals if there is an adequate pool of qualified applicants from the discriminated against group from which to make selections; and if the employer does not meet the goal, he has the obligation to justify his failure.

Similarly, where an employer has purported to follow merit principles, but has utilized selection procedures which are in fact discriminatory and have not been shown validly to measure or to predict job success (see, *Griggs v. Duke Power Co.*, [3 EPD ¶ 8137] 401 U.S. 424), there frequently is no valid basis presently available for ranking applicants objectively in order of the probabilities of success on the job. In such circumstances, all agencies agree that a public employer will be expected to devise or borrow a selection procedure which is as objective as possible and is likely to be proved valid and is not likely to perpetuate the effects of past discrimination; and to meet those goals which have been set on a vacancy basis. The selection procedure should be as objective and job related as possible, but until it has been shown to be valid for that specific purpose, it must be recognized that rank ordering does not necessarily indicate who will in fact do better on the job. Accordingly, if the goal is not being met because of the interim selection procedure, the procedure and other

aspects of the affirmative action program may have to be revised. All agencies agree that use of such goals does not and should not require an employer to select on the basis of race, national origin, or sex a less qualified person over a person who is better qualified by objective and valid procedures. Where such procedures are not being utilized, valid selection procedures to determine who will in fact do better on the job should be established as soon as feasible in accordance with the principles set forth in paragraphs 2 and 5 below.

With the foregoing in mind, the agencies agree that the following principles should be followed:

1. Whenever it is appropriate to establish goals, the goals and timetables should take into account anticipated vacancies and the availability of skills in the market place from which employees should be drawn. In addition, where unlawful discrimination by the employer has been established, the corrective action program, including the recruiting and advertising obligations and the short range hiring goals, should also take into account the need to correct the present effects of the employer's past discriminatory practices.

2. The goals should be reached through such recruiting and advertising efforts as are necessary and appropriate, and the selection of persons only from amongst those who are qualified. A goal, unlike a quota, does not require the hiring of persons when there are no vacancies, nor does it require the hiring of a person who is less likely to do well on the job ("less qualified") over a person more likely to do well on the job ("better qualified"), under valid selection procedures. When the standards for determining qualifications are invalid and not predictive of job success, valid selection procedures should be developed as soon as feasible. Where an employer has followed exclusionary practices, however, and has made little or no progress in eliminating the effects of its past discriminatory practices, the selection standards it proposes to utilize in determining who is "qualified," or "better qualified" will be examined with care to assure that they are in fact valid for such purposes and do not perpetuate the effects of the employer's past discrimination (i.e., which have as little discriminatory impact as possible under the circumstances) and do not raise artificial or unnecessary barriers.

3. In no event does a goal require that an employer must in all circumstances hire a specified number of persons, because such a goal would in fact be a quota. It is, however, appropriate to ask a court to impose goals and timetables, including hiring goals, on an employer who has engaged in racial or ethnic exclusion, or other unconstitutional or unlawful employment practices. The goals we seek in court, like those accepted voluntarily by employers, are subject to the limitations set forth in this memorandum.

4. As a general matter, relief should be provided to those persons who have been adversely affected as a consequence of the employer's unlawfully discriminatory practices. All agencies will continue to seek insofar as feasible to have persons who can show that they were injured by such practices restored to the position they would be in but for the unlawful conduct. In addition, all agencies will seek to have those persons who have been excluded from consideration or employment because of such discriminatory practices allowed to compete for future vacancies on

the basis of qualifications and standards no more severe than those utilized by the employer in selecting from the advantaged groups, unless the increased standards are required by business necessity. Such relief will be sought to prevent the erection of unnecessary barriers to equal employment opportunities. Such relief will not preclude a public employer from adopting merit standards; nor will it preclude such an employer who has previously used invalid selection standards or procedures from developing and using valid, job related selection standards and procedures as contemplated by paragraphs 2 and 5 of this memorandum.

5. Where an employer has utilized a selection device which is itself unlawfully discriminatory, relief should be sought to prohibit the use of that and similar selection devices (i.e., devices which measure the same kinds of things) together with the development of an appropriate affirmative action plan which may include goals and timetables in accord with the principles set forth in this paper. In addition, we will ask the courts to permit the employer to select (or develop) and validate a job related selection procedure which will facilitate selections on the basis of relative ability to do the job. The speed with which such new selection devices can and should be developed and validated depends upon the facts and circumstances of each case.

Agencies with equal employment opportunity responsibilities should take actions in accordance with the principles outlined in this memorandum in order to assure a coordinated approach within the Executive Branch to eliminate discriminatory employment practices and their consequences.

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