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BEYOND *BAKKE*: THE CONSTITUTION AND REDRESSING THE SOCIAL HISTORY OF RACISM

*Robert Allen Sedler**

The crucial constitutional issue today in the area of racial equality is the extent to which governmental entities[1] are required or permitted to take action to redress the present consequences of the social history of racism in this nation.[2] Full redress for this history of racism would require equalization of the societal position of blacks as a group[3] with that of whites as a group. It would mean ending white supremacy in all of its manifestations and, in the words of Justice Marshall, achieving "genuine equality"[4] between blacks and whites in American society.

The effort to achieve genuine racial equality must reconcile blacks' and whites' conflicting perceptions of the relationship between

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[1] "Governmental entities" refers to agencies of federal, state, and local governments and to the courts.

[2] *See* pp. 136–39 *infra*.

[3] Although this Article focuses on blacks, the social history of racism has also had an adverse impact on other racial-ethnic groups, such as Hispanics and Native Americans, who, like blacks, have been subject to discrimination and victimization because the dominant majority has perceived them as "nonwhite." *See, e.g.*, Keyes v. School Dist. No. 1, 413 U.S. 189, 197–98 (1973) (educational opportunities of Hispanics). For constitutional purposes, the legislature should be able to conclude that the needs and values of governmental actions designed to provide equality for blacks are applicable to these groups as well. *See* Regents of the Univ. of Cal. v. Bakke, 98 S. Ct. 2733, 2784 n.35 (1978) (Brennan, White, Marshall & Blackmun, JJ.). It should be noted that Justice Powell's discussion in *Bakke* of the difficulty in determining which groups should receive "preference," *id.* at 2751–53 (Powell, J.), was in the context of holding that the use of race-conscious criteria favoring minorities was subject to "strict scrutiny"; Justice Powell did not indicate that the legislature was precluded from assimilating other "nonwhite" groups to blacks for purposes involving the use of race-conscious criteria. More detailed discussion of the use of racial criteria to favor other racial-ethnic groups, however, is beyond the scope of this Article.

[4] 98 S. Ct. at 2804 (Marshall, J.).

past discrimination and its present effects. If the public opinion polls are to be believed, a majority of white Americans oppose discrimination against black Americans and in this sense favor "racial equality." But white Americans also insist that they are not responsible for what happened in the past and that they should not be expected to make sacrifices in order to "compensate" blacks for past societal discrimination.[5] Herein, of course, lies the dilemma. If action is to be taken to overcome the present consequences of this nation's history of racism, such action will benefit blacks as a group at the expense of individual whites who will suffer the direct impact of such action.[6]

This Article will not address the moral aspects of the dilemma, although a persuasive argument may be made that the moral equities weigh in favor of an effort to eliminate the consequences of racism.[7] Rather, this Article will approach the question from a constitutional perspective,[8] and will maintain that the Constitution permits, and in some circumstances requires, governmental entities to take action to

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[5] *See* Release, American Institute of Public Opinion, June 1, 1977 (Gallup Poll).

[6] It will not "illegitimately" benefit blacks as a group at the expense of whites as a group, since whites as a group can have no legitimate interest in maintaining their present position of societal dominance. Loving v. Virginia, 388 U.S. 1, 11 (1967).

[7] *See* Regents of the Univ. of Cal. v. Bakke, 98 S. Ct. 2733, 2802–03 (1978) (Marshall, J.).

[8] I do not purport to be taking an "objective" view of the question. I have been much too involved, both as an academic commentator, *see, e.g.*, Sedler, *Racial Preference, Reality and the Constitution:* Bakke v. Board of Regents of the University of California, 17 SANTA CLARA L. REV. 329 (1977) [hereinafter cited as Sedler, *Racial Preference*], and as a lawyer to do so. In the latter capacity I was the principal author of the amicus curiae brief of the Society of American Law Teachers in *Bakke*, urging reversal of the judgment of the California Supreme Court. I have also filed an amicus curiae brief on behalf of New Detroit, Inc., an urban coalition in the Detroit metropolitan area, in the appeal of Detroit Police Officers Ass'n v. Young, 446 F. Supp. 979 (E.D. Mich. 1978), *appeal docketed*, No. 78-1163 (6th Cir. Apr. 25, 1978), a case involving a challenge to the City of Detroit's affirmative action program with respect to police promotions. In addition, I have been an attorney for the plaintiffs in school desegregation cases, *see* Sedler, Book Review, 62 CORNELL L. REV. 645, 645 n.1 (1977), and am currently acting as counsel in school desegregation cases in Atlanta, Georgia, and Akron, Ohio. As to the effect of "adversary involvement" on "academic perspective," *see* Sedler, *Metropolitan Desegregation in the Wake of* Milliken — *On Losing Big Battles and Winning Small Wars: The View Largely from Within*, 1975 WASH. U.L.Q. 535, 537 n.9 [hereinafter cited as Sedler, *Metropolitan Desegregation*].

overcome the present consequences of past discrimination. The emphasis will be on the link between the past history of racism and its present effects, and on the constitutional significance of that link.

The first section of the Article will discuss the causal relationship between the social history of racism and the denial of equal participation for blacks in American society today. The second section will discuss the *Bakke*[9] decision and its implications for the constitutionality of using race-conscious criteria to provide equal participation for blacks. The third section will show that the government may be affirmatively required to take action to overcome the present consequences of past discrimination when the government itself has been implicated in identified prior discrimination. The final section will set forth the Article's central thesis: that the government is constitutionally *permitted* to use race-conscious criteria in an appropriate manner in order to overcome the present consequences of the social history of racism and provide equal participation for blacks in all aspects of American life.

I. OVERCOMING THE CONSEQUENCES OF THE SOCIAL HISTORY OF RACISM: THE NATURE OF THE PROBLEM

The history of racism in America need not be set out at length. It has become saddeningly familiar and was traced fully by Justice Marshall in *Bakke*.[10] It had its genesis in the institution of chattel slavery, and it is a history of inferiority established by law; of rampant discrimination in employment; of ghettoization; of segregated and tangibly inadequate schooling; and of the denial of access to societal power. Racial discrimination was often commanded by government at all levels, and when it was not commanded, it was tolerated and encouraged. Private entities and individuals added their significant contribution to the social pattern of racism. Indeed, only in the last two decades has any real progress been made in halting much of the overt discrimination practiced against blacks in America.

An extended analysis of the causal relationship between this history of overt societal racism and blacks' current inequality is beyond the scope of this Article. It is apparent, however, that the nation's

[9] Regents of the Univ. of Cal. v. Bakke, 98 S. Ct. 2733 (1978).

[10] *Id.* at 2798–2803 (Marshall, J.).

purposeful and systematic relegation of the entire black race to an inferior status in American society had many characteristics which have perpetuated racial inequality to the present day, when overt discrimination itself is much reduced. For example, their family's relegation to a low economic status has a severe detrimental impact on the educational attainments of children.[11] Low educational attainment in turn has a severe detrimental impact, when the children become adults, on their economic status, social mobility, political involvement, and other indicia of social wellbeing.[12] Indeed, even if this negative cycle could be eliminated, and all overt discrimination eliminated as well, the unequal status of blacks in American society would nonetheless continue for many years. An examination of "elite" professions such as law and medicine, where blacks are still grossly underrepresented,[13] illustrates the point. If law and medical schools were to begin admitting black applicants in direct proportion to their numbers in the general population, there would be only a slight yearly increase in the overall percentage of blacks within the professions as the racially representative classes began to graduate. Complete equality would not be attained until virtually all of the current members of the profession, disproportionate numbers of whom are white, had retired. It is estimated that it would take at least seven generations to achieve complete equality in the occupational distribution of blacks and whites, even if all overt discrimination in the job market were eliminated.[14] To the extent that discrimination continues, and is not redressed, true equality can never be achieved.

Given the self-perpetuating nature of societal inferiority, it is not surprising that fundamental inequalities between blacks and whites still permeate virtually every aspect of our society. Blacks continue to lag significantly behind whites in the level of education attained.[15] When

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[11] *See, e.g.*, C. JENCKS, INEQUALITY 138–41 (1972).

[12] *See, e.g.*, J. GUTHRIE, G. KLEINDORFER, H. LEVIN, & R. STOUT, SCHOOLS AND INEQUALITY 91–108 (1971) [hereinafter cited as SCHOOLS AND INEQUALITY].

[13] *See* p. 138 *infra*.

[14] Lieberson & Fuguitt, *Negro-White Occupational Differences in the Absence of Discrimination*, 73 AM. J. SOC. 188, 193 (1967).

[15] In 1976, the median number of school years completed by black males was 10.8, compared to 12.5 for white males. The median for black women over age 25 was 11.4 years, compared to 12.4 for white women. (All figures are for people over age

the quality of education received by blacks is considered, the gap grows even wider. One indication that blacks in this country receive an education substantially inferior to that of whites is found in recent studies which show that in urban areas, where the great majority of American blacks now live,[16] there is marked discrimination in educational expenditures between low-income, predominantly nonwhite neighborhoods and wealthier, predominantly white areas, even within the same school districts.[17] Similarly, the average levels of teachers' experience, salary, and verbal skills in urban schools decrease as neighborhood income levels and the percentage of white students decrease.[18] While the relative importance of educational expenditures and even of teacher experience has been disputed,[19] it is nonetheless clear that the level of knowledge actually imparted to black school children by our educational system is far below that which white children attain.[20]

25.) U.S. BUREAU OF THE CENSUS, DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 136 (1977) (table 217) [hereinafter cited as STATISTICAL ABSTRACT]. A black American in 1976 was only 32% as likely to graduate from college and only 85% as likely to graduate from high school as his or her white counterpart. U.S. COMM'N ON CIVIL RIGHTS, SOCIAL INDICATORS OF EQUALITY FOR MINORITIES AND WOMEN 12–14 (1978) (tables 2.3 and 2.4) [hereinafter cited as SOCIAL INDICATORS].

[16] In 1970, 74.3% of blacks lived in standard metropolitan statistical areas, as defined by the Bureau of the Census. And 58.2% lived in the central cities. STATISTICAL ABSTRACT, *supra* note 15, at 16 (table 15).

[17] SCHOOLS AND INEQUALITY, *supra* note 12, at 34–36; J. OWEN, SCHOOL INEQUALITY AND THE WELFARE STATE 18–21 (1974). The latter study found that in a typical city, the educational expenditure per child increased by $18 for every $1000 increase in average per family neighborhood income. *Id.*

[18] J. OWEN, *supra* note 17, at 20–22.

[19] *Compare* J. COLEMAN, EQUALITY OF EDUCATIONAL OPPORTUNITY 290–330 (1966) *and* C. JENCKS, *supra* note 11, at 146–53 *with* SCHOOLS AND INEQUALITY, *supra* note 12, at 57–90.

[20] A recent assessment under the United States Office of Education's Right to Read program found that only 58% of black seventeen-year-olds were functionally literate, compared to 87% of white seventeen-year-olds. U.S. CONGRESSIONAL BUDGET OFFICE, INEQUALITIES IN THE EDUCATIONAL EXPERIENCES OF BLACK AND WHITE AMERICANS 8–9 (1977). By the time black males reach high school, they are more than twice as likely to be two or more grades behind in school than are their majority peers. SOCIAL INDICATORS, *supra* note 15, at 6 (table 2.1). The disparity in educational quality carries over into higher education, where blacks are more likely

The unequal position of blacks in American society is reflected in the area of employment as well. To begin with, blacks suffer substantially higher-than-average unemployment rates.[21] In addition, a disproportionate number of blacks who are employed are found in low-paying, low-prestige[22] occupational categories; working blacks are underrepresented in the more "elite" jobs.[23] Even within the "blue

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than whites to attend poorly rated colleges, according to freshman aptitude scores. U.S. COMM'N ON CIVIL RIGHTS, TWENTY YEARS AFTER BROWN: EQUALITY OF EDUCATIONAL OPPORTUNITY 79 (1975) (second of a four-part series). Blacks are more likely to enroll in public and junior colleges than are whites, and two out of five black college students attend all-black institutions. *Id.*

[21] In 1976 the unemployment rate for black males stood at 15.9%, compared to 5.9% for whites. The rates for women were 18.9% and 8.7% respectively. SOCIAL INDICATORS, *supra* note 15, at 30 (table 3.1). The inequality was even greater for black teenagers, with 47.8% of black males and 51.3% of black females in the sixteen-to-nineteen-year-old range unemployed, compared to 5.9% and 19.2% for whites. *Id.* at 32 (table 3.2).

The figures are based on Bureau of the Census data, and indicate the percentage of the population who are fifteen years of age or older, out of work, and actively seeking work. They exclude "discouraged workers," those individuals who have worked in the past but who, due to a perceived lack of employment opportunity, were not actively seeking employment when the data were collected. A disproportionate number of such individuals are members of minority groups, and hence the actual gap in employment between blacks and whites is larger than the statistics indicate. *Id.* at 28–29. *See also,* Flaim, *Discouraged Workers and Changes in Unemployment,* MONTHLY LABOR REVIEW, Mar. 1973, at 12.

[22] The United States Commission on Civil Rights recently surveyed the relative "prestige values" of the occupations of white and nonwhite workers, employing a study that devised "prestige scores" for each occupational category used by the Bureau of the Census. SOCIAL INDICATORS, *supra* note 15, at 34. It found that the prestige value of the average black male worker was only 77% of that of his white counterpart. *Id.* at 36 (table 3.4).

[23] As of 1970, black men constituted only 1.2% of our nation's male lawyers and judges, 2.0% of its male physicians and dentists, 2.8% of its male scientists, and 1.7% of its accountants. Black women constituted only 7.4% of our nation's female scientists and only 4.3% of its female accountants. The Bureau of the Census did not compile figures for female lawyers, judges, physicians, or dentists. In 1970, blacks made up over 11% of the national population. STATISTICAL ABSTRACT, *supra* note 15, at 407–08 (table 662), 31 (table 35).

In 1976, 34.7% of the nonwhite work force was employed in all "white collar" occupations, compared to 51.8% of white workers. Conversely, 25.4% of nonwhite workers were employed in "service" occupations, including household help, while only 12.3% of white workers were so employed. *Id.* at 407 (table 661).

collar'' category, where the distribution of blacks and whites is more equal,[24] blacks are disproportionately concentrated in the least desirable occupations.[25]

High unemployment rates and concentration in low-income, low-prestige occupations have had their predictable impact on overall black income levels. A much greater percentage of black families live below the federally defined poverty level, and a black family's median income is barely more than half that of a white family.[26] Furthermore, blacks enjoy significantly less upward mobility in income than do whites.[27]

It is painfully obvious that a quarter of a century after *Brown*,[28] the consequences of our history of racism are still with us, as measured by the fundamental criteria of education, employment, and income. It remains to be considered how, consistent with the Constitution, this persistent inequality may best be overcome.

Until very recently, the struggle for racial equality concentrated almost entirely on attacking the existing structure of societal racism, in order to remove the structural impediments that denied equality to racial minorities.[29] From a legal standpoint, this struggle has been

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[24] "Blue collar" categories employed 37.6% of black workers and 32.6% of white workers in 1976. STATISTICAL ABSTRACT, *supra* note 15, at 407 (table 661).

[25] For instance, 8.3% of all nonwhite workers were employed as nonfarm laborers, compared to 4.5% of all white workers. The crafts employed 8.7% of all nonwhite workers but 13.4% of all white workers. *Id.*

[26] In 1976, 28.2% of all blacks lived in families whose income was below the poverty level, compared to 7.5% of whites. STATISTICAL ABSTRACT, *supra* note 15, at 454 (table 735). The median income for black families was only 59% that of white families, *id.* at 445 (table 717), and the disparity in median household per capita income was even greater (as of 1975), with blacks earning only 52% as much as whites. SOCIAL INDICATORS, *supra* note 15, at 50 (table 4.2). ("Household per capita income" is an individual household's income divided by the number of household members. *Id.* at 52.)

[27] The average earnings increment by age for black males is only 49% of that for white males. *Id.* at 58 (table 4.4).

[28] Brown v. Board of Educ., 347 U.S. 483 (1954).

[29] As Justice Powell noted in *Bakke*, at the time of the enactment of the Civil Rights Act of 1964, what has now come to be called "affirmative action" was unknown: "There simply was no reason for Congress to consider the validity of hypothetical preferences that might be accorded minority citizens; the legislators were dealing with the real and pressing problem of how to guarantee those citizens equal treatment." 98 S. Ct. at 2746 (Powell, J.).

largely successful.[30] The Constitution has now been interpreted to prohibit state-imposed segregation and other traditional forms of discrimination against racial minorities.[31] Federal laws prohibit racial discrimination in voting, employment, public accommodations and housing, and similar protection is afforded by the laws of many states. This means that there is now a system of prevention: the law prohibits present discrimination against racial minorities and provides remedies for such discrimination.[32] But this system of prevention does not purport to deal directly with the present effects of past discrimination.[33] Moreover, because the effects of past discrimination are so pervasive, the system of prevention will do relatively little to alter blacks' societally disadvantaged position.

If the removal of structural barriers to equality alone could bring about equal participation in the benefits of American society, the societal position of blacks should have improved significantly during the last decade. But such has not been the case; they remain in a disadvantaged position.[34] Just as a physician must not only arrest a disease and

[30] This does not mean that overt discrimination against blacks does not persist. One measure of blacks' continuing economic disadvantage attributable solely to race appears in the result of a recent comparison of earnings of minority and white workers, conducted by the United States Commission on Civil Rights. The Commission isolated race as the determinative factor by adjusting the average earnings levels by group in order to compensate for group differences in education, age, occupational prestige, hours worked, and income of state of residence. SOCIAL INDICATORS, *supra* note 15, at 53–56. The Commission found that an average black male worker earns only 85% as much as a white worker who is identical in every respect except race. *Id.* at 54 (table 4.3).

[31] For a discussion and review of cases, see Sedler, *Racial Preference, supra* note 8, at 370–72.

[32] The same protection against racial discrimination is afforded to whites as well. See the discussion in *Bakke*, 98 S. Ct. at 2749–53 (Powell, J.). However, because the social history of racism has been one of discrimination against blacks, remedying the consequences of that social history may have an adverse impact upon the interests of individual whites. As the subsequent analysis will demonstrate, it does not for that reason constitute invidious racial discrimination. *See* pp. 164–66 *infra*.

[33] *See* International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977).

[34] The Civil Rights Commission found that from 1960 to 1976, blacks as a group had made some gains in absolute terms according to a number of indicators of social wellbeing. Nonetheless, there was little improvement in blacks' societal position vis-à-vis whites. SOCIAL INDICATORS, *supra* note 15, at 89–91. As the Commission stated, "majority males have continued to enjoy broader opportunities and to reap

prevent its recurrence but must also prescribe treatment for its lingering effects, our society must now deal with the lingering effects of its legacy of racism. If the Constitution and laws of this nation do no more than embody a system of prevention, we will not see an end in the foreseeable future to what one study has called "two societies, black and white, separate and unequal."[35] For this reason the crucial constitutional issue of racial equality today revolves around governmental action to overcome the lasting effects of racism in the United States.

II. THE *BAKKE* DECISION

In *Bakke* only five members of the Court reached the issue of the constitutionality of remedying the effects of this country's history of racism. The University's efforts to deal with one of these effects — the serious shortage of minority physicians, and the absence of minority students in the University's medical school — involved the use of race-conscious criteria in medical school admissions. As a general proposition, the permissibility of the government's use of race-conscious criteria depends on whether, in the circumstances presented, it amounts to invidious racial discrimination; for it is invidious racial discrimination that is proscribed by the Constitution.[36] To determine whether the use of race-conscious criteria in the University's admissions process amounted to invidious racial discrimination, Justice Powell subjected the Davis program to review under a standard purportedly different from that applied by Justices Brennan, White, Marshall, and Blackmun (the Brennan group).[37] Both the Powell and Brennan group opinions rejected the University's argument that so-called "benign discrimination"[38] need pass muster only under the

disproportionate benefits while women and minority males have in many instances fallen even further behind." *Id.* at 91.

[35] REPORT OF THE NATIONAL ADVISORY COMM'N ON CIVIL DISORDERS 1 (1968).

[36] *See* Sedler, *Racial Preference, supra* note 8, at 368–72.

[37] Justices Brennan, White, Marshall, and Blackmun are joint authors of the opinion. 98 S. Ct. at 2766 (Brennan, White, Marshall & Blackmun, JJ.).

[38] Benign discrimination, from the University's perspective, was any action discriminating in favor of those who, unlike white males, require "extraordinary protection from the majoritarian political process." *Id.* at 2748 (Powell, J.). *See also* Sedler, *Racial Preference, supra* note 8, at 362–63 (discrimination by white majority against itself is constitutionally irrelevant).

purportedly less restrictive "rational relationship" test. The Brennan group instead asserted that "benign" racial classifications should be tested against the intermediate yet still "searching" standard that the Court has applied in cases of discrimination on the basis of gender. By that standard, the classification must serve an "important and articulated" purpose, and must be "substantially related" to achieving that purpose.[39]

Justice Powell, on the other hand, argued that any classification based on race was inherently suspect and was therefore subject to "the most exacting judicial examination."[40] He accordingly applied his formulation of the "strict scrutiny" standard to the University's claims: a state "must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the [race-conscious] classification is 'necessary . . . to the accomplishment' of its purpose or the safe-guarding of its interest."[41]

The Justices' seeming disagreement over the appropriate standard of review reflects a more significant disagreement over which governmental interests are of sufficient importance to justify the use of race-conscious criteria. In any event, we will use Justice Powell's test for permissible government action, on the assumption that any use of race-conscious criteria that Justice Powell would sustain, the Brennan group would sustain as well.

Under Justice Powell's formulation, invidious (and therefore unconstitutional) racial discrimination is any use of race-conscious criteria that is not necessary to the accomplishment of a valid and substantial governmental interest.[42] This principle is illustrated by the cases in which the Court has invalidated the use of race-conscious criteria directed against racial minorities.[43] The use of race-conscious criteria directed against whites is equally unconstitutional where it is not cru-

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[39] 98 S. Ct. at 2784–85 (Brennan, White, Marshall & Blackmun, JJ.).

[40] *Id.* at 2749 (Powell, J.).

[41] *Id.* at 2756–57 (citations omitted).

[42] As the Supreme Court has stated, in order for the use of "racial classifications" to be sustained, it "must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate." Loving v. Virginia, 388 U.S. 1, 11 (1967).

[43] For a discussion and review of cases, see Sedler, *Racial Preference*, *supra* note 8, at 370–72.

cial to the advancement of the requisite governmental interest. The state, for example, could no more systematically exclude whites from serving on juries[44] or bar them from using public facilities than it could exclude or bar blacks.[45] This being so, it is submitted that the concept of "reverse" or "benign" discrimination, in the sense that such concepts distinguish between the use of race-conscious criteria directed against racial minorities and the use of similar criteria directed against whites, is analytically unsound. All use of race-conscious criteria must be subjected to "strict scrutiny,"[46] and all racial discrimination found to be invidious is unconstitutional whenever practiced by the state, whether at the instance of whites or at the instance of blacks[47] and whether the victims of such discrimination are blacks or whites or both.[48]

The question then is whether the use of race-conscious criteria in any given set of circumstances advances a valid and substantial governmental interest by what the Court finds to be appropriate means.[49] It is this question that divided Justice Powell and the Brennan group in

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[44] *See* Strauder v. West Virginia, 100 U.S. 303, 308 (1880).

[45] *Cf.* New Orleans City Park Improvement Ass'n v. Detiege, 252 F.2d 122 (5th Cir.), *aff'd per curiam*, 358 U.S. 54 (1958) (city may not deny blacks equal access to city park facilities solely on grounds of race).

[46] This is true for both the Powell and the Brennan group formulations of strict scrutiny.

[47] *Cf.* Castaneda v. Partida, 430 U.S. 482 (1977) (discrimination by Mexican-Americans in the "governing majority" against Mexican-Americans is tested under the same standard as discrimination by whites in the "governing majority").

[48] *See* 98 S. Ct. at 2749–53 (Powell, J.) (discussion of the same point in the context of "strict scrutiny").

[49] In *Bakke*, Justice Powell stated that the use of race-conscious criteria had to be "necessary" to the accomplishment of a valid and substantial governmental interest. *See, e.g., id.* at 2757. At another point he referred to a "burden . . . precisely tailored to serve a compelling governmental interest." *Id.* at 2753. It is clear that Justice Powell is insisting on very careful scrutiny of the means-ends fit whenever the use of race-conscious criteria is involved, and he applied such scrutiny in *Bakke*. *Id.* at 2759–64. Nonetheless, as indicated by his approval of the "Harvard method," Justice Powell also made it clear that race-conscious criteria may be used to advance some racial objectives, such as diversity within a university's student body. More significant, perhaps, he indicated approval of quota-type remedies to redress identified discrimination in the employment area. *Id.* at 2754–55. As the Fifth Circuit recently observed in Morrow v. Dillard, 580 F.2d 1284, 1294 (5th Cir. 1978), when it upheld the imposition of such a remedy: "The *Bakke* decision should not be viewed as a

Bakke, in the context of admission to a publicly supported university. The University argued that its minority admissions program was designed to overcome a present effect of past racism, the shortage of minority physicians, and thus that it advanced a valid and substantial governmental interest. Justice Powell posed the question in terms of whether the University was justified in using race-conscious criteria for the purpose of "helping certain groups whom the faculty of the Davis Medical School perceived as the victims of 'societal discrimination,'"[50] and concluded that it was not. The Brennan group, on the other hand, related the shortage of minority physicians to the social history of racism[51] and concluded that

> Davis' articulated purpose of remedying the effects of past societal discrimination is, under our cases, sufficiently important to justify the use of race-conscious admissions programs where there is a sound basis for concluding that minority underrepresentation is substantial and chronic, and that the handicap of past discrimination is impeding access of minorities to the medical school.[52]

The four Justices who subscribed to the Stevens opinion and decided the case on Title VI grounds did not reach this question.

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contrary decision of law applicable to the issue of the constitutionality of affirmative hiring relief, but as a decision reaffirming the equitable power of the federal courts to remedy the effects of unconstitutional acts through race-conscious means." The availability of alternative and "less drastic" means to advance the racial objective is, of course, relevant in determining whether the particular means at issue is "necessary." Also relevant is the reasonableness of the racial preference and the burden that it places on those who are adversely affected by it. *See, e.g.*, Carter v. Gallagher, 452 F.2d 315, 330 (8th Cir.), *cert. denied*, 406 U.S. 950 (1972), one of the cases cited by Justice Powell in *Bakke*. There is no magic, however, in the use of words such as "necessary," "precisely tailored," "less drastic means," and the like. There will be careful scrutiny of the means-ends fit, and the court must conclude that the particular means used are *appropriate* to achieve the racial objective in the circumstances presented. The concept of appropriate means therefore seems to be the most helpful in expressing the standard by which a court evaluates the means-ends fit in the context of race-conscious criteria.

[50] 98 S. Ct. at 2759 (Powell, J.).

[51] *See* Sedler, *Racial Preference*, *supra* note 8, at 355–61.

[52] 98 S. Ct. at 2785 (Brennan, White, Marshall & Blackmun, JJ.).

In light of the division of Justices in *Bakke*, it cannot be said that the Court has yet resolved whether remedying the consequences of societal racism by providing for equal participation by blacks in all aspects of American life advances a valid and substantial governmental interest. If the position of the Brennan group had commanded a majority, *Bakke* would have been a sweeping decision and would have gone a long way to support the thesis set forth in this Article. If governmental action designed to overcome the present consequences of the social history of racism, as reflected in minority underrepresentation in the medical profession, had been found to advance a valid and substantial governmental interest, the same finding presumably would apply to actions taken to increase minority participation in all aspects of American life in which they have been denied such participation.

As it now stands, *Bakke* has resolved very little. The point on which Justice Powell and the Brennan group implicitly agreed, that maintaining educational diversity in a university student body advanced a valid and substantial governmental interest,[53] does not in one sense go much beyond the Court's earlier holding that public school systems could use race-conscious criteria in student assignment for the purposes of integration.[54] The Court has yet to render a definitive holding on the question whether the government can employ race-conscious criteria to advance the equal-participation objective. When the question arises again, one or more of the Justices who joined the Stevens opinion may adopt the position of the Brennan group on this crucial issue of racial equality.[55] It is the unresolved issue of *Bakke*.

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[53] *Id.* at 2760–61 (Powell, J.), 2767 n.1 (Brennan, White, Marshall & Blackmun, JJ.). In the view of the Brennan group, however, "the use of race to achieve an integrated student body is necessitated by the lingering effects of past discrimination." *Id.* at 2767 n.1. Justice Powell, on the other hand, saw the University's interest as rooted in the first amendment principle of academic freedom. It is precisely because Justice Powell saw the University's interest in light of its own particularized function, rather than in light of broader societal needs, that he found the use of rigid racial quotas to be impermissible; he considered them to be counterproductive to advancing educational diversity. As he put it: "Petitioner's special admissions program, focused *solely* on ethnic diversity, would hinder rather than further attainment of genuine diversity." *Id.* at 2761 (Powell, J.) (emphasis in original) (footnote omitted). It was in this context that he held up Harvard's approach as a model. *Id.* at 2762–63.

[54] Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971). In another sense, *Bakke* goes significantly farther. *See* pp. 158–59 *infra*.

[55] It may be significant in this regard that in United Jewish Organizations, Inc. v. Carey, 430 U.S. 144, 167 (1977), both Justice Stevens and Justice Rehnquist were of

III. REMEDYING THE CONSEQUENCES OF IDENTIFIED DISCRIMINATION

Incorporating the doctrine of prior cases, *Bakke* does make it clear that the use of race-conscious criteria to redress the consequences of identified past discrimination by the governmental agency undertaking such action advances a valid and substantial governmental interest. As Justice Powell put it, "The State certainly has a legitimate interest in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination."[56] Indeed, the governmental agency that has practiced prior discrimination may be affirmatively required to undertake action to eliminate the effects of its past discriminatory conduct.[57] To the extent that "identified" discrimination is a subset of this nation's social history of racism, the Constitution requires the government to act to overcome its present consequences.

Justice Powell illustrates the requirement that government entities remedy the effects of identified discrimination by citing the school desegregation cases. In those cases, whether involving school districts in states where school desegregation was required by state law prior to *Brown*[58] or school districts in states where it was not, the courts' focus is on the relationship between past governmental action and the present racially segregated character of the school system. If the past governmental actions, whether mandated by state law or undertaken with segregative intent by the school board, have resulted in a present condition of racial segregation, then the segregation is de jure rather than de facto,[59] regardless of how long ago the actions occurred. As the Court has stated: "If the actions of the school authorities were to any degree motivated by segregative intent and the segregation resulting from those actions continues to exist, the fact of remoteness in time certainly does not make these actions any less 'intentional.'"[60]

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the view that the government could use race-conscious criteria in legislative districting in order to ensure "a fair allocation of political power between white and non-white voters." *See* pp. 159–60 *infra*.

[56] 98 S. Ct. at 2757 (Powell, J.).

[57] *See* Green v. County School Bd., 391 U.S. 430, 437–38 (1968). *See also* 98 S. Ct. at 2785–86 (Brennan, White, Marshall & Blackmun, JJ.); Keyes v. School Dist. No. 1, 413 U.S. 189, 200 n.11 (1973).

[58] Brown v. Board of Educ., 347 U.S. 483 (1954).

[59] Keyes v. School Dist. No. 1, 413 U.S. 189, 205–06 (1973).

[60] *Id.* at 210–11. In desegregation cases involving school districts in states where

The problem of overcoming the continuing effects of identified discrimination also arises in the employment discrimination cases. Where an employer, private or public, has been found to have engaged in past racial discrimination in hiring or promotions,[61] courts can order an affirmative hiring or promotional remedy by which the employer must hire or promote a specified proportion of black workers before white workers who otherwise might be preferred.[62]

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segregation was required by state law prior to *Brown*, the courts look to the continued existence and racial composition of schools antedating *Brown*. If a substantial number of pre-*Brown* schools have retained their pre-*Brown* racial composition, the system is considered still to be practicing de jure segregation. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971). Since the system has thereby retained its dual character, the school board is charged not only with the affirmative duty of desegregating the pre-*Brown* schools, but also with the affirmative duty of preventing other schools from becoming racially identifiable. *See* Newburg Area Council, Inc. v. Board of Educ., 489 F.2d 925, 930–31 (6th Cir. 1973), *vacated and remanded*, 418 U.S. 918 (1974), *reinstated*, 510 F.2d 1358 (6th Cir. 1974), *cert. denied*, 421 U.S. 931 (1975). The entire system must be desegregated, and the desegregation plan must achieve the "greatest possible degree of actual desegregation, taking into account the practicalities of the situation." Davis v. Board of School Comm'rs, 402 U.S. 33, 37 (1971).

In desegregation cases involving school districts in states where segregation was not required by state law prior to *Brown*, the courts look to actions of the school board that were contributory causes of the schools' becoming racially distinct. Once a school has become racially identifiable as a result of intentional segregatory actions of the school board, the board is under an affirmative duty to desegregate that school. *See* Taylor v. Board of Educ., 294 F.2d 36 (2d Cir.), *cert. denied*, 368 U.S. 940 (1961). When the board has practiced intentional racial segregation with respect to a substantial part of the school system, courts will assume that segregation in the remaining parts of the system was also due to the board's intentional segregatory acts. If that presumption cannot be rebutted, systemwide relief is mandated. Keyes v. School Dist. No. 1, 413 U.S. 189 (1973); *cf.* Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406 (1977) (systemwide remedy unjustified absent finding that segregative intent has had systemwide impact).

The Supreme Court will consider the matter of systemwide relief again this Term in Penick v. Columbus Bd. of Educ., 583 F.2d 787 (6th Cir. 1978), *cert. granted*, 47 U.S.L.W. 3463 (U.S. Jan. 8, 1979) (No. 78-610), and in Brinkman v. Gilligan, 583 F.2d 243 (6th Cir. 1978), *cert. granted sub nom.* Dayton Bd. of Educ. v. Brinkman, 47 U.S.L.W. 3463 (U.S. Jan. 8, 1979) (No. 78-627).

[61] Racial discrimination by state governmental employers, of course, violates the fourteenth amendment. Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981 (1976) proscribe racial discrimination by federal, state, and private employers.

[62] *See, e.g.*, United States v. City of Chicago, 549 F.2d 415 (7th Cir.), *cert. denied*, 434 U.S. 875 (1977); Carter v. Gallagher, 452 F.2d 315 (8th Cir.), *cert.*

The rationale for affirmative hiring and promotional remedies cannot be explained solely on the ground that they are designed to put identified victims of past discrimination in their "rightful place."[63] As the Brennan group noted in *Bakke*: "Such relief does not require as a predicate proof that recipients of preferential advancement have been individually discriminated against; it is enough that each recipient is within a general class of persons likely to have been the victims of discrimination."[64] Preferential treatment can also be given to persons who never even applied for a job if they can show that they were deterred from doing so by the employer's known discriminatory practices.[65] What may really be involved here, then, is the interest of blacks as a group in having a "fair share" of an employer's jobs: the affirmative hiring or promotion remedy is imposed at least in part as a means of remedying the present effect of the employer's past discrimination on the employment interests of blacks as a group.[66] The "disa-

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denied, 406 U.S. 950 (1972). The same kind of remedy can be ordered for the benefit of other protected groups, such as ethnic minorities, religious minorities, and women. *See* EEOC v. American Tel. & Tel. Co., 556 F.2d 167 (3d Cir. 1977), *cert. denied*, 98 S. Ct. 3145 (1978).

It should be noted that the adverse impact of such a hiring-and-promotion remedy on white workers is the same as it would be if the employer in question undertook the program voluntarily, without a finding of identified discrimination. *See* 98 S. Ct. at 2786–87 (Brennan, White, Marshall & Blackmun, JJ.); p. 166 *infra*. *See also* Carter v. Gallagher, 452 F.2d 315, 330 (8th Cir.), *cert. denied*, 406 U.S. 950 (1972). *But see* Weber v. Kaiser Aluminum & Chem. Corp., 563 F.2d 216 (5th Cir. 1977) (employer could not, consistent with Title VII, voluntarily undertake an affirmative action program unless supported by governmental finding of past discrimination against minority workers), *cert. granted*, 99 S. Ct. 720 (1978) (Nos. 78–432, 78–435 & 78–436).

[63] *See* Franks v. Bowman Transp. Co., 424 U.S. 747 (1976) (remedy awarding retroactive seniority necessary to put victims of discrimination in "rightful place" as employees).

[64] 98 S. Ct. at 2786 (Brennan, White, Marshall & Blackmun, JJ.); *see* International Bhd. of Teamsters v. United States, 431 U.S. 324, 357–62 (1977).

[65] International Bhd. of Teamsters v. United States, 431 U.S. 324, 362–67 (1977).

[66] The notion that a group as an entity can have rights to distributive and compensatory justice has been the subject of considerable academic debate. Professor Fiss has argued that any group constituting a "perpetual underclass" is entitled to relief *as a group*. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 151 (1976). Professor Van Dyke maintains that the same principles governing individual

bling effects of identified discrimination" in employment are felt by blacks as a group, and pervasive employment discrimination has contributed greatly to the depressed economic situation of blacks in comparison with that of whites. In order to overcome those effects and to give blacks a "fair share" of the employer's jobs, the courts appear to have been fairly lenient in finding a connection between the employer's past discrimination and "injury" to the specific recipients of preferential treatment.[67] Whether they accept the group interest rationale or not, the courts in these cases are "eliminating or ameliorating" the present consequences of past employment discrimination against blacks as a group by imposing affirmative hiring and promotional remedies, and the use of race-conscious criteria advances a valid and substantial governmental interest.

It follows by analogy that if a publicly supported university were found by a court to have practiced past discrimination in determining admission to its professional schools, a court could order an affirmative admissions program involving racial preference. Again, as Justice Powell observed in *Bakke*: "After such findings have been made, the governmental interest in preferring members of the injured groups at the expense of others is substantial, since the legal rights of the victims must be vindicated."[68] As in the employment cases, it would be expected that the courts, in order to overcome the "disabling effects of identified discrimination," would be fairly lenient in finding "vic-

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rights to equality and justice may be extended to a group as an entity. Van Dyke, *Justice as Fairness: For Groups?*, 69 AM. POL. SCI. REV. 607 (1975).

Professor Brest, on the other hand, argues that a theory of group rights is contrary to the underlying political theory of American society: liberalism, or the rights of individuals. Any recognition of group interests has the sole purpose of vindicating the rights of the group's individual members. Brest rejects as morally and philosophically untenable the idea that "an act of discrimination is a wrong to the 'group,' and that . . . redress is appropriately made to any member of the group regardless of his or her personal injuries." Brest, *The Supreme Court, 1975 Term – Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 51 (1976).

Although the debate continues, the author finds the general theory of group interests persuasive. *See* Sedler, *Racial Preference, supra* note 8, at 372-80.

[67] The courts appear to be stricter in finding such a connection when individualized relief, such as retroactive seniority awards and back pay, is sought. *See International Bhd. of Teamsters*, 435 U.S. at 371-74; Mitchell v. Mid-Continent Spring Co., 583 F.2d 275 (6th Cir. 1978).

[68] 98 S. Ct. at 2758 (Powell, J.).

tims" of that discrimination. The burden would be on the university to show that an applicant who had applied and was rejected would not have been admitted in the absence of the discriminatory policy,[69] and it should not be difficult to find "qualified" applicants who were "deterred" from applying because of that policy. A "rightful place" argument might even be made in some cases: If past discrimination were shown, it would not matter whether the beneficiaries of the remedy — that is, the very individuals excluded in the past — continued to be objectively admissible; their admission would be necessary to put them in the place that they would have occupied if the past discrimination had not occurred.

As in the employment cases, however, what would really be involved would be the interest of blacks in having a "fair share" of the available places in the university's professional schools. If the university were found to have practiced discrimination in its admissions policies, it should be required to give black applicants a "fair share" of the currently available places in order to overcome the "disabling effects of identified discrimination" that have contributed to denying blacks access to the professions. In this regard, the "preferred" applicants, like the "preferred" workers who receive the jobs or promotions in the employment situation, should be seen as the representatives of blacks as a group, and it should not matter whether they themselves are "identified" victims of the past discrimination.[70]

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[69] Here the analogy may be extended to the employment discrimination cases. Where the employer is found to be practicing a policy of discrimination, the burden is on the employer to show that a particular job applicant would not have been hired in the absence of that discriminatory policy. Franks v. Bowman Transp. Co., 424 U.S. 747, 772 (1975). In *Bakke*, the California Supreme Court held that the burden was on the University to prove that Bakke would not have been admitted if the special admissions program had not been in effect, and the University did not try to sustain that burden. *See* 98 S. Ct. at 2743-44 (Powell, J.).

[70] Another point of difference between Justice Powell and the Brennan group in *Bakke* was over the question whether the University could make a finding that it had been guilty of past discrimination. *Compare* 98 S. Ct. at 2758-59 (Powell, J.), *with id.* at 2787 n.42 (Brennan, White, Marshall & Blackmun, JJ.) Justice Powell is correct, however, when he notes that the University did not purport to have made such a finding. *Id.* at 2758 (Powell, J.). At trial, the University did not introduce evidence showing that it had practiced racial discrimination during the first two years of its operation, and the lower court had refused to allow parties to intervene for the purpose of introducing such evidence. *See* pp. 166–68 *infra.*

This Article has pointed out three manifestations of the social history of racism which can be traced to identified discrimination and which, as a result, the government has a valid and substantial interest in eliminating: (1) school segregation, (2) employment discrimination,[71] and (3) discrimination in admission to publicly supported universities. This identified discrimination should be seen as causing injury to the interests of blacks as a group, apart from the injury caused to particular victims; and group-oriented remedies, involving the use of race-conscious criteria, should be employed to overcome the existing effects of that discrimination.

Another aspect of the problem of remedying the present consequences of identified past discrimination is the question whether the identified discrimination must have been that of the governmental entity which acts or is required to act to remedy those consequences. There is no logical or policy reason why this should be so, as long as the identified discrimination can be traced to illegal action on the part of a governmental entity. In the area of school segregation, for example, we have seen that the courts have looked to the present consequences of past action by school boards. Suppose, however, that in a state where segregation was not required by law prior to *Brown*, a school board is not shown to have engaged in intentional segregatory acts.[72] It has simply followed geographical attendance zoning without any racially motivated alterations or use of optional zones, but because of patterns of residential racial segregation, there are a large number of racially identifiable schools within the district. Since neither state law nor school board action produced these racially identifiable schools, the condition of school segregation is said to be de facto rather than de jure and thus is not unconstitutional.[73] But suppose also that it can be shown that patterns of residential racial segregation were caused in substantial part by the intentional, racially discriminatory action of

[71] The governmental interest is the same whether agencies of the government are acting to remedy their own prior discrimination, or whether the courts or administrative tribunals are acting to remedy the discrimination of private entities subject to antidiscrimination laws.

[72] *See* Higgins v. Board of Educ., 508 F.2d 779 (6th Cir. 1974).

[73] *See, e.g.*, Deal v. Cincinnati Bd. of Educ., 369 F.2d 55 (6th Cir. 1966); Spencer v. Kugler, 326 F. Supp. 1235 (D.N.J. 1971), *aff'd mem.*, 404 U.S. 1027 (1972).

government agencies at all levels, such as denial of FHA financing for blacks to obtain housing in white residential areas; enforcement of racial restrictive covenants; discriminatory zoning practices; segregated operation of public housing; and the like.[74] Since school segregation admittedly results from residential racial patterns, and since those residential patterns have been brought about in substantial part by intentional, racially discriminatory actions on the part of the government, the question arises whether the school segregation itself is unconstitutional.[75]

The issue of governmental responsibility for racial residential segregation as it affects school segregation has arisen primarily in the context of prescribing an interdistrict remedy[76] in order to eliminate a condition of de jure segregation found to exist in an urban school district. In *Milliken v. Bradley I*,[77] Justice Stewart, whose vote was necessary to the decision, expressly stated that an interdistrict remedy might be appropriate, "[w]ere it to be shown, for example, that state officials had contributed to the separation of the races . . . by purposeful, racially discriminatory use of state housing or zoning laws."[78] In *Evans v. Buchanan*,[79] the three-judge district court relied on governmental responsibility for residential racial patterns in the Wilmington metropolitan area as one of the reasons for the imposition of an interdistrict remedy between Wilmington, Delaware, and the suburban school districts,[80] and its decision was summarily affirmed by the Supreme Court.[81]

The question of imputation — the extent to which one governmental unit can be held responsible for the intentional racial discrimination practiced by another governmental unit — was fully considered

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[74] *See* Spencer v. Kugler, 404 U.S. 1027, 1027 n.*(Douglas, J., dissenting).

[75] This question is currently being litigated in Bell v. Board of Educ., No. C78-20A (N.D. Ohio, filed Jan. 13, 1978).

[76] An interdistrict remedy applies not only to a school district found to have discriminated, but also to surrounding districts whose inclusion in a desegration plan is necessary to remedy effectively the segregation existing in the district found to have discriminated.

[77] 418 U.S. 754 (1974).

[78] *Id.* at 755.

[79] 393 F. Supp. 428 (D. Del.), *aff'd mem.*, 423 U.S. 963 (1975).

[80] *Id.* at 434-35, 447.

[81] 423 U.S. 963 (1975).

by the Seventh Circuit in *United States v. Board of School Commissioners*,[82] which involved the imposition of an interdistrict remedy in the Indianapolis metropolitan area. In holding that an interdistrict remedy could be imposed because of governmental responsibility for urban-suburban racial residential patterns, the court stated:

> The commands of the Fourteenth Amendment are directed at the state and cannot be avoided by a fragmentation of responsibility among various agents. If the state has contributed to the separation of the races, it has the obligation to remedy the constitutional violations. That remedy may include school districts which are its instrumentalities and which were the product of the violation. Thus, if state discriminatory housing practices have a substantial interdistrict effect, it is appropriate to require school authorities to remedy the effects even though they did not themselves cause this aspect of school segregation.[83]

The same reasoning would apply to governmental responsibility for residential racial patterns that resulted in school segregation within a school district.[84] While a discussion of the proposition that governmental responsibility for residential racial segregation renders the resulting school segregation de jure rather than de facto is beyond the scope of the present writing,[85] the proposition does suggest that the use of race-conscious criteria to remedy identifiable past discrimination may be required on the part of a governmental agency that has not itself engaged in such discrimination.

The same idea, considered in the context of race-conscious admissions programs at a publicly supported university, leads to the question whether it would have been relevant in *Bakke* if a number of public school systems in California having a substantial minority pop-

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[82] 573 F.2d 400 (7th Cir. 1978).

[83] *Id.* at 410 (citation omitted).

[84] *Cf.* Holland v. Board of Pub. Instruction, 258 F.2d 730 (5th Cir. 1958) (where city ordinance required residential racial segregation, resulting school segregation was unconstitutional).

[85] The proposition has been outlined in Sedler, *Discussion of Papers*, 10 URB. REV. 149, 153-54 (1978).

ulation were found to have been practicing de jure segregation.[86] If racially segregated education is indeed "inherently unequal,"[87] and unequal in the sense of inferior,[88] then black applicants to the Davis Medical School as a group would have received inferior educational opportunities in comparison with white applicants as a group; the inferiority could have contributed to the blacks' generally lower test scores.[89] If a publicly supported university were to give preference to black applicants who received a substantial part of their education in school systems that had been found by the courts to have been practicing de jure segregation,[90] then the university would be "ameliorating . . . the disabling effects of identified discrimination,"[91] for the benefit of the identified victims, not merely for the benefit of the group.

[86] The California Supreme Court has rejected the dejure/defacto distinction, and has held that all racial segregation is harmful to minority children, so that school boards in that state have an affirmative obligation to eliminate actual segregation. *See* Crawford v. Board of Educ., 17 Cal. 3d 280, 289-302, 551 P.2d 28, 33-42, 130 Cal. Rptr. 724, 729-38 (1976). In *Bakke*, the Brennan group noted that "[j]udicial decrees recognizing discrimination in public education in California testify to the fact of widespread discrimination suffered by California-born minority applicants." 98 S. Ct. at 2790 (Brennan, White, Marshall & Blackmun, JJ.). Some of these decrees were issued by federal courts, indicating that at least some of the segregation in the California public schools would be found to be de jure under federal standards. *See, e.g.*, Soria v. Oxnard School Dist. Bd. of Trustees, 386 F. Supp. 539 (C.D. Cal. 1974); Spangler v. Pasadena City Bd. of Educ., 311 F. Supp. 501 (C.D. Cal. 1970). The Brennan group also noted that many minority group applicants living in California received their education in school districts in southern states that were practicing de jure segregation during that period. 98 S. Ct. at 2790 (Brennan, White, Marshall & Blackmun, JJ.).

[87] Brown v. Board of Educ., 347 U.S. 483, 495 (1954).

[88] *Id.* at 494.

[89] The great majority of current black applicants to professional school have probably received a substantial part of their primary and secondary education in schools judicially determined to be de jure segregated, and it is reasonable to conclude that the "inherently unequal" education received has impaired their ability to compete with white applicants as a group for the available seats. *See* Sedler, *Racial Preference, supra* note 8, at 351-55.

[90] This could be done by adding a number of points to such a black applicant's overall score, and comparing his or her adjusted overall score with the overall score of all the other applicants. Presumably this would satisfy Justice Powell's concern that all applicants must be permitted to compete for all available seats. 98 S. Ct. at 2764 (Powell, J.).

[91] *Id.* at 2757.

Furthermore, this should satisfy Justice Powell's requirement of a "judical determination of constitutional violation as a predicate for the formulation of a remedial classification."[92] Consequently, the university's action would not run afoul of Justice Powell's objections to the use of race-conscious criteria. There would seem to be no constitutional objection to giving de jure segregation "bonus points" to those black applicants as part of the "competitive consideration of race and ethnic origin,"[93] despite the fact that the governmental entity providing the remedy was different from the entity found to have discriminated. It seems fair to conclude that the past discrimination need be only that of some governmental agency, and not necessarily that of the agency employing race-conscious criteria.

Insofar as the social history of racism is reflected in identified discrimination by the government or by private entities legally prohibited from engaging in such discrimination, the government has a valid and substantial interest in eliminating the present consequences of that discrimination. Where the government itself has engaged in identified past discrimination, it has an affirmative duty to take action to overcome the discrimination's continuing effects.[94] Because overcoming the present consequences of identified past discrimination is so clearly a valid and substantial governmental interest, litigative efforts must continue to focus on proving past discrimination. To the extent that those efforts are successful, we will have come some distance toward the goal of eliminating the persistent effects of racism in this country. Nonetheless, in order to cover the remaining distance, we must make it equally clear that the government has an overriding interest in reversing the present effects of past discrimination that is not specifically identified.

IV. THE SOCIAL HISTORY OF RACISM AND THE EQUAL PARTICIPATION OBJECTIVE

The central thesis of this Article is that the government is constitutionally permitted to use race-conscious criteria in an appropriate

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[92] *Id.* at 2754.

[93] *Id.* at 2764.

[94] Green v. School Bd., 391 U.S. 430, 437-38 (1968). *See also* 98 S. Ct. at 2785-86 (Brennan, White, Marshall & Blackmun, JJ.).

way whenever the use of such criteria is necessary to advance the objective of providing equal participation for blacks in the benefits of American life, and thus to redress the present consequences of the social history of racism which have denied them such participation.[95] It is clear, as the prior discussion indicates, that the admittedly valid and substantial governmental interest in "ameliorating, or eliminating where feasible, the disabling effects of identified discrimination"[96] essentially involves overcoming the present consequences of particular aspects of the social history of racism. If the government may constitutionally be required to take action involving the use of race-conscious criteria in order to redress the present effects of its identified past discrimination, there is no logical reason why it should not be permitted to take such action in order to eliminate the present effects of such discrimination by the society as a whole. It is this thesis that now will be developed more fully.

A. The Goal of a Racially Equal Society

Providing equal participation for blacks in all of the benefits of American life advances the goal of a racially equal society. That this is a constitutionally permissible goal is evident from the broad, organic purpose of the fourteenth amendment and the other Reconstruction Amendments, taken as a whole. As one commentator has observed:

> [T]he main thrust of the Thirteenth, Fourteenth and Fifteenth Amendments was the construction of a penumbra of legal commands which were designed to raise the race of freedmen from the status of inferior beings — a status imposed by the system of chattel slavery — to that of free men and women, equal participants in the hitherto white political community consisting of the "people of the United States." The constitutional right of the black race to this status of

[95] In *Bakke*, four Justices were of the view that redressing the effects of the social history of racism advanced a valid and substantial interest. 98 S. Ct. at 2785-89 (Brennan, White, Marshall & Blackmun, JJ.). Justice Powell indicated that it did not, *id.* at 2757-59 (Powell, J.), and the remaining Justices did not pass on the question, *id.* at 2809-15 (Stevens, J.).

[96] *Id.* at 2757 (Powell, J.).

> freedom was the simple and central objective of the Reconstruction Amendments.[97]

The Supreme Court recognized the constitutional significance of black freedom when it upheld the power of Congress, under the implementing clause of the thirteenth amendment, to prohibit racial discrimination by private persons which constitutes "badges and incidents of slavery."[98]

Given the present effects of past discrimination, a racially equal society is not possible until blacks enjoy a degree of participation in American society roughly equal to that enjoyed by whites. As we have seen, the present system of prevention has not and cannot overcome the persistent effects of our long and tragic history of racism.[99] A racially equal society cannot be attained unless affirmative measures are taken to increase blacks' participation in all aspects of American life. And since the objective is a racial one, race-conscious criteria should ordinarily be considered an appropriate means to achieve it.

From this perspective, it seems illogical and unsound to distinguish between those aspects of the social history of racism that can be traced to identified discrimination on the part of governmental and private entities, and those that cannot. What Justice Powell called "societal discrimination" is nothing more than an accumulation of wrongs on the part of governmental and private entities that cannot be identified with particularity at the present time. But their consequences are no less enduring because they cannot be so identified. The non-identifiable nature of the discrimination does not obviate the government's valid and substantial interest in redressing its consequences. It merely converts that interest from a constitutionally mandated to a constitutionally permissible one.

B. The Helpful Cases

While the Supreme Court has not yet recognized the broad thesis of this Article, there are Supreme Court and lower federal court cases

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[97] Kinoy, *The Constitutional Right of Negro Freedom*, 21 RUTGERS L. REV. 388 (1967).

[98] Jones v. Alfred H. Mayer Co., 392 U.S. 409, 439-44 (1968). *See also* Runyon v. McCrary, 427 U.S. 160 (1976); Sedler, *Racial Preference, supra* note 8, at 366-67.

[99] *See* pp. 136–39 *supra*.

that support the constitutionality of using race-conscious criteria in an appropriate way to advance the equal participation objective and the goal of a racially equal society. In *Bakke* itself, Justice Powell, implicitly joined on this point by the Brennan group, took the position that the University's interest in achieving an educationally diverse student body was a valid and substantial governmental interest, justifying the use of race-conscious admissions criteria.[100] In this regard *Bakke* appears to be but a slight extension of *Swann v. Charlotte-Mecklenburg Board of Education*,[101] where the Court expressly stated that school boards could use race-conscious criteria to achieve integration even to the point of requiring that "each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole."[102] The extension, however, is not without significance. When a public school system acts voluntarily to achieve integration, no white children, of course, are denied admission to the schools. The "detriment" they suffer is in being unable to attend the "neighborhood school."[103] The use of race-conscious admissions criteria to achieve integration in a university's professional school, on the other hand, does deny admission to some white applicants, who in this sense suffer substantially greater "detriment" than the public school children bused away from the "neighborhood school," as Justice Powell very carefully noted in *Bakke*.[104] Nonetheless, assuming that the integration objective has been achieved by

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[100] *See* note 49 *supra*.

[101] 402 U.S. 1 (1971).

[102] *Id.* at 16. Strictly speaking, the statement was dictum, since the case did not involve a direct challenge to the constitutionality of voluntary integration. Nonetheless, the dictum has been accepted as authoritative, and it in effect affirms a long line of lower federal and state decisions upholding the constitutionality of integration programs voluntarily undertaken by school boards or required by state law. *See* Sedler, Book Review, 62 CORNELL L. REV. 645, 647-48 (1977). *See also* 98 S. Ct. at 2786 (Brennan, White, Marshall & Blackmun, JJ.); Lee v. Nyquist, 318 F. Supp. 710 (W.D.N.Y. 1970), *aff'd*, 402 U.S. 935 (1971).

[103] Justice Powell, it may be noted, considers this to be a "detriment" of some significance. *See* Keyes v. School Dist. No. 1, 413 U.S. 189, 243-50 (1973) (Powell, J., concurring in part & dissenting in part).

[104] "Petitioner did not arrange for respondent to attend a different medical school in order to desegregate Davis Medical School; instead it denied him admission and may have deprived him altogether of a medical education." 98 S. Ct. at 2754 n.39 (Powell, J.). *See also* Sedler, *Racial Preference*, *supra* note 8, at 362-63.

appropriate means,[105] Justice Powell did not find that the resulting denial of admission to a white applicant amounted to "unequal treatment under the Fourteenth Amendment."[106]

Both *Bakke* and *Swann*, then, support the proposition that achieving racial integration is a valid and substantial governmental interest. Given that proposition, the government may require that any program it operates be administered on an integrated basis. A public housing authority could, for example, assign persons to its housing on a racial basis in order to ensure that all of the sites would be racially integrated.[107] The same integration objective renders fully constitutional the federal government's efforts to require recipients of federal funds, such as colleges and universities, to achieve genuine integration of their faculties and student bodies, and federal contractors of their workforces.[108]

The appropriate use of race-conscious criteria to advance the equal participation goal was also found constitutional in *United Jewish Organizations of Williamsburgh, Inc. v. Carey*.[109] The Court, although fragmented, upheld the use of race-conscious criteria in legislative districting in order to "achieve a fair allocation of political power between white and non-white voters."[110] Although in that case there was a question of eliminating the consequences of past racial discrimination in legislative districting, the lineup of the Court there, coupled with the lineup of the Court in *Bakke*, supports the proposition that equal participation in the political process is a valid and substantial governmental interest. Justices White, Stevens, and Rehnquist ex-

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[105] Justice Powell concluded that it had not been in *Bakke*. 98 S. Ct. at 2764 (Powell, J.).

[106] *Id.* at 2763. As he noted, "The denial to respondent of this right to individualized consideration without regard to his race is the principal evil of petitioner's special admissions program." *Id.* n.52.

[107] *See* Otero v. New York Housing Auth., 484 F.2d 1122 (2d Cir. 1973). It should be noted that achieving the integration objective in this context, as in the school desegregation context, may cause the same "detriment" to blacks as to whites. In *Otero* the "detriment" was a delay in obtaining publicly assisted housing until a vacancy suitable for the race of the applicant was available.

[108] Some of these efforts are described in the appendices to the Brief of the United States as Amicus Curiae, Regents of the Univ. of Cal. v. Bakke, 98 S. Ct. 2733 (1978).

[109] 430 U.S. 144 (1977).

[110] *Id.* at 167.

pressly approved the "fair allocation of political power" objective, totally without regard to past discrimination.[111] Justices Brennan and Blackmun focused on remedying past discrimination without reaching the "equal participation" issue.[112] Justice Marshall did not participate.[113] Given the views of Justices Brennan, Marshall, and Blackmun in *Bakke*, it is reasonable to conclude that they would have agreed with the position of Justices White, Stevens, and Rehnquist in *Williamsburgh*, had they addressed the equal participation question raised in that case. It can therefore be argued that *Williamsburgh* stands for the proposition that achieving a "fair allocation of political power between white and non-white voters" — equal participation in the political process — is a valid and substantial governmental interest, justifying the use of race-conscious criteria.[114]

Another valid and substantial governmental interest, according to an unbroken line of federal circuit decisions, is racial minorities' equal participation in the "governmental market." Under federal regulations promulgated pursuant to Executive Order 11246, federal contractors are required to take "affirmative action" in order to ensure specified proportions of minority workers in their workforces.[115] In *Contractors Association of Eastern Pennsylvania v. Secretary of La-*

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[111] *Id.* at 165-68.

[112] Both Justices Brennan and Blackmun joined in all sections of Justice White's opinion except the section dealing with the equal participation objective. *Id.* at 147. Justice Brennan filed a separate concurring opinion in which he elaborated his reasons for approving the race-conscious remedy at issue. *Id.* at 168-79 (Brennan, J., concurring).

[113] For a more detailed discussion of *Williamsburgh*, see Sedler, *Racial Preference*, *supra* note 8, at 381-84.

[114] In *Bakke*, however, Justice Powell explained *Williamsburgh* as a case in which "the remedy for an administrative finding of discrimination encompassed measures to improve the previously disadvantaged group's ability to participate, without excluding individuals belonging to any other group from enjoyment of the relevant opportunity — meaningful participation in the electoral process." 98 S. Ct. at 2756 (Powell, J.). The Brennan group, to the contrary, saw *Williamsburgh* as a case in which (1) there had been no judicial finding of discrimination by the entity employing race-conscious criteria, and (2) there was detriment to another group, since the districting deprived Hasidic Jews of their prior voting-bloc strength. *Id.* at 2786-87 (Brennan, White, Marshall & Blackmun, JJ.).

[115] The regulations are set out at length in Contractors Ass'n v. Secretary of Labor, 442 F.2d 159, 162-64 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971).

bor,[116] the Third Circuit upheld, over fifth amendment "equal protection" objections, the "Philadelphia Plan," which imposed on federal contractors in the five-county Philadelphia metropolitan area detailed requirements as to minority hiring. The court emphasized that it was irrelevant that the affected contractors had not been shown to have discriminated against blacks.[117] Since the federal government had a "cost and performance" interest in the construction projects, it could require that minority workers be included in the labor pool.[118]

The federal contract cases involve a governmental interest beyond the economic one. Executive Order 11246 is an attempt by the federal government to overcome the present effects of a particular aspect of our society's history of racism: The major objective of the Executive Order is that of equal participation. Blacks historically had been excluded from the construction trades, and Executive Order 11246 was designed to ensure that they participate fairly in the economic benefits resulting from federal construction projects.[119] In *Contractors Association of Western Pennsylvania v. Kreps*,[120] the Third Circuit again indicated that it was constitutional for Congress to require that minority contractors receive a proportion of the contracts financed with federal grants.[121] According to the court, the "set-aside" contained in the Local Public Works Capital Development and

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[116] *Id.* at 176-77.

[117] *Id.* at 176. In *Bakke,* Justice Powell interpreted *Contractors Ass'n* as a case involving an administrative finding of past discrimination by the industries affected. 98 S. Ct. at 2754-55 (Powell, J.). The Third Circuit, however, shortly before *Bakke* was decided, referred to *Contractors* as a case in which "[w]e upheld the remedial use of racial employment 'goals' by the executive without a prior adjudication that discrimination existed." Contractors Ass'n v. Kreps, 573 F.2d 811, 816 (3d Cir. 1978).

[118] 442 F.2d at 177. In addition, the federal government should be permitted to advance the racial integration objective with respect to the activities of recipients of federal contracts, just as it may with respect to the activities it engages in itself. *See* pp. 158–59 *supra*.

[119] *See generally* Comment, *The Philadelphia Plan: A Study on the Dynamics of Executive Power,* 39 U. CHI. L. REV. 723 (1972). Neither the Executive Order nor the implementing regulations require that the minority workers who are hired be identifiable victims of past discrimination either by the employer or by the "industry."

[120] 573 F.2d 811 (3d Cir. 1978).

[121] The case arose on an appeal from the district court's denial of a preliminary injunction against the operation of the program, 441 F. Supp. 936 (W.D. Pa. 1977), and the Third Circuit agreed with the district court that the plaintiffs were not likely to succeed on the merits, 573 F.2d at 818.

Investment Act of 1976[122] was designed to "'begin to redress' what Congress perceived to be the continuing economic impact of racial discrimination" and to encourage minority businesses.[123] The states have a similar interest in providing for full participation by racial minorities in the labor pools of state governmental contractors, and the constitutionality of state "Philadelphia Plans" has likewise been sustained.[124]

To summarize the results of the Supreme Court and lower federal court cases, it appears that the following are valid and substantial governmental interests, justifying the use of race-conscious criteria:[125] integration of governmentally operated facilities and institutions; equal participation of racial minorities in the political process; and equal participation of racial minorities in the "governmental marketplace." All of these interests, however, are merely particular instances of the general governmental interest in providing equal participation for blacks in American life. If these interests are considered valid and substantial enough to justify the use of race-conscious criteria, it is

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[122] 42 U.S.C. §§ 6701-6710 (1976).

[123] 573 F.2d at 817. After *Bakke*, the Second Circuit also upheld the constitutionality of the "set-aside," but was careful to bring it within the ambit of "remedying past discrimination." Fullilove v. Kreps, 584 F.2d 600 (2d Cir. 1978), *petition for cert. filed*, 47 U.S.L.W. 3465 (U.S. Dec. 21, 1978) (No. 78-1007). The *Fullilove* court pointed out that in *Bakke* Justice Powell had noted Congress' special competence to make findings of past discrimination, and the court found that "[i]t is also beyond dispute that the set-aside was intended to remedy past discrimination." *Id.* at 604. Prior to *Bakke*, the Sixth Circuit reached the same conclusion. Ohio Contractors Ass'n v. Economic Dev. Admin. 580 F.2d 213 (6th Cir. 1978). In Associated Gen. Contractors v. Secretary of Commerce, 47 U.S.L.W. 2290 (C.D. Cal. Oct. 20, 1978)(on remand from the Supreme Court for reconsideration of issue of mootness in light of *Bakke*, *see* 98 S. Ct. 3132, 3133 (1978)), the court found that the case was not moot, and it adhered to its prior ruling of unconstitutionality, *see* 441 F. Supp. 955 (C.D. Cal. 1977), this time on the ground that "[t]he 10 percent race quota was not a constitutionally acceptable means of promoting the Congress' legitimate interest in promoting employment in the construction industry among minority group members." 47 U.S.L.W. at 2290.

[124] *See* Associated Gen. Contractors v. Altshuler, 490 F.2d 9 (1st Cir. 1973), *cert. denied*, 416 U.S. 957 (1974); Southern Ill.Builders Ass'n v. Ogilvie, 471 F.2d 680 (7th Cir. 1972).

[125] Of course, the use of race-conscious criteria must still be an "appropriate" means, under all the relevant circumstances, of advancing the governmental objective. *See* note 49 *supra*.

difficult to see why the general equal participation interest should not be found to be valid and substantial as well.

C. Objections to the Use of Race-Conscious Criteria to Advance the Equal Participation Objective – A Constitutional Inquiry

This Article has argued that the goal of providing equal participation for blacks in all aspects of American life is consistent with the broad, organic purpose of the fourteenth amendment and of the Reconstruction Amendments as a whole.[126] It has also shown in the preceding section that the Supreme Court and the federal circuits have upheld the use of race-conscious criteria in particular instances related to the advancement of the equal participation objective. If the government cannot use racial criteria in an appropriate way to advance the same objective in all instances, and to overcome the present consequences of all aspects of the social history of racism, then it must be because some other constitutional principle renders the use of race-conscious criteria for so broad a purpose impermissible. The Article now turns its inquiry to whether such a principle exists.

In *Bakke*, Justice Powell expressed two primary concerns which led him to conclude that the goal of redressing the present consequences of "societal discrimination" was not a governmental interest of sufficient importance to justify the University's use of race-conscious admissions criteria. His first concern was that a program which gave preference to members of a minority group would have an unjustifiable, adverse impact on other individual applicants.[127] His second concern was that the concept of societal discrimination was too "amorphous" and too dependent on political forces to provide a principled basis for determining which minority groups would receive special consideration.[128] It is submitted that neither concern renders

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[126] *See* p. 157 *supra*.

[127] 98 S. Ct. at 2753, 2758 (Powell, J.).

[128] *Id.* at 2751 & n.36, 2757. In Justice Powell's words, to find a governmental interest in reversing societal discrimination "would be to convert a remedy heretofore reserved for violations of legal rights into a privilege that all institutions throughout the Nation could grant at their pleasure to whatever groups are perceived as victims of societal discrimination." *Id.* at 2759.

the goal of redressing the present consequences of "societal discrimination" constitutionally impermissible.

Whenever a governmental entity adopts a race-conscious remedy in order to redress the persistent ill effects of past discrimination, that entity advances the group interest of blacks in their equal participation in society.[129] Advancement of the interests of blacks as a group admittedly has an adverse impact on the interests of individual whites, who are compelled to give up certain benefits that they otherwise would have received.[130] The initial question, therefore, is whether advancing the equal participation interest of blacks as a group, for the purpose of eliminating the consequences of the social history of racism, is unconstitutional because it has an adverse impact on the interests of individual whites.[131]

In *Bakke*, Justice Powell put a great deal of emphasis on the importance of individual interests. As he noted, the "rights created by the first section of the Fourteenth Amendment are by its terms, guaranteed to the individual,"[132] and "it is the individual who is entitled to judicial protection against classifications based on his racial or ethnic background because such distinctions impinge upon personal rights, rather than the individual only because of his membership in a particular group."[133] Finally, there is a "measure of inequity in forcing innocent persons . . . to bear the burdens of redressing grievances not of their making."[134] But Justice Powell made those statements in

[129] *See* pp. 148–50 *supra*. In United Jewish Organizations of Williamsburg, Inc. v. Carey, 430 U.S. 144 (1977), the interest at stake was the "fair allocation of political power between white and non-white voters." *Id.* at 167. In *Bakke*, the group interest at stake was equal representation within the medical profession.

[130] In the employment context, individual whites suffer decreased chances of being hired or promoted. *See* pp. 147–48 *supra*. In school desegregation, some individuals are deprived of the advantage of attending neighborhood schools. *See* p. 158 *supra*. In United Jewish Organizations of Williamsburg, Inc. v. Carey, 430 U.S. 144 (1977), the adverse impact was on the members of the Hasidic Jewish community, who suffered dilution of their bloc-voting strength. In *Bakke*, individual whites suffered decreased chances of admission to medical school.

[131] It is settled that whites as a group have no legitimate interest in maintaining their position of societal dominance. Loving v. Virginia, 388 U.S. 1, 11-12 (1967).

[132] 98 S. Ct. at 2748 (Powell, J.).

[133] *Id.* at 2753.

[134] *Id.* The Brennan group, by contrast, did not see the inequity. Since the special admissions program was, in their view, a proper method of dealing with the present consequences of the social history of racism, Allan Bakke, who was in effect a

the context of holding that the use of race-conscious criteria was subject to "strict scrutiny," not that its use was impermissible whenever it had an adverse impact on the interests of individual whites. Indeed, as Justice Powell concluded, what the individual was entitled to was no more than a "judicial determination that the burden he is asked to bear on that basis [the use of race-conscious criteria] is precisely tailored to serve a compelling governmental interest."[135]

Given that conclusion, the adverse impact on the interests of individual whites resulting from the use of race-conscious criteria does not of itself render the use of such criteria unconstitutional, nor does it furnish any guidance in determining whether the use of such criteria advances a valid and substantial governmental interest.[136] When Justice Powell held that integration of the medical school's student body amounted to such an interest, he necessarily held that it could be advanced at the expense of those white applicants who were excluded from the medical school as a result. Ultimately, the only protection for the potentially excluded white applicant is that the University must advance the governmental interest by what the court finds to be appropriate means.

Thus, the adverse impact on the interests of individual whites resulting from the use of race-conscious criteria is *constitutionally* irrelevant to the validity and substantiality of the governmental interest. Racial criteria may be used in an appropriate way whenever their use advances an interest otherwise found to be suffciently important, such as overcoming the disabling effects of identified discrimination,[137] providing equal participation for minorities in the political process[138] and in the "governmental market,"[139] or integrating gov-

beneficiary of that social history, had no cause to complain: "If . . . the failure of minorities to qualify for admission at Davis under regular procedures was due principally to the effects of past discrimination, then there is a reasonable likelihood that, but for pervasive racial discrimination, respondent would have failed to quality for admission even in the absence of Davis' special admissions program." *Id.* at 2787 (Brennan, White, Marshall & Blackmun, JJ.).

[135] *Id.* at 2753 (Powell, J.).

[136] It may, however, be a factor in determining if the race-conscious program in question is an appropriate means of advancing the government's interest. *See* note 49 *supra*.

[137] *See* pp. 146–51 *supra*.

[138] *See* pp. 159–60 *supra*.

[139] *See* pp. 160–62 *supra*.

ernmentally operated facilities and institutions.[140] Indeed, in all instances where the use of racial criteria has been upheld, it has had an adverse impact on individual whites.[141] Once it has been shown that a race-conscious program's adverse impact on whites is not determinative of the constitutional issues, the only relevant question is whether the equal participation objective — or "countering the effects of societal discrimination," as the University phrased it[142] — is a valid and substantial governmental interest.

Justice Powell answered that question in the negative primarily because of his concern over the "amorphous" and "ageless" definition of "societal discrimination."[143] He did not feel that the term could be given a clear, constant meaning that could form the basis of a predictable system of providing benefits to disadvantaged minorities.[144] He insisted that there was no constitutionally significant governmental interest at stake, absent some finding of specific, identifiable discrimination.[145]

The concept of "societal discrimination" is neither "amorphous" nor "ageless" when tied to the history of racism in this country. The nation's problem of racism against blacks has been more persistent and more critical than problems of discrimination against other groups. Because blacks' resulting disadvantages can therefore be differentiated, there is a reasonable constitutional basis for concluding that blacks may be given special treatment while other minorities need not be.[146]

Even more important, the "amorphousness" of "societal discrimination" is no greater than that of some supposedly "identified discrimination" contained in legislative findings. The opinion asserts that "judicial, legislative, or administrative findings of constitutional or statutory violations" are of sufficient importance to justify appropriate use of race-conscious criteria to ameliorate the consequences of

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[140] *See* pp. 158–59 *supra*.

[141] *See* note 130 *supra*.

[142] 98 S. Ct. at 2757 (Powell, J.).

[143] *Id.*

[144] *Id.* at 2751-53.

[145] *Id.* at 2757-58.

[146] *See generally* Wasserstrom, *Racism, Sexism and Preferential Treatment: An Approach to the Topics*, 24 U.C.L.A. L. REV. 581, 584–603 (1977). *See also* pp. 136–39 & notes 11–28 *supra*.

those violations, even though individual whites might thereby be disadvantaged.[147] By recognizing the ability of *legislative* bodies to make such findings and to promulgate race-conscious programs, Justice Powell implicitly recognized that the findings of "constitutional or statutory violations" need not be made with a great degree of particularity concerning specific instances of misconduct, for in general it is the function of legislative bodies to make determinations of policy rather than to make adjudicatory findings of fact. Whenever a legislative body makes findings of constitutional or statutory violations in the context of racial discrimination, the findings are likely to be generalized rather than based on particular instances of violations.[148]

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[147] 98 S. Ct. at 2757-58 (Powell, J.).

[148] For example, the Voting Rights Act of 1965, 42 U.S.C. § 1973 (1976), requires, in some instances, that state governments take race into account when implementing legislative reapportionments. *See, e.g.*, United Jewish Organizations of Williamsburg, Inc. v. Carey, 430 U.S. 144 (1977). The Act was a broad remedial measure designed to "banish the blight of racial discrimination in voting." South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966). The congressional findings on which the Act was based were very broad, amounting essentially to findings of widespread (or "societal") discrimination against blacks in voter registration. *See* H. R. REP. No. 439, 89th Cong., 1st Sess. 8-16 (1965); S. REP. No. 162, pt. 3, 89th Cong., 1st Sess. 3-16 (1965). Moreover, the criterion for triggering application of the Act against any state or subdivision of a state is the Attorney General's determination that as of November 1, 1972, the state or local government in question maintained "any test or device" (such as a literacy requirement) which, according to the Director of the Census, contributed to the result that less than 50% of the persons in the state (or subdivision) registered to vote during that year, or that less than 50% of the persons of voting age actually voted. (For earlier years, the 1968 and 1964 election years were the determinative dates.) 42 U.S.C. § 1973b (1976). Application of the Act is thus triggered by two separate findings of the executive branch, neither of which requires determination that a single instance of "identified" discrimination has occurred. Similarly, the Local Public Works Capital Development and Investment Act of 1976, 42 U.S.C. §§ 6701-6735 (1976), *as amended* (Supp. 1977), conditions the receipt of federal grants under the Act on the requirement that 10% of the grants go to minority enterprises. *See* pp. 161–62 & notes 116–24 *supra*. The committee reports make no explicit finding of past discrimination, although it is clear from the legislative history of the Act, as amended, that it was meant to overcome, *inter alia*, what Congress considered to be widespread discrimination and underrepresentation of minority enterprises in the construction industry. *See* Fullilove v. Kreps, 584 F.2d 600, 605-08 (2d Cir. 1978), *petition for cert. filed*, 47 U.S.L.W. 3465 (U.S. Dec. 21, 1978) (No.78-1007). The findings of past discrimination involved in the promulgation of the

A legislative finding of "societal discrimination" should therefore be no more objectionable under Justice Powell's analysis than would be any other legislative finding of racial discrimination. The former would reflect "constitutional or statutory violations" to the same extent as other legislative findings:[149] that is, to the extent that any such findings rest on particular violations.[150] If a finding of societal discrimination is acceptable when made by a legislature, then it cannot be that there is an inherently "amorphous" and "ageless" quality about the concept which prevents the government from having a valid and substantial interest in redressing the effects of societal discrimination.

It should also be noted that Justice Powell voiced a third concern in discussing the concept of "societal discrimination": he did not believe the University was capable of making the kind of findings that he saw as prerequisites to the imposition of a race-conscious remedy.[151] Yet the delegation of power from a state legislature to subordinate governmental entities is not a federal concern.[152] If the state government may constitutionally advance a policy objective such as redressing the effects of "societal discrimination," then it is of little concern for constitutional purposes how the state chooses to allocate the responsibility for making that policy choice.[153]

Act amount essentially to findings of "societal" discrimination in the construction industry. *See generally id.* at 606.

Given the nature of legislative decisionmaking, there is no meaningful distinction between findings of "identified" discrimination and of "societal" discrimination in a particular aspect of society, at least when legislative bodies are making the determinations. Nor are findings of discrimination by administrative bodies necessarily particularized, a point recognized by Justice Powell in *Bakke*, when he explained the "Philadelphia Plan" as being based on an administrative finding of past discrimination by the industries affected. *See* note 117 *supra*.

[149] This is true because "societal discrimination" is largely an aggregate of individual instances of constitutional or statutory violations that have not been identified with particularity. The statutory framework prohibiting discriminatory conduct extends to actions of private individuals, as well as to governmental actions. *See* Runyon v. McCrary, 427 U.S. 160 (1976); Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).

[150] *See* note 148 *supra*.

[151] 98 S. Ct. at 2758-59 (Powell, J.).

[152] *See, e.g.*, National League of Cities v. Usery, 426 U.S. 833 (1976); Sweezy v. New Hampshire, 354 U.S. 234 (1957).

[153] As the Brennan Group stated in *Bakke*:

Justice Powell's opinion thus presents no persuasive reason why a governmental entity cannot determine that overcoming the present consequences of past societal discrimination, through the appropriate use of racial criteria, is a valid and substantial governmental interest. To take that conclusion one step further, there can be no rational objection to the validity and substantiality of the government's interest in providing blacks with equal participation in all areas of American life.[154] Once it is recognized that the adverse impact on individual

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> Generally, the manner in which a State chooses to delegate governmental functions is for it to decide. . . .California, by constitutional provision, has chosen to place authority over the operation of the University of California in the Board of Regents. . . .Control over the University is to be found not in the legislature, but rather in the Regents who had been vested with full legislative (including policymaking), administrative, and adjudicative powers by the citizens of California. . . .This is certainly a permissible choice, . . . and we, unlike our Brother POWELL, find nothing in the Equal Protection Clause that requires us to depart from established principle by limiting the scope of power the Regents may exercise more narrowly than the powers that may constitutionally be wielded by the Assembly.

98 S. Ct. at 2788 n.42 (Brennan, White, Marshall & Blackmun, JJ.) (citations omitted).

[154] The same reasoning should apply, for example, to the facts of a recent case in which the equal participation objective was not recognized. A city council, in the absence of a finding of individual discrimination, adopts an affirmative action program to increase the number of black officers, sergeants and lieutenants on the city's police force. When the program comes under constitutional attack, the city could respond that the program seeks to redress the effects of past unidentified discrimination in a broad spectrum of areas, and to provide blacks with the opportunity to participate equally in the governance of the city through the important functions of the police. The government's interest in providing that opportunity is valid and substantial. It is consistent with the Reconstruction Amendments, and any adverse impact it may have on whites is irrelevant to its constitutional validity. The city council is a legislative body capable of making findings of "societal discrimination." The council's decision to operate its police department in accordance with the affirmative action program is a matter of state rather than federal concern.

Because the interest at stake is a valid and substantial one, the city government should be able to adopt a race-conscious program in order to advance the interest. *See* Detroit Police Officers Ass'n v. Young, 446 F. Supp. 979 (E.D. Mich. 1978), *appeal docketed,* No. 78-1163 (6th Cir. Apr. 25, 1978).

A similar argument can be made on the facts of another case recently decided in light of *Bakke*. A state university's student government regulations require that two minority members be appointed to the student legislature in the event fewer than two are elected. The equal participation objective being advanced is that of providing

whites is irrelevant to the constitutional importance of the governmental interest, and that the "amorphous" nature of societal discrimination does not negate the government's interest in redressing its effects, then there can be no logical or principled rebuttal to the conclusion of Justices Brennan, White, Marshall, and Blackmun:

> Davis' articulated purpose of remedying the effects of past societal discrimination is, under our cases, sufficiently important to justify the use of race-conscious admissions programs where there is a sound basis for concluding that minority underrepresentation is substantial and chronic, and that the handicap of past discrimination is impeding access of minorities to medical school or to any other opportunities to participate in American Society.[155]

Remedying the effects of past societal discrimination — of the social history of racism — and providing equal participation for blacks in all aspects of American life furthers the goal of racial equality that lies at the heart of the fourteenth amendment.[156] Whenever the gov-

"protective representation" for those whose voices in government have traditionally been drowned out. The objective is a valid and substantial one: "condemnation of the regulations because they impinge upon other individuals' rights is simplistic." Uzzell v. Friday, 47 U.S.L.W. 2505 (4th Cir. Feb. 2, 1979) (Winter, J., dissenting).

[155] 98 S. Ct. at 2785 (Brennan, White, Marshall & Blackmun, JJ.).

[156] It is now clearly established that the government may use gender-based criteria in order to overcome the present consequences of the social history of sexism, which has disadvantaged women as a group in comparison with men as a group. Califano v. Webster, 430 U.S. 313 (1977); Schlesinger v. Ballard, 419 U.S. 498 (1975); Kahn v. Shevin, 416 U.S. 351 (1974). As the Court noted in *Califano,* it is permissible to "[redress] our society's longstanding disparate treatment of women." 430 U.S. at 317. In *Bakke,* the Brennan group relied on the gender-based discrimination cases to support the proposition that the University could use race-conscious admissions criteria in order to aid victims of societal discrimination. 98 S. ct. at 2783-84, 2786-87 (Brennan, White, Marshall & Blackmun, JJ.). Justice Powell, on the other hand, in the context of discussing why racial classifications were subject to "strict scrutiny" while gender-based classifications were not, noted that "the perception of racial classifications as inherently odious stems from a lengthy and tragic history that gender-based classifications do not share." *Id.* at 2755 (Powell, J.). If gender-based criteria may be used to "redress our society's long-standing disparate treatment of women" but, as Justice Powell would hold, race-conscious criteria may not be used to overcome the present consequences of the social history of racism, there

ernment acts to advance this objective, it is acting to advance a valid and substantial governmental interest. In the years to come, it may be hoped that the Court will so hold.

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is a curious paradox. Apparently Justice Powell is of the view that the history of societal sexism is not as "tragic" as the history of societal racism — a point on which many advocates of equality for women would not agree — so that the use of gender-based criteria is permissible where the use of race-conscious criteria may not be. Carried to its logical conclusion, this means that because societal victimization of blacks has been greater than societal victimization of women, the government may not use race-conscious criteria to overcome the existing effects of societal racism, but may use gender-based criteria to overcome the existing effects of societal sexism. Surely Justice Powell cannot mean this. Since the Court has clearly sustained the use of gender-based criteria to overcome the present consequences of societal sexism that are felt by women as a group, it is difficult to see why the same rationale should not sustain the use of race-conscious criteria to overcome the present consequences of societal racism that are felt by blacks as a group. *See* Ginsburg, *Women, Equality and the* Bakke *Case*, CIV. LIB. REV., Nov.-Dec. 1977, at 8-16.