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Supreme Court of the United States

October Term, 1976

No. 76-811

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,

Petitioner,

—v—

ALLAN BAKKE.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

BRIEF OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AS *AMICUS CURIAE*

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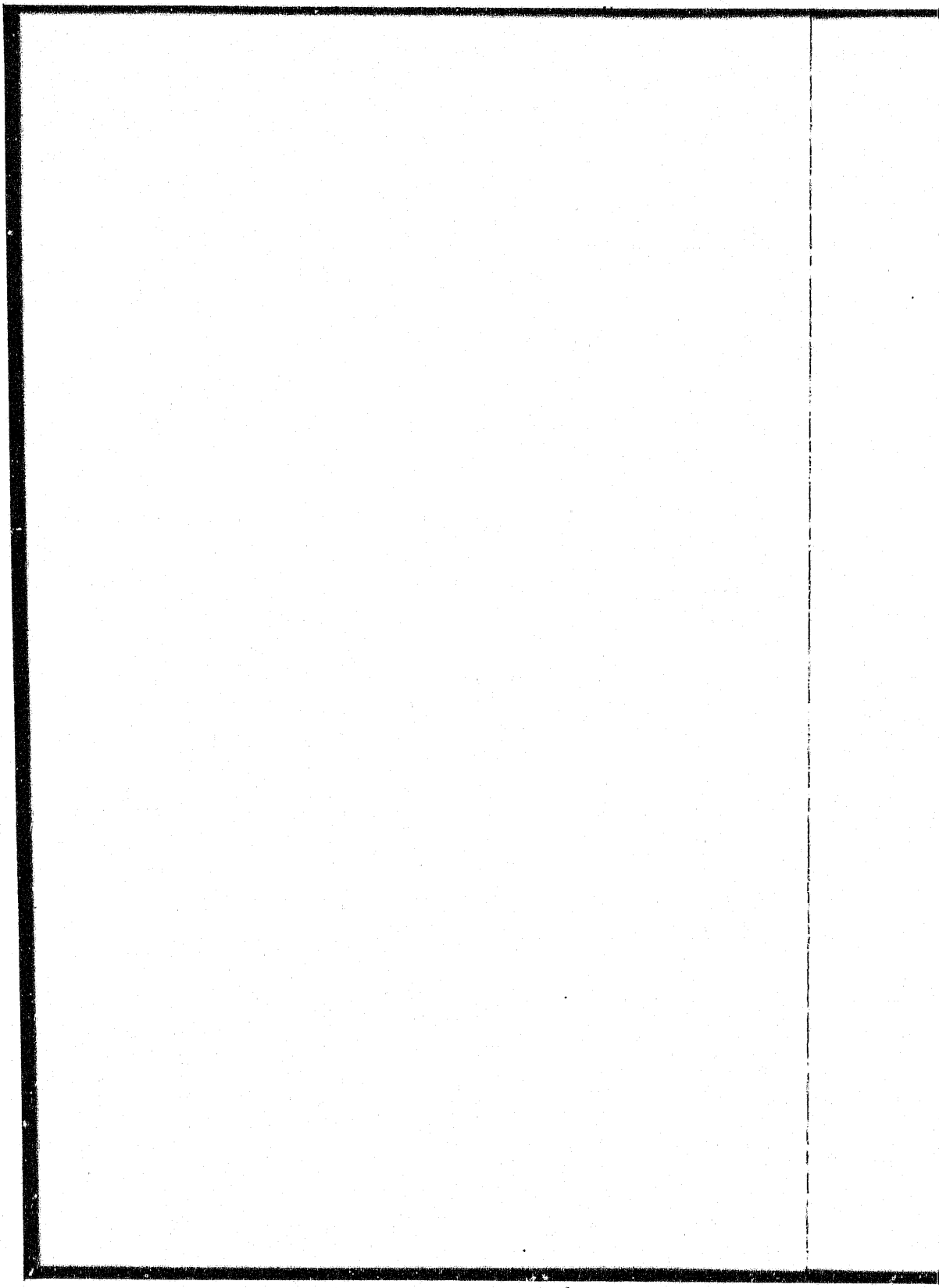

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Interest of Amicus

The N.A.A.C.P. Legal Defense and Educational Fund, Inc., is a non-profit corporation established under the laws of the State of New York. It was formed to assist black persons to secure their constitutional rights by the prosecution of lawsuits. Its charter declares that its purposes include rendering legal services gratuitously to black persons suffering injustice by reason of racial discrimination. For many years attorneys of the Legal Defense Fund have represented parties in litigation before this Court and the lower courts involving a variety of race discrimination issues in the fields of education and health care. *See, e.g., Brown* v. *Board of Education*, 347 U.S. 483 (1954); *Simkins* v. *Moses Cone Memorial Hospital*, 323 F.2d 959 (4th

Cir. 1963), *cert. denied* 376 U.S. 938 (1964). The Legal Defense Fund believes that its experience in such litigation and the research it has performed will assist the Court in this case. The parties have consented to the filing of this brief and letters of consent have been filed with the Clerk.

Summary of Argument

We submit that the Fourteenth Amendment prohibits any racial classification which has the purpose or effect of stigmatizing as inferior any racial or ethnic group. The history of the Fourteenth Amendment demonstrates, however, that the framers intended it to legitimate and to allow implementation of race-specific remedial measures where a substantial need for such programs was evident. This history is clear and unequivocal.

There has been extensive *de jure* segregation in the California public educational system, an inevitable result of which has been the production of a disproportionately low number of minority-race doctors. Moreover, minority populations in California and the nation suffer serious health and health care delivery problems. Petitioners' special admission program is intended and reasonably structured to ameliorate both of these conditions and is therefore constitutional under the Equal Protection Clause.

ARGUMENT

I.

Introduction

Much has been written on the question presented in this case, and a large number of *amicus curiae* briefs have been filed. We will not attempt to recapitulate what has been submitted and will rather try to set forth rele-

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vant materials which have not, insofar as we are aware, been presented fo. the Court's consideration.

We begin with what we believe to be a focusing characterization of the facts which engendered this litigation: while Linda Brown was denied entrance to Topeka's Sumner Elementary School almost three decades ago because she was black, respondent Allan Bakke is not a member of a racial group which is systematically excluded from the University of California-Davis medical school; indeed, whites comprise and have comprised the vast majority of the student body. The school's special admission policy did favor—for permissible reasons which we shall discuss—minority groups of which respondent Bakke was not a member, and a result was to deny admission to some applicants because there were not enough places for all those who wished to attend. But the critical fact about the special admission policy is, we submit, that it had neither the intention[1] nor effect of stigmatizing respondent as inferior or slurring him because of his race or color.

The Equal Protection Clause of the Fourteenth Amendment invalidates a State statute or policy, aimed at any racial or ethnic group, which "is practically a brand upon them, affixed by the law; an assertion of their inferiority,

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[1] Respondent has not contended that the University's special admission program was adopted with the purpose of stigmatizing nonminority applicants as inferior, and nothing in the record controverts the University's allegation, made in its cross-complaint for declaratory relief, that "the purposes of the special program were to promote diversity in the student body and the medical profession, and to expand medical education opportunities to persons from economically or educationally disadvantaged backgrounds." *Bakke* v. *Regents of University of California*, —— Cal.3d ——, 132 Cal. Rptr. 680, 553 P.2d 1152, 1155 (1976). It is rather the effect of this admissions program which respondent Bakke claims subjects him to "*invidious* discrimination because of his race," *ibid.* (emphasis added).

and a stimulant to . . . race prejudice." *Strauder* v. *West Virginia*, 100 U.S. 303, 308 (1880). The harshly discriminatory "black codes" enacted by the Confederate States shortly after Appomattox supplied a major impetus for the adoption of the Fourteenth Amendment.[2] A perception of the unconstitutionality of invidious and stigmatizing racial classifications was at the heart of the Court's landmark *Brown* v. *Board of Education*, 347 U.S. 483 (1954),[3] decision, and this recognition has recently been rearticulated by a majority of the Court.[4] *See also Morton* v. *Mancari*, 417 U.S. 535, 554 (1974).[4a]

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[2] TENBROEK, EQUAL UNDER LAW 180-181 (rev. ed. 1965); FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT 15, 72-73, 96 (1908); Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 13-14, 17 (1955). *See also* CONG. GLOBE, 39th Cong. 1st Sess. 603, 1117, 1118, 1123-1125, 1151, 1160 (1866); *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 70-71 (1873).

[3] The Court held that to separate black school children "from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." *Brown* v. *Board of Education, supra*, 347 U.S. at 494. The Court's decision recognized "a plain fact about the society of the United States—the fact that the social meaning of segregation is the putting of the Negro in a position of walled-off inferiority—or the other equally plain fact that such treatment is hurtful to human beings." Black, *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 427 (1960).

[4] In *United Jewish Organizations of Williamsburgh, Inc.* v. *Carey*, —— U.S. ——, 51 L.Ed. 2d 229 (1977), the Court considered whether New York's use of racial criteria to draw electoral district lines, in an effort to comply with Section 5 of the 1965 Voting Rights Act, violated either the Fourteenth or Fifteenth Amendment. Three members of the Court found New York's redistricting plan constitutionally acceptable despite the fact that the State "used race in a purposeful manner" because "its plan represented no racial slur or stigma with respect to whites or any other race"—the State's action was thus "not discrimination violative of the Fourteenth Amendment." 51 L.Ed. 2d at 246 (opinion of Mr.

(See footnote 4a on following page.)

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The absence of a stigmatizing intent in this case is significant because the Court has recently asserted that disproportionate racial impact is ordinarily[5] not alone enough to "trigger the rule . . . that racial classifications are to be subjected to the strictest scrutiny and justifiable only by the weightiest of considerations." *Washington* v. *Davis*, 426 U.S. 229, 242 (1976). Application of this standard would *ipso facto* require reversal of the judgment below. But respondent contends that since petitioner's admissions policy consciously takes race into consideration and in many cases[6] applies a differential admissions standard

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Justice White for the Court). Two other members of the Court agreed that "[u]nder the Fourteenth Amendment the question is whether the reapportionment plan represents purposeful discrimination against white voters . . . . The clear purpose with which the New York Legislature acted—in response to the position of the United States Department of Justice under the Voting Rights Act —forecloses any finding that it acted with the invidious purpose of discriminating against white voters." 51 L.Ed. 2d at 254-255 (concurring opinion of Mr. Justice Stewart) (footnote omitted).

[4a] *Morton* v. *Mancari*, though dealing with a "tribal" rather than a strictly racial preference, 417 U.S. at 553, is particularly relevant to this case, for there the Court held that the Fifth Amendment's prohibition of racial discrimination, *Bolling* v. *Sharpe*, 347 U.S. 497 (1954), was not violated by a hiring preference for certain Indians by the Bureau of Indian Affairs. The Court ruled that such a preference was appropriate "to enable the BIA to draw more heavily from among the constituent group in staffing of its projects, all of which, either directly or indirectly, affect the lives of tribal Indians." *Supra* at 554. It was held that Congress could permissibly have found that the inclusion of such Indian personnel would "make the BIA more responsive to the needs of its constituent groups." *Ibid.*; *see also Califano* v. *Webster*, —— U.S. ——, 45 U.S.L.W. 3630 (March 21, 1977).

[5] *But see Washington* v. *Davis*, 426 U.S. 229, 252-256 (1976) (concurring opinion of Mr. Justice Stevens); *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960); *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886).

[6] The categories established in petitioner's admissions program were by no means racially hermetic. A number of minority applicants were admitted under the regular admissions program between 1970 and 1974. *Bakke* v. *Regents of University of California, supra,*

on the basis of race, the policy is unconstitutional under the Fourteenth Amendment without regard to stigmatizing motivation.

The Court below has purported to consider the validity of petitioner's admissions policy "[r]egardless of its [the Equal Protection Clause's] historical origin," *Bakke* v. *Regents of University of California*, —— Cal.3d ——, 132 Cal. Rptr. 680, 553 P.2d 1152, 1163 (1976). This Court has emphasized, however, that constitutional questions arising under the Fourteenth Amendment cannot "be safely and rationally [re]solved without a reference to that history [of the Amendment's enactment]," *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 67 (1873),[7] and the first question this Court asked counsel in the 1954 desegregation cases to address upon reargument was the intention of the framers of the Fourteenth Amendment as to school segregation.[8]

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553 P.2d at 1165 n.21. Petitioner did not contest, however, the trial court's finding that "applicants who are not members of a minority are barred from participation in the special admission program," *id.* at 1159.

[7] "Our sworn duty to construe the Constitution requires . . . that we read it to effectuate the intent and purposes of the Framers. We must, therefore, consider the history and circumstances indicating what the Civil War Amendments were in fact designed to achieve." *Bell* v. *Maryland*, 378 U.S. 226, 288-289 (1964) (concurring opinion of Mr. Justice Goldberg). A "questio[n] of constitutional construction . . . is largely a historical question," *Sparf* v. *United States*, 156 U.S. 51, 169 (1895).

[8] *Brown* v. *Board of Education*, 345 U.S. 972 (1953):

"In their briefs and on oral argument counsel are requested to discuss particularly the following questions insofar as they are relevant to the respective cases:

1. What evidence is there that the Congress which submitted and the State legislatures and conventions which ratified the Fourteenth Amendment contemplated or did not contemplate, understood or did not understand, that it would abolish segregation in public schools?"

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We therefore believe it desirable—and necessary[9]—to set forth at some length the historical circumstances surrounding the enactment of the Fourteenth Amendment. For while this history has been frequently analyzed, and is often Delphic, it is squarely controlling here since the precise question at issue in this case—the permissibility of providing educational benefits to blacks but not whites—was heatedly debated and self-consciously resolved by the same Congress which approved the Fourteenth Amendment. In light of this contemporaneous evidence, set forth in Part II, *infra*, the history of the Fourteenth Amendment is neither ambiguous nor "inconclusive," *Brown* v. *Board of Education, supra*, 347 U.S. at 489.

It is true, of course, that "[t]ime works changes, brings into existence new conditions and purposes, . . . [and] a principle, to be vital, must be capable of wider application than the mischief which gave it birth," *Weems* v. *United States*, 217 U.S. 349, 373 (1910). While the clock cannot be turned back to the 1860's, the resolution of the debate concerning race-conscious educational remedies in the Thirty-Ninth Congress is controlling today because the conditions which originally engendered these remedies—the "mischief" at which the Fourteenth Amendment was principally aimed—are still present today. After a discussion of these Reconstruction measures adopted by the same Congress that enacted the Fourteenth Amendment, *see* Part II *infra*, we set forth the substantial and legitimate reasons petitioner adopted its special admission program. We first describe the *de jure* segregation in California's elementary and secondary education system, *see* Part III *infra*, and

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[9] It cannot now be confidently asserted that "[f]ortunately, that history [of the adoption of the Civil War Amendments] is fresh within the memory of us all," *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 68 (1873)).

then discuss the medical needs and health manpower shortage among racial minorities in this country and the way in which production of minority-race doctors serves to ameliorate these problems, *see* Part II(c) and IV *infra.*

As we have previously noted, *see* note 1 *supra*, "[t]here can be no doubt that . . . [this policy] may be regarded as an enactment [intended] to enforce the Equal Protection Clause." *Katzenbach* v. *Morgan,* 384 U.S. 641, 652 (1966). Moreover, petitioner brought to the solution of these perceived problems of discrimination and health care "a specially informed . . . competence," *id.* at 656 (footnote omitted),[10] and acted pursuant to formal legislative policy, most recently declared in Assembly Concurrent Resolution Number 151 (1974), which mandated:

> "That the Regents of the University of California, the Trustees of the California State University, and Colleges, and the Board of Governors of the California Community Colleges . . . prepare a plan that will provide for addressing and overcoming, by 1980, ethnic, economic, and sexual underrepresentation in the makeup of the student bodies of institutions of public higher education as compared to the general ethnic, economic, and sexual composition of recent California high school graduates."

We submit that in the absence of any proven stigmatizing motives and upon demonstration that this racially conscious admissions policy (which earmarked 16% of the places in first year medical school classes for minority groups con-

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[10] *Cf. Katzenbach* v. *Morgan, supra,* 384 U.S. at 653:

"It is not for us to review the congressional resolution of these factors [which impelled Congress to enact the Voting Rights Act of 1965]. It is enough that we be able to perceive a basis upon which the Congress might resolve this conflict as it did."

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stituting approximately 16% of California's population)[11] advances substantial State interests, petitioner should be allowed to decide whom it will train as medical doctors in light of its perception of society's needs.[12] As this Court

[11] No particular racial minority is specially favored by petitioner's special admissions program, which is open to, *inter alia*, blacks, Hispanic Americans, native Americans, and oriental Americans. In 1970, there were 17,761,000 whites, 1,400,000 blacks, 91,081 native Americans, 522,270 oriental Americans, and 178,671 members of other minority groups in California, with the latter four groups constituting approximately 11% of the State's population. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 1976, at pp. 31, 32 (1976). The Bureau of the Census counts Hispanic Americans in its "white" category, and this group comprised 5.6% of California's population in 1970, *id.* at 36, making a total "minority" population in the State of about 16.6%.

[12] We recognize that "community prejudices are not static, and from time to time other differences from the community norm [than race] may define other groups which need . . . [constitutional] protection," *Hernandez* v. *Texas*, 347 U.S. 475, 478 (1954). Over a hundred years ago, the Court stated that "[w]e do not say that no one else but the negro can share in this protection [of the post-civil war amendments]." *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 72 (1873). Should a federal court be confronted with an arcane racial (or ethnic or religious) classification in a state educational admissions policy, its first task would be to determine whether this classification has the purpose or effect of stigmatizing the classified group as inferior. "Whether such a group [in need of constitutional protection] exists within a community is a question of fact." *Ibid.* Invidious racial classifications are "constitutionally suspect," *Bolling* v. *Sharpe*, 347 U.S. 497, 499 (1954) (footnote omitted), and subject "to the 'most rigid scrutiny' " and justification, *McLaughlin* v. *Florida*, 379 U.S. 184, 192 (1964). Such classifications have been upheld by this Court only in light of "[p]ressing public necessity," *Korematsu* v. *United States*, 323 U.S. 214, 216 (1944). Of course, even if not invidious or stigmatizing, such classifications may nevertheless violate the Fourteenth Amendment since the Equal Protection Clause "den[ies] to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute." *Reed* v. *Reed*, 404 U.S. 71, 75-76 (1971). The classifications which a State enforces "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Royster Guano Co.* v. *Virginia*, 253 U.S. 412, 415 (1920).

has now wisely recognized, the Fourteenth Amendment did not enact Mr. Herbert Spencer's *Social Statics*.[13] But neither did it enact the Educational Testing Service's Medical College Admissions Tests. While the Constitution may not have compelled adoption of the special admission program, petitioner has voluntarily and in good faith sought to remedy the lingering effects of racial discrimination. "To use the Fourteenth Amendment as a sword against such State power would stultify that Amendment." *Railway Mail Association* v. *Corsi*, 326 U.S. 88, 98 (1945) (concurring opinion of Justice Frankfurter).[14]

II.

The Legislative History of the Fourteenth Amendment

The propriety of race-conscious remedies was a matter squarely considered by the Congress which fashioned the Fourteenth Amendment, and that Congress believed such remedial programs not merely permissible but necessary. From the closing days of the Civil War until the end of civilian Reconstruction, Congress adopted a series of social welfare laws expressly delineating the racial groups entitled to participate in or benefit from each program. Con-

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[13] *Lochner* v. *New York*, 198 U.S. 45, 75 (1905) (dissenting opinion of Justice Holmes); *Ferguson* v. *Skrupa*, 372 U.S. 726, 728-733 (1963).

[14] In *Railway Mail Association* v. *Corsi, supra*, the Court sustained the constitutionality of a New York "Civil Rights Law", 326 U.S. at 89, which forbade any labor organization to deny equal treatment to any of its members "by reason of race, color or creed," *ibid.* A labor union had attacked the Law as violative of the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The Court rejected this argument, noting that "[a] judicial determination that such legislation violated the Fourteenth Amendment would be a distortion of the policy manifested in that amendment which was adopted to prevent state legislation designed to perpetuate discrimination on the basis of race or color." 326 U.S. at 93-94.

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gress adopted these race-specific measures over the objections of critics who opposed such special assistance for a single racial group. The most far reaching of these programs, the 1866 Freedmen's Bureau Act, was enacted less than a month after Congress approved the Fourteenth Amendment, and there is substantial evidence that a major reason Congress adopted the Amendment was to provide a clear constitutional basis for such race-conscious remedies.

The range and diversity of these measures is striking. The Bureau of Refugees, Freedmen and Abandoned Lands, (popularly known as the Freedmen's Bureau) was authorized by Congress in 1866 to provide land and buildings and spend designated funds for "the education of the freed people," [15] but could provide no such aid to refugees or other whites. The same statute conveyed a number of disputed lands to "heads of families of the African races" and authorized the sale of some thirty-eight thousand other acres to black families who had earlier occupied them under authority of General Sherman.[16] Congress in 1867 made special provision for disposing of claims for "pay, bounty, prize-money, or other moneys due . . . colored soldiers, sailors, or marines, or their legal representatives." [17] It awarded federal charters to organizations established to

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[15] 14 Stat., c.200 at 174, 176 (1866).

[16] 14 Stat., c.200 at 174, 175 (1866). The statute referred simply to "such persons and to such only as have acquired and are now occupying lands under and agreeably to the provisions of General Sherman's special field order, dated at Savannah, Georgia, January sixteenth, eighteeen hundred and sixty-five." That order, as Congress well knew, provided that the land in question in South Carolina and Georgia was "reserved and set apart for the settlement of the negroes now made free by the acts of war and the proclamation of the President of the United States," II W. Fleming, Documentary History of Reconstruction 350 (1906).

[17] 15 Stat., Res. 25 at 26 (1867).

suppor[t] . . . aged or indigent and destitute colored women and children," [18] to serve as a bank for "persons heretofore held in slavery in the United States, or their descendants," [19] and "to educate and improve the moral and intellectual condition of . . . the colored youth of the nation" [20] (these youth were also provided assistance to them in the form of funds[21] and land grants).[22] Express appropriations were made for "the relief of freedmen or destitute colored people in the District of Columbia," [23] and for a hospital for freedmen established in the District.[24] No comparable federal programs existed for—or were established—for whites.[25]

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[18] 12 Stat., c.33 at 650 (1863).

[19] 13 Stat., c.92 at 511 (1865).

[20] 12 Stat., c.103 at 796 (1863).

[21] 14 Stat. c.296, 317 (1866). Such assistance continued after the end of Reconstruction.

[22] 12 Stat., c.33 at 650 (1863). Such assistance continued after the end of Reconstruction.

[23] 15 Stat., Res. 4 at 20 (1867).

[24] *See, e.g.*, 16 Stat. c.14, 8 (1869); 16 Stat., c.114 at 506-507 (1871); 17 Stat. 366, 528 (1872). In years prior to these appropriations the hospital was supported by the Freedmen's Bureau.

[25] Other programs, while open to all blacks, were also available to a limited group of whites, the unionist refugees who had fled to the North during the Civil War. These measures provided food, medical assistance, clothing and transportation administered by the Freedmen's Bureau, 13 Stat. c.90 at 507-508 (1865); 14 Stat. c.200 at 174-175 (1866). Such white refugees were also entitled, along with the freedmen, to up to 40 acres of land from among property seized by the United States from confederate sympathizers. 13 Stat., c.90 at 508-509 (1865); this 1865 program, however, was largely emasculated when President Johnson directed the return of most of the seized property to its original owners. *See Report of the Commissioner of the Bureau of Refugees, Freedmen and Abandoned Lands*, H.R. Exec. Doc. No. 11, 39th Cong. 1st Sess. 4-5 (1865); II O. Howard, Autobiography 229, 233, 235 (1907); II J. Blaine, Twenty Years in Congress 164 (1886); G. Bentley, A History

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These racial distinctions were neither inadvertent nor unopposed. A vocal minority in Congress, as well as President Andrew Johnson, criticized such proposals as class legislation discriminating against whites. A substantial majority of the Congress, however, believed such special treatment appropriate and necessary to remedy past mistreatment of blacks.

We shall examine in detail the legislative history of eight measures: the 1864 Freedmen's Bureau bill, the 1865 Freedmen's Bureau Act, the 1866 Freedmen's Bureau Act, the 1867 Colored Servicemen's Claims Act, two 1867 relief statutes, and two 1868 statutes extending the Freedmen's Bureau. The most important of these debates concerned the 1866 Freedmen's Bureau Act; it was here that the arguments for and against special legislation for blacks were most fully developed, and it was at this time that the Fourteenth Amendment was considered and approved by Congress.

A. *Race-Conscious Legislation of the Reconstruction Era*

(1) The 1864 Freedmen's Bureau Bill

The first major legislation specifically designed to aid blacks[26] called for the creation of a new agency, the Bureau of Freedmen's Affairs, to provide special assistance and protection.[27] The beneficiaries of this plan were described

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OF THE FREEDMEN'S BUREAU 89-96 (1955). No limitations were placed, however, on the Southern Public Lands Act of 1866 or on Federal food provided in the south and southwest during the famine of 1867; these were available, respectively, with "no distinction or discrimination . . . on account of race or color," 14 Stat., c.127 at 66, 67 (1866), and "to any all classes of destitute or helpless persons," 15 Stat. Res. 28, 28 (1867).

[26] CONG. GLOBE, 38th Cong., 1st Sess. 19 (1864).

[27] The Bureau's responsibilities were to include overseeing the enforcement of all laws "in anyway concerning freedmen aiding

in the House bill as "persons of African descent," [28] and in the Senate version as "such persons as have once been slaves." [29] The Senate rejected a draft that would have limited coverage to "such persons as have become free since the beginning of the present war," [30] the Senate sponsor arguing that blacks might require its "aid and protection" even though freed decades before the war.[31]

A variety of arguments were advanced in opposition to these bills, with the Democrats contending that such social legislation was traditionally the exclusive concerns of the states and should be left to them.[32] The bill was also opposed because it applied only to blacks, the argument being framed in several different ways. A minority of the House Select Committee on Emancipation objected—in language much like that used in today's debates about affirmative action—to whites being taxed to support such assistance for blacks.

> "A proposition to establish a bureau of Irishmen's affairs, a bureau of Dutchmen's affairs, or one for the affairs of those of Caucasian descent generally, who are incapable of properly managing or taking care of their own interests by reason of a neglected or defi-

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them in fashioning and enforcing their labor contracts and leases, participating in litigation "as next friends of the freedmen," and renting to them such abandoned confederate real estate as came into the possession of the United States. The Senate version of the bill is set out at CONG. GLOBE, 38th Cong. 1st Sess., 2798 (1864).

[28] *Id.* at 2801.

[29] *Id.* at 2798.

[30] This was the language proposed by the Senate committee. *Id.* at p. 2798. It was amended on the floor at the urging of the Senate sponsor, Senator Sumner. *Id.* at 2800-01.

[31] *Id.* at 2971, 2973. The bill applied, however, only to blacks in "the rebel States."

[32] *Id.* at 760; CONG. GLOBE, App., at 54.

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cient education, would, in the opinion of your committee, be looked upon as the vagary of a diseased brain. Why the freedmen of African descent should become these marked objects of special legislation, to the detriment of the unfortunate whites, your committee fail to comprehend . . . . The propriety of incurring an expenditure of money for the sole benefit of the freedmen, and laying a tax upon the labor of the poor and, perhaps, less favored white men to defray it, is very questionable . . . . [I]f [the Bureau] is to be converted into a grand almshouse department, whereby the labor and property of the white population is to be taxed to support the pauper labor of the freedmen . . . its operations cannot be too closely scrutinized." [33]

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[33] H. R. REP. No. 2, 38th Cong., 1st Sess., at 2, 4 (1864). The minority criticized the provisions on abandoned lands because whites were to be excluded from them.

> "Your committee cannot conceive of any reason why this vast domain, paid for by the blood of white men, should be set apart for the sole benefit of the freedmen of African descent, to the exclusion of all others."

Id. at 3. There seems to have been some uncertainty on the floor as to whether the bill in fact prohibited leases to whites. *See* CONG. GLOBE, 38th Cong., 1st Sess., 775 (1864). Congressman Knapp, one of the Committee minority, later expanded this objection beyond the lands provisions.

> "If there is any duty on the part of the Government to support these persons who have been rendered destitute by the operation of this war, I ask why not support all the bruised and maimed men, the thousands and tens of thousands of widows, and the still larger number of orphans left without the protection of a father . . . . If this bill is to put upon the ground of charity, I ask that charity shall begin at home and . . . I shall claim my right to decide who shall become the recipients of so magnificent a provision, and with every sympathy of my nature in favor of those of my own race"

CONG. GLOBE, 38th Cong., 1st Sess. App., 54 (1864). As the hypothetical tone of this statement suggests, Knapp was not squarely advocating that whites be afforded the benefits of the bill, but only

In the Senate, opponents did not focus on the differing treatment of blacks and whites under this particular bill, but criticized it as part of a general Republican policy of preferential treatment for blacks. Senator Richardson complained:

> "[T]he idea now sought to be carried out and consummated by this bill, to make war for, to feed, to clothe, to protect and care for the negro, to give him advantages that the white race do not receive or claim, is one that has characterized the legislation of Congress and all the acts of the President and his Cabinet for the past three years." [34]

Proponents of the bill emphasized that it was needed to overcome the effect of past mistreatment of blacks,[35] and it passed the House on March 1, 1864,[36] and, in a different form, the Senate on June 28, 1864.[37] The two Houses could not, however, iron out their differences,[38]

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that they be treated the same as blacks. Representative Knapp also urged as a reason for opposing the bill that it might lead to comprehensive federal social legislation for both whites and blacks. *Id.* at 761; *see also id.* at 763 (remarks of Rep. Brooks).

[34] *Id.* at 2801. Similar views were expressed by Senators Powell, Saulsbury and Hicks. *Id.* at 2787, 2933, 2966, 3366.

[35] *Id.* at 572, 572-573, 774, 2799.

[36] *Id.* at 895. The vote was 69 to 67.

[37] *Id.* at 3350. The vote was 21 to 9.

[38] The substantive provisions of the two bills were largely identical, but they differed as to the department in which the Bureau was to be located; the House wished to place it in the Department of War, while the Senate preferred the Department of the Treasury. *See* G. BENTLEY, A HISTORY OF THE FREEDMEN'S BUREAU 39-43 (1955). This difference ultimately proved fatal to the bill. The Conference Committee, unable to agree whether to place the Bureau in the Departments of War or Treasury Department, reported to the next session a bill establishing instead an independent "Department of Freedmen and Abandoned Lands." CONG. GLOBE, *op.*

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and as the Civil War neared its end, new legislation was introduced.

(2) The 1865 Freedmen's Bureau Act

After the extensive debates of 1864 and the failure to agree on a compromise bill, the House passed on February 18, 1865, a simplified bill introduced by Congressman Schenck[39] establishing a new Bureau of Refugees, Freedmen and Abandoned Lands to be situated within the War Department[40] and to continue operation until one year after the end of hostilities. With very little debate, a similar bill passed the Senate, a conference bill was approved by both Houses, and President Lincoln signed the measure on March 3, 1865.[41]

The 1865 Act contained three substantive provisions. First, the Secretary of War was authorized to provide

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cit., at 563-564, 767. The Conference bill was widely criticized as being a new bill altogether, rather than merely a compromise of the House and Senate versions. *Id.* at 689 (remarks of Rep. Washburne), 691 (remarks of Rep. Schenck, 785 (remarks of Sen. Davis), 958 (remarks of Sen. Hendricks and Sen Grimes). Despite this objection, the House agreed to the conference bill by a 64-62 vote. *Id.* at 694. The Senate, however, which had earlier approved the bill by a margin of 21-9, voted on February 22, 1865, to reject the conference bill by a margin of 24-14 and asked for another conference. *Id.* at 990. Since by this point the war was virtually over, and the need for some aid provision particularly urgent, Congress turned from the complex bill it had been considering for over a year to a similar measure for a Bureau of more limited authority whose location was to prove less controversial.

[39] *Id.* at 908. During the debates on the 1864 bill, Congressman Schenck and others urged that provision be made for white refugees because they faced many of the problems of poverty and local hostility which affected freedmen. *Id.* at 691, 960, 962, 984, 985. Congressman Eliot, the sponsor of the 1864 bill, stated that he had no objection to including refugees if such a need were demonstrated. *Id.* at 693.

[40] *Id.* at 1182, 4037; S. REP. No. 137, 38th Cong., 2d Sess. (1865).

[41] Act of Mar. 3, 1865, c.90, 13 Stat. 507-508.

"provisions, clothing and fuel" for "destitute and suffering refugees and freedmen." [42] Second, the Commissioner of the Bureau was authorized to lease, and ultimately sell, up to forty acres of abandoned land to any refugee or freedman. Third, the Bureau was invested with "the control of all subjects relating to refugees or freedmen." Although the statute did not detail many of the powers enumerated in the 1864 bill for the aid of freedmen, this general language of its three substantive provisions was broad enough to authorize all such activities. In its actual operations, the Bureau undertook all the remedial activity contemplated by the 1864 bill for the assistance of blacks, and provided most of that assistance to blacks alone, *see* pp. 19-42 *infra*.

(3) The 1866 Freedmen's Bureau Act

The Freedmen's Bureau Act ultimately passed by the Thirty-Ninth Congress in 1866 was one of the most comprehensive of the race conscious remedial measures enacted during the Reconstruction period. The chronological sequence of events during this year is complicated, but important, and a brief perspective is useful before considering in detail the various legislative debates. After lengthy discussion, Congress passed a Freedmen's Bureau bill in February, 1866, S. 60, but this bill was vetoed immediately by President Johnson, and Congress failed to override the veto. The Civil Rights Act of 1866 was also passed by Congress in early 1866, and was vetoed, but Congress overrode this veto and enacted the measure in

[42] The law was limited to freedmen or refugees "from the rebel States." Historians of this period have not regarded the inclusion of the white refugees provisions in the bill a significant factor in its enactment. *See, e.g.*, G. BENTLEY, A HISTORY OF THE FREEDMEN'S BUREAU 47-49 (1955); P. PIERCE, THE FREEDMEN'S BUREAU 42-45 (1904).

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April, 1866.[43] During the spring, the Fourteenth Amendment was formulated, passed both Houses, and was submitted by the Secretary of State on June 16, 1866, to the several States for ratification. While the Fourteenth Amendment was being debated in Congress, a second Freedmen's bill was prepared, and a conference bill was approved by both Houses in July. President Johnson again vetoed the bill, but this time, the veto was overridden, and the Freedmen's Act of 1866 was enacted on July 16, 1866.[44]

The consideration in 1866 of new legislation to protect the freedmen was undertaken after General Oliver Howard, Commissioner of the Freedmen's Bureau, submitted a report[45] in December, 1865, describing the Bureau's activities under the 1865 statute. The report revealed that most of the Bureau's programs in actual operation applied only to freedmen. Among the programs where only freedmen were among the named or intended beneficiaries were education,[46] the regulation of labor,[47] Bureau farms, land distribution and adjustment of real estate disputes,[48] supervision of the civil and criminal justice systems through the freedmen's courts,[49] registration of marriages,[50] and aid to orphans.[51] General Howard's recommendations to

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[43] Act of April 9, 1866, 14 Stat., c. 31, at 27.

[44] Act of July 16, 1866, 14 Stat., c. 200, at 173-177.

[45] H.R. EXEC. DOC. No. 11, 39th Cong., 1st Sess. (1865).

[46] *Id.* at 2, 3, 12, 13.

[47] *Id.* at 2, 12.

[48] *Id.* at 4, 7-12.

[49] *Id.* at 22.

[50] *Id.* at 23.

[51] *Ibid.* Both freedmen and refugees received medical assistance, but not in equal numbers; as of October 30, 1865, there were 27,819

Congress, which stressed particularly the importance of education,[52] dealt almost exclusively with the needs of freedmen.[53]

After consulting at length with General Howard,[54] Senator Lyman Trumbull introduced a new Freedmen's Bureau bill, S. 60,[55] as a companion to the Civil Rights Act of 1866. S. 60 proposed to continue the operations of

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freedmen under treatment, but only 238 refugees. *Id.* at 20-21. Freedmen received about three-quarters of all rations, and an unstated share of clothing and fuel distributed. *Id.* at 13, 16. Only in the area of transportation were the numbers of freedmen and refugees indeed approximately equal, but this represented less than 1% of the Bureau's budget and was a function which the report described as "nearly ceased." *Id.* at 14, 17. The regulations issued by Assistant Commissioners in the various states paralleled this distinction; those dealing with education, contracts, labor conditions, orphans or courts referred almost exclusively to freedmen, whereas regulations pertaining to rations, medicine and transportation referred to both Freedmen and refugees. *See* H.R. EXEC. DOC. No. 70, 39th Cong., 1st Sess. (1865).

[52] "Education is absolutely essential to the freedmen to fit them for their new duties and responsibilities . . . . Yet I believe the majority of the white people to be utterly opposed to educating the negroes. The opposition is so great that the teachers, though they may be the purest of Christian people, are nevertheless visited, publicly and privately, with undisguised marks of odium." H.R. EXEC. DOC. No. 11, 39th Cong., 1st Sess. 33 (1866). Howard urged that sites and buildings be provided for schools, and that they "not be exclusively for freedmen; for any aid given to education the numerous poor white children of the south will be most important to the object our government has in view; I mean the harmony, the elevation, and the prosperity of our people. *Id.* at 34. Congress did not accept this suggestion. The first bill, S. 60, was limited to white children who were refugees, and the law ultimately adopted provided for educational assistance only to freedmen. *See* note 149 *infra*.

[53] *Id.* at 32-35.

[54] II O. HOWARD, AUTOBIOGRAPHY 280-81 (1907).

[55] The bill in the form ultimately adopted by Congress in February but vetoed by the President, is set out in E. MCPHERSON, THE POLITICAL HISTORY OF THE UNITED STATES OF AMERICA DURING THE PERIOD OF RECONSTRUCTION 72-74 (1871).

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the Bureau "until otherwise provided by law," and to extend its jurisdiction to refugees and freedmen "in all parts of the United States." [56]

The 1866 bill was opposed on grounds similar to those advanced against the 1865 proposal, but the arguments concerning special treatment for blacks were more fully developed. Although S. 60 made few significant racial distinctions on its face, opponents and supporters generally regarded it particularly in view of General Howard's report as largely if not exclusively for the assistance of freedmen. Congressman Taylor, opposing the bill, contended there were no longer any refugees for the Bureau to assist:

> "The Freedmen's Bureau was established ostensibly for the aid and protection of refugees and freedmen. At the time the bureau was created there was a large class of refugees, or persons, both white and black, who were very properly denominated refugees; persons who had escaped and broke through the enemy's lines into our own for safety. But now, since the war has ceased, the term 'refugees' ceases to describe any class of persons among us. That class of persons which the word refugees was descriptive of have now

[56] An extensive geographic organization was contemplated, with agents, where necessary in every county. The purchase of school buildings for refugees and freedmen was directed, subject, however, to an express appropriation by Congress. The President was authorized to reserve for freedmen and refugees up to three million acres of "good" public land, to be rented and ultimately sold in parcels not exceeding forty acres. Blacks occupying certain lands south of Savannah were assured possession for another three years and the Commissioner was authorized to provide them with other property thereafter. Discrimination against freedmen or refugees in the administration of the criminal or civil law was prohibited in terms similar to the 1866 Civil Rights Act, except that violations were to be tried before agents of the Bureau under rules and regulations set by the War Department.

returned to their homes; and the great change wrought by the termination of the war in the circumstances and condition of that class of persons leaves the name of refugee without a meaning, as in its original application, therefore obsolete and inapplicable in describing any class of persons now having a habitation within the United States.

Now, according to my understanding of the meaning of the name refugee as it is used in the bill creating the bureau and the bill now before us, the present proposed legislation is solely and entirely for the freedmen, and to the exclusion of all other persons. . . ." [57]

Representative Chanler reviewed the Bureau's report in detail to demonstrate the paucity of assistance to refugees:

"This present bill is to secure the protection of the Government to the blacks exclusively, notwithstanding the apparent liberality of the measure to all colors and classes . . . General Howard's report establishes the fact that the present bureau gave most of its aid exclusively to the negro freedmen." [58]

After quoting excerpts from the report, Chanler concluded:

"From these extracts it will plainly be seen that black freedmen and not white refugees were the special care of the bureau.

The white refugees were few in number and received no land from the Government. The period during

[57] CONG. GLOBE, 39th Cong., 1st Sess. 544 (1866) (the Globe for this session will hereinafter be cited GLOBE; its Appendix, GLOBE App.). *See also* GLOBE 634, 635 (remarks of Representative Ritter).

[58] GLOBE, App. 78.

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> which they received aid by transportation ended with the date of the report, or was rapidly doing so. The 'supervisors' appointed were not instructed to aid the poor whites of the South, of whose destitute condition we hear so much. . . ." [59]

Congressman Eliot, the House sponsor of S. 60, referred only to freedmen in describing the bill,[60] and only mentioned the coverage of refugees at the instance of another supporter.[61] Proponents of the bill did not seriously contest that its scope was as suggested by Taylor and Chanler, but grounded their arguments on the special needs of blacks.

Most opponents of the bill complained, in the words of Senator Wiley, that it made "a distinction on account of color between the two races." [62] Senator McDougall, who believed in the natural superiority of members of the white race, objected:

> "This bill undertakes to make the negro in some respects their superior, as I have said, and gives them favors that the poor white boy in the North cannot get; gives them favors which were never offered to the Indian, whom I hold to be a nobler and far superior race. It makes us their voluntary guardians to see, in the first place, that they have the opportunity to work, and then their guardians to see that they get paid, and then that they are taken care of, and then we are to take care of them ourselves. I never had

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[59] GLOBE, App., p. 81.

[60] GLOBE 514-15.

[61] *Id.* at 516.

[62] *Id.* at 397; *see also id.* at 342 (remarks of Sen. Cowans), 544 (remarks of Rep. Taylor), App. 82 (remarks of Rep. Chanler).

> anybody to do that for me, even when I was quite a young lad; and from that time until now it has been my office to protect myself; to earn what I could for my own support. This bill confers on the negro race favors that have not been extended to many men on this floor within my personal knowledge." [63]

Congressmen Marshall and Ritter contended the bill would result in two separate governments, "one government for one race and another for another." [64]

Differing sections of the bill were singled out by opponents for particular criticism. Senator Saulsbury objected in particular to the lands provision:

> "Another section requires that there shall be three million acres of land assigned in certain States in the South for those freedmen; and, mark you, the negro is a great favorite in the legislation of Congress, and the bill provides that it shall be 'good land.' No land is to be provided for the poor white men of this country, not even poor land; but when it comes to the

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[63] *Id.* at 401.

[64] *Id.* at 627 (remarks of Rep. Marshall), 634 (remarks of Rep. Ritter). Several members of Congress renewed the objection advanced without success in 1865 that the bill would result in whites being taxed to assist blacks; Representative Ritter asked, "Will the white people who have to support the government ever get done paying taxes to support the negroes?" *Id.* at 635; *see also id.* at 362 (remarks of Sen. Saulsbury); 634 (remarks of Rep. Ritter); GLOBE, App. 83 (remarks of Rep. Chanler). Others argued that the bill would actually harm the Negro, either by increasing his dependence, GLOBE 401 (remarks of Sen. McDougall), or by provoking white resentment. GLOBE, App. 69-70 (remarks of Rep. Rousseau). Several speakers thought the measure a device "to practice injustice and oppression upon the white people of the late slave-holding states for the benefit of the free negroes." GLOBE 402 (remarks of Sen. Davis); *see also id.* at 251 (remarks of Sen. Moccill); 415 (remarks of Sen. Davis); GLOBE, App. 78 (remarks of Rep. Chanler).

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negro race three million acres must be set apart, and it must be 'good land' at that." [65]

Senator Guthrie complained that the litigation authorized before Bureau agents was solely for the protection of the freedmen:

"All the suits to be instituted under this bill are to be those in which justice shall be administered in favor of the blacks; and there is not a solitary provision in it relative to suits in cases where the blacks do wrong to the whites."

Congressman Rousseau cited the example of several schools in Charleston established apparently with the assistance of the Bureau, for the education of colored children, while federal authorities forbade the opening of public schools on an all-white basis:

"Mr. Speaker, when I was a boy, and in common with all other Kentucky boys was brought in company with negroes, we used to talk, as to any project, about having 'a white man's chance.' It seems to me now that a man may be very happy if he can get 'a negro's chance.' Here are four school-houses taken possession of, and unless they mix up white children with black, the white children can have no chance in these schools for instruction. And so it is wherever this Freedmen's Bureau operates." [67]

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[65] GLOBE 362. Senator Hendricks was less concerned about the reservation of such lands in Southern states, but found it "very objectionable" to reserve such property for blacks in the mid-west where there was "likely to be a great demand for homesteads by white settlers." *Id.* at 372. *See also, id.* at 373 (remarks of Sen. Johnson); 635 (remarks of Rep. Ritter); GLOBE, App. 84 (remarks of Rep. Chanler).

[66] *Id.* at 336. *See also id.* at 342 (remarks of Sen. Cowan).

[67] GLOBE, App. 71.

Senator Johnson urged:

> "If there is an authority in the Constitution to provide for the black citizen, it cannot be because he is black; it must be because he is a citizen; and that reason being equally applicable to the white man as to the black man, it would follow that we have the authority to clothe and educate and provide for all citizens of the United States who may need education and providing for." [68]

Opponents of S.60 suggested a variety of white groups which they claimed were equally entitled to assistance. Senator Hendricks referred to the plight of white southerners generally:

> "It is all very well for us to have sympathy for the poor and the unfortunate, but both sides call for our sympathy in the South. The master, who, by his wickedness and folly, has involved himself in the troubles that now beset him, has returned, abandoning his rebellion, and has bent down upon his humbled knees and asked the forgiveness of the Government, and to be restored again as a citizen." [69]

Senator Stewart cited the needs of the families of fallen Union soldiers:

> "I have also sympathy for the widows and orphans of the North that have been bereaved by this terrible contest, who are forgotten in our efforts for the negro. I have sympathy for the poor negro who is left in a destitute and helpless condition. I am anxious to enter upon any practical legislation that shall help all classes

[68] GLOBE 372.

[69] *Id.* at 319.

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and all sufferers, without regard to color—the white as well as the black." [70]

Congressman Marshall pressed for aid instead to loyal white southerners whose property had been seized or used by the Union army:

"There are others who have higher claims to our consideration. In Tennessee and other southern States thousands of loyal men left their homes to battle for the flag of the Union; and in many cases their entire property was seized in their absence and appropriated to the use and support of the Federal armies, and their families reduced to poverty and want. . . . And they now come here to ask the Government to pay only for the property actually taken for the use of the Government. The claim of these men to such compensation is a just and holy one. This is not denied. But I do not hear enactment of a law to pay these claims. You have, on the contrary, passed a resolution that such claims shall not be considered, because, as you allege, the Government is not now able to pay these debts. . . . No peans are sung in praise of these wronged defenders of their country. They happen, unfortunately, to be white men and white soldiers, and they may starve and die from want, and no wail will be raised in their behalf; but when money is wanted to feed and educate the negro I do not hear any complaints of the hardness of the times or of the scarcity of money." [71]

Senator Davis, while opposing any such federal welfare program, thought southern white paupers equally entitled to assistance:

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[70] *Id.* at 297.

[71] *Id.* at 629.

> "[T]he free negroes in South Carolina and in all the southern States constitute a portion of their population. It is a principle of our system of government, and the Senator from Illinois cannot overturn or shake it, that every State is bound to provide for its own paupers, whether they be black or white. . . . The people of Kentucky would be gratified if the Congress of the United States could constitutionally take off them this burden. . . . If there is an obligation or a duty or a power to take care of the negro paupers, there is, I suppose, an equal obligation to take care of the white paupers of the different states." [72]

Senator McDougall saw no reason to treat freedmen better than the "[t]housands of white boys in the North . . . the poor boys of our own race and people." [73]

Supporters of the bill defended it by stressing the special needs of blacks. Senator Fessenden, for example, stated:

> "A large body of men, women, and children, millions in number, who had received no education, who had been laboring from generation to generation for their white owners and masters, able to own nothing, to accomplish nothing, are thrown, without protection, without aid, upon the charities of the world, in communities hostile to them." [74]

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[72] *Id.* at 370.

[73] *Id.* at 363.

[74] *Id.* at 365. Congressman Donnelly urged:

> "We have liberated four million slaves in the South. It is proposed by some that we stop right there and do nothing more. Such a course would be a cruel mockery. These men are without education, and morally and intellectually degraded by centuries of bondage."

Id. at 588; *see also* GLOBE, App. 75 (remarks of Rep. Phelps.) Assistance to this disadvantaged minority was argued to be in

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Congressman Moulton distinguished Bureau aid to upgrade blacks from unfair discrimination:

> "The object of the bill is to protect the colored man. The pro-slavery party on the other side of the House from the foundation of the Government up to the present time have done everything they could against ameliorating the condition of the colored men. . . . One object of the bill is to ameliorate the condition of the colored man. . . . The gentleman has made another objection to this bill. . . . He says the bill provides one law for one class of men, and another for another class. The very object of the bill is to break down the discrimination between whites and blacks. . . . Therefore I repeat that the true object of this bill is the amelioration of the condition of the colored people." [75]

Congressman Phelps urged that the bill properly gave special assistance to blacks because they lacked the political influence of whites to advance their own interests:

> "The very discrimination it makes between 'destitute and suffering' negroes and destitute and suffering

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the best interest of the country as a whole. Congressman Hubbard insisted:

> "They ought not to be left to perish by the wayside in poverty and starvation when the country so much needs their work. It is not their crime nor their fault that they are so miserable. From the beginning to the present time they have been robbed of their wages, to say nothing of the scourgings they have received. I think that the nation will be a great gainer by encouraging the policy of the Freedmen's Bureau, in the cultivation of its wild lands, in the increased wealth which industry brings and in the restoration of law and order in the insurgent States."

Id. at 630. Senator Donnelly urged that with such assistance the negro "becomes perforce a property-holder and a law-maker, and he is interested with you in preserving the peace of the country." *Id.* at 589.

[75] *Id.* at 631-32.

white paupers, proceeds upon the distinction that, in the omitted case, civil rights and immunities are already sufficiently protected by the possession of political power, the absence of which in the case provided for necessitates governmental protection." [76]

Despite some expressed doubts as to the bill's constitutionality,[77] Congress approved this legislation by sizeable

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[76] GLOBE, App. 75. Senator Fessenden responded to the complaint that whites would be taxed to aid blacks by arguing that the South had brought that upon itself by commencing the war. GLOBE 366. Particular emphasis was placed on the fact that the bill was intended and formed to assist blacks to better their own position, rather than merely providing relief. Senator Trumbull, the bill's author and Senate sponsor, explained that such legislation was appropriate

> "to educate, improve, enlighten, and Christianize the negro; to make him an independent man; to teach him to think and to reason; to improve that principle which the great Author of all has implanted and every human breast . . . ."

Id. at 322. Trumbull urged that the

> "cheapest way by which we can save this race from starvation and destruction is to educate them. They will then soon become self-sustaining. The report of the Freedmen's Bureau shows that today more than seventy thousand black children are being taught in the schools which have been established in the South. We shall not long have to support any of these blacks out of the public Treasury if we educate and furnish them land upon which they can make a living for themselves."

Ibid. Congressman Donnelly similarly emphasized the importance of education to both the blacks and "the safety of the nation." *Id.* at 590.

[77] As in 1865, Congress was divided as to whether it had constitutional authority to adopt protective legislation of this sort. Proponents of the bill relied, *inter alia*, on the Thirteenth Amendment and the analogy of aid to Indians. Referring to the section two of Amendment Senator Trumbull urged, "I have no doubt that under this provision of the Constitution we may destroy all these discriminations in civil rights against the black man; and if we cannot, our constitutional amendment amounts to nothing. *Id.* at 322; *see also id.* at 366 (remarks of Sen. Fessenden); 393 (re-

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majorities. President Johnson, who had been expected to sign the Freedman's Bureau bill, vetoed it instead on February 19, 1866.[78] Among other objections, the President saw both the adoption of social welfare programs by the federal government and the selection of one group for special treatment as unprecedented. Congress, he urged,

> "has never founded schools for any class of our own people, not even for the orphans of those who have fallen in the defense of the Union, but has left the care of education to the much more competent and efficient control of the States, of communities, or private associations, and of individuals. It has never deemed itself authorized to expend the public money for the rent or purchase of homes for the thousands, not to say millions, of the white race who are honestly toiling from day to day for their subsistence. A system for the support of indigent persons in the United States was never contemplated by the authors of the

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marks of Senator McDougall); 623 (remarks of Rep. Kerr); 631 (remarks of Rep. Moulton). Congressman Moulton asserted:

> "I think the provisions of this bill are in accordance with the acts of the Government in reference to similar subjects. . . . I may allude to the same practice in regard to the Indian tribes. Only a few days ago a bill was introduced into this House by which we appropriated half a million dollars of money for some half-starved Indians."

Id. at 631; *see also id.* at 319 (remarks of Sen. Trumbull); 323 (remarks of Sen. Fessenden); 363 (remarks of Sen. Saulsbury). A substantial majority of both houses concluded that such assistance to blacks was both authorized and necessary. The bill passed the Senate on January 25, 1866, by a vote of 37 to 10, and was approved by the House on February 6, 1866, by a vote of 137 to 33. *Id.* at 421, 688.

[78] His lengthy veto message raised a variety of objections to the legislation, including doubts as to its necessity, fear of creating a permanent institution, and a desire that such problems as might exist be solved instead by the States. VIII MESSAGES AND PAPERS OF THE PRESIDENTS, 3596-3603 (1914).

> Constitution; nor can any good reason be advanced why, as a permanent establishment, it should be founded for one class or color of one people more than another." [79]

The Senate sought to override the veto the next day. Senator Davis argued strongly that the legislation was intended to elevate blacks to a position of superiority over whites:

> "[W]hile holding out to the negro the magic lure of liberty and homes and largesses at the cost of the white people of the United States, the design is to re-enslave the freedmen and to reduce the white race of the southern States to a slavery even lower than that of the blacks." [80]

The broad powers of the Bureau, he urged,

> "will enable it to depress the whites, to favor and hold up the blacks, to flatter the vanity and excite the insolence of the latter, to mortify and irritate the former, and perpetuate between them enmity and strife." [81]

Senator Trumbull responded to the arguments in the veto message paragraph by paragraph,[82] but although the bill

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[79] *Id.* at 3599. He urged that, if federal protection was to be afforded blacks, it be limited to such relief as might be provided by the federal courts. *Id.* at 3600, 3603.

[80] GLOBE 935.

[81] *Ibid.*

[82] In reply to the President's contention that Congress had not in the past enacted class legislation, Senator Trumbull urged:

> "The answer to that is this: we never before were in such a state as now; . . . never before in the history of this Government have nearly four million people been emancipated from the most abject and degrading slavery ever imposed on human beings; never before has the occasion arisen when it was neces-

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had earlier passed with better than a two-thirds majority, several supporters unexpectedly switched their positions and the vote in favor of the bill, 30 to 18,[83] was insufficient to override the veto.

This veto precipitated a final break with Congressional Republicans.[84] On March 27, 1866, the President vetoed the Civil Rights Bill of 1866 on the ground, *inter alia*, that it provided blacks with unprecedented and unwarranted special treatment:

> "In all our history, in all our experience as a people living under Federal and State law, no such system as that contemplated by the details of this bill has ever before been proposed or adopted. They establish for the security of the colored race safeguards which go infinitely beyond any that the General Government

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sary to provide for such large numbers of people thrown upon the bounty of the Government, unprotected and unprovided for. But, sir, when the necessity did exist the Government has acted. We have voted hundreds of thousands and millions of dollars, and are doing it from year to year, to take care of and provide for the destitute and suffering Indians. We appropriated, years ago, hundreds of thousands of dollars to take care and feed the savage African who was landed upon our coast by slavers . . . And yet, sir, can we not provide for those among us who have been held in bondage all their lives, who have never been permitted to earn one dollar for themselves, who, by the great constitutional amendment declaring freedom throughout the land, have been discharged from bondage to their masters who had hitherto provided for their necessities in consideration of their services? Can we not provide for these destitute persons of our own land on the same principle that we provide for the Indians, that we provide for the savage African?"

Id. at 939. Senator Trumbull contended that the Thirteenth Amendment afforded ample constitutional justification for the bill. *Id.* at 941-942.

[83] *Id.* at 943.

[84] J. McPherson, The Struggle for Equality 347-349 (1964)).

> has ever provided for the white race. In fact, the distinction of race and color is by the bill made to operate in favor of the colored and against the white race." [85]

He objected in particular that the automatic citizenship conferred upon blacks entailed "discrimination against large numbers of intelligent, worthy, and patriotic foreigners" who were still required to meet the statutory standards for naturalization[86] and that the bill required federal courts, "which sit only in one place for white citizens", to move to any part of their district at the direction of the President "to hear civil rights cases." [87] On April 9, 1866, Congress passed the Civil Rights Bill over the President's veto.[88]

Emboldened by the success of the Civil Rights bill, Congress decided to try again to enact a Freedmen's Bureau bill, and on May 22, 1866, a new bill, H.R. 613, was reported by the House Committee on Freedmen.[89] The new bill eliminated two provisions which had provoked the most criticism of S.60: the Bureau was extended for only two years, rather than indefinitely, and no express provision was made for appointment of agents for every county.[90] In addition, the reservation of a million or more acres of

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[85] VIII MESSAGES AND PAPERS OF THE PRESIDENTS, *op. cit.*, 3610-3611.

[86] *Id.* at 3604-3605.

[87] *Id.* at 3610.

[88] Act of April 9, 1866, 14 Stat., c. 31, 27. The provisions of the 1866 Civil Rights Act are now incorporated in 42 U.S.C. §§ 1981 and 1982.

[89] GLOBE 2743. The Senate bill was reported out of committee on June 11, 1866. *Id.* at 3071.

[90] Mr. Eliot explained these modifications on the floor of the house. *Id.* at 2772-2773.

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federal public lands for refugees and freedmen was deleted as unnecessary because of the adoption of the Southern Homestead Act,[91] which opened up federal lands in five southern States for settlement.

The new bill, however, distinguished between freedmen and refugees in a number of ways not found in the vetoed proposal. While section one of S. 60 had extended the old statute to "refugees and freedmen in all parts of the United States," section 1 of the new bill extended it to

> "all loyal refugees and freedmen, so far as the same shall be necessary to enable them as speedily as practicable to become self-supporting citizens of the United States, and to aid them in making the freedom conferred by proclamation of the commander-in-chief, by emancipation under the laws of States, and by constitutional amendment, available to them and beneficial to the Republic." [91a]

Although the word "refugees" was included in this section of H.R. 613, the purposes of effectuating the recently conferred "freedom" applied only to blacks. Section 6 of S. 60 had authorized the erection of schools "for refugees and

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[91] C. 127, 14 Stat. 66 (1866). Freedmen enjoyed an indirect though significant priority under the Act over most whites. For six months after the bill went into effect the public lands were not available to any person who had "borne arms against the United States, or given aid and comfort to its enemies." 14 Stat., c. 127 at 67 (1866). This prohibition excluded a large proportion of southern whites. "Oliver Howard urged his assistant commissioners to take immediate advantage of this restrictive proviso, to present information about the opportunity it offered 'in the strongest manner', and to make every effort to secure homes for the Negroes before the 'rebels' could take up the lands. *'Do all you can,'* he emphasized." G. BENTLEY, A HISTORY OF THE FREEDMEN'S BUREAU, 134 (1955) (emphasis in original).

[91a] 14 Stat., c. 200 at 174 (1866).

freedmen dependent on the Government for support"; under H.R. 613, however, educational programs were limited to blacks. Section 12 of H.R. 613 authorized the use of land, buildings or the proceeds derived therefrom for "the education of the freed people", and section 13 directed cooperation with and assistance to "private benevolent associations of citizens in and of freedmen . . . for purposes of education." [92] While the general lands provision of S.60 was deleted, H.R. 613 had six sections protecting blacks who had occupied certain specified abandoned lands,[93] and Congressman Eliot contemplated that the Bureau would use the provisions of the Southern Homestead Act "to provide for the freedmen," [94] as indeed occurred.[95] In sum, though slightly weakened in other respects, the new bill expressly provided special protection and aid for blacks alone in a manner unknown to the vetoed bill or the 1865 Freedmen's Bureau Act.

Since the provisions of S. 60 had been exhaustively discussed earlier in the year, the debates on H.R. 613 were brief. The objection to the measure as a form of special treatment for blacks, a description particularly accurate as to H.R. 613, was renewed. Congressman LeBlond urged that it was

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[92] 14 Stat., c. 200 at 176 (1866). Congressman Eliot noted that the broader provisions of S.60 had been objected to on the ground "that the United States ought not to educate," but urged "[i]t is perfectly plain that education cannot be secured to these freedmen" without federal assistance. GLOBE 2773.

[93] 14 Stat., c. 200 at 174-76 (1866).

[94] GLOBE 2773.

[95] *See* p. 32, *supra*, n. 90. Sections 7 and 8 of the old bill which had protected "negroes, mulattoes, freedmen [and] refugees" from discrimination in the administration of civil and criminal law, were redrawn to prohibit only discrimination on the basis of "race or color, or previous condition of slavery." 14 Stat., c. 200 at 176-77 (1866).

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> "the duty of this Congress to strike down that system at once, leaving these colored people, free as they are, to make a living in the same way that the poor whites of our country are doing. . . . [T]he period has gone by when the American people, taxed as they are almost to the death for the purpose of supporting this Government, are going to contribute any longer to the maintenance of this class of persons." [96]

He objected in particular to the provision of H.R. 613 authorizing the Secretary of War "to issue such medical stores or other supplies and transportation, and afford such medical or other aid" as might be needed to carry out the purposes of section 2 of the 1865 Act, *i.e.* for the assistance of "destitute and suffering refugees and freedmen": [97]

> "It is true it only purports upon its face to confer the power to furnish medical aid; yet the power is there given not only to feed but to clothe the colored people who have been slaves. That of itself is objectionable. It is class legislation; it is doing for that class of persons what you do not propose to do for the widows and orphans throughout the length and breadth of this whole country." [98]

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[96] GLOBE 2780.

[97] 13 Stat. c. 90, 508 (1865); 14 Stat., c. 200 at 174 (1866).

[98] With reference to the lands provisions of H. R. 613 he argued, "We owe something to these freedmen, and this bill rightly administered, invaluable as it will be, will not balance the account. We have done nothing to them, as a race, but injury. They, as a people, have done nothing to us but good . . . . We reduced the fathers to slavery, and the sons have periled life to keep us free. That is the way history will state the case. Now, then, we have struck off their chains. Shall we not help them to find homes? They have not had homes yet."
GLOBE 2780. Additional constitutional authority, he urged, could

Again, Congressman Eliot, in support of the bill, urged that such special treatment was entirely proper.[99] H.R. 613 passed the House on May 29, 1866, and the Senate approved a similar draft on June 26. The Conference Report on the bill was adopted by both houses on July 2 and 3, 1866.[100]

President Johnson again vetoed the bill, arguing that it fell "within the reasons assigned" in his veto message concerning S. 60.[101] After urging that any special problems of blacks had already been resolved, he particularly criticized the lands sections providing property only

> "to a particular class of citizens. While the quieting of titles is deemed very important and desirable, the discrimination made in the bill seems objectionable. . . ." [102]

The new veto message closed with an emphasis on the undesirability of such special treatment for any "favored class of citizens": "In conclusion I again urge upon Congress the danger of class legislation, so well calculated to keep the public mind in a state of uncertain expectation, disquiet, and restlessness." [103]

The bill was returned by President Johnson to Congress on July 16, 1866, and voted on by both houses the same day. Senator Saulsbury, who had opposed legislation for freed-

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be found in section 2 of the Thirteenth Amendment, which he read as giving power to adopt such legislation as it "shall deem to be appropriate to make fairly effective the great grant of freedom." *Id.* at 2779.

[99] *Id.* at 2773.

[100] *Id.* at 2878, 3413, 3524, 3562.

[101] VIII MESSAGES AND PAPERS OF THE PRESIDENTS, *op. cit.* 3620.

[102] *Id.* at 3623.

[103] *Ibid.*

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men since the first proposals in 1864, once again objected to the bill's preferential treatment for blacks.

> "What is the principle involved? No less a principle than this: has the Congress of the United States the power to take under its charge a portion of the people, discriminating against all others, and put their hand in the public Treasury, take the public money, appropriate it to the support of this particular class of individuals, and tax all the rest of the people of the country for the support of this class? . . .
>
> Not only are the negroes of the South set free, by which the object and the aim of all abolitionists in the land was accomplished as we supposed, but a bill is passed by Congress conferring upon them all civil rights enjoyed by white citizens of the country, and they are now selected out from among the people of the United States, the public Treasury put at their disposal, and the white people of the country taxed for their support. Lands to which you claim title . . . you take and given to the negroes in South Carolina. You give these lands to no white person. . . .
>
> I never believed that Congress had any right to establish any such bureau to take under its charge any particular portion of the people of the United States and to provide for them out of the public Treasury or out of the public lands." [104]

Congress, which had consistently rejected such arguments, did so again.

The House voted 104 to 33 to override the veto, and the Senate voted the bill into law by a margin of 33 to 12.[105]

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[104] GLOBE 3840-3841.

[105] *Id.* at 3842, 3850. The 1866 Freedmen's Bureau Act is codified as Act of July 16, 1866, c. 200, 14 Stat. 173-177.

(4) Freedmen's Bureau Legislation, 1868-1870

Although General Howard had believed the Freedmen's Bureau should be allowed to expire in July, 1868, as the 1866 Act provided,[106] he discovered that the consequence of withdrawing Bureau agents from the Southern States was:

> "to close up the schools; to intimidate Union men and colored people, and, in fact, to paralyze almost completely the work of education which, until then, was in a healthful condition and prospering." [107]

Accordingly, Howard wrote to Congress on February 8, 1868, recommending continuation of the Bureau for another year.[108]

Congressman Eliot introduced such legislation to extend the Bureau, emphasizing the importance of its educational work:

> "[I]f the protecting care of the General Government, feared by those whose hearts are rebel as their hands were hostile during the war, should be removed, there is no doubt at all that schools would be abolished and a war upon the freedmen begun. There are now two hundred and thirty-eight thousand three hundred and forty-two scholars receiving instruction in these schools. The teachers are chiefly supplied and paid

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[106] In his report of December, 1867, General Howard noted that, while other Bureau activities had generally declined since its creation, the operation of schools for freedmen had continued to expand. For the year ending September 1, 1867, educational activities accounted for $208,445 of the Bureau's $284,117 in expenditures. REPORT OF THE COMMISSIONER OF THE BUREAU OF REFUGEES, FREEDMEN AND ABANDONED LANDS 36 (1867).

[107] CONG. GLOBE, 40th Cong., 2d Sess., 1817 (1868).

[108] *Ibid.*

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> by northern and western benevolent associations. The school houses are mainly built from private funds of freedmen and contributions from loyal men. School-houses are in some places rented and everywhere protected by the Government and it is this protection which is needed, and without which they cannot be continued." [109]

This extension of the Bureau was opposed on the grounds urged in past years. Congressman Adams objected to legislation "to feed, clothe, educate and support one class of people to the exclusion of all others equally as destitute and much more deserving".[110] Congressman Wood objected to taxing white men for the aid of blacks.[111] Senator Hendricks attacked the Bureau for placing freedmen "in supremacy and in power over the white race".[112] Congress again rejected these arguments by a decisive margin,[113] and in June, 1868, renewed the Bureau for another year.[114] In July of 1868, without significant additional debate, Congress passed over the President's veto,[115] a new statute continuing indefinitely "the educational department of said Bureau and payment of moneys due the soldiers, sailors, and marines," and terminating other Bureau functions as

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[109] *Id.* at 1816.

[110] *Id.* at App. 292.

[111] *Id.* at 1994.

[112] *Id.* at 3054.

[113] The House vote was 97 to 38. *Id.* at 1998. The Senate vote was not recorded. *Id.* at 3058.

[114] The law is set out at 15 Stat. 83, c.135 (1868). The bill became law without the President's signature. *Id.* at 84.

[115] The veto was based on limitations placed by the new statute on the President's authority to appoint Bureau personnel. G. BENTLEY, A HISTORY OF THE FREEDMEN'S BUREAU 202 (1955).

of January 1, 1869.[116] Congressional appropriations for freedmen's hospitals in Washington, D. C. and elsewhere continued for many years, thereafter.[117]

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[116] CONG. GLOBE, 41st Cong., 1st Sess., 193-194 (1870).

[117] Except for a single appropriation in 1866, the Bureau had been largely self-supporting, paying for its education and other programs in part with funds received from the rental of abandoned property and other activities. With the termination of all but the education and colored servicemen programs, however, these sources of income were lost, and after continuing on cash reserves for two years the Bureau ran out of funds in the spring of 1870. This development forced Congress to consider whether or not to follow General Howard's recommendation that federal assistance to or operation of local educational facilities be continued and funded on a permanent basis. In March of 1870, Congressman Arnell introduced legislation to create an Office of Education "to exercise the same powers of those hitherto exercised by the Freedmen's Bureau in its educational division." *Id.* at 2295. The measure passed the House by a vote of 104-55 on April 5, 1870, *id.* at 2430, but never reached a vote in the Senate, and thus died. *Id.* at 5286, 5287. While the basis of Senate opposition cannot be determined, since the bill was never debated, the primary objection to the measure in the House was that providing for education was a matter for the states. Congressman McNeely argued that all the Southern States had or would make "suitable provision by their constitutions for the education of the children of freedmen," and if they failed to do so Congress could as easily intervene then as now. *Id.* at 2317. He therefore urged Congress:

> "to end this Federal interference in educational affairs and leave their exclusive regulation to the States and the people directly interested. What would suit one State might not suit another, and that system of teaching or character or qualification of teachers, or kind of school books, or set of rules for school discipline, which might suit the people of one county or school district might not suit another."

Id. at 2319. Congressman Lawrence argued that:

> "this bill opens up a subject vastly more important than many members of this House have as yet supposed. It presents the question whether we shall embark in the general business of taking charge of the educational interests of the States. For if we may in this way provide the means of education in the States of this Union, we may do it to the exclusion of the common schools already existing in the States; and we may sub-

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(5) 1867 Relief Legislation

In March, 1867, Congress adopted two statutes providing food and other aid to the poor whose contrasting provisions and legislative histories indicate the care with which Congress designated by race the intended recipients.

The first measure, which became law on March 16, 1867, appropriated funds "for the relief of freedmen or destitute colored people in the District of Columbia, the same to be expended under the direction of the commissioner of the bureau of freedmen and refugees." [118] Senator Morrill urged "the necessities of this class of people in the district commend themselves very strongly to [the Senate's] sense of humanity and charity." [119] Congressman Holman argued for its adoption on the ground "that great destitution exists among the colored population here, and that an appropriation of this kind is imperatively demanded by considerations of common humanity." [120]

Two weeks later, Congress enacted "a Resolution for the Relief of the Destitute in the Southern and Southwestern States." This measure, growing out of crop failure and resulting famine, authorized the Secretary of War, "through the commission of the freedmen's bureau," to provide from funds previously allocated to the Bureau "supplies of food sufficient to prevent starvation and

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vert the educational systems which have been established in every State of this Union."

Id. at 2320. The arguments of past years regarding special aid to freedmen were not, however, raised again. With the defeat of the Arnell bill the educational activities of the Bureau came to an end, as did most of the freedmen's schools. The Bureau itself, moribund except for the payment of colored servicemen's claims, was finally abolished in 1872.

[118] 15 Stat. Res. 4, 20 (1867).

[119] CONG. GLOBE, 40th Cong., 1st Sess., 28 (1867).

[120] *Id.* at 76.

extreme want to any and all classes of destitute or helpless persons." [121] The decision to give indigent whites equal access to Bureau food supplies originally intended for freedmen was a matter of great controversy. Congressman Butler objected to this plan to aid "the white men at the expense of freedmen." He asked, rhetorically, for whom they were asked to encroach "upon the provision made for the freedmen," and concluded that the food would go to "[n]ot merely the women and children, not merely the sick and disabled, but the able bodied rebel who, lounging at the corner grocery, refuses to work," while the "mudsills of the North are obliged to work in order that they may pay taxes for the support of the Government." [122] Others renewed their criticism of the general exclusion of whites from the Bureau's aid programs,[123] and urged that the statute be modified to include whites for other purposes.[124]

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[121] 15 Stat. Res. 28, 28 (1867).

[122] CONG. GLOBE, 40th Cong., 1st Sess., 257 (1867); *see also id.* at 83-84.

[123] *Id.* at 85 (remarks of Rep. Chanler).

[124] *Id.* at 237 (remarks of Rep. Pile). Such modifications were not enacted. The sense of Congress was expressed by Ohio Congressman John A. Bingham, the author of the Fourteenth Amendment, who saw no objection to the general limitation in the Freedmen's Bureau Act for which he had voted in 1866, *id.* at 235-236, but urged that no such distinction should be made in a case of actual starvation:

> "[T]he war's dread alarm has ended, as happily as it had with us, when the broken battalions of rebellion have surrendered to the victorious legions of the Republic, let no man stand within the forum of the people and utter the horrid blasphemy that you shall not have regard for the famishing poor. Do not then, I pray you, ask that this Government shall degrade itself in the presence of the civilized world by refusing supplies to its own citizens who are famishing for bread, and stop to inquire of the starving thousands whether they were friends or enemies. Sir, you cannot discriminate, if you would, between friends and enemies when famishing men ask for bread."

Id. at 90.

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(6) The Colored Servicemen's Claim Act

During the war special bounties and other payments were authorized for soldiers who enlisted in the Union forces, the funds, at least in part, only payable at the conclusion of hostilities or completion of the period of enlistment. In the following years unscrupulous claim agents, offering to represent black servicemen in obtaining such sums, pensions, or back pay due to them, took unfair advantage of their often uneducated and unsophisticated clients and pocketed unwarranted portions of the funds ultimately obtained. To protect the black soldiers, Congress in 1866 established a schedule of maximum fees payable to agents or attorneys handling such claims for colored soldiers.[125] This measure having proved inadequate, Senator Wilson proposed in 1867 that all claims of black servicemen from Southern states handled by agents or attorneys be paid to the Commissioner of the Freedmen's Bureau, who was to pay to each claimant and agent or attorney the sum authorized by law.[126]

This proposal, like other legislation pertaining to the Freedmen's Bureau, was opposed as a form of discriminatory legislation. Senator Grimes urged that he had long maintained that such:

> "class legislation was a great error, that it was wrong, that it was wicked; that we should not single out one class and say that the nation should take the guardianship of that class to the exclusion of another class; that we should not single out one class and confer upon them a consequence which we would not confer

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[125] 14 Stat. Res. 86 at 368 (1866).

[126] The Bureau had, since July, 1865, been attempting to protect colored servicemen from such abuses by assisting them, without charge, to collect money owed them. G. BENTLEY, A HISTORY OF THE FREEDMEN'S BUREAU 87 (1955).

upon another class. I had thought and hoped that that time had gone by; that we were successful; that we had triumphed in this regard; and that we were to see and hear no more of class legislation. But what is this proposition but placing, by an act of Congress, the business affairs of all the colored men who have been in the Army and Navy and Marine Corps of the United States under the guardianship of the Government. . . ." [127]

Senator Henderson objected

"My impression is that the negroes understand their rights as well as anybody; and I protest against the idea that we must be eternally legislating for the negro in order to protect his interest and regarding him as a ward of the Government. All we need do is confer upon him the rights, civil and political, that we confer upon other men, and then I guaranty that the negro will take care of himself; and so far as his money rights are concerned he will look out for them with the same diligence and the same care that white men do." [128]

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[127] CONG. GLOBE, 40th Cong., 1st Sess., 79 (1867).

[128] *Id.* at 80; *see also id.* at 444 (remarks of Rep. Chanler). Congressman Holman could see so basis for treating blacks less than self-sufficient in financial matters if Congress believed them qualified to vote:

"If, as you assert, the colored man is competent to control the affairs of the nation, I insist that all public laws and regulations which are made applicable to any class of our citizens who participate in controlling public affairs should be alike applicable to all who are invested with that high right; and that all our laws should be sufficiently effective in their provision to protect all men in their just rights of property."

Id. at 445.

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Senator Howe thought the bill covered too many blacks, since it did not "discriminate at all between . . . those who are educated and those who are not." [129]

Proponents of the legislation based their arguments on the special needs of black servicemen.[130] Congressman Scofield argued that conditions requiring special treatment for colored servicemen were the result of past discrimination.

> "The object of [the bill] is to protect the colored soldiers against the fraudulent devices by which their small bounties are taken away from them. We have passed bills for the protection of white soldiers, not exactly like this, but having the same end in view, for the protection of men who from infancy have had the benefit of our common schools, and have acquired

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[129] *Id.* at 81.

[130] Congressman Garfield responded to Congressman Holman's argument, *see* note 128 *supra*:

> "I perfectly agree with the gentleman that we ought to have general rules operating uniformly upon all classes of cases that are similar; but I call his attention and the attention of the House to the marked difference between the condition of the soldiers and sailors from the States lately in rebellion—the colored soldiers and sailors—and the position of other soldiers and sailors. Our soldiers and sailors, enlisted from northern States, came from States . . . that had their military State agents here at Washington to take care of the interests of their soldiers. These soldiers from the South had no such protection or care. Their State authorities were hostile to them.

Id. at 445. Senator Wilson contended for the bill on this basis; colored servicemen, he urged,

> "have scattered about; there is nobody to watch for or take care of them; and there are a great many agents who are plundering them and getting all they can out of them . . . . This proposition is made for no other purpose on earth than to provide the necessary precautions so that the money paid by the Government shall go into the hands of those to whom the Government intends to pay it."

Id. at 79.

> all that sharpness and self-reliance that come from the rough and tumble of American life. . . . I say we have passed laws for the protection of white soldiers, but not going quite as far as this, because, unlike the blacks, they have not been excluded from our schools by legal prohibition, nor have they all their lives been placed in a dependent position. I know the colored people are ignorant, but it is not their own fault, it is ours. We have passed laws that made it a crime for them to be taught and now, because they have not the learning that the white man has, gentlemen say we must not pass laws to protect them against plunder by the sharks that hang around the bounty offices." [131]

Congress found these arguments for special treatment persuasive, and passed the bill by a substantial margin.[132]

B. ***The Adoption of the Fourteenth Amendment***

The Fourteenth Amendment was fashioned and approved by the same Congress that deliberately enacted race-conscious remedies for the exclusive or primary benefit of blacks. This is hardly coincidental, for one of the chief purposes of the Fourteenth Amendment was to constitutionalize the remedies which the Thirty-Ninth Congress had already adopted.[133]

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[131] *Id.* at 444.

[132] *Id.* at 294, 445. The House vote was 62 to 24; the Senate vote was not recorded. The statute is set out at 15 Stat. 26, Res. 25 (1867). "In five years the Bureau paid to Freedmen from Boston to Galveston over seven and a half million dollars." G. BENTLEY, A HISTORY OF THE FREEDMAN'S BUREAU 148 (1955).

[133] *See* H. FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT 11 (1908):

> "The legislation preceding the adoption of the Amendment will probably give an index to the objects Congress was striving to obtain or to the evils for which a remedy was being sought

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> "The one point upon which historians of the Fourteenth Amendment agree, and, indeed which the evidence places beyond cavil, is that the Fourteenth Amendment was designed to place the constitutionality of the Freedmen's Bureau and civil rights bills . . . beyond doubt. . . . [T]he new amendment was written and passed, at the very least, to make certain that that statutory plan was constitutional, to remove doubts about the adequacy of the Thirteenth Amendment to sustain it, and to place its substantive provisions in the Constitution." [134]

When President Johnson vetoed on February 19, 1866 the first Freedmen's Bureau Bill of 1866, he had questioned whether the measure was "warranted by the Constitution" and challenged in particular the authority of Congress to spend funds, at least outside the District of Columbia, for the assistance of any class of the needy. In that month, Congress was already debating an early draft of the Fourteenth Amendment, H.R. 63, which gave Congress the authority similar to that now contained in Section 5.[135] On February 28, 1866, nine days after the veto, Congressman Woodbridge, after reciting the need for federal aid to destitute freedmen, argued:

> . . . . This legislation, together with the debates in Congress, while being considered by that body, as well as the debates on the Amendment itself, should afford . . . sufficient material and facts on which to base a fairly accurate estimate of what Congress intended to accomplish by the Amendment."

[134] J. TENBROEK, EQUAL UNDER LAW 201, 203 (1965).

[135] The Amendment then before the House provided, "The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several Sta[illegible] and to all persons in the several States equal protection in the rights of life, liberty, and property." H.R. 63, 39th Cong., 1st Sess. (1866) GLOBE 1034.

> "But it may be said that all this may be done by legislation. I am rather inclined to think that most of it may be so accomplished. But the experience of this Congress in that regard has been most unfortunate. Sir, I cast no imputation upon the President of the United States . . . . But inasmuch as the President, honestly, I have no doubt, has told us that there were constitutional difficulties in the way, I simply suggest that we submit the proposition to the people, that they may remove these objections by amending the instrument itself." [136]

Later in the debate on the same day Congressman Bingham, the sponsor of H.R. 63, placed in the record a newspaper article describing the "rejoicing of the people of the South" at news "that the President had vetoed the Freedmen's Bureau bill." When opponents objected to the relevance of this article, the Speaker ruled it was pertinent since related to the purpose and effect of the proposed Amendment:

> "This constitutional amendment proposes to give Congress 'power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States and to all persons in the several States equal protection in the rights of life, liberty, and property.' And if the Chair is correctly informed by the remarks of the gentleman from Ohio as to what this extract is, it relates to the veto by the President of a bill passed by Congress in regard to the rights of certain persons, and if that is the case, it may be within the province of Congress to pass a constitutional amendment to secure those rights and the rights of others generally,

[136] *Id.* at 1088.

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and therefore, as a part of the remarks of the gentleman from Ohio, this is certainly in order." [137]

The Freedmen's Bureau Act of 1866, the Reconstruction measure which probably contained the most race-specific remedial legislation, was considered simultaneously in Congress with the Fourteenth Amendment. The House passed the Amendment on May 10, 1866, the Senate voted a modified version on June 8, 1866, and the House acquiesced in the Senate changes on June 13.[138] The House approved the second Freedmen's Bureau Act on May 29, 1866, the Senate voted a modified version on June 26, 1866,[139] and the Conference Report was adopted on July 2 and 3, 1866. On several occasions the Act was debated in one House at the same time the Amendment was being debated in the other.[140]

Moreover, the same legislators who comprised the two-thirds majority necessary to override President Johnson's second veto of the Freedmen's Bureau Act of 1866 also composed the two-thirds majority who approved the Fourteenth Amendment.[141] The sponsors of the Amendment, Congressman Stevens and Senator Wade, as well as its apparent author, Congressman Bingham, all voted for the Freedmen's Bureau Act. The sponsors of the Act, Senator Trumbull and Congressman Eliot, voted for the Amend-

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[137] *Id.* at 1092.

[138] *Id.* at 2545, 3042, 3149.

[139] *Id.* at 2773, 3413, 3524, 3562.

[140] *See, e.g.*, at 2799, 2807, 2869, 2977.

[141] Of the 33 Senators and 104 Representatives who voted to override President Johnson's second veto of the Freedmen's Bureau Act, all who were present for the vote on the Fourteenth Amendment voted for it. Of the 33 Senators and 120 Representatives who voted for the Amendment, all but 4 representatives who were present for the vote or the veto voted to override it. *Id.* at 3042, 3149, 3842, 3850.

ment; Eliot spoke at length in support of the Amendment,[142] and Trumbull wrote and sponsored the 1866 Civil Rights Act whose substantive provisions were the basis of section 1 of the Amendment.[143]

Congressman Stevens, introducing the Fourteenth Amendment to the House, described its basic purpose as providing for "the amelioration of the condition of the freedmen." [144] These are exactly the same words which Congressman Moulton used only three months earlier to describe the object of the first Freedmen's Bureau bill of 1866.[145] This identity of phrasing reflects the similarity of purpose underlying the two measures. The supporters of the Act and Amendment regarded them as both consistent and complementary, while opponents viewed the two, together with the Civil Rights Act of 1866, as part of a single coherent, though in their view, undesirable, policy.[146] No member of Congress intimated he saw any inconsistency between the provisions of the Act and the Amendment; or between the Thirteenth Amendment, which advocates of the bill contended provided authority to establish and continue the Bureau, and the Fourteenth Amendment. During the debates on the Amendment, opponents frequently went out of their way to criticize the Freedmen's Bureau,[147] while supporters of the Amendment praised the Bureau.[148]

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[142] *See, e.g., id.* at 2511-12.

[143] *See* FLACK, *op. cit.*, at 55-97.

[144] GLOBE 2459.

[145] *Id.* at 632.

[146] *Id.* at 2501 (remarks of Rep. Shanklin); 2537-8 (remarks of Rep. Rogers); 2941 (remarks of Sen. Hendricks); App. 239-40 (remarks of Sen. Davis).

[147] GLOBE at 2472 (remarks of Rep. W. Black); 2501 (remarks of Rep. Shanklin).

[148] *Id.* at 1092 (remarks of Rep. Bingham); 3034-35 (remarks of Sen. Henderson).

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The Thirty-Ninth Congress, which was fully aware of the race-conscious remedies and limitations contained in the Freedmen's Bureau Acts it had passed in February and July of 1866, cannot conceivably have intended by its approval of the Fourteenth Amendment on June 12, 1866, to have invalidated or forbidden such remedies. The debates in that Congress have an uncannily modern reverberation: the opposition to the Freedmen's Bureau Acts and other race specific remedies was expressed in much the same terms as contemporary argument against such measures as petitioner's special admission program. Moreover, the post-Civil War remedies cannot be distinguished from petitioner's program on the ground that they provided general services to a particular racial group without denying services to another racial group, since the services provided to freedmen were *not* at the time available to whites in the affected areas and were usually not authorized to be provided to them by the legislation aimed at the freedmen. As the debates just reviewed indicate, the "scarcity of resources" argument was frequently voiced by opponents of the Reconstruction measures—the freedmen's legislation was undesirable and unconstitutional, it was contended, because affording programs to blacks meant denying such programs to whites. These opponents—and respondent—have contended that abstract principles of equality and racial justice preclude special assistance for racial groups whose members have for generations suffered invidious discrimination, although the lack of remedial treatment is likely to perpetuate the exclusion of these groups from important areas of American life. This social theory was repeatedly and overwhelmingly rejected over a hundred years ago, and insofar as respondent's arguments in this case assume the Fourteenth Amendment is founded upon such a theory, these arguments do not withstand analysis.

C. *Discrimination in Medical Education During the Last Century*

The most significant achievement of the Freedmen's Bureau was in the area of education,[149] although the progress

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[149] General Howard had contended that "the most urgent want of freedmen was a practical education; and from the first I have devoted more attention [to that] than to any other branch of my work." II O. HOWARD, AUTOBIOGRAPHY 368 (1907). *See also* G. BENTLEY, A HISTORY OF THE FREEDMEN'S BUREAU 63, 169, 257 n. 101 (1955). In most years, more than two-thirds of all funds spent by the Bureau were used for the education of freedmen. COMMISSIONER OF BUREAU OF REFUGEES, FREEDMEN, AND ABANDONED LANDS REPORT 12 (1866); *id.* at 33, 36 (1876); *id.* at 7 (1868); *id.* at 21 (1869); *id.* at 14 (1870). Over three million dollars was spent on freedmen's schools from 1868 to 1870. W. DUBOIS, BLACK RECONSTRUCTION 648 (1935). The Bureau provided funds, land, or other assistance for the establishment of more than a dozen colleges and universities for the education of black students. HOWARD, *supra,* at 390-422; BUREAU OF REFUGEES, FREEDMEN AND ABANDONED LANDS, SIXTH SEMI-ANNUAL REPORT ON SCHOOLS FOR FREEDMEN, 60-63 (July 1, 1868); EIGHTH SEMI-ANNUAL REPORT ON SCHOOLS FOR FREEDMEN, 75-80 (July 1, 1869); NINTH SEMI-ANNUAL REPORT ON SCHOOLS FOR FREEDMEN, 61-63 (January 1, 1870). Provision was also made for normal schools to educate black teachers. Only one institute of higher education for white refugees, the Lookout Mountain Educational Institute, was ever assisted by the Bureau. BENTLEY, *supra,* at 255 n.43. In 1867, following the incorporation of Howard University, the Bureau provided it with the down payment for the property on which the University is located and then constructed for it buildings at a cost of half a million dollars. HOWARD, *supra,* at 398-401. Underlying the decision to establish and assist the University and to establish graduate and professional schools there, was General Howard's view that, following the Civil War, "Negro pharmacists and other medical men were soon required, and contentions with white men in courts demanded friendly advocates at law." *Id.* at 394. Howard was open to whites, LOGAN, HOWARD UNIVERSITY: THE FIRST HUNDRED YEARS, 1867-1967, 34 (1969), but the Bureau required as a condition of its aid that the University make "special provision for freedmen." BUREAU OF REFUGEES, FREEDMEN, AND ABANDONED LANDS, SIXTH SEMI-ANNUAL REPORT ON SCHOOLS FOR FREEDMEN 60 (July 1, 1868).

In 1870 General Howard's conduct of the Bureau was investigated by the House Committee on Education and Labor, following charges of misconduct made by Congressman Fernando Wood. The first of the fifteen specific accusations considered was that the

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made was limited, and although many of the educational institutions were abandoned or abolished after other Bureau programs were terminated in 1869 and after federal aid to freedmen's education was ended in 1870. Congress apparently believed that such education should be left to the States, but the Hayes-Tilden compromise after the election of 1876 and the end of military reconstruction ushered in an era which was marked by vicious racism:[150] the neglect of black educational problems by the federal

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Bureau's aid to Howard University was "without authority of law." H.R. Rep. No. 121, 41st Cong., 2d Sess., 2 (1870). General Howard defended that assistance, *inter alia*, by reference to this special provision, "If it be claimed that the University charter does not call for the education of refugees and freedmen, or their children, the answer is, that its charter is not limited; that in the reception of all the funds derived from the government the University Corporation formally accepted the conditions expressed in the order of transfer and in the contracts for building. The deeds of transfer of the buildings also expressly demand and secure the fulfillment of this important condition." Statement of Br. Maj. Gen. O.O. Howard Before the Committee on Educational Labor in Defense Against the Charges Presented by Hon. Fernando Wood, *id.* at 517. The committee found persuasive Howard's explanation of this and other disputed conduct, and exonerated him. H.R. Rep. No. 121, 41st Cong., 2d Sess. (1870). On March 2, 1871, the House adopted a resolution from the Committee formally acquitting Howard of the charges and praising his administration of the Bureau. Cong. Globe 41st Cong., 3d Sess., p.1850-51 (1871).

Approximately 100,000 students were educated each year during the existence of the Bureau's schools, with enrollment limited almost exclusively to blacks. General Howard "refused to spend Bureau money on [school] buildings unless they were on sites secured by deed for Negro education forever." BENTLEY, *supra*, at 174. Among black students, no distinctions were made according to degree of past disadvantage. During this period, comparable free public education was not generally available in the South. R. HENRY, THE STORY OF RECONSTRUCTION 129, 243 (1938); H. CARTER, THE ANGRY SCAR 57 (1959). A Georgia editor complained in 1871 that "[t]he colored people of Georgia are receiving more educational advantage than the poor whites." II W. FLEMING, DOCUMENTARY HISTORY OF RECONSTRUCTION 203 (1906).

[150] *See generally* C. VAN WOODWARD, THE STRANGE CAREER OF JIM CROW (3rd ed. 1974).

and state governments, the forcible segregation of the black population, and the denial to that population of equivalent medical training and care.

In no area was this invidious discrimination more marked than in medical education and health facilities. We set forth this dreary history at length in Appendix A, *infra,* and only a few highlights need be recounted here. During the past century, medical education has been almost entirely segregated, and 90% of the nation's black physicians have been trained at the medical schools of Howard and Meharry Universities, institutions expressly created for blacks and financed with federal funds.[151] As late as 1948, a third of the approved medical schools in this country (26 out of 79) had an official policy of denying admission to black applicants solely on account of their race.[152] The effects of this invidious discrimination are reflected in the disproportionately small number of black doctors now practicing in this country. While there is one white doctor for every 477 whites, there is only one black doctor for every 2779 blacks,[153] and a mere 2.2% of the nation's physicians are black.[154] Even when black medical students have gained admission to medical schools, their professional advancement and, indeed, their ability to treat the sick has often been impeded or actually

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[151] J. BLACKWELL, THE BLACK COMMUNITY 127-128 (1975). *See also* H. MORAIS, THE HISTORY OF THE NEGRO IN MEDICINE 93-94, 134-138, 174 (1967); J. CURTIS, BLACKS, MEDICAL SCHOOLS AND SOCIETY 13-14 (1971).

[152] Johnson, *History of the Education of Negro Physicians,* 42 J. MED. EDUC. 439, 441 (1967).

[153] U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES, 1976, 25; C. ODEGAARD, MINORITIES IN MEDICINE 18 (1977) (population as of 1975).

[154] ODEGAARD, *id.*

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thwarted by racial discrimination in training programs, the use of hospital facilities, and in medical associations.

The attempt since 1969 to expand medical educational opportunities for blacks and other minority students[155] and petitioner's special admissions program reflect the recognition that the invidious discrimination which prompted federal legislation in the 1860's continues to plague the nation and that programs such as those enacted by Congress in the Reconstruction Era are still needed a century later to alleviate the injuries suffered by blacks and other minorities in the health area.

III.

De Jure Segregation in California Public Education

Just as the court below considered the constitutionality of petitioner's special admission program without regard to the history of the Fourteenth Amendment, so also did it ignore judicially noticeable materials which establish that this program is a remedial response to historical *de jure* educational segregation in California.[156] This Court has

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[155] *See* ASSOCIATION OF AMERICAN MEDICAL COLLEGES TASK FORCE TO THE INTER-ASSOCIATION COMMITTEE OF EXPANDING EDUCATIONAL OPPORTUNITIES IN MEDICINE FOR BLACKS AND OTHER MINORITY STUDENTS (1970).

[156] "There is no evidence in the record to indicate that the University has discriminated against minority applicants in the past . . . . Neither party contended in the trial court that the University had practiced discrimination, and no evidence with regard to that question was admitted below.[29] Thus, on the basis of the record before us, we must presume that the University has not engaged in past discriminatory conduct." *Bakke* v. *Regents of University of California, supra,* 553 P.2d at 1169. In note 29, the court conceded: "Admittedly, neither the University nor Bakke would have an interest in raising such a claim [of *de jure* segregation]. But this fact alone would not justify us in making a finding on a factual matter not presented below."

ruled that "the differentiating factor between *de jure* segregation and so-called *de facto* segregation . . . is *purpose* or *intent* to segregate," *Keyes* v. *School District No. 1,* 413 U.S. 189, 208 (1973) (emphasis in original), whether this latter element is manifested by legislative or administrative action. As we demonstrate in Appendix B, *infra,* California schools were segregated by statute until 1947, and since that time there have been a large number of judicial and administrative decisions, *see, e.g., Pasadena City Board of Education v. Spangler,* 427 U.S. 424 (1976), finding "racial discrimination through official action," *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 32 (1971). We also show in Appendix B that an overwhelming proportion of black children attend virtually all minority public schools in California, and most attend schools in districts that have been adjudicated in violation of federal and state law in the last decade. In the past ten years, the fact that minority groups "are underrepresented in our institutions of public higher education as compared to the proportion of these groups among recent California high school graduates," (Assembly Concurrent Resolution No. 151 (1974)), due to the lingering effects of historical *de jure* segregation, has been frequently recognized by the California legislature, which has mandated petitioner and other State educational institutions to undertake "affirmative action" programs to eradicate the continuing problems of invidious discrimination.

We describe these judicial and legislative materials in detail in Appendix B, and we submit that they are sufficient to establish the existence of a condition of *de jure* segregation in minority education in California[157] which justifies—

[157] In *Keyes* v. *School District No. 1, supra,* 413 U.S. at 197, the Court noted a 1971 Report of the United States Commission on Civil Rights "[f]ocusing on students in . . . California" and other Southwestern States which concluded:

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if it does not mandate—a special medical school admission program such as petitioner's.

IV.

Minority Health Problems and Petitioner's Special Admissions Program

Petitioner's plan to increase the number of minority doctors is a rational response to the serious health problems of minority communities. It is well established that blacks and other minorities have more illnesses and die younger than white Americans, but a review of mortality and disease statistics, which are set forth in detail in Appendix C, shows that the problems are truly grave and justify a decisive and meaningful response by those who are responsible for medical care and medical education.

Measures of life expectancy,[158] infant mortality,[159] maternal deaths,[160] fetal death rates,[161] and deaths among young children[162] show a horrendous gap between the health of black and white Americans. Blacks suffer from

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" 'The basic finding of this report is that minority students in the Southwest—Mexican Americans, blacks, American Indians —do not obtain the benefits of public education at a rate equal to that of their Anglo classmates.' "

413 U.S. at 197 n.8.

[158] U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES, 1976, 60.

[159] Id. at 64; AMERICAN PUBLIC HEALTH ASSOCIATION, MINORITY HEALTH CHARTBOOK 36 (1974).

[160] U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES, 1976, 64.

[161] *Id.*

[162] NATIONAL CENTER FOR HEALTH STATISTICS, DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, MONTHLY VITAL STATISTICS REPORT, SUMMARY REPORT FINAL MORTALITY STATISTICS, 1973, Table 3.

serious disease at a higher rate,[163] and when blacks do get ill the incidence of death from disease far surpasses the white mortality rate for the same disease.[164]

Although morbidity and mortality rates among the black population are attributable in part to poor housing, nutrition, and other incidents of poverty, studies have established that illness and death among blacks is directly related to lack of health care,[165] and that with adequate facilities and doctors the high incidence of infant and maternal death and illness is dramatically reduced.[166] Yet although access to doctors directly correlates with improved health, minorities have fewer opportunities to receive medical attention, and in fact visit doctors much less frequently that the white population.[167]

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[163] B. TUNLEY, THE AMERICAN HEALTH SCANDAL 40-41 (1966).

[164] Darity, *Crucial Health and Social Problems in the Black Community,* JOURNAL OF BLACK HEALTH PERSPECTIVES Table 13 at 46 (June/July 1974).

[165] PUBLIC HEALTH SERVICE, U.S. DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, SELECTED VITAL AND HEALTH STATISTICS IN POVERTY AND NON-POVERTY AREAS OF 19 LARGE CITIES, UNITED STATES, 1969-71 13; see Iba, Niswander & Woodville, *Relation of Prenatal Care to Birth Weights, Major Malformations, and Newborn Deaths of American Indians,* 88 HEALTH SERVICES REPORTS 697-701 (1973); Weiner & Milton, *Demographic Correlates of Low Birth Weight,* 91 AM. J. EPIDEMIOL. 260-272 (Mar. 1970); D. KESSNER et al., CONTRASTS IN HEALTH STATUS, VOLUME I, INSTANT DEATH: AN ANALYSIS BY MATERNAL RISK AND HEALTH CARE (1973).

[166] *E.g.,* MATERNAL AND CHILD HEALTH SERVICE, U.S. DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, PROMOTING THE HEALTH OF MOTHERS AND CHILDREN, FISCAL YEAR, 1972, 6; Hochheister, et al., *Effect of the Neighborhood Health Center on the Use of the Pediatric Emergency Departments in Rochester, N.Y.,* 285 NEW ENGLAND JOURN. OF MED. (July, 1971).

[167] Reissman, *The Use of Health Services by the Poor,* SOCIAL POLICY 41 (May/June 1974); NATIONAL CENTER FOR HEALTH STATISTICS, VITAL AND HEALTH STATISTICS, VOLUME OF PHYSICIAN VISITS, U.S., JULY, 1966-JUNE, 1967 (1968). One in every 20 blacks

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Lack of access to health care is due in part to the gross maldistribution of physicians in the United States today, which leaves many areas and communities devoid of adequate health manpower, and the discrepancies have worsened in the past decade.[168] Whether in inner cities or rural areas, not only blacks as a whole but other underrepresented minorities have poorer access to health care.[169] Studies demonstrate that ghetto areas have significantly fewer doctors than white areas of the same city.[170]

The lack of adequate health manpower to serve low-income minorities is also attributable to the growth of specialization and the decline in the supply of general practitioners, a trend that has characterized American medicine in the twentieth century. Between 1931 and 1963, the number of general practitioners fell from 112,000 to

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has never seen a physician; this is true of only 1 in every 100 whites. Fein, *An Economic and Social Profile of the Negro American*, in K. Clark & T. Parson eds., THE NEGRO AMERICAN (1966). While much of the health difference is due to poverty, the National Health Survey found that black-white health and health service differences fail to disappear when income groups were examined separately. Melton, *Health Manpower and Negro Health: The Negro Physician*, 43 J. MED. ED. 798, 801 (1968).

[168] 1976 U.S. CODE CONG. & ADMIN. NEWS 5390 shows that doctors are clustered in urban centers in the New England, Atlantic and Pacific shores. See also A REPORT OF THE CARNEGIE COUNCIL ON POLICY STUDIES IN HIGHER EDUCATION, PROGRESS AND PROBLEMS IN MEDICAL AND DENTAL EDUCATION 35-36 (1976).

[169] ODEGAARD, *supra* at 44.

[170] For example, the black ghetto of Watts in Los Angeles, California has 1 physician for every 4,200 persons, although the average number of physicians in urban areas was 1 per 620. Melton, M. *Health Manpower and Negro Health: The Negro Physician*, 43 J. MED. ED. 798, 810 (1968): see, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 136 (1968); Cherkasky, *Medical Manpower Needs in Deprived Areas*, 44 J. MED. ED. 126 (1969). See study of metropolitan areas in 1976 U.S. CODE CONG. & ADMIN. NEWS 5392-5393 (Study Conducted in 1973).

73,000, or from 72% to 28% of all physicians.[171] In 1973, general practitioners were an even smaller 14.9% of all doctors.[172] Yet, as those physicians who offer the point of entry into the health system and continuing contact with it, primary care doctors dispense preventative and ambulatory care, and can best ameliorate the needs of underserved, low-income minorities.[173]

An increase in the number of black physicians is crucial not only to remedy the past effects of discrimination in medical education and institutions, but also to expand the supply of doctors who will serve blacks and to provide greater access to health care for the black community.

Studies over the past thirty-five years have confirmed the well-recognized fact that black doctors in the United States serve as primary care providers to an overwhelmingly black patient group.[173a] A study in 1942 found that

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[171] R. Fein, The Doctor Shortage: An Economic Diagnosis 68-72 (1967).

[172] U.S. Public Health Service, The Supply of Health Manpower: 1970 Profiles and Projections to 1990, 60 (1974). If one includes doctors in family practice, internal medicine, pediatrics and obstetrics-gynecology as those who provide primary care, the percentage fell from 54.5% in 1963 to 48.4% in 1973. *Id.*

[173] Rodgers, *The Challenge of Primary Care,* Daedalus 82 (Winter 1977). The AMA has recognized the need for primary care medicine. Citizens Commission on Graduate Medical Education, The Graduate Education of Physicians, 1960 (Millis Commission); Committee on Education for Family Practice, Meeting the Challenge of Family Practice, 1966 (Willard Commission). To encourage greater emphasis on primary care, the AMA Council on Medical Education approved a certifying board for family practice in 1969. Odegaard, *supra* at 149.

[173a] See in general, T. Thompson and S. Barrely, A Study of the Distribution and Characteristics of Black Physicians in the United States, 1972, The NMA Foundation 1973; Jackson, *The Effectiveness of a Special Program for Minority Group Students,* 47 J. Med. Ed. 620-624 (1972); Richard, *The Negro Physician: A study in Mobility and Status Inconsistency,* 61 JNMA 278-279 (May, 1969).

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black doctors, educated at Howard and Meharry medical schools moved to urban communities to serve the health needs of blacks who had migrated there from the South.[174] A 1946 report showed that 88% of black physicians interviewed dispensed primary care, and two-thirds were full time general practioners.[175] In 1956, black doctors in fourteen cities surveyed had predominately black patients, and the health of the black communities were found to be related to the numbers of black doctors in all but one city.[176] In a survey conducted by the AMA in 1970, 45% of the physicians interviewed indicated they were practicing in or around the town in which they were raised;[177] given the pervasive segregation in housing in this country, this data supports the findings of the other studies that black doctors practice in black communities. The highest concentration of black doctors in 1970 were in California, the District of Columbia, and New York, the same three areas that had shown among the largest increase in black population during those years.[178] In a 1972 random sample of 200 doctors and dentists in New York, less than 5% served a predominately white patient group.[179] In 1974, Na-

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[174] Cornely, *Distribution of Negro Physicians in the United States in 1942*, 124 JAMA 826-830 (1944). In 1942, black doctors were confined to a nationally dispersed professional ghetto, Thompson, *Curbing the Black Manpower Shortage, supra.*

[175] Cornely, *The Economics of Medical Practice and the Negro Physicians*, 43 JAMA 84-88 (1951) (Questionnaires were returned by 417 black doctors.)

[176] D. Rietzes, Negroes and Medicine (1958).

[177] *Hearing on S. 3585, Health Manpower Act Before the Subcommittee on Health of the S. Comm. on Labor and Public Welfare*, 93rd Cong., 2d Sess. 229 (1974).

[178] Haynes, *Distribution of Black Physicians in the United States*, 1967, 210 JAMA 93 (1969). Black doctors in California mirrored the rise in that State's population where the number of blacks increased ninefold since 1942. *Id.*

[179] Curtis, Blacks, Medical Schools and Society, *supra* at 149.

tional Medical Fellowships, Inc., an organization dedicated to increasing the number of black and minority physicians and to breaking racial barriers in medicine, sent a questionnaire to all 471 recipients of NMF scholarships (all black)who had graduated from medical school in 1970 or before and to one-third (1,777) of all National Medical Association members (who are black) to determine, inter alia, who their patient populations were. Of the 166 NMF black doctors who responded, 94% reported that they served black patients; 55% stated that they served exclusively blacks. Of the 259 NMA doctors, 88% said they served black patients; 79% served only blacks.[180]

Despite the overwhelmingly predominance of black doctors in black communities, the meager number of black doctors as a whole prevents the black community from receiving anywhere near its share of health resources. In the three areas that have the largest percentage of black physicians, the ratio of black doctors to black population were: District of Columbia, 1:1,100; California, 1:1,800; New York, 1:3,000,[181] although the national average physician to population rate is 1:750.[182] Nationwide, there is one black physician per 2,779 blacks in contrast to one white physician per 599 whites, a difference of 463%.[183]

White physicians are obviously needed to serve the black community, but researchers have reported that white doc-

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[180] Reitzes & Elkhanialy, *Black Physicians and Minority Group Health Care—The Impact of NMF,* 14 MEDICAL CARE 1052, 1058 (1976).

[181] Thompson, *Curbing the Black Manpower Shortage,* 49 J. MED. ED. 944, 949 (1974).

[182] Johnson, *History of the Education of Negro Physicians,* 42 J. MED. ED. 439, at 443 (1967) (data as of 1967).

[183] Population figures and numbers of doctors derived from U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES, 1976, at 25, 78 (as of 1974) ; percentage of black doctors to all doctors, ODEGAARD, *supra* at 18.

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tors and dentists are reluctant to practice in ghetto areas,[184] and leave areas as the racial population turns from white to black.[185] Economics is undoubtedly one of the reasons for this pattern. Even within comparable income groups, non-whites spend significantly less than whites on medical care.[186] In some instances, however, racism is the reason for the refusal of white doctors to treat black patients.[187] In general, the decision to serve the black community as primary care providers involves a financial sacrifice.[188] Nevertheless, interviews of black medical students indicate that, they intend to return to black areas as primary care providers.[189]

The effect of the shortage of health manpower on the ill health of blacks and other minorities is aggravated by

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[184] Melton, *supra,* at 798, citing Tufts University School of Medicine, Comprehensive Community Health Action Program, Application written for the Office of Economic Opportunity, 1966 (mimeographed); University of Southern California School of Medicine, Neighborhood Family Health Service Center, Application written for the Office of Economic Opportunity, 1966 (mimeographed).

[185] *E.g.,* Cherkasky, *Medical Manpower Needs in Deprived Areas.* 44 J. MED. ED. 126 (1969) (Study of the Bronx).

[186] CURTIS, BLACKS, MEDICAL SCHOOLS AND SOCIETY, *supra,* at 159-160.

[187] See, *e.g.,* cases concerning the refusal of health professionals to treat Negro patients. *Washington* v. *Blampin,* 38 Cal. Rptr. 235 (Calif. Dist. Ct. of Appeals 1964), 9 Race Rel. L. Rep. 899 (damage suit versus doctor who refused to treat black child under state civil rights law); *Buefort* v. *Elias,* No. P-242 (Pa. Human Rel. Commissioner Jan. 26, 1965), 11 Race Rel. L. Rep. 2186 (similar).

[188] Melton, *supra* at 807. On the average, non-white physicians earn less than half the amount earned by white doctors. *Id.*

[189] CURTIS, BLACKS, MEDICAL SCHOOLS AND SOCIETY, *supra* at 147; Curtis, *Minority Student Success and Failure with The National Intern and Resident Matching Program,* 50 J. MED. ED. 563, 566-567 (1975). (Less than one-fifth of the students interviewed sought training in other than primary care areas.)

the underutilization by low-income minorities of those services which are available. Long waits at clinics, bureaucratic procedures and the extreme impersonality of encounters between physicians and patients account for some of the resistance of these groups seeking health care.[190] In the area of psychiatry, blacks are generally subject to treatment inferior to that received by whites under similar circumstances.[191] An increase in black and other minority physicans to serve these groups can minimize the accessibility problems in obtaining medical care due to cultural and life style barriers.[192]

If blacks and other minorities are to have greater access to health care, more doctors are needed to serve minority

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[190] Strauss, *Medical Ghettoes,* in PATIENTS, PHYSICIANS AND ILLNESS 381-388 (E. Jaco, ed. 1972); Coe & Wesson, *Social Psychological Factors Influencing the Use of Community Health Resources,* 55 AM. J. PUB. HEALTH 1024-1031 (1965); Reissman, *The Use of Health Services by the Poor,* SOCIAL POLICY 41, 42-43 (May/June 1974).

[191] In comparison with the white population, blacks are more likely to be placed in mental hospitals (Rabkin & Struening, ETHNICITY, SOCIAL CLASS AND MENTAL ILLNESS (1976); Hollingshead and Redlich, *Social Stratification and Psychiatric Disorder,* 18 AMER. SOC. REV. 163 (1953) while less likely, along with other lower-class patients, to receive outpatient psychotherapy (Schaffer & Myers, *Psychotherapy and Social Stratification,* 17 PSYCHIATRY 83 (1954); given only drugs or custodial care while in a hospital (Singer, *Some Implications of Differential Psychiatric Treatment of Negro and White Patients,* SOCIAL SCIENCE AND MEDICINE 1 (1967); Hollingshead & Redlich, *supra;* kept in hospitals longer than whites (Crawford, Rollins & Sutherland, *Variations between Negroes and Whites in Concepts of Mental Illness and its Treatment,* 84 ANN. N.Y. ACAD. SCI. 918 (1963); Chassan, *Race, Age and Sex in Discharge Probabilities of First Admissions to a Psychiatric Hospital,* 26 PSYCHIATRY 391-393 (1963); treated by lower-ranking personnel (Schaffer & Myers, *supra*); and treated for lesser periods of time on an outpatient basis (Schleifler, *et al., Clinical Change in Jail-Referred Mental Patients,* 18 ARCHIVES OF GENERAL PSYCHIATRY 42 (1968).

[192] Thompson, *supra,* at 949.

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communities. The efforts of petitioner and other medical schools to increase the percentage of minority physicians is a rational strategy to ameliorate the paucity of health manpower in such communities.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment of the court below should be reversed.

Respectfully submitted,

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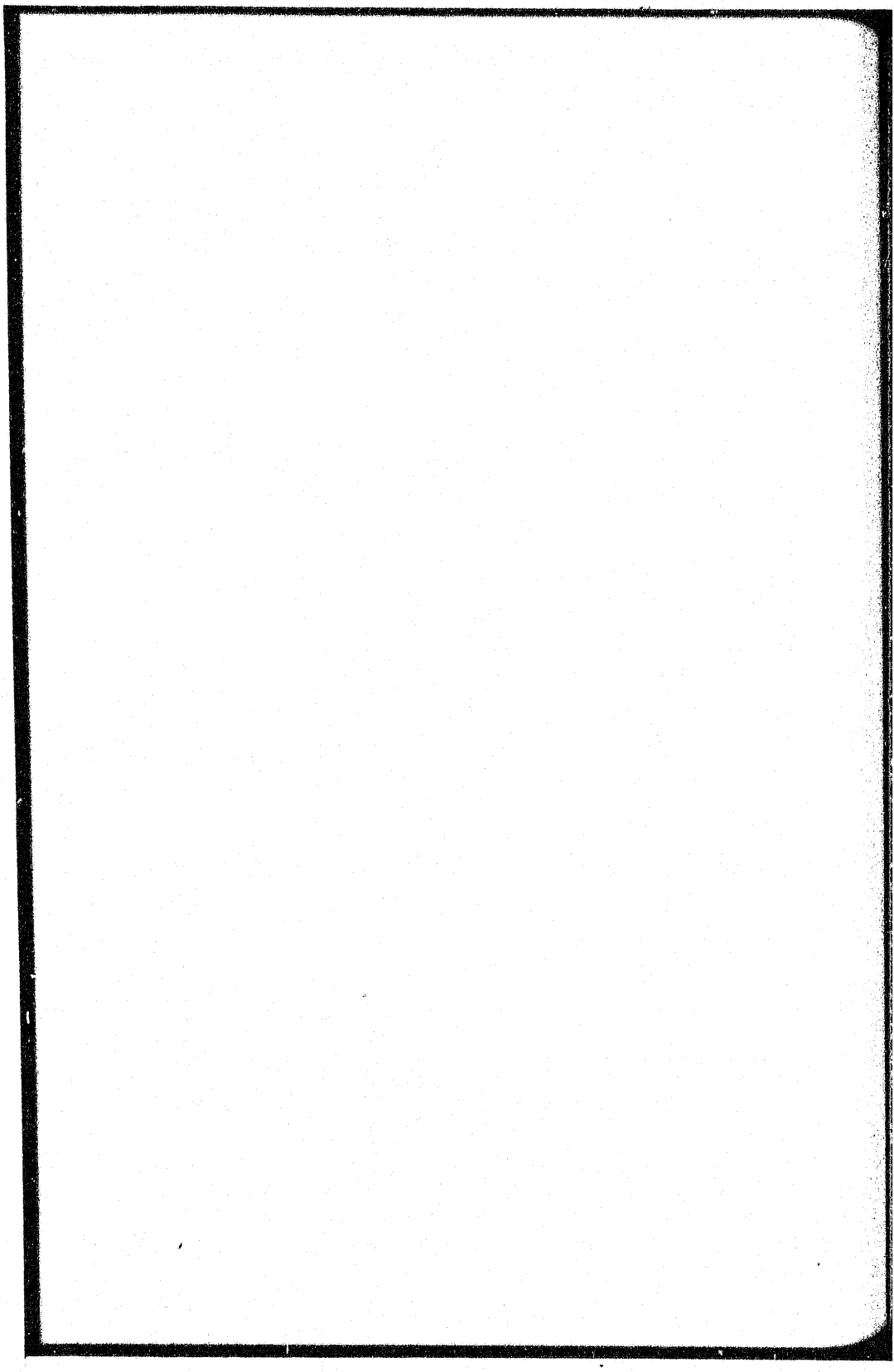

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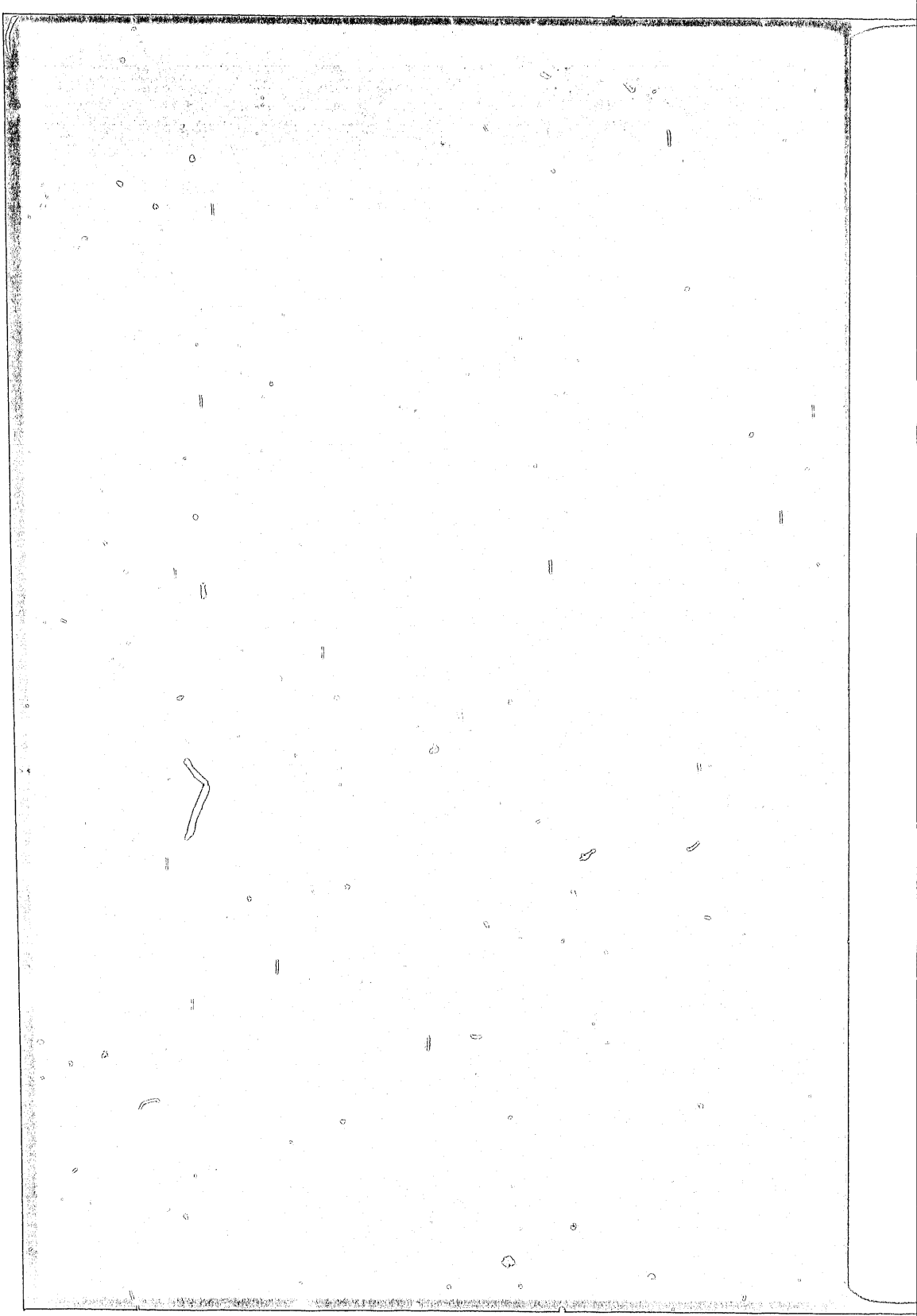
APPENDICES



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APPENDIX A

Discrimination in Medical Education 1870-1977

Petitioner's special admission program represents one of the first successful attempts by a medical school not only to increase the actual numbers of black physicians it produces but also to racially integrate the medical education it provides. Prior to 1969, when the Association of American Medical Colleges began efforts to expand educational opportunities for blacks and other minority students,[1] *two* institutions provided the vast majority of black physicians trained in this country: Howard University College of Medicine and Meharry Medical College.[2] Each was expressly created for blacks and financed with federal funds.[3]

Pervasive segregation has characterized medical education in this country. By 1948, a third of the approved medical schools in this country (26 out of 79) did not admit black students.[4] Efforts to segregate medical education were not the individualistic expression of isolated schools;

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[1] *See* ASSOCIATION OF AMERICAN MEDICAL COLLEGES TASK FORCE, REPORT TO THE INTER-ASSOCIATION COMMITTEE ON EXPANDING EDUCATIONAL OPPORTUNITIES IN MEDICINE FOR BLACKS AND OTHER MINORITY STUDENTS (1970).

[2] During the past century, 90% of the Nation's black physicians have been trained at Howard and Meharry. J. BLACKWELL, THE BLACK COMMUNITY, 127-128 (1975).

[3] H. MORAIS, THE HISTORY OF THE NEGRO IN MEDICINE, 93-94, 134-138, 174 (1967); J. CURTIS, BLACKS, MEDICAL SCHOOLS AND SOCIETY, 13-14 (1971). Seven other small black medical schools operated for short periods of time, but had ceased to operate by the 1920's. Johnson, *History of the Education of Negro Physicians*, 42 J. MED. EDUC. 439, 440-441 (1967).

[4] Johnson, *History of the Education of Negro Physicians, supra* at 441.

segregation has been legislatively mandated and financed. On February 8, 1948, the governors of fourteen southern states entered into an interstate compact for regional education, which included a plan for joint support of Meharry Medical College to finance the medical education of blacks from their states who were barred from admission to the medical schools in their borders. At least sixteen states finally participated in the program and adopted implementing legislation which included laws providing for the payment of tuition of blacks to attend out-of-state schools.[5]

The obvious effect of systematic exclusion was to limit the production of black graduates to the number of seats at Meharry and Howard. Even as black students gained access to increasing numbers of white medical schools, they remained a minuscule percentage of all students.

[5] P. MURRAY, STATES' LAWS ON RACE AND COLOR, 23-28 (Ala.), 81 (Fla.), 91-96 (Ga.), 182-187 (La.), 201-208 (Md.), 241-245 (Miss.), 333-338 (N.C.), 363-368 (Okla.), 410-414 (S.C.), 432-436 (Tenn.), 666-675 (Note on Regional Compact) (1951). While in theory, following *Sipuel* v. *Board of Regents*, 332 U.S. 631 (1948), those states could not bar blacks from their own state schools, the interstate compact at least encouraged out-migration of black medical students and clearly signaled that they were not welcome within the states on the same basis as whites.

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Appendix A

TABLE I[6]

Black Student Enrollment in U.S. Medical Schools for Selected Years 1938-39 to 1969-70

Year	*Total Enrollment*	*Number of Black Students*	*% Black Students*	*% of Total Black Enrollment in Predominantly White Schools*
1938-1939	21,302	350	1.64	12.9
1947-1948	22,739	588	2.59	15.8
1948-1949	23,670	612	2.59	19.1
1949-1950	25,103	651	2.59	21.2
1950-1951	26,186	661	2.52	21.6
1951-1952	27,076	697	2.57	23.2
1952-1953	27,135	715	2.63	26.7
1955-1956	28,639	761	2.66	31.0
1968-1969	35,828	782	2.18	37.3
1969-1970	37,756	1,042	2.75	52.4

[6] J. CURTIS, BLACKS, MEDICAL SCHOOLS AND SOCIETY, 34 (1971). Source: (1) Dietrich C. Reitzes, *Negroes and Medicine*, Harvard University Press 1958; (2) A.A.M.C. Fall 1969 Enrollment Questionnaire. While the percentage of black students remained fairly constant during the years through 1969 and 1970, the actual *numbers* of students showed an increase due at least in part to the decreasing number of schools which refused to admit blacks.

Negro Medical Student Distribution

Year	*Total Negro Students Enrolled*	*Negro Enrollment in White Schools*	*White Schools With Negro Students*
1947-1948	588	93	20
1955-1956	761	236	48
1969-1970	1,042	546	84

Id. at 40.

Appendix A

By 1970, a mere 2.2% of the nation's physicians were black, although blacks comprised approximately 11% of the population.[7]

The special efforts of University of California-Davis and other medical schools since 1969 to provide greater access to medical education for minorities have for the first time resulted not only in a substantially greater number and percentage of minority students, but have begun to eliminate the almost totally segregated nature of medical education for blacks. Thus, enrollment for first year black students increased four-fold from 1968-69 to 1974-75 principally as a result of increased admissions to white medical schools.[8] For other minorities who had not benefited from the existence of Howard and Meharry, the results of the affirmative admissions policies were even more dramatic. During the same period, Mexican-Americans experienced an eleven-fold increase;[9] American Indian and Mainland Puerto Rican enrollment increased twenty-fold.[10]

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[7] U. S. Bureau of the Census, STATISTICAL ABSTRACT OF THE UNITED STATES, 1976, 25 (Statistics as of 1970); U. S. Bureau of the Census, OCCUPATIONAL CHARACTERISTICS, 1970, 593. The percentage showed no advance since 1950, when there were 7 million less black citizens who comprised 10% of the population. REITZES, *supra* at 3; STATISTICAL ABSTRACT, *id.*

[8] ODEGAARD, *supra* at 32.

[9] ODEGAARD, *supra* at 33. First-year enrollment in 1975-76 for Mexican-Americans of 1.5% still falls short of the 2.2% represented by this group in the United States. *Id.*

[10] *Id.* Mainland Puerto Ricans comprise 0.7% of the United States population; American Indians, 0.4%. UNITED STATES PUBLIC HEALTH SERVICE, DEPT. OF HEALTH, EDUCATION AND WELFARE, MINORITY HEALTH CHARTBOOK 1-2 (1974).

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TABLE II[11]

Selected Minority Group Enrollment in First-Year Classes in U.S. Medical Schools (1968–75)

Year	Black American *		American Indian		Mexican American		Mainland Puerto Rican		Total Selected Minority Group		Total First-Year Enrollment
	Number Enrolled	% of Total Enrollment	Number Enrolled	% of Total Enrollment	Number Enrolled	% ot Total Enrollment	Number Enrolled	% of Total Enrollment	Number Enrolled	% of Total Enrollment	
1968–69	266	2.7	3	0.03	20	0.2	3	0.03	292	2.9	9,863
1969–70	440	4.2	7	0.1	44	0.4	10	0.1	501	4.8	10,422
1970–71	697	6.1	11	0.1	73	0.6	27	0.2	808	7.1	11,348
1971–72	882	7.1	23	0.2	118	1.0	40	0.3	1,063	8.5	12,361
1972–73	957	7.0	34	0.3	137	1.0	44	0.3	1,172	8.6	13,677
1973–74	1,023	7.5	44	0.3	174	1.2	56	0.4	1,297	9.1	14,124
1974–75	1,106	7.5	71	0.5	227	1.5	69	0.5	1,473	10.1	14,763
1975–76	1,036	6.8	60	0.4	224	1.5	71	0.5	1,391	9.1	15,295

* Black Americans at Howard and Meharry medical schools accounted for 120 of these 1969–70 freshmen and 195 of these 1974–75 freshmen.

[11] ODEGAARD, *supra* at 30 (1977).

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TABLE III[12]

Selected Minority Group Total Enrollment in U.S. Medical Schools (1968–75)

Year	Black American *		American Indian		Mexican American		Mainland Puerto Rican		Total Selected Minority Group		Total Enrollment
	Number Enrolled	% of Total Enrollment	Number Enrolled	% of Total Enrollment	Number Enrolled	% of Total Enrollment	Number Enrolled	% of Total Enrollment	Number Enrolled	% of Total Enrollment	
1968–69	783	2.2	9	0.02	59	0.16	3	0.01	854	2.4	35,830
1969–70	1,042	2.8	18	**	92	0.2	26	0.07	1,178	3.1	37,690
1970–71	1,509	3.8	18	**	148	0.4	48	0.1	1,723	4.3	40,238
1971–72	2,055	4.7	42	0.1	252	0.6	76	0.2	2,425	5.5	43,650
1972–73	2,582	5.5	69	0.2	361	0.8	90	0.2	3,102	6.5	47,366
1973–74	3,045	6.0	97	0.2	496	1.0	123	0.2	3,761	7.4	50,751
1974–75	3,355	6.3	159	0.3	638	1.2	172	0.3	4,324	8.1	53,554
1975–76	3,456	6.2	172	0.3	699	1.3	197	0.4	4.524	8.1	55,818

* Black Americans at Howard and Meharry medical schools accounted for 496 of these 1969–70 enrollees and 695 of these 1974–75 enrollees.

** Less than 0.1 percent.

[12] *Id.* at 31.

Appendix A

Special admission policies are needed to overcome not only the effects of segregated and inferior elementary, secondary, and college education for blacks,[13] but also the effects of an exclusionary segregated health care system. Blacks have been deterred from becoming physicians not only because of the few medical school places available to them, but also because upon graduation, they have faced systematic, and in many instances, statutory barriers based on the color of their skin to practicing as doctors and delivering health care services. Black doctors have been excluded from the staffs of white hospitals.[14] Racial segregation in hospital facilities of various types was authorized or required by statutes of the United States[15] and

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[13] See Part III, pp. 57-59, supra.

[14] In a study of fourteen communities conducted in 1955, Atlanta, Nashville and New Orleans had no black physicians with hospital affiliations in a predominantly white hospital. In only two of the other cities surveyed (Boston, Brooklyn, Chicago, Detroit, District of Columbia, Gary, Indianapolis, Kansas City, Los Angeles, Philadelphia, St. Louis) was the percentage of black physicians with privileges in white hospitals higher than 28% and eight were below 8%. REITZES, *op. cit.*

[15] Prior to 1965 the Hill-Burton Act contained a prohibition against racial discrimination in state hospital construction plans, but permitted the states to plan for separate hospital facilities for separate population groups if there was equitable provision for each group. Hill-Burton Act §622, 60 Stat. 1041 (1946), 42 U.S.C. §291c (1964). The Surgeon General issued a regulation under this provision. 21 Fed. Reg. 9841 (1956). The authorization of segregation was held unconstitutional in *Simkins* v. *Moses Cone Memorial Hosp.*, 323 F.2d 959 (4th Cir. 1963), *cert. denied* 376 U.S. 938 (1964). As of March, 1964, 104 segregated hospitals and health facilities were built with federal funds under the Hill-Burton Act, 84 of them for "whites only" and 20 for blacks. H. MORAIS, THE HISTORY OF THE NEGRO IN MEDICINE, 180 (1967).

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fifteen states.[16] Despite the fact that white hospitals were more modern, better equipped and thus capable of providing better health care, black doctors and dentists were barred from their staffs and were unable to admit their

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[16] The States with hospital segregation laws were:

Alabama: Ala. Code tit. 45 §4 (tubercular hospitals); §248 (mental deficients); tit. 46, §189 (white women not to nurse Negro men patients).

Arkansas: Ark. Stats. Ann. §§7-401, 7-402, 7-404 (tuberculosis hospital).

Delaware: Del. Code Ann. tit. 16 §155 (1953).

Georgia: Ga. Code Ann. §35-225 (1935) (mental hospital); §35-308 (1957 Supp.) (mental defectives).

Kentucky: Ky. Rev. Stats. §215.078 (tubercular hospitals) and §205.180 (1953) (mental hospitals) (both repealed in 1954).

Louisiana: La. Rev. Stats. Ann. §46.181 (1950) (homes for aged and infirm); Acts. 1904 (Colored Asylum).

Maryland: Md. Code Ann. 59, §§61-63 (state hospital for insane); §§285-286 (separate tubercular hospital).

Mississippi: Miss. Code Ann. §6883 (mental hospital); §6927 (State Charity Hospital); §6973 (separate entrances); §6974 (separate nurses).

Missouri: Mo. Rev. Stats. §9390 (1939) (school for feeble minded).

North Carolina: N.C. Gen. Stats. §122-3 (1957 supp.) (mental hospital).

Oklahoma: Okla. Stats. Ann. tit. 10, §§201-206.1 (1951) (Consolidated Negro Institute); tit. 35, §§251-256 (insane); tit. 63 §§531, 532 (tubercular).

South Carolina: S.C. Code 1942, §6223 (separate nurses training at Negro Department of State hospital).

Tennessee: Tenn. Code Ann. §33-602 (1955) (hospital for insane).

Texas: Tex. Civ. Stats. Ann. art. 324a (1952) (TB hospital).

Virginia: Va. Code §§37-5 to 37-6 (1950) (hospitals for insane and epileptics).

West Virginia: W. Va. Code §2632 (1955) (mentally deficient aged and infirm); §2636 (TB hospitals for white persons).

See P. MURRAY, STATES' LAWS ON RACE AND COLOR (1951).

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patients.[17] Where black patients were admitted, they were often placed in segregated wards and rooms.[18]

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[17] *Simkins* v. *Moses Cone Memorial Hospital*, 323 F.2d 959 (4th Cir. 1963), *cert. denied* 376 U.S. 938 (1964).

[18] A substantial number of courts have ruled on claims that both publicly-owned and nongovernmental facilities have excluded or segregated black patients and health professionals. See, *e.g.*, *Eaton* v. *Board of Managers*, 261 F.2d 521 (4th Cir. 1958), *cert. den.* 359 U.S. 984; *Rackley* v. *Board of Trustees*, 310 F.2d 141 (4th Cir. 1962); *Eaton* v. *Grubbs*, 329 F.2d 710 (4th Cir. 1964); *Flagler Hospital, Inc.* v. *Hayling*, 344 F.2d 950 (5th Cir. 1965); *Smith* v. *Hampton Training School for Nurses*, 360 F.2d 577 (4th Cir. 1966); *Cypress* v. *Newport News General and Nonsectarian Hospital*, 375 F.2d 648 (4th Cir. 1967); *Johnson* v. *Crawfis*, 128 F. Supp. 230 (E.D. Ark. 1955); *Wood* v. *Hogan*, 215 F. Supp. 53 (W.D. Va. 1963); *Porter* v. *North Carolina Bd. of Control*, No. C-123-D-62 (M.D. N.C. Mar. 28, 1963); *Addison* v. *High Point Memorial Hospital*, No. C-96-C-64 (M.D. N.C. Aug. 28, 1964); *Clayton* v. *Person County Hospital*, No. C-137-D-64 (M.D. N.C. Oct. 28, 1964); *Rogers* v. *Druid City Hospital*, 10 Race Rel. L. Rep. 1273 (1965); *Batts* v. *Duplin General Hospital*, No. 1110 (E.D. N.C. Dec. 23, 1965), 11 Race Rel. L. Rep. 1427 (1966); *Hall* v. *Roanoke-Chowan Hospital*, No. 522 (E.D. N.C. Sept. 7, 1975); *Mangrum* v. *Iredell Hospital*, No. 519 (W.D. N.C., Nov. 9, 1965); *Rackley* v. *Board of Trustees*, 238 F. Supp. 512 (E.D. S.C. 1965); *Bell* v. *Fulton DeKalb Hospital Authority*, No. 7966 (N.D. Ga. Feb. 23, 1965); *Lewter* v. *Lee Memorial Hospital*, No. 65-47-Ci. (M.D. Fla. Dec. 10, 1965); *Reynolds* v. *Anniston Memorial Hospital*, No. 65-206 (N.D. Ala., June 21, 1965); *Rax* v. *State Department of Hospitals*, C.A. No. 3265 (E.D. La. Dec. 23, 1965), 11 Race Rel. L. Rep. 384; *Pringle* v. *State Tuberculosis Bd.*, No. 1044 (N.D. Fla. Jan. 26, 1966) 11 Race Rel. L. Rep. 1427; *Burton* v. *Arkansas Tubercular Sanitorium*, No. LR-60-C-51 (E.D. Ark., May 3, 1966), 11 Race Rel. L. Rep. 1933; *Marable* v. *Alabama Mental Health Board*, 297 F. Supp. 291 (M.D. Ala. 1969). See a general discussion of discrimination in medical care in Meltsner, *Equality and Health*, 115 PA. L. REV. 22 (1966); and REITZES, NEGROES AND MEDICINE 1958; *See also* Reports of Detroit Mayor's Interracial Committee (1956), 1 Race Rel. L. Rep. 1123; Atty. Gen. Opinion, Michigan, July 17, 1957, 2 Race Rel. L. Rep. 1203 (private nursing home can restrict facilities to caucasians); Chicago Ordinance of March 14, 1956 at 2 Race Rel. L. Rep. 697 (forbidding discrimination by hospitals); N.Y. Dept. of Welfare Policy, Dec. 12, 1956, 2 Race Rel. L. Rep. 511 (policy against exclusion in nursing homes).

Appendix A

Black physicians have faced and still face segregation and exclusion not only by hospital facilities but by the organized medical profession as well.

In 1868, black physicians first sought, and were refused, membership in the American Medication Association (AMA).[19] In the 1960's blacks were still faced with the problem, especially in the South, of being excluded from membership in local affiliates of the AMA. Despite numerous attempts to have the AMA revoke the privileges of local medical societies which denied membership to blacks, the AMA has continued to refuse to adopt such resolutions.[20] Local dental associations have similarly refused black membership.[21] Denial of membership in these associations has not only deprived black physicians and dentists of an important forum for the exchange of ideas, techniques and advances but has actually meant denial of hospital affiliation and loss of fees.[22] Absent local medical or dental society accreditation, Southern black doctors were automatically barred from participation in company

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[19] MORAIS, note 3 *supra* at 52.

[20] *Id.* at 174-175; Melton, *Health, Manpower and Negro Health: The Negro Physician*, 43 J. MED. EDUC. 798, 799 (July 1968); Johnson, *History of the Education of Negro Physicians*, 42 J. MED. EDUC., 439, 444-445 (1967).

[21] *Hawkins* v. *North Carolina Dental Society*, 355 F.2d 718 (4th Cir. 1966); *Bell* v. *Georgian Dental Association*, 231 F. Supp. 299 (N.D. Ga. 1964).

[22] In many areas of the country, doctors have to be accredited by their county societies before they can be eligible for hospital appointments. If black doctors wish to hospitalize patients in such circumstances, they have to do so by referring them to staff physicians, thereby running the risk of losing them forever. MORAIS, *supra* at 179.

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and union-backed health-care plans;[23] black dentists were denied the right to vote for or become members of State Boards of Health, medical licensing boards, and state hospital advisory boards.[24]

[23] *Ibid.*

[24] *See Hawkins* v. *North Carolina Dental Society*, 355 F.2d 718 (4th Cir. 1966); *Bell* v. *Georgia Dental Association*, note 21 *supra*.

APPENDIX B

De Jure Segregation in California Public Education

1. *Elementary and Secondary Public School Segregation*

In 1972, three-quarters of California's black elementary and secondary public school pupils attended schools which were 50-100% black, Chicano, Asian or Indian; over 40% attended public schools which were 95-100% minority,[25] and numerous judicially noticeable decisions demonstrate that official policies have caused, at the very least, a substantial measure of this condition. The following school districts have been found to have segregated minority school children in violation of the Fourteenth Amendment of the federal Constitution and/or in violation of federal statutory civil rights guarantees:[26] San Francisco,[27] Los

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[25] BUREAU OF THE CENSUS' STATISTICAL ABSTRACT OF THE UNITED STATES, 1976, p. 133 (1976).

Statistical evidence on the extent of segregation in California elementary and secondary education is available in U. S. DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, OFFICE FOR CIVIL RIGHTS, DIRECTORY OF PUBLIC ELEMENTARY AND SECONDARY SCHOOLS IN SELECTED DISTRICTS, ENROLLMENT AND STAFF BY RACIAL/ETHNIC GROUPS, for FALL 1968 (1970), FALL 1970 (1972), and FALL 1972 (1974). See also biannual CALIFORNIA STATE DEPARTMENT OF EDUCATION, RACIAL AND ETHNIC SURVEY OF CALIFORNIA PUBLIC SCHOOLS, for FALL 1966 (1967), FALL 1968 (1969) and FALL 1970 (1971); CENTER FOR NATIONAL POLICY REVIEW, TRENDS IN BLACK SCHOOL SEGREGATION, 1970-1974, Vol. I (1977) and TRENDS IN HISPANIC SEGREGATION, 1970-1974, Vol. II (1977).

[26] Pursuant to Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, and Title VII of the Emergency School Aid Act of 1972, 20 U.S.C. § 1600 *et seq.*, the Department of Health, Education and Welfare is given authority to terminate federal assistance in cases of, respectively, school segregation generally and teacher assignment. HEW's enforcement role is discussed in, *inter alia*, 3 U.S. COMM. ON CIVIL RIGHTS, THE FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT—1974, *To Ensure Equal Educational Op-*

(See footnote 27 on following page.)

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Appendix B

Angeles,[28] Pasadena,[29] San Diego,[30] Oxnard,[31] Pittsburg,[32] Richmond,[33] Delano,[34] Fresno,[35] Sweetwater,[36] Watsonville

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portunity 49-138 (1975). Recent litigation concerning HEW's failure to fulfill its enforcement obligations includes *Adams* v. *Richardson,* 480 F.2d 1159 (D.C. Cir. 1973); *Brown* v. *Weinberger,* 417 F. Supp. 1215 (D.D.C. 1976); *Kelsey* v. *Weinberger,* 498 F.2d 701 (D.C. Cir. 1974).

[27] *Johnson* v. *San Francisco Unified School District,* 339 F. Supp. 1315 (N.D. Cal. 1971), *app. for stay denied, Guey Heung Lee* v. *Johnson,* 404 U.S. 1215 (1971), *vacated and remanded,* 500 F.2d 349 (9th Cir. 1974); *P.* v. *Riles,* 343 F. Supp. 1306 (N.D. Cal. 1972), *affirmed,* 502 F.2d 963 (9th Cir. 1974) (14th Amendment violation); *Lau* v. *Nichols,* 414 U.S. 563 (1974) (Title VI violation found).

[28] *See, Kelsey* v. *Weinberger, supra,* 498 F.2d at 704 n. 19 (HEW determination of violation of Emergency School Aid Act noted).

[29] *Spangler* v. *Pasadena City Board of Education,* 311 F. Supp. 501 (C.D. Cal. 1970) (14th Amendment violation).

[30] *People* v. *San Diego Unified School District,* 19 Cal. App. 3d 252, 96 Cal. Rptr. 658 (Ct. App. 1971) (14th Amendment violation).

[31] *Soria* v. *Oxnard School District Board of Trustees,* 386 F. Supp. 539 (C.D. Cal. 1974), *on remand from,* 488 F.2d 577 (9th Cir. 1973).

[32] *Brice* v. *Landis,* 314 F. Supp. 94 (N.D. Cal. 1969) (14th Amendment violation).

[33] See *Kelsey* v. *Weinberger, supra,* 498 F.2d at 704 n. 19 (HEW determination of violation of Emergency School Aid Act noted).

[34] *See, Brown* v. *Weinberger, supra,* 417 F. Supp. at 1224 (violation of Title VI noticed by HEW).

[35] *See, Brown* v. *Weinberger, supra,* 417 F. Supp. at 1223 (violation of Title VI noticed by HEW).

[36] *See, Brown* v. *Weinberger, supra,* 417 F.Supp. at 1224 (violation of Title VI noticed by HEW).

(Pajaro Valley),[37] Desert Sands,[38] Bakersfield,[39] Berkeley,[40] and Redwood City (Sequoia).[41] In addition, school systems in Los Angeles,[42] San Francisco,[43] San Diego,[44] San Jose,[45] Pasadena,[46] Delano,[47] San Bernardino,[48] and Santa

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[37] *Id.*

[38] *Id.*

[39] *See,* CENTER FOR NATIONAL POLICY REVIEW, JUSTICE DELAYED, HEW AND NORTHERN SCHOOL DESEGREGATION 108 (1974) (violation of Title VI noticed by HEW).

[40] *Id.; see also,* U.S. COMM. ON CIVIL RIGHTS, FULFILLING THE LETTER AND SPIRIT OF THE LAW 50-54 (1976) (discussion of Berkeley's voluntary desegregation effort).

[41] *See,* CENTER FOR NATIONAL POLICY REVIEW, JUSTICE DELAYED, HEW AND NORTHERN SCHOOL DESEGREGATION 108 (1974) (violation of Title VI noticed by HEW).

Also, the State Department of Education agreed to remedy disproportionate representation of Mexican-American children in classes for educable mental retarded classes by a consent decree in *Diana* v. *State Board of Education,* N.D. Cal. Civ. Act. No. C-70-37 REP, stipulation dated June 18, 1973.

[42] *Crawford* v. *Board of Education,* 17 Cal. 3d 280, 130 Cal. Rptr. 724, 551 P.2d 28 (1976).

[43] *See, San Francisco Unified School District* v. *Johnson,* 3 Cal. 3d 937, 943, 92 Cal. Rptr. 309, 311, 479 P.2d 669, 671 (1971) (*en banc*), *cert. denied,* 401 U.S. 1012 (1971).

[44] *People ex rel. Lynch* v. *San Diego Unified School District,* 19 Cal. App. 3d 252, 96 Cal. Rptr. 658 (Ct. App. 1971), *cert. denied,* 405 U.S. 1016 (1972).

[45] *Carlin* v. *San Jose Unified School District,* —— Cal. App. Supp. 3d ——, —— Cal. Rptr. —— (Super. Ct., County of San Diego, No. 303800, filed March 9, 1977).

[46] *Jackson* v. *Pasadena City School District,* 59 Cal.2d 876, 31 Cal. Rptr. 606, 382 P.2d 878 (1963) (*en banc*).

[47] *Pena* v. *Superior Court,* 50 Cal. App. 3d 694, 123 Cal. Rptr. 500 (Ct. App. 1975).

[48] *NAACP* v. *San Bernardino City Unified School District,* 17 Cal. 3d 311, 130 Cal. Rptr. 744, 551 P.2d 48 (1976).

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Barbara[49] have been found in violation of State school segregation and racial imbalance prohibitions. While necessarily an estimate, it appears that fully 59% of black and 43% of all minority public school pupils in 1970 attended schools in districts that have been found in violation of federal or State laws prohibiting school segregation.[50] It also should be noted that a substantial proportion of California's black population received some part of its schooling under *de jure* segregation conditions in the southern states.[51]

Moreover, the recent school desegregation decisions indicate that California has not fully dismantled its historic separate school system, which has been characterized as a "classic case of [the] *de jure* segregation involved in *Brown* v. *Board of Education,* 347 U.S. 483, relief ordered, 349 U.S. 294," *Guey Heung Lee* v. *Johnson,* 404 U.S. 1215, 1215-

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[49] *See, Santa Barbara School District* v. *Superior Court,* 13 Cal. 3d 315, 319, 118 Cal. Rptr. 637, 642, 530 P.2d 605, 609-610 (1975) (*en banc*).

[50] Statistics derived from enrollment statistics by school district and projected universe statistics for all California districts in U.S. DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, OFFICE OF CIVIL RIGHTS, DIRECTORY OF PUBLIC ELEMENTARY AND SECONDARY SCHOOLS IN SELECTED DISTRICTS, ENROLLMENT AND STAFF BY RACIAL/ETHNIC GROUPS, FALL 1970 (1972).

[51] Fully 42% of California's black population was born in the South, see U.S. Bureau of the Census, 1970 Census of Population, Series PC(2)-2A, State of Birth 55, 61 (1973); see also U. S. Bureau of the Census, *Current Population Reports,* Series P-23, No. 46; The Social And Economic Status of the Black Population in the United States, 1972 at 12 (1973). Extraordinary black migration to California, principally from the South, during and after the Second World War, resulted in the black population multiplying by 11.3 times from 1940 to 1970, U. S. BUREAU OF THE CENSUS, HISTORICAL STATISTICS OF THE UNITED STATES, COLONIAL TIMES TO 1970, PART I 25 (1976). In the same period, the white population increased by only 2.7 times).

1216 (1971) (Mr. Justice Douglas, Circuit Justice).[52] Soon after the first public "colored school" was opened in San Francisco for black children, California's education law was formally amended in 1860[53] to permit separate schools for the education of "Negroes, Mongolians and Indians."[54] The constitutionality of the provision subsequently was upheld, *Ward* v. *Flood,* 48 Cal. 36 (1874),[55] but the statute was repealed in 1880[56] after the closing of separate black schools in California's larger cities for reason of economy.[57] However, recalcitrant districts continue to separate black school children,[58] and systemic segregation continued into the 20th century.[59] The most common means of segregation has been through manipulation of student attendance zones, school site selection and neighborhood school pol-

[52] In *Guey Heung Lee,* Mr. Justice Douglas denied a request by Americans of Chinese ancestry to stay a school desegregation plan for San Francisco, observing that, "[s]chools once segregated by State action must be desegregated by State action, at least until the force of the earlier segregation policy has been dissipated," *id.* at 1216.

The history of school segregation in California is reviewed in C. WOLLENBERG, ALL DELIBERATE SPEED, SEGREGATION AND EXCLUSION IN CALIFORNIA SCHOOLS, 1855-1975 (1976) and I. HENDRICK, THE EDUCATION OF NON-WHITES IN CALIFORNIA, 1849-1970 (1977). Pertinent sources and studies are cited. *See also,* M. WEINBERG, A CHANCE TO LEARN (1977).

[53] 1860 Cal. Stats., c. 329, §8; *see also,* 1863 Cal. Stats., c. 159, §68.

[54] *See,* WOLLENBERG, *supra,* at 10-14.

[55] *Ward* v. *Flood* was later cited with approval in *Plessy* v. *Ferguson,* 163 U.S. 537, 545 (1896).

[56] General School Law of California, §1662 at 14 (1880).

[57] *See,* C. WOLLENBERG, *supra,* at 24-26.

[58] *See, Wysinger* v. *Crookshank,* 82 Cal. 588, 23 P. 54 (1890).

[59] *See* HENDRICK, *supra,* at 78-80, 98-100.

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icy.[60] Following unsuccessful efforts to exclude Chinese,[61] Japanese[62] and Indian children[63] from public education altogether, specific statutory authority was created for the establishment of separate schools for Chinese, Japanese and Indian children.[64] The California Education Code provided:

> "§ 8003. *Schools for Indian children, and children of Chinese, Japanese, or Mongolian parentage: Establishment.* The governing board of any school district may establish separate schools for Indian children, excepting children of Indians who are wards of the United States Government and children of all other Indians who are descendants of the original American Indians of the United States, and for children of Chinese, Japanese, or Mongolian parentage.
>
> "§ 8004. *Admission of children into other schools.* When separate schools are established for Indian children or children of Chinese, Japanese, or Mongolian parentage, the Indian children or children of Chinese, Japanese, or Mongolian parentage shall not be admitted into any other school."

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[60] *See, id.*, at 100, 103-106; *see, e.g., Spangler* v. *Pasadena City Board of Education*, 311 F. Supp. 501 (C.D. Cal. 1970). *Cf. Keyes* v. *School District No. 1*, 413 U.S. 189, 191-194 (1973).

[61] *See, e.g., Tape* v. *Hurley*, 66 Cal. 473, 6 P. 129 (1885).

[62] *See, e.g., Aoki* v. *Deane*, discussed in WOLLENBERG, *supra*, at 48-68.

[63] *See, e.g., Anderson* v. *Mathews*, 174 Cal. 537, 163 P. 902 (1917); *Piper* v. *Big Pine School Dist.*, 193 Cal. 664, 226 P. 926 (1924).

[64] 1885 Cal. Stats., c. 117, §1662 (Chinese); 1893 Cal. Stats., c. 193, §1662 (Indians); 1921 Cal. Stats., c. 685, §1 (Japanese). The 1893 Indian provision was amended in 1935, *see infra*, at p. 18a, n. 67. *See generally*, WOLLENBERG, *supra*, at 28-107; HENDRICK, *supra*, at 11-59.

These provisions were not repealed until 1947,[65] *see Guey Heung Lee* v. *Johnson, supra,* 404 U.S. 1215.

The repeal of California school segregation statutes seven years before this Court's invalidating decision in *Brown* v. *Board of Education, supra,* was precipitated by *Mendez* v. *Westminster School District,* 64 F. Supp. 544 (C.D. Cal. 1946), *affirmed,* 161 F.2d 744 (9th Cir. 1947) (*en banc*), involving yet another racial minority. As was true of the southwestern states generally, see *Keyes* v. *School District No. 1,* 413 U.S. 189, 197-198 (1973), *de jure* public school segregation of Mexican-American school children was tolerated by the State.[66] While California law did not expressly sanction separate schools, state administrative authorities construed the term "Indian" in the school segregation law to include Mexican-Americans.[67] *Mendez* v. *Westminster School District, supra,* held that "the general and continuous segregation in separate schools of the children of Mexican ancestry from the rest of the elementary school population" in four Orange County dis-

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[65] 1947 Cal. Stats., c. 737, §1.

[66] *See,* HENDRICK, *supra,* at 60-70, 81-82, 89-92; WOLLENBERG, *supra,* at 109-118.

[67] California's Attorney General was of the view that, "the greater portion of the population of Mexico are Indians, and when such Indians migrate to the United States, they are subject to the laws applicable generally to other Indians." 22 CALIFORNIA DEPARTMENT OF JUSTICE, OPINIONS OF THE ATTORNEY GENERAL, *Opinion 6735a* (January 23, 1930) 931-932 (1930). The legislature then amended the separate school law to exclude from coverage "children of Indians who are wards of the United States Government and children of all other Indians who are descendants of the original American Indians of the United States," 1935 Cal. Stats., c. 488, §§1, 2. As a result, most American Indians were excluded from coverage but Mexican-Americans included, *see,* HENDRICK, *supra,* at 87; WEINBERG, *supra,* at 166.

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tricts was impermissible under the Fourteenth Amendment. As was the case with the other racial minorities,[68] segregation of Mexican-American children in public schools was part and parcel of general state-imposed racially discriminatory policies and practices.[69]

The 1940's and the 1950's witnessed an accelerated rate of segregation as a result of rapid in-migration of minority groups and the actions of districts in drawing school attendance areas.[70] Thus, in the State Department of Education's first statewide survey of racial distribution in school districts in 1966, it was concluded that, "despite efforts to implement the policies of the State Board of Education and the progress made by the Department of Education, the task of eliminating segregation and providing equal educational opportunities remains formidable." [71] As the recent cases decided in the decade since demonstrate, *supra*, "the force of the earlier segregation policy has [not] been dissipated," *Guey Heung Lee* v. *Johnson, supra,* 347 U.S. at 1216.

Studies have documented some of the deleterious effects of this educational deprivation. See, *e.g.*, GOVERNOR'S COMMISSION ON THE LOS ANGELES RIOTS, VIOLENCE IN THE CITY 49 *et seq.* (1965); CALIFORNIA LEGISLATURE, ASSEMBLY PER-

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[68] *See, e.g., Yick Wo* v. *Hopkins,* 118 U.S. 356 (1886); *Oyama* v. *California,* 332 U.S. 633 (1948); *Takahashi* v. *Fish and Game Commission,* 334 U.S. 410 (1948).

[69] *See, e.g., Lopez* v. *Seccombe,* 71 F. Supp. 769 (S.D. Cal. 1944) (exclusion from municipal park and swimming pool); *Perez* v. *Sharp.,* 32 Cal. 2d 711, 198 P.2d 17 (1948) (miscegenation).

[70] *See,* HENDRICK, *supra,* at 104-106; *cf., Romero* v. *Weakley,* 226 F.2d 399 (9th Cir. 1955).

[71] CALIFORNIA STATE DEPARTMENT OF EDUCATION, RACIAL AND ETHNIC SURVEY OF CALIFORNIA'S PUBLIC SCHOOLS, FALL 1966, iii (1967).

MANENT SUBCOM. ON POSTSECONDARY EDUCATION, UNEQUAL ACCESS TO COLLEGE (1975). See generally U.S. CIVIL RIGHTS COMMISSION, MEXICAN AMERICAN EDUCATION STUDY, REPORTS I—VI (1971-1974) (comprehensive study of Mexican-American public school segregation in the southwestern states, including California). "A predicate for minority access to quality post-graduate programs is a viable, coordinated . . . higher education policy that takes into account the special problems of minority students." [72] It was therefore appropriate for the University of California-Davis medical school in framing its admissions policies "to consider whether . . . educational requirement[s] ha[ve] the 'effect of denying . . . the right [to public higher education] on account of race or color' because the State or subdivision which seeks to impose the requirement[s] has maintained separate and inferior schools for its [minority] residents," *Gaston County* v. *United States,*

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[72] *Adams* v. *Richardson,* 480 F.2d 1159, 1165 (D.C. Cir. 1973). In *Adams,* the D. C. Circuit analyzed the requirements of Title VI for State systems of higher education, and concluded that,

> "The problem of intergrating higher education must be dealt with on a state-wide rather than a school-by-school basis.[10] Perhaps the most serious problem in this area is the lack of state-wide planning to provide more and better trained minority group doctors, lawyers, engineers and other professionals. A predicate for minority access to quality post graduate programs is a viable, coordinated state-wide higher education policy that takes into account the special problems of minority students.

> [10] It is important to note that we are not here discussing discriminatory admissions policies of individual institutions. . . . This controversy concerns the more complex problem of of system-wide racial imbalance."

Id. at 1164-1165. In the next section, we show that the State of California has done precisely this, *viz.* formulated a state-wide higher education policy that seeks to overcome discrimination at lower levels of public education.

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395 U.S. 285, 293 (1969). *Oregon* v. *Mitchell,* 400 U.S. 112, 1333 (1970).

2. *California's Postsecondary Effort to Overcome the Effects of Racial Segregation at Lower Levels of Public Education*

The entire public higher education system of the State of California is under a duty imposed by state law to "[address] and overcom[e] . . . ethnic . . . underrepresentation in the makeup of the student bodies of institutions of public higher education."[73] This deliberate State policy sanctions the race-conscious admissions program of the University of California-Davis medical school.[74]

In 1960, California's Master Plan for Higher Education stipulated that up to two percent of the undergraduate body of the University of California, the California State University and Colleges, and the California Community Colleges be admitted as exceptions to the general admission requirements.[75] Pursuant to this authority the University of California in 1964-65, and the State Colleges

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[73] California Assembly Concurrent Resolution No. 151, 1974 Cal. Stats., Res. c. 209.

[74] *See, e.g.,* CALIFORNIA POSTSECONDARY EDUCATION COMMISSION, PLANNING FOR POSTSECONDARY EDUCATION IN CALIFORNIA: A FIVE YEAR PLAN UPDATE 33, n.* (1977).

[75] CALIFORNIA LEGISLATURE, ASSEMBLY, A MASTER PLAN FOR HIGHER EDUCATION IN CALIFORNIA, 1960-1975 p. 12 (1960). The Master Plan was approved by the State Board of Education and the Regents of the University of California December 18, 1959, *id.* at 6. The Master Plan was formulated pursuant to authority conferred by the legislature, 1959 Cal. Stats., Res. c. 160.

in 1966-1967[76] began to establish various undergraduate "Equal Opportunity Programs" to increase opportunities for "socio-economically disadvantaged" students[77] through recruitment, tutoring, financial aid, etc.[78] in order "to re-

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[76] The California Community Colleges instituted its program in 1969-1970, *infra.*

[77] "Initially, under the terms of the 1960 Master Plan, the number of authorized exceptions to the basic state college and University admissions rules were limited to the equivalent of 2% of the number of applicants expected to be admitted as freshmen and as transfer students. The figure of 2% was recommended by the Master Plan Survey Team without any particular justification, except that it would provide some release from the basic rule in the case of athletes and others whom the state colleges and University might wish to admit.

"As the pressure to admit more disadvantaged students began to increase, the pressure to admit a greater number of exceptions also increased. A careful examination of the way the campuses were actually using the allotted 2% revealed, to no one's surprise, that it was being used primarily for ahtletes and others with special talents or attributes which the campuses wanted. For 1966 it was found that among the freshmen admitted as exceptions by both segments, less than 2 of 10 could be termed disadvantaged. And the figure was less than 1 in 10 for those admitted to advanced standing. In the following year, 1967, as pressure continued to mount for the admission of disadvantaged students, these figures began to show some improvement, but the number of exceptions who were also disadvantaged remained well below 50%."

CALIFORNIA LEGISLATURE, JOINT COM. ON HIGHER EDUCATION, THE CHALLENGE OF ACHIEVEMENT: A REPORT ON PUBLIC AND PRIVATE HIGHER EDUCATION IN CALIFORNIA 77 (1969).

[78] CALIFORNIA POSTSECONDARY EDUCATION COMMISSION, PLANNING FOR POSTSECONDARY EDUCATION IN CALIFORNIA: A FIVE YEAR PLAN UPDATE, 1977-1982, 32-34 (1977) describes the affirmative action and related programs of the three branches of California's higher education system:

"University of California: In 1964, the University of California established an Educational Opportunity Program (EOP) designed to increase the enrollment of disadvantaged students at the undergraduate level. Supported by the Uni-

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adjust some of the past practices which have contributed to the problems of 'minority and disadvantaged' populations" and "to attack one of the root causes of social

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versity's own funds and those from federal financial aid programs, this program has grown from an enrollment of 100 students and a budget of $100,000 in 1965, to an enrollment of over 8,000 students with a budget in excess of $17 million.

"Dissatisfied with the growth in minority enrollments, the University in 1975 initiated an expanded Student Affirmative Action program to supplement the activities of campus EOPs. . . .

* * *

"The University also has initiated a variety of programs at the graduate and professional level to increase the enrollment of students from underrepresented groups. Generally, these programs include special recruitment efforts and academic support services. As a result, the enrollment of Black and Chicano students at the graduate level increased from 3 percent in 1978 to 10.7 percent in 1972. Since then, Chicano graduate enrollments have continued to increase but Black graduate enrollments have declined.

"Finally, the University is authorized to admit up to 4 percent of its entering students under a special program which provides for the admission of students who demonstrate potential for success but do not fully meet the regular entrance requirements.

"California State University and Colleges: Approximately $5.5 million in State funds were allocated to the California State University and Colleges in 1974-75 for its Educational Opportunity Program, which served 13,585 students that year. For 1976-77, the State University projects that it will serve 19,439 students with a total of $10,182,138 in State appropriations ($6,129,041 in grants and $4,053,097 in support services). EOP funds provide not only financial aid, but also a number of student support services such as personal and academic counseling. In addition, the State University is experimenting with alternative admissions standards on several campuses. The State University system also is authorized to admit up to 4 percent of its entering freshmen class in exception to regular admission requirements, with a similar percentage for lower division transfer students. . . .

"California Community Colleges: Extended Opportunity Programs and Services of the California Community Colleges

inequality—the lack of education." [79] The systematic underrepresentation of minority groups at successive levels of California public education was cited as the rationale for the programs.[80] Reviewing the programs in 1966, the

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reached approximately 37,000 students in 1974-75 with a State appropriation of $6.7 million. For 1976-77, those funds were increased to $11.4 million. The EOPS program was the result of specific legislation (SB 164, 1969) which identified the unique purposes for allocating State funds in this area. The Community Colleges report that the State dollars are put at the disposal of students either through student support services (such as academic and personal counseling, tutoring, and financial aid counseling), or through direct grants and work/study programs."

Compare CALIFORNIA LEGISLATIVE, JOINT COM. OF HIGHER EDUCATION, THE CHALLENGE OF ACHIEVEMENT: A REPORT ON PUBLIC AND PRIVATE HIGHER EDUCATION IN CALIFORNIA 65-80 (1969); CALIFORNIA LEGISLATURE, JOINT COM. ON HIGHER EDUCATION, K. MARTYN, INCREASING OPPORTUNITIES FOR DISADVANTAGED STUDENTS, PRELIMINARY OUTLINE (1967).

[79] CALIFORNIA COORDINATING COUNCIL FOR HIGHER EDUCATION, H. KITANO & D. MILLER, AN ASSESSMENT OF EDUCATIONAL OPPORTUNITY PROGRAMS IN CALIFORNIA HIGHER EDUCATION 2 (1970).

[80] See, *e.g.*, California Legislature, Joint Com. on Higher Education, The Challenge of Achievement, *supra*, at 66 (Table 6.1):

RACIAL AND ETHNIC DISTRIBUTION OF ENROLLMENT FOR CALIFORNIA PUBLIC SCHOOLS AND PUBLIC HIGHER EDUCATION, FALL 1967

Level of Enrollment	*Spanish Surname*	*Negro*	*Chinese, Japanese, Korean*	*American Indian*	*Other Nonwhite*	*Other White*
Elementary Grades (K-8)	14.4%	8.6%	2.1%	.3%	.7%	73.9%
High School Grades (9-12)	11.6	7.0	2.1	.2	.5	78.6
All Grades, K-12	13.7	8.2	2.1	.3	.7	75.1
Junior Colleges	7.5	6.1	2.9	.1	.8	82.6
California State Colleges	2.9	2.9	1.9	.7	—	90.1
University of California*	.7	.8	4.6	.2	—	93.7

* Excludes Berkeley Campus.

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Appendix B

California Coordinating Council on Higher Education[81] advised higher education bodies "to explore ways of expanding efforts to stimulate students from disadvantaged situations to seek higher education" [82] and, as part of that effort, directed that consideration be given to expanding the two per cent exception by an additional two per cent to accommodate disadvantaged students not otherwise eligible.[83] Two years later, the Council recommended, and the University and State Colleges accepted an expansion of the programs by raising the ceiling to four per cent, with at least half the exceptions reserved for disadvantaged students.[84] Criticism of the exception as unduly narrow, however, continued.[85] After further study,[86] the California

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[81] The Council was renamed the California Postsecondary Education Commission.

[82] CALIFORNIA COORDINATING COUNCIL FOR HIGHER EDUCATION, K. MARTYN, INCREASING OPPORTUNITIES IN HIGHER EDUCATION FOR DISADVANTAGED STUDENTS, *supra* at 7 (1966).

[83] *Id.*

[84] *See*, CALIFORNIA LEGISLATURE, JOINT COM. ON HIGHER EDUCATION, THE CHALLENGE OF ACHIEVEMENT: A REPORT ON PUBLIC AND PRIVATE HIGHER EDUCATION IN CALIFORNIA, *supra*, 78.

[85] For instance, the Joint Committee on Higher Education's report, *id.*, criticized the four per cent ceiling as "arbitrary" and limiting, and suggested a ten per cent ceiling that would permit "a real effort on the part of the two four-year segments to expand opportunities for disadvantaged students." The report also called for a general reappraisal of California higher education policies and stated that:

> "To many institutions, in the name of maintaining standards, have excluded those who would benefit most from further education. For these reasons we believe that current admissions policies among California's public institutions of higher education should be very carefully and thoroughly reexamined."

Id. at 80.

(See footnote 86 on following page.)

Appendix B

Legislature enacted Assembly Concurrent Resolution No. 151 (1974) to provide, in pertinent part, that:

> "WHEREAS, The Legislature recognizes that certain groups, as characterized by sex, ethnic, or economic background, are underrepresented in our institutions of public higher education as compared to the proportion of these groups among recent California high school graduates; and
>
> "WHEREAS, It is the intent of the Legislature that such underrepresentation be addressed and overcome by 1980; and
>
> "WHEREAS, It is the intent of the Legislature that this underrepresentation be eliminated by providing additional student spaces rather than by rejecting any qualified student; and

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[86] "In the 1960 Master Plan for Higher Education, California committed itself to provide a place in higher education to every high school graduate or eighteen-year-old able and motivated to benefit. California became the first state or society in the history of the world to make such a commitment. We reaffirm this pledge.

* * *

"Our achievements in extending equal access have not met our promises. Though we have made considerable progress in the 1960's and 1970's, equality of opportunity in postsecondary education is still a goal rather than a reality. Economic and social conditions and early schooling must be significantly improved before equal opportunity can be realized. But there is much that can be done by and through higher education."

CALIFORNIA LEGISLATURE, JOINT COM. ON THE MASTER PLAN FOR HIGHER EDUCATION, REPORT 33, 37 (1973). The report recommended that, *inter alia*, "Each segment of California public higher education shall strive to approximate by 1980 the general ethnic, sexual and economic composition of the recent California high school graduates," at 38, and is the principle legislative history of Assembly Concurrent Resolution No. 151.

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Appendix B

"WHEREAS, It is the intent of the Legislature to commit the resources to implement this policy; and

"WHEREAS, It is the intent of the Legislature that institutions of public higher education shall consider the following methods for fulfilling this policy:

(a) Affirmative efforts to search out and contact qualified students.

(b) Experimentation to discover alternate means of evaluating student potential.

(c) Augmented student financial assistance programs.

(d) Improved counseling for disadvantaged students;

now, therefore, be it

"*Resolved by the Assembly of the State of California, the Senate thereof concurring,* That the Regents of the University of California, the Trustees of the California State University and Colleges, and the Board of Governors of the California Community Colleges are hereby requested to prepare a plan that will provide for addressing and overcoming, by 1980, ethnic, economic, and sexual underrepresentation in the makeup of the student bodies of institutions of public higher education as compared to the general ethnic, economic, and sexual composition of recent California high school graduates . . ."

"In adopting Assembly Concurrent Resolution 151 (1974) the Legislature acknowledged that additional effort by colleges and universities is necessary to overcome under-

representation of ethnic minorities and the poor," CALIFORNIA LEGISLATURE, ASSEMBLY PERMANENT SUBCOM. ON POSTSECONDARY EDUCATION, UNEQUAL ACCESS TO COLLEGE 1 (1975).

California's public higher education affirmative action effort has been predicated on the need to increase educational opportunities of persons disadvantaged by financial, geographic, academic and motivational barriers.[87] The documented effect of such artificial barriers to exclude many disadvantaged students, particularly minority students, from higher education in California was the spur to affirmative action.[88]

Moreover, it is evident that individuals of low-income minority groups suffer from double discrimination.[89] California's public higher education system has been characterized as "inherently racist because socioeconomic and

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[87] CALIFORNIA COORDINATING COUNCIL FOR HIGHER EDUCATION, H. KITANO & D. MILLER, AN ASSESSMENT OF EDUCATIONAL OPPORTUNITY PROGRAMS IN CALIFORNIA HIGHER EDUCATION, *supra*, at 9; CALIFORNIA LEGISLATURE, JOINT COMMITTEE ON HIGHER EDUCATION, K. MARTYN, INCREASING OPPORTUNITIES FOR DISADVANTAGED STUDENTS, PRELIMINARY OUTLINE, *supra;* CALIFORNIA COORDINATING COUNCIL FOR HIGHER EDUCATION. K. MARTYN, INCREASING OPPORTUNITIES IN HIGHER EDUCATION FOR DISADVANTAGED STUDENTS, *supra*, at 10-11.

[88] *See, e.g.,* CALIFORNIA LEGISLATURE, JOINT COM. ON HIGHER EDUCATION, K. MARTYN, INCREASING OPPORTUNITIES FOR DISADVANTAGED STUDENTS, PRELIMINARY OUTLINE, *supra*, at 3-14; CALIFORNIA LEGISLATURE, JOINT COM. ON HIGHER EDUCATION, THE CHALLENGE OF ACHIEVEMENT: A REPORT ON PUBLIC AND PRIVATE HIGHER EDUCATION IN CALIFORNIA, *supra*, at 66-67; CALIFORNIA LEGISLATURE, ASSEMBLY PERMANENT SUBCOM. ON POSTSECONDARY EDUCATION, UNEQUAL ACCESS TO COLLEGE, *supra;* CALIFORNIA POSTSECONDARY EDUCATION COMMISSION, EQUAL EDUCATIONAL OPPORTUNITY IN CALIFORNIA POSTSECONDARY EDUCATION: PART I 4-6, Appendix B at B-1—B-11 (1976).

[89] *See, e.g.,* CALIFORNIA LEGISLATURE, JOINT COM. ON THE MASTER PLAN FOR HIGHER EDUCATION, REPORT, *supra*, at 37-38.

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cultural conditions in the early experience of minority persons leave them unable to measure up to the admissions standards of the four-year segments." [90]

> ". . . [O]ne of the most serious blocks to participation in higher education for minority students occurs in the secondary educational system. Students from [black and Mexican-American] minority groups tend to be systematically underrepresented at each successive level of educational attainment." [91]

"The importance of the high school experience on the [minority] student's opportunity to attend college cannot be too heavily emphasized." [92] Thus, while the proportion of high school seniors eligible for entrance into the University of California and State University and Colleges (on the basis of grades and test scores) increases with family income for all students, the proportion of minority seniors is consistently lower.[93] The percentage of eligible

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[90] *Id.*, at 47.

[91] CALIFORNIA COORDINATING COUNCIL FOR HIGHER EDUCATION, H. KITANO & D. MILLER, AN ASSESSMENT OF EDUCATIONAL OPPORTUNITY PROGRAMS IN CALIFORNIA HIGHER EDUCATION, *supra*, at 3.

[92] CALIFORNIA LEGISLATURE, JOINT COM. ON THE MASTER PLAN FOR HIGHER EDUCATION, R. LOPEZ & D. ENOS, CHICANOS AND PUBLIC HIGHER EDUCATION IN CALIFORNIA 14 (1972). This report is one of a series that analyzes problems and available affirmative action efforts from the perspective of various minority groups. See also, CALIFORNIA LEGISLATURE, JOINT COM. ON THE MASTER PLAN FOR HIGHER EDUCATION, R. YOSKIOKA, ASIAN-AMERICANS AND PUBLIC HIGHER EDUCATION IN CALIFORNIA (1973); CALIFORNIA LEGISLATURE, JOINT COM. ON THE MASTER PLAN FOR HIGHER EDUCATION, NAIROBI RESEARCH INST., BLACKS AND PUBLIC HIGHER EDUCATION IN CALIFORNIA (1973).

[93] CALIFORNIA COORDINATING COUNCIL FOR HIGHER EDUCATION, H. KITANO & D. MILLER, AN ASSESSMENT OF EDUCATIONAL OP-

minority race seniors who actually matriculate also is a fraction of the percentage of eligible white seniors.[94] Such trends persist in the college and post-college careers of minority students.[95]

In a comprehensive review of the State of California's higher education affirmative action programs, the California Postsecondary Commission concludes that more rather than less is required, EQUAL EDUCATIONAL OPPORTUNITY IN CALIFORNIA POSTSECONDARY EDUCATION: PART II (publication pending).

PORTUNITY PROGRAMS IN CALIFORNIA HIGHER EDUCATION, *supra*, at 4-5; CALIFORNIA LEGISLATURE, ASSEMBLY PERMANENT SUBCOM. ON POSTSECONDARY EDUCATION, UNEQUAL ACCESS TO COLLEGE, *supra*, at 7 *et seq.*; CALIFORNIA POSTSECONDARY EDUCATION COMMISSION, EQUAL EDUCATIONAL OPPORTUNITY IN CALIFORNIA POSTSECONDARY EDUCATION: PART I, *supra*, at 5-6.

[94] *Id.*

[95] CALIFORNIA COORDINATING COUNCIL FOR HIGHER EDUCATION, H. KITANO & D. MILLER, AN ASSESSMENT OF EDUCATIONAL OPPORTUNITY PROGRAMS IN CALIFORNIA HIGHER EDUCATION, *supra*, at viii; authorities cited *supra* at p. 29a, n. 92.

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APPENDIX C

Morbidity and Mortality Statistics of the Black Population

The life expectancy of white males is six years longer than black males; white females are expected to live 5.4 more years than black females.[96] There is approximately a 200% difference in the infant mortality of whites and non-whites.[97] Maternal deaths among non-whites are 3½ times that of whites.[98] The fetal death rate for non-whites is 1½ times greater for blacks than for whites and the gap between the two groups was greater in 1974 than in 1960.[99] According to statistics gathered in 1973, among children aged 1 to 4, minority children die at a rate 70% higher

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[96] U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES, 1976, *supra* at 60. (Statistic is as of 1974).

[97] *Id.* at 64. This statistic represents death in infants under 1 year old, exclusive of fetal deaths. The incidence of all non-white deaths was 28.5 per 1000 live births; infant mortality in 1971 among blacks 30.3 per 1000 live births; for whites 17.1 deaths per live births. AMERICAN PUBLIC HEALTH ASSOCIATION, MINORITY HEALTH CHART BOOK 36 (1974).

[98] U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES, 1976, *id.*

[99] *Id.* Neo-natal death (death between birth and 22 days) per 1,000 live births were as follows:

	Male	*Female*
blacks	23.3	18.5
whites	14.8	11.2

Death of post-natal infants per 1000 (death between 28 days and 1 year) in 1971 were:

	Male	*Female*
blacks	10.0	8.7
whites	4.5	3.5

Minority Health Chartbook, *id.* at pp. 39-40. Chart is based on unpublished data from Division of Vital Statistics, National Center for Health Statistics, Dept. of HEW, 1974.

than white; in the 5 to 9 age group minority children die at a rate 40 percent higher than white children.[100]

Blacks also suffer from serious disease at a far higher rate than whites. The incidence of tuberculosis among blacks is 31.4 per 100,000; among whites, it is 3.9 per 100,000.[101] Diabetes and cancer of the cervix (both of which are controllable) are three times more prevalent among blacks.[102] Three times as many blacks as whites suffer from high blood pressure[103] and when blacks do get ill, the incidence of death from disease far surpasses the white mortality rate for the same disease.[104]

Studies have established that illness and death among blacks, notably fetal, infant and maternal morbidity and mortality, are directly related to lack of health care.[105]

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[100] National Center for Health Statistics, Department of Health, Education and Welfare, *Monthly Vital Statistics Report, Summary Report Final Mortality Statistics, 1973,* Table 3.

[101] Tunley, THE AMERICAN HEALTH SCANDAL 40-41 (1966).

[102] *Id.*

[103] Mills, *Each One Teaches One,* JOURN. BLACK HEALTH PERSPECTIVES 5-10 (Aug.-Sept. 1974).

[104] Darity, *Health and Social Problems of the Black Community,* JOURN. OF BLACK HEALTH PERSPECTIVES (June/July 1974), Table 13, p. 46.

[105] "For pregnant women, the adverse effects of chronic states of illness induced by such diseases as syphilis, tuberculosis, and diabetes, or resulting from poor nutritional status can be mitigated if these conditions are identified and treated during early pregnancy. Other adverse conditions . . . may develop later in pregnancy or immediately before labor. For these reasons, the initiation of prenatal care in early pregnancy and the continuous medical supervision of the pregnant woman throughout the gestational period are needed to ensure both the optimum development of the fetus and the well-being of the mother." PUBLIC HEALTH SERVICE, U.S. DEPT. OF HEALTH, EDUCATION & WELFARE, *Selected Vital and Health Statistics in Poverty and Nonpoverty Areas of 19*

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Appendix C

While the level of inadequate prenatal care is higher in poverty areas than in higher income areas for all races, the proportion of non-white women receiving no prenatal care is greater than that of whites.[106] Mothers who have had no prenatal care are three times more likely to give birth to infants with low birth weights,[107] which is associated with almost half of infant deaths, and substantially increases the likelihood of birth defects.[108] With adequate facilities

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Large Cities. United States, 1969-71. 13; *See,* Iba Niswander & Woodville, *Relation of Prenatal Care to Birth Weights, Major Malformations, and Newborn Deaths of American Indians,* 8 HEALTH SERVICES REPORTS, 697-701 (1973); Weiner & Milton, *Demographic Correlations of Low Birth Weight,* 3 AM. J. EPIDEMIOL. 260-272 (Mar. 1970); KESSNER, et al., *Contrasts in Health Status,* Vol. I—*Infant Death: An Analysis of Maternal Risk and Health Care* (1973).

[106] Selected Vital and Health Statistics in Poverty and Non-poverty Areas of 19 large Cities, U.S. 1969-1971, *Id.*

[107] National Center for Health Statistics, U.S. Dept. of Health, Education and Welfare, *Monthly Vital Statistics Reports, Summary Report, Final Mortality Statistics* 1973, p. 8.

[108] National Foundation, Annual Report 1974, p. 9. See Montague, PRENATAL INFLUENCES (1962).

and doctors, the high incidence of infant and maternal death and illness is dramatically reduced.[109]

[109] See studies in Providence (Maternal and Child Care Service, U.S. Department of Health, Education & Welfare, *Promoting the Health of Mothers and Children, Fiscal Year 1972*, p. 6); Lowndes County, Alabama, Bolivar County, Mississippi (Davis, *A Decade of Policy Developments in Providing Health Care for Low Income Families in Haveman, R. ed.*, A DECADE OF FEDERAL ANTI-POVERTY POLICY: ACHIEVEMENTS, FAILURES AND LESSONS (1976) 47-48); and Boston (Robertson, et al., *Toward Changing the Medical Care System: Report of an Experiment, in Haggarty,* The Boundaries of Health Care, Reprinted from Alpha Omega Honor Society, PHAROS OF ALPHA OMEGA ALPHA, Vol. 35, pp. 106-111 (1972) which established that greater access to medical care resulted in reduction of infant and maternal mortality of 50% even though poor housing, nutrition and other incidents of poverty remained stable in the population. *See also,* studies in Denver and Birmingham discussed in Roger, *The Challenge of Primary Care,* in DAEDALUS (Winter 1977) p. 88, where results were similar.

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