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Racial Preference and the Constitution: The Societal Interest in the Equal Participation Objective

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RACIAL PREFERENCE AND THE CONSTITUTION: THE SOCIETAL INTEREST IN THE EQUAL PARTICIPATION OBJECTIVE

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I. INTRODUCTION: RACIAL PREFERENCE AND THE CONSTITUTION

While the concept of "affirmative action" may embrace a number of things, constitutional considerations come into play only when affirmative action takes the form of *racial preference.*[1] Racial preference is involved for constitutional purposes whenever the race of persons is taken into account by the government in allocating benefits or burdens, so that persons are subject to differential treatment on the basis of race.[2] Racial preference is involved when race is taken into account in determining admission to a publicly-supported university,[3] in hiring and promotion in public employment,[4] or in entitlement to governmental contracts.[5] At the present time, the constitutional question arises in the context of racial preference being given to blacks and other racial-ethnic groups, such as Hispanics and Native-Americans,

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1. *See* Legal Aid Soc'y of Alameda County v. Brennan, 608 F.2d 1319, 1343 (9th Cir. 1979).

2. *See* Posner, *The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities,* 1974 SUP. CT. REV. 1, 25.

3. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

4. Detroit Police Officers Ass'n v. Young, 608 F.2d 671 (6th Cir. 1979); *cf.* United Steelworkers of America v. Weber, 443 U.S. 193 (1979) (private employment).

5. Fullilove v. Klutznick, 48 U.S.L.W. 4979 (1980).

who, like blacks, have been subject to discrimination and victimization in American society because the dominant white majority has perceived them as "nonwhite."[6] While many of the traditional forms of discrimination against blacks resulted in racial preference for whites,[7] there was no need, for purposes of constitutional analysis, to distinguish racial preference from the other forms of discrimination against blacks. The use of race-conscious criteria that produced discrimination against blacks invariably was found by the Supreme Court to be "invidious" and hence unconstitutional, because in no case could it be shown to be "necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the objective of the Fourteenth Amendment to eliminate."[8]

As I have discussed more fully elsewhere,[9] constitutional doctrine in regard to racial equality has developed with reference to the concept of invidious racial discrimination.[10] The Constitution proscribes invidious racial discrimination, which is the use of race-conscious criteria not necessary to the accomplishment of a valid and substantial governmental interest.[11] The use of race-conscious criteria directed

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6. Since these groups have been subject to discrimination and victimization on this basis, for constitutional purposes, a legislative body should be able to include them in any racial preference given to blacks. *See* Sedler, *Beyond Bakke: The Constitution and Redressing the Social History of Racism*, 14 HARV. C.R.-C.L. L. REV. 133, 136-39 (1979) [hereinafter Sedler, *Beyond Bakke*]. *See also* Greenawalt, *The Unresolved Problems of Reverse Discrimination*, 67 CALIF. L. REV. 87, 117-19 (1979). As to the matter of inclusion in the preference, see Regents of the Univ. of. Cal. v. Bakke, 438 U.S. at 359 n.35 (Brennan, J., concurring in part, dissenting in part).

7. *E.g.*, discrimination against blacks in employment or in admission to universities.

8. Loving v. Virginia, 388 U.S. 1, 11 (1967).

9. Sedler, *Racial Preference, Reality and the Constitution*, 17 SANTA CLARA L. REV. 329, 368-72 (1977) [hereinafter Sedler, *Racial Preference*].

10. It has been contended that the Constitution should be interpreted to prohibit "the differential treatment of other human beings by race," Van Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution*, 46 U. CHI. L. REV. 775, 809 (1979), and that "the proper constitutional principle is not, no 'invidious' racial or ethnic discrimination, but no use of racial or ethnic criteria in the distribution of government benefits or burdens." Posner, *supra* note 2, at 25. My own view of racial preference in terms of constitutional values is, of course, quite different. *See* Sedler, *Racial Preference, supra* note 9, at 361-80. *See also* Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023, 1043-50 (1979). Regardless of one's view as to how the Constitution should be interpreted, however, it has not been interpreted to prohibit "differential treatment on the basis of race," where such "differential treatment" does not amount to invidious racial discrimination. And as Dean Sandalow has noted: "A constitutional principle that government may not distribute burdens or benefits on racial or ethnic grounds is required neither by the 'intentions of the framers' nor by a more general principle of constitutional law." Sandalow, *Racial Preferences in Higher Education: Political Responsibility and the Judicial Role*, 42 U. CHI. L. REV. 653, 675 (1975).

11. When race-conscious critera are employed, the state " must show that its purpose or interest is both constitutionally permissible and substantial and that its use

against whites is equally unconstitutional where it is not shown to be necessary to the accomplishment of the requisite governmental interest.[12] Any use of race-conscious criteria by the government is subject to "strict scrutiny,"[13] and all invidious racial discrimination[14] is unconstitutional whenever practiced by the government, whether at the instance of whites or of blacks,[15] and whether the victims of such discrimination are blacks, whites or both.[16]

For purposes of constitutional analysis then, there is a distinction between the use of race-conscious criteria and invidious racial discrimination. While it has been contended that any use of race-conscious criteria that produces detriment to persons of the other race amounts to racial discrimination and should be held to be unconstitutional,[17] this has not been the Court's approach to the constitutionality of the use of race-conscious criteria. The Court has interpreted the Constitution to permit the use of race-conscious criteria, like other criteria based on identifiable group membership,[18] where such criteria

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of the [race-conscious] classification is 'necessary . . . to the accomplishment' of its purpose or the safe-guarding of its interest." Regents of Univ. of Cal. v. Bakke, 438 U.S. at 305 (citations omitted).

12. *Cf.* Strauder v. West Virginia, 100 U.S. 303, 308 (1880) (rejecting systematic exclusion of blacks or whites from jury service); New Orleans-City Park Improvement Ass'n v. Detiege, 252 F.2d 122 (5th Cir.), *aff'd per curiam*, 358 U.S. 54 (1958) (rejecting denial to blacks of equal access to public facilities).

13. In Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978), there was some disagreement between Justice Powell and Justice Brennan over the meaning of "strict scrutiny," with Justice Powell's view appearing to be more exacting. *See* Sedler, *Beyond Bakke, supra* note 6, at 141-42. As to the significance of this disagreement in regard to challenges to racial preference, *compare* Greenawalt, *supra* note 6, at 105-06 *with* Perry, *supra* note 10, at 1045.

14. The invidious racial discrimination doctrine relates, of course, to the express or otherwise intentional use of race-conscious criteria. Under the present state of the law, the use of racially-neutral criteria having a racially-disproportionate impact ordinarily is not unconstitutional. Washington v. Davis, 426 U.S. 229 (1976).

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

16. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 291-99 (1978) (Powell, J.). This being so, it is submitted that any notion of "reverse" or "benign" discrimination, in the sense of distinguishing *analytically* between the use of race-conscious criteria directed against racial minorities and the use of similar criteria directed against whites is unsound.

17. See note 10 *supra*.

18. Such examples include gender, alienage, legitimacy, and age. There is no doubt that the Constitution permits the government to classify on the basis of identifiable group membership, and such classifications have not infrequently been sustained. If the government can constitutionally use gender, alienage, legitimacy, and age "in the distribution of governmental benefits or burdens," it is difficult to see why it is constitutionally precluded from ever using race for this purpose. Whenever classifications on the basis of group membership are used "in the distribution of governmental benefits or burdens," the constitutional question—sometimes obscured by the debate over the appropriate standard of review—is necessarily the same: is the "distribution of governmental benefits or burdens" on this basis necessary to the ad-

use advances a valid and substantial governmental interest by what the Court finds to be appropriate means.[19] In such circumstances the use of race-conscious criteria does not amount to invidious racial discrimination and is constitutional despite detriment that it causes to persons of either or both races.[20] Unless the Court is to radically alter existing constitutional doctrine in regard to racial equality, the constitutionality of racial preference, like the constitutionality of any other race-conscious criteria use, must be analyzed with reference to the concept of invidious racial discrimination. This analysis makes the constitutionality of racial preference depend on whether the use of racial preference, in the circumstances presented, advances a valid and substantial governmental interest by what the Court finds to be appropriate means.

The matter of racial preference bitterly divides American society today,[21] and is the subject of intense moral and philosophical debate.[22] But like many controversial questions of public concern, it has been drawn into our constitutional system, and as Professor Dixon has observed: "Once taken into our constitutional system, the dialogue takes on a new seriousness. It is, therefore, critically important that we get the questions right and the answers right, because constitutional law is written in concrete and is not easily washed out by rain or tears."[23] The right questions, however, and I would submit, the right answers as well, must be formulated in light of constitutional doctrine[24] that the Court has developed in regard to racial equality and in

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vancement of a valid and substantial governmental interest. If so, then it is constitutional. *See, e.g.*, Lalli v. Lalli, 439 U.S. 259 (1978); Foley v. Connelie, 435 U.S. 291 (1978); Califano v. Webster, 430 U.S. 313 (1977); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976). The constitutional question is no different when the "distribution of governmental benefits or burdens" is on the basis of race.

19. The concept of "appropriate means" seems to be the best way to express the standard by which a court evaluates the permissibility of the particular use of race-conscious criteria in relation to the advancement of the governmental interest found to be valid and substantial. *See* Sedler, *Beyond Bakke, supra* note 6, at 143-44 n.49.

20. *See* Sedler, *Beyond Bakke, supra* note 6, at 157-62. *See also* Fullilove v. Klutznick, 48 U.S.L.W. 4979, 4988-89 (Burger, C.J.), 4998-99 (Marshall, J.) (1980).

21. *See* Lipset & Schneider, *The Bakke Case: How Would It Be Decided at the Bar of Public Opinion*, PUB. OPINION, Mar./Apr. 1978, at 38.

22. *Compare* Cohen, *Why Racial Preference is Illegal and Immoral*, COMMENTARY, June 1979, at 40 *with* Nickel, *Preferential Policies in Hiring and Admissions: A Jurisprudential Approach*, 75 COLUM. L. REV. 524 (1975). *See generally* EQUALITY AND PREFERENTIAL TREATMENT: A PHILOSOPHY AND PUBLIC AFFAIRS READER (M. Cohen ed. 1977).

23. Dixon, *Bakke: A Constitutional Analysis*, 67 CALIF. L. REV. 69, 70 (1979).

24. The doctrine that the Court has developed must be related to the Court's "institutional behavior," that is, to the pattern of results that is reached by the Court in cases coming before it for decision. The Court's institutional behavior evolves over a period of time and is not necessarily fully consistent with the doctrine articulated by the Court to explain the basis of its decisions. As regards the doctrine of invidious racial discrimination, the Court's behavior in applying that doctrine in the earlier cases coming before it for decision has almost invariably been to invalidate the particular use of race-conscious criteria. But this was because in none of those cases could

light of general principles of constitutional law. Since the doctrine that the Court has developed in regard to racial equality is based on the concept of invidious racial discrimination, which looks to whether the use of race-conscious criteria in the circumstances presented advances a valid and substantial governmental interest,[25] the first "right question" is whether the giving of racial preference in the circumstances presented advances a valid and substantial governmental interest. Racial preference also means that particular individuals will, because of their race, receive a benefit at the expense of other individuals, who, because of their race, will be denied that benefit. The second "right question," then, is whether, assuming that the giving of racial preference in the circumstances presented advances a valid and substantial governmental interest, there is a principle of constitutional law that renders the giving of the preference unconstitutional because this causes "racial detriment" to particular individuals. It is these questions that will be explored in the present writing.

II. THE CONSTITUTIONAL ISSUE

The constitutional issue, as I have formulated it in terms of the "right questions," revolves around the governmental interest that is advanced by the giving of racial preference, and by the "racial detriment" to particular individuals resulting from the racial preference. While at the present time racial preference is almost invariably being given to blacks and other nonwhite minorities, the constitutional inquiry does not depend on the "direction" of the racial preference as such. Constitutional doctrine in this sense is "universal," since, as I have said, all invidious racial discrimination is unconstitutional whenever practiced by the government, whether at the instance of whites or of blacks, and whether the victims of such discrimination are blacks, whites or both.[26] If, for example, an ordinance were passed in a predominantly black city reserving all public facilities for the exclusive use of blacks, that ordinance would be no less unconstitutional than an ordinance reserving all public facilities for the exclusive use of whites, because the racial

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the use of race-conscious criteria be shown to be "necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the objective of the Fourteenth Amendment to eliminate." Loving v. Virginia, 388 U.S. 1, 11 (1967). See notes 7, 8 & accompanying text *supra*. The Court, however, in more recent times, has sustained the constitutionality of the use of race-conscious criteria because, in the circumstances presented, it was shown to be necessary to the advancement of a valid and substantial governmental interest. See note 20 *supra*. In this area, therefore, we see congruence between the Court's articulated doctrine and its institutional behavior.

25. It is not necessary to repeat the additional requirement that it must do so by what the Court finds to be appropriate means. See note 19 *supra*.

26. See notes 12-16 & accompanying text *supra*.

preference in these circumstances either way cannot advance any valid and substantial governmental interest.[27] Similarly, if a public university used a racial quota in assigning places for no other purpose than to prefer members of one racial group over another, the racial preference again would not advance any valid and substantial governmental interest, and would be unconstitutional whether the preference favored blacks or whites.[28] On the other hand, where an employer has discriminated on the basis of race, the courts can order a preferential hiring or promotional remedy. In that case, "[t]he governmental interest in preferring members of the injured groups at the expense of others is substantial, since the legal rights of the victims must be vindicated,"[29] and it would make no difference whether the victims of the employer's discrimination were black or white.[30]

The analysis of the constitutional issue, then, is not affected by the race of the beneficiaries of racial preference generally. However, the race of the beneficiaries of the *particular* racial preference is highly relevant to the question of whether the giving of that particular racial preference, in the circumstances presented, advances a valid and substantial governmental interest.

Racial preference in today's society is almost invariably racial preference given to blacks, and the constitutionality of the use of racial preference will be determined in that context.[31] The preference

27. *See* Sedler, *Racial Preference, supra* note 9, at 373-74.

28. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 307 (1978) (Powell, J.).

29. *Id.*

30. *See* United Steelworkers of America v. Weber, 443 U.S. 193, 200-01 (1979); McDonald v. Santa Fe Transp. Co., 427 U.S. 273 (1976).

31. The institutional behavior of the Court with respect to the constitutionality of the use of race-conscious criteria must also be related to the context in which the question arises. When the Court was dealing with the use of race-conscious criteria directed against racial minorities, designed to maintain the system of white supremacy, *see, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967), it is accurate to say that the Court indicated that the Constitution "removed the race line from our governmental systems." Van Alstyne, *supra* note 10, at 783, *quoting* Plessy v. Ferguson, 163 U.S. 537, 555 (1896) (Harlan, J., dissenting). But just as the prohibition against racial discrimination in Title VII "must be read . . . [in] the historical context from which the Act arose," United Steelworkers of America v. Weber, 443 U.S. 193, 201 (1979), the Court's earlier indications as to the constitutional "irrelevancy" of race must also be taken in context. To paraphrase, Justice Powell's discussion of congressional intent with respect to Title VI's prohibition against racial discrimination: "[t]here simply was no reason for [the Court] to consider the validity of hypothetical preferences that might be accorded minority citizens; the [Court was] dealing with the real and pressing problem of how to guarantee those citizens equal treatment." Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 285 (1978) (Powell, J.). The guarantee of equal treatment has not been sufficient to overcome the consequences of the long and tragic social history of racism in this nation. *See* Sedler, *Beyond Bakke, supra* note 6, at 135-41. It is not that "discrimination on the basis of race" means one thing when the discrimination favors blacks and another thing when it favors whites. Rather it is that there may be a valid and substantial governmental interest in favoring blacks in order to overcome the present conse-

is given to blacks as a group at the expense of individual whites,[32] and the constitutional issue generally has been framed in terms of a conflict between group rights and individual rights. In *Bakke*, for example, Justice Powell stressed that, "[i]t is the individual who is entitled to judicial protection against classifications based upon his racial or ethnic background because such distinctions impinge upon personal rights, rather than the individual only because of his membership in a particular group."[33] And in rejecting the contention that redressing the consequences of "societal discrimination" was a valid and substantial governmental interest, justifying the use of racial preference, Justice Powell stated: "Hence the purpose of helping certain groups whom the faculty of the Davis medical school perceived as victims of 'societal discrimination' does not justify a classification that imposes disadvantages upon persons like respondent, who bear no responsibility for whatever harm the beneficiaries are thought to have suffered."[34] Justice Brennan, while relating "societal discrimination" to the social history of racism in this nation,[35] also framed the issue in terms of group rights and individual rights, noting that the excluded whites such as Bakke were not "stigmatized" by the racial preference, and observing that:

> If . . . the failure of minorities to qualify for admission to Davis under regular procedures was due principally to the effects of past discrimination, then there is a reasonable likelihood that, but for pervasive racial discrimination, respondent would have failed to qualify for admission even in the absence of Davis' special admissions program.[36]

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quences of past discrimination against blacks as a group, and in those circumstances the "discrimination" does not amount to invidious racial discrimination for constitutional purposes, just as the racial preference in *Weber* did not amount to "discrimination on the basis of race" within the meaning of Title VII, and the use of race as a factor in determining university admission did not amount to "discrimination on the ground of race" within the meaning of Title VI in *Bakke*.

32. The preference is not at the expense of whites as a group assuming that the preference is a reasonable one. Whites as a group, of course, can have no legitimate interest in maintaining their position of societal dominance. Loving v. Virginia, 388 U.S. 1, 11 (1967).

33. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 299 (1978) (Powell, J.).

34. *Id.* 310.

35. Justice Brennan noted:

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

438 U.S. at 362 (Brennan, J., concurring in part, dissenting in part).

36. *Id.* 365-66.

In commenting on *Bakke*, Professor Dixon has observed that, "[u]nderlying all of the opinions on the merits is the obvious need to clarify our thinking on the concept of 'discrimination' itself, and the emerging question of individual rights versus group rights in our constitutional order,"[37] and that, "[e]specially critical is the extent to which the fourteenth amendment's traditional focus on individual rights can be reshaped into—or replaced by—a group rights concept."[38] Professor Greenawalt has stated the value conflict posed in *Bakke* as follows:

> On the one hand, justice requires that groups that have previously suffered gross discrimination be given truly equal opportunity in American life; on the other, justice precludes the assignment of benefits and burdens on the arbitrary basis of racial and ethnic characteristics. So long as steps to correct racial injustice were limited to assuring that individual members of minority groups would receive the same benefits and opportunities available to persons like them except in race, the steps implemented both these values (against the competing claim that individuals and organizations should be left free to assign benefits and opportunities on whatever grounds they chose). But when individual blacks and members of other minority groups began to be given benefits at the expense of whites who, apart from race, would have had a superior claim to enjoy them, the values were brought into sharp conflict . . . .[39]

As Professor Bell has succinctly put it from a different perspective, whites resist paying the *costs* associated with racial preference designed to overcome the consequences of societal racism.[40]

I too originally approached *Bakke* in terms of the conflict between the interests of blacks as a group and the interests of individual whites.[41] I saw this conflict as in turn implicating the fourteenth amendment values of racial neutrality and black freedom,[42] and concluded that: "The resolution of that conflict may require a *balancing*,

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37. Dixon, *supra* note 23, at 69.

38. *Id.* 75. The notion that a group as an entity can have rights to distributive and compensatory justice has been the subject of considerable academic debate. *Compare* Fiss, *Groups and the Equal Protection Clause*, 5 PHILOSOPHY & PUB. AFF. 107 (1976) *with* Brest, *The Supreme Court, 1975 Term - Forward: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 48-52 (1976).

39. Greenawalt, *supra* note 6, at 87.

40. Bell, *Bakke, Minority Admissions, and the Usual Price of Racial Remedies*, 67 CALIF. L. REV. 3, 9-12 (1979).

41. Sedler, *Racial Preference, supra* note 9, at 358-61.

42. As to the nature of the value of black freedom, see Sedler, *Racial Preference, supra* note 9, at 365. *See generally* Kinoy, *The Constitutional Right of Negro Freedom*, 21 RUTGERS L. REV. 387 (1967).

a reasonable accommodation between the interests of blacks as a group in full integration into American society, and the interests of whites as a group in racial neutrality and freedom from discrimination."[43] I concluded that a reasonable racial preference, such as that involved in *Bakke*, satisfied this test and, therefore, was constitutional.[44]

My post-*Bakke* analysis of the constitutionality of racial preference expanded on this theme and treated the group interest of blacks as one of equal participation in all aspects of American life, which had been denied to them by the social history of racism in this nation. It was my submission that the government was constitutionally permitted to use race-conscious criteria, including racial preference, in an appropriate way, whenever the use of such criteria was related to providing equal participation for blacks in all aspects of American life and thus overcoming the present consequences of the social history of racism.[45] Overcoming the present consequences of the social history of racism, I contend, is a constitutionally permissible objective in light of the broad organic purpose of the fourteenth amendment, and the reconstruction amendments, taken as a whole.[46] Since this is so, the use of racial preference to accomplish that objective advances a valid and substantial governmental interest and is constitutional.[47]

There is, however, a further dimension to the equal participation objective that I propose to develop more fully in the present writing: the *societal interest* that is advanced by the equal participation of blacks in any or all aspects of American life. Rather than view the constitutionality of racial preference in terms of the conflict between the interests of blacks as a group and the interests of individual whites, I will now view it from the perspective of the societal interest in having the equal participation of blacks in various aspects of American life. When viewed from this perspective, the constitutional question no longer revolves around whether group rights can be preferred to individual rights,[48] but around whether the racial preference advances societal interests and, if so, whether this justifies "racial detriment" to individual whites.

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43. Sedler, *Racial Preference, supra* note 9, at 374.

44. *Id.* 378-80. It was reasonable, I contended, because it reserved only a limited number of places for racial minorities, in relation to minority representation in the general population, while all of the other places were available for white applicants.

45. Sedler, *Beyond Bakke, supra* note 6, at 155-56.

46. *Id.* 156-57.

47. Again, assuming that this is accomplished by what the Court finds to be appropriate means.

48. It is my submission, of course, that they can be when the preference for group rights advances a valid and substantial governmental interest, such as overcoming the present consequences of the social history of racism. Sedler, *Racial Preference, supra* note 9, at 370-80; Sedler, *Beyond Bakke, supra* note 6, at 163-71.

It is my submission that there is strong societal interest in the equal participation of blacks in all aspects of American life, and that this being so, the government can give racial preference to advance this interest, even though by doing so it causes "racial detriment" to individual whites. In developing this submission, I will first explain precisely what I mean by the equal participation objective. I will then discuss the general principle of constitutional law that the government can give preference to particular individuals over other individuals when this advances societal interests, and show why this principle is no less applicable when the societal interest is a racial one. In the final section of the writing, I will show how the societal interest is advanced by the equal participation of blacks in a number of important aspects of American life. If I am correct in this submission, there can be no doubt that racial preference designed to advance the equal participation objective is fully constitutional.

III. THE EQUAL PARTICIPATION OBJECTIVE

The equal participation objective relates to redressing the long and tragic social history of racism in this nation, as a result of which fundamental inequalities between blacks and whites permeate virtually every aspect of American life,[49] so that we still have "two societies, black and white, separate and unequal."[50] The goal of the equal participation objective is to end white supremacy and black inequality in all of its manifestations, and in the words of Justice Marshall, to achieve "genuine equality" between blacks and whites in American society.[51]

What the equal participation objective ultimately means is that blacks as a group will participate equally with whites as a group in all aspects of American life. Blacks, as well as whites, will participate in societal governance. Blacks, as well as whites, will share positions of power and prestige. Blacks will be meaningfully represented in the American economic system, and blacks will not be disproportionately lower-income in comparison with whites. The consequences of the social history of racism will no longer be so strikingly visible in American society.

Since the equal participation objective relates to redressing the present consequences of the social history of racism in this nation, it is necessarily a racial objective, and the frame of reference is necessarily

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49. As to the extent of these fundamental inequalities, see Sedler, *Beyond Bakke, supra* note 6, at 135-39.

50. REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 1 (Bantam ed. 1968).

51. 438 U.S. at 398 (Marshall, J., concurring in part, dissenting in part).

black and white.[52] We are concerned with race, not with ethnicity. Blacks are not an "ethnic group" in American society.[53] They are the historic "slave race" and the racial group against which the social history of racism has been directed. As Professor Perry has observed: "The *material inequality* of the races is the objective, concrete, manifestation of the past widespread American belief in the *moral inequality* of the races and of racially discriminatory practices reflecting that belief."[54] The social history of racism clearly was predicated on a belief in the moral inferiority of blacks, a belief that was necessary to justify the institution of chattel slavery, and a belief that persisted to justify pervasive racial discrimination and victimization of blacks throughout American society.

This pervasive racial discrimination and vicitimization, relating to a belief in the moral inferiority of blacks, is qualitatively different from the kind of discrimination that has been practiced in times past against white ethnic groups in this nation. As was observed by the National Advisory Commission on Civil Disorders: "European immigrants too suffered from discrimination, but never was it so pervasive as the prejudice against color in America, which has formed a bar to advancement, unlike any other."[55] While white supremacy and advantage may not be evenly distributed throughout all segments of the white population,[56] it is the supremacy of whites as a group and the inequality of blacks as a group that has resulted from the social history of racism, and the equal participation objective is designed to remedy the condition of *racial inequality*. This being so, the legitimacy of advancing the equal participation objective and of achieving "genuine racial equality" in American society is not affected by the fact that in the past some segments of the white population have been subject to discrimination by dominant segments of that population and may not share to the same degree all the advantages that have come with being white in American society.[57]

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52. As to the inclusion of other non-white minorities in the legislative definition of "black," see note 6 *supra*.

53. Justice Powell appeared to assume this throughout his opinion in *Bakke*.

54. Perry, *supra* note 10, at 1040.

55. REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 279 (Bantam ed. 1968). Similarly, as Justice Marshall observed in *Bakke*:

> The experience of Negroes in America has been different in kind, not just in degree, from that of other ethnic groups. It is not merely the history of slavery alone but also that a whole people were marked as inferior by the law. And that mark has endured. The dream of America as the great melting pot has not been realized for the Negro; because of his skin color he never even made it into the pot.

438 U.S. at 400-01 (Marshall, J., concurring in part, dissenting in part).

56. *See* Justice Powell's discussion in Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 295-97 (1978).

57. Most persons probably still would agree that on balance, even with "affirmative action," it is better to be white than to be black in American society today.

The equal participation objective is not based on any notion of "reparations" or "proportionality." It does not mean that because blacks have been subject to a long history of discrimination and victimization, white society owes blacks "reparations" and must give blacks benefits now at the expense of whites. Nor does it mean that blacks as a group are entitled to the "proportionate" share of the benefits of American society that they would have received had it not been for the social history of racism or a share of those benefits in exact proportion to their representation in the general population.[58] In attacking the constitutionality of racial preference, Professor Dixon states that "there is the plea from many blacks for reparations in the form of a substantial approximation to ethnic proportionality in the allocation of scarce social goods," and contends that "a policy of ethnic proportionality that qualifies a person's equality of opportunity has no foundation in our individual-rights focused constitutional tradition."[59] Regardless of the validity of Professor Dixon's attack on "reparations" and "proportionality," that attack cannot properly be mounted against the equal participation objective. The equal participation objective is not concerned with "reparations" for the past or with "proportionality," but with the absence of full participation of blacks as a group in all aspects of American life. It is concerned with the present consequences of the social history of racism that are felt by blacks as a group today. The equal participation objective does not seek to give blacks the proportionate share of societal participation and power that they would have had in the absence of the social history of racism, but to give blacks as a group *some* meaningful share of societal participation and power, and to bring them into the "*mainstream* of American life."[60]

The focus of the equal participation objective, then, is on the present consequences of past discrimination. If no present consequences remained, despite past discrimination, there would be no basis for invoking the equal participation objective. This is another basis for distinguishing the situation of blacks from the situation of white ethnic groups, and it also points up the irrelevancy of "reparations" and "proportionality" to the equal participation objective. For example, it cannot be doubted that there has been past discrimination against

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58. What they are entitled to is a "degree of participation in American society roughly equal to that enjoyed by whites." Sedler, *Beyond Bakke*, *supra* note 6, at 157. Insofar as the legislative body determines the extent of the particular preference with reference to minority representation in the general population, this relates to an effort to make the preference a reasonable one, not to any notion of ' proportionate entitlement."

59. Dixon, *supra* note 23, at 74 & discussion at 84-85.

60. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 396 (1978) (Marshall, J., concurring in part, dissenting in part) (emphasis added).

Jews in America. Let us assume that if it had not been for such discrimination, Jews as a group would have a greater share of societal power than they now have; for example, that there would be more Jewish physicians and lawyers than there are now.[61] But Jews as a group have not been excluded from a "fair share" of societal power and Jews as a group participate fully in all aspects of American life. There are, for example, quite a substantial number of Jewish physicians and lawyers.[62] If blacks as a group, despite the social history of racism, also had a "fair share" of societal power and were participating fully in all aspects of American life today, there would be no justification for invoking the equal participation objective and racial preference for blacks could not be sustained on this basis. Similarly, although Asian-Americans have been subject to discrimination that can be characterized as "racial,"[63] Asian-Americans as a group also appear to have a "fair share" of societal power and participation in relation to their representation among the general population, and preference for Asian-Americans cannot be justified as necessary to advance the equal participation objective.[64] In other words, the justification for the invocation of the equal participation objective is that the social history of racism has produced present consequences for blacks as a group, denying to blacks as a group equal participation in American society and relegating them to a condition of *racial inequality*.[65]

The Court in *Bakke* did not deal directly with the constitutionality of the use of racial preference to advance the equal participation objective. Both Justice Powell and Justice Brennan saw the issue as one of remedying "societal discrimination," and as we have said, framed the constitutional question in terms of a conflict between group rights and individual rights. Justice Marshall, however, emphasized the equal participation objective and related it to overcoming present consequences of the social history of racism. As he stated:

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61. Whether this in fact would be so depends on the time when the discrimination essentially ended.

62. On a personal note, when I was in law school, which was over 20 years ago, I did not feel conscious of being Jewish, since there were a number of other Jewish students in the class. There was not a single black student in the class.

63. See note 6 *supra*.

64. See the discussion in Greenawalt, *supra* note 6, at 120. In 1973, 13 Asians were admitted to the entering class at the Davis medical school through the general admissions process and only two were admitted through the special program, "thus creating doubt that Asians as a class needed the preference." *Id.* 120 n.133. Preference for Asians generally, however, could be justified in order to advance the "educational diversity" objective.

65. As Professor Greenawalt points out, the Brennan opinion in *Bakke* requires a "combination of past discrimination and present disadvantage" in order to support racial preference as a means of redressing "societal discrimination." Greenawalt, *supra* note 6, at 115.

> In light of the sorry history of discrimination and its devastating impact on the lives of Negroes, bringing the Negro into the mainstream of American life should be a state interest of the highest order. To fail to do so is to ensure that America will forever remain a divided society . . . .
>
> . . . .
>
> It is because of a legacy of unequal treatment that we now must permit the institutions of this society to give consideration to race in making decisions about who will hold the positions of influence, affluence and prestige in America. For far too long, the doors to those positions have been shut to Negroes. If we are ever to become a fully integrated society, one in which the color of a person's skin will not determine the opportunities available to him or her, we must be willing to take steps to open those doors. I do not believe that anyone can truly look into America's past and still find that a remedy for the effects of that past is impermissible.[66]

As will be demonstrated subsequently, there is a strong societal interest in bringing blacks "into the mainstream of American life." It is my submission that the existence of that strong societal interest justifies the use of racial preference to advance the equal participation objective.

IV. RACIAL DETRIMENT AND SOCIETAL INTEREST

In the next section of the writing I will discuss the societal interest in the equal participation objective. When the equal participation objective is advanced by means of racial preference, however, this causes racial detriment to whites. By racial detriment I mean tangible detriment caused to particular white individuals by the preference given to blacks in the allocation of societal benefits. Racial detriment is suffered by the white applicant excluded from admission to a publicly-supported university because of preference for black applicants. It is suffered by the white denied public employment or promotion because of preference for blacks. It is suffered by the white entrepreneur who loses out on a public works contract because of preference given to black entrepreneurs. The question with which I am now concerned is whether the use of racial preference, which otherwise is found to advance a valid and substantial governmental interest, becomes unconstitutional because it causes racial detriment to particular white individuals. It is submitted that the answer is clearly in the negative.

It is a general principle of constitutional law that individuals may

66. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 396, 401-02 (Marshall, J., concurring in part, dissenting in part).

be required to make sacrifices in the public interest, and the public interest may require that particular individual interests be preferred over other interests and that particular individuals receive benefits at the expense of other individuals. This general principle is applicable in a number of contexts. Perhaps the Court's strongest exposition of the principle occurred in *Miller v. Schoene*.[67] There it sustained against a due process attack a state statute requiring the destruction of cedar trees found to be the host plant for cedar rust, where the cedar trees were located within two miles of an apple orchard. Cedar rust, although having no effect on cedar trees, could destroy apple trees within a two mile radius, and since apple-growing was a major industry in Virginia, the legislature decided to protect the apple trees at the expense of the cedar trees. In holding that this was constitutional, the Court stated:

> . . . [t]he state does not exceed its constitutional powers by deciding upon the destruction of one class of property in order to save another which, in the judgment of the legislature, is of greater value to the public. It will not do to say that the case is merely one of a conflict of two private interests and that the misfortune of apple growers may not be shifted to the cedar owners by ordering the destruction of their property; for it is obvious that there may be, and that here there is, a preponderant public concern in the preservation of the one interest over the other. And where the public interest is involved preferment of that interest over the property interest of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of the police power which affects property.[68]

The giving of benefits to particular individuals and groups at the expense of other individuals and groups on the ground that societal interests are advanced thereby appears in much economic and social regulation. The government can create a monopoly in favor of a particular enterprise or individual.[69] It can prohibit new entrants into a business activity, thereby favoring established enterprises, on the ground that further competition would be "detrimental to public interest."[70] It can favor the financial interests of debtors over the financial interests of creditors by declaring a moratorium on mortgage

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67. 276 U.S. 272 (1928).

68. *Id.* 279-80 (citations omitted).

69. Kotch v. Board of River Port Pilot Comm'rs, 330 U.S. 552 (1947); The Slaughterhouse Cases, 83 U.S. (16 Wall.) 36 (1873).

70. "Lochner era" cases holding to the contrary, such as New State Ice Co. v. Liebmann, 285 U.S. 262 (1932), and Louis K. Leggett Co. v. Baldridge, 278 U.S. 105 (1928), have been overruled. North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156 (1973).

payments during times of economic depression.[71] It can require consumers to pay higher prices for the benefit of producers.[72] It can do all of these things, because the benefit that one individual receives at the expense of another individual is deemed to advance societal interests.

The government can also give preference to particular individuals over other individuals when it is allocating governmental benefits, on the ground that by so doing it is advancing societal interests. It can give preference in civil service employment to veterans over non-veterans, including those who were not eligible to serve in the armed forces.[73] It can give preference in admission to publicly-supported universities to athletes and give them special scholarships because their skills are useful to the university's athletic programs.[74] It can make classifications in regard to entitlement to welfare benefits that have the effect of denying the benefit to otherwise deserving persons, because the classification avoids the necessity of individual determinations, thus saving costs and making more funds available to other persons eligible for the benefit.[75] Again, the preference for some individuals over other individuals is justified in terms of the advancement of societal interests.

In all of these instances there is an element of unfairness. As regards veterans preference, for example, while some veterans may have suffered detriment because of their military service,[76] this is not true of all veterans. Indeed, some veterans may have acquired marketable skills in military service that they would not have acquired in civilian life, and they receive a "double benefit" when those marketable skills and their veteran's status result in their receiving a civil service position. Until recently, no more than 2% of the members of the armed forces could be women, so most women could not acquire veteran status. Even though a woman may be "more qualified" for a civil service position in terms of "objective merit," she may lose out to the veteran. But while the veterans preference may be unfair, it is not *unjustifiable*. It is not unjustifiable because the legislature has determined that veteran's preference in the civil service

71. Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934).

72. Nebbia v. New York, 291 U.S. 502 (1934).

73. Koelfgen v. Jackson, 355 F. Supp. 243 (D. Minn. 1972), *aff'd mem.*, 410 U.S. 976 (1973). *Cf.* Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979) (preference statute upheld against equal protection claim of sex discrimination).

74. *See* Justice Blackmun's discussion in Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 404 (1978).

75. Weinberger v. Salfi, 422 U.S. 749 (1975).

76. This has been the primary rationale relied on by the courts to sustain the constitutionality of veterans preference. *See* Branch v. Dubois, 418 F. Supp. 1128, 1130 (N.D. Ill. 1976); Feinerman v. Jones, 356 F. Supp. 252, 260 (M.D. Pa. 1973); Koelfgen v. Jackson, 355 F. Supp. 243, 251-52 (D. Minn. 1972).

advances an important societal interest, and that determination is a reasonable one.[77] There is unfairness in requiring owners of cedar trees to sacrifice their trees for the benefit of apple tree owners, but it is justifiable to require them to make this sacrifice because the legislature has concluded that society's interest is better served by protecting the apple trees. It is unfair to deny new enterprises the opportunity to compete against established enterprises, but again denial of the opportunity is justifiable because the legislature has concluded that further competition would not be in the public interest. It is unfair to deny welfare benefits to claimants who could establish their entitlement to the benefit if an individualized determination was made, but the societal interest is deemed better served by denying them the benefit to avoid the costs of individual determinations and make more funds available to pay benefits to other claimants. In all of these instances *it is unfair, but it is not unjustifiable.* It is not unjustifiable because societal interests are advanced by preferring some individuals and groups over other individuals and groups. And because it is not unjustifiable, it is not unconstitutional.

The principle that the societal interest may require that particular individuals receive benefits at the expense of other individuals is no less applicable where the societal interest advanced by the giving of the preference is a racial interest and the preference is a racial one. It may be contended that there is a significant difference between preferring apple tree owners over cedar tree owners and preferring black applicants to medical school over white applicants to medical school, because the former situation involves economic and societal legislation subject to "minimal scrutiny" under the "rational basis" test, while the latter situation involves a racial classification which is "suspect" and subject to "strict scrutiny." But this difference has no relevance to the point in issue. "Strict scrutiny" relates to the degree with which the Court scrutinizes the justification for the racial classification and the validity of the asserted governmental interest, and the appropriateness of the racial classification as a means of advancing the interest. As Justice Powell explained "strict scrutiny" in *Bakke*: "When they [classifications] touch upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest."[78]

As *Bakke* makes clear, however, there is no question that when the racial classification, or more accurately, the racial preference, is

77. It is reasonable because the legislature has some degree of discretion in making classifications with respect to governmental benefits, and can conclude that the majority of veterans have suffered detriment because of their military service.

78. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 299 (1978) (Powell, J.).

"precisely tailored to serve a compelling governmental interest," an individual can be asked to bear the burden resulting from that preference. Thus, in *Bakke*, when Justice Powell, joined on this point by the Brennan group,[79] held that the medical school had a valid interest in achieving an "educationally diverse" student body, so that it could give "competitive consideration to race and ethnic origin" in determining admission to the medical school,[80] he necessarily held that this interest could be advanced at the expense of those white applicants who were excluded from the medical school as a result.[81] This is but an application in the racial preference context of the general constitutional principle that the societal interest may require that particular individuals receive benefits at the expense of other individuals.[82]

It is clear, therefore, that if the societal interest in achieving the equal participation objective is found to be valid and substantial, the use of racial preference to advance the interest is constitutional, notwithstanding that it causes racial detriment to particular white individuals.

V. THE SOCIETAL INTEREST IN THE EQUAL PROTECTION OBJECTIVE

When talking about the societal interest in the equal participation objective, I am not concerned with whether the government has a valid and substantial interest in providing equal participation for blacks so that *blacks* can obtain benefits from such participation.[83]

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79. *Id.* 311-15 (Powell, J.); *id.* 326 n.1 (Brennan, J., concurring in part, dissenting in part).

80. *Id.* 320 (Powell, J.).

81. *See* Sedler, *Beyond Bakke, supra* note 6, at 164-65.

82. See the discussion of this point in regard to the set-off for minority business enterprises in *Fullilove*. 48 U.S.L.W. at 4989. By the same token, the government could give racial preference to whites where this would advance a valid and substantial governmental interest by appropriate means. A state university, with a predominantly black student body, in order to advance its interest in achieving a racially diverse student body, could give the kind of racial preference to white applicants that the medical school in *Bakke* was permitted to give to black applicants. Or, a public housing authority could assign persons to its housing on a racial basis in order to insure that all sites would be racially integrated, even if there were more blacks than whites on the waiting list so that some whites would obtain public housing sooner in preference to some blacks. *See* Otero v. New York Hous. Auth., 484 F.2d 1122 (2d Cir. 1973).

83. It was this theme that I developed in *Beyond Bakke*. As I started there:

> Remedying the effects of past societal discrimination—of the social history of racism—and providing equal protection for blacks in all aspects of American life furthers the goal of racial equality that lies at the heart of the fourteenth amendment. Whenever the government acts to advance this objective, it is acting to advance a valid and substantial governmental interest.

Sedler, *Beyond Bakke, supra* note 6, at 170-71.

I am not qualifying my position in any way by maintaining that *in addition* there is a strong societal interest in the equal participation objective. Nonetheless, the focus on the societal interest rather than on the interest of blacks may tend to perpetuate the

The societal interest to which I am referring is the interest of the society *itself* in the benefits that result from the equal participation of blacks in any or all aspects of American life. Although the Court in *Bakke* did not deal directly with the equal participation objective, it did deal directly with the matter of the societal interest, and it is the societal interest that is the basis of Justice Powell's conclusion that the medical school could use race-conscious admissions criteria[84] in order to achieve an "educationally diverse" student body. As Professor Dixon has observed:

> Justice Powell's diversity idea is based on an interest of the *institution*—that is, an enterprise interest in an enriched educational atmosphere—rather than on an interest held by the represented minority group. This seems to be Justice Powell's view, despite the fact that the represented groups are the immediate beneficiaries of the policy, and the proximate cause of the hypothesized enrichment.[85]

This is precisely the point that I want to make about the societal interest in the equal participation objective. The focus is on the societal interest that is advanced by having the equal participation of blacks in various aspects of American life. Just as the university in *Bakke* could assert its own institutional interest to support the use of race-conscious admissions criteria, other agencies of government can assert both their particular institutional interest and the interest of the society they serve in having the equal participation of blacks, so as to justify their use of racial preference in the circumstances presented. This points up the distinction between the societal interest in the equal participation objective that I am discussing in the present writing and the group interest of blacks in the equal participation objective that I discussed in earlier writings.[86]

Justice Powell's opinion in *Bakke* also gives some insights, perhaps unintended, on precisely why there is a societal interest in the equal participation of blacks in the various aspects of American life. Although purportedly applying a standard of "strict scrutiny," Justice Powell appeared to be giving considerable deference to the university's contention that it had a valid and substantial interest in achieving an "educationally diverse" student body, so as to justify

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regrettable process of viewing "affirmative action" with reference to "white interests" and from a "white perspective." See Bell, *supra* note 40, at 3-9.

84. This necessarily involves racial preference in that it enables particular blacks to be admitted in preference to particular whites who would have been admitted if race-conscious admissions criteria had not been used.

85. Dixon, *supra* note 23, at 75-76.

86. There is a valid and substantial governmental interest in providing equal participation for blacks. See note 83 *supra*.

the use of race-conscious admissions criteria.[87] Justice Powell stated that, "[t]he atmosphere of 'speculation, experiment and creation'—so widely essential to the quality of higher education—is widely believed to be promoted by a diverse student body" and concluded that, "[i]n this light, petitioner must be viewed as seeking to achieve the goal that is of paramount importance in the fulfillment of its mission."[88] But there is very little discussion about *racial* diversity as such in the opinion, and Justice Powell does not explicate why *race* as such contributes in a major way to educational diversity.[89] The answer may be that this is so obvious that he considered extended discussion of the point to be unnecessary. Such an explanation is fortified by his reference to the Harvard College Admission Program, in which it is simply stated that, "[a] black student can usually bring something that a white person cannot offer."[90]

The reason why this is so relates to the perspective that comes from "the experience of being black in America." Professor Blasi has contended that, "[i]t is difficult to maintain that there is any one trait that compares with race in terms of the likely contribution of persons who possess the trait to the goal of diversifying," and that, "most educational institutions can rightly regard racial homogeneity as by far the greatest threat to the goal of a truly diverse educational environment."[91] Professor Blasi relates the contribution of blacks to "educational diversity" because of their race by having gone through the "black experience" in American society, and concludes that, "membership in a minority race can be viewed as a good proxy for several personal characteristics that may be important in the learning process."[92] At a minimum, blacks can tell to others first hand

87. See the very penetrating analysis of Justice Powell's "two opinions" in *Bakke*, in Karst & Horowitz, *The Bakke Opinions and Equal Protection Doctrine*, 14 HARV. C.R.-C.L. L. REV. 7, 7-20 (1979). As they note, Justice Powell's scrutiny of the university's "educational diversity" claim "is far from exacting." *Id.* 12.

88. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 312-13 (1978) (Powell, J.). See the discussion of this statement in relation to "strict scrutiny" in Karst & Horowitz, *supra* note 87, at 12-13.

89. He refers to race or ethnic origin as a "single though important element" in achieving "educational diversity." Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 315 (1978) (Powell, J.).

90. *Id.* 316.

91. Blasi, *Bakke as Precedent: Does Mr. Justice Powell Have a Theory?* 67 CALIF. L. REV. 21, 43, 45 (1979).

92. *Id.* 44. As he states:

> Compared to his white counterpart, a black applicant is much more likely to: (1) have been the object of racial prejudice in a wide variety of contexts, and thus have first hand knowledge about the nature and impact of such prejudice; (2) have had his aspirations seriously influenced by preceptions regarding what opportunities were available to persons of his race, and thus have a special appreciation of the social significance of aspiration and self-esteem; (3) have had personal relationships with people who are very poor and frequently unemployed; (4) have spent a great deal of time coming to

what racial discrimination is all about, for, as Justice Marshall observed in *Bakke*, "the racism of our society has been so pervasive that none, regardless of wealth or position, has managed to escape its impact."[93] A university may conclude, then, that in order for its student body to be truly diverse, there must be some black representation in that student body.[94]

Let me analyze the result in *Bakke* with reference to the societal interest in the equal participation objective. The university was permitted to give racial preference in determining admission to its medical school because the participation of blacks in the educational program of that school contributed to "educational diversity," and so advanced the school's educational goals.[95] The university could conclude that, in light of "the experience of being black in America," a black student "can usually bring something that a white person cannot offer" to the university's educational program.

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grips with his own racial identity as well as thinking and talking about the social problem of race relations; (5) have been the object of special scrutiny by others who were curious to see how a person of his race would behave or perform in the particular situation, and thus have an appreciation of the "fishbowl" phenomenon in social relations; (6) feel a responsibility to help mitigate the suffering of the persons who have been most oppressed by social and political patterns that can be traced in part to racial prejudice; (7) display a special interest in and knowledge about the black experience in the United States and the rest of the world; and (8) feel a disenchantment with, if not hostility toward, social structures and institutions (including principles of distribution) that historically have operated to the detriment of black people. These are characteristics for which the trait of membership in a minority race is a good proxy.

93. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 400 (1978) (Marshall, J., concurring in part, dissenting in part). As Karst and Horowitz succinctly put it: "It is the history of racial subordination, above all, that makes race socially significant. If a black student can 'bring something that a white person cannot offer' the 'something' is, primarily, an inheritance from past societal discrimination." Karst & Horowitz, *supra* note 87, at 16-17.

94. Also that this representation must be in more than token numbers. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (Powell, J., appendix).

95. Professor Greenawalt has observed:

> I have yet to find a professional academic who believes the primary motivation for preferential admissions has been to promote diversity in the student body for the better education of all the students while they are in professional school. Diversity is undoubtedly one reason for such programs, but the justification of countering the effects of societal discrimination relied on by Justices Brennan, White, Marshall, and Blackmun comes closer to stating their central purpose, and Justice Powell offers no convincing reason for rejecting that justification and accepting the diversity argument.

Greenawalt, *supra* note 6, at 16. While I agree fully with Professor Greenawalt's assessment of the real motivation for racial preference in professional school admissions, "educational diversity" would qualify as "purpose" in regard to constitutional analysis, and the "real motivation" would be constitutionally irrelevant. *Cf.* United States v. O'Brien, 391 U.S. 367 (1968) (legislators' "purpose" irrelevant in constitutional challenge to statute). As to compliance with *Bakke, see generally* Lesnick, *What Does Bakke Require of Law Schools*, 128 U. PA. L. REV. 141 (1979).

There was thus a societal interest in the equal participation objective here, in that participation of blacks in the university's educational program improved the educational quality of that program. This being so, the use of racial preference in determining admission to the medical school advanced a valid and substantial governmental interest and was constitutional.

Reasoning from *Bakke*, there would appear to be a societal interest in the equal participation objective whenever a "black [person] can . . . bring something that a white person cannot offer" to any governmental institution, so that the institution, because of black participation, will be in a better position to perform its institutional function. Consider first the police function, which "fulfills a fundamental obligation of government to its constituency."[96] Blacks have traditionally been grossly underrepresented in municipal police forces, even in cities having a substantial black population, and virtually nonexistent in state police forces.[97] Frequently, this has been shown to have been the product of unlawful racial discrimination, and racially preferential hiring and promotional remedies have been ordered on this basis.[98] But suppose that a city concludes that, without regard to identified past discrimination, it wants substantial black participation in the police function, which is now lacking. It then adopts a racially preferential hiring and promotional program, designed to increase significantly the number of black officers and supervisors.[99] There can be no doubt that participation by blacks in the all-important police function advances the societal interest in the effective performance of that function. So long as blacks are grossly underrepresented in the police department, the police will be perceived of by the black community as an "occupying army," as was so tragically demonstrated in the 1967 riots.[100] According to the President's Commission on Law Enforcement and the Administration of Justice:

> In order to gain the general confidence and acceptance of a community, personnel within a police department should be

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96. Foley v. Connelie, 435 U.S. 291, 297 (1978).

97. *See generally* REPORT OF THE NATIONAL ADVISORY COMMITTEE ON CIVIL DISORDERS, 315-18 (Bantam ed. 1968).

98. *See, e.g.*, United States v. City of Chicago, 549 F.2d 415 (7th Cir.), *cert. denied*, 434 U.S. 875 (1977); NAACP v. Allen, 493 F.2d 614 (5th Cir. 1974).

99. When the City of Detroit adopted a racially preferential hiring and promotion policy with respect to the police department in July, 1974, the city had a black population of nearly 50%, but a police force that was only 17% black. Detroit Police Officers Ass'n v. Young, 608 F.2d 671, 681 (6th Cir. 1979). Based on my personal knowledge as counsel for one of the amicae in the case, less than 5% of the supervisors were black.

100. REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 299-301 (Bantam ed. 1968).

> representative of the community as a whole . . . . If minority groups are to feel that they are not policed entirely by a white police force, they must see that Negro or other minority officers participate in policymaking and other crucial decisions.[101]

As the Sixth Circuit put it, in holding that racial preference in police promotions could advance a valid and substantial governmental interest:

> The argument that police need more minority officers is not simply that blacks communicate better with blacks or that a police department should cater to the public desires. Rather it is that effective crime prevention and solution depend heavily on the public support and confidence in the police. In short, the focus is not on the superior performance of minority officers, but on the public's perception of law enforcement officials and institutions.[102]

The equal participation by blacks in the police function, then, clearly serves the societal interest in effective law enforcement. This being so, the use of racial preference to implement the equal participation objective advances a valid and substantial governmental interest and should be upheld as constitutional.[103]

There is also a societal interest in the equal participation of blacks in all functions of government. The Senate Committee on Labor and Public Welfare, when recommending the extension of Title VII to state and local governments, observed that: "The exclusion of minorities from effective participation in the bureaucracy not only promotes ignorance of minority problems in that particular community, but also creates mistrust, alienation, and all too often hostility toward the entire process of government."[104] The equal participation

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101. TASK FORCE REPORT: THE POLICE at 167 (1967).

102. Detroit Police Officers Ass'n v. Young, 608 F.2d 671, 696 (6th Cir. 1979). In that case the city claimed that the racially preferential promotions program which was in issue was necessary to remedy the city's own prior discrimination and that, apart from identified prior discrimination, the program was necessary for "operational needs." The district court, applying an erroneous legal standard, held that prior discrimination was not shown. The Sixth Circuit remanded the case for further proceedings in regard to both the prior discrimination claim and the operational needs claim.

103. As to the governmental interest in advancing the equal participation objective for the benefit of the black citizenry in this context, see Sedler, *Beyond Bakke, supra* note 6, at 169 n.154. It was this argument that I presented in the amicus brief in Detroit Police Officers Ass'n v. Young, 608 F.2d 671 (6th Cir. 1979).

104. SENATE COMMITTEE ON LABOR AND PUBLIC WELFARE, 92d. CONG., 2d SESS., LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, at 419 (1972).

of blacks in all functions of government, then, serves important societal interests by (1) insuring that the government will be aware of the problems and needs of minority communities, (2) insuring that the government, while making and implementing governmental policy, will have the benefit of the perspective that comes from "the experience of being black in America," and (3) helping to bring about confidence in the institutions of government on the part of the black community.[105] Again, the use of racial preference to implement the equal participation objective in this context advances a valid and substantial governmental interest and should be upheld as constitutional.

Now consider the societal interest in the equal participation of blacks in the "power professions," such as law and medicine. As Justice Marshall argued in *Bakke*, "[i]t is because of a legacy of unequal treatment that we now must permit the institutions of this society to give consideration to race in making the decisions about who will hold the positions of influence, affluence and prestige in America."[106] As a lawyer, I am fully aware of the power and influence that lawyers as a group wield in American society, not only in regard to their role in the legal system and the administration of justice, but in legislatures, governmental bodies, and many other important societal institutions. Being a lawyer means that one is in a position, by virtue of one's profession, to do significant things in American society.

Since entry into the profession is almost entirely dependent upon admission to law school, the requirements for admission to law school are also requirements for admission to the profession.[107] In determining its requirements for admission, therefore, the law school may properly take into account the societal interest in the makeup of the legal profession. As Professor Greenawalt has observed:

> Universities and particularly professional schools have long made decisions about who will have the keys to important societal positions through determinations about admissions and scholarships. Implicit in the exercise of such power is some vision of the public welfare. It would seem appropriate for a law school to choose not to limit consideration even to such broad concerns as potential ability as a lawyer and likely area of legal employment. A school might well, for example, admit

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105. As to the need for minority participation in governmental decision-making, *see also* Ginger, *Who Needs Affirmative Action*, 14 HARV. C.R.-C.L. L. REV. 265, 270-73 (1979).

106. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 401 (1978) (Marshall, J., concurring in part, dissenting in part).

107. Henkin, *What of the Right to Practice a Profession?* 67 CALIF. L. REV. 131, 136 (1979).

> a student it thought had great potential for political leadership, though believing he might perform less well as a lawyer than some rejected applicant. It requires no substantial extension of the institutional responsibility to determine who will become members of the profession for institutions to make some judgments about the social desirability of broadening the availability of professional positions, in the belief that a more diverse and representative profession will enrich the understanding of all its members of relevant social problems and will otherwise promote a more harmonious and integrated society.[108]

Although the black population at the time of the last census was 11%, less than 2% of the lawyers in this country are black,[109] and blacks clearly are not equal participants in the exercise of societal power that is reflected in membership in the legal profession.

A publicly-supported university law school, whose admission requirements are also requirements for the admission to the profession in that state, can reasonably conclude that there is a strong societal interest in having the equal participation of blacks in the legal profession. It can conclude that something is missing when the perspective that comes from "the experience of being black in America" is not adequately represented in the profession. The societal interest in the equal participation of blacks in the legal profession is not so much that black lawyers will be available to represent black clients,[110] but that blacks will be participants in the exercise of societal power by the legal profession and will be able to bring the "black perspective" to that exercise of societal power. Blacks will be judges and prosecutors and law professors. They will be laywers for the government, "members of the firm," and bar association officers. They will be in a direct position to contribute to the development of the American legal system and to make that system responsive to the needs of black people. In addition, black people will have greater confidence in the legal system and in the administration of justice, because blacks, as well as whites,

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108. Greenawalt, *supra* note 6, at 124. In this regard Professor Greenawalt also notes that:

> Indeed it can be argued that the main reasons why applicants with superior qualifications are themselves ordinarily picked has to do with social utility rather than their intrinsic deserts and that they, therefore, have no convincing complaint when reasons of social utility lead to choosing less well-qualified applicants, at least so long as the grounds of the differentiation are otherwise acceptable.

Id. 126 n.150.

109. Sedler, *Racial Preference, supra* note 9, at 347-48 n.70.

110. The interest of blacks in the equal participation objective would relate to having the opportunity to be represented by black lawyers if they choose just as whites have the opportunity to be represented by white lawyers if they choose, and the interest of having blacks participate in the legal system and the administration of justice.

will be full participants in that system. There is, then, a strong societal interest in equal participation by blacks in the legal profession, and racial preference in law school admissions advances that societal interest.

It may be queried whether the Court in *Bakke* would have viewed racially preferential admissions in a different light if that case had involved admission to law school rather than admission to medical school. The ways in which lawyers exercise societal power, of course, would have been clear to the Court. The ways in which physicians exercise societal power may have been less clear. Moreover, it appears that the university's societal interest justification for racially preferential admissions to the medical school related to the fact that minority physicians were more likely to serve currently underrepresented minority communities.[111] Justice Powell took the position that the university "simply has not carried its burden of demonstrating that it must prefer members of particular ethnic groups over all other individuals in order to promote better health care delivery to deprived citizens."[112] Leaving aside, however, the question of whether black physicians are more likely to serve black communities than are white physicians,[113] the societal interest advanced by the equal participation of blacks in the medical profession does not relate to their practicing in black communities. Like the societal interest in the equal participation of blacks in the legal profession, the societal interest in the equal participation of blacks in the medical profession relates to incorporating the "black perspective" in the exercise of societal power by the medical profession. The medical profession exercises societal power in a very significant way by controlling, to a large degree, the nation's health care delivery system. Physicians do much more than treat patients. They serve on hospital staffs and medical committees. They are involved in decisions that affect the kind of medical services that will be offered and the cost of those services. They influence the distribution of medical resources and the location of health care facilities. They perform substantially the same function with respect to the health care

111. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 310-11 (1978) (Powell, J.).

112. *Id.* 311.

113. The empirical evidence strongly indicates that they do. A major study by the National Planning Association concluded that: (1) young minority physicians are locating at unprecedented rates in the south, where minority urban and rural populations have traditionally been underserved; (2) minority physicians are more likely to settle in large cities with concentrations of low-income populations; (3) they are more likely to engage in primary care practice; (4) they are more likely to practice in large city public hospitals, neighborhood health centers and other public institutions responsible for providing services to low-income persons. Koleda & Craig, *Minority Physicians Practice Patterns and Access to Health Care Service,* LOOKING AHEAD, Vol. 2, No. 6 (1976).

delivery system that lawyers do with respect to the legal system and the administration of justice.

Entry to the profession is completely dependent upon admission to medical school, and the enormous cost of training physicians severely constrains the number of new entrants into the profession. As with publicly-supported law schools, publicly-supported medical schools control entry to the profession in that state, and they can reasonably conclude that there is a strong societal interest in having the equal participation of blacks in the medical profession so that blacks can be involved, along with whites, in that profession's control over the health care delivery system. There is a considerable "health gap" between blacks and whites in this nation, with blacks as a group having higher mortality and morbidity rates than whites as a group and with black communities being underrepresented in the delivery of health care services.[114] It is certainly reasonable to believe that the equal participation of black physicians in the medical profession can contribute to ending the "health gap" between blacks and whites. Black physicians would seem for the most part to be in a better position than white physicians to assess the health care needs of black communities and to understand the difficulties that black people have in making use of the traditionally white-dominated health care delivery system. They could also be expected to be more disposed to "lobby" for the provision of adequate health care facilities for black communities. The equal participation of blacks in the health care delivery system, like equal participation of blacks in the legal system, serves a strong societal interest, and a publicly-supported medical school is justified giving racial preference in admissions to advance that societal interest. If the societal interest in the equal participation of blacks in the medical profession—focusing on their participation in the health care delivery system—had been emphasized in *Bakke*, it is possible that Justice Powell would have found that interest to be "compelling."[115]

I want now to consider the societal interest in the equal participation of blacks in what may be called the "American economic system." Blacks as a group do not participate equally in the economic system, just as they do not participate equally in the legal or health care delivery systems. There are relatively few black-owned business enterprises, and such existing enterprises do not generate a significant amount of business volume. As of 1976, for example, only 3% of the 13 million businesses in the United States were owned by blacks and other minority persons, and of 2.54 trillion dollars in gross business re-

114. For a summary of the data, see M. SEHAM, BLACKS AND AMERICAN MEDICAL CARE 9-11 (1973).

115. If so, a quota-type preferential admissions program presumably would be found to be an appropriate means of advancing this interest.

ceipts that year, only about 16.6 billion dollars, or 0.65% of the total, were realized by minority-owned businesses.[116] The absence of blacks in the top management of American corporations needs no documentation. Blacks are disproportionately underrepresented in "white collar" jobs,[117] and even in the "blue collar" category, where the distribution of blacks and whites is more equal, blacks are disproportionately concentrated in "laborer" jobs and are very underrepresented in "crafts" jobs.[118]

The lack of the equal participation of blacks in the economic system directly correlates with the condition of *racial economic inequality* that exists in this nation. There is a substantial "income gap" between blacks and whites,[119] a much higher incidence of unemployment and underemployment among blacks,[120] and a much higher proportion of black families than white families living below the federally-defined poverty level.[121]

Racial preference in the economic area involves making *structural changes* in the way that particular forms of economic activity operate to increase black participation in those activities. In *United Steelworkers of America v. Weber*,[122] last Term's "affirmative action" case, the racial preference was directed toward increasing the representation of blacks in the skilled crafts. In *Fullilove v. Klutznick*,[123] this Term's "affirmative action" case, the preference was directed at improving the position of minority business enterprises by giving them a 10% share of public works projects financed by federal grants.[124] Since *Weber* dealt with a voluntary racial preference contained in an in-service training program established pursuant to a collective bargaining agreement between the employer and the union, the issue was whether the program was violative of Title VII, and the Court held that it was not.[125] In *Fullilove*, the constitutionality of the minor-

116. 122 CONG. REC. 13866 (1976) (statement of Senator Javits); 122 CONG. REC. 34754 (1976) (statement of Senator Glenn).

117. *See* Sedler, *Beyond Bakke, supra* note 6, at 138 nn.22-23.

118. *Id.* 138-39 nn.24-25. The exclusion of blacks from the crafts on racial grounds has been so clearly demonstrated as to now be a subject of judicial notice. United Steelworkers of America v. Weber, 443 U.S. 193, 198 n.1 (1979).

119. *See* Sedler, *Beyond Bakke, supra* note 6, at 139 nn.26-27.

120. *Id.* 138 nn.21-22.

121. *Id.* 139 n.26.

122. 443 U.S. 193 (1979).

123. 48 U.S.L.W. 4979 (1980).

124. Public Works Employment Act of 1977, 42 U.S.C. § 6705(f)(2) (Supp. I 1977).

125. The employer, under the collective bargaining agreement, was to establish an in-plant training program for skilled craft workers. The trainees were to be drawn from the employer's work-force, and half of the trainees were to be black. In effect, separate racial seniority lists were established to determine eligibility for admission to the program. The program was challenged by an excluded white worker who had greater plant seniority than some of the included black workers. The employer and the

ity business enterprise "set aside" was sustained by the Second Circuit on the ground that it was designed to remedy past discrimination in the awarding of governmental construction contracts,[126] and the remedying of past discrimination was the essential basis of the various opinions upholding the "set aside" when the case reached the Supreme Court.[127]

I want to approach these cases from the perspective of the societal interest in the equal participation of blacks in the economic system. In order to bring *Weber* into the constitutional ambit, assume that the federal government required the employer, as a federal contractor, to adopt the program in order to be eligible to receive federal contracts.[128] As I have discussed elsewhere, the government, as a contractor, can assert an interest in having the equal participation of racial minorities in the "governmental market."[129] But leaving this aside, I want to discuss the societal interest that is advanced by requiring that black workers be brought into the skilled crafts and by giving black business enterprises a share of governmental construction contracts.

These actions, as we have seen, represent an effort to make structural changes in the operation of particular forms of economic activity to increase black participation in that activity. The ultimate objective of such efforts is to alleviate the condition of *racial economic inequality* that exists in this nation, reflecting the lack of equal participation of blacks in the economic system. The training of blacks as skilled workers will contribute to increasing the income of blacks as a group. Similarly, since experience indicates that black business enterprises are likely to employ proportionately more blacks than are white business

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union did not admit that there had been past discrimination against blacks in the employer's workforce. The Court held that the program was not violative of Title VII on the ground that Congress did not intend to prohibit "all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy [in employment.]" United Steelworkers of America v. Weber, 443 U.S. at 204. It may be noted that the result of the employer's "affirmative action" program here was to open new opportunities for white workers in the plant as well as black workers, since prior to the institution of the program, the employer had recruited all of its craft workers from outside of the plant. *Id.* 198-99. As to gains to whites from programs initially instituted for the benefit of blacks and from black efforts to achieve equality, see the discussion in Bell, *supra* note 40, at 14-16.

126. Fullilove v. Kreps, 584 F.2d 600 (2d Cir. 1978), *aff'd*, 48 U.S.L.W. 4979 (1980).

127. See note 139 *infra*.

128. *See* Exec. Order No. 11, 246, 3 C.F.R. § 339 (1965) *as amended by* Exec. Order No. 11,375, 3 C.F.R. 1978 Comp. pp. 230-34. In *Weber*, the district court found that one of the reasons motivating the adoption of the racially-preferential in-plant training program was Kaiser's concern for meeting the "affirmative action" goal it had established pursuant to E.O. 11246. Weber v. United Steelworkers of America, 415 F. Supp. 761, 764-65 (E.D. La. 1976), *aff'd*, 563 F.2d 216 (5th Cir. 1977), *rev'd*, 443 U.S. 193 (1979).

129. Sedler, *Beyond Bakke, supra* note 6, at 160-62.

enterprises,[130] the continued survivability of these enterprises will likewise increase the income of blacks as a group.[131] In addition, the increase in the number of black craft workers and viable black-owned businesses may have the effect of reducing black unemployment and underemployment.[132]

The question, then, becomes whether the government can reasonably conclude that there is a societal interest in alleviating the condition of racial economic inequality that exists in this nation. Some guidance in this regard can be obtained from the Court's decision in *Weber* and from its decisions interpreting Title VII generally. These decisions indicate that when Congress enacted Title VII, it recognized that there was a societal interest in blacks having a "fair share" of the available jobs in an employer's workforce,[133] so that in time there might be an end to racial economic inequality, resulting in large part from years of rampant racial discrimination in employment. As the Court stated in *Weber*:

> Congress' primary concern in enacting the prohibition against racial discrimination in Title VII of the Civil Rights Act of 1964 was with "the plight of the Negro in our economy." Before 1964, blacks were largely relegated to "unskilled and semi-skilled jobs." Because of automation the number of such jobs was rapidly decreasing. As a consequence, "the relative position of the Negro worker [was] steadily worsening. In 1947 the nonwhite unemployment rate was only 64 percent higher than the white race; in 1962 it was 124 percent higher."[134] Congress considered this a serious social problem. . . .
>
> Congress feared that the goals of the Civil Rights Act—the integration of blacks into the mainstream of American society—could not be achieved unless this trend were reversed. And Congress recognized that that would not be possible unless blacks were able to secure jobs "which have a future." . . . Accordingly, it was clear to Congress that "[t]he crux of the problem [was] to open employment opportunities for Negroes in occupations which have been traditionally closed to them," and it

130. Blacks are more likely to be aware of jobs that are available in black-owned enterprises and are more likely to be hired by those enterprises.

131. There will also be a multiplier effect insofar as those enterprises deal with other black enterprises as suppliers and/or customers.

132. As Senator Brooke observed: "[M]inority businesses' workforces are principally drawn from residents of communities with severe and chronic unemployment. . . . Only with a healthy, vital minority business sector can we hope to make dramatic strides in our fight against the massive and chronic unemployment which plagues minority communities throughout this country." 123 CONG. REC. S. 3910 (Daily ed. Mar. 10, 1977) (statement of Senator Brooke).

133. *See* Sedler, *Beyond Bakke, supra* note 6, at 148.

134. As of 1976, it was more than double. Sedler, *Beyond Bakke, supra* note 6, at 138 n.21.

> was this problem that Title VII's prohibition against racial discrimination in employment was primarily addressed.[135]

As the above discussion indicates, racial economic inequality, in all its manifestations, is a "serious social problem," and "integration of blacks into the mainstream of American society" cannot be achieved until race is no longer associated with low-income status and until there is no longer racial economic inequality in American life.

Racial economic inequality is perhaps the most enduring and persistent consequence of the social history of racism,[136] and it can only be ended by making structural changes in economic activity to increase black participation in that activity and bring about equal participation of blacks in the economic system.[137] There is a strong societal interest in ending the racial economic inequality that exists in today's American society which should render constitutional governmental efforts to bring about equal participation of blacks in the economic system.[138]

It is my submission, therefore, that there is a strong societal interest in bringing about equal participation of blacks in a number of important aspects of American life: the institutions of government, the "power professions," and the economic system. The use of racial preference to advance the equal participation objective, therefore, advances a valid and substantial governmental interest and should be held to be constitutional.[139]

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135. United Steelworkers of America v. Weber, 443 U.S. at 202-03 (citations omitted).

136. Black family income, for example, has never exceeded 60% of white family income, Sedler, *Beyond Bakke, supra* note 6, at 139, and the other indicators of economic inequality have likewise persisted over the years. *See generally* U.S. COMM. ON CIVIL RIGHTS, SOCIAL INDICATORS OF EQUALTY FOR MINORITIES AND WOMEN (1978).

137. This point was emphasized in the debates over the minority business enterprise set aside. According to Representative Mitchell: "We cannot continue to hand out survival programs for the poor in this country. We cannot continue that forever. The only way we can put an end to that kind of a program is through building a viable minority business system." 123 CONG. REC. H. 1437 (daily ed. Feb. 24, 1977) (statement of Representative Mitchell). As Representative Biaggi concluded: "This amendment will go a long way toward helping to achieve [economic] parity and more importantly to promote a sense of economic equality in this Nation." *Id.* (statement of Representative Biaggi).

138. Because these efforts adversely impact upon the economic interests of individual whites, the courts will carefully scrutinize the appropriateness of the means used. But the key to appropriateness is the reasonableness of the preference, and a reasonable racial ratio, such as the 50-50 ratio involved in *Weber*, which is intended to "eliminate a manifest racial imbalance," United Steelworkers of America v. Weber, 443 U.S. at 208, or the 10% set aside involved in *Fullilove*, clearly satisfies this test. Fullilove v. Klutznick, 48 U.S.L.W. at 4889-90 (Burger, C.J.), 4997 (Powell, J.), 4999 (Marshall, J.).

139. Since Fullilove v. Klutznick, 48 U.S.L.W. 4979 (1980), was decided after this article had gone to press, there was no opportunity to incorporate a discussion of the

VI. CONCLUSION

In this writing, I have considered the constitutionality of racial preference in light of the societal interest in the equal participation objective. In the final analysis, the societal interest is an interest in bringing about equal participation of blacks in all aspects of American life, in getting the consequences of the social history of racism behind us, once and for all,[140] in ending the existence of "two societies, black

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case in the body of the article. By a vote of 6-3, the Court upheld the constitutionality of the 10% minority business enterprise "set aside." There was no majority opinion. Chief Justice Burger wrote an opinion joined in by Justices White and Powell. Justice Powell also wrote a separate opinion. Justice Marshall wrote an opinion, joined in by Justices Brennan and Blackmun. Justice Stewart, joined by Justice Rehnquist, dissented, and Justice Stevens dissented separately.

The remedying of past discrimination was the essential basis of the opinions upholding the constitutionality of the "set aside." Chief Justice Burger saw the "set aside" as representing the determination of Congress, acting pursuant to its spending power and to its power under Section 5 of the Fourteenth Amendment, that grantees of federal funds would not employ procurement practices that might result in "perpetuation of the effects of prior discrimination which had impaired or foreclosed access by minority businesses to public contracting opportunities." 48 U.S.L.W. at 4986. Justice Powell contended that deference had to be given to the conclusion of Congress that "purposeful discrimination contributed significantly to the small percentage of federal contracting funds that minority business enterprises have received." 48 U.S.L.W. at 4995. Justice Marshall, while maintaining that his resolution of the issue in *Fullilove* was governed by his separate opinion in *Bakke*, also emphasized that "Congress had a sound basis for concluding that minority-owned construction enterprises, though capable, qualified, and ready and willing to work, have received a disproportionately small amount of public contracting business because of the continuing effects of past discrimination." 48 U.S.L.W. at 4999. Justices Stewart and Rehnquist in dissent argued that the government could never require that public works contracts be awarded on the basis of race. 48 U.S.L.W. at 5000-5001. Justice Stevens, while not going quite that far, maintained that Congress had failed to "demonstrate that its unique statutory preference is justified by a relevant characteristic that is shared by the members of the preferred class." 48 U.S.L.W. at 5008.

Because of the majority's emphasis on remedying past discrimination, there was no real consideration of the societal interest in the equal participation of blacks in the economic system. *Fullilove* may indicate that for the foreseeable future, "affirmative action" cases will be litigated (and "affirmative action" programs will be structured) within the framework of "remedying past discrimination" rather than with reference to the equal protection objective that has been the focus of this article.

140. As Justice Blackmun observed in *Bakke*: "In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently. We cannot—we dare not—let the Equal Protection Clause (perpetrate racial supremacy." Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 407 (1978) (Blackmun, J.).

Professor Van Alstyne argues to the contrary:

> Rather, one gets beyond racism by getting beyond it now: by a complete, resolute, and credible commitment *never* to tolerate in one's own life—or in the life or practices of one's government—the differential treatment of other human beings by race. Indeed, that is the great lesson for government itself to teach: in all we do in life, whatever we may do in life, to treat any person less well than another or to favor any more than another for being black or

and white, separate and unequal."[141] The use of racial preference to achieve the equal participation objective, therefore, is in the societal interest, and since it is in the societal interest, it is constitutional. Whether viewed in terms of constitutional values,[142] or in terms of the societal interest in the equal participation objective, the use of racial preference to advance the equal participation objective is constitutional because it is related to achieving "genuine equality" between blacks and whites in American society.[143]

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white or brown or red, is wrong. Let that be our fundamental law and we shall have a Constitution universally worth expounding.

Van Alstyne, *supra* note 10, at 809-10. Given the present consequences of the social history of racism in this nation, however, Van Alstyne's view of a "Constitution universally worth expounding" would be a Constitution that reinforces white supremacy and black inferiority. As has so frequently happened in American society, see Bell, *supra* note 40, at 16, the costs of this "lofty" constitutional principle would be borne unmitigatedly by blacks, who for the remotely foreseeable future would be relegated to a condition of societal inferiority and denied equal participation in American life. I do not think that such a Constitution would be one "universally worth expounding."

141. See note 50 *supra*.

142. This was the approach that I took in my prior writings. See note 83 *supra*.

143. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 398 (1978) (Marshall, J., concurring in part, dissenting in part).