Dear Lewis,

I was just thinking of you the other day and was beginning to believe or may be make the great effort to do so, and mention me.

(Colgate Darden)
June 29, 1978

Dear Mr. Justice:

I hope it is no violation of protocol for a friend to write a fan letter about your fine opinion in the Bakke case. It seems to me to meet every aspect of the case with breadth of mind, a sense of history, and elegant conciseness of reasoning. I take some vain pleasure in having predicted it. At that Charles Bartlett lunch with Clark Kerr I told you about, I ventured that "this seems to me an opportunity for Justice Powell to write a magisterial opinion." You have done so; and as time passes I believe that your opinion will be viewed as a truly distinguished example of the Court at its best. I suspect that our admired mutual friend Alex Bickel would have agreed.

This note comes with best wishes for a pleasant summer, and the hope of an early visit.

Cordially,

Ed Yoder
June 29, 1978

Mr. Justice Powell
The Supreme Court
Washington, D. C. 20543

Dear Mr. Justice Powell:

I have not previously felt impelled to write a Supreme Court Justice about a decision. Bakke has altered that posture.

Not even Solomon could part the child and have each half live autonomously. Your opinion was nothing short of brilliant. You have saved the nation from protracted rancor and divisiveness.

This opinion establishes your worth to the citizenry and frees you from any perceived bondage regarding your appointment.

Sincerely,

Gary R. Myers
June 29, 1978

Dear Lewis,

I managed to obtain a copy of the Bakke opinions by late yesterday afternoon, and I have now had a chance to read them. I cannot resist the temptation to break my usual rule against offering unsolicited comment; I think your stance was exactly right; your fine opinion is of the greatest significance, and I not only hope but believe that it will be recognized as of the greatest importance long after both of us are gone.

I knew the case was a difficult one, and your labors were self-evident. I am especially delighted that you resisted on prudential, and that you made the case for it so powerfully. Much as I respect Paul Mabie and Jack Oliver, I believe the prospect of a Court adoption of a per se defense as their UC brief advocated, is alarming that all who spoke on the equal protection issue represented that it the Board et al. opinion was not far from it in essence, and that made me insist that an equal-numbered of the racial criteria is the more vital. In 1954, at the time of Brown, none would have doubted that strict scrutiny across the board was the right standard. We resolved whether it was at our peril, and I am profoundly grateful that you did not do so.

I hope, in peace, we then sighted

Gerald Gunther,
William Nelson Cromwell Professor of Law
Crown Quadrangle
Stanford California 94305
I agree with your stance. (It is in the approach, I have advocated in my earlier case law, alone – with almost no much disagreement on your argument.) I hope I can able to write sufficient displacement to think as I do, that quite apart for my own inclination, it was of historic importance that an opinion such as yours be written. More than ever, I can glad that you are in the Court, and that you can be counted on to strive for principle over in principle weather.

I am, around at this time of the year, buried in the case's output in order to put together annual usted supplement.办公 will help with its already considerable size, but there are a surprisingly large number of other cases worth discussing in what seemed like an otherwise relatively quiet Term. The commerce clause and Ant. IV cases alone make a rather hefty package.

A week from Sunday, an older son Daniel will be married. After ten very years, he turned a corner toward stability last fall – he’s been doing well at college, is now at Berkeley, and plans to go to law school. It is a direction I would not have dared to predict when winter age! Andy in transferring to Brandeis College this fall. He’s still at Bryn Mawr, but plans to move to St. Louis. The boys’ development this year has made the last few months less rigorous for Beth and me. But one reminds, and keeps watch, padding and doing liturgy and doing.

With best regards — Cary
Dear Lew:

"Such qualities could include exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion..." -- in a word, the type of students who attend Washington & Lee!

As a "swing man", you were terrific.

Sincerely yours,

BMM:jhs

The Honorable Lewis F. Powell, Jr.
Associate Justice of the United States Supreme Court
One First Street, N.E.
Washington, D.C. 20543
The Honorable Lewis F. Powell, Jr.
Associate Justice
United States Supreme Court
Supreme Court Building
Washington, D. C. 20543

Dear Lewis:

This is just a note to let you know how much I appreciate the very arduous tasks which face you daily as a member of the Supreme Court.

I wish to commend you for your recent decision on the "Bakke" case and for the impact which it has had on our nation.

It is with a great deal of fondness that I remember you and your family when we worked together at the Grace Covenant Church in Richmond. Please give Jo and your children our best love when next you see them.

Very truly yours,

John B. Boyd
June 30, 1978

The Honorable Lewis F. Powell
Associate Justice of The United States
Supreme Court
Washington, D. C.

Dear Sir:

It seems that once again, in the Bakke case, you have written the key opinion for the Court. It brings to mind Mrs. Jean Cahn's observations during your confirmation hearings. "... His conscience and his very soul will wrestle with every case until he can live in peace with the decision that embodies a sense of decency and fair play and common sense." How prophetic she was.

Sincerely yours,

[Signature]

WGC, Jr. :jbm
Dear Justice Pope,

I am with you in the conclusion of the opinion written by you in the Beatty case, appearing in the Richmond Times-Dispatch of June 27. If it is not too much trouble, I would like a copy of the full opinion for further study.

As a retired college preparatory history teacher, I have served as a volunteer in the Richmond public schools since 1967. In this experience, I have taught huge pupils in small classes and have tried to improve their reading skills and comprehension and enrich their understanding of our American heritage. This summer, I was teaching a class of black students at a summer school and was requiring them to read the lives of great black leaders. Yesterday I submitted a summary of your opinion and tried to get them to think about its implications for themselves. It is interesting to note that one of the more intelligent and well informed members of the class expressed the opinion that the admissions system practiced at the University of California at Davis would result in a lowering of standards. Several of them agreed.
FRANKLIN I. CARTER
3509 Stuart Avenue
Richmond, Virginia 23221

That the decision meant that they would have to
work much harder in order to deserve any
special consideration they might be given.
Not one of the class took exception to the
equity of your decision.

Wishing you a well-deserved Summer
vacation, Sam,

Sincerely your neighbor and admirer,

Franklin I. Carter
June 30, 1978

Dear Justice Powell:

I have always been proud of the Supreme Court. If it is not presumptuous for a citizen to say this, let me tell you the depth of wisdom I perceive in Case No. 76-811 and particularly the majority opinion.

It is my honor to know you, and I shall look forward to being with you at Columbia in August.

Respectfully,

Fred W. Friendly

The Honorable Lewis Powell
1235 Rothesay Road
Richmond, Virginia 23221
Dear Justice Powell:

In early February a friend (Worth Remick, from Smithfield, Va.) and I put into motion the independent study we had carefully planned: a three-stage project on the Bakke case. The first stage was research: taking advantage of the location of our school, Woodberry Forest (65 miles from D.C. and 35 miles from Charlottesville), we conducted interviews in Washington with members of the Civil Rights Commission, and with others knowledgeable on constitutional law. These interviews were, to be frank, useless, but just one half-hour discussion with Dr. Abraham of the UVa faculty was immensely profitable. We also spent many hours researching the case in the UVa Law Library, reading law reviews reference volumes on the Constitution. Needless to say, we digested all of the conventional literature on the case. The research was extremely rewarding: it gave us the opportunity to empathize with you and your brothers of the Court, and with the lawyers who present the cases.

The second phase of the project consisted of compiling and submitting to a mock Supreme Court (composed of five faculty members and four students) legal briefs. My client was the respondent, Allan Bakke, and Mr. Remick represented the Regents of California. I have enclosed a copy of my brief (23 pages) in the hope that you might read portions of it and
comment. I feel that many of my conclusions resemble those in your historic opinion--tell me if my comments on possible alternate qualities in minority applicants (p. 7) are similar to your holding that race could, in proper circumstances, be considered. Mr. Remick might well send you a copy of his brief under separate cover. I assure you that every bit of our technical research was absolutely unassisted.

The third and final phase of the project was Supreme Court-simulated oral argument. It was by far the most exciting academic exercise in which I have been involved. We had to respond to cleverly contemplated questions, sometimes ridiculously hypothetical ones. But the oral argument gave us a real feel for legal reasoning.

I graduated from Woodberry early in June (our oral presentation was in late May). I will attend Tulane University this fall, but my long range goal is to attend the University of Virginia School of Law. At Woodberry I have developed an addiction to legal literature, and in addition to an earlier independent study (the history of Law in America), I took the school’s Constitutional Law course (I visited the Court twice, and once you granted our class an interview, in January 1977). Allow me to praise the conclusions of your opinion (as they are essentially those of the Court). I do not believe preference based on race in and of itself is constitutionally possible. Thank you so much for donating your precious time to an avid fan of law and the Court.

Respectfully yours,

Matt Patteson
Jonesboro, Arkansas
Dear Lewis:

I enclose a copy of the White House press briefing which I gave at the request of the President on the Bakke case. I also gave the President a copy of the several opinions and advised him to read yours.

I have never written a member of a court before about an opinion, but I cannot restrain the urge to thank you for your opinion and for all of the hard work and reflection that must have gone into its preparation. You were able to bring a sense of balance and a proper tone to a complex problem and one which could seriously divide our country.

Have a nice summer and we hope to see you during the summer. Love to Jo and warm regards.

Sincerely,

Griffin B. Bell

Mr. Justice Powell
The Supreme Court
Washington, D.C. 20543

Enclosure
Dear Lewis:

Thanks for reading my article on SALT at a time when you should be indulging in more frivolous pastimes. We are all proud of you and your contribution to the B ker decision, which seems to have accomplished the amazing feat of making all far too reasonably happy.

There's much to be said for the British practice of rewarding military victors by appending to them the name of the site of their triumphs—Montgomery of Alamein, for instance. Analogous justice would make you Poorl yBolke, although Albi's friends might give a rubbin to such a dubbin.

Yours sincerely,
Max
June 30, 1978

Honorable Lewis F. Powell, Jr.
Supreme Court of the United States
Washington, D. C. 20543

Dear Lewis:

Many thanks for your letter of June 23. We are all so pleased that you will preside over the Keedy Cup Prize Argument in November of 1979. (Although my own expected career shift will mean that I will not have the pleasure of officially greeting you as Dean, I do hope to be permitted to attend the Argument).

Sincerely,

LHP:rdb

P.S. Courtesy of Nancy Bregstein, who kindly brought copies of the Bakke opinions to me at my confirmation hearing before the Senate Judiciary Committee yesterday, I have now made my way through approximately sixty percent of what you and your brethren wrote in that extraordinary case — and I hope to complete my (first) reading by the end of the 4th of July weekend. Although, to be sure, I do not agree with every word of your dispositive opinion, I do find it enormously impressive — indeed, persuasively statesmanlike — in its lucid and perceptive articulation of the enormous issues of public law and policy. (I suppose I should add that even as to those aspects of your opinion about which I am dubitante, I certainly expect to be bound by them, where applicable, in my new life as an inferior court judge).
P.P.S. Now that your mammoth labors are done, I do hope that you and Mrs. Powell have a very restful summer.
July 1, 1978

Dear Lewis,

For obvious reasons I generally refrain from writing a justice of the Supreme Court about his opinions. But, having just finished reading Bokker, I must write to express my appreciation for the great service you have rendered the nation. This case had the potential of being another Dred Scott case. If it had gone our other way, it would have rendered the country and the Court itself another "self-inflicted wound.")

Your moderation and statesmanship have saved us from that. The margin was uncomfortably narrow, but it marks one of Mark Twain's sacramental God protects children, dandies, and the United States.
Justice Lewis F. Powell, Jr.
United States Supreme Court
Washington, D.C.

Dear Justice Powell:

I am a professor of Social Science and so face the task this fall of trying to explain the Bakke decisions to my class.

I fully understand your position in the one instance where you affirmed the California Supreme Court's decision that Mr. Bakke was unlawfully denied admission to the University of California, Davis Medical School, Indeed, as both a professor and private citizen, I applaud your reasoned approach.

I cannot comprehend your other decision in which you conclude that race, under given circumstances, may be used as a criterion for admissions to a professional school. It seems to me that your second decision not only contradicts your first reasoned decision, but is basically wrong under the Equal Protection Clause of the 14th Amendment. The word "equal" is a clear-cut English word and cannot mean or connote unequal. Yet, that is what you have said in your second decision. If blacks and other minorities are given any special consideration because of race, then whites are not being treated equally as demanded by the 14th Amendment.

One can always rationalize the position that past discrimination demands a measure of inequality but that is not relevant to the Constitutional proviso in the 14th Amendment.

Moreover, many whites have grave educational and economic handicaps but your decision ignores their plight. You lump all whites together as a favored group, but sociological and economic data indicate this not an accurate view of society. Many whites need help but you set them adrift in your racial decision. Not all blacks are handicapped. In fact middle and upper class black children have an advantage over lower class white children but since you lump all blacks together, all blacks are given an advantage even if they do not need the advantage.
I know you state each person will be treated individually but once you make a racial distinction giving blacks a "plus" factor because they are black, that "last seat" in a professional school that you talk about can be given on the basis of that racial designation. Moreover, racial designations are group designations, so we are back to groups and not individuals.

I am afraid that I must conclude that your second decision leaves the door open to a new and subtle type of racial discrimination that schools can practice to the detriment of future innocent Bakkes, and that in fact you are institutionalizing a new form of racism.

I would appreciate any comment you may make so that in the fall I can explain your position to my class.

Sincerely,

Matthew H. Epstein, Ph.D.
Professor of Social Science &
Director Student Affairs
East Campus
July 3, 1978

Dear Lewis:

I regret that you are overcommitted for 1978-79. I hope you will keep us in mind and give the Cornell Law School the highest priority for a visit during the fall of 1979. Next spring I will write to see whether we can arrange a specific date.

Your opinion in the Bakke case has already given us a great deal to think about. Your position is nearly identical to that I have urged and expected.

Faithfully,

Roger C. Cramton
Dean

RCC/sp
July 3, 1978

Dear Mr. Myers:

I so much appreciate your note of June 29.

I tend to agree with your view that a different outcome in Bakke could have created "protracted rancor and divisiveness.

Of course, problems remain but at least I hope we have taken one constructive step.

With best wishes.

Sincerely,

Honorable Gary R. Myers
Post Office Box 685
Alexandria, Virginia 22313

LFP/lab
Dear Justice Buck,

The nature of my practice is such that I do not have the opportunity to appear before your Court. Further, it seems to me that you have thus far done quite well without praise or criticism from me. Accordingly, it is my purpose to have you understand my reaction, as one who has had the privilege of your acquaintance, upon reading your opinion in the Bakke case, a report intended not as flattering but as honest facts:

[Continued on next page]
I was deeply stirred by the richness of your opinion. Upon putting it down and thinking about it, I feel a real sense of pride in our national traditions and in this country of mine which, through the instrumentality of your hand, could have produced such a thoughtful, wise judgment.

Sincerely,

Robert J. Woody
Dear Justice Powell:

I know you are a very busy man, but I know how to amused if I did not visit and tell you how pleased I am and how much I speak for thousands of others of your wisdom and excellent record as a member of the Supreme Court. I know you have your own book but I will remember when you attended 2 of our V.R.M.A. seminars. I have served 13 years on the Board and just stepped down as Chairman of the Board of the fine organization.

I now represent Holiday Inn (5 locations) in Virginia as Public Relations Director, and in my office I have a group of photos of outstanding leaders who have meant so much to me over the years.

I am asking if you might send me an autographed photo of yourself which I would truly prize to have in my office.

I have faith in our country, and truly,
Believe that as long as we have men of your caliber on the highest court in the land that justice will prevail.

You have proven to be in my opinion, the outstanding Justice. Thank you for serving our country. If you can etch me with an autographed photo I would be so very pleased.

Thank you
Your friend

EDWARD Z. ANGLSTADT
631 MAURY STREET
FREDERICKSBORG, VIRGINIA
22401
Mr. Justice Lewis F. Powell,
Supreme Court of the United States,
Washington, D.C. 20546.


Dear Lew:

I have long admired your work on the Court and have read with pleasure many of your opinions but you achieved new heights of tact and skill last week in your Bakke decision, which was concurred in, at least in part, by all the other members of the Court. Unfortunately, the New York Times gave only excerpts from the several opinions, I will have to wait until the Advance Sheets are issued to read the full text of what you wrote.

However, enough has been published to make it clear that you solved very neatly the dilemma created by the decision of the Supreme Court of California which combined the admission of Bakke to the Medical School at Davis with an injunction that the School no longer give any weight to racial factors in the selection of candidates for admission. It could not, therefore, be affirmed or overruled without going too far in one direction or the other. By approving Bakke’s admission to the School and simultaneously vacating the injunction, you were able to induce the other members of the Court to concur in your opinion. That, I think, was a real achievement.
The trouble I find with the position of the four members of the Court who joined in Mr. Justice Brennan’s opinion is that they were so anxious to redress past discriminations that they ignored the new discriminations which will necessarily result from the remedial action they favored. Giving preferences to the descendants of the victims of past discriminations will inevitably deny equality to somebody else. It does not seem to bother them that penalizing today’s generation for ancient wrongs is both unfair and an obvious violation of the Equality Clause of the Fourteenth Amendment.

Finally, I am afraid that those who emphasize the righting of past discriminations will never be satisfied with anything less than quotas giving all disadvantaged minorities clear cut preferences. The vehemence with which their dissent was expressed in some of the supporting opinions, makes me fear that it may be many years before the Court will unanimously agree with your wise conclusion that race should, at most, be one of the factors to be considered in complying with the Fourteenth Amendment.

As ever sincerely yours,

Rolland L. Redmond.

I

'Twas the night before Bakke when all through the court,
Endless the silence as though in a fort.
The gowns were hung by the chimney with care
In the hope that Justice soon would be there.

II

The next day they came, all nine in their robes
Each his own view of Justice to disclose.
Their opinions were weighty and each firmly held,
Not for a second would they lessen the jell.

III

So Lewis to solve this unalterable division
Decided to give a Solomonic decision.
He went with four Justices, and him to make five
To keep Affirmative Action alive.

IV

He then in revolving door did appear
To pick up the other four tiny reindeer.
Now with these five he Justice did keep
From going to its death on a mathematical heap.
V

And so our dear Lewis is now in such trauma
He needs bedside rest in his lounging pajama.
But tonight we have him here to thank
For clearly the neatest legal prank.

VI

He split himself but not the court
For conciliation is his forte.
We thank him loud and we thank him clear
And Josephine to us is dear.

J.H.W. Jr.
July 5, 1978

Hon. Lewis F. Powell, Jr.
Justice
Supreme Court of the United States
U.S. Supreme Court Building
Washington, D.C. 20543

Dear Justice:

Last week I had the great pleasure of reading your opinion in the Bakke case.

It is, of course, the most important decision in the field since Brown v. Board of Education. To me it was an outstandingly analyzed and eloquently expressed opinion, and I could not resist telling you so.

Cynthia joins in warmest greetings to you and Jo.

Cordially,

EL: rj
July 5, 1978

Hon. Lewis Powell  
United States Supreme Court  
Washington, D.C.

Dear Justice Powell:

I have no desire to add to your correspondence burdens as a result of the Bakke decision, but I feel an irresistible urge to call attention to the unkind cut contained in the quotation from my opinion, contained on page 42 of your slip opinion.

The use of [sic] in the quotation indicates that I committed a grammatical error in writing that "there is no empirical data to demonstrate . . ." I respectfully demur, and in so doing I am supported by numerous authoritative sources:

Copperud, A Dictionary of Usage and Style, page 118: "data, datum. Data is technically the plural of datum, but this remains of interest only to Latinists. Data is almost invariably used as a collective with a singular verb: 'The data is interesting but unreliable.' Its use with a plural verb is still correct, of course, but unusual: 'The data are mostly in the form of percentages.' Datum is all but extinct."

Bergen Evans, A Dictionary of Contemporary American Usage, page 126: data may be treated as a singular or a plural. In the social sciences data is usually treated as a singular. Specialists in these fields characteristically refer to their data as it and talk about much data and very little data. These are singular constructions. They are perfectly acceptable, provided they are not followed by a plural verb. . . A singular construction such as the data is now in, but we have not examined much of it is perfectly good English.
Fowler, A Dictionary of Modern English Usage (2d ed.), page 119: "data is a Latin plural; the singular, comparatively rare, is datum; one of the data is commoner than a datum; Latin plurals sometimes become singular English words (e.g., agenda, stamina) and data is often so treated in U.S.; in Britain this is still considered a solecism, though it may occasionally appear."

Webster's New International Dictionary (2d ed.) page 670: "Although plural in form, data is not infrequently used as a singular; as, this data has been furnished for study and decision."

1972 Supplement to Oxford English Dictionary, page 737: data is "used in plural form with singular construction."

Would it be an imposition for your staff to call this to the attention of the Reporter of Decisions before your exquisitely crafted opinion becomes perpetuated in the bound volumes?

Sincerely yours,

[Signature]

STANLEY MOSK
July 5, 1978

Dear Gail:

I have a small project that perhaps the Curator's Office can do for me.

The Bakke case will be an historic one. As I wrote the controlling opinion, I have a special interest in preserving - as a part of its history - the news commentary. This would include the news stories in the Post, Star and New York Times that came out the day after the Bakke decision was announced on June 29; the editorial comment in those three papers; additional editorial comment that Barrett McGurn has agreed to collect and make available; stories in Time and Newsweek (issues for this week); and such commentary by columnists as Mr. McGurn may have (for example, there is a column by Rasberry in the Post of July 3).

Barrett McGurn said that he would have editorials from about ten papers; would make Xerox copies, and send them to my Chambers. Linda will make them available to you.

What I would like is a scrap book that contained these stories, editorials and comments. They should be Xeroxed, as newsprint disintegrates quite rapidly. The scrap book also should include a copy of my oral statement from the bench and anything else you think appropriate.

I emphasize that I do not want you to do this yourself. My understanding is that you have assistance during the next several months from summer interns. If you think it appropriate, one of these interns could take on the project. After all, it is Court history. I will, of course, pay for the scrap book and all other costs that may be involved.

Sincerely,

Miss Gail Galloway
Curator's Office

LFP/lab
July 6, 1978

Dear Mr. Justice Powell:

When my students saw you in the Lawyers’ Lounge Bakke was pending. What my students saw was a soft-spoken, sensitive man, a man who obviously values careful deliberation of questions that are important to the Nation.

I have just finished reading the Bakke opinions. Yours is soft-spoken and sensitive, just like your work in Keyes. You were too modest in saying to my students that none of the members of the present Court can be compared with great justices of the past. Your work in Bakke reminds me of Marshall’s in Marbury itself.

I hope your summer in Richmond will give you peace and quiet at last and some rest.

Thank you, Mr. Justice, for seeing my students this year, the year of Bakke. I may be wrong but I believe that, having seen you live and in person, my students are more likely to read your opinion. That is important.

Respectfully,

Paul Baier

Mr. Justice Lewis F. Powell, Jr.
Hon. Lewis Powell  
Justice of the U. S. Supreme Court  
Supreme Court Building  
Washington, D. C.

Dear Lewis:

Enclosed is a copy of my own little blurb of appreciation after your decision. I have felt throughout that Bakke should be decided not as a millennial issue but as a law suit, and you did.

With all good wishes.

Yours very truly,

John P. Frank

Enclosure.
Bakke Case
Decision
Hailed Here

Twenty-five years ago when Phoenix attorney John Frank was a Yale law professor he assisted Thurgood Marshall in the original school desegregation case.

Marshall later became the first black on the U.S. Supreme Court, a post he still holds.

Frank is a crackerjack constitutional lawyer.

ASKED today to comment on the high court's 5-4 ruling Wednesday that strict racial quotas or goals are illegal but other types of affirmative action programs may be permitted, Frank said: "At that time, 25 years ago, we advocated diversity as a legitimate objective of professional schools and this decision upholds the position we have been advocating since the early 1950's.

The decision struck down the University of California's program that blocked white applicant Allan Bakke from attending its medical school at Davis.

"THE professional schools of America ought to have diversified, well-qualified student bodies," Frank said. "I have long believed that it is constitutionally proper to seek such diversification and am delighted that the Supreme Court's opinion permits this."

As in Arizona, Frank said, "I'm best acquainted with the Arizona law school. They have long lived in the mainstream of the Supreme Court's approval and do not think that any change will be required."

Asked if the decision would affect women, Frank said: "I doubt that this will have any very practical effect for women because, in the professional schools of the country, the women have caught the train already and are now pretty well represented. What it will do is encourage conscientious efforts of good professional schools to diversify their student bodies with blacks, Chicanos and Orientals."
Alpheus Mason argues that one should not congratulate a man for doing his job, however skillfully. Therefore, it's not right to write a note about it. I apologize for my previous note. I hope Bob Conforto does well in today's test.

JUL 11 1976

Dear Mr. Turbo,

I am now reading a book that I found in a cardboard box. It is a book titled "The Mind of a Child". I thought you might be interested in reading it. I have also sent a copy to my mother.

I am looking forward to hearing from you soon.

Best regards,

[Signature]

July 11, 1976
July 11, 1975

Dear Mr. Justice,

I have just finished reading and re-reading your opinion in Bakke. I cannot help but express my deep and personal appreciation for — and, indeed, awe of — its soundness and scholarship. I am so proud that it was you who have rendered a judgement and written an opinion which must be the most significant judicial landmark since Brown v. School Board. I am staggered by the work, the agony, the legal validity and the philosophical soundness that shine through every paragraph and footnote of your Opinion.

I write this letter simply because I am moved to do so. It needs neither answer nor acknowledgement — since it is simply an expression of my appreciation.

Respectfully,

[Signature]

FRANCIS THORNTON GREENE
ATTORNEY AT LAW
CALIFORNIA BUILDING
WARRENTON, VIRGINIA 22186

TELEPHONES (703) 347-9061
(202) 452-7000
July 7, 1978

Supreme Court Justice,
Lewis F. Powell Junior,
Supreme Court of the United States,
Washington D.C. 20543

Your Honor:

I would like to personally congratulate you and your fellow justices for your favorable decision in the Allan Bakke case.

I am delighted to see a truly "color blind" interpretation of the fourteenth amendment.

As you stated in your opinion, America is a nation composed of "various minority groups"; if there is ever to be true equality under the law all people will have to be dealt with equally. To discriminate against one race for the sake of another race is beyond my understanding.

I personally would like to see an end to any type of "quota system" in the schools, government and the private sector. I would like to see all people judged on their own personal merit, without any consideration of race.

As I stated in the beginning of this letter, it is to serve as my personal thank you. I would also like to point out, that as a member of the "silent majority", I realize that the bulk of the people who agree with me on this issue will not take the time or trouble to make you aware of their feelings.

I am sure that the people who are not happy with your decision plan to let you know loud and clear. I realize that a man of your position and character would not allow his judgement to be swayed by pressure from any special interest groups, but I would like you to know that you do have a great deal of support from the general public.

Respectfully,

Larry G. J. Haynes

LGJH/re
Dear Fred,

How very thoughtful of you to write about my Bakke opinion.

We were interested at the Court that you should have predicted -- in your pre-Bakke article -- how the case would be decided. Perceptive man!

No doubt you have seen that Ed Morrow's "person to person" programs are being telecast on about 35 public TV stations. I hope to see some of them.

Best wishes.

Sincerely,

Professor Fred W. Friendly  
Columbia University  
School of Law  
435 West 116th Street  
New York, New York 10027
Q&A:

How one Justice set the policy in the Bakke case

Charles F. Arenthony teaches civil rights and constitutional law at the University of New Hampshire Law Center. Frank Allen, professor of law at Rutgers University, is general counsel for the American Civil Liberties Union. They were interviewed by The Chronicle's Ellen K. Coughlin.

Q: What is your assessment of Justice Powell’s opinion? Is this a case of a single Supreme Court Justice setting legal precedent for the nation?

Arenthouse: "Yes. One man has made the overall policy. [But] this is the really interesting thing about the case. Eight Justices were prepared to be inaccurate, and the very policies balancing that went on came about solely because of one person.

"Justice Powell seems to have been the person most sensitive to the people who have been educated, but at the same time not forgetting that they have had discrimination to do whatever they wanted later on.

"Justice Powell seemed to have been the person most sensitive to setting the law on some highly sensitive... In one sense it’s just going to make us start all over again.

Q: How much guidance does the Bakke decision give colleges and universities for their admissions programs? Isn’t the Court really condemning a discrete use of a quota system?

Arenthouse: "It is an area of guidance. Justice Powell went out of his way to include the Harvard College plan as an example of what would be acceptable.

"Certainly you could accommodate with the Harvard plan the same thing as John University of California at Davis sought to accomplish... I think it’s somewhat different, though.

Powell makes the point... that when you can’t look at one factor among many, the white person or the non-preferred minority person—translation: white person—would still be able to compete and may still win a spot... It gets close to fuzzy, but...

"One of the things... is that the Court was thinking about the way the public perceives that these kinds of programs operate. And one of the things we’ve all wanted to accomplish is to make race a much less overt issue, a much more imperceptible issue. So that there wouldn’t be any white backlash and there wouldn’t be any feeling of black sensitivity that I made it, but out on my own merits.

"So the Harvard College plan really, by establishing all of these factors, toughens the public’s perception of action being important. And that is important in the long run.

"What’s likely to happen over the next 20 or 30 years is that we will make up for these inequalities in giving more of these quotas, the factor of race will take on less and less importance.”

Arenthouse: "I think [the decision provides] very contradictory and incongruent guidance. I think people will take from it what they want to... In some ways Powell is encouraging subterfuge. I think in university admissions, for example. You can do it by the law of the case, and say... ‘You’ve got to do indirectly certain things I’m not going to let you do directly...’ That’s an opening for all kinds of arbitrary decision-making... The whole admissions process will be made much more arbitrary, more subjective.”

Q: How will the decision affect affirmative action programs in general?

Arenthouse: "It’s hard to tell... We’re only talking about voluntary programs—persons who have never been found guilty of prior discrimination, who want to increase the proportion of minorities in their student body just for the sake of diversity.

"To the extent that this will leave one tool in the government’s hand for encouraging greater affirmative action, there may be some backlash.

"One part of this opinion that I think is the most conservative in the long run, and may have the most adverse impact on civil rights, is the holding that Title VI [and the 13th Amendment] both mean the same thing.

"The Court has held over the last several years that the only type of discrimination outlawed by the 13th Amendment is intentional discrimination.

"Title VI... holds that what we’re concerned with is the impact of educational programs, not with the intent. The decision that Title VI is to have the same effect as the 13th Amendment apparently overrides that... Even though the affirmative-action

Arenthouse: "We come within one vote of an exceptionally good decision which would have spurred affirmative action in important ways to resolve the racial crisis in this country. We felt sure we voted short of getting that kind of ratification for the most vigorous kinds of programs... The decision will be taken by some as an excuse for us to accept the law of the case, and the guidelines of affirmative action programs... A lot of them come—those that are hostile to affirmative action..."

Continued on Page 18, Volume 3

Chronicle of Higher Education

July 10, 75
Q and A

action—are going to take this to sig-
and that any such programs are im-
proper. . . . There's enough in here
for everybody, so that people can
begin to implement their own biases.

"On the other hand, I think that
that opinion, together with the four
represented by the Brown-Marshall
group, can also be taken by those
who have a commitment to affirmative
action to maintain and continue
programs, but in fact you will end up
with a lot of confusion."

Q: In the wake of this deci-
sion, what are the prospects for more
"reverse-discrimination" cases like
Alton Baker's?

Abernathy: "It will bring on more
litigation in areas other than higher
education.

"For example, many people will
want to test whether these principles
would apply in private employment
or in government contract programs,
... in the area of higher education.
... I think Powell's pretty much
tried these things for us. He's basically
told, 'Look, here's the Harvard Col-
lege program. If you don't want to be
sued and you want some affirmative
action, follow it.' So the only thing
that could possibly be litigated is
whether a certain school follows the
Harvard College plan."

Askin: "It will spur a lot more
litigation from people opposed to
affirmative-action programs . . . ."

Q: What are the implications
now for the enforcement of Title VI?
Do you think Congress will
revert in any way to the Justices' in-
terpretation of the statute?

Abernathy: "Congress is never
going to change Title VI . . . .
There's no way in hell that Congress
is going to pass a law militarizing the
use of quotas. They would never do
it."

Askin: "One thing the Court has
done is put the issue back in Con-
gress's lap. They are saying, I sup-
pose, 'All right, if Congress dis-
agrees with us, they can change the
law.' . . .

"Powell's opinion, on the other
hand, takes the position that cer-
tain things are forbidden by the Con-
stitution.

"Exactly what is forbidden may
be a little obscure, but certain kinds
of affirmative-action programs . . .
are forbidden by the Constitution.

"Now, the other four never say
that. They say we don't have to
reach that, because we think Con-
gress has forbidden it by statute. So
they do give Congress an opportuni-
ty to make some legislative changes.

"I don't doubt that, politically,
that's probably very difficult at this
particular stage in American life."

Continued from Page 9
We're all very proud of you and your great decision.

With the compliments of

Roy M. Blanks, Consultant

2500 EAST GRACE STREET
RICHMOND, VIRGINIA 23223
July 10, 1978

Dear Colgate,

How very thoughtful of you to write about my Bakke opinion.

Although difficult questions remain as to the circumstances in which race properly may be considered in the dispensing of benefits by government, I do think the result we reached in Bakke was right under the precedents of the Court and in the best interest of our country.

I continue to miss seeing you, and often look back with nostalgia on the pleasure and privilege of our association in years past -- on the State Board of Education, the Constitutional Revision Commission, and in other good causes. The State also misses your wise leadership.

I necessarily live a cloistered life in Washington, but Jo enjoys the cultural opportunities of that strange city. We are in our Richmond home for a few weeks. Even here I spend a fair amount of time in my office at the federal court.

I know Jo would join me in sending affectionate best to both you and Connie.

As ever,

Honorable Colgate W. Darden
7438 Flicker Point
Norfolk, Virginia 23505
July 10, 1978

Dear Mr. Woody:

I write to say that I greatly appreciate your writing about my opinion in the Bakke case, and your most generous assessment of it.

As we rarely receive compliments (and, as judges, do not expect or deserve them), I was especially pleased by your letter.

Sincerely,

Robert J. Woody, Esquire
Casey, Lane & Mittendorf
Suite 802
815 Connecticut Avenue, N.W.
Washington, D.C. 20006
Dear Mr. Colby:

I so much appreciate your generous note of June 30 about my opinion in the Bakke case.

I am impressed that you should have remembered Mrs. Cahn's tribute at the time of my confirmation hearings.

With best wishes.

Sincerely,

Mr. William G. Colby, Jr.
199 Panorama Drive
Richmond, Virginia 23223
July 11, 1978

The Honorable Lewis F. Powell  
Justice of the Supreme Court  
of the United States  
Washington, D. C. 20543

Dear Lewis:

I have, of course, been reading the various reports and articles regarding the Supreme Court's Bakke decision with great interest, as have all of us associated with higher education.

The enclosed article from the July 10 issue of the "Chronicle of Higher Education", however, has led me to drop you this note.

I was particularly interested in Mr. Abernathy's answer to the first question asked in the article. You do all of us proud and I am delighted that you are an honorary alumnus of this College.

With kind personal regards,

Sincerely,

Thomas A. Graves, Jr.  
President

Encl.

TAG:jl
Dear Mr. James Powell —

I have always been proud to have known you but never more than now — after Dad.!

I have prayed that your Court would sometimes find a way to decide that case right — but I honestly feel and see that could be done. And I think!

But every day that my Court did
Not true the problem to you —
for, actually, we have everything
on our "tightes". Your, known.
found just the exactly right
way to mine.

Congratulations!

JUDGE
Genevieve Blatt
THE GRAYCO APARTMENTS
HARRISBURG, PENNA. 17101
JUL 8 1978

[Handwritten text]

JUDGE
Genevieve Blatt
THE GRAYCO APARTMENTS
HARRISBURG, PENNA. 17101
JUL 11 1978

[Handwritten text]
Dear Lewis—

This is by way of being a
form letter.

Having read Bahke, I con-
der that you reached exactly
the right result. It was brilliant.
Any other Standard seems to me
constitutionally fallible. And I
do not think your Standard im-
precise. It is a long way back to
our arguments about Charlotte—

week ending; I question whether
you would have reached the same
result then.

It seems to me, however, that
you had a good deal more trouble
with the girl. (Smile Painter!)
July 12, 1978

Dear Dr. Epstein:

Thank you for your letter of July 3rd.

Although I accept the sincerity of your request, I do not think it appropriate -- in light of the tradition at the Court -- to offer any explanation of my decision in the Bakke case beyond the opinion itself. I do suggest that you bear in mind that the Court decides only the specific issues presented in a particular case. There were only two issues in this case: (1) whether the Davis categorized admissions program was valid, and (2) whether, assuming the invalidity of the existing program, race could be a factor in an admissions program -- to be considered, competitively, along with various other factors deemed relevant by the admissions authorities.

These were the only two questions that I addressed in my opinion.

Sincerely,

Dr. Matthew H. Epstein
Professor of Social Science &
Director of Student Affairs
East Campus
Michigan State University
Akers Hall
East Lansing, Michigan 48824
Dear Grif,

As Phil Jordan may have told you, I called to say "good-bye" before Jo and I left for Richmond.

I primarily called to commend you personally on taking a strong affirmative position on the Court's judgment in Bakke. Although the more difficult cases probably lie ahead, I think it was quite important for the Department of Justice to do exactly what was done. There was a good deal of tension and apprehension in the country (perhaps a good deal more than was justified), and this was defused by your action.

I am now settled in my office at the Fourth Circuit Court of Appeals. Jo and I will be in Richmond for most of July and August, returning to Washington Labor Day weekend. We do expect to attend the ABA meeting in New York.

We look forward to seeing you and Mary in the early fall.

As ever,

Attorney General Griffin Bell
Room 1103
Watergate South
2500 Virginia Avenue, N.W.
Washington, D.C. 20037

P.S. I so much appreciate your note of June 30th that just reached me here in Richmond.

Incidentally, I'm glad you are not in jail -- at least not yet!
Dear Henry,

I enclose Justice Stanley Mosk's letter of July 5, requesting that the use of "[sic]" on page 42 of my slip opinion be omitted.

I have written Justice Mosk that I will be glad to honor his request. He does have quite respectable authority supporting the singular use of data.

I would appreciate your being sure that this minor change is made.

I hope all goes well, and -- at long last -- you and your colleagues are having some relief from the dreadful pressure that we imposed on you in June.

Sincerely,

Mr. Henry Putzel, Jr.
Reporter
United States Supreme Court
Supreme Court Building
Washington, D.C. 20543
July 12, 1978

Dear Justice Mosk:

I appreciate your writing me about the use of [sic] in the quotation from your opinion. It was presumptuous of me to include it, and it most certainly will be removed.

I have great respect for your opinions, both in form and substance.

With my thanks for writing, and with best wishes.

Sincerely,

Honorable Stanley Mosk
Supreme Court of California
State Building
San Francisco, California 94102
July 13, 1978

Dear Roger,

I appreciate your note, and am heartened by the knowledge that my position in Harke is nearly identical to yours.

Best wishes.

Sincerely,

Dean Roger C. Cramton
Cornell Law School
Myron Taylor Hall
Ithaca, New York 14853
July 13, 1978

Dear Mr. Blanks:

It was most gracious of you to send me the "profile" from *Time*.

With appreciation and best wishes.

Sincerely,

Mr. Roy M. Blanks
2500 East Grace Street
Richmond, Virginia 23223
William A. MacDonough
BOX 550 • CLEMSON, SOUTH CAROLINA 29631

July 14, 1978

Hon. Lewis Powell
U.S. Supreme Court
Washington D.C.

Dear Lewis:

Having also been a member of the '29A class at Washington & Lee University, I assume that it is in order for me to address you by your first name.

For many years I have been impressed by the progress of your career and I thank you for the many contributions you have made to the legal profession. I was also happy to see you become a member of the Supreme Court.

Recently when I read the attached commentary in Time Magazine, I was reminded of some of the specific actions you have taken, for which I am personally very grateful. I have circled a few that I consider particularly important.

I hope that you will continue to be a major force on the Court for many years to come. I also hope that when W&L holds a reunion for the 50th time for the members of the Class of 29A, I will have an opportunity to greet and thank you.

Cordially

William A. MacDonough

[Signature]
July 14, 1978

Dear John,

I so much appreciate your note about Bakke, enclosing the story in which you are quoted favorably--both as a prophet and a "crackerjack constitutional lawyer."

Best wishes.

Sincerely,

John P. Frank, Esquire
Lewis and Roca
First National Bank Plaza
100 West Washington Street
Phoenix, Arizona 85003
Dear Ed,

Your extremely generous letter of July 5 finally reached me here in Richmond. I so much appreciate your writing.

We see Irving and Helen Kaufman from time to time, and they keep us somewhat up to date on the Laskers. They are great admirers of you and Cynthia. Despite the health problems that have plagued you, Irving states that you have lost none of your keen insight into difficult problems and your zest for living and friends.

I have seen Harvie Wilkinson and Justin Moore since returning to Richmond, and they have briefed me on some of the "doings" at Philip Morris. There seem to be few dull moments.

My best to you and Cynthia.

Sincerely,

Edward Lasker, Esquire
3435 Wilshire Boulevard
28th Floor
Los Angeles, California 90010
Dear Francis,

I so much appreciate your generous longhand note.

I did devote a great deal of effort and thought to Bakke over a period of several months. I am content with the Court's judgment in that case, but appreciate that this area of combined social, political and legal problems will present other difficult cases down the road.

Jo and I are in Richmond for most of July and August, and happy to be here.

Warm best wishes.

Sincerely,

Francis T. Greene, Esquire
California Building
Warrenton, Virginia 22186
Mr. Justice Lewis F. Powell, Jr.
United States Supreme Court
Washington, D.C.

July 15, 1978

Dear Mr. Justice Powell:

I wish to draw your attention to a possible error in word usage in your Bakke opinion. On page 45 of the slip opinion you state: "Physicians serve a heterogenous population." Webster's Third New International Dictionary defines "heterogenous" as "of other origin; not originating within the body." Webster's New Collegiate Dictionary defines the same word as: "originating in an outside source, esp. derived from other species." From the context, it appears that you meant to use the word "heterogeneous," which Webster's Third International defines as "differing in kind," "consisting of dissimilar ingredients," etc.

Your opinion will undoubtedly be quoted by many judges in the future. I therefore hope you will make this correction before the error is perpetuated in other opinions.

Sincerely,

Ann E. Kruse

Ann E. Kruse
July 18, 1978

Dear Mr. Angstadt:

Thank you for your letter of July 4. I am glad that you approve of my Bakke opinion.

As requested, I enclose a photograph.

West best wishes.

Sincerely,

Mr. Edward Z. Angstadt
631 Maury Street
Fredericksburg, VA 22401
July 18, 1978

Dear John,

I so much appreciate your note about the Bakke decision. It was good to hear from you, and I send best wishes. Sincerely,

Reverend John B. Boyd
The First Presbyterian Church
112 South Salisbury Street
Raleigh, North Carolina 27601
Dear Matt:

Thank you for your letter of June 30, enclosing a copy of your "brief" in the Bakke moot court case at Woodberry.

Without reading every sentence, I have scanned your brief enough to know that it is a fine product. Indeed, your three-stage project was a commendable one that provided valuable training.

Responding to your specific question as to the views you expressed on page seven, I would say that your idea of a university's interest in diversity is quite similar to my own. As stated in my opinion, so long as applicants are treated on a competitive and individual basis one's background -- which includes race -- may properly be considered with other relevant factors.

I note that you hope to attend University of Virginia School of Law. It is one of the best. You are off to a splendid start.

Sincerely,

Mr. Matthew C. Patteson, Jr.
c/o Woodberry Forest School
Orange, Virginia 22969
Dear Earl,

Your letter of June 30th was my favorite of all letters I have received about Bakke.

I would have liked it even if you had not quoted me!

I am most appreciative, and look forward to seeing you and Jean in August.

As ever,

Earl F. Morris, Esquire
Porter, Wright, Morris & Arthur
37 West Broad Street
Columbus, Ohio 43215

July 18, 1978
Dear Lou,

I so much appreciate your letter about the Bakke case.

Despite the diversity of our opinions, I do believe we left the way open for development of the law in this area. This, it seems to me, is important.

I note that you refer to your new role as that of "an inferior court judge." We never so characterize district courts. Sometimes the word "lower" is descriptive of the way cases move. But the fact is that the rights of most litigants are resolved by district judges. In my view, a district judge is the single most powerful and influential figure in the federal judiciary.

It is good to have you in that position.

Sincerely,

Dean Louis H. Pollak  
University of Pennsylvania  
The Law School  
3400 Chestnut Street I4  
Philadelphia, Pennsylvania 19104
Dear Tony,

This is a belated note to say that I thought your column, commenting on Bakke, was one of the most sensitive and perceptive pieces that I have seen.

Difficult cases lie ahead, and I hope as we address these -- on a case by case basis -- we can develop a majority consensus.

With best wishes.

Sincerely,

Mr. Anthony Lewis
Editorial Staff
The New York Times
229 West 43rd Street
New York, New York
July 20, 1978

Dear Mr. Carter:

I write to thank you for your most generous letter of June 30th about the Bakke case. I am glad to know that your class did not take exception to the equity of the decision.

I commend you on continuing your teaching, with emphasis on minority pupils with deficient reading skills.

I do not have available a copy of the entire set of opinions -- which covers more than 150 pages. Both the New York Times and the Washington Post printed, on June 29, the most pertinent excerpts from the opinions.

With best wishes.

Sincerely,

Mr. Franklin I. Carter  
3509 Stuart Avenue  
Richmond, Virginia 23221
July 24, 1978

Dear Tom:

I so much appreciate your letter of July 11, enclosing the clipping.

I also was particularly interested in Professor Abernathy's views.

I send best wishes to you and Zoe.

Sincerely,

Dr. Thomas A. Graves, Jr.
President
The College of William and Mary
in Virginia
Williamsburg, Virginia 23185

LFP/lab
July 24, 1978

Dear Bill:

Thank you for your note of July 14 about the Time magazine article.

I was good to hear from you after all these years.

I send best wishes.

Sincerely,

Mr. William A. MacDonough
Box 550
Clemson, South Carolina 29631

LFP/lab
Dear Roland:

It was most thoughtful of you to write, and I am gratified that you approve of my Bakke opinion — at least on the basis of the excerpts in the New York Times.

Despite the diversity of the several opinions, I believe we have provided reasonably clear guidance to universities with respect to admission programs. But, as you would recognize, difficult decisions lie ahead. The social and legal problems created by "affirmative action" programs will continue to tax the fairness and wisdom of all three branches of government.

It was good, as always, to hear from you. I do hope you continue to be as fit and vigorous as you were when we visited together at the Court.

I send warm best wishes.

Sincerely,

Roland L. Redmond, Esquire
Carter, Ledyard & Milburn
2 Wall Street
New York, New York 10005
Re: Bakke

Dear Sam,

The New York Review has sent me an advance copy of its issue of August 17, containing an article by Ronald Dworkin entitled "The Bakke Decision: Did It Decide Anything?"

If you have the opportunity, I think you will be interested in the article. Dworkin is hardly a "fan" of my opinion, and his criticisms are not unanswerable. But it is a thoughtful examination and correctly identifies what the Court did not decide.

If you should find the time, I would be quite interested in your comments on the article.

I am sure, however, that you are fully occupied now with preparations for your professorial duty, but I know Bakke is of special interest to you, and perhaps there will be some time for comment later in the fall.

Sincerely,

Mr. Samuel Estreicher
511 West 113th Street
Apartment 61
New York, New York 10025

bcc: Mr. Robert D. Comfort
Apartment 3608
1500 Locust Street
Philadelphia, PA 19102
The Honorable Lewis F. Powell II  
Chief Justice  
Supreme Court of the United States  
Washington, D. C. 20543

My dear Mr. Justice:

This is an unpardonably long overdue letter. The reasons for its delay are not worthy of detailed explication. They include, however, the daily tribulations of attempting to manage an ambitious university system and a State legislature which more and more like the U.S. Congress, refused to go home.

The Bakke decision and your part in it have been the subject of nationwide praise. Please allow me to add mine. I write, not only as an administrator but an admiring and respectful friend, to say that the decision struck at the very heart of the problem of selection and admissions. If I read it correctly, the Court has asked us to use our own and better judgment on matters which we have too willingly relinquished to "more objective" criteria, i.e., test scores. A much needed revolution for admissions may now be in its earliest stages. I hope that there will be an early opportunity for us to get together and discuss the future of the whole matter—perhaps for dinner in early fall.

Carolyn and I very much regretted missing Lewis III's wedding in June. The complications of multiple commencements and the demanding schedules of teenage daughters made it impossible to make it. We hope he understands.

Hope to see you and Mrs. Powell soon—warmest wishes to you both.

Sincerely,

James B. Holderman

July 28, 1978
Dear Ms. Kruse:

Thank you for your letter of July 15th.

I am referring it to the official Reporter of the Court, Mr. Putzel.

I do appreciate your writing.

Sincerely,

Ms. Ann E. Kruse
1 S. Second Street
Apartment 1-208
Fargo, North Dakota 58102

cc: Mr. Henry Putzel, jr.

Henry: I leave to your good judgment whether the lady is right. I had thought that "heterogeneous" is used frequently and correctly with respect to population, but I have never seriously considered the matter.
July 31, 1978

Dear Mr. Haynes:

I have wanted for some time to thank you for your generous letter of July 7th.

It is good to know that you approve of the Court's decision in Bakke.

I send best wishes.

Sincerely,

Mr. Larry G. J. Haynes
Commercial Graphics
4832 North Broadway
St. Louis, Missouri 63147
August 2, 1978

Dear Jim:

Thank you for your generous letter of July 28.

I am pleased that you agree with the Bakke decision. Having served on university boards, I may have been a bit prejudiced in favor of a large measure of discretion rather than rigid criteria. I think the resolution of the case also was wholly compatible with constitutional standards.

I am afraid that even more difficult cases in this area lie ahead.

We did miss you at Lewis' wedding. It was quite an elegant affair.

My best to you and Carolyn.

Sincerely,

Dr. James B. Holderman
President
University of South Carolina
Columbia, South Carolina 29208

lfp/ss
West Tisbury, Mass.
Aug. 3, 1978

Dear Mr. Justice,

Your letter of July 20 has just reached me here on vacation. You were exceptionally kind to write as you did.

Thank you. And I hope that the consensus you mention does develop. If it does, you will have been in good part responsible.

Best wishes —

Ford
LETTER FROM LORD SCARMAN:

21st August 1978

Dear Judge,

The Bakke case.

I have read, with profound admiration, your opinion in this case. I say this very humbly: for we on this side of the water could not have achieved anything like it. The decision: Yes, I believe we would have reached your conclusion. But our system does not give us the opportunity for the deep and wide-ranging opinions, which are the outstanding feature of the case.

When I ask myself why this is so, I find the answer in the constitutional responsibility placed upon the Supreme Court. The guardian of our constitution is Parliament. We do not look to the judges to monitor our ways of doing things. If they have a go (e.g., the history of our labor law), Parliament reverses, and banishes, them. But I believe change is on its way.

All my, very respectful, congratulations.

Yours,

/s/ Leslie Scarman
Dear [Name],

The [Name of Case]

I have read, with profound admiration, your opinion in this case.

I may have only briefly perused the record of the case, but I could not have envisioned anything less. The decision is

Yes, I believe we would have reached your conclusion. But our system does not give us the opportunity for
two deep and wise opinions.
August 28, 1978

The Honorable Lewis F. Powell, Jr.
Associate Justice of the Supreme Court
Supreme Court of the United States
1 First Street, N.W.
Washington, DC 20543

Dear Justice Powell:

Many interpretations of the Bakke Decision have been publicized and I would like to have the benefit of your views, or those of your colleagues, as it relates to the enclosed "interpretation".

Your cooperation will be appreciated.

Sincerely,

[Signature]

Samuel L. Devine, M.C.

SLD:ebd

Enc.
Dear Friends:

Contrary to our worst fears, the Supreme Court's decision in the controversial Bakke case clearly upholds the principle of affirmative action. This decision did not require public agencies to be "color-blind" and did not disturb previous rulings that required such agencies to take positive steps to remedy the effects of past discrimination against blacks, other minorities, and women. The decision was, to use the words of Benjamin Hooks, "a clear-cut victory for voluntary affirmative action, not only in the field of admissions to schools and universities, but in other civil rights areas as well."

The Bakke decision came just after our Board of Directors secured the services of Dr. Warren Moore, a professor in the School of Social Work, Ohio State University, to conduct a study of Franklin County Government to determine the employment status of minorities, and the extent to which Franklin County Government is in compliance with federal laws that prohibit employment practices that discriminate on the basis of race or sex. This study will focus primarily upon blacks and women and the handicapped of all racial groups as protected classes. Our study commenced on June 21, and we would like for it to go on until December 1978.

As I see it, we in the civil rights movement are now confronted with one overwhelming challenge: We must use the Court's decision as a foundation for advancing authentic affirmative action programs. In the wake of Bakke, we have an unparalleled opportunity to counter the widespread and destructive belief that racial quotas and affirmative action are the same thing. As a result of the Bakke decision, Americans--both black and white--are at last beginning to understand that minorities do not seek "preferential treatment." Quite the contrary, they seek fair treatment.

Now that the Court has ruled on the Bakke case, as supporters of affirmative action programs, I believe that our research project will be most helpful to us as an organization working to improve the civil rights of the people in Franklin County. However, we need your financial support in order to carry out this project. So what I am going to ask is--could you help us in underwriting the expenses of this research project? You have always been more than generous in supporting projects initiated by CACRC, and I felt that you would be glad to make a "plus" pledge at this time for this opportune project.

We will look for your reply in the mail. Thank you for your prompt attention.

Sincerely,

Samuel L. Varner
President
September 4, 1978

Dear Genevieve:

I so much appreciated the note you wrote me earlier in the summer about the Bakke case.

My wife Jo and I spent most of July and August in Richmond, but have now returned to Washington to prepare for our fall Term. I hope we do not have any more Bakke-type cases this Term, although other types of affirmative action are certain to reach us in time and may present even more difficult questions. The problems in this country - indeed in the world - seem at times to be quite beyond mortal man's capacity to resolve.

I am sure you are finding this to be the situation in cases that come before your Court.

I saw Charlie Brietel and Herbert Wechsler in New York for the ABA meeting. I look back on our Crime Commission service as one of the more interesting experiences in my life. We had an exceptionally able group.

I send warm best wishes.

Sincerely,

Hon. Genevieve Blatt
The Grayco Apartments
Harrisburg, Pennsylvania 17101
lfp/ss
September 4, 1978

Dear Paul:

This is a belated "thank you" for your extremely nice letter about my Bakke opinion.

As was quite evident from the several opinions filed, the case was a most perplexing one for all of us. Nor are we yet at the end of the road in this difficult area.

I enjoyed meeting with you and your class. Do come in to see me when you are at the Court.

Sincerely,

Professor Paul Baier
Louisiana State University Law Center
Baton Rouge, Louisiana 70803

lpf/ss
September 4, 1978

Dear Congressman Devine:

Thank you for your note of August 28, inquiring about the Bakke case.

There is a tradition here that we do not comment on decisions. This is probably a wise tradition, as once commenting is commenced, it would be difficult to draw any line.

Moreover, as you know, we actually decide only one case at a time and only the future can tell the scope and ultimate meaning of a precedent.

With best wishes.

Sincerely,

Hon. Samuel L. Devine
Rayburn Building
Washington, D. C. 20515

lfp/ss
Dear Bill:

This is a belated acknowledgment of your note about my opinion in Bakke.

It was a most pleasant surprise to hear from you after all of these years. Thoughts of you brought back fond memories of exciting times and of friends whom I greatly admired.

It has been years since I saw anyone with whom we worked in intelligence in Africa. General Pete Quesada, who had a fighter command there, and later commanded the Ninth Tactical Air Force in Europe lives here and we see the Quesadas with some frequency.

As perhaps you know, General George McDonald died perhaps a dozen years ago, and General Spaatz more recently.

I commend to you a fairly recent biography on Rommel entitled "The Trail of the Fox" by David Irving, an English historian. It is one of the best books on World War II, and particularly the African phase of it that I have read.

If you are ever in Washington, it would give us much pleasure to see you.

Sincerely,

Mr. William Ballard
Miramont-de-Quercy
82190
(Tarn et Garonne)
France

1fp/ass

September 11, 1978
September 13, 1978

Dear Lord Scarman:

It was most gracious of you to write about the Bakke case. I am impressed that you should have read the opinions which I am told will occupy more than 100 pages in our Reports.

Although the similarities in our systems of justice are greater than the dissimilarities, there is a marked difference at the level of constitutional adjudication - as you point out. I believe I was told, perhaps by Whit Seymour, that in your lecture at Columbia last winter you expressed the view (or was it a merely a hope) that Great Britain eventually would adopt a written bill of rights. I have heard fine things about your lecture.

After we met in Atlanta, I was told that during World War II you were an intelligence officer with the RAF in Africa and Europe, and also in on the Ultra secret. This was of special interest to me as I also worked in intelligence with the U.S. Air Force in both of these theaters, and after a period of indoctrination at Bletchley I served as an Ultra officer on General Spaatz's staff. It would be pleasant to "swap yarns" in London or Washington, if we ever have that opportunity.

With appreciation and best wishes.

Sincerely,

The Rt. Hon. Lord Scarman
House of Lords
London, England

1fp/ss
MEMORANDUM TO THE CONFERENCE:

In reviewing the editing of my opinion by Mr. Putzel, I have omitted the "Cf." citation in note 38, p. 30 to Stewart's article. It is not really relevant to the statement in the text.

L.F.P., Jr.
Dear Mr. Justice,

Please forgive me for not having thanked you sooner for your warm letters of July 26 and September 4, as well as your very kind letter to Dean Redlich. I will treasure these notes as mementoes of a singular year.

I write to you on the date of my watershed, i.e., thirtieth birthday. A popular slogan among the young of the 1960's was "Don't Trust Anyone Over 30." I now join the ranks of "the untrustworthy."

I hope everything is going well in the Chambers. Paul tells me that the four clerks are working well together, and that the Powell Chambers remain the envy of the other offices on the Court. That is to be expected.

Life in New York is exciting, if nothing else. Aleta is working as hard as you might imagine, but I admire her ability to maintain a perspective on it all and to find time for some of the other important things in life, such as Michael, the Metropolitan Opera, and, on rare occasion, her husband. When he is not running a fever, our little redhead Munchkin is having a ball with his compatriots and teachers at the Purple Circle Day-Care Center, a parent-run cooperative that we found on the West Side. For my part, I am finding law teaching both stimulating and difficult, but a very solitary experience. I miss very much the camaraderie of our Chambers, the collegiality of the Court's work, and the charge one gets from being in the thick of things.

You asked me to comment on Ronald Dworkin's piece in the August 17 issue of The New York Review.

Mr. Justice Lewis F. Powell, Jr.
Supreme Court of the United States
Washington, D.C. 20543
of Books. You may not be aware that Dworkin holds a joint appointment at NYU and Oxford, and is teaching here this semester. An influential writer in the area of jurisprudence (there is an excellent critique of his jurisprudential work in the December 1977 issue of the New York University Law Review), Dworkin has never struck me as a particularly persuasive commentator on contemporary legal developments. His pieces in The New York Review of Books are often marred by a measure of stridency and analytical imprecision that is not characteristic of his scholarship.

The Bakke piece of August 17 has to be read in light of Dworkin's earlier essay, "Why Bakke has no Case," The N.Y. Rev. of Books (Nov. 10, 1977), p. 11. In Dworkin's view, the Bakke issue is an easy one, as a matter of constitutional principle and morality, because race was used against Alan Bakke not as an expression of "public insult," but because of a rational calculation about the socially most beneficial use of limited resources for medical education." Individual rights to fair treatment, in his view, are not impaired when race is used to render "racial justice" to the victims of a race-conscious society. In essence, Dworkin's position is virtually identical to that of the Brennan-White-Marshall-Blackmun opinion.

The August 17 article criticizes our opinion on two grounds. First, he asserts that our distinction between the Davis program and more flexible race-conscious programs does not reflect any important difference in principle, "which is what a constitutional, as distinct from a political, settlement requires." If race may be used to disadvantage a white applicant, he maintains, "it does not make any difference to [the applicant] in principle whether his race is a constant small handicap in the competition for all places, or no handicap at all in the competition for a slightly smaller number of places." Second, Dworkin argues, the presence or absence of "stigma" is the only sound way of differentiating bad racial classifications from permissible racial distinctions. Educational diversity, by contrast, does not provide an analytically persuasive ground,
as the Court presumably would not condone an admissions policy that penalized Jewish applicants in the interest of promoting heterogeneity.

Dworkin does identify the two major problems with our opinion, but his attack is not unanswerable. His first point assumes that educational diversity is a sufficient justification for the use of race. If so, he is certainly wrong in his assertion that there is no difference, from the standpoint of individual rights, between the two systems. The point about flexible programs, even one that assigns a fixed value to race, is that departure from predetermined policies is possible. For example, a late applicant who is an Einstein may be accepted for a remaining slot even though the school's goal of racial diversity had not been attained. Indeed, Dworkin concedes that a flexible program "will allow the institution to take less than the rough target number of minority applicants when the total group of such applicants is weaker, and more when it is stronger." Moreover, Dworkin downplays the symbolic, educational importance of insisting on the least offensive use of race in admissions decisions. The law lives up to its function when it requires adherence to fundamental values to the maximum extent compatible with what is, hopefully, a short-run recourse to race. Reliance on racial considerations may be a necessary evil, but that does not mean that the law should give way to every type of race-conscious program. Dworkin himself recognizes that [r]eserving a special program for minority applicants -- providing a separate door through which they and only they may enter -- preserves the structure, though of course not the purpose, of classical forms of caste and apartheid systems, and seems to denigrate minority applicants while helping them. Your opinion rightly insists on a rule of "least offensive alternative."

Dworkin's second point entails a frontal attack on the diversity justification. Here, I believe, he is on firmer ground. In our very first conference on the case, I expressed uneasiness with the educational-diversity argument, noting the parallel to President Lowell's remarks on the over-representation of Jews on the Harvard student body of his time. Nevertheless, there is force to the argument that the values of academic freedom, rooted in the First Amendment, permit universities a measure of freedom in furthering educational policy. That zone of autonomy precludes constitutional interference with reasonable educational judgments that race-conscious admissions are necessary to
Mr. Justice Lewis F. Powell, Jr.
September 29, 1978
Page 4

It is important to note that the educational-diversity justification is not open-ended. As our opinion points out, sub-rosa quota systems remain subject to constitutional attack. Moreover, it is at least implicit in our opinion that race or ethnic origin may be used only where necessary to correct a genuine dearth, not to adjust the relative proportions of groups that are amply represented in the student body. The short answer to what might be termed the "Lowell objection" is that an all-black university may use racial criteria to secure the admission of more whites, but Harvard (or Columbia) may not use religious criteria because a student body that is 40% Jewish is "too Jewish." A school's use of an otherwise suspect classification must be justified by a compelling need.

As you can see, I remain as prolix as ever. The widespread expression of satisfaction with your opinion, including the approval of liberal scholars such as former NYU Dean Robert McKay (see enclosed) and Professor Norman Dorsen, Chairman of the Board of the ACLU, is evidence that your opinion is responsive to deeply held values of American society. Judge Friendly's reference to Dred Scott is not far fetched. In many ways, Chief Justice Taney's opinion was impeccably logical. Your opinion, by contrast, was in the Holmesian tradition.

By coincidence, in response to my application for membership in the Association of the Bar of the City of New York, Paul De Witt invited Aleta and me to the dinner and Orison S. Marden Memorial Lecture on October 18. I look forward to seeing you again.

My very best wishes to you and your family.

Sincerely,

P.S. Aleta tells me that she is getting a great kick out of seeing your name in the opinions featured in her casebooks. She sends her love.
October 20, 1978

Dear Bob:

Thank you for yours of October 17 in which you pay your respects to Dworkin. We are in complete accord, as usual.

Perhaps I should have left footnote 34 as we had drafted it before the protest came from one of the Brothers.

Here is a copy of the Richmond Medical Academy speech. Plagiarize it at will! Also enclosed is the text of a speech I give tomorrow in Richmond at the national convention of the English Speaking Union. The Honorable Anne Armstrong is national President. I also spoke at The Association of the Bar of the City of New York Wednesday evening, but my assigned subject - professional responsibility - was too dull to burden you with.

The last sentence in your letter was duly noted by Sally. Since things here at the Court were relatively quiet for about 20 minutes, Sally persuaded me to write the enclosed letter to her favorite football coach.

I saw Sam and Aleta in New York. They looked fine, but I had no opportunity to visit.

Sincerely,

Robert D. Comfort, Esquire
Morgan, Lewis & Bockius
123 Broad Street
Philadelphia, Pennsylvania 19109

1fp/4g
Enc.
October 17, 1978

Justice Lewis F. Powell, Jr.
Supreme Court of United States
Washington, D. C. 20543

Dear Mr. Justice:

I read the Dworkin article this weekend. It certainly does not shed any new light on the issues, being merely a pale reflection of the Brennan position. As I read the article, Dworkin has two major points, both of which were wrestled with in Chambers all last Term:

1) There is no substantial difference between a Davis-type program and a Harvard-type program;

2) By calling diversity a compelling state interest, the door is left open to the reintroduction of the sort of exclusionary quotas that prevailed at some major universities in the early part of this century.

Dworkin himself acknowledges that there is a vast symbolic difference between Davis and Harvard. Your opinion highlights the importance of this difference in Footnote 53. Moreover, Dworkin loses sight of the requirement, where strict scrutiny is applied, that the least intrusive means be used. As the opinion demonstrates at some length, a Harvard-type plan is less intrusive than the system utilized at Davis. At Davis, if Albert Einstein had applied for admission at a time when all seats were filled except for those set aside for the special admissions program, he would not have had an opportunity to compete, simply because of his race. A flexible program, which considers each applicant individually and which does not restrict the number of seats for which any person can compete, could take account of Einstein's special characteristics.
As for the argument concerning the level of scrutiny, Footnote 34 of your opinion points out that the test applied by the Brennan - White - Marshall - Blackmun opinion is far more malleable than the test applied in your opinion. (As you will recall, that footnote at one time contained a much more pointed demonstration of the malleability of the Brennan test). Under strict scrutiny, race and ethnic background could never be used in a negative fashion, i.e., a university could not target Jews and decide that because their numbers were too great they, as a single group, would have to bear all of the burdens of increasing representation of other groups. Instead, individuals with backgrounds underrepresented in the school would be given additional credit so that, other things being equal, they would win out over any other individuals whose characteristics were amply represented already. As your opinion points out, again at some length, this permits each applicant to be viewed as an individual, with no blanket exclusions because race or ethnic background.

The Brennan test, on the other hand, would permit the university, in effect, to impose an overall ceiling on a number of any given group simply by issuing a press release declaring that Iowa Methodists had been excluded from the school in the past and that henceforth a particular number of seats would be reserved for them at the expense of whatever group is targeted. Dworkin blithely assured us that the "four justices who voted to uphold the Davis program as constitutional would have no trouble distinguishing these flexible programs that count being Jewish as a handicap or being white as a beneficial factor." (P. 24.) For someone who is uncomfortable with the "subjectivity" of the standard set forth in your opinion, he places a great deal of faith in the judgment and goodwill of the individual Justices. He neatly skips over the question treated in the first part of your opinion: how do we identify the groups to be preferred, either in terms of judicial scrutiny, or by the school?

The two problems with which Dworkin deals in his article are the ones that made Bakke such an unremittingly hard case. It is quite easy to spot them as the issues. It is another matter to shed some light on their proper resolution. Both your test and Justice Brennan's are open to bad faith
manipulation, of course, but to rank yours as more subjective seems silly. By denying the complexity of the problems, and by fervently attempting to be on what he considers to be the "moral" side of this issue, Dworkin has failed to give off much heat, let alone light.

Enclosed is a short piece by Judge Adams of the Third Circuit concerning his recent trip to India. There's a mention of our favorite case toward the end of the piece.

Could I trouble you to send me a copy of the speech you made last year to the Richmond Medical Society? I have been asked to give a short talk about the Supreme Court to the Rotary group in my hometown, and I would like to be able to relate the anecdote concerning Justice Field and his California feud.

Also, please relay to Sally the following message, which I was given yesterday in South Philadelphia: "The Eagles have landed. Signed, Vince Papale."

Sincerely,

Robert D. Comfort

Enclosure
Hon. Lewis Powell  
Associate Justice  
Supreme Court  
Washington, D.C.

Honorable Sir:

My mother, Doris L. Sassower, mentioned to me that last week, at the Orison Marden lecture in New York, she gave you a copy of The Independent's special issue on the Bakke decision.

I am writing this note to assure you that our newsweekly has a firm policy of equal access to the media. We would be honored by your reaction, either on or off the record, to our study's conclusion that Harvard's undergraduate admissions serves as an unsatisfactory model for affirmative action policies of other institutions.

I am enclosing an extra copy of The Independent for your convenience. In any case, I hope you enjoyed reading the issue.

Most respectfully,

Carey Sassower  
Associate Editor

Enclosure

Mailing address: 118 Trowbridge Street  
Cambridge, MA 02138  
(617) 868-3505
October 30, 1978

Dear Mr. Sassower:

Thank you for your courtesy in writing.

Although I am happy to have your issue on Bakke that your mother was kind enough to give me, I will offer no comments on the Court's decision or my opinion in that case. The tradition here is to rely on the published opinions, without subsequent explanation except perhaps in some future case.

With best wishes.

Sincerely,

Mr. Carey Sassower
Associate Editor
The Harvard Independent
118 Trowbridge Street
Cambridge, Massachusetts 02138

lfp/ss
Dear Lewis,

Dec. 29, 1978

You will be interested in my comments on the cartoon I got off your chest during the break in the piece just published at p. 31 of the journal. I take no responsibility for the cartoons!

With warm regards,

[Signature]

Gerald Guntner
William Nelson Cromwell Professor of Law
December 11, 1978

Dear Bob and Sam:

The enclosed xerox copy of an interview, published in the Stanford Magazine (fall issue), with Professor Gunther will be of interest.

Erwin Griswold also has said publicly, in a recent lecture, that he supports my Bakke opinion.

It has been a little surprising to read that colleges and universities, both at graduate and undergraduate levels, seem confused - and even upset - by the decision of the Court. My guess is that the negative reaction is probably attributable to a desire not to be subject to any constraints at all. A flat-out quota system is easier to administer than one that requires the exercise of a more exacting and fairer judgment with respect to applicants.

It is especially interesting to note expressions of concern emanating from that obscure institution that graduated one Robert Comfort. After all, the Court approved - by name - that institution's plan!

I know that Jo would join me in sending to you, and to your "better halves" our greetings and special best wishes for 1979.

As ever,

Robert D. Comfort, Esquire
Samuel Estreicher, Esquire

lfp/as
Dec. 18, 1978

Dear Justice Powell,

Thank you for the reprint of the Guttmacher piece. I agree with him that the press may be "crying wolf" a bit too often for its own good. The reluctance of a majority of the Court to accede to every requested extension of doctrine is not tantamount to a repudiation of our constitutional liberties.

Enclosed you will find accounts of this faculty's response to Bakke.

Aleeta, Michael and I send our love and best wishes for the new season. Sam
Justice Lewis F. Powell, Jr.
U.S. Supreme Court Building
1 1st St., N.E.
Washington, DC 20543

Dear Mr. Justice Powell:

Aware of the voluminous reading your office makes incumbent upon you, I have hesitated to contribute to it. Your decision in the Alan Bakke case distressed me as it did many Americans. As I, and I imagine you expected, the absence of clarity in that action has yielded further litigation. You now have before you a case relating to employment and perhaps others on the issue of "reverse discrimination". Since you will be reviewing this issue again, I have decided to write.

My problems with the court's initial decision can be briefly summarized. First as I have indicated, it was so narrow and unclear that it will necessarily encourage other members of the majority to try their luck. Since the financial means of the majority in the aggregate exceed those of the minority, the former can afford to litigate as long as the issue remains unresolved and thereby cast doubt upon any positive action. In the absence of a clear response to the issue, your action has encouraged litigation and so delayed and increased the cost of justice for the minority.

Secondly, and perhaps most disturbing, the court's judgment has shifted the focus of affirmative action from the moral recognition of injustice and an attempt to remedy it, to the relatively limited educational goal of racial or geographical balance in class make-up. To perceive the issue in terms of institutional predilection (not all educational institutions are or should be concerned for such balance on educational grounds) rather than the moral imperative to correct a serious fault in our society trivializes a crucial issue in public policy to a crippling degree. Only those institutions whose moral commitment out runs the courts will even be interested in availing themselves of the courts limited permission for action.

Thirdly, the method proposed to address the issue of minority enrollment smacks of classism and reinforces the trivializing effect of the principle on the basis of which race is permitted to affect academic admissions. This is
so not because Harvard is held up as the model, but because you have removed the activity from objective review and public scrutiny and placed it solely in the hands of those who run the institutions which in the past have conspired or acquiesced in the exclusion of minorities. You tell us that public quotas publicly verified are forbidden but subjective quotas, set by the institutions and subject only to their internal monitoring as well as determination, are permissible.

In reaching your decision it seems to me that the court has missed several issues I hope you will consider before you speak collectively on this matter again. At the risk of trying your patience I have enclosed copies of three articles which in different ways review the Bakke issue in particular, but affirmative action and "reverse discrimination" as well. They are all brief as you can see but, I think you will find them provocative and useful. The article on equality and justice is, I think, particularly germane at this point. Much has been written on this issue. You could not read it all. I hope you will find it possible to peruse the enclosed.

Very sincerely,

Warner R. Traynham
Dean

WRT/dlp
Enclosures

cc: Associate Supreme Court Justices
The charge of reverse discrimination alleges that a switch has taken place in American life. The laws and institutions that once permitted or even actively fostered a limited minority access to the goods and opportunities of society now limit the majority racial community instead. Whites, the doctrine asserts, are now the victims of "reverse racism." Even if partially true, this is a large and ugly claim considering the magnitude of the structures of segregation and discrimination in this country, and their psychological, social and economic impact on the traditional victims. Indeed because of its size some have dismissed the charge out of hand as an absurd impossibility. It asserts that the goal of equality fought for during the civil rights movement has been replaced by a version of the motto of Animal Farm. "While all people are equal, minorities are more equal than others." It seems to assume a power and a transformation in American life of which most minority people are unconscious.

But such an observation does not adequately answer the charge. The issue is one which we will hear more and more about. It is the cry of those who feel the pinch of social change, and it may not be easily dismissed.

A friend told me the story of a black mother and child who entered the courthouse of a Southern town. The child walked over to the water fountain to take a drink. The mother watched, smiling, shook her head, and commented that most of her life she would not have dared drink from that formerly white fountain. "Oh, mother," the child said looking at her in disbelief. Society's memory for unpleasant facts is short. Even the children of those who dare drink from that formerly white fountain. The struggle is only masked and more subtle.

The battle is not over. The minorities are not out of the woods, the war has not been won. But with every gain the territory is more hotly contested. Because the troops are not in the streets, we deceive ourselves that there is peace. The struggle is only masked and more subtle. What I would like to do here is to look first at the Bakke case which has brought this matter to a head and then turn to the larger issue of reverse discrimination itself. Hopefully the former will illuminate the latter.

While the focus of this issue is a case relating to higher education, its potential impact is much broader and includes the realm of employment and housing as well. Affirmative action, in some sense, is on trial. The assumption that more or less objective scores prove he has no case is a large and perhaps impossible claim considering the magnitude of the structures of segregation and discrimination in this country, and their psychological, social and economic impact on the traditional victims.

John Kemeny, in an article in the current issue of Alumni Magazine, eloquently argues the case against objective tests as the sole basis for admissions. He says, "Those who forget.

Bakke may have no right to sue, but sue he has. Allen Bakke is a 37 year old white American male of Scandinavian extraction, trained and working as a civil engineer. In 1972 he applied to two medical schools and was rejected. In 1973 he applied to eleven— including the University of California's School at Davis. All eleven rejected him. In 1974 he again applied to Davis. One of almost 3000 people seeking admission to a class of 100, he was again rejected. Bakke discovered that the Medical School at Davis had a special admissions program designed to promote minority enrollment and that it reserved 16 of the 100 places in the entering class for this purpose. He also discovered that he probably outranked those 16 applicants in his objective scores. He clearly had scores on the Medical College Admissions Test better than the average of accepted applicants at Davis and better than any of the 16 accepted through the special program. He also had high grades and an excellent internal rating score from the admissions reviewers, yet he had not been admitted, while 16 people who scored lower across the board but happened to be either black, Chicano or Asian American, were. Bakke concluded he had been denied his constitutional rights and took the matter to the court. The trial court found for him as did the state supreme court on appeal. The grounds—that he had been discriminated against as a result of the preferential program for minorities.

As Alfred F. Risch observes, Davis was not the only medical school to turn Bakke down. He was rejected by several other medical schools as well. The number of minority members admitted to those schools the years he applied range from none up to 16% at Davis. Risch speculates that it was Bakke's age which disqualified him. He was, on the average, ten to eleven years younger than the typical applicant. Medical schools generally see their graduates as investments and tend to prefer students who are likely to have longer careers. To admit Bakke today to Davis as the California state supreme court required, would only mean that someone else, presumably as competent and younger, would get bumped. There are only 100 slots and almost 30 times as many applicants. Bakke's case rests on the assumption that more or less objective scores prove he was a better qualified applicant than the 16 minority matriculants.
among other things, that schools have particular purposes and the purpose of one will not be that of another. To require all academic institutions to admit students on the basis of their scores alone would deprive the institution of significant control over those purposes and its character, as well as the educational quality of its life. Certainly one obvious value of seeking a racial or an economic or sexual mix in a student body is to increase the number of perspectives to which they are exposed and so improve the quality of education that derives from that interaction. A whole range of facts enter into the process of admissions having to do with character, background, special competencies and interests, etc. This discretionary process was not questioned constitutionally until race became an issue. In reality, as John Kemeny puts it, objective tests may help you in identifying the student who will fail here or who will find Dartmouth a struggle. They cannot predict distinction, particularly when one comes to minorities. Since we know that blacks and Native Americans, for instance, have been disadvantaged in one way and by American society, one would expect that fact to show up on the scores designed to test "normative aptitudes." Such tests, therefore, tend to be unreliable guides. Objective tests have become the entering point for determining who is to be admitted—not the end. When one comes to medical schools the object is to produce good doctors and no one has yet demonstrated a correlation between one's MCAT scores and success in one's chosen career.

One covert implication in all this talk about objective scores is that the 16 minority applicants admitted to Davis were unqualified. Obviously no one wishes to be treated by an incompetent doctor and to produce one is no benefit to society. It will be worthwhile to note that Davis admitted 2.7% of the whites and 3.4% of its minority applicants the first year the Bakke applied. The next year 2.7% of the whites and 2.5% of the minority applicants were admitted. Davis was not taking just anyone in either pool. A correlate of the first assumption is that the University had no right to establish a policy, for whatever reasons, which limited a person's access to a medical education on the basis of race and color, etc. This is the institution's right to take other matters into consideration beyond objective tests the issue has already become cloudy.

Dartmouth College considers race as one of its criteria for admission. More than that it has a special recruitment program to discover qualified black and Native American candidates. Since that program has been in place it has resulted in a significant increase in black enrollment. While that enrollment has never reached the quota requirement, it is significant. While there were no blacks or chicanos enrolled, between 1970 and 1974, after the institution of the special admissions program, 57 blacks and chicanos entered under it. But only 7 entered under the regular admissions program.

Why did these two institutions undertake special efforts to attempt to attract minority students? Presumably because they saw a significant social purpose to be served. The purpose of these programs is to remedy a past wrong, the effects of which are still with us and to utilize the route of education to help bring excluded minorities into the mainstream of American life. With respect to higher education, between 1965 and the present, black college and graduate school enrollments have actually declined from 8.3% to 7.1% of the total. Blacks make up roughly 12% of the nation. With respect to medicine, in 1972, the first year Mr. Bakke applied to a medical school, only 1.7% of all the applicants in the country were black. With respect to health in the black community; infant mortality rate for blacks is almost double the white rate; maternal mortality is three times that of whites; and the life expectancy for blacks is substantially lower than that for whites. Now it has been shown that minority professionals tend to practice in minority areas and white in white areas. So one could argue that the education of minority doctors is the most direct way to affect the serious health problems of minority communities.

One could also argue that such a concern is a serious and appropriate social purpose. It is clear in the case of both institutions mentioned that they made little or no significant impact on this need for minority education until they deliberately turned their attention to it and set about to change the past performance by going after results. This "affirmative action" is what is at issue. Because of it, Mr. Bakke believes he was discriminated against. Certainly because of the special admissions program, 16 places were not available for white applicants. Since Dartmouth does not deal with specific figures, it would be much harder to substantiate such a claim against it, but it could quite conceivably be made.

The issue is whether the Regents of the University of California have the right to establish a policy which, while increasing minority access to medical education, necessarily limits access to that same education for some members of the majority who, by some standards at least, are more qualified. As a matter of fact if one takes the period in which Allen Bakke was trying to get into medical school, and looks at admissions, an interesting discovery is made. During the period from 1968 to 1970, the number of minority admissions to medical schools around the country excluding the two black medical schools, increased from 131 to 1,187. Apparently, 1,076 whites were bumped as a result. In fact, however, white enrollment during the same period, rose from 9,562 to 14,213. That fact, of course, reflects an increase in the number of medical schools and therefore of available places. An expanding market can better accommodate increased minority participation. As we see, the method is complained of even in that context.

Central to the issue of the Bakke case is the question of whether the Regents of the University of California have the right to establish a policy which, while increasing minority access to medical education, necessarily limits access to that same education for some members of the majority who, by some standards at least, are more qualified. As a matter of fact if one takes the period in which Allen Bakke was trying to get into medical school, and looks at admissions, an interesting discovery is made. During the period from 1968 to 1970, the number of minority admissions to medical schools around the country excluding the two black medical schools, increased from 131 to 1,187. Apparently, 1,076 whites were bumped as a result. In fact, however, white enrollment during the same period, rose from 9,562 to 14,213. That fact, of course, reflects an increase in the number of medical schools and therefore of available places. An expanding market can better accommodate increased minority participation. As we see, the method is complained of even in that context.

Central to the issue of the Bakke case is the question of whether the Regents of the University of California have the right to establish a policy which, while increasing minority access to medical education, necessarily limits access to that same education for some members of the majority who, by some standards at least, are more qualified. As a matter of fact if one takes the period in which Allen Bakke was trying to get into medical school, and looks at admissions, an interesting discovery is made. During the period from 1968 to 1970, the number of minority admissions to medical schools around the country excluding the two black medical schools, increased from 131 to 1,187. Apparently, 1,076 whites were bumped as a result. In fact, however, white enrollment during the same period, rose from 9,562 to 14,213. That fact, of course, reflects an increase in the number of medical schools and therefore of available places. An expanding market can better accommodate increased minority participation. As we see, the method is complained of even in that context.

Central to the issue of the Bakke case is the question of whether the Regents of the University of California have the right to establish a policy which, while increasing minority access to medical education, necessarily limits access to that same education for some members of the majority who, by some standards at least, are more qualified. As a matter of fact if one takes the period in which Allen Bakke was trying to get into medical school, and looks at admissions, an interesting discovery is made. During the period from 1968 to 1970, the number of minority admissions to medical schools around the country excluding the two black medical schools, increased from 131 to 1,187. Apparently, 1,076 whites were bumped as a result. In fact, however, white enrollment during the same period, rose from 9,562 to 14,213. That fact, of course, reflects an increase in the number of medical schools and therefore of available places. An expanding market can better accommodate increased minority participation. As we see, the method is complained of even in that context.

Central to the issue of the Bakke case is the question of whether the Regents of the University of California have the right to establish a policy which, while increasing minority access to medical education, necessarily limits access to that same education for some members of the majority who, by some standards at least, are more qualified. As a matter of fact if one takes the period in which Allen Bakke was trying to get into medical school, and looks at admissions, an interesting discovery is made. During the period from 1968 to 1970, the number of minority admissions to medical schools around the country excluding the two black medical schools, increased from 131 to 1,187. Apparently, 1,076 whites were bumped as a result. In fact, however, white enrollment during the same period, rose from 9,562 to 14,213. That fact, of course, reflects an increase in the number of medical schools and therefore of available places. An expanding market can better accommodate increased minority participation. As we see, the method is complained of even in that context.
there is no evident reason to believe that the school must admit incompetents in order to meet what it calls a goal. Is it an upper limit? It would certainly look like it, if those 16 minority persons were the only ones ever admitted. However, that is not the case. While the number is small, there have been 7 minority candidates admitted to Davis under the regular admissions program. Certainly enough to demonstrate that the goal does not establish a ceiling. Despite the precise number, the policy does look more like a goal than a quota, as defined above.

This issue is important for two reasons. Some have said fixed numbers, either quotas or goals, require that schools admit and employers hire the unqualified. Fixed quotas may logically require that. Clearly numerical goals do not. Secondly, some have asserted that quotas are abhorrent because they can be used to limit free access as well as upgrade minority participation. Jews, who tend to be represented in education out of proportion to their numbers in the general society, were often blocked in the past by the use of quotas as limits. What that proves is that tools are morally neutral and may be used for good or evil ends. I make this point because goals may get called quotas and vice versa. The issue is not first the instrumentality, but first the purpose the instrumentality serves, the ultimate goal, and secondly the appropriateness of the instrumentality.

The issue of quotas is like the issue of busing. There are fears attached to both—some legitimate. Unfortunately, for many the greatest fear is that the instrumentality will indeed affect its goal. In rural areas, buses were used for generations to support school segregation. Because housing patterns in urban areas are different, buses were not needed to segregate in cities. No one complained about their use to support segregation in rural areas. The complaints arose when they were utilized to reverse the pattern of discrimination in cities. Then buses, as such, were perceived as the problem. Goals or quotas like buses however, are neutral—the purposes for which they may be used are not.

The real question is, what do the American people desire to do about the racial problems which have plagued this nation since its inception? If current Americans accept the bounty their forefathers reserved for them, they must by the same token accept responsibility for the cost of undoing their wrongs, especially when in large measure the former was built on the latter. The fact is, since emancipation America has been ambivalent on the subject and that fact, despite the 60's, clearly has not changed. Each small step is reckoned enough. Those opposed to true equality declare it to be achieved after each battle while they continue the war. After the Civil War a hand full of people were allowed to choose their former masters and the matter was declared solved because they were, after all, no longer slaves. The Plessy vs. Ferguson doctrine was intended to resolve the succeeding racial troubles by establishing separate but equal societies. Despite the pronouncement, no national attempt was ever made to enforce the equality of that separation. It has been a dance, two steps forward and one back, since the beginning, and today is no different. We are once again witnessing the erosion of the political gains of the 60's in the face of the charge of reverse discrimination. We are, as usual, witness to the old reality under a new name—the Bakke-lash. It is the predictable reaction, when the bill is presented for the latest round of rhetoric in which we have indulged. It is the city of Hamlin refusing to pay the piper for ridding it of rats. As in that instance it flirts with further social upheaval.

To assert that equality of opportunity exists simply because the structures of de jure segregation have been thrown down when the effects of their 100 year weight still with us and when de facto segregation has hardly been addressed, is nonsensical.

Yes a black can walk into any restaurant and vote in any election for which he or she is qualified, but 25 years after court action on the issue most blacks go to segregated public schools encouraged by de facto segregation in housing. The unemployment rate for blacks stands consistently at twice that of whites, and that of black youths at ca. 45%. Bakke continue to earn significantly less than whites with the same educational background and achievements. The average black family income moved in 1965 from 54% of the average white family income to 62% in 1976, demonstrating something of the effect of affirmative action, the economy, and the distance still to be traveled.

I have already noted that black colleges and graduate school enrollments have declined from 8.3% to 7.1% of the national total since 1965. It is worth noting that "admissions to medical school, relevant to the Bakke case, were 91% while in 1976—that hardly looks like reverse discrimination. The assumption of those who say we have equal opportunity, and that the constitution is 'color blind,' is, to use Mr. Justice Berger's phrase 'that we are writing on a clean slate' while, as even that conservative jurist observed, we are not. The options are not equal opportunity for all or reverse discrimination against whites. The options are, continued de facto discrimination against minorities or a policy of affirmative action which seeks to overcome the results of past discrimination an equality of opportunity may exist in the future. It is a temporary social policy, the cost of which is the present inconveniencing of some of the majority group. The alternative is continued discrimination. Mr. Bakke objects because the Medical School at Davis formally reserves 16 out of 100 spaces for minority students in order to address their virtual exclusion from medicine. The alternative, of course, is de facto segregation, which has and would reserve virtually all those spaces for white candidates. Doubless the cost to Mr. Bakke is real. But we are aware that many of the Bakke who applied to medical school and who were qualified by any standard, were not admitted because of the competition. Indeed in Mr. Bakke's case, Davis accepted white students who in several particulars scored below him but he did not choose to name them in his suit.

Beyond this, medical schools, like many such institutions, have a responsibility to the society as well as to the individual. The question is, is that responsibility better discharged by seeking to redress the exclusion of minorities, in this case from medicine, by the system of discrimination which limits their educational and cultural possibility, or is it better discharged by doing business as usual? The fact is, one cannot change society without cost to someone. You cannot alter the distribution of finite resources without denying something to some of those who because of their position, have come to expect it would be theirs. So long as our economy was expanding that cost could be absorbed in a reduced increase for some. In a static economy the price is more obvious. The members of minority groups, because they were members of minority groups, and for no other reason, have paid tremendous costs for the present organization of society and the benefits of the majority. Will they be required to continue to pay these costs indefinitely or will their situation be addressed as what is by comparison minimal costs to members of the majority group?
There is no middle ground. There are no other options. Our policy must be to protect majority privilege by continued discrimination against minorities or "reverse discrimination," which is in reality the redistribution of finite resources. If you had it all and are deprived of a little, it will seem like a great loss. The question is, is your loss significant as the gain of those who have had none and now see the hope of having some? The point is not reparation, the paying back of old losses, that isn't even an issue. We are talking about the present.

Unless one believes in some form of inherent racial inferiority, mental or cultural, the exclusion of minorities from full participation in society must be attributed to effects of past and present discrimination. 'If you break a man's leg, you ought not to be surprised if he limps.' And to stand him at the starting line with a man with two sound legs and call it a fair race is a travesty. One does not play a serious game of golf like that. Let alone the game of life. One must treat the leg and adjust for it until it is healed. The only way one can seriously assert that there is equality of opportunity in America is by some, if not equality, comparability of results. As with that leg, we are, in affirmative action programs, discussing short adjustments in order to enable long term performance. If we are to have equal opportunity in the future we must have affirmative action now. The options as I have said, are not to be equal or discriminatory. The options are to compensate for the results of discrimination at a marginal cost to the majority or to continue its effects for the minority and effectively, the thing itself. The claim of reverse discrimination is in fact an argument for the status quo. Most of those who argue for it, also argued for the status quo ante. We have spoken about voluntary affirmative action programs. In one sense, of course, there are such things. The affirmative action concept was adopted because the issue was pressured into adopting it. Many other organizations and institutions opted for it in the face of this very real pressure or in light of the heightened consciousness which resulted from the agitation around it. Often the intention was to help. These complaints about the red tape involved and the slippage already seen in these programs in education and employment and in governmental inaction, demonstrate the half-hearted commitment present in the best of times. And these are certainly not the best for affirmative action.

In the light of this kind of reality, it is crazy to talk about affirmative action, as some wish to do, without recourse to numbers. I hold no brief for quotas which limit numbers for any group, although quotas are seldom met for minorities unless they are ridiculously low. I have opposed the College's policy on women because it limits their admission. But numerical goals are essential. Without them there would never be any agreement on what affirmative action was. Institutions would be encouraged in their absence to do what too many do now: employ the status quo merely through the motions. Further, there would never be any way to evaluate the performance. As I have said, in a society which has and continues to discriminate, the only way to demonstrate equality of opportunity is by at least comparability of results. The requirement that one of the "spoilers" must be a way to gauge them. The intention is not to limit access for others, it is to guarantee access for the systematically excluded. If one could assume good faith on the part of institutions and organizations in our society, one would still have to reckon with ignorance which an affirmative action program often dispels with respect to "qualified applicants or discriminating definitions of "qualifications." If one could assume good faith and wisdom, we would not need numerical goals but notions would we need affirmative action programs. But if we had had good faith and wisdom, we would never have had slavery, segregation, or discrimination. It is no good telling the oppressed "trust us, we'll do all right by you." That is not even the way democracy is supposed to work. It is certainly not the way any democracy I have ever been exposed to has ever worked. Those who cry reverse discrimination say that the constitution is "color blind." The core issue, I believe, is the broad one of public policy, not constitutional law, but even if one believed otherwise, it is ironic that the Bakke case was brought under the fourteenth amendment, passed precisely because the constitution is not "color blind." It was passed to protect the rights of blacks and guarantee them an equal place in society. It would be a reversal if it were now used to deny them and other disadvantaged groups that same guarantee.

The phrase "color blind" has come to be regarded by most in our society as representing a good. That this is so is peculiar. In normal life, color blindness is a disadvantage. Yet in law or in social intercourse it is thought to be a virtue. It is not. It is not that we see color that is the problem, it is that we make serious judgments on the basis of color which color or race will not justify. By the same token the word, "discriminate," has gotten a bad name in social intercourse, for equally simplistic reasons. We all discriminate. That is, we make judgments between people as a jury must discriminate between the guilty and the innocent. To discriminate means to differentiate or to recognize differences that have real or appropriate bearing upon one's actions. The problem arises when the action is based on irrelevant or inaccurate notions or prejudices. If "reverse discrimination" means that white people are now, because of irrelevant or inaccurate notions or prejudices, disadvantaged in society in the same way that minorities have been, you will never demonstrate it unless you can convince yourself and your auditors that in an orgy of ravenous masochism that majority has turned to devour itself. If reverse discrimination means that instead of judging people on a spurious basis and disvaluing them, we are now recognizing the differences in treatment that have put them at a disadvantage and are trying to remedy this, then perhaps there is such a thing. We shall have to see. Though somehow I doubt that that is quite what the coiner of the term had in mind.

Warren B. Traysham
Dean, Tucker Foundation

FOOTNOTES
5. Ibid, p. 38.
8. Ibid, p. 25.
even dozen words which gave limited 

"merit" to both sides. The decision was as -

tabled by some as impossibly vague and 

confusing, with the only clear conse-

quence a decade or more of further litiga-

tion in tortured pursuit of an admissions 

formula that would be consistent with the 

Court's ruling. It was assailed by others 

who feel that for the present only through 

explicit reservation of places—"quotas"— 

can there be real progress toward racial 

equality and justice in a society that is still 

predominantly racist and class-bound. 

Although its precise legal effect on other 

individuals and cases lies in the future, the 

Bakke decision has already had a major 

symbolic impact. The Court's unanimous 

1978 decision, in *Bakke v. Board of Edu-

cation*, which held that racially separate 
education could not be equal education, 

was an enormously powerful symbol of 
national commitment to equality. In the 

same way, we believe that the Bakke deci-

sion is a symbol of retreat from the 1960's 

communication to racial equality and social 

justice. This symbolic shift will be re-

flected in the weakening or the abandon-

ment of thousands of voluntary efforts and 

in the narrowing or restriction of thou-

sands of "legal" but "controversial" af-


**Perceptions of the Issues**

The narrow legal issues turned on 

Bakke's argument that the University of 

California at Davis had deprived him "equal 

protection under the law" by setting aside 

for minorities sixteen of the one hundred 

places in the first-year medical school 

class, thereby denying him an "equal" 

chance of admission. In opposition, the 

University of California argued that with-

out a "quota" system for race, or some 

other equally strong method of ensuring 

admission to members of racial minori-

ties, it would be impossible to redress the 

long-standing pattern of discrimination 

against such minorities in the United 

States, to gain a diverse class in medical 
education, and to serve the medical needs 
of many black, Hispanic, Native Ameri-
can, and other communities in the United 

States. 

But public perception of the Bakke de-

cision goes far beyond these narrow legal 

issues. The public's understanding of the 

issues included the perception that Bakke 

was "better qualified" for medical school 
admission than black applicants who were 

actually accepted and as a result Bakke 

had been the victim of "reverse discrimi-
nation." A large part of the public believes 

that the Bakke decision means that "indi-

vidual merit" should be the only test for 
admission into medical school. The under-

pinning of this belief, a profoundly Amer-

ican idea of what is fair, is the feeling that 
in the American system neither a "merit-
ious" individual black nor a "meritori-

ous" white should be discriminated 

against. 

This may indeed be a reasonable posi-

tion in a truly democratic society in which 

the criteria for "merit" are themselves not 

predetermined by racial, sexual, or social 
class factors, a society in which the selec-

tion criteria are related to the desired outcome (in 

this case good doctors for everyone in the 

society), and a society in which there has 

not been a persistent history of discrimi-
nation against entire groups on the basis 
of race, gender, or class. As four of the 

Justices pointed out, our society has been 

and remains racist, which raises questions 

about criteria for "merit" in general. 

**Criteria for Medical School Admission**

In our field, medical education, the 

problem gets even deeper. The criteria 

that are now employed to select medical 

students have never been shown to bear 

any precise relationship to the quality or 
type of medical practice. There is even
Despite the public investment, admissions are skewed. The median income of the families of medical students is $28,000 per year, exactly twice the national median income. The poorest 36 percent of families in the United States manage to place their children in only 12 percent of the medical school slots, while the richest 12 percent fill 60 percent of the places. Admissions to medical school in short, are "sold" by social class and therefore largely by race.

"The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are accorded the same protection, then it is not equal.

—Justice Powell

We are not referring to the recently revealed instances in which medical school admissions committees for years were making decisions on the basis of race, sex, or the names of applicants. Nor did the court directly engage one other central question—the social meaning of medical school training. In medical school admission a reward given for individual "merit" in the sense of high grades or test scores, or even a reward for overcoming educational or other handicaps? Or is medical school admission part of an attempt to deal with social problems—on the one hand the supply of doctors of sufficient number, diversity, and quality to meet the medical needs of a diverse and, in many instances, poorly served population, and on the other hand the educational and advancement needs of disadvantaged minority groups?

Medical schools are indeed intended to solve social problems rather than simply to reward the "brightest" in the society. For decades the production and distribution of physicians has been the focus of concern. We extended discussion and generous financial support by the executive and legislative branches of both federal and state governments. As a result, most of the cost of medical education in both public and private schools is paid by public funds rather than by individual tuition.

The Hastings Center
Societal Discrimination: Beyond Racial Prejudice

By expressing the social purpose of medical education to the disadvantages broader concern with equity, Justice Brennan, Marshall, White, and Blackmun interpreted the central meaning of the Court's decision to be that "Governments may take race into account... to remedy disadvantages cast on minorities by past racial prejudice, at least where appropriate findings have been made by judicial, legislative, or administrative bodies with competence to act in this area." But this statement is doubly hedged: even where there is clear evidence of past discrimination it says "may," not "must." This seems to imply that social programs or institutions bear no social responsibility for redress of society's pattern of discrimination. By extension that leaves none of us specifically responsible for the redress of racial injustices that have for centuries oppressed blacks and other racial minorities and unfairly benefited whites. The Court, as we read it, relieves educational institutions (and the rest of us) of the obligation to act in order to redress the effects of past discrimination. We may so act, but we don't have to; and if we do try, we will (because of the symbolic, not the purpose of a Court's decision) have fierce opposition.

After Bakke, the critical facts remain. Only 2 or 3 percent of the nation's doctors are black, while over 12 percent of the nation's people are black. The proportion of blacks in first-year medical school classes has risen from 3 percent in 1968, in part because of "affirmative action" programs, but it has risen to only 7 percent and actually fell from a high of 7.5 percent in 1974 to 6.7 percent in 1976. In the foreseeable future most of this nation's blacks—and Hispanic and Native American—citizens who in our view have the ability to become good physicians will never find the role models and the self-image, will never get the secondary and undergraduate education, will never hurdle the biased criteria, and will never be admitted to medical training.

Justice Blackmun, in our view, came closest to identifying the solution. "To go beyond racism..." he wrote, "we must first take account of race. And in order to treat some persons equally, we must treat them differently." But racial discrimination cannot be corrected by a "plus" that gets added to the points for college grades, for test scores, or for personality characteristics of specific minority individuals, as Justice Powell seems to suggest for the Court. How many points is it worth to be black in Selma or Hispanic in the South Bronxs?

A Proposal for a Quota System

On the contrary, we believe the only way effectively to take race into account in medical school admissions and to redress our past and present patterns of educational and professional injustice, is explicitly to set aside a given number of all medical school places in the United States each year for qualified racial minority students—a minimum, not a maximum, as in the previous minority quotas of the past—and to let it be known to parents, teachers, and students that places are waiting for those who train themselves to meet basic admission criteria.

Yes, this is a quota system. It is also explicit and, in our view, far more effective and honest than covers optional systems. No, it will not lower the quality of physicians in practice; everyone who is admitted to medical school would be in the range now considered qualified. On the contrary, we believe, it would improve the quality of physician practice by bringing to it a desperately needed group with background, social class origins, and community experience that is now lacking.

Yes, such a system would differ from the seeming fairness of "let's treat everybody equally from here on in." But the "fairness" is deceptive; a racist society's equality is not equality but rather, as the late Whitney Young once pointed out simply "a system for guaranteeing that the rear wheels will never catch up with the front wheels." And yes, such a system would measurably diminish the opportunity for medical school admission of white, male, middle-class applicants who may indeed also be qualified for the practice of medicine and who may not have been directly responsible for past or current discrimination. Even leaving aside the national interest in adequate medical care for all segments of the population, the right to redress of those deprived by racism past or present may require some diminution of some rights and privileges for all the rest of us. That, in our view, is what a moral responsibility implies. Either we all contribute, by some sacrifice, to a solution of the problem or the problem is unlikely to get solved.

The Supreme Court in its decision in *Brown v. Board of Education* of 1954 laid down a clear judgment, one which has been used to fight against the segregationist policies of the antiblack regime of Birmingham. What was needed from the courts this time is a statement, not only for the protection of the rights of the racial minorities who have suffered the brunt of past and present discrimination, but also to help force the redirection of medical education so that it may fulfill its social purpose. We needed a clarion call to battle; what we get was the Court's evasion of some of the central issues and its permission for inaction. We needed a recasting judicial bang. We got a judicial whimper.

H. Jack Geiger, M.D., is Arthur C. Lang Professor of Community Medicine, Center for Biomedical Education, Cit College of New York. Victor W. Brait, M.D., is professor and chairman, department of social medicine, Manuf acture Hospital and Medical Center, Albert Einstein College of Medicine, Bronx, N.Y.
The Triumph of Unequal Justice

We cannot dismantle a caste system or reform a sexist society by plodding from one violation to another, leaving the distorted and distorting structures largely intact.

DANIEL C. MAGUIRE

+ UPON HEARING the initial radio reports of the Bakke decision, I feared at first cynical blush that an accurate summary of the decision might be: "The Supreme Court of the United States has ruled that race may be taken into account in university admissions, so long as it makes no perceptible difference, and so long as nothing is done in an un-Harvard-like manner." After reading Justice Lewis Powell's "judgment of the court" and the other opinions, however, I can describe my reaction as pleased but nervous. I am pleased because although Allan Bakke the man won, Bakke the symbol of invidious individualism lost. And with that, the American sense of justice turned an important corner. I am still nervous because the court showed itself unclear about the foundations for its ruling. That is a dangerous sign, since moral progress is precarious when its theoretical underpinnings are not firmly anchored.

Powell's decisive opinion has been hailed as a masterful piece of tightrope walking. It was not. He fell off the tightrope several times; the net that saved equality. But with all of that, however, I can describe my reaction as pleased but nervous. I am pleased because although Allan Bakke the man won, Bakke the symbol of invidious individualism lost. And with that, the American sense of justice turned an important corner. I am still nervous because the court showed itself unclear about the foundations for its ruling. That is a dangerous sign, since moral progress is precarious when its theoretical underpinnings are not firmly anchored.

Powell's decisive opinion has been hailed as a masterful piece of tightrope walking. It was not. He fell off the tightrope several times; the net that saved equality. But with all of that, however, I can describe my reaction as pleased but nervous. I am pleased because although Allan Bakke the man won, Bakke the symbol of invidious individualism lost. And with that, the American sense of justice turned an important corner. I am still nervous because the court showed itself unclear about the foundations for its ruling. That is a dangerous sign, since moral progress is precarious when its theoretical underpinnings are not firmly anchored.

Unresolved Contradictions

Powell, like our society, is torn between the traditional ideology of individualism and equality and the pressing claims of social justice for corrective inequality. He decries the "principal evil" of the admissions program at the medical school of the University of California at Davis, which is to deny to an applicant the "right to individualized consideration without regard to his race." He insists: "Preference members of any one group for no reason other than race or ethnic origin is discrimination for its own sake." An approved program must treat "each applicant as an individual in the admissions process." His qualifications must be weighed "fairly and competitively" so that he will have no reason to complain of unequal treatment under the 14th Amendment. A university must proceed "on an individualized, case by case basis." At this point all those who thrill to the American ideology of individualism and free enterprise should be on their feet cheering.

But there is another side to the decision. Harvard University's perennial snob appeal, which generally serves no good purpose, in this instance comes to the aid of social justice. The Supreme Court apparently has a predilection for Harvard. In 1976 more than one-third of the court's clerks came from Harvard and Yale, even though there are 100 applications for each clerkship. (A quote?) In the Harvard admissions plan which Powell cites as a model, "the race of an applicant may tip the balance in his favor." Other "nonobjective factors" such as the ability to play a flute or stuff a ball in a basket, or the fact of being from Mississippi, might also tip the balance. Harvard wants diversity, a rich mix of students, in its educational milieu. Therefore race may be deemed a "plus" in a particular applicant's file." If I were a white, qualified, but borderline applicant, I would now be getting nervous. That "right to individualized consideration without regard to . . . race" which Powell requires would seem to be in peril, if blackness is a "plus" that I do not have which might "tip the balance" toward the competitor who has it.

But there is more. The approved Harvard plan does not operate "without some attention to numbers." The admission of ten or so blacks would not suffice, since they "could not begin to bring to their classmates and to each other the variety of points of view, backgrounds and experiences of blacks in the United States. Their small numbers might also create a sense of isolation among the black students themselves." So not only are we allowed to take race into account as a balance-tipping "plus," but we are also allowed to count the number of blacks to make sure they constitute more than a token force. Simultaneously, however, we are assured that we have "not set targets-quotas for the number of blacks." Who would like to be the admissions officer assigned to explain this to the rejected white applicant who lacked the racial "plus" that tipped the balance?

Dr. Maguire is professor of theology at Marquette University, Milwaukee. His most recent book is The Moral Choice (Doubleday).
in the inclusion of some and the exclusion of others on the basis of race. Given the number of subjective and objective factors in admissions analysis, it may not be feasible to identify and name those who were denied admission as a result of the racial factor. But they are there. And they are individuals who did not get the "individualized consideration without regard to...race" that Davis was condemned for failing to provide. In simple language, what is being done at Harvard and Davis is the same thing. How it is being done is diversity argument was, perhaps, more secure in championing the idea of educational diversity than he would have in addressing directly the crucial issue of dismantling a caste system in the United States. He did, however, manage to come down in favor of the sacrifice of individual opportunity for the perceived needs of the common good. Well before the decision, philosopher Thomas Nagel wrote that the most impor-

it subordinates to broader social aims the individual's right to equal treatment. On that critical point, Powell did say that such subordination is possible. He did, therefore, lend support in principle to preferential affirmative action.

Second, Justices Brennan, White, Marшall and Blackmun led of their opinion by stressing that the multiple opinions emanating that day from the court "must not mask the central meaning" of the decisions. Those decisions are that the state and federal governments have constitutional power "to act affirmatively to achieve equal opportunity for all," and that "government may take race into account when it acts not to demean or insult any racial group, but to remedy disadvantages cast on minorities by past racial prejudice, at least when appropriate findings have been made." That is what really happened at the court on the day the Bakke decision was rendered. The court was not ruling on educational psychology. The ruling concerned itself with specific forms of ongoing discrimination; the argumentation and history of the case and the record 6o-plus amici briefs filed show that. The tender progress made here must not be downplayed.

Powell's Progress

Powell's stress on the glories of diversity in a school context could imply that he was writing a piece in educational psychology. Clearly such an emphasis would be less unpopular than an outright face down on the last available seat to another candidate receiving a "plus" on the basis of ethnic background. Harvard, the chance to compete for every single place, while at Davis he could not even be considered for a certain number of places. But here white man speaks with forked tongue. The ability to compete for every opening, when more than a token number of openings are going to be filled by qualified black candidates, is not an unalloyed and equal opportunity to compete for every opening. Down around the cut-off point, being black and qualified is better than being white and qualified - for some applicants at least.

Powell's Progress

Critics of affirmative action have a field day with his stress on the glories of diversity in a school context. That is being the least caste in our society. We move away from neighborhoods

September 27, 1978

883
The lowest-caste status of blacks has three salient qualities that mark out the special suppression of blacks and suggest the criteria that may make other deserving groups identifiable:

1. **The bias against blacks goes to the point of depersonalization.** They are not just victims of particularized injustices. Neither are they but the latest suffering wave of temporarily deprived immigrants or migrants. They are culturally branded as genetically inferior, and recent studies have garnished this widely felt belief with "scholarship." Quite symbolically, black blood is tainted and tainting. Anyone with a trace of it is deemed black, though we would not say that anyone with a trace of white blood is deemed white.

   **'Built-in Headwinds'**

2. **The bias against blacks has become culturally and systematically ingrained in the national fabric.** Religious and other cultural myths have supported it, and law and economics have consolidated its social momentum. The results of this systemic bias are active and lethal: blacks are effectively excluded from the centers of power in the professions, in banking, in national government, in the major religions, in the police and military establishments, in journalism, in the corporations, in literature, and in the writing of history. The Supreme Court has previously recognized the "built-in headwinds" and the "artificial, arbitrary and unnecessary barriers to employment" that our society has set up against blacks.

   The result of this ingrained societal bias and the broad momentum that it generates is that we, the white people, kill blacks. The maternal mortality rate for blacks is three times as high as for whites, and black infant mortality is twice as high. Life expectancy is seven years less for blacks than for whites. Unemployment is twice as high, and among teen-agers almost three times as high, according to 1977 figures. Denied the recent affirmative-action policies, Vernon E. Jordan, executive director of the National Urban League, can still report that "there are twice as many blacks out of work today as there were ten years ago." The caste myth says that blacks are shiftless and lazy, though solid and repeated studies have shown that they want to work as much as any group in our society. It is just that the "headwinds" are such that they can't find the work.

   In view of the pervasively ingrained nature of the problem, it would appear illogical, if it were not so self-servicing of higher caste advantages, to say, as Powell has again, that governmental relief may be forthcoming only in instances where there are specific findings of discrimination. Let Mr. Powell note that the headwinds are built-in: they are not isolated, unconnected or individuated, and they will not be handled on a kind of tort-by-tort basis. So long as Powell can dismiss "societal discrimination" as "an amorphous concept of injury," he does not understand the sociological complexity of the caste system and his contributions to dismantling it will be limited.

3. **The final aspect of the unique black problem is blacks' visibility.** In dawning times it was said that one of the advantages of black slaves was that they were branded from head to toe. Assimilation was a way of relief for many immigrant groups. But blackness perdures and ensures the effective working of the caste system in social life, politics and economics, and cuts off the escapes and alternatives that are available to others.

**Dismantling the Caste System**

I conclude that blacks are in a class by themselves as claimants for preferential policies. The dismantling of the caste system is the priority for a nation that fashion itself the beacon light of democracy and lectures other nations on human rights. There are, however, other groups that also deserve the very special social medicine of preference. No group fulfills the three criteria I have cited as do blacks. But certain other groups have been socially disempowered by a systematically operative bias which is (1) depersonalizing, (2) ingrained and institutionalized and (3) facilitated by the visibility of the victim. Women obviously fulfill these criteria. Power and social status in this society are white and male. However, the progress of women in the professions under affirmative action has been much greater than that of blacks—perhaps an indication that their situation is more promising.
life and culture clearly qualify Aristotle's conception for preferential standing. And the plight of many Hispanics, especially in certain sections of the country, is somewhat comparable to that of blacks. At any rate, it is mere evasion to say that we cannot find and identify for purposes of relief those groups whom we had no trouble finding for purposes of discrimination.

**Equality or Justice?**

It should be abundantly clear by now that what I am doing to long is unequal opportunity and unequal protection of the laws. And having thus gouged that sacred cow, I had better rush to explanation. Justice am defending is unequal opportunity and unequal and identify for purposes of equality is not. The alternative to justice is barbarity. Justice is the minimal response we can make to moral evolution is justice, and we do not do well at the social whole in their dispensing of justice. As Aristotle said, "When men are friends, they have no need of justice." Friendship, however, is not the energy of the social order. The best we can do in society at this primitive point in moral evolution is justice, and we do not do well at that. Our first iniquity is to misdefine it.

It would be easy to fall from the literature of philosophy and law at least go alleged species of justice. What is broadly missing in this analytical melee is the recognition that justice is basically tripurpose. Justice restores to others their minimal due. But there are three modes of such rendering, and deficiency in any one of the three constitutes injustice. Justice regulates relations between individuals (individual or commutative justice), and between individuals and the common good (social justice); moreover, it regulates the agencies of the social whole in their dispensing of "goods" and "bads" to individuals (distributive or governmental justice). Individual persons are implicated not just in one form of justice, individual or commutative, but in all three forms of justice, including distributive or governmental. In simple terms, if you were not making a fuss, you are the aesthetic underbase of the maldistribution in the corporations and government. But apathy is a form of injustice, since it does not render to persons what is their due.

Individualistic America, unfortunately, grooves on only one of the three forms of justice - individual justice. Here we are strong and committed. If I crush your fender, I owe you a fender's worth. If I contracted to polish your car, I owe you the job done. Fixation at the level of individual justice would then allow you falsely to conclude: if I did not then obey those things, I owe you nothing. But that conclusion ignores social and distributive justice, and hence injustice.

Communists tend to make the same error individualists do but at a different point of fixation.

**Conclusion**

Social justice and distributive justice reflect the fact that we have debts to the common good not because of any imagined contract or consent to have a go at it together, but by reason of the nature and intrinsic sociality of personhood itself. To be a person is to be the counterpart of other persons with whom, we are inextricably interwoven in a way that creates obligations. Humanity is a shared glory, and it is in patterns of sharing that human existence survives and flourishes.

The common good is not entirely distinct from the individual good, since the individual shares in the common good. But individual good may be justly sacrificed to the common good in unequal ways, as in the supreme sacrifice, progressive taxation, eminent domain, aid to the handicapped, veterans' benefits, antitrust laws, welfare provisions, and depletion allowances.

When society has allowed massive and monopolistic dislocations of power to obtain, it is a work of social and distributive justice to correct these by restructuring the distributive processes. When these dislocations are embodied in patterns that result in the diminishing and demeaning of personal dignity, the urgency of redistribution and reform is imperative.

There is also an element of self-defense in this work of justice. Suffering and death may be willingly and even gladly borne in a context of respect, but insult spurs rebellion and cracks the very structure of the polis.

**Patterned Injustice, Patterned Redress**

It is dispiriting to read in Justice Powell's decision that the Supreme Court has "never approved preferential classifications in the absence of proven constitutional or statutory violations." The thinking here is fixated at the level of individual, one-to-one justice. This constrained perspective of atomistic individualism simply won't do. One cannot channel a river by scooping out buckets of water. We cannot dismantle a caste system or reform a racist society by plodding from one violation to another, leaving the distorted and distorting structures largely intact. Patterned injustice requires patterned redress. "Preferential classifications" are needed even when there are no findings of specific violations.

Contrary to the Powell opinion, it is irrelevant whether the medical school at Davis ever discriminated against anyone. The only issue is what Davis can do in simple justice to help dismantle monopolistic patterns of social distribution. Powell would give a dispensation from the human work of justice to institutions that are not convictable of past injustices.
A CASK now being pursued in Imperial Court in San Diego could eventually result in a landmark Supreme Court decision in the area of separation of church and state. At least is the question of whether a national church can insulate itself from the actions of its local congregations and regional governing bodies. The United Methodist Church claims that its connectional system is an integral part of its church, a matter of internal church policy, and not to be interfered with by the secular government and its courts.

I

The case is a class-action suit filed in San Diego Superior Court in September 1977 on behalf of residents of Pacific Homes, Inc. The seven retirement homes with long-term care facilities are related to the Pacific and Southwest Conference of the UMC in California, Arizona, and Hawaii. Some 140 of the

Mr. Gillmor is religious writer for the San Diego Union.

1,600 residents are plaintiffs in the suit, which has generated controversy among the residents over the issue of suing the church, one of its annual financial statements and other church agencies.

The suit had asked $266 million as damages for the failure of the homes to honor long-term care contracts which had been sold to the residents for amounts ranging from $20,000 to $40,000. In a more recent action attorneys for the plaintiffs have filed an amended complaint removing the dollar amounts sought and asking for damages to prove.

The church-sponsored network of homes, through its parent California corporation, had advertised in life-care contracts as a "good way to beat inflation" in the Wall Street Journal and National Geographic among other publications, insisting the homes as an agency of the United Methodist Church. The corporation filed bankruptcy on February 18, 1979, and sought to have the contracts discarded and new arrangements made for caring for the elderly residents. Many of the residents had moved over all their assets in the homes in order to pay accommodations fees when they moved in. Others paid for all or part of the amount considered necessary for their health care.

Management of the homes has been largely in the hands of members of the annual conference, as required in the incorporation papers of Pacific Homes. These officials claimed that inflation, particularly in medical costs, was responsible for the shortfall in cash. Others have said that poor management, if not outright shady dealing, played a part in the problems of the homes, which have had a history of financial difficulties since the early 1970s.

Attorney Colin West, who filed the class-action suit, said the suit is not intended to "put the bishop in jail, but merely seeks to have church officials honor the contracts and rules that Pacific Homes is supposed to operate his church.

The present worth of the contracts is estimated at $50 million.
March 2, 1979

Dear Dean Traynham:

I write to acknowledge your letter of February 16, and appreciate your writing at such length about the Bakke case.

As we rely on our written opinions, I make no comment on your letter beyond saying that although our duty is to function as judges rather than legislators, we are mindful of the societal as well as the legal problems that make "affirmative action" decisions so difficult.

Sincerely,

Dean Warner R. Traynham
Dartmouth College
Hanover, New Hampshire 03755

LFP/lab