June 23, 1978

Bakke

PERSONAL

Dear Bill:

Since your telephone call I have given further thought (interrupted by an engagement away from the Court) to your question whether the following sentence on the first page of your opinion is accurate as to my opinion as well as yours:

"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."

Your opinion states that the foregoing reflects the "central meaning of this Court's judgment". If your statement is read literally, I doubt that it does reflect accurately the judgment of the Court. In terms of "judgment", my opinion is limited to the holding that a state university validly may consider race to achieve diversity. But my opinion recognizes broadly (perhaps one could call it dicta) that consideration of race is appropriate to eliminate the effects of past discrimination when appropriate findings have been made by judicial, legislative or administrative bodies authorized to act.

Thus, I suppose John's footnote is correct in the sense that the judgment itself does not go beyond permissible use of race in the context of achieving a diverse student body at a state university. This holding could be stated more broadly in one simple sentence as follows:

"Government validly may take race into account in furthering the compelling state interest of achieving a diverse student body."
Despite the foregoing I have not objected to your characterization of what the Court holds as I have thought you could put whatever "gloss" on the several opinions you think proper. I believe that one who reads my opinion carefully will conclude that your gloss goes somewhat beyond what I have written and what I think. Thus, I cannot say that John Stevens is incorrect in expressing his view of the result of our several opinions.

In sum, while I might prefer that you describe the judgment differently, I have no thought of making any response on this point beyond what I have already circulated.

Sincerely,

Mr. Justice Brennan

1fp/ss
June 23, 1978

Dear Mr. Justice Powell:

Re: No. 76-811, Regents of the University of California v. Bakke

Attached is a draft syllabus for your opinion in the above case which I shall appreciate your returning to me, together with any suggestions that you care to make concerning the portion relating to your opinion.

This draft of the syllabus is based on the opinion draft number given in the upper right-hand corner. Please send me two copies of any subsequent draft of the opinion necessitating changes in the syllabus, together with any information about line-up changes.

When I receive the syllabus back from you and the other Justices involved, I shall have the Print Shop set it up in type and shall then send you a proof copy.

Respectfully,

Henry Putzel, jr.
Reporter of Decisions

Attachment

Honorable Lewis F. Powell, Jr.
Associate Justice

*A copy of this draft syllabus is being sent to every Member of the Court.
REGENTS OF THE UNIVERSITY OF CALIFORNIA v. BAKKE

Certiorari to the Supreme Court of California

No. 76-811. Argued October 21, 1977--Decided

The Medical School of the University of California at Davis (hereinafter Davis) had two admissions programs for the entering class of 100 students—the regular admissions program and the special admissions program. Under the regular procedure, candidates whose overall undergraduate grade point averages fell below 2.5 on a scale of 4.0 were summarily rejected. About one out of six applicants was then given an interview, following which he was rated on a scale of 1 to 100 by each of the committee members (five in 1973 and six in 1974), his rating being based on the interviewers' summaries, his overall grade point average, his science courses grade point average, and his Medical College Admissions Test (MCAT) scores, letters of recommendation, extracurricular activities, and other biographical data, all of which resulted in a total "benchmark score." The full admissions committee then made offers of admission on the basis of their review of the applicant's file and his score, considering and acting upon applications as they were received. The committee
chairman was responsible for placing names on the waiting list and had discretion to include persons with "special skills." A separate committee, a majority of whom were members of minority groups, operated the special admissions program. The 1973 and 1974 application forms, respectively, asked candidates whether they wished to be considered as "economically and/or educationally disadvantaged" applicants and members of a "minority group" (blacks, Chicanos, Asians, American Indians). If an applicant of a minority group was found to be "disadvantaged," he would be rated in a manner similar to the one employed by the general admissions committee. Special candidates, however, did not have to meet the 2.5 grade point cut-off and were not ranked against candidates in the general admissions process. About one-fifth of the special applicants were invited for interviews in 1973 and 1974, following which they were given benchmark scores, and the top choices were then given to the general admissions committee, which could reject special candidates for failure to meet course requirements or other specific deficiencies. The special committee continued to recommend candidates until 16 special admission selections had been made. During a four-year period 63 minority students were admitted to Davis under the special program and 44 under the general program. No disadvantaged whites were admitted under the
special program, though many applied. Respondent, a white
male, applied in 1973 and 1974, in both years being
considered only under the general admissions program.
Though he had a 468 out of 500 score in 1973 he was
rejected, no general applicants with scores less than
470 being accepted after respondent's application, which
was filed late in the year, had been completed. At that
time four special admission slots were still unfilled.
In 1974 respondent applied early, and though he had a total
score of 549 out of 600, he was again rejected. In neither
year was his name placed on the discretionary waiting list.
In both years special applicants were admitted with sig-
nificantly lower scores than respondent's. After his second
rejection, respondent filed this action in state court
for mandatory injunctive and declaratory relief to compel
his admission to Davis, alleging that the special admissions
program operated to exclude him on the basis of his race in
violation of the Equal Protection Clause of the Fourteenth
Amendment, a provision of the California Constitution, and
§601 of Title VI of the Civil Rights Act of 1964, which
provides, inter alia, that no person shall on the ground
of race or color be excluded from participating in any
program receiving federal financial assistance. Petitioner
cross-claimed for a declaration that its special admissions
program was lawful. The trial court found that the special program operated as a racial quota, because minority applicants in that program were rated only against one another, and 16 places in the class of 100 were reserved for them. Declaring that petitioner could not take race into account in making admissions decisions, the program was held to violate the Federal and State Constitutions and Title VI. Respondent's admission was not ordered, however, for lack of proof that he would have been admitted but for the special program. The California Supreme Court, applying a strict-scrutiny standard, concluded that the special admissions program was not the least intrusive means of achieving the goals of the admittedly compelling state interests of integrating the medical profession and increasing the number of doctors willing to serve minority patients. Without passing on the state constitutional or federal statutory grounds the court held that petitioner's special admissions program violated the Equal Protection Clause. Since petitioner could not satisfy its burden of demonstrating that respondent, absent the special program, would not have been admitted, the court ordered his admission to Davis. Held: The judgment below is affirmed insofar as it orders respondent's admission to Davis and invalidates petitioner's special admissions program,
but is reversed insofar as it prohibits petitioner from as a factor taking race into account in any way in its future admissions decisions.

18 Cal. 3d 34, 553 P. 2d 1152, affirmed in part and reversed in part.

MR. JUSTICE POWELL concluded:

1. Title VI proscribes only those racial classifications that would violate the Equal Protection Clause if employed by a State or its agencies. Pp. 12-18.

2. Racial and ethnic classifications of any sort are inherently suspect and call for the most exacting judicial scrutiny. While the goal of achieving a diverse student body is sufficiently compelling to justify consideration of race in admissions decisions under some circumstances, petitioner's special admissions program, which forecloses consideration to persons like respondent, is unnecessary to the achievement of this compelling goal and therefore invalid under the Equal Protection Clause. Pp. 18-49.

3. Since petitioner could not satisfy its burden of proving that respondent would not have been admitted even if there had been no special admissions program, he must be admitted. P. 49.
MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN concluded:

1. Title VI prohibits only those racial classifications that would violate the Equal Protection Clause if employed by a State or its agencies. Pp. 4-33.

2. Racial classifications call for strict judicial scrutiny. Nonetheless, the purpose of overcoming substantial, chronic minority underrepresentation in the medical profession is sufficiently important to justify petitioner's explicit remedial use of race. Thus, the judgment below must be reversed in that it prohibits race from being used as a factor in university admissions. Pp. 34-57.

MR. JUSTICE STEVENS, joined by THE CHIEF JUSTICE, MR. JUSTICE STEWART, and MR. JUSTICE REHNQUIST, being of the view that whether race can ever be a factor in an admissions policy is not an issue here; that Title VI applies; and that respondent was excluded from Davis in violation of Title VI, concurs in the Court's judgment insofar as it affirms the judgment of the court below ordering respondent admitted to Davis. Pp. 1-14.
POWELL, J., announced the Court's judgment and filed an opinion expressing his own views of the case. BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ., filed an opinion concurring in the judgment in part and dissenting in part. WHITE, MARSHALL, and BLACKMUN, JJ., filed separate opinions. STEVENS, J., filed an opinion concurring in the judgment in part and dissenting in part, in which BURGER, C.J., and STEWART and REHNQUIST, JJ., joined.
BAKKE HEADNOTE

Held: The judgment below is affirmed insofar as it orders respondent's admission to medical school and invalidates petitioner's special admissions program, but is reversed insofar as it prohibits petitioner from taking race into account in any way in its future admissions decisions.

MR. JUSTICE POWELL concluded:

1. Title VI proscribes only those racial classifications that would violate the Equal Protection Clause if employed by a State or its agencies.

2. Racial and ethnic classifications of any sort are inherently suspect and call for the most exacting judicial scrutiny. While the goal of achieving a diverse student body is sufficiently compelling to justify use of such classifications in some circumstances, petitioner's special admissions program, which forecloses consideration to persons like respondent, is unnecessary to the achievement of this compelling goal and therefore invalid under Equal Protection Clause.
3. Since Davis could not satisfy its burden of proving that respondent would not have been admitted even if there had been no special admissions program, he must be admitted.

MR. JUSTICE BRENNAN, et al., concluded:

1. Title VI proscribes only those racial classifications that would violate the Equal Protection Clause if employed by a State or its agencies.

2. Racial classifications call for strict judicial scrutiny. Nonetheless, the purpose of overcoming substantial, chronic minority underrepresentation in the medical profession is sufficiently important to justify petitioner's explicit remedial use of race. Thus, the judgment below must be reversed in that it prohibits race from being used as a factor in university admissions.
MR. JUSTICE STEVENS, joined by ---, being of the view that whether race can ever be a factor in an admissions policy is not an issue here; that Title VI applies; and that respondent was excluded from petitioner's medical school in violation of Title VI, concurs in the Court's judgment insofar as it affirms the judgment of the Court below ordering respondent admitted to Davis.
RE: No. 76-811 Board of Regents v. Bakke

MEMORANDUM TO: Mr. Justice Powell
Mr. Justice Stevens

Our proposed final opinion. More to follow.

[Signature]
W.J.B. Jr.
June 23, 1978

Dear Mr. Justice Powell:

Re: No. 76-811, Regents of the University of California v. Bakke

Attached is a draft syllabus* for your opinion in the above case which I shall appreciate your returning to me, together with any suggestions that you care to make concerning the portion relating to your opinion.

This draft of the syllabus is based on the opinion draft number given in the upper right-hand corner. Please send me two copies of any subsequent draft of the opinion necessitating changes in the syllabus, together with any information about line-up changes.

When I receive the syllabus back from you and the other Justices involved, I shall have the Print Shop set it up in type and shall then send you a proof copy.

Respectfully,

Henry Putzel, Jr.
Reporter of Decisions

Attachment

Honorable Lewis F. Powell, Jr.
Associate Justice

*A copy of this draft syllabus is being sent to every Member of the Court.
June 24, 1978

MEMORANDUM TO THE CONFERENCE

Re: Regents v. Bakke, No. 76-811

Enclosed are two copies of xeroxed pages showing changes made in response to Bill Brennan's most recent circulation.

Sincerely,

[Signature]

L.F.P., Jr.
76-811—OPINION

UNIVERSITY OF CALIFORNIA REGENTS v. BAKKE 3

separate opinions, my Brothers Mr. Justice Brennan, Mr. Justice White, Mr. Justice Marshall, and Mr. Justice Blackmun concur in this judgment.

Affirmed in part and reversed in part.

The Medical School of the University of California at Davis opened in 1968 with an entering class of 50 students. In 1971, the size of the entering class was increased to 100 students, a level at which it remains. No admissions program for disadvantaged or minority students existed when the school opened, and the first class contained three Asians but no blacks, no Mexican-Americans, and no American Indians. Over the next two years, the faculty devised a special admissions program to increase the representation of "disadvantaged" students in each medical school class. The special program consisted of

¹ Material distributed to applicants for the class entering in 1973 described the special admissions program as follows:

"A special subcommittee of the Admissions Committee, made up of faculty and medical students from minority groups, evaluates applications from economically and/or educationally disadvantaged backgrounds. The applicant may designate on the application form that he or she requests such an evaluation. Ethnic minorities are not categorically considered under the Task Force program unless they are from disadvantaged backgrounds. Our goals are (1) a short range goal in the identification and recruitment of potential candidates for admission to medical school in the near future, and (2) our long range goal is to stimulate career interest in health professions among junior high and high school students.

"After receiving all pertinent information selected applicants will receive a letter inviting them to our School of Medicine in Davis for an interview. The interviews are conducted by at least one faculty member and one student member of the Task Force Committee. Recommendations are then made to the Admissions Committee of the medical school. Some of the Task Force Faculty are also members of the Admissions Committee.

"Long-range goals will be approached by meeting with counselors and students of schools with large minority populations, as well as with local youth and adult community groups.

"Applications for financial aid are available only after the applicant has
tions are founded upon the doctrine of equality.'” Loving v. Virginia, 388 U. S. 1, 11 (1967), quoting Hirabayashi, 320 U. S., at 100.

Petitioner urges us to adopt for the first time a more restrictive view of the Equal Protection Clause and hold that discrimination against members of the white "majority" cannot be suspect if its purpose can be characterized as "benign." The clock of our liberties, however, cannot be turned back to 1868. Brown v. Board of Education, supra, at 492; accord, Loving v. Virginia, supra, at 9. It is far too late to argue that the guarantee of equal protection to all persons permits the recognition of special wards entitled to a degree of protection greater than that accorded others. The Fourteenth Amendment is not directed solely against discrimination due to a "two-class theory"—that is, based upon differences between 'white' and Negro." Hernandez, supra, at 478.

Once the artificial line of a "two-class theory" of the Fourteenth Amendment is put aside, the difficulties entailed in varying the level of judicial review according to a perceived "preferred" status of a particular racial or ethnic minority are intractable. The concepts of "majority" and "minority" necessarily reflect temporary arrangements and political judgments. As observed above, the white "majority" itself is composed of various minority groups, most of which can lay

Professor Bickel noted the self-contradiction of that view:

"The lesson of the great decisions of the Supreme Court and the lesson of contemporary history have been the same for at least a generation: discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society. Now this is to be unlearned and we are told that this is not the matter of fundamental principle but only a matter of whose ox is gored. Those for whom racial equality was demanded are to be more equal than others. Having found support in the Constitution for equality, they now claim support for inequality—under the same Constitution." A. Bickel, The Morality of Consent 133 (1975).
In the view of MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN, the pliable notion of "stigma" is the crucial element in analyzing racial classifications. See, e.g., post, at 40. The Equal Protection Clause is not framed in terms of "stigma." Certainly the word has no clearly defined constitutional meaning. It reflects a subjective judgment that is standardless. All state-imposed classifications that rearrange burdens and benefits on the basis of race are likely to be viewed with deep resentment by the individuals burdened. The denial to innocent persons of equal rights and opportunities may outrage those so deprived and therefore may be perceived as invidious. These individuals are likely to find little comfort in the notion that the deprivation they are asked to endure is merely the price of membership in the
dominant majority and that its imposition is inspired by
the supposedly benign purpose of aiding others. One
should not lightly dismiss the inherent unfairness of, and
the perception of mistreatment that accompanies, a system
of allocating benefits and privileges on the basis of skin
color-and-ethnic origin.

Moreover, limiting the concept of stigma to the
imposition of a badge of inferiority would inhibit
appropriate scrutiny of classifications such as the quotas
imposed upon admission of Jews to some educational
institutions in the early part of this century, which were
based upon the belief that by virtue of superior ability
that group would come to dominate such-institutions. See
generally-Steinberg, How-Jewish Quotas-Began, Commentary
67 (Sept. 1971). It might be said that those particular
quotas reflected religious intolerance rather than
legitimate educational goals, But MR.
JUSTICE BRENNAN, MR. JUSTICE WHITE, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN offer no principle for deciding whether functionally similar classifications reflect a benign remedial purpose or a malevolent stigmatic classification, since they are willing in this case to accept mere post hoc declarations by an isolated bureaucratic entity -- a medical school faculty -- unadorned by particularized findings of past discrimination, to establish such a remedial purpose.
claim to a history of prior discrimination at the hands of the state and private individuals. Not all of these groups can receive preferential treatment and corresponding judicial tolerance of distinctions drawn in terms of race and nationality, for then the only "majority" left would be a new minority of White Anglo-Saxon Protestants. There is no principled basis for deciding which groups would merit "heightened judicial solicitude" and which would not. Courts would be

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As I am in agreement with the view that race may be taken into account as a factor in an admissions program, I am in accord with the result reached in this case by the opinion of Justice BRENNAN, White, MARSHALL, and BLACKMUN. But I disagree with much that is said in their opinion.

They would require as a justification for a program such as petitioner's, only two findings: (i) that there has been some form of discrimination against the preferred minority groups "by society at large," post, at 34,

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(it being conceded that petitioner had no history of discrimination), and (ii) that "there is reason to believe" that the disparate impact sought to be rectified by the program is the "product" of such discrimination:

"If it was reasonable to conclude—as we hold that it was—that the failure of Negroes to qualify for admission at Davis under regular procedures was due principally to the effects of past discrimination, then there is a reasonable likelihood that, but for pervasive racial discrimination, respondent would have failed to qualify for admission even in the absence of Davis's special admission program." Post, at 44.

The breadth of this hypothesis is unprecedented in our constitutional system. The first step in the analysis—whether or not there has been societal discrimination—may require little or no proof. The second step, however, involves a speculative leap: but for this discrimination by society at large, Bakke "would have failed to qualify for admission" because Negro applicants—nothing is said about Asians—cf., e.g., post, at 32 n. 46—would have made better scores. Not one word in the record supports this conclusion, and the plurality offers no standard for courts to use in applying such a presumption of causation to other racial-or ethic-classifications. This failure is a grave one, since if it may be concluded on this record that each of the minority groups preferred by the petitioner's special program is entitled to the benefit of the presumption, it would seem difficult to determine that any of the dozens of minority groups that have suffered "societal discrimination" cannot also claim it, in any area of social-intercourse. See Part V-B, infra.
I agree with my Brothers BRENNAN, WHITE, MARSHALL, and BLACKMUN that the portion of the judgment that would proscribe all consideration of race must be reversed. See Part VI, infra.
innocent persons competing for the benefit. Without such findings of constitutional or statutory violations, it cannot be said that the government has any greater interest in helping one individual than in refraining from harming another. Thus, the government has no compelling justification for inflicting such harm.

Petitioner is not in a position to make such findings. Its mission is education, not the formulation of legislative policy or the adjudication of particular claims of illegality. For reasons similar to those stated in Part IV of this opinion, isolated segments of our vast governmental structures are not competent to make those decisions, at least in the absence of legislative mandates and legislatively determined criteria. Cf. Hampton v. Mow Sun Wong, 426 U. S. 88 (1976). Compare n. 44, supra. Before relying upon these sorts of findings in establishing a racial classification, a governmental body must have the authority and capability to establish, in the record, that the classification is responsive to identified discrimination. See, e. g., Califano v. Figes, 430 U. S. 313, 316-321 (1977); Califano v. Goldfarb, 430 U. S. 199, 212-217 (1977). Lacking this capability, petitioner has not carried its burden of justification on this issue.

Hence, the purpose of helping certain groups whom the faculty of the Davis Medical School perceived as victims of "societal discrimination" does not justify a classification that imposes disadvantages upon persons like respondent, who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered. To hold otherwise would be to convert a remedy heretofore reserved for violations of legal rights into a privilege that all

For example, the University is unable to explain its selection of only the three favored groups—Negroes, Mexican-Americans, and Asians—for preferential treatment. The inclusion of the last group is especially curious in light of the substantial numbers of Asians admitted through the regular admissions process. See also n. 44, supra.
Bakke, No. 76-811, p. 26, footnote 35, Rider B:

The first step is easily taken. No one denies the regrettable fact that there has been societal discrimination in this country against various racial and ethnic groups.
MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN misconceive the scope of this Court's holdings under Title VII when they suggest that "disparate impact" alone is sufficient to establish a violation of that statute and, by analogy, other civil rights measures. See post, at 41-42, 45-46 & n.42. That this was not the meaning of Title VII was made quite clear in the seminal decision in this area, Griggs v. Duke Power Co., 401 U.S. 424 (1971):

"Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." Id., at 431 (emphasis added).

Thus, disparate impact is proscribed under Title VII only if the practice in question is not founded on "business necessity," ibid., or lacks "a manifest relationship to
the employment in question," id., at 432. See also

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-803,
805-806 (1973. Nothing in this record -- as opposed to
the some of general literature cited by MR. JUSTICE
BRENNAN, MR. JUSTICE WHITE, MR. JUSTICE MARSHALL, and MR.
JUSTICE BLACKMUN -- even remotely suggests that the
disparate impact at Davis Medical School, which results
from the sort of disparate test scores and grades set
forth in footnote 7, supra, is without educational
justification.

Moreover, this presumption in Griggs -- that
disparate impact without any showing of business
justification established the existence of discrimination
in violation of the statute -- was based on legislative
determinations, wholly absent here, that past
discrimination had handicapped various minority groups to
such an extent that disparate impact could be traced to
identifiable instances of past discrimination:
"[Congress sought] to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices." Griggs, supra, 429-430.

See, e.g. H.R. Rep. No. 914, 88th Cong., 2d Sess., at 26 (1963) ("Testimony concerning the fact of discrimination in employment is overwhelming.") See generally Vaas, Title VII: The Legislative History, 7 B.C. Ind. & Com. L.Rev. 431 (1966). The Court emphasized that "the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group." Id., at 430-431. Indeed, § 703(j) of the Act makes it clear that preferential treatment for an individual or minority group to correct an existing "imbalance" may not be required under Title VII. 42 U.S.C. § 2000e-2(j). Thus, Title VII principles support the proposition that findings of identified
discrimination must precede the fashioning of remedial measures embodying racial classifications.
nonobjective factors, did not outweigh those of the other applicant. His qualifications would have been weighed fairly and competitively, and he would have no basis to complain of unequal treatment under the Fourteenth Amendment.

It has been suggested that an admissions program which considers race only as one factor is simply a subtle and more sophisticated—but no less effective—means of according racial preference than the Davis program. A facial intent to discriminate, however, is evident in petitioner's preference program and not denied in this case. No such facial infirmity exists in an admissions program where race or ethnic background is simply one element—to be weighed fairly against other elements—in the selection process. "A boundary line," as Mr. Justice Frankfurter remarked in another connection, "is none the worse for being narrow." McLeod v. Dilworth, 322 U. S. 327, 329 (1944). And a Court would not assume that a university, professing to employ a facially nondiscriminatory admissions policy, would operate it as a cover for the functional equivalent of a quota system. In short, good faith would be presumed in the absence of a showing to the contrary in the manner permitted by our cases. See, e. g., Arlington Heights v. Metropolitan Housing Development Corp., 429 U. S. 252 (1977); Washington v. Davis, 426 U. S. 229 (1976); Swain v. Alabama, 380 U. S. 202 (1965).

The denial to respondent of the right to individual treatment without regard to his race is the principal evil of petitioner's special admissions program. To suggest, as do Mr. Justice Brennan, Mr. Justice White, Mr. Justice Marshall, and Mr. Justice Blackmun, post at 41 n. 4, that respondent was not deprived of any significant benefit because he might have been able to attend some other medical school is thus beside the point. Moreover, respondent's position is not analogous to that of a pupil bored from his neighborhood to a comparable school in another neighborhood in compliance with a desegregation decree. Petitioner did not arrange for respondent to attend a different medical school in order to desegregate Davis Medical School; instead, it denied him admission and may have deprived him altogether of a medical education.

Universities, like the prosecutor in Swain, may make individualized
The denial to respondent of this right to individualized consideration without regard to his race is the principal evil of petitioner's special admissions program. Nowhere in the opinion of MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN is this denial even addressed.
MEMORANDUM

TO: Bob

FROM: Lewis F. Powell, Jr.

DATE: June 25, 1978

Bakke

I hesitate to mention this case again, especially to call on you for any further effort.

Nevertheless, if you have the time - and only on that condition - it would be extremely helpful to have you take our files to some quiet place and put them in some order. Sally normally performs this function, but this would be a particularly difficult case for her or indeed for anyone not as familiar with the case as you are.

It is evident that historians will be intensely interested in this case. Several of the Justices, including Justice Brennan, devote meticulous care to their files as they will constitute the most tangible evidence of how they performed as Justices. I plan to leave my files, subject to prescribed conditions, to the Library of Congress - which has requested them.

If you find time to do this, I suggest that we talk briefly.

L.F.P., Jr.