MEMORANDUM FOR MR. JUSTICE POWELL

FROM: Bob Comfort DATE: January 2, 1978

RE: Keeping Mr. Justice Blackmun in the Fold

Here is a draft of a counterattack designed to
tar Justice Stevens with the same brush he has used to
daub your November 22 Memorandum to the Conference. It is
designed to indicate to (presumed) neutrals that your
Memorandum is not a departure from the proper judicial
role. This draft goes so far as to suggest that Justice
Stevens is the one bending his judicial principles (which
I think is true), and that if one does rejects his rather
naive view of the evanescence of the constitutional
dilemma, one would follow rather unprincipled statutory
approach for no reason at all.
The second part of this draft goes on to explain that Justice Stevens' other charge -- that your Nov. 22 memo is nothing but dictum -- is also unfounded.

Since no one knows what Justice Blackmun is thinking, it is difficult to frame arguments that would appeal to him in particular. I think this draft covers in a general way the challenges that have been raised against your memorandum. If you wish to cover other areas, please let me know.
No. 76-811 Regents v. Bakke

MEMORANDUM TO THE CONFERENCE:

I

The combination of the Chief's invitation to circulate memoranda and our deferral of a definitive Conference vote have resulted in an unprecedented volume of circulations in this case. Although my first impulse is to "cringe" when I see another one, each memorandum has been educational for me and - in a case of this importance - the exchange of views has been a welcome supplement to our usual truncated Conference discussion. I nevertheless am hesitant to impose upon you yet another memorandum. But John's thoughtful essay of December 29 (that enlightened my New Year's weekend) emboldens me to do so.

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I voted not to request supplemental briefs on the Title VI issue because I believed that we could not responsibly follow a Title VI route to avoidance of the constitutional problem. Now that we have requested briefs, our opinion of course must address the statutory problem explicitly. I continue to believe, however, that invoking
Ashwander principles in support of affirmance under Title VI alone reads too much into Justice Brandeis' admonition. It is not a license for invariable recourse to statutory interpretation. See G. Gunther, Constitutional Law 1604 (9th ed. 1975).

Nor do our "normal principles of restraint" invariably counsel the decision of difficult statutory issues not passed upon by the court below, in order always to avoid a properly presented constitutional question. As recently as last Term in Arlington Heights v. Metropolitan Housing Development Corporation, 429 U.S. 252 (1977), we reached the equal protection issue even though the Court of Appeals, "proceeding in a somewhat unorthodox fashion, did not decide the statutory [Title VIII] question." Id. at 271. And while I am in agreement with the quotation from Spector Motor Co. v. McLaughlin, 323 U.S. 101, 105 (1944), quoted in John's Dec. 29 Memorandum, at 30, it should be noted that the holding of that case was that a constitutional issue could not even be presented until questions of local law had been answered in a certain manner. The Court viewed the lower federal courts as incompetent to provide those answers. Hence, the case was remanded to the District Court with instructions to retain jurisdiction pending the initiation of state proceedings to clarify the scope of relevant statutes. No such obstacle
blocks the presentation of the constitutional issue in this case.

As I understand John's position on the substance of the Title VI argument, he agrees that "Title VI was, in large part, intended to echo the constitutional prohibition against racial discrimination." See John's Dec. 29 Memorandum to the Conference, at 31. In view of Thurgood's Oct. 28 Memorandum to the Conference, the Solicitor General's Supplemental Brief, and my own research, I think that conclusion is clearly correct. The next question is whether -- because of prudential considerations -- we should read a broader meaning into the legislative history or rely on a perceived "plain meaning" of §2000d, in order to avoid reaching the Fourteenth Amendment issue. It seems to me that either of these approaches

1/ Although the question whether there exists an implied right of action under Title VI is a close one for me, I am inclined to think that petitioner has waived any objection to respondent's assertion of a cause of action under the statute. The Solicitor General's Supplemental Brief, combined with our reaching the merits in Lau v. Nichols, 414 U.S. 565 (1974), is quite persuasive on this point. See Supplemental Brief for the SG, at 24-25.

2/ I place this phrase in quotation marks to emphasize that the only thing even close to being "plain" about the meaning of § 2000d is that Congress seemed to think it meant the same thing as the Equal Protection Clause, which is far from "plain."
would represent a departure from the normal decision-making processes of this Court and could be justified only by a basic judgment about the nature of the racial problem in this country and the institutional role of this Court.

I believe that it would be very difficult to write a defensible opinion holding that the legislative history supported a reading of Title VI going beyond the Equal Protection Clause. Thurgood's Oct. 28 Memorandum on that subject and the SG's Supplemental Brief are convincing on that point. Among other things, they make it clear that Congress purposely refrained from defining "discrimination" in § 2000d, thereby leaving the nondiscrimination principle of the Fourteenth Amendment and other federal statutes to infuse § 2000d with meaning. See Thurgood's memo at 6-7, and sources cited therein; SG's Supplemental Brief at 9-10 & n.5. To say that Congress in enacting Title VI was contemplating a departure from the Fourteenth Amendment would be quite a judicial tour de force.

Even if one views the language of Title VI as arguably having a meaning different from the Fourteenth Amendment (a view I cannot accept), a fair resolution of its meaning hardly could be made without recourse to the legislative history. Only two Terms ago we held that "'[w]hen aid to construction of the meaning of words, as
used in the statute, is available, there certainly can be no "rule of law" which forbids its use, however clear the words may appear on "superficial examination,"'" Train v. Colorado Public Interest Research Group, 426 U.S. 1, 10 (1976), quoting United States v. American Trucking Assns., 310 U.S. 534, 543-544 (1940). A disregard of Congress' apparent purpose ("to echo the constitutional prohibition") and the expanding of Title VI into an independent, broad-gauge prohibition would – as I view it – be quite difficult to justify.

Thus, it strikes me that the decision to affirm on the basis of Title VI alone would represent a departure from our usual methods of adjudication. It would be "worth the candle" only if it furthered some extremely important prudential consideration.

John believes that it does. The prudential considerations that he advances for avoidance of a constitutional decision are based upon his view – as I understand it – that reverse discrimination "poses problems unique in our history", see John's memo at 31, problems that may work themselves out in the short run, obviating any need to make a constitutional judgment at this time. If there were reasonable assurance that this "unique" problem would resolve itself in the foreseeable future, there would be more force to John's counsel of avoidance.
But there is no evidence that this problem will "go away". When Defunis was here three years ago, we avoided - I thought on sound grounds - the constitutional issue. We were criticized then for leaving the hundreds of state colleges, universities and graduate schools without guidance. The need for resolution of the issue certainly has not lessened.

If the Court now were to affirm this case on Title VI without reaching the Fourteenth Amendment, again we will have resolved finally exactly nothing. I suppose (from what has been said) that such an opinion would hold only that the language of Title VI proscribes the precise type of reverse discrimination found to exist by the courts below. Every state institution of higher learning in our country would then have to terminate forthwith all Davis-type programs. Institutions with Harvard-type programs, or some variation thereof, would have no idea whether they were in compliance with the law. Nor, indeed, would HEW, which provides funds to virtually all of these institutions. Inevitably, after some presently indeterminate time - perhaps another two to three years - the constitutional issue will again be before us.

There is no reason to believe that in so short a span of time the socio-economic position of racial and ethnic minorities will have changed so drastically as to
end the demand for some types of preferential admission programs. Even the petitioner estimates that "minority conscious programs" will be necessary for some 25 to 50 years. Br. for Petr, p. 43, n. 53. It seems to me, therefore, that the relevant prudential considerations weigh heavily in favor of our resolving the constitutional issue that is before us, which was the issue that prompted us to take the case.

II

The remaining argument is that if the Court were to affirm the judgment of the California Supreme Court, any indication in the Court's opinion that race properly may be one element to be weighed in admission decisions would be mere dictum and therefore inappropriate. Again, I respectfully differ from those who hold this view.

We are not reviewing the judgment below in a vacuum. It draws meaning from the opinion supporting it, and that meaning is that race may never be considered to any extent in admitting students to a university. Certainly the opinion of the California court has been read that way, and I do not see how it can be read any other way. For the reasons stated in my November 22 memorandum to the Conference, I think this holding is erroneous. If a majority of this Court were to agree with me, we would be obligated as a reviewing court to correct this error.
It would not suffice for us merely to state that we do not read the California judgment as necessarily prohibiting all use of race in admissions decisions, or to say that we reserve judgment on other types of race conscious plans. In view of the opinion below (which, incidentally, did identify a number of non-racial factors that could be considered), such an unenlightening statement by this Court would merely perpetuate the confusion and doubt that now exists.

It must be remembered that petitioner argues that educational diversity is a compelling state interest, and further argues - as do many of the amici briefs - that this interest cannot be served effectively by any means other than a dual track system. As stated in my November 22 memo, I agree that diversity of the student body, as that term is now used, is now generally recognized as a state and educational interest of the highest importance. But I do not agree with petitioner's argument that the only efficacious means of serving this interest is a Davis-type program. Accordingly, it would be essential to demonstrate that other less restrictive means not only are available, but are employed successfully by leading universities. I can think of no better way to demonstrate that less restrictive alternatives do exist than to reply on the actual experience of these universities.
In sum, I think that prudential considerations - the desirability of resolving a constitutional issue of national importance and one that will not "go away" - weigh strongly in favor of staying on the course that we charted when we granted certiorari. I hold this view quite without regard to whether the California judgment is affirmed, affirmed in part and reversed in part (to the extent of modifying the order), or reversed. And, in view of my perception as to the correct analysis of the constitutional issue, I consider it both necessary to a reasoned opinion, as well as prudential, to negate petitioner's basic position by demonstrating that valid and less restrictive and means are available to further the asserted state interest.

L.F.P.
L.F.P., Jr.
ss
MEMORANDUM

TO: Bob Comfort

FROM: Lewis F. Powell, Jr.

Bakke

Your citation of Arlington Heights in the memorandum I circulated last week was a good "find". It is a square precedent for reaching a constitutional issue when we had an option, to the same extent we have it in the present case, to consider first a statutory issue.

The second "straw man" argument against our view is that we resort to dictum. In this connection, take a look at my opinion in U.S. District Court, decided in 1972. I deliberately tried to provide some guidance to Congress in the event it considered (as it is doing at this time) amendments to the Omnibus Crime Act that would deal with subversion and espionage.

My recollection is that something similar was done by the Court (Justices Stewart) in Katz. I am dictating this at home and have not looked at these cases in quite a while. I think it was Katz that invalidated the New York state statute, and that identified – perhaps by pointing out its defects – the elements of a valid statute that subsequently were incorporated to a large extent in the Omnibus Crime Act.
If these cases prove helpful on the "dictum" question, I do not intend to circulate another memorandum. But I would use the cases - or any others that occur to you, Sam or me (especially one that may have been written by the Chief Justice) - when we next discuss Bakke. You may have the opportunity, also, to use the cases in discussions with other clerks.

L.F.E Jr.

ss
MEMORANDUM

TO:    Mr. Justice Powell
FROM:  Bob

"Dictum" vs. "Guidance" in Bakke

Your opinion in United States v. United States District Court, 407 U.S. 297 (1972), does, as you indicated, furnish a good example of the Court's passing the constitutional question strictly at issue in order to offer guidance on an acceptable method of achieving the desired result. After holding the domestic security provisions of Title III of the Crime Control Act subject to the warrant requirements of the Fourth Amendment, your opinion goes on to explain that domestic security cases might not be subject to all the procedural requirements attached to other types of criminal activity addressed in Title III. The opinion goes into some detail as to the type of warrant requirement Congress conceivably could establish.

Justice Stewart's opinion for the Court in Katz v. United States, 389 U.S. 347 (1967), is not as helpful. It leaves the question whether the warrant requirement would attach to national security cases, but it does not offer any "guidance" on the issue. It was Justice White's concurrence that ventured beyond the issue squarely presented. Justice White declared that a warrant should not be required in national security cases.
As for cases penned by the Chief containing "guidance"/dictum, one springs to mind that is so obvious that I cannot understand why I did not think of it earlier. In Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971), the question before the Court was whether the district court had the power to prescribe racial ratios for schools within a school district that had not been desegregated in accordance with the dictates of Brown. The Chief's opinion has no difficulty answering this question in the affirmative, but goes on to spin out the "school authorities' discretion" dictum that has been grist for the Petitioner's mill throughout this case:

School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities; absent a finding of a constitutional violation, however, that would not be within the authority of a federal court.

402 U.S. at 16. Petitioner and many of his allied amici have argued that this dictum conferred discretion upon the University to prescribe racial ratios in the interest of educational diversity.

As the memo you circulated on Jan. 5 states, however, the strongest argument against Justice Stevens' "dictum" straw man is that consideration of least restrictive alternatives simply is not dictum in an equal protection case going off on that ground.
MEMORANDUM FOR MR. JUSTICE POWELL

FROM: Bob
RE: Ammunition for the Battle on the Scope of Bakke

While doing the research for Nixon v. Warner Communications, I discovered another example of the Court deciding a case on a broad legal ground because of the social and institutional consequences of a decision on a narrower ground. In United States v. Nixon, 418 U.S. 683 (1974) (Nixon I), the Court held that a claim of executive privilege could not override a subpoena for evidence needed in a criminal trial, at least without further balancing by the courts. There was, however, a much narrower legal ground. The Watergate grand jury had named President Nixon as an un-indicted co-conspirator in the cover-up; hence, the Court could have held that the executive privilege does not extend to conversations identified by extrinsic evidence as part of the criminal conspiracy in question. This would have been a narrower intrusion on the domain of the privilege.

Such a decision would have had other costs, though. It would have implied, at the least, that a grand jury lawfully can name a sitting President as a conspirator. A holding, on this basis, that the privilege was inapplicable would have been a strong intimation that the Court thought the President guilty. Although cert had been granted on the question whether the grand jury acted within its authority in naming President
Nixon an un-indicted co-conspirator, it was dismissed as improvidently granted. 418 U.S. at 687 n.2. Thus, the Court eschewed adherence to the narrowest possible legal ground in order to minimize the political costs of its decision. I cannot imagine that, at the time of the decision in Nixon I, anyone was criticized for taking the broader legal ground because of a judgment as to the consequences of adhering to the narrower one.
January 27, 1978

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

Dear Lewis,

It was good of you to write as you did. I do hope that our paths will cross soon. Certainly if I can come to Washington on a visit I will let you know.

You were kind enough to ask about recent writings. Although I am mainly trying to make progress on the History, I have done some slight things by way of lectures, and I enclose reprints of two. Also enclosed is a typescript of remarks at a reunion of Nieman Fellows at Harvard, on the Bakke case. The transcript is scheduled to be included in an issue of the Nieman Reports devoted to the reunion, but since it is not yet published you may not wish to read it at this time. It is enclosed with this cautionary label.

I hope that your colleagues will soon be back in full stride, for all your sakes. I turn to your own opinions as I did to John Harlan's, in order to have a candid appreciation of the difficulties of a problem and a resourceful way of coping with them. I am sure you will understand what is conveyed by the comparison.

With warm regards,

Sincerely,

Paul A. Freund

(I did not read Paul's talk until after Bakke came down. This may be obscure from what I wrote.)
Reflections on the Bakke case
Remarks of Paul A. Freund
at the Nieman Fellows' Reunion
October 8, 1977

It seems to me that there are two sets of issues raised by the Bakke case which are not always kept disentangled in discussion. One set of issues has to do with the intrinsic fairness of the racial preference plan and the other set of issues has to do with its necessity, its utility, its practical efficiency in achieving certain educational and social goals. The opponents of the plan tend to focus on the first set of issues, that of fairness or intrinsic justice. The proponents of the plan tend to focus on the second set of issues, namely its effectiveness, its usefulness, its pragmatic value. It seems to me that both issues have to be faced, and that in particular the issue of fairness has to be approached more analytically than is often done. By the plan in the Bakke case I mean, of course, a plan whereby a limited number of places in admission to professional school are kept for members of so-called disadvantaged minorities, meaning primarily blacks, and to some extent Chicanos and American Indians, who are qualified, that is, who predictably can succeed in the course of study in that professional school. Now over and against such a plan is set the notion of meritocracy as the overriding criterion for any admission system that purports to be fair or moral or just.

An analysis of the meaning of merit in this connection is useful. What do we mean by merit as reflected in rank or test scores? My point is not that the tests themselves are biased; that is an arguable question; I don't know enough about the tests to have an opinion on that. My point is a somewhat more philosophical one, namely that what we mean by merit in that context
is not a moral conception of desert, because the scores don't test individual effort or character that ought to be rewarded. They test something more, something in the nature of both achievement and promise, which are instrumental for further contributions to the society or the profession which the students plan to enter. In other words, the concept of merit is not a purely moral concept in this context, but it is itself an instrumental concept linked with efficiency, effectiveness, future contribution and the like. So that we are thrown at once into the second set of questions, namely whether the plan is one that is relevant to proper functions and purposes of the university, both educational and social purposes.

But I think one ought not to leave the question of fairness quite so early. There are still some questions that will be raised about it. For one thing, it will be argued, granted that merit is not in this context a purely or basically moral concept, still the idea of race or ethnic origin or color is peculiarly illegitimate as a factor or criterion in choice for admissions. Color blindness, in other words, is our professed norm. That, of course, is a noble ideal. It reminds me a little of the masthead of the St. Louis Post-Dispatch, on which I was nourished, namely, Mr. Pulitzer's motto: "Yielding neither to predatory plutocracy nor to predatory poverty." Shades of Anatole France!

The argument is that justice involves generality and reciprocity, not favoritism on the basis of color or race. There are two aphorisms, curiously each involving a goose, which exemplify these norms of generality and reciprocity. The first, of course,
is What is sauce for the goose is sauce for the gander. And the other, reminding us of reciprocity: "We prosecute the man or woman/Who steals the goose from off the common/But the greater felon we let loose/Who steals the common from the goose." Well, those are useful reminders of the moral ideals of generality and reciprocity, but what is sauce for the goose is not necessarily sauce for the gander if the sauce is estrogen, or if one of the pair had in the recent past been gorged and the other had been starved. I think one would not hold fast to the maxim. And as for reciprocity, well, I think even a lawyer can see the difference between a majority giving preferred treatment to a minority and a majority giving preferred treatment to itself.

In fact, of course, as we know, the constitution is not color blind, at least where there has been in the past purposeful discrimination by the organization or the enterprise that is involved. We know that remedial measures are themselves asymmetrical, setting numerical goals where color is a highly conscious factor in choice in order to redress a prior, deliberate imbalance. It's true that those are cases where there has been purposeful discrimination in the past, and there is no evidence in the Bakke record that the University of California at Davis had purposefully discriminated. But the point I'm making now is that in that situation, which we have come to accept as a proper one for asymmetrical treatment, if you will, preferential treatment -- in that situation the beneficiaries of that policy today are not correlated individually with the victims of past discrimination. The worker who is hired under a racial preference plan today need
not be the identical worker who was excluded in the past. Similarly those who are presently disadvantaged need not be those who themselves discriminated. That is to say, the worker who fails to get a job today because of a racial preference to others need not be someone who has himself discriminated in the past. The employer or the union may have discriminated, but not the individual. At least in that situation of remedial redress, we have come to accept a lack of correlation on a one-to-one victim-beneficiary basis. And I submit that where there is no imputation of guilt or wrongdoing, where the institution itself has not discriminated in the past, there is even less reason to insist on that kind of correlation because we are not branding anyone as having been guilty. We are not attaching shame. It's not a question of punishment or penalty, it's rather a question of equitable restitution, as where an innocent donee of property that has been stolen is required to return it to the victim of the theft or the fraud even though the donee was no participant in the fraud or the theft in the beginning. It would be unfair to retain benefits at the expense of another innocent person who had been victimized.

How does that idea of equitable restitution without personal guilt fit here? One has to make the point that in a real sense all white persons have been advantaged in the past, including the recent past, by the preferences and advantages built into our society, even those sons and daughters of recent immigrants who had nothing to do with the ante-bellum south and its aftermath didn't have to compete with blacks for jobs as clerks or sales people or railroad conductors because it was the jobs on the
lower rung that were reserved for blacks. They were the porters. They were the janitors. They were the custodians, not curators, and could not aspire to reach the higher rung. Any white person was the innocent, if you will, beneficiary of a system that assigned priorities and preferences and denigrations on the basis of race.

Well you may say, true, and some kind of restitution is due, but it ought to be at the expense of the whole society, not of a few people who are crowded out of a place in professional schools or other kinds of gainful occupation. We do have social programs based on taxation, but that is not necessarily the exclusive means of redress. In any case of profound and dislocating social progress, it is always those closest to the new configuration who are the specially disadvantaged group in the transition. If, for example, land is taken for a public playground that had been residential, the people who owned the houses will be compensated, but the people next to them who may have depended upon those residents for access, for neighborliness, for customers, the people next to the new playground will be specially disadvantaged and at least as far as the federal constitution is concerned, their property was not "taken" and they are not entitled to any special compensation. We may sympathize with them and yet we feel that this is an inevitable concomitant of social reconstruction. The people two miles away are not affected, just as the people at the bottom of the list in the admission roster are not going to be affected one way or the other. They are going to lose out regardless of the six percent -- or sixteen percent -- reserved
places. It's the people close to the new configuration — and
I'm using bridge words trying to assimilate as lawyers do by
analogy the new playground to the new admissions policy — it is
those people close to the intersection who do bear a special
burden, but that is the way the world moves, has moved, and the
injury is not new in kind.

Another objection is that this plan would be an entering
wedge beyond admissions, leading to favoritism or disparity in
ggrading, in admission to the bar or certification to specialties,
and so on. Where do you draw the line? That's always a question.
Where do you draw the line? The principle of the dangerous pre-
cedent was defined by F.M. Cornford as meaning that you should not
now do an admittedly right thing for fear that you or your equally
timid successors will not have the courage to act differently in
a situation that superficially resembles the present, but is
essentially unlike it. That's the principle of the dangerous
precedent. Now one shouldn't be too flippant about it. I think
the real problem is whether there is on the continuum a natural
point of discontinuity, a natural point of distinction, so that
one is not either logically or practically impelled to go all the
way. And here I think the relevant concept is that of 'opportunity
versus execution or 'ultimate performance'. It seems to me that
entrance to a university, including a professional school, is still
in the stage of opportunity, and that one can say that after
admission, the performance will be graded on a non-preferential
basis, and certainly admission to the profession will be on a non-
preferential basis. But when we are still in the stage of opportunity

* What about suits pending attacking bar
exams?
we can take factors into account fairly and morally that we would not take into account if we were judging ultimate performance. Here we are judging potential or capacity for future contributions. That leads me to the second cluster of problems, which can be dealt with more briefly and which are the ones that are generally talked about, particularly by proponents of the plan, namely whether the preferential system is consistent with the appropriate functions of a university or of professional schools and is necessary and likely to be effective in its professed purposes. Here we are in a pragmatic realm. I'm not one to argue for the multiversity when I speak of the functions of a university. I'm old fashioned enough to embrace the idea that a university is designed to transmit, preserve, criticize learning or knowledge or understanding. That does not describe a social service institution performing contracts for various groups or for the state. Still, within the old fashioned concept of the university, surely one's eyes must be open to the life for which the university is preparing its students. After all, Harvard was established "lest there be an illiterate ministry" and if you want to go back to the middle ages, the classic trivium was law, theology and medicine -- surely not without an eye to the world outside.

The purposes of the California program are served in two ways: one on the educational side within the university and the other on the social or community side after the university stage is ended. So far as the educational experience is concerned, there is evidence from the University of California at Davis itself that the Chicano students who had been admitted have been
remarkably successful, uniquely successful, in establishing rapport with Chicano members of the community who are subjects of teaching and learning and not merely patients, but learning material, to use the barbaric phrase that hospitals and medical schools employ. Surely the establishment of a new rapport is not an unimportant part of medical education, in the taking of case histories and in the diagnosis of ailments. On the law side, there are aspects of law which used to be ignored that could hardly be ignored if you had a sizeable group of minority students in the classroom. My revered teacher of constitutional law, T.R. Powell, told us that we would be docked five points on the final exam if we mentioned equal protection of the law. To him it was a soft subject. It wasn't worthy of the rigor of analysis that he thought appropriate to constitutional law. I don't think that he could have said that if there had been a sizeable number of minority students. I am not now speaking of pressure, I'm speaking of intellectual awareness, and if he had been more thoughtful about the problem, I think he could have contributed intellectually to its analysis and we all would have profited.

On the side of the professions themselves, it is sometimes said that the students will not go back to their own communities and that therefore the program is a loss. But I don't think that follows. In the first place, some of them will go back, but even those who don't will make a special contribution just as William Coleman became Chairman of the Lawyers' Defense Committee of the NAACP while he was a partner in a prominent Philadelphia
firm, but more basically, those who do go into establishment
offices will themselves make a contribution by showing implicitly
that they can hold their own in the world of law or medicine. In
law, they will be seen by jury people, by judges, even by journal-
ists, as persons who can hold their own in roles that have
previously been closed and unfamiliar to the world at large.

There are risks. Of course there are risks. The whole
program may be counterproductive. It may increase tensions
rather than relieve them. It may become the dangerous precedent
whereby standards will be lowered and unqualified people will be
admitted or allowed to practice. These are risks. In the end,
the question it seems to me comes down to this: shall the court
stay the experiment or shall we judge the risks not a priori but
on the basis of experience and experiment. Justice Frankfurter
used to be opposed to advisory opinions because it was too easy
for courts to nip in the bud some social legislation before it
had a chance to be applied in practice, through advisory opinions
immediately on the enactment of a statute. I quoted to him those
lines from Hamlet, "The canker galls the infants of the spring/
Too oft before their buttons are disclosed". That is not merely
horticultural wisdom, but I think juristic wisdom as well. He
seemed to be impressed. It was the only thing I ever did that
seemed to impress him. On the basis of that he recommended me
for a clerkship to Justice Brandeis so I have been grateful to
Hamlet ever since.

There is, finally, the issue of academic freedom. The
policy in the Bakke case was adopted by the University of
California at Davis. It was they who were experimenting and getting the experience. It was not imposed on them. But you may say, if it is upheld then the next step will be that HEW will require this in all universities, all professional schools. It does not necessarily follow. The power of HEW is the power of the purse, namely to attach germane conditions to the giving of funds, and the question would remain whether a policy of racial preference is germane to the giving of funds to a university, particularly in light of the tradition of academic freedom and academic autonomy which is so precious in this country. It seems to me that a conservative judge who finds racial preference in admissions unappealing, per se, might yet decide that if it is adopted autonomously by a university it ought to be allowed to run its course and have its day. At any rate I don't think the experiment ought to be opposed by some abstract symmetry like color blindness or sauce for the goose and sauce for the gander.

I think here of some lines of Wallace Stevens:

   Rationalists, wearing square hats
   Think, in square rooms,
   Looking at the floor,
   Looking at the ceiling,
   They confine themselves
   To right-angled triangles.
   If they tried rhomboids,
   Cones, waving lines, ellipses--
   As, for example, the ellipse of the half-moon,
   Rationalists would wear sombreros.

What I'm really asking is that you let your minds be bold, look at the reality outdoors, and wear sombreros.