In the

Supreme Court of the United States

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,

PETITIONER,

V.

ALLAN BAKKE,

RESPONDENT.

No. 76-811

Washington, D. C.
October 12, 1977

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ALLAN BAKKE,

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Washington, D. C.,

Wednesday, October 12, 1977.

The above-entitled matter came on for argument at 10:01 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

ARCHIBALD COX, ESQ., Langdell Hall, Cambridge, Massachusetts 02138; on behalf of the Petitioner.

WADE H. McCREE, JR., ESQ., Solicitor General of the United States, Department of Justice, Washington, D. C. 20530; on behalf of the United States as amicus curiae.

REYNOLD H. COLVIN, ESQ., Jacobs, Blanckenburg, May & Colvin, 111 Sutter Street, Suite 1800, San Francisco, California 94104; on behalf of the Respondent.

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: The first case on today's calendar is No. 76-811, Regents of the University of California against Bakke.

Mr. Cox, you may proceed whenever you're ready.

ORAL ARGUMENT OF ARCHIBALD COX, ESQ.,

ON BEHALF OF THE PETITIONER

MR. COX: Mr. Chief Justice, and may it please the Court:

This case, here on certiorari to the Supreme Court of California, presents a single vital question: whether a State university, which is forced by limited resources to select a relatively small number of students from a much large number of well-qualified applicants, is free, voluntarily, to take into account the fact that a qualified applicant is black, Chicano, Asian or native American in order to increase the number of qualified members of those minority groups trained for the educated professions and participating in them. Professions from which minorities were long excluded because of generations of pervasive racial discrimination.

The answer which the Court gives will determine, perhaps for decades, whether members of those minorities are to have the kind of meaningful access to higher education in the profession, which the universities have accorded them

in recent years, or are to be reduced to the trivial numbers which they were prior to the adoption of minority admissions programs.

There are three facts, realities, which dominated the situation that the Medical School at Davis had before it, and which I think must control the decision of this Court.

The first is that the number of qualified applicants for the nation's professional schools is vastly greater than the number of places available. That is a fact and an inescapable fact. In 1975-76, for example, there were roughly 30,000 qualified applicants for admission to medical school, a much greater number of actual applicants, and there were only about 14,000 places.

At Davis, there were 25 applicants for every seat, in 1973; in 1974, the ratio had risen to 37 to 1.

So that the problem is one of selection among qualified applicants, not of ability to gain from a professional education.

The second fact, as which there is no need for me to elaborate, but it is a fact, for generations racial discrimination in the United States, much of it stimulated by unconstitutional State action, isolated certain minorities, condemned them to inferior education, and shut them out of the most important and satisfying aspects of American life, including higher education and the professions.

And the greatest problem, as the Carnegie Commission on Higher Education noted more than ten years ago, the greatest problem in achieving racial justice was to draw those minorities into the professions that play so important a part in our national life.

And then there is one third fact. There is no racially blind method of selection, which will enroll today more than a trickle of minority students in the nation's colleges and professions. These are the realities which the University of California at Davis Medical School faced in 1968, and which, I say, I think the Court must face when it comes to its decision.

Until 1969, the applicants at Davis, as at most other medical schools, were chosen on the basis of scores on the medical aptitude test, their college grades, and other personal experiences and qualifications, as revealed in the application.

The process excluded, virtually, almost all members of minority groups, even when they were fully qualified for places, because their scores, by and large, were lower on the competitive test and in college grade point averages.

There were no black students and no Chicanos in the class entering Davis in 1968. If one puts to one side the predominantly black medical schools, Howard and Meharry, less than one percent, eight-tenths of one percent of all

medical students in the United States were black in the year '68-69.

In 1969, the faculty at Davis concluded that drawing into the medical college qualified members of minorities -- minorities long victimized by racial discrimination -- would yield important educational, professional and social benefits. It then chose one variant of the only possible method to increasing the number. It established what came to be known as the Task Force Program, following the name of a program established by the Association of American Medical Colleges, which would select -- there were only 50 in the entering class at that time -- which would select 8 educationally but fully qualified -- select 8 educationally or economically disadvantaged, but fully qualified minority students, for inclusion among the 52 in the entering class.

QUESTION: Mr. Cox, is there something in the record indicating who proposed or adopted the Task Force Program?

MR. COX: It's indicated that it was adopted by the faculty of the school. Or was voted by the faculty. That appears from Dean Lowrey's testimony. And it also appears --

QUESTION: Of course he wasn't there then, was he?

MR. COX: No, I guess he must have learned, when he came somewhat later. There's nothing more than his testimony, going on -- I may say, I have seen the minutes that --

QUESTION: Is there anything in the record indicating the approval of the Regents, other than the fact that they are defendants in the suit?

MR. COX: No. Because the Regents had delegated to each faculty of each school the responsibility for admissions.

QUESTION: Thank you.

MR. COX: So that this was left to the different colleges, and very wisely, I think, because autonomous institutions, each trying to solve this problem in their own way, may give all of us the benefit of the experience of trial and error, creativity. That's the virtue of not constitutionalizing problems of this kind.

The number was increased to 16, when the size of the class was increased to 100.

And it was that this step was taken as part of a movement led by the Association of American Medical Colleges which brought the number of black students, studying at predominantly white medical schools, from less than one percent to more than five percent, from 211 to 3,000 in a period of ten years.

I want to emphasize that the designation of 16 places was not a quota, at least as I would use that word. Certainly it was not a quota in the older sense of an arbitrary limit put on the number of members of a non-popular

group who would be admitted to an institution which was looking down its nose at them.

QUESTION: It did put a limit on the number of white people, didn't it?

MR. COX: I think that it limited the number of non-minority, and therefore essentially white, yes. But there are two things to be said about that.

One is that this was not pointing the finger at a group which had been marked as inferior in any sense, and it was undifferentiated, it operated against a wide variety of people.

So I think it was not stigmatizing in the sense of the old quota against Jews was stimatizing, in any way.

QUESTION: But it did put a limit on their number, in each class?

MR. COX: I'm sorry?

QUESTION: It did put a limit on the number of non-minority people in each class?

MR. COX: It did put a limit, no question about that, and I don't mean to infer that. And I will direct myself to it a little later, if I may.

QUESTION: Do you agree, then, that there was a quota of 84?

MR. COX: Well, I would deny that it was a quota. We agree that there were 16 places set aside for qualified

disadvantaged minority students. Now, if that number -- if setting aside a number, if the amount of resources --

QUESTION: No, the question is not whether the 16 is a quota; the question is whether the 84 is a quota? And what is your answer to that?

MR. COX: I would say that neither is properly defined as a quota.

QUESTION: And then, why not?

MR. COX: Because, in the first place -- because of my understanding of the meaning of "quota". And I think the decisive things are the facts. And the operative facts are: this is not something imposed from outside, as the quotas are in employment, or the targets are in employment sometime, today.

It was not a limit on the number of minority students. Other minority students were in fact accepted through the regular admissions program. It was not a guarantee of a minimum number of minority students, because all of them had to be, and the testimony is that all of them were, fully qualified.

All right. It did say that if there are 16 qualified minority students, and were also disadvantaged, then 16 places shall be filled by them and only 84 places will be available to others.

QUESTION: Mr. Cox, the facts are not in dispute.

Does it really matter what we call this program?

MR. COX: No. I quite agree with you, Mr. Justice. I was trying to emphasize that the facts here have none of the aspects, that there are none of the facts that lead us to think of "quota" as a bad word.

What we call this doesn't matter, and if we call it a quota, knowing the facts, and deciding according to the operative facts and not influenced by the semantics, it couldn't matter less.

Some people say this was a target. I prefer not to call it either, because "target" has taken on a connotation.

But I would emphasize that it doesn't point the finger at any group, it doesn't say to any group, 'You are inferior"; it doesn't promise taking people regardless of their qualifications, regardless of what they promise society, promise the school, or what qualities they have. And I think those things -- and that it is not forced but was really a decision by the school as to how much of its assets, what part of its assets it would allocate to the purposes that it felt were being fulfilled by having minorities in the student body, and increasing the number of minorities in the profession.

Justice Stevens, let us suppose that the student was -- that the school was much concerned by the lack of qualified general practitioners in Northern California, as

indeed it was, but I want to exaggerate for illustration a little bit, and it told the admissions committee: "Get people who come from rural communities, if they are qualified, and who express the intention of going back there." And the Dean of Admissions might well say: "Well, how much importance do you give this?"

And the members of the faculty might say, by vote or otherwise, "We think it's terribly important. As long as they are qualified, try and get ten in that group."

I don't think I could say that it was a "quota" of 90 students for others. And I think this, while it involves race, of course -- that's why we're here -- or color, really is essentially the same thing. The decision of the University was that there are social purposes, or purposes aimed in the end at eliminating racial injustice in this country and in bringing equality of opportunity, there will be purposes served by including minority students.

Well, how important do you think it is? We think it's this important. And that is the significance of the number. That's about the only significance.

QUESTION: Mr. Cox, is it the same thing as an athletic scholarship?

MR. COX: Well, I --

QUESTION: So many places reserved for athletic scholarships.

MR. COX: In the sense -- I don't like to liken it to that in terms of its importance, but I think there are a number of places that may be set aside for an institution's different aims, and the aim of some institutions does seem to be to have athletic prowess. So that in that sense this is a choice made to promote the schools, the faculty's choice of educational and professional objectives.

QUESTION: The aim of most institutions --

MR. COX: So I think there is a parallel, yes.

QUESTION: It's the aim of most institutions, isn't it? Not just some.

MR. COX: Yes. But they have -- of athletic?

QUESTION: Yes.

MR. COX: Well, I come from Harvard, sir.

[Laughter.]

MR. COX: I don't know whether it's our aim, but we don't do very well.

QUESTION: But I can remember the time when -- Mr. Cox, I can remember the time when you did, even if --

MR. COX: Yes. Yes. You're quite right.

[Laughter.]

QUESTION: Mr. Cox, --

MR. COX: Maybe I better stop, I've had almost --

QUESTION: Mr. Cox, along that line, is there -- I suppose athletic scholarships are largely confined, but

not entirely confined, to undergraduate schools, largely perhaps. Is that a difference between the problems that you're presenting, with respect to undergraduate schools and professional graduate schools?

MR. COX: Well, I guess -- that was -- it's because the purposes, athletic and social purposes, of an undergraduate school are different from those of a professional school that I am frank from pressing the analogy too far; although I think it's logical accurate, and it helps one's thinking.

Well, the objectives of undergraduate education are somewhat broader, somewhat harder to define. On the other hand, it's clear to me that the inclusion of minorities in undergraduate colleges may be at least as important as at a professional school. And, indeed, of course, if they are going to get to a professional school, they have to be there.

But I think one finds that the objectives of these programs apply in large part to undergraduate colleges as well as professional schools, so has the objective of improving education through greater diversity, and is perhaps even more important at an undergraduate school than it is at a professional school.

But I wouldn't minimize its importance at a professional school, and I would emphasize its importance when it comes to membership in the profession, so that the

professions will be aware of all segments of society.

I think the objective of breaking down isolation, which is one of the greatest problems in achieving racial justice in this country, is solved by including minorities, I would say about equally involved.

The objective that impresses itself on my mind, partly because Dean Lowrey testified it and partly because I am, at least in part, an educator, is the importance of including young men and woman at both undergraduate colleges and the medical schools, so that the other, younger, boys and girls may see, yes, it is possible for a black to go to the University of Minnesota or to go to Harvard or Yale.

"I know Johnny, down the street, and I know Sammy's father, he became a lawyer, and John's father became a doctor."

This is essential if we are ever going to give true equality in a factual sense to people, because the existence or nonexistence of opportunities, I am sure we all know, shapes people's aspirations when they are very young, and shapes the way they behave, and shapes, in the most pedagogical sense, I suspect, whether they do or don't read a book in the afternoon.

QUESTION: Mr. Cox, what if --

MR. COX: And they do or don't read in school.

So I think all these apply to both, Mr. Chief

Justice, very strongly.

QUESTION: Mr. Cox, what if Davis Medical School had decided that since the population of doctors in the -- among the minority population of doctors in California was so small, instead of setting aside 16 seats for minority doctors, they would set aside 50 seats, until that balance were redressed and the minority population of doctors equalled that of the population as a whole. Would that be any more infirm than the program that Davis has?

MR. COX: Well, I think my answer is this -- and it's one which I draw upon Judge Hastie for, in an excellent essay he wrote on this subject -- that so long as the numbers are chosen, he said, and they are shown to be reasonably adaptable to the social goal -- and I'm thinking of the one you mentioned, Justice Rehnquist -- then there is no reason to condemn a program because of the particular number chosen.

I would say that perhaps -- I don't think I have to press for a reasonably related test, I think that here is a much better showing than that.

I would say that as the number goes up, the danger of invidiousness or the danger that this is being done not for social purposes but to favor one group as against another group, the risk, if you will, of a finding of an invidious purpose to discriminate against is great. And therefore I think it's a harder case, but I would have to put the particu-

lar school in the context of all schools. There are programs which are designed, for example, to train Indians, to go back and teach at Indian reservations; and nobody else is taught in those.

I don't think it's unconstitutional when you see it in the total context.

But I think that as the number goes up, it raises these dangers, fears, and the possibility of an adverse finding on what might be the factually dispositive question of intent.

QUESTION: Mr. Cox, along this same line of discussion, would you relate the number in any way to the population, and, if so, the population of the nation, the State, the city, or to what standard?

MR. COX: Well, the number 16 here is not in any way linked to population in California.

QUESTION: It's 23 percent, I think, for the minorities.

MR. COX: Well, this was 16.

QUESTION: Yes.

MR. COX: I think that as the number gets -- I think that I would only say as the number gets higher, I think that it's undesirable to have the number linked to population.

I'll be quite frank to say that I think one of the

things which causes all of us concern about these programs is the danger that they will give rise to some notion of group entitlement to numbers, regardless either of the ability of the individual or of -- which is not always related to inability -- ability in the narrow sense -- or of their potential contribution to society.

And I think that if the program were to begin to slide over in that direction, I would first, as a faculty member, criticize and oppose it; as a constitutional lawyer, the further it went the more doubts I would have.

But I think it's quite clear that this program was not of that character, and, in fact, of course, if we're speaking of what's going to happen to education all over the country, in fact the numbers have not come anywhere -- the minorities admitted to professional schools have not come anywhere near their actual percentage of the population.

QUESTION: Mr. Cox, is it relevant, do you think, to the question we have to decide, how the benchmark rating system operates at Davis in the two programs?

MR. COX: No. I think it is not at all relevant.

QUESTION: Is there anything in the record which tells us exactly how race is taken into account in the benchmark ratings in the special programs?

MR. COX: There is nothing that tells how it is taken into account in the benchmark ratings. I would infer

from the actual benchmark ratings that it was not taken into account in the benchmark ratings at all.

QUESTION: In the special program?

MR. COX: That nothing was added to a benchmark rating because one was a member of a minority.

QUESTION: Well, does that suggest that the benchmark ratings in the two programs were comparable? Among those --

MR. COX: They may -- there is nothing in the record about that, if I understood your question. That is to say, there is nothing to show whether people were being rated on the same standards when they were in the Task Force Program or when they were in the general pool.

It's in the past, and I don't know whether anyone could ever find out, quite frankly.

QUESTION: Mr. Cox, the 23 percent that -- or if you haven't finished answering Mr. Justice Brennan, please do so.

MR. COX: I was going down --

QUESTION: Go ahead.

MR. COX: -- just a little further.

There wasn't any occasion to put them on the same scale. Because the -- if you were qualified, minority, and disadvantaged, then you were eligible for one of the 16 places and there was no occasion for you to be compared with anyone

in the general pool.

Now, if I may, I wanted to go on just another step in that answer.

QUESTION: Please. Go ahead.

MR. COX: It is fair to say, Mr. Justice, and I don't want to slide away from the thing, the Task Force Program reduced the opportunity of a nondisadvantaged, non-minority applicant who was somewhere near the borderline or below it to get into Davis, because there were a certain number of places which were allocated for this purpose, just as a certain number of places might be allocated for people who would deliver medical services as general practitioners in the minority area -- in a rural area.

The other thing I was going to say -- and then I'm through, Mr. Chief Justice -- is that while it is true that Mr. Bakke and some others, under conventional standards for admission, would be ranked above the minority applicant, I want to emphasize that, in my judgment and I think in fact, that does not justify saying that the better, generally better-qualified people were excluded to make room for generally less-qualified people. There's nothing that shows that after the first two years at medical school the grade point averages will make the minority students poorer medical students, and still less to show that it makes them poorer doctors or poorer citizens or poorer people.

It's quite clear that for some of the things that a medical school wishes to accomplish, and this medical school wished to accomplish, that the minority applicant may have qualities that are superior to those of his classmate who is not minority. He certainly will be more effective in bringing it home to the young Chicano, that he too may become a doctor, he too may attend graduate school.

He may be far more likely to go back to such a community to practice medicine where he's needed.

Forgive me for taking so long.

QUESTION: Mr. Justice Powell referred to a figure of 23 percent minorities. Does that include Orientals in California?

MR. COX: I think it does. Yes.

QUESTION: Is there anything -- is there a specific finding in this record that Orientals, as one identifiable group, have been disadvantaged?

MR. COX: Well, I think that the decisions of this Court show perhaps better than anything else that they have been the victim of de jure discrimination over the years.

QUESTION: And what particular holdings do you refer to?

MR. COX: I had in mind Okiyama?, I think that's the most -- no, that's not the most recent case. Takihashi? is such a case. They go back to Yiklo?. I am sure there are

three or four more, Your Honor will think of quickly.

QUESTION: In terms of the professions, Mr. Cox, is there anything in this record to show that there are not a substantial number of Orientals in medicine, in teaching, and in law?

MR. COX: There are no --

QUESTION: Probably higher than in any of the other categories.

MR. COX: I don't think there are any figures in the record, and there are very few figures or minority participation in the professions published, except with respect to black doctors and black medical students.

The others -- there are some meaningful figures on Chicanos, but the others are very scattered and inadequate.

QUESTION: Mr. Cox, may I ask you a question? The trial court found a violation of Title VI of the 1964 Civil Rights Act. Do you think we have to consider the Title VI question before getting to the constitutional question?

MR. COX: No, because the Supreme Court of California ruled only on the federal Constitution, and I would think the other questions were not before this Court.

QUESTION: You think it's not before the Court, even though the trial court made a finding?

MR. COX: I think that the trial court's ruling

has no more importance than a potential ground for -- State ground or statutory ground for decision, if the plaintiff urges, but which isn't ruled on at any stage.

QUESTION: Two of the amicus argue the Title VI question, you know.

MR. COX: I realize they do, but it wasn't included in any of the questions presented, and --

QUESTION: Well, is it necessary when a ruling one way would support the judgment below?

MR. COX: Well, I believe the Court has indicated that it is necessary for it to be raised in the -- new trial --

QUESTION: Well, couldn't the respondent urge it, to support the judgment?

MR. COX: Well, my understanding is that the -- while that was the earlier rule, that the Court has recently changed and indicated that the respondent cannot support an additional ground which has not been brought to the Court's attention at the time of the petition.

QUESTION: I'd be interested in that case, if you have a citation.

QUESTION: He has it.

MR. COX: I believe it's the Trunk? case --

I don't have it on the top of my mind, and I may be mistaken, I was familiar with the older rule

but was corrected, Mr. Justice. I'm repeating the correction.

QUESTION: Well, is it clear in the record that this institution is within the coverage of Title VI?

MR. COX: All medical schools get grants, including the one in effect, grants per student. So we can't seriously deny it.

I don't think it was proved in the record, but it is a fact.

QUESTION: Well, there's a finding to that effect.

MR. COX: It's not -- the respondent, of course, doesn't press this argument here. And there are a number of questions, Mr. Justice, lurking -- if this is to be explored. For example, there's some question whether an individual may sue under Title VI. And there's a decision of the Seventh Circuit, not under Title VI but under an analogous situation, dealing with discrimination against women, holding that an individual cannot sue.

And it would seem, by analogy, to be applicable here.

QUESTION: Mr. Cox, --

MR. COX: And there are a lot of points that haven't been adequately covered, because we didn't think it was in the case.

QUESTION: Mr. Cox, may there not be a difference in federal -- whether we're reviewing a federal court decision and a State court decision -- as to whether the statutory

question should be decided by us? 1257 just gives us jurisdiction over a federal question in which a decision of the highest court of the State has been had; whereas our jurisdiction on certiorari to review Courts of Appeals' judgments is on anything in the Court of Appeals.

MR. COX: It could be that the -- I must plead inability to assist, except by a later letter, Mr. Justice. I am not -- I haven't a cane on the top of my mind.

QUESTION: Well, perhaps you know whether the Title VI question was presented to the California Supreme Court.

MR. COX: Oh, it was pleaded, it was pleaded.

QUESTION: In the California Supreme Court? Was it argued and briefed there?

MR. COX: Yes, well, the briefs do encompass it very briefly.

QUESTION: So it was presented, it was presented but just not decided in that court?

MR. COX: That is correct. And it would remand, like the State ground, it would remain open on remand.

When I say like the State ground, there was also a ruling by the trial court that there was a violation of the California Equal Protection Clause. And that, of course, would remain open if, as we hope, this case reverses and remands.

That's always true of undecided State questions, on

which the respondent may hope to retain his judgment.

QUESTION: May I go back,--

MR. COX: Yes, Mr. Justice.

QUESTION: -- Mr. Cox, to what was our colloquy about benchmark ratings. Do I now understand that your submission is that in both programs the benchmark ratings were only a measure of qualification, and that none, at least in the special program, was loaded for the purpose of compensating for past discrimination?

MR. COX: That is my understanding, but I do not wish to mislead Your Honor and say that that clearly appears in the record anywhere.

But it's implicit in the logic of the situation. Remember that the Task Force applicants were being considered by the Task Force Subcommittee.

Incidentally, it's the majority of the faculty were not minority, there was one minority member.

Its function was to admit up to 16 qualified minority and educationally or disadvantaged applicants. It wasn't comparing them, it wasn't charged with comparing them with anyone else, and therefore the benchmarks it put on them were only for the purpose of comparing them with each other.

QUESTION: And so, as it operated, it had the effect of someone with a higher benchmark rating in the regular

program losing a place?

MR. COX: Yes, but whether that -- it certainly -- yes, as the numbers were scored. Whether in fact the numbers are comparable, I don't know.

I do want to stress that, as we see the case, this is not a matter of a contest to be judged according to certain standards of performance on grades or a prize to be awarded, that the institution has important, broader educational, professional and social purposes. So that for the purposes of all of us, it may be more important to have a qualified member of a minority there than it is to have somebody whose benchmark was higher.

And this is the kind of judgment that has to be made.

I would like to direct my attention, if I may, to one important point, and that's again the significance of the number 16.

We submit, first, that the Fourteenth Amendment does not outlaw race-conscious programs where there is no invidious purpose or intent, or where they are aimed at offsetting the consequences of our long tragic history of discrimination, and achieving greater racial equity.

QUESTION: Mr. Cox, may I interrupt you --

MR. COX: I would think that there --

QUESTION: Mr. Cox, may I interrupt you with a question that's always troubled me?

It's the use of the term "invidious", which I've always had difficulty really understanding. You suggested, in response to Mr. Justice Rehnquist, that if the number were 50 rather than 16, there would be a greater risk of a finding of invidious purpose.

How does one -- how does a judge decide when to make such a finding?

MR. COX: Well, I think he has to consider all the facts. They were most recently laid out in Justice Powell's opinion in the Arlington Heights case, the sort of thing that he thought the court should consider.

If Your Honor is asking me what do I mean by "invidious", I mean primarily stigmatizing, marking as inferior, --

QUESTION: Let me make my --

MR. COX: -- shutting out of participation --

QUESTION: Mr. Cox, let me make my question a little more precise. Can you give me a test which would differentiate the case of 50 students from the case of 16 students?

MR. COX: I would have to make this turn on a subjective inquiry, I think, but I would also have to look and see what the significance of the 50 students was in the over-all context of the community, its educational system, and the State.

And I would -- I suppose I would be governed partly

by purpose and partly by effect, but that would lead me back to purpose.

QUESTION: But in Mr. Justice Rehnquist's example, he was assuming precisely the same motivation that is present in this case: a desire to increase the number of black and minority doctors, and a desire to increase the mixture of the student population.

Why would not that justify the 50?

MR. COX: Well, if the finding is that this was reasonably adapted to the purpose of increasing the number of minority doctors, and that it was not an arbitrary, capricious, selfish setting -- and that would have to be decided in the light of the other medical schools in the State and the needs in the State; but if it's solidly based, then I would say 50 was permissible. Just as in my example, I said that educating only Indians in a program tailored to training teachers to go back to Indian reservations seems to me to be constitutional. And there are such programs, at both private and State institutions.

QUESTION: Are you going to address the question of other alternatives, Mr. Cox?

MR. COX: I will in short, yes.

In our view, the other alternatives suggested simply won't work.

One is to build more medical schools. Well, Davis

was a new medical school, and it did not have any -- until it adopted this program; virtually no blacks or Chicanos were admitted.

One would have to increase the number of medical schools out of all reason before that would produce substantial numbers of minorities under the conventional admissions test.

A second suggestion is better recruiting. That suggestions seems to us to overlook the extensive recruiting efforts that were made during the late Sixties that are described in Odegaard's Minorities in Medicine -- which, incidentally, is probably the best reference book on this subject. And other references in our brief.

It also assumes that there are out there a lot of high test score, high college grade members of minorities that haven't applied or been found by any law school, any medical school, or any graduate school.

QUESTION: Well, what about a -- what about a make-up, what about an additional year of make-up for all people who might be --

MR. COX: Well, then the next suggestion is that something be done for all disadvantaged. That won't meet these -- I don't want to keep anything from disadvantaged or talk down any program that was for the disadvantaged; but that would not meet the specific needs for which these programs are tailored, for two reasons:

First, the minorities are only a minor fraction of all disadvantaged.

Second, all the studies show -- whatever the explanation -- that minority students do worse among the students of families who are economically disadvantaged, just as they do worse when you take the total ratio of applicants.

So that the program for the disadvantaged would not bring substantial numbers of minorities into these schools.

The other suggestion that has been made is that we should not use the word "race", we should talk about choosing people for admission to medical colleges who are most likely to go to those communities that have been the victims of discrimination and need better medical care -- but don't ever say the word.

Or that we should get those who will be role models for the communities in which the past has denied the ambition to young people, certainly ambition to this kind of role in the community.

These, I submit, are circumlocution, or they are euphemisms. If we are talking about realities, race is a fact; it is something that all kinds of social feelings, contacts, a vision of one's opportunity, is related to. And if one is going to meaningfully direct these programs in

social objectives, it is simply stultifying to disregard a reality that we hope will stop having significance in these areas, and which will have more -- and which we have a best chance of depriving of its present unfortunate significance if these programs are permitted to continue and succeed.

May I save, Mr. Chief Justice, the few minutes I have left?

MR. CHIEF JUSTICE BURGER: You have very little left, but we've taken a good deal of your time, so we'll enlarge your time five minutes, and enlarge Mr. Colvin's time accordingly.

MR. COX: Perhaps I can better use it in rebuttal, and I can see what the Court is --

MR. CHIEF JUSTICE BURGER: That will give you about seven minutes altogether.

MR. COX: Thank you very much.

MR. CHIEF JUSTICE BURGER: Mr. Solicitor General.

ORAL ARGUMENT OF WADE H. McCREE, JR., ESQ.,
ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE

MR. McCREE: Mr. Chief Justice, may it please the Court:

The interest of the United States as amicus curiae stems from the fact that the Congress and the Executive Branch have adopted many minority-sensitive programs that take race or minority status into account in

order to achieve the goal of equal opportunity.

The United States has also concluded that voluntary programs, to increase the participation of minorities in activities throughout our society, activities previously closed to them, should be encouraged and supported.

Accordingly, it asks this Court to reject the holding of the Supreme Court of California, that race or other minority status may not constitutionally be employed in affirmative action and special admissions programs, properly designed and tailored to eliminate discrimination against racial and ethnic minorities as such discrimination exists today, or to help overcome the effects of past years of discrimination.

This Court does not require a recital of the extent and duration of racial discrimination in America from the time it was enshrined in our very Constitution, in the three-fifths compromise, in the fugitive slave provision, and in the provision preventing the importation of such persons prior to 1808. And it continues until the present day, as the overburdened dockets of the lower federal courts, and indeed of this Court, will indicate, where there has been noncompliance with the decisions of this Court that have rediscovered and are still rediscovering the true genius of the Fourteenth Amendment.

Indeed, many children born in 1954, when Brown was

decided, are today, 23 years later, the very persons knocking on the doors of professional schools, seeking admission, about the country. They are persons who, in many instances, have been denied the fulfillment of the promise of that decision because of resistance to this Court's decision that was such a landmark when it was handed down.

And this discrimination has not been limited just to persons of African ancestry. We all know too well the Asian Exclusion Acts that have discriminated against Asian-American citizens. The sad history of our native American Indian population. And the treatment of our Hispanic population, sometimes called Chicanos.

This is what prompts the interest of the United States in seeing that this Court shall overturn the ruling of the California Supreme Court, that race or minority status may not be taken into consideration in formulating remedial programs.

A Professor Zimmer at the University of Illinois has written: If the ultimate social reality is the irrelevancy of race, the present reality is that race is very relevant.

Accordingly, it would appear that to be blind to race today is to be blind to reality.

Now, as we have argued in our brief, a school district may take race into account in formulating voluntary

plans of integration. We have argued, and this Court has held, that it need not await litigation, and it may take into account not only its own discrimination but also the consequences of discrimination elsewhere in our society, because the impact of discrimination is not limited by source or locality.

QUESTION: Mr. Solicitor General, is there any evidence in this record that this University, its Medical School at Davis, has ever engaged in any exclusion or discrimination on the basis of race?

MR. McCREE: There is no evidence in the record that this University has, and, indeed, I would be surprised to have found it, according to the state of this record.

However, this Court is aware, through its decisions, of discrimination in the State of California, in many cases involving the school districts of Los Angeles, of Pasadena, of San Francisco, and indeed there is census data revealing that about 40 percent of the black students in California, or black persons of school age in California grew up and spent part of their growing years in States where there was de jure segregation. Until it was stricken down in 1954, and where it persisted, and still seems to elude efforts to extricate it, root and branch.

And this is the significance of my statement, that the school need not be restricted to eliminating the effects

of its own acts of discrimination, but may take into account society's discrimination, because of the pervasiveness of its impact.

QUESTION: Including -- do you include in that conduct outside the State of California?

MR. McCREE: I would include conduct throughout the nation, because we are a nation without barriers to travel, and indeed California seems to have been -- seems to be currently one of the principal recipients of the flow of population from other parts of the country. And many of them bring with them the handicaps imposed upon them by conditions to which they were subjected before they went west.

We suggest that it is not enough, really, to look at the visible wounds imposed by unconstitutional discrimination based upon race or ethnic status, because the very identification of race or ethnic status in America today is, itself, a handicap. And it is something that the California University at Davis, Medical School, could and should properly consider in affording a remedy to correct the denial of racial justice in this nation.

We submit that the Fourteenth Amendment, instead of outlawing this, indeed should welcome it as part of its intent and purpose.

There are very limited opportunities for professional and graduate education and, as my brother, Mr. Cox, has pointed

out, there is a problem faced by every school, which has to apportion scarcity, of making decisions how it shall employ these resources. And the United States submits that this is a decision best left to the professional judgment of the faculties of those schools, so long as this apportionment is not motivated by invidious racial purposes.

QUESTION: General McCree, does the United States really care whether the decision is made by the faculty, by the President, or by the Board of Regents?

MR. McCREE: The United States should not care about that.

I was referring to the facts of this case, where it appears that it was made by the faculty. There is a reference to a faculty resolution, which, unfortunately, does not appear in this sparse record.

QUESTION: Do you think it would be any different if it had been made by the Board of Regents rather than by the faculty? Or by the Legislature?

MR. McCREE: I would think the result should be the same, Your Honor.

QUESTION: Mr. Solicitor General, you suggest on this question of invidiousness that there should be a remand to take further evidence, to find out, among other things, why the Asian-Americans were included in the program.

Supposing the evidence shows that the reason that

were included was because they had in the past been the victims of discrimination, what inference should we draw from that kind of conclusion? Would that mean the program is good or bad? Is that a sufficient justification?

MR. McCREE: Well, we submit that a remedy is intended to right a wrong, and we think that the Court should scrutinize the use of race, to make certain that it is being used to remedy a wrong.

Our reference to Asian-Americans here certainly was not to suggest that they are not entitled to consideration within the program, but just to indicate that the sparseness of this record makes it difficult, if not impossible, to determine the extent of continuing -- the continuing impact of racial discrimination upon that segment of our society.

If I may continue in this answer, it would appear that the Asian-American population isn't monolithic any more than any other categorical segment of the American population. Certainly, in addition to Chinese and Japanese, there are Korean, Philippino, Cambodian, Laotian, Indonesian, and the impact upon these varying segments is not known and doesn't appear from the record, except where we make a reference, I believe on page 40 of our brief, to some census statistics concerning it.

We think that this Court should, and courts should appropriately, make certain that programs that have a racial

component are indeed remedial. And this is the reason for the suggestion of our remand, because of the state of this particular record.

QUESTION: What does this record lack with respect to Asian-Americans that it has with respect to the other minorities who are included in the program?

MR. McCREE: Well, among other things, this record -- well, it isn't so much the record, let me correct that answer, as it is available data in the form of statistics, census data, which would show, for example, that black physicians comprise something like 2.4 -- that is an approximation -- of all the physicians; that the native American figure, I believe, is less than one percent; that the Hispanic or Chicano figure is approximately 2 percent, and we just don't know the impact of that within the Asian-American community.

And we think that this could be determined if it was sent back for this purpose.

QUESTION: Does the record show the number of doctors, lawyers, engineers who are of Asian ancestry, Asian-Americans, in California?

MR. McCREE: There is a reference, I believe it's page 42 of my brief, that has a census figure that has a gross statement of the number of professional -- the number of professional persons within -- may I correct that? It's

page 42, and it's the footnote.

There's a reference -- "29.1 percent of Asian-American persons held professional, managerial, and administrative positions" and then it goes on to speak of laboring positions and so forth, but there's no breakdown in this professional and managerial to professional, and particularly including medical or legal practitioners.

QUESTION: Well, 29 percent is substantially higher than their proportion of the total population, is that so?

MR. McCREE: This would appear to be so, but it would be significant only if it were a monolithic community. It might turn out that among Koreans the figure was less than one or two percent. Or among Taiwanese, or among Cambodians or Laotians.

And it's such a generic category of Asian-Americans that we submit that this is something that a court might want to look at.

QUESTION: Well, on its face, the 29 percent hardly would support any ready conclusion that there's a pervasive discrimination against people of Asian ancestry; isn't that so?

MR. McCREE: On this record, this is possible. But we know how sparse this record is. We know that this was submitted solely on the declaration of Dr. Lowrey, and a

discovery deposition with -- and the pleadings, with no testimony taken at all, about the statistics or the demographic statistics of California.

And the interest of the United States as amicus curiae is in the principle that there may be remedial, voluntary remedial programs that are race conscious, minority aware, to take these factors into consideration in order fairly to evaluate credentials of persons who may have suffered from this.

And we are interested in having this principle cleared, and the Supreme Court of California has said that the race of an applicant or of other applicants may not be taken into consideration for any purpose --

QUESTION: May I ask, Mr. Solicitor General, do you agree with Mr. Cox that we ought not to address the Title VI question?

MR. McCREE: I believe that Title VI of the Civil Rights Act of 1964 states no principle, no substantive principle different from the Fourteenth Amendment.

QUESTION: Well, that goes to the merits.

Should we or should we not address it?

MR. McCREE: Well, I disagree with him in one respect. This Court has held that a ground not urged below may be urged here in support of a judgment.

The question becomes: whether it is urged here.

There's a reference to it in the reply brief of respondent. Whether that is an assertion in support of the judgment or not is something that I think is debatable. I would like to argue that it is not, that it is a passing reference.

But it can be urged here in support of the judgment.

QUESTION: Of course, he may -- he may still urge it.

[Laughter.]

MR. McCREE: He may, and, unfortunately, he follows us.

[Laughter.]

MR. McCREE: I would like to conclude -- and undoubtedly he shall.

[Laughter.]

MR. McCREE: I would like to conclude that this is not the kind of case that should be decided just by extrapolation from other precedents; that we are here asking the Court to give us the full dimensions of the Fourteenth Amendment that was intended to afford equal protection.

And we suggest that the Fourteenth Amendment should not only require equality of treatment, but should also permit persons who were held back to be brought up to the starting line, where the opportunity for equality will be meaningful.

And this Court has risen on other occasions to challenges like this, because we will never forget that when it hears the real cases, it is a Constitution, it is expounding.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Solicitor General.

Mr. Colvin.

ORAL ARGUMENT OF REYNOLD H. COLVIN, ESQ.

ON BEHALF OF THE RESPONDENT

MR. COLVIN: Mr. Chief Justice, and members of the Court:

I think that the Honorable Wade McCree's last remark was something of a prediction that I might not disappoint him and I will try not to.

It seems to me that the first thing that I ought to say to this Honorable Court is that I am Allan Bakke's lawyer and Allan Bakke is my client. And I do not say that in any formal or perfunctory way. I say that because this is a lawsuit. It was a lawsuit brought by Allan Bakke up at Woodland in Yolo County, California, in which Allan Bakke from the very beginning of this lawsuit in the first paper we ever filed stated the case. And he stated the case in terms of his individual right. He stated the case in terms of the fact that he had twice applied for admission to the Medical School at Davis and twice he had been refused, both in the year 1973 and the year 1974. And he stated in that complaint what now, some three-and-a-half years later, proves to be the very heart of the thing that we are talking about at this juncture. He stated that he was excluded from that school because that school had adopted a racial quota which deprived him of the opportunity for admission into the school. And that's where the case started. It started with a suit against the University.

He stated three grounds upon which he felt that he had been deprived of the right to admission to that school: the Equal Protection Clause of the Fourteenth Amendment, the Privileges and Immunities portion of the California Constitution, and Title VI, 42 United States Code 2000(d). And those were the three grounds upon which he placed his complaint from the very beginning.

QUESTION: You spoke, Mr. Colvin, of the right to admission. You don't seriously submit that he had a right to be admitted.

MR. COLVIN: I wanted to get to that and I quite agree and let me say it now so that it is out of the way.

We have no contention here that Allan Bakke has a constitutional right, or even a statutory right to be in a medical school. As a matter of fact, I am sure that if the Regents of the University of California had decided to close the Medical School at Davis that Allan Bakke couldn't stand up here through his lawyer, or even get beyond the first demurrer in the Superior Court at Woodland, and say, 'I have a right to go to medical school.'

That is not Allan Bakke's position. Allan Bakke's position is that he has a right, and that right is not to be discriminated against by reason of his race. And that's what brings Allan Bakke to this Court.

Now let me go on for just a moment with what happened in the lawsuit, because it is very important that we follow this step by step.

The University, at the very beginning, did several things. First, they denied that they had a racial quota. I think that disappeared from the case. Secondly, they denied that Mr. Bakke would have been admitted, even had there been no racial quota. And, as I will indicate at some length, I

hope later on, that's disappeared from the case.

They admitted, speaking of the scope of Section 2000(d), they admitted they were a federally funded institution, but they did more than that. They did more than that. They then filed a cross-complaint against Allan Bakke and within the cross-complaint they sought their own kind of relief. And the relief which they sought was the relief that their program be declared constitutional -- not only constitutional, but constitutional within the federal sense, within the California sense and something else, that it also be declared constitutional within the meaning of 2000(d), that is Title VI. And so the issue was joined.

Now bear in mind the whole scope of what we are talking about in this lawsuit. Here we are in June of 1964. We file a complaint. The name of the game is not to represent Allan Bakke as a representative of a class. We are not representing Allan Bakke as a representative of some organization. This is not an exercise in a law review article or a bar examination question. This is a question of getting Mr. Bakke into the medical school -- and that's the name of the game, and we have to do that in order to be effective as lawyers and we humbly try to be effective as lawyers -- sometime between June of 1974 and the entering class of September of 1974. And if you read the record, you will see the frantic efforts we make to get before the court. And we tried to get

before the Court on a question of injunction, on a question of andemus, on a question of declaratory relief, each of them moving the thing forward on the calendar.

QUESTION: But no one is charging you with laches here, Mr. Colvin.

(laughter)

MR. COLVIN: I am relieved to hear it, but that wasn't exactly my point. If I may just continue for the moment.

I want to continue for a moment to discuss the dimension of the record because that's part of what has been said here, and in order to indicate the record and why the record is in the posture that the record is in.

The first thing that we did within the record was to take the deposition of Dr. Lowrey and after we took the deposition of Dr. Lowrey, Dr. Lowrey's deposition was further bolstered by Dr. Lowrey's declaration prepared, no doubt, with the assistance of his counsel.

Now, where do we find --

QUESTION: I corrected that. Dr. Lowrey was not Dean when all this occurred, was he?

MR. COLVIN: That is not -- It is true and it is not true. May I explain, sir.

QUESTION: Was he Dean when this regulation was put into effect?

MR. COLVIN: The answer to that is no, but the answer to the question --

QUESTION: My point is, if I may finish my point: Did you put on any evidence as to what happened?

MR. COLVIN: No. We accepted --

QUESTION: All you had was hearsay.

MR. COLVIN: It was hearsay, but it was hearsay by the Dean of Admissions who was administering a program. And if I may just say this. I will not attempt to get into a discussion of what is hearsay and what is not hearsay, but the fact of the matter is that it was Dr. Lowrey who was administering the program, both in 1973 and in 1974, and more than that it was Dr. Lowrey himself, who had reviewed and interviewed Mr. Bakke in 1974. So the point that I am trying to make is that we were not exploring the testimony of some official who was 200 miles away, as to what had happened. Dr. Lowrey was there on the scene.

Justice Marshall, you are correct in this respect that at the time the faculty adopted the resolution Dr. Lowry was elsewhere. I believe, from my recollection of the deposition, that he was at the University of Michigan. I may be mistaken on that, but that is my recollection.

QUESTION: Did you take the deposition of anybody who knew what happened?

MR. COLVIN: Well, we think -- And it was quite

clear. Let me answer that. I am satisfied --

QUESTION: Well, you could answer that very simply by yes or no.

MR. COLVIN: My answer is yes. My answer is that Dr. Lowrey was the Dean of Admissions, that he brought with him to the deposition every piece of paper which we had asked for, that he had personally interviewed Mr. Bakke, and, as a matter of fact, the record of the interview between Dr. Lowrey and --

QUESTION: What was the decision of the committee of the faculty?

MR. COLVIN: Mr. Bakke was turned down for admission --

QUESTION: No, no. I mean when the rules were set up, what were the rules?

MR. COLVIN: The rules were simply that 8%, that 16% of the entering class --

QUESTION: What about the 8%

MR. COLVIN: Eight percent is the number. I am sorry.

QUESTION: Eight percent was before and now you say 16.

MR. COLVIN: May I start over again? It was always 16%

QUESTION: Sixteen people.

MR. COLVIN: No. In the early years of the school,

there were just 50 admitted in the entering class.

QUESTION: Does the rule say 16% or --

MR. COLVIN: The rule says 16%.

QUESTION: -- or 16.

MR. COLVIN: Sixteen percent.

QUESTION: Where is the rule in the record?

MR. COLVIN: Well, --

QUESTION: It's in Dr. Lowrey's testimony.

MR. COLVIN: It is in Dr. Lowrey's deposition.

QUESTION: There is no other thing there except that?

MR. COLVIN: That's where we find it, yes.

QUESTION: And that's hearsay?

MR. COLVIN: In my judgment, it would only be hearsay in the sense that it relatesto the historical origin of the rule but it is not hearsay as it relates to --

QUESTION: Well, that's true.

MR. COLVIN: -- the way that the rule was imposed in the two years that Dr. --

QUESTION: My only point was, sir, that we don't know how the rule came about.

MR. COLVIN: Well we do know that it came about by faculty vote. That's in the record.

QUESTION: Right.

MR. COLVIN: That's in the record.

QUESTION: And what else do we know?

MR. COLVIN: We also know that statistics were kept and they are in the record for each --

QUESTION: Well, what criteria was set down for

disadvantaged?

MR. COLVIN: That question was asked of Dr. Lowrey. In the deposition of Dr. Lowrey, I asked Dr. Lowrey two questions. The first question was: Was there any definition of the term "educationally disadvantaged"? The answer was no. And the second question was: Was there a definition of the term "economically disadvantaged"? And the answer was no.

QUESTION: He's talking about the present time, when he was testifying.

MR. COLVIN: Yes.

QUESTION: Well, I am trying to find out what happened when it was adopted. I guess there is no way for me to find that out, with this record.

MR. COLVIN: I don't believe there is, except if I may say, most respectfully, that I do have the feeling as a lawyer that you have two things in the record: You have the deposition of Dr. Lowrey, the Dean of Admissions. You have the declaration of Dr. Lowrey the Dean of Admissions, and I think that a fair reading of both of those documents lays out pretty well what the situation was. Whether something was technically hearsay, I really couldn't assume that point.

QUESTION: There is no controversy between counsel as to the existence of the plan or its contours or what is provided, is there?

MR. COLVIN: Well, we believe, yes. We believe there

is a very important kind of controversy which is involved here and that is precisely the controversy over the concept of quota.

QUESTION: Is it a factual controversy or --

MR. COLVIN: We think, in general, yes. We think there are a lot of factual elements to it. Let me make a distinction on this quota question, if I may, Your Honor.

There are many points in the University's brief where somehow in order to take the sting out of the word "quota" the word "goal" is used. This is not a quota, they say, but it is a goal. We find that to be a real misuse of language.

QUESTION: Mr. Colvin, to follow up a minute, Justice Powell's question, that really is a matter of characterization, rather than strictly a fact. If I understand it, there were 16 places set aside for minority applicants. You are certainly free to argue from that what you want to about quotas and goals, but that really goes beyond a strict factual matter.

MR. COLVIN: Well, the factual question, if I may respond to that just briefly, arises somehow in a different way. And let me illustrate it this way, because it is a factual, there is a factual circumstance involved. And let me try to spell out what I believe that factual circumstance to be.

Normally, if we have a goal, if we have a goal, if we are going to get a number of people in, we select a standard

and then above that standard we admit people in order to qualify. Precisely the opposite is true here. In this case, we have to follow what the factual situation is. Here, we have a quota where the number is first chosen and then the number is filled regardless of the standard. And let me say precisely from the record what I mean. When we take Dr. Lowrey's deposition, one of the very first questions asked Dr. Lowrey is this question: What is the standard for admission to the school? And Dr. Lowrey's response is that the standard is that we will interview no one who has a Grade Point Average below 2.5.

Now let's look at the record on that point. In the year 1973, the people within the quota or special admissions program have overall Grade Point Averages which run all the way down to 2.21. That's in '74. In 1973, they run all the way down to 2.11, but the science Grade Point Averages for that group -- and I am not giving you averages. I mean to say range. The range runs all the way down to 2.02. That's the Grade Point Average side of it. Take the MCAT --

QUESTION: Mr. Colvin, you do not dispute the basic finding that everybody admitted under the special program was qualified, do you?

MR. COLVIN: We certainly do dispute it. Not upon the ground that Mr. Bakke is attempting to tell the school what the qualifications are, nor upon the ground that we, as

his counsel, can somehow set up a rule which will tell us who is qualified to go to medical school.

MR. CHIEF JUSTICE BURGER: Mr. Colvin, don't get too far away from the microphone, if you want to stay on the record.

MR. COLVIN: I am sorry. I sometimes think of it as a retreat.

But the point that we are making is this, that the rules as to admission were fixed neither by Bakke nor his attorneys but were fixed by the school itself. They were the ones who chose grade point averages and they were the ones who chose MCAT scores as a basis for judging admission. And let me say this about the MCAT scores, because it relates again to the question that I was answering as to the difference between a goal and a quota.

QUESTION: There is nothing in the record to indicate that they chose the 2.5 figure because they felt that anyone with a lesser score would not be qualified either to do the academic work or to practice medicine.

MR. COLVIN: No, but that was their rule. That was their rule, and I think there is a fair inference from the record that there was a reasonable basis for Dr. Lowrey stating that that was the rule of the school.

QUESTION: Yes, it was an administrative basis.

MR. COLVIN: It was an administrative basis, but

at least it was their basis.

QUESTION: But, then, how does that go -- Why do you disagree with the proposition that there is nothing in this record to show that any of the special people were qualified to study and to practice?

MR. COLVIN: We simply say that we do not agree, we do not agree that there is a showing that they were qualified. We are not making the argument that they were disqualified, but we are saying, taking the school's own standards, taking the very thing that the school was talking about, they simply do not measure up on that point. But let me finish, if I may, because it is hard to finish all of these things. And I do want to comment about the same thing as it applies to the MCAT scores.

You will recall that in Dr. Lowrey's deposition Dr. Lowrey says, "We would be hard pressed" -- "We would be hard pressed to admit people to the school if they had MCAT" -- Medical College Aptitude Test -- "percentiles in science and in verbal which were below 50."

But look at the record in the case. Look at the record in the case. In 1973, the average -- not the range, but the average of the people in the special admissions group -- was in the 35th percentile in science and in the 46th percentile in verbal. In 1974, the percentile in science -- and this is an average and not a range -- was 37 and in verbal

Allan Bakke took the test only once and his record is there. You will find it on page 13 of our brief. He scored in the 97th percentile in science and in the 96th percentile in verbal.

The ultimate fact in this case, no matter how you turn it, is that Mr. Bakke was deprived of an opportunity to attend the school by reason of his race. This is not a matter of conjecture. This is a stipulation by the Regents of the University of California.

QUESTION: For purposes of this argument, though, do you need to go any farther than to assert and convince somebody that he was deprived of an opportunity to compete for one of the sixteen seats because of his race. Do you need to go any farther than that?

MR. COLVIN: I am afraid that --

QUESTION: If you don't need to go any farther, you certainly are taking up a lot of your time.

MR. COLVIN: I don't want to take up my time except to say that there is within this record the stipulation of the Regents of the University of California that Mr. Bakke was deprived of the opportunity to attend the University of California Medical School at Davis because of the use of the sixteen places by the special admissions program.

QUESTION: Mr. Colvin, may I follow up on Justice

White's observation -- same as I view this record -- the University doesn't deny or dispute the basic facts. They are perfectly clear. We are here -- at least I am here -- primarily to hear a constitutional argument. You have devoted twenty minutes to laboring a fact, if I may say so. I would like to help. I really would, on the constitutional issues. Would you address that, please?

MR. COLVIN: Yes. I would like to address, I would like to address the problems that arise with quota and the problems that arise with race and I would like also to address the alternative which the University suggests.

We have the deepest difficulty in dealing with this problem of quota, and many, many questions arise. For example, there is a question of numbers. What is the appropriate quota? What is the appropriate quota for a medical school? Sixteen, eight, thirty-two, sixty-four, one hundred? On what basis, on what basis is that quota determined? And there is a problem a very serious problem of judicial determination.

Does the Court leave open to the school the right to choose any number it wants in order to satisfy that quota? Would the Court be satisfied to allow an institution such as the University of California to adopt a quota of 100 percent and thus deprive all persons who are not people within selected minority groups.

QUESTION: Well, what's your response to the assertion

of the University that it was entitled to have a special program and take race into account, and that under the Fourteenth Amendment there was no barrier to its doing that because of the interests that were involved? What's your response to that?

MR. COLVIN: Our response to that is fundamentally that race is an improper classification in this situation. As a matter of fact, the Government in its own brief makes that very point.

QUESTION: Do you disagree with the California Supreme Court when it said that, when it identified the interest that it understood the University was taking into account in this special program, and agreed with the University's submission that these were compelling interests?

MR. COLVIN: The California Court made those assumptions arguendo.

QUESTION: Do you agree with them or not?

MR. COLVIN: We think that we need not disagree with them, that they are fair assumptions but it went much further.

QUESTION: Well, then you agree -- you don't disagree that these --

MR. COLVIN: We don't disagree.

QUESTION: -- that these interests are compelling interests.

MR. COLVIN: We assume, as the court did, that

those specific interests, not all of them, but that those specific interests are compelling interests. Our problem is --

QUESTION: Do you agree -- Do you also agree that if they are compelling, and if there were no alternatives, if there were no alternatives, would you agree that the racial classification could be upheld?

MR. COLVIN: We might someday come to that, but I don't think we come to it in this case. And I think --

QUESTION: Part of your submission is: Even if these are compelling interests, even if there is no alternative, the use of the racial classification is unconstitutional?

MR. COLVIN: We believe it is unconstitutional. We do.

QUESTION: Because it is limited rigidly to sixteen?

MR. COLVIN: No, not because it is limited to sixteen, but because the concept of race itself as a classification becomes in our history and in our understanding an unjust and improper basis upon which to judge people. We do not believe that intelligence, that achievement, that ability are measured by skin pigmentation or by the last surname of an individual, whether or not it sounds Spanish or --

QUESTION: Do you mean by that that in the sixteen places, the allocation was dominantly by race?

MR. COLVIN: There is no question but what the

sixteen places was dominantly by race. I have to go back to the record, if I may, just to reach that point. There were no non-minority people who were ever admitted to the special admissions program. And I do not mean that that was for the lack of trying. In the years 1973 and 1974, 245 people whom the University itself classified as economically white -- as white economically disadvantaged -- sought admission into those places. And there were none admitted either in those two years or in any years, and that was more than a third of all the people who sought to get into the program. But they could not.

And so that you had a program at the University of California Medical School at Davis where people were shut out from sixteen of the places. Our belief in this case is that this is done essentially because the universities will not follow the suggestion of the California Supreme Court. And the essential --

QUESTION: I take it then that if we disagreed with you that the racial classification is invalid, even if there are compelling interests and even if there is no alternative, you then support the California court's conclusion that there were alternatives in fact.

MR. COLVIN: We do support the conclusion that there were alternatives, and I would like to comment on that phase of the case.

One of the suggestions which the California Supreme

Court made was that the universities look at people in terms of disadvantage. Look at people individually in terms of disadvantage. Now I know and we all know that there are cases that are deemed to be societal discrimination where millions and tens of millions of people are involved, particularly cases dealing, perhaps with Social Security, dealing -- cases dealing with women. That is not this case. There were one hundred people who were enrolled each year into the Davis Medical School. It may have been administratively difficult for people, for the administrators of the school to look at the one hundred and to select those whom they would admit upon the basis of disadvantage. The problem is that the universities become quota happy. They become --

QUESTION: Mr. Colvin, what if the University says, "We don't want to just aim at the disadvantaged, we want to increase the number of black doctors who are practicing in California"? Is that a permissible goal on the part of the University?

MR. COLVIN: To the extent that the judgment is made on whether those doctors are disadvantaged, it is a legitimate means. To the extent -- and the Supreme Court of California says this -- to the extent that the preference is on the basis of the race, we believe that it is an unconstitutional advantage.

QUESTION: Well, do you say, then, it is not a

permissible goal on the part of the University to increase the number of black doctors practicing --

MR. COLVIN: We say it is a permissible goal and if - -

QUESTION: -- If it is a permissible goal, why on earth beat around the bush? Why not simply make a race oriented selection?

MR. COLVIN: Because the Supreme Court says to the University, "You cannot leap to the quota system. What you must first do is to undertake to meet the question of disadvantage where it exists, if it exists."

QUESTION: But the University comes back and says, "We are not interested in disadvantage, as such, we are interested in blacks."

MR. COLVIN: Yes, but the Supreme Court comes back to the University and says, "What you are doing is skipping one step. You are not -- " What is the reason for this goal? What is the reason why people are saying we want more chicano doctors, more black doctors, more oriental doctors? The reason is we claim that there was disadvantage. The difficulty is, with a racial classification, is that we are engaging in these broad generalizations that every one of a given race has suffered the same advantage or the same disadvantage, the same wealth or the same poverty, the same education or the same lack of education.

There are two benefits for a university to look at the question of advantage. And the first of those benefits is that it does not run into a constitutional difficulty. And the second advantage -- or the second benefit of looking at the question of disadvantage is that it meets the problem where it exists. It meets it at the point of the individual. It does not generalize. It is not true that all members of a given race have exactly the same experience, the same wealth, the same education. And that's the point that Justice Mosk is making in the California Supreme Court. He says, "It is inappropriate, whatever your goal is, to jump to the question of making these racial discriminations." And particularly inappropriate, we say, because the thing that happens is that it keeps Mr. Bakke out of medical school not because of somebody else's race or anything else, but because of Mr. Bakke's race he becomes ineligible himself to enter the medical school. And Mr. Bakke's individual stake in this matter is an important stake.

And I started with the proposition that I am Mr. Bakke's lawyer and Mr. Bakke is my client. He has a right to that protection. He has a right, if he desires, to show that he is one of those who is entitled to enter that medical school. To keep him out because of his race, we submit, is an impropriety. The whole point --

QUESTION: Your client did compete for the 84 seats,

didn't he?

MR. COLVIN: Yes, he did.

QUESTION: And he lost?

MR. COLVIN: Yes, he did.

QUESTION: Now, would your argument be the same if one, instead of sixteen seats, were left open?

MR. COLVIN: Most respectfully, the argument does not turn on the numbers.

QUESTION: My question is: Would you make the same argument?

MR. COLVIN: Yes.

QUESTION: If it was one?

MR. COLVIN: If it was one and if there was an agreement, as there is in this case, that he was kept out by his race. Whether it is one, one hundred, two --

QUESTION: I didn't say anything about him being -- I said that the regulation said that one seat would be left open for an underprivileged minority person.

MR. COLVIN: Yes.

QUESTION: You would argue that?

MR. COLVIN: We don't think we would ever get to that point --

QUESTION: So numbers are just unimportant?

MR. COLVIN: Numbers are unimportant. It is the principle of keeping a man out because of his race that is

important.

QUESTION: You are arguing about keeping somebody

out and the other side is arguing about getting somebody in.

MR. COLVIN: That's right.

QUESTION: So it depends on which way you look at it doesn't it?

MR. COLVIN: It depends on which way you look at the problem.

QUESTION: It does?

MR. COLVIN: If I may finish. The problem --

QUESTION: You are talking about your client's rights. Don't these underprivileged people have some rights?

MR. COLVIN: They certainly have the right to compete --

QUESTION: To eat cake.

MR. COLVIN: -- They have the right to compete. They have the right to equal competition. They even have another right which was given them by the California Supreme Court. They have the right to compete not only upon the basis of grades, they have the right to compete upon the basis of disadvantage. The University, of course, says we will have nothing to do with that. If we can't have a quota, then there is no place for us to go.

Bear in mind that the Supreme Court of the State of California is entirely explicit in its opinion. It says, "We are not" -- emphasize we are not -- "telling the University of California Medical School that it has to take the

hundred people with the highest grade point average or the highest MCAT scores," or whatever it is --

QUESTION: May I ask you a question that I think is relevant to your last statement?

MR. COLVIN: Yes.

QUESTION: The case before us involves essentially a two-track admissions system, with separate committees. Let's assume you had a university, a medical school, with a single admissions committee and with no allocation of seats to any particular minority or other group of applicants, but that had a long list of factors or elements that the admissions committee fairly considered. And assume further that race and sex and geographical location and economic background and urban-rural and all of the other factors that academicians do consider in admitting people to college and to professional schools, assume that type of system, and further assume that your client had not been admitted. Would your argument be the same, as a constitutional matter?

MR. COLVIN: Our argument would be the same, to the extent, to the extent that race itself was the crucial factor in the admissions situation.

QUESTION: Well, my hypothetical listed race as one of eight or ten factors or elements the committee might fairly weigh in the interest of divestiture of a student body, for example. Would that be unconstitutional, in your

opinion?

MR. COLVIN: In our opinion, at this point, in the California situation, with the rule of the Supreme Court before it -- the Supreme Court of California -- that race itself is an improper ground for selection or rejection for the medical school.

Now there are all kinds of other factors of economic and educational diversity. We have no quarrel whatever with them. The problem really is that, as we look at the Fourteenth Amendment and as we look at 2000(d), the fact of the matter is that is race itself, it is discrimination on the ground of race itself which is forbidden. 2000(d), as a matter of refreshment, refreshing, says, "No person in the United States shall on the ground of race, color or national origin be excluded from participation in, be denied the benefit of or be subjected to discrimination under any program or activity receiving federal financial assistance." And we think that the particular scheme to the extent that race becomes a crucial and important matter certainly flies in the face of this.

QUESTION: I take it if we didn't agree with the California Supreme Court on the federal issue and reversed them, I take it you would pursue the other ground that you had in the California Supreme Court, the state grounds and the federal statutory grounds.

MR. COLVIN: Let me -- May I just say a word about the record on that. The record on that, as I have indicated, is that when Mr. Bakke filed his complaint up at Woodland he listed the state ground and the statutory ground, as well as the constitutional ground. Number two, when the University filed its cross-complaint up at Woodland, it listed both the state constitutional ground and the statutory ground, as part of its declaratory relief.

Point three. When Judge Manker, who was the trial judge, made his findings and conclusions in this case, his conclusion was that the program was improper, not only under the constitutional and the state ground but also under 2000(d) And more than that. Number four. The very judgment in this case, as it exists, is a judgment that --

QUESTION: On all of those grounds.

MR. COLVIN: On all of those grounds.

QUESTION: How were all those grounds taken to the Supreme Court of California?

MR. COLVIN: They were all called to the attention of the Supreme Court of California. It is true that by that time the University had written a brief, basically under the Fourteenth Amendment, and it is true that the California court ignored -- elected not to --

QUESTION: If we reverse the California Supreme Court on the ground that it did decide, what would be the

upshot in the California Supreme -- I suppose the other issues would have to be faced then in the California Supreme Court, namely, the federal statutory ground and the state constitutional ground.

MR. COLVIN: My own judgment, if I may be so bold, is that that becomes almost an idle act, because if the basis of reversal, is telling the California court, "Look at this from the point of view of 2000(d)" or "Look at this from the point of view of the Privileges and Immunities Clause of the California Constitution," and I say this respectfully and without having the stature to make the statement, I say respectfully that as I read the Fourteenth Amendment and I read 2000(d) it seems to me that 2000(d) is even stronger than --

QUESTION: I think it is certainly possible that the Fourteenth Amendment might permit or wouldn't forbid what Congress could forbid in the statute. And Congress has often done that. Technically, it could be that the Civil Rights Act forbids things the Fourteenth Amendment itself wouldn't.

MR. COLVIN: Yes.

QUESTION: Are you asking us, then, Mr. Colvin, to decide the federal statutory ground?

MR. COLVIN: I am asking this Court to decide --

QUESTION: Obviously, we can't pass on the state constitutionality.

MR. COLVIN: I understand that.

QUESTION: What I am asking, then, -- yes or no -- do you want us to decide the -- Federal statutory ground?

MR. COLVIN: We believe that this case is ripe and r-ady for a decision on the constitutional ground and on the statutory ground. We believe that what we have here --

QUESTION: Well, ordinarily, we don't decide constitutional questions if we can affirm what you ask us to do on a Federal statutory ground.

MR. COLVIN: I understand that, Justice Brennan, and I am not at any point in this argument attempting to place myself where I do not belong, and that is at the decision-making place.

QUESTION: Are you asking us to pass on the Federal statutory ground?

MR. COLVIN: I am asking you to affirm the California Supreme Court decision --

QUESTION: On any ground?

MR. COLVIN: On both grounds. And I am suggesting to the Court that the California Supreme Court had before it, as has been indicated by Mr. Cox, a very difficult, sensitive issue, that it handled it in a very pragmatic and a very practical and valuable sense. It laid down no harsh rules. It required no one to discriminate.

QUESTION: Do you think it is arguable that the

California Supreme Court should have decided the statutory question before reaching the constitutional question?

MR. COLVIN: I have heard that argument made.

I think that what really --

QUESTION: I don't thi k it has been pressed today except as our inquiries are aimed at it.

MR. COLVIN: I have heard that argument made. I happen to believe that the California Supreme Court felt that it was on perfectly sound ground in the federal constitution and that that was the way the case ought to go. I, of course, was not a party to their other deliberations.

QUESTION: May I ask you one more question. In one of the amicus briefs it is asserted that in November 1976 the California Constitution was further amended to say that no person shall be debarred admission to any department of the University on account of race. Now that, of course, isn't in the case, but I suppose that would come up in the case if we reverse it.

MR. COLVIN: I suppose if there were a new case it would come up. The fact of the matter is that California has a system, as the Court probably knows, where the Constitution of California can be amended by a popular plebiscite and that's what happened. The fact of the matter is that that amendment to the California Constitution occurred approximately a month after the California Supreme Court decision below was final.

QUESTION: Thank you.

QUESTION: Mr. Colvin, my brother Powell, a moment

ago, asked you a question suggesting that a university's admission policy took into account a number of considerations one of which was race. Your response to him was that so long as race is a crucial factor it is bad under the Fourteenth Amendment.

I want to refine that question a little bit, to pose the question: where race is taken into account but it is not a crucial or dispositive factor, as you referred to it in your answer to him, is that permissible under the Fourteenth Amendment, or not?

MR. COLVIN: In my judgment, the use of race as a basis for admission to a medical school or the exercise of other rights is an improper measure. That is my answer to the question.

QUESTION: Whether crucial or not?

MR. COLVIN: Whether crucial or not, except in this situation. And that is to the extent that the identification of race may give further inquiry to the admissions committee as to whether there has been actual disadvantage, economic, educational, persecution, or whatever. But then the decision is to be made on those factors and not the factor of race itself. That's my position on the matter.

QUESTION: If taking race into account increases a person's chances of getting in, it is inevitable that it is going to be crucial at some point, or at any point.

MR. COLVIN: I think that was the answer that I made.

that it was permissible to the extent that it gave some clue to the admissions committee that they ought to consider in terms of this individual applicant out of the 100 that it was talking about, whether there was a prior history of economic, educational, or whatever, deprivation, persecution or whatever it may be.

QUESTION: I think you had argued earlier that this record shows that race -- this was your argument at least -- that race was the dispositive factor here.

MR. COLVIN: Yes, that's our argument.

QUESTION: I think you said the Regents agreed with that.

MR. COLVIN: I don't think I said that because I know of no record that there was an explicit approval by the Regents of this system at the Davis Medical School.

QUESTION: When I say the Regents, I mean your adversary.

MR. COLVIN: Oh, yes. I'm identifying the Regents as such.

MR. COLVIN: Yes. And what we are saying in that regard that on the facts of this case there was no non-minority person in any of the years covered by the statistics here that was ever admitted to the special admissions program. There was no definition of what was meant by educationally or economically disadvantaged, and what I said before and I repeat now is that in the very two years that Mr. Bakke applied there were 245 people who were deemed by the school to be

white economically disadvantaged who tried to get into the program, more than a third of those who tried and none got in. And I also call to the Court's attention one other fact, that in the year 1973, when the application was handed out the application said, "Are you applying as a member of a disadvantaged group, economically or educationally?" That was not the question in 1974. In 1974, the school had gone to the MCAT system, which is the general application system used by half the medical schools in the United States. The question in 1974 which triggered consideration by the special admissions group was this: "Are you applying as a member of a minority group?" So on its face the program becomes not even the pretense of a disadvantaged group. The program becomes a program which is designed as a racial proposition, and that is what Mr. Bakke is complaining of. It is that which deprives Mr. Bakke of his full opportunity to 100 places in the class.

QUESTION: The University stipulated after the judgment of the Supreme Court of California, didn't it, that it could not rest on the burden of proof and that he would not have been admitted under a different system?

MR. COLVIN: Yes. That is true. There was not only a stipulation, but what happened was that the Supreme Court of the State of California decided the case, it decided the unconstitutionality of the quota. We had argued back and

forth through the trial court and through the Supreme Court the question of burden of proof. Did Mr. Bakke have the burden of proving that he would have qualified or did the University have the burden of proving that he would not have qualified?

The original decision of the Supreme Court of California was a decision which said that -- which agreed with us finally, and said yes, the burden of proof is on the University. It's just like Franks v. Bowman Transportation, once you prove the discrimination then the University has to prove that Mr. Bakke would not have been admitted even though there had been no such quota. And the University then entered into a petition for rehearing and in the petition for rehearing, it entered into a stipulation. And the stipulation is filed before the California Supreme Court, and the stipulation is very brief, very brief. "It is hereby stipulated by the Regents of the University of California (the University) that it has produced all of the evidence available to it on the question of whether Mr. Bakke's failure to be admitted to the class entering the School of Medicine of the University of California, Davis, in September 1973, resulted from the operation of the special admissions program. The University concedes that it cannot meet the burden of proving the special admissions program did not result in Mr. Bakke's failure to be admitted."

And without taking your time, I will tell you that this is carried over to the petition for rehearing. The stipulation is an exhibit to it. And then the University says the University has produced all of the evidence it has on the question and concedes, as set forth in the attached stipulation of Donald L. Readart, that it will not attempt to meet that burden of proof.

Mr. Bakke was a highly qualified applicant, and came extremely close to admission in 1973, even with the special admissions program being in operation. It cannot be clearly demonstrated that the special admissions program did not operate to deny Mr. Bakke admission in that year and then, upon receipt of the petition for rehearing with the stipulation attached to it, the California Supreme Court then did the logical thing. Instead of remanding the matter to Woodland in Yolo County, to Judge Manker to make this determination, it ordered Mr. Bakke into the Medical School. He is presently ordered into the Medical School and were it not for the stay in this case of course he would be in the Medical School.

MR. CHIEF JUSTICE BURGER: Your time has now expired.

MR. COLVIN: Thank you, very much.

MR. CHIEF JUSTICE BURGER: Mr. Cox, do you have something further?

REBUTTAL ARGUMENT OF ARCHIBALD COX, ESQ.,
ON BEHALF OF THE PETITIONER

MR. COX: Mr. Chief Justice --

QUESTION: Mr. Cox, before you commence your argument may I inquire whether you agree with my understanding of the Solicitor General's position that the record is inadequate for a constitutional decision and should be remanded?

MR. COX: I do not agree. I disagree and I will develop the reasons, if I may. That was one of the points that I planned to address myself to.

I think perhaps I can be most helpful by trying to put the very particular points we covered in my argument within a larger framework of my basic thinking.

The first main proposition that I would assert is that the racially conscious admissions program at Davis, and any racially conscious admissions program designed to increase the number of minority students at a professional school, is fully consistent with both the letter and the spirit of the Fourteenth Amendment.

And I should want to add one footnote to say that when I use the word "race" or "racially conscious" I am not speaking of race the way one would speak of a redheaded man or a man that has some other mark that is sheer happenstance. That isn't the quality of race in our society today, and I am really talking about all of the things that have gone with

race and the remnants of those things in terms of current social problems, and race is a shorthand to express them.

Now that main proposition we would develop I would state in three points. We say, first, that there is no per se rule of color-blindness incorporated in the Equal Protection Clause.

We say, second, that the educational, professional and social purposes accomplished by a race conscious admissions program are compelling objectives, or to put it practically, there are more sufficient justifications for those losses, those problems, that are created by the use of race. We don't minimize them, but we say the cost is greatly outweighed by the gains.

And third, as I said in my argument, we submit that there is no other way of accomplishing those purposes.

This brings me to the point that the Supreme Court of California was wrong and its judgment should be reversed, because it said that under present circumstances we may not take race into account. That's what Mr. Colvin pitched his case on. That's the proposition he presented below and he presented here.

Justice Powell, he doesn't need any more facts on that. He is either right or wrong as a matter of constitutional law, or if statutory law if he goes back to the court below.

There is further question. Is there something about

the use of the number 16 that renders this program peculiarly vulnerable?

There are educational institutions that pursue minority admissions programs, but the admissions committee is instructed to get a good number, get a substantial number. Get within a range of 10 to 20 percent.

We submit that the method of putting the general policy into actual practice, the level at which somebody reduces it to numbers, is not a matter of constitutional dimension.

And for like reason, we say that the questions raised in the Solicitor General's brief are not matters of constitutional dimension. They are details of admissions programs.

And in both instances we urge that this Court should not get the lower federal courts into being the supervisors of the admissions policies of certainly state and perhaps private institutions.

QUESTION: You wouldn't say that if an admissions committee suddenly decided that they wouldn't admit any black people.

MR. COX: No, but I am suggesting that the details to which I was addressing myself were of a different order or magnitude. You have to decide whether we are right in saying that race may be taken into account for proper purposes.

Of course you will.

I do stress, and even with respect to the main question, but I think it is more important as one gets down to what I regard as details, such as this specific number, I do stress two things. One is the judicializing or constitutionalizing, the drawing of courts in, the writing of monolithic rules, tends to dampen one of the greatest -- abandon one of the greatest sources of creativity in this country, and the opportunity in dealing with delicate and sensitive and often painful -- it is not easy to turn down young men and women. And in dealing with those problems we are advised to take advantage of the fact that there are 50 states. We are advised to take advantage so far as the legislatures will allow it of the fact that different campuses, different faculties are allowed to make up their own minds. And I think if you set a lot of rules that would draw the federal courts into scrutinizing the details of what is done would invite constant litigation and, as I say, it would abandon a source of creativity. It would destroy important autonomy, an discretion with which I and I am sure all the Court recognize is an extraordinarily sensitive and difficult problem, but a search for justice for all to which this country has always been committed, and which I am sure it still is.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

the case is submitted.

(Whereupon, at 11:58 o'clock, a.m., the oral argument in the above-entitled matter was concluded.)