The Burger Court Opinion Writing Database

Regents of the University of California v. Bakke

438 U.S. 265 (1978)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

October 13, 1977

Dear Byron:

Re: Bakke 76-811

I have your memorandum of today. Part of it I find I can agree with. I have spent considerable time in the last few days on the Title VI matter and expect to devote some time to it in my opening summary tomorrow.

In spite of the prodding from the Bench, we did not get much help from the parties on the Title VI issue, and there may be some sentiment to ask the parties to brief this. The language of that statute bears rather startling resemblance to the situation presented by this case.

Regards,

WEB

Mr. Justice White

cc: The Conference

Wm. Brennan
Oct 77

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

October 21, 1977

CONFIDENTIAL

MEMORANDUM TO THE CONFERENCE

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

I have made a tentative and preliminary analysis of what this case appears to be at the present stage, based on the assumption that a way can be found to affirm the decision of the California Supreme Court without putting the states, their universities, or any educational institutions in a straitjacket on the matter of broader based admissions programs.

Establishing fixed ground rules for educators is not the business of courts except when, as in desegregation cases, we are confronted with a pattern of affirmative de jure conduct, based exclusively on race. We have far more competence to say what cannot be done than what ought to be done.

I have always tried to keep in mind the great expression of Brandeis:

> "To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment. *** But in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles." New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (dissenting).

The Regents adopted their program to accomplish a number of commendable, long-range objectives, but as

presently structured, the program is one of the more extreme methods of securing those objectives. The program excluded Bakke from the medical school on the basis of race and this is not disputed. I am open to being shown how, consistent with the prior decisions of the Court, we can escape the significance of this fact.

Having come thus far, I am confronted with the tactical consideration of how best to structure and shape a result so as to confine its impact and yet make it clear that the Court intends to leave states free to serve as "laboratories" for experimenting with less rigidly exclusionary methods of pursuing desirable social goals. My inclination at this point is to emphasize the particularly troubling aspects of the Regents' Program and the difficult statutory and constitutional problems they raise, but to go only a little beyond that point in addressing the question of what alternatives might be devised.

The basic facts are not subject to dispute.

(1) Bakke was not allowed to compete for any of the 16 seats reserved for the Regents' Program solely because of his race.

(2) Bakke's individual qualifications were such that he would have been admitted if all 100 seats had been open and free from any arbitrary exclusion based on race.

(3) The university evaluated minority applicants as a separate group and did not compare their individual qualities with those of other applicants.

STANDARD OF REVIEW

The first question for the Court is what level of scrutiny should be applied in this case. Although I have long been uneasy with the "slogans" that have evolved in equal protection analysis, I think that the Court must give the very closest look possible -- essentially "strict scrutiny" -- to any state action based on race. No member of this Court, so far as I recall, has ever had any question but that racial classifications are suspect under all circumstances. Having said this, I can find no principled basis for holding that this program is exempt from close scrutiny because it only excludes

members of the "majority." We cannot assume that individuals who appear to be part of a "majority" have consented to racial discrimination against themselves. Obviously, Bakke does not consent to the discrimination against him. Furthermore, a racial classification that appears "benign" to some members of a minority may not seem "benign" to other members of the same minority. See United Jewish Organizations of Williamsburg v. Carey, 430 U.S. 144, 173-4 (Brennan, J., concurring).

There is no question about consent

Given the "no person" language of Title VI and the "any person" language of the Fourteenth Amendment, I become confused by the glib attribution of either a benign or invidious purpose to an exclusionary classification solely on the basis of whether it appears to a reviewing court that minorities are favored thereby. Furthermore, the analysis proceeds on the dubious assumption that minorities are readily indentifiable "blocs" which in some way function as units and are generally harmed or benefited in roughly the same degree by the same external forces such as social programs like the one at issue here. That is a superficial and problematic characterization of intent that does not satisfy me as the "trigger" for one level or another of equal protection scrutiny.

The second question is whether the university's sound and desirable objectives provide sufficient justification for the rigid, plainly racial basis of the Regents' Program. I do not think they do. The university desires to remedy the general effects of broad historic social discrimination, not discrimination by the university or by the state but by society at large, in and outside California. However, it is understandable that the Regents want to ensure that a diversity of viewpoints and experiences are reflected in its student body and ultimately in the medical profession, so as to produce doctors who can and will serve areas and patients who currently lack adequate medical care, and to erode racial stereotypes. Parenthetically, the program seems deficient in not binding the admittees by contract to carry out the commitment to serve the blighted, neglected areas. A contracted, five-year commitment is a familiar mechanism in other areas.

? (is it? (

ALTERNATIVES

There are many ways that the University can pursue these goals short of completely excluding whites from competing for a certain number of places in its entering class. On this record, I must reject the Regents' assertion that there are no realistic alternatives to their program. They can't know because they have not tried any alternatives.

The various admission standards and procedures that might be designed to account fully for the individual capabilities of each minority applicant and fairly compare each one with other applicants have not yet been explored. The record in this case indicates dissatisfaction on the part of university administrators with present methods of evaluating applicants for professional education. The Regents intimate that there is no universal agreement as to the proper objectives of medical schools, other than the truism that the mission of medical school is to produce the best possible doctors for service to the ailing and injured among us.

The task of setting standards for admission to medical school, I repeat, is beyond judicial competence. I think that the Court should encourage efforts and experimental programs to redefine admissions criteria in view of the possible changing attitudes as to the mission of medical schools, keeping in mind only the limited constraint imposed by a narrow affirmance here -- that race alone can never be a permissible basis for excluding an applicant. Brown I settled that and I cannot believe anyone wants to retreat.

I am convinced that remedial educational programs can be devised to give "disadvantaged" applicants an opportunity to compete successfully for admission to medical schools. In Milliken II, the Court endorsed special training for disadvantaged children whose "habits of speech, conduct, and attitudes" reflect "cultural isolation" from the mainstream of society. Milliken v. Bradley, 76-447, 45 L.W. 4873, 4879. Similar measures ought to be explored and might be applied in the context of higher education. As of now, I am not convinced that the Court should forbid efforts to establish programs primarily for those who have sustained deprivations

which closely correlate with race but might affect anyone isolated from the cultural mainstream. I am not ready to say now that in evaluating "disadvantage" race may not be given some consideration.

DISPOSITION

As of now I would say only that this rigidly cast admissions program is impermissible on this record because it does precisely what has long been condemned by this Court -- it excludes applicants on the basis of race. On this record there is nothing to suggest any inquiry into alternatives was made. I simply cannot believe the Regents' frankly race-based program is the least offensive or least intrusive method of promoting an admittedly important state interest. Subject to what the supplemental briefs tell us, the Regents' program surely appears to be in plain conflict with the explicit language of Title VI. Since the Fourteenth Amendment and Title VI are cast in similar terms except that Title VI is more specific and is a summary mechanism for federal regulation of its grants of money, I have some difficulty reading their respective prohibitions on racial discrimination differently.

If, after receiving the requested briefs, we conclude that Bakke is covered under Title VI, it seems to me, as of now, that our long practice and policy has been to base our decision on the statutory ground. But I defer further consideration or firm conclusions on this score until we have all had time to study the requested supplemental submissions.

In exploring the idea of a very narrow affirmance, making clear that other avenues are open, I do not ignore Byron's concern with the question of whether there is a principled basis for distinguishing other racially sensitive programs from the practice of rigidly reserving "seats" for minorities. I do not think that we can or should address that problem in the abstract. In this case we do not have to pass on the constitutionality of the possible alternative admissions programs. Acknowledging the plain and obvious proposition that there are other alternatives does not require us to bless them in advance.

For now I would leave open whether and to what extent indirect consideration of race is compatible with constitutional or statutory proscriptions. I find that articulating this concept is far from easy but I am optimistic that a way can be found.

Perhaps that can be deferred until the question arises in the context of an admissions program which involves a less explicit racial quotient. Or possibly someone may point the way to doing so in this case. Confining ourselves to a narrow affirmance along these lines would seem both prudent and generally consistent with our traditional method of developing principled approaches to complex social issues through a case by case process rather than by wholesale, uninformed pronouncement.

With all deference to the distinguished array of counsel who have been plunged into a very difficult case on a record any good lawyer would shun, I see no reason why we should let them (aided by the mildly hysterical media) rush us to judgment. The notion of putting this sensitive, difficult question to rest in one "hard" case is about as sound a trying to put all First Amendment issues to rest in one case. Brown I bears date May 17, 1954 and case by case evolution has followed up to our recent Milliken II last June. I see no signs of abatement in the refinement process there.

If it is to take years to work out a rational solution of the current problem, so be it. That is what we are paid for.

Regards,

WEB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

December 12, 1977

RE: 76-811 - Regents of Univ. of Calif. v. Bakke

Dear Bill:

I had reached essentially the same conclusions on the jurisdiction problem as John's memo of December 12 indicated.

Regards,

WEB

Mr. Justice Brennan

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

December 19, 1977

Dear Bill:

Re: 76-811 Bakke v. Regents University of Calif.

Your memorandum of December 13 does not quite reflect my position on the use of race as criteria for admission or exclusion. In my memo dated October 21, 1977 and my conference summary, which I had written out in longhand because of the nature of the case, indicated my sympathy with leaving maximum "elbow room" to educators but stopping short of use of race as such to admit or exclude. This led me to an affirmance but not, as I thought I made clear at conference, on the route Lewis would go.

As I see the record the University cannot now show that it acted in a way which, for me, is foreclosed by its position in this case. Hence there is no purpose in a remand to explore this.

Regards,

WEB

Mr. Justice Brennan

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

December 30, 1977

Re: 76-811 - Regents of the University of California
v. Allan Bakke

MEMORANDUM TO:

Mr. Justice Stewart
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

At this stage I confine circulation of this memorandum to the above-named, in the hope we can ultimately find a common ground which is acceptable -- even if not preferred. I do not assume anyone will agree with all that follows, and, indeed, I do not wholly agree. This is a first try in search of a narrow common ground which will leave the maximum possible "elbow room" for universities to run their own affairs, as to which they are more competent than are we.

The question presented by the petition for certiorari in this case was stated by the petitioner:

"When only a small fraction of thousands of applicants can be admitted, does the equal protection clause forbid a state university professional school faculty from voluntarily seeking to counteract effects of generations of pervasive discrimination against discrete and insular minorities by establishing a limited special admissions program that increases opportunities for well-qualified members of such racial and ethnic minorities?"

Harry I emphasize that this is almost right off the longhand draft hence inescapably flawed in detail, style, organization, etc. The purpose, as indicated above, is to find out whether something along these lines will "fly" with four others. Obviously any who agree generally, are warmly invited to use their blue and red pencils WEB

Happy New Year

76-811
12-30-77
(first page in file)

I

The Medical School of the University of California at Davis, a public educational institution supported by public funds and receiving federal financial assistance, opened in 1968. For the first two years of its operation, the Medical School had a single, uniform admissions program for all applicants.[1/] In 1969, the faculty of the Medical School established a special admissions or "Task Force" program for disadvantaged applicants. It operated in tandem with the regular admissions program, however, 16 of the 100 available places in the entering class were reserved for minority students admitted under the special program. The objectives of the special program were primarily to counter the general effects of longstanding societal discrimination, not by this University or by the State of California, but by the social structure and customs of this country over a long period. The declared objective was to promote diversity in the student body and the medical profession, to improve the delivery of medical care to underserved minority

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1/ The first two entering classes at the Medical School included one Chicano, two Negroes, and 14 Asian American students out of the total of 100 students admitted during the two year period.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

December 31, 1977

Re: 76-811 -- Regents of the University of California
v. Allan Bakke

MEMORANDUM TO:

Mr. Justice Stewart
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

A paragraph was unintentionally omitted from my memorandum of December 30, 1977. Please substitute the enclosed corrected pages.

Regards,

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

January 3, 1977

PERSONAL AND CONFIDENTIAL

Dear Potter:

Re: 76-811 Regents of the University of California v. Bakke

Many thanks for your memorandum of January 3. Of course, my draft was in no sense a proposed opinion but an exploratory effort, as I have occasionally found useful, to find out if there are others who find the "direction" acceptable.

On a case which has attracted far more attention than it deserves, I feel strongly that there should be a Court opinion backed by at least five. Others may not share my view, but I see it as institutionally very unfortunate if the case is resolved on a judgment made up of three plus two who are diametrically opposed on the underlying issue, whether that turns on the Fourteenth Amendment or Title VI.

Although I do not contemplate investing a great amount of added time until the reactions come in, I have already done considerable changing, as would be the norm on a first draft.

Thanks for your prompt reaction.

Regards,

WEB

Mr. Justice Stewart

cc: Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

May 2, 1978

MEMORANDUM TO THE CONFERENCE

Re: 76-811 Regents of the U. of California v. Baake

Given the posture of this case, Bill Brennan and I conferred with a view to considering what may fairly be called a "joint" assignment. There being four definitive decisions tending one way, four another, Lewis' position can be joined in part by some or all of each "four group."

Accordingly, the case is assigned to Lewis who assures a first circulation within one week from today.

Regards,

WEB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 13, 1978

RE: 76-811 - Board of Regents, Univ. of California v. Bakke

Dear John:

Please join me in your opinion concurring in part and dissenting in part.

Regards,

WEB

Some suggestions may evolve when all the "returns" are in

Mr. Justice Stevens

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 23, 1978

Re: 76-811 - Regents of the University of California v. Bakke

MEMORANDUM TO THE CONFERENCE:

In reviewing the preliminary draft of the proposed headnote, I observed what seems to me an inaccuracy in the headnote in line 2, page 5. I understand from Lewis that he agrees that the three words "in any way" overstate the holding. He also indicates he would suggest that these three words be stricken and "as a factor" be substituted.

Although what follows the "HELD" is the most crucial, I also observe what seems a confusing description of the California trial court's holding. (Line 5, pg. 4)

A more accurate and complete statement of that holding, I submit, should be something along the following lines:

> "Declaring that Bakke was entitled to have his application considered without regard to his race or the race of any other applicant, the trial court held the program to violate the Federal and State Constitution and Title VI. (See Petn. for Cert. App., at 117a.)

Ordinarily, we need not worry unduly about headnotes but with the high tension that has been generated, the headnote in this case is crucial and will guide most of what is written and said on the evening and day following announcement.

All these final days are under pressure and it is understandable that problems such as this arise. But it is imperative that the headnote accurately describe the holding. At best, people will be overwhelmed in dealing with this case.

Regards,

WEB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 27, 1978

CONFIDENTIAL

MEMORANDUM TO THE CONFERENCE:

This is how our opinion day schedule appears as of now. I will advise you of changes as soon as they are known:

Wednesday, June 28, 1978

(3) 76-811 - Bd. of Regents, Univ. of Calif. v. Bakke - LFP
(1) 77-747 - Allied Structural Steel Co. v. Spannaus - PS
(2) 77-653 - Swisher v. Brady - WEB

No

Thursday, June 29, 1978

77-369 - Furnco Construction Co. v. Waters - WHR

77-240 - St. Paul Fire & Marine Ins. Co. v. Barry - LFP

76-709 - Butz v. Economou - BRW

76-1560 - United States v. U. S. Gypsum Co. - WEB

(MORE)

Friday, June 30, 1978 (Very Tentative)*

77-528 - FCC v. Pacifica Foundation - JPS

77-285 - California v. United States - WHR

77-510 - United States v. New Mexico - WHR

76-6997 - Lockett v. Ohio - WEB

76-6513 - Bell v. Ohio - WEB

Absent dissent we will proceed.

Regards,

WEB/

*Pacifica (77-528), Lockett (76-6997), and Bell (76-6513) may not clear the hurdle for Friday

cc: Mr. Cornio

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 29, 1978

Re: 76-811 - Regents of the University of California v. Bakke

Dear Lewis:

On the third line, third paragraph, "of California" should be inserted to avoid any possible confusion.

With that addition, I'm prepared to sign.

Regards,

WEB

Mr. Justice Powell

Copies to the Conference

for following pages

re pg 1-3 in file

JR

ALTERNATIVES

There are many ways that the University can pursue these goals short of completely excluding whites from competing for a certain number of places in its entering class. On this record, I must reject the Regents' assertion that there are no realistic alternatives to their program. They can't know because they have not tried any alternatives.

The various admission standards and procedures that might be designed to account fully for the individual capabilities of each minority applicant and fairly compare each one with other applicants have not yet been explored. The record in this case indicates dissatisfaction on the part of university administrators with present methods of evaluating applicants for professional education. The Regents intimate that there is no universal agreement as to the proper objectives of medical schools, other than the truism that the mission of medical school is to produce the best possible doctors for service to the ailing and injured among us.

The task of setting standards for admission to medical school, I repeat, is beyond judicial competence. I think that the Court should encourage efforts and experimental programs to redefine admissions criteria in view of the possible changing attitudes as to the mission of medical schools, keeping in mind only the limited constraint imposed by a narrow affirmance here -- that race alone can never be a permissible basis for excluding an applicant. Brown I settled that and I cannot believe anyone wants to retreat.

I am convinced that remedial educational programs can be devised to give "disadvantaged" applicants an opportunity to compete successfully for admission to medical schools. In Milliken II, the Court endorsed special training for disadvantaged children whose "habits of speech, conduct, and attitudes" reflect "cultural isolation" from the mainstream of society. Milliken v. Bradley, 76-447, 45 L.W. 4873, 4879. Similar measures ought to be explored and might be applied in the context of higher education. As of now, I am not convinced that the Court should forbid efforts to establish programs primarily for those who have sustained deprivations

which closely correlate with race but might affect anyone isolated from the cultural mainstream. I am not ready to say now that in evaluating "disadvantage" race may not be given some consideration.

DISPOSITION

As of now I would say only that this rigidly cast admissions program is impermissible on this record because it does precisely what has long been condemned by this Court -- it excludes applicants on the basis of race. On this record there is nothing to suggest any inquiry into alternatives was made. I simply cannot believe the Regents' frankly race-based program is the least offensive or least intrusive method of promoting an admittedly important state interest. Subject to what the supplemental briefs tell us, the Regents' program surely appears to be in plain conflict with the explicit language of Title VI. Since the Fourteenth Amendment and Title VI are cast in similar terms except that Title VI is more specific and is a summary mechanism for federal regulation of its grants of money, I have some difficulty reading their respective prohibitions on racial discrimination differently.

If, after receiving the requested briefs, we conclude that Bakke is covered under Title VI, it seems to me, as of now, that our long practice and policy has been to base our decision on the statutory ground. But I defer further consideration or firm conclusions on this score until we have all had time to study the requested supplemental submissions.

In exploring the idea of a very narrow affirmance, making clear that other avenues are open, I do not ignore Byron's concern with the question of whether there is a principled basis for distinguishing other racially sensitive programs from the practice of rigidly reserving "seats" for minorities. I do not think that we can or should address that problem in the abstract. In this case we do not have to pass on the constitutionality of the possible alternative admissions programs. Acknowledging the plain and obvious proposition that there are other alternatives does not require us to bless them in advance.

For now I would leave open whether and to what extent indirect consideration of race is compatible with constitutional or statutory proscriptions. I find that articulating this concept is far from easy but I am optimistic that a way can be found.

Perhaps that can be deferred until the question arises in the context of an admissions program which involves a less explicit racial quotient. Or possibly someone may point the way to doing so in this case. Confining ourselves to a narrow affirmance along these lines would seem both prudent and generally consistent with our traditional method of developing principled approaches to complex social issues through a case by case process rather than by wholesale, uninformed pronouncement.

With all deference to the distinguished array of counsel who have been plunged into a very difficult case on a record any good lawyer would shun, I see no reason why we should let them (aided by the mildly hysterical media) rush us to judgment. The notion of putting this sensitive, difficult question to rest in one "hard" case is about as sound a trying to put all First Amendment issues to rest in one case. Brown I bears date May 17, 1954 and case by case evolution has followed up to our recent Milliken II last June. I see no signs of abatement in the refinement process there.

If it is to take years to work out a rational solution of the current problem, so be it. That is what we are paid for.

Regards,

WEB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

November 23, 1977

MEMORANDUM TO THE CONFERENCE

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

I fully share the hope that circulation of views in advance of conference will be helpful in deciding this significant case. In the following, I set out my own views without necessarily attempting to answer different approaches taken in other memoranda. Since the Title VI briefs are in, I've added a section to state the reasons, largely in agreement with the Solicitor General, why I've concluded that Title VI affords no escape from deciding the constitutional issue. Specifically, I agree with the SG that decision of this case can no more easily be made on the "delphic" wording of Title VI than on the language of the Fourteenth Amendment. My discussion of the constitutional problem therefore precedes my Title VI discussion.

If Davis' program is unconstitutional, I am clear that this is not because the law requires the automatic

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

December 13, 1977

MEMORANDUM TO CONFERENCE

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

I fully agree with Byron's conclusion that in deciding whether Bakke was entitled, under the federal constitution, to the judgment ordering his admission to the Davis medical school we must answer the question whether race can ever be a permissible consideration in making admissions decisions. After conference, I thought that on one view or another the Chief Justice, Byron, Thurgood, Lewis, and I believed that it could be constitutionally permissible to give consideration to race.

If the Court were to take this position, it would have clear consequences for the controversy that is before us. As Byron has stated, the University should be afforded an opportunity to show that Bakke would not have been admitted even if the unconstitutional aspect of the Davis program, the so-called "quota", had been eliminated. It

is obvious, I should think, that the University's concession below should not foreclose it from attempting to make that showing upon remand if we take the position that race may be given "weight" in the admissions process. Both the Superior Court decree and the Supreme Court's opinion make plain that the California courts took the position that the constitution prohibited Davis from ever making an applicant's race a positive factor in an admissions decision. See especially Cert Petition at 15a. If that view of the law were correct, the Davis Special Admissions Program would be invalid in toto: for as administered, race apparently was taken into account 1) in determining eligibility for the program, 2) in assigning the "combined numerical rankings" or "benchmark scores" (since these are intended to gauge each applicant's potential contribution, see Record at 180-81, and since his race is relevant thereto, it seems race may well have been given positive weight in making this determination) and 3) in giving an absolute preference to the 16 qualified special program applicants with the highest combined numerical rankings. Racial criteria having been so employed meant that, under the State Courts' view, the only way Davis could demonstrate that Bakke was not victimized by unconstitutional discrimination would be by showing that he would not have been one of the 16 unsuccessful Davis applicants admitted had the special

program been abolished and had the University determined admissions under a "colorblind" system. See Cert Petition at 37a.

I understand why Davis believed that it could not possibly have made that showing. Of the 35 unsuccessful Davis applicants who had benchmark scores in 1973 that were the same as or higher than Bakke's (15 were at 469 and 20, including Bakke, were at 468) 21 were admitted to other medical schools. (3 to foreign medical schools) See Record at 70. For Davis to demonstrate that Bakke would not have been admitted in 1973 under a colorblind system, it would have had to prove that of these 35 unsuccessful applicants at least 20 both would have been ranked higher than Bakke and would have accepted Davis's invitation over those of any other school(s) to which they may have been admitted. I would think that--especially given that Davis had the burden of proof--such a showing would have been nigh impossible in the nature of things. Thus, forced necessarily to accept the California Courts' constitutional view, Davis had virtually no choice but to concede that it could not meet the burden of proof imposed by the California Supreme Court.

If, on the other hand, the California Supreme Court had taken the view that race can constitutionally be made a positive factor in an admissions decision--but can not

be decisive--I doubt the University would have conceded that Bakke would have been admitted if the unconstitutional aspects of the program had been eliminated. Under an interpretation of the Fourteenth Amendment in which race could be given weight, the only clearly objectionable feature of the Davis Special Program would have been the "quota" requiring the admission of a minimum of 16 of the qualified task force applicants. The use by Davis of a special committee initially to evaluate disadvantaged minority applicants would, I assume, be justifiable because of the desirability of having a body with special expertise perform the delicate task of attempting to quantify the potential of such applicants in the first instance. If so, even if Bakke would have been admitted under the colorblind system required by the state courts, it might have been possible for Davis to show that he would not have been admitted if Davis had modified its admissions criteria to eliminate the quota and run a Harvard type program. Indeed, there is much in the record suggesting that, even if the quota had been abolished, Bakke would have been rejected. As to 1973--which is the only year in which Bakke was close to admission--Lowrie stated that the task force admittees had not greatly dissimilar median benchmark scores and had the same range of benchmark scores as did the regular program admittees. See Record at 181. Notwithstanding Archie Cox's

disclaimer at oral argument, the record suggests, see Record at 180-81, and the California courts assumed, see, e.g., Cert Petition at 2a, that Davis understood that the benchmark scores assigned by the two subcommittees were at least roughly comparable (i.e. insofar as it is possible to compare them, see my memorandum of Nov. 23 at 10-12). Certainly then, the record implies that a goodly number of the task force applicants might have been admitted even if the Regular Committee had compared them with the top unsuccessful regular program applicants. The committee could, consistent with a Harvard type program, have preferred slightly "less qualified" minority applicants--i.e. ones with somewhat lower benchmark scores --to nonminority applicants like Bakke in order to attain the constitutionally permissible goal of integration. In short, it is possible that Davis could easily demonstrate that Bakke would not have fared any better under a Harvard type program than he did under Davis's "quota" system.

In sum, if we were to agree that the Davis program is unconstitutional but were to conclude that the California Supreme Court erred in ruling that race may never be made a positive factor in making an admissions decision, simple fairness requires that Davis be given a chance to show that Bakke would not have been admitted under a constitutional program. Hence, if we believe that race is a permissible consideration, I think we must say so,

reverse the judgment in part, and remand the case for proceedings not inconsistent with our decision.

An additional reason for reaching the question of the permissibility of the use of a racial criteria is the California Superior Court's decree, which of course was affirmed insofar as it declared the Davis program invalid. While I of course respect John's view that the use of "his" in the second paragraph of the decree suggests that Davis might not be in contempt were it to adopt the Harvard program, there is more to the decree. The third paragraph, which is the judgment on Davis's cross claim for a declaratory judgment that its program is a permissible one, declares that the program is invalid. I would think it quite possible that a California Court, in light of the opinions of the California Superior and Supreme Courts in this case, would interpret the second and third paragraphs as inextricably linked and declare that Davis would be acting illegally were it to adopt the Harvard program.

Of course, my preference remains--as I voted at Conference--to reverse outright. But if that view does not carry the day, I think the Court is dutybound to decide whether race can ever be a permissible consideration.

WJB, Jr.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 10, 1978

RE: No. 76-811 Board of Regents v. Bakke

Dear Lewis:

I have read your opinion very carefully and have regretfully come to the conclusion that I should write out my own views. I think those views as reflected in my memorandum of November 23 differ so substantially from your own that no common ground seems possible.

Sincerely,

Mr. Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 16, 1978

RE: No. 76-811 Board of Regents v. Bakke

Dear Lewis:

Supplementing my note of May 10, I can join pages 1 through the top of page 14 and also subdivision (B) at 14 through 17 except that I may join Byron's treatment of Title VI if he writes a more expanded treatment.

I have also considered whether I might agree with your subdivision (E) at page 46 and think that I should reserve decision on that until my own writing is concluded. The reason is that there may be other reasons besides educational diversity that will support competitive consideration of race and ethnic origin.

Sincerely,

Bill

Mr. Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 30, 1978

RE: No. 76-811 Board of Regents v. Bakke

Dear Byron:

Thank you very much for your note and the proposed Title VI segment of our joint opinion. I would like to give more thought to the question of the implication of a private right of action. As you know my tentative thinking was that one might be implied but I am not irrevocably wedded to that position. Even if I finally find myself in disagreement I might be willing simply to drop a footnote saying I don't subscribe to that part. In any event, the scuttlebutt has it that the "gang of four" will shortly have their Title VI disposition in circulation and it may be what they say will help us both decide what finally should be done.

My recollection is that Harry is already on record that he is in agreement with you. As far as I can recall Thurgood has not gone on record one way or the other.

I repeat I am determined to do what I possibly can to have Harry, you and I and, if possible at all, to have Thurgood agree on a joint opinion.

I am shooting for the beginning of next week to get a copy of the constitutional treatment to you, Harry and Thurgood. Other things are also in the works and I may be too optimistic but I am going to try.

Sincerely,

Bill

Mr. Justice White

Mr Brennan 6/1/78

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 8, 1978

RE: No. 76-811 Board of Regents v. Bakke

Dear Byron, Thurgood, Harry & Lewis:

Enclosed is the suggested treatment of the constitutional question. My hope, of course, is that we can end up with a joint opinion. We have by no means finished our work in this but hope it will give you an idea of the line we think ought be taken.

As you will see the Title VI discussion is missing. This is because we think that there may be an overlap of the treatment of congressional affirmative action between Byron's Title VI treatment and the enclosed that must be worked out. Notwithstanding we are still working on it, we earnestly seek your comments and criticism on the enclosed. I would suppose our hope to have a joint opinion would best be furthered if we can all get together on the proposed end product, including Title VI, as soon as is reasonably possible.

Sincerely,

Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell

Wm Brennan
OCT 77

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

June 12, 1978

MEMORANDUM TO: Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell

RE: No. 76-811 Board of Regents v. Bakke

Enclosed is a second copy of the working draft. You'll notice that on pages 1 through 5 the opinion has been corrected to accommodate Lewis' suggestions.

Bill

W.J.B.Jr.

To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Brennan

Circulated: 6/12/78

Recirculated:

0413A

FIRST WORKING DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-811

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA v. ALLAN BAKKE	))))	On Writ of Certiorari to the Supreme Court of California

[Decided June --, 1978]

Opinion of . . . .

The Court today, in reversing in part the judgment of the Supreme Court of California, affirms the authority of our Nation's leaders to achieve equal opportunity for all with "all deliberate speed." The difficulty of the issue presented -- whether Government may use race-conscious programs to redress the continuing effects of past discrimination -- and the mature consideration which each of our Brethren have brought to it have resulted in many

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 20, 1978

Memorandum re: No. 76-811, Regents v. Bakke

Byron, Thurgood, Harry, and I will file a single joint opinion in this case, which I now send to all of you in Wang form. You will see that the discussion of Title VI ends abruptly on page 7. This is because we are incorporating pages 9 to the end of Byron's previously circulated memorandum on Title VI, with further stylistic editing, as our joint opinion. Since Byron's memo has already circulated, we are not recirculating it now.

Byron will file a separate opinion based on pages 1-8 of his Title VI memorandum, which will discuss his view that there is no private right of action under Title VI. Harry circulated yesterday a statement of his further views on this case, which will be filed as a separate opinion. Thurgood will shortly circulate a draft opinion which sets forth his further views. I have to catch a ferry, and therefore I will break ranks and remain uncharacteristically silent!

Sincerely,

W.J.B., Jr.

Copies to the Conference

To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Brennan

Circulated: _____

Recirculated: 20 JUN 1978

2d WANG DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-811

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA	)	On Writ of Certiorari to the Supreme Court of California
v.	)	
ALLAN BAKKE	)	

[Decided June --, 1978]

Opinion of MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN, concurring in part and dissenting in part.

The Court today, in reversing in part the judgment of the Supreme Court of California, affirms the constitutional power of Federal and State government to act affirmatively to achieve equal opportunity for all. The difficulty of the issue presented -- whether Government may use race-conscious programs to redress the continuing effects of past discrimination -- and the mature consideration which each of our Brethren have brought to it have resulted in many opinions, no single one speaking for the Court. But this should not and must not mask the central meaning of this Court's judgment: Government may take race into account when it acts not to demean or insult any racial group, but to remedy disadvantages cast on minorities by past racial prejudice.

To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From Mr Justice Brennan

Circulated

Recirculated 22 JUN 1978

1st PRINTED DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-811

Regents of the University of California, Petitioner, *v.* Allan Bakke. | On Writ of Certiorari to the Supreme Court of California.

[June —, 1978]

Opinion of MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN.

The Court today, in reversing in part the judgment of the Supreme Court of California, affirms the constitutional power of Federal and State Government to act affirmatively to achieve equal opportunity for all. The difficulty of the issue presented—whether Government may use race-conscious programs to redress the continuing effects of past discrimination—and the mature consideration which each of our Brethren have brought to it have resulted in many opinions, no single one speaking for the Court. But this should not and must not mask the central meaning of this Court's judgment: Government may take race into account when it acts not to demean or insult any racial group, but to remedy disadvantages cast on minorities by past racial prejudice.

THE CHIEF JUSTICE and our Brothers STEWART, REHNQUIST, and STEVENS, have concluded that Title VI of the Civil Rights Act of 1964, 78 Stat. 252, as amended, 42 U. S. C. § 2000d *et seq.* (1970 ed. and Supp. V), prohibits programs such as that at the Davis Medical School. On this statutory theory alone, they would hold that respondent Alan Bakke's rights have been violated and that he must, therefore, be admitted to the Medical School. Our Brother POWELL, reaching the Constitution, concludes that, although race may be taken into account, Davis has not shown that it was necessary to exclude respond-

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 23, 1978

MEMORANDUM TO: Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

This is the first half of the proposed final opinion. Rest to follow.

W.J.B. Jr.

OC '77
Wm Brennan

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 23, 1978

RE: No. 76-811 Board of Regents v. Bakke

MEMORANDUM TO: Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

Second batch. More to follow.

Bill

W.J.B.Jr.

To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr Justice Marshall
Mr. Justice Blackmun
Mr Justice Powell
Mr. Justice Rehnquist
Mr Justice Stevens

From M. J.

Circulated

1st PRINTED DRAFT Recirculated 6/27/78

SUPREME COURT OF THE UNITED STATES

No. 76-811

Regents of the University of California, Petitioner, *v.* Allan Bakke. | On Writ of Certiorari to the Supreme Court of California.

[June —, 1978]

Opinion of MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN

The Court today, in reversing in part the judgment of the Supreme Court of California, affirms the constitutional power of Federal and State Government to act affirmatively to achieve equal opportunity for all. The difficulty of the issue presented—whether Government may use race-conscious programs to redress the continuing effects of past discrimination—and the mature consideration which each of our Brethren ~~have~~ has brought to it have resulted in many opinions, no single one speaking for the Court. But this should not and must not mask the central meaning of this Court's judgment: Government may take race into account when it acts not to demean or insult any racial group, but to remedy disadvantages cast on minorities by past racial prejudice.

THE CHIEF JUSTICE and our Brothers STEWART, REHNQUIST, and STEVENS, have concluded that Title VI of the Civil Rights Act of 1964, 78 Stat. 252, as amended, 42 U. S. C. § 2000d *et seq.* (1970 ed. and Supp. V), prohibits programs such as that at the Davis Medical School. On this statutory theory alone, they would hold that respondent Alan Bakke's rights have been violated and that he must, therefore, be admitted to the Medical School. Our Brother POWELL, reaching the Constitution, concludes that, although race may be taken into account in university admissions, ~~Davis has not shown that it was necessary to exclude respond-~~ the particular special admissions program used by petitioner, which resulted in the exclusion of respondent Bakke, was not shown to be necessary

Concurring in the judgment in part and dissenting.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 23, 1978

RE: No. 76-811 Board of Regents v. Bakke

MEMORANDUM TO: Mr. Justice Powell
Mr. Justice Stevens

Our proposed final opinion. More to follow.

W.J.B.Jr.

OCT 77

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 26, 1978

MEMORANDUM TO THE CONFERENCE

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

Although this final draft is designated as a "third draft," it does not differ from the draft with riders circulated on Friday except for the addition of a new footnote 63, and stylistic changes throughout.

Sincerely,

WJB, Jr.

Wm Brennan
6/77

To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

3rd DRAFT

From: Mr. Justice Brennan

Circulated: _____

Recirculated: 6/26/78

SUPREME COURT OF THE UNITED STATES

No. 76-811

Regents of the University of California, Petitioner, *v.* Allan Bakke. | On Writ of Certiorari to the Supreme Court of California.

[June —, 1978]

Opinion of MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN, concurring in the judgment in part and dissenting.

The Court today, in reversing in part the judgment of the Supreme Court of California, affirms the constitutional power of Federal and State Government to act affirmatively to achieve equal opportunity for all. The difficulty of the issue presented—whether Government may use race-conscious programs to redress the continuing effects of past discrimination—and the mature consideration which each of our Brethren has brought to it have resulted in many opinions, no single one speaking for the Court. But this should not and must not mask the central meaning of today's opinions: Government may take race into account when it acts not to demean or insult any racial group, but to remedy disadvantages cast on minorities by past racial prejudice, at least when appropriate findings have been made by judicial, legislative, or administrative bodies with competence to act in this area.

THE CHIEF JUSTICE and our Brothers STEWART, REHNQUIST, and STEVENS, have concluded that Title VI of the Civil Rights Act of 1964, 78 Stat. 252, as amended, 42 U. S. C. § 2000d *et seq.* (1970 ed. and Supp. V), prohibits programs such as that at the Davis Medical School. On this statutory theory alone, they would hold that respondent Allan Bakke's rights have been violated and that he must, therefore, be admitted to the

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 27, 1978

RE: No. 76-811 Board of Regents v. Bakke

Dear Lewis:

My suggestion was the following, although perhaps you'll think of a better place to put it:

Insert in dashes after the words "bifurcated ones" the following:

> - affirming insofar as the California Supreme Court's judgment orders that respondent Bakke be admitted to Davis Medical School and reversing insofar as that judgment prohibits the University from establishing race-conscious programs in the future -

Sincerely,

Mr. Justice Powell

Wm Brennan 6/+77

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

July 3, 1978

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

Dear Lewis:

The form of judgment you have circulated is satisfactory with me.

Sincerely,

Bill

Mr. Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

PERSONAL

January 3, 1978

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

Dear Chief,

I have carefully reviewed the memorandum you sent to four of us on December 30. While I would prefer to decide this case on the basis of the Equal Protection Clause of the Fourteenth Amendment, I think that what is important above all else is that there be a Court opinion. If there is a realistic prospect of enough others agreeing on an opinion along the lines of your memorandum, I shall be glad to make a fifth.

I have a good many suggestions with respect to your draft, but shall not burden you with them until or unless it becomes apparent that this draft can become the basis of an opinion for the Court.

Sincerely yours,

P.S.

The Chief Justice

Copies to Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

June 12, 1978

No. 76-811, Univ. of Calif. Regents v. Bakke

Dear John,

I am glad to join your separate opinion in this case.

Sincerely yours,

P.S.

Mr. Justice Stevens

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

June 29, 1978

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

Dear Lewis,

The order you propose is fine with me.

Sincerely yours,

P.S.

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

Bill,

After we had jawboned the Bakke case for several months, Jeff Glekel produced the attached draft, which comes very close to reflecting my views on the constitutional issue. I intended to revise it to put somewhat more weight on the diversity justification--although I doubt that independently it would suffice--and to make clear that the available justificatio satisfy the most exacting standards of review. I should have done so and circulated, for in most respects it satisfies me and deals with some aspects of the case better than any of the briefs.

This is the original with marginal scrawls and all. Let me have it back, but you are free to make a copy and keep it if it would be helpful to you.

Cheers,

BRW

Home typing job. Sorry.

PS. Also here is a commentary on LFP's first draft--also Jeff's. It is interesting. Please send back.

WN Brennan
Dec 77

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

October 13, 1977

One copy only

MEMORANDUM FOR THE CONFERENCE

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

Although not in accord with practice, I thought I would spare you listening to what I would initially say about the Bakke case in conference tomorrow in the event I was not dissuaded by the views of those who precede me.

First, I disagree with some of the amici that Bakke has no standing in the case or controversy sense or otherwise to attack the special admissions program. His claim is that he was disqualified for racial reasons from competing for the 16 seats reserved for the task force program. It is not that his application should have been considered by the task force committee but that there should not have been a racially discriminatory special program at all and that the 16 seats should have been filled through the general admissions procedure. Bakke is entitled to have this claim adjudicated. Even if one agrees with the District Court that an injunction admitting him to the University was not warranted, this does not affect his entitlement to a declaratory judgment with respect to the validity of the program and, if invalid, to an order enjoining this continuance in the future.

There are suggestions in one or more briefs amici that the task force program is required by the Fourteenth Amendment as a remedy for past discrimination against minorities in this country. I do not accept that position, and the University itself makes no such claim. The California Supreme Court declared that the Fourteenth Amendment forbids the special program and the validity of that conclusion seems to be the constitutional issue tendered by the University.

Bakke also claims, however, that he is entitled to his judgment because the task force program is forbidden by

Title VI of the Civil Rights Act. The trial court so held; and the issue was presented to but not decided by the California Supreme Court, which chose to proceed directly to the constitutional issue. We are at least entitled to consider the statutory ground which Bakke requests; and because we usually prefer to deal with a possibly dispositive statutory ground before reaching a constitutional issue, I think we should deal with the Title VI argument.

Moreover, it is argued by some of the amici that Title VI and the regulations under it require precisely what the University has done; and the United States seems to argue that federal statutory policy at least authorizes affirmative action programs taking race into account in admitting students even though this may result in preempting some seats on the basis of race. If either of these positions is valid, the Congress has expressly or implicitly asserted that the Fourteenth Amendment does not bar racial preference in university admissions. For some, perhaps, this would be an important consideration in resolving the Fourteenth Amendment issue. Cf. Katzenbach v. Morgan, 384 U.S. 641 (1966).

Despite the position of the United States, whatever that might be, I doubt that Bakke's statutory claim is frivolous. It is just not that clear that a statute which on its face forbids racial exclusions from government sponsored programs nevertheless permits or requires exclusions based on race. And it lends little to the argument to say that employers or universities may or must discriminate in hiring or in admissions or achieve racial balance in the work force or the student body in order to avoid being charged with racially discriminatory practices and having to disprove the charge. Before concluding that national statutory policy is to authorize racially preferential admissions policies in universities, I would want as much help from the parties as possible. The difficulty is that the University has not briefed the issue, and Bakke's brief is quite inadequate. Although some of the amici deal with the question, I think we should call for further briefs on the Title VI issue.

If we were to decide that Title VI forbids what the University is doing, this particular case would be over. Congress has simply forbidden something that the Fourteenth Amendment might permit. If on the other hand we were to decide that Congress has authorized racially sensitive admissions policies, then the constitutional issue must be reached. Against such a statutory background, I would reverse the Fourteenth Amendment judgment of the Supreme Court of California. I agree with Bakke that he has been excluded from

competing for the 16 seats on racial grounds; but as I see it the state interests are sufficiently important to warrant the preference, and there are no satisfactory alternatives for achieving the University's goals. Nor do I--although I am not adamant about it--see much difference between the open reservation of seats for minorities at issue here and a "racially sensitive" program which in the end would often make race the determinative factor in administering a seemingly neutral set of qualifications.

For me these are not easy conclusions to come to, to say the least; and they are not made easier by the failure of the University to present a clear record of the ends it was seeking and the necessity for adopting this particular program in order to achieve them. All we have is the decision of the Medical School faculty. There is nothing from the University Regents but their brief and nothing from the California legislature, although the latter omission is understandable since it appears that under the California constitution, university admissions is not a matter for the legislature but for the University, subject to constitutional requirements.

Conceivably we could decide that the federal statutes and regulations neither forbid, require nor authorize what the Medical School has done. This would bring us to the constitutional issue unencumbered by and without guidance from congressional action. In that event, it is probable, but I'm not sure, that I would arrive at the same conclusion.

Of course, if the California Supreme Court was convinced that the Fourteenth Amendment should be construed as its opinion indicates, I would think that if it had had before it the recent amendment to the California constitution that forbids exclusions from a university based on race and had chosen to proceed under that amendment, it could even more readily have invalidated the task force program, which, as I see it, does indeed foreclose 16 seats to all but minority applicants. I am not sure that this would be the case if we were now to construe both the federal statutes and the Fourteenth Amendment to permit the task force program.

B.R.W.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

December 12, 1977

MEMORANDUM TO THE CONFERENCE

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

Contrary to John's memorandum, I am inclined to think that in passing on the injunction ordering Bakke's admission to the Medical School, we must decide whether the Regents of the University of California may employ race in any way as a factor in making admissions decisions.

The judgment of the trial court includes the following provision:

> "2. That plaintiff is entitled to have his application for admission to the medical school considered without regard to his race or the race of any other applicant, and defendants are hereby restrained and enjoined from considering plaintiff's race or the race of any other applicant in passing upon his application for admission; . . ."
> Petn. App. 120a.

On appeal, the Supreme Court of California left this portion of the judgment standing. It viewed the central issue in the case as being "whether the rejection of better qualified applicants on racial grounds is constitutional," Petn. App. 16a, and answered the question in the negative--"no applicant may be rejected because of his race, in favor of another who is less qualified, as measured by standards applied without regard to race." Petn. App. 25a. Thus the University was forbidden from considering the race of any applicant to be the determinative factor in passing upon Bakke's application. The breadth of the California courts' rulings makes

Wm Brennan 12/77

it necessary for the Court to consider the constitutional propriety of racial preferences in order to determine whether Bakke was entitled to an order directing his admission. A decision limited to a holding that the Medical School's special admissions program was unconstitutional would not resolve the question of Bakke's admission. The reason for this is that even if that program as presently administered is unconstitutional, the University is entitled to an opportunity to demonstrate that Bakke would have been denied admission even in the absence of the defect which rendered the program unconstitutional. See Mt. Healthy City School District Board of Education v. Doyle, 428 U.S. 285-287 (1977).

It is true that the Supreme Court of California initially remanded the case to give the University an opportunity to make such a showing, Petn. App. 38a-39a, and the University conceded that it could not establish that, but for the existence of the special admissions program, Bakke would not have been admitted. Petn. App. 80a. In light of the Superior Court's judgment and the Supreme Court's opinion, however, the University must have understood that it could not grant any preference based on race in the course of passing on Bakke's application. If in fact the California courts were wrong and race does have legitimate uses in making admission decisions, the University would be entitled to an opportunity under Doyle to establish, upon remand, that Bakke would not have been admitted if the special admissions program had been administered in a manner conforming to constitutional requirements. This would place the University in a much more favorable posture, because it might be able to prove that under a constitutionally administered special admissions program Bakke's chances of admission would be remote. Thus the question of whether Bakke is constitutionally entitled to a judgment ordering his admission seems inextricably linked to the question of whether special consideration may be given in any form to racial minorities.

B.R.W.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

February 10, 1978

MEMORANDUM TO THE CONFERENCE

Re: 76-811 Regents of the University of California v. Bakke

Since I have concluded most of my research concerning the application of Title VI to Bakke, I thought it might be useful to circulate my conclusions in written form.

Sincerely,

Attachment

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall ✓
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice White

Circulated: 2-10-78

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-811

Regents of the University of California, Petitioner, *v.* Allan Bakke. | On Writ of Certiorari to the Supreme Court of California.

[February —, 1978]

Memorandum of MR. JUSTICE WHITE.

Bakke would support the judgment below on the ground that the Medical School's Preferential Admissions Policy violates Title VI of the Civil Rights Act. The claim, if valid, would dispose of the case on a purely statutory basis; and as I early indicated to the Conference, I am firmly of the view that the Court should not, particularly in this case, ignore or abandon its time-honored rule that statutory grounds should be addressed first and constitutional issues not at all if the statutory rationale is dispositive. To put aside a statute that may forbid or affirmatively permit the very conduct at issue is to ignore the views of that branch of the Government having exclusive legislative power, as well as those of the President, who has signed the legislation, and of the Executive Branch that enforces the law and necessarily interprets it in the process. It is also to assume a prescience, a power and a public influence that history has indicated the Court does not and should not have.

Having said that, however, the statutory issue presented—namely, whether Bakke is entitled to relief under Title VI—is shortly disposed of because in my view there is no private right of action available under Title VI. With all due respect, I am unable to agree with JOHN STEVENS' thorough memo-

Mr. Justice Marshall

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76–811

Regents of the University of California, Petitioner, *v.* Allan Bakke. } On Writ of Certiorari to the Supreme Court of California.

[February —, 1978]

Memorandum of MR. JUSTICE WHITE.

The threshold question to be decided is whether Title VI of the Civil Rights Act of 1964, 42 U. S. C. § 2000d *et seq.*, provides for a private cause of action. I am unwilling merely to "assume" an affirmative answer for purposes of this case. If in fact no private cause of action exists, this Court and the lower courts as well are without jurisdiction to consider petitioner's Title VI claim. As I see it, if we are not obliged to do so, it is at least advisable to address this threshold jurisdictional issue. See *United States* v. *Griffin*, 303 U. S. 226, 229 (1938).[1] Furthermore, just as it is inappropriate to address

[1] *Griffin* also held that "lack of jurisdiction . . . touching the subject matter of the litigation cannot be waived by the parties. . . ." 303 U. S., at 229. See also *Mount Healthy City Bd. of Educ.* v. *Doyle*, 429 U. S. 274, 278 (1977); *Louisville & Nashville R. Co.* v. *Motley*, 211 U. S. 149, 152 (1908); *Mansfield, Coldwater & Lake Michigan R. Co.* v. *Swan*, 111 U. S. 379, 382 (1884).

In *Lau* v. *Nichols*, 414 U. S. 563 (1974), we did adjudicate a Title VI claim brought by a class of individuals. But neither the Court, the parties, nor the numerous *amici curiae* addressed the private cause of action issue. In addition, the understanding of MR. JUSTICE STEWART's concurring opinion, which observed that standing was not being contested, was that the standing alleged by petitioners was as third-party beneficiaries of the funding contract between the Department of Health, Education, and Welfare and the San Francisco United School District, a theory not alleged by the present petitioner. *Id.*, at 571 n. 2. Furthermore, the plaintiffs in *Lau* alleged jurisdiction under 42 U. S. C. § 1983 rather than directly

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 16, 1978

Re: 76-811 - Regents of The University of California v. Bakke

Dear Lewis,

As I have orally indicated to you, I can join certain parts of your circulation, but not others. As presently advised, I have nothing to add or subtract from your part I. I intend to write roughly along the lines that I have previously circulated with respect to the statutory issue, including the question of private cause of action. It is doubtful, therefore, that I could join part II-A, but I will join part II-B. I also agree with part III and am reasonably sure that part IV-A is satisfactory, although I may have a suggestion or so for you.

I doubt that I can be with you on the rest of part IV or on part V. The same is true of parts VI-A, -B, -C, and -D. I should like, however, to join part VI-E if you could change the words "the substantial state interest" in line 3 of that part to read "that the State has a substantial interest."

Of course, I would reverse the judgment entirely.

Sincerely yours,

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 12, 1978

MEMORANDUM TO THE CONFERENCE

Re: 76-811 - Regents of the University of California v. Bakke

This is another printing of the memorandum I originally circulated but with some rewriting with respect to the private cause of action issue. I am also returning it to the printer for some corrections. Whether and to what extent Bill Brennan will incorporate this in his own circulation, I am not yet completely sure.

Sincerely yours,

Attachment

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice White

Circulated: _____

Recirculated: 6/12

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76–811

Regents of the University of California, Petitioner, *v.* Allan Bakke. | On Writ of Certiorari to the Supreme Court of California.

[February —, 1978]

Memorandum of MR. JUSTICE WHITE.

The threshold question to be decided is whether Title VI of the Civil Rights Act of 1964, 42 U. S. C. § 2000d *et seq.*, provides for a private cause of action. I am unwilling merely to "assume" an affirmative answer for purposes of this case. If in fact no private cause of action exists, this Court and the lower courts as well are without jurisdiction to consider petitioner's Title VI claim. As I see it, if we are not obliged to do so, it is at least advisable to address this threshold jurisdictional issue. See *United States* v. *Griffin*, 303 U. S. 226, 229 (1938).[1] Furthermore, just as it is inappropriate to address

[1] *Griffin* also held that "lack of jurisdiction . . . touching the subject matter of the litigation cannot be waived by the parties. . . ." 303 U. S., at 229. See also *Mount Healthy City Bd. of Educ.* v. *Doyle*, 429 U. S. 274, 278 (1977); *Louisville & Nashville R. Co.* v. *Motley*, 211 U. S. 149, 152 (1908); *Mansfield, Coldwater & Lake Michigan R. Co.* v. *Swan*, 111 U. S. 379, 382 (1884).

In *Lau* v. *Nichols*, 414 U. S. 563 (1974), we did adjudicate a Title VI claim brought by a class of individuals. But neither the Court, the parties, nor the numerous *amici curiae* addressed the private cause of action issue. In addition, the understanding of MR. JUSTICE STEWART's concurring opinion, which observed that standing was not being contested, was that the standing alleged by petitioners was as third-party beneficiaries of the funding contract between the Department of Health, Education, and Welfare and the San Francisco United School District, a theory not alleged by the present petitioner. *Id.*, at 571 n. 2. Furthermore, the plaintiffs in *Lau* alleged jurisdiction under 42 U. S. C. § 1983 rather than directly

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 13, 1978

Re: 76-811 - Regents of the University of California v. Bakke

Dear Bill,

I have read your very interesting draft in Bakke and although I have not yet maturely concluded whether I can join all of it or whether, even if I can, I need write in addition, let me submit the following comments--and I hope you will forgive if they appear curt:

1. I think the wise approach is to defer to the state decision-makers and to what they deem necessary or appropriate to remedy what they deem to be the lingering consequences of past discrimination. We need not, I think, ourselves suggest or argue for the adoption of affirmative action programs, and I would avoid as far as possible suggesting a duty to do so.

2. Your discussion of the adequacy of the admissions criteria at Davis before adoption of the special program seems unnecessary to me. I am reluctant, absent much more study, to assume a competence to make this kind of judgment. However accurately the special tests predict how well a candidate may do in medical school, any school will exclude many applicants who could successfully complete the academic program if the school reserves its available seats for those who the tests show are the best qualified. If we are serious that past discrimination has left black college graduates less able to qualify under the standard criteria, there is no need to attack the tests to sustain the special program.

3. I am frank to say that I don't see much help in the gender classification cases, but if they don't rub someone else the wrong way, I don't object.

Wm. Brennan
OCT 77

4. Now for some more specific but nevertheless not insignificant items. On page 2 you state the central meaning of the Court's judgment, but are there not only four of us who satisfy your description? Also, with respect to the introductory section, it sounds as though we were concurring with Justice Powell in all respects. Shouldn't we make it clear here that four of us would reverse the entire judgment?

5. As I indicated in my letter to Lewis on May 16, I can join more of his opinion than you state on page 5. Perhaps I should say so separately. As far as I can see, it would not be inconsistent for me to do so. I do not, however, join part II-A.

6. I am inclined to keep the decibel level as low as possible. We won't accomplish much by beating a white majority over past ills or by describing what has gone by as a system of apartheid.

7. I am not sure that the "Moreover" sentence in note 8.1 is factually true of public universities. It is not in my home state. Besides, I doubt that "active" review would be inappropriate in any event.

8. I am doubtful about the "at least" clause in the first full sentence on page 18.

9. Just as a matter of style, I resist quoting law review articles in the text of an opinion, at least for the purpose of making them a substantial part of the opinion's structure.

10. It may be that Korematsu and Hirabayashi are as you indicate "foreign to our more recent cases"--although I am not at all sure about that either; but isn't it true that Korematsu established the governing rule that you want to embrace; namely, that racial classifications are subject to the most rigid scrutiny? We have a heavy enough of a burden as it is without needlessly undertaking some others.

11. You refer to Swann as "holding" that even in the absence of a judicial finding of past discrimination, a school board could adopt a plan assigning standards on the basis of race. But was this not just gratuitous advice from the Court--good advice but nevertheless dictum?

12. I also wonder whether Bill Douglas' dissent in Defunis or what the California Supreme Court said in this case is very necessary or helpful. See page 26.

13. In part III, to the maximum extent possible, I would present the admissions data and the statistics as having been submitted by the Regents in support of their judgment, rather than suggesting that we have searched out independent sources. In any event, I hope that anything that we have included here that the Regents have not called to our attention is not substantial.

14. Is it true that the statutes noted on page 44 in notes 25-28 derive from the 1964 and 1965 Acts?

There are also some matters you have omitted that I would like said. I shall prepare a draft covering them today. They relate to the legislative role of the state university, the impracticality of achieving the faculty's goal without employing racial preference and a hopefully gentle statement of my differences with Lewis Powell. There are one or two other matters.

Cheers,

Mr. Justice Brennan

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
✓Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

pp. 1, 7, 8

From: Mr. Justice White

Circulated: _____

4th DRAFT

Recirculated: 6/21

SUPREME COURT OF THE UNITED STATES

No. 76-811

Regents of the University of California, Petitioner, *v.* Allan Bakke. | On Writ of Certiorari to the Supreme Court of California.

[February —, 1978]

Separate opinion of MR. JUSTICE WHITE.

I write separately concerning the question of whether Title VI of the Civil Rights Act of 1964, 42 U. S. C. § 2000d *et seq.*, provides for a private cause of action. Four Justices are apparently of the view that such a private cause of action exists, and four Justices assume it for purposes of this case. I am unwilling merely to assume an affirmative answer. If in fact no private cause of action exists, this Court and the lower courts as well are without jurisdiction to consider ~~petitioner~~'s Title VI claim. As I see it, if we are not obliged to do so, it is at least advisable to address this threshold jurisdictional issue. See *United States* v. *Griffin*, 303 U. S. 226, 229 (1938).[1] Furthermore, just as it is inappropriate to address

respondent's

[1] It is also clear from *Griffin* that "lack of jurisdiction . . . touching the subject matter of the litigation cannot be waived by the parties. . . ." 303 U. S., at 229. See also *Mount Healthy City Bd. of Educ.* v. *Doyle*, 429 U. S. 274, 278 (1977); *Louisville & Nashville R. Co.* v. *Motley*, 211 U. S. 149, 152 (1908); *Mansfield, Coldwater & Lake Michigan R. Co.* v. *Swan*, 111 U. S. 379, 382 (1884).

In *Lau* v. *Nichols*, 414 U. S. 563 (1974), we did adjudicate a Title VI claim brought by a class of individuals. But the existence of a private cause of action was not at issue. In addition, the understanding of MR. JUSTICE STEWART's concurring opinion, which observed that standing was not being contested, was that the standing alleged by petitioners was as third-party beneficiaries of the funding contract between the Department of Health, Education, and Welfare and the San Francisco United School

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

STYLISTIC CHANGES THROUGHOUT.
SEE PAGES: 7 & 8

From: Mr. Justice White

5th DRAFT

Circulated: _____

Recirculated: 6-23-78

SUPREME COURT OF THE UNITED STATES

No. 76-811

Regents of the University of California, Petitioner, *v.* Allan Bakke.

On Writ of Certiorari to the Supreme Court of California.

[February —, 1978]

Separate opinion of MR. JUSTICE WHITE.

I write separately concerning the question of whether Title VI of the Civil Rights Act of 1964, 42 U. S. C. § 2000d *et seq.*, provides for a private cause of action. Four Justices are apparently of the view that such a private cause of action exists, and four Justices assume it for purposes of this case. I am unwilling merely to assume an affirmative answer. If in fact no private cause of action exists, this Court and the lower courts as well are without jurisdiction to consider respondent's Title VI claim. As I see it, if we are not obliged to do so, it is at least advisable to address this threshold jurisdictional issue. See *United States* v. *Griffin*, 303 U. S. 226, 229 (1938).[1] Furthermore, just as it is inappropriate to address

[1] It is also clear from *Griffin* that "lack of jurisdiction . . . touching the subject matter of the litigation cannot be waived by the parties. . . ." 303 U. S., at 229. See also *Mount Healthy City Bd. of Educ.* v. *Doyle*, 429 U. S. 274, 278 (1977); *Louisville & Nashville R. Co.* v. *Motley*, 211 U. S. 149, 152 (1908); *Mansfield, Coldwater & Lake Michigan R. Co.* v. *Swan*, 111 U. S. 379, 382 (1884).

In *Lau* v. *Nichols*, 414 U. S. 563 (1974), we did adjudicate a Title VI claim brought by a class of individuals. But the existence of a private cause of action was not at issue. In addition, the understanding of MR. JUSTICE STEWART's concurring opinion, which observed that standing was not being contested, was that the standing alleged by petitioners was as third-party beneficiaries of the funding contract between the Department of Health, Education, and Welfare and the San Francisco United School

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 26, 1978

Re: 76-811 - The Regents of the University of California v. Bakke

Dear Bill,

The circulation that came around yesterday seemed satisfactory to me.

Sincerely yours,

Mr. Justice Brennan

Wm Brennan
OCT 77

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

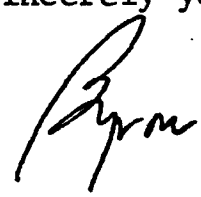
June 29, 1978

Re: 76-811 - Regents of the University of California v. Bakke

Dear Lewis,

The form of judgment you have circulated is satisfactory to me.

Sincerely yours,



Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

October 28, 1977

MEMORANDUM TO THE CONFERENCE

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

Attached is the first draft of some research on Title VI of the Civil Rights Act of 1964 prepared by my law clerk, Ellen Silberman. It appears that we have two sides of the legislative history.

T.M.

December 29, 1977

MEMORANDUM TO THE CONFERENCE

76-811 - Regents of the University of California v. Allan Bakke

Although I share the Solicitor General's ultimate conclusion that an individual may maintain a cause of action under Title VI, I think a somewhat more careful consideration of the problem than is found in his brief is appropriate. Most of the following discussion is devoted to analyzing various pieces of Title VI's legislative history that appear to provide answers to the question whether Congress intended either to deny or to create a private remedy. This rather lengthy exegesis of legislative history is in response to what I believe are inaccuracies presented by both sides. For instance, I do not think the Solicitor General is correct in saying that there is "no contemporaneous legislative history concerning private actions." (Br. at 32). On the other hand, the University exaggerates the significance and misstates the meaning of much of the legislative evidence on which it relies.

By analyzing the legislative history in detail, however, I do not mean to suggest that it provides the dispositive answer

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

April 13, 1978

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

MEMORANDUM TO THE CONFERENCE

I repeat, for next to the last time: the decision in this case depends on whether you consider the action of the Regents as admitting certain students or as excluding certain other students. If you view the program as admitting qualified students who, because of this Nation's sorry history of racial discrimination, have academic records that prevent them from effectively competing for medical school, then this is affirmative action to remove the vestiges of slavery and state imposed segregation by "root and branch." If you view the program as excluding students, it is a program of "quotas" which violates the principle that the "Constitution is color-blind."

If only the principle of color-blindness had been accepted by the majority in Plessy in 1896, we would not be faced with this problem in 1978. We must remember, however, that this principle appeared only in the dissent. In the 60 years from Plessy to Brown, ours was a Nation where, by law, individuals could be given "special" treatment based on race. For us now to say that the

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 17, 1978

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

Dear Lewis:

I will dissent "in toto". I doubt that I can join any part of your opinion.

Sincerely,

T.M.

Mr. Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 23, 1978

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

MEMORANDUM TO THE CONFERENCE

Attached is a Wang-draft of my separate opinion in Bakke. There may be minor changes and two additional closing paragraphs in the printed draft that will circulate shortly.

Sincerely,

T.M.

23 JUN 1978

NO. 76-811, Regents of the University of California v. Bakke

Mr. Justice Marshall.

I agree with the judgment of the Court only insofar as it permits a university to consider the race of an applicant in making admissions decisions. I do not agree that petitioner's admissions program violates the Constitution. For it must be remembered that, during most of the past 200 years, the Constitution as interpreted by this Court did not prohibit the most ingenious and pervasive forms of discrimination against the Negro. Now, when a state acts to remedy the effects of that legacy of discrimination, I cannot believe that this same Constitution stands as a barrier.

Pp. 1, 5, 7-16

Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Marshall

Circulated: _____

1st PRINTED DRAFT Recirculated: 26 JUN 1978

SUPREME COURT OF THE UNITED STATES

No. 76-811

Regents of the University of California, Petitioner, *v.* Allan Bakke. | On Writ of Certiorari to the Supreme Court of California.

[June —, 1978]

MR. JUSTICE MARSHALL.

I agree with the judgment of the Court only insofar as it permits a university to consider the race of an applicant in making admissions decisions. I do not agree, however, that petitioner's admissions program violates the Constitution. For it must be remembered that, during most of the past 200 years, the Constitution as interpreted by this Court did not prohibit the most ingenious and pervasive forms of discrimination against the Negro. Now, when a State acts to remedy the effects of that legacy of discrimination, I cannot believe that this same Constitution stands as a barrier.

I

A

Three hundred and fifty years ago, the Negro was dragged to this country in chains to be sold into slavery. Uprooted from his homeland and thrust into bondage for forced labor, the slave was deprived of all legal rights. It was unlawful to teach him to read; he could be sold away from his family and friends at the whim of his master; and killing or maiming him was not a crime. The system of slavery brutalized and dehumanized both master and slave.[1]

[1] The history recounted here is perhaps too well known to require documentation. But I must acknowledge the authorities on which I rely in retelling it. J. H. Franklin, From Slavery to Freedom (4th ed. 1974)

Wm Brennan
0-77

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 29, 1978

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

Dear Lewis:

I agree with your mandate.

Sincerely,

T.M.

Mr. Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

Rochester, Minnesota
December 5, 1977

MEMORANDUM TO THE CONFERENCE

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

I am advised that a conference for a discussion of this case is scheduled for December 9. I think the conference and the discussion of the case should go on even though I am not back in Washington at the time. My absence should not defer conference discussion (without me) and the development of the analysis and thinking of the Bakke case. I can swing into place one way or the other after my return. My presence, if I were there, would be of little assistance anyway for I am frank to say that I have not thus far had the energy to get into the supplemental briefs that were requested.

H. A. B.

WE Burger 12/7/77

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 1, 1978

MEMORANDUM TO THE CONFERENCE

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

The Chief, not inappropriately, has been pressing me for a vote in this case.

Since my two months' relegation to the sidelines -- from November 11 to early January -- although constantly stewing about the Bakke case, I purposefully and I think properly, gave priority to the attempt to stay even with all the other work. I feel that I have been successful in this and that, except for Bakke, I have held nothing up either for a dissent or for any other reason.

Absorbing Bakke was not made easier by the voluminous and eager writings. I have read each and all of these word by word, as well as the many briefs, for I have felt obliged to review what has proved to be so oppositely persuasive for members of the Court. Having done all this, and having given the matter earnest and, as some of my clerical friends would say, "prayerful" consideration, I outline the following:

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 16, 1978

Re: No. 76-811 - Board of Regents v. Bakke

Dear Lewis:

In order that I do not sit in silence, I can state now that I can give you a tentative vote of joinder with respect to pages 1 through the top of page 11, that is, the preliminary paragraphs and Part I. As of the moment, I am favorably inclined to Part II, as well, but I would like to reserve judgment until I have seen Byron's final writings. I shall defer commitment on the balance of your circulation of May 9.

Sincerely,

Harry

Mr. Justice Powell

cc: The Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated: JUN 19 1978

Recirculated: _____

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

MR. JUSTICE BLACKMUN.

I participate fully, of course, in the opinion, ante, p. ____, that bears the names of my Brothers Brennan, White, Marshall, and myself. I add only some general observations that hold particular significance for me, and then a few comments on equal protection.

I

This is not an ideal world. It probably never will be. At least until the early 1970's, apparently only a very small number, less than 2%, of the physicians, attorneys, and medical and law students in the United States were members of what we now refer

Wm Brennan Oct 77

76-811 Bakke

HAB

June 22, 1978

[Personal]

Dear Chief:

I have decided that I shall probably say a few words on "B Day."

Sincerely,

HAB

The Chief Justice

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated: _____

1st PRINTED DRAFT

Recirculated: JUN 23 1978

SUPREME COURT OF THE UNITED STATES

No. 76-811

Regents of the University of California, Petitioner, *v.* Allan Bakke. | On Writ of Certiorari to the Supreme Court of California.

[June —, 1978]

MR. JUSTICE BLACKMUN.

I participate fully, of course, in the opinion, *ante*, p. —, that bears the names of my Brothers BRENNAN, WHITE, MARSHALL, and myself. I add only some general observations that hold particular significance for me, and then a few comments on equal protection.

I

At least until the early 1970's, apparently only a very small number, less than 2%, of the physicians, attorneys, and medical and law students in the United States were members of what we now refer to as minority groups. In addition, approximately three-fourths of our black physicians were trained at only two medical schools. If ways are not found to remedy that situation, the country can never achieve its professed goal of a society that is not race conscious.

I yield to no one in my earnest hope that the time will come when an "affirmative action" program is unnecessary and is, in truth, only a relic of the past. I would hope that we could reach this stage within a decade at the most. But the story of *Brown* v. *Board of Education*, 347 U. S. 843 (1954), decided almost a quarter of a century ago, suggests that that hope is a slim one. At some time, however, beyond any period of what some would claim is only transitional inequality, the United States must and will reach a stage of maturity where action

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 29, 1978

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

Dear Lewis:

I agree that the proposed judgment seems appropriate.

Sincerely,

Harry

Mr. Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

October 14, 1977

No. 76-811 Regents v. Bakke

MEMORANDUM TO THE CONFERENCE

This memo is prompted by Byron's suggestion that we consider special briefing or a remand in Title VI. I would oppose this suggestion for the reasons set forth below. The fact that the reasons are prudential does not make them less compelling for me.

(1) The Ashwander canon preferring the resolution of statutory questions to constitutional interpretation is a policy of institutional prudence, not a rigid restriction on the power of the Court to make decisions it thinks proper. Viewing the matter in a prudential light, the arguments on both sides of the Fourteenth Amendment issue are as fully developed as they will ever be. Any action by us that may be perceived as ducking this issue for the second time in three years would be viewed by many as a "self-inflicted wound" on the Court.

We Brennan 10/17

(2) As far as the additional briefing goes, my brief Chambers' check of the law indicates that the Howard University amicus brief about covers the field. Of course, there is no briefing by the other side, since none of the pro-Bakke briefs fully addresses Title VI. But the only development we could find through Lexis, not already covered in substance by the Howard brief, was the affirmance on rehearing en banc of the Uzzell case, 547 F.2d 801 (4th Cir.), aff'd en banc, 558 F.2d 727 (1977), on the basis of the panel opinion.

(3) If a majority of the Court is of the opinion that Title VI at least does not forbid this program, then sending it back or requiring rebriefing would be futile as a practical matter. Given the brevity of Title VI -- which is akin to the brevity of the Equal Protection Clause -- and the ambiguity of the regulations thereunder, one's view of what is permitted under the statute is almost certain to be the same as one's opinion of the reach of the Fourteenth Amendment. If the prevailing sentiment is that the Equal Protection Clause permits the special program, the same conclusion almost certainly will be reached under Title VI. Thus, the constitutional issue would not be avoided.

On the other hand, a decision that Title VI forbids the program, made merely to avoid a decision that the Fourteenth Amendment may permit it, would be futile. Futile, because the next case will present the Fourteenth

Amendment issue anyway. It also may seem irrational because if one really believes that special preferences are permissible under the Fourteenth Amendment, there seems to be no reason to reach a different result under a similarly Delphic Title VI.

(4) This leads to a concern expressed by Professor Gunther, Constitutional Law 1604 (9th ed. 1975) and Chief Justice Vinson, in Shapiro v. United States, 335 U.S. 1, 31 (1948): "The canon of avoidance of constitutional doubts must, like the 'plain meaning' rule [in statutory interpretation], give way where its application would produce a futile result, or an unreasonable result 'plainly at variance with the policy of the legislation as a whole .'" Gunther elaborates:

> "This avoidance technique risks not only indefensible statutory interpretation but also irresponsible constitutional adjudication. There may be temptation to strain for a meaning in the statute beyond that fairly possible in order to avoid constitutional interpretation. Yet constitutional interpretation may not be wholly avoided: tentative interpretations may be ventured in the very process of stating what constitutional issues are being avoided; there may be temptations to launch constitutional trial balloons and indulge in free floating constitutional dicta without the restraints of fashioning constitutional law dispositive of the case."

In sum, a holding either way on Title VI almost surely will presage quite clearly the Court's views on the constitutional issue.

L.F.P., Jr.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

November 22, 1977

76-811 Regents v. Bakke

MEMORANDUM TO THE CONFERENCE:

In accord with the suggestion of the Chief Justice that this is an appropriate case for the pre-conference circulation of memoranda, I join those of you who have done this and now circulate the accompanying memorandum.

It addresses only the constitutional issue. Although my review of the Title VI briefs has been rather hurried, those briefs and the memoranda previously circulated leave little doubt that there was no legislative intent to have Title VI depart from the dictates of the Fourteenth Amendment. The principles by which the validity of the action are to be judged are the same. Thus, it may be that the narrower mode of decision would be to avoid reaching out for the statutory ground. A decision under Title VI would require resolution of several significant questions not argued or addressed below, e.g., whether there is an implied private right of action under Title VI, whether such a right would entail private remedies, and whether it would require exhaustion of administrative remedies.

In short, there is no reason to avoid the constitutional issue. This was the basis of the holding in the California supreme court, was the issue that prompted us to grant certiorari, and was - until we requested Title VI briefing - the only substantive issue addressed by the parties.

L.F.P.

L.F.P., Jr.

ss

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: NOV 22 1977

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-811

Regents of the University of California, Petitioner, *v.* Allan Bakke. | On Writ of Certiorari to the Supreme Court of California.

[November —, 1977]

Memorandum to the Conference from MR. JUSTICE POWELL.

I

Petitioner does not deny that decisions based on race or ethnic origin by faculties and administrations of state universities are judicially reviewable. See, *e. g., Missouri ex rel. Gaines* v. *Canada,* 305 U. S. 337 (1938); *Sipuel* v. *Board of Regents,* 332 U. S. 631 (1948); *Sweatt* v. *Painter,* 339 U. S. 629 (1950); *McLaurin* v. *Oklahoma State Regents,* 339 U. S. 637 (1950). For his part, respondent does not argue that all racial or ethnic classifications are *per se* invalid. That, too, would appear to be an untenable position. See, *e. g., Hirabayashi* v. *United States,* 320 U. S. 81 (1943); *Korematsu* v. *United States,* 323 U. S. 214 (1944); *Lee* v. *Washington,* 390 U. S. 333, 334 (1968) (Black, Harlan, and STEWART, JJ., concurring); *United Jewish Orgs.* v. *Carey,* — U. S. —, 97 S. Ct. 996 (1977).

The parties do disagree as to the level of scrutiny to be applied to the special admissions program. This raises a threshold question that may be central to a resolution of the equal protection challenge asserted by respondent. Petitioner argues that the court below erred in applying strict scrutiny, as this inexact term has been applied in our cases.

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: _____

Recirculated: DEC 1 1977

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-811

Regents of the University of California, Petitioner, *v.* Allan Bakke. | On Writ of Certiorari to the Supreme Court of California.

[November —, 1977]

Memorandum to the Conference from MR. JUSTICE POWELL.

I

Petitioner does not deny that decisions based on race or ethnic origin by faculties and administrations of state universities are judicially reviewable. See, *e. g., Missouri ex rel. Gaines* v. *Canada,* 305 U. S. 337 (1938); *Sipuel* v. *Board of Regents,* 332 U. S. 631 (1948); *Sweatt* v. *Painter,* 339 U. S. 629 (1950); *McLaurin* v. *Oklahoma State Regents,* 339 U. S. 637 (1950). For his part, respondent does not argue that all racial or ethnic classifications are *per se* invalid. See, *e. g., Hirabayashi* v. *United States,* 320 U. S. 81 (1943); *Korematsu* v. *United States,* 323 U. S. 214 (1944); *Lee* v. *Washington,* 390 U. S. 333, 334 (1968) (Black, Harlan, and STEWART, JJ., concurring); *United Jewish Organizations* v. *Carey,* 430 U. S. 144 (1977). A different view of these threshold issues by either party would appear untenable.

The parties do disagree as to the level of scrutiny to be applied to the special admissions program. As this raises a question central to resolution of respondent's equal protection challenge, I will review the arguments of the parties in light of the relevant history and judicial authority.

Petitioner argues that the court below erred in applying strict scrutiny, as this inexact term has been applied in our cases.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

December 19, 1977

MEMORANDUM TO THE CONFERENCE

No. 76-811 Regents v. Bakke

This memo comments on the recent circulation of views as to the scope of our judgment if a majority of the Court should agree with the substance of Part IV of my memorandum, first circulated on November 22. My initial observation is that the assumption underlying the recent circulations is wholly speculative at this time. I discern no concensus in favor of my suggested resolution of the case -- or indeed of any other resolution.

But the recent memos from Bill Brennan, Byron, and John do serve a useful purpose -- certainly for me. As I stated at Conference (when Bill Brennan put the question as to the form of a judgment under my view), I had not considered the scope of the trial court's injunction. If it can be read as enjoining Davis from ever including race or ethnic origin as one element, to be weighed competitively with all other relevant elements in making admissions decisions (i.e., from adopting what I shall refer to herein as the "Harvard"-type admissions policy), then -- as I stated -- I would certainly favor a modification of that injunction.

In light of the memos recently circulated, and some further study, I think the California injunction would have to be modified to avoid future uncertainty as to its scope. The language is ambiguous, as John and the Chief suggest, and it should be clarified. 1/

1/ If the injunction had been issued by a federal court, I suppose we could simply interpret it to resolve the ambiguity. I am not sure we have as much authority to interpret a state court injunction.

Thus, in the unlikely but welcome event that a concensus develops for allowing the competitive consideration of race as an element, I think we should affirm as to the Davis program, but reverse in part as to the scope of the injunction.

I do not agree, however, that this is a case that properly could be remanded for the retroactive application by Davis of a Harvard-type admission program that was not in existence in 1973 or 1974, and that could not possibly be structured and applied fairly some four to five years after the discriminatory action. Mt. Healthy simply does not apply to such a situation.

In Mt. Healthy there was considerable doubt as to whether the First Amendment activity in fact had been the "but for" cause of Doyle's discharge. Here, in contrast, the University has represented to us that this particular racial classification was essential to the admission of the minority students in question. The University admits acting on that belief and the use of a racial classification. In these circumstances Mt. Healthy would not support a theoretical reenactment of the Davis admissions in 1973/1974, purporting to use criteria not used when the applicants were being interviewed and their files reviewed.

The relevant inquiry concerns Davis' interest and purpose at the time it excluded Bakke, not the reasons it conceivably could have entertained, but did not. 2/

2/ For example, I cannot imagine that a remand would have been necessary in Mt. Healthy if the school board had fired Doyle only for First Amendment activity, and the Board's records so disclosed. Having lost on that basis, the board could not have sought a remand by contending for the first time that there might have been some other reasons that would have supported the firing, even though the board had not in fact considered them. In Mt. Healthy, the question was simply whether the other reasons that in fact had been considered on the record were sufficient.

If Mt. Healthy may be read as permitting those guilty of unconstitutional discrimination to defend by advancing reasons they might have considered but did not, then Arlington Heights v. Metropolitan Housing Devel. Corp., 429 U.S. 252 (1977), was overruled sub silentio the day it was decided. I say this because such a reading of Mt. Healthy would uphold a defendant's decision where improper racial discrimination was in fact the only motive entertained.

The answer is not speculative. Davis has conceded its two-track system was designed to assure 16 minority admissions, and exclude a corresponding number of whites regardless of their qualifications and capacity to contribute to diversity. In Arlington Heights we said that where "there is proof that a discriminatory purpose has been a motivating factor in the [state action], judicial deference is no longer justified." 429 U.S. at 265-266. Here the improper racial purpose was the sole motivation for the dual admissions program. Mt. Healthy is wholly inapposite.

Moreover, the Mt. Healthy-type inquiry is a practical impossibility in this case. In Mt. Healthy, there was a pre-existing, neutral evaluation procedure and a record. It was fair to permit the school board to show that on the record -- after deleting the protected conduct -- the pre-existing procedure and standards would have produced the same result. Here, the standards and the procedural format by which they were applied -- the admissions process -- are precisely what is at issue. It is sheer speculation to say how -- or even if -- Davis would have operated its admission program if it had known that the Harvard-type program was permissible and its Task Force program was unconstitutional.

Nor is there a record of legitimate, alternative grounds for the decision, as there was in Mt. Healthy. Those grounds would have to be derived from the sort of case-by-case, individualized comparisons described in my memorandum. The time when those comparisons could be made has gone forever. Any attempt to make them retroactively would be a fictitious recasting of the facts. In practical terms, if -- on remand -- Davis reaffirmed the admission of all 16 minority applicants in both years and adhered to its exclusion of Bakke, it would appear to all the world as a self-serving charade. No one would accept it as bona fide.

For these reasons I think it would be improper to remand the case under Mt. Healthy. Certainly it would set a dangerous and far-reaching precedent.

Sincerely,

Lewis

LFP/lab

V

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

January 5, 1978

No. 76-811 Regents v. Bakke

MEMORANDUM TO THE CONFERENCE:

I

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

* * * *

I voted not to request supplemental briefs on the Title VI issue because I believed that we could not responsibly follow a Title VI route to avoidance of the constitutional problem. Now that we have requested briefs, our opinion of course must address the statutory problem explicitly. I continue to believe, however, that invoking

April 12, 1978

PERSONAL

Bakke 76-811

Dear Chief:

Following your visit on Monday and our discussion of the current deadlock on this troublesome case, I have reviewed the situation to see whether I could identify a way to break the present deadlock - other than for Harry to cast his vote. My review has not been fruitful.

There are presently four votes to hold that the University's consideration of race was improper: yours, Potter, Bill Rehnquist, and John.* There are four who will say that race may be considered: Bill Brennan, Byron, Thurgood and Powell. But we do stand five to three on affirmance of the portion of the California Supreme Court order that Bakke be admitted to medical school. On that issue, I am with you.

It is necessary to keep in mind exactly what has been ordered. The trial court initially entered a judgment with three substantive portions:

> (i) denying Bakke's request for an injunction ordering his admission;
>
> (ii) enjoining the medical school "from considering plaintiff's race or the race of any other applicant in passing upon his application for admission"; and
>
> (iii) declaring the special admissions program unconstitutional.

Petn 120a.

*I am not sure how John will vote if he concludes the 14th Amendment rather than the statute should be applied.

The California Supreme Court vacated the first part of the judgment, holding that the burden should have been placed upon the University to demonstrate that Bakke would not have been admitted even in the absence of the unconstitutional program. It remanded for proceedings on that score. When the University conceded that it could not carry its burden on that issue, the supreme court modified its opinion to instruct the trial court to enter an order directing Bakke's admission. Petn 80a.

John would read Part (ii) of the judgment above as referring only to Bakke; the University cannot consider Bakke's race "or the race of any other applicant in passing upon his [Bakke's] application for admission."

John's reading does not, as I view it, jibe with commonsense, since the opinion of the California court clearly purported to forbid uses of race other than the particular one at issue here. This topic has been canvassed in my memoranda to the Conference of December 19 and January 5.

In addition, John's reading would make Part (ii) of the judgment utterly meaningless. The California Supreme Court in effect has reversed Part (i), and has ordered the trial court to issue the injunction Bakke requested directing that he be admitted. But the supreme court did not purport to alter Part (ii) of the judgment; hence, it still stands, restraining the University from considering Bakke's race "or the race of any other applicant in passing upon his application for admission." This portion of the judgment simply cannot be read as applying only to Bakke, since he now has his own personal order for admission; the University will never consider his application again, but will simply admit him. Thus, unless Part (ii) of the judgment is read -- in the light that the supreme court opinion certainly casts upon it -- as restraining the University from considering the race of any applicant in considering that applicant's admission, the California court would have left standing a portion of the judgment that is wholly without effect. This does not seem to be either a defensible reading of the judgment or a rational interpretation of what the California court must have thought it was doing.

It was in light of the foregoing that I concluded to cast what, in effect, is a split vote: affirm so much of the California court's order that would reinstate Bakke, but reverse the portion thereof that enjoins the medical school from considering "the race of any other applicant in

passing upon his application for admission". Thus, at the end of my opinion the bottom line would be: "Affirm in part and reverse in part". Bakke would win his case, but the medical school would be free to consider race as one element in its admissions determinations, with all places open to competition.

As you know, I have thought your position was quite close to mine in terms of the end result. You have said repeatedly that you would like to leave the universities free to exercise their own judgment - considering all relevant factors - so long as there was no quota system. We have parted company, apparently, on how the opinion should be written.

Generally, I am strongly inclined to defer to you. But on this issue I have a conviction that the Court should speak out clearly and unambiguously. If we merely affirm the California decision, and leave standing paragraph (ii) of its judgment, no university in the country will feel free to give any consideration to race. I simply could not join that result.

Nor do I think the consequences would differ in any material respect even if the opinion hinted broadly, as you have suggested, that despite the affirmance of the California judgment, universities would be free to do essentially as they please. I would think this would exacerbate the turmoil that now prevails so widely in the academic community and, indeed, in other segments of society on an issue that has aroused even greater public interest than either the abortion or the capital cases.

I recognize, of course, that just as the public has widely varying perceptions on the issue, so do we here on the Court. I therefore fully respect your views and those of our other Brothers. My own thinking may be shaped by my long experience in education, including experience with this problem.

More broadly, I think the country deserves and expects an unequivocal answer from its highest court. Four possible answers have emerged from the plethora of discussions and memorada: (i) no consideration of race is permissible under the Constitution; (ii) race may be given unlimited and controlling weight, by quota systems or otherwise; (iii) <u>maybe</u> race can be considered, but give no guidance other than to say that a quota system is out; and (iv) to go my route, which would be clear and unambiguous, affording both guidance and counseling restraint.

I could never agree with either answer (i) or (ii), although they do have the virtue of being unambiguous. Nor can I, in good conscience, merely hint that race may be considered in some circumstances and at the same time leave Part (ii) of the California court's judgment standing. If you think some consideration of race is permissible (as I understand you do), I continue to hope you will join me in an opinion that resolves the issue with guidance for the universities and colleges.

The fact remains that at present we are deadlocked. Unless Harry is willing to cast a vote fairly soon, I suppose he will request that the case be reargued. In my view, carrying this over would subject the Court to a torrent of deserved criticism. The alternative of bringing the case down on a 4 to 4 vote without an opinion would reflect even greater discredit on the Court. I therefore return to the only sound resolution: Harry should vote. Although time is slipping away, I cannot believe that Harry is insensitive to this situation. Nor can I believe that he will want the case reargued. We will never be better informed on the issue. With perhaps a total of 75 or more briefs filed in DeFunis and Bakke, and with distinguished counsel having argued, carrying the case over would be viewed as an irresponsible failure to do our duty.

I therefore have every confidence that Harry will make his decision in the near future, and however his vote may go, the country will then have an answer.

Sincerely,

The Chief Justice

lfp/ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 9, 1978

76-811 Regents of U. of Calif. v. Bakke

MEMORANDUM TO THE CONFERENCE:

In accordance with the assignment from the Chief Justice and Bill Brennan, I have prepared - and now circulate - a proposed "judgment" decision in this case.

The judgment portion of the opinion is contained in the first page and a half and reaffirmed at the end on pages 45 and 46. As suggested by the Chief and Bill, the format attempts to follow that of Mitchell v. Oregon, 400 U.S. 112 (Mr. Justice Black).

In light of the views previously expressed, there are four votes to affirm the judgment of the Supreme Court of California in its entirety, and four votes to reverse it. As previously indicated, I will join the four votes to affirm as to Bakke himself and the invalidity of petitioner's program, but I take a different view - and therefore will reverse - as to the portion of the judgment enjoining petitioner from any consideration of race in its admission program. Accordingly, the judgment of this Court would be: "Affirmed in part and reversed in part".

I attach a rough "roadmap" of the enclosed opinion, hoping it will be helpful.

This draft, except for previously prepared portions, has been prepared under some time constraints. No doubt I will do some further editing, although the draft does reflect my views on the substantive issues.

L.F.P.

L.F.P., Jr.

ss

lfp/ss 5/9/78

76-811 Regents of U. of Calif. v. Bakke

Outline of Draft Opinion

Part I is a statement of the facts and the history of the case. (pp. 2-11). This has not previously been circulated.

Part II deals with Title VI (pp. 11-17). Part II-A briefly considers the arguments for and against implying a cause of action. It then notes that this question was neither raised nor decided below and goes on to assume the existence of such a cause of action for the purposes of this case. Part II-B considers the meaning of the statute and concludes that it proscribes only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment. I have drawn heavily on the helpful memos previously circulated - especially those of Byron and Thurgood.

The remainder of the opinion (except for the final two pages) tracks quite closely the memorandum that I circulated on December 1, 1977, as I recall. I have undertaken, however, to divide this portion of the opinion into a number of parts and subparts, hoping that some of these may be acceptable to some of you. I recognize, as indicated on page 2, that many - if not all - of you will file separate opinions.

Part III (pp. 17-19) is a short section dealing with the irrelevancy of the semantic wrangle over the terms "quota" and "goal".

Part IV (pp. 19-33) is devoted to determination of the appropriate level of scrutiny. Part IV-A is a brief statement of this Court's traditional view of all racial classifications as suspect. IV-B explores the historical underpinnings of that view, and IV-C deals with what I view as the doctrinal problems entailed by adoption of any other view. Part IV-D distinguishes prior decisions cited as approving less exacting levels of scrutiny.

In Part V (pp. 33-41), the various justifications for petitioner's classification are examined to determine whether they are "compelling". Part V-A concludes that increased minority representation, per se, is not a legitimate goal. Part V-B finds that eliminating the effects of past discriminating is a compelling state interest, but that such effects and their incidence have not been identified with sufficient precision in the instant case to permit petitioner to claim that it actually is advancing that goal. Part V-C also recognizes improved health care for underserved citizens as a goal of great importance, but concludes that nothing in this record establishes that this program actually advances it. Part V-D, however, finds that because of the existence of countervailing and substantial First Amendment interests, the achievement of educational diversity is a compelling interest for an educational institution to advance. Part V-E indicates that petitioner's program must serve this goal in the least intrusive manner.

Part VI (pp. 41-46) involves "means" analysis. Part VI-A concludes that petitioner's program is not the least intrusive method of serving its avowedly constituional goal. Part VI-B identifies a widely used program that I view as a less restrictive alternative. It concludes that the California court erred in assuming that even such a program would be invalid and in barring its implementation. VI-C notes that we should not assume that universities will operate the Harvard type program as a mere cover for a fixed "quota" type system. Part VI-D summarizes the conclusion that petitioner's program is invalid, and VI-E states the judgment that the court below went too far in proscribing all consideration of race as a relevant factor.

Part VII states the judgement that Bakke is entitled to admission and explains why a remand is not called for. The Appendix, of course, is the Harvard Admissions Program upon which I drew in Part VI-B, and which was an exhibit to the amicus brief filed by several universities.

L.F.P.

L.F.P, Jr.

May 9, 1978

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-811

Regents of the University of California, Petitioner, *v.* Allan Bakke. | On Writ of Certiorari to the Supreme Court of California.

[May —, 1978]

MR. JUSTICE POWELL announced the judgment of the Court.

This case presents a challenge to the special admissions program of the petitioner, the Medical School of the University of California at Davis, designed to assure the admission of a specified number of students from certain minority groups. The Superior Court of California sustained respondent's challenge, holding that petitioner's program violated the California Constitution, Title VI of the Civil Rights Act of 1964, 42 U. S. C. § 2000d, and the Equal Protection Clause of the Fourteenth Amendment. The court enjoined petitioner from considering respondent's race or the race of any other applicant in making admissions decisions. It refused, however, to order respondent's admission to the Medical School, holding that he had not carried his burden of proving that he would have been admitted but for the constitutional and statutory violations. The Supreme Court of California affirmed those portions of the trial court's judgment declaring the special admissions program unlawful and enjoining petitioner from considering the race of any applicant. It modified that portion of the judgment denying respondent's requested injunction and directed the trial court to order his admission.

For the reasons stated in the following opinion, I believe that so much of the judgment of the California court as holds

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 17, 1978

No 76-811

Bakke

Dear Byron:

Thank you for your letter of May 16.

I am glad to make the changes you suggest on page 20 of Part IV-A of my draft opinion. I enclose a marked up copy of page 20 reflecting the changes. I also am making the verbiage change in Part VI-E that you suggested in your letter.

In view of the "paper chase" that goes on here at this time of the year, I will await circulations from other Chambers before recirculating my opinion.

With my thanks for your assistance.

Sincerely,

Lewis

Mr. Justice White

lfp/ss

cc: The Conference

Stylistic Changes Throughout

1, 9, 10, 12, 14, 17, 19-26, 28, 29, 31, 32, 34, 35, 36, 39-46

L.F.P.

2nd DRAFT 5/31

SUPREME COURT OF THE UNITED STATES

No. 76-811

Regents of the University of California, Petitioner, *v.* Allan Bakke.	On Writ of Certiorari to the Supreme Court of California.

[May —, 1978]

MR. JUSTICE POWELL announced the judgment of the Court.

This case presents a challenge to the special admissions program of the petitioner, the Medical School of the University of California at Davis, which is designed to assure the admission of a specified number of students from certain minority groups. The Superior Court of California sustained respondent's challenge, holding that petitioner's program violated the California Constitution, Title VI of the Civil Rights Act of 1964, 42 U. S. C. § 2000d, and the Equal Protection Clause of the Fourteenth Amendment. The court enjoined petitioner from considering respondent's race or the race of any other applicant in making admissions decisions. It refused, however, to order respondent's admission to the Medical School, holding that he had not carried his burden of proving that he would have been admitted but for the constitutional and statutory violations. The Supreme Court of California affirmed those portions of the trial court's judgment declaring the special admissions program unlawful and enjoining petitioner from considering the race of any applicant. It modified that portion of the judgment denying respondent's requested injunction and directed the trial court to order his admission.

For the reasons stated in the following opinion, I believe that so much of the judgment of the California court as holds

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 10, 1978

76-811 Bakke

Dear Bill:

Thank you for the opportunity to read your Wang draft, which I must say is exceptionally well written - even if it doesn't quite persuade me to abandon my draft.

As I believe Bob Comfort has pointed out to Whit, it will be necessary to make a change or two on page 4 to reflect my position accurately. As I do believe that the Davis program is unconstitutional, I cannot agree to a reversal of paragraph 3 of the judgment below. I am in entire accord, however, as to reversal of paragraph 2.

I may have a few minor editing changes to suggest with respect to the description of where the various Brothers come out in this case. I am sure that Bob and Whit can work these out.

As you know, I am entirely in accord with your views and Byron's - and I take it with Thurgood's and Harry's - as to Title VI. Indeed, Part II of my opinion in largely a summary of Byron's and Thurgood's memoranda. Accordingly, I plan to join your Part I which will include the Title VI discussion. Thus, we will have "cross joins" on this issue. The one point as to which I have a reservation is whether a private action is permissible. My preference has been not to decide that question.

I congratulate you on producing a major draft with such celerity.

Sincerely,

Lewis

Mr. Justice Brennan

lfp/ss

cc: Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

√√

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 12, 1978

No. 76-811 Bakke

Dear Byron:

Although I am in agreement with a great deal of what you have written about Title VI, I will remain with what I have said in Part II of my opinion.

If I had to decide the issue, I probably would agree with you as to the absence of a private cause of action. But as this question was neither argued nor decided in either of the courts below, and as I have made no independent study of it, I prefer merely to assume for the purposes of this case that Bakke has a right of action under Title VI.

I also will remain with Part II-B of my opinion. It is not inconsistent in any way with your Part II in which you conclude, as I do, that Title VI proscribes only those racial classifications that would violate the Equal Protection Clause. But, as some of your discussion is more expansive than I am prepared to accept at this time, I will not join you.

Sincerely,

Lewis

Mr. Justice White

lfp/ss

cc: The Conference

Stylistic Changes Throughout.

1, 2, 29 32-38

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: _____

Recirculated: 10 MAY 1978

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-811

Regents of the University of California, Petitioner, *v.* Allan Bakke. | On Writ of Certiorari to the Supreme Court of California.

[May —, 1978]

MR. JUSTICE POWELL announced the judgment of the Court.

This case presents a challenge to the special admissions program of the petitioner, the Medical School of the University of California at Davis, which is designed to assure the admission of a specified number of students from certain minority groups. The Superior Court of California sustained respondent's challenge, holding that petitioner's program violated the California Constitution, Title VI of the Civil Rights Act of 1964, 42 U. S. C. § 2000d, and the Equal Protection Clause of the Fourteenth Amendment. The court enjoined petitioner from considering respondent's race or the race of any other applicant in making admissions decisions. It refused, however, to order respondent's admission to the Medical School, holding that he had not carried his burden of proving that he would have been admitted but for the constitutional and statutory violations. The Supreme Court of California affirmed those portions of the trial court's judgment declaring the special admissions program unlawful and enjoining petitioner from considering the race of any applicant.* It modified that

*MR. JUSTICE STEVENS attempts to portray the judgment of the California court as limited to prohibiting the consideration of race only in passing upon Bakke's application. *Post*, at 1–4. It must be remembered, however, that petitioner here cross-complained in the trial court for a

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 21, 1978

CONFIDENTIAL

Bakke

MEMORANDUM TO THE CONFERENCE:

On the assumption that I will announce the judgment in this case, I have tried my hand at a statement. A copy is enclosed.

My primary purpose was to assist the representatives of the media present in understanding "what in the world" the Court has done!

I have proceeded on the theory that following my statement, the principal authors of the other opinions will announce their views.

I am entirely flexible in this matter and await your instructions.

L.F.P.

L.F.P., Jr.

ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 21, 1978

No. 76-811 Regents v. Bakke

MEMORANDUM TO THE CONFERENCE:

I am making the attached changes in my opinion at the points indicated. I plan no further changes.

L.F.P.

L.F.P., Jr.

SS

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 23, 1978

Bakke

PERSONAL

Dear Bill:

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

> "Government may take race into account when it acts not to demean or insult any racial group, but to remedy disadvantages cast on minorities by past racial prejudice."

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

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

> "Government validly may take race into account in furthering the compelling state interest of achieving a diverse student body."

Wm Brennan
6/23/78

Despite the foregoing I have not objected to your characterization of what the Court holds as I have thought you could put whatever "gloss" on the several opinions you think proper. I believe that one who reads my opinion carefully will conclude that your gloss goes somewhat beyond what I have written and what I think. Thus, I cannot say that John Stevens is incorrect in expressing his view of the result of our several opinions.

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

Sincerely,

L. Lewis

Mr. Justice Brennan

lfp/ss

✓

1, 26, 37-39, 47

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: _____

Recirculated: 23 JUN 1978

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-811

Regents of the University of California, Petitioner, *v.* Allan Bakke. | On Writ of Certiorari to the Supreme Court of California.

[May —, 1978]

MR. JUSTICE POWELL announced the judgment of the Court.

This case presents a challenge to the special admissions program of the petitioner, the Medical School of the University of California at Davis, which is designed to assure the admission of a specified number of students from certain minority groups. The Superior Court of California sustained respondent's challenge, holding that petitioner's program violated the California Constitution, Title VI of the Civil Rights Act of 1964, 42 U. S. C. § 2000d, and the Equal Protection Clause of the Fourteenth Amendment. The court enjoined petitioner from considering respondent's race or the race of any other applicant in making admissions decisions. It refused, however, to order respondent's admission to the Medical School, holding that he had not carried his burden of proving that he would have been admitted but for the constitutional and statutory violations. The Supreme Court of California affirmed those portions of the trial court's judgment declaring the special admissions program unlawful and enjoining petitioner from considering the race of any applicant.* It modified that

*MR. JUSTICE STEVENS views the judgment of the California court as limited to prohibiting the consideration of race only in passing upon Bakke's application. *Post*, at 1–4. It must be remembered, however, that petitioner here cross-complained in the trial court for a declaratory

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 24, 1978

MEMORANDUM TO THE CONFERENCE

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

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

Sincerely,

L.F.P.

L.F.P., Jr.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 26, 1978

Cases Heretofore Held for 76-811 Regents v. Bakke

MEMORANDUM TO THE CONFERENCE:

No. 77-635 Friday v. Uzzell

In this case, white students at the University of North Carolina challenged three racial policies of the University: (i) disbursement of funds collected from mandatory student fees to the Black Student Movement, a group composed exclusively of black students whose purpose was promotion of a "separate cultural identity;" (ii) a provision of the "student constitution" requiring that there be at least two blacks, two women, and two men on the campus governing council, the necessary members to be appointed by the president if not returned in the election; and (iii) a provision in the campus judicial code that, upon request of a person accused before the student honor council, four of his seven judges be of his own race.

After discovery but before trial, the DC granted summary judgment for the University on claims (ii) and (iii), holding claim (i) moot, since the Black Student Movement had integrated. CA4 affirmed the mootness holding, but reversed and ordered the entry of summary judgment for the white students on the other two claims. This holding was upheld en banc, over a strong dissent by Judge Winter. He doubted that the students had standing to challenge the provisions requiring appointment of blacks to the governing council because they had not shown any loss of representation or dilution of their vote, nor had they been denied the right to stand for election and to win. As for the judicial council provision, Judge Winter did not believe that plaintiffs had any right to object to the racial composition of the panel judging another individual.

I think that the governing council issue should be returned for trial in the light of Bakke. In my Bakke opinion, I view United Jewish Orgs. v. Carey, 430 U.S. 144 (1977), as a case in which "the remedy for an

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 26, 1978

Cases Heretofore Held to 76-811, Regents v. Bakke

MEMORANDUM TO THE CONFERENCE

I would like to correct two typographical errors in the memo relating to cases held for Bakke that I circulated this morning. First, on page 3 of that memo, the Docket Number for Cannon v. University of Chicago should be 77-926, not 77-296.

Second, and also on page 3, the fifth line of the first paragraph should state that "CA7 held that there was no private right of action."

I apologize for the errors.

L.F.P., Jr.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 27, 1978

CONFIDENTIAL

Bakke

MEMORANDUM TO THE CONFERENCE:

On June 21 I circulated a draft of my proposed announcement of the judgment in this case.

I now circulate a revised draft. I have embodied comments received, as well as added a summary of my own views.

It is a bit difficult to refer - with brevity - to the various authors and "joiners" of the several opinions. I would particularly welcome - from each of you - any change that you may wish me to make. I would appreciate receiving any suggestions you may have no later than this afternoon.

As I am a "chief" with no "indians", I should be in the rear rank, not up front!

L.F.P.

L.F.P., Jr.

ss

Bakke

June 27, 1978
6:00 p.m.

CONFIDENTIAL

MEMORANDUM TO THE CONFERENCE:

The Chief has asked me, in his absence, to advise that the cases scheduled for tomorrow will be brought down in the following order:

No. 77-747 Allied Structural Steel v. Spannaus - PS

No. 77-653 Swisher v. Brady - WEB

No. 76-811 Bd. of Regents, Univ. of Calif. v. Bakke - LFP

This is in accord with the decision made at our Conference on Monday. The Chief's memorandum circulated earlier this afternoon is to be disregarded as to Wednesday. It remains effective as to the cases to come down on Thursday and Friday.

L.F.

L.F.P., Jr.

ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 29, 1978

MEMORANDUM TO THE CONFERENCE:

In view of our discussion yesterday, I thought it would be desirable to circulate the enclosed copy of the proposed judgment in Bakke. It seems appropriate to me.

After this judgment is approved and signed a mandate tracking its language will be prepared.

My understanding is that if we agree on its form, Bill Rehnquist - or any one of us to whom a stay application is presented - will be authorized to deny it.

L.F.P.

L.F.P., Jr.

SS

v.

Allan Bakke

ON WRIT OF CERTIORARI to the Supreme Court of the State of California.

THIS CAUSE came on to be heard on the transcript of the record from the Supreme Court of the State of California, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the Supreme Court in this cause is affirmed insofar as it orders respondent's admission to Davis and invalidates petitioner's special admissions program, and reversed insofar as it prohibits petitioner from taking race into account as a factor in its future admissions decisions; and that this cause is remanded to the Supreme Court of the State of California for further proceedings not inconsistent with the judgment of this Court.

June 28, 1978

Supreme Court of the United States

No. 76-811

Regents of the University of California,

Petitioner,

v.

Allan Bakke

ON WRIT OF CERTIORARI to the Supreme Court of the State of California.

THIS CAUSE came on to be heard on the transcript of the record from the Supreme Court of the State of California, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the Supreme Court in this cause is affirmed insofar as it orders respondent's admission to Davis and invalidates petitioner's special admissions program, and reversed insofar as it prohibits petitioner from taking race into account as a factor in its future admissions decisions; and that this cause is remanded to the Supreme Court of the State of California for further proceedings not inconsistent with the judgment

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

November 10, 1977

MEMORANDUM TO THE CONFERENCE

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

The University's admissions policy in this case seems to me to make its "affirmative action" program as difficult to sustain constitutionally as one conceivably could be. Two factual elements in particular stand out, and the Regents make no bones about them. First, the limitation of the special admissions programs to blacks, Hispanics, native Americans, and other minorities is not simply a shorthand method of finding people who may have been "culturally deprived" or "disadvantaged" in such a way that, although they might be very good medical students or doctors, they would not do well on standardized tests. Rather, the University's ultimate goal is to place additional members of these ethnic minorities in the medical school.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

November 11, 1977

MEMORANDUM TO THE CONFERENCE

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

This memo was intended to accompany the stream of (attached) consciousness memo which I circulated earlier today. As Byron said in his circulation just before our first Conference on the case, it is not the "usual practice", but I think I have derived some benefit from his and other's subsequent written circulations. I also think that some written comments before Conference on a case this complicated and multi-faceted could save a lot of time in what is bound to be a long Conference discussion anyway.

Sincerely,

L.F.P.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

December 9, 1977

MEMORANDUM TO THE CONFERENCE

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

It occurred to me upon returning to Chambers after ou discussion that our discussion of vacating the injunction the Superior Court in part, etcetera, while quite proper i the context of a case coming to us from the federal courts might be unwarranted in a case coming to us from the Supre Court of California. While we could undoubtedly affirm in part and reverse in part, as I recall the statement of Mr. Justice Brandeis quoted somewhere or other, a remand to a state court can only be "for further proceedings not incon sistent with this opinion".

Sincerely,

WEB

Wm Brennan 12/77

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

He wants race out as a factor at all

January 3, 1978

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

Dear Chief:

I have had an opportunity to first peruse, and then read a second time with a little more care, your recent circulation in this case. Like Potter, I am anxious to work towards a Court opinion, and will do my best to accommodate my own views not only as to drafting and to style but as to substantive points which I do not consider critical. There is one particular of your draft, however, that I would regard as impossible for me to accept in its present form, not because of any problem of style, organization, or nuance, but because it seems to me to give rise to a "negative pregnant" which is contrary to my understanding of the Constitution, and therefore to the way I would feel obligated to construe Title VI.

This particular manifests itself in two places: Page 29 and page 33. On the first of these pages, the opinion states

that "those regulations do not, however, countenance the use of race as the determinative factor in excluding any applicant from participation in a federally assisted program." (Emphasis supplied.) On page 33, the last sentence reads: "The determination of what components of the whole person are to be weighed in the scale remains for medical educators -- provided only that race, as such, is not determinative of the choice among applicants in federally funded programs." (Emphasis supplied.) This is too grudging a version of what I understand the Title VI "color blind" standard to mean. To be consistent with the legislative history that John has adverted to in his first memo, and with my understanding of the Fourteenth Amendment, the statute and therefore the regulation must mean not merely that race may not be a "determinative" standard or factor, but that it may not be used at all in deciding who is accepted and who is rejected at a medical school.

The "special recruitment policies" referred to in § 80.5(j) and quoted on page 29 of your draft would not conflict with this view insofar as they are designed by the institution

"to make its program better known . . .". Insofar as they are designed to make its programs "more readily available" (see § 80.5(j) quoted on page 29) in the sense that race may be used as a factor in deciding who is accepted or who is rejected, I would find myself obligated to reject the illustration as a valid application of the regulation in the light of my view of the Equal Protection Clause of the Fourteenth Amendment.

Since these particular Amendments were enacted in July, 1973, a number of years after the statute itself was enacted and, perhaps not coincidentally, after the Supreme Court of Washington had handed down its decision in DeFunis v. Odegard, 507 P. 2d 1169, decided on March 8, 1973, I think they are of little assistance in shedding light on the intent of Congress. General Electric Co. v. Gilbert, O.T. 1976; Skidmore v. Swift & Co., 323 U.S. 124, 140 (1944).

Since this latter point is not in any sense "stylistic", "editorial", or "minor", I felt I should point it out to you as soon as I could, and to the others of us to whom you had circulated your draft.

I realize that in this case we are dealing with a program which did make race the determinative factor, and am quite agreeable to deciding it on as narrow a statutory basis as we can. But while this might lead me to omit both phrases such as "race being the determinative factor" and phrases such as "race being taken into consideration", it could not persuade me to even by indirection suggest that the statute would permit a program which took into consideration race as one of several factors. But I could be perfectly comfortable with an opinion which left the latter question totally and completely open, if such an opinion can be drafted.

Sincerely,

The Chief Justice

Copies to: Mr. Justice Stewart
Mr. Justice Blackmun
Mr. Justice Stevens

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

February 21, 1978

Re: No. 76-811 Regents v. Bakke

Dear John:

It occurs to me that I have never actually responded to your long and thoughtful memorandum of December 29th, in which you conclude that there is a private cause of action under Title VI upon which Bakke may rely. While I am not presently willing to join it outright, I am sufficiently in agreement with its substance so that I am willing to change my Conference vote and go with you on this issue. My earlier response to the Chief's memorandum of December 30th on the merits of the Title VI claim I have now concluded reflects a more critical view of his memorandum than I would be prepared to insist upon, and in view of the importance of trying to get a Court opinion if it is possible to do so along the lines he suggests. Since your circulation went to the entire Conference, but the Chief's did not, I am sending copies of this note only to the Chief, Potter, and Harry.

Sincerely,

WHR

Mr. Justice Stevens

Copies to the Chief Justice
Mr. Justice Stewart
Mr. Justice Blackmun

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 12, 1978

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

Dear John:

Please join me in your separate opinion in this case circulated June 12th.

Sincerely,

Mr. Justice Stevens

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 29, 1978

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

Dear Lewis:

Your proposed form of mandate in this case is agreeable to me.

Sincerely,

WHR

Mr. Justice Powell

Copies to the Conference

LFP

I agree with your mandate

WHR

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

October 19, 1977

MEMORANDUM TO THE CONFERENCE

Re: 76-811 - University of California v. Bakke

During our discussion at Conference it was suggested that we share some of our research. Accordingly, I enclose copies of a memorandum prepared for me by my clerk Frank Blake on Title VI, and also a memorandum which I requested Marc Richman to prepare.

Respectfully,

Enclosures

76-811

UNIVERSITY OF CALIFORNIA V. BAKKE

Supplemental Memo re Title VI of the 1964 Civil Rights Act, 42 U.S.C. §2000d:

Section 601 of Title VI, 42 U.S.C. §2000d, provides that: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance."

I. Legislative History:

The immediate object of §601 was to prevent federal funding of segregated facilities. In particular, Congress was concerned about provisions in acts, such as the Hill-Burton Act, 42 U.S.C. §291e(f), that contemplated federal grants to racially segregated institutions. See,e.g., comments of Sen. Javits, 110 Cong. Rec. ~~1521~~ 7686 ; of Sen. Humphrey, 110 Cong. Rec. 6544; and of Rep. Celler, 110 Cong. Rec. 1521. See also, H.R.Rep. No. 914, Additional Views of Seven Representatives, 1964 U.S. Code Cong. & Admin. News 2511.

However, it is clear from the following pieces of legislative history that Congress intended the section to have a broader sweep:

1) Proponents of the legislation described §601 as establishing an "all-encompassing" federal statement against racial and ethnic discrimination. See,e.g., comments of Sen. Case, 110 Cong. Rec. 13930; H.R.Rep. No. 914, supra, at 2400-01.

2) In turn, opponents of the legislation criticized the section precisely because it was so broad. They complained that the word "discrimination" was never defined and that the section would be used by federal agencies to impose racial quotas. The comments of

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

Revised Copy

December 12, 1977

Re: 76-811 - Regents v. Bakke

Dear Bill:

After reflecting on your comments at Conference, I have concluded that the trial court's decree does not force us to consider the legality of a Harvard-style program prematurely. A brief procedural history of the case shows why. Judge Manker concluded that the special admissions program was illegal, but that Bakke would not have been admitted in 1973 or 1974 even if the program had not existed. Pet. App. 116-117a. Accordingly, the judge denied an injunction ordering Bakke's admission. Pet. App. 120a. Instead, he ordered the school to consider Bakke's application without regard to Bakke's race or the race of any other applicant. Id. On appeal, the California Supreme Court reversed because the trial judge incorrectly placed on Bakke the burden of showing that he would have been admitted in the absence of discrimination. Pet. App. 38a. The University conceded "that it cannot meet the burden of proving that the special admission program did not result in Bakke's exclusion." Pet. App. 80a. Accordingly, the California Supreme Court directed the trial court to enter judgment ordering Bakke's admission. Id. Its mandate was stayed by this Court.

If we affirm the Supreme Court's order on a narrow ground, it will supersede (or at least make moot) the relief granted in the trial court: Bakke will never file an application, and the injunction will be meaningless. Bakke's is not a class action, and the "color-blind" relief applied only to Bakke's application:

> "2. [P]laintiff is entitled to have his application for admission to the medical school considered without regard to his race or the race of any other applicant;

> and defendants are hereby restrained and enjoined from considering plaintiff's race or the race of any other applicant in passing upon his application for admission." Pet. App. 120a.

By straining mightily, one could find an ambiguity in this injunction. The final "his" could arguably apply to "any other applicant," but the consistent use throughout the paragraph of the pronoun to refer to Bakke militates against such a reading, as does the failure of the trial court to suggest that it was issuing relief to applicants who were not parties to the suit.

Respectfully,

/h

Mr. Justice Brennan

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

December 14, 1977

Re: 76-811 - Regents v. Bakke

Dear Bill:

Although I have other problems with your most recent memorandum, I would first suggest that the validity of your entire analysis rests on an assumption that counsel for the University of California were not sufficiently competent to understand that the constitutionality of the program presented a certworthy issue.

Respectfully,

John

Mr. Justice Brennan

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

December 19, 1977

RE: 76-811 Regents v. Bakke

Dear Lewis:

If we construe the injunction as merely prohibiting the consideration of the race of any applicant in the processing of Bakke's application, he will be admitted to medical school and there will be no outstanding injunction forbidding the consideration of racial criteria in processing other applications. If we explain that this is our understanding of the judgment, neither Bakke nor the University can be adversely affected by the failure to render an advisory opinion on the validity of a Harvard-type program.

Indeed, the facts (1) that the judgment, fairly read, only relates to Bakke's right to be admitted and (2) that this reading cannot harm either litigant, are persuasive reasons for not reaching out to discuss a profoundly difficult constitutional issue that is not necessary to the resolution of the controversy between the litigants before us.

I agree completely with your analysis of Mt. Healthy.

I am working on an additional memorandum relating to the statutory question which I hope to circulate in a few days.

Respectfully,

John

Mr. Justice Powell

Copies to the Conference

December 29, 1977
JPS

MEMORANDUM TO THE CONFERENCE

76-811 - Regents of the University of California v. Allan Bakke

Although I share the Solicitor General's ultimate conclusion that an individual may maintain a cause of action under Title VI, I think a somewhat more careful consideration of the problem than is found in his brief is appropriate. Most of the following discussion is devoted to analyzing various pieces of Title VI's legislative history that appear to provide answers to the question whether Congress intended either to deny or to create a private remedy. This rather lengthy exegesis of legislative history is in response to what I believe are inaccuracies presented by both sides. For instance, I do not think the Solicitor General is correct in saying that there is "no contemporaneous legislative history concerning private actions." (Br. at 32). On the other hand, the University exaggerates the significance and misstates the meaning of much of the legislative evidence on which it relies.

By analyzing the legislative history in detail, however, I do not mean to suggest that it provides the dispositive answer

WJB 12/29/77 32 pages long

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

PERSONAL

January 3, 1978

Re: 76-811 - Regents of the University of California v. Bakke

Dear Chief:

As you know, I strongly favor deciding the case on the statutory ground set forth in your memorandum. Like Potter, I have several suggestions with respect to the form of the opinion but will reserve them for the time being.

Perhaps I am much too optimistic, but I should think there would be a realistic possibility that this rationale could receive additional support. If a majority of the Court holds that an individual victim of racial discrimination may maintain a private action under Title VI, I should think that both Byron and Lewis would be willing to join the portion of the opinion holding on the merits that there was a statutory violation. If they could do so, conceivably Byron could limit a dissent to his disagreement with the private cause of action holding and Lewis could still write separately setting forth his views that the Harvard approach is entirely permissible.

Indeed, I think Bill Brennan and Thurgood would have good reason to qualify the scope of their dissenting opinions if the Court adopts the narrowest possible rationale. For as Lou Pollak pointed out in his article in 9 Sw. L. Rev. 571 (1977), a narrow holding will enable the proponents of affirmative action to distinguish this case from most of the programs that are in effect throughout the country. It is really contrary to the interests that they support to contend that a two-track program is logically indistinguishable from the Harvard program, for example. As of the present, I am now persuaded

that there is a valid distinction between the two and that the national interest will best be served by avoiding a premature decision of any question which need not be decided to dispose of this case.

Respectfully,

The Chief Justice

Copies: Mr. Justice Stewart
Mr. Justice Blackmun
Mr. Justice Rehnquist

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Mr. Justice Stevens

Circulated: JUN 12 1978

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-811

Regents of the University of California, Petitioner, *v.* Allan Bakke. | On Writ of Certiorari to the Supreme Court of California.

[June —, 1978]

MR. JUSTICE STEVENS, concurring in part and dissenting in part.

It is always important at the outset to focus precisely on the case before the Court. It is particularly important to do so in this case because correct identification of the issues will determine whether it is necessary or appropriate to express any opinion about the legal status of any admissions program other than petitioner's.

I

This is not a class action. The controversy is between two specific litigants. Allan Bakke challenged petitioner's special admissions program, claiming that it denied him a place in medical school because of his race in violation of the Federal and California Constitutions and of Title VI of the Civil Rights Act of 1964, 42 U. S. C. § 2000d. The California Supreme Court upheld his challenge and ordered him admitted. If the state court was correct in its view that the University's special program was illegal, and that Bakke was therefore unlawfully excluded from the medical school because of his race, we should affirm its judgment, regardless of our views about the legality of admissions programs that are not now before the Court.

The judgment as originally entered by the trial court contained four separate paragraphs, two of which are of critical

Pp. 1, 3-4, 12

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Mr. Justice Stevens

Circulated: _____

Recirculated: 6/19/78

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-811

Regents of the University of California, Petitioner, *v.* Allan Bakke. } On Writ of Certiorari to the Supreme Court of California.

[June —, 1978]

MR. JUSTICE STEVENS, with whom THE CHIEF JUSTICE, MR. JUSTICE STEWART, and MR. JUSTICE REHNQUIST join, concurring in part and dissenting in part.

It is always important at the outset to focus precisely on the controversy before the Court. It is particularly important to do so in this case because correct identification of the issues will determine whether it is necessary or appropriate to express any opinion about the legal status of any admissions program other than petitioner's.

I

This is not a class action. The controversy is between two specific litigants. Allan Bakke challenged petitioner's special admissions program, claiming that it denied him a place in medical school because of his race in violation of the Federal and California Constitutions and of Title VI of the Civil Rights Act of 1964, 42 U. S. C. § 2000d. The California Supreme Court upheld his challenge and ordered him admitted. If the state court was correct in its view that the University's special program was illegal, and that Bakke was therefore unlawfully excluded from the medical school because of his race, we should affirm its judgment, regardless of our views about the legality of admissions programs that are not now before the Court.

The judgment as originally entered by the trial court contained four separate paragraphs, two of which are of critical

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 21, 1978

Re: 76-811 - Regents of the University of California v. Bakke

Dear Lewis:

The Chief Justice, Potter, Bill and I have all agreed on the following suggested revision of the first paragraph on page 3 of your proposed oral statement:

> "The Chief Justice, and Justices Stewart, Rehnquist and Stevens have concluded that the statutory issue controls this case. In their view, which they will state more fully for themselves, the only question before us is whether Bakke was unlawfully excluded from the California Medical School because of his race. They believe that Congress has answered that question by the language in Title VI, which forbids the exclusion, on grounds of race, of any person from federally funded programs. They also believe that it is inappropriate to address the question whether race may ever be considered as a factor in an admissions program, or to consider any constitutional issue in this case. They would affirm the judgment of the Supreme Court of California without either adopting or rejecting the reasoning in that Court's opinion."

This is the way they want it

We would also be grateful if instead of referring to "the Chief Justice's plurality," you refer to the four of us by name.

Also, as I indicated over the telephone, we plan to add the following footnote at the end of the first sentence on page 1 of our opinion:

> "Four members of the Court have undertaken to announce the legal and constitutional effect of this Court's judgment. It is hardly necessary to state that only a majority can speak for the Court or to determine what is 'the central meaning' of any judgment of the Court."

Respectfully,

Mr. Justice Powell

cc: The Chief Justice
Mr. Justice Stewart
Mr. Justice Rehnquist

✓

pp. 1, 5, 12-14

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Mr. Justice Stevens

Circulated: _____

Recirculated: JUN 22 '78

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-811

Regents of the University of California, Petitioner, *v.* Allan Bakke. | On Writ of Certiorari to the Supreme Court of California.

[June —, 1978]

MR. JUSTICE STEVENS, with whom THE CHIEF JUSTICE, MR. JUSTICE STEWART, and MR. JUSTICE REHNQUIST join, concurring in the judgment in part and dissenting in part.

It is always important at the outset to focus precisely on the controversy before the Court.[1] It is particularly important to do so in this case because correct identification of the issues will determine whether it is necessary or appropriate to express any opinion about the legal status of any admissions program other than petitioner's.

I

This is not a class action. The controversy is between two specific litigants. Allan Bakke challenged petitioner's special admissions program, claiming that it denied him a place in medical school because of his race in violation of the Federal and California Constitutions and of Title VI of the Civil Rights Act of 1964, 42 U. S. C. § 2000d *et seq.* The California Supreme Court upheld his challenge and ordered him admitted. If the state court was correct in its view that the University's special program was illegal, and that Bakke was therefore unlawfully

[1] Four Members of the Court have undertaken to announce the legal and constitutional effect of this Court's judgment. See opinion of JUSTICES BRENNAN, WHITE, MARSHALL, and BLACKMUN, *ante*, at 1–2. It is hardly necessary to state that only a majority can speak for the Court or determine what is the "central meaning" of any judgment of the Court.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 27, 1978

RE: 76-811 - Regents of the University of California
v. Bakke

Dear Lewis:

Is this shortened version of the paragraph we submitted on June 21 acceptable?

in an opinion authored by Mr Justice Stevens,

"The Chief Justice, and Justices Stewart, Rehnquist and Stevens have concluded that the only question before us is whether Bakke was unlawfully excluded from the California Medical School because of his race, and that Congress has answered that question in Title VI. They would affirm the judgment of the Supreme Court of California without addressing the question whether race may ever be considered as a factor in an admissions program."

Thanks for your patience.

Respectfully,

JPS

Mr. Justice Powell

cc: The Chief Justice
Mr. Justice Stewart
Mr. Justice Rehnquist

P.S. For your convenience, I have enclosed a copy of our June 21 letter.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 29, 1978

Re: 76-811 - Regents of the University of California v. Bakke

Dear Lewis:

The proposed form of judgment is fine with me.

Respectfully,

Mr. Justice Powell

Copies to the Conference

here. See *San Antonio, supra,* at —. Nor do whites as a class have any of the "traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Id.,* at 28; see *United States* v. *Carolene Products Co.,* 304 U. S. 144, 152 n. 4 (1938).*

Moreover, if the University's representations are credited, this is not a case where racial classifications are "irrelevant and therefore prohibited." *Hirabayashi,* 320 U. S., at 100. Nor has anyone suggested that the University's purposes contravene the cardinal principle that racial classifications that stigmatize—because they are drawn on the presumption that one race is inferior to another or because they put the weight of government behind racial hatred and separatism—are invalid without more.** See *Yick Wo* v. *Hopkins,* 118 U. S. 356, 174 (1886); * accord, *Strauder* v. *West Virginia,* 100 U. S. 303, 308 (1879); *Korematsu* v. *United States,* 323 U. S., at 223; *Oyama* v. *California,* 332 U. S. 633, 663 (1948) (Murphy, J., concurring); *Brown I, supra; McLaughlin* v. *Florida,* 379 U. S., at 191–192; *Loving* v. *Virginia,* 388 U. S., at 11–12; *Reitman* v. *Mulkey,* 387 U. S. 369, 375–376 (1967); *United Jewish Organizations of Williamsburgh, Inc.* v. *Carey,* 430 U. S. 144,

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* Of course, the fact that whites constitute a political majority in our Nation does not necessarily mean that active judicial scrutiny of racial classifications that disadvantage whites is inappropriate. Cf. *Castaneda* v. *Partida,* 430 U. S. 482, 499–500 (1977); *id.,* at 501 (MARSHALL, J., concurring).

** ~~See *infra*, at —.~~

* "[T]he conclusion cannot be resisted that no reason for [the refusal to issue permits to Chinese] exists except hostility to the race and nationality to which petitioners belong . . . . The discrimination is, therefore, illegal . . . ."