Piercing the Veil: William J. Brennan's Account of *Regents of the University of California v. Bakke*

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INTRODUCTION

For an institution that takes great pride in following various norms and conventions, the Supreme Court of the United States is notorious for departing from those very norms and conventions when it sees fit or when the circumstances seem to necessitate it.[1] Some incursions occur on a case-by-case basis: "The Rule of Four," dictating that the Court will grant review only to those certiorari petitions that obtain positive votes from four Court members, usually holds but sometimes does not;[2] the principle of stare decisis, declaring that past decisions should guide future ones, appears as a rationale in many opinions but certainly not all.[3] Other departures, once they have occurred, have had more lasting effects. The demise of the norm of consensus, under which the justices rarely made public their private disagreements, gave way to the dissent.[4] Similarly, the junior vote rule, under which the newest member of

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1. Norms and conventions are informal institutions that "structure social interactions in particular ways." JACK KNIGHT, INSTITUTIONS AND SOCIAL CONFLICT 2 (1992).

2. As Justice John Paul Stevens once put it, "the Rule of Four is a valuable, though not immutable, device for deciding when a case must be argued . . . ." New York v. Uplinger, 467 U.S. 246, 251 (1984) (Stevens, J., concurring). For examples of deviations from the Rule of Four, see LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE (1998); and H.W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT (1991).

3. More to the point, Harold Spaeth and Jeffrey Segal have shown that, despite the doctrine of stare decisis, Justices who dissent from a precedent-setting decision continue to dissent from decisions applying that precedent. HAROLD J. SPAETH & JEFFREY A. SEGAL, MAJORITY RULE OR MINORITY WILL (1999). For more on the "norm" of stare decisis, see SAUL BRENNER & HAROLD J. SPAETH, STARE INDECISIS (1995); and Knight & Epstein, *The Norm of Stare Decisis*, 40 AM. J. POL. SCI. 1018 (1996).

4. Studies examining the demise of the norm of consensus (or the rise of dissent) on the U.S. Supreme Court include Caldeira & Zorn, *Of Time and Consensual Norms in the Supreme Court*, 42 AM. J. POL. SCI. 874 (1998); Haynie, *Leadership and Consensus on the U.S. Supreme Court*, 54 J. POL. 1158 (1992); and Walker et al., *On the Mysterious Demise of Consensual Norms in the United States Supreme Court*, 50 J. POL. 361 (1988).

the Court voted first at Conference, gave way to the norm of seniority, under which the Chief Justice, followed by the Associates in order of seniority, now votes first.[5]

And, yet, in all of these departures one norm seems *nearly* unflappable. Namely, justices should and do not go public with private information about the Court's deliberations over particular cases. To be sure, justices occasionally leave trails in the form of documents found in the personal papers they have deposited in libraries and public institutions[6] but, to the extent that it is up to others to follow the trail, the justice him or herself has not pierced the veil. Also, to be sure, some violations have occurred. Leaks on the Court, whether from clerks or the justices themselves, seemed so egregious to Chief Justice Warren E. Burger that he appointed a committee of his colleagues to "to look into the problem."[7] It is nonetheless fair to say, whether out of some sense of

5. Until well into Earl Warren's Chief Justiceship, the Justices spoke in order of seniority, but voted in reverse order, allowing the Chief, if he so wished, to be in the majority and so assign the opinion of the Court. During Taft's Chief Justiceship, he and several of his colleagues sometimes held "mock conferences," a practice that Harlan Fiske Stone, often the better to oppose Chief Justice Hughes, carried on. WALTER F. MURPHY, ELEMENTS OF JUDICIAL STRATEGY (1964). Sometimes Earl Warren and William J. Brennan, Jr. carried out similar meetings. WILLIAM O. DOUGLAS, THE COURT YEARS, 1937-1975, at 229 (1980). It is also possible that the Conference has not allowed the Chief Justice to speak first. William O. Douglas reported to Professor Walter F. Murphy that, after *United States v. Nixon*, 418 U.S. 683 (1974), had been argued, he and a majority of the brethren, believing that then-Chief Justice Warren Burger had recently visited the White House and had discussed the pending case with the President, held their own conference and decided the case unanimously. At the formal conference, before Burger could say anything Douglas began speaking first. Angry, Burger asserted his privilege to initiate discussion, and Douglas replied he could have that privilege as long as he understood that the decision on the merits was already settled. Knowing Douglas's animosity toward Burger, Murphy takes this story as probably not completely accurate. E-mail from Walter F. Murphy to authors (June 16, 2000) (on file with the authors).

6. For information about these collections, see LEE EPSTEIN ET AL., THE SUPREME COURT COMPENDIUM: DATA, DECISIONS, AND DEVELOPMENTS 386-394 tbl. 5-11 (2d ed. 1996); and ALEXANDRA K. WIGDOR, THE PERSONAL PAPERS OF SUPREME COURT JUSTICES: A DESCRIPTIVE GUIDE (1986).

7. On January 24, 1973, Chief Justice Burger circulated the following memorandum to the Justices:

> The attached story from *Time* [reporting on internal deliberations over *Roe v. Wade*, 410 U.S. 113 (1973)] is a gross breach of security of the processes of the Court and goes to the very heart of the integrity of our processes.
>
> It appears that the admonitions of Justices to law clerks have fallen on deaf ears, at least to some. Had one of my clerks even talked with this reporter, or any other reporter, in these circumstances—as some law clerks have done—I would dismiss him or them forthwith.
>
> It is plain to that the article could not have been written without access to a draft of the opinion. We have an obligation to find the source.
>
> If we sit placidly by, the impression may get around that we are tolerant of this kind of professional misconduct and I have no intention of being tolerant any longer about repeated breaches of the confidential matters of the Court.
>
> As soon as all are available, I will call a special conference.

On March 5, 1973, Burger asked Justices Rehnquist and Stewart to serve as an "Ad Hoc Committee on 'Court Security'" and make "recommendations for improvement."

On June 18, 1973 Rehnquist and Stewart made their report. They described "known leaks" and "existing practices for preventing them." They also made a number of recommendations: (1) Lock up "draft circulations or opinions or orders which have not yet come down at the time that the last of the personnel in chambers leave for the day;" (2) Hold " a group discussion" with "all new law clerks some time just before the beginning of the Term . . . [W]e think that the session should be attended by every member of the Court who wishes to do so, and that the general outline of the proposed discussion of confi-

institutional or personal loyalty, the norm of secrecy is, in fact, a norm to the extent that the vast majority of the Court's members have followed it, continue to do so, and are sanctioned when they do not.[8]

Almost unbroken adherence to this norm for more than a century makes the document contained in this Article extraordinary. At some point during or perhaps shortly after the Court's private deliberations over *Regents of the University of California v. Bakke*,[9] Justice William J. Brennan, Jr., wrote—in long hand—a 37-page narrative about what was transpiring within the Court.[10] What Brennan planned to do with it, we cannot be absolutely certain.[11] What is clear: His musings on *Bakke* provide perhaps the most revealing first-hand account of the Court—its inner workings, its personnel, and its deliberative process—ever produced by a justice.

This uniqueness alone makes his narrative worthy of careful study. But there is more: We can hardly imagine a more interesting and important case for analysis. Even though it is fast approaching its twenty-fifth anniversary, *Bakke* continues to resonate with Americans. Scholars and others have produced nearly twenty books dealing with the decision in some significant way;[12] the

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dentiality be reviewed in advance by all of us; (3) Give thought "to the possibility of trying to protect our privacy from invasion by electronic means." All memoranda on file with the authors.

8. Sanctions on the Court "can range from ostracism to a refusal to interact cooperatively with the offending party." EPSTEIN & KNIGHT, *supra* note 2, at 117. For examples of what can happen to violators of the norm of secrecy, see EPSTEIN & KNIGHT, *supra* note 2, at 117, and ALPHEUS THOMAS MASON, HARLAN FISKE STONE: PILLAR OF LAW (1956). For more on why justices follow the norm, see, for example, Peter Fish, *Secrecy and the Supreme Court: Judicial Indiscretion and Reconstruction Politics*, 8 WM. & MARY L. REV. 225 (1996); Felix Frankfurter, *Mr. Justice Robert*, 104 U. PA L. REV. 311 (1955).

9. 438 U.S. 265 (1987).

10. We found the narrative in Box 464 of the Papers of Justice William J. Brennan, Jr., located in the manuscript reading room of the Library of Congress, Washington, D.C. NARRATIVE OF JUSTICE WILLIAM J. BRENNAN (1978) (copy on file with authors).

11. We do know that Brennan made a habit, at the end of each term, to go through his files and sort out and comment on material from important cases that he thought it would be useful for a biographer to have. These he would carefully keep.

We thank Professor Walter F. Murphy for providing this information. Professor Murphy also believes that Brennan's "habit" was one of the factors that may have contributed to the accuracy of some of the information contained in BOB WOODWARD & SCOTT ARMONSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT (1979). Brennan told Murphy that someone had entered Brennan's office, jimmied the locked on the filing drawers under his desk and removed the papers he had "edited" for those terms. Brennan even showed Murphy the jimmy marks, which led Murphy to believe that "clearly someone had used a crow bar or similar instrument to break the lock." E-mail from Walter F. Murphy to the authors (June 16, 2000) (on file with authors).

12. Electronic searches of various library catalogues, conducted on the key word *Bakke*, turned up the following books (all of which deal with the case in some significant way): ADMITTING AND ASSISTING STUDENTS AFTER *BAKKE* (Alexander W. Astin et al., eds 1978); SUSAN BANFIELD, THE *BAKKE* CASE QUOTAS IN COLLEGE ADMISSIONS (1998); JOEL DREYFUSS & CHARLES LAWRENCE, THE *BAKKE* CASE (1979); TERRY EASTLAND & WILLIAM J. BENNETT, COUNTING BY RACE (1979); PAUL FISCHER, THE *BAKKE* DECISION: ITS REAL MEANING (1978); WINTON H. MANNING, BEYOND *BAKKE* (1978); CHRISTOPHER F. MOONEY, INEQUALITY AND THE AMERICAN CONSCIENCE (1982); TIMOTHY J. O'NEILL, *BAKKE* & THE POLITICS OF EQUALITY (1985); BERNARD SCHWARTZ, BEHIND BAKKE (1988); THOMAS OLIVER SCOTT, EDUCATION IS OUR RIGHT: THE *BAKKE* CASE AND THE DEVELOPTING CRISIS IN EDUCATION (1977); RON SIMMONS, AFFIRMATIVE ACTION (1982); ALLAN P. SINDLER, *BAKKE*, *DEFUNIS*, AND MINORITY ADMISSIONS (1978); MARY TEN THOR, THE *BAKKE* SYMPOSIUM (1977);

case name appears in nearly 2,000 law review articles.[13] Every U.S. Court of Appeals has cited *Bakke* at least once,[14] as have nearly 30 state appellate courts.[15] Attorneys too have managed to work the decision into more than 500 briefs filed on the merits of cases before the U.S. Supreme Court.[16]

More specifically, and perhaps most importantly, both the vitality and meaning of the *Bakke* decision continue to be actively litigated with the future of race-conscious admissions programs hanging in the balance. In 1996, the Fifth Circuit Court of Appeals held in *Hopwood v. Texas* "that the University of Texas School of Law may not use race as a factor in deciding which applicants to admit in order to achieve a diverse student body, to combat the perceived effects of a hostile environment at the law school, to alleviate the law school's poor reputation in the minority community, or to eliminate any present effects of past discrimination by actors other than the law school."[17] This decision virtually rejected *Bakke* as binding precedent, and the Fifth Circuit based its rejection in part on the reasoning that Justice Powell's "argument in

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UNITED STATES COMMISSION ON CIVIL RIGHTS, TOWARD AN UNDERSTANDING OF *BAKKE* (1979); JOHN WALSH, MINORITIES IN MEDICINE: REPORT OF A CONFERENCE (1977); SUSAN WELCH & JOHN GRUHL, AFFIRMATIVE ACTION AND MINORITY ENROLLMENTS IN MEDICAL AND LAW SCHOOLS (1998); and J. HARVIE WILKINSON, FROM *BROWN* TO *BAKKE* (1979).

13. As revealed by a LEXIS search of the LAWREV library, ALLREV file on 'Regents w/n 5 Bakke.' Search conducted by authors on May 15, 2000.

14. *See, e.g.*, Hayden v. County of Nassau, 180 F.3d 42 (2d Cir. 1999); Stefanovic v. Univ. of Tenn., No. 98-5824, 1999 U.S. App LEXIS 5978 (6th Cir. Mar. 30, 1999); Tuttle by Tuttle v. Arlington County Sch. Bd., 195 F.3d 698 (4th Cir. 1999); Buchwald v. Univ. of N.M. Sch. of Med., 159 F.3d 487 (10th Cir. 1998); Wessmann v. Gittens, 160 F.3d 790 (1st Cir. 1998); Grahek v. City of St. Paul, 84 F.3d 296 (8th Cir. 1996); Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996); Taxman v. Bd. of Educ., 91 F.3d 1547 (3d Cir. 1996); CC Distrib., Inc. v. United States, 883 F.2d 146 (D.C. Cir. 1989); United States v. Alabama, 791 F.2d 1450 (11th Cir. 1986); Britton v. S. Bend Cmty. Sch. Corp., 775 F.2d 794 (7th Cir. 1985); Schmidt v. Oakland Unified Sch. Dist., 662 F.2d 550 (9th Cir. 1981).

15. *See, e.g.*, Arrington v. Associated Gen. Contractors of Am., 403 So. 2d 893 (Ala. 1981); Adams v. Pipeliners Union 798, 699 P.2d 343 (Alaska 1985); NBC Subsidiary, Inc. v. Superior Court of L.A. County, 980 P.2d 337 (Cal. 1999); DiLeo v. Bd. of Regents of Univ. of Colo., 590 P.2d 486 (Colo. 1978); Gay Rights Coalition of Georgetown Univ. Law Ctr. v. Georgetown Univ., 536 A.2d 1 (D.C. Cir. 1987); Elliott v. State, 591 So. 2d 981 (Fla. Dist. Ct. App. 1991); Am. Subcontractors Ass'n, Ga. Chapter v. City of Atlanta, 376 S.E.2d 662 (Ga. 1989); Petrie v. Ill. High Sch. Ass'n, 394 N.E.2d 855 (Ill. App. Ct. 1979); Moore v. Vanderloo, 386 N.W.2d 108 (Iowa 1986); La. Associated Gen. Contractors, Inc. v. State, 669 So. 2d 1185 (La. 1996); Lindsay v. Great N. Paper Co., 532 A.2d 151 (Me. 1987); Gilchrist v. State, 667 A.2d 876 (Md. 1995); Hosford v. School Comm. of Sandwich, 659 N.E.2d 1178 (Mass. 1996); Local 526-M, Mich. Corrections Org., Serv. Employees Int'l Union, AFL-CIO, CLC v. State, 313 N.W.2d 143 (Mich. Ct. App. 1981); Hennepin County v. Perry, 561 N.W.2d 889 (Minn. 1997); Srate v. Gray, 887 S.W.2d 369 (Mo. 1994); Univ. & Cmty. Coll. Sys. of Nev v. Farmer, 930 P.2d 730 (Nev. 1997); Dixon v. Rutgers, 541 A.2d 1046 (N.J. 1988); Opinion of the Justices (School Financing), 712 A.2d 1080 (N.H. 1998); Ass'n of Convenience Stores v. Urbach, 658 N.Y.S.2d 468 (N.Y. App. Div. 1997); Ritchey Produce Co. v. State Dep't of Admin. Servs., 707 N.E.2d 871 (Ohio 1999); Smith v. State *ex rel.* Bd. of Regents of Okla. State Univ., 846 P.2d 370 (Okla. 1993); Office of Disciplinary Counsel v. Grigsby, 425 A.2d 730 (Pa. 1981); Trembley v. City of Cent. Falls, 480 A.2d 1359 (R.I. 1984); LaBore v. Muth, 473 N.W.2d 485 (S.D. 1991); *Ex parte* Rhodes, 974 S.W.2d 735 (Tex. Crim. App. 1998); Southwest v. Pierce City, 667 P.2d 1092 (Wa. 1983); State v. Martin, 530 N.W.2d 420 (Wis. Ct. App. 1995); Toothman v. Brescoach, 465 S.E.2d 866 (W. Va. 1995).

16. As revealed by a LEXIS search of the GENFED library, BRIEFS file on "Regents w/n 5 Bakke." Search conducted by authors on May 15, 2000.

17. 78 F.3d 932, 962.

Bakke garnered only his own vote and has never represented the view of the majority of the Court."[18] Scholarly commentary on the vitality of the diversity rationale has often similarly advanced the view that the conceptions of diversity and affirmative action employed by Justice Powell and the members of the Brennan concurrence are sufficiently distinct so as to render Justice Powell's opinion without weight.[19]

In December of 2000, however, the Ninth Circuit Court of Appeals reached the opposite conclusion when it recognized Justice Powell's diversity opinion in *Bakke* as binding precedent, choosing instead to "leave it to the Supreme Court to declare that the *Bakke* rationale regarding university admissions policies has become moribund, if it has."[20] Thus, the inside look that Brennan's papers provide into the development of his concurrence and the relationship of this concurrence to Justice Powell's diversity opinion may provide information central to an analysis of the continuing precedential weight of the diversity rationale.

Justice Brennan's papers may also provide critical insight for those actively involved in litigating the meaning of diversity as employed in Justice Powell's opinion. At least four challenges to race-conscious admission programs at various institutions of higher education have recently concluded or are currently underway.[21] At the heart of these cases is an effort to adduce the parameters of diversity as a state interest and the permissible methods for universities to structure admissions programs so as to achieve diversity.

So too, and despite the passage of time, *Bakke,* and affirmative action more generally, have remained high enough on the public's agenda that all presidential contenders since 1978 have taken a stand on the issue, and that not a year has elapsed without some survey appearing on the subject.[22] What those surveys reveal, of course, is that Americans were and remain divided over whether minorities and women should receive preferential treatment in hiring, promotion, and admission to universities and other areas of American life. Brennan's narrative reveals that the justices were also divided, and in ways that the opinions do not necessarily make apparent. So, for example, we learn that Thurgood Marshall did not merely dissent from portions of Lewis Powell's plurality opinion; he was, according to Brennan, "livid" over Powell's writing, "which [Marshall] regarded as racist."[23] Brennan's narrative is replete with other examples of a group of Americans—albeit a uniquely situated

18. *Id.* at 944.

19. Lacklund H. Bloom, Jr., Hopwood, Bakke *and the Future of the Diversity Justification*, 29 TEX. TECH. L. REV. 1, 30 (1998).

20. Smith v. Univ. of Wash., 233 F.3d 1188, 1200 (9th Cir. 2000).

21. *Id.*; Tracy v. Bd. of Regents of Univ. Sys. of Ga., 2000 U.S. Dist LEXIS 11320 (S.D. Ga. June 16, 2000), *reh'g denied*, 2000 U.S. Dist. LEXIS 11262 (S.D. Ga July 24, 2000); Grutter v. Bollinger, 122 F.Supp.2d 811 (6th Cir. 1999); Gratz v. Bollinger, 122 F.Supp.2d 811 (E.D. Mich. 2000).

22. For the results of various surveys, see EPSTEIN ET AL., *supra* note 6, at 687.

23. *See infra* text accompanying notes 78-79.

one—grappling with one of the most complex issues of our times and attempting to persuade each other of the "correctness" of their views.

The narrative itself begins in May of 1978, with Brennan reporting that Justice Harry Blackmun—after months of apparent indecision—had finally cast his (initial) vote. This is somewhat unfortunate since awareness of the Court's internal deliberations leading up to Blackmun's vote may be critical to developing a full appreciation of Brennan's story. To fill this gap, we provide, in Part I, a chronology of the Court's internal deliberations over *Bakke* prior to May 1978—a chronology that we developed from materials located in the private papers of Justices William J. Brennan, Jr., Thurgood Marshall, and Lewis F. Powell, Jr.[24] Other scholars have provided commentary and insights into some of the events denoted below.[25] We do not; rather we lay out the facts and let readers—perhaps via Brennan's insights— reach their own conclusions. Following the chronology, in Part II, we reprint Brennan's narrative in its entirety. Although we have not changed any of his words, we have annotated the document, adding notes to fill in pieces of the story he omitted and to provide readers with full texts of various letters and memoranda to which he refers. Part III houses a brief epilogue.

I. A CHRONOLOGY OF *BAKKE* THROUGH MAY 1978

January 21, 1977

The Court takes its first vote on whether to grant certiorari to *Bakke*. The votes were as follows:

Deny	*Grant*	*Pass*
Burger	Stewart	Blackmun
Brennan	White	
Marshall	Powell	
	Rehnquist	
	Stevens	

Even though there were sufficient votes to grant certiorari, the Court relisted the case for Chief Justice Burger.[26]

24. The Thurgood Marshall and William J. Brennan, Jr. collections are located in the manuscript reading room of the Library of Congress, Washington, D.C.; Lewis F. Powell's papers are in the in the Law Library of Washington & Lee University. Copies of all materials are on file with the authors.

25. The two most notable are SCHWARTZ, *supra* note 12, and JOHN C. JEFFRIES, JUSTICE LEWIS F. POWELL, JR. (1994). Schwartz's book, which purports to provide an inside account of *Bakke*, appears to rely heavily on documents now located in Brennan's papers in the Library of Congress. Jeffries's biography of Powell also provides an interesting "insider's" perspective of *Bakke*, though one seen (largely) through Powell's eyes.

26. *Certiorari* Vote Tally, Regents of Univ. of Cal. v. Bakke (Jan. 21, 1977) (on file with authors).

January 24, 1977

The Court takes its second vote on whether to grant certiorari to *Bakke*. The votes were as follows:

Deny	*Deny?*	*Grant*
Brennan	Burger	Stewart
Marshall		White
Blackmun		Powell
		Rehnquist
		Stevens

Again, while there were sufficient votes to grant certiorari the Court relisted the case—this time for Justice Blackmun.[27]

February 18, 1977

The Court takes its final vote on whether to grant certiorari to *Bakke*. The votes were as follows:

Deny	*Grant*
Burger	Stewart
Brennan	White
Marshall	Powell
Blackmun	Rehnquist
Stevens[28]	

February 22, 1977

The Court announces its decision to grant certiorari.[29]

October 12, 1977

The Court hears oral arguments in *Bakke*.[30]

October 13, 1977

Justice White circulates a Memorandum to the Conference:[31]

Although not in accord with practice,[32] I thought I would spare you listening to

27. *Certiorari* Vote Tally, Regents of Univ. of Cal. v. Bakke (Jan. 21, 1977) (on file with authors).
28. *Certiorari* Vote Tally, Regents of Univ. of Cal. v. Bakke (Jan. 21, 1977) (on file with authors).
29. Regents of Univ. of Cal. v. Bakke, 429 U.S. 1090 (1977).
30. For interesting accounts of oral arguments in *Bakke*, see SCHWARTZ, *supra* note 12, at 47-54. *See also* JEFFRIES, *supra* note 25, at 478-82.
31. "Memorandum to the Conference" is a document the writer (here, White) circulates to all the Justices (the "Conference").
32. Usually the Justices wait until after conference discussion before they circulate memoranda. *See* EPSTEIN & KNIGHT, *supra* note 2, at 76.

> 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.[33]

The balance of White's memo (see Appendix A) urged his colleagues to consider one of Bakke's claims; namely, Title VI of the Civil Rights Act of 1964 prohibits the University from maintaining its affirmative action program. To White, this claim was neither "frivolous"—"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"[34] — nor were its merits entirely transparent—in contrast to Bakke "some of the amici [argue] that Title VI and the regulations under it *require* precisely what the University has done."[35] Accordingly, White suggested:

> 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.[36]

This led White to conclude that "we should call for further briefs on the Title VI issue."[37]

October 13, 1977

Chief Justice Burger responds to Justice White's memorandum, with copies circulated to the Conference:

> I have your memorandum of today. Part of it I find I can agree with it. 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 the statute bears rather startling resemblance to the situation presented by this case.[38]

October 14, 1977

Justice Powell sends a Memorandum to the Conference, responding to Justice White's suggestion:

> This memo is prompted by [White's] suggestion that we consider special briefing or a remand in Title VI. I would oppose this question for the reasons set forth below. . .

33. Memorandum to the Conference from Justice White, to the Justices of the Supreme Court 1 (Oct. 13, 1977) (on file with authors).
34. *Id.* at 2.
35. *Id.*
36. *Id.*
37. *Id.*
38. Memorandum of Chief Justice Burger, to the Justices of the Supreme Court (Oct. 13, 1977) (on file with the Library of Congress).

Primarily Powell believed that "both sides of the Fourteenth Amendment issue are as fully developed as they will ever be." Hence, any effort to avoid the constitutional issue "may be perceived as ducking this issue for the second time in three years" and "would be viewed by many as a 'self- inflicted wound" on the Court."[39]

October 14, 1977

The Court holds its first conference on *Bakke*. According to Justice Powell, "discussion on the first tentative vote [was] limited to Byron [White's] suggestion," specifically "whether we should consider [the] Title VI issue and request a briefing on it." Powell's conference notes are as follows:

> *C.J. [Chief Justice Burger]:* Yes. Issue is here. Resp[ondent] has always insisted on it. But resp[ondent] should have [a] chance to brief it.
>
> *W.J.B. [Brennan]:* No. Before reviewing [White's] memo, thought we need not consider Title VI. Would construe VI to allow this program. Still thinks we should address constit[utional] issue.
>
> *Erie v. Tompkins*[40] could have been decided without reaching the const[itutional] q[uestion]. We have done it before.
>
> The new Calif[ornia] Const[itutional] prov[ision] is almost identical with VI.
>
> *Stewart:* No. No construction of T[itle] VI would affect his views under the [Equal Protection] Clause.
>
> Calif[ornia] C[ourt] perhaps should have addressed VI but it did not. Calif[ornia] C[ourt] is bound by our prudential rule.
>
> *White:* Yes. We should reach VI issue and decide it, even if we don't have reargument.
>
> *Thurgood [Marshall]:* No.
>
> *Harry [Blackmun]:* Yes.
>
> *L.F.P. [Powell]:* No.

39. Memorandum to the Conference from Justice Powell, to the Justices of the Supreme Court (Oct. 14, 1977) (on file with authors). Justice Powell alludes to *Defunis v. Odegaard*, 416 U.S. 312 (1974), in which the Court rendered moot an affirmative action claim—an action that was, in fact, widely seen by outsiders and even some justices as an attempt to avoid ruling on the merits of the case. For example, as Justice White remarked during the Court's conference discussion of *United Jewish Organization v. Carey*, 430 U.S. 144 (1977), "What we ducked in DeFunis is here." Conference notes of Justice Brennan (Oct. 8, 1976) (on file with the Library of Congress).

40. 304 U.S. 64 (1938). This reference provides one of the many ironies in *Bakke*. Counsel for both sides in *Erie* argued that the Court need not reach the question of the validity of *Swift v. Tyson*, 16 Pet. 1 (1842). But Justice Louis Brandeis, a supposed advocate of judicial self-restraint (see especially *Ashwander v. TVA*, 297 U.S. 288, 342-56 (1936) (Brandeis, J., concurring), in which he proposed a set of rules that would allow the Court to avoid deciding constitutional questions), ignored counsel and opened his opinion for the Court with: "The question for decision is whether the oft-challenged doctrine of *Swift v. Tyson* shall now be disapproved." *Erie*, 304 U.S. at 69.

> *Rehnquist:* Pass on first vote. Yes on second vote.
>
> *John [Stevens]:* Yes. The more profound the const[itutional] issue, the less influential the prudential argument.
>
> But the statute may be different. Title VI is broader than 14th Amend[ment]. It covers this case. Leg[islative] hist[ory] has great deal of language as to "color blindness" of the Act. VI is more restrictive than [the] 14th Amend[ment]. Calif[ornia] program is invalid under VI—but not necessarily so under 14th. Will sustain program under 14th.[41]

Based on the 5-4 vote over the Title VI issue, on October 17, 1977 the Court issued the following order: "Each party to this cause is directed to file within 30 days a supplemental brief discussing Title VI of the Civil Rights Act of 1964 as it applies to this case."[42]

In addition, Burger suggested that the justices circulate memoranda (setting out their views and sharing their research) to the conference.[43] Another conference on the case would be held on December 9.

October 19, 1977

Justice Stevens circulates a Memorandum to the Conference:

> 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 . . . on Title VI, and also a memorandum which I requested [a law clerk] to prepare.[44]

The memo reiterated and reinforced the views Stevens presented at conference.

October 21, 1977

Chief Justice Burger circulates a "CONFIDENTIAL" memorandum to the Conference, in which he describes the results of his "tentative and preliminary analysis" of the case. His primary conclusions were as follows.

1. On the constitutional claim, Burger thought that the Court needed to apply "strict scrutiny" to "any state action based on race." "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."[45]

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41. Conference notes of Justice Powell (Oct. 14, 1977) (on file with authors).

42. 434 U.S. 900 (1977).

43. SCHWARTZ, *supra* note 12, at 62 (noting that the Chief Justice suggested that the Justices "should share their research").

44. Memorandum to the Conference from Justice Stevens, to the Justices of the Supreme Court (Oct. 19, 1977) (on file with the Library of Congress).

45. Memorandum from Chief Justice Burger, to the Justices of the Supreme Court 2-3 (Oct. 21, 1977) (on file with authors), *reprinted in* SCHWARTZ, *supra* note 12, at 167-72.

2. On the Title VI claim, Burger believed that the program "surely appears to be in conflict with the explicit language of Title VI."[46]

3. Ultimately, Burger wanted to rule 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."[47]

October 28, 1977

Justice Marshall circulates a memorandum to the Conference:

> Attached is the first draft of some research on Title VI of the Civil Rights Act of 1964 prepared by my law clerk. . . It appears that we have two sides of the legislative history [a reference to the analysis produced by Stevens' clerk; see October 19 entry above].

On Marshall's account, affirmative action programs were consistent with Title VI.

November 11, 1977

Justice Rehnquist circulates a memorandum to the Conference:[48]

> This memo was intended to accompany the stream of consciousness memo I circulated earlier today. As [White] said in his circulation [of October 13] 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 multifaceted could save a lot of time in what is bound to be a long Conference discussion anyway.

Rehnquist largely agreed with the position taken by the Chief Justice in his memorandum of October 21, 1977. He also addressed the question of whether race could be one of several factors universities could consider in making their admissions decisions. If the Court were to apply strict scrutiny, as Rehnquist thought it should, he believed the answer was no.

November 22, 1977

Justice Powell circulates a 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 who have this and now circulate the accompanying memorandum.
>
> It addresses only the constitutional issue.[49]

46. Memorandum from Chief Justice Burger, *supra* note 38, at 5.
47. Memorandum from Chief Justice Burger, *supra* note 38, at 5.
48. Memorandum to the Conference from Justice Rehnquist, to the Justices of the Supreme Court (Nov.11, 1977) (on file with authors), *reprinted in* SCHWARTZ, *supra* note 12, at 175.

This memorandum, as Jeffries and Schwartz note,[50] was essentially the first draft of what would be Powell's judgment for the Court in *Bakke*. In the memo, Powell expressed his belief that the University's program violated the Equal Protection Clause but noted his approval of programs, like Harvard's, which "eschew quotas," though take race, among other factors, into account to "achieve meaningful diversity in the broad sense of the term."

November 23, 1977

Justice Brennan circulates a memorandum to the Conference:

> 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.[51]

On the constitutional claim, Brennan argued that the Court long ago had "settled the principle that not every remedial use of race is constitutionally forbidden." As for the standard of review the Court should apply, Brennan seemed to suggest that the Court should not invoke strict scrutiny because the University's program was not about "stigma and insult." But he also noted that "under any standard of Fourteenth Amendment review, other than one requiring absolute color-blindness, the Davis program passes muster."

December 5, 1977

Justice Blackmun, who is in Rochester, Minnesota for surgery, circulates a Memorandum to the Conference:

> 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 this case should go on even though I am not back in Washington at that time. My absence should not defer[sic] 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.[52]

49. Memorandum to the Conference from Justice Powell, to the Justices of the Supreme Court (Nov.22, 1977) (on file with authors), *reprinted in* SCHWARTZ, *supra* note 12, at 197.

50. JEFFRIES, *supra* note 25, at 484; SCHWARTZ, *supra* note 12.

51. Memorandum to the Conference from Justice Brennan, to the Justices of the Supreme Court (Nov. 23, 1977) (on file with authors), *reprinted in* SCHWARTZ, *supra* note 12, at 227.

52. Memorandum to the Conference from Justice Blackmun, to the Justices of the Supreme Court (Dec. 5, 1977) (on file with authors).

December 9, 1977

The Court holds its second conference on *Bakke*. Brennan's conference notes are as follows:

> *Burger*: Could affirm on Title VI. I have considered what Davis could do constitutionally. Diversity is a consideration but it ought be sought at lower levels than graduate school. Davis could have make up courses etc.
>
> *Stewart:* Nothing in equal protection clause that forbids a state from barring admission to [illegible word] applicants based on geography, alumni, athletes, etc. . . . Would decide this case on 14th Amendment since it was 1) basis of California Supreme Court decision 2) Title VI would be harder than 14th Amendment 3) Congress cannot have meant to forbid what Equal Protection Clause permitted. If Equal Protection Clause does nothing else, it forbids discrimination based on person's race. That's precisely what the Davis program does and injurious action based on race is unconstitutional. No state agency can take race into account. My view on Fifth Amendment might be different.
>
> *White:* On Title VI I think there's no private cause of action. But if it's congruent with the 14th Amendment, then we must reach 14th Amendment. If Congress thought [the] Constitution required color blindness when Title VI was written that would cement its meaning even if [it was a] wrong understanding of 14th Amendment. As a constitutional issue, Davis may set this quota and fill it with qualified Negroes. I'll rely on legislative and executive view of what's permissible under 14th Amendment.
>
> *Marshall:* Agree substantially with [White] and [Brennan], although not sure there wasn't private cause of action under Title VI. As constitutional question, this is not a quota to keep someone out—it's quota to get someone in.
>
> *Powell:* Title VI is congruent with 14th Amendment. Most schools seem to operate along Harvard program lines. I can't join [Marshall], [White] or [Brennan] in holding that 16 or 84 or any quota was OK. Symbolic effect of 14th Amendment is completely lost. Rather, while admissions policy should be left to university, colossal blunder here was to pick a number. Diversity is a necessary goal to assure broad spectrum of Americans an opportunity for graduate school. But not one of other three justifications has any merit. Each applicant should be able to compete with others and taking race into account is proper. But never setting aside a fixed number of places.[53]

[According to Jeffries, because the affirmative action plan at issue in *Bakke* involved a "fixed number of places," Powell came to conference prepared to affirm the California Court's ruling, which struck down the plan. But, after Powell expressed his intent to affirm, Brennan "made a brilliant intervention; given Powell's view of the case, shouldn't he vote to affirm in part and reverse in part? After all, the California court had not only struck down the Davis quota; it had also barred all racial preferences in admissions." Since Powell did not support the latter, Brennan

53. Brennan did not record his own views, but, according to SCHWARTZ, *supra* note 12, at 94, the Justice "repeated the position taken in the memo he had circulated November 23 . . . whatever the standard of review, the program was valid." As for Title VI, Brennan viewed it as "congruent with the Equal Protection Clause," meaning that Title VI "could not prohibit an affirmative action program that satisfied constitutional standards."

> suggested that Powell vote to reverse in part. Powell agreed and Brennan recorded the following comment from Powell: "Agree judgment must be reversed in so far as it enjoins Davis from taking race into account." Powell later told the Chief Justice to record his vote as "[a]ffirm in part and reverse in part."[54]]
>
> *Rehnquist:* Basically agree with PS. Don't agree with [Powell] that race can be taken into account. Title VI is more difficult for me—not sure there isn't a private cause of action. Not sure either that Title VI and 14th A are congruent.
>
> *Stevens:* Would decide on Title VI. If [Brennan], [White], and [Marshall] prevailed we'd have a permanent conclusion that blacks can never reach a point where they'd not be discriminated against. Affirmative action programs perform a fine service but they ought to be temporary—can't ever believe that day won't come where two track systems will be unnecessary. If we can duck constitutional holding we should. Davis program not product of careful thought. Think Title VI gives private cause of action and that less than 14th Amendment proof required. No intent need to be proved for example. I would hold Title VI violated by the quota system.

Brennan recorded the vote as 3 to reverse (Brennan, White, and Marshall), 4 to affirm (Burger, Stewart, Rehnquist, and Stevens) 1 to affirm but reverse the injunction (Powell). Blackmun was not at conference and did not leave a vote.

Because the conference appeared indecisive,[55] the justices decided to "defer[] a definitive Conference vote."[56] Instead they agreed to circulate memoranda on "what the bottom line of the decision should say (*e.g.*, affirmed, reversed, reversed in part, etc.)."[57]

December 9, 1977-April 13, 1978

The justices circulated fifteen memoranda during this period. Some went to all members of the Court; others went to only a few, select justices. In the latter category is Powell's "PERSONAL" letter to Chief Justice of April 12, providing Powell's view of the current situation on the Court:

> 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 [Blackmun] to cast his vote. My review has not been fruitful.
>
> There are presently four votes to the hold that University's consideration of race was improper: yours, Potter [Stewart], Bill Rehnquist, and John [Stevens]. There

54. Conference Notes of Justice Brennan (Dec. 9, 1977) (on file with the Library of Congress). *See also* JEFFRIES, *supra* note 25, at 487.

55. Following conference, the Chief Justice (if he is in the majority) or the most senior associate member of the majority (if the Chief Justice is in the minority), typically assigns a Justice to write the opinion of the Court. The *Bakke* opinion was not assigned until May 2, 1978. See *infra* text accompanying notes 60-65 for Brennan's description of how the assignment was made.

56. Memorandum to the Conference from Justice Powell, to the Justices of the Supreme Court (Jan. 5, 1978) (on file with authors).

57. Brennan's attachment to Memorandum to the Conference from Justice Rehnquist, to the Justices of the Supreme Court (Dec. 9, 1977) (on file with authors).

> are four who will say that race may be considered: Bill Brennan, Byron [White], Thurgood [Marshall] 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.[58]

(Appendix B contains a full version of this memorandum; others circulated during this period are on file with the authors.)

May 1, 1978

Approximately six months after the Second Conference, Blackmun finally circulated a memorandum outlining his views. It begins:

> 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.

Thirteen pages later, Blackmun concluded: "I therefore vote to reverse."[59]

It is at this point that Brennan's narrative begins. In what follows (Part II) we reprint it, only adding footnotes to flesh out his story.

II. BRENNAN'S ACCOUNT OF *BAKKE*

It was immediately apparent that HAB's[60] vote, if it could be counted upon, meant at least a partial victory for the view I had championed. The Court was now split 4-1-4,[61] an eventuality which the clerks and I had often discussed and for which I was prepared. Since I had known the CJ to use the [opinion] assignment power in an unorthodox manner in other important cases, I was prepared to resist any such effort in this case. Immediately, I approached the CJ and, relying on *Mitchell v. Oregon,*[62] pointed out that the only assignment which could be made would be a joint one from me and the Chief to LFP—the only one of us not in partial dissent.

58. Letter from Justice Powell, to Chief Justice Burger (Apr. 12, 1978) (on file with authors).

59. A copy of this memorandum is on file with the authors. Memorandum to the Conference, from Justice Blackmun, to the Justices of the Supreme Court (May 1, 1978), *reprinted in* SCHWARTZ, *supra* note 12, at 247-59.

60. Brennan uses the following acronyms throughout: HAB=Justice Harry A. Blackmun; CJ=Chief Justice Warren Burger; LFP=Justice Lewis F. Powell, Jr.; BRW=Justice Byron R. White; TM=Justice Thurgood Marshall; WHR=Justice William H. Rehnquist; JPS=Justice John Paul Stevens.

61. The groups were: Brennan, White, Blackmun, and Marshall to reverse; Powell to affirm in part and reverse in part; Burger, Stevens, Stewart, and Rehnquist to affirm.

62. Brennan is probably referring to *Oregon v. Mitchell,* 400 U.S. 112 (1970) in which Black was assigned to write the opinion of the Court (in all likelihood) because he was in the position of agreeing with the Justices who believed Congress had the authority to allow eighteen-year-olds to vote in national elections *and* with those who thought that Congress did not have authority to allow eighteen-year-olds to vote in state elections.

[The] CJ, after initially rejecting this proposal, agreed and LFP, CJ and I met to discuss the proposed assignment.[63] LFP indicated that he would be willing to undertake the difficult task of finding a common ground upon which five could join [him] with respect to both parts of the judgment. He told me that he understood well the differences between us from the exchange of memoranda, but that he would be flexible and work to accommodate my concerns in his opinion much as I had done in *Monell*.[64] He said that he expected the process of reaching a consensus among five to reverse that part of the judgment prohibiting the use of race would be long and difficult, but that he was ready to try. I returned to chambers somewhat hopeful that a unified position for the Court might be reached. Those hopes were short-lived, however.

On May 2, the Chief sent a memo to the conference explaining the joint assignment which indicated that LFP assured a first circulation within one week.[65] How, I wondered, could the task of synthesizing the views expressed in the memoranda of BRW, TM, HAB and myself with those of LFP be accomplished in so brief a period. The answer was not long in coming. On May 9, LFP circulated a first opinion draft[66] which his published opinion would closely parallel and which, with the exception of several new sections, was identical to the November 22 memorandum.[67] Part I, which was new, was merely a statement of facts and history of the case and unexceptional. Part II-A, with which I fully agreed, concluded that the existence of an implied private cause of action under Title VI should be assumed without decision. Part II-B concluded that Title VI proscribes only those racial classifications violative of the Equal Protection Clause or the Fifth Amendment. The remainder of the draft differed from the earlier memorandum only in that it was punctuated with numerous subdivisions to facilitate joinder of various parts by respective

63. This meeting took place either on May 1 or 2, 1978—shortly after Blackmun cast his vote.

64. In *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978), Brennan took great pains to marshal the Court behind his majority opinion. After he circulated the first draft, he responded to more than ten memoranda from his colleagues, making major changes in the draft to accommodate them. The memoranda and draft opinions are located in Brennan's case files in the Manuscripts Division of the Library of Congress. For a description of some of the behind-the-scenes bargaining, see EPSTEIN & KNIGHT, *supra* note 2.

65. The memorandum reads as follows: "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 one week from today." Memorandum to the Conference from Chief Justice Burger, to the Justices of the Supreme Court (May 2, 1978) (on file with the Library of Congress).

66. Powell labeled this a "judgment of the Court," not a majority opinion. Draft of Justice Powell 1 (May 1978) (on file with authors).

67. Powell's biographer, Jeffries, *supra* note 25, at 490, agrees with Brennan: "Lengthy additions covered the facts of the case and the question of Title VI, but the heart of the [May 9] opinion came from his draft of November 22, 1977." For information on the November 22 draft, see the November 22 entry in the chronology, *supra* text accompanying notes 49-50. A copy of Powell's draft is on file with the authors and reprinted in SCHWARTZ, *supra* note 12, at 197-223.

groups of four.[68] Since issue had clearly been joined,[69] I wrote to LFP the next day that my views "differ so substantially from your own that no common ground seems possible," and that I would therefore write out my views separately.[70]

At this point I was, of course, dismayed that common ground could not be reached for a partial reversal. I was finally convinced that affirmative action programs were not only justified as a matter of history and constitutional principle, but that they were sorely needed if the place of minorities in society were ever to advance. I had become increasingly concerned that if the rationale for partial reversal were fragmented, the legality of all affirmative action programs might appear questionable giving the upperhand to opponents of affirmative action in the political arena.[71]

After discussion with my clerks, I resolved to broach the idea of a jointly signed opinion with BRW, TM, and HAB, a course which I hoped would amplify the message that a majority had held that most affirmative action programs are permissible under both Title VI and the Constitution.

Notwithstanding my resolve earlier in the Term to have BRW carry the laboring over in such an endeavor, I soon became convinced that only I might be in a position to obtain the votes of the remaining three.[72] This became clear to me when BRW, on May 16, advised LFP that he would recirculate a draft [of] his earlier memorandum on Title VI,[73] including his discussion against

68. When Justices sign on to an opinion they typically write "I join."

69. "Issue had been joined" is the way the Justices say that the battle lines have been drawn.

70. Brennan's memorandum reads as follows: "I have read your opinion very carefully and 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." This memorandum to Justice Powell was circulated to the Conference. Memorandum from Justice Brennan, to the Justices of the Supreme Court (May 10, 1978) (on file with the Library of Congress).

71. This kind of concern with the political "arena" or environment is not at all unusual. Quite the opposite: as Epstein & Knight, *supra* note 2, at 148-149, show, it is particularly pervasive in cases of statutory interpretation—with at least one justice mentioning the preferences and likely actions of governmental actors during conference discussion in nearly 70 percent of those cases.

72. Again, Brennan is referring to Marshall, White, and Blackmun.

73. In that memorandum of May 16, 1978, White wrote to Powell:

> As I have orally indicated to you, I can join certain parts of your circulation [of May 9], 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 [see *infra* Appendix A], 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.

Memorandum from Justice White, to Justice Powell (May 16, 1978) (on file with authors).

implication of a private cause of action.[74] BRW's position against implication was one with which TM and I tentatively disagreed and with which HAB, though tentatively, agreed, insisted, along with LFP, need not be taken in this case.[75]

> [Brennan crossed out the following passage: As a parenthetical, it should be recounted here that one of the ironies of the *Bakke* case is that the judgment of affirmance rested in large part on Title VI, and necessarily on the existence of a private cause of action, although at least five members of the Court would likely have voted to the contrary in another case. BRW, LFP, and HAB clearly were of the view that there should not be implication; WHR and [the] CJ had also been of that view and would have decided the case on constitutional grounds but for JPS's insistence.]

BRW indicated, moreover, that he would join part II-B of LFP's opinion which concluded that Title VI proscribes only those racial classifications that would violate the Constitution, and, moreover, that he could join part IV-A.[76] Part IV-A was a critical part of the opinion for it concluded that "racial distinctions *of any sort* are inherently suspect and thus call for the most exacting judicial examination." BRW's tentative agreement with LFP on this point concerned me more than his insistence on deciding the private cause of action issue. Superficially, at least, it suggested disagreement with my position that racial classifications established for remedial purposes which do not demean or stigmatize are not subject to "strict scrutiny."

BRW assured me, however, that he had not changed his position that such classifications are permissible. Nevertheless, his acceptance of LFP's premise that strict scrutiny applies seemed to me fundamentally inconsistent with the kind of scrutiny to which we had agreed programs like Davis should be subjected. Based on a conversation with BRW's law clerk, my law clerk informed me that the former had attempted to dissuade BRW from joining part IV-A, but that BRW was adamant that "*for political reasons*" it was essential to label the standard of review as strict scrutiny, though he agreed that its content in the context of remedial programs would be quite different from traditional strict scrutiny.[77]

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74. Recirculation means that the justice has revised the existing draft or memorandum and is now sending it around for some or all of the justices to read. White, in fact, recirculated on June 12, 1978.

75. On May 16, 1978, the same day White indicated to Powell that he could join certain parts of the May 9 circulation, Blackmun also wrote to Powell:

> 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 [White's] final writings. I shall defer commitment on the balance of your circulation of May 9.

Memorandum from Justice Blackmun, to Justice Powell (May 16, 1978) (on file with authors).

76. Memorandum from Justice White, *supra* note 73.

77. Brennan's clerk expressed this in a letter he wrote to Brennan on May 17, 1978:

> This circulation [White's letter of May 16 to Powell] from Justice White came in last night. I was non-plussed by his tentative agreement with part IV-A. After talking with [White's law

BRW's joinder in part IV-B militated against an assignment to BRW for two reasons. First, I realized that the inconsistency between LFP's position that strict scrutiny applied and BRW's conviction that remedial programs normally should be sustained could not be overcome and I feared that a BRW opinion beginning with LFP's premise would not be supported by TM, HAB, or myself. Secondly, I thought TM would be offended by any opinion which joined LFP's equal protection discussion. TM had been extremely sensitive the entire Term regarding the Court's approach to the *Bakke* issue. He was livid over LFP's opinion which he regarded as racist. Certainly LFP had not been careful regarding the tenor of the opinion. Language such as "It is far too late to argue that the guarantee of equal protection to *all* persons permits the recognition of special wards entitled to a degree of protection greater than that accorded others," harkened back to the insensitivity, if not racism, in the Court's opinion in the *Civil Rights Cases*,[78] a point which infuriated TM and for which he chided LFP in his opinion. In response to an LFP memo urging those who had not yet responded to the May 9th circulation to do so, TM shot back tartly: "I will not join *any* part of the opinion."[79] With such evident ill-will and sensitivity in the background, it would be difficult to win TM's vote, but I felt that I would be in a better position than BRW to try.

At that point I had four Court opinions in progress (The *Trans Alaska Pipeline Rate Cases* [TAPS],[80] *Hicklin v. Orbeck*,[81] *Penn Central Trans. Co. v. N.Y.*,[82] and *Beth Israel Hosp. v. NLRB*[83]) and each of the Clerk's' [sic] was

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clerk] about it, however, I am convinced that it does not signal any major shift in position from that expressed in his memo on the constitutional issue. He simply reads thsi [sic] section as stating quite blandly that careful or strict scrutiny is applicable to this use of race, but does not read it as stating why this use of race triggers strict scrutiny. White thinks that that is stated only in the remainder of part IV, which of course he has not joined. Thus, he continues in agreement with you that a race-sensitive remedial program is valid without the kind of strict scrutiny analysis that Powell employs. He adheres to the position taken in his memo that in the context of remedial race-sensitive programs, strict scrutiny requires only that the program is bona fide and not a front for racial separatism, and some of the other points you articulated in [*United Jewish Organizations v. Carey*, 430 U.S. 144 (1977)].

I think that part IV will not be read as White is reading it, however, and am concerned that he has joined. [White's law clerk] apparently is as well (he urged White not to join part IV-A), but think that after a comprehensive opinion is written for our three, he will realize that there is no point in joining that small segment of Powell's opinion.

The suggestion to which he refers that he will be making to Powell is that the discussion of the [*United States v.] Carolene Products Co.* [304 U.S. 144 (1938)] n.4 concept of insularity to say that although insularity is not the only basis for invoking strict scrutiny, it is the force behind the level of review which is given to the invidious use of race directed at minorities.

I think that at this point, we should not react in any way to [White's] join letter.

Memorandum from Brennan clerk, to Justice Brennan (May 17, 1978) (on file with authors).

78. 109 U.S. 3 (1883).

79. On May 17, 1978, Marshall wrote to Powell: "I will dissent 'in toto.' I doubt that I can join any part of your opinion." Letter from Justice Marshall to Justice Powell (May 17, 1978) (on file with the Library of Congress).

80. 436 U.S. 631 (1978).

81. 437 U.S. 518 (1978).

82. 438 U.S. 104 (1978).

83. 437 U.S. 483 (1978).

occupied assisting on these. *TAPS* and *Beth Israel* were closest to being ready for circulation and I therefore assigned to the clerks working on those cases the task of beginning research for *Bakke*. Those opinions were not circulated until May 22, and May 25 respectively and further research on *Bakke* consequently did not begin until that time.

With the end-of-term so close at hand, I realized that the objective of producing a jointly signed opinion would flounder if a circulation were not *quickly made*. We worked at a furious pace to accomplish a first typewritten circulation by the first week of June. That effort was again impeded by HAB, however. HAB had circulated a draft of a Court opinion in *NBMA v.U.S.*[84] on May 8 and BRW circulated a draft dissent [in *NBMA*] on May 25. BRW's dissent convinced me that, as I had advised HAB on May 10 I would, I should write a concurring opinion [in *NBMA]*. At conference on Thursday June 1, HAB evidently forgot this and asked to have NBMA announced the following Monday. Also forgetting that I had planned to concur, I failed to object. When the announcement list reached my chambers, my clerk immediately sent a note into Conference advising me of the oversight. I apologized to HAB and explained that NBMA could not yet come down. HAB was furious, again focusing upon me blame for his being behind in announcing decisions much as he had over *Baldwin*.[85] Given HAB's sensitivity over the Fordham article, I feared losing his vote for the proposed joint opinion in *Bakke*. I apologized obsequiously and promised to have *NBMA* ready to be announced the following opinion day. That weekend I and one of the clerks interrupted our work on *Bakke* in order to write the *NBMA* concurrence which I circulated on June 5. Thus, in spite of the interruption, I pressed hard to have a first working draft for the constitutional section [in *Bakke*] circulated to BRW, TM, LFP, and HAB on June 8.[86] [In the margin Brennan wrote: BRW especially impatient to

84. Nat'l Broiler Mktg. Ass'n v. United States, 436 U.S. 816 (1978).

85. Baldwin v. Montana Fish & Game Comm'n, 436 U.S. 371 (1978). Blackmun was assigned to write the opinion in this case, which was argued before *Bakke*. He circulated a draft that five Justices joined. But Brennan decided against casting his vote until after arguments in *Hicklin*, 437 U.S. 518 (1978). Blackmun was, according to Jeffries, *supra* note 25, at 489, and Schwartz, *supra* note 12, at 125-126, furious with Brennan at least in part because he felt Brennan's reluctance would hurt his reputation—already damaged, Blackmun believed, by an article in the *Fordham Law Review* reporting that he was "one of the slower authors on the Court." Blackmun was so irate that even considered holding a press conference to rebut this charge.

86. This draft was not circulated to conference—only to White, Marshall, Powell, and Blackmun. It contained the following cover letter, from Brennan to White, Marshall, Blackmun, and Powell:

> 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 to 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.

see a draft.]

The draft contained the basic doctrinal formulation which separated my position from LFP and which is reflected in the published joint opinion: While all of our cases applying "strict scrutiny" to racial classifications resulted in their invalidation, all invariably involved racial classifications which stigmatized or demeaned racial groups as inferior. Use of race for purposes of remediating past discrimination should not be subject to traditional "strict scrutiny" which had been "strict in theory but fatal in fact." I was also convinced that, because of the potential for abuse of racial classification and latent race hatred lingering as a result of past abuse, the traditional lower tier scrutiny is also inappropriate.

This draft was very rough indeed and many important changes in the formulation of the standard of review would be made before the final draft. Nevertheless, it clearly rejected LFP's conclusion that any racial classification must satisfy traditional strict scrutiny involving less restrictive alternative and closely tailored means-end analysis and therefore LFP's response on the 10th, declining to join us, was not surprising.[87]

BRW's reaction was cool. While not finally rejecting the idea of a joint opinion, he indicated informally that he would withhold decision until a later draft. On June 13, while withholding assent, BRW nevertheless communicated several areas of disagreement.[88]

Brennan discusses relevant parts of the draft in his narrative. *See infra* text accompanying note 86.

A week before Brennan circulated his draft of June 8, Powell sent around the second version of his opinion. Some of the changes he made were designed to meet the concerns White expressed in his memorandum of May 16, 1978. *See infra* note 73.

87 On June 10, 1978, Powell wrote a letter to Brennan (with copies sent to White, Marshall, and Blackmun), which read in pertinent part:

> Thank you for the opportunity to read your . . . draft, which I must say is exceptionally well written—even if it doesn't quite persuade me to abandon my draft . . .
>
> As I do believe that the Davis program is unconstitutional, I cannot agree to a reversal of paragraph 3 of the judgement below. I am in entire accord, however, as to reversal of paragraph 2 . . .
>
> As you know, I am entirely in accord with your views and [White's]—and I take it with [Marshall's and Blackmun's]—as to Title VI. Indeed, Part II of my opinion [is] largely a summary of [White's and Marshall'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.

Memorandum from Justice Powell, to Justice Brennan (June 10, 1978)(on file with authors).

88. White put these suggestions in a private memo to Brennan:

> I have read your very interesting draft in *Bakke* and although I have 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 me 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 pre-

In response to LFP's and BRW's [concerns], we began to make changes in our draft of June 8. First, LFP indicated that we had mischaracterized his (LFP's) understanding of the judgment below. Our differences on this turned out to be merely a matter of semantics easily remedied by the language appearing on page 2 of the final opinion. We circulated a draft with these changes on June 12, 1978.[89]

BRW's suggestions were more difficult to consider and resolve. First, he felt we had intimated that, in the absence of an affirmative action program, the Davis admissions system would have been unconstitutional. We had not intended this and were therefore some what pressed to find language changes to solve the problem. BRW also said "I don't see much help in the gender classification cases." Since these cases were at the heart of my analysis, I was again puzzled at what alternative approach I could adopt. Also, the gender cases were, I thought, important to HAB and consistent with his position. Worse yet, BRW insisted that *Korematsu*[90] and *Hirabayashi*[91] held what LFP said they did despite my quotations from those opinion showing that they had applied a *lower tier* scrutiny.[92] Again, this appeared to reflect BRW's resolve to say

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> dict 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 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.

The rest of White's memo dealt with more "specific . . . items." Memorandum from Justice White, to Justice Brennan 1 (June 13, 1978) (on file with authors).

89. The June 12 draft only dealt with the "semantics" issues of concern to Powell. It was not until June 16 that Brennan circulated the second full draft. Also, on June 12, Stevens filed his opinion for the other side. It was quickly joined by Rehnquist (on June 12), Stewart (on June 12), and Burger (on June 13), though Burger wrote that "some suggestions may evolve when all the 'returns' are in." Memorandum from Chief Justice Burger, to the Justices of the Supreme Court (June 13, 1978) (on file with authors). Finally, on June 12 White circulated a revised draft of his original memo of October 13, 1977 (*see infra* Appendix A), in which he did some "rewriting" designed to deal with the cause of action issue. He was not sure, as he wrote to Conference, "Whether and to what extent Bill Brennan will incorporate this in his own circulation." This elicited a response from Powell, in the form of a letter to White (and circulated to the other justices):

> 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 not 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 your discussion is more expansive that I am prepared to accept at this time, I will not join you.

Memorandum from Justice Powell, to Justice White 1 (June 12, 1978) (on file with authors).

90. Korematsu v. United States, 323 U.S. 214 (1944).

91. Hirabayashi v. United States, 320 U.S. 81 (1943).

92. The discussions of *Hirabayashi*, *id.*, and *Korematsu*, 323 U.S. 214, provide more ironies in the Court's deliberations of *Bakke*. In those cases, the majority had not utilized any standards whatsoever, other than military necessity trumped the Constitution in war time, though Black had opened his opinion

"strict scrutiny" at any cost. BRW ended by promising to send a draft of further changes.

In the meantime my clerks and I had second thoughts about the standard of review set out in the first draft opinion [the June 8th draft]. That standard had three parts:[93]

> On the basis of our prior cases, therefore, we think Davis' minority admissions program can be sustained if: (1) there is a sound basis for concluding that the handicap of past discrimination would make it unfair to judge minority applicants on the same basis with nonminority students; (2) no "discrete and insular" group bears the brunt of the Davis program; and (3) the program does not simply equate minority status with disadvantage, but makes a reasonable effort to exclude from preference those who are least likely to have suffered racial discrimination" (pp. 30-31).

In the second draft, we restated the standard in two parts:

> In sum, because of the significant risk that gender and race classifications can be misused, causing effects not unlike those created by invidious classifications, it is inappropriate to inquire only whether there is any conceivable basis that might sustain such a classification. Instead, an important and articulated purpose for use of racial classifications must be shown. In addition, any statute must be stricken that stigmatizes any group or that singles out those least well represented in the political process to bear the brunt of a benign program. Thus our review under the Fourteenth Amendment should be strict—not "'strict' in theory and fatal in fact," because it is stigma that causes fatality—but strict and searching nonetheless (internal citation omitted).

The change in phrasing in part one of the test brought it in line with the gender cases. Also, our earlier draft had vacillated between an "actual purpose" standard and a standard of "substantial support" for what Davis had done. Obviously, the Court had no way of knowing what actually motivated Davis and therefore such a standard seemed misleading.

The third prong of the test was whether "The program. . .simply equate(s) minority status with disadvantage (rather than making) a reasonable effort to exclude from preferred those who are least likely to have suffered from past racial discrimination" (June 8th draft at 30-31). The bases for concluding that this prong had been satisfied were set forth in the June 8th draft, at pp. 51-52:

> Finally, the Davis admissions program does not equate minority status with disadvantage. Respondent does not contest, and indeed appears to concede, see Brief for Respondent 14, that

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in *Korematsu* with an eloquent statement of what would later become known as strict scrutiny. In a sense, the Justices in *Bakke* became enmeshed in a trap set by their earlier selves. After 1945, the justices believed that cases like *Korematsu* would never again arise and, with the exception of Black believed those decisions to have terrible mistakes. Thus, they frequently cited *Hirabayshi* and *Korematsu* for their dicta, pretending that both had upheld flagrant racism and had instead established strict standards for judicial review of racial classifications. *See* Murphy, *Civil Liberties and the Japanese American Cases: A Study in the Uses of Stare Decisis,* 11 W. POL. Q. 3 (1958); Audio tape of Transcriptions of Conversations Between William O. Douglas and Walter F. Murphy, Tape Recorded During 1961-1963 (The Mudd Library, Princeton Univ.), pp. 161ff, 171f, 358ff.

93. These are verbatim from Brennan's June 8 draft.

> [i]n making [the] determination [whether an individual applicant is disadvantaged], the chairman [of the admissions committee] looks at such factors as whether the student has requested and been granted a waiver of is [sic] application fee, which requires a means test; whether the student was an Educational Opportunity Program (EOP) student in college; whether in applicant worked during his undergraduate years or interrupted his education to support himself of family members; the parents' occupation and educational level; and other information relative to disadvantage which is volunteered by the applicant. . . Applicants from minority but not non-disadvantaged backgrounds are referred to the regular admissions process (Record 66).
>
> Davis does not indiscriminately prefer minority applicants over all others, but makes an individualized determination of each applicant's claim to have been disadvantaged by racial discrimination. Nor can Davis' reservation of 16 positions for which minorities are preferred be labeled a quota if that term is to be reserved for the pernicious schemes with which it has been associated in the past for here there is no simple equation of merit with skin color. True, the procedure by which disadvantage is detected is informal, but we have never insisted that educators conduct their affairs through adjudicatory proceedings and we see no reason to saddle the admissions process with any such requirement.

There was much debate in chambers during the week of June 8 to June 16 as to whether 1) that test, in fact, had been satisfied by Davis; 2) such a requirement is necessary to prevent abuses which the Fourteenth Amendment aimed to prevent; 3) whether such a requirement, as a practical matter, ever could be achieved, and 4) whether a requirement of screening "disadvantage" would not unavoidably identify economic disadvantage and whether such identification would not be inconsistent with the premise of the constitutional discussion that the program is not subject to strict scrutiny because it seeks to remedy past racial discrimination. These were the questions upon which no one up until this point had focused.

One of my clerks pointed out that, as had been articulated in the June 8th draft, any use of race is inherently divisive and therefore any program using race logically ought to be required to tailor closely means to the end in order to avoid exacerbating the race hatred which it is a purpose of the 14th Amendment to prevent. He argued that affirmative action programs in education have the greatest tendency to stimulate race prejudice precisely when they advance less qualified, economically advantaged minority students over better qualified economically disadvantaged whites. Another clerk argued that, however, that may be, if we are serious that the underrepresentation of minorities in medicine may be remedied by preferential admissions systems, it makes little sense to exclude from preferred minorities those, who by virtue of superior education and training when compared to minorities as a whole, are most likely to succeed in medical school and in the profession. He noted that Professor O'Neil, in an article in 80 Yale L.J. 699 (1971),[94] which I regarded as one of the best

94. O'Neil, *Preferential Admissions: Equalizing the Access of Minority Groups to Higher Education*, 80 YALE L.J. 699 (1971).

on the subject of "reverse discrimination," had documented the problem of high failure rates when administrators passed over the most highly qualified of the minority students to admit "legitimate ghetto types." Moreover, whites in professional schools are comprised predominantly of the relatively advantaged among whites; why should a program whose goal is to move minorities into the mainstream of American life be concerned with the relative economic disadvantage of those minorities it advances.

I was troubled by all of these conflicting considerations, but tentatively adhered to the language in the June 8th draft. I resolved to get TM's reaction to the problem over lunch one day that week. Not to put too fine a point on it, I asked whether if _____ (TM's son[95]) were a candidate for admission to medical school, he thought it would be proper for school administrators to accord his applicant special consideration because of his race. TM's asseveration was: "Damn Right, They Owe Us."[96] While I did not regard TM's position as a defensible one, I was later to change my mind for a different reason. One of HAB's clerks had suggested (later to be put in a memorandum to HAB, which he sent to me[97]) that the basis for concluding that Davis' program satisfied the third prong, did indeed focus on screening for economic disadvantage, as it would have to as a practical matter. He pointed out that this was inconsistent with the basis for upholding affirmative action programs discussed elsewhere in the opinion which focused on remedying the effects of racial discrimination by advancing minorities. I argued (as did my clerks) that this suggestion had merit and resolved that the kind of means-ends test which the third prong had suggested was not constitutionally required; accordingly the third prong was jettisoned in the June 16th draft.

In addition to the change in standard, BRW had questioned the accuracy of my assertion that the "cultural meaning" of the *Bakke* decision was: "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." This assertion—which I had intentionally placed in a very prominent position at the end of the first paragraph of my opinion—was intended to give some guidance and assurance to those who wanted to keep affirmative action alive. Accordingly, I was dismayed to find that BRW thought it inaccurate. I immediately called LFP, who assured me that he had no trouble with the

95. We assume Brennan forgot his name.

96. Douglas quoted Marshall as making a similar remark in deliberations about *Johnson v. Comm. of Examinations*, 407 U.S. 915 (1971). At issue was whether the Court should grant certiorari to review a decision of Arizona's supreme court denying the petition of a white applicant to the bar who, though failing the bar exams, had scored higher than some black applicants for whom passing the examination had been waived. Douglas' argument was that it was as wrong to discriminate against whites as against blacks. He recorded Marshall as replying: "You guys have been practicing discrimination for years. Now it is our turn." DOUGLAS, *supra* note 5, at 149.

97. Blackmun sent this to Brennan on June 18, 1978. Memorandum from Justice Blackmun, to Justice Brennan (June 18, 1978) (on file with authors).

form of the assertion—a position he later retracted somewhat, *see infra,* at [8]. I quickly relayed LFP's position to BRW, and this seemed to mollify him.

My second draft also made an attempt to remove ideas BRW did not like while incorporating some material out of a memorandum BRW had earlier prepared on constitutional issues. Unfortunately, much of BRW's analysis tracked LFP's strict scrutiny, which I had rejected, so many changes had to be cosmetic at best. We did ultimately remove a great deal of statistical material from our first draft, which made BRW much more receptive to the analysis of the Davis program itself. In short, the second draft applied what BRW wanted to call "strict scrutiny" and I called a search for an "important and articulated" purpose.

While I was redrafting my opinion (the June 8th draft), LFP and BRW got into a tiff over Title VI.[98] BRW had circulated his earlier Title VI memo with some changes about the same time our first constitutional law draft had appeared.[99] On June 12, LFP wrote Byron "I will not join you." This caused Byron to insist that none of the four of us (BRW, HAB, TM, or myself) should join LFP's Title VI discussion. BRW's "reasoning" was that a join on Title VI implied an agreement with LFP's constitutional analysis. I was not persuaded but did not ask BRW how he could *expressly* join part IV-A of LFP's constitutional discussion if he could not live with the *implication* of joining the Title VI discussion. I never received a satisfactory answer!

On June 16, I circulated a second working draft to BRW, TM, and HAB. HAB quickly joined this draft, which it turned out was the first he had had time to read.[100] His only contribution was to chide us for referring to "men" in our gender discussion where we could have said "persons"! BRW also quickly acquiesced.[101] TM also agreed to join this opinion. Why he changed his initial adamant view that he would not join is still a puzzle to me.[102]

In any case, it was with great joy that I sent the following memo to conference on June 20:

> Memorandum re: No. 76-811, Regents v. Bakke
>
> Byron, Thurgood, Harry and I will file a joint opinion in this case, which I now

98. *Supra* note 89.

99. *Supra* note 89.

100. Blackmun joined on June 19, 1978. On that same day, he also circulated a separate opinion, which began: "I participate fully, of course, in the opinion . . . that bears the names of 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." Memorandum to the Conference from Associate Justice Blackmun, to the Justices of the Supreme Court (June 19, 1978) (on file with authors).

101. Nonetheless, on June 21, 1978 White circulated the fourth draft of his Title VI memo, though now labeled "Separate Opinion of Mr. Justice White." Memorandum to the Conference from Associate Justice White, to the Justices of the Supreme Court (June 21, 1978) (on file with authors).

102. We have sifted through Marshall's papers trying to find a solution to this puzzle. None emerged.

> send to all of you in Wang form.[103] You will see 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.[104] I have to catch a ferry,[105] and therefore I will break ranks and remain uncharacteristically silent!

My joy was short-lived, however.

On June 21, LFP circulated changes to his draft which attacked ours as unprincipled.[106] On June 23, LFP wrote to say that he had had second thoughts about our assertion of the "central meaning" of the decision.[107] A

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103. Wang form is a typed (rather than printed) version of an opinion draft.

104. Memorandum to the Conference from Justice Marshall, to the Justices of the Supreme Court (June 26, 1978) (on file with authors).

105. Brennan's way of saying he is ready for his summer vacation.

106. Powell's circulation of June 21, 1978 added two footnotes.

> Note 35. As I am in agreement with the view that race may be taken into account as a factor in an admissions program, I am in accord with the result reached in this case by the plurality opinion of JUSTICES BRENNAN, WHITE, MARSHALL, and BLACKMUN. But I disagree with much that is said in their opinion.
>
> They would require as a justification for a program such as petitioner's, only two findings: (i) that there has been some form of discrimination against the preferred minority groups 'by society at large,' . . . and (ii) that "there is reason to believe" that the disparate impact sought to be rectified by the program is the product of such discrimination . . .
>
> The breadth of this hypothesis is unprecedented in our constitutional system. The first step in the analysis—whether or not there has been societal discrimination—may require little or no proof. The second step, however, involves a speculative leap: but for this discrimination by society at large, Bakke 'would have failed to quality for admission' because Negro applicants—nothing is said about Asians...would have made better scores. Not one word in the record supports this conclusion, and the plurality offers no standard for courts to use in applying such a presumption of causation to other racial or ethnic classifications of this sort. This failure is a grave one, since if it may be concluded *on this record* that each of the minority groups preferred by the petitioner's special program is entitled to the benefit of the presumption, it would seem difficult to determine that any of the dozens of minority groups that have suffered 'societal discrimination' cannot also claim it, in any area of social discourse.
>
> Note 50. The denial to respondent of this right to individual treatment without regard to his race is the principal evil of the petitioner's special admissions program. To suggest as do MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN that respondent was not deprived of any significant benefit because he might have been able to attend some other medical school is thus beside the point.... Memorandum to the Conference from Justice Powell, to the Justices of the Supreme Court (June 21, 1978) (on file with authors).

107. In that June 23, 1978 letter, sent only to Brennan, Powell wrote:

> I have given further thought . . . 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

phone call to LFP quickly resolved the compromise language found in the final draft on the "central meaning" point. [In the margin, Brennan wrote, "I should stress that LFP fully agreed that the ultimate language chosen accurately reflects his view of what his opinion and mine jointly stood for."] At the same time, BRW sent over his law clerk with reams of additional suggested changes.

My clerks and I set to work trying to accommodate BRW and answer LFP. This proved reasonably easy, although it left the draft very marked up. The second was to prove almost my undoing.

LFP asserted that we were applying one test for whites and one for blacks. I retorted that we were not. That our standard applied equally and, moreover, it reconciled all the important equal protection cases that LFP and I discussed in our opinions. I also vigorously disputed LFP's reading of *Korematsu*[108] and *Hirabayashi*,[109] which I insisted—and insist—announced the "suspect class" phrase while using "lower tier" scrutiny.

A draft with all these changes circulated after 5:00 pm on Friday, June 23.[110] On Saturday, all hell broke loose. First BRW called me at home to say he could not live with the changes relating to the standard of review. He was absolutely insistent that we say "strict scrutiny" and further, that our analysis remain superficially traditional.

I went to the office to discuss this with BRW. On arriving there, my clerks told me HAB had called. I called HAB and he, too, indicated that he was pulling out of the opinion. HAB was simply very mad that we had made a lot of changes. He stated that he had not read any of them, but that he was just in no position to even consider *Bakke* any further.

Faced with this mess, I huddled with BRW and found he would stay in if I would withdraw the *Korematsu* discussion. I agreed to do this.

In the meanwhile, LFP circulated a response which said quite bluntly that

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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 . . . the *judgment* itself does not go beyond permissible use of race in the context of achieving a diverse student body at a state university. This holding could be stated more broadly in one simple sentence as follows:

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

Despite the foregoing I have not objected to your characterization of what the Court holds as I have thought you could put whatever 'gloss' on the several opinions you think proper. I believe that one who reads my opinion carefully will conclude that your gloss goes somewhat beyond what I have written and what I think . . . .

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. Letter from Justice Powell to Justice Brennan (June 23, 1978) (on file with authors).

108. 323 U.S. 214 (1944).

109. 320 U.S. 81 (1943).

110. Brennan circulated this draft to White, Blackmun, and Marshall only—it was not sent to Powell.

my opinion endorsed Jewish quotas.[111] This was too much. BRW quickly called LFP and told him to retract this material.[112] My clerks and I were particularly mad about this because LFP's First Amendment approach quite clearly left the door open for approval of Jewish quotas, so that LFP was really "calling the kettle black." In any case, LFP yielded to BRW's insistence and this was resolved.

Once BRW was aboard, I had my clerks take our "consent draft" to HAB's law clerk, who had been studying the changes in the earlier draft. He took the amended copy out to HAB, telling us that he and HAB had gone over the earlier changes by phone and that there were no substantive problems. Later that afternoon HAB called me at home to say that the consent draft was fine, and that he was back with us if we would promise to make no more changes. I promised.[113]

HAB's effort to rationalize his indecision was exemplified by a squib appearing in U.S. News & World Report, April 24, 1978, p. 8. The magazine claimed that "Justice Harry A. Blackmun told a private group recently that the case is presenting such difficult issues that 'we all wish it would go away.'"[114] While that statement might have been accurate as to some of the brethren in October, in April the only wish shared by all regarding *Bakke* was that HAB cast his vote.

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111. Powell's response was published in the opinion as note 34, which reads as follows (438 U.S. 265, 294):

> In the view of MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN, the pliable notion of "stigma" is the crucial element in analyzing racial classifications. See, *e.g.*, *post* at 361, 362. The Equal Protection Clause is not framed in terms of "stigma." Certainly the word has no clearly defined constitutional meaning. It reflects a subjective judgment that is standardless. *All* state-imposed classifications that rearrange burdens and benefits on the basis of race are likely to be viewed with deep resentment by the individuals burdened. The denial to innocent persons of equal rights and opportunities may outrage those so deprived and therefore may be perceived as invidious. These individuals are likely to find little comfort in the notion that the deprivation they are asked to endure is merely the price of membership in the dominant majority and that its imposition is inspired by the supposedly benign purpose of aiding others. One should not lightly dismiss the inherent unfairness of, and the perception of mistreatment that accompanies, a system of allocating benefits and privileges on the basis of skin color and ethnic origin . . .

The circulation to which Brennan refers contained an additional paragraph:

> Moreover, limiting the concept of stigma to the imposition of a badge of inferiority would inhibit appropriate scrutiny of classifications such as the quotas imposed upon the admission of Jews to some educational institutions in the early part of this century, which was based upon the belief that by virtue of superior ability that group would come to dominate such institutions.

JEFFRIES, *supra* note 25, at 492.

112. According to JEFFRIES, *supra* note 25, at 492, it was Brennan, not White, who phoned Powell to tell him that he found the statement on Jewish quotas "personally offensive." Powell was apparently surprised by Brennan's reaction but said that he "would omit anything from any opinion where a Justice of the Court requested me to do so on the ground that what I had written was 'personally offensive.'"

113. He kept his promise. On June 26, 1978, Brennan circulated his final draft.

114. Brennan's case files are full of newspaper articles that he clipped and dated.

III. EPILOGUE

On June 28, 1978, after nearly one and half years of consideration, the Court finally handed down its decision in the *Regents of the University of California v. Bakke.* Although the justices were far from united,[115] a singular message emerged: Universities were (relatively) free to take race and ethnic background into account in their admissions decisions but they were not free to maintain strict quotas absent a history of racial discrimination demanding a strong remedy.

Eight justices, as we know from Brennan's narrative and the published record, were unhappy with this substantive conclusion; only Powell was fully satisfied that the Court had reached the correct result. And he remained so even after he left the bench. When reporters asked to name his most important decision, Powell replied with *Bakke.*[116] Powell's biographer, who devotes a chapter to *Bakke,* agrees, deeming affirmative action "[t]he area of Powell's greatest impact as a Supreme Court Justice."[117]

This claim—at least while Powell remained on the bench—has some truth to it.[118] Of the eleven post-*Bakke* affirmative action cases in which he participated,[119] Powell was in the majority in all of them. But the divisions over affirmative action that Brennan so richly highlighted in his narrative persisted: Nine of the twelve total post-*Bakke* cases (through the 1986 term), were decided by 6-3 or 5-4 votes;[120] all told, the twelve generated 46 opinions, for an average of 3.8 per case.

More relevant today, of course, is that Powell's approach to racial preferences hangs on a thread. What with the retirement of all members of *Bakke*'s

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115. 438 U.S. 265, at 267-68, lists the lineup as follows:
POWELL, J., announced the Court's judgment and filed an opinion expressing his views of the case, in Parts I, III-A, and V-C of which WHITE, J., joined; and in Parts I and V-C of which BRENNAN, MARSHALL, and BLACKMUN, JJ., joined. BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ., filed an opinion concurring in the judgment in part and dissenting in part, post, p. 324. WHITE, J., *post*, p. 379, MARSHALL, J., *post*, p. 387, and BLACKMUN, J., *post*, p. 402, filed separate opinions. STEVENS, J., filed an opinion concurring in the judgment in part and dissenting in part, in which BURGER, C. J., and STEWART and REHNQUIST, JJ., joined, *post*, p. 408.

116. Linda Greenhouse, *Powell: Moderation Amid Divisions*, N.Y. TIMES, June 27, 1987, at 32.

117. JEFFRIES, *supra* note 25, at 457.

118. Data reported in this and the next paragraph come from HAROLD J. SPAETH, THE U.S. SUPREME COURT JUDICIAL DATA BASE (1999), *available at* http://www.ssc.msu.edu/~pls/pljp/sctdata.html. The data are based on analu=0 (orally argued citation) and dec_type=1 (orally argued signed opinion) or 7 (judgment of the Court).

119. The eleven cases, as identified in SPAETH, *supra* note 118, are: United States v. Paradise, 480 U.S. 149 (1987); Johnson v. Transp. Agency, 480 U.S. 616 (1987); Local 28, Sheet Metal Workers v. EEOC, 478 U.S. 421 (1986); Local 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501 (1986); Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986); Firefighters Local Union v. Stotts, 467 U.S. 561 (1984); Irving Indep. Sch. Dist. v. Tatro, 468 U.S. 883 (1984); Weinberger v. Rossi, 456 U.S. 25 (1982); Minnick v. Cal. Dep't of Corrections, 452 U.S. 105 (1981); Fullilove v. Klutznick, 448 U.S. 448 (1980); Southeastern Cmty. Coll. v. Davis, 442 U.S. 397 (1979).

120. *See id.* (citing eleven of the twelve cases). The twelfth is *United Steelworkers v. Weber*, 443 U.S. 193 (1979), which was decided by a 5-2 vote (Powell and Stevens did not participate).

pro-affirmative action coalition, the anti-affirmative action wing has grown substantially, to the point where the Court now strikes down more programs than it upholds. Just consider that after *Bakke* and until Powell's retirement, the Court articulated a pro-affirmative action position in nine of the twelve cases it heard (75 percent); in the post-Powell years (through the 1998 term), it expressed support for affirmative action in only one of the four cases it considered (25 percent).[121] In this climate, the U.S. Supreme Court's refusal to review *Hopwood*, amid explicit charges that a court of appeals had overturned its own decision, has left many analysts wondering about the future of *Bakke*.[122]

Whatever its future and whatever the nature and content of future debates, it is clear from Brennan's narrative that the Court anticipated at least some of the reaction, both for and against its decision. At the very least, the narrative reveals a group of Americans just as divided as "ordinary" citizens over whether minorities and women should receive preferential treatment in hiring, promotion, and admission to universities and other areas of social and political life. So too the narrative may prove to a crucial piece of evidence that will help the litigants and courts of today to adduce the force and parameters of the diversity rationale.

Finally, it reveals a group of American who operate in a fashion not wholly unlike other small groups—be they appointments committees at laws schools, boards of directors of corporations, or executive commissions—that attempt to reach decisions. The justices bargain and compromise, they think prospectively, and they use whatever information they have to persuade others of the rightness of their views. In light of a spate of recent[123] and not-so-recent[124] literature providing inside accounts of the U.S. Supreme Court, such should come as no surprise. And, yet, disbelievers—those who continue to characterize the justices as mechanical decision makers, who fail to consider the strategic context in which Court members toil—remain a vocal force, espe-

121. The four are *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Martin v. Wilkes*, 490 U.S. 755 (1989); *Metro Broad., Inc. v. FCC*, 497 U.S. 547 (1990); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995).

122. This is so despite Justice Ginsburg's attempt to explain the Court's decision. In an opinion respecting the denial of the petition for a writ of certiorari, joined by Justice Souter, she wrote:

> Whether it is constitutional for a public college or graduate school to use race or national origin as a factor in its admissions process is an issue of great national importance. The petition before us, however, does not challenge the lower courts' *judgments* that the particular admissions procedure used by the University of Texas Law School in 1992 was unconstitutional. Acknowledging that the 1992 admissions program "has long since been discontinued and will not be reinstated," the petitioners do not defend that program in this Court. Instead, petitioners challenge the *rationale* relied on by the Court of Appeals. "[T]his Court," however, "reviews judgments, not opinions." Accordingly, we must await a final judgment on a program genuinely in controversy before addressing the important question raised in this petition.

Texas v. Hopwood, 518 U.S. 1033, 1033 (1996) (citations omitted).

123. *E.g.*, EPSTEIN & KNIGHT, *supra* note 2; EDWARD LAZARUS, CLOSED CHAMBERS: THE FIRST EYEWITNESS ACCOUNT OF THE EPIC STRUGGLES INSIDE THE SUPREME COURT (1998).

124. *E.g.*, MURPHY, *supra* note 5; WOODWARD & ARMSTRONG, *supra* note 11.

cially inside the academy.[125] No more remarkable and starker evidence exists, we believe, to refute their position than Justice William J. Brennan's account of the landmark case that is Regents of the University of California v. Bakke.

125. There are scores of these accounts. For a recent example, see Ronald Kahn, *Institutional Norms and Supreme Court Decision Making: The Rehnquist Court on Privacy and Religion*, *in* SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES 175 (Cornell W. Clayton & Howard Gillman eds., 1999).

APPENDIX A: MEMORANDUM FOR THE CONFERENCE, RE: NO, 76-811—*REGENTS OF THE UNIVERSITY OF CALIFORNIA V. BAKKE*, FROM THE CHAMBERS OF JUSTICE BYRON R. WHITE, CIRCULATED ON OCTOBER 13, 1977[126]

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

126. A copy of this memorandum is on file with the authors.

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

APPENDIX B: PERSONAL LETTER FROM LEWIS F. POWELL, JR. TO WARREN E. BURGER, WRITTEN ON APRIL 12, 1978[127]

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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.

127. A copy of this letter is on file with the authors.

April 12, 1978

PERSONAL

Bakke

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.

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*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

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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) maybe 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