June 26, 1978

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

MEMORANDUM TO THE CONFERENCE

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

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

I apologize for the errors.

L.F.P.

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MEMORANDUM TO THE CONFERENCE

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

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

Sincerely,

WJB, Jr.
June 26, 1978

Cases Heretofore Held for 76-811 Regents v. Bakke

MEMORANDUM TO THE CONFERENCE:

No. 77-635 Friday v. Uzzell

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

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

I think that the governing council issue should be returned for trial in the light of Bakke. In my Bakke opinion, I view United Jewish Orgs. v. Carey, 430 U.S. 144 (1977), as a case in which "the remedy for an
administrative finding of discrimination encompassed measures to improve the previously disadvantaged group's ability to participate, without excluding individuals belonging to any other group from enjoyment of the relevant opportunity." Bakke Draft, p. 34. (Bill Brennan, Byron, Thurgood and Harry go even farther in permitting such use of race.) According to petitioners and Judge Winter, this sort of analysis should be applied to the provisions for appointment to the governing council. They claim that there has been a history of discrimination at the school, which justified the use of unusual measures to upgrade the participation of previously excluded groups. Because there has been no trial, the University has never had an opportunity to establish the need for this allegedly remedial measure. If such a need is established - i.e., if "identified" discrimination is proved - then my analysis of UJO, together with the views of Bill, Byron, Thurgood and Harry, well might be applicable to the provisions concerning appointment. Otherwise, I probably would view this use of race as inappropriate. But a trial will be necessary to establish whether there was identifiable discrimination and the remedial purpose of the provison. CA4 simply assumed that any use of race was forbidden by the Fourteenth Amendment and Title VI. Bakke makes clear that this is not necessarily the case. I think that the white students here have standing to the same extent that the Hasidic Jews had standing in UJO, as this classification in effect insures the "election" of representatives from the designated groups. I would GV&R on this issue.

Standing problems are more serious with respect to the student honor council provisions. It is by no means clear that Student A is injured by Student B's option to select a jury which is 4/7 of his (Student B's) race. I suppose, however, a fair argument could be made for some injury in fact here: if we presume that racially constituted juries are more likely to be biased in favor of members of their own race, then more cheaters will be exonerated by the student honor council and honest students will be injured in their class standing. But this is a rather attenuated injury, and the University, which has the most direct interest in punishing cheaters, is willing in this case to stack the deck against itself.

I am inclined to GV&R in light of Bakke.
The question presented here is whether there is an implied private right of action under Title IX of the Civil Rights Act of 1964, 20 U.S.C. §1681, which prohibits discrimination by recipients of federal funds on the basis of sex. CA7 held that there was private right of action. There is no circuit conflict as to Title IX, but other circuits have found private rights of action under Title VI, and the arguments are virtually the same under both statutes. See, e.g., Bossier Parish School Bd. v. Lemon, 370 F.2d 847 (CA5), cert. denied, 388 U.S. 911 (1967); Cypress v. Newport News General and Nonsectarian Hospital Ass'n, 375 F.2d 648 (CA4 1967); Kelley v. Altheimer Public School Dist., 378 F.2d 485 (CA8 1967); Nashville I-40 Steering Comm. v. Ellington, 387 F.2d 179 (CA6 1967), cert. denied, 390 U.S. 921 (1968). None of these opinions really examined the private action question in great detail, though. The issue is important, and it is not likely to get any greater ventilation in the lower courts than it already has. Moreover, this Court has had a dry run in Bakke.

Bakke, of course, assumes arguendo that there is a private action under Title VI, so that it furnishes no basis for a GV&R. As I see no reason to delay the decision of this important issue, I would grant.

These three appeals arise out of the same case. A group of contractors challenged as violative of the Equal Protection component of the Fifth Amendment a provision of the 1977 Public Works Act which required that 10% of all funds disbursed by the Secretary of Commerce for support of local construction projects be expended, if feasible, for minority business enterprises. The three-judge district court held that the statute was unconstitutional. The court enjoined the federal and local defendants from enforcing the provisions of the statute after specified dates subsequent to the court's decision, but it refused to compel the undoing of grants already made and committed to specific projects. In 77-1067, the local defendants appeal the finding of unconstitutionality; in 77-1078, the contractors appeal the refusal to grant retroactive relief; in 77-1271, the SG argues that since all of the funds now
have been allocated to local bodies and all the contracts let, there is no controversy between the parties as to the disbursement of any more moneys, and the case is moot.

This is the "next case" after Bakke. Congress passed a bill quite explicitly using a racial classification to favor members of designated minority groups, but there was no explicit finding of previous discrimination in the particular sector affected, nor any expressed intention to enforce Section 5 of the Fourteenth Amendment or any other federal law.

As indicated in my Bakke opinion, where the legislature enacts of preferential racial classification, I am inclined to think there must be findings of "identifiable discrimination" and some showing on the record that the particular classification enacted is a response tailored to that discrimination. This statute does not appear to meet that test. According to the district court, the legislative history contained no mention on the minority contracting provisions. No study was made, and there was no finding as to the effects of discrimination in employment of minority contractors. Apparently one congressman discussed discrimination during the floor debate, but the court refused to treat this as evidencing the intent of Congress. It noted that even this congressman introduced no specific evidence of discrimination. Thus, this case seems to present rather dramatically the issue whether Congress can rely on an implicit notion of compensating for generalized societal discrimination in enacting racial preferences, or whether it must invoke expressly its remedial powers and respond only to identified occurrences of discrimination.

The case, however, may be moot, as the SG argues. As of the time that the district court entered its order, the record showed that all the funds authorized and appropriated under the Act had been allocated. And since the order did not apply to such allocated funds, the local defendants went ahead and let all their contracts requiring the use of such funds. Hence, there are no funds left for the parties to argue about.

The contractors argue that mere cessation of illegal activity is not enough to moot a case, citing United States v. W.T. Grant, 345 U.S. 629 (1953). This is not, however, mere cessation of conduct by a party capable
or re-starting it at any time. Here, a congressional appropriation will be necessary before these defendants will once again be able to perform similar actions. Moreover, in recent years, W.T. Grant has been invoked but seldom, most recently in SEC v. Sloan. No. 76-1607, but there the SEC was capable of restarting its noxious activity on its own motion.

The contractors also maintain that this is an issue capable of repetition, yet evading review. That is probably incorrect, since if they had not waited until the last minute to bring their suit, they undoubtedly could have obtained a court order that could have become effective before all the subject funds were allocated.

The SG does note two hypothetical situations that might serve to make the case not moot. First, there could be subcontracts or supply contracts remaining to be let, so that the defendants would still have to be divvying up the federal funds in compliance with the statute. But all this record shows is that all the contracts were let; it reflects nothing as to subcontracts outstanding.

The SG also notes that a minority contractor might default, so that a contract would have to be re-bid, presumably in conformity with the statute. But that is speculative and probably is not a sound basis for judicial involvement.

In these circumstances, I am inclined to agree with the recommendation of the SG that the judgment below should be vacated and the case remanded for a determination of MOOTNESS.

L.F.P., Jr.
As the Chief Justice indicated, I am authorized to announce the judgment of the Court.

The facts in this case are well known. I think it is fair to say that no case in modern memory has received as much media coverage and scholarly commentary, reflecting widely divergent views. Beginning with more than 60 briefs filed with the Court, we have received the unsolicited advice — through the media and the commentaries — of countless extra-judicial advocates.

The case was argued some eight months ago, and as we will speak today with many voices, perhaps it can be said that we needed all of this advice.

In any event, it will be evident from our several opinions that the case — intrinsically difficult — has received our most careful attention.

So much for an introduction. As there are six separate opinions, and the judgment itself is a bifurcated one, I will try at the outset to explain the judgment.

The opinion and judgment of the Supreme Court of California presented us with two central questions: the first — and the one widely perceived as the only ultimate question — is whether the medical school's special admissions program discriminated unlawfully against Bakke. I will refer to this as the Bakke admission question.
The second, and broader question, is whether it is permissible -- either under the Constitution or Title VI of the Civil Rights Act of 1964 -- to consider race as a factor relevant to the admission of applicants to a university. I will refer to this question, generally, as whether race may be considered.

As will be perceived at this point, if the answer to the second question is negative - that is, that race may never validly be considered, this answer disposes of both issues. Bakke would be admitted, and the University could not in the future give any conscious consideration to race in its admission program.

If, however, the second question is answered affirmatively - that is, that race may be considered - then it becomes necessary also to address the first question separately: that is whether the special admissions program at Davis is compatible with Title VI and the Constitution.

You will have noted that I have mentioned both Title VI - that often is referred to as the "statutory issue" - and the Constitution, under which is presented the equal protection issue under the Fourteenth Amendment. Again, the case is complicated because if it were disposed of under Title VI, there would be no occasion to reach the constitutional issue.
Now, as to how the questions are decided:

The Chief Justice, and Justices Stewart, Rehnquist and Stevens have concluded that the statutory issue does control. In their view, which will be stated more fully by Mr. Justice Stevens, the language of Title VI does not permit race to be considered as a factor in an admissions program. Therefore, they would affirm the judgment of the Supreme Court of California in its entirety.

Justices Brennan, White, Marshall, Blackmun and I have a different view as to Title VI. We believe, despite its more detailed provisions, that it goes no further in prohibiting the use of race than the Equal Protection Clause. The five of us therefore reach the two constitutional questions.

On a constitutional analysis, founded on the equal protection clause, Justices Brennan, White Marshall and Blackmun - for reasons that Justice Brennan will outline - hold not only that race properly may be considered, but that the special admissions program of the Davis Medical School is valid in every respect.

Thus, under the Chief Justice's plurality view the judgment of the California Court would be affirmed in its entirety. Under the Justice Brennan plurality that judgment would be reversed in its entirety.
I come now to my views. I agree with the Justice Brennan plurality that Title VI does not dispose of this case, and therefore I addressed the constitutional questions.

In summary, on the first question, I agree with the result of the Chief Justice's plurality - that the Davis special admissions program, with 16 of 100 seats reserved exclusively for four categories of minorities, is invalid under the Equal Protection Clause. Thus, there are five votes - four on the Title VI basis and my vote on constitutional grounds - to affirm the judgment of the California Court invalidating that program. Under this judgment, Bakke will be admitted to the Medical School.

I agree, however, with the Justice Brennan plurality in their collective judgment that race may be considered in an admissions program. Thus, there are five Justices who join in a judgment to reverse that portion of the judgment of the California Court that would have denied petitioner the right to accord any consideration to the factor of race.

But the process of constitutional analysis by which I reach this result differs significantly from that of the four Justices who compose Justice Brennan's plurality. I will leave it to Mr. Justice Brennan to state their views.
As my own reasoning is set forth fully in my separate opinion, I will conclude with only the briefest statement.
As the Chief Justice stated, I am authorized to announce the judgment of the Court. There is no opinion joined in its entirety by five members of the Court.

The facts in this case are so well known as to require no restatement. Perhaps no case in modern memory has received as much media coverage and scholarly commentary. Beginning with more than 60 briefs filed with the Court. We also have received the unsolicited advice through the media and the commentaries of countless extra-judicial advocates.

The case was argued some eight months ago, and as we will speak today with a notable lack of unanimity, it may be fair to say that we needed all of this advice.

In any event, it will be evident from our several opinions that the case—intrinsically difficult—has received our most thoughtful attention over many months.

So much for an introduction. As there are six separate opinions, and the judgment itself is a bifurcated one, I will state first the Court's judgment. Insofar as the California Supreme Court held that Bakke must be admitted to the Davis Medical School, we affirm.
admitted to the Davis Medical School, we affirm. Insofar as the California Court prohibited Davis from considering race as a factor in admissions, we reverse.

I will now try to explain how we divided on these issues. This may not be self-evident from a hurried examination of our various opinion.

The decision of the California Court presented us with two central questions: the first - and the one widely perceived as the only ultimate question - is whether the medical school's special admissions program discriminated unlawfully against Bakke, either under the Constitution or under Title VI of the Civil Rights Act of 1964. I will refer to this as the Bakke admission question.

The second, and broader question, is whether it is ever permissible to consider race as a factor relevant to the admission of applicants to a state university. I will refer to this question, generally, as whether race may be considered.

As will be perceived at this point, if the answer to the second question is negative - that is, that race may never validly be considered, this answer disposes of both issues.
issues. Bakke would be admitted, and the University could not in the future give any consideration to race in its admissions program.

If, however, the second question is answered affirmatively—that is, that race may be considered—then it becomes necessary also to address the first question separately: that is, whether the special admissions program at Davis is compatible with Title VI and the Constitution.

I have mentioned both Title VI—often referred to as the "statutory issue"—and the Constitution, under which is presented the equal protection issue arising under the Fourteenth Amendment. The case is complicated further because if it were disposed of under Title VI, there would be no occasion to reach the constitutional issues.

I will state more specifically how the questions are decided:

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

Justices Brennan, White, Marshall, Blackmun and I have a different view as to Title VI. We believe, despite its more detailed provisions, that it goes no further in prohibiting the use of race than the Equal Protection Clause. The five of us therefore reach both of the constitutional questions.

On a constitutional analysis, founded on the equal protection clause, Justices Brennan, White, Marshall and Blackmun, in their joint opinion, hold not only that race properly may be considered, but that the special admissions program of the Davis Medical School is valid in every respect.

When I have concluded, Mr. Justice Brennan will state this position more fully. Mr. Justice Marshall and Mr. Justice Blackmun also will make statements.

As I agree that Title VI does not dispose of this case, I also addressed the constitutional questions.
On the first question—whether the special admissions program is invalid—I agree with the result reached by Mr. Justice Stevens' opinion. But I do so on constitutional grounds/rather than under Title VI.

Thus/there are five votes to affirm the judgment/invalidating the special program. Under this judgment, Bakke will be admitted to the medical school.

As to the second constitutional issue—whether race may be considered as a factor/in an admissions program—I agree with the result/reached by the joint opinion of Mr. Justice Brennan and my Brothers/who joined him. Thus, there are five Justices/who join in a judgment of reversal on this issue.

But the process of constitutional analysis/by which I reach this result/differs significantly from that of the four Justices/who have filed a joint opinion.

As my reasoning is set forth fully in my written opinion,/and as other Justices will speak,/I will merely summary:

The Davis Special Admissions program/
The Davis special admissions program, with 16 of 100 seats reserved exclusively for three categories of minorities, is a classification based on race. Our cases establish, beyond question, that a racial classification by a state agency is inherently suspect, and must be subjected to the most exacting judicial scrutiny.

Although adopted primarily to protect persons of the Negro race, the guarantee of the Equal Protection Clause by its terms protects "all persons." It provides explicitly that no person shall be denied equal protection of the laws.

Despite this absolute language, our cases have held that some distinctions are justified if necessary to further a compelling state interest.

Davis relies on several interests said to be compelling. One is the desire to redress a racial imbalance said to result from general societal discrimination against the minority groups selected for preferential treatment. But there is a complete absence, on this record, of any findings that this imbalance is traceable to discriminatory practices. Discrimination by society at large,
society at large, with no determined effects, is not sufficient to justify petitioner's racial classification.

In my view, the only interest that fairly may be viewed as compelling on this record is that of a university in a diverse student body.

This interest, encompassed within the concept of academic freedom, is a special concern of the First Amendment. But there has been no showing in this case that the Davis special program is necessary to achieve educational diversity.

The Davis program totally excludes all applicants who are not Negro, Asian or Chicano from 16 of the 100 seats in an entering class. No matter how strong their qualifications, qualitative and quantitative, including their own potential for contributing to educational diversity, they are not afforded the opportunity to compete with applicants from the preferred groups for these 16 seats.

At the same time, the preferred applicants have the opportunity to compete for every seat in the class.

A University's interest in a diverse student body
A university's interest in a diverse student body is not limited to ethnic diversity. Rather, its compelling interest in this respect encompasses a far broader array of qualifications and characteristics, of which race is only one.

I refer in my opinion refers to the Harvard admission program as an example of how race properly may be taken into account.

I will quote briefly from the description of the more flexible Harvard program, contained in the appendix to my opinion:

The committee has not set target quotas for the number of blacks, or of musicians, football players, physicists, or Californians, to be admitted in a given year."

Awareness of the need for diversity means only that in choosing among thousands of academically qualified applicants, "the committee with a number of criteria in mind, pays some attention to distribution among many types and categories of students." End Quote

Thus race is considered in a flexible program designed to achieve diversity but it is only one factor weighed competitively - against a number of other factors deemed relevant. Under such a system, each applicant is
treated as an individual, regardless of race, and is considered in competition for each seat in the class.

As the briefs in this case, and the literature in this area, abundantly illustrate, many of our finest universities and colleges pursue a flexible, competitive admissions program in which race may be considered as a relevant factor.

This experience demonstrates that the Davis-type program—one that arbitrarily forecloses all competition solely on the basis of race or ethnic origin—is not necessary to attain reasonable educational diversity.

It therefore violates the Equal Protection Clause in a most fundamental sense.

Yet, the way is open to Davis to adopt the type of admissions program proved to be successful at many of our great universities.