November 22, 1977

76-811 Regents v. Bakke

MEMORANDUM TO THE CONFERENCE:

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

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

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

L.F.P., Jr.
MEMORANDUM TO THE CONFERENCE

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

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

H. A. B.
Bob

1. My morphine levels may have peaked.
2. I'd like to come in a nurse, medication.
3. We should consider medicating them in 2020.
4. Any more from medical community, Tony?
5. Have we made any forecasts for use of Caravaggio recently?
December 7, 1977

Dear Lewis,

I had an opportunity last night to read the material you sent me from the *New England Journal of Medicine*, and the William Raspberry column. They were most interesting and most discouraging. Thank you for sharing them with me.

Sincerely yours,

P. Potter

Mr. Justice Powell
SPECIAL ARTICLE

BLACK UNDER-REPRESENTATION IN UNITED STATES MEDICAL SCHOOLS

BOYD C. SLEETH, A.B., AND ROBERT I. MISHELL, M.D.

Abstract To understand why blacks are under-represented in medical schools and how this situation might be changed, we analyzed statistics on medical-school applicants, medical-school students and college undergraduates. The pool of qualified black applicants to medical schools has not been large enough to achieve appropriate black representation. If black under-representation is to be corrected, the pool of qualified black applicants must be increased. Affirmative-action programs for blacks who are already in college are unlikely to be sufficient by themselves to increase the pool of black applicants substantially. Such programs should therefore be developed for high-school students. (N Engl J Med 297:1146-1148, 1977)

Blacks are under-represented in medical schools in the United States. In the late 1960's and early 1970's the medical schools increased black representation substantially. The efforts made by medical schools were not sufficient, however, to correct black under-representation. The evidence presented below shows some of the reasons why blacks continue to be under-represented in medical schools; the evidence also suggests how affirmative-action programs might be developed that would be effective in correcting black under-representation.

Many affirmative-action programs have been described in the literature. The literature does not, however, give evidence that allows the reader to evaluate directly the effectiveness of these programs. Nevertheless, continued black under-representation in medical schools indicates that these programs have not succeeded.

Data on black medical-school applicants and accepted candidates are regularly made available. Analyses of black under-representation, however, do not accompany the data. The problem of black under-representation, in fact, is often obscured by discussion of all minority groups, which include highly represented minorities such as Asian-Americans.

In this paper data are presented on black medical-school applicants and candidates accepted and on black college undergraduates. The evidence suggests that if black under-representation in medical school is to be corrected, affirmative-action programs should be developed for students at the pre-college level. The data on black students who have already entered college indicate that affirmative actions taken for these students are unlikely to result in sufficient numbers of qualified black applicants to ensure their full participation in medicine.

BACKGROUND

In 1970, 11.1 per cent of the United States population were blacks; yet they accounted for only 2.12 per cent of the country's physicians, dentists and related practitioners. Blacks in California, although 7.0 per cent of the state's population, composed only 2.07 per cent of the physicians, dentists and related practitioners. In 1968, only 2.7 per cent of the country's first-year medical students were blacks.

Medical schools began to respond formally to black under-representation in 1968, when the Association of American Medical Colleges (AAMC) recommended that "medical schools must admit increased numbers of students from geographical areas, economic backgrounds and ethnic groups that are now inadequately represented." In 1969-70, an AAMC task force investigated minority under-representation in medical schools and recommended that 12 per cent of all first-year medical students be blacks by the 1975-76 academic year. Despite efforts that substantially increased the numbers of black medical students, this goal was not achieved. In 1975-76, only 6.8 per cent of all first-year medical students were blacks.

FINDINGS

When the AAMC first set affirmative-action policies, black representation increased substantially. Since 1971 the proportion of blacks among first-year medical students, however, has not increased (Table 1). Too few blacks applied to medical schools to bolster their representation (Table 2). For the years for which information was available, the proportion of black applicants did not exceed 6.6 per cent.

Given their affirmative action policies and the small number of black applicants, medical schools accepted black applicants at a greater rate than all applicants (Table 3). This course is true for many medical schools, not merely for the predominantly black medical schools, Howard and Meharry. Data on 74 medical schools show that in 1974, 51 (69 per cent) accepted blacks at a substantially greater rate than all applicants. The higher acceptance rates for blacks did not accomplish the AAMC's minority recruitment goals since so few blacks applied. For the 1975-

*Information on 1975 medical-school applicants obtained from personal communication with Division of Student Studies, Association of American Medical Colleges, Washington, DC.
Table 1. Percentages of Blacks among First-Year Medical Students, 1968-76.

<table>
<thead>
<tr>
<th>Academic Yr.</th>
<th>% Blacks</th>
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</thead>
<tbody>
<tr>
<td>Beginning</td>
<td></td>
</tr>
<tr>
<td>1968</td>
<td>2.7</td>
</tr>
<tr>
<td>1969</td>
<td>4.2</td>
</tr>
<tr>
<td>1970</td>
<td>6.1</td>
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<tr>
<td>1971</td>
<td>7.1</td>
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<tr>
<td>1972</td>
<td>7.0</td>
</tr>
<tr>
<td>1973</td>
<td>7.3</td>
</tr>
<tr>
<td>1974</td>
<td>7.5</td>
</tr>
<tr>
<td>1975</td>
<td>6.8</td>
</tr>
<tr>
<td>1976</td>
<td>6.7</td>
</tr>
</tbody>
</table>

76 freshmen class to have been 12 per cent black, medical schools would have had to accept 80 per cent of their black applicants.

The problem of few black applicants is compounded by the fact that many of the applicants are poorly prepared for medical school. As compared to white students, black medical students are less likely to be promoted with their class, and more likely to drop out or be dismissed (Table 4). In 1970, 77.8 per cent of first-year black medical students and 97.3 per cent of white students were promoted with their class; in 1971, 80.8 per cent of blacks and 95.8 per cent of whites were promoted with their class. In 1971, first-year medical students were not promoted with their class because of academic dismissal (4.4 per cent of all first-year blacks and 0.5 per cent of all first-year whites), permanent withdrawal from school for reasons other than academic dismissal (2.4 per cent of all first-year blacks and 1.5 per cent of all first-year whites), leaves of absence (0.9 per cent of all first-year blacks and 0.5 per cent of all first-year whites), and to repeat all or part of their previous studies (9.7 per cent of all first-year blacks and 0.6 per cent of all first-year whites). Thus, academic dismissal and the need to repeat first-year studies are the major causes for lower promotion of blacks than of whites. Interestingly enough, of the blacks who entered medical schools in 1969, the year many medical schools began to adopt affirmative-action policies, far fewer graduated with their class than blacks who entered medical schools in 1968.

The small percentage of well qualified black applicants among all medical-school applicants is clearly an important cause for continued black under-representation in medical schools. But why is the pool of qualified black applicants to medical schools so small?

Black representation in colleges and the characteristics of black college undergraduates, as compared to nonblack college undergraduates, partly answer the question.

In 1971, black college freshmen were as likely as nonblack freshmen to want to become doctors (M.D. or D.D.S.). Yet blacks composed only 6.3 per cent of college freshmen. Continued black under-representation in colleges has therefore perpetuated black under-representation in medical schools. The desire to become doctors, furthermore, is not translated into degree expectations. Although 5.0 per cent of nonblack college freshmen planned to obtain an M.D., D.O., D.D.S. or D.V.M. degree, only 3.7 per cent of black college freshmen planned to obtain one of these degrees. By 1975, blacks made up 8.0 per cent of college freshmen; blacks and nonblacks continued, however, to have different degree expectations. The reasons that fewer blacks expected to obtain an M.D., D.O., D.D.S. or D.V.M. than expressed a desire to become doctors were not stated. If blacks are less well prepared academically than nonblacks, black college freshmen have reason to doubt if they will attain a level of achievement sufficient for acceptance to medical schools.

Table 2. Proportion of Blacks among Medical-School Applicants, 1970-72 and 1974-75.

<table>
<thead>
<tr>
<th>Academic Yr.</th>
<th>% Blacks</th>
</tr>
</thead>
<tbody>
<tr>
<td>Beginning</td>
<td></td>
</tr>
<tr>
<td>1970</td>
<td>3.0</td>
</tr>
<tr>
<td>1971</td>
<td>3.3</td>
</tr>
<tr>
<td>1972</td>
<td>6.6</td>
</tr>
<tr>
<td>1974</td>
<td>5.7</td>
</tr>
<tr>
<td>1975</td>
<td>5.4</td>
</tr>
</tbody>
</table>

Table 3. Medical-School Acceptance Rates, 1970-72, 1974-75.

<table>
<thead>
<tr>
<th>Yr of Application</th>
<th>% Blacks Accepted/Appling</th>
<th>% All Accepted/Applying</th>
</tr>
</thead>
<tbody>
<tr>
<td>1970</td>
<td>51.4</td>
<td>46.0</td>
</tr>
<tr>
<td>1971</td>
<td>52.2</td>
<td>42.3</td>
</tr>
<tr>
<td>1972</td>
<td>40.2</td>
<td>38.1</td>
</tr>
<tr>
<td>1974</td>
<td>43.3</td>
<td>35.3</td>
</tr>
<tr>
<td>1975</td>
<td>45.3</td>
<td>36.2</td>
</tr>
</tbody>
</table>

Attrition may further reduce the pool of potential black applicants to medical schools. By the end of the 1969-70 academic year, 27 per cent of the black students who entered college in the fall of 1966 had left school without graduating. Only 18.5 per cent of the white students had dropped out. It is not known how many potential medical-school applicants drop out.

In addition, blacks are less likely than nonblacks to study in traditionally premedical fields. Blacks are also less confident with mathematics than nonblacks. In 1971, 54 per cent of black college freshmen, as compared to 35 per cent of nonblack freshmen, thought that they needed special help with that subject. Six and two-tenths per cent of black college freshmen planned to major in the biological and physical sciences; 8.6 per cent of nonblack freshmen planned to major in these fields.

The percentages of all students planning to obtain a medical degree and actually majoring in the biological

* The statistics on college undergraduates discussed in the text are derived from very large numbers, and are highly significant.
Table 4. Retention and Graduation of Black and White Medical Students, 1968-72

<table>
<thead>
<tr>
<th>Entering Yr</th>
<th>% Blacks Retained</th>
<th>% Blacks Graduating</th>
<th>% Whites Retained</th>
<th>% Whites Graduating</th>
</tr>
</thead>
<tbody>
<tr>
<td>1968</td>
<td>91</td>
<td>90</td>
<td>96</td>
<td>95</td>
</tr>
<tr>
<td>1969</td>
<td>89</td>
<td>75</td>
<td>96</td>
<td>91</td>
</tr>
<tr>
<td>1970</td>
<td>88</td>
<td>NA*</td>
<td>97</td>
<td>NA</td>
</tr>
<tr>
<td>1971</td>
<td>90</td>
<td>NA</td>
<td>98</td>
<td>NA</td>
</tr>
<tr>
<td>1972</td>
<td>93</td>
<td>NA</td>
<td>99</td>
<td>NA</td>
</tr>
</tbody>
</table>

*Data not available.

and physical sciences decrease over the four years of college. Although 4.7 per cent of freshmen who entered college in the fall of 1967 planned to obtain an M.D., D.D.S., or D.V.M. degree, only 3.1 per cent still planned to obtain one of these degrees by the time they graduated. Whereas 10.9 per cent of these students, as freshmen, planned to major in the biologic and physical sciences, only 9.8 per cent actually majored in these sciences as seniors.

Finally, the time black students decide to become doctors may affect their chances for getting into medical schools. A 1973 survey of black medical students revealed that 61 per cent of these successful applicants had decided to become doctors before they entered college; 74 per cent of them had made their decision before the end of the first two years of college. Certainly, an early decision gives the student time to study and achieve in the premedical sciences.

**Discussion**

After a long history of black under-representation, when affirmative-action policies were established, medical schools quickly and substantially increased black representation. The actions taken by medical schools, however, did not fully correct black under-representation. The percentage of black medical school applicants remains too small to support appropriate black representation in medical schools. New kinds of affirmative actions must therefore be employed to increase the percentage of well qualified blacks among medical school applicants.

Data on black college undergraduates largely explain why so few blacks apply to medical schools. Blacks are under-represented in colleges, black attrition from college is high, and blacks are less likely to study traditionally premedical sciences. Many black college freshmen who would like to become doctors, furthermore, have low-degree expectations.

Financial and tutorial assistance programs can help students already in college to remain in college and to become better qualified applicants to medical schools. Programs for these students, however, may not result in a sufficiently large pool of black applicants. The data show that successful black medical-school applicants generally decide early to become doctors. The data suggest, furthermore, that many black college undergraduates are poorly prepared for premedical curricula and therefore study other subjects. We believe, on the basis of the evidence presented above, that effective programs for black high-school students are essential to correct black under-representation in medical schools. We also believe that effective high-school programs would also benefit other minority groups — American Indians, Chicanos and mainland Puerto Ricans — who are also seriously under-represented in the medical profession. We hope that data on the effectiveness of such high-school programs will be collected and reported in the literature.

The key to affirmative action lies in increasing the pool of qualified black applicants to medical schools, rather than trying to achieve appropriate black representation from too limited a pool of black applicants. More black high-school students must receive the academic preparation to achieve in college. Blacks must attain a high level of academic achievement in college if they are to compete for admission to medical schools on an equal basis with other groups. Programs that help black high-school students receive such preparation, together with support programs at the college level, are most likely to ensure the full participation of blacks in a manner consistent with the democratic values of American society.

We are indebted to Dr. Theodore E. Cohn and Ms. Helen Moody, of the Health Arts and Sciences Program, and Ms. Eva Carroad, Ms. Susan Downs, and Ms. Margaret Icle, of the Health Sciences Information Service, Health and Medical Sciences Program, University of California, Berkeley, for assistance.

**References**

6. Office of Minority Affairs: Minority Student Opportunities in United States Medical Schools, 1975-76. Washington, DC, Association of American Medical Colleges, 1975
MINORITY ADMISSIONS: BEYOND BAKKE

Few legal contests in recent times have evoked as much national soul-searching as the celebrated Supreme Court case of Bakke vs. Regents of the University of California. The legal issue revolves about the minority-admissions policy of the medical school at the University of California in Davis and, by implication, the "affirmative-action" policies of all state-supported or federally aided institutions of higher learning.

There is no virtue in further discussion of the case itself. The legal and philosophical subtleties of "quotas," "goals," "reverse discrimination" and the like have been exhaustively explored. However, in all the discussion central point seems to have been forgotten. Regardless of the Court's decision (which, at this writing, is still not known), the problem of black* under-representation in United States medical schools will not have been solved. As Sleeth and Mishell pointed out in this issue of the journal, the basic difficulty is an inadequate supply of black candidates. If their view is substantially correct — and the data that they marshalled seem convincing — the problem is not to be resolved merely by tinkering with admissions policies. Some critics suggest that admissions committees rely too much on grades and test scores, and not enough on personal characteristics. But, whatever criteria one adopts, the evidence presented by Sleeth and Mishell implies that there would be no quick way to increase substantially the present fraction of blacks entering medical school other than through the wholesale, systematic application of quite different standards for blacks and whites. Since such an alternative would be damaging to all concerned, other approaches must be sought.

Sleeth and Mishell suggest that the pool of qualified black applicants to medical school needs to be increased — and, of course, they are right. That is the obvious, sensible, long-term solution to the problem. There are proportionately too few black students entering the educational pipeline leading to graduate schools, and too few staying the distance. Sleeth and Mishell recommend programs in high schools to bring more qualified black premedical students into college. One such program was started in Philadelphia in 1968 by the American Foundation for Negro Affairs (AFNA).1 Supported by federal funds, with assistance from the Association of American Medical Colleges and private foundations, and with the co-operation of the medical schools in Philadelphia, the AFNA plan consists of a co-ordinated educational effort to recruit promising black students who have completed the 10th grade, to interest them in medical careers and to help them through pre-professional education in high school and college. It is still too early to evaluate long-term results, but the initial experience with the plan has been encouraging, and efforts are being made to extend it nationally.

Many educators are convinced that interventions of this sort must begin much earlier if they are to be maximally effective. Children from economically and culturally deprived homes enter elementary school already seriously handicapped. Therefore, it is argued, remedial efforts should be directed at the earliest phases of the learning sequence. Beginning in the middle 1960's, a variety of experiments have been undertaken with preschool children of low-income families, largely black. Described collectively under the name "Head Start," these experiments have sought to stimulate learning in deprived children through special neighborhood nursery schools and home-based programs involving parents as well as children. Similar programs, called "Follow Through," have worked with youngsters in the early elementary-school years. Here, again, data are insufficient to permit firm conclusions about long-term effects, but initial reports seem to indicate that very early compensatory education can improve a child's scholastic performance in the elementary grades. There is now reason to believe that a large-scale federal investment in programs of this sort might pay great dividends in lifting the educational attainments of impoverished children.2

The United States has paid a heavy price for its initial toleration of slavery and for nearly a century of failure to deal with the consequences. The end is not yet in sight. The social, economic and cultural problems that are responsible for the under-representation of blacks in medical schools cannot be solved by the courts. We need to look beyond the Bakke case to the educational handicaps faced by poor black children in this country today. Only by a sustained commitment to practical social action can we hope to provide black children with the same opportunity to become physicians as their white compatriots enjoy. The need for new educational programs is clear: Do we have enough time?

Arnold S. Relman, M.D.
Bakke

Conference of 12/9/77

C.J. - Appeal on either or both grounds

Stands on her words.

Now satisfied that a private citizen has standing to raise Title VI claim.

Could decide case on VI without a remand. Violation of VI is absolutely clear.

No def. set 14th Amends to Title VI

Remand would not be useful.

Should write narrowly & express our view as to valid admission procedure. But Rehr. claims there are no other possible alternatives & we should address this claim. Remedial ed. is one positive step; better recruiting (or of all students); etc.

Diversity is desirable but not imp. at undergraduate level. Not too imp. in technical or scientific schools. But Davis could seek diversity in
Brennan - Revenue on 14th Amend.

Title VI protects whites also but doesn't preclude affirmative action programs that do not stigmatize. Rads. under VI are imp.

Whatever 14th Amend permits, Title VI also permits. They are essentially the same. We therefore must reach Court issue.

Race may be taken into a/k/a always is whether the program stigmatizes some other race or ethnic group. Have no stigma.

5 factors on this memo.

Just a quota - just an honest effort to create an affirmative action program.
Stewart - Affirm on Court. Grounds

Nothing in E/P Clause that prevents a State from making choices in its admissions policy. An educational institution has freedom to make its admissions standards as it please.

We must decide case on Court. grounds - not Title VI

E/P Clause forbids adverse action on basis of race. Once race is accepted as a permissible factor, it becomes decisive in some cases. The basic core meaning of E/P Clause is just this: a State may not act adversely against any person because of his race.

Can't agree with my memo or with C.J. S. Disagree with all memos.

(C.J. spoke & said he was close to Potter.)
White - Raven

The private cause of action under Title VI. Leg. history is cleat.
We should dispose of this issue first.

If we think VI is congruent with 14th Amend, then we must decide Court issue first.
Leg. history of Title VII indicates that quota would be invalid. History of VI is not quite so clear in this respect. But Congressional views have changed since the 60s (e.g. Public Acts Act provides a 10% quota for minorities - free of contest). (Redlining)

We must decide Court issue, & 14th Amend doesn't forbid. Forbid this program.

I could agree with Harvard Plan - but see no difference bet.
@ Pettis plan + Harvard Plan.
Marshall - Reverse

Agree with Brennan & White. Not at most one private cause of action under Title VI. This is a "quota to get someone in." "Not a quota to get someone out." Relies on quote from Rodriguez.

Title VI doesn't apply.

Decide on Court issue.
Religious - Affirm on Court Grounds

Stand on Memo.

Basic agt. with Patten.

Disagreement with LFP - race may not be a factor in any program.

As to Title VI,Reader have probably in no standing. Not in Bill sure that IT is congruent with 14th. Would affirm under either.
Stevens - Affirm on Title VI

Should decide on Title VI.

Problem with Court: issue is that
these programs may not be permanent. Negroes may not need protection many more years.
Thurgood spoke up to say it will be 100 years.

John approves of quota system as temporary measure but not so sure as to permanence. If the later, he could not agree.

Not at last in Harvard Plan. Would like to allow these programs to continue; would therefore like to "check" the Court, issue of let this problem work itself out.

There has been no legislative consideration of the Davis program. There a private cause of action. On merits, the statute is quite different from 14th Amend. In 1964 Congress may have thought VI was same as 14th. But subsequent history shows change in Congress.
MEMORANDUM FOR MR. JUSTICE POWELL

RE: Justice Brennan's Dec. 13 Memo on Bakke

Justice Brennan seems to have expressed his willingness to reverse in part along the "Harvard" lines of our memorandum. If Justices Marshall and White were to take the same tack, it would be an important step, for it would establish what we take to be the central issue of the case: all racial classifications are subject to strict scrutiny. I say that their joinder in the "Harvard" discussion would establish this proposition because there is no reason to evaluate the Davis program in terms of least restrictive alternatives, as we do in Part IV, the "Harvard" section, unless one has agreed that strict scrutiny applies. I suppose that they could reach the same reversal in part by applying a form of middle tier scrutiny, but Justice Brennan does not raise that possibility in this memo. Thus, there is movement.

Turning our Part IV into the opinion of the Court, rather than generous dictum in affirmance, however, raises a problem. By telling the California court that the Harvard program is constitutionally acceptable, that it was constitutional error to forbid all use of race, this Court opens the Mt. Healthy issue noted by Justices
White and Brennan. That is, Davis made its concession on the burden of proof under the assumption that race could not have been taken into account in any way. Now that the Court has told it that it could use race in a Harvard-type system, it is open to Davis to show that operating under that sort of a system the same 16 minority students would have been admitted over Bakke. This does seem like a somewhat easier task than demonstrating that the other white students on the waiting list would have come to Davis if the 16 Task Force slots had been thrown open. It is a bit more concrete, since the University has 16 people before it, and they can say that even applying the constitutionally permissible standards those same 16 people would have been preferred to Bakke. Davis need not investigate the preferences and subsequent careers of the persons on the waiting list; it need only speak of what it would have done in line with the permissible uses of race. In other words, if it had known in the court below that some uses of race were permissible, it would not have conceded that it could not prove that Bakke would not have been admitted but for its impermissible conduct.

This possibility raises the necessity for a remand, according to Justices Brennan and White, because the Mt. Healthy Court declared that it was not enough that impermissible discrimination (in a First Amendment context) had been a "motivating" factor; the defendant
had to be given the opportunity to show that it was not a "but for" cause. In practical terms, I am not quite sure how one separates a "motivating factor" from a "but for" cause. The University, however, can claim that its decision as to Bakke would have been the same even in the absence of the impermissible use of race as the Court has now described them. Since the court below improperly restricted them, the University was unfairly induced to make a concession to which it now should not be held.

Notice first that there is some tension between Mt. Healthy and your opinion in Arlington Heights. Arlington Heights held that "[w]hen there is proof that a discriminatory purpose has been a motivating factor in the decision," judicial deference is no longer proper. It stressed that the discriminatory purpose need not be dominant. Arlington Heights, in the absence of Mt. Healthy, could be read as a refusal to dissect the elements of a decision to determine which ones were the "but for" factors and which were not. If that were the law, the reversal in part and the remand would not be necessary. The Court, having concluded that impermissible discrimination on the basis of race was a "motivating factor," would not permit the defendant to try to sort out the different motivations and prove that the
one in question would not have made any difference. **Mt. Healthy** goes beyond **Arlington Heights** in that it says discovery of improper discrimination as a "motivating factor" does not end the inquiry; it must also be a "but for" cause. It requires the improper motive to be "dominant" in that limited sense. **Mt. Healthy** evidences a greater willingness to investigate and separate the motivations of the discriminator. It is not necessarily in conflict with **Arlington Heights**, however. And since it was unanimous, I suppose it must be held to extend **Arlington Heights** in the fashion described in the White-Brennan memos.

Unless discrimination on the basis of First Amendment rights is to be distinguished from racial discrimination, then, it seems to follow from turning our "Harvard" discussion from dictum into holding that the Brennan-White view of the disposition is correct. The only other way for the Court to adhere to our memo, yet affirm, would be to read **Mt. Healthy** narrowly and focus on the fact of the concession below. In **Mt. Healthy**, the Court was concerned that the employee, by creating a First Amendment cause celebre, not be able to insulate himself from the normal kind of fitness review in which employers engage. Thus, it was fair to permit the employer to show that the normal review process would have produced the same results. Here, the review process -- i.e., the admissions process -- is precisely what is at stake. It
is impossible to say how -- or even if -- Davis would have operated its admission program if it had known that the Harvard plan was permissible. Thus, there is no existing, neutral review plan against which to test the admissions decision in the hypothetical absence of the impermissible conduct, as there was in Mt. Healthy. Since the University conceded that it could not prove that Bakke would have been kept out but for the operation of the program it did operate, the Court will not go behind that concession and speculate about the sorts of programs it would have operated had it known a Harvard plan was okay. That would add an additional layer of uncertainty to the Mt. Healthy inquiry.

The fact that the state court gave Davis the wrong standard by which to judge its concession would be irrelevant; since no neutral review program pre-existed the impermissible use of race, any reconstruction of what the University would have done would have been just as speculative at that stage of the litigation as it is now. Having chosen not to fight out the causation questions stemming from the impermissible program it did operate, the University must now be held to that concession. Hence, the judgment must be affirmed.

I doubt that Justices White or Brennan would be very receptive to this position. From their point of view, even if they join our "Harvard" position, it is
politically very desirable to reverse the judgment below, if only in part. Assuming that they would be willing to recognize the basis of the "Harvard" discussion (that strict scrutiny applies), and a Court could be obtained on that point and on the permissible uses of race, an important victory would have been won without regard to the form of the judgment.
December 19, 1977

MEMORANDUM TO THE CONFERENCE

No. 76-811 Regents v. Bakke

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

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

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

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If the injunction had been issued by a federal court, I suppose we could simply interpret it to resolve the ambiguity. I am not sure we have as much authority to interpret a state court injunction.
Thus, in the unlikely but welcome event that a consensus develops for allowing the competitive consideration of race as an element, I think we should affirm as to the Davis program, but reverse in part as to the scope of the injunction.

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

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

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

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

If Mt. Healthy may be read as permitting those guilty of unconstitutional discrimination to defend by advancing reasons they might have considered but did not, then Arlington Heights v. Metropolitan Housing Devel. Corp., 429 U.S. 252 (1977), was overruled sub silentio the day it was decided. I say this because such a reading of Mt. Healthy would uphold a defendant's decision where improper racial discrimination was in fact the only motive entertained.
The answer is not speculative. Davis has conceded its two-track system was designed to assure 16 minority admissions, and exclude a corresponding number of whites regardless of their qualifications and capacity to contribute to diversity. In Arlington Heights we said that where "there is proof that a discriminatory purpose has been a motivating factor in the [state action], judicial deference is no longer justified." 429 U.S. at 265-266. Here the improper racial purpose was the sole motivation for the dual admissions program. Mt. Healthy is wholly inapposite.

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

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

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

Sincerely,

LFP/lab