MEMORANDUM FOR MR. JUSTICE POWELL

FROM: Bob
DATE: 2/10/78
RE: Justice White's Bakke Memo

It has taken five months and 41 pages of sound and fury to move the Court back to the position it was in before supplemental briefing on Title VI was requested. (I say the "Court," because as I recall there were only five votes to ask for supplemental briefing. Justice White, who voted for the supplementation, would make the fifth vote for saying that Title VI does not get the Court anywhere.)

This does seem to be the definitive work on the subject of Title VI and its meaning in relation to the Fourteenth Amendment. After this, only the blindest reliance on a "plain meaning" doctrine could support a conclusion that Title VI departed from the principles of the Equal Protection Clause. (Of course, this was apparent to some of us earlier than to others.)

I continue to feel that the proper way to dispose of the question of the private right of action is to say that Petr waived any objection to it below and then assume arguendo that it exists. There is no point in resolving any Title VI issues that can be avoided. Lau v. Nichols would support this approach.

If only Justice Blackmun would get his feet wet, progress could begin.
MEMORANDUM FOR MR. JUSTICE POWELL

FROM: Bob  DATE: 2/8/78
RE: Possible Common Ground With Justice Brennan in Bakke

I explored this issue informally with Dave Carpenter today. After our conversation, I was pessimistic about the possibility that Justice Brennan would join substantial portions of an opinion you authored. I should make it clear, however, that Dave has not sounded Justice Brennan out on this issue for some time. Also, I get the impression that Dave may be less flexible in his approach to making up a Court opinion than Justice Brennan himself might be. If anything breaks in their Chambers, Dave will let us know.

As to specific issues separating your position from Justice Brennan's, Dave was convinced that our differences were over "small points." I was not so convinced, primarily because Dave's view seemed to be not so much that the points themselves were small, but that our positions on them were not seriously defensible. First, Dave believes that Justice Brennan will maintain his proposition that stigmatizing and non-stigmatizing discrimination can be differentiated and should be treated differently in terms of judicial review. This does not seem to be a small point to me, since much of our memo is directed to the idea that, in cases such as this, it is too difficult for a court to attempt to sort out who is
stigmatized and who is not. This is the thrust of Justice Douglas's DeFunis dissent, from which we quote at length.

If this classification is non-stigmatizing, and if such classifications do not trigger "strict" scrutiny, then our entire memo evaporates.

Second, Dave believes that Justice Brennan will refuse to agree that under the facts of this case, the only compelling state interest advanced by the state was integration of the student body, i.e., diversity. According to Dave, Justice Brennan believes that correcting "societal discrimination" is a compelling state interest, and one that the University plausibly could serve without guidance from the Legislature or other state entities. I suggested that our memo left open the possibility that if the legislature or some other body charged with remedying the effects of some broad-based notion of discrimination investigated the problem and made a judgment based on some relevant evidence, this might be considered a compelling state justification. Dave refused to concede that there was any federal interest in preventing the states from delegating decision-making authority in any way it sees fit. This, despite my assertion that such a principle underlay City of Lafayette! Dave dismissed this as a 'statutory' case, for whatever relevance that has. Again, this point seems to be a linchpin of our memo, because if you accept the idea that the University is in a position to redress the wrongs perpetrated by society at large on blacks as an undifferentiated group, then once more our less restrictive alternative analysis melts away.
Third, Dave thinks that Justice Brennan could agree to apply less restrictive alternative analysis to this case, though he would disagree that our "case-by-case consideration" alternative actually is less restrictive. I think that is the weakest chink in our armor, but I do not understand why, given Justice Brennan's purported positions on the previous two issues, he even has to reach a less-restrictive-alternative inquiry. In any event, since he would conclude that the existing Davis plans is the least restrictive alternative, it is not clear what it would mean to join a section of your opinion applying such analysis.

Dave says that it is Justice Brennan's belief that you will be assigned the opinion announcing the judgment of the Court, assuming that Justice Blackmun ends up somewhere on our side of the fence. This belief is based on the fact that yours would be the narrowest ground for reversal, and it would be reversal only in part. Because of that fact, Justice Brennan concludes that it would be your opinion to which courts and schools would look for guidance, since you would state the actual judgment and ratio. For that reason, says Dave, Justice Brennan is eager to join as much of your opinion as he can. Yet Dave gave little indication that his boss could join anything of significance in our memo as it now stands.
MEMORANDUM TO THE CONFERENCE

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

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

Sincerely,

Attachment
February 24, 1978

Mr. Chief Justice Warren E. Burger
Supreme Court of the United States
One First Street, N.E.
Washington, D.C. 20543

My dear Mr. Chief Justice:

Enclosed please find copies of pages 20 and 21 of a Supplemental Brief for the United States filed by the Department of Justice in October, 1977 in the case of University of California vs. Allan Bakke.

Also enclosed find pages H4315, H4316 and H4317 of the May 12, 1976 Congressional Record which includes the debate on my so-called "anti-quota" amendment.

If I read the Justice Department brief correctly, I was one hundred and eighty degrees misinterpreted. The fact is my amendment passed -- both the House and Conference Committee (modified) as an anti-quota amendment in purpose and it has been a statute for over a year but ignored by the Department of Health, Education and Welfare.

I cannot understand how all of the above can go officially unnoticed and even be apparently misused by the Department of Justice in a statement before your court.

Sincerely yours,

Edwin D. Eshleman
Member of Congress, Retired

This is mildly interesting.

Ed

EDE: msp

Enclosures
be unlawful for the Secretary to defer or limit any Federal financial assistance on the basis of any failure to comply with the imposition of quotas (or any other numerical requirements which have the effect of imposing quotas) on the student admission practices of an institution of higher education * * *.” The statute, as so amended, was enacted. Education Amendments of 1976, Pub. L. 94-482, 90 Stat. 2233, adding Section 440(c) to the General Education Provisions Act, 20 U.S.C. (1976 ed.) 1231i(c). Thus the statute ultimately enacted did not prohibit goals or timetables; moreover, it is significant that the statute applied only to programs required by the federal government, rather than to programs voluntarily adopted. Congress therefore concluded, at least by negative implication, that minority-sensitive programs employing goals and timetables do not violate Title VI. 16

The present Congress also has considered the propriety of minority-sensitive programs. Representative Levitas proposed an amendment to an appropriations bill that, in the words of Representative Ashbrook, would have limited the federal government’s ability “to initiate, carry out or enforce any program of affirmative action” (123 Cong. Rec. H6099 (daily

16 The Conference Committee stated that the amended language took no position on the question whether the Secretary of Health, Education, and Welfare could withhold federal funds because an institution of higher learning declined to adopt goals or timetables. H.R. Conf. Rep. No. 94-1701, 94th Cong., 2d Sess. 243 (1976). This reservation did not pertain, however, to the lawfulness of voluntarily-adopted minority-sensitive programs.
The gentleman referred to grants to nongovernmental agencies, institutions, etc. et cetera. What can the gentleman say in the way of assurance that these grants will not go to the States and States efforts provided by the doctrine of interdependence, or the declaration of interdependence, et cetera? I happen to believe they are the very people who will get the grants we are talking about.

Mr. BRADEMANS. Mr. Chairman, I might say to the gentleman that the concern the gentleman has expressed has been addressed to by the amendment that has been offered by the gentleman from Ohio (Mr. Ashbrook) as a substitute for the amendment offered by the gentleman from Oregon (Mr. Quix). The question was taken; and on a division (demanded by Mr. Ashbrook) there were—yes 22, noes 61.

Mr. ASHBROOK. Mr. Chairman, I demand a recorded vote, and pending this I make the point of order that a quorum is not present.

The CHAIRMAN. The Chair will count. One hundred forty-one Members are present.

Mr. ASHBROOK. Mr. Chairman, I demand a recorded vote.

A recorded vote was refused. So the amendment offered as a substitute for the amendment was rejected.

The CHAIRMAN. The question is on the amendment offered by the gentleman from Minnesota (Mr. Quix). The amendment was agreed to.

Amendment offered by Mr. Eshleman. Mr. Chairman, I offer an amendment.

Mr. THOMPSON. Mr. Chairman, I have a point of order against the amendment which I would reserve until the amendment is rejected.

The CHAIRMAN. The gentleman from New Jersey (Mr. Thompson) reserves a point of order against the amendment.

The Clerk will report the amendment. The Clerk read as follows:

Amendment offered by Mr. Eshleman: On page 85, line 25, insert "(a)" immediately after "Sec. 202".

On page 67, immediately after line 7, insert the following new subsection:

"(b) It shall be unlawful for the Secretary to require the imposition of quotas, goals, or any other numerical requirements on the student admission practice of a State or local educational agency or institution of higher education, community college school agency offering a pre-school program, or other educational institution receiving Federal funds, whether directly or indirectly, under any or other provisions of this Act, if the requirements so deferred or limited on the basis of failure to comply with such numerical requirements." POINT OF ORDER

The CHAIRMAN. Does the gentleman from New Jersey insist upon his point of order?

Mr. THOMPSON. Yes, Mr. Chairman. The CHAIRMAN. The gentleman is recognized.

Mr. THOMPSON. Mr. Chairman, I make the point of order—I respectfully regret that I must do so, I will say to my friend from Pennsylvania—that the amendment is nonsensical. Mr. Chairman, this is a higher education bill. While a very few of these provisions may have an impact on secondary schools, it is entirely indirect. The great majority, in fact, 90 percent, is in higher education. As a matter of fact, 100 percent of it. This can only be characterized as a higher education bill.

The gentleman's amendment deals with the admissions practices of elementary and secondary schools, and even preschools. That subject matter is completely foreign to the subject matter of the bill. I repeat, it is a higher education bill.

The gentleman's amendment, by reaching out to admissions policies of preschool, elementary and secondary schools, goes too far and is, therefore, not germane. There is one amendment in the bill, Mr. Chairman, of the General Education Provision Act which the gentleman's amendment attempts to amend. Here too, however, the committee bill is exclusively a higher education bill.

The committee amendment to the General Education Provision Act proposes a 1-year extension of the "end for the improvement of postsecondary education." This is the only way the committee bill amends the general education provisions at all.

Further, Mr. Chairman, the amendment deals with the institution for receiving Federal funds directly or indirectly under any provision of law. Mr. Chairman, I repeat that under any provision of law, this is beyond the limited scope of the bill.

The CHAIRMAN. Does the gentleman from Pennsylvania (Mr. Eshleman) wish to respond on the point of order?

Mr. Eshleman. Mr. Chairman, I would just point out to the Chair that I submitted this amendment under section 202, which is opening section 449 of the General Education Provision Act, which I think I have amended on occasion before in this House, because we are under the provision of general education. But in case the Chair should rule against that, I have another amendment on the desk which I would send to the desk which is limited only to higher education.

The CHAIRMAN. The Chair is prepared to rule.

The committee amendment clearly refers to higher education and, with only extremely narrow amendment, can deal with no matter that would substantially relate to other programs.

On the other hand, the amendment offered by the gentleman from Pennsylvania is a blank one, with no other amendment, so that no matter that would substantially relate to other programs.

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CONGRESSIONAL RECORD — HOUSE
May 12, 1976

H 4316

the end thereof the following new subsec-

(2) It shall be unlawful for the Secre-
tary to require the imposition of quotas, goals, or any other numerical requirements on any university, college, or institution of higher education, community college receiving Federal funds, whether directly or indirectly, under any applicable program, and funds shall not be deferred or limited on the basis of failure to comply with such numerical requirements.

POINT OF ORDER
Mr. THOMPSON. Mr. Chairman, I make a point of order against the amend-
ment.

The CHAIRMAN. The gentleman from New Jersey (Mr. Thompson) will state his point of order.

Mr. THOMPSON. Mr. Chairman, the fact is that there remains language in the gentleman's amendment which says, "* * * under any provision of law, and funds shall not be deferred or limited on the basis of failure to comply with such numerical requirements."

The fact that the entire scope of the act is quoted, and "* * * any provision of law" still remains in, I would insist, Mr. Chairman, makes it not germane to the legislation to which it is addressed.

The CHAIRMAN. Does the gentleman from Pennsylvania (Mr. Eschelman) desire to be heard?

Mr. ESCHELMAN. Mr. Chairman, I would first point out, respectfully, that the gentleman from New Jersey (Mr. Thompson) is incorrect. I did not leave in under any provision of law. I changed it to "under any applicable programs." And that original terminology is not there, as the gentleman stated. I have attempted—maybe I said, in Pennsylvania Dutch—to limit this to institutions of higher education.

Mr. THOMPSON. Mr. Chairman, will the gentleman yield?

Mr. ESCHELMAN. I yield to the gentleman from New Jersey (Mr. Thompson).

Mr. THOMPSON. Under the General Education Provisions Act. That includes all programs of elementary and secondary, administered by the Commissioner of Education.

Mr. ESCHELMAN. Mr. Chairman, I will say to the gentleman from New Jersey that I am willing to leave the decision to the Chair.

Mr. THOMPSON. So am I.

The CHAIRMAN (Mr. Wright). The Chair is prepared to rule.

The Chair carefully reviewed the changes made by the gentleman from Pennsylvania (Mr. Eschelman) in the language contained in the amendment as orally offered. The Chair observes that the amendment presently before the Committee is limited to the applications of higher education or community colleges, and that it applies only to those institutions of higher education and community colleges which receive Federal funds under any applicable program.

The Chair believes that the amendment as presently drafted before the Committee is germane to the bill, and the point of order is overruled.

Mr. ESCHELMAN. Mr. Chairman, this is a simple amendment, but I will admit it is a controversial amendment.

Really all the amendment does is to correct what I think has been a bad habit of the Department of Health, Education, and Welfare, and that is that the Department has taken the word, "quotas," and made it synonymous with the word, "quotas."

I also have seen letters to colleges in my district, including a State institution in my district, in which they were specifically told that they must have 13 percent of their enrollment composed of minority groups. The Chair recognizes the gentleman from Pennsylvania (Mr. Eschelman) in support of his amendment.

Mr. ESCHELMAN. Mr. Chairman, this is a simple amendment, but I will admit it is a controversial amendment.

Really all the amendment does is to correct what I think has been a bad habit of the Department of Health, Education, and Welfare, and that is that the Department has taken the word, "quotas," and made it synonymous with the word, "quotas."

I also have seen letters to colleges in my district, including a State institution in my district, in which they were specifically told that they must have 13 percent of their enrollment composed of minority groups. That is what I am pointing out. I do not know what would be wrong with 14 percent, but the figure is 13 percent. I do not know whether my colleagues want to believe this or not, but I personally believe that the enrollment figures could be 20 percent or 22 percent.

The point is that I do not see why the Department of Health, Education, and Welfare should have the authority to tell a college in my district that 13 percent of its freshman class must be composed of certain minority groups.

I am not in the habit of weakening civil rights. In fact, I believe if HEW would abandon this quota system, we would strengthen civil rights. This kind of thing is what is "turning off" the American public. Nowhere do we have quotas in the Constitution. Why put that in the bill? HEW has put it in by bureaucratic ruling, and by our inaction we are going to let it remain. We are going to let it stay by our inaction.

If I give the Members that we will strengthen civil rights in this country if we prohibit the use of the word, "quotas."

Also, how many of you want HEW to have a desk in the dean of admissions offices of the colleges and universities within your district? That is what they have done. HEW has made themselves a part of every dean of admissions office of all our colleges and universities.

Mr. STEIGER of Wisconsin. Mr. Chairman, I will yield.

Mr. ESCHELMAN. I yield to the gentleman from Wisconsin.

Mr. STEIGER of Wisconsin. Mr. Chairman, I appreciate the gentleman's yielding.

I am trying to figure out in my own mind, if I understand correctly from the gentleman from Pennsylvania, where under present law or in any bill or in any rule or regulation of the Department of Health, Education, and Welfare there is any quota, goal, or numerical requirement relating to student admissions practices.

Mr. ESCHELMAN. Mr. Chairman, I appr-
Mr. Chairman, what the gentlewoman from New York (Mrs. CHESWOLD) said with respect to schools that have been under violation on the bill, I would say with respect to this amendment—that it does not apply to schools that have been under violation on the bill, the amendment would not apply to schools that have not yet been under violation on the bill.

Mr. CHESWOLD. Once a legal determination has been made, as set by the court-mandated guidelines, they are put on a numerical ratio.

Mr. ESHLEMAN. If the gentleman from Pennsylvania (Mr. ESHLEMAN) held further, may I ask her a question?

Mr. CHESWOLD. Yes. Would the gentleman say that the Department of Education, and Welfare can correct a legal determination, or does our court system do that?

Mr. CHESWOLD. The Judicial system.

Mr. ESHLEMAN. Mr. Chairman, I oppose this amendment which prohibits the imposition of quotas, goals, or any other numerical requirements in the admission of students to religious institutions. It would end the recent affirmative action efforts in education which are designed to remedy past discrimination.

In the past institutions have restricted the number of women either by using a quota or a set percentage of the applicants as the number to be accepted. Title IX prohibits such discrimination and requires that women be selected on a nonsex basis. In fact, admissions quotas based on sex are prohibited by statute.

While the establishment of goals are reasonable, such goals have never been levied by HEW to remedy sex discrimination in student admissions.

Numerical goals based on race and sex have been recognized by the courts as a valid and indispensable means of eliminating discrimination. There is a significant difference between such goals and the imposition of quotas. Quotas require the selection of a pre-determined number of individuals. Numerical goals are not set by the institution, encouraging the hiring of persons who have been discriminated against, but do not require that a specific number be chosen. HEW has set numerical goals after a finding of discrimination. Enforcing full numerical goals is insufficient to end discrimination.

The courts have interpreted Title VII of the Civil Rights Act of 1964 to permit numerical goals to end employment discrimination. Enforcing full employment discrimination is insufficient to end numerical goals and are effective treatment of women and minorities. This amendment would establish HEW regulations from such remedies.

Any plan to end discrimination must be race-oriented. The plan must be able to determine whether, in fact, women have been discriminated against, informed of admission policies and finally, whether or not they are admitted. By denying Federal assistance to schools that use the numerical remedies, this amendment deprives them of enforcement powers and severely undercuts efforts to move toward civil rights and urge colleagues to vote against it.

The CHAIRMAN. The question is on the amendment offered by the gentleman from Pennsylvania (Mr. ESHLEMAN).

The question was taken, and on a division (Democratic, 44, Republican, 23) there were—aye 44, noes 23.

Mr. DELUMPS. Mr. Chairman, I demand a recorded vote.

A recorded vote was refused.

So the amendment was agreed to.

AMENDMENT OFFERED BY MR. CONLAN

Mr. CONLAN. Mr. Chairman, I offer an amendment.

The Clerk read as follows:

Amendment offered by Mr. CONLAN: On page 88, between lines 6 and 7, add the following new subsection:

"(c) No grant, contract, or support is authorized under this Act for any educational program, curriculum research and development, teacher orientation, or any project involving one or more students and teacher-student contact, which affects in any way the religious beliefs or religious activities of the institution, if such religious beliefs or activities are in conflict with the principles of the United States.

On page 88, lines 7, redesignate subsection (d) as subsection (e)."

Mr. O'HARA. Mr. Chairman, I reserve a point of order on the amendment.

The CHAIRMAN. The gentleman from Michigan reserves a point of order on the amendment.

(Mr. CONLAN asked and was given permission to revise and extend his remarks.)

Mr. CONLAN. Mr. Chairman, this amendment prohibiting taxpayer support for any educational program or activity involving any aspect of the religion of secular humanism is a legislative and constitutional necessity.

The amendment touches the heart of the concept of academic freedom—a concept which in some circles has been virtually destroyed by the false assumption that the "secular humanist" stance taken by many administrators and others in the area of understanding the role and practice is fundamentally religiously "neutral."

Nothing could be further from the truth.

The U.S. Supreme Court stated clearly in the 1961 decision in the case of Torcaso against Watkins that secular humanism is a religion—a world and life view.

The highest court perceptively declared in this case that the establishment of the State, the existing of a religious belief is not a violation of the Constitution.

Among religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhists, Jews, Unitarians, Secular Humanists, and others.

Secular humanism declares that there is no God, that man is his own god. Educators advocating a secular humanist view consistently excluded from the classroom the moral and ethical principles based on the Judaic-Christian belief in God.

Historically, the increasingly vehe
tent attack upon and exclusion of certain Judaic-Christian Biblical views of origins and ethics has falsely been thought to be the upsurging of the ban-

ner of "scientific or humanistic neutralism."

But we must recognize that in Abington against Schempp, in 1963, the Supreme Court upheld the rule that—

The Government may not establish a "religion of secularism" in the sense of affirming or denying the existence of God or trying to determine how the heavenly bodies operate, thus "preferring those who believe in no religion over those who do believe."

In vogue among certain educationalists is the belief that ethics are situational—never absolute. That is a religious standpoint. Also, in vogue among the educationalists is the belief that the idea of culture is completely relative. For those persons, there are no norms for evaluating barbarism as distinct from civilization. That is a religious stance.

Mr. Speaker, it is clear that Federal funds have been used in grants, contracts, and support for educational programs, projects, and activities which give preference to the religion of secular humanism. That fact is appalling. And those preferential funds should be stopped.

This Congress is going to finance preferential treatment for the religion of secular humanism in public school educational content is to rebuke the tens of millions of Christian and Jewish men, women, and children. Instead of being the Christian, the Creator and Sustainer, who do embrace a faith in that God, who actively subscribe to Judaic-Christian principles and ethics and do not want to see those principles they teach in the home later destroyed in the school.

Since we are not funding the Judeo-Christian ethic, I see no reason why we should be funding another religion that is hostile to the Christian viewpoint. If we are going to stay neutral in this matter of religion, then let us stay neutral across the board and not slap the Judeo-Christian ethic in the face by voting against this amendment.

I urge passage of this amendment. If you believe, as I do, that hundreds of thousands of your constituents do not want their tax dollars financing the destruction of the principles they teach in the Judeo-Christian ethic, then you will want to vote "yes" on this amendment.

POINT OF ORDER

The CHAIRMAN. Does the gentleman from Michigan (Mr. O'HARA) insist on a point of order?

Mr. O'HARA. I do, Mr. Chairman.

The amendment as offered says, "grant, contract, or support is authorized under this Act," and in the context in which it is offered, it is clear that Arizona would apply to all of the parts of the National Education Act because it inserts into it on page 88 between lines 6 and 7, which is all of 11, as an amendment of section 603 of the National Defense Education Act. So he goes very exceedingly far beyond the scope of the provisions of the sections of the section he offers to amend. Therefore, his amendment is not germane.

The CHAIRMAN. Does the gentleman from Arizona (Mr. CONLAN) desire to be heard on the point of order?
MEMORANDUM FOR MR. JUSTICE POWELL

FROM: Bob DATE: April 11, 1978
RE: Disposition in Regents v. Bakke, No. 76-811

After reconsidering the proper treatment of the California court's judgment in this case, I am more convinced than ever of the need to reverse in part. In addition to all the reasons -- which I will not repeat since they are readily accessible in the Bakke Notebook that Linda prepared -- stated in your memoranda to the Conference of December 19 and January 5, a reason occurred to me tonight that seems compelling. I regret not thinking of it months ago, when the exchange over the scope of the judgment was occurring.

As you will recall, 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.

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 direct the trial court to enter an order directing Bakke's admission. Petn 80a.

John{ Justice Stevens} 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." You have argued that in light of the obvious import of the California Supreme Court opinion, the underscored "his" must be read as a general pronoun referring to "any other applicant." I still believe that this reading carries the greatest common sense, and that Justice Stevens would not press his upon the Court if he were not so anxious to avoid the constitutional question in this case.
John's reading does not, as I view it, jibe with common sense.

But, in addition to the common sense of the matter, Justice Stevens' reading would make Part (ii) of the judgment utterly meaningless. The Supreme Court in effect has reversed Part (i), ordering 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 would cast upon it anyway -- 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 hardly would

Justice Stevens himself noted this fact in his memorandum to the Conference of December 12. At that time, the significance of it escaped me. But now I am forced to wonder whether it is the usual procedure of this
Court to interpret a judgment so as to render a substantial portion of it totally nugatory. I would think not, so that the weight of the evidence seems to tip clearly in favor of reading the California judgment as embracing the opinion.

* * * * *

Another reason for not adopting the course charted by the Chief is the political impact of the decision. If you are the fifth vote to affirm, your opinion certainly could not be the opinion of the Court, since the discussion of the validity of "competitive consideration of race" would then be entirely dictum; your opinion, not being the narrowest in favor of that disposition, would follow a rather cryptic opinion for the Court (and perhaps a series of rather cryptic and restrictive separate opinions) and would not be read as the controlling word on the subject, but at most as an attempt to put a gloss on the otherwise preclusive and Delphic opinions of a fractionated Court. To follow this route seems to be abject surrender of the objective you most desire: furnishing guidance to educators as to how they legitimately pursue these objectives. The result almost surely would be increased turmoil in the academic community and in all the other segments of society in
which preferential programs exist.

Thus, the only way I could recommend agreeing to affirm in toto would be if the other four Justices in that camp agreed to join your opinion with the bombshell dictum. They obviously will do no such thing, since they would have joined you already if they could agree to follow your approach. That being the case, I think you owe it to your perception of the just and proper outcome to remain where you are and to put the case over until next Term if need be.

Of course, if Justice Blackmun ultimately comes down in favor of affirmance, all will have gone for nought. But I see no reason why you, rather than he, should be the one to engineer the frustration of your own goals. And if Justice Blackmun should come down somewhere on your side of the fence, then your opinion almost certainly will be the narrowest and will be read as the prescription for solving this enormous problem.

Thus, I think the Chief's suggestion is a no-win proposition. Waiting for Justice Blackmun at least offers some hope of success.

Incidentally, we were wrong in thinking that the Chief's view of the case as currently a 4-4 tie is incorrect. There are presently 4 votes to say at least
that the University's use of race here was improper: the Chief and Stewart, Rehnquist, and Stevens, JJ. There are four to say that race may be used, at least in some circumstances: Brennan, White, Marshall, & Powell, JJ. Hence, on that point the Chief is right in saying that the vote is 4-4. It is 5-3 on the issue of whether Bakke gets his order directing that he be admitted: the Chief, Stewart, Powell, Rehnquist, & Stevens, JJ, say yes. Justices Brennan, White, and Marshall say no.
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.

*I am not sure how John will vote if he concludes the 14th Amendment rather than the statute should be applied.
The California Supreme Court vacated the first part of the judgment, holding that the burden should have been placed upon the University to demonstrate that Bakke would not have been admitted even in the absence of the unconstitutional program. It remanded for proceedings on that score. When the University conceded that it could not carry its burden on that issue, the supreme court modified its opinion to instruct the trial court to enter an order directing Bakke's admission. Petn 80a.

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

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

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

It was in light of the foregoing that I concluded to cast what, in effect, is a split vote: affirm so much of the California court's order that would reinstate Bakke, but reverse the portion thereof that enjoins the medical school from considering "the race of any other applicant in
passing upon his application for admission". Thus, at the end of my opinion the bottom line would be: "Affirm in part and reverse in part". Bakke would win his case, but the medical school would be free to consider race as one element in its admissions determinations, with all places open to competition.

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

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

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

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

More broadly, I think the country deserves and expects an unequivocal answer from its highest court. Four possible answers have emerged from the plethora of discussions and memoranda: (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

1fp/ss
April 13, 1978

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

MEMORANDUM TO THE CONFERENCE

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

If only the principle of color-blindness had been accepted by the majority in Plessy in 1896, we would not be faced with this problem in 1978. We must remember, however, that this principle appeared only in the dissent. In the 60 years from Plessy to Brown, ours was a Nation where, by law, individuals could be given "special" treatment based on race. For us now to say that the
principle of color-blindness prevents the University from giving "special" consideration to race when this Court, in 1896 licensed the states to continue to consider race, is to make a mockery of the principle of "equal justice under law."

As a result of our last discussion on this case, I wish also to address the question of whether Negroes have "arrived." Just a few examples illustrate that Negroes most certainly have not. In our own Court, we have had only three Negro law clerks, and not so far have we had a Negro Officer of the Court. On a broader scale, this week's U.S. News and World Report has a story about "Who Runs America." They list some 83 persons — not one Negro, even as a would-be runnerup. And the economic disparity between the races is increasing. According to the latest report of the United States Commission on Civil Rights:

"While the average jobless rate for whites fell from 7 percent in 1976 to 6.2 percent in 1977, the average unemployment rate for blacks increased from 13.8 percent to 13.9 percent during that period. The black unemployment rate thus was more than twice as great as that for whites during 1977. For workers of Hispanic origin, the average jobless rate dropped from 11.5 percent in 1976 to 10 percent in 1977 but unemployment among Hispanic was still 1.6 times higher than that among whites."

The dream of America as the melting pot has not been realized by Negroes — either the Negro did not get into the pot, or he did not get melted down. The statistics on unemployment and the other statistics quoted in the briefs
of the Solicitor General and other amici document the vast gulf between White and Black America. That gulf was brought about by centuries of slavery and then by another century in which, with the approval of this Court, states were permitted to treat Negroes "specially."

This case is here now because of that sordid history. So despite the lousy record, the poorly reasoned lower court opinion, and the absence as parties of those who will be most affected by the decision (the Negro applicants), we are stuck with this case. We are not yet all equals, in large part because of the refusal of the Plessy Court to adopt the principle of color-blindness. It would be the cruelest irony for this Court to adopt the dissent in Plessy now and hold that the University must use color-blind admissions.

Sincerely,

[Signature]

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

April 28, 1978

MEMORANDUM TO THE CONFERENCE:

I will defer assignments in the outstanding argued cases until all votes are in as to the following cases:

76-811 - Bakke
76-6573 - Bell
76-6997 - Lockett
77-747 - Fleck

I am not in a position to make these final assignments until all votes are firmly in hand. Even one change has a "domino" impact on all other assignments -- especially at this time of the Term!

Regards,

P.S. I will send a memo on "snails" shortly.
OUTLINE OF PROSPECTIVE OPINION IN BAKKE, NO. 76-811

INTRODUCTION [essentially written]

I. FACTS [essentially written - old draft; add old standing footnote]

II. TITLE VI [new]
   A. Private Cause of Action [assume arguendo that it exists or conclude that Petitioner has waived right to object]
   B. Interpretation [examine legislative history and conclude that Title VI cannot be held to prohibit conduct permitted by the Fourteenth Amendment]

III. FOURTEENTH AMENDMENT - QUOTA OR GOAL? [presently Part I]

IV. FOURTEENTH AMENDMENT - LEVEL OF SCRUTINY [presently Part II]
   A. History of the Fourteenth Amendment.
   B. Cases Cited by Petr as Favoring Consideration of Race

V. FOURTEENTH AMENDMENT - STATE INTERESTS [presently Part III]
   A. Obtaining Specified Percentages
   B. Remediya Past Discrimination
   C. Improving Health Care for Minority Groups
   D. Diversity/First Amendment Concerns

VI. FOURTEENTH AMENDMENT - MEANS/END SCRUTINY [presently Part IV]

Present system goes too far, but so does portion of California Supreme Court judgment proscribing all use of race; competitive consideration is permissible. This portion of the order must be reversed.
VII. INJUNCTION [new]

Process approved in previous section cannot be rerun on the basis of some fiction. Bakke deserves order directing his admission. Affirm that portion of the judgment.

VIII. CONCLUSION

APPENDIX - H ARVARD PLAN
The following is an outline of a proposed opinion in Regents v. Bakke, No. 76-811, by Powell, J. The sections of such an opinion which other Members of the Court could be expected to join are noted.

OUTLINE OF BAKKE OPINION

INTRODUCTION

I. FACTS

II. TITLE VI

A. Existence of a Private Cause of Action. (Here it would be assumed arguendo that a cause of action exists, or be held that petitioner has waived its right to object to Bakke's standing. WJB, PS, BRW, TM, and HAB could be expected to agree.)

B. Interpretation of Title VI. (Here the legislative history of Title VI would be examined; it would be concluded that Title VI does not prohibit uses of race consistent with the Fourteenth Amendment. WJB, BRW, TM, HAB, and perhaps PS could be expected to join.)

III. FOURTEENTH AMENDMENT TERMINOLOGY - QUOTA OR GOAL
(All Members of the Court appear to agree that it is irrelevant whether this program is called a quota or goal.)

IV. FOURTEENTH AMENDMENT - LEVEL OF SCRUTINY

A. History of the Fourteenth Amendment.

B. Cases Cited by Petitioner as Cutting Against Application of Strict Scrutiny.

V. FOURTEENTH AMENDMENT - STATE INTERESTS

A. Guaranteeing Specified Percentages.
B. Remedying Past Discrimination.

C. Improving Health Care for Minority Groups.

D. Diversity/First Amendment Concerns. (WJB, BRW, TM, and HAB can be expected to join the conclusion that this is a compelling state interest, but to write separately and find that V-A, -B, and -C are, too.)

VI. FOURTEENTH AMENDMENT - MEANS/END SCRUTINY

A. Special Program Vastly Over- and Under-inclusive.

B. Competitive Consideration of Race Permissible. (WJB, BRW, TM, and HAB could be expected to agree that such a program would be permissible, but to write separately and find that the Davis program as it exists is valid, too.)

C. Judgment Reversed Insofar as Precludes All Consideration of Race. (WJB, BRW, TM, and HAB would join.)

VII. BAKKE'S ADMISSION

A. Process Cannot Be Rerun as if Proper Standards Had Been Applied.

B. Judgment Affirmed Insofar as It Directs Bakke's Admission.

VIII. CONCLUSION

APPENDIX - HARVARD PLAN

The crucial sections of the opinion are Parts II-B and VI-B and -C. Those are the sections defining
what is permissible under Title VI and under the Fourteenth Amendment. At least five Justices can be expected to agree with each of those sections, so that the holding of the Court can be readily perceived by institutions seeking guidance for the future.