MEMORANDUM TO THE CONFERENCE

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

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

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

Regards,

[Signature]

* I met their schedule.
MEMORANDUM FOR MR. JUSTICE POWELL

FROM: Bob  DATE: May 2, 1978
RE: Announcement of the Judgement in Bakke

In Oregon v. Mitchell, 400 U.S. 112 (1970), there were two issues in the case; (i) congressional power to lower the voting age to 18 in federal elections; (ii) congressional power to lower the voting age to 18 in state elections. Four Justices thought Congress could do both; four Justices thought Congress could do neither. Mr. Justice Black thought Congress could do (i), but not (ii). Mr. Justice Black delivered an opinion "announcing the judgments of the Court in an opinion expressing his own view of the cases."

In New York Times Co. v. United States, 403 U.S. 713 (1971), the judgment of the Court was announced in a three-paragraph per curiam, followed by six concurring and three dissenting opinions. Each concurrence expressed a slightly different view of the power of prior restraint in national security cases.
May 9, 1978

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

MEMORANDUM TO THE CONFERENCE:

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

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

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

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

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

L.F.P., Jr.
76-811 Regents of U. of Calif. v. Bakke

Outline of Draft Opinion

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

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

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

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

Part IV (pp. 19-33) is devoted to determination of the appropriate level of scrutiny. Part IV-A is a brief statement of this Court's traditional view of all racial classifications as suspect. IV-B explores the historical underpinnings of that view, and IV-C deals with what I view as the doctrinal problems entailed by adoption of any other view. Part IV-D distinguishes prior decisions cited as approving less exacting levels of scrutiny.
In Part V (pp. 33-41), the various justifications for petitioner's classification are examined to determine whether they are "compelling". Part V-A concludes that increased minority representation, per se, is not a legitimate goal. Part V-B finds that eliminating the effects of past discriminating is a compelling state interest, but that such effects and their incidence have not been identified with sufficient precision in the instant case to permit petitioner to claim that it actually is advancing that goal. Part V-C also recognizes improved health care for underserved citizens as a goal of great importance, but concludes that nothing in this record establishes that this program actually advances it. Part V-D, however, finds that because of the existence of countervailing and substantial First Amendment interests, the achievement of educational diversity is a compelling interest for an educational institution to advance. Part V-E indicates that petitioner's program must serve this goal in the least intrusive manner.

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

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

L.F.P., Jr.

May 9, 1978
RE: No. 76-811  Board of Regents v. Bakke

Dear Lewis:

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

Sincerely,

Bill

Mr. Justice Powell

cc: The Conference

Bill plans to join judgment of the first 14 pages.
May 16, 1978

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

Dear Lewis:

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

Sincerely,

Larry

Mr. Justice Powell

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

Dear Lewis:

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

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

Sincerely,

[Signature]

Mr. Justice Powell

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

Dear Lewis,

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

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

Of course, I would reverse the judgment entirely.

Sincerely yours,

Mr. Justice Powell

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

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL  

May 17, 1978

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

Dear Lewis:

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

Sincerely,

T.M.

Mr. Justice Powell

cc: The Conference

Hardly a surprise in view of TM's views as to "reparations".
Nevertheless, petitioner argues that the court below erred in applying strict scrutiny to the special admissions programs because white males, such as respondent, are not a “discrete and insular minority” requiring extraordinary protection from the majoritarian political process. United States v. Carolene Products Co., 304 U. S., at 152–153, n. 4. This rationale, however, has never been invoked in our decisions invalidating racial or ethnic distinctions. See, e. g., Brown v. Board of Education, 347 U. S. 483 (1954). Nor has this Court held that discreteness and insularity constitute necessary preconditions to a holding that a particular classification is invidious. See, e. g., Skinner v. Oklahoma, 316 U. S. 535, 541 (1942); Carrington v. Rash, 380 U. S. 89, 94–97 (1965). These characteristics may be relevant in deciding whether or not to add new types of classifications to the list of “suspect” categories. See, e. g., San Antonio Indep. School Dist. v. Rodriguez, 411 U. S. 1, 28 (1973) (wealth); Graham v. Richardson, 403 U. S. 365, 372 (1971) (aliens); Oregon v. Mitchell, 400 U. S. 112, 295 n. 14 (1970) (Stewart, J., concurring in part and dissenting in part) (persons between ages 18 and 21). Racial and ethnic classifications, however, are odious without regard to these additional characteristics. We declared as much in the first cases explicitly to recognize racial distinctions as suspect:

“Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.” Hirabayashi, supra, at 100.

Supreme Court of the United States
Memorandum

May 17, 1978

To: LFB, Jr.

These changes look fine. I've included them on the Master Copy.

Of course, they blow any change — if there ever was one — of Justice Stewart joining this section.
May 17, 1978

Bakke

Dear Byron:

Thank you for your letter of May 16.

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

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

With my thanks for your assistance.

Sincerely,

Mr. Justice White

lfp/ss

cc: The Conference
Mr. Justice Lewis F. Powell, Jr.
Supreme Court of the United States
1 First Street, S. E.
Washington, D. C. 20543

Dear Mr. Justice Powell:

It is difficult to express adequately my profound appreciation for your graciousness and warmth toward our family and friends during that lovely (other than weather-wise!) weekend—and, of course, for your kindness in coming out to Gambier to become a "fellow-graduate." We are deeply honored and lastingly grateful. To see Philip, called up first to obtain his diploma, because of his last name—for which I had the privilege of receiving "K.P." duties sixteen times as an enlisted man—and to follow him stride past you on his happy way to President Jordan's chair, will always be one of those precious moments that will linger in the mind's eye until the end... .

Thank you so very much for much.

Cordially,

Henry J. Abraham
James Hart Professor

HJA:mr

P.S. I enclose the promised Bakke chart. I shall take the liberty to add, entre nous, that had I been on the Court, I would have voted with you on Bakke's admission, but with Mr. Justice Stevens on statutory grounds.
The Four Bakke Questions/Answers—Cum Rulings
(Culled from the 6-opinion, 156 pp. decision)

A. Was Bakke impermissibly* denied admission and must he thus be admitted forthwith at Davis? "YES"

<table>
<thead>
<tr>
<th>5:4</th>
<th>PO</th>
<th>BR</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>STVS</td>
<td>WH</td>
</tr>
<tr>
<td></td>
<td>BU</td>
<td>MA</td>
</tr>
<tr>
<td></td>
<td>STT</td>
<td>BM</td>
</tr>
<tr>
<td></td>
<td>RE</td>
<td></td>
</tr>
</tbody>
</table>

(*For PO on constitutional grounds, because of Davis's resort to a rigid racial quota; for STVS, BU, STT, and RE on statutory grounds.)

B. May race be used as a criterion in "affirmative action" cases under certain conditions,* under both the XIV's E.P. clause and Title VI of the Civil Rights Act of 1964?+ "YES"

<table>
<thead>
<tr>
<th>5:4</th>
<th>PO</th>
<th>STVS</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>BR</td>
<td>BU</td>
</tr>
<tr>
<td></td>
<td>WH</td>
<td>STT</td>
</tr>
<tr>
<td></td>
<td>MA</td>
<td>RE</td>
</tr>
<tr>
<td></td>
<td>BM</td>
<td></td>
</tr>
</tbody>
</table>

(*Here, by PO's controlling vote, strictly for purposes of the admission of a purposefully diversified student body to an educational institution.)

C. Is the utilization of race* "under any program or activity receiving federal financial assistance," as Davis does, violative of the language of Sec. 601 (Title VI) of the Civil Rights Act of 1964?+ "NO"

<table>
<thead>
<tr>
<th>4:5</th>
<th>STVS</th>
<th>PO</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>BU</td>
<td>BR</td>
</tr>
<tr>
<td></td>
<td>STT</td>
<td>WH</td>
</tr>
<tr>
<td></td>
<td>RE</td>
<td>MA</td>
</tr>
<tr>
<td></td>
<td>BM</td>
<td></td>
</tr>
</tbody>
</table>

(*For PO only because of the limited utilization framework he creates under "B" above; for the other four consideration of race is permissible in order to redress the societal wrongs of the past.)

D. Is Davis's program that excluded Bakke on racial grounds constitutionally permissible* under the E.P. clause of XIV? "NO"

<table>
<thead>
<tr>
<th>4:5</th>
<th>BR</th>
<th>PO</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>WH</td>
<td>BU</td>
</tr>
<tr>
<td></td>
<td>MA</td>
<td>STT</td>
</tr>
<tr>
<td></td>
<td>BM</td>
<td>RE</td>
</tr>
<tr>
<td></td>
<td>STVS</td>
<td></td>
</tr>
</tbody>
</table>

(*"NO", for Powell, on E.P. under XIV grounds; the other four do not reach the constitutional issue, their "NO" being mandated by "A." above.)

(Underlined Justices signify written opinions on the issue at hand.)

+The Act provides: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." (Italics added.)