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MS-603: Rabbi Marc H. Tanenbaum Collection, 1945-1992.

Series E: General Alphabetical Files. 1960-1992

Box 79, Folder 1, Bakke case, 1978.

M.T



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August 14, 1978

"FOR YOUR INFORMATION"

Mr. Morris B. Abram
345 Park Avenue
New York, NY 10022

Dear Morris:

Bayard Rustin, Seymour Samet and I met recently to consider what we could do to promote effective affirmative action in the post-Bakke era. Bayard told Seymour Samet and me that at a recent meeting of the Leadership Conference on Civil Rights, he found blacks so intransigent that they were unwilling to adopt any post-Bakke statement on what should be done now to support affirmative action unless it also blasted the Supreme Court. He viewed the mood as suicidal -- a go-it-alone approach that would have to spell economic, social and political disaster in a period when the Proposition 13 approach is ensuring cuts in jobs, social services, welfare and other things needed by blacks and other poor and working people.

In addition, there is active rivalry between Ben Hooks and Vernon Jordan for top place in the black community, a rivalry that makes unity difficult to achieve.

Instead of my original approach of getting organizations together for a National Coalition for Effective Affirmative Action, we agreed with Bayard's suggestion that we ask you, Morris, to call together a group of top concerned citizens to meet with you at your home or office to agree on a simple statement which would say something like this:

1. The Supreme Court Bakke decision is the law of the land. Even though many of us have different views on quotas, we all agree that effective affirmative action in admission to higher education institutions and in employment is of the utmost importance.
2. We are fearful of a backlash against affirmative action and therefore dedicate ourselves to countering any efforts to weaken or destroy it.
3. We will support sensitively developed goals and timetables, as well as methods to expand opportunities for qualified or qualifiable minorities through expanded recruiting; tutoring, apprenticeship and in-service training; bias-free testing; remedial education programs; and the granting of special consideration to those applicants from among those discriminated against or disadvantaged who are substantially equal in qualifications to others being considered.

4. We call on business and labor and all levels of government as well as the American public to support such affirmative action programs.

What do you think of the idea? Of course, this is only a rough draft which will have to be revised.

We believe that you are the one person who has the contact and standing with the people we suggest inviting to be able to bring them together successfully. Among those we suggest be invited are the following:

Blacks: Ben Hooks, Vernon Jordan, Dorothy Height, Bayard Rustin, Carl Holman.

Labor: Tom Donahue, Doug Fraser, Sol C. Chaikin, Jake Clayman, Joyce Miller.

Catholics: Msgr. George Higgins. (I'll call Higgins and talk to Marc Tanenbaum about other Catholics to be invited).

Protestants: I'll talk to Marc about which ones. Suggested at our meeting were Howard Spragg of the United Church of Christ and Episcopal Bishop Moore.

Jews: Bert Gold, Henry Siegman, Ben Epstein, Al Chernin, Arnie Aronson.

Business: I'll talk with Carl Holman and Dave Hyatt about suggestions.

Women: Betty Friedan, Bernice Sandler, business women. I'll ask Marilyn Braveman about others.

Hispanics: Look at LCCR membership list and ask Arnie Aronson and Haskell Lazere.

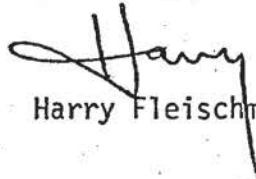
Ethnics: I'll ask Irv Levine.

Education: University Presidents. I'll ask Marilyn Braveman.

It was agreed that I would get in touch with you and we will follow through from there.

All the best.

Cordially yours,


Harry Fleischman

HF:df

cc: Bayard Rustin
Seymour Samet
Bert Gold

bcc: Hyman Bookbinder
Marc Tanenbaum ✓
Marilyn Braveman
Haskell Lazere
Irving Levine

MT

memorandum

"FOR YOUR INFORMATION"

THE AMERICAN JEWISH COMMITTEE

date August 17, 1978

to Area Directors/Executive Assistants

from Harry Fleischman

subject Humphrey-Hawkins Bill

Good news to report. Both Senate Majority Leader Byrd and President Carter have included the Humphrey-Hawkins Full Employment Bill on their list of highest priority legislation for passage by the Senate before adjournment in October.

A vote on the bill is projected for September, after the Senate Labor Day recess from August 30 to September 11. This period of traditional concern for issues related to work could afford us an excellent opportunity to advance the cause. You helped make Full Employment Week a success last year. Now you can help make this Labor Day period a time of effective pressure for Humphrey-Hawkins.

- * Enclosed is a copy of a letter sent by the Seattle chapter to their Senators. It would be helpful if all our chapters sent similar letters to their Senators.
- * Urge your members to contact their Senators to support the Human Resources Committee bill rather than the Banking Committee version whose zero inflation clause would seriously weaken the Humphrey-Hawkins Bill.
- * A letter similar to that of our Seattle chapter, signed by the heads of 74 national organizations including our own Bert Gold, is going next week to all Senators, but, as you know, getting letters from their own constituents rather than national groups is very compelling to elected officials. Among the organizations joining us on that letter are the National Council of Catholic Charities, the National Council of Churches, the NAACP, the National Urban League, the National Center for Ethnic Affairs, the National Council of La Raza, the American Association of Retired Persons, the National Council of Senior Citizens, the Consumer Federation, the League of Women Voters and scores of unions and other civic groups.

Also enclosed for your background information are copies of A SUMMARY OF THE FULL EMPLOYMENT AND BALANCED GROWTH ACT and a flyer on WHAT DO PRESIDENT CARTER, THE AFL-CIO, THE NATIONAL ASSOCIATION OF MANUFACTURERS AND THE U.S. HOUSE OF REPRESENTATIVES HAVE IN COMMON?

Please let us know what you are able to do on this important issue.

HF:df

78-650-35



THE AMERICAN JEWISH COMMITTEE.

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Terry Kulka

August 8, 1978

FOR YOUR INFORMATION
SEATTLE CHAPTER
AMERICAN JEWISH COMMITTEE

Senator Henry M. Jackson
137 Old Senate Office Building
Washington, D.C. 20510

Dear Senator Jackson,

The Humphrey-Hawkins Full Employment bill may soon be before the Senate for action. We urge your support of the bill in the form in which it passed the House of Representatives and was approved by the Senate Human Resources Committee. We particularly urge your opposition to crippling amendments such as the inflation goal proposed by the Senate Banking Committee.

The unrealistic and inflexible goal of zero per cent inflation creates enormous problems, as does any specific goal for inflation. Humphrey-Hawkins as it passed the House already includes major anti-inflation provisions, far stronger than current law and policy. It requires the President to set yearly inflation targets; to establish inflation goals over a five-year period; to propose policies and programs to combat inflation.

Prices, wages and profits are, and should be, determined in the private sector. Even when direct price controls were needed and used during World War II, Congress did not set numerical goals. A quantitative goal and time-table for price stability would lead inevitably to wage controls.

There are sound and persuasive reasons for a numerical goal for unemployment. Unemployment involves the condition of people; it is a human problem as well as an economic problem. The correlation between unemployment and crime is well documented. The list of social and health problems directly linked to unemployment rates is lengthy. There are no such links with the price level.

Humphrey-Hawkins is designed to put America back to work. The improvements in the jobless rate in President Carter's first eighteen months in office have been significant. But the unemployment rate is still higher than it was during the six years of the Nixon presidency.

The unemployment rate last month was 5.7 per cent. During the Nixon years, the rate averages 5.1 per cent. In only one of those years was the average rate more than 5.7 per cent.

The next few weeks will determine whether we move ahead or fall back in the battle for full employment. A defeat in the Senate would be a devastating blow not only for full employment but for greater economic and social justice. We urge your strong support for an effective and workable Humphrey-Hawkins bill.

Sincerely,



Harry Ash
Chapter Chairman

ALS



AMERICAN JEWISH
ARCHIVES

An exact copy of this letter was sent to:

Senator Warren G. Magnuson
127- Old Senate Office Building
Washington, D.C., 20510

FOR YOUR INFORMATION
SEATTLE CHAPTER
AMERICAN JEWISH COMMITTEE

M. Tannenbaum

memorandum

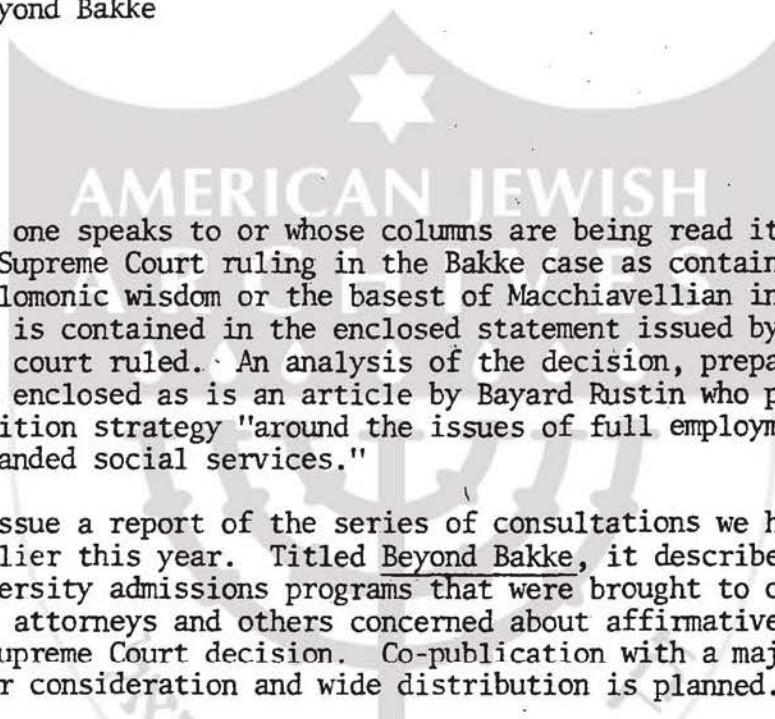
THE AMERICAN JEWISH COMMITTEE

date August 17, 1978

to Members of the Domestic Affairs Commission

from Seymour Samet

subject Beyond Bakke



Depending on whom one speaks to or whose columns are being read it is possible to look upon the Supreme Court ruling in the Bakke case as containing either the essence of Solomonian wisdom or the basest of Macchiavellian intent. AJC's official response is contained in the enclosed statement issued by Bert Gold shortly after the court ruled. An analysis of the decision, prepared by Sam Rabinove, is also enclosed as is an article by Bayard Rustin who proposes a civil rights coalition strategy "around the issues of full employment, improved education and expanded social services."

Shortly we will issue a report of the series of consultations we had on affirmative action earlier this year. Titled Beyond Bakke, it describes the variety of non-quota university admissions programs that were brought to our attention by the educators, attorneys and others concerned about affirmative action in the wake of the Supreme Court decision. Co-publication with a major education institute is under consideration and wide distribution is planned.

At our September 24-25 meeting in Washington, D.C., we are making arrangements to further consider the program and policy implications of the court decision, particularly as they may affect affirmative action in the area of employment. This will also be an item for discussion at the National Executive Council meeting in Boston in October. The DAC will meet there on October 26 and any policy considerations we wish to propose will be submitted for NEC action the next day.

SS/rbk
 Encl: "The Bakke Decision: Both Sides Won" - B.H. Gold
 "The Bakke Decision: Its Meaning and Implications" - S. Rabinove
 "New Report on Black Gains Supports Coalition Strategy" - B. Rustin
 78-600-70

THE BAKKE DECISION: BOTH SIDES WON

Bertram H. Gold

Executive Vice President, The American Jewish Committee

The American Jewish Committee welcomes the U.S. Supreme Court's Bakke decision banning racial quotas in college and university admissions. We are equally pleased that the Court has upheld the legitimacy of non-quota affirmative action programs to promote the integration of racial and ethnic minorities into the mainstream of American life.

By affirming the concept of individual rights rather than group rights and, at the same time, underscoring the legality of affirmative action programs which do not rely on race as the sole determining factor, the Court has adopted a broad middle ground which should enable those on both sides of the Bakke case to renew the inspiring civil rights coalition of the early Sixties. How effective such a revived coalition can be will depend, in large measure, on how wholeheartedly both sides respond to the challenge. Bakke supporters must now back, with concern and conviction, the non-rigid, non-quota affirmative action programs the Court has sanctioned. University of California at Davis supporters must refrain from efforts to introduce covert quotas institutionalizing racial and ethnic preferences.

To be sure much careful analysis will be necessary before the full implications of the complex Bakke ruling are completely understood. It is evident already that the Court has left open a number of issues that will have to be dealt with by Federal regulations, legislation and further judicial review. The task of those who want to see affirmative action succeed is to concentrate on furthering the kinds of admission programs the Court has sanctioned, and on a variety of special programs, beginning at the pre-school level, that will help prepare disadvantaged children of all backgrounds more adequately for higher education.

Throughout its history-- and perhaps because of its history-- the American Jewish Committee has opposed quotas based on race, religion or national origin, because they undermine the concept of the individual merit and do not permit people to be judged on their own qualifications. Our amicus brief on behalf of Allan Bakke argued strongly for admissions procedures that recognized-- and made allowance for-- economic, educational and social disadvantages that prevented some students from presenting as strong an academic record as their more fortunate peers. In citing the Harvard admissions program, the Supreme Court has clearly endorsed this concept.

The decision in the Bakke case, though it deals only with college admissions, will undoubtedly be used as a yardstick for affirmative action programs in employment as well. Indeed, within days of the Bakke decision the Court, in its ruling on the AT&T case, underscored that more specific programs directed by the Courts or by government agencies, are permissible to correct discrimin-

atory practices that are permissible to promote affirmative action. But in both instances, a variety of fair and rational affirmative action programs without quotas, should be supported and encouraged.

In programs designed to overcome clear patterns of discrimination, the American Jewish Committee supports the use of goals and timetables, provided that they are not permitted to disguise a quota. (Unfortunately, over the last several years, Federal guidelines and regulations in the area of employment have not always distinguished adequately between goals and quotas.)

Our objective in all of our efforts must be to adhere to the spirit as well as to the letter of the law. Goals must be sensitively drawn and administered; and they must be viewed by admissions officers, personnel managers and regulatory agencies alike as tools for measuring the effectiveness of corrective affirmative action rather than as rigid standards of performance or as devices for affording an absolute preference for any race or ethnic group. To do otherwise would be to undermine the commitment to justice and equality.

The question of who should be admitted to colleges and universities and how, and of who should be hired and promoted and how, has been one of the most divisive issues of our decade. Those on both sides of the Bakke case have escalated far beyond reason the rhetoric and the dire predictions of gloom and doom if the Court failed to support their particular view. Now that the Court has spoken-- and spoken in a way that upholds the finest tradition of the American promise-- both sides must come together to make that promise a reality.

The Bakke Decision: Its Meaning and Implications

by Samuel Rabinove

Someone once said that trying to predict U.S. Supreme Court decisions is like trying to predict the future through reading entrails. When people used to ask me what the Supreme Court was likely to do in the Bakke case, I would tell them that I didn't know, that the decision could go either way and (only half-facetiously) that the one thing I was sure of was that the nine Justices would render ten separate opinions. I was wrong about that. The Justices agonized plenty, but they managed to come up with only six opinions. And many people are still trying to figure out precisely what they mean.

Let's start with Justice Powell, whose key opinion announced the judgment of the Court. That judgment affirmed the decision of the California Supreme Court to the extent that it held the special admissions program at the Medical School of the University of California at Davis to be unlawful and directed that Allan Bakke be admitted to the Medical School, while reversing the California Supreme Court ruling to the extent that that court had barred the Medical School from giving any consideration to race in its admissions process.

But the Court was sharply divided, with Justice Powell being part of two separate majorities of five. Four of the Justices (Chief Justice Burger and Justices Stewart, Rehnquist and Stevens) agreed with Justice Powell insofar as the ruling of the California Supreme Court was affirmed. The four remaining Justices (Brennan, White, Marshall and Blackmun) agreed with Justice Powell insofar as it was reversed. In short, in effect there were two majorities writing two separate decisions. Yet it is noteworthy that no majority of five justices was able to agree on any single opinion. It was a 4-1-4 ruling, with something in it for everybody. The pivotal opinion of Justice Powell agreed in good measure with one quartet of Justices in one part of it and with the other quartet in the other. In addition to that opinion, there were separate opinions by Justice Stevens (with whom Chief Justice Burger and Justices Stewart and Rehnquist joined), by Justice Brennan (with whom Justices White, Marshall and Blackmun joined), as well as by Justices White, Blackmun and Marshall each of whom wrote individual opinions.

In his opinion, Justice Powell placed great weight on the significance of the Equal Protection Clause of the Fourteenth Amendment. He stressed repeatedly that this constitutional protection is guaranteed to all individuals regardless of racial or ethnic origin. "The fatal flaw in petitioner's preferential program," stated Powell, "is its disregard of individual rights as guaranteed by the Fourteenth Amendment." Justice Powell also believes, however, that race may be taken into account to achieve educational diversity, citing with approval the admissions policy of Harvard College. But he cautioned that "(E)thnic diversity,...is only one element in a range of factors a university may properly consider in attaining the goal of a heterogeneous student body" and declared that the Davis Medical School "special admissions program, focused solely on ethnic diversity, would hinder rather than further attainment of genuine diversity." He also distinguished between diversity on the one hand and preference on the other, noting that "we have never approved preferential classifications in the absence of proven constitutional or statutory violations." (There was no such violation at Davis Medical School.) In short, Powell finds no constitutional

infirmary in an admissions program which seeks ethnic diversity, provided that such a program "treats each applicant as an individual in the admissions process."

In the opinion written by Justice Stevens, he and the three Justices who joined him took the narrow position that the issue of whether race can ever be used as a factor in an admissions decision was not properly before the Court because the California Supreme Court, although it ordered Bakke admitted, did not bar the Medical School from considering racial criteria in processing other applications. Although the California Supreme Court based its ruling in favor of Bakke on the Equal Protection Clause of the Fourteenth Amendment, these Justices declined to consider the constitutional issue because it is the Court's "settled practice...to avoid the decision of a constitutional issue if the case can be fairly decided on a statutory ground." Hence they based their opinion squarely on their interpretation of Title VI of the Civil Rights Act of 1964 which prohibits discrimination on the ground of race, color or national origin in any program or activity receiving Federal financial assistance. In reaching this conclusion, the Justices alluded to the "plain language of the statute", as well as their interpretation of its legislative history.

Justices Brennan, White, Marshall and Blackmun in their joint opinion agreed with Justice Powell that some use of race in university admissions is permissible, but rejected his conclusion that the special admissions program at Davis is unconstitutional. In the course of analyzing at considerable length both the legislative history of Title VI and prior Supreme Court interpretations of the Equal Protection Clause, these Justices concluded that "we cannot and...need not under our Constitution or Title VI,...let color blindness become myopia which masks the reality that many 'created equal' have been treated within our lifetimes as inferior both by the law and by their fellow citizens." They went on to say that Title VI "does not bar the preferential treatment of racial minorities as a means of remedying past societal discrimination to the extent that such action is consistent with the Fourteenth Amendment." Applying their reasoning to the Davis Medical School, they declared that its racially preferential admissions program is justifiable "where there is a sound basis for concluding that minority underrepresentation is substantial and chronic, and that the handicap of past discrimination is impeding access of minorities to the medical school." These Justices further stated that "no decision of this Court has ever adopted the proposition that the Constitution must be color-blind", and that it has been the "clear judgment of Congress that race-conscious remedial action is permissible."

It is obvious that the Supreme Court was bitterly divided over the Bakke case. Although, as noted above, there was a five-Justice majority in support of the use of race as one factor in university admissions, Justice Powell explicitly stated that he disagreed with much that was said in the opinion of Justices Brennan, White, Marshall and Blackmun who agreed with him on this vital question. Whereas Powell reached this conclusion through the importance he placed on diversity, the Brennan quartet saw it as a proper vehicle for institutionalizing racial preference and, perforce, went further than Powell was prepared to go by upholding the racial and ethnic quota scheme at Davis Medical School.

In staking out his position independently of Brennan and the three Justices who joined with him, Justice Powell stressed that the denial to Bakke of his "right to individualized consideration without regard to his race is the principal evil of petitioner's special admissions program" and observed that "nowhere in the opinion" of the Brennan four "is this denial even addressed." Powell also chided his brethren in the pro-quota camp for their view that a racial classification is permissible if

it does not "stigmatize any discrete group or individual", maintaining that the word "stigma" has "no clearly defined constitutional meaning" and "reflects a subjective judgment that is standardless."

The sharp ideological split among the Justices is exemplified too by the response of Justice Stevens to the language of the Brennan opinion which sought to define "the central meaning of today's opinions: Government may take race into account when it acts not to demean or insult any racial group, but to remedy disadvantages cast on minorities by past racial prejudice, at least when appropriate findings have been made by judicial, legislative, or administrative bodies with competence to act in this area." In an obviously acerbic footnote, Justice Stevens remarked: "Four members of the Court have undertaken to announce the legal and constitutional effect of this Court's judgment...It is hardly necessary to state that only a majority can speak for the Court or determine what is the 'central meaning' of any judgment of the Court."

In addition to the major opinions of Justice Powell and the two four-Justice groupings alluded to above, Justices Blackmun, White and Marshall each felt constrained to write individual separate opinions. Justice Blackmun, after remarking that many kinds of preferences are prevalent both in educational institutions and in government programs (such as alumni children and veterans' preferences), concluded that there is no other way to get beyond racism without first taking account of race and "in order to treat some persons equally, we must treat them differently." Justice White deemed it necessary to express his view that Title VI does not provide a private right of action, in contrast to his colleagues all of whom either believe that such a cause of action does exist, or at least were willing to assume it for the purposes of this case.

Justice Marshall, in an impassioned opinion which traced the history both of slavery and of post-slavery oppression of Negroes, underscored his conviction that the racism of our society has been so pervasive that individual Negroes should not have to demonstrate that they have been its victims. In his own words: "It is not merely the history of slavery alone but also that a whole people were marked as inferior by the law." Justice Marshall concluded, therefore, that "bringing the Negro into the mainstream of American life should be a state interest of the highest order." As happened after the Civil War, he intimated, the Supreme Court again is stepping in to destroy "the movement toward complete equality...this time to stop affirmative action programs of the type used by the University of California."

What are we to make of these voluminous opinions, adding up to a total of 154 pages? Obviously many questions were left unanswered and further litigation is inevitable.* But that would probably have been the case no matter how the Justices had ruled. This much, at least, is clear. As far as university admissions are concerned, absent a finding of past discrimination, racial and ethnic quotas are unacceptable, but other kinds of affirmative action involving race-conscious remedies are permissible. So the fears expressed by many in the civil rights movement that the Supreme Court would use the Bakke case as an instrument to strike down affirmative action across the board were simply unfounded. While the Justices did not say precisely to what extent race could be taken into account in a "properly devised" admissions program so as to pass constitutional or statutory muster, five of them did cite with approval the Harvard College Admissions Program which gives an indeterminate amount of weight to applicants of color while avoiding any fixed numbers

*A recent cartoon in the New York Daily News suggested that Bakke may now change his mind and decide to go to law school instead.

or percentages. Since many other universities have been doing very much the sort of thing that Harvard has been doing, in all probability very little will change. "We have more programs like Harvard than like Davis," said Jack Peltason, Executive Director of the American Council on Education. One thing is certain: university admissions personnel will have to play major (and very difficult) roles in shaping the results of the Bakke decision.

The problem, of course, with Justice Powell's approval of the objective of "diversity" is that it so readily can be misused to grant de facto preferences to applicants whose capabilities, as measured by almost any yardstick, are substantially below those of others who are rejected because they cannot meet the criterion of "diversity". In fact that is essentially what happened, at least to some degree, at the Davis Medical School, though that school went much further than Powell could approve in openly conferring racial and ethnic preferences under a fixed two-track system with lower standards for the preferred groups only, and failed to limit itself solely to the objective of "diversity."

Depending on how it may be implemented, the quest for "diversity" may adversely affect members of groups, such as Jews, which for various historical and cultural reasons, tend to be "overrepresented." If, after all, it is important to enroll a representative cross-section of American society, "diversity" could well spill over into a rough proportionality or what is tantamount to "quotaism." A professional school might reasonably conclude, as in fact has happened in the past, that it has too many students from the northeast part of the country and needs more Idaho farm boys or Appalachian coal miners' daughters to improve its geographic mix. Carried to a logical extreme, it is that kind of approach that could restrict opportunities for Jewish students, who reside disproportionately in the northeast and who are rarely found on farms or in coal mines.

While the Bakke case spotlighted the controversiality and complexity of the problems posed by quotas, affirmative action and so-called "reverse discrimination", its implications for the employment sector are even less clear than they are for the field of education. There are numerous cases now pending in lower courts which challenge the validity of various forms of affirmative action in employment and business on the ground that they discriminate against whites. For example, no less than 27 suits have been filed by construction contractors and their associations that challenge the constitutionality of a requirement in the Public Works Employment Act of 1977 that 10% of the grants made under the program be allocated to minority contractors. Thus far, three U.S. District Courts have upheld the constitutionality of that provision and one, in Los Angeles, has struck it down. On July 3, just before the U.S. Supreme Court recessed for the summer, the Court remanded the case in which the judge had invalidated the 10% quota requirement to the lower court with the suggestion that it may be moot because all of the contracts for the Los Angeles area public works projects had already been let and hence there was no further legal controversy to be resolved. Since other challenges to this same provision are still pending elsewhere, to date without success, it is still possible that the issue may be submitted again to the Supreme Court with a different factual picture.

Also on July 3, in a most significant ruling, without any recorded dissent the Justices declined to review and thereby let stand a decision of the U.S. Court of Appeals for the Third Circuit which upheld the validity of a 1973 consent decree that required the American Telephone and Telegraph Company to hire and promote more Blacks and women. The affirmative action program embodied in that decree was challenged by three unions which charged that the agreement violated some of their members' cherished

seniority rights, won in collective bargaining and incorporated in their contracts with AT&T. While the Court's refusal to disturb the ruling in the AT&T case does not establish any firm legal precedent, it does indicate that the Justices are not disposed to reject far-reaching affirmative action plans, even though they may entail some cost to white males, in employment situations where there has been evidence of past discrimination.

In any event, the Supreme Court may soon have another opportunity to clarify affirmative action law in the employment sphere. In the case of Weber v. Kaiser Aluminum and Steel Company, the U.S. Court of Appeals for the Fifth Circuit struck down a one-to-one racial hiring quota for a job training program, set up by the company on a voluntary basis, as part of an affirmative action plan on the ground that past discrimination had not been established. The plaintiff had charged that the scheme discriminated against him as a white under Title VII of the Civil Rights Act of 1964. If the Supreme Court agrees to review this case, it will confront the problem of how to reconcile two of its prior decisions in job discrimination cases with its decision in Bakke. In the 1971 case of Griggs v. Duke Power Company, the Supreme Court unanimously construed Title VII to mean that "discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed," and that Congress had made job qualification "the controlling factor so that race, religion, nationality and sex become irrelevant." And in McDonald v. Santa Fe Trail Transportation Company* in 1976 the Court, again unanimously, ruled that Title VII protects whites on the same basis as it protects Blacks. Both Griggs and McDonald, therefore, tended to uphold color blindness under the Civil Rights Act. Yet in Bakke, five of the Justices agreed that race is a "plus" factor, even in situations where there is no prior history of discrimination. How the Court may attempt to resolve this apparent dilemma should be of surpassing interest. In a different context, namely, the Court decisions on the death penalty, Chief Justice Burger recently commented, "The signals from this Court have not always been easy to decipher."

On the day after the Supreme Court rendered its decision in the Bakke case, while some Black leaders reacted guardedly and others even found reason for encouragement, the influential Black weekly, the New York Amsterdam News, headlined the event, as follows: "Bakke: We lose!!" The paper then proceeded to analyze the impact of the decision, concluding that it "also has jeopardized every affirmative action program in the country, not only in colleges and graduate schools, but also in private business and industry", and went on to say that the fact that "Blacks have now lost the case may further divide Blacks from Jews at the national and local levels." Perhaps this attempt to snatch defeat from what was at least a measurable victory for Black people may be excused as an ill-advised, impulsive response. In rebuttal, it might even be maintained that the Court's rejection of quotas at the Davis Medical School, in the long run, will advance the interests of Black people further than if the Court had upheld such quotas.

There is no question that the overwhelming majority of the American people are opposed to racial and ethnic quotas and to any absolute preference based on race or ethnicity. In fact, the Gallup Poll taken in March 1977 revealed that 64% of even the non-white participants in the survey expressed opposition to preferential treatment in higher education and employment for minority group members and favored use of ability criteria as measured by tests, notwithstanding past discrimination. Since

*AJC filed an amicus brief in this case.

"quotatism" is so heavily opposed by the public at large, even if it were to be clearly ratified by the Supreme Court, its utilization would serve to further polarize our society, as well as to discredit other types of legitimate affirmative action which are more acceptable to most people.

There is little doubt, for example, that most Jews, while quick to express their strong aversion toward quotas, are prepared to be supportive of reasonable, realistic affirmative action measures to rectify the consequences of past discrimination. Certainly that was the posture adopted by the major Jewish organizations in the friend-of-the-court briefs they filed in the Supreme Court in the Bakke case. By way of illustration, among the affirmative action measures endorsed by the American Jewish Congress and the American Jewish Committee (together with six white ethnic organizations) in their amicus brief were: expanded recruitment, remedial programs for disadvantaged students at all levels of the educational process, and a "plus" factor for disadvantaged medical school applicants who have demonstrated the capability of overcoming the handicaps of racial discrimination or poverty.

The brief urged, moreover, that medical schools evaluate college grades and aptitude test scores in the light of a candidate's background: whether he or she came from a culturally impoverished home, the nature and quality of schools attended, leadership ability and evidence of high motivation such as volunteer work among the sick or underprivileged. In other words, the brief stressed the importance of evaluating the total life experience of each individual applicant, specifying most of the very same criteria set forth by Justice Powell in the course of his endorsement of consideration of race as one factor which properly may be considered by a college or university.

But there is another point to be made against quotas, advanced most forcefully by Black economist Thomas Sowell in his book, Black Education: Myths and Tragedies. In Sowell's words:

What all the arguments and campaigns for quotas are really saying, loud and clear, is that black people just don't have it, and that they will have to be given something in order to have something...Those black people who are already competent, and who could be instrumental in producing more competence among the rising generation, will be completely undermined, as black becomes synonymous--in the minds of black and white alike --with incompetence, and black achievement becomes synonymous with charity or payoffs.

To the extent that Sowell may be correct, a heavy price may be paid in the long run for immediate gains.

In his Foreword to Minorities in Medicine by Dr. Charles E. Odegaard, published in 1977, Dr. John Z. Bowers stated: "Enough qualified minority group applicants are simply not available." Clearly that is a symptom of an ailment for which some have prescribed the remedy of a racial quota. The key reason why there are too few qualified Black medical school applicants, of course, is not hard to discern: it is the long and terrible history of oppression and discrimination, some of which continues to this very day. As noted above, our joint brief in the Bakke case set

forth affirmative action measures that can be constructive, rather than counter-productive, to expand the pool of qualified minority applicants for medical and other professional schools.

On a personal note, in the course of several years of laboring in the vineyard of affirmative action in general and the Bakke case in particular, there is no question in my mind that at least some of those in the pro-Bakke camp were and are "closet" racists, people who do not really want to help Blacks, Hispanics or Native Americans. Some of them are of the same ideological bent as those who, for so many years, accepted with equanimity, if not approval, the pervasive rejection and exclusion of people of color from everything good in American society. In their meanness of spirit, they are inclined to blame the victims for their plight and to begrudge them any compensatory or remedial help whatever to enable them to overcome their genuine handicaps. Others secretly share the views of Dr. William Shockley that Blacks, on the whole, are inherently inferior to whites in intelligence and that nothing can or should be done about this. ("Quotaism" serves to reinforce this contemptible stereotyping, as Prof. Sowell has indicated.)

There are those who seem to enjoy pointing out that, in contrast to the relatively low average achievement levels of Black students, Asian Americans have demonstrated high upward academic mobility. Children and grandchildren of Chinese and Japanese immigrants almost all of whom came here in dire poverty, who faced an acute language barrier, as well as systemic exclusion and discrimination on the part of the dominant white society, nevertheless have managed to compete successfully with whites in very substantial numbers for openings in medical and other professional schools. In responding to this type of argument, it is appropriate to reiterate as Justice Marshall did in his separate opinion in Bakke, that no other ethnic group in this country was ever enslaved in this country, with all that that has meant for the descendants of the enslaved.

It has also been suggested, however, that one of the factors in the painful reality that too few Black students are able to compete successfully with whites for medical school admission places is that too few Black pupils and students study hard enough to overcome their deprivation. Not enough Black college students, for example, undertake the tough mathematics and science courses that are prerequisite to medical school admission. Why this is so, of course, is explainable in large part in terms of the total historical and cultural experience of Black people, of disproportionate numbers of severely troubled home situations and consequent demoralization of so many young people who are struggling merely to survive. But it is important to acknowledge that it is so for the necessary remedial efforts to be successful.

Black leaders have been appearing in inner-city schools and neighborhoods throughout the country calling upon Black students, teachers and parents to join in programs to upgrade Black student achievement levels. They stress the importance of establishing high academic standards and the need for attaining self-discipline, through peer-group pressure, as the path to meeting such standards. Their demanding message reportedly has been greeted with enthusiasm, including their attacks on those elements of the contemporary "youth culture" which feature alcohol, drugs and sex, rather than scholastic achievement. Along somewhat similar lines are the words of Prof. Kenneth S. Tollett, a Black lawyer and Distinguished Professor of Higher Education at Howard University, "Our scores just do not look good...we are going to have to work at

improving our performance on these tests."*

H.L. Mencken is reputed to have said that there are some problems for which there are solutions that are simple, easy -- and wrong. A complicated problem is how to help all the disadvantaged to actualize their full potentialities and to take their rightful places within the mainstream of American society. The solution that is simple, easy -- and wrong -- is "quotaism". As for the Bakke decision, perhaps future Supreme Court rulings will better reveal its true meaning and its full implications for everyone.

Mr. Rabinove is Legal Director of the American Jewish Committee.



*"What Led to Bakke", The Center Magazine, January/February 1978

Quotas Not Effective:

New Report on Black Gains Supports Coalition Strategy

By Bayard Rustin

IN MORE THAN A FEW respects, the current discussion of racial quota systems has acquired an almost theological flavor. Rather than focusing on earthly realities, the debaters prefer to discuss abstractions such as white guilt, the meaning of equal opportunity, and the legacy of black slavery.

As interesting as these subjects might be, they overshadow the real questions: Are quotas and other forms of affirmative action really effective means for advancing the economic and social position of minority groups in America? A new report just issued by the Rand Corp. says no. And its conclusions are well worth examining.

Contrary to the dominant social mythology, the Rand report concludes that affirmative action programs have been "a relatively minor contributor" in raising black income relative to white income. "Our results," the report states, "suggest that the effect of government on the aggregate black-white wage ratio is quite small and that the popular notion that these recent changes are being driven by government pressure has little empirical support."

What, then accounts for the gradual narrowing of the black-white income gap? "Blacks and whites," according to the study, "are simply becoming more alike in those attributes producing higher wages." Specifically, blacks have made significant gains in the area of education, improving their competitive position in the labor market. In 1930 the average black worker had nearly four fewer years of formal education compared to white workers. By 1970, the gap had dropped to a little over one year.

Another major factor, the report points out, has been the steady industrialization of the South. The transformation of the South from a backward, tradition-bound province into a modern industrial region has produced steadily increasing wage rates for blacks who were once confined to the fringes of the southern economy. "There is no question," the researchers said, "that blacks are at least equal participants with whites in the recent economic resurgence in the South."

While the report contains some good news for blacks, it also describes some persistent problems, especially economic inequality. Even with steady economic gains, the incomes of black males are still only three-fourths of those earned by white males. And, even worse, the report predicts that

white-black income will not approach full equality during the current century.

Like all statistical reports, the Rand study should be treated with a fair amount of skepticism. But, the report—even with all its flaws—deserves thoughtful consideration within the black community. It should not be dismissed automatically as another "establishment" attempt to ignore the problems of black Americans.

As I see it, the Rand study offers the black community an opportunity to re-examine old strategies and preconceptions. Most importantly, the report strongly suggests that a civil rights movement concerned exclusively with racial issues will soon become obsolete. While few will deny that racial discrimination stubbornly persists in certain industries and regions, it is no longer the major determinant of black economic well-being.

RATHER THAN CONCENTRATING on issues like the Bakke case, and the further advancement of quota-oriented affirmative action plans, the Rand study suggests another, more promising strategy for the civil rights movement—that strategy, simply stated, is the formation of a racially integrated political coalition around the issues of full employment, improved education, and expanded social services.

As we all know, there are dangerous political forces in America that thrive on racial conflict. For many of the more doctrinaire conservatives, racial issues serve as a convenient cover for their disastrous economic policies. Unable to win on a platform promising high unemployment, unfair tax policies, and cutbacks in social services, conservatives can frequently win votes by appealing to widespread opposition against quotas and other devices perceived as instruments of "preferential treatment."

For years I have argued that black people cannot even hope for economic liberation without solid allies. In the recent past, especially during the period from 1968 until quite recently, racial animosity nearly destroyed the political coalition which united blacks, white workers and liberals.

Now, with the needless re-emergence of racial issues in the form of a bitter and highly divisive debate on quotas, the progressive political coalition is once again endangered. Some of us, I fear, seem all too eager to sacrifice programs and approaches ensuring real economic gains in defense of highly questionable social mythology, namely the dubious utility of racial quotas.

Rabbi Tunenbaum

memorandum

THE AMERICAN JEWISH COMMITTEE

date May 23, 1978
to Area Directors (One to an Office - Please Share)
from Seymour Samet
subject POST BAKKE

URGENT - PLEASE READ RIGHT AWAY

The U.S. Supreme Court is expected to rule on the Bakke case momentarily. We have prepared several alternate public statements for national AJC release. They are attached for your guidance in the event you wish to issue or are asked for a local statement.

(Please note that the alternative wording in "If the Court rules for Bakke" would enable us to respond whether the Court rules under the Fourteenth Amendment or under Title VI of the Civil Rights Act of 1964. Title VI provides that no person shall be subjected to discrimination based on race, color or national origin under any program or activity receiving Federal financial assistance.)

Sam Rabinove cautions that in view of the gravity and sensitivity of the case, we may wish to modify some of the words in the release, depending on the precise nature of the Court's ruling and how the Justices divide. He will prepare an analysis of the decision and its implications for you as soon as possible after the ruling.

Also enclosed is a copy of a Leadership Conference on Civil Rights statement in which we joined in with 77 other organizations many months ago. You may wish to consider adapting it for a joint statement with local counterparts of some of these groups.

Should you desire any assistance regarding program or policy following the ruling of the Court on Bakke please contact:

- Samuel Rabinove - Legal analyses
- Harry Fleischman - Employment & Affirmative Action
- Marilyn Braveman - Education & Affirmative Action

(over)

Under separate cover you will be receiving a draft of a proposed AJC document which Marilyn has prepared. It identifies some of the means of achieving affirmative action objectives without resort to quotas. The recommendations are the result of a series of meetings held at our national office with proponents and opponents of Bakke all of whom were anxious to identify programs that could be responsive to existing needs. Your comments will be solicited for changes, additions and deletions.

Please keep me informed of local programs and reactions to the Bakke decision plus any recommendations you may have for national action.

SS/sso
Att. (3)
78-620-30
78-620-31
LCCR statement w/
list of signatories
78-600-45



April 20, 1978

If the Court rules for Bakke --

The American Jewish Committee is pleased that the U.S. Supreme Court has ruled that it is unconstitutional (or illegal) to use racial or ethnic quotas in the process of admitting students to colleges and universities. This need not and must not mean an end to legitimate affirmative action. There still are constitutional (or legal) and effective programs to admit qualified minorities and others who have previously been excluded from our institutions of higher learning. We continue to support such programs as firmly as ever.

The time has come for all of us who have been involved in the Bakke case on either side to join together to identify and encourage the institution of such programs. They should take into account each individual's qualities of motivation, perseverance and leadership, as well as skill, training, grades and test scores. These should be further evaluated in the light of handicaps an applicant may have had to surmount, whether caused by racial or religious discrimination, poverty or chronic illness.

We also urge continued support for the use of quota-free goals and timetables in order to measure the effectiveness of affirmative action programs in employment and education. It must not be forgotten that discrimination is still a tragic fact of life for many people in this country. We must continue to move to eradicate it.

Bringing together groups which have been on different sides in the Bakke case has been a major effort of the American Jewish Committee for the past several months and we stand prepared to convene other civil rights, civic, ethnic, educational, labor and business groups to work together to complete this task.

April 20, 1978

If the Court rules for the University --

It was the hope of the American Jewish Committee that the U.S. Supreme Court would outlaw racial or ethnic quotas as a means to implement affirmative action in admitting students to colleges and universities. The Court has ruled otherwise.

The Court has affirmed the constitutionality of making special efforts to admit specified minorities and others who have previously been excluded from our institutions of higher learning. But its ruling does not require all or any other institutions to adopt the same system. In fact, experience indicates that most Americans strongly disapprove of quotas. We believe that there are other -- more acceptable and less divisive-techniques available to implement the intent of this ruling.

The time has come for all of us who have been involved in the Bakke case, on either side, to join together to identify and encourage the institution of such programs. They should take into account each individual's qualities of motivation, perseverance and leadership, as well as skill, training, grades and test scores. These should be further evaluated in the light of handicaps an applicant may have had to surmount, whether caused by racial or religious discrimination, poverty, chronic illness or whatever.

We also urge continued support for the use of goals and timetables rather than quotas in order to measure the effectiveness of affirmative action in employment and education.

Bringing together groups which have been on different sides in the Bakke case has been a major effort of the American Jewish Committee for the past several months and we stand prepared to convene other civil rights, civic, ethnic, educational, labor and business groups to work together to complete this task.

November 1, 1977

TEXT OF THE JOINT STATEMENT ON THE BAKKE CASE

No case in recent years has aroused so much attention, interest and emotion as the case of the Regents of the University of California v. Allan Bakke, now before the U. S. Supreme Court. Organizations that have long been allied in the fight for civil rights, including the undersigned, find themselves on opposite sides of the case. It has been suggested in many quarters that the differences among us are evidence of an irreversible rift that foreshadows the end of the coalition that helped bring about the civil rights laws and advances of the past two decades. We reject all such predictions.

Our differences on the merits as well as on the ultimate impact of the Bakke case are deep and not to be minimized. But neither should they be permitted to obscure the shared goals that still unite and bind us together.

Whatever the decision in the Bakke case, we shall work together in the future, as we have in the past, to secure full civil rights for all our citizens and to help realize those social and economic conditions in which alone the fulfillment of those rights is possible. We are determined to press for government policies and programs that will establish as a matter of right (1) a job at a living wage for everyone willing and able to work or who can be qualified for work by training; (2) a guaranteed income, sufficient for living in dignity, for all those unable to work; (3) a decent home in a decent environment for all; (4) education to the limit of each person's ability, and (4) medical care for all in sickness and in health.

These goals cannot be achieved by any one group, acting along or for itself alone. They require a concerted, coordinated effort by all who believe in human dignity and equality. We pledge our utmost energies and resources toward such an effort.

LIST OF SIGNATORIES TO THE BAKKE STATEMENT

Alpha Kappa Alpha Sorority, Inc.

Amalgamated Clothing and Textile Workers Union of America

Amalgamated Meatcutters & Butcher Workmen

American Baptist Churches, U.S.A. - National Ministries

American Coalition of Citizens with Disabilities, Inc.

American Council for the Blind

American Ethical Union

American Federation of Government Employees

American Federation of Teachers

American Jewish Committee

American Jewish Congress

American Veterans Committee

Americans for Democratic Action

Anti-Defamation League of B'nai B'rith

A. Phillip Randolph Institute

B'nai B'rith Women

Central Conference of American Rabbis

Center for Community Change

Center for National Policy Review

Church of the Brethren-World Ministries Committee

Church Women United

Communication Workers of America

Friends Committee on National Legislation

Frontlash

Industrial Union Department - AFL-CIO

International Ladies Garment Workers Union of America

International Union of Electrical, Radio & Machine Workers

Iota Phi Lambda Sorority, Inc.

Japanese American Citizens League

Jewish Labor Committee

Labor Zionist Alliance

League for Industrial Democracy

League of Women Voters of the United States

Lutheran Human Relations Association

Metropolitan Washington Planning & Housing Association

Mexican-American Legal Defense & Education Fund

Migrant Legal Action Program, Inc.

National Association for the Advancement of Colored People

National Association of Negro Business & Professional Women's Clubs, Inc.

National Association of Social Workers

National Bar Association

National Catholic Conference for Interracial Justice

National Conference of Catholic Charities

National Conference of Christians & Jews, Inc.

National Council of Jewish Women

National Council of Negro Women

National Education Association

National Federation of Temple Sisterhoods

National Jewish Community Relations Advisory Council

National Neighbors

National Office for Black Catholics

National Rural Housing Coalition

National Urban League

NETWORK

Newspaper Guild

Oil, Chemical & Atomic Workers International Union

Opportunities Industrialization Center - Government Relations Services (OIC)

Organization of Chinese Americans, Inc.

Phi Beta Sigma Fraternity, Inc.

Potomac Institute

Retail Clerks International Union

Rural America

Southern Christian Leadership Conference

Transport Workers Union of America

Union of American Hebrew Congregations

Unitarian Universalist Association

Unitarian Universalists for Black & White Action

United Automobile Workers of America

United Church of Christ - Office of Church & Society

United Presbyterian Church - Unit on Church & Race

United Rubber, Cork, Linoleum & Plastic Workers of America

U.S. Catholic Conference - Division for Urban Affairs

United States National Student Association

United Steelworkers of America

United Synagogue of America

Women's Equity Action League

Workmen's Circle

Zeta Phi Beta Sorority, Inc.