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Bakke's Wake*

By Philip B. Kurland

Some years ago now, James Joyce published a novel—I think it can be called a novel—titled Finnegans Wake. When I tried to read it, I found it recondite, cryptic, enigmatic, and obscure. Some time thereafter, a book titled The Skeleton Key to Finnegans Wake was published. But even with that guide, Finnegans Wake remained as arcane as ever for me. Probably what I need is a Cipher to the Skeleton Key to Finnegans Wake.

While, unlike with Finnegans Wake, I understand almost every word of the Bakke opinions in Regents of University of California v. Bakke, 98 S. Ct. 2733 (1978), the meaning as a whole of these judicial efforts remains recondite, cryptic, enigmatic, and obscure. Of course, unlike the Joyce product, which is—I am told—a great work of art, the Bakke judgments are—I am told—at best minor works of judicial statesmanship, sometimes called politics. And unlike with the novel, no one has yet ventured to offer a skeleton key to Bakke. Nor do I.

It may well be that either the Fourteenth Amendment or the Civil Rights Act of 1964 is truly the skeleton key to the different Bakke opinions; at least these are represented by the Justices to be their guides. Or it may be that most of the opinions are merely expositions of the personal predilections of each of the authors, having nothing to do with the intent or function of either Constitution or congressional legislation.

Before I venture further into the subject, however, allow me to reveal my bias so that you may discount it as you consider what I say. With others, I filed a brief amicus curiae in the Bakke case on behalf of the Anti-Defamation League. In that brief we asserted that the questions presented to the Court by the case were two:

May a State consistently with the commands of the Fourteenth Amendment, exclude an applicant from one of its medical schools solely on the ground of the applicant's race?

May a State consistently with the commands of the national Civil Rights Acts, exclude an applicant from one of its medical schools solely on the ground of the applicant's race?

The relevant provisions of the Fourteenth Amendment read: “No State shall . . . deny to any person within its jurisdiction the equal protection of the laws” (emphasis added). The

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*This article is adapted from a talk delivered in the Distinguished Speaker Program of DePaul University College of Law on August 1, 1978, and before the Legal Club of Chicago on September 18, 1978.
Civil Rights Act provision to which we had reference was Title VI of the 1964 statute, 42 U.S.C. § 2000d, which 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. (Emphasis added.)

We also made reference to 42 U.S.C. § 1981, which derives from the Civil Rights Act of 1866. We offered this not so much as a ground for relief, because it was not a part of the applicant's complaint in the California courts, but rather as a more particularized statement of the meaning of the Fourteenth Amendment. Section 1981 provides:

*All persons* within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other. (Emphasis added.)

In sum, this direct antecedent to the Fourteenth Amendment provides that the black citizens of our nation are entitled to those rights available to white citizens and should not be subjected to greater "punishment, pains, [and] penalties" than white citizens.

The facts, as we saw them, were not complicated. "It only need be said that sixteen places in Petitioner's entering class at the medical school at Davis were closed to [Bakke] and all other white applicants because of their race." We thought the question a narrow one: "The sole question for adjudication . . . is whether such exclusionary action by the State of California on the ground of Respondent's race is invalid under the Constitution and laws of the United States?"

We pointed out that certain issues cognate to those in the case should not be the Court's concern in resolving *Bakke*:

This is not a case concerned with framing a remedy to right a constitutional wrong. . . .

The question in this case is also not whether the University of California is restricted in its admissions standards to such matters as the applicants' Medical College Admissions Test and college record. Nor does the case test the validity of these criteria as measures of potential achievement in medical school or medical practice. . . .

Nor is the question in this case whether the national government may, under certain circumstances, constitutionally indulge, or compel states to indulge, racial classifications pursuant to Congress's constitutional powers, whether under Article I, or § 5 of the Fourteenth Amendment, or § 2 of the Fifteenth Amendment. . . .
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This case does not raise the question whether a national or state legislature can, by majority action of the relevant legislature, purport to waive the constitutional rights of whites to equal protection of the laws. . . .

Finally, the question in this case is not whether a large number of medical and law associations and other special interest groups think the departure from the principles of the Constitution's Equal Protection Clause is desirable. . . .

Our primary argument was one that derived from our earlier brief in *DeFunis v. Odegaard*, 416 U.S. 312 (1974), which was recaptured by the late Professor Alexander M. Bickel in his posthumously published book, *The Morality of Consent*. He wrote:

If the Constitution prohibits exclusion of blacks and other minorities on racial grounds, it cannot permit the exclusion of whites on similar grounds; for it must be the exclusion on racial grounds which offends the Constitution, and not the particular skin color of the person excluded.

The lessons of the great decisions of the Supreme Court and the lesson of contemporary history have been the same for at least a generation: discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society. Now this is to be unlearned and we are told that this is not a matter of fundamental principle but only a matter of whose ox is gored. Those for whom racial equality was demanded are to be more equal than others. Having found support for equality, they now claim support for inequality under the same Constitution. Yet a racial quota derogates the human dignity and individuality of all to whom it is applied; it is invidious in principle as well as in practice. Moreover, it can as easily be turned against those whom it purports to help. The history of the racial quota is a history of subjugation, not beneficence. Its evil lies not in its name but in its effect; a quota is a divider of society, a creator of castes, and it is all the worse for its racial base, especially in a society desperately striving for an equality that will make race irrelevant.

Indeed, it may be added, not until racial categories are obliterated from our laws can there be even a hope for the realization of equality in our society.

Perhaps because the Thirteenth Amendment was not in issue, we did not make reference, as we might have done, to the quotation from Mr. Justice Bradley in *The Civil Rights Cases*, 109 U.S. 3, 25 (1883), which reads: "When a man has emerged from slavery . . . there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a . . . man, are to be protected in the ordinary modes by which other men's rights are protected." Our reliance, instead, was principally on *Sweatt v. Painter*, 339 U.S. 629 (1950), which
held that exclusion of an applicant from a university on grounds of color was a violation of the Fourteenth Amendment; on *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976), which held that the Civil Rights Act of 1964 protected whites as well as racial minorities from discriminatory treatment; on *Lucas v. Forty-Fourth General Assembly of Colorado*, 377 U.S. 713, 738 n.31 (1964), which held that “disparities from population-based senatorial representation” could not be justified on grounds that they “were necessary in order to protect ‘insular minorities’ and to accord recognition to the ‘state’s heterogeneous characteristics’”; and on Mr. Justice Douglas’s opinion in *DeFunis v. Odegard*, 416 U.S. 312, 342-44 (1974), where he wrote:

The Equal Protection Clause commands the elimination of racial barriers, not their creation in order to satisfy our theory as to how society ought to be organized. . . .

If discrimination based on race is constitutionally permissible when those who hold the reins can come up with “compelling” reasons to justify it, then constitutional guarantees acquire an accordionlike quality. . . . It may well be that racial strains, racial susceptibility to certain diseases, racial sensitiveness to environmental conditions that other races do not experience, may in an extreme situation justify differences in racial treatment that no fair-minded person would call “invidious” discrimination. Mental ability is not in that category. All races can compete fairly at all professional levels. So far as race is concerned, any state-sponsored preference to one race over another in that competition is in my view “invidious” and violative of the Equal Protection Clause.
We argued, too, that racial quota preferences for blacks were, indeed, invidious in some of their effects on blacks. Professor Thomas Sowell, who is black and can, therefore, say things that would be deemed hypocritical coming from whites, has written frequently on this point. In 1972, he wrote in his book *Black Education, Myths and Tragedies*:

What all the arguments and campaigns for quota 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. The devastating impact of this message on black people—particularly black young people—will outweigh any few extra jobs that may result from this strategy. 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 pay offs.

This attitude is shared by many blacks. It was not, however, offered for the proposition that black quotas do more harm than good, but as a recognition that quotas can and do have stigmatic effects on those that they purport to benefit no less than on those they condemn.

Finally, if the blacks do not regard the quota system as adverse to their interests, there are large numbers who are denominated members of the majority who do resent the shift to them of the badges of slavery, not the badges of slaves but those of slave masters: to be turned out of school places and jobs on the grounds that they were responsible—or their ancestors were responsible and passed on the liability to them—for the slavery that was and is the cause of what has been appropriately called the “American dilemma.” And so we quoted in our brief from Professor Nathan Glazer's book *Affirmative Discrimination*:

The gravest political consequence is undoubtedly the increasing resentment and hostility between groups that is fueled by special benefits for some. The statistical basis for redress makes one great error: All “whites” are consigned to the same category deserving of no special consideration. That is not the way “whites” see themselves, or indeed are, in social reality. Some may be “whites” pure and simple. But almost all have some specific ethnic or religious identification, which, to the individual involved, may mean a distinctive history of past—and perhaps some present—discrimination. We have analyzed the position and attitudes of the ethnic groups formed from the post-1880 immigrants from Europe. These groups were not particularly involved in the enslavement of the Negro or the creation of the Jim Crow pattern in the South, the conquest of part of Mexico, or the near-extermination of the American Indian. Indeed, they settled
in parts of the country where there were few blacks and almost no Mexican Americans and American Indians. They came to a country which provided them with less benefits than it now provides the protected groups. There is little reason for them to feel they should bear the burden of redress of a past in which they had no or little part, or to assist those who presently receive more assistance than they did. We are indeed a nation of minorities; to enshrine some minorities as deserving of special benefits means not to defend minority rights against a discriminating majority but to favor some of these minorities over others.

It will be readily seen that a Supreme Court brief addresses a wide variety of measures. For if the Supreme Court is a court of law, it is not only a court of law. It is engaged not merely in resolving a dispute between the parties but in framing national policies on a wide variety of social and economic issues. I am not saying that the latter is a legitimate function of the Court. But one would have to be terribly naive not to recognize that what was once called "social engineering" has, since 1954 if not before, become the Court's primary role, particularly since Congress has abdicated its authority and the bureaucracy—usually an ally of the judiciary—has come to dominate policymaking in the executive branch.

So when one addresses an argument to the Court it is appropriate to justify an adversary position on the basis of the original meaning and intention of the constitutional or statutory provision involved; to consider the gloss on the Constitution or statute provided by judicial precedents; to point out the political and economic and social consequences of a decision one way or another; and, more subtly, to appeal to the idiosyncratic wishes of each of the Justices.

Nevertheless, it must be accepted that the briefs and arguments of the lawyers in a Supreme Court case ordinarily have only a peripheral effect on the outcome. They tend, at best, to provide rationalizations for the conclusions that the Justices have reached before the briefs are read, thus affecting later cases in lower courts far more than the Supreme Court case itself. Judge Learned Hand was wont to advise neophytes that lawyers seldom win cases at the appellate level, although they frequently lose them. He advised further that more cases are lost by counsel talking too much than by counsel talking too little.

Whether the Bakke case was one of the very few cases in which the briefs and arguments affected the judgment, we shall never know. There certainly were enough briefs for each of the Justices to find something he liked in at least one of them, although most of the briefs merely showed on which side of the controversy a given judicial constituency was to be found. But the outcome of the case does reveal that the essentially schizophrenic nature of the adversary system preceded, if it did not cause, an essentially schizophrenic judgment by the Court. Perhaps it is Solomonic wisdom to recommend splitting the baby in half as a means to a just result. It
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is something less than Solomonic wisdom actually to bisect the infant, as the Court appears to have done in *Bakke*.

II

The judgment of the Court was announced by Mr. Justice Powell. His opinion spoke only for himself, however, except as to Part I, which was a statement of the facts, and Part V-C, which was a single paragraph that reads:

In enjoining petitioner from ever considering the race of an applicant, however, the courts below failed to recognize that the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin. For this reason, so much of the California court's judgment as enjoins petitioner from any consideration of the race of any applicant must be reversed.

The meaning of the determinative phrase "competitive consideration of race and ethnic origin" is somewhat less than pellucid.

There were two conflicting opinions, each of which garnered the votes of four Justices, one attributed to the joint pens of Justices Brennan, White, Marshall, and Blackmun. (It reads to me, however, as if Mr. Justice Brennan was the principal author.) The other was written by Mr. Justice Stevens and joined by Justices Burger, Stewart, and Rehnquist. (Perhaps it should be noted that the allegedly monolithic bloc of Nixon appointees was split one and one-half to two and one-half, with Mr. Justice Powell affording the swing vote for both judgments.) Thus, of the 154 pages of opinions, only the nine pages of statement of facts and the one quoted paragraph are entitled to precedential effect.

The division of the Court was accomplished by finding two judgments by the California courts where it had generally been believed that only one existed. A majority of the Court found that the issue made by the facts of the case—i.e., whether Bakke was the victim of invalid racial discrimination by his exclusion from consideration for any of the sixteen places set aside for minority applicants—must be resolved in his favor. It found further, however, that the trial court order which forbade totally the use of race as a criterion in the admissions process should be reversed, because race was not a forbidden classification but only a highly suspect one.

III

The Brennan group sought to capture the judgment by characterizing its meaning. "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." This is not what Mr. Justice Powell said, however, and the Stevens opinion clearly rejected this reading.

Like Powell, the Brennan four thought that Title VI is to be equated
with the Fourteenth Amendment. "Title VI . . . does not bar preferential treatment of racial minorities as a means of remediating past societal discrimination to the extent that such action is consistent with the Fourteenth Amendment." "Past societal discrimination" is the novation quietly inserted as a new predicate for reverse discrimination.

How is this judgment supported? First, by a demonstration that Title VI and the Fourteenth Amendment were both intended to bar discrimination on the basis of race. Whatever interpretation the Court might give the Fourteenth Amendment, therefore, should also be read into the language of the legislation. Although in 1964, when the statute was enacted, there was no reason for Congress to believe that the Constitution tolerated reverse racial discrimination, Congress, the Brennan four asserted, obviously wrote the legislation so that it would conform to whatever the Supreme Court might later say that the Constitution meant. In short, the legislature was deemed to have written open-ended legislation, the meaning of which was to be filled in, not by the elected representatives in Congress, but by the Supreme Court and the bureaucracy.

The Brennan group argued that HEW had, since the enactment of Title VI, required reverse discrimination, and Congress surely intended to delegate its lawmaking powers to expert administrative explication. It is assumed by both the Brennan four and HEW that if there has been racial discrimination against minorities by a governmentally funded institution, it must engage in reverse discrimination; if there has been no racial discrimination by the governmentally financed institution, it may engage in reverse discrimination. (Quaere, in light of the finding that whites have been discriminated against by the University of California at Davis by the quota system banned by the Court in this case, must Davis or may Davis now engage in racial discrimination on behalf of whites?)

When it turned to the Constitution whose meaning is to be read into Title VI, the Brennan four started with an unchallengeable proposition from which it quickly retreated. "The assertion of human equality is closely associated with the proposition that differences in color or creed, birth or status, are neither significant nor relevant to the way in which persons should be treated. Nonetheless, the position . . . has never been adopted by this Court as the proper meaning of the Equal Protection Clause."

Moreover, if every racial classification was found in the past to be a "suspect classification" subject to "strict scrutiny"—two code phrases that almost invariably led to a finding of unconstitutionality—it seems that suddenly "strict scrutiny" is an "inexact term" that requires redefinition (in light of the result that they should like to reach in this case?). The Brennan four were sudden converts to the Court's earlier 5-4 decision in San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973), from which Justices Brennan, White, and Marshall had dissented: that access to education is not a fundamental right. Nevertheless, if the old formula requiring "strict scrutiny" could not be
invoked on behalf of Bakke, according to these four Justices, they would make it clear that a mere test of reasonableness, which would return the judgment of the wisdom of legislative action to the legislatures, was not to be tolerated either.

After a curtsy to the need to avoid stigmatizing or stereotyping any group—particularly women; a bow to the irrelevance of such immutable criteria as race, sex, and legitimacy to almost any legislative classification; and even an acknowledgment of the importance of individual responsibility and merit: “advancement sanctioned, sponsored, or approved by the State should ideally be based on individual merit or achievement, or at least on factors within the control of an individual”—the Brennan opinion strongly concluded that “even if the concern for individualism is weighed by the political process, that weighing cannot waive the personal rights of individuals under the Fourteenth Amendment.” For which the opinion, mirabile dictu, cited Lucas v. Forty-Fourth General Assembly, supra.

The new standard for measurement of the validity of a racial classification, for at least the Brennan four-ninths of the Court, is summed up thus:

... because of the significant risk that racial classifications established for ostensibly benign purposes can be misused, causing effects not unlike those created by invidious classifications, it is inappropriate to inquire only whether there is any conceivable basis that must sustain such a classification. Instead, to justify such a classification an important and articulated purpose for its use must be shown. In addition, any statute must be stricken that stigmatizes any group or that singles out those least well represented in the political process to bear the brunt of a benign program. Thus our review under the Fourteenth Amendment should be strict—not “‘strict’ in theory and fatal in fact,” because it is stigma that causes fatality—but strict and searching nonetheless.

Then, without facts, the Court found that the legislative body—the admissions committee and subcommittee—had ample ground to believe that there was “minority underrepresentation” due to the “handicap of past discrimination.” The Brennan four would, therefore, have sustained the Davis quota admissions program, but on this point they were a discrete minority. The standard of proof is as mushy as the rest of the opinion: “Such relief does not require as a predicate proof that recipients of preferential advancement have been individually discriminated against; it is enough that each recipient is within a general class of persons likely to have been the victims of discrimination.” When? Where? By whom? All appear to be irrelevant questions as the opinion marches on. For it would seem that not history but statistics will supply the answer. “Underrepresentation” is itself proof of discrimination, at least so long as the claim of discrimination does not derive from a white male or class of white males.

In sum, if you are a member of a racially identifiable minority (or a
female), you can be, by statute or even without one, entitled to the privilege of a place within any trade, profession, school, or university, without regard to the relative capacities of your competition, until such time as the ratio of the racial minority approximates its ratio to the population at large or in the pool of applicants, at which time the past discrimination (which need not be defined) entitles you only to equality of treatment and no longer to privilege.

This is apparently the collective view of the Brennan four.

Individually, Mr. Justice White wrote an opinion expressing the view that Title VI does not create any individual right of suit. (The Court has granted certiorari to determine this question in the case of a female applicant for admission to the medical schools of the University of Chicago and Northwestern University.) Mr. Justice Marshall wrote an opinion based on the revisionist history of slavery, from which emerges a duty of reverse discrimination at least in favor of blacks, whatever their individual heritage or condition. Non-black minorities might find themselves outside the ken of affirmative action programs under this opinion's rationalization. Marshall, incidentally, was of the view that the majority of the Court, in Bakke, had in fact destroyed the validity of most, if not all, governmental affirmative action programs—a position of dubious merit.

Mr. Justice Blackmun sounds almost apologetic for being found where he was, but he seems to say that the Constitution may be set aside because the problem of a short supply of physicians of minority races is there and the courts should certainly tolerate any university admissions discrimination that may contribute to an increase in their number.

I shall, shortly, examine the degree to which the Brennan four position is supported by the Powell opinion, but first a look at the position of the other bloc of four Justices as gathered in Mr. Justice Stevens's opinion.

IV

While the Brennan group and Mr. Justice Powell each took fifty-five pages to state their positions, the Stevens opinion was only fourteen pages—and most of these were covered with footnotes. The opinion was short because he thought the issues before the Court to be few and narrow: "...the question whether race can ever be used as a factor in an admissions decision is not an issue in this case, and discussion of that issue is inappropriate." Nor was it necessary to address any constitutional question, since the case was fully disposed of by resort to Title VI.

On Mr. Justice Stevens's reading of the language of Title VI and its legislative history, the meaning was clear that it protected everyone, white or black or brown or yellow, from discrimination on the basis of race by any institution receiving federal funds. "In unmistakable terms the Act prohibits the exclusion of individuals from federally funded programs because of their race. As succinctly phrased during the Senate debate, under Title VI it is not permissible to say "yes" to one person, but to say "no" to another person, only because of the color of his skin.'
According to Stevens, the question of the right of an individual to invoke Title VI was not properly before the Court because the petitioner had never raised the issue before. If the issue had to be decided, however—

"To date, the courts, including this Court, have unanimously concluded or assumed that a private action may be maintained under Title VI. The United States has taken the same position; . . . Congress has repeatedly enacted legislation predicated on the assumption that Title VI may be enforced in a private action. The conclusion . . . is amply supported in the legislative history of Title VI itself."

By way of conclusion, he wrote:

"The University's special admissions program violated Title VI of the Civil Rights Act of 1964 by excluding Bakke from the medical school because of his race. It is therefore our duty to affirm the judgment ordering Bakke admitted to the University."

It was almost as though these four Justices thought that they were a court of law and not a continuing constitutional convention. For they disposed of a narrow question presented on the facts of the case on the basis of unambiguous language of a controlling statute made even clearer by its legislative history. The opinion was almost unbecomingly modest and sound.

V

Mr. Justice Powell refused to pass on the question whether Title VI gave rise to individual suits, because that question had not been contested below. He was, however, willing to assume for purposes of the case that jurisdiction over the Title VI claim was proper.

He then joined the Brennan four in the position that Title VI was intended to have the same meaning as the Constitution, even though this would result in a new meaning for the same statutory language every time the Court amended the Constitution by judicial action, as it has done so frequently. This conclusion is strange in light of the fact that the Court, in the past, has found a clear distinction, for example, between the constitutional standard and the statutory standard of Title VII; e.g., Washington v. Davis, 426 U.S. 229 (1976). Be that as it may, there are now five votes that the language of the 1964 Civil Rights Act means what the Fourteenth Amendment's Equal Protection Clause means. Powell, therefore, quickly turned to, and rested on, a constitutional construction.

Powell seems, however, to give to the Fourteenth Amendment the same reading that the Stevens group gave to Title VI. Thus, Powell wrote:

"[T]he special admissions program is undeniably a classification based on race and ethnic background. . . . It is settled beyond question that the 'rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. They are personal rights.' . . . The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal."

Powell then rejected the essence of the Brennan group theory. He said,
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in effect, that there can be no such thing as a benign racial discrimination, making reference here to the language I quoted earlier from Bickel's *Morality of Consent*. And he rejected both the notion that there is a simple white majority and the notion that the sins of the fathers shall be visited on their children unto the third and fourth generations. He wrote:

The concepts of "majority" and "minority" necessarily reflect temporary arrangements and political judgments. As observed above, the white "majority" itself is composed of various minority groups, most of which can lay claim to a history of prior discrimination at the hands of the state and private individuals. Not all these groups can receive preferential treatment and corresponding judicial tolerance of distinctions drawn in terms of race and nationality, for then the only "majority" left would be a new minority of White Anglo-Saxon Protestants. There is no principled basis for deciding which groups would merit "heightened judicial solicitude" and which would not.

Moreover, there are serious problems of justice connected with the idea of preference itself. First, it may not always be clear that a so-called preference is in fact benign. . . . Nothing in the Constitution supports the notion that individuals may be asked to suffer otherwise impermissible burdens in order to enhance the societal standing of their ethnic groups. Second, preferential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth. . . . Third, there is a measure of inequity in forcing innocent persons in respondent's position to bear the burden of redressing grievances not of their making.

Thus, Powell rejected the notion that the cases invoking racial classification for purposes of remedying a particular racial discrimination were relevant here. For this reason, it would be inappropriate to read *Bakke* as damning all "affirmative action" programs. Those addressed to a particular remedy for a particular statutory or constitutional violation would seem to be condonable under *Bakke*. It was Powell's conclusion that the classification undertaken by the University of California was a suspect classification and must be justified where a white was discriminated against in the same terms as prior decisions had demanded justification where blacks were the victims of discrimination. This the university could not do:

If petitioner's purpose is to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin, such a preferential purpose must be rejected not as insubstantial but as facially invalid. Preferring members of any one group for no reason other than race or ethnic
origin is discrimination for its own sake. This the Constitution forbids.

If the university could not afford benefits to a racial group because they were a racial group, Powell said, neither could they justify a goal of “remedying the effects of ‘societal discrimination,’ an amorphous concept of injury that may be ageless in its reach into the past.” Particular statutory or constitutional violations may be redressed. But the university could not make such findings of constitutional or statutory violations. It was not competent to do so.

Hence, the purpose of helping certain groups whom the faculty of the Davis Medical School perceived as victims of “societal discrimination” does not justify a classification that imposes disadvantages upon persons like respondent, who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered.

The university’s argument that it sought minority students in order to enhance the medical services that would be delivered to minority and deprived patients (a dubious equation) simply was not demonstrated on the record. “Indeed, petitioner has not shown that its preferential classification is likely to have any significant effect on the problem.”

Powell’s opinion then took a strange and wonderful turn. Pointing out that the university claimed the right to select its own student body, Powell agreed that “[t]he freedom of a university to make its own judgments as to education includes the selection of its student body.” That argument was likely to prove too much, however, for if the university’s discretion was unlimited, then the concept of academic freedom would permit exclusion as well as admission on racial grounds. Therefore: “Although a university must have wide discretion in making the sensitive judgments as to who should be admitted, constitutional limitations protecting individual rights may not be disregarded.”

Diversity of student population is a valid state interest. But “[t]he diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element. Petitioner’s special admissions program, focused solely on ethnic diversity, would hinder rather than further attainment of genuine diversity.”

Thus, race is not a totally irrelevant factor in a university’s admissions program. But, said Powell, this proposition is not a means for providing an evasion of the principles that he had stated to this point:

It has been suggested that an admissions program which considers race only as one factor is simply a subtle and more sophisticated—but no less effective—means of according racial preference than the Davis program. A facial intent to discriminate, however, is evident in petitioner’s preference program and not denied in this case. No such facial infirmity exists in an admission program where race or ethnic background is simply one ele-
ment—to be weighed fairly against other elements—in the selection process.

It was here that Powell inserted paragraph V-C, which, with the Brennan four position, called for the reversal of the injunction entered by the district court against any use of race in the admissions process.

The Powell opinion, therefore, affords little support for the Brennan position. On the major issue—whether mere membership in a so-called racial or ethnic minority constitutionally justified a privilege or preference by a state or federal governmental agency—there was a clear majority of five in opposition. On the alternate question—whether race can ever be a factor in conferring a benefit or privilege—there was a clear majority holding that it may, at least if there were a constitutionally justifiable reason for it; here the reason was "academic freedom."

VI

The Bakke case was, and is, a victim of what we have come to call, in the course of our destruction of the English language, "hype." It was overplayed by the press and various interest groups before judgment as the most important case that the Court was called on to decide since Dred Scott made the Civil War inevitable. On the day the decision came down, it was played in the press and over television like the attack on Pearl Harbor. Certainly, by now, it should be realized that the case will have no broad consequences, except a decided increase in the amount of litigation. It has opened issues rather than foreclosing them. Nor will it have the significance of Brown v. Board of Education, which gave a new and fundamental shift to the meaning of our Constitution. For neither the Powell opinion, announcing the judgment of the Court, nor the Brennan-White-Marshall-Blackmun opinion, nor the Stevens opinion is in any way authoritative. We are left, rather, with an opened Pandora's box, from which nothing has yet emerged except noises suggesting that it does indeed contain some frightful ills. But we should remember that, with all the ills of mankind that Pandora's box contained, there was also to be found in it Hope.

The only result certainly to be brought about will be that university admissions programs based on fixed quotas, like those at the University of California at Davis, will be abandoned. But there weren't very many of these to begin with. The same results in terms of minority admissions, however, are likely to be brought about by indirection. Most universities and their professional schools now have admissions policies in which the discretion of the admissions officers is controlling; each decision is an ad hoc one. That discretion includes a consideration of the university's interest in enhancing the student enrollment with minority students. That tendency is certainly not likely to be diminished by the Bakke judgment.

Indeed, the critical issues in "reverse discrimination" are not really to be found in the voluntary efforts of employers or universities to enlarge the proportion of minorities in employment or classrooms. The pri-
mary difficulties arise from legislative or constitutional mandates for reverse discrimination, particularly under Titles VII and IX of the Civil Rights Act of 1964. The principal question will be what proof shall be required of the existence of antiminority discrimination as a trigger for remedial reverse discrimination. And here we have little to rely on in the Bakke opinions. An extension of the Stevens bloc reading of Title VI to the other titles of the Act would suggest the need for fairly stringent proof to invoke a racial standard. The Brennan group would apparently require no proof of discrimination: sufficient for them that the person to be preferred is a member of a racial minority. Powell's opinion really affords little guidance, for he would seem to say that the quantum of proof should be measured in each case according to its facts.

It turns out, then, that there really is no Bakke's Wake. The funereal ceremonial that is a wake is unnecessary because Bakke is in need of christening and growth rather than burial. And unlike the wake of a ship, Bakke leaves no smooth waters immediately behind it, only some flotsam and jetsam that will prove a danger to future, but different, cases which are certain to track its course. Bakke will prove to be a much-cited case, but rather for the dicta contained in the various opinions than as a precedent for anything.

I wonder whether I should reach a similar conclusion if I were to try to reread Finnegans Wake.