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Constitutional Law - Equal Protection - Affirmative Action Programs - Reverse Discrimination

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here) and should be rewritten. In any event, some kind of integration of sections 304 and 351 would be in order. The aforementioned divergent alternatives of either complete taxation of the cash at ordinary rates regardless of gain or loss, or sale or exchange treatment to extent of "boot" do not present adequate solutions.

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CONSTITUTIONAL LAW—EQUAL PROTECTION—AFFIRMATIVE ACTION PROGRAMS—REVERSE DISCRIMINATION—The Supreme Court of Washington has held that the University of Washington Law School may, without any showing of past discriminatory practices on its part, apply separate and distinct admissions criteria to its minority applicants in order to achieve a racial balance within the school.

DeFunis v. Odegaard, 82 Wash. 2d 11, 507 P.2d 1169, *cert. granted*, 94 S. Ct. 538 (1973).

The plaintiff, Marco DeFunis Jr., was a white applicant to the University of Washington Law School for the 1971-1972 academic year. Pursuant to the law school's admissions procedure, plaintiff's credentials were rated against those of other prospective students, and upon this basis of competition,[1] he was ultimately denied acceptance. The applications of Black, Chicano, and American Indian students, however, were excluded from the "majority" process, and were analyzed separately. Admissions of students within this preferred "minority" group were granted without any comparison of their credentials to those of other

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1. Each applicant's junior-senior collegiate grade point average and Law School Aptitude Test (LSAT) scores were combined according to a formula determined by the law school to yield a "predicted first year average" (PFYA). Plaintiff's PFYA was calculated to be 76.23 based on his junior-senior grade point average of 3.71; average LSAT score of 582 (on three separate test dates he had received scores of 512, 566, and 668); and average writing test score component of 61.

Each applicant was placed into one of three categories based upon his or her relative PFYA. The vast majority of applicants with PFYA's above 77 were accepted; the vast majority of applicants with PFYA's below 74.5 were rejected; and the students with PFYA's in the median range along with the applicants from the other two categories who had not been summarily accepted or rejected, were placed in a separate classification for personal review by the faculty-student admissions committee. Plaintiff's PFYA score fell within the parameters of this third category. After personal review of his application, plaintiff was placed on the lowest priority waiting list and was subsequently denied admission. DeFunis v. Odegaard, 82 Wash. 2d 11, 507 P.2d 1169, *cert. granted*, 94 S. Ct. 538 (1973).

("majority" group) applicants.[2] The consequence of this two-tiered admissions policy was, according to the more rigid criteria of the "majority" process, the admission of minority students with lesser qualifications than those of the plaintiff and of numerous other "majority" applicants who had been denied admission.[3]

Plaintiff commenced an action in the Superior Court of the State of Washington for Kings County[4] against the University of Washington, alleging deprivation of rights guaranteed by the equal protection clause of the fourteenth amendment.[5] The court, after a nonjury trial, ruled that the challenged admissions procedure had violated the fourteenth amendment, and subsequently ordered the University of Washington Law School to admit plaintiff to its 1971 entering class.

Upon appeal to the Supreme Court of Washington,[6] the court reversed; holding that the equal protection clause of the fourteenth amendment, as interpreted by the courts, did not preclude classifications based upon race when such classifications were necessary to redress a racial imbalance in the law school.[7]

The *DeFunis* court's method of analysis in the area of equal protection was basically two-fold. Initially, from a survey of *Brown v. Board of Education I*[8] and *II*,[9] and of the numerous public school cases which resulted from confusion over the *Brown* mandate, the *DeFunis* court

2. Applications of students within the specified "minority" classification were all given personal review by the admissions committee regardless of the student's PFYA. Subsequently, the "minority" students who had the highest potential of success in law school, as determined by the committee, were accepted. 507 P.2d at 1174.

3. Thirty-six "minority" students offered invitations to the entering law class had lower PFYA's than plaintiff, and twenty-nine "majority" applicants who had been rejected had PFYA's higher than plaintiff's. The trial court had found that some minority students were accepted with PFYA's so low that had they been white, they would have been summarily rejected. *Id.* at 1176.

4. DeFunis v. Odegaard, No. 741752 (Wash. Super. Ct., Kings Co., Sept. 22, 1971).

5. U.S. CONST. amend. XIV, § 1 reads in part:

> . . . nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

6. DeFunis v. Odegaard, 82 Wash. 2d 11, 507 P.2d 1169 (1973).

7. As a threshold issue, defendant law school had contended that DeFunis lacked standing to challenge the constitutionality of its minority admissions procedure. The plaintiff had been legitimately placed on the lowest priority waiting list; and thus, the defendant contended, even if no minority students had been admitted, their positions in the class most probably would have been filled by "majority" applicants ranked ahead of plaintiff. The court, noting that there was no absolute method of ascertaining whether plaintiff would have been admitted to the law school in the absence of the "minority" admissions process, found that his interest in the adjudication constituted the requisite "personal stake in the outcome of the controversy" as laid down in Flast v. Cohen, 392 U.S. 83, 99 (1968), and Baker v. Carr, 362 U.S. 186, 204 (1962).

8. 347 U.S. 483 (1954) [hereinafter referred to as *Brown I*].

9. 349 U.S. 294 (1955) [hereinafter referred to as *Brown II*].

concluded that the use of racial classifications is not a per se violation of the fourteenth amendment. The school desegregation cases, however, had not dealt with the denial of a "benefit" to any one faction, and thus there remained the sub-issue of whether such racial stratification could be adopted when the outcome was discriminatory in effect. Citing several cases dealing with discrimination in employment, the court further concluded that "race is not necessarily a per se violation of the Fourteenth Amendment if the racial classification is used in a compensatory way to promote integration."[10]

Having thus buttressed itself with these conclusions, the court dispensed with the second major issue—whether the racial considerations used by the University of Washington Law School could withstand the traditional "strict scrutiny" test applicable to suspect classifications.[11] Applying this standard of review, it held that the State of Washington demonstrated a compelling interest in the elimination of "racial imbalance within public legal education"[12] adequate to justify the racial classifications connected with its law school admissions policy.

It appears that the Supreme Court of Washington, as evidenced by its method of analysis, considered *DeFunis* as falling within the established exceptions to strict equal protection as carved out by *Brown I* and *Brown II* and their numerous dependent cases. Such a conclusion, however, is unfounded. The *DeFunis* court has not authored a decision which can comfortably rest within the mainstream of decisional law. Rather, it has broadened an already vague area of exceptions to fourteenth amendment equal protection. An analytical survey of the cases cited within the *DeFunis* decision will show this to be evident.

Brown I shattered the system of dual public education and foreshadowed a period of chaotic upheaval which was finally ignited by *Brown II*. Through the *Brown* decisions, the Supreme Court had pronounced two interdependent mandates for the states to follow. First, it stated that any system of public education whereby Blacks were segre-

10. 507 P.2d at 1181.

11. Before applying the strict scrutiny test, the court had actually addressed itself to the preliminary issue of whether the less stringent "rational basis" test could be applied when racial distinctions are used to redress past discrimination. With little hesitation, however, it had rejected the use of the "rational basis" test for suspect classifications in any situation. For discussions generally on the possible use of such lowered standards within the realm of "benign quota" analysis, *see* O'Neil, *Preferential Admissions: Equalizing the Access of Minority Groups to Higher Education*, 80 YALE L.J. 699, 709-11 (1971); Comment, *Developments in the Law: Equal Protection*, 82 HARV. L. REV. 1065, 1106-17 (1969).

12. 507 P.2d at 1182.

gated from the majority of students so stigmatized the minds of the black children with a feeling of inferiority that they were incapable of obtaining an equal education no matter how adequate their facilities may be. The second command of the court, as stated in *Brown II*, added the force of law to the sociological conclusion that had been born out of *Brown I*. With uncompromising authority, the Supreme Court ordered the states to do all that was necessary to carry out the mandate of its first decision.[13]

What followed was a series of cases in which the full significance of the *Brown* rulings was slowly exposed. In *Green v. County School Board*[14] and *Swann v. Charlotte-Mecklenberg Board of Education*,[15] relied upon by the *DeFunis* court as examples of a non-colorblind approach to equal protection, the Supreme Court struggled with the practicalities of creating integrated schools within formerly de jure[16] segregated school systems.

In *Green*, a "freedom of choice" plan of student attendance, proposed by the local school board eleven years after *Brown I*, was rejected at that late date as an illusory solution to the problems created by formerly segregated schools.[17] The Court demanded that affirmative steps be taken to create an integrated system, the application of which necessarily implied the use of racially designated classifications.[18] In

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13. The Court, by implication, authorized the use of racial classifications to undo the effects of dual educational systems. It stated:

> To effectuate this interest may call for elimination of a variety of obstacles in making the transition to school systems operated in accordance with the constitutional principles . . . .

349 U.S. at 300.

14. 391 U.S. 430 (1968).

15. 402 U.S. 1 (1971).

16. De jure segregation has been defined as that which is ". . . directly intended or mandated by law or otherwise issuing from an official racial classification." Hobson v. Hansen, 269 F. Supp. 401, 492 (D.D.C. 1967), *aff'd sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969).

De facto segregation is that which is brought about inadvertently by social and economic determinants absent any action by school authorities.

17. The *Green* Court concluded that the harm of a dual school system would merely be perpetuated by the continued use of a "freedom of choice" plan when an all black high school and an all white high school presently existed. There had been no white students and only a small percentage of black students who had transferred out of their racially dominated schools in the three years the plan had been in existence. 391 U.S. at 441.

18. The Supreme Court demanded that the burden of a workable system of integration be shifted from the students to the school board. It stated,

> The Board must be required to formulate a new plan and, in light of other courses which appear open to the Board, such as zoning, fashion steps which promise realistically to convert promptly to a system without a "white" school and a "Negro" school, but just schools.

Id. at 442.

Swann, the Supreme Court approved a desegregation plan characterized by significant pupil redistribution based on race.[19]

In both cases the catalyst of the court's affirmative remedial demands was the mandatory compliance with *Brown II* which had been ignored by the defendant school districts, *i.e.*, the Supreme Court itself was requiring classifications of pupils based on racial lines, when those classifications were needed to overcome the "racial stigmatization" that *Brown I* declared had denied "equal protection" to black students in the area of public education.[20]

These school desegregation cases commanded affirmative action[21] on the part of segregated school districts to effect compliance with the fourteenth amendment, and the ancillary use of racial considerations to achieve this equality in education was tolerated as an unavoidable consequence of realistic desegregation schemes. The Supreme Court had not authorized a carte-blanche use of regulations based upon race; indeed, it had not even held, contrary to what the *DeFunis* court inferred, that racial classifications may be tolerated to redress any type of past discrimination. What the Supreme Court had approved, by implication, was the mere use of court-induced racial classifications when they were needed to convert former de jure segregated public school systems into statistically integrated systems.[22]

In the realm of judicially induced desegregation plans, therefore,

19. The Court in *Swann* explicitly authorized the use of racially induced remedial measures when it stated:

> . . . one of the principle tools employed by school planners and by courts to break up the dual school system has been a frank—and sometimes drastic—gerrymandering of school districts and attendance zones. . . . [A]s an interim corrective measure, this cannot be said to be beyond the broad remedial powers of a court.

402 U.S. at 27.

20. As the Supreme Court stated in *Swann*,

> The objective today remains to eliminate from the public schools all vestiges of state-imposed segregation. Segregation was the evil struck down by *Brown I* as contrary to the equal protection guarantees of the Constitution.

Id. at 15.

21. The term affirmative action can refer to various types of conduct. In the school desegregation cases, affirmative action programs were procedures whereby school districts consciously classified students and student attendance zones along racial lines. In this sense the term implies an active use of racial classifications.

Affirmative action can also encompass preferential admissions or hiring policies whereby minority applicants are given some degree of preference by the admitting authority. For a discussion of the varying degrees of preferential admission policies, *see* O'Neil, *Preferential Admissions: Equalizing the Access of Minority Groups to Higher Education*, 80 YALE L.J. 699, 700 n.3 (1971).

22. Notably, the vast majority of the school desegregation cases handled by the Supreme Court have involved the use of court-induced classifications to facilitate desegregation. *See* Drummond v. Acree, 409 U.S. 1228 (1972); Wright v. Council of City of Emporia, 407 U.S. 451 (1972); Davis v. School Comm'rs, 402 U.S. 33 (1970); Swann v. Charlotte-Mechlenberg Bd. of Educ., 402 U.S. 1 (1971); Monroe v. Board of Comm'rs, 391 U.S. 450 (1967); Raney v. Board of Educ., 391 U.S. 443 (1967); Green v. County School Bd., 391 U.S. 430 (1968).

the de jure-de facto distinction has maintained significant importance. The Court in *Swann*, inhibited by the Civil Rights Act of 1964,[23] was compelled to limit its command for affirmative action programs to school districts which had formerly practiced de jure segregation;[24] and the significance of this distinction was recently reaffirmed by the Supreme Court.[25] Consequently, the use of the fourteenth amendment as a tool of the courts to impose racial classifications upon recalcitrant participants has been limited to situations involving past de jure segregation.[26]

In *DeFunis*, however, the University of Washington Law School had not been guilty of any form of discrimination.[27] Indeed, this was not a case where minority members had brought a suit to promote integration, but rather one where the law school had voluntarily instigated methods to "achieve a reasonable representation within the student body of persons from these groups which have been historically suppressed.[28] Therefore, the value of the school desegregation cases as precedents for the *DeFunis* decision is questionable.

The actual question presented in *DeFunis*—the permissive use of

23. 42 U.S.C. § 2000c (b) (1970), reads:
"Desegregation" means the assignment of students to public schools and within such schools without regard to their race, color, religion, sex, or national origin, but "desegregation" shall not mean the assignment of students to public schools in order to overcome racial imbalance.
Id. § 2000c-6, reads, in relevant part:
. . . nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards.

24. The Court was very careful to distinguish the obligations of the school districts which had formerly operated under de jure segregation from those which had merely entertained de facto segregation. In rejecting the idea that the Civil Rights Act precluded any power to instigate affirmative action, the Court stated:
. . . Congress was concerned that the Act might be read as creating a right of action under the Fourteenth Amendment in the situation of the so-called *de facto* segregation, where racial imbalance exists in the schools but with no showing that this was brought about by discriminatory action of state authorities. In short, there is nothing in the Act that provides us material assistance in answering the question of remedy for state-imposed segregation in violation of Brown I.
402 U.S. at 17-18.

25. Keyes v. School Dist. No. 1, 413 U.S. 189 (1973). In this case, a finding of de jure segregation within one area of the Denver school system created a prima facie case of dual education which could only be rebutted by the school district proving that this one school zone had been separate and distinct from the rest of the system.

26. The term de jure segregation encompasses an expanding concept. It no longer refers exclusively to segregation that has been sanctioned by state law, but encompasses any conduct by school board officials calculated to foster segregation. As the Court stated in *Keyes*, ". . . [T]he differentiating factor between *de jure* segregation and so-called *de facto* segregation to which we referred in Swann is *purpose* or *intent* to segregate." 413 U.S. at 208.

27. 507 P.2d at 1182-83.

28. *Id.* at 1175.

voluntary classifications based upon race—has never been before the Supreme Court, although a number of lower courts have dealt with the issue.[29] The Supreme Court of Washington relied upon several of these decisions to justify affirmative action used on a voluntary basis.

In *Offerman v. Nitkowski*,[30] and *State ex rel. Citizens Against Bussing v. Brooks*,[31] local school boards, responding to deeply entrenched de facto segregation within their districts, voluntarily employed affirmative action programs to deal with the realities of racially divided schools.[32] The *Offerman* and *Brooks* courts, as other lower courts had done, acting without clear Supreme Court guidelines, extrapolated the rationale of *Brown I* and held the voluntary use of racial classifications to be constitutional in these demanding situations.

The anomaly created by purely de facto public school systems is unique. *Brown I* had declared that any public school system in which Blacks are denied the interchange of ideas with other students, denies these minority students the opportunity for an equal education. Realistically, therefore, a school district that maintains an all black school merely because of economic and social determinants, is denying an equal education to its black students as clearly as a school district which is segregated by law. The Supreme Court, however, perhaps heeding the restraint of Title IV of the Civil Rights Act of 1964,[33] has refused to demand affirmative action in such a situation; but by declining to adjudicate the question, it has nonetheless left the door open to voluntary acts of desegregation.

When the *DeFunis* court grasped upon the rationale of *Offerman* and *Brooks*, it failed to recognize the symbiotic relationship that exists between all of the voluntary desegregation cases and the *Brown* rationale. The courts that have allowed bussing and redistricting based upon racial considerations have done so with the idea that they are fulfilling the spirit, if not the letter, of the *Brown* holding.[34] Therefore, classifi-

29. Significantly, perhaps, the Supreme Court has denied certiorari to several lower court decisions in the area. *See* Deal v. Cincinnati Bd. of Educ., 369 F.2d 55 (6th Cir. 1966), *cert. denied*, 389 U.S. 847 (1967); Vetere v. Allen, 15 N.Y.2d 174, 205 N.E.2d 279, 257 N.Y.S.2d 129, *cert. denied*, 382 U.S. 825 (1965).

30. 378 F.2d 22 (2d Cir. 1967).

31. 80 Wash. 2d 121, 492 P.2d 536 (1972).

32. In *Offerman*, the local school district had implemented a plan of voluntary redistricting, while the school board in *Brooks* had begun bussing students from highly concentrated black schools to formerly white schools.

33. 42 U.S.C. §§ 1981 to 2000h-6 (1970).

34. Indeed, the Supreme Court of Washington itself had seemed to base its approval of voluntary affirmative action programs on the kinship between the de facto and de jure segregated public schools, and the need to provide equal educational opportunities in both

cations based upon race have only been tolerated in those instances when, as in the school desegregation cases, they are unavoidable consequences of a plan to offer equal educational opportunities to all public school students. The courts have merely taken the *Brown II* holding which regulates de jure segregation in public schools and employed it in parallel de facto situations.

The compelling state interest in allowing the use of such classifications is not a general need for better educational opportunities for minority students, rather it is the specific need to offer such students the opportunity for education that *Brown I* and the fourteenth amendment demand. The *DeFunis* court did not recognize this limited sphere of use, and attempted to interpret the string of de facto segregation cases as validating any use of racial classifications for compensatory purposes. No public education case has ever ventured so far afield from the confines of *Brown*.

The *DeFunis* court also cited various cases which had dealt with racially motivated employment programs, concluding that they had authorized the use of compensatory racial classifications even when one party had been denied a "benefit" by their use. The facts in each of these cases are distinguishable from those in the *DeFunis* case; so that a mere extraction and use of their conclusions is a faulty basis for decision.

In *Carter v. Gallagher*,[35] a finding of actual past discrimination within the Minneapolis Fire Department precipitated the United States Court of Appeals for the Eighth Circuit to hold that the limited use of a quota system for hiring minority applicants was a constitutionally acceptable remedy.[36] However, the reluctance of the *Gallagher*

instances. As the court stated in State *ex rel.* Citizens Against Bussing v. Brooks, 80 Wash. 2d 121, 492 P.2d 536 (1972):

> Reason impels the conclusion that, if the Constitution supports court directed mandatory bussing to desegregate schools in a system which is dual "de jure," then such bussing is within the appropriate exercise of the discretion of school authorities in a system which is dual "de facto."

Id. at 128, 492 P.2d at 541.

35. 452 F.2d 315 (8th Cir. 1971).

36. Five persons, representing the whole class of minority applicants who claimed they had been denied equal protection, filed suit for injunctive relief against the fire department. The trial court issued a lengthy injunction ordering the fire department to significantly alter its hiring techniques, and most importantly, to immediately implement a procedure to give "absolute preference" in employment to twenty minority persons who met the qualifications for the position.

A panel of three federal judges found the use of such racial preference to be in violation of the equal protection clause of the fourteenth amendment. At a rehearing before the court en banc, a limited use of the quota system was reinstated as a proper remedy for actual past discrimination. One out of every three firemen hired was to be black until twenty minority firemen existed on the force.

court to order such relief, even with adequate proof of flagrant discrimination, coupled with the existence of strong dissents, would seem to limit the holding of *Gallagher* to cases where the court itself must fashion some type of remedy for actual discriminatory practices.[37] The compelling interest in allowing such racially motivated classifications in employment is, as in the school desegregation cases, the need for realistic remedial schemes to offset a history of past discrimination, and, therefore, the use of "benign quotas" or other affirmative programs in hiring has rather consistently been limited to cases involving evidence of prior discriminatory offenses.[38]

In *Porcelli v. Titus*,[39] also relied upon by the *DeFunis* court, the Newark New Jersey school board's voluntary reorganization of its promotional lists for administrative positions was held to be constitutional even though the result was the promotion of minority teachers over other teachers who had previously been ranked higher on the lists.[40] The court's decision, however, rested upon its finding that the new promotional procedure was not discriminatory in effect when racial considerations were applied equally to all applicants in an effort to select the best administrators for a school district that faced racial problems.[41]

37. There is little doubt that the *Gallagher* court was compelled to order affirmative relief because of actual discriminatory practices within the Minneapolis Fire Department. As the court stated:

> The absolute preference ordered by the trial court would operate as a present infringement on those non-minority group persons who are equal or superiorly qualified for the fire fighter's positions; and we hesitate to advocate implementation of one constitutional guarantee by the outright denial of another. Yet we acknowledge the legitimacy of erasing the effects of past racial discriminatory practices.

452 F.2d at 330.

38. *Carter* and the vast majority of employment cases have been brought under the Civil Rights Act of 1964, 42 U.S.C. 1981 to 2000h-6 (1970), and have dealt with actual discriminatory practices. *See* Porham v. Southwestern Bell Tel. Co., 433 F.2d 421 (8th Cir. 1971); United States v. Local 38, IBEW, 428 F.2d 144 (6th Cir.), *cert. denied*, 400 U.S. 943 (1970); Local 53, Asbestos Workers v. Vogler, 407 F.2d 1047 (5th Cir. 1969); United States v. Central Motor Lines, Inc., 352 F. Supp. 1253 (W.D.N.C. 1970).

In Contractors Ass'n v. Secretary of Labor, 442 F.2d 159 (3rd Cir.), *cert. denied*, 404 U.S. 854 (1971), also cited by the *DeFunis* court, the use of an Executive Order to coerce a minority quota system upon contract bidders of federal building projects was held not to be a violation of fifth amendment due process. The history of actual racial discrimination within the contractors association, and the unique power of the executive branch to apply pressure through its spending power, more than distinguish this case from *DeFunis*.

39. 431 F.2d 1254 (3rd Cir. 1970), *cert. denied*, 402 U.S. 944 (1971), *aff'g* 302 F. Supp. 726 (D.N.J. 1969).

40. Before the procedure was revised teachers were rated for advancement on the basis of standardized test scores; and at that time only two out of approximately fifty-five persons considered for the positions of principal or vice-principal were black. The school board eliminated the promotional tests and instigated a reviewing process whereby every applicant's credentials were personally analyzed for ability to deal with the peculiar problems of the Newark School District. 302 F. Supp. at 731-32.

41. The *Porcelli* court accepted, with little discussion, the school board's good faith

Although both *Porcelli* and *DeFunis* deal with voluntary plans which ultimately bestow a "benefit" on minority members to the detriment of others, each case represents a distinctly different legal situation. In *Porcelli*, the school board had instigated a new selection process to determine promotions which the court was satisfied it had applied equally to both majority and minority applicants. Within the framework of this procedure, race was admittedly a factor which the board considered, but only regarding a realistic determination of who would be a qualified administrator to cope with the problems of a minority-dominated school district. The *Porcelli* court had held that race may be, for a compelling reason, one of several factors to be weighed in a selection process that is equally applied to all applicants; and certainly the extreme problems of the Newark school district would justify such considerations of race.[42]

The University of Washington Law School was not faced with a parallel problem. Whereas the Newark school board was non-discriminatory in its use of the new promotional policy, the law school admittedly favored minority applicants over others.[43] Had the university applied the same admissions analysis which it used for minority students to all of its applicants, *i.e.*, screening each applicant's credentials separately and weighing the social aspects and extra curricular activities together with the LSAT scores and grade point averages, then there would have been a situation similar to that found in *Porcelli*, and the discretionary procedure of the law school admissions committee would have been less vulnerable to attack.

Clearly, the factual situation surrounding the University of Washington's voluntary affirmative action program distinguishes it from those cases cited by the *DeFunis* court. The *Brown* related decisions stand for the very narrow use of racial classifications to effectively provide equal education to minority students who had formerly been denied their rights under a de jure segregated educational system. The

motivation for changing the promotional procedure. In a school district where there were three black students for every white, one of the basic qualifications for a satisfactory administrator would undoubtedly be an understanding of minority educational problems. The Newark School Board merely considered a teacher's ability to deal with the problems of black students as one of the criteria it applied to all applicants seeking advancement.

42. The Director of Reference and Research for the Newark Board of Education, Dr. Donald Wesley Campbell, had stated that there was somewhat of an "educational crisis" within the district. The levels of scholastic achievement of the Newark public school students were considerably below the national medians, and at least one expert witness seemed to imply that the level of education for black students might improve under the guidance of more black administrators who understood minority problems. 302 F. Supp. at 733.

43. 507 P.2d at 1175-76.

de facto segregation cases somewhat broadened this exception to strict equal protection, but they have merely allowed *Brown's* mandate to be applied to situations where the detrimental effects of de facto segregation are indistinguishable from those of de jure, and where no student can realistically claim that he or she is being denied a "benefit" by the implementation of affirmative action programs. The vast majority of discrimination in employment cases are either predicated on actual acts of discrimination or federal coercive powers.

Thus, *DeFunis* seems to stand apart from the mainstream of cases both in its factual setting and its interpretation of permissible exceptions to equal protection. An independent state agency, the University of Washington Law School, at its own discretion, was permitted to deny equal protection to a number of its applicants without any showing of past or present de jure or de facto discrimination within the law school.

It is difficult to comprehend how this decision could exist as a logical extension of those cases dealing with school desegregation or discrimination in employment. Until now, it seems, affirmative action programs have been allowed only as restitutory measures for specific wrongs done by the acting institution or for deprivations of rights which the institution has a constitutional duty to restore. The Supreme Court of Washington has played a familiar game of judicial gymnastics; it has parrotted the existing concepts of fourteenth amendment guarantees, but has nonetheless broken from the traditional restraints applicable to suspect classifications and authored a new concept of equal protection, the bounds of which are yet unknown.

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